The Nature of Interim Constitutions: A Comparative Analysis

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ABSTRACT

This thesis concerns interim or deliberately temporary constitutional texts. I argue that interim constitutions are a new form of constitutional text, with unique possibilities and pitfalls. I explore the argument that interim constitutions represent an attempt to forge a more legitimate constitutional structure, through a two-stage drafting procedure, heightened judicial oversight, an increased role for international law and institutions, a mutual interdependence with transitional justice mechanisms, and greater popular involvement. I contend that interim constitutions are a coherent but diverse group, united by the distinct consequences of the adoption of a temporary constitution. The thesis draws upon case study interim constitutions as adopted in Poland, Hungary, Albania, South Africa, the Democratic Republic of Congo, Iraq, Sudan, Thailand, and Nepal. On the basis of a comparative analysis of these case studies, it is argued that the two-staged drafting process embodied by interim constitutions can allow for greater constitutional legitimacy, sophistication, flexibility, and effective peace-building. A number of potential difficulties associated with interim constitutions are also discussed, including cases where interim constitutions are not succeeded by final constitutions, and fail into permanence. In the context of the increasing popularity of interim constitutional texts, this thesis is the first major comparative study across a wide range of interim texts, and represents an attempt to understand the myriad legal and theoretical issues involved.

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PART A

CHAPTER 1: INTRODUCTION

Interim constitutions are deliberately temporary texts that are intended to serve as the supreme law of the states that they govern. In this thesis I develop a theory of modern interim constitutions, and argue that they represent a novel approach to legitimacy, and constitution-making. Interim constitutions represent a category of agreement that falls between permanent – or ordinary – constitutions and limited peace agreements or other preliminary constitutional steps. In this thesis I examine the nature of these interim constitutions, and explore the issues they raise and illuminate in constitutional theory and law.

The central thesis is that interim constitutions represent a unique form of modern constitutionalism, capable of responding to specific political and legal circumstances, and directed at an increased level of legitimacy and public engagement with a state's constitution. This thesis does not, however, claim that interim constitutions are a universally superior or desirable form of constitution-making, neither does it claim that interim constitutions are necessarily successful. Rather, it is an attempt to develop an explanation of the circumstances in which interim constitutions are adopted, a typology explaining their key characteristics, and an account of how they interact with transitional justice. This analysis is completed in order to better understand interim constitutions themselves, and modern constitutionalism in general. It is suggested that interim

constitutions have structural characteristics which have the potential for a unique form of constitutional and legal change and transition.

The twentieth and twenty-first centuries have seen a shift in the nature of warfare, and a consequent shift in the predominant circumstances of peace-building and constitution-drafting. Since World War II, the majority of conflicts have not been between nation states, but *within* states, so that the parties that begin the process of negotiation and peace-building in post-conflict environments are, more often than not, differing political, ethnic or religious groups within a country, rather than states or coalitions of states. As such, constitutional development often requires participation by all parties to an internal conflict, and is often connected with peace-making and peace-building processes. Interim constitutions have emerged as one way for states in post-conflict environments or periods of transition to deal with the political problems and issues associated with constitutional and legal legitimacy; they have been employed as a stop-gap, fostering the development of legitimacy, public participation and emergence of constitutional consensus.

The topicality of this thesis lies in this shift in the nature of conflicts, and the nature of constitution-drafting. In 2011, interim constitutions were adopted in popular uprisings in Egypt[1] and Libya,[2] during the Arab Spring. In this thesis I examine the interim constitutions that have been employed in: Hungary;[3] Albania;[4] Poland;[5] South

[1] Constitutional Declaration (Egypt) 2011.
[2] Constitutional Declaration of the National Transitional Council of Libya 2011.
[3] Act No. XXXI of 1989 (Act No. XX of 1949 (as amended)) (1989 Constitution of Hungary).
[4] Law on Major Constitutional Provisions 1991.

Africa;[6] Democratic Republic of Congo;[7] Iraq;[8] Sudan;[9] Thailand;[10] and Nepal.[11] I address the interim texts adopted in Somaliland[12] and South Sudan[13] in limited sections of this thesis; they fall outside the parameters of the project (as discussed in **Chapter 2**, on Methodology). There are examples of earlier interim constitutions, such as the brief, five Article interim constitution of Ireland,[14] earlier interim texts in Thailand,[15] and that of Tanzania,[16] but this project focuses on modern interim constitution-making, in an attempt to understand interim constitutions from the most recent 'wave' of constitution-making.

Interim constitutions are an increasingly prominent method of constitution-making, and yet, as a participant in the Princeton Workshop on Constitution Building Processes noted,

> [t]he operation of these interim mechanisms or interim authorities has received little attention. We know relatively little about the sources of

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[5] Constitutional Act of 17th October 1992, on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government Dziennik Ustaw Nr 84 Poz 426 1992. ('***Small Constitution***').
[6] Interim Constitution of the Republic of South Africa 1993.(*'**SA-IC**'*).
[7] Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') 2003.
[8] Law of Administration for the State of Iraq for the Transitional Period 2004.
[9] Interim National Constitution of the Republic of the Sudan 2005.
[10] Constitution of the Kingdom of Thailand (Interim Edition) of BE 2549 2006.
[11] Interim Constitution of Nepal 2063 2007.
[12] Interim Constitution of the Republic of Somaliland 1997.
[13] Transitional Constitution of the Republic of South Sudan 2011, replacing the sub-national The Interim Constitution of Southern Sudan, 2005.
[14] Constitution of Dáil Éireann 1919.
[15] See generally Tom Ginsburg, 'Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution' (2009) 7 International Journal of Constitutional Law 83.
[16] Interim Constitution of Tanzania 1965.

> legal authority, the parts of the constitution typically suspended, and the rules put in place in most instances.[17]

In a 2014 workshop on Interim Constitutions in Post-Conflict Settings, the participants observed that

> The timeliness of analysing the role of interim constitutions or constitutional provisions as peace-building mechanisms is self-evident, given the increasing use of constitution building in peace-building processes. There is a clear need to establish linkages between the normative literatures on constitution making on the one hand, and conflict resolution and peace building on the other. There is also a need for more in-depth comparative research of case studies and lessons learned by diverse domestic and international actors engaged in these processes. Individual case studies, as well as a limited number of comparative studies, have been published on constitution-building processes, in particular on the role of public participation, or on specific substantive constitutional design issues, such as forms of government, court design or decentralization. But there is no similar comparative study of interim constitutions or collection of lessons learned. These gaps in the academic literature are replicated in policy practice.[18]

In writing this thesis, I attempt to address the very gap recently identified in this Discussion Report. I aim to provide a comparative study of interim constitutions, consider the history and evolution of the field, draw links between constitution-making and peace-building and transitional processes, and provide a collection of 'lessons learned' that might be useful for future constitutional projects.

The contribution of this project is in part, therefore, an attempt to understand a particular constitutional form that has received little analysis or extended discussion. There is a body of research relating to individual interim constitutions, but little

[17] Bobst Center for Peace & Justice, Princeton University, in conjunction with Interpeace and International IDEA, 'Proceedings, Workshop on Constitution Building Processes' (2007) 16.
[18] 'Interim Constitutions in Post-Conflict Settings: Discussion Report' (International IDEA and the Edinburgh Centre for Constitutional Law in association with the Global Justice Academy, University of Edinburgh 2014) 3 <http://www.constitutionnet.org/files/interim-constitutions-in-post-conflict-settings-pdf.pdf>.

comparative work, and still less that focuses on the particular characteristics of and issues surrounding the interim nature of the constitutions.

1.1 The category under consideration: a preliminary definition

It is necessary at the outset to formulate a working definition of the types of agreements that may be designated as 'interim constitutions'. In order to arrive at a definition of this composite phrase, it is first necessary to consider the difficulty of identifying or defining a constitution itself.

In the introduction to their edited collection on *Comparative Constitutional Law*, Rosalind Dixon and Tom Ginsburg identify several possible ways of resolving this difficulty. First, they note, the 'most straightforward way in which to define the constitutional domain is by reference to the text of legal instruments that are expressly labelled by their drafters as constitutional';[19] they argue that this approach is adopted 'almost by necessity' by scholars doing quantitative work, as well as by many undertaking qualitative work. Secondly, they identify an approach which focuses on the notion of entrenchment – the 'degree to which certain legal rules are immune from change by ordinary as opposed to super-majority legislative processes'.[20] A third approach is 'more functional, and defines the constitutional domain by reference to the role of constitutions in both 'checking' and 'creating' government power',[21] a fourth,

[19] Dixon, Rosalind and Tom Ginsburg, 'Introduction' in Tom Ginsburg and Dixon, Rosalind (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 4.
[20] ibid.
[21] ibid.

'more sociological…and linked to the way in which national actors understand domestic legal norms as constitutional'.[22]

In this paper, I adopt a mixed approach, relying initially on the first language-based approach to identify potential constitutional documents, and then referring to the third, functional approach described above, to assess whether the constitutions so-called function in the manner described. The entrenchment-based approach is a complex one, and, as will be discussed, not particularly applicable to interim constitutions, which are often characterised by a lesser degree of entrenchment.

A deeper understanding of how to define a constitution, functionally, may be found in the work of Joseph Raz. In *On the Authority and Interpretation of Constitutions*: *Some Preliminaries,* Raz provides a seven-part definition of a constitution in the 'thick sense', according to which a constitution is: constitutive of a legal system; stable, at least in aspiration; written; superior law; justiciable; entrenched, i.e., more difficult to change than other law; and expressive of a common ideology.[23] As discussed, entrenchment is a difficult criterion for an interim constitution to reach, as it is deliberately established as a replaceable document. Nonetheless, interim constitutions are often more difficult to replace than ordinary legislation, and a relatively high degree of entrenchment may be achieved through measures such as an unamendable core of principles, as with the 'Constitutional Principles' ('***CP***') in the *SA-IC*; the check of a public referendum, as in Poland, or generally heightened amendment procedures.

[22] ibid 4–5.
[23] Joseph Raz, 'On the Authority and Interpretations of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism—Philosophical Foundations* (Cambridge University Press 2001) 153.

Arguably, interim constitutions meet all of the aspects of Raz's definition, except, as will be discussed in depth, their intended degree of stability or permanence. They are written, constitutive of a legal system in the sense of establishing, empowering and limiting the key institutions of government, and expressive of a common ideology, often linked with a rejection of the past. Interim constitutions, like other constitutions, are typically enacted (often explicitly) as the supreme law of the land; however, this supremacy is perhaps less assured in light of the very high levels of judicial review and amendability of interim constitutions, and so the balance between these characteristics is perhaps different in interim constitutions as compared with many permanent constitutions. In relation to entrenchment, the instability and negotiability of constitutional law that accompanies interim constitutions lends itself to greater public participation, complex phases of engagement with the historical legacy of the past regime, and an extended period of legal possibility.

Having defined constitutions in general, it is necessary to elaborate a means of identifying interim constitutions in particular. Interim constitutions may be defined as agreements establishing the basic features constituting a society or a legal system – through the empowerment and limitation of governmental institutions – with an intentionally limited period of operation. This definition distinguishes interim constitutions from peace agreements that relate solely or primarily to the cessation of hostilities, without establishing detailed rules as to the creation or functioning of governmental institutions. It also distinguishes interim constitutions from ordinary constitutions, which are typically intended to run indefinitely. There are other instances of quasi-constitutional documents (including peace agreements) that may have varying

degrees of constitutional significance, and which may go beyond the traditional bounds of the peace agreement (with content relating to the cessation of hostilities, and the terms of peace) and cross into areas of constitutional regulation. I do not seek to draw a sharp dividing line between the central cases listed above and other potential borderline cases. Where relevant, comparisons may be drawn with these kinds of agreements. Further, there is a range of other transitional constitutional mechanisms or processes – multi-stage public drafting and consultation processes, and the adoption of new constitutions that are subject to approval by different political bodies as well as by public ratification, that have been employed in various cases. Interim constitutions will be identified as a distinct form of transitional constitutionalism from amongst this broader pool; it is submitted that the attempt to create a document intended to function as a complete but temporary constitution raises a distinct set of theoretical and legal issues.

The interim nature of a constitution depends not on its ultimate (factual) longevity, but on the intention of the founders that the constitution operate for a limited period of time, with the expectation that it will ultimately be succeeded by a permanent constitution. In some cases, a particular timeframe for replacement will be stipulated. In others, an interim constitution is intended to operate for an unspecified but limited period of time, until it is replaced by a final constitution. This latter formulation was reflected in the Preamble of the Polish Constitution, which stated that the 'Small Constitution' was passed '[f]or the purpose of improving the activity of the supreme authorities of the State, pending the passing of a new Constitution of the Republic of Poland…'.[24] In Nepal, a

[24] Constitutional Act of 17th October 1992, on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government Dziennik Ustaw Nr 84 Poz 426 (n 5), Preamble.

more structured timeframe was adopted, with a Constitutional Assembly charged with the task of producing the draft of a final constitution by 28 May 2010, a deadline that was not met by the Assembly. The methods for the drafting and adoption of final constitutions vary widely between the interim constitutions studied, but each of them is alike in providing for their replacement by a final constitution.

The question of how to define interim constitutions and the complexities and difficulties with the preliminary definition adopted here are explored in depth in Chapter 2, on Methodology.

1.2 Contextualising this project in existing research

There are many works that contribute to the literature on interim constitutions, and from which I draw references, but there has not yet been a broad-based comparative study that unites theory and constitutional law, and practice. The work of Andrew Arato on post-sovereign constitution-making considers a number of cases that overlap with the ones in this project[25] and has provided invaluable conceptual background for this project. Other authors such as Vicki Jackson[26] and Ozan Varol[27] have written on topics relating to transitional constitution-making and they have made considerable contributions to the field. There are also a number of detailed case studies of individual states and their

[25] Andrew Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, Now What?' (2010) 26 South African Journal on Human Rights; Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press 2009).
[26] Vicki C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2007) 49 William and Mary Law Review 1249.
[27] Ozan O Varol, 'Temporary Constitutions' (2014) 102 California Law Review 409.

constitutional transitions, such as those in *Framing the State in Times of Transition*,[28] Zaid Al-Ali's book *The Struggle for Iraq's Future*,[29] or Stiliano Ordolli's *Histoire constitutionelle de l'Albanie: des origines à nos jours*. In this thesis I attempt to unite detailed analysis of actual interim constitutional transitions with a theoretical framework about the category of interim constitutions.

Part of what is original about my approach, within the comparative work done in this field, is that I do not predicate my analysis on an interim constitution meeting certain procedural or normative requirements. There are a number of scholarly works by authors that posit categories of constitution-making that are dependent upon a constitutional process evolving in a certain way or meeting certain benchmarks.

There are examples of these approaches in the work of scholars such as Andrew Arato, and Vicki Jackson. Arato has advanced a theory of post-sovereign constitution-making, which involves: a two-stage drafting process and the making of two constitutions; round-table negotiations prior to the first constitutions; an emphasis on legal continuity throughout the transition, including the use of existing institutions and/or amendment rules; a significant role played by constitutional courts 'generally created by interim constitutions, in policing the procedural limitations stipulated by' the interim text; and the 'central role of a democratically elected assembly in drafting the second and final constitution'. Arato provides South Africa as the key example of the 'fully realised'

[28] Miller, Laurel E (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010).
[29] Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press 2014).

version of this constitution-making model, and discusses it in relation to other processes such as those in Hungary and Iraq.[30]

Vicki Jackson, in her article 'What's in a name? Reflections on Timing, Naming and Constitution-Making', reflects on post-conflict and transitional constitutions. She develops a scheme of post-conflict constitutions, including: those involving a ''quick clean break' from a prior, discredited regime' as in post-war Germany and Japan; those that 'emerge from a more incremental process of constitutional change, occurring…over a period that may be closer to a decade' as in Hungary or Poland; and the 'relatively recent innovation' of transitional or interim constitutions, as in South Africa.[31]

Each of these scholars develops frameworks for analysing transitional constitutions that are nuanced, thorough and persuasive. Both frameworks are suitable as a lens for constitutional analysis, and provide fruitful ground for further scholarly work and practical policy application. I refer to the work of these authors throughout this thesis, and am grateful for their considerable contributions to the field.

However, for the purposes of this project, I believe that the appropriate starting point is to begin with a more formalistic definition: to include within the scope of analysis texts that purport to be interim constitutions, and then to analyse the category as a whole. Not all of the constitutions I study meet the requirements of Arato's post-sovereign constitution-making; and Jackson's incremental vs interim approach clearly divides some of the case study countries in my analysis into different groups. Both of

[30] Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, Now What?' (n 25) 20–21.
[31] Jackson (n 26) 1260.

these studies group constitutions according to their post-adoption development: they select constitutions based on similar outcomes and experiences. I believe there is considerable value in charting the group of intentionally temporary interim constitutions, and finding not only points of similarity, but of difference amongst the group. It is valuable to note that the interim constitution of Hungary began in a similar way to those of Albania and Poland, but that they charted markedly different courses. Similarly, although the Iraqi process failed to meet the requirements of a genuine two-stage process, it had the *potential* to run in a different way, and it is worthwhile to note the ways in which it diverged from this path.

Ozan Varol's work on 'Temporary Constitutions' is a recent addition to the field, and Varol considers the possibilities of temporary constitutions and temporary constitutional provisions from a starting point not unlike my own. Varol's analysis is perceptive and interesting, and draws upon literature in the social sciences in an effective way. Our projects proceed along not dissimilar theoretical tracks; but our work diverges in terms of engagement with empirical studies. Varol discusses the interim constitutions of South Africa, Poland and Iraq, but does not examine those of Albania, Hungary, Nepal, Thailand, Sudan, the DRC, or Somaliland. Varol's work contains a number of important insights at the theoretical level and elucidates the origins and concept of temporary constitutions, but does not—and does not purport to—contain a detailed comparative analysis of actual interim transitions.

In this thesis I attempt to unite both a theoretical analysis of interim constitutions and temporary constitutionalism with a detailed understanding of a range of case studies

of actual interim constitutions. A fuller description of the sources that I rely upon, and the way in which I use them, is contained in Chapter 2.

1.3 Key research questions and arguments

The key research question that has motivated this thesis from the outset is: what is the nature of interim constitutions? The phrase is frequently used without definition, and the concept is employed without regard to the variation within the category. I attempt to develop a typology of interim constitutions; an understanding of their general characteristics and similarities, as well as their differences, and the different parts of the spectrum that these similarly named constitutions occupy. I develop a typology of interim constitutions through comparative study of cases from: Poland, Hungary, Albania, South Africa, the DRC, Iraq, Sudan, Thailand, and Nepal.

I argue that modern interim constitutions ('***ICs***') are a new form of constitutional text, with unique possibilities and pitfalls. I contend that ICs represent an attempt to forge a more legitimate constitutional structure, through a two-stage drafting procedure, heightened judicial oversight, an increased role for international law and institutions, and greater popular involvement. ICs can enjoy a mutually reinforcing—or mutually delegitimising—relationship with transitional justice and peace-building processes. I argue that ICs are a coherent but diverse group, united by the distinct consequences of the adoption of a temporary constitution. In reflecting on this comparative analysis, I develop a framework for assessing success and failure of interim constitutions. Before beginning

this detailed analysis, however, it is necessary to explore the methodological foundations of the project in greater detail.

1.3(a) Part A

In Part A of this thesis, I place my analysis within an academic and historical context, in terms of the evolution of comparative constitutional law, and the theoretical debates that shape this project. Part A comprises this Introductory Chapter, as well as Chapters 2 and 3. In **Chapter 2**, on Methodology, I first elaborate (in Part I) the methodological issues and approaches adopted in this thesis. In Part II, I outline my own methodological approach. This involves a more detailed definition of both parts of the phrase 'interim constitution', and I explore and respond to the difficulties with the preliminary definition advanced in this Chapter. I acknowledge the limitations and difficulties in comparative constitutional work, and argue that it is nonetheless a worthwhile project to investigate interim constitutions in a comparative framework. The next and most substantial section of Chapter 2 involves a discussion of case study selection—both in terms of cases included, and excluded—from this project. There are a number of 'central' cases of interim constitutions, but borderline cases such as the constitutions of Hungary and Germany are addressed in order to explain the coherence and validity of the category as a whole. Finally I explore the practical issues involved in a project such as this, and explain my responses to these challenges.

In **Chapter 3**, I explore the reasons for which and circumstances in which ICs are adopted. This Chapter grounds the reader in the historical and legal contexts of each of

the case study countries, and introduces some themes that will be run throughout the thesis. ICs are adopted when there is a clear need for constitutional change, but a lack of agreement about what that change should involve, or a lack of ability to bring about that change. I explore some of the key *circumstances* in which this situation arises: an IC as a peace agreement following internal conflict or unrest (DRC, Nepal, Sudan, Thailand); following occupation (Iraq); after the end of oppressive or exclusionary rule (Albania, Hungary, Poland, South Africa); or part of a movement towards independence (South Sudan, and the putative state of Somaliland). In considering the *reasons* for which interim texts are adopted, I first consider some other constitutional paths, and then explore some of the deeper thematic issues which will be considered throughout the thesis: the possibility that a two-staged constitutional process might create greater constitutional legitimacy; that time might allow for more legal sophistication and greater flexibility, and goals associated with transitional justice and peace-building.

1.3(b) Part B

In **Part B** of the thesis, which comprises Chapters 4, 5, 6 and 7, I elaborate a typology of interim constitutions based on comparative analysis. In **Chapter 4**, on Time and Permanence, I explore the way in which ICs, although intended to be temporary, have permanent effects. The first phase of this analysis involves a categorisation of the different ways in which interim texts regulate their duration, from minimalist texts that state that the IC endures until the adoption of a permanent constitution, to the more regulated texts which set out strict timeframes, stages, and provide solutions to deadlocks. In the second part of this Chapter, I analyse the way in which these ICs have

permanent effects through: rules as to the content of final texts; procedural rules; the difficulty of re-opening negotiations of matters resolved for the interim text; the continuance of institutions established in the interim era; the decisions of constitutional courts made in the interim period; and finally 'failure into permanence', whereby failed ICs achieve *de facto* permanence.

Chapter 5 'Two-Stage Process' explores the way in which the division of constitutional drafting into two phases creates the possibility for greater constitutional legitimacy in what may be a precarious political environment. This Chapter begins with a theoretical analysis of legitimacy in a constitutional context, and then explores the two phases of constitution-making in an interim process. First, an interim text is adopted, typically by a body that incorporates differing voices but which is not fully representative or democratic. Subsequently, a more democratically constituted body can begin a more structured constitutional drafting process for the final constitution that may involve higher levels of public participation and debate. This Chapter argues that ICs may create greater constitutional legitimacy, but discusses the way in which the many permanent effects discussed in **Chapter 4** may undermine this argument.

In **Chapter 6**, I argue that ICs enjoy a *complex* supremacy. I return to the notion of constitutions as 'superior' or 'supreme' law, enjoying authority over the people and institutions they govern, as well as over ordinary laws. ICs partake of this supremacy in part, but the situation is complicated by high levels of amendability by political organs, and often high levels of judicial review. In South Africa, the Constitutional Court was empowered by the IC to regulate the constitutional drafting process, and required to

certify the final constitution. This section involves analysis of various judicial decisions, and argues that the heightened role played by Constitutional Courts may be explained as a resort to an additional source of legitimacy in an unstable period.

ICs often have a close relationship with international law and international institutions. The degree and nature of these connections vary. In **Chapter 7**, I explore these different connections, which arise through: explicit incorporation of public international law or international organisations; structural dependency on international rules concerning self-determination or occupation; overlap with the *jus in bello* or *jus post bellum*; and the involvement of international organisations. I argue that the heightened presence of international law in interim constitutional issues reflects the grasping for legitimacy that characterises this period. I explore a special case study of Somaliland, a putative state that adopted an IC, and the connections between its constitutional development and its claims for statehood.

In the second part of this Chapter I examine the connections between ICs and transitional justice. It is argued that these processes are mutually interdependent: for example, in South Africa, the acceptance of widespread political amnesties (in response for truthful testimony) was predicated upon the promise in the IC of wholesale constitutional change. Other issues such as criminal trials, and the connections between constitutional reform and lustration, are explored.

1.3(c) Part C

In **Part C** of this thesis, I draw upon the work completed in the earlier Parts to create a framework for assessing success and failure in interim constitutions. In **Chapter 8** I argue that interim constitutions may be judged based on: to what extent the IC effectively secures a solution to the constitutional impasse; to what extent the IC governs effectively (as a coordinating device) during the period of its operation; and to what extent the IC establishes an effective foundation for the drafting and adoption of an effective permanent or successor constitution. These three questions conceal a larger range of criteria upon which it is possible to judge interim constitutions. I consider these criteria at greater length, and also place my framework within the context of other possible approaches. Finally, in the concluding **Chapter 9**, I reflect upon the typology and analysis developed in this thesis, and suggest possible avenues for future research.

1.4 Final introductory comments

Ruti Teitel wrote in *Transitional Justice* that

> from a transitional perspective [if] a political regime is not yet consolidated, it makes little sense to insist on constitutional permanence. To the contrary, the constitutional opening may well be contingent on its transience. The possibility of reform associated with the first interim constitution is often predicated on and bounded by the assumption of a deferred, more plenary constitutional process.[32]

[32] Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 199.

In a sense, the authority of the interim constitution reflects the forwards and backwards nature of all constitution-making,[33] but perhaps uniquely draws on both political history and an anticipated future polity for its legitimacy. The interim constitution is legitimated in part by a past history – either by a rejection of the legitimacy of the immediate past regime (as accepted in the South African transition), or the recalling of a *prior* and legitimate constitutional history interrupted by forces seen as external or illegal (as seen in Eastern European states which reverted, immediately post-communism, to their pre-World War II constitutional texts).[34]

Moreover, interim constitutions are, as is alluded to in Teitel's quote above, dependent for their legitimacy in part on the anticipated future agreement of a final constitution, calling forward towards the possibility of full consensus and legitimacy. Throughout this thesis, I attempt to unite and understand the backwards and forwards looking features of interim constitutions, and to highlight the ways in which ICs present unique possibilities, and pitfalls.

[33] Jackson makes a similar point in Jackson (n 26) 1280.

[34] For example, Estonia. See generally András Sajó, *Limiting Government—An Introduction to Constitutionalism* (Central European University Press 1999) 5, on fear in constitutions.

CHAPTER TWO: METHODOLOGY

In this thesis I undertake a comparative analysis of interim constitutions, in order to create a typology of their features, possibilities, and pitfalls. This involves an analysis of the origins, design, content, procedural and content regulation, endurance and replacement of these temporary texts. Further, it involves an analysis of interim constitutions in relation to core constitutional concerns such as legitimacy, permanence, supremacy, and the relationship between the state's constitutional order and the international legal order.

The analysis of a wide range of constitutional texts from different countries naturally involves a number of methodological challenges. Moreover, the attempt to identify constitutional concepts, and to find links between and across constitutional texts requires a considered methodological approach, and an appreciation of the potential value— and limitations— of the project. In this Chapter, I outline and defend the methodological approach adopted in this thesis. In order for this to be a meaningful explanation, it is necessary to situate my approach within broader debates about methodology relating to comparative constitutional legal scholarship.

In the Introduction to this Chapter, I outline the methodological approach that I adopt, in summary form. I then consider, in Part I, the history and evolution of comparative constitutional law ['CCL'], in order to situate my approach and the current state of CCL within a historical and scholarly context. In Part II, I outline my own

methodological approach, and respond to a number of questions and potential difficulties involved in this approach.

In summary, the approach that I adopt in this thesis is one of qualitative comparative analysis, with the pool of ten constitutional case studies as the units of analysis. As such this is a Small-Number study, although I rely and refer to Large-Number studies and quantitative analysis completed by others, such as the Comparative Constitutions/Constitute Project. My case selection is limited to those constitutional texts adopted by recognised nation states[35] that are explicitly temporary, and designed to be replaced by permanent, successor constitutions. I frame the study within the temporal limitation of constitutional transitions begun after 1989 and before 2011. The reasoning behind these definitions and exclusions, as well as the implications of this approach are discussed in further detail in Part II. The approach that I adopt is primarily legal: it begins with an analysis of constitutional and legislative texts, and then refers to other key legal texts such as judicial decisions and the drafting history or records of constitutional design processes. However, my work also necessarily involves an analysis of historical and political data and scholarship on each relevant case study country, in order to understand the constitutions as deeply embedded political texts. In Part II of this Chapter, I return in greater detail to expand upon my methodological approach and the possibilities of such a comparative project, and highlight and respond to the challenges and limitations of such an approach.

[35] Note the special case of Somaliland, a state not recognised by the international community, but which arguably meets the non-recognition based requirements of statehood under customary international law. Article 1, Montevideo Convention on the Rights and Duties of States 1934.

The methodological approach that I adopt in this thesis was not predetermined at the outset of my research. I began the project with an understanding that there was a gap in comparative constitutional and transitional literature about interim constitutions; from there I began my textual research and reading of interim texts. However, the approach that I adopt, and the responses I provide to the theoretical and methodological challenges in this thesis, are the result of an iterative approach, returning back and forth to my key research questions, the available resources, and the analytic content of my argument.

2.1 Part I: The history and evolution of comparative constitutional law

There is a long tradition of comparative law, and the attempt to bring divergent legal systems, structures and texts into conversation with one another. This tradition has in part been motivated by a desire simply to understand different legal systems, and in part by an attempt to develop, through comparison, 'the ideal metropolis'.[36] As Dixon and Ginsburg note, the tradition of comparative constitutional law may be traced to Aristotle's *Politics*, in which he compares different models of government.[37] Historically, comparative constitutional scholarship or writing arises from the co-existence or proximity of different legal schemes.

[36] Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2014) 3.

[37] Dixon, Rosalind and Tom Ginsburg, 'Introduction' in Tom Ginsburg and Dixon, Rosalind (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 1. As Rosenfeld and Sajó note, Plato's analysis of different models of government was more in the realm of theory, and ideal types, whereas Aristotle's work 'was concerned with actual government': Rosenfeld and Sajó (n 2) 3.

Hirschl points to 'Ptolemaic (Hellenic) Egypt (*c*. 300-30 BCE)',[38] as the first recorded instance of an *intersection* of different constitutive laws. There, Egyptian law applied to the local population, but Greek immigrants and Jewish citizens were, at least to some degree, governed by the laws of their respective cultures.[39] There were echoes of this situation in arrangements reached under the Roman Empire, and in communities under Moorish rule, and the Ottoman Empire. This legal – or perhaps constitutional – pluralism reflects that 'many polities throughout history have acknowledged and considered the foundational laws of others'.[40] This legal pluralism, and the intersection of different legal frameworks, naturally gives rise to the possibility of comparison. In the mediaeval period, the intersection of different legal systems often involved the clash of local customary laws, and the 'wave of legalism' and codification associated with the increased dominance of Papal authority and church law.[41]

A new interest in comparing legal systems emerged in the Enlightenment era, alongside an early wave in the drafting of new constitutions (including the late eighteenth century constitutions of Poland, France and the United States of America[42]). Montesquieu's *The Spirit of the Laws* (1748)[43] is, according to Hirschl, 'indisputably a—

[38] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 81.
[39] ibid 82.
[40] ibid.
[41] ibid 83.
[42] Other constitutions of the time include the Constitución española (Spanish Constitution) 1812; Constitution of Norway 1814.
[43] See Hirschl for a discussion of scholars working on similar issues prior to the Enlightenment era, including Thomas More (*Utopia*, 1516), the French jurist Jean Bodin (*Method for the Easy Comprehension of History*, 1566), François Hotman (*Anti-tribonianus*, 1567). Bodin is singled out for particular attention as having produced comparative research that is 'beyond impressive', addressing a number of legal systems, both ancient and contemporary. Methodology is described as ''concept formation through multiple descriptions', of the same constitutional phenomena across countries', as well as a 'substantive…comparison of the advantages and disadvantages of the different types of constitutional arrangement' Hirschl (n 4) 120. Hirschl argues that comparative public law as 'a systematic inquiry' was

if not the—defining moment in the history of comparative public law', generating both legal and more sociological or socio-legal research.[44] His work is not only a great theoretical achievement, but is supported by 'hundreds of comparative examples', from ancient and contemporary constitutions, with a notable if 'haphazard' discussion of non-European constitutions (Asian and African).[45] Writing of this period in the evolution of comparative constitutional analysis, Dixon and Ginsburg state: '[t]he enlightenment thinkers of the French, Polish and American projects saw written constitutions as acts of purposive institutional design, for which wide study was a desirable, even necessary, feature'.[46] They note that because of the lack of judicial review or consideration of constitutions in the Enlightenment and post-Enlightenment era, the texts from this time are devoid of case law, and tend instead towards compilations or compendiums of different constitutions.[47]

In the post-Enlightenment era, comparative constitutional scholarship became relevant to constitution-makers and politicians. Rosenfeld and Sajó write that following the French and American revolutions, '[t]he empirical evidence offered by comparison was both a source of inspiration and of legitimation'.[48] In the United States, the Federalist Papers,[49] which concerned the debates leading up to the drafting of the US Constitution, referred to foreign experiences, and in France, US State Constitutions

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'born in mid-16th-century France, and Jean Bodin may legitimately be considered among its founding fathers'.

[44] ibid 127.

[45] ibid 130, 131.

[46] Dixon, Rosalind and Ginsburg (n 3) 2.

[47] Dixon, Rosalind and Ginsburg, Tom, 'Introduction' in Dixon, Rosalind and Ginsburg, Tom (eds), *Comparative Constitutional Law in Asia* (Edward Elgar 2014) 2.

[48] Rosenfeld and Sajó (n 2) 3.

[49] Alexander Hamilton and John Jay, *The Federalist Papers* (Michael A Genovese ed, Palgrave Macmillan 2009).

'became important in debate'.[50] Henri-Benjamin Constant's work, on liberty, and the nature of constitutional monarchy, influenced a number of nineteenth century constitutions.[51] In South America, Simón Bolívar's constitutional thought was influential in the reforms of the 1810s-1820s.[52] In the field of sociology, nineteenth century academics such as Maine, Morgan and Durkheim[53] continued and expanded upon the kind of work begun by Montesquieu.

In the twentieth century, there were waves of constitution-making immediately following the second World War (for example in Japan, the Federal Republic of Germany, the German Democratic Republic, the Fourth Republic in France[54]); in the era of decolonisation in the 1960s and 1970s, and also following the end of the Cold War and the independence and decommunisation in former communist states. These waves of constitution-making have each triggered corresponding waves of interest and activity in the academic discipline of comparative constitutional law.

Rosenfeld and Sajó argue that it was not until the period following the second World War that comparative constitutional law truly 'emerge[d] as an academic discipline'.[55] Comparative study in areas such as contract and property law has historically been more thorough than that of public law. The disparity exists to this day:

[50] Rosenfeld and Sajó (n 2) 3. Hirschl states that the *Federalist Papers* is 'arguably the single most influential work of constitutional theory to date' Hirschl (n 4) 134.
[51] Hirschl identifies a number of constitutions that were influenced by Constant's writings, including those of Portugal (1822), Brazil 1824), France (Charter of 1830), Sardinia (1848), Italy (1861). See Hirschl (n 4) 134.
[52] ibid 135.
[53] ibid 131.
[54] Constitution of the Fourth Republic (Constitution de 1946, IVe République) 1946; The Constitution of Japan 1946; Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) 1949; The Constitution of the German Democratic Republic (Die Verfassung der Deutschen Demokratischen Republik) 1949.
[55] Rosenfeld and Sajó (n 2) 4.

as Rosenfeld and Sajó observe in *The Oxford Handbook of Comparative Constitutional Law,* comparative constitutional law 'rates a mere 35-page entry in the 1,400 page *Oxford Handbook of Comparative Law*'.[56] The reason for this disparity is connected to the methodological challenges inherent in comparative public law in general and constitutional law in particular; whereas the contractual system of a country might be analysed in relative isolation, it is arguably more difficult to compare different constitutional systems, which are intimately tied to the unique political and historical circumstances of the relevant countries. As Mark Tushnet observes, comparative constitutional law is an area that lends itself to other related disciplines such as comparative politics, political science, and social science.[57] There is a concern amongst lawyers that constitutional systems differ so greatly from country to country that it is impossible or fruitless to attempt to compare them.

The 1990s, with the advent of post-communist independence, and the redrafting of constitutions in states such as South Africa, represent the beginning of the present and vibrant era of comparative constitutional law. The journal, *East European Constitutional Review*, for example, published extensively from Spring 1992 on the constitutional reform and transitions occurring throughout that region. The contemporaneity of these transitions allowed for extensive comparative work by national and regional experts.

Comparative constitutional law emerged as a 'newly energised field in the early 21st century'.[58] New constitutions—emerging in newly independent states, or reforming

[56] ibid 2.
[57] Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar 2014) 4.
[58] Dixon, Rosalind and Ginsburg, Tom (n 13) 1.

or post-revolutionary states (in East Timor, Croatia, Kosovo, Sudan and South Sudan, the DRC, Iraq, Nepal, Afghanistan, and in Arab Spring countries such as Egypt, Libya, and Tunisia)—have created new waves of study. Publications and conferences[59] focussing on comparative constitutional law and constitutional design and amendment have flourished.[60]

The newest development in comparative constitutional studies is the creation and ever-increasing importance of large databases of constitutional texts and information, and the statistical analysis that is being conducted. The Comparative Constitutions Project, created by Tom Ginsburg, Zachary Elkins, and James Melton ('Melkinsburg'), involves a broad study of constitutions and constitutional events from 1789 to the present. This project has created comparative studies on a number of topics, ranging from *The Endurance of National Constitutions* to studies on the branches of government, the role of international law,[61] etc, all using a large dataset of constitutions.[62] The Constitute Project,[63] run by the Comparative Constitutions Project and Google Ideas, renders

[59] Hirschl (n 4) 3.
[60] For example, see 'Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence' (The Center for Constitutional Transitions at NYU Law & International IDEA 2014) <http://ctransitions.wpengine.com/publications/constitutional-courts-after-the-arab-spring/#papers>; 'Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring' (The Center for Constitutional Transitions at NYU Law & International IDEA 2014) <http://ctransitions.wpengine.com/publications/semi-presidentialism-as-power-sharing/> accessed 6 March 2015; Miller, Laurel E (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010); James Thuo Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya' (2009) 49 William and Mary Law Review 1109.
[61] Comparative Constitutions Project, 'Option Reports: Customary International Law' (27 January 2009) <Previously hosted at constitutionmaking.org/files, copy on file with thesis author> accessed 5 October 2011.
[62] Ginsburg, Tom (ed), *Comparative Constitutional Design* (Cambridge University Press 2012); Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009); Ginsburg, Tom and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014).
[63] Comparative Constitutions Project, 'Constitute Project' <https://www.constituteproject.org/> accessed 6 March 2015.

accessible virtually all current constitutions, and allows the user to search by keyword, date, or country. Until recently, it has been surprisingly difficult to obtain English translations of constitutions for all countries, even with access to library databases; it remains difficult to obtain English translations of many historical or superseded constitutions. The Constitute Project allows scholars and members of the public access to an extraordinary amount of comparative data in both English and Arabic, and will no doubt contribute to the next era of comparative constitutional law.

Arguably, one of the factors contributing to the demand for comparative constitutional work of all kinds is the increasing role of constitutionalism and judicial review, globally. Hirschl notes that 'over 150 countries and several supranational entities across the globe can boast the recent adoption of a constitution or a constitutional revision that contains a bill of justiciable rights…', and with constitutional courts playing a bigger role, it is understandable that there is 'ever-expanding interest among scholars, judges, practitioners, and policymakers'.[64]

In this section I have discussed the history and evolution of comparative constitutional law, in order to provide a context for the approach I adopt in this thesis.

2.2 Part II: Methodological approach

In Part I of this Chapter, I explored the history and evolution of comparative constitutional law. In this part, I outline the methodological approach that I adopt throughout this project. This section is structured in terms of my response to a series of

[64] Hirschl (n 4) 2.

questions with which I have had to engage throughout my doctoral research. The responses to these questions define my methodological approach. The questions are both theoretical and practical in nature; some of them are common to much of comparative constitutional scholarship, others are specific to this project.

2.2.1 Defining the unit of analysis: what is a constitution?

As discussed in the Introduction to this thesis, the definition of a constitution is itself a matter of academic controversy. In the Introduction, I adopted Joseph Raz's seven part definition of a constitution, according to which a constitution is: constitutive of a legal system; stable, at least in aspiration; written; superior law; justiciable; entrenched, that is, more difficult to change than other law; and expressive of a common ideology.[65] A constitutional text does not, of course, exhaust the constitution or constitutional law of a given legal system; decisions of superior courts, important legislation, constitutional conventions, historical and political factors, and institutional practices all contribute to the practice, reception, and efficacy of a constitutional system. In comparative constitutional scholarship, there is often a link between the scope of the study and the way that the constitution is defined. In a Large-N study, which refers to many constitutions, it is more typical to see an emphasis on the constitutional text, rather than the broader picture.[66] The Constitute Project, for example, relies on textual analysis of constitutions alone for the majority of its research and conclusions. On the other hand, a single case study of a given constitutional system, such as Jędruch's text *Constitutions,*

[65] Joseph Raz, 'On the Authority and Interpretations of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism—Philosophical Foundations* (Cambridge University Press 2001) 153.
[66] Dixon, Rosalind and Ginsburg (n 3) 4.

Elections and Legislatures of Poland, 1493-1993—A Guide to their History contains a great deal of historical and political background and depth on broader Polish constitutional law and practice. As Hirschl notes, such projects can be almost in the nature of 'ethnographic' studies.[67]

This project falls between the extremes of the single case studies and the large-N studies. As such, I approach the constitution, as defined by Raz above, as that which is *constitutive* of a legal system; this involves a primary focus on the constitutional text itself, but also involves an analysis of other legal artefacts that comprise the legal system. These might include quasi-constitutional legal texts – for example peace agreements or legislation that supplements constitutional provisions about the holding of elections or the nature of transition. Other relevant texts include the decisions of constitutional or superior courts, and constitutional practices that evolved under new regimes or persisted from prior legal traditions. Finally, it is necessary to examine constitutions as documents in practice, in terms of the degree to which they are reflected in the law and politics of the state. As such, I refer to historical and political commentary to provide a fuller understanding of the constitutions studied.

2.2.2 Is it possible or profitable to compare?

A second question that emerges in this kind of research is whether it is possible to compare constitutional texts, and whether such comparison is profitable. This issue has been discussed above, in Part 1, in terms of the relative torpor that has characterised the

[67] Hirschl (n 4) 193.

development of comparative constitutional law. The great challenge in comparing constitutions, and indeed whole constitutional systems, is how to draw meaningful links between legal systems in states that are diverse in terms of politics, history, religion, geography, and culture. This challenge presents itself both at a theoretical level, and a practical level. Hirschl's 2014 book, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, is highly instructive on this point.

Hirschl raises the valid and little-asked question of what is meant by the word 'comparative' in this context. He observes that there is a wide range of approaches within the field of comparative constitutional scholarship, and that these vary both in the scope of analysis and the purpose or orientation of analysis. As discussed above, the scope of a study can range from a 'freestanding, single-country stud[y]' that is 'characterised as comparative by virtue of dealing with a country other than the author's own',[68] to small studies of constitutions within a region (common to analysis of post-communist Eastern Europe,[69] or evident in Ginsburg and Chen's *East Asian Constitutionalism in Comparative Perspective*[70]) or based around a theme,[71] to the large-N studies. In terms of purpose, and orientation, constitutional studies evince a range of approaches: some appear to be based on encyclopaedic or fact-finding goals; others

[68] ibid.
[69] For example, see Joel Hellman, 'Constitutions and Economic Reform in the Postcommunist Transitions' (1996) 5 Eastern European Constitutional Review 46; Alina Mungiu-Pippidi, 'Whatever Happened with Transition in Central and Eastern Europe?' (South East European Studies at Oxford (SEESOX), Oxford, 3 February 2014); Alberto Febbrajo and Wojciech Sadurski (eds), *Central and Eastern Europe After Transition: Towards a New Socio-Legal Semantics* (Ashgate 2010); Jan Zielonka, *Democratic Consolidation in Eastern Europe; Volume 1: Institutional Engineering* (Oxford University Press 2001).
[70] Tom Ginsburg, 'East Asian Constitutionalism in Comparative Perspective' in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press 2014).
[71] Ginsburg, Tom and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014).

towards 'genealogies and taxonomic labelling of legal systems',[72] and others are survey-style approaches 'aimed at finding the "best" or most suitable rule across cultures',[73] or what Rosenfeld and Sajó refer to as the quest for 'an ideal metropolis'.[74] Then there are studies that aim to compare and contrast constitutional systems, for the purposes of self-reflection, or 'concept formation through multiple descriptions of the same constitutional phenomena across countries', or 'normative or philosophical contemplation of abstract concepts such as 'constitutional identity', or more causally based arguments.[75]

My approach is one of a small study of constitutional cases (ten key case studies, with some reference to the quasi-case of Somaliland), oriented around a single theme, that of interim constitutions. The particular issues around case selection are discussed below, in Question 3. In terms of purpose and approach, my work is oriented towards more than one of Hirschl's discussed goals. At a basic level, there is a fact-finding element to my work; this is of particular value in connection to less studied cases, such as Albania, or the Sudan. I do not attempt to discover what is the 'best' approach, but I do attempt to reflect upon the study of multiple cases in order to generate concepts, and to contemplate more abstract concepts, such as constitutional legitimacy, in light of my research. I create a typology of interim constitutions, in order to understand the nature and range of interim constitutions, which I believe are a diverse but coherent group. Finally, I make limited causal claims about the importance of careful structuring of interim constitutions and their likelihood to have permanent effects. This mix of aims in comparative constitutional legal scholarship is common, but it is often the case that the

[72] Hirschl (n 4) 193.
[73] ibid.
[74] Rosenfeld and Sajó (n 2) 3.
[75] Hirschl (n 4) 193.

articulation of what is being attempted, and what is capable of being proved, is sometimes insufficiently clear.

Extending beyond the realms of academia, an increasingly relevant goal of comparative constitutional scholarship (which is connected to the 'quest' for the 'ideal metropolis') is the attempt to provide information to constitution-makers and reformers. Rosenfeld and Sajó observe that this aspect of comparative scholarship is directed towards or relevant to *participants* in 'the constitutional arena', whereas some of the earlier purposes discussed are of greater relevance to the *observers* of the constitutional arena[76] (such as academics and commentators). In Part 1, the connections between CCL scholarship and the drafting of constitutions, from the time of the French and American revolutions onward, were discussed. It is arguable that with increased international communication and information sharing, the ability of constitutional drafters to obtain and interact with comparative data, and to use it to inform constitutional reform is greater than ever. Indeed, this is expressly contemplated by the founders of the *Constitute Project*, who anticipate, not unreasonably, their work being used in future constitution-making projects.[77] Leaving aside for the moment the desirability of the 'transplant' of constitutional systems or legal concepts, the notion of constitutional learning is arguably of great value to participants in constitution-making processes.

[76] Rosenfeld and Sajó (n 2) 6.
[77] 'New constitutions are written every year. The people who write these important documents need to read and analyze texts from other places. Constitute offers access to the world's constitutions that users can systematically compare them across a broad set of topics — using an inviting, clean interface' Comparative Constitutions Project, 'About' (*Constitute Project*) <https://www.constituteproject.org/content/about?lang=en> accessed 6 March 2015.

Judges who refer to the decisions of foreign courts in order to assist them in deciding a given case practise another type of comparative constitutional law. The use of foreign and comparative jurisprudence in judicial decision-making is a controversial and well-discussed area of comparative constitutional law, but it is beyond the scope of this thesis, and not necessary to an analysis of interim constitutional law.

Finally, in order to conduct effective comparative constitutional research I argue that a scholar must navigate a *via media* between the poles of constitutional particularism, in which each constitutional system is viewed as being totally unique and idiosyncratic, and universalism, in which points of commonality and synchronicity are strongly emphasised.[78] In analysing interim constitutions across a number of diverse states, I attempt to identify points of commonality and concurrence, as well as noting the wide range of approaches and outcomes.

Rosenfeld and Sajó note that '[t]here are factual and normative issues regarding methodology and though the two are conceptually distinct, they are often linked in practice'.[79] I will now address these more practical methodological questions.

2.2.3 What cases should be included?

In this thesis, I analyse interim constitutions. This approach raises a number of threshold issues. In order to define this phrase carefully, it is necessary to focus on each word. By *interim*, I do not mean all transitional constitutions, or even constitutions that turn out to

[78] Hirschl (n 4) 197.
[79] Rosenfeld and Sajó (n 2) 11.

be very short-lived, or temporary and relate only to a transitional or interim period. Rather, I am addressing constitutions that are deliberately—and explicitly—temporary. I explore the complexities of this deceptively simple term in 2.3.1 below.

By *constitution*, I mean, as discussed above, texts that are constitutive of a legal system. Further, I examine only constitutions actually adopted (excluding, for example, the proposed Interim Constitution of Scotland), in states that are generally recognised to be nation states—so I analyse the quasi-case of Somaliland only in limited sections, including in relation to public international law. Similarly, the 2005 Interim Constitution of South Sudan, as a sub-national or regional text prior to that state's independence in 2011, is not considered except in reference to the 2005 Interim Constitution of the Republic of the Sudan.

In addition to this basic definition, I adopted a temporal limitation, excluding constitutional cases that began their transition before 1989, and excluding those that began their transition after 2010, when I began research on the first phase of this project. The main reason for commencing the study with transitions begun in 1989 relates to my intention to address the interim constitution as a modern kind of constitutional text, and to study it as a category that is currently—or has very recently been—in use. Additionally, as a Discussion Report on Interim Constitutions in Post-Conflict Settings produced by the International IDEA (Institute for Democracy And Electoral Assistance) in December 2014 notes,

> Compared to the 1945–90 period, when interim constitutions were deployed mainly after coups, 1990–2014 has witnessed a very marked increase in the use of interim constitutions in a variety of circumstances:

> post-occupation, union of previously divided jurisdictions, independence, secession, decolonization, entrenching or eradicating communism, ending violent conflict and, most often, after toppling authoritarian regimes.[80]

South Africa was the first of the nine case study countries to have adopted a permanent, successor constitution, in 1996. Even the oldest successor to a modern interim constitution is less than 20 years old. In order to be able to make meaningful comparisons and to generate concepts and reflections on the nature of interim constitutions, I felt it was necessary to have a relatively small temporal period, especially given the wide geographical spread of the case study countries. Regrettably, this results in an exclusion of some of the limited group of earlier interim constitutions, including the interim constitutions of Ireland (1919) and Tanzania (1965).

The terminal temporal limitation on the study, excluding transitions begun after 2010, is necessitated by the practical limitations and timing of this doctoral project. Additionally, transitions in Egypt, Libya and Tunisia are, for various reasons, still very much in flux, and it seems that it may be some time before it is possible to reflect upon the role played by interim constitutions in these volatile states. This is not to say that flux or volatility is a reason for exclusion: in Nepal, the Interim Constitution is still in effect, and has not been succeeded by the Permanent Constitution first mandated to be adopted by May 2010; Thailand is in a state of constant constitutional flux, and conflict and uncertainty persist in Sudan, South Sudan and the DRC. I contend that these transitions are sufficiently further advanced so as to allow greater reflection and analysis than those

[80] 'Interim Constitutions in Post-Conflict Settings: Discussion Report' (International IDEA and the Edinburgh Centre for Constitutional Law in association with the Global Justice Academy, University of Edinburgh 2014) <http://www.constitutionnet.org/files/interim-constitutions-in-post-conflict-settings-pdf.pdf>. Note that the precise definition of what counts as an 'interim constitution' is not explained in this report.

post-2010 constitutions, although necessarily less may be said of these transitions in relation to issues such as their permanent effects or relationship to successor constitutions. Developments post-2010 in case study countries are discussed as much as possible; in connection to the case of the Sudan, where the interim constitution was adopted in 2005, I discuss the 2011 Interim Constitution of South Sudan as a linked event, but not a case study in its own right. As with the initiating temporal limitation, this terminal limitation regrettably excludes several interim texts, including the Arab Spring transitions of Egypt, Libya and Tunisia, and prohibits a full analysis of the 2011 South Sudan Constitution. A further analysis of these excluded cases would naturally form part of further work on the topic, but is beyond the scope of this thesis.

2.2.4 Practical matters

Having established the working definition of an interim constitution, and the parameters of the study, it is also necessary to explain, on a practical basis, how the group of case study countries was identified. As will be discussed, practical issues contribute to the exclusion of certain cases from my study. I began the process of identifying which states fell into this category of constitutional text first by finding references to deliberately temporary constitutions in other legal or political scholarship. These lists were largely similar, but I conducted further research on what countries might fall into this category through searches for phrases such as ‘interim constitution’ and ‘temporary constitution’ on legal databases and on Google.

The *Constitute Project* currently contains only contemporary constitutions, and so any interim constitutions that have been replaced by permanent texts are not included, but I have completed searches of that database of all current constitutions for any references to previous interim or temporary texts. Additionally, I have established a Google Alert notification for any new instance of the phrase 'interim constitution' to be sent to me; this can bring in false positives, of states that are discussed in passing to have had an 'interim constitution' when in fact they had a transitional or temporary constitution that was not intentionally time-limited. Together with general monitoring of the news media, it also provides me with information about when an interim constitution is being proposed or debated in a country, such as the proposed Interim Constitution of Scotland.

Of course, even an interim constitution that is deliberately and explicitly rendered as such may not contain these words, at least in its title, as is the case with the interim texts of Albania, for example. The temporal limitation of my study, by beginning in 1989, meant that I excluded certain earlier cases of interim constitutions (such as the Irish interim constitution of 1919[81]), and thus limited the possibility of missing little-discussed or ancient interim constitutions. I read broadly in generalist texts about constitutional transitions, and transitional justice, and looked for any references to temporary texts, in order to create what I reasonably believe to be a comprehensive list of interim constitutions.

The list that I generated following this research is represented in the nine case study countries discussed in this thesis. It is not, however, exhaustive. Much later in the

[81] Constitution of Dáil Éireann 1919.

course of my research I came across other possible examples of interim constitutions, within the temporal limitations of my study. A primary example is Burundi, where a 2004 Interim Constitution[82] was replaced in 2005 by the Transitional Constitution of Burundi,[83] which remains in power today.[84] There has been a great deal of political upheaval and constitutional debate[85] in the recent history of Burundi, with a tense political climate surrounding issues of ethnicity,[86] and most recently, a constitutional crisis surrounding President Nkurunziza's attempt to pursue a third presidential term.[87]

There are also borderline cases such as Somalia, which adopted a Transitional Federal Charter that was distinct from the National Constitution.[88] The case of Kosovo, which is cited in the IDEA Report, is extremely interesting and a potential subject for close study. However, it involved a 2001 interim document[89] under UNMIK (United Nations Interim administration Mission in Kosovo), some six years prior to Kosovo attaining statehood, and was thus not the interim constitution of a sovereign state. For this reason, as with the interim constitutions of Somaliland and the 2005 South Sudan text, I have excluded it from the present study.

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[82] The Post-Transition Interim Constitution of the Republic of Burundi (La Constitution Intérimaire Post-transition de la République du Burundi) 2004.
[83] Transitional Constitution of Burundi (La Constitution de Transition de la République du Burundi) 2001.
[84] Note the discussion of the 1998 'failed' interim constitution of Burundi in 'Burundi 2001' (*Princeton: Constitution Writing & Conflict Resolution*) <http://www.princeton.edu/~pcwcr/reports/Burundi2001.html> accessed 20 March 2015.
[85] Patrick Nduwimana, 'U.S. Urges Burundi to Drop Constitution Changes, Avoid "Dark Days"' *Reuters* (Bujumbura, 8 April 2014) <http://www.reuters.com/article/2014/04/08/us-burundi-usa-idUSBREA371QI20140408> accessed 24 April 2015.
[86] Matthias Goldman, 'Does Peace Follow Justice or Vice Versa? Plans for Postconflict Justice in Burundi' (2006) 30 The Fletcher Forum of World Affairs 137, 138.
[87] Hugo Williams, 'Burundi's President Pierre Nkurunziza in Profile' *BBC News* (11 June 2015) <http://www.bbc.co.uk/news/world-africa-32490645> accessed 23 June 2015.
[88] Transitional Federal Charter of the Somali Republic 2004.
[89] Constitutional Framework For Provisional Self-Government in Kosovo 2001.

There is a great deal of literature in the social sciences about the selection of case studies. Hirschl is critical of legal scholars in their selection of cases in small-N studies; he argues that 'the systematic study of comparative constitutional law has been characterised by a lack of adherence to inference-oriented case-selection and research-design standards'.[90] Some of the common and accepted principles for case-selection include: 'most similar cases'; 'most different cases'; 'prototypical cases'; 'most difficult case'; 'outlier cases'.[91]

This study does not fall neatly into any of those categories; there are some cases that are very similar (Hungary, Poland, and to a lesser extent Albania share similar features), but overall it is a highly diverse group. It is not, however, a selection of 'most different cases', because all share the features of being historically significant transitions conducted in an atmosphere of uncertainty and according to broadly similar constitutional methods. The driving feature of my case selection was the identification of the common characteristic: the deliberately temporary constitution. Within temporal limitations, I have examined each possible case within this category, in order to draw conclusions that are as well founded in fact as possible. The terminal temporal limitation, which excludes three Arab Spring states, means that I am somewhat limited in the conclusions that I can draw. However, being nearly comprehensive within the temporally limited category of interim constitutions means that I am able to avoid suggestions of cherry-picking or 'looking out over a crowd and picking out [one's] friends'.[92]

[90] Hirschl (n 4) 226.
[91] Hirschl (n 4) 244–5.
[92] US Chief Justice Roberts in his 2005 Confirmation speech, citing Harold Leventhal's remark, made in the context of a discussion of the use of legislative history in constitutional interpretation. Kenji Yoshino

2.2.5 The special case of Hungary

In defining what counts as an interim constitution, there are naturally some borderline cases that must be evaluated to see whether they should rightly be viewed as an interim constitution. In the preceding section I discussed borderline cases (such as interim constitutions of non-sovereign states) that were *excluded* from consideration. In this section, I consider the borderline case of the 1989 Constitution of Hungary,[93] which I have *included* in this study. The 1989 text[94] was an amended version of the 1949 Communist Constitution.[95] The Hungarian Constitution is discussed in more detail in Part B of this thesis, but in this section I address preliminary questions about its inclusion in the category of interim constitutions.

The Preamble to the 1989 Amendment/Constitution states that:

> In order to promote a peaceful transition to a jural state having a multi/party [sic] system, parliamentary democracy and social market economy, the National Assembly, for the period before the enactment of the new Constitution of the country, determines the text of the Constitution of Hungary as follows…

In this way the Hungarian constitution neatly fits the formal definition of a constitution which is deliberately and explicitly temporary, and which is predicated on its replacement by a permanent, successor constitution. However, this 1989 text remained in place (albeit

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and Michael Kavey, 'Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law', *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1097.

[93] I am indebted on this point to discussions had with several conference participants, following my presentation of a paper; Caitlin Goss, 'Success and Failure of Interim Constitutions', *The Science of Constitutions: Measures of Success and Failure* (Foundation for Law, Justice and Society 2015).

[94] Act No. XXXI of 1989 (Act No. XX of 1949 (as amended)) (1989 Constitution of Hungary).

[95] Act No. XX of 1949 (1949 Constitution of Hungary).

heavily amended)—until it was replaced by the Fundamental Law of 2011. It might reasonably be asked whether a constitution can be said to be interim if it lasts for longer than a decade and, indeed, outlasts the average constitutional lifespan of nineteen years that has been identified by Ginsburg *et al*.[96] Moreover, as János Kis has written, the 1989 text contained no provisions as to how the successor constitution was to be written,[97] a fact which differentiates it considerably from interim constitutions in, for example, Nepal and South Africa.

I would argue, however, that neither of these factors is disqualifying. My interest in this thesis is analysing *deliberately temporary* constitutions, and examining the issues that explicit and intentional temporariness raises. To say that an interim constitution lasts a long time is not to disqualify it from being considered—at least for some period of its duration—an interim text. The Nepali constitution has now been in power for approximately eight years (which in the Hungarian context would be late 1997), and yet no one doubts that it is, or has been, an interim constitution.

Neither should the lack of procedure about the adoption of a future constitution disqualify the Hungarian text from being considered as an interim document. Although many interim constitutions have elaborate procedures for their replacement, not all do. The interim constitutions of Hungary's closest temporal and geographical neighbours in

[96] Fundamental Law (Constitution of Hungary) 2011.
[97] János Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 5.

the set of case studies, Albania[98] and Poland,[99] also contained very little information or regulation of the drafting of the final constitution.

It is arguable that both the long duration of the Hungarian 1989 constitution, as well as the lack of procedure as to the adoption of a permanent constitution, tends to make the Hungarian case a *weaker* example of an interim constitution. I concede that it is much less of a 'central case' than say South Africa. However, I submit that to exclude the Hungarian case would be to prejudge the case studies to be considered; it is worth considering an interim constitution that diverges so greatly from the 'central case', in order to learn both about the category as a whole, and its logical limits. Therefore I argue that by virtue of the terms of the constitution itself, and the initial intent around its adoption, the Hungarian Constitution of 1989 should be counted as an example of an interim constitution when adopted. The question of whether and when it came to be a *permanent* constitution—or ceased to be an interim text—is a complex one. Before proceeding further, however, it is necessary to make a more detailed argument about the reasons for my inclusion of the Hungarian case in this study.

[98] 'The provisions of this law operate until the adoption of the Constitution of the Republic of Albania, whose draft will be prepared by the Special Commission appointed by the People's Assembly. The members of the commission and the deadline for submitting the draft constitution shall be defined by a special decision of the People's Assembly.'- the sole guidance provided in the Law on the Major Constitutional Provisions (Albania) 1991 Article 44.

[99] The Preamble to the Small Constitution states that it continues in force 'pending the passing of a new Constitution', although other legislation was introduced to provide further detail for the process. Constitutional Act of 17th October 1992, on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government Dziennik Ustaw Nr 84 Poz 426 1992.

2.2.5(a) The case for considering the 1989 Hungarian Constitution as an interim text

The reasons for initially including the 1989 Hungarian constitution in the category of interim texts are two-fold: first, on the basis of the explicit textual statement extracted above; and secondly, on the basis of the work of other legal academics, historians and political scientists who refer to it as such. The Hungarian case should be included in the category of interim constitutions because not only was it adopted as an interim constitution, but following its adoption, it was *treated* as a text intended to be replaced, with repeated attempts to replace it. In order to make this argument, it is necessary to delve into each of these claims in greater detail.

The 1989 Constitution is referred to in many, though certainly not all, scholarly works on constitution-making as an example of an interim text.[100] This analysis tends to refer to: the intention for the text to be temporary; reasons for the explicit temporariness of the text; and discussion of efforts in the post-1989 years to adopt a permanent or new constitution. Andrew Arato, the Hungarian-born academic and Professor at the New School, and who served as a consultant to the Hungarian constitution between 1997-

[100] See, for example: Rudolf L Tökés, 'Institution Building in Hungary: Analytical Issues and Constitutional Models, 1989-90' in András Bozóki (ed), *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy: Analysis and Documents* (Central European University Press 2002) 123, 124, 126, 128, 130, 132, 133 <http://hdl.handle.net/2027/heb.08625.0001.001>; Andrew Arato, 'The Roundtables, Democratic Institutions and the Problem of Justice' in András Bozóki (ed), *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy: Analysis and Documents* (Central European University Press 2002) 230–1 <http://hdl.handle.net/2027/heb.08625.0001.001>; Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003) 31–2, 34, 162; Zoltán Miklósi, 'Constitution-Making, Competition and Cooperation' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 59; Márta Dezső, A Vincze and B Vissy, 'Part I. Sources of Constitutional Law' in Márta Dezső (ed), *Constitutional Law in Hungary* (Kluwer Law International) 59 [82].

1998,[101] has written extensively of the Hungarian text as an interim constitution. Both in work focussed on Hungary as well as his recent work on 'post-sovereign constitution making', Arato has written about the interim constitution of Hungary, and has compared it to other interim processes in Iraq and Nepal.[102]

Catherine Dupré, in her book *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*, writes that '[u]nlike the communist constitutions, which tended to follow a very similar pattern under Moscow's close supervision, post-communist constitutions adopted different formats and some of them were 'only' interim amendments, as in Poland and Hungary'.[103]

Dupré argues that the Hungarian constitution of 1989 was distinct because

> it was understood that it would be ***only an interim constitution*** registering the concessions made by the ruling party during the Round Tables negotiations and that it would be ***replaced by a new constitution*** to be adopted by the parliament due to be elected in spring 1990.[104]

Georg Brunner, explaining this intention, notes that

> at the Roundtable the societal opposition was able to impose its view that a new constitution should be adopted only by a democratically elected Parliament and that the task of the sitting Parliament could simply be to

[101] 'Faculty: Andrew Arato' (*The New School for Social Research*) <http://www.newschool.edu/nssr/faculty/?id=4e54-6734-4f51-3d3d> accessed 23 June 2015.
[102] See generally Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press 2009); Andrew Arato and Zoltán Miklósi, 'Constitution Making and Transitional Politics in Hungary', *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010); Andrew Arato, 'The Constitution-Making Endgame in Hungary: The Politics of a Constitutional Impasse' (1996) 5 East European Constitutional Review 31.
[103] Dupré (n 67) 20.
[104] Emphasis added. ibid 32.

> create the democratic rule of law infrastructure necessary for the change of regimes.[105]

Similarly, in *Constitutional Law in Hungary*, Márta Dezső *et al* write that

> The present content of the Constitution was the result of agreements reached at the so-called National Round Table, and was established by the Parliament operating until the first free elections, but only for the period of time until a new Constitution was adopted. That is why the Constitution's preamble refers to the document as an interim instrument.[106]

Contrary to these intentions, of course, a new constitution was not adopted. The new government, with its attention on other legislative matters, failed to adopt a new constitution and instead introduced a number of constitutional amendments between 1990 and 1994; as Dupré observes, in these four years, 'no fewer than ten amendments were adopted'.[107] In 1995, Arato argued that constitutional amendment rules must be changed in order to 'bring the period of transition in the legal sense to a close', and noted that in and noted that prior to the 1994 election, there had been consensus that the constitution should 'at the very least [be] redrafted' to deal with various issues.[108]

The matter was picked up again in the coalition government's platform when it was elected in 1994. As Dupré notes, proposals came from the Alliance of Free Democrats, and by the Hungarian Socialist Party's proposal. Further, a

> special parliamentary committee was apportioned with a view to drafting a new constitution and parliament issued a moratorium on constitutional

[105] Georg Brunner, 'Structure and Proceedings of the Hungarian Constitutional Judiciary' in László Sólyom and Georg Brunner (eds), *Constitutional judiciary in a new democracy : the Hungarian Constitutional Court* (University of Michigan Press 2000) 68.
[106] Dezső, Vincze and Vissy (n 67) 59.
[107] Dupré (n 67) 32.
[108] Andrew Arato, 'Election, Coalition, and Constitution in Hungary', *Lawful Revolution in Hungary 1989-94* (Social Science Monographs 1995) 123–5.

> amendments. In March 1996, a set of fundamental principles for the new constitution was published in newspapers and the consultation process began. However, the whole process ground to a halt, due to a failure to agree on the text of the constitution. In December 1996, another project was published by the government but it became clear that there was too little time left to finalise a draft constitution and to organise a referendum before the end of the second government.[109]

In July 1997, further amendments were introduced on a number of key topics; as Dupré writes, 'This led some commentators to think that Hungary was not going to have a new constitution'.[110] Many scholars and academics have discussed the way in which talk of reform or replacement of the 1989 text faded away. As Brunner put it in 2000, '[t]he project to draft a new constitution is still on the agenda, but it is no longer so urgent, even given all of the discrepancies in the current Constitution'.[111] Dezső *et al* observed in 2010 that '[t]hough some politicians and experts on public law still urge elaboration of a new constitution, especially because they think the Constitution's legitimacy may be questioned, that step has yet to be taken'.[112]

The constitutional project then lapsed for some years, before the controversial reforms leading to the adoption of the Fundamental Law in 2011.113 It is arguable that at some point between 1994 and the mid-2000s, the 1989 constitution, lapsed into permanence, or otherwise lost its interim status.

Because of the explicitly interim nature of the Hungarian text, its treatment in the literature as an interim text, and the sustained and frequent attempts at reform and

[109] Dupré (n 67) 32.
[110] ibid.
[111] Brunner (n 72) 69.
[112] Dezső, Vincze and Vissy (n 67) 59.
[113] Fundamental Law (Constitution of Hungary) (n 63).

replacement in the years after it was adopted, I treat it as an interim text. This is not to suggest either that the Hungarian case is very similar to each of the other case studies, or that the adoption of the 2011 Fundamental Law was a completion of a coherent constitutional drafting process that began with the 1989 law. Rather, studying the case of Hungary gives insights into the way in which interim texts can lapse into permanence, and the potential consequences of failing to specify procedures for drafting a new constitution. Accordingly, I discuss the special case of the Hungarian interim constitution throughout this thesis, considering the way in which it 'failed into permanence' in Chapter 4; the incomplete two-stage process in Chapter 5, and the many amendments to the 1989 Constitution (23 between 1990 and 2010114) in Chapter 6.

2.2.6 The (excluded) borderline case of Germany

Finally, it is worth discussing, briefly, the related borderline case of Germany. The German Basic Law, first adopted by West Germany (the Federal Republic of Germany) in 1949, contained a provision stipulating that the law 'shall become invalid on the day when a constitution adopted in a free decision by the German people comes into force'.[115] A similar provision was incorporated into the German Basic Law of the united Germany in 1990, stating in the same-numbered Article 146 that: 'This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German

[114] Kis (n 64) 9.
[115] Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) (n 20).

people takes effect'.[116] The 36th or 'Unification' Amendment to the Constitution in October 1990 introduced only eight changes to the 1949 text when the five Eastern states ('Länder') joined the West, including the partial amendment of Article 146 discussed above.[117] Kommers and Miller note that while Article 146 seemed to 'clearly anticipate that reunification would cause West Germany's Basic Law to expire, to be succeeded by a new constitution 'negotiated by all the German people',[118] it was instead achieved through accession, under Article 23. Although there was a 'heated controversy'[119] over whether a new constitution should have been adopted according to Article 146 the matter was never contested before the Constitutional Court,[120] and the decision to use the Article 23 procedure appears to have gained popular legitimacy.

It is noteworthy that another change made by the Unification Amendment related to the Preamble. The 1949 Preamble stated that the Law was to 'give a new order to political life for a transitional period'; the reference to a transitional period was removed in the 1990 text. It is thus arguable that in making the 1990 Amendment, Article 146 was not considered to be a mandatory provision about the temporary nature of the constitution (as it had not been used in 1990), and its inclusion in the amended text made constitutional replacement *permissible* rather than rendering the 1990 Basic Law an interim text. The removal of the description of the Basic Law as governing during a 'transitional period' also supports this thesis. Winkler regards the inclusion of Article 146

[116] Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) (rev 2012) 1949.
[117] Axel Tschentscher, *The Basic Law (Grundgesetz) 2012 : The Constitution of the Federal Republic of Germany (May 23rd, 1949) – Introduction and Translation* (3rd edn, Jurisprudentia 2013) <http://www.servat.unibe.ch/jurisprudentia/lit/The_Basic_Law_SSRN_2013.pdf>.
[118] Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 686.
[119] Heinrich August Winkler, *Germany: 1933-1990* (Oxford University Press 2007) 498.
[120] Kommers and Miller (n 85) 686.

in the 1990 text as a kind of safeguard option if the constitutional arrangements proved unsatisfactory: '[I]n terms of democratic legitimacy, it was true that accession was less ideal than a new constitution…But if this was a deficiency, it was one that could be removed by a nationwide constitutional debate and, if necessary, by a constitutional reform and a referendum *after* accession'.[121] Similarly, Arthur Benz refers to Article 146 as providing an 'opportunity' for wholesale constitutional reform, rather than requiring such reform.[122] Kommers and Miller note that a

> parliamentary commission on constitutional revision established in 1991 nevertheless rejected the idea of holding a popular referendum; [it] appeared to accept the prevailing view among Germany's constitutional lawyers that twelve national elections in forty years expressed overwhelming popular support for the existing constitutional order and established the Basic Law's legitimacy,

and that the voluntary accession of the Eastern states 'affirmed in East Germany's first free election on March 18, 1990' showed the acceptance for the text among East Germans.[123] Regardless of the initial intention of the 1949 text, I would argue maintaining an amended version of Article 146 in the 1990 text did not amount to an interim constitution, but to the maintenance of an *option* that the German people have the power to adopt a new constitution. In light of the preceding discussion, therefore, I do not treat the 1990 German Basic Law as an interim constitution. Although it shares some similarities with the 1989 Hungarian text, in terms of having some statement of intention to be replaced, I would argue that for the reasons discussed in this section: the non-use of the Article 146 in the 1990 transition; the removal of the reference to the 'transitional'

[121] Winkler (n 86) 500.
[122] Arthur Benz, 'A Forum of Constitutional Deliberation? A Critical Analysis of the Joint Constitutional Commission' in Klaus H Goetz and Peter J Cullen (eds), *Constitutional Policy in Unified Germany* (Routledge 2013) 104.
[123] Kommers and Miller (n 85) 30–31.

nature of the constitution in the Preamble; and the treatment of the new Article 146 by political actors as an option rather than a requirement, it does not count as an interim text.

2.2.7 A qualitative approach

The approach I adopt in this thesis is evidently a qualitative one, relying on analysis of constitutions in context and in comparison. Where possible I rely and refer to quantitative studies, such as reports or data produced by the Comparative Constitutions or Constitute Projects. Examples of my use of quantitative data include a comparison of the prevalence of international law provisions in interim constitutions as against the whole set of historical and contemporary constitutions,[124] the latter of which is formulated by the Comparative Constitutions Project. Elsewhere, I use comparative quantitative data about the average lifespan or endurance of ordinary constitutions, the relative prevalence of transitional justice provisions, and so forth. Quantitative analysis of the whole set of ordinary constitutions is still only available or possible in certain areas of constitutional study, and I contend that qualitative analysis as the primary mode of analysis in this area allows a fuller understanding of my key research questions: what is the nature of interim constitutions; under what circumstances are they adopted; what is the connection between interim constitutions and legitimacy, judicial power and international law?

Put another way, this thesis is an attempt to understand the circumstances in which the decision is made to adopt an interim constitution in the 'critical juncture' of constitutional transition, and the consequences of this decision. Critical junctures have

[124] Comparative Constitutions Project, 'Option Reports: Customary International Law' (n 27).

been defined by Giovanni Capoccia and R Daniel Kelemen as '*relatively* short periods of time during which there is a *substantially* heightened probability that agents' choices will affect the outcome of interest'.[125] There are several features to this line of analysis: an understanding of what led to the critical juncture (see Chapter 3 on Reasons and Circumstances); a description of the nature of the choice(s) made; and an attempt to show the consequences of those choices, partly through an understanding of nearly possible counterfactuals (i.e. the adoption of an interim constitution versus other constitutional approaches, and a comparison of the consequences of adoption of different interim constitutional approaches). Capoccia and Keleman describe a kind of research—of 'multiple narratives and spatial unit comparisons—which is largely consistent with the approach I adopt. They note that

> The most common research design used in comparative arguments involving critical junctures is based on a theoretical framework that identifies similar historical processes in different units (for example, countries, parties, interest groups) that involve critical junctures in which the same kind of actors act in a similar strategic environment and face similar challenges. Variation normally comes from the contingent outcomes of decisions and strategic interactions during critical junctures.[126]

This approach of comparing interim constitutions to one another, and also to the broader corpus of constitutional texts, involves a deeply contextualised and—in the sense described above—narrative approach to describing and understanding each case study and the group as a whole. Although I rely at times on quantitative analysis and data, it is this qualitative work which forms the bulk of my research.

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[125] Giovanni Capoccia and R Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341, 348.
[126] ibid 359.

2.2.8 What practical difficulties are there in such a study, and how should they be approached?

Having described the approach that I adopt in the preceding sections, it is evident that there are a number of practical questions that I must address. Given the scope of the project—a survey of nine case study countries—and the nature of it—qualitative analysis—it is evident that a large amount of research is necessary in order to conduct the project satisfactorily. In addition to responding to the theoretical and design questions discussed above, there were a number of more practical challenges that I will briefly discuss.

Firstly, because I extend my focus beyond constitutional texts and address the unique political and historical backgrounds of each state, the research necessary for this project is extensive in breadth and depth. I began with the constitutional texts of each state, analysing the interim, successor and predecessor constitutions, and then looked at other available legal texts, including drafting histories, relevant legislation, and decisions of superior courts. Following this preliminary analysis, I read legal scholarship, and political and historical commentary. Finally, I consulted contemporary news sources. The scope of this work means that my research on any given state is very different to—and not as detailed as—work of the more ethnographic, individual case study kind of project. However, in the context of comparative work of this scale, and within the confines of this project, my research was as detailed as possible.

Secondly, I faced the problem that the data available on each state varied greatly both in volume and nature. As discussed in the Introduction to this thesis, comparative legal attention is highly concentrated on a small number of states, which are by and large, Western, and often English-speaking. The correlative of this dearth of constitutional analysis, as I argue in the Introduction, is that research based upon less-studied states is of particular value. However, for the purposes of my research, this inequality of resources presented methodological challenges. Certain countries, such as Hungary, Poland, and South Africa, are the subjects of an enormous amount of legal analysis; at times my research tends to focus on these heavily discussed states, because there is more information available, and a great deal more legal scholarship available. Other states such as Albania are less discussed overall, whereas states such as Iraq, Nepal, Thailand and South Sudan are the subject of a great deal of political and news media analysis, but not much detailed legal analysis, or even detailed book-length historical and political studies. As such, the research for these countries tends to involve a higher degree of reference to news articles and contemporaneous reporting. Further, the existence of a constitutional court that takes a prominent role, and whose judgments are published more extensively, naturally provides more information (especially in relation to judicial review) than is available in other states without such a court. South Africa's active, well-reported and scrutinised Constitutional Court is a key example of this. There is no obvious solution to this problem; my research on the constitutions of Thailand or the Sudan is necessarily less rich than other states on certain points. It is beyond the scope of this study to perform field-work in each of these states, but it is hoped that increasing attention to states in less-developed, non-Western states will allow greater analysis in the future. As discussed I

have attempted to gain greater understanding of these less-studied countries through consultation of sources such as news articles, and in the case of Nepal through correspondence with a local barrister who works on these issues.

A third, related problem, is that of language and translation. I am necessarily reading much of the material I analyse in translation, or in some cases, relying upon my own translation of French documents relating to the DRC in particular. Additionally, I am aware that there will be resources inadvertently missed in this analysis due to a lack of availability in translation or my inability to find them in their original language. I have been able to obtain all key constitutional texts in English transition, and have then relied upon secondary analysis to highlight key information that is or should be translated.

2.2.9 What criteria should be used: how to judge the success or failure of interim constitutions?

Throughout this Chapter I have discussed the methodological approach I adopt. In Chapter 8, and the Conclusion to this thesis, I turn to the question of whether interim constitutions as a group, and each interim constitution in particular, are successes or failures. This discussion involves the use of the critical juncture concept discussed above, and necessitates a reflection on the nature of the choices made about interim constitutions at these junctures, and the permanent effects or path-dependencies they have created. I consider and apply several standards of quantitative metrics of success, such as whether the interim constitution was succeeded by a permanent constitution; whether this happened within the timeframe and according to the process stipulated in the interim text;

whether the permanent constitution has succeeded in enduring; whether the interim constitution and its successor have been followed by a period of stability. This analysis of the relative successes and failure of interim constitutions is not the sole or indeed primary purpose of the thesis, which is directed at understanding the origins, nature, and implications of the adoption of interim constitutions at critical junctures in constitutional transitions. However, it is a necessary component of presenting a complete picture of interim constitutions as a diverse but coherent category.

2.3 Conclusions

Throughout this Chapter I have discussed the methodological issues involved in this thesis. In Part 1, I provided the context of the evolution and history of comparative constitutional law as a discipline. In Part 2, I elaborated my own methodological approach, structured in response to five key methodological questions, both theoretical and practical, that I confronted in the course of my work. As discussed in the Introduction to this Chapter, this approach was not pre-determined or garnered from any one existing constitutional study or existing methodological approach; rather it was formulated through an iterative process of reflection and analysis. In the next Chapter, Chapter 3, I begin the first stage of my substantive analysis: an examination of the circumstances in which and reasons for which interim constitutions are adopted, during the critical junctures of constitutional transitions.

CHAPTER 3: REASONS AND CIRCUMSTANCES

Wholesale constitutional change is rarely, if ever, conducted according to the existing rules of a legal system. Constitutional replacement typically takes place in time of great uncertainty, and often, in a vacuum of legality and legitimacy. Interim constitutions are one method that has been adopted in transitional constitutional contexts to attempt to respond to the difficulties of legitimacy, and political instability. Interim constitutions have been adopted in a variety of different political and legal circumstances, but the stated reasons for their adoption are often quite similar. In this Chapter, I first discuss some of the *circumstances* in which interim constitutions have been adopted (Part I), and then go on to examine the *reasons* cited for their adoption (Part II).

The relevance of considering the circumstances in which and reasons for which interim constitutions are adopted is two-fold. First, it is necessary as a starting point for understanding the factual backgrounds of key cases that will be discussed throughout this thesis. It is not possible to understand the origins of any constitution without an understanding of the historical and political circumstances and legal debates surrounding its adoption, and this is arguably true *a fortiori* in relation to interim constitutions, which are adopted in a period of great change. As Teitel has argued, '[t]ransitional constitutions…are explicitly political, in that they all ratify features of political agreements often contemporaneous with transitional constitutions and themselves directives of constitutional change'.[127] Secondly, an understanding of the reasons for

[127] Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 200. Ebrahim and Miller observe that '[t]he story of the South African constitution-making process cannot be separated from the larger story of the negotiated transition to democracy', in Hassen Ebrahim and Laurel E Miller, 'Creating the Birth

which interim constitutions are adopted provides one means of judging the success of interim constitutions – in terms of their own stated goals, as will be discussed in more detail in Chapter 8. Put simply, this Chapter attempts to characterise the aims and claims made by interim constitutions and their makers.

In order to discuss the reasons for which interim constitutions are adopted, it is necessary to outline the alternatives that exist at such transitional constitutional moments. First, there is non-action. Political actors could simply ignore or disavow the need for constitutional change, or indeed the existence or operation of a constitution at all. Secondly, a state may adopt a new, permanent constitution without the adoption of a new, explicitly interim constitution. In Romania, a new permanent constitution was adopted and approved via referendum in 1992; in Estonia, the nation reverted briefly to its pre-communist, 1938 constitution, before adopting a new permanent constitution in 1992. In Bulgaria, the Grand National Assembly adopted a new constitution[128] in mid-1991, also avoiding an interim stage. Thirdly, a state may employ a series of transitional constitutional measures that do not rise to the level of interim constitutions – peace agreements that deal chiefly with the cessation of hostilities, agreements about the drafting of a new constitution, and so forth. An example of this approach is seen in Cambodia, where the Paris Peace Agreements[129] were adopted in 1991, containing a brief list of six conditions as to a permanent constitution, which was adopted in 1993.[130] This third category shares much with those countries that have adopted interim constitutions.

Certificate of a New South Africa: Constitution Making After Apartheid' in Miller, Laurel E (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 114.

[128] Constitution of the Republic of Bulgaria Prom SG 56/13 July 1991.

[129] Agreements on a Comprehensive Political Settlement of the Cambodia Conflict (Paris, 23 October 1991) Annex 5.

[130] Constitution of Cambodia 1993.

What is distinct about interim constitutions, however, is the attempt to create legal legitimacy through a temporary but superior law, adopting two distinct constitutional regimes as part of a singular constitutional transition process. Therefore, this Chapter investigates the reasons for which political actors choose to adopt an explicitly temporary but comprehensive constitution *as a means* to writing a permanent constitution.

3.1 Circumstances in which interim constitutions are adopted

As discussed in the Introduction of this thesis, this project attempts to understand interim constitutions through a detailed analysis of interim constitutions drawn from a range of states. In this Chapter, I focus on four of those cases, namely Poland, South Africa, Iraq and Nepal. These case studies have been selected because of the differing circumstances in which and reasons for which interim constitutions were employed. Although it is beyond the scope of this thesis to provide a detailed historical background of the case studies under examination, focussing on this smaller set of texts allows for a more thorough analysis of several situations in which interim constitutions have been adopted. Throughout the Chapter I add comments and comparisons relating to the other case study countries, of Albania, Hungary, Sudan, Thailand and the DRC.

3.1.1 Poland

Vicki Jackson, in her article 'What's in a name? Reflections on timing, naming, and constitution-making', argues that the post-communist Eastern European states experienced a

> more incremental method of constitutional regime change…albeit with marked differences from one country to another. Formal changes in the constitution began immediately—and marked a very clear break from the prior regime—but constitutional change continued to emerge over a longer time period as well, in a process in which domestic courts and informal negotiations played important roles.[131]

Turning to Poland, the 'Small Constitution' of 1992,[132] Poland's interim constitution, reflected a recent development in a long history of Polish constitutional law. Poland's constitutional history dates to the sixteenth century,[133] and it adopted the first 'constitutional instrument in Europe',[134] on 3 May 1791.[135]

In the modern era, Poland's 'March Constitution' of 1921[136] established a parliamentary democracy, at the centre of which was the *Sejm* (the lower house), a body which persisted in title if changed in substance through subsequent constitutional regimes until the present day. The Sejm persisted even during the Soviet era, during which 'effective control over the Polish territory passed to the Soviet-controlled government, which imposed a Soviet-style constitution on July 22, 1952'.[137] Although 'not a mere copy' of the USSR's basic law, approximately 50 of the Polish Constitution's 91 articles were 'more or less strictly translated' from the Soviet constitution.[138] Other articles differed out of historical and factual necessity: the advent of communism in Poland could

[131] Vicki C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2007) 49 William and Mary Law Review 1249, 1265.
[132] Constitutional Act of 17th October 1992, on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government Dziennik Ustaw Nr 84 Poz 426 1992.
[133] Wenceslas J Wagner, 'The New Constitution of Poland' 2 American Journal of Comparative Law 59, 59.
[134] Lelch Garlicki and Zofia Garlicka, 'Constitution Making, Peace Building and National Reconciliation: The Experience of Poland', *Framing the State in Times of Transition* (United States Institute of Peace 2010) 391.
[135] Constitution of 3 May 1791 (Poland).
[136] Jackson (n 5) 1265.
[137] Garlicki and Garlicka (n 8) 406.
[138] Wagner (n 7) 59.

not be described as a result of the 'overthrow of the power of the landlords and capitalists'[139] as it was in the Russian basic law; instead, the 1952 Polish Constitution referred to 'realisation' of communist ideas, and the *progressive* transformation of the state's social foundations. The Polish state was described in Article 1 of the Constitution as a 'State of People's Democracy' in contrast to the 'socialist state of workers and peasants' in Article 1 of the Russian constitution.[140] The 1952 constitution did not remain static throughout the Soviet era; it was amended substantially in 1976, although the 'Soviet-oriented nature' of the Constitution was preserved, and the Sejm continued to be monopolized by the Communist (Polish United Workers Party). Irena Gruzidnska-Gross argues, however, that the reforms of the mid-1970s presaged the 'constitutionalization' and liberalisation of Soviet rule that would occur in the 1980s[141]: economic liberalization, the introduction of new legal institutions such as the High Administrative Court, the Tribunal of State, the Constitutional Tribunal and the human rights ombudsman,[142] and the permitted establishment of independent trade unions.[143]

It was in this context of 'creeping legalism', as well as a deteriorating economic climate, that moderates within the ruling Communist Party opened lines of negotiation with the opposition, holding Round Table discussions which produced an Agreement and consequent constitutional Amendment.[144] The trade union and political movement

[139]Constitution of the USSR (1936) Article 2., in Wagner (n 7) 60.
[140] Wagner (n 7) 60.
[141] Irena Grudzinska-Gross, 'The 1997 Polish Constitution: Introduction: When Polish Constitutionalism Began' (1997) 6 Eastern European Constitutional Review 64, 64–5.
[142] ibid.
[143] Garlicki and Garlicka (n 8) 392 describing the effect of the Gdansk Agreement.
[144]ibid 392–3.

Solidarity played a significant role in bringing about and negotiating the transition. As Garlicki and Garlicka observe,

> There was no problem in defining who should represent the opposition (at the Round Table). As the illegal Solidarity trade union had survived martial law, it was clear that Walesa and his advisers would appoint the oppositional representation.[145]

Lech Wałęsa, the leader of the Solidarity movement, played a significant role not only throughout the 1980s in his work with the trade union and social movement, but as a political leader—and ultimately President of Poland—in the 1990s.

The Communist Party lost power in the summer of 1989; almost immediately both houses of parliament initiated processes to draft a new constitution, with the goal of adopting 'a new constitution on May 3, 1991, to commemorate the anniversary of Poland's first democratic constitution, voted on May 3, 1791'.[146] As a stop-gap measure, further amendments were introduced in December 1989, introducing a significant rule of law provision to the Polish Constitution, but contributing further to the 'constitution patchwork' effect.[147] Both houses of parliament had begun to prepare drafts of a new constitution; 'political elites as well as most scholars realised that some changes should be introduced immediately', but the drafts produced by the Sejm and the Senate were 'basically irreconcilable and no arbiter existed who could decide which draft should be submitted to a referendum'.[148] It was in this climate that the Small Constitution was

[145] ibid 407.
[146] ibid 393.
[147] ibid 394.
[148] Osiatynski, in ibid 393.

adopted, on October 17 1992, alongside a raft of supporting political and electoral legislation.

Similar but not identical circumstances surrounded the adoption of interim texts in Albania and Hungary. Poland was the first of the post-communist states to begin its transition, and Albania the last of the communist states outside of the USSR to do so. Timothy Garton Ash observes that in Hungary and Poland the transitions were the result of change from above (enlightened communist leadership) and below (popular pressure), with Hungary demonstrating more movement from above, and Poland more movement from below.[149] It is a view frequently expressed that there was never a widespread political or activist movement prior to the collapse of communism in Hungary—activists worked largely at the level of the elite intelligentsia[150]—in contrast to Poland, which experienced the 'largest and most sustained popular 'push' in the history of communist Eastern Europe' in 1989.[151] Although the two transitions emerged in different ways, they shared some key features: both transitions employed Roundtable discussions, and both had multi-staged transitions from communism to democracy. These features will be discussed further in Chapter 5.

Although it had begun to '[embark] on mildly reformist' policies in the year before the collapse of communist regimes across Eastern Europe, the Albanian government led by Enver Hoxha's successor, Ramiz Alia, continued in power until the first free elections in 1991. A number of small changes and steps preceded the end of

[149] Timothy Garton Ash, *We The People: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague* (Penguin Books 1999) 15.
[150] ibid 56.
[151] ibid 15.

communism: amnesties for political prisoners, strikes, the opening of travel, reform of the penal code, and the decriminalisation of the practice of religion.[152] Multiparty, and free— if not entirely fair— elections were held in March 1991, and the interim constitution was adopted in April 1991, when the country was part of the way through its transition to democracy.[153] In Albania, an interim constitution was therefore adopted in a climate of change, and with the knowledge that further change was needed, but before the legacy and control of the past, oppressive regime had been removed.

3.1.2 South Africa

The interim constitution in South Africa was adopted in the context of an internally negotiated regime change that encompassed wholesale political, legal and social upheaval. In the early 1990s, the government of South Africa, led by President F W de Klerk of the National Party ('***NP***'), began negotiations with the African National Congress (ANC), led by Nelson Mandela. The NP, which had governed South Africa since 1948, had instituted and maintained a practice of apartheid.

Apartheid was described in Article II of the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*[154] as '[i]ncluding similar policies and practices of racial discrimination as practised in southern Africa, [and applies] to …inhuman acts committed for the purpose of establishing and maintaining domination

[152] Miranda Vickers, *The Albanians: A Modern History* (Revised, IB Tauris 2014) 204–5.
[153] ibid 213.
[154]International Convention on the Suppression and Punishment of the Crime of Apartheid 1976 (GA res 3068).

by one racial group of persons over any other racial group of persons and systematically oppressing them'.[155] Apartheid permeated all aspects of the South African legal system, and was accomplished through a range of supporting legislation, from laws limiting interracial marriage to laws denying or limiting franchise[156] to black and 'coloured'[157] citizens.[158] Initially, the courts acted as a check on some of the more extreme aspects of apartheid laws; but by the late 1950s, the NP had increasingly appointed judges sympathetic to government policies, and the courts were an ineffective check on legislation throughout the apartheid era.[159] Apartheid became 'grand apartheid', with policies pushed further in the late 1950s to mid-1960s. In the 1970s to 1980s, following the Soweto uprising, the government undertook a 'liberalizing policy', but it was more 'cosmetic than substantial'.[160] Following de Klerk's ascent to power in 1989, the government began more substantive reforms, after receiving a 'mandate to proceed with new constitutional proposals' in the 'last whites-only general election of September 1989'.[161]

A series of promising developments, including secret talks between Mandela and government leaders, the Harare Declaration of the Organization of African Unity, and

[155] Apartheid is also defined as a crime against humanity under the Rome Statute of the International Criminal Court 1998 Article 7.
[156] *Certification of the Constitution of the Republic of South Africa* (1996) 4 SA 744 (Constitutional Court of South Africa) [5].
[157] The word 'coloured' is 'a term used in South Africa to refer to persons of mixed race'. Ebrahim and Miller (n 1) 149.
[158] Richard Spitz and Matthew Chaskalson, *The Politics of Transition- A Hidden History of South Africa's Negotiated Settlement* (Hart Publishing 2004) 3–5.
[159] DM Davis, 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience' (2003) 1 International Journal of Constitutional Law 181, 182.
[160] Spitz and Chaskalson (n 32) 9.
[161] Ebrahim and Miller (n 1) 9.

deKlerk's 'crossing the Rubicon'[162] speech, set the stage for 'talks about talks' in 1990-1991. Amidst domestic political violence and posturing from both sides on the international stage, a series of agreements was reached,[163] leading up to the Convention for a Democratic South Africa ('CODESA') I and II multiparty negotiations. Following the failure of CODESA II, there was a 'cycle of deadlocks followed by breakthroughs followed by new deadlocks'[164] and further violence and protests. Finally, a new Multi-party Negotiating Process (MPNP) was the forum out of which the interim constitutional model emerged. The interim constitution in South Africa may be described as a means to solving a political puzzle: overcoming the unwillingness of the reigning NP to surrender power without certain guarantees, and the desire of the African National Congress to exercise its democratic majority and support in forming the new constitutional framework of South Africa. In its first *Certification* decision of 6 September 1996, the Constitutional Court described the interim constitution as a way of resolving a 'deadlock' in post-apartheid political negotiations. The government and other groups, the court noted,

> were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposition side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution.[165]

[162] ibid.
[163] Groote Schuur Minute (4 May 1990) (South Africa); Pretoria Minute (6 August 1990) (South Africa); DF Milan Accord (12 February 1991) (South Africa); Ebrahim and Miller (n 1) 116.
[164] Ebrahim and Miller (n 1) 118.
[165] *First Certification Decision* (n 30) [12].

The 'ingenious solution'[166] devised by the NP and the ANC was to initiate a two-stage constitution-making process, by which an interim constitution would operate for a limited period of time, while a democratically elected national legislature would draft a new constitution. The 'key to the resolution of the deadlock'[167] came in the introduction of the novel[168] use of Constitutional Principles ('***CPs***'), with which the ultimate constitution would need to comply. The 'Postscript' to the Interim Constitution described the Constitution as an

> historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy, and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[169]

3.1.3 Iraq

The 2004 *TAL* or Iraqi Interim Constitution was adopted during the occupation of Iraq by the United States of America. Although Iraq had had previous constitutions, 'none of Iraq's previous constitutions were democratic, none satisfactorily acknowledged Iraq's regional and multiethnic nature, and the human rights protections expressed in these documents did little…to protect Iraqi citizens'.[170] The *TAL* was adopted on 8 March 2004, during the period in which the Coalition Provisional Authority ('***CPA***') controlled

[166] Spitz and Chaskalson (n 32) 2.
[167] *First Certification Decision* (n 30) [13].
[168] Ebrahim and Miller (n 1) 127.
[169] Postscript, Interim Constitution of the Republic of South Africa 1993.
[170] Jonathan Morrow, 'Deconstituting Mesopotamia: Cutting a Deal on the Regionalisation of Iraq' in Laurel E Miller (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 564.

Iraq.[171] The CPA, which was created by and controlled by the United States Department of Defence, under the leadership of Ambassador L. Paul Bremer, had created an Iraqi Governing Council ('***IGC***'). The creation of the IGC was described by the United Nations Security Council as being 'broadly representative' of the Iraqi population, and as 'an important step towards the formation by the people of Iraq of an internationally recognized, representative government'.[172] The IGC was viewed by many Iraqis as a 'rubber stamp' for the CPA, and it possessed limited powers.[173] The IGC was, however, charged with the responsibility of organising the drafting of a permanent constitution.

Following a deterioration of the security situation in Iraq, the Bush administration adopted a new strategy, formalised in the 'November 15 Agreement', which stipulated that an interim constitution would be drafted by February 28 2004, a basic law 'describing the structure of a transitional administration and codifying a bill of rights'.[174] The adoption of the Interim Constitution would be followed by elections, including elections to a constitutional convention, which would draft the permanent constitution of Iraq.[175] The timing and procedure for the drafting of the new constitution was controversial; many Iraqis, including the influential[176] Shi'a cleric the Grand Ayatollah Ali al-Sistani, insisted on elections preceding the drafting of any constitutional document, arguing 'No one has the right to appoint the members of the constitutional assembly'.[177] The United States argued that early elections were impossible: Iraq lacked the census

[171] 21/04/2003-28/06/2004.
[172] UNSC Res 1511 (16 October 2003) S/RES/1511; David L Phillips, *Losing Iraq: Inside the Postwar Reconstruction Fiasco* (Basic Books 2006) 172.
[173] Phillips (n 46) 172.
[174] ibid 177–8.
[175] ibid.
[176] Morrow (n 44) 564.
[177] Phillips (n 46) 178–9.

data, electoral laws and infrastructure necessary for elections; moreover, the United States feared that an early election would favour the Baathists.[178] Through the intervention of Lakhdar Brahimi, an Algerian diplomat and UN negotiator, a deal was reached in February 2004: elections would take place by the end of 2004, following a short period of rule by an unelected, transitional government. The Interim Constitution was adopted by early March 2004, and 'issued as a CPA edict'.[179]

3.1.4 Nepal

The Interim Constitution of Nepal ('***IC-N***') was adopted in 2007, the year following the Comprehensive Peace Agreement ('***CPA'***)[180] which came after a ten year civil war associated with the Maoist attempts to overthrow the monarchy and establish a 'People's Republic of Nepal'. Known as the 'People's War',[181] the civil war was 'underpinned by poverty, discrimination and inequality'.[182] The war resulted in deaths of approximately 13, 000 people,[183] as well as massive population displacement, and economic, political and social disruption within Nepal. The CPA contained a commitment to a 'lasting peace',[184] placing goals of social and economic transformation alongside a plan to create an interim constitution to be adopted by a constituent assembly.[185] Additionally, the CPA created a prominent role for various United Nations bodies in the realization of the terms

[178] ibid 179.
[179] Morrow (n 44) 565.
[180] Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal 2006, 21 November 2006.
[181] Daniel Aguirre and Irene Pietropaoli, 'Gender Equality, Development and Transitional Justice: The Case of Nepal' (2008) 2 International Journal of Transitional Justice 356, 358.
[182] ibid.
[183] 'Q&A: Nepal's Future' *BBC News* (13 May 2009) 4 October 2011.
[184] Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (n 54).
[185] ibid 2(b)(d).

of the agreement, and the interim constitution. Under Article 9 of the Agreement, both sides agree that the UN Office of the High Commissioner for Human Rights, Nepal shall continue monitoring human rights provisions, that the UN Mission in Nepal (UNMIN) will monitor the arms agreement reached by the parties, and that the UN will act as an observer in Constituent Assembly elections, amongst other provisions. The Interim Constitution, adopted on 15 January 2007, replaced the 1990 Constitution of the Kingdom of Nepal.

The interim constitutions of the DRC and Sudan, as in Nepal, were adopted as part of an attempt to resolve an ongoing conflict. While each of these states varies in terms of the scale, nature, origins and evolution of the relevant conflicts, there are points of commonality. First, in Nepal, the DRC and Sudan, the adoption of the interim constitution was preceded by the adoption of at least one peace agreement: the 2005 Comprehensive Peace Agreement of the Sudan;[186] the 2006 CPA of Nepal,[187] and the 2002 Global and All-Inclusive Agreement in the DRC.[188] Secondly each of the interim constitutions in those states *incorporates* the key peace agreement in the text of the constitution. There are a number of differences between the conflicts in the various states: the Second Congo War, which began in 1998 and which the Global and All-Inclusive Agreement was aimed at ending, involved the largest loss of life in conflict since World

[186] The Comprehensive Peace Agreement Between The Government of The Republic of The Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army 2005.
[187] Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (n 54).
[188] Global and Inclusive Agreement on Transition in The Democratic Republic of the Congo, Inter-Congolese Dialogue, Political Negotiations on the Peace Process and on Transition in the DRC 2002.

War II, with an estimated 5.4 million deaths.[189] In both Sudan and the DRC, substantial conflict has continued after the signing of peace agreements, and following the adoption of the Interim (and in the case of the DRC, permanent) constitutions.

The Sudanese case uniquely involves a central issue of state secession, and is the only interim constitution studied to foresee and plan for the independence of a new state. The independence of South Sudan in 2011 and its own adoption of a sovereign interim constitution has not stopped the conflict in the region, however.[190]

The preceding examples have involved cases of interim constitutions following a civil war. In Thailand, the Interim Constitution of 2006 was adopted not as a consequence of war, but as a consequence of political unrest and a bloodless military coup.[191] The particularities of the Thai situation are discussed in more detail in Chapter 4, but it is impossible to discuss the context of the 2006 Thai Interim Constitution without placing it within the context of repeated coups and power shifts in recent Thai history.

As Ginsburg wrote, before the most recent, 2014 Thai coup, '[i]n seventy-six years since the establishment of the constitutional monarchy, Thailand has had eighteen constitutions, somewhere between seventeen and twenty-three coups and coup attempts, and fifty-six governments'.[192] The Thai case is peculiar in the degree and regularity of

[189] Joe Bavier, 'Congo War-Driven Crisis Kills 45,000 a Month: Study' *Reuters* (Kinshasa, 22 January 2008) <http://www.reuters.com/article/2008/01/22/us-congo-democratic-death-idUSL2280201220080122> accessed 25 March 2015.
[190] Mugume Davis Rwakaringi, 'South Sudan Fighting Delays Delivery of Permanent Constitution' (*Voice of America*, 23 May 2014) <http://www.voanews.com/content/south-sudan-fighting-delays-delivery-of-permanent-constitution/1921117.html>.
[191] Tom Ginsburg, 'Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution' (2009) 7 International Journal of Constitutional Law 83, 2.
[192] ibid 6.

constitutional change; however, it is similar to many of the other case study countries in terms of experiencing considerable constitutional instability and change at periodic intervals throughout the 20th and 21st centuries.

3.2 Reasons for the adoption of an interim constitution

Having now elucidated some of the specific factual *circumstances* surrounding the adoption of four interim constitutions, it is now useful to turn to the more general question of the potential *reasons* for the adoption of an interim constitution. As the preceding discussion has demonstrated, interim constitutions arise in moments of great political and legal complexity; the reasons for the adoption of interim constitutions in a given instance may be highly idiosyncratic. However, it is possible, with reference to the case studies, to identify certain reasons for which interim constitutions may be adopted, which recur, either in the text of the interim constitutions themselves, the arguments advanced by their proponents, or in the analysis provided by academic commentators. In this section, I attempt to provide a brief overview of these potential reasons, and the roles that they have played in individual constitutional transitions.

3.2.1 Agreements to agree: legitimacy and deep political divides

There is a range of reasons typically cited for the adoption of an interim constitution; these reasons have overlapping and complex relationships with one another. The first set of reasons relate to the political difficulties of the relevant state: interim constitutions allow a way of forging agreement out of disagreement, of obtaining 'an agreement to

agree' where parties are too divided to reach a more permanent and complete agreement. Interim constitutions represent a means of delaying or deferring two categories of disagreements: substantial and procedural, while creating mechanisms that will lead to change. The latter type of dispute, about the procedure that should lead to the adoption of a permanent constitution, is inextricably linked with deeper and more theoretical questions relating to the legitimacy of the constitutional framework being established.

The use of interim constitutions as a means of obtaining legitimacy for the constitutional text, and for fostering a sense of constitutional legitimacy amongst citizens, is chief amongst the reasons listed explicitly in interim constitutional documents. This intention is often reflected in the preamble of interim constitutions. The first preambular paragraph of the Iraqi *TAL* reads as follows:

> The people of Iraq, striving to reclaim their freedom, which was usurped rby the previous tyrannical regime, rejecting violence and coercion in all their forms, and particularly when used as instruments of governance, have determined that they shall hereafter remain a free people governed under the rule of law.

This introductory explanation touches on several key features associated with an attempt to claim legitimacy: the distancing of the new regime from an older, illegitimate regime, the rejection of the methods of the past regime, and the assertion that the new regime will be governed by the rule of law. 'The people',[193] an undefined group, are invoked in an attempt to create a sense of popular legitimacy, as they often are in constitutions of all

[193] See generally Galligan, Denis J, Denis J Galligan and Mila Versteeg, 'The Social Foundations of the People and the Constitution', *The Social and Political Foundations of Constitutions* (Cambridge University Press 2011).

kinds, and in interim constitutions in particular.[194] Beyond the textual claims of interim constitutions, the attempt to use interim constitutions as a method of fostering legitimacy may be seen in the possibilities of a two-phase or multi-phased constitutional process. Referenda might be an alternative method of fostering legitimacy in a draft of a permanent constitution, but as Stephen Holmes argues, a referendum can be seen as indication that the 'voice of the people is not adequately expressed through the representative process'.[195] Whether or not this is the case, a referendum also has the weakness of being limited, in general, to a simple up or down vote, wherein one model is presented to the public, without alternative. Interim constitutions, accompanied by robust debates in a constitutional assembly, allow for the tabling and consideration of multiple options, as in the Polish case.

In South Africa, Spitz and Chaskalson argue that the 'ingenious solution' of the IC was

> the central link between the act of the constituted power in dissolving the existing constitutional order and the act of an elected constitution-making assembly, with the necessary legitimacy to write and adopt a final Constitution. But in another device peculiar to South Africa's negotiated transition, the final Constitution would be written within constraints – known as [CPs] – agreed by parties in the Multi-Party Negotiating Process and enshrined in the [IC].[196]

[194] Law of Administration for the State of Iraq for the Transitional Period 2004 (Iraqi National Council), Article 59A; Interim Constitution of Nepal 2063 2007, Preamble, Article 63(1); Interim Constitution of the Republic of South Africa (n 43), Postamble.
[195] Stephen Holmes, 'Back to the Drawing Board: An Argument for Constitution Postponement in Eastern Europe' (1993) 2 Eastern European Constitutional Review 21, 23.
[196] Spitz and Chaskalson (n 32) 2.

In the Iraqi constitution, the promise of legitimacy in a permanent constitution was described in the Preamble:

> This Law is now established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being.

These quotes demonstrate the way in which interim constitutions attempt to claim legitimacy both through a distancing from the past, and a promise of future change. It is worth noting, however, that states in transition rely, in varying degrees, on legal institutions, personnel and ideas associated with the previous regime. As has been noted, the *SA-IC* was adopted as the last act of an all-white parliament.[197] Teitel argues that 'the transitional constitution's origins in the apartheid regime are mitigated by its express provisionality… The possibility of reform associated with the first interim constitution is often predicated on and bounded by the assumption of a deferred, more plenary constitutional process'.[198]

In addition to the deeper issue of legitimacy, interim constitutions are frequently used as a means of delaying divisive and controversial political and legal decisions. This attempt to defer controversial decisions is arguably two-fold: on the one hand, it is a political tactic to create a minimum agreement but delay difficult decision-making; on the other, it is an attempt to delay decision-making to a period of great legitimacy. Although some controversial and difficult questions will need to be decided at the point of drafting

[197] Courtney Jung and David Shapiro, 'South Africa's Negotiated Transition: Democracy, Opposition and the New Constitutional Order' 23 Politics and Society 269; Ebrahim and Miller (n 1) 125.
[198] Teitel (n 1) 199.

the interim text, delaying a final decision might reduce the 'decision costs' in the process, and thus facilitate greater negotiation.[199]

One of the key disagreements on which the constitutional debates foundered in South Africa was whether the new constitutional regime should have a 'consociational' aspect, which would give minority racial groups (such as white South Africans) a check or veto power in a new democratic regime. Consociationalism was 'anathema' to the ANC, which had 'overwhelming grassroots support and [a] well-founded expectation that it would hold an absolute majority in the new Parliament'.[200] The NP, however, was reluctant to surrender entirely the political dominance that it had enjoyed, and following ANC concessions, the Interim Constitution of 1992 *did* adopt the 'consociational outcome' which the NP had 'insisted on',[201] although the permanent constitution did not. Other key disputes included the extent to which communist ideas were to be included in a permanent constitution, socio-economic rights, federal-provincial divisions of power and independence, the role of traditional leaders, and the issue of criminal culpability or amnesty for those who committed crimes during the apartheid era. Specific political issues such as the nature of the right to life and the question of whether or not to continue the use of the death penalty, were also debated, and ultimately delayed and then avoided, with decisions on the constitutionality of the death penalty and gay marriage being left to the Constitutional Courts.

[199] Ozan O Varol, 'Temporary Constitutions' (2014) 102 California Law Review 409, 415.
[200]
[201] Jung and Shapiro (n 71) 275.

In a similar manner, the *Small* Constitution of Poland was adopted in the context of great division as to the role of the Roman Catholic Church in the constitution and the state, the presence of socio-economic rights, and the formulation of particular rights, such as the right to life. The intervening period of years between the adoption of an interim constitution and the adoption of a permanent constitution allows a greater scope for the resolution of these issues, and arguably, for their resolution through a more legitimate political process.

3.2.2 Legal sophistication, flexibility

Other reasons for the adoption of an interim constitution include that the postponement of a constitution will allow for a greater level of sophistication in legal culture and constitutional understanding, particularly in countries that may never have experienced constitutional or democratic government (as in the case of Iraq), or which have had long periods of external oppression and domination (as in Poland). Writing in 1993, Stephen Holmes argued that constitution-making in Poland was much more sophisticated at that time than it was two years prior.[202]

Stephen Holmes contends that, in the context of Eastern European constitutional change, the uncritical adoption in many countries of contemporary Western models of constitutional law may in some cases be 'counterproductive', and that 'the liberalism that developed from the seventeenth through the nineteenth centuries, in Holland, England, France, and the United States, is both individualistic and cosmopolitan [and] therefore not

[202] Holmes (n 69) 23.

a particularly useful doctrine for helping East Europeans deal with permanent ethnic minorities'.[203] Further, Holmes argues that delaying a final constitution allows for experimentation and greater legislative flexibility in undertaking political and economic reform.

The argument for postponement to allow for experimentation is perhaps best exemplified in Poland; the Polish constitution-makers had the advantage of seeing changes made in countries with similar recent political histories, and of undertaking multiple small constitutional amendments, rather than committing to a particular model immediately following the end of communism. Holmes argues that the sheer volume of tasks required to be undertaken in the reform process place 'a premium on centralized executive power and institutional flexibility', and that transitional systems have a 'crying need' for strong executive action. Holmes therefore argues that 'stopgap constitutionalism' is a way of postponing constitution-making until after the completion of certain major reforms. Holmes advocates a 'drawn-out process of constitution-making, with false starts and half steps, where constitutional committees proceed by trial and error and go periodically back to the drawing board'.[204] As will be discussed in Chapter 4, however, Holmes perhaps overstates the degree to which the effects of temporary constitutions can be limited to the interim period; in some instances, flexibility is possible, and a kind of constitutional Darwinism prevails. However, in other instances, such as the South African model, interim constitutions may prove to be highly

[203] ibid 21.
[204] ibid 22.

determinative of permanent constitutional models, in spite of the explicitly temporary nature of interim documents.

Joel Hellman analyses Holmes' claims in relation to economic reform and finds that '[t]he results suggest that neither the early adoption of a new post-communist constitution nor the postponement of constitution-making have any significant effects on the extent of economic reform adopted across the entire set of postcommunist countries'.[205] It is worth noting, in relation to this point, that phased constitution-making processes do not always coincide with a similar approach in terms of other reforms, including economic reforms. Whereas Poland quickly adopted the 'shock therapy' of economic reforms recommended by Western advisers, it adopted a decided slow and phased approach to constitution-making.[206]

In a recent article on 'Temporary Constitutions', Ozan Varol of the Lewis and Clark Law School makes a similar argument, arguing that 'durable' constitutions can 'stifle constitutional incrementalism and experimentation', and that the costs of norm entrenchment in a durable constitution can be high.[207] I discuss this in terms of the theme of constitutional amendment, and learning, in Chapter 6.

Relatedly, Varos notes that constitutions adopted in 'turbulent moments following a war, revolution or social crisis' might represent an overreaction to the past regime. On the other hand, he argues, temporary texts with an extended drafting period 'allow

[205] Joel Hellman, 'Constitutions and Economic Reform in the Postcommunist Transitions' (1996) 5 Eastern European Constitutional Review 46, 50.
[206] Alina Mungiu-Pippidi, 'Whatever Happened with Transition in Central and Eastern Europe?' (South East European Studies at Oxford (SEESOX), Oxford, 3 February 2014).
[207] Varol (n 73) 414.

transitional passions to settle and to achieve economic, social, and institutional stability before a more durable constitution is drafted'.[208] This idea can be linked to András Sajó's concept of a 'constitutionalism of fear'. Sajó argues that constitutions, instead of being forward-looking, 'reflect the fears originating in, and related to, the previous political regime', and notes that the post-communist transitions reflected fears of communism.[209] Delaying constitution-drafting (or at least the permanent aspect of it) might allow a cooling-off period, thus encouraging constitution drafters to take a broader view of history, and avoid simply responding in fear to the immediate predecessor regime. constitutional affairs.[210]

Varol also discusses the possibility of the interim constitution as a means of avoiding the 'dead hand of the past' controlling a country's constitution.[211] For various reasons, I do not believe that interim constitutions, as they have been employed, assist in obtaining this possibility. This theme is discussed in greater depth in Chapter 4, where I examine whether the temporariness of interim constitutions is ultimately novel or conservative.

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[208] ibid 415.

[209] András Sajó, *Limiting Government—An Introduction to Constitutionalism* (Central European University Press 1999) 2, 3.

[210] This discussion calls to mind a section of dialogue in the 1940 film, The Philadelphia Story. Tracy Lord (Katharine Hepburn) and her ex-husband, CK Dexter Haven (Cary Grant) discussing her impending marriage to George Kittredge. Lord: 'I love him as I never even began to love you.' Haven: 'Maybe so, but I doubt it. It's just a swing from me...but it's too violent a swing. Kittredge is no great tower of strength. He's just a tower.' George Cukor, *The Philadelphia Story* (Metro-Goldwyn-Mayer 1940). Haven was proved correct; it was too violent a swing.

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3.2.3 Goals associated with transitional justice

Finally, there are a range of goals associated with transitional justice which may encourage constitution-makers to opt for an interim constitution, including the possibility of increasing popular involvement in constitutional drafting through a two-staged process, and the possibility of sparking debate from a concrete text, in the form of the interim constitutional model. Multi-phased constitutional drafting allows for greater participation of stakeholder groups, and indeed, greater organisation within potential stakeholder groups. In Iraq, the American concern about holding immediate elections and adopting a permanent constitution related to the fear that, after many years of effective one-party rule, the Baathists would dominate early elections because they alone had institutional structures to employ in electoral campaigning. Additionally, an interim constitution and an interim or transitional government allows groups (such as the Kurds in Iraq) that have been effectively locked out from decision-making procedures to have a chance to advocate for their concerns in a preliminary constitutional setting, prior to the adoption of the permanent constitution. Interim constitutions are sometimes seen as assisting in goals related to peace-building between groups, and as a means for a kind of practice of cooperation between parties who may previously have been in conflict, or a more equal negotiating sphere for parties between whom there was previously a great imbalance of power. Goals associated with transitional justice, such as national reconciliation and catharsis, as well as the relationship between interim constitutions and transitional justice mechanisms such as criminal trials, reconciliation processes and amnesties, will be discussed in Chapter Seven.

3.3 Conclusions

It is arguable that the primary reasons for the adoption of an interim constitution are those associated with ending a political deadlock, and deferring difficult political decisions until a time of greater cooperation between parties. Other factors, such as the possibility of greater legal sophistication and flexibility, are typically not cited in the constitutions themselves, or by the drafters of constitutions; rather, they are identified by academics and theorists as potential incentives for—or by-products of—interim constitutions. It is difficult to bear out the truth of these more secondary claims in comparative research, as demonstrated by the work of Joel Hellman on constitutional postponement and economic reform; in the context of constitution-making and nation-building, a cornucopia of factors affect the ultimate success, and indeed the constitutional culture of a state, beyond the choice as to the adoption of an interim constitution or phased constitution-making process, as opposed to the immediate adoption of a permanent constitution. Nonetheless I explore these themes in comparative context throughout this thesis.

It is arguable that the reasons in favour of an interim constitutional model support a notion of constitutionalism that moves away from the traditional idea of the 'constitutional moment' as a 'discontinuous founding moment'.[212] As McConnachie and Morrison argue, the notion of a singular constitutional moment 'does not cover the idea of a constitution as part of a dynamic and transformative social process',[213] and is not overly applicable to modern, heterogeneous and often ethnically divided societies. If, as

[212] Kirsten McConnachie and John Morison, 'Constitution Making, Transition and the Reconstitution of Society' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford University Press 2008) 76.
[213] ibid 77.

Ghai and Galli have argued, modern constitutions are 'instruments to enhance national unity and territorial integrity, defining or sharpening a national ideology, and developing a collective agenda for social and political change',[214] it is perhaps understandable, even desirable, that the definition of the nation, and the development of a national identity, undergo a multi-staged process of redefinition and contention.

This Chapter has examined the circumstances in which, and the reasons for which, interim constitutions are adopted. Additionally, it has considered the potential secondary effects or advantages of interim constitutions, at times questioning whether the assumptions underlying those claims are correct. In the next Part of this thesis, I examine the nature of interim constitutions themselves, in term of structure, content, and transitional mechanisms, and then attempt to develop a kind of typology of interim constitutions, identifying patterns across different constitutional texts. The discussions in this Chapter will be brought to bear on the next Part, as I attempt to consider the extent to which the *reasons* for which interim constitutions are adopted are reflected in the nature and content of the constitutions, and the procedures surrounding their adoption.

[214] Yash Ghai and Guido Galli, 'Constitution Building Process and Democratisation' (Institute for Democracy and Electoral Assistance 2006) 13 <http://www.idea.int/ publications/cbp_democratization/> accessed 5 October 2011.

PART B

CHAPTER 4: TIME AND CONSEQUENCES

In this Chapter, I consider issues relating to the temporal nature of interim constitutions. In the first Part (4.1), I explore the conceptual significance of the notion of a deliberately temporary constitution, considering the traditional understanding of a constitution and the ways in which interim constitutions represent a new strain of constitutional law. In the second Part (4.2), I propose a classification system for the transitional provisions of interim constitutions, that is, those sections that govern the temporary nature of these constitutions, and which provide for their replacement by permanent constitutions. I argue that effective transitional provisions in interim constitutions require a mixture of rigidity and flexibility to allow for a fruitful drafting process. Finally, in the most substantive section of this Chapter (4.3) I argue that although interim constitutions are temporary constitutions, they have permanent and often far-reaching effects on ongoing constitutional arrangements and politics. I conclude that this demonstrates the importance of the process of drafting an effective *interim* constitution, given the potential longevity of its effects. An interim constitution should not be viewed as a mere placeholder; its provisions may end up having long-lasting or permanent effects. Throughout this analysis I will refer to each of the case study countries, attempting to categorise and analyse the experiences of different interim constitutional drafting processes.

4.1 Conceptual

The defining feature of interim constitutions is that they are deliberately temporary, and provide for their own replacement by a more permanent constitution. In this Part I examine the significance of this feature, in light of traditional definitions of constitutions, and explore the way in which it differentiates interim and ordinary constitutions.

The significance of the deliberately temporary nature of interim constitutions lies in the traditional conception of constitutions as permanent and stable. As discussed in the Introduction to this thesis, there are a number of approaches to defining constitutions. In *On the Authority and Interpretation of Constitutions*: *Some Preliminaries,* Raz provides a seven-part definition of a constitution in the 'thick sense', according to which a constitution is: constitutive of a legal system; stable, at 'least in aspiration'; written; superior law; justiciable; entrenched, i.e. more difficult to change than other law; and expressive of a common ideology.[215] The conception of constitutions as 'stable, at least in aspiration' and 'entrenched' reflects a widely-held belief that however long a national constitutions *in fact* endures, it is typically intended to be permanent, or indefinite in duration. This view is reflected in the works of many other constitutional legal scholars, and it appears early in constitutional thinking. In this section I argue that the understanding of constitutions as permanent documents is evident from: theoretical and historical writing; the distinction between constitutions as permanent, entrenched law and ordinary law; explicit references to time in constitutions; and the presence of 'unamendable' provisions in constitutions.

[215] Joseph Raz, 'On the Authority and Interpretations of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism—Philosophical Foundations* (Cambridge University Press 2001) 153.

Vicki Jackson writes that 'constitutional desiderata generally include the goal of endurance across long periods of time; [but] transitional constitutions need not embrace this aspiration'.[216] I explore this contrast throughout this Chapter.

The idea of a constitution as a permanent document appears as early as in Aristotle's *Politics*,[217] and is evident in the debates surrounding the adoption of the oldest extant constitution, of the United States of America. Alexander Hamilton argued that 'Constitutions should consist only of general provisions: the reason is, that they must necessarily be permanent, and that they cannot calculate for the possible change of things';[218] and generally speaking, the delegates at the Philadelphia convention 'assumed that constitutions by their nature ought to be permanent, a position rooted in an understanding of the English Constitution as being ancient and immutable'.[219] Arguing against the prevailing understanding of constitutions as permanent texts, Thomas Jefferson contended that every nineteen years, each generation should rewrite a nation's constitution, deriding those who 'look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched'.[220] On the basis of their

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[216] Vicki C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2007) 49 William and Mary Law Review 1249, 1255.

[217] "For if a constitution is to be permanent, all parts of the state must wish that it should exist and the same arrangements be maintained", Aristotle, *Politics* IX 350 BC, cited in Raz (n 1) 153.

[218] Alexander Hamilton, in Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787. Together with the Journal of the Federal Convention, Luther Martin's Letter, Yate's Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution.* (2nd edn, JB Lippincott & co 1836) <http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed0021))>, 364.

[219] Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) 13.

[220] Jefferson, in ibid Preface. At 13, the authors note that the Jeffersonian position was reflected in the 'ill fated French Constitution of 1793, which emphatically refused to entrench itself and declared that no generation could subject future generations to its laws'. See: Article 28, Déclaration Des Droits de l'Homme et Du Citoyen 1793, which was never adopted. Cf the judgment of John Marshall in *Marbury v Madison* (1803) 5 US 137, cited in ; Jackson (n 2) 1279. Jackson cites Marshall's position that there is a

comparative constitutional analysis, Elkins, Ginsburg and Melton observe that nineteen years is the average life expectancy of a national constitution, demonstrating that regardless of the intention of permanency, most constitutions are short-lived in duration.[221]

Philip Hamburger, in discussing the historical evolution of the American constitution, notes that the conception of constitutions as permanent or 'immutably fixed' arises in contrast to the flexible and evolving nature of the common law.[222] Similarly, Andrei Marmor reflects on the links between constitutional longevity, and constitutional rigidity and entrenchment. He observes that 'Constitutions, by their very nature, purport to be in force for a very long time, setting out the basic structure of the legal system for future generations';[223] and that in this manner they are set apart from ordinary legislation and law-making.

Constitutional endurance and stability may be identified with a number of goals: the ability for citizens and branches of government to plan and act on the assumption of constitutional continuity; the elevation of constitutional law and structures above day-to-day politics, and immunising such fundamental matters from partisan attack; and in the context of federal states, the ability for state and federal governments to share power in a stable and predictable manner. Further, constitutional restrictions on government power

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right to establish a constitution, but that 'The exercise of this original right is a very great exertion; *nor can it, nor ought it to be frequently repeated*…And as the authority, from which they proceed, is supreme, and can seldom act, they are *designed to be permanent*.'

[221] Elkins, Ginsburg and Melton (n 5) 2.

[222] Philip A Hamburger, 'The Constitution's Accommodation of Social Change' (1989) 88 Michigan Law Review 239.

[223] Andrei Marmor, 'Are Constitutions Legitimate', *Law in the Age of Pluralism* (Oxford University Press 2007) 91, 93.

or bills of rights, if stable and enduring, limit the laws that might adopted by future, democratically elected legislatures. The metaphor of Ulysses 'lashing' himself to the mast is often used in this context, with the idea that constitutional drafters 'lash' future legislatures to the constitutional mast, preventing them from adopting tempting but unconstitutional laws that might result in the violation of rights. The importance of constitutional entrenchment is discussed further in Chapter 6, 'A Complex Supremacy'.

Moving beyond the theoretical, what is meant by the claim that constitutions are intended to last permanently, or indefinitely? Classical constitutions do not, after all, typically expressly state that they are intended to be permanent. Rather, to describe ordinary constitutions as being permanent or indefinite is to say that their founders envision, *ceteris paribus*, that they will continue as enacted, unless disrupted by an extra-legal force; no legitimate means is established by or implied in the constitution of effecting wholesale constitutional replacement. The Preamble to the 2005 constitution of Iraq, a successor to that state's interim text does self-describe as a permanent constitution:

> We, the people of Iraq, of all components and across the spectrum, have taken upon ourselves to decide freely and by choice to unite our future, to take lessons from yesterday for tomorrow, and to enact this permanent Constitution, through the values and ideals of the heavenly messages and the findings of science and man's civilization…[224]

[224] Constitution of Iraq 2005 Preamble.

Additionally, a number of interim constitutions refer to permanent[225] or final[226] constitutions, signalling the intent that their successor documents be permanent or indefinite in duration. Other interim constitutions simply refer to the adoption 'of the Constitution'[227] or 'of the new constitution'[228] arguably implying that the difference between the interim text and the more final text is the very temporariness of the transitional document.

The ambition of constitutional drafters towards permanence is also evident in constitutional provisions that are declared unamendable. A search of the Constitute Project's database reveals 77 state constitutions that prohibit amendment of at least one section of the constitution.[229] These safeguarded constitutional provisions range from the protection of state ideology or religious affiliation[230] to the preservation of basic human rights[231] or principles such as democracy and the separation of powers;[232] the conditions

[225] Constitutional Declaration of the National Transitional Council of Libya 2011 Preamble; Transitional Constitution of the Republic of South Sudan 2011 ch. II; Interim National Constitution of the Republic of the Sudan 2005 s 226(8); Constitution of the United Arab Emirates 1971 Preamble, Article 144(3),(4).
[226] Interim Constitution of the Republic of South Africa 1993
[227] Law on the Major Constitutional Provisions (Albania) 1991 Article 44(1).
[228] Constitutional Provisions Continued in Force Pursuant to Article 77 of the Constitutional Act of 17th October 1992 on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government, Repealing the Constitution of the Republic of Poland of 22nd July 1952. 1992, Preamble.
[229] 'Topics- Amendment- Unamendable Provisions' (*The Constitute Project*) <https://www.constituteproject.org/search/topics.> accessed 10 May 2014.
[230] As in the preservation of Islamic principles: Constitution of Afghanistan 2004; Constitution of Algeria 1968.
[231] Constitution of the Democratic Republic of Congo 2005 s 220.
[232] Constitution of Azerbaijan 1995 s X(2); Bosnia-Herzegovina 1995 s 60; Constitution of Thailand 2007 291.

of federalism or rights of states;[233] the continued role of the monarchy;[234] and the territorial integrity of the state.[235]

The fact that an ordinary constitution is intended to be permanent, or an interim constitution intended to be temporary, is of course not a guarantee that the intention will be realised. Ozan Varol identifies the concept of 'burden shifting',

> In a durable constitution, the opponents of a constitutional provision bear the burden of amendment or repeal…In contrast…the proponents of a temporary constitution or constitutional provision bear the burden of reenacting it following its sunset. This change in the default rule, and the attendant shift in the burden, generates both benefits and costs for constitutionalism that remain underexplored in the literature.[236]

It has been argued in this section that constitutions are classically conceived of as documents with permanent or indefinite duration. This is evident in theoretical and historical writings, in the distinction between stable and entrenched constitutional law and more changeable ordinary legislation,[237] the language of state constitutions, and the existence of unamendable constitutional provisions.

The characteristic of entrenchment will be examiner further in Chapter 6, 'A Complex Supremacy'. However, before leaving the foundations of the idea of constitutional permanence, it is necessary to raise two conceptual questions about the departure of the interim constitution from the assumption of permanence. First, whether the temporariness of the interim constitution represents a radical challenge –or indeed a

[233] Australia (1901, rev 1985); DRC Article 220 2005 (rev 2011).
[234] Bahrain (2002); Belgium (1831, rev 2012); Thailand s291 (2007).
[235] Constitution of Benin 1990 156.
[236] Ozan O Varol, 'Temporary Constitutions' (2014) 102 California Law Review 409, 417–8.
[237] Wil Waluchow, 'Constitutionalism', *Stanford Encyclopedia of Philosophy Online* (2011) <http://plato.stanford.edu/entries/constitutionalism>.

challenge of any kind – to the presumption of constitutional permanence, and the emphasis on constitutional rigidity and the binding of future generations. On one hand, it is possible to conceive of interim constitutions as fundamentally altering our perceptions of the nature of constitutions, opening the door to shorter-term documents which govern for limited periods of time, in the Jeffersonian spirit. It might be possible to argue that the very process of interim constitutional rule, and the co-existence of interim constitutions with the drafting of permanent constitutions represents a shift and an expansion of traditional conceptions of constitutional law. However, it is also possible to conceive of interim constitutions as a reversion to the constitutional norm of permanence. They represent temporariness, but only a *temporary* temporariness. An interim constitution may be a novel form of constitution, but its very purpose is to allow for the drafting of a *permanent* constitution. The existence of an interim constitution, that enjoys a temporary, complex supremacy, is permissible only within constitutional thought and law because it is directed towards the norm of permanence, and towards a system which will be better able to bind future generations in a more rigid way.

Secondly, it is necessary to explore the extent to which an interim constitution—although temporary and unstable, at least in intention—has permanent and binding effects on the permanent constitution of a state. In the next section of this Chapter, I explore the notion of interim constitutions as temporary documents with permanent effects.

4.2 Temporary documents

In contrast to the presumed permanence of ordinary constitutions, interim constitutions

are predicated on the very notion of their expiry. The temporal duration of an interim constitution may be governed by: the specification of a particular duration or finishing date of validity for a constitution; the tying of the duration of the interim constitution to the completion of a particular action or set of actions by a particular body, or a combination of the two. Additionally, interim constitutions vary in terms of the presence of – and detail surrounding – contingency plans, and the legal status of the constitution should the process fail to produce a permanent constitution. The degree of specificity and rigidity in the temporal conditions often reflect the more general provisions on the transitional period and the way in which the permanent constitution is to be negotiated and adopted.

The Hungarian interim constitution of 1989, for example, was adopted without a specified end date, and it also lacked provisions detailing how the drafting process would operate. As Arato observes, the interim constitution '[t]urned out to be 'permanent', because the second stage of the process, left more or less to the ordinary and open-ended amending process, failed'.[238] Only in 2011 did the Hungarian parliament finally adopt a new constitution. This is not to say that the level of detail in the temporal limitation of an interim constitution, or the extent of its provision on the adoption of a permanent constitution, is determinative of the success of the interim constitution in establishing a permanent successor; indeed, as will be seen below, the *IC-N*, which Arato has described (alongside the *SA-IC*) as an 'elaborate and complete interim constitution as part of a fully regulated two-stage process', with fulsome provisions on the adoption of the permanent

[238] Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press 2009) 62.

constitution, has been repeatedly extended, and looks set for possible failure. However, it is worth noting at this preliminary stage that there are connections between temporal conditions and more general provisions, and these connections reflect the drafting process of the interim constitution.

In this section I argue that transitional provisions in interim constitutions governing the duration of the temporary constitution and the adoption of the final constitution may be classified into three broad groups: those involving low, moderate and high levels of procedural regulation. These levels of categorisation involve varying degrees of specificity over the timeframe for replacement, the method for replacement, provisions regulating deadlocks or situations requiring extensions of time, and provisions allowing for amendment of the drafting procedure itself. Based on the case study countries, it is arguable that interim constitutional processes require a mixture of procedural constraints with procedural flexibility. Interim constitutions transition more effectively to permanent constitutions where a timeline and procedural framework is elaborated, rather than a more general provision simply stating that the interim constitution lasts until it is replaced. Conversely, constitutions that are overly rigid and which are lacking in flexibility may be exposed to the risk of collapse or highly politicised judicial intervention if extensions or deadlock-breaking procedures are not allowed. This analysis of the ways in which different interim constitutions define, plan and limit their temporal jurisdiction is necessary in order to understand this foundational characteristic of interim texts. This work serves as a foundation upon which further analysis and substantive work may be based.

4.2(a) Case studies and differing types of provisions

In order to classify interim constitutions according to the nature of their transitional provisions, it is first necessary to review basic facts surrounding the drafting history of these documents and their successors in each of the case study countries. This will involve an analysis of the provisions of interim constitutional texts as to time, the provisions as to deadlocks and extensions, and a review of how these provisions correlated with the reality of constitutional drafting.

4.2(a)(i) Hungary

The Preamble of the Constitution of the Republic of Hungary (1989) reads as follows:

> In order to promote a peaceful transition to a jural state having a multi/party [sic] system, parliamentary democracy and social market economy, the National Assembly, *for the period before the enactment of the new Constitution of the country*, determines the text of the Constitution of Hungary as follows:[239]

As discussed in Chapter 2, the Hungarian constitution of 1989 is a special and unusual case amongst interim constitutions. The Hungarian interim constitution, adopted in October 1989, was an amended version of the existing communist constitution (and Hungary's first written constitution[240]), which was first adopted in 1949. The new, amended constitution, declared interim in the preambular passage quoted above, was to be further amended to such a degree that although it retained the title of 'Act No. XX of 1949 (as amended)', as Szikinger observes, 'practically no provision survived unscathed

[239] Act I of 1989 (Act No. XX of 1949 (as amended)) 1989. Emphasis added
[240] Istvan Szikinger, 'Hungary's Pliable Constitution' in Jan Zielonka (ed), *Democratic Consolidation in Eastern Europe*, vol 1 (Oxford University Press 2001) 408.

after the numerous modifications – except the one declaring Budapest as the country's capital'.[241] Thus, he continues, 'Hungary [had] a formally old, substantially new constitution', the result of 'decisions made at the Roundtable talks'.[242] The interim constitution lacked any further direction as to how or when the new constitution would be adopted.[243]

After this initial period of reform, the constitutional project stalled; attempts in 1995 and 1996 to update the constitution failed. The delay and failure of constitutional reform may be attributed in part to the failure of any party to obtain the two-thirds majority necessary to introduce constitutional change.[244] However, it is also arguable that the interim constitution continued because it was functional: Kis argues that 'there was no pressure to write a new constitution…the 1989 [IC] could do the job of regulating the workings of a democratic polity very well'.[245] Writing in 1994, Osiatynski argued that Hungary 'has not introduced a new constitution, but the Hungarians did not even attempt to do so, as they are relatively satisfied with the amendments made to the old constitution in 1989'.[246] The constitution was a liberal-democratic one; it instituted separation of church and state, protected human rights, established a Constitutional Court, and otherwise was 'aligned with the constitutions of other advanced rule-of-law

[241] ibid 407.
[242] ibid 408.
[243] János Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 5.
[244] ibid 6.
[245] ibid.
[246] Wiktor Osiatynski, 'Poland's Constitutional Ordeal' 3 Eastern European Constitutional Review 29, 29; Márta Dezső, E Bodnár and B Somody, 'General Introduction' in Márta Dezső (ed), *Constitutional Law in Hungary* (Kluwer Law International) 32.

democracies'.[247] However, as will be discussed in greater detail in Chapter 5**,** the lack of democratic credentials of the interim constitution, combined with other political factors, led to the constitutional reforms of 2011-2012. The authors of the Fundamental Law, which came into effect on 1 January 2012, 'refused to see it as the second stage of the process started in 1989', explicitly repealing the 1949 constitution and all amended versions, and claiming continuity with the pre-communist 'historical constitution' in the 'Avowal of National Faith' which serves as the preamble to the Fundamental Law.[248] Over twenty-two years after the interim constitution was adopted, the Hungarians adopted a permanent constitution—a constitution that rejected not only the communist era, but much of the constitutional history and culture of post-communist Hungary.

The total lack of direction in the Hungarian IC as to its own duration or the method of adopting a new constitution reflects in part the fact that the Roundtables did not originally intend to create a new constitution. This lack of direction, combined with the relative effectiveness of the IC in its early years, and the political division that followed, contributed to the longevity of the IC. The Hungarian IC has less regulation as to time and procedure than any other interim constitution studied.

4.2(a)(ii) Albania

The interim constitution of Albania entered into force[249] on 29 April 1991, invalidating the 1976 Constitution of the People's Socialist Republic of Albania.[250] The General

[247] Dezső, Bodnár and Somody (n 32).
[248] Fundamental Law (Constitution of Hungary) 2011.
[249] Article 46, IC- Albania.
[250] 28 December 1976; note that in accordance with Article 45 of the IC-Albania, subsequent amendments to the 1976 constitution were also invalidated.

Section of the Albanian IC also established the basic organs of government: the People's Assembly, the legislature; the Presidency; the Council of Ministers (an executive body); and the (independent) courts. The remainder of the Constitution explores these organs, and their powers and limitations, in more detail. The People's Assembly is the sole 'law-making' organ of the state,[251] and possesses a wide competency over domestic and foreign policy.[252] Article 16(2) provides that the PA 'approves and changes the Constitution and the laws, decides definitely upon the reconciliation of the laws with the Constitution, and makes their interpretation'. Amendment procedures are outlined, and are achieved through a two-thirds majority in the PA. The interim provision establishes that the constitution operates until the adoption of the Constitution, 'whose draft will be worked out by the special commission charged by the PA',[253] but sets out no deadlock or failure clauses.

The Albanian interim constitution was adopted in what has been called the 'Democratic Dawn' of 1991,[254] following the end of the communist era.[255] In 1993, Kathleen Imholz[256] reflected that Albania was

> confronted with a staggering number of problems, like the other countries of the region. If anything, Albania's problems are even more severe, both because of the nature of the Communist regime there and the drastic

[251] Article 15(1), IC-Albania.
[252] Article 16(1), IC-Albania.
[253] Law on the Major Constitutional Provisions (Albania) (n 13) Article 44.
[254] Aage Borchgrevink, 'Albania's Second Transition' (1998) 9 Helsinki Monitor 9.
[255] Led by Enver Hoxha 1944-1985, then Ramiz Alia 1985-1992.
[256] An American lawyer who was then a Fulbright Fellow in Albania, and Director of the Albanian Legal Education Project. Kathleen Imholz, 'A Landmark Constitutional Court Decision in Albania' (1993) 2 Eastern European Constitutional Review 23, 63.

> economic situation of the country, which has been Europe's poorest for many years, dating back to well before Communism.[257]

Like Poland, the Albanian polity embodied a range of views on what form the country's new constitution should take, as well as a range of potential drafts of that constitution. Although the Party of Labor (the successor to the Communist Party) had a sufficient majority to pass a draft of the new constitution in parliament, they compromised and adopted the transitional constitution, with the intention that it would be 'replaced by a full constitution by early 1992'.[258] The Democratic Party, led by Sali Berisha, won power from opposition, and instead of replacing the IC, enacted a number of amendments, including a chapter 'reorganising the judicial system and establishing a Constitutional Court for the first time', and chapters on local government and human rights.[259]

The constitutional drafting process stalled, and a referendum held in 1994 on a new proposed draft failed to gain public support,[260] a defeat related in part to doubts as to the constitutionality of the referendum (discussed in Chapter 6).[261] The country became mired in internal political disputes and violence, described as reaching the level of the 'total collapse of law and order',[262] and a 'vacuum of power [in which] traditional laws and clan structures step in, [as well as] crime, corruption and all sorts of Hobbesian practices'.[263] Major problems emerged when '1 million Kalashnikov machine-guns fell

[257] ibid 23–25.
[258] ibid 24.
[259] ibid.
[260] Daan Huisinga, 'Consolidation of Democracy and the Rule of Law in Albania: OSCE Assistance Efforts' (1993) 9 Helsinki Monitor 18, 19.
[261] Scott N Carlson, 'The Drafting Process for the 1998 Albanian Constitution' in Laurel E Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 313-314.
[262] Arie Bloed, 'OSCE Involvement in Albania' (1998) 9 Helsinki Monitor 40, 40.
[263] Borchgrevink (n 40) 11.

into the hands of Albania's 3.5 million inhabitants';[264] violent overthrows of regional authorities had to be quashed by the capital. The collapse of a series of pyramid investment schemes led to 'massive financial losses', popular rioting, and a level of unrest that 'raised the spectre of civil war'.[265] Dramatic incidents such as the assassination of then Democratic Party leader Azem Hajdari in late 1997 contributed to a climate of tension, chaos, and distrust. In this vacuum of legality, the influence of international actors, such as Operation Alba (an Italian-led operation, that involved the deployment of NATO troops), and the Organization for Security and Cooperation in Europe (OSCE) became paramount. With assistance from the OSCE, political negotiations resulted in fresh elections, the defeat of Berisha's Democratic party, the victory of the Socialist Party, and a framework for adopting a new constitution.[266]

A complex process of consultation and negotiation (discussed in Chapter 5 below) followed, and a permanent constitution was approved by popular referendum on November 22 1998, and formally promulgated on November 28 1998, over seven years after the interim constitution came into effect. The Albanian IC, like the Hungarian IC, lacked a specific temporal limitation. Unlike the Hungarian IC, it did give some procedural guidance as to the drafting of a permanent constitution; and although delayed, these provisions were broadly followed in 1997.[267]

[264] Huisinga (n 46) 21.
[265] Owen Pearson, *Albania as Dictatorship and Democracy: From Isolation to the Kosovo War 1946-1998* (The Centre for Albanian Studies 2006) 660.
[266] Declaration 339 1997.
[267] Carlson (n 44), 318.

4.2(a)(iii) Poland

The *Small Constitution* of Poland 1992 has very little discussion of the interim nature of the constitution and, arguably, a relatively minimal range of transitional provisions otherwise.[268] The brief Preamble simply states that 'For the purpose of improving the activity of the supreme authorities of the State, *pending the passing of a new Constitution of the Republic of Poland*, it is enacted as follows...'.[269] Like the interim texts adopted in Hungary and Albania, the Polish text declined to specify the precise limit on its temporal jurisdiction. The Small Constitution was enacted on 17 October 1992, and was replaced by the permanent Constitution of Poland on 17 October 1997, five years to the date after the adoption of the interim text.

As in other matters, the relative brevity of transitional provisions in the *Small Constitution* may be explained in part by its interdependence with other associated constitutional amendments (both antecedent and subsequent to the adoption of the *Small Constitution* in October 1992), and other associated legislation. The Small Constitution itself, known in full as *The Constitutional Act of 17th October, 1992, On the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government*[270] must be read alongside the amended and partly repealed version of the 1952 Soviet Constitution,[271] as well as the *Constitutional Act on the*

[268] Constitutional Act of 17th October 1992, on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government Dziennik Ustaw Nr 84 Poz 426 1992 Articles 76, 77, 78.
[269] ibid Preamble, emphasis added.
[270] ibid.
[271] *Constitutional Provisions Continued in Force Pursuant to Article 77 of the Constitutional Act of 17th October 1992 on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government, Repealing the Constitution of the Republic of Poland of 22nd July 1952. (n 14).*

Procedure for Preparing and Enacting a Constitution for the Republic of Poland.[272] The *Small Constitution* contains no provisions relating to the transitional constitutional period, as it merely preserves, amends or repeals previous constitutional provisions. The latter Act on the *Procedure for Preparing* does contain transitional provisions, relating to the drafting of the permanent constitution, including specifying a multi-staged process by which the draft of the constitution would be passed by the National Assembly, and then passed fourteen days after the completion of this process by national referendum.[273]

As Franck and Thiruvengadam note, with its five-year delay between the Small Constitution and the 1997 permanent Constitution, Poland was 'the earliest country in the region to start planning for a new constitution and among the last to complete the task'.[274] Like the Albanian and Hungarian Constitutions, the Polish Small Constitution lacked specificity about its temporal jurisdiction, but the accompanying legislation does provide more structured guidance as to the process of adoption, including drafting and approval.

4.2(a)(iv) South Africa

The Preamble to the *SA-IC* frames the adoption of an IC in the context of it being necessary 'that provision…be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution'. The time frame for the duration of the IC is constrained by Article 73, in Chapter 5 'The Adoption of the New Constitution', which

[272] Constitutional Act of 23rd April 1992, on the Procedure for Preparing and Enacting a Constitution for the Republic of Poland Dziennik Ustaw Nr 61 Poz 251 1992.
[273] ibid 1–11.
[274] Thomas M Franck and Arun K Thiruvengadam, 'Norms of International Law Relating to the Constitution Making Process' in Laurel E Miller (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 13.

provides that the Constitutional Assembly is tasked with the drafting of the *SA-IC*,[275] and that it 'shall pass the new constitutional text within two years as from the date of the first sitting of the National Assembly under this Constitution'.[276] The date of the first sitting of the National Assembly is relevant to the Constitutional Assembly and its drafting task because the CA is comprised of the National Assembly and the Senate, when sitting 'jointly for the purposes' of Chapter 5 of the IC.[277]

The South African IC contained a number of contingency clauses, or sections dealing with potential political deadlock in the drafting of the final constitution. Ebrahim and Miller describe the interim constitution as having 'elaborate deadlock-breaking measures, including the possibility of sending a completed draft text to a referendum if the assembly failed to adopt it'.[278] The Constitutional Assembly was assisted in its role by various subcommittees, a management committee, technical committees, as well as three other bodies instituted according to the requirements of the SA-IC: 'an independent panel of constitutional experts', which had a deadlock-breaking role, which it was not called upon to use; a commission on provincial government, and a *volkstaat* council. Each of these groups played various roles in ensuring ongoing negotiations, consensus and participation of the various factions.[279] The South African Interim Constitution therefore had a high level of regulation, including specified time periods, procedural

[275] *Interim Constitution of the Republic of South Africa 1993 68(2).*
[276] ibid 73(1).
[277] ibid 68(1).
[278] ibid 73.
[279] Hassen Ebrahim and Laurel E Miller, 'Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid' in Miller, Laurel E (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 128–129.

guidance, the requirement of Constitutional certification, and provisions for resolving deadlocks.

The South African IC emerges in contrast to the post-communist ICs of Eastern and South Eastern Europe; its detailed provisions as to procedure became the model for many subsequent interim texts.

4.2(a)(v) Democratic Republic of Congo

The Transitional Constitution of 2003 was adopted in the Democratic Republic of Congo as part of a peace movement. Following extensive civil war and border conflicts with neighbouring states including Rwanda and Uganda, three sections of the DRC, controlled by the government and two rebel groups,[280] came together for peace talks in Lusaka, and signed a ceasefire agreement in 1999. Ongoing conflict and peace negotiations continued in tandem after the 'false start'[281] of the ceasefire. At the end of 2002, the 'All Inclusive Agreement' (AIA)[282] was signed, and in April 2003 the Transitional Constitution (DRC-TC) was adopted. As Ziegler observes, the first Article of the TC clarifies that it is developed 'on the basis of' the AIA, and that taken together, the two documents form the 'sole source[s]' of power during the transition in the DRC. The TC maintains supremacy

[280] Kai Peter Ziegler, 'Democratic Republic of the Congo: The Transitional Constitution of April 1, 2003' (2005) 3 International Journal of Constitutional Law 662, 664.
[281] Emeric Rogier, 'The Inter-Congolese Dialogue: A Critical Overview' in Mark Malan and João Gomes Porto (eds), *Challenges of peace implementation: the UN Mission in the Democratic Republic of the Congo* (Institute for Security Studies 2004) 26.
[282] *Global and Inclusive Agreement on Transition in The Democratic Republic of the Congo, Inter-Congolese Dialogue, Political Negotiations on the Peace Process and on Transition in the DRC 2002*.

over other laws,[283] and supersedes the previous Constitutional Decree Law No 003 of May 1997.[284]

The transitional provisions of the DRC TC employed relatively high levels of regulation, with specified time periods, extension provisions, and a *post hoc* review process. It differs from the South African IC in that it did not require certification by a constitutional court on the basis of Constitutional Principles. The DRC-TC, adopting the formula of the AIA,[285] stipulates a transitional period of 24 months, which runs from the time of the formation of the transitional government and ends following the election and inauguration of a President of the Republic.[286] The transitional period is extendable by a period of six months, renewable once, in the case of election organisational issues.[287] The Senate is charged with developing a draft permanent Constitution,[288] which after approval by the National Assembly,[289] is to be put to a referendum. As Ziegler observes,

> [c]ritically, it also determines, in conjunction with the AIA, the allocation of power among the parties to the peace process- primarily between the DRC government and the two major rebel movements but also among smaller armed rebel groups, the peaceful political opposition, and civil society elements.[290]

The AIA provides some further structure to the transitional process: Annex III creates a follow-up commission, to supervise the implementation of the AIA and mediate disputes;

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[283] Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') 2003 s 2.
[284] ibid 200, 202 (cf 203).
[285] *Global and Inclusive Agreement on Transition in The Democratic Republic of the Congo, Inter-Congolese Dialogue, Political Negotiations on the Peace Process and on Transition in the DRC (n 68).*
[286] Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') (n 69).
[287] ibid.
[288] ibid 104.
[289] ibid 98.
[290] Ziegler (n 66).

and Annex IV establishes an international committee to support the transition. This 'bilevel supervision…not only empowered the parties but also provided support to keep them from floundering in this early, difficult phase'.[291]

The AIA reads in some ways like a conventional Interim Constitution: it outlines certain institutions and processes (the structure of the branches of government, the nature of the ministries, the existence of an amnesty law), and requires that they later be adopted in the IC. The AIA is also a peace agreement, however, and includes a negotiated settlement for the cessation of hostilities and withdrawal of troops,[292] and provision of security for relevant political leaders.[293]

The process for the adoption of the final constitution progressed relatively smoothly; one six-month extension of the DRC-TC was granted 'to accommodate delayed election logistics'. The final constitution in the DRC was adopted within a relatively short timeframe, and approved with a vote of 84% in favour at referendum in December 2005.[294]

4.2(a)(vi) Iraq

In Iraq, the Transitional Administrative Law was adopted on 8 March 2004. Planning and discussion about constitutional change in Iraq preceded the March 2003 invasion; the US and the UK had been holding talks with Iraqi exiles, expatriates and opposition

[291] ibid, 672.
[292] *Global and Inclusive Agreement on Transition in The Democratic Republic of the Congo, Inter-Congolese Dialogue, Political Negotiations on the Peace Process and on Transition in the DRC (n 68).*
[293] ibid Annex 5.
[294] In the referendum of 18-19 December 2005, the new constitution was approved by 84% of voters. 64% or 15,505,810 of a registered group of 25,021,703 voted in the election. See: Renee Dopplick, 'DR Congo-Constitutional Reform' <http://www.insidejustice.com/law/index.php/intl/2005/12/21/dr_congo_new_constitution>.

groups for 'decades' before the invasion.[295] The TAL was drafted by a committee including Iraqis and members of the Coalition Provisional Authority ('CPA'), but was heavily influenced by the dictates of the Bush administration.[296]

The Preamble to the TAL established that it would govern Iraq 'during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being'. The 'transitional period' is further defined in Article 2 of the TAL as consisting of two phases,[297] the first commencing a little over a month after the adoption of the Interim Constitution, on 30 June 2004, and involving 'a fully sovereign Iraqi Interim Government' which would take power on that date, a government to be constituted after consultation by the Iraqi Governing Council (IGC), the Coalition Provisional Authority, and (possibly) the United Nations. The second phase of the transitional period was to commence after the formation of the Iraqi Transitional Government, which would replace the Interim Government after elections for that National Assembly had taken place; this second period was to end 'upon the formation of an Iraqi government pursuant to a permanent constitution'.[298]

As Arato notes, there are several ambiguities relating to the way in which adoption of the permanent constitution was to occur, and the potential duration of the interim constitution.[299] Procedurally, the TAL designated the National Assembly as the

[295] Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press 2014) 39–40.
[296] See generally Al-Ali (n 81).
[297] Law of Administration for the State of Iraq for the Transitional Period 2004 2(B).
[298] ibid 2(B)(2).
[299] Arato (n 24) 188.

body responsible for drafting the permanent constitution;[300] stipulated that there should be public participation; and mandated a referendum for the approval of the election (with detailed conditions).[301] Faced with Sunni boycotts of elections and other difficulties associated with worsening political circumstances, the US continued to insist on a 'breakneck' schedule for completing the permanent constitution in seven months, by August 2005, even though 'most of the Iraqis closest to the negotiations' including the chairman of the committee, Sheikh Humam Hamoudi, as well as 'most, if not all, important civil-society organizations',[302] supported an extension on the timeline. Although a procedure allowed a six month extension 'if necessary'[303] for the drafting of the constitution, US pressure ensured that the extension was not utilised.[304] The permanent constitution was ratified on 15 October 2005, less than two years after the TAL had been adopted.

4.2(a)(vii) Thailand

The Thailand IC adopted in 2006 and approved by King Bhumipol following a bloodless coup was 'designed to provide for civilian government and the drafting of a new constitution in 2007'.[305] The 2006 coup was not a unique event in Thai history- it was the seventeenth military coup since 1932, and the country has had eighteen constitutions in that period, seven of which 'have been intended only as temporary or transitional

[300] *Law of Administration for the State of Iraq for the Transitional Period (n 83).*
[301] Jonathan Morrow, 'Deconstituting Mesopotamia: Cutting a Deal on the Regionalisation of Iraq' in Laurel E Miller (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 571.
[302] ibid 574.
[303] *Law of Administration for the State of Iraq for the Transitional Period (n 83).*
[304] Feisal Amin Rasoul al-Istrabadi, 'Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process' (2008) 87 Texas Law Review 1627, 1640.
[305] Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart 2011), xxix.

constitutions (usually called 'charter for the administration of the Kingdom' rather than 'constitution')'.[306] Even those constitutions intended to be permanent have been short-lived, and a number of scholars make the argument that the Constitutions of Thailand of the last century have not so much directed as reflected constitutional changes; the constitutions trail rather than lead the political system. In May 2014, following months of political turmoil, a military coup occurred, led by the Thai army commander General Prayuth Chan-ocha.[307] The political and constitutional implications of this latest coup remain to be seen.

In spite of frequent constitutional change, there has been a reasonable amount of institutional consistency, with Harding and Leyland noting that

> most institutions, apart from the two houses of the National Assembly and more recently the Constitutional Court, have also tended to continue virtually undisturbed and, although differently configured in each constitution, to have become virtually mandatory features in any constitution.[308]

The Preamble of the Thailand IC states that

> expeditious proceedings shall be undertaken to prepare a new draft constitution with extensive public participation at all stages...the King is graciously pleased to proclaim the following provisions as the Constitution of the Kingdom of Thailand (Interim) until the promulgation of a Constitution which is to be subsequently drafted and presented to the King.

More extensive provisions appear later in the Thai IC, chiefly related to the appointment of drafting bodies, including the Constitutional Drafting Commission and the Constituent

[306] ibid.
[307] 'The Path to the Throne' [2014] *The Economist* <http://www.economist.com/news/asia/21602759-sudden-move-army-brings-only-near-term-calm-path-throne> accessed 22 May 2014.
[308] Harding and Leyland (n 91).

Assembly, and include failsafe provisions if there is disagreement or failure to appoint representatives to those bodies.[309] Additionally, if a constitution failed to pass at referendum, the military junta had the power to submit a revised draft of any previous constitution for royal assent. Ultimately, a draft of the permanent constitution was submitted, and approved at referendum by 58% of voters, coming into effect in August 2007. The interim constitution lasted for less than a year. Scholars such as Ginsburg and Harding and Leyland have argued that the 1997 Constitution is a pivotal moment in Thai politics, having a significant 'afterlife' in the very similar 2007 constitution.[310] The interim constitution of 2006, and other temporary constitutional documents, may be looked at as reflecting the emergence of constitutionalism as a general idea, not particularly tied to a given constitutional text, or may be viewed as reflecting 'a temporary deviation from constitutional rectitude, provided that this leads directly back to such rectitude within a short period [of] time'.[311]

4.2(a)(viii) Nepal

In Nepal, the Preamble to the IC established that the IC was 'enforceable until a new Constitution is framed by the Constituent Assembly'; but the Preamble must be read alongside other provisions of the IC, which combine to mean that a permanent constitution is to be adopted within two years from the date of the first meeting of the Constituent Assembly, with an additional six month extension only in the case of the proclamation of a state of emergency.[312] The N-IC provides that Constitutional Bills are

[309] See sections 14, 19, 22-25, Constitution of the Kingdom of Thailand (Interim Edition) of BE 2549 2006.
[310] Harding and Leyland (n 34), 25. See also Tom Ginsburg, 'Constitution Afterlife: The Continuing Impact of Thailand's Post-Political Constitution' (2009) 7 *International Journal of Constitutional Law* 83.
[311] Harding and Leyland (n 91) 24.
[312] Interim Constitution of Nepal 2063 2007 s 64.

to be passed by the Constituent Assembly with a quorum of two thirds of the Assembly voting, and with unanimous support;[313] if unanimous support for a draft constitution is not obtained even after negotiation amongst party leaders, then the CA is to re-vote, with the requirement of a two thirds quorum and a two thirds majority.[314]

In the United Nations Security Council Report dated 2 January 2009, the UN Secretary-General, commenting on the UN's Mission in Nepal ('***UNMIN***') noted that

> While the Constituent Assembly has agreed on the regulations for drafting the Constitution, which under the Interim Constitution should be completed by May 2010, and committee members have been named, the substantive work of the Assembly has yet to begin.[315]

After being elected, Nepal's Legislature-Parliament, which is the Constituent Assembly for the purposes of drafting the interim constitution, adopted regulations and procedures on 14 November 2008, directed at completing the drafting of the permanent constitution within 82 weeks, by May 2010.[316] The first deadline, relating to the election of the Vice-Chairperson of the Constituent Assembly, was met on 28 November 2008. However, the Assembly failed to meet its May 2010 deadline, and extended the constitution for one year, to May 2011.[317] Again, the Assembly failed to meet the deadline, and extended its deadline for three further months;[318] in August 2011, the government extended the duration of the interim constitution for a further three months. These extensions are particularly extraordinary in light of the fact that the only provision for extension in the

[313] ibid 70(7).
[314] ibid 70(6).
[315] United Nations Security Council, 'Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of Its Peace Process' (2009) S/2009/1 para 12.
[316] United Nations Security Council (n 101).
[317] 8th Amendment, *Interim Constitution of Nepal 2063 (n 98).*
[318] 9th Amendment, *ibid.*

IC is one based on necessity, and for a period of six months. In May 2011, the Supreme Court of Nepal ruled that the 2010 one year extension was invalid, because it violated Article 18A of the interim constitution, but it did find that there was an implied 'doctrine of necessity', which would allow 'additional time to complete constitution-making'.[319] It refused to declare the extension null and void, for fear of derailing the constitutional process, and so the extensions have continued.

The process has reached a potential turning point with the announcement of an expert panel to take over drafting the permanent constitution, and the agreement of the main opposition party, Nepali Congress, to support the panel. Ultimately the process has continued seemingly indefinitely, to the point of the election of a second Constituent Assembly- see discussion below in Chapter 6, relating to the second phase of constitution drafting in Nepal.

[319] Arun Sahgal, 'Constitutional Rumblings in Nepal: Three Scenarios' [2011] Institute of Peace and Conflict Studies <http://www.ipcs.org/article/ nepal/constitutional-rumblings-in-nepal-three-scenarios-3388.html> accessed 4 October 2011.

4.2(a)(ix) Sudan, South Sudan

Sudan

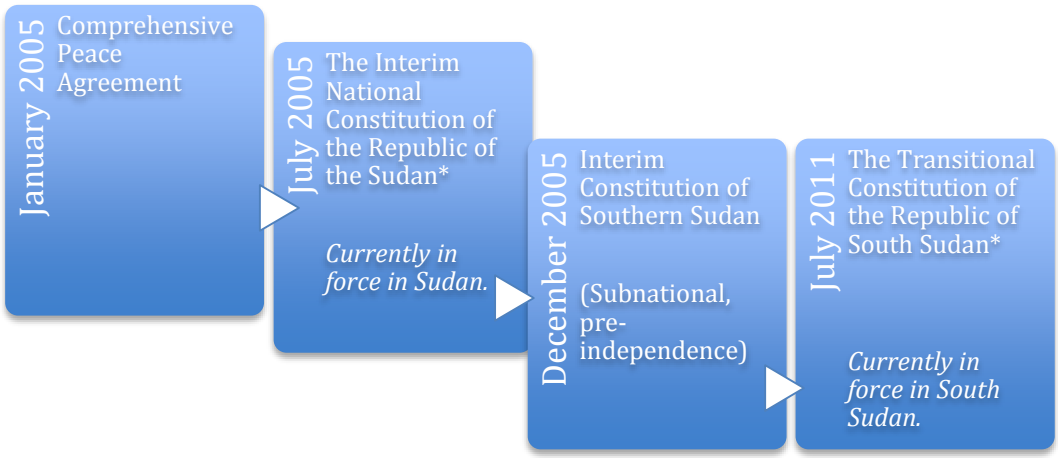


Fig 1. Progression of Constitutional Law in the Republic of the Sudan and the Republic of South Sudan

The Interim National Constitution of the Republic of the Sudan (2005) was adopted following a Comprehensive Peace Agreement of January 2005. The southern states of what was then the Sudan have now seceded to become the Republic of South Sudan; the remaining northern states continue to exist as the Republic of the Sudan, under the IC-Sudan 2005.

The IC of Sudan is unusual because it is an interim constitution that provides for the creation of a sub-national IC in South Sudan, as well as on the condition subsequent of a successful referendum on self-determination and secession for South Sudan, the bringing into existence of another interim constitution in an independent South Sudan. The original 2005 IC of the Republic of the Sudan remains in force, but it is ranked

highly in a study of 'sham'[320] constitutions, where there is a large difference between what a constitution promises and the reality of the situation.

The Preamble to the 2005 IC of the Republic of Sudan references its links to the Comprehensive Peace Agreement. The CPA provided the political and legal basis for the drafting of the IC itself.[321] The temporal limitation of the constitution is first mentioned in the preamble of the IC, where it is stated that the IC is the 'supreme law by which the Republic of the Sudan shall be governed during the interim period'.[322] In 226(8), the Constitution is declared to govern for the interim period, until a 'permanent constitution is adopted', subject to any amendments made by the National Legislature (requiring a special majority).[323] Section 140 of the 2005 IC affirms the responsibility of the National Constitutional Review Commission (created the CPA)[324] to begin a Constitutional Review Process during the six-year interim period. The 2005 IC of Sudan affirms the right of South Sudan to self-determination[325] and establishes a six-year period at the end of which South Sudan is to have a referendum on self-determination.[326] At the conclusion of the six-year transitional period, the secession referendum for the South was approved,[327] but no real progress has been made as to the adoption of a permanent constitution for the Republic of Sudan.

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[320] David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 California Law Review 863.
[321] The Comprehensive Peace Agreement Between The Government of The Republic of The Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army 2005 ch. II Part C, 3.1.2.
[322] Preamble, Interim Constitution of Sudan 2005.
[323] *Interim National Constitution of the Republic of the Sudan (n 11).*
[324] CPA (Sudan) (n 107) Part C, 3.1.4.
[325] Interim National Constitution of the Republic of the Sudan (n 11) Articles 69(1); 82(c).
[326] ibid 220, 222.
[327] 'South Sudan Profile- Overview' *BBC News* (20 May 2015) <http://www.bbc.co.uk/news/world-africa-14069082> accessed 7 July 2015.

South Sudan

In 2011, the newly created state of South Sudan enacted an 'amended Interim Constitution of Southern Sudan 2005', which after its 'adoption by the Southern Sudan Legislative Assembly [was] known as the Transitional Constitution of the Republic of South Sudan'. Kevin Cope argues that the

> 2011 'technical' revision committee's changes consolidated power in the central government or executive and expanded the power of the national government generally [and that it] gave President Kiir powers more commonly associated with autocracies than democracies.[328]

The TCR-SS is to be reviewed by a National Constitutional Review Commission, following which a process of consultative constitutional drafting will occur. Since December 2013, South Sudan has been in a state of upheaval, arguably related to the concentration of power in government hands, which will inevitably delay the process.

4.2(b) Summary

In this section I have attempted to show the variety of ways in which interim constitutions are made temporary. The regulation of the interim period and the process for adoption range from the most minimal (Hungary) to the highly regulated, as in South Africa and Nepal. It is arguable based on the preceding analysis that the lack of a specified time frame appears to be linked to a prolonged period of interim constitutional existence, whereas the specification of a time frame appears to be linked to the timely

[328] Kevin Cope, 'South Sudan's Constitutional Bait-and-Switch' <http://www.constitutionnet.org/news/south-sudans-constitutional-bait-and-switch> accessed 26 February 2014.

adoption of a permanent constitution. In Albania, Hungary and Poland, the lack of a specified time frame, combined with political factors, led to prolonged interim constitutions. In Sudan, the constitution specified an interim period, but lacked a defined approach as to deadlines for constitutional drafting milestones; the interim text adopted in 2005 continues in force there. In countries where time frames were adopted, such as South Africa, Iraq, Thailand, and the DRC, the interim periods have been shorter and closely tied to those time frames. The exception to this rule is Nepal, where the interim constitution remains in force. Of course, the mere specification of a time frame for a constitution does not ensure that it will be followed; political factors are relevant in cases of failure and success of adoption of permanent constitutions. But it is arguable that the existence of a time period creates a constitutional standard, which, if the political parties are effective, and operating in good faith, becomes one of the rules which they must – and must be seen to – follow. Experience in the DRC and in Nepal has shown the importance of deadlock provisions, as well as clear parameters for constitutional courts with oversight of the process, should the courts be required to intervene.

The temporal provisions in interim constitutions regulate the formal duration and authority of these temporary documents; they do not, however, succeed in limiting the scope of the effects and consequences of interim constitutions. As will be explored below, interim constitutions can have a significant – and in some cases, near controlling – impact on a permanent constitution and the broader constitutional culture of a country.

4.3 Long term effects

The preceding discussion has related to the way in which interim constitutions are temporally limited, and the provisions ensuring that they are ultimately superseded by constitutions that are intended to be permanent. It is contended, however, that although interim constitutions are temporary in terms of their jurisdictional limits –they have long-lasting effects. This argument will be made by reference to the ways in which interim constitutions in the case study countries have continued to have effects following their obsolescence.

As a preliminary matter, it is worth noting that the argument in this section is not simply that interim constitutions, like any kind of law or policy, can have long term effects. I argue in particular that because of the circumstances in which they are adopted, and the kind of claims that that interim constitutions make, they are particularly prone to have considerable long term effects on constitutional law and culture. In arguing this I rely on the notion of 'critical junctures', first introduced in this thesis in Chapter 2. The idea of 'critical junctures', as explored by Capoccia and Kelemen, is that institutions enjoy long periods of stability, alternating with moments of 'fluidity and rapid change'.[329] Critical junctures are '*relatively* short periods of time during which there is a *substantially* heightened[330] probability that agents' choices will affect the outcome of interest'.[331] Capoccia and Kelemen, reflecting on this definition, note that in emphasising that the 'probability that actors' choices will affect outcomes decreases after the critical

[329] Giovanni Capoccia and R Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341, 344.
[330] Compared to the periods before and after the juncture.
[331] Capoccia and Kelemen (n 115) 348.

juncture, this definition suggests that their choices during the critical juncture trigger a path-dependent process that constrains future choices'.[332] Interim constitutions are typically adopted at times that can easily be described as critical junctures, moments in which 'agents face a broader than typical range of feasible options', and where great change is possible.[333] In this section, I trace through the ways in which choices made by interim constitution drafters during critical junctures can have long-term effects, and create path-dependencies in numerous ways.

First, interim constitutions may directly affect the contents of a permanent constitution by the inclusion of binding rules as to what may or may not be contained in a permanent constitution. Secondly, the procedural rules established in an interim constitution may favour particular parties, approaches or outcomes in the drafting of the permanent constitution. Thirdly, political realities surrounding the negotiation of an interim constitution may mean that agreements, once reached, are difficult or impossible to re-negotiate, so that controversial issues may not be re-opened in the second drafting phase. Fourthly, institutions or practices established by an interim constitution may be maintained, for reasons of efficiency and efficacy, in the ultimate constitution. Fifthly, constitutional courts or supreme courts may make decisions during the period in which the law is governed by the interim constitution, and those decisions of the interim period may have lasting effects on the way in which the permanent constitution is drafted, or on the jurisprudence of the same courts following the adoption of the permanent constitution, even though the interim constitution has expired. Finally, an interim

[332] ibid.
[333] ibid.

constitution may have effects beyond the date of its temporal limitation where it becomes permanent or virtually permanent through a failure to adopt a permanent constitution. In this section, I consider the various ongoing effects that interim constitutions may have; in Chapter 6, I address the question as to what extent these permanent effects are compatible with the conception of interim constitutions as devices that promote constitutional legitimacy and accountability.

Jon Elster argues that there are two kinds of constraints imposed upon the work of a constitutional assembly drafting a (permanent) constitution. First, there are 'upstream' constraints, which are imposed by the external creator of the constitutional assembly, and which can guide and limit the terms of the drafting process. Secondly, there are 'downstream' constraints, which arise in connection with ratification, so that where framers know 'that the document they produce will have to be ratified by another body, knowledge of the preferences of that body will act as a constraint on what they produce'.[334] Elster's framework provides another way of thinking about the way in which interim constitutions can have an impact upon final constitutions: requirements as to content, such as the Constitutional Principles (CPs) of South Africa, provide an 'upstream' constraint on drafters in the assembly, whereas the procedures adopted, such as ratification through referendum, act as a 'downstream' constraint on framers who must make constitutions sufficiently widely acceptable to succeed electorally.

Interim constitutions differ markedly in terms of the degree to which they affect longer-term constitutional law and culture; arguably, the *SA-IC* is the clearest example of

[334] Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 Duke Law Journal 364, 373.

an interim constitution that has had longer-lasting effects. Spitz and Chaskalson, noting that the interim constitution was replaced less than three years after it came into effect, argue that it nonetheless has a 'substantial legacy, most obvious in the provisions of the final constitution'; and that the final constitution could be thought of as a 'version of the interim constitution modified in the light of the dogged political circumstances in the Constitutional Assembly'.[335] In the case of Nepal, where the interim constitution has long outlasted its formal end date, and been renewed on multiple occasions, it is difficult to comment on what the permanent effects of the interim constitution might be, other than that it may become, by default, the permanent constitution, or a prolonged interim constitution. In this section, I consider each of the case study countries to some extent, but go into greater detail considering the four core case study countries of Poland, South Africa, Nepal and Iraq. Unfortunately, given the deeply historically and factually embedded circumstances of each constitutional transition, it is impossible to go into detail for each case.

4.3(a) Content rules; procedural rules

It is worth noting that the ways in which interim constitutions have permanent effects are not always discrete or easily separable; in the South African case, content restrictions are closely linked with the role of the Constitutional Court, because that Court was given the power of adjudicating whether content requirements were met. For that reason, I will address content and procedural rules in concert. Where possible, different factors will be dealt with separately, but there is naturally an interlinking of these issues.

[335] Richard Spitz and Matthew Chaskalson, *The Politics of Transition- A Hidden History of South Africa's Negotiated Settlement* (Hart Publishing 2004) 422.

The **South African** interim constitution stands as the paradigmatic example of a temporary constitution imposing content requirements or restrictions on a permanent constitution.

> In the history of South Africa's transition, the creation of the interim constitution of 1993 was as important a milestone as the adoption of the final constitution. The interim constitution – the culmination of almost four years of concerted effort to reach a negotiated settlement – was effectively a peace treaty. It established transition mechanisms, specified the process for crafting the final constitution, and substantively constrained the final document through this embrace of thirty-four binding constitutional principles. While its operative effect was short-lived, its influence was peremptory due to the mandatory impact of the constitutional principles on the parameters within which the final constitution was written; also, the constitutional assembly used the interim constitution as the basis for its drafting work…
>
> Though a time-limited framework, [the *SA-IC*] was a *fully elaborated constitution that created the basic institutions of democracy*.[336]

It is useful to deal in concert with the first and second possibilities discussed above; interim constitutions may contain procedural or content-based prescriptions about the adoption of the ultimate constitution that constrain or pre-determine the outcomes of the drafting procedure for the permanent constitution. The *SA-IC* is notable – and unique – in its inclusion of the 34 Constitutional Principles ('CPs'). The Namibian constituent assembly had, in 1989, adopted a set of principles emerging from a UN Security Council Resolution as guidelines in its constitutional drafting, but South Africa was the first to adopt *binding* principles.[337] The principles are crucial to the legal structure and 'solemn pact' of the interim constitution.[338] Section 71 of the *SA-IC* clarifies the significance of

[336] Haysom, 'The final constitution in most respects constitutes a refinement of the interim text', cited in Ebrahim and Miller (n 65) 153, emphasis added.
[337] ibid 127.
[338] Preamble, *Interim Constitution of the Republic of South Africa (n 61).*

the CPs contained in Schedule 4 of the Interim Constitution, requiring at s71(1)(a) that the final constitutional text shall 'comply with the [CPs] contained in Schedule 4', and that a new constitutional text 'shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the [CPs]'.[339] A decision by the Constitutional Court under s71(2) that the new constitutional text complies with Schedule 4 is 'final and binding', and not appellable.[340] As the Court noted in the 6 September 1996 *Certification Decision,*

> That casts an increased burden on us in deciding on certification. Should we subsequently decide that we erred in certifying we would be powerless to correct the mistake, however manifest.[341]

The Court itself had been a topic of considerable debate in the course of negotiations for the interim constitution, with disagreements in particular about whether it should form a separate arm of the judiciary, whether it should have exclusive jurisdiction in relation to constitutional issues, and more procedural matters concerning the qualifications and appointment of judges.[342] As the Court noted in its first *Certification* decision, '[j]udicial "certification" of a constitution is unprecedented and the very nature of the undertaking has to be explained'.[343] The Court conceived of its task as being 'much wider' in 'scope and purpose' than simply certifying the draft Constitution against the 'complaints specifically drawn to the Court's attention'. Rather, the Court stated that its duty was to 'measure each and every provision of the new constitution, viewed both singly and in conjunction with one another, against the stated [CPs], irrespective of the attitude of any

[339] ibid 71(2), 72(3).
[340] ibid 71(3).
[341] *Certification of the Constitution of the Republic of South Africa* (1996) 4 SA 744 (Constitutional Court of South Africa) [18].
[342] Spitz and Chaskalson (n 121) 191; Interim Constitution of the Republic of South Africa (n 61).
[343] *First Certification Decision* (n 127) [1].

interested party',[344] thus conducting a general review of the entire draft constitution. The Court was therefore conducting a *facial* review of the draft constitution, on the grounds of its potential clash with the principles and requirements of the interim constitution, rather than adjudicating on a particular dispute or controversy in relation to a particular set of facts or the application of the constitution to a given scenario.[345] The Court was clear that its task was, however, a *judicial* one rather than a *political* one, stating that the 'wisdom or otherwise of any provision of the NT [new text] is not this Court's business'.[346] However, as Ebrahim and Miller have noted, 'the [CPs] were essentially political agreements among parties bringing an end to conflict…[and] a fair amount of the thirty-four principles could be interpreted in various ways'.[347] In its wide-ranging judgment, the Court provided a survey of the relevant political and legal history of South Africa, including a précis of the deadlocks and negotiations prior to the adoption of the interim constitution.[348]

In evaluating the NT, the Court clarified that its task was to assess the NT in light of its compliance with the CPs, and not with the interim constitution as a whole.[349] The Court's interpretative approach was expressly purposive and teleological, directed at the constitutional commitment to ''create a new order', based on 'a sovereign and democratic constitutional state' in which 'all citizens' are 'able to enjoy and exercise their fundamental rights and freedoms''.[350] Eschewing an approach of 'technical rigidity',[351]

[344] ibid 1–2.
[345] ibid 3.
[346] ibid 27.
[347] Ebrahim and Miller (n 65) 140.
[348] *First Certification Decision* (n 127) [12–13].
[349] ibid 3, 32, 53.
[350] ibid 34.

the Court favoured an 'holistic' and 'integrated' interpretation of the CPs.[352] The Court embarked upon a two-stage analysis, dealing first with the threshold issue of whether the NT complied with the 'basic structures and premises…contemplated by the applicable CPs'.[353] Having identified that the NT did comply with these basic requirements, such as that the NT support a 'constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary',[354] the Court turned to the more difficult, secondary question of whether any given provision of the NT complied with all of the CPs. In its ruling, the Court, 'mindful…not to cast too dark a shadow on the text'[355] emphasized that the vast majority of provisions did comply with the CPs. However, it refused to certify[356] the NT, having found a series of provisions that did not comply with the CPs,[357] with some provisions failing to comply with multiple CPs. The violated CPs related to collective bargaining, the justiciability of legislation, the entrenchment of rights and freedoms, the independence of the Public Services Commission, as well as multiple issues concerning the division of power between local, federal and provincial governmental bodies. Thus the NT as negotiated by the elected Constitutional Assembly had to be redrafted by the Assembly in accordance with the CPs imposed by the Interim Constitution.

The Constitutional Assembly quickly began working on a revised draft; under the guidance of the management committee, two subcommittees began working on

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[351] ibid 36.
[352] ibid 37.
[353] ibid 46.
[354] ibid 45.
[355] Ebrahim and Miller (n 65) 141.
[356] *First Certification Decision* (n 127) [484].
[357] (Draft) Constitution of the Republic of South Africa 1996 ss 23, 24(1), Sch 6 s22(1)(b), 74m 194, 196, 229.

amendments and technical revisions to the text. Just over a month after the 6 September 1996 *Certification Decision*, the Constitutional Assembly passed the amended version of the text with an 'overwhelming majority'[358] on 11 October 1996. The Constitutional Court took two and a half days to hear oral arguments on the revised text, and delivered a unanimous judgment on 4 December 1996, certifying that the text complied with the CPs. The procedural provisions in the IC concerning the negotiation of the permanent constitution, as well as the content-based restrictions in the form of the CPs, led to close similarities between the IC and the final constitution certified by the Constitutional Court.

Jackson argues that the CPs may be viewed as a 'form of partial, *long-term* entrenchment'. Jackson observes that

> Whether the normative force of such pre-binding efforts is derived from the subsequent decision of the polity to treat them as binding (i.e., by consent), or from their substantive normative force (in some instances, as "supra-positive" norms of international constitutionalism), can be debated but perhaps not disentangled: the substantive force of the principles may contribute to the willingness of both judicial and political actors to treat them as binding.[359]

In some ways the South African IC appears to be the *ur*-interim constitution in terms of having content-based influences on its permanent successor. In a related way, the IC of Sudan enjoys a particularly close relationship with its partial successor, the IC of South Sudan, which is substantially the same as the IC of Sudan.

In contrast to the position in South Africa, **Poland's** interim constitution was arguably not designed in such a way that it was likely to have significant long-term

[358] Ebrahim and Miller (n 65) 142.
[359] Jackson (n 2) 1284.

influence. As in South Africa, there was a series of talks in Poland prior to the adoption of the interim constitution; in Poland they began in 1989, and notably included the April 1989 Round Table Agreement. However, unlike South Africa, there was no pinnacle of pre-constitutional negotiations and no single historic moment at which some degree of constitutional consensus was reached. Further, there was the related difficulty that the *Small Constitution* was, arguably, one document among others. The Small Constitution was an amended version of the 1952 Constitution, the amended text was followed by numerous amendments, and the interim text was substantially supported by and dependent upon the *Constitutional Law on the Procedure for Preparing and Enacting of the Constitution*,[360] which had been adopted several months prior to the interim text. Thus, in the same way that Poland lacked a moment of constitutional consensus, it lacked a singular text with rhetorical and political weight, which would help to guide and control outcomes in the final constitution. Finally, as has been discussed, the Small Constitution was much less controlling of the ultimate constitution in terms of content requirements, and the process outlined in the *Procedure for Preparing* fostered a multiplicity of constitutional drafts and approaches, rather than requiring or encouraging reference to a set of constitutional principles. It appears that this profusion of debate and perspectives on the constitution resulted in a high degree of continuity between the pre and post-1997 constitutional frameworks, as will be discussed below.

The drafting process was prolonged and difficult, and involved the simultaneous consideration of multiple drafts of a potential permanent constitution, submitted and

[360] Constitutional Act of 23rd April 1992, on the Procedure for Preparing and Enacting a Constitution for the Republic of Poland Dziennik Ustaw Nr 61 Poz 251 (n 58).

considered over an extended period of time. The key provisions regulating the adoption of the permanent constitution were contained in the *Procedure for Preparing*, which created a constitutional Committee of 46 Sejm (lower house) representatives and 10 Senate representatives. The Sejm maintained the role of considering and debating constitutional drafts, but the Committee was given the power to submit drafts to the Sejm, as were the President and groups of at least 56 parliamentarians. The Committee was then tasked with the role of consolidating a draft for a reading of the Constitution before the National Assembly (a congress of the Sejm and the Senate), before a complicated process of readings and voting. The final stage in the drafting of the new constitution was to be a public referendum, requiring majority support by the Polish people, although not specifying a quorum.[361] The *Procedure for Preparing* the Constitution allowed for six months from the inauguration of the Constitutional Committee in which the various eligible groups were able to submit draft constitutions to the Sejm. The Committee began its work in October 1992—six months after the *Procedure for Preparing*—was enacted, and as a consequence the constitutional drafting process was virtually suspended in parliament for a year following the adoption of the *Procedure for Preparing*.[362]

The Committee accepted seven drafts of the permanent constitution in late March or April 1993, including a 'Senate' draft submitted by 58 members of parliament, as well as by various other parties.[363] A further four drafts which had been submitted by other groups, but which had not met the regulatory requirements, were nonetheless viewed by

[361] Lelch Garlicki and Zofia Garlicka, 'Constitution Making, Peace Building and National Reconciliation: The Experience of Poland', *Framing the State in Times of Transition* (United States Institute of Peace 2010) 394–395.
[362] ibid 395.
[363] ibid 396.

the Committee as 'sources of information'.[364] To complicate matters further, the Committee, which had begun to consider the drafts before it, was dismissed when the President dissolved parliament in May 1993, and upon the election of a new parliament and the inauguration of a new committee, the six month period for submissions began to run again, along with the addition of a new procedure allowing for the submission of popular drafts of the constitution supported by 500, 000 voters.[365] Three of the 1993 drafts were replaced by revised drafts, four remained in place as submitted, one was withdrawn, and one popular draft organised by the Solidarity trade union was submitted, with the support of nearly one million voters.[366]

Osiatynski observes that the original 1992 *Procedure* Act, which had 'constitutional status' and required a two-thirds majority for amendment, 'was meant to guarantee the durability of rules governing the constitution-making process', but 'these rules did not prove adequate to overcoming the formidable obstacles to the creation of a new constitution'.[367] Several factors may be identified as contributing to the delays and difficulties in the adoption of a permanent constitution. First, the negotiation process was complicated by the steps that had been taken prior to the *Small Constitution*; in 1989, according to the terms of the April Round Table Agreement, a new Senate was freely elected, while the Sejm derived 65 per cent of its representatives from approved communist or allied parties, and only 35 per cent from free elections. As such, the two

[364] ibid.
[365] *Constitutional Act of 23rd April 1992, on the Procedure for Preparing and Enacting a Constitution for the Republic of Poland Dziennik Ustaw Nr 61 Poz 251 (n 58).*
[366] Garlicki and Garlicka (n 147) 396.
[367] Osiatynski (n 32) 29.

houses of parliament, representing 'opposite ends of the political spectrum',[368] began parallel and competing constitutional drafting processes,[369] creating from the beginning a sense of dislocation in the drafting discussions, in contrast to the more consensus-driven approach adopted in South Africa. The 'two drafts were basically irreconcilable and no arbiter existed who could decide which draft should be submitted to referendum', and thus the early promise of social euphoria and public momentum 'was…dissipated even before the first transitory Parliament dissolved itself in the summer of 1991'.[370]

Secondly, the requirements stipulated in the *Procedure* Act created a high bar for the adoption of a new constitution: two-thirds majority in the Assembly, presidential approval, and public approval in a referendum. In a context of heated disputes between the parliament and the President's offices, and ongoing debates about whether Poland should adopt a system founded on legislative or executive supremacy, the approval and role of the President was not an uncontroversial one.[371] The *Small Constitution* itself had arisen out of a need to clarify *inter alia* the respective competencies of the parliament and the President.[372] Thirdly, the entire process was highly politicized, and there was much less of a role for technical guidance and leadership from experienced lawyers in the drafting of the Constitution; Osiatynski notes that there was '[o]nly a handful of lawyers' amongst the members of the Constitutional Commission, and many of the deputies lacked

[368] Jacek Jędruch, *Constitutions, Elections and Legislatures of Poland, 1493-1993—A Guide to Their History* (EJJ Books 1998) 408.
[369] Garlicki and Garlicka (n 147) 403.
[370] ibid 30; Jon Elster and Stephen Holmes, 'Walesa Adopts Proposal of Chicago Center Director' 1 Eastern European Constitutional Review 9, 9.
[371] Osiatynski (n 32) 29–30.
[372] ibid 30.

experience even in politics.[373] Fourth, the creation and consideration of multiple drafts led to a fractured process, in which political parties and interest groups had a stake in the success of an entire model of a constitution, rather than in relation to particular issues in a jointly-drafted constitution as in the South African case. The Committee had great difficulty preparing a draft; it had received multiple submissions and had little guidance in how or why to choose between them, or how to combine them into one document. By early 1995, the Committee had managed to create a 'Uniform Draft of the Constitution', which was '[m]eant to merge the seven submitted drafts into one'; the Uniform Draft was revised and reissued several times by the Committee before being adopted in a referendum in 1997. At the same time the submission of the Solidarity-led popular draft was considered by the Commission amidst demands – ultimately denied – from Solidarity to put that draft to a referendum, also.

The constitutional drafting process was a lengthy one, and one in which constitutional and everyday political politics became intermeshed.[374] The 1997 Constitution may be described as similar to the 1992 constitution by virtue of its preserving many of the institutions and practices of the 1992 constitution; many of these were also practices established in or even prior to 1989. Garlicki and Garlicka argue that the constitutions or constitutional amendments adopted between 1989 and 1997 in Poland – unlike the transformative constitutions of 1791 and 1921 – were 'less ambitious' and not intended to be 'vehicle[s] of transformation'.[375] They contend that the 1997 constitution was an exercise of 'normalization', necessary to conclude the interim

[373] ibid 31; Garlicki and Garlicka (n 147) 397, 404. ibid 31; cf. Garlicki and Garlicka (n41),397,404.
[374] Garlicki and Garlicka (n 147) 397.
[375] ibid.

constitutional period, and to give the existing changes a 'modern framework', but state that 'probably nothing would have changed if the constitution had been adopted in 1996 or 1998'.[376] Spiewak characterizes the 1997 constitution similarly, arguing that it 'codifies, and partially sorts out, a political system that already exists'.[377] Various individual provisions may be identified as being identical, or broadly similar to the *Small Constitution*: the basic bicameral structure was preserved, the new procedure adopted in the *Small Constitution* by which the Sejm can dissolve itself by a vote with a two-thirds majority, was preserved,[378] and so forth.

There are several provisions in the TAL of **Iraq** which regulate the making of the permanent constitution: the Presidential Council is required to make recommendations in relation to remedying the gerrymandering of administrative districts,[379] and it is stated that the permanent constitution shall contain 'guarantees to ensure that the Iraqi Armed Forces are never again used to terrorize or oppress the people of Iraq'.[380] Procedurally, the National Assembly is charged with the task of drafting a permanent constitution, with the requirement that this responsibility be fulfilled in part 'by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution'.[381] Further, the draft constitution establishes a 'downstream' constraint by requiring a

[376] ibid 402.
[377] Pawel Spiewak, 'The Battle for a Constitution' (1997) 6 Eastern European Constitutional Review 89, 89.
[378] 08/07/2015 16:45:00
[379] *Law of Administration for the State of Iraq for the Transitional Period (n 83)58B.*
[380] *ibid 59A.*
[381] ibid 60.

referendum for the passing of a permanent constitution.[382] In particular, Article 61(C) of *TAL* established that if any three of Iraq's eighteen provinces voted against the constitution, it would fail; this effectively gave veto power to Sunni Arabs, who dominate at least three provinces.[383]

The positive consequences flowing from the *TAL* and persisting beyond its temporal duration include that it brought about the holding of the first free elections in Iraq in January 2005, thus initiating a new era of—albeit imperfect—democracy. However, the *TAL*, even during the period of its operation, failed on a number of fronts, with a series of constitutional requirements not met, including those requiring the dismantling of irregular military forces and the protection of human rights.[384] In the context of the insurgency of late 2004, then, the provisions in the TAL as to the drafting of the permanent constitution represented the greatest hope for the interim constitution to have a lasting, meaningful impact on Iraqi constitutional law. As discussed above, the 'breakneck' speed of constitutional drafting was insisted upon by the US authorities, and resisted by virtually all Iraqi bodies. The constitutional committee collapsed under pressure and was replaced by a Leadership Council, without any Sunni members. It is arguable that at least three consequences flowed from the related factors of the tight timeline, US influence and Sunni exclusion. First, the process did not support the evolution of a united Iraqi identity – or even a full negotiated compromise – between Sunnis, Shias and Kurds, and it is arguable that opportunities for better political relations between these groups, as well as a satisfactory agreement on federalism, were lost. Sunni

[382] ibid.
[383] Morrow (n 87) 571.
[384] ibid 568.

Arabs were hostile to the constitution, with polls showing only 27% of Sunnis supporting the constitution at referendum.[385] Secondly, public participation in and understanding of the Iraqi constitution was hindered by the confusion of the drafting procedure and failures in the outreach program. The interim period therefore also represented a missed opportunity in terms of the creation of a constitutional culture amongst Iraqis. Morrow argues that although 'Iraq already was a chronically fragmented society, the rushed constitutional process amplified these fissures and squandered an opportunity to narrow them'.[386] Thirdly, a bargain was reached in the drafting of the permanent constitution to ensure some Sunni support at the referendum; this involved Article 142 of the Iraqi Constitution of 2006, which established a constitutional amendment committee, which would begin work following the adoption of the permanent constitution. As such, the permanent constitution itself was in some ways a deferral of final decision-making – or an interim measure by another name.

4.3(b) Negotiating realities

Interim constitutions may effect long-lasting change due to the difficulty, politically, of re-negotiating hard-won agreements made in preliminary talks, even when matters may theoretically be renegotiated for the permanent constitution. In the South African case, the Bill of Rights in particular carried across from the interim constitution to the permanent constitution: the 1992 Bill of Rights was the 'founding Bill of Rights', and 'remained influential even after the coming into force of the final constitution'; many provisions were retained, and even where provisions were altered or abandoned, the

[385] ibid 581, 595.
[386] ibid 588.

interim constitution was the starting point for all discussion.[387] Spitz and Chaskalson comment that Etienne Mureinik was right, when he

> advised [the Democratic Party] to aim to get as much as possible into the Bill of Rights at the first stage, predicting that it would be difficult for the Constitutional Assembly to remove rights and freedoms that had appeared in the interim constitution. The enduring significance of the interim Bill of Rights was ultimately formalized by Constitutional Principle II, which required the final Bill of Rights to be drafted after due consideration of the interim document.[388]

Agreements, once made, were seen as having some presumptive weight; those who sought to abandon prior agreements were seen as 'rocking the boat' and had to justify reasons for the change.[389] In many ways, this political reality constrained the ANC, which had increased its power in the Constitutional Assembly since the drafting of the interim constitution. The pressure against breaking the consensus meant that many provisions could not be changed; and indeed the attempted removal of a relatively insignificant provision relating to labour lockouts almost resulted in the collapse of negotiations, with the National Party threatening to withdraw support for the permanent constitution altogether.[390]

4.3(c) The constitutional laboratory

The impact of interim constitutions beyond the interim period may be related to the institutions or practices that were established by the interim constitution and maintained

[387] Spitz and Chaskalson (n 121) 406–407.
[388] ibid 409.
[389] ibid 424.
[390] ibid 425.

in the permanent constitution. In **South Africa** even the relatively short interim period of approximately two years allowed for some experimentation with institutions, and a chance to see which might be successfully be incorporated into the final constitution; the Senate seemed an ineffective body to represent provincial interests, but conversely, other successful institutions were left in place. As Ebrahim and Miller observe, during the interim period 'South Africans had begun to take for granted constitutional democracy in general and the institutional role of the constitutional court in particular'.[391]

In **Poland**, as Varol notes, many structural elements were maintained from the Small Constitution to the 1997 Constitution. These include 'a strong parliamentary system, the requirement that certain presidential acts be countersigned by the Prime Minister, the authorisation provided to the Sejm to override a presidential veto by a two-thirds majority and an 'entirely novel' procedure for nominating and approving a Prime Minister…'.[392]

The Constitutional Courts emerged during the 1990s in **Albania** as an 'important court in the Albanian legal system'.[393] The 1998 Constitution sanctioned the 'important position of the Constitutional Court',[394] endorsing the provisions enacted under Law 7561, an early amendment to the Albanian Interim Constitution.[395] Although the Court was a product of the interim era, its continued role—cemented in the 1998 constitution—

[391] Ebrahim and Miller (n 65) 141; Spitz and Chaskalson (n 121) 425; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007) 29–30.
[392] Varol (n 22) 338, citing ; Mark Brzezinski, *The Struggle for Constitutionalism in Poland* (Macmillan in association with St Antony's College 1998).
[393] Constitution of Albania 1998 pt. 8.
[394] Brunilda Bara and Jona Bara, 'Constitutional Court and Constitutional Review in Albania: A Historical and Institutional Overview' (2013) 7 Vienna Journal on International Constitutional Law 214, 215.
[395] Law No. 7561 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1992) 1992.

has allowed it to continue to play an 'important role in the political, economic and social reforms in Albania,' including in terms of the European integration process'.[396]

There are many examples of institutions or bureaucratic organisations being established by interim era constitutions, and then maintained under the final constitution. One such example is from the Constitution of the Transition of the **DRC**,[397] which established the Electoral Independent Commission (EIC), an institution that was maintained in the final constitution.[398] The EIC is 'an autonomous body responsible for the organisation of free and fair elections and referendum'.[399] Professor André Mbata B Mangu of the University of South Africa observes that the EIC played a crucial role in bringing about multiparty elections after 'decades of undemocratic rule' and a host of obstacles.[400] Although there have been issues with the independence of the EIC, it helped to bring about peaceful elections, and is another example of an institution created under an interim constitution and maintained in the permanent text.[401]

4.3(d) Constitutional courts and culture

A fourth way in which interim constitutions can effect long-lasting change is through the jurisprudence of constitutional courts in the interim period. This possibility is particularly identifiable in South Africa and in Poland. The jurisprudence of the South

[396] Bara and Bara (n 180) 215–6.
[397] Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') (n 69) Article 154.
[398] Constitution of the Democratic Republic of Congo (n 17) Article 211.
[399] Bara and Bara (n 180) 215.
[400] André Mbata B Mangu and Mpfariseni Budelli, 'Democracy and Elections in Africa in the Democratic Republic of Congo: Lessons for Africa' (The Institute for Democracy, Governance, Peace and Development in Africa 2006) 26 <http://www.idgpa.org/downloads/IDGPA-English%203%20-%20Elections%20in%20the%20DRC.pdf>.
[401] See generally Mangu and Budelli (n 186).

African Constitutional Court in relation to the *Certification* decisions has already been discussed. It is arguable that these decisions, in addition to the *ratio* ruling on the constitutionality of various draft provisions, established influential *obiter* relating to the constitutional culture and interpretative techniques of the South African Constitutional Court, which has influenced subsequent case law.[402]

A range of other cases decided in South Africa in the interim period has also had long-lasting effects. One prominent example is the case of *S v Makwanyane and Another*,[403] in which the Constitutional Court was called upon to adjudicate the constitutionality of the death penalty, in light of the new interim constitution. In this landmark 1995 decision, the Court, citing the role of the interim constitution as an 'historic bridge' between the past regime and a future regime founded on human rights and equality, ruled that the death penalty violated the rights to life and dignity guaranteed in the IC. Chaskalson P noted that the issue had not arisen at the trial of Makwanyane, because that had taken place prior to the adoption of the SA-IC in 1993. Emphasising the importance of the Bill of Rights in the new constitutional regime, Ackerman J wrote that

> We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to

[402] Brunilda Bara and Jona Bara, 'Constitutional Court and Constitutional Review in Albania: A Historical and Institutional Overview' (2013) 7 Vienna Journal on International Constitutional Law 214, 215–6.
[403] *S v Makwanyane and Another* (1995) 3 SA 391.

> arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.[404]

This position on the death penalty has been maintained by the Constitutional Court in the sixteen years since *Makwanyane*. In this way, the interim constitution and its drafting has had a long-lasting effect on the constitutional law of South Africa. Significantly, the death penalty was a highly controversial but unresolved issue in the negotiations at Kempton Park; the parties deliberately left the constitutionality of the death penalty to be decided by the Court. Nonetheless, this case and other others[405] decided in the interim period according to the provisions of the interim constitution have had a profound impact on South African constitutional law, particularly in relation to human rights issues.

In **Poland**, there was no equivalent of the South African *Certification* decisions, although some issues relating to the constitution were addressed by the Constitutional Tribunal. However, one way in which the *Small Constitution* and the various pre-1997 constitutional amendments had an impact was through the general jurisprudence of the Tribunal, which was active in this period. The Constitutional Tribunal had been established in the communist era, and commenced hearing cases in 1986. The only body of its kind in the Soviet bloc, it lacked the political or legal power to challenge the supremacy of the legislature, but even in the communist period, the Tribunal was effective in its focus on 'substatutory actions, particularly regulations of administrative

[404] ibid 4.
[405] *Zuma & Ors (1995)* (1995) 2 SA 642.

agencies and officials', and '[r]epeatedly struck down administrative legislation as exceeding authority given by law'.[406]

Oniszczuk identifies this as the first of four phases in the Constitutional Tribunal's jurisprudence, with the second commencing on 31 December 1989, with the coming into force of constitutional amendments, the third with the *Small Constitution*, and the fourth with the coming into force of the permanent 1997 Constitution.[407] Oniszczuk argues that the Tribunal's jurisprudence in relation to a range of issues, including freedoms and rights, the rule of law, and local self-government, had continuity with post-1997 jurisprudence, as well as a direct impact on the 1997 Constitution itself.[408] Garlicki and Garlicka also highlight the way in which the Constitutional Tribunal contributed to long-term constitutional law during the interim period, noting that

> judges, particularly in the constitutional court, referred to the new constitutional principles, mainly the *Rechtsstaat* principle, and in some cases, rewrote them using both new constitutional principles and provisions of the European Convention on Human Rights. In this way, the judicial branch civilized and modernized the old constitution and prepared a relatively smooth transition to the post-1997 constitutional order.[409]

The *Rechtsstaat* principle in Poland is embodied in Article 1 of the amended 1952 constitution, and states that Poland is a 'democratic state ruled by law, implementing principles of social justice'. Andrzej Zoll, Chief Justice of the Constitutional Tribunal

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[406] AE Dick Howard, 'Prospects for Constitutional Democracy in Poland' in Marek Jan Chodakiewicz, John Radzilowski and Dariusz Tolczyk (eds), *Poland's Transformation: A Work in Progress* (Transaction Publishers 2006) 137.
[407] Jerry Oniszczuk (ed), 'Introduction', *Constitutional Tribunal, A Selection of the Polish Constitutional Tribunal's Jurisprudence From 1986 to 1999* (Trybunal Konstytucyjny 1999) 5.
[408] ibid 11.
[409] Garlicki and Garlicka (n 147) 404.

from 1993, describes the 'great deal of freedom' the Tribunal has in interpreting the principle,[410] and as Howard has argued, the Tribunal used the principle to 'read due process standards into the Constitution, including a prohibition against retroactive laws, the protection of 'vested' rights, and access to the courts'.[411] The Tribunal exercised powerful legislative review in the period between 1 January 1990 and 30 June 1995, with 40 of 52 statutes considered being held to be unconstitutional.[412] The Tribunal's influence during this time is all the more notable because the Tribunal's decisions were not binding until the 1997 Constitution.[413]

There are a number of instances where constitutional courts in interim periods delivered significant judgments which formed part of a broader pattern of reform and contributed to the development of the rule of law. In **Albania**, the role of the judiciary in the extensive interim period was complex. The adoption of the provisions relating to the Albanian Constitutional Court led to a landmark decision in which the Court found that a lustration law adopted in 1993—denying licences to practice law to those who had been involved in the apparatus of the former communist state—was unconstitutional, and violated Albania's obligations under the International Convention on Economic and Social Rights, which it had ratified in 1992.[414] The decision was significant, and at the time described as the 'farthest-reaching judicial decision on this issue to date in any of

[410] Irena Grudzinska-Gross, 'Interview with Professor Andrzej Zoll, Chief Justice of the Polish Constitutional Tribunal' (1997) 6 Eastern European Constitutional Review 77, 77.
[411] Howard (n 192) 138.
[412] ibid.
[413] Article 33a(2), 1952 Amended Constitution: Judgments of the Constitutional Tribunal on the nonconformity of laws to the Constitution are subject to examination by the Sejm; Grudzinska-Gross (n 196) 77–78.
[414] Law No 7666 of January 1993; the case reviewed the decision of a commission which revoked the licences of 47 lawyers that fell into certain proscribed categories. See Imholz (n 42) 23.

the de-Communizing countries of East and central Europe'.[415] This case occurred in the context of initially promising constitutional reform, which was ultimately undermined by inability to conclude upon a draft, as well as political manoeuvring, and a series of measures that diminished the independence of the judiciary.

The **Hungarian** Fundamental Law, which came into force on 1 January 2012, contained an explicit disavowal of the 1949 Constitution, and appeared to reject the post-communist era amendments to that law, as well. As has been discussed, the Fundamental Law looks back to the 'historical constitution' of Hungary, with the Preamble stating

> We do not recognise the suspension of our historical constitution due to foreign occupations…We do not recognise the communist constitution of 1949, since it was the basis of a tyrannical rule; therefore we proclaim it to be invalid.[416]

The notion of the discontinuity between the Constitution of 1989 and the Fundamental Law will be discussed in greater detail in Chapter 5. In spite of the questionable lineage between the two constitutional texts, and the attempts of the drafters of the 2012 Law to disavow its connection to the 1989 Constitution and the polity it created, the Constitutional Court's rulings in the interim era continue to have a significant influence on the law of Hungary.

The decisions made by the Court, throughout the activist years of 1990-1993 in particular, will continue to have an effect on Hungarian constitutional law. As has been noted, the Hungarian IC was, if somewhat incomplete, broadly speaking a modern, liberal

[415] ibid.
[416] *Fundamental Law (Constitution of Hungary) (n 34).* Preamble, see also Article R re constitutional interpretation in light of the 'historical constitution'.

democratic constitution, with a bill of rights. In a 1990 decision, then Chief Justice László Sólyom wrote of the notion of the 'invisible constitution', a '[s]afe guideline of constitutionalism above the existing constitution that is currently still being amended out of fleeting daily purposes'.[417] That is, the very changeability and temporary nature of the interim constitution contributed to an active Constitutional Court, whose decisions would continue to have effects on the constitutional culture of the country in the long term. Schwartz, in his book on 'The Struggle for Constitutional Justice in Post-Communist Europe', puts it as follows:

> The amended constitution was necessarily incomplete and marked by internal inconsistencies. Early on, the Court announced that in order to fill in the gaps and cope with the inconsistencies and contradictions, the Court would develop an 'invisible Constitution' a 'system of dogma' principles and methodology drawn from contemporary constitutional thinking in leading national and international courts around the world…[418]

The Court made landmark decisions in relation to the separation of church and state,[419] freedom of speech, the death penalty,[420] retroactive criminalisation,[421] and a number of other human rights decisions, in a way that will continue to affect Hungarian constitutional jurisprudence in the years to come.[422] The principle of dignity (in Hungarian *az emberi méltóság*, the concept itself an import from German constitutional

[417] Andrew Arato and Zoltán Miklósi, 'Constitution Making and Transitional Politics in Hungary', *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 369, citing 23/1990 Constituitonal Court Ruling.
[418] Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000) 82.
[419] *Decision 4 of 1993: 12 February 1994 On the Restitution of Church Property (Hungarian Constitutional Court)*.
[420] *Decision 23 of 1990: 31 October 1990 On Capital Punishment (Hungarian Constitutional Court)*.
[421] *Decision 11 of 1992: 5 March 1992 On the Retroactive Prosecution of Serious Criminal Offences (Hungarian Constitutional Court)*.
[422] Arato and Miklósi (n 203) 369.

law) played a key role in the early decisions of the Court.[423] Catherine Dupré argues that in less than 10 years 'the Hungarian Court achieved a standard of (human rights) protection similar to that existing in the older democracies after over five decades of existence',[424] a feat made possible by the importation of foreign- particularly German- constitutional jurisprudence and concepts. The current Hungarian government has undone and is attempting to undo or limit some of the rights-related decisions made during the First Constitutional Court (1990-1999), but the expansive human rights jurisprudence of those years continues to have a lasting effect in many areas of Hungarian constitutional law, in spite of the end of the interim period.

An example of the continued application of principles developed by the Court under the 1989 Constitution, in a 2013 case the Court invalidated an Act on Election Procedure on the basis that it was unconstitutional. The Court's ruling included reference to numerous cases heard under the previous constitution. In arguing for a particular interpretation of Article 7(1) of the Fundamental Law about Hungary's acceptance of the 'generally recognised rules of international law', the Court made its decision according to the approach 'already established by the Constitutional Court on the basis of the previous Constitution' in a 1993 case, and noted that the previous constitution contained the 'same essential content'.[425] In a separate part of the judgment, reviewing Article 70 of the Fundamental Law on the right to vote, the Court applied the reasoning developed under the 1989 Constitution. The Court noted that while the two Constitutions contained

[423] Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003), 7.
[424] ibid.
[425] *Decision 1 of 2013: AB on the unconstitutionality of certain provisions of Act on Election Procedure (Hungarian Constitutional Court)* [3.2–3.3].

provisions that were not identical, they were 'similar', and that 'therefore the Constitutional Court's interpretation of the law as contained in its previous decisions is to be followed in the course of reviewing the present case, too'.[426]

4.3(e) Failing into permanence

One of the ways in which interim constitutions have long-term effects is when they continue to exist for longer than anticipated. I call the phenomenon where interim constitutions continue beyond their specified temporal jurisdiction 'failing into permanence'. This is not a normative judgment about the quality of the constitutional system; in some cases, such as the interim period in Hungary, the constitutional framework may be reasonably effective and successful. Rather, it groups together a variety of instances in which interim constitutions continue to exist, and fail to be replaced by a permanent constitution. One downside of a prolonged interim constitutional period is that it can result in a failure to capitalise on democratic enthusiasm and public support for reform. Equally, there may be periods of great enthusiasm and robust debate, but if the process is not managed carefully, that debate may not lead to concrete constitutional development. However, there may be positive aspects to a prolonged interim period: it may signal the success of the temporary document, or allow for a slow but effective drafting period for the permanent constitution.

Hungary is a complicated case: with an interim constitution that lasted over 20 years, it might be said that the Hungarian IC 'failed into permanence', and yet many

[426] ibid 4.

argue that it was, in general, a highly successful constitution. The Hungarian state functioned effectively with an interim constitution that became a *de facto* permanent constitution until the amendments of 2011 and 2012. However, as will be discussed further in relation to the theme of legitimacy, it is arguable that the failure to achieve democratic endorsement of the constitution which emanated from the Roundtable talks left the Hungarian constitution—and political culture—vulnerable to attack.

In many cases, it seems that a prolonged interim constitution often signifies crisis – either crisis directly around the constitution and its adoption (as in Nepal) or general societal and political crisis (as in Albania).

These considerations raise the question of how to measure the success of constitutions in general, and how to measure the success of interim constitutions in particular. The notion of success and the ability to judge success in the context of interim constitutions is considered in Chapter 8 'On Success and Failure', but some possible ways of measuring the success of interim constitutions explored there include: whether the provisions of an interim constitution are followed; whether a permanent constitution is adopted according to the conditions of its interim predecessor; whether the interim constitution or its successor is followed by a period of peace; whether its successor is stable in duration. As has been described earlier, in Thailand there is an observable tendency for constitutions to trail or reflect constitutional and political developments that have already occurred, rather than dictating them. In this sense it can be difficult to assess whether a constitution such as the interim constitution of Thailand—which arguably

represents a formal though not factual break with existing constitutional law in Thailand—is a success, or indeed what effects it has had.

In this section I consider failed or unintentionally prolonged constitutions in the context of their propensity to create long-lasting effects, leaving the broader consideration of constitutional success and failure to Chapter 8.

In **Nepal**, the interim constitution has outlasted its intended duration, and continues on indefinitely, with repeated extensions granted by the Supreme Court, some invoking the doctrine of 'necessity'. Continuing political discord, the inability of the legislature to complete the constitutional drafting required of it by the interim constitution, and the willingness of the Supreme Court in many cases to sanction repeated extensions, have contributed to the prolonged duration of the interim constitution. The decisions of the Supreme Court have the potential to have a lasting impact upon Nepali constitutional law, including the endorsement of the doctrine of necessity. As legal advocate Rajib Dahal has noted, the doctrine of necessity, since its first endorsement by the Supreme Court, has been cited by the government in a number of cases, and appears to be gaining hold.[427]

The doctrine of necessity, Dahal notes, finds its origins in the work of medieval jurist Henry de Bracton, whose maxim states 'that which is otherwise not lawful is made lawful by necessity'.[428] The Nepali Supreme Court 'reasoned that the objective of

[427] Rajib Dahal, 'Nepal: (Un)Necessary—Doctrine of Necessity' *Telegraph Nepal* (21 September 2011) <http://www.telegraphnepal.com/views/2011-09-21/nepal:-unnecessary-doctrine-of-necessity.html>.
[428] ibid.

Constitutional Assembly was to draft and to promulgate a new constitution and to conclude the peace process…that has not been achieved yet', and that therefore the 9th amendment to the IC, relating to the May 2011 three month extension of the constitution was valid by reason of necessity.[429] The potential for this doctrine of necessity to lead towards untrammelled parliamentary supremacy, wherein the parliament has the power to amend the IC without regard to its own rules on amendment, is a development that may have lasting impacts beyond the duration of the IC. Additionally, the Court is in a curious position where by extending the *temporal* jurisdiction of the IC, it in effect destroys the *material* jurisdiction of the IC and the degree to which it actually governs constitutional and political change – that is, the degree to which the IC is constitutive of the polity.

The early extensions of the Supreme Court have now given way to seemingly intractable political disputation. In January 2014 a second Constituent Assembly, consisting of over 80% new members, was elected, after the first Constituent Assembly failed to perform its role of producing a draft permanent constitution. The elections were 'largely peaceful'[430] and the Election Commission estimated that voter turnout was approximately 70%, up from 60% in the previous, 2008 elections. Various parties have

[429] Cited in ibid.
[430] 'Nepal Voting Ends for New Constituent Assembly' *BBC News Asia* (19 November 2013) <http://www.bbc.co.uk/news/world-asia-24987573>. Elections were peaceful, following an explosion prior to the election, which injured three people. See also Ban Ki-moon, 'Congratulating People of Nepal On Conduct of Peaceful Election, Secretary-General Renews Commitment to Country' (2013) SG/SM/15483 <http://www.un.org/News/Press/docs/2013/sgsm15483.doc.htm>.

expressed their commitment to the creation of a new constitution,[431] and the process is ongoing.

In **Albania**, an early period of positive transformation was followed by political fighting and stagnation. As early as 1996, Elez Biberaj, a journalist in Albania, was saying that 'The optimism and hope that greeted the 1992 democratic victory have mostly faded away.'[432] A number of experts testifying to the US Congress's Commission on Security and Cooperation in Europe had similar views: a draft constitution was defeated at referendum in spite of its apparent strength, with bitter political strategising and ultimately violence derailing the process. Kathleen Imholz, a lawyer who has written extensively on Albania's transition, argued that in 1991-1992, immediately following the end being the communist regime, there was a greater openness in the country, with the high point of the adoption of an expansive bill of rights in March 1993.[433] This case perhaps illustrates the potential for true reforming spirit to be lost if the delay of an interim constitution extends the constitutional process for too long, or if there is a lack of political cooperation in the transitional period. o argued that

> the delay in adopting a new Constitution has muddied the division of labor and responsibilities between different branches of government and, as a result, the decision-making process has at times been confounded by institutional confusion. Moreover, current constitutional laws lack the legitimacy that a single new charter…would have if it were ceremoniously adopted…Therefore, the speedy promulgation of a new Constitution has become indispensable.[434]

[431] Xinhua, 'Nepal's New Lawmakers Pledge Early Charter' *China Daily (Asia)* (21 January 2014) <http://www.chinadailyasia.com/news/2014-01/21/content_15114008.html>.
[432] Challenges to Democracy in Albania [CSCE 104-2-11] 4.
[433] ibid 15.
[434] ibid 32–33.

Albania's ongoing political, financial[435] and constitutional crisis ultimately culminated in internal unrest, the assassination of the parliamentarian Azem Hajdari by a colleague, and significantly, a UN mission led by Italy ('Operation Alba'[436]) which helped to stabilise the country. A permanent constitution was ratified in 1998, and the country continues on a complex path towards increased democracy.

In the case of Albania, as well as in Nepal, the phenomenon of an interim constitution 'failing into permanence' reflects deep-seated political disputes, as well as a failure to capitalise on early peace-building momentum. The effects of the continued existence of an interim constitution past its intended temporal jurisdiction are manifold. Constitutional courts and other institutions enter the constitutional drafting fray; the constitution itself becomes part of ordinary partisan politics and becomes difficult to isolate, and overall, a document whose intended authority was temporary governs beyond its intended duration.

4.3(f) Reconciling permanent effects with legitimacy

In Chapter 5, the notion of an interim constitutional process as a two-stage process directed towards greater constitutional legitimacy is explored. The argument is made that although an initial interim constitution is typically made by an undemocratic (or under-democratic body) such as a Roundtable, or by leaders of opposing factions, the interim constitution acts as a placeholder and guide for a final, more democratic constitution to

[435] Christopher Jarvis, 'The Rise and Fall of Albania's Pyramid Schemes' (2000) 37 Finance & Development <http://www.imf.org/external/pubs/ft/fandd/2000/03/jarvis.htm>.
[436] Dino Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania' 12 Leiden Journal of International Law 511.

be written. However, as has been explored in this Chapter, interim constitutions often have permanent effects—in some cases, quite significant effects and influences on the structure and content of the permanent constitution, as well on important questions of constitutional law such as the legality of the death penalty, or the nature of judicial review itself.

The question then is whether the legitimacy and increased democratic participation promised by the two-stage process is a real or illusory concept. Moreover, are permanent effects of interim constitutions inevitable, or desirable? Is it unrealistic, and perhaps undesirable to think of interim constitutions as being empty placeholders that merely delay decision-making? If an interim constitution lacked any principles this would decrease its appeal to those who make the bargains in the first place, and potentially render the interim period a chaotic free-for-all.

It is possible that as with the procedural and temporal provisions of an interim constitution, where it is argued that there should be some structure but also the possibility for amendment or extension, there is a *via media* for the long term consequences of interim constitutions. It might be arguable that certain features of constitutional debate that are vital to the securing of a peace accord or to constitutional progress should be determined or heavily guided by an interim constitution, but that questions that are likely to be of importance to a range of groups and which could be informed by wide public participation and debate should be left open, at least to a degree. Of course the identifying of which decisions should be resolved and which should be left open is a difficult one and dependent on the circumstances of each individual constitution. It may not be possible to

accurately identify the ideal resolution of any given issue at the time; but it is contended that nonetheless some degree of constitutional guidance and some degree of constitutional flexibility is desirable. Moreover, it is evident based on this Chapter that the potentially permanent effects of interim constitutions are often unintentional and could not be predicted. These themes will be explored in greater detail at the conclusion of Chapter 5 on the two-phased nature of interim constitutions. Finally, the possibility for interim constitutions to have long-term effects in the ways discussed in this Chapter highlights the importance of the process by which interim constitutions are drafted, and that they should be – as much as is possible – carefully composed, and as representative as possible.

CHAPTER 5: TWO-STAGE PROCESS

> A peace agreement's claim to constitutional validity lies in the lack of legitimacy of the previous constitution (and by implication the state), and the need to negotiate an end to the violence which reflects the question-mark over the state's legitimacy. In some cases (for example, South Africa) the lack of legitimacy is accepted by all sides; however in many other cases it is not.[437]

In her text *On the Law of Peace*, Christine Bell makes a case that peace agreements constitute a unique constitutional form, and that many transitional constitutions should be understood as peace agreements. Bell argues that

> [p]eace agreements are classically constitutions, with similarities to other forms of constitution and exhibiting their classic dilemmas. However, peace agreements are also distinctive in exhibiting and resolving constitutional law's classic dilemmas in peculiar ways.[438]

One of these peculiar issues is that of legitimacy in the context of transitional constitutionalism. In this section, I will adopt Bell's argument that peace agreement constitutions are premised on a rejection of the legitimacy of the past regime. Further, I will argue that the legitimacy of interim constitutions is premised not only on a rejection of the past, but on the promise of the legitimacy of the future, permanent constitution, whose coming into being is guaranteed in the interim constitution. In procedural terms, this complex construction of legitimacy in the two-phased nature of constitutional drafting is created by interim constitutions. In the first phase, a body that is typically elite and unelected creates an interim constitution, which is premised on a rejection of the past.

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[437] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 152.
[438] ibid 200.

That body has in itself no legitimacy, but it creates a kind of placeholder legitimacy through its rejection of the past illegitimate regime, and the guaranteeing of future legitimacy through the procedures it establishes for the adoption of a permanent, democratically legitimate constitution. In the second phase, a more democratically constituted body, such as an elected constituent assembly, begins drafting the permanent constitution. This second phase of drafting, for the permanent constitution, often involves increased public consultation, education, and judicial oversight.

5.1 Defining 'legitimacy'

The term 'legitimacy' has been employed thus far without further elucidation, but the single word has a host of potential meanings. 'Legitimacy' is commonly used in literature on constitutional change and drafting, without definition or justification, simply to refer to the extent to which a constitutional regime has popular support, or was formed with popular involvement or according to the wishes of the people. While it is beyond the scope of this project to engage in an extended analysis of the concept of legitimacy, it is helpful to advance a working definition of the term for the purposes of this chapter, and also to highlight some potential issues with such a definition. Legitimacy may be conceived of either as a descriptive concept, referring to 'people's beliefs about political authority and, sometimes, political obligations', or as a normative concept linked to 'some benchmark of acceptability or justification of political power or authority'.[439] Put another way, an account of legitimacy may be subjective- about what people *believe* to be

[439] Peter Fabienne, 'Political Legitimacy' [2010] The Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legitimacy/> accessed 30 January 2014.

legitimate, or it may be objective- about what is in fact legitimate when compared against an external benchmark. It is arguable, however, that while the descriptive and normative approaches to understanding legitimacy are clearly distinct, they are deeply interconnected. The subjective understanding of a people about what is legitimate may be linked to objective facts about a given constitutional system. Those views may or may not track the normative truth of the matter closely, but the concepts are interlinked. Similarly, many normative conceptions of legitimacy rely in some way on arguments about the consent or acquiescence of the people; in this respect, as with many areas of constitutional law, the theory is difficult to separate from the practice.[440] As Raz writes in *Between Authority and Interpretation*,

> My suggestion was that even the notion of a mere de facto authority (i.e. one that exercises power over its subjects, but lacks the right to it) involves that of legitimacy. What makes mere de facto authorities different from people or groups who exert naked power (e.g. through terrorizing a population or manipulating it) is that mere de facto authorities claim, and those who have naked power do not, to have a right to rule those subject to their power. They claim legitimacy. They act, as I say, under the guise of legitimacy.[441]

It is useful to develop an understanding of the descriptive and normative approaches in more detail, before advancing a working definition of legitimacy. In the ***descriptive*** tradition, Max Weber developed a tripartite formulation of authority, arguing that a political system is legitimate when 'its participants have certain beliefs or faith

[440] In Hardin's words, 'Constitutionalism without social science is an arid intellectual pastime.' Russell Hardin, 'Why a Constitution' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 52.
[441] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 128.

('Legitimitätsglaube') in regard to it',[442] that is a belief 'by virtue of which persons exercising authority are lent prestige'.[443] The basis for this belief or faith may come from: traditional domination (the power of the ruler is accepted because of reasons of history); charismatic domination (the power of the ruler is accepted because of that individual's charismatic leadership), or rational-legal authority, which rests 'on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority)'.[444] Weber's account 'excludes any recourse to normative criteria'.[445] Weber's descriptive approach holds an appeal for this sort of project: the categories he develops track observable tendencies in public discussion and understanding, and allow an entry-point for an empirically-oriented discussion of constitutional systems.

Normative approaches often involve notions of consent, or the social contract. This connection between legitimacy and consent dates back at least to John Locke's *Second Treatise of Government* in which he advanced the proposition that 'government is not legitimate unless it is carried on with the consent of the governed'.[446] The weakness of the social contract theory of constitutionalism is the notion of genuine consent or agreement; whereas, as Russell Hardin has argued, 'constitutions require merely acquiescence to make them work'.[447] Historically, the consent of the governed was rarely obtained in the drafting of a constitution. Even highly participatory drafting

[442] Fabienne (n 3).
[443] ibid.
[444] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol 2 (University of California Press 1978) 215.
[445] Fabienne (n 3).
[446] Richard Aschraft (ed), *John Locke: Critical Assessments* (Routledge 1991), 524.
[447] Hardin (n 4) 53.

processes are often flawed, and even those culminating in a public referendum do not necessarily guarantee a high degree of public participation, as seen in the Polish case. The famed experiment in 'crowd-sourcing' a new Icelandic constitution collapsed amidst low voter turnout and political disagreement.[448] As will be discussed below, the Razian instrumental approach is an alternative to consent-based approaches.

The ideal-typical participatory constitution amounts to a constitution drafted by a democratically elected constitutional assembly (or similar institution), in a process that allows for public feedback and consultation, and that ends in a public ratification procedure such as a referendum. But issues such as low voter turnout, the predominance of elite interests and the 'yes/no' nature of referenda conspire to mean that it is difficult to argue that citizens have truly consented to a constitution, if consent may be broadly defined as a free choice from a range of real options.

Joseph Raz's conception of legitimacy encompasses both descriptive and normative features. Raz argues for a *service* conception of authority, in which authority is justified where it serves the needs of the people. This is the 'Normal Justification Thesis': authority is justified where it is demonstrated that a subject will better conform with their reasons for action by following the directives of an authority than by trying to conform directly.[449] For example, we will be better able to drive safely by obeying the directives of traffic officers (for example to stop at Stop signs) than by trying to work out for ourselves what constitutes safe driving. In terms of coordination, this amounts to an

[448] Thorvaldur Gylfason, 'Democracy on Ice: A Post-Mortem of the Icelandic Constitution' *Open Democracy* (19 June 2013) <http://www.opendemocracy.net/can-europe-make-it/thorvaldur-gylfason/democracy-on-ice-post-mortem-of-icelandic-constitution> accessed 22 March 2014.
[449] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 53.

argument that an authority is only justified where it would coordinate human behaviour better than the existing alternatives, which for present purposes might be the past regime or alternative models for future change. This approach is descriptive in the sense that it is connected to the reasons that people have for following the directives of an authority, and normative in the sense that it requires that in order to be legitimate, an authority must be an effective coordinating device—an effective way to achieve certain public goods. Raz's approach is particularly helpful in the context of a constitutional and legal system in transition; the shifting towards a democratically elected and legitimate mode of government is linked to the reasons of the populace to comply with the directives of the new, tenuous authority. Although the new constitutional regime may be drafted by an unelected body, or the legislature in flux, the promise is that the new regime will provide certain goods—peace, reconciliation, stability, free trade and protection of property, freedom of speech, etc—that lend the constitutional structure legitimacy.

Raz is not the only theorist to focus on reasons, and the coalescence of interests between government and citizens. Hardin links acquiescence to his conception of constitutions as ***coordinating devices***. Invoking David Hume, he elaborates a 'dual-convention' theory, whereby

> Government derives its power (not its right) to rule by some specific form of coordination that is a convention and the populace acquiesces in that rule by its own convention. Once empowered by these two conventions, the government has the capacity to do many things, including ancillary things unrelated to the purpose of maintaining social order.[450]

[450] Hardin (n 4).

Each of these approaches to defining legitimacy has something to offer in understanding the concept. Throughout this thesis, I adopt Raz's approach, arguing that a constitutional regime is legitimate where its authority provides its citizens with reasons for action that pre-empt their existing reasons. Raz argues that a regime is legitimate when its rules help subjects to conform with reasons that they already apply to them. This is an instrumental defence of authority, and need not be associated with any one mode of rule formation, such as democracy.[451] I argue that there are various features associated with interim constitutions—their temporariness; their two-staged drafting process; popular involvement; reference to international law; high levels of amendability and judicial review—that reflect different modes of legitimate authority, or different ways of achieving legitimate authority. Each of these additional sources of legality and authority increase the prospect for citizens that their reasons for supporting the state will align with the goods that they seek or that constitute the good life, such as peace, the ability to own property, free speech, and so forth.

It is arguable that Raz's approach is one way of exploring the idea of rational-legal legitimacy, within Weber's tripartite definition. This will be my primary focus, in part because it is the most closely connected with constitutional law and the process of constitutional change. However, at times it will be necessary to refer to Weber's concepts of traditional domination (for an understanding of the influence of history on legitimacy) or charismatic domination, to understand the role played by particularly important figures.

[451] See discussion in Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346; see discussions in Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451.

Throughout this Chapter, I explore the ways in which the two-staged nature of interim constitutional drafting allows for greater legitimacy of a constitutional system, increases the likelihood of the ultimate constitution serving as an effective coordination device, and provides reasons for action to its citizens. Not all interim constitutions have followed this path; however, the distinct two-staged nature of constitutional drafting that arises with the discrete drafting and adoption processes for interim and final constitutions, if used effectively, can increase the coordinating potential and ultimately the legitimacy of a constitutional system.

5.2 Stage One: The drafting of the interim constitution

This two-staged feature of modern constitution-making is not, as with some other aspects of transitional constitutionalism, unique to *interim* constitutions. It is, however, best embodied in the clearly phased processes adopted in interim constitutions. In her article *Constitution Writing in Post-conflict Settings: An Overview*, Jennifer Widner notes that

> constitution writing embraces a bundle of procedures, not a single, identifiable decision rule. It generally covers a number of functions, organized in stages: negotiation of ground rules; development of interim documents or immutable principles; preparation of an initial text; deliberation and adoption of a final draft; and finally, ratification and promulgation.[452]

Each of the case studies considered in this thesis has used complex and multi-phased procedures to create interim and permanent constitutions, and it is useful to identify some

[452] Jennifer Widner, 'Constitution Writing in Post-Conflict Settings: An Overview' (2007) 49 Wm. & Mary L.Rev 1513, 1522.

key aspects of those procedures, and how they functioned in relation to the broader project of legitimacy. In this section I explore the preliminary stage of drafting in the interim constitutional process: either Round Table or similar discussions, or peace agreement talks amongst warring parties. In each case these preliminary talks take place in the context of constitutional and political uncertainty, and thus represent an early step towards legitimate and effective constitutional change. I argue that the first stage of this two-stage constitutional drafting process is characterised by: a rejection of or commitment to moving away from the constitutional status quo; the adoption of a draft interim constitution by a quasi-representative constitutional body; the commitment to a second stage of constitutional drafting; and a commitment to a more democratic, rights-oriented final constitution. Each of these traits may contribute to greater constitutional coordination and constitutional legitimacy, though the period may be difficult and fraught with instability, including shifting coalitions and porous relationships between parties.

5.2(a) Commitment to constitutional change; rejection of the past

The commitment to constitutional change may be negotiated in a complex manner in the interim or two stage constitutional drafting process; the approach often tends away from a *revolutionary* model and towards a staged reform process. Timothy Garton Ash, in various historical accounts of the era, has argued that the Round tables in both Poland and Hungary were part of the gradual and non-violent nature of the transformation from communist state to democracy; he argues that the period embodied a spirit somewhere

between reform and revolution ('refolution').[453] Similarly, Arato characterises the two-stage approach to constitution drafting as the democratic alternative to 'revolutionary constitution-making'.[454] Arato cites the work of János Kis, in which '*reform* is defined as continuity of both legitimate authority and legality, *revolution* as rupture in both dimensions, and *coordinated transition* or *negotiated (regime)* transition as rupture of legitimacy but generally with legal continuity'.[455] It is arguable that interim constitutional drafting processes are predicated on two equally important precepts: the promise of change or rejection of the past, combined with a willingness on behalf of those negotiating the change to work with the existing legal system or representatives of the past era.

In South Africa, the 'ingenious solution' devised by the NP and the ANC was to initiate a two-stage constitution-making process, by which an interim constitution would operate for a limited period of time, while a democratically elected national legislature would draft a new constitution. The 'key to the resolution of the deadlock'[456] came in the introduction of the novel[457] use of Constitutional Principles, with which the ultimate constitution would need to comply. The 'Postscript' to the Interim Constitution described the Interim Constitution as an

[453] Timothy Garton Ash, cited in János Kis, 'Between Reform and Revolution' (1998) 12 East European Politics & Societies 300, 301–2.
[454] Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press 2009), viii.
[455] Ibid, 5.
[456] *Certification of the Constitution of the Republic of South Africa* (1996) 4 SA 744 (Constitutional Court of South Africa) [13].
[457] Hassen Ebrahim and Laurel E Miller, 'Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid' in Miller, Laurel E (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 127.

> historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy, and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[458]

Similarly, James Gathii has argued that although 'constitutions have come to symbolize a commitment to make a complete break with the past', in the case of the DRC from Mobutuism, there is continuity as well as change.[459] Thus even in cases where constitutional and political change is dramatic, the interim constitutional approach embraces a bridging approach, rather than representing a dramatic break from the past regime.

5.2(b) Roundtables and initial drafting bodies

The first step in the negotiated transition of two-stage constitutional drafting often comes in the form of preliminary discussions which have, since the Central and Eastern European constitutional transitions, been known as 'round tables'. In *Constitution Making Under Occupation*, Arato observes that interim constitutions help with 'subjecting the process of constitution making to constitutionalism but not with the vexing problem of how to begin democratically or at least legitimately where there was no democracy before',[460] arguing that round tables are 'called upon' to play this role. As Arato notes, round tables are unelected bodies (ordinarily of political and legal elites), that lack popular legitimacy, but, as he contends, may be able to gain some legitimacy by an inclusive, transparent and consultative approach.

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[458] Postscript, *Interim Constitution of the Republic of South Africa 1993*.
[459] James Thuo Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya' (2009) 49 William and Mary Law Review 1109, 1110-1111.
[460] Arato (n 18) 72.

Preliminary constitutional negotiations involve threshold questions that can be highly controversial: who takes part in the negotiations; on what terms does it occur (or, as the question arose in Hungary, *what shape is the table*)*;* are the proceedings formal and intended to be binding, or are they open-ended and exploratory; when do the talks begin; when should the talks end. Often, due to the repressive nature of the former regime, parties appearing to negotiate at preliminary talks may have a claim to representing groups of people, but cannot point to electoral support or even membership to demonstrate this claim.

The Round Tables came to prominence in **Eastern Europe** in the post-communist transitions. The Polish roundtable, as has been discussed, began early, even before the end of communism, and it is arguable that it has served as a kind of model for subsequent roundtables. As a participant in the Princeton Workshop on Constitution Building Processes argued,

> It developed a relationship between the communist establishment and the opposition. The idea was not to replace the existing system, but rather to open participation to Solidarity. It took several months to organize, as each side grew to understand what was involved. Eventually it convened with government and Solidarity representatives, as well as Catholic Church observers, although it really only met twice. Between the opening and closing meetings, committees and sub-committees dealt with the real issues. When disputes arose, the sub-committees sent the problems to the committees, and the committees sent the problems they could not resolve for mediation at high levels, usually informally. The sides cut deals about which group would hold each of several key positions and how the reform process would unfold.
>
> The roundtable accomplished three tasks in Poland. It addressed what would happen to Solidarity by re-legalizing the union as an opposition party. It prepared an election in which Solidarity could contest seats and win representation. Finally, it offered some guarantees to the

> Communists. Afterwards the parliament pursued the actual job of writing a new constitution. [461]

As discussed in relation to the longer-term effects of the interim constitution in **Poland**, the Polish Round Tables and the April 1989 Round Table Agreement gave way to popular elections, and the drafting of the permanent constitution by a democratically elected parliament. Interestingly, because the Senate transitioned to fully open elections before the Sejm did, there is a kind of intermediate phase, where one house of the Polish parliament was popularly elected and drafting a constitution with popular authority, and the lower house was a remnant of the pre-transitional era. As Jedruch discusses, the Sejm elected in mid-1989 is known as the last (Number X) of the communist Polish People's Republic, whereas the freely elected Senate is known as the first (I) of the Polish Republic established in 1989.[462] The success of the opposition Solidarity movement at the June 1989 election was a surprise to many, including Solidarity's leaders,[463] and reflected both a desire for change and the strong personal popularity of Walesa.[464]

The **Hungarian** roundtables were very much informed and influenced by the Polish experience.[465] Whereas in Poland the opposition movement was relatively unified and centralised in the form of Solidarity, in Hungary the opposition movement was more fragmented. Consequently, the first round table in the Hungarian context was exclusively a group of opposition parties- the **Opposition Round Table** (the Ellenzéki Kerekasztal or

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[461] Bobst Center for Peace & Justice, Princeton University, in conjunction with Interpeace and International IDEA, 'Proceedings, Workshop on Constitution Building Processes' (2007) 16.
[462] Jacek Jędruch, *Constitutions, Elections and Legislatures of Poland, 1493-1993—A Guide to Their History* (EJJ Books 1998) 413.
[463] Ash (n 14), 25.
[464] Ibid, 33. Walesa's 'personal popularity and authority had reached extraordinary heights, reinforced, of course, by every meeting with a President Mitterand or Bush'.
[465] Hardin (n 4).

'EKA'), which was a consensus-based decision making group that operated between March and June 1989. In the next phase from June to September 1989, the Opposition Round Table entered into talks with the Communist Party/government representatives, and third parties affiliated with the Communists; these trilateral talks constituted the **National Round Table.**[466] In a third phase, following the declaration of the new Republic on 23 October 1989, talks in the National Roundtable continued. The talks in Hungary were significant, and as Bozóki argues, they 'constituted the hub of a total revolutionary transformation. The history of the change of regime in Hungary is unintelligible without a clear insight into the history of the Roundtable talks.'[467] In spite of their significance, these talks were less connected to a popular movement, when compared to the Polish process: Ash argues that '[t]here was no massive social mobilisation. Active participation in politics remained largely confined to the intelligentsia'.[468]

In both Poland and Hungary, the Round Table talks began without a clear agenda, and before transition was by any means certain, or even likely. In the Hungarian case, the unelected nature of the NRT made the ORT reluctant even to engage in negotiations around constitutional change and a new economic platform.[469] The ORT representatives 'held the view that in these matters only a newly and freely elected Parliament would be empowered to make decisions',[470] but the ruling Hungarian Socialist Workers' Party

[466] Timothy Garton Ash records that there were extensive negotiations about the shape of the roundtables in Hungary: Ash (n 27) 56.
[467] Bozóki (n 14).
[468] Timothy Garton Ash, *We The People: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague* (Penguin Books 1999), 56.
[469] Bozóki (n 26), xxii-xxiii.
[470] Ibid, xxii.

('MSzMP') insisted upon resolution of key constitutional questions as a precondition for transition.[471] The ORT agreed to these conditions, and under these circumstances the constitution was fundamentally reworked into what became the Hungarian Interim Constitution. Bozóki observes that all parties were intent on avoiding violent conflict (mindful of the quashed 1956 uprising), and thus this period was not a 'razing' to the ground of an old regime, but an attempt to 'reconstruct' older democratic institutions.[472] Indeed, the constitutional change was conducted – to refer to Kis's schema – with a rejection of the legitimacy of the old regime, but within its laws.

Albania began the process of democratisation later than its central and eastern European counterparts. In 1990, the Communist Albanian Party of Labour was still in power, with Ramiz Alia as the nation's leader, having replaced the long-time dictator Enver Hoxha in 1985. In a slow response to the liberalisation of neighbouring states, and internal pressure, Alia began a process of opening up Albania to the international community, and allowing some political freedoms to Albanian citizens.[473]

In June and July 1990 a 'political earthquake shook Tirana',[474] with mounting student protests, and large numbers of Albanians attempting to emigrate or seek asylum in neighbouring countries. In an initial election, the successor to the Communist party, the Socialist Party of Albania, won a two-thirds majority, and enacted the first part of constitutional reform that would become the interim constitution. Although they had a sufficient majority to pass a draft of the new constitution in parliament, they

[471] Ibid, xxiii.
[472] Ibid, xxv.
[473] Owen Pearson, *Albania as Dictatorship and Democracy: From Isolation to the Kosovo War 1946-1998* (The Centre for Albanian Studies 2006) 654.
[474] Ibid, 652.

compromised and adopted the transitional constitution, with the intention that it would be 'replaced by a full constitution by early 1992'.[475] Two months later, following protests, strikes and violence, the government collapsed, and the Democratic Party which had formed less than a year and a half earlier, was elected in March 1992.[476] Under the leadership of Sali Berisha, the Democratic Party government, instead of replacing the IC, enacted a number of amendments, including a chapter 'reorganising the judicial system and establishing a Constitutional Court for the first time', and chapters on local government and human rights.[477]

In this case, it is possible to conceive of the first stage of interim constitution drafting (comprised as it is of sub-stages), as being similar to the Polish and Hungarian systems in that it operated through the legal system and rules of the earlier era, but a moment of rupture in terms of public response and the collapse of the government shifted the locus of legitimacy. The 'Major Constitutional Provisions' or IC, represented a 'dramatic change from the past', but as Carlson notes, 'suffered from shortcomings and lacked clarity in certain areas'.[478] As will be discussed in the following section, these shortcomings were later exploited in the midst of the political disagreements and unrest that followed.

In **South Africa**, the significance of the role of the Round Table and the initial Technical Committee drafting the interim constitution is magnified by the close links

[475] Kathleen Imholz, 'A Landmark Constitutional Court Decision in Albania' (1993) 2 Eastern European Constitutional Review 23, 24.
[476] Pearson (n 37) 654–655.
[477] Imholz (n 39) 24.
[478] Scott N Carlson, 'The Drafting Process for the 1998 Albanian Constitution' in Laurel E Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 4.

between the interim constitution and the permanent constitution discussed in Chapter 4. The Constitutional Court displayed an awareness of the lack of democratic support in the interim constitution in its Certification decision, saying '[c]ompiled as it was by the unmandated negotiating parties, [the interim constitution] has no claim to lasting legitimacy or exemplary status'.[479] Where the popularly elected legislature is tightly constrained by the decisions of the unelected early elite discussion group, this may create doubts about legitimacy in the process. As Ebrahim and Miller argue, the

> democratic credentials can be seen as weak, as is often the case with interim measures in transitional and post-conflict settings. Given the control the interim constitution exercised over the final constitution through the constitutional principles, that weakness is not insignificant.[480]

Furthermore, unlike Poland, South Africa did not have a popular referendum against which to check the final outcome of the decision.

In **Nepal**, constitutional change began in the context of a legal rupture: 'the monarchy, exercising a kind of dictatorship that violated the constitution of 1990, was forced to extralegally reconstitute the illegally dissolved legislature';[481] and a provisional government accountable to the legislature then participated in the multiparty agreements that led to the Nepali IC. The IC was adopted in the context of an ongoing peace process surrounding the end of the Nepalese Civil War in 2006. The *IC-N* was created by the Interim Constitution Drafting Committee (ICDC), a six person committee of senior

[479] *First Certification Decision* (n 20) [30].
[480] Ebrahim and Miller (n 21) 122.
[481] Arato (n 18) 82.

Nepalese lawyers formed in July 2006,[482] and led by former Supreme Court Justice Laxman Prasad Aryal.[483] The Committee and the drafting of the interim constitution followed a 'landmark deal' between the Maoist rebels and the interim government.[484] The government comprised a seven-party alliance of democratic-based parties seeking to end autocratic rule in Nepal. The ICDC reached agreement on the text of the Interim Constitution in December 2006, and the text was then approved by the Nepalese cabinet and ratified by the Nepalese parliament in January 2007.[485] The interim text deferred key decisions on several controversial matters, including the fate of the monarchy, leaving those decisions to be made by a Constituent Assembly. The parties involved in the negotiations were politically if not ethnically inclusive.[486] As Arato observes, in this case, 'after the initial revolutionary break…there has been an attempt to adhere to principles of legality', such that 'legal discontinuity has not become the excuse for legal voluntarism'.[487]

The first stage of the constitutional drafting process in **Iraq** is unique amongst the set of case study countries. The invasion and occupation of Iraq, as Arato argues, created an '*externally* imposed, *revolutionary* rupture involving a complete break[488] in

[482] Jeannie Shawl, 'Nepal Interim Constitution Panel Submits Draft' [2006] Jurist Legal News and Research <http://jurist.org/paperchase/2006/08/nepal-interim-constitution-panel.php> accessed 2 October 2011.
[483] Jaime Jansen, 'Nepal Begins Consultations on Interim Constitution' [2006] Jurist Legal News and Research <http://jurist.org/paperchase/2006/06/nepal-begins-consultations-on-interim.php> accessed 2 October 2011.
[484] ibid.
[485] Alexi Unkovic, 'Nepal Parliament Ratifies Interim Constitution' [2007] Jurist Legal News and Research <http://jurist.org/paperchase/2007/01/nepal-parliament-ratifies-interim.php> accessed 30 September 2011.
[486] Arato (n 18) 82.
[487] ibid 84.
[488] See discussion of 'clean break' constituiton-making in Vicki C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2007) 49 William and Mary Law Review 1249, 1260.

legality'.[489] Arato argues that the constitutional drafting process that occurred in Iraq represents a 'pathological or highly defective version' of the two-staged constitutional process which he advocates: one 'with an interim constitution as its centrepiece and with relatively free, competitive elections between the two stages, the transition between them provided by the election of a *nonsovereign* constitutional assembly', where nonsovereign means that the assembly would neither produce its own rules nor have totally free reign in producing a final constitution.[490]

Zaid Al Ali, in his book *The Struggle for Iraq's Future*, demonstrates the way in which the very selection of drafting bodies and representatives was fundamentally controlled by the US administration;[491] even before invasion occurred, the US and the UK ran a 'Future of Iraq Project[492] which involved western-friendly expatriate Iraqis, so that the transition landscape began in a context disconnected to the Iraqi people even before there was a transition to manage.

There was resistance among Iraqis about an externally imposed constitution; Sistani issued a fatwa stating that 'any constitution not drafted by a democratically elected boy would be 'unacceptable''.[493] By calling the interim text the 'Transitional Administrative Law,' the drafters 'avoided any use of the "c" word to achieve apparent compliance with the fatwa'.[494]

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[489] Arato (n 18) 82.
[490] ibid 60.
[491] Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press 2014).
[492] David L Phillips, *Losing Iraq: Inside the Postwar Reconstruction Fiasco* (Basic Books 2006) 38.
[493] Jackson (n 52) 1301.
[494] ibid.

Arato argues that the failure to have a genuinely representative roundtable process to draft the IC in Iraq rendered the process 'fundamentally flawed'.[495] Nonetheless, the promise of legitimacy in a *future*, permanent constitution was described in the Preamble:

> This Law is now established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being.[496]

Another interim constitution involving a break in legality was the **Thai** IC of 2006, which was adopted following the 'bloodless' coup of September 19, 2006.[497] The military junta, led by General Sondhi Boonyaratkalin, abolished the 1997 constitution, and adopted an interim constitution, which like so many before it, might be viewed as a 'blessing' of the coup.[498] The break with legality is effectively conceded in the text of the interim constitution, with the 2006 IC providing immunity for any offences committed in prosecution of the coup.[499] Ginsburg notes that many aspects of the 1997 constitution continued in force in spite of the adoption of the interim constitution; various agencies established to act as 'guardians' or checks on public institutions continued to operate.[500] The IC, adopted as it was as a result of a coup, and lacking even a thorough-going reform of the existing system, lacked a certain legal reality, as well as legitimacy.

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[495] Arato (n 18) 75.
[496] *Law of Administration for the State of Iraq for the Transitional Period 2004.*
[497] Tom Ginsburg, 'Constitution Afterlife: The Continuing Impact of Thailand's Post-Political Constitution' (2009) 7 International Journal of Constitutional Law 83, 1.
[498] ibid 8.
[499] *Constitution of the Kingdom of Thailand (Interim Edition) of BE 2549 2006 s 37.* Validated in *Constitution of Thailand 2007 s 309.* Harding and Leyland note that 'no person has ever been punished for mounting a successful coup in Thailand, and the worst practical consequence for a coup-promoter has been exile'. See Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart 2011) 29.
[500] Ginsburg (n 61) 2–3.

In a number of interim constitutional processes that involved the cessation of hostilities and the adoption of a ***peace agreement***, peace talks amongst belligerents functioned instead of or as a precursor to preliminary constitutional talks. Negotiations in these cases are typically conducted by warring parties, sometimes with input from other civil society groups, and typically with observation and assistance by regional or international representatives or NGOs.

The Interim Constitutions of the **Sudan** and then **South Sudan** emerged as part of a peace process. There were a series of conflicts in the Sudan, beginning with the 'First Sudanese Civil War' (Anyanya rebellion) of 1955-1972, and followed after a brief uneasy peace by the Second Sudanese Civil War which began in 1983 and continued until the signing of the Comprehensive Peace Agreement in January 2005.[501] The drafting of the CPA, and then the Sudan IC, constituted the first stage of constitution drafting for the Sudan, and a precursor to the first stage of constitutional drafting for South Sudan. The CPA was signed by the Sudan People's Liberation Movement ('SPLM', the Southern Sudanese movement) and the Government of the Republic of Sudan in January 2005, and was followed in July 2005 by the adoption and then coming into force of the Interim Constitution.

The issue of independence for Southern Sudan was treated as a negotiated transition: in the CPA and the Sudanese IC, Southern Sudan remains part of the Republic of Sudan, but provides for its possible secession. The issue of independence was crucial to the conflict and its resolution, and the promise of the possibility of secession was vital

[501] Kevin L Cope, 'Sudan's Dualistic Constitution' in Denis J Galligan and Versteeg, Mila (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013), 298.

to the legitimacy of the constitution, and the acquiescence of the people, particularly those in South Sudan.

The South Sudanese IC is in many ways a version of the 2005 Republic of Sudan IC, with USAID stating that '[a] sweeping overhaul of the existing constitution was never contemplated'.[502] The process was dominated by the SPLM, however, and many groups were excluded, with civil society groups such as women and disabled groups being criticised by President Kiir for undermining unity, by suggesting 'alternative' constitutions.[503] The narrative of liberation was used to silence alternative voices. As with the drafting of the CPA and Republic of Sudan IC, international actors played an active role in the drafting process, and had an influence on the rights-based sections of the Constitution in particular. Cope notes that the lack of inclusiveness in the revision process 'provoked widespread public anger at the Kiir administration', and the process 'raised public doubts' about the credentials of the South Sudanese government as transparent and democratic.[504] In general the revisions to the constitution gave increased power to the executive (reflecting a confidence that the SPLM has no truly viable opposition), and decreased judicial and other oversight over the political process. Attorneys are placed under national control and the President may dismiss judges and suspend rights if he deems an emergency to have taken place. The Interim Constitution of South Sudan was led by the SPLM, the body whose plight had been crucial to the Peace Agreement and Republic of Sudan IC; but the failure to engage with the public and

[502] Kevin Cope, 'The Intermestic Constitution: Lessons from the World's Newest Nation' (2013) 53 Virginia Journal of International Law 667, 696.
[503] Cope (n 66).
[504] ibid 696.

lesser political voices undermined the legitimacy- and ultimately the stability- of the South Sudan IC.[505]

In the **DRC**, the Interim Constitution also followed a peace agreement, in this case the Pretoria Agreement that ended a five-year war. In accordance with an agreement of the Inter-Congolese Dialogue, President Kabila appointed the Congolese Constitutional Commission that was tasked with drafting what became the 2003 DRC-IC.[506] The Commission had representatives from the larger political parties, and as Gathii argues there was 'little widespread discussion of the draft [and] to the extent there was consultation, it appeared that the views of the people were ignored'.[507] The international community was well represented at the constitutional talks—France, Mauritius, Belgium and the US assisted the drafters—and various international organisations including USAID and the UNDP were involved.[508] The IC was adopted by the transitional National Assembly in May 2005, and then received 84% support in a referendum of December of that year. The referendum and contemporaneous elections were 'widely considered procedurally successful', although overall public awareness and understanding of the constitution was low.[509] Gathii argues that the urgency of the situation was helpful: the sheer necessity of ending the conflict made possible a relatively

[505] Hilary Matfess, 'The Root of South Sudan's Crisis Is Constitutional Not Ethnic' [2014] *Think Africa Press* <http://thinkafricapress.com/south-sudan/constitutional-crisis-not-ethnic-one-kiir-machar-splm>.
[506] Gathii (n 20), 1113.
[507] Ibid, 1114, discussing popular opposition to the death penalty.
[508] Ibid, 1114-5.
[509] Ibid, 1115.

successful constitutional drafting process, including high public approval of a document that was adopted without real popular consultation.[510]

In a number of the case study countries, early talks between unelected political figures resulted in the first step in a negotiated transition. A detailed factual analysis of the authority of these figures or processes is beyond the scope of this thesis, but it is evident that in some cases personal popularity or moral authority played a relevant role (as in Poland), in some cases a hearkening back to an earlier tradition or constitutional era was relevant (as in Nepal, or in South Sudan), and in some cases an emphasis on legality of the procedures was relevant. In some cases, the primary step was grounded in illegality: an illegal occupation, or a coup. In any scenario, it is possible for the second step and the transition to a permanent constitution to be a more democratic process, and one that increases the legitimacy and coordinating efficacy of the constitutional system.

5.3 Stage Two: The drafting of the permanent constitution

5.3(a) Legitimacy and constitution-drafting

In interim constitutional drafting processes, the second phase of drafting involves the creation of a permanent text to succeed its temporary predecessor. In most cases, the second phase of constitutional drafting involves some or all of: the election or appointment of a body with greater popular support and apparent legitimacy; the consideration of constitutional drafts; the solicitation of public views and contributions; and the consideration of the final draft either by a representative body or the people

[510] Ibid, 1112.

through referenda. It is arguable that the second part of this two-stage process is an instrument by which a new constitutional structure establishes legitimacy. That is, the drafting of a constitution through a democratically elected body that seeks public participation, and ultimately relies upon public approval, is more likely to effectively coordinate the constitutional system.

If handled effectively, this second stage of the process can lead to more time for representatives to consult with their constituencies or supporters; an opportunity for representatives to consult with the international community and consider any advice; and time in which representatives may acquire information and develop more sophisticated positions and platforms. It is also possible that the public participation either through consultation or referendum could have positive benefits for the quality and representative nature of the constitution, as well as associated benefits of civic awareness, constitutional literacy, and an investment in the constitutional process. All of these factors may contribute to a constitution that is more effectively drafted – and better suited to coordinate a polity—than a constitution adopted in a singular process. In this section I first provide an overview of the nature of constitution making in this second stage of the interim process, and then go on to highlight particular issues and themes in different case studies. The drafting process of each permanent constitution could be the subject of an extended study; my intention in this section is not to provide an exhaustive account of drafting processes, but merely to draw out the key issues that arise in interim processes, and highlight both the diversity and coherence within the case studies.

5.3(b) Overview

In institutional terms, interim constitutions approach the drafting of the permanent text in a range of ways. Drafting processes are not monolithic, and must be considered in their component parts. Throughout this section, I consider the following features of drafting for permanent constitutional texts: the drafting process, including the drafting body; the adoption process; the consultation or review process; and the approval process. Before discussing these in greater detail with reference to the case studies, I will provide a brief summary and overview of the key observable trends.

Interim constitutions typically delegate the primary responsibility for drafting an interim constitution to a specially appointed body: a constitutional commission or committee, with appointed representatives drawn from parliamentarians or other office holders (as in Poland, Albania, the DRC); a Constituent or Constitutional Assembly who were democratically elected, and also performed other legislative functions (as in South Africa, Nepal); and in Thailand a Constitutional Convention that empowered a Constituent Committee to draw up the draft. In Poland, a constitutional amendment allowed the public to submit constitutional drafts, if they met a threshold of 500, 000 signatures. Nonetheless, it was the Constitutional Committee that was charged with the responsibility of assessing and uniting these drafts.

The situation in Iraq was complicated; the TAL stipulated that the National Assembly (the general legislature[511]) would write a draft of the permanent constitution.[512]

[511] Law of Administration for the State of Iraq for the Transitional Period (n 60) Chapter Four- The Transitional Legislative Authority.

However, in practical terms this responsibility was taken on by a Constitutional Commission, but was also to be negotiated by the 'informal meeting of principals…called the 'Leadership Council' or the 'Kitchen'', before ultimately referring to the National Assembly.[513] As will be discussed in more depth below, this multi-layered process played out in a problematic way.

In Sudan, according to the Interim Constitution and the CPA, a National Constitutional Review Commission is tasked with creating a permanent constitution. In spite of some recent amendments to the constitution (see discussion in Chapter 6), there has been no real move to replace the Interim text. In a February 2015 article in the *Sudan Tribune*, President Bashir was reported as saying that 'the drafting of a permanent constitution will be preceded by a comprehensive Islamic dialogue between all sectors of society to reach a constitution acceptable to all the people of Sudan and a model of the Islamic state', although, as the article notes, the 'matter is supposed to be discussed in a national constitutional conference with the participation of all the political forces including the armed opposition groups'.[514]

In terms of adoption, in general a constitutional text, once drafted, is formally adopted. In states with elected constituent or constitutional assemblies, the adoption is typically done by the drafting body itself, as in South Africa. Under the terms of the IC-N, the Nepali Constituent Assembly must pass a draft constitution by a two-thirds

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[512] ibid Article 60.
[513] Arato (n 18) 220.
[514] 'Sudan's Bashir Reiterates Adherence to Islamic Constitution' *Sudan Tribune* (Khartoum, 16 February 2015) <http://www.sudantribune.com/spip.php?article54016> accessed 25 February 2015.

majority in order to adopt it.[515] In states that use smaller constitutional committees, typically a draft is adopted by the legislature, as a kind of preliminary ratification stage. In Poland the text of the proposed permanent constitution was considered and debated extensively in the National Assembly (comprising both houses of parliament) before being adopted on April 2, 1997.[516] Legislatures in Albania[517] and the DRC[518] adopted permanent constitutional texts, and in Iraq the National Assembly declared the text 'final', although it was not, and this did not meet the Article 60 requirement to adopt the text.[519]

In terms of final ratification measures, referenda were used in Albania, Poland, Iraq, the DRC, and Thailand, in the adoption of permanent constitutional texts. Referenda are possible methods of resolving constitutional issues, but not mandatory in approving constitutional texts in the interim constitutions of Nepal[520] and Sudan.[521] Somewhat unusually, a referendum was held in Hungary in November 1989, shortly after the interim stage of drafting was complete, and the 1989 Constitution was adopted. That referendum decided that Hungary would become a parliamentary rather than presidential republic,

[515] Interim Constitution of Nepal 2063 2007 Article 70.
[516] Lelch Garlicki and Zofia Garlicka, 'Constitution Making, Peace Building and National Reconciliation: The Experience of Poland', *Framing the State in Times of Transition* (United States Institute of Peace 2010) 400.
[517] Carlson (n 42) 321.
[518] In accordance with Article 104 of the Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') 2003; Gathii (n 23) 1115.
[519] Arato (n 18) 240.
[520] As provided in Article 157 of the Interim Constitution of Nepal 2063 (n 79). See also: 'Referendum on Major Issues of Constitution: Bhandari' *EKantipur* (Kathmandu, 25 October 2014); Surendra Bhandari, 'Constitution Making and the Failure of Constituent Assembly: The Case of Nepal' (2012) 11 Ritsumeikan Annual Review of International Studies, 1, 12.
[521] Transitional Constitution of the Republic of South Sudan 2011 Article 217.

and represented, in Arato and Miklósi's words, the 'only democratic participation that Hungarian constitution making involved'.[522]

The consultation or review aspect of constitution drafting differs markedly from case to case. However, in most cases, the second stage of constitutional drafting—for the permanent constitution—typically involves more popular participation than its predecessor interim text. Consultation and review typically involve participation from three broad groups: citizens; domestic actors and experts; and international actors and experts. These groups can overlap and interact in complex ways.

There are a number of ways in which the citizenry might be engaged in the project of constitution making. Popular participation and legitimacy are closely connected in the literature and reasoning surrounding constitution drafting; as Justin Blount notes, the 'most frequently cited, and most intuitively plausible, claim for participation is that it enhances constitutional legitimacy'.[523] There are other possible claims as to the goods related to public participation in constitution drafting, but those are discussed elsewhere in this thesis- in Chapter 3 in relation to reasons for adopting an interim constitution, and in connection with transitional justice goals in Chapter 7. Popular participation and involvement may take several forms: it may be achieved indirectly through elections of drafters, through referenda, and through public consultation, submissions and questionnaires.

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[522] Andrew Arato and Zoltán Miklósi, 'Constitution Making and Transitional Politics in Hungary', *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 351.

[523] Justin Blount, 'Participation in Constitutional Design' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 39.

An example of direct popular involvement is evident in South Africa, where citizens made direct submissions to a constitutional drafting process. Vivien Hart has argued that the two million submissions made to South Africa's constitutional assembly have 'set a standard' for constitution makers in terms of educating of the public. Jackson describes the South African process as involving 'a stunning amount of outreach…[which] included the extensive circulation of drafts and explanatory materials that led to more than 70 percent of the public having knowledge of the constitutional process'.[524] In Poland, public consultation by the government, educational projects by the Constitutional Tribunal[525] and referenda were all used as part of efforts to engage with the public.[526] The efforts to engage with the public in Albania and Iraq are discussed below. In the DRC, as Gathii observes, in spite of a lack of wide-ranging public discussion during constitution drafting, the Constitution was approved at referendum by 84% of voters.[527]

Public participation and representation may be channelled and structured in a way that allow for groups to share power, or for one group to have the power of veto over another. The Interim Constitution of South Africa provided for a 'Government of National Unity' (or 'GNU'), which meant that any party with twenty or more seats in the National Assembly would obtain a cabinet seat, and thus participate in government.[528] Group rights were protected in other ways in the SA-IC, and the two-thirds majority

[524] Jackson (n 52) 1269.
[525] Irena Grudzinska-Gross, 'Interview with Professor Andrzej Zoll, Chief Justice of the Polish Constitutional Tribunal' (1997) 6 Eastern European Constitutional Review 77, 78.
[526] Vivien Hart, 'Constitution Making and the Right to Take Part in a Public Affair' in Laurel E Miller (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 21.
[527] Gathii (n 23) 1112.
[528] Interim Constitution of the Republic of South Africa (n 22).

requirement for adopting the constitutional text provided an opportunity for veto.[529] The consociational or power-sharing aspects were reduced in the text of the permanent Constitution of South Africa adopted in 1996, and a GNU was no longer required.[530]

Consociational or power-sharing arrangements were incorporated into the interim constitutions of the DRC, Sudan and Nepal. As Mehler observes, the 'transitional government agreed upon in 2002 and established in 2003 functioned on a somewhat, but not all inclusive executive power-sharing formula' that involved various vice-presidents representing different groups; this structure was not continued in the permanent Constitution.[531] In Nepal, a consensus government was mandated by the IC-N, and in Sudan the arrangements concerning South Sudan and the consensus requirements associated with that amounted to consociationalism.[532] In Nepal, the system was nonetheless capable of producing outcomes favourable to particular groups; as Blount argues, the '2008 elections that gave the Unified Communist Party of Nepal–Maoist a sizable plurality may have undermined the consensual elements of the 2006 (Comprehensive Peace Agreement) (International Crisis Group, 2009)'.[533]

5.3(c) Case studies

In **Iraq**, the question of legitimacy is a difficult one, beginning as it does in an externally-imposed revolution. Arato writes that

[529] See generally Arend Lijphart, 'South African Democracy: Majoritarian or Consociational?' (1998) 5 Democratization 144.
[530] ibid 147.
[531] Andreas Mehler, 'Consociationalism for Weaklings, Autocracy for Muscle Men? Determinants of Constitutional Reform in Divided Societies' (2013) 15 Civil Wars 21, 30–31.
[532] ibid 31–2.
[533] Blount (n 87) 43.

> It took [the Bush administration] over four months to realize that top-down constitution making in Iraq…had to be abandoned. Not only the Ayatollah al-Sistani's democratic demand for a freely elected, sovereign constitutional assembly, but also informal proposals from the UNDP aiming at some kind of interim legitimacy, were initially disregarded. The latter, learning from recent efforts from South Africa to Afghanistan, suggested a genuine and pluralistic expansion of the Interim Governing Council, and gradual preparation for later free elections under international supervision, leading to a democratic constitutional assembly.[534]

This possibility was ended, however, with the imposition of the November 15 2004 agreement, which Arato describes as having been imposed in a 'coup-like fashion'.[535] The formal authority of the *TAL* in the eyes of international law was established through UNSC Resolution 1511, which recognised the Coalition Provisional Authority ('***CPA of Iraq***') as exercising temporary sovereignty, and the Iraqi Governing Council as embodying sovereignty. The November 15 Agreement, which led to the adoption of the *TAL*, lacked political legitimacy. It was created in a relatively closed process by the Drafting Committee of the IGC and the IGC itself, and it was influenced by the US-led 'Governance Team'.

Arato argues that in spite of the immense problems associated with legitimacy in Iraq, the interim constitution held the possibility of

> creating a provisional repository of state sovereignty, and establishing rules for the transition that include both the prerogatives of an electoral majority and fundamental constitutional principles affording rights and legal protections to minorities as well as individuals.[536]

[534] Andrew Arato, 'Sistani v. Bush: Constitutional Politics in Iraq' (2004) 11 Constellations 174, 174.
[535] ibid 175.
[536] ibid 187.

As mandated by the *TAL*, a Constitutional Drafting Committee (drawn from the elected members of the Transitional National Assembly), composed the permanent constitution, which was then approved in a referendum by the people of Iraq on 15 October 2005. However, as Arato and Zaid Al-Ali have discussed in their lengthy accounts of occupation-era Iraq, the drafting process was taken over by the Iraqi Leadership Council. Following the failed attempt of the chair of the Constitutional Committee to get an extension for completing the draft permanent Constitution, the Leadership Council (the 'informal meeting of principals'[537]) took over the matter. Al-Ali argues, based on the drafting history, that the expanded CDC (fifteen Sunnis—a group previously unrepresented—were added to the Committee)

> was making progress towards a constitution in which the central government would have played a much more important role than under the TAL…It turns out that most of the Sunni and Shia Islamists who were on the constitutional drafting committee had very similar ideas about what their future state should look like: they wanted for the state to be heavily influenced by religion, and also wanted for the central government to be the dominant force in the state and not the regions and provinces.[538]

Al-Ali notes that after the Leadership Council took over, the approach was revised, shifting to 'a very loose federation in which the central government played hardly any role'.[539] Rather than being debated by the National Assembly, the deputy speaker 'merely read the draft…without giving them a chance to debate or vote on it', and as a result,

[537] Arato (n 18) 236.
[538] Joel Wing, Interview with Zaid Al-Ali, 'How Faults With Iraq's Constitution Undermines The Country, Interview with Constitutional Scholar Zaid Al-Ali' (24 February 2014) <http://musingsoniraq.blogspot.co.uk/2014/02/how-faults-with-iraqs-constitution.html> accessed 17 February 2015.
[539] ibid.

'most of the drafters and most of the elected representatives of the people were totally shut out of the process'.[540]

Taking a somewhat more optimistic approach, Hart argues that although the Iraqi constitution process was not as participatory as some drafting processes, the fact that the *TAL* 'mandated informed public debate in the constitutional process'[541] contributed to public engagement with the process. Morrow, however, takes a dimmer view of public participation in the drafting process, describing constitutional committee meetings as inaccessible, taking place 'behind the blast walls, barbed wire, and gun turrets of Bagdhad's International Zone', difficult for Iraqis to enter.[542] Morrow characterises the outreach program as deeply flawed, noting that the outreach unit was understaffed and rushed in its work, and that although the outreach program received 400 000 submissions, 'none of these reached the committee itself by the deadline', and so were wasted.[543]

Although the *TAL* created a two-stage drafting process directed at greater legitimacy, its success in achieving these goals was hampered by the short time frame given for drafting, and by the practical and structural difficulties faced by the committee. Jackson, examining the missed opportunities for genuine public involvement in Iraq, notes that 'just days before the referendum on the final constitution, a provision was added—but not printed in the drafts previously circulated for review—to provide for a further revision soon after its ratification.[544] The drafting process for the permanent

[540] ibid.
[541] Hart (n 90) 21.
[542] Jonathan Morrow, 'Deconstituting Mesopotamia: Cutting a Deal on the Regionalisation of Iraq' in Laurel E Miller (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 585.
[543] ibid 587.
[544] 'Article 142, inserted on October 12 before the October 14 referendum…' Jackson (n 52) 1273–4.

constitution 'arguably exacerbated, not mitigated, group suspicion' between different sections of society.[545]

Public participation is not necessarily an indicator of constitutional success. Gathii argues that the **DRC** constitution has been relatively successful in spite of the lack of public participation, in contrast to the Kenyan constitution, which had a much more participatory model. I would argue that direct public participation in terms of consultation and feedback is the least important way in which the public might be involved in constitution drafting. The more important methods of public involvement are through effective representation by a democratically elected constitutional body, and the ability to confirm or reject a constitution at a referendum.

The **Polish** experience is an interesting study of the way in which public involvement can wax and wane; following the dissipation of the euphoria of 1989, the Small *Constitution* 'did not attract a great deal of attention or participation', but by 1997 the constitution had 'gained importance' due to three factors;

> The first was time, as the drafting process lasted long enough for public discussions to take place. The second was the referendum, as the requirement to have the constitution confirmed by a popular vote made the general public a necessary partner in enacting the document…The third was politics, as the drafting process became closely connected with parliamentary elections in its final stage…[546]

This close connection encouraged politicians to engage actively with the constitutional debate. Parliamentarians debated the draft constitution actively, and suggested some 500 amendments to the Constitution; the President suggested 41

[545] ibid.
[546] Garlicki and Garlicka (n 80) 406.

amendments.[547] The committee made recommendations about which amendments should be adopted, with the National Assembly having the final vote. Public participation in the referendum was, however, low: in a climate of political passivity, with less than half of eligible voters voting in the referendum,[548] and only a bare majority voting in favour of the Constitution, the text passed with the positive support of only one fifth of eligible voters. As Hart argues, '[t]he oft-cited function of legitimizing the text, essential if a culture of constitutionalism is to support its implementation, may not be achieved merely by casting a vote'.[549]

In the special case of **Hungary**—discussed in Chapter 2—a second phase of constitutional drafting ultimately began over twenty years after the 1989 Constitution was adopted. However, although adopted using the amendment procedures laid out in the 1989 text, it is difficult to see the Fundamental Law as the completion of an interim process.

János Kis, writing in the Introduction to *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* writes that the Law

> declares its continuity with the pre-war authoritarian regime while stigmatising the socialist party- which was three times elected to govern the country in free and fair elections- as the successor of a criminal organisation. It flies in the face of the principle of basic rights…It betrays

[547] ibid 400.
[548] ibid 401.
[549] Hart and Miller, Laurel E (n 90) 35–46; Richard Spitz and Matthew Chaskalson, *The Politics of Transition- A Hidden History of South Africa's Negotiated Settlement* (Hart Publishing 2004) 414; Ebrahim and Miller (n 21) 135.

> the principle of representative government by entrenching the current government's policy preferences into constitutional provisions…[550]

Kis observes that the drafters of the Law 'refused to see it as the second stage of the process started in 1989', instead claiming continuity with 'the 'historical constitution' of the Hungarian Kingdom [while remaining] conspicuously silent about any relationship to the constitutional changes of 1989'.[551] As such, Kis concludes, the anomaly of 'Hungary's post-communist constitution-making' is three-fold: the 'unusual delay'; that the second stage 'did not come as a completion but rather as a negation of the initial constitution-making process', and by dividing the nation rather than uniting it through its rejection of the principles of 1989.[552]

In the initial interim period, attempts were made by parties to replace the constitution.[553] Instead, the constitution was repeatedly amended (23 times between 1990 and 2010),[554] before being replaced by the Fundamental Law. The 'national consultation' process prior to the drafting of the FL on the iPad of Hungarian politician Jozsef Szajer was largely limited to sending surveys to Hungarians on key constitutional questions, with some 10% of the populace responding.[555] The process was driven by elites, lacked genuine public engagement, and reflected a narrow, majority-based and traditional view of Hungary.

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[550] János Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 1.
[551] ibid 4.
[552] ibid.
[553] ibid 8.
[554] ibid 9.
[555] Zoltan Simon, 'Hungary First to Write a Constitution on Ipad, Lawmaker Says' [2011] *Bloomberg* <http://www.bloomberg.com/news/2011-03-04/hungary-first-to-write-a-constitution-on-ipad-lawmaker-says.html> accessed 25 March 2012.

Kis writes of the 'serious…defect' of the 1989 Constitution as being that it was democratic in 'nature' (i.e. content and effect) but 'lacking democratic confirmation'.[556] In a way, as has been discussed earlier in this thesis, the Hungarian Constitution of 1989 was a victim of its own success. It functioned—with amendments, and the assistance of the Constitutional Court—as a patchwork but nonetheless effective, modern and liberal constitution. This effectiveness, combined with political apathy, meant that any initial intentions towards the temporariness of the interim text faded. It is arguably more correct to say that the interim nature of the 1989 text in some way lapsed in the mid-1990s as the constitution began to be viewed as a permanent text, without serious energy for reform. It is also therefore more accurate to view the Fundamental Law which was adopted in 2011 and came into force in 2012 not as a completion but as a new constitution, which used the amendment rule but disavowed much of the basis of its (initially) interim predecessor.

In **Nepal,** the relatively brief, elite-led process of Committee drafting of the IC-N was followed by a second phase of prolonged and public drafting for the permanent constitution. The Constituent Assembly, which then served as the Constitutional Assembly, was structured in the interim constitution in such a way as to ensure some participation from all relevant parties, with a total of 601 members elected from a range of groups. A range of measures were adopted to attempt to increase public participation: in March 2009 members of the Constitutional Assembly visited 'every constituency in Nepal to obtain citizens' views on important issues'; the members took with them questionnaires for citizens to complete, and held 'informal discussions' on constitutional

[556] Kis (n 114) 8.

matters.[557] Various thematic committees were established, including three relating to public participation, namely the Committees on: Citizens; the Collection and Coordination of Public Opinion; Capacity-building and Source-Management.[558]

The Nepali process represents, like the Iraqi process, a failure to capitalise on a potentially participatory constitution-drafting scheme. In Nepal, extensive efforts towards public engagement have been rendered futile by political machinations; the April 2008 Constituent Assembly elections were dominated by the Maoists, and this 'may have undermined the consensual elements of the 2006 [Peace Agreement]'.[559] Constitutional and ordinary political debates became intertwined, and constitutional deadlock has been reached, with a cycle of extensions and further stalemates since 2007. Efforts towards greater legitimacy in the second stage of constitution drafting have been thwarted by the inability of the parties to reach agreement. As Surendra Phuyal observed in a report for the BBC, there have been a number of sticking points throughout the drafting of the permanent constitution, including issues associated with federalism, the division of powers between a president and prime minister, and the nature of the electoral system and the judiciary.[560] The Supreme Court has been involved in a number of issues to do with the procedures for adopting the permanent text, and the timing of that process in particular. The details of the Nepali Supreme Court's involvement in the constitutional negotiations are discussed at length in Chapter 6, on amendments and judicial review.

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[557] Centre for Constitutional Dialogue, *Participatory Constitution Making Process: Participatory Constitution Building in Nepal (Booklet Series No. 10)* (2009) 2 <http://ccd.org.np/new/publications/Participatory_Constitution_English.pdf> accessed 11 September 2011.
[558] ibid 4.
[559] Blount (n 87) 43.
[560] Surendra Phuyal, 'Nepal's Hamstrung Constitution: Why the Wait?' *BBC Nepali* (Kathmandu, 21 January 2015) <http://www.bbc.co.uk/news/world-asia-30901175>.

After years of failing to produce a permanent constitution, the first Nepali Constituent Assembly was dismissed, and replaced first with a caretaker government led by former Chief Justice Khil Raj Regmi, and then with a second Constituent Assembly that was elected in November 2013.[561] The elections were conducted in an atmosphere of 'great…public disappointment with the political class' in terms of its management of the constitutional drafting process.[562] The possibility of a second CA had not been provided for in the interim text, but in January 2014 the second CA took office. In the year following, the CA has remained mired in debates[563] and internal disputes.[564] The advent of the devastating earthquakes in April 2015 appears to have focussed the attention of leaders on making a constitutional deal. In early June, the political parties agreed to a draft constitution, a 'federal model with eight provinces', the details of those provinces remaining unresolved.[565] The draft constitution, a document that 'should…give much joy' is a highly controversial[566] text, criticised for numerous faults including its approach to citizenship, and to federalism. The *Kathmandu Times* editorialised that

> The new draft marks a major step backwards in ensuring that Nepal becomes a more just society…The gist of the constitution is clear: it is meant to further consolidate the old power structure. This is the result of a

[561] 'Nepal Voting Ends for New Constituent Assembly' *BBC News Asia* (19 November 2013) <http://www.bbc.co.uk/news/world-asia-24987573>.
[562] Krishna Hachhethu, 'The Making of Nepal's Second Constituent Assembly' (*Constitution Net*, 19 November 2013) <http://www.constitutionnet.org/news/making-nepals-second-constituent-assembly>.
[563] See, for example: 'MPs Divided over Statute Procedure' *EKantipur* (Kathmandu, 17 December 2014) <http://www.ekantipur.com/2014/12/17/capital/mps-divided-over-statute-procedure/399130.html>.
[564] Jay Nishaant, 'So Close yet so Far' *EKantipur* <http://www.ekantipur.com/2014/12/30/opinion/so-close-yet-so-far/399681.html>.
[565] Bhadra Sharma and Ellen Barry, 'Earthquake Prods Nepal Parties to Make Constitution Deal' *The New York Times* (Kathmandu, 8 June 2015) <http://www.nytimes.com/2015/06/09/world/asia/earthquake-prods-nepal-parties-to-make-constitution-deal.html>.
[566] Prashant Jha, 'Understanding Nepal's Own "love Jihad" and the Fear of Indians' *Hindustan Times* (29 June 2015) <http://www.hindustantimes.com/analysis/nepal-s-own-love-jihad-the-fear-of-indians/article1-1363789.aspx> accessed 29 June 2015.

> high degree of complacency among the top leaders…[who] believe that they can get away with such an exclusionary constitution.[567]

The situation in late June 2015 thus remains highly uncertain; if the draft constitution is adopted, it will need to be passed at a referendum.[568] In spite of the seemingly well-structured provisions of the Nepali interim text, the second phase of drafting has been a failure.

In **Albania**, the second phase of drafting—for what became the Albanian Constitution of 1998—concluded in a surprisingly effective way. After many years of dysfunction and failed attempts at replacing the interim text, the constitutional drafting process was revived in 1997 when the parliament approved Decision 339, legislation which 'provided a general framework'[569] for the adoption of a final constitution. The Decision created a parliamentary Commission to produce a constitutional draft, as envisaged in Article 44 of the Interim Constitution.

In addition, a new Ministry of Institutional Reform and Relations was created to manage the process.[570] The Commission was to include representatives from each party, but the Democratic Party boycotted the process in response to the Socialist Party having a one-seat majority.[571] The Commission completed a draft of the permanent constitution, revised it in light of the public review process described below, and submitted it to the People's Assembly, which adopted it on October 30 1998, ahead of the referendum on 22

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[567] 'Editorial: Two Steps Back' *The Kathmandu Post* (29 June 2015) <http://epaper.ekantipur.com/kpost/showtext.aspx?boxid=4920662&parentid=18490&issuedate=2962015> accessed 29 June 2015.
[568] *Interim Constitution of Nepal 2063 (n 79).*
[569] Carlson (n 42) 314.
[570] ibid 314–5.
[571] ibid 318.

November.[572] The referendum was ultimately successful; in spite of a number of logistical challenges, inclement weather, and the boycott of the Democratic Party, the referendum returned a vote of approximately 90% in favour.[573] The OSCE certified the procedure, and noted that the referendum had followed 'an open and transparent process'.[574]

There are a number of additional factors that contributed to the success of the second phase of drafting in the Albanian interim process. The Administrative Centre for the Coordination of Assistance and Public Participation (the '***ACCAPP***') was established in OSCE's Tirana offices, and it acted as a liaison between 'Albanian and international participants in the constitution-drafting process', and it published a regular newsletter in English and Albanian to publicise information about the drafting process.[575] The Ministry of Institutional Reform and the ACCAPP formulated a two-phased program of public participation in the constitutional drafting. Phase I involved 'more than a dozen forums and symposia' which provided drafters with insight into issues of public interest, NGO meetings on various topics, and televised high-level Symposia on the key issues.[576] Phase II began after the production of a revised draft of the constitution was released in August 1998, and public comment was invited at hearings across the country,[577] Carlson reports that hundreds of the suggested changes were considered, and the Commission ultimately

[572] ibid 321.
[573] ibid 322.
[574] ibid.
[575] ibid 315.
[576] ibid 316.
[577] ibid 316–7.

amended ‘approximately 25% of the draft articles based on specific public suggestions’.[578]

The draft constitution was also considered by domestic experts, foreign experts (most notably the Venice Commission), including at public review sessions that were open to the media.[579] Carlson argues that the sustained education campaign run by the ACCAPP and other NGOs is an ‘example of the processes that must underlie the establishment of a successful constitutional democracy’, and cites the various initiatives, including public forums, television and radio programs, pamphlets, newspaper serials, and essay-writing contests, as some of the ways used to engage the public.[580]

The success in Albania of enacting a constitution with significant public engagement is remarkable given not only the preceding years of instability, but the dramatic events that began on September 12 1998 (two months prior to the referendum) with the assassination of a prominent figure in the Democratic Party, Azem Hajdari. The DP blamed the Socialist Party, and stormed government buildings, and armed protestors responded before pressure from the international community and OSCE assistance led to normalisation.[581] This episode demonstrates the volatility of Albanian politics at the time, but also became a ‘defining moment’ in the constitutional process, clarifying the

[578] ibid 317.
[579] ibid.
[580] ibid 318.
[581] ibid 324–5.

importance of reaching a stable and enduring bargain and maintaining the support of the international community.[582]

The constitutional history of **Thailand** is highly idiosyncratic. The 1997 Constitution—which was in power until the coup and Interim Constitution of 2006—was an unusually democratic text that emphasised accountability, and checks and balances.[583] The undemocratic IC of 2006, which was released eight days after the coup, then gave way to a drafting process for the permanent constitution. This was a complicated process: the junta, or Council for National Security (CNS)

> appointed 2,000 members to a National Assembly, which nominated 200 of its own members as candidates for a CDA (Constitution Drafting Assembly). The CNS then selected 100 of these 200 to actually form the CDA.[584]

In turn, the CDA had a Constitutional Drafting Committee (CDC) of 35, whose members were primarily drawn from the CDA. Perhaps the most unusual aspect of the Thai Interim Constitution of 2006 was its requirement that the CDC explain how its draft differed from the Constitution of 1998.[585] By hearkening back to past authority—strangely, the authority which it formally rescinded—the Thai process attempted to claim legitimacy.[586] This claimed legitimacy may be linked with the category of *traditional domination* in the Weberian model. As Ginsburg has observed, the written constitution of 2006 did not destroy the previous constitutional regime, and many of the public institutions were

[582] ibid 325.
[583] Harding and Leyland (n 63) 23.
[584] ibid 24.
[585] Constitution of the Kingdom of Thailand (Interim Edition) of BE 2549 (n 63), Article 26.
[586] Harding and Leyland (n 63) 25.

maintained.[587] The 'constitutional afterlife' of the 1997 constitution persisted in spite of the rupture of the 2006 IC, and continues to have a role now. Ultimately the draft constitution was, in accordance with the timetable, put to a referendum, where it succeeded with a majority of 58%; Ginsburg notes that this was the 'first ever referendum held on a constitution in Thailand; the 1997 constitution had promoted the idea but not actually utilized it'.[588] The drafting of the (theoretically) permanent Thai constitution does reflect that a constitutional process that began in an undemocratic manner can include democratic elements.

5.4 Conclusions

Throughout this Chapter I have explored the two-staged nature of interim constitutional drafting, and argued that it is an instrumental way of attempting to achieve greater constitutional legitimacy and coordination of constitutional interests. It has been argued that the first phase of constitutional drafting, though typically completed by an unelected body, may enjoy some legitimacy through its promise of reform. This promise must be developed in the second phase of constitutional drafting, for the permanent constitution, or the constitution may fail to come into being (as in Nepal, and for some time Hungary), or fail to develop true legitimacy in the sense of securing the goods and interests of the people, and thus giving them a reason to comply with the authority of the constitutional regime.

[587] See generally Ginsburg (n 61).
[588] Tom Ginsburg, 'Constitution Afterlife: The Continuing Impact of Thailand's Post-Political Constitution' (2009) 7 International Journal of Constitutional Law 83, 100.

CHAPTER 6: A COMPLEX SUPREMACY

In the *Introduction* to this thesis, I adopted Joseph Raz's seven-part definition of a constitution, which includes the requirement that the constitution be the superior law in a given legal system. In this Chapter, I consider what the requirement or notion of superior law (or what others often term 'supremacy') involves, and the ways in which interim constitutions adhere to or depart from the conventional notion of constitutional supremacy. This analysis involves a consideration of: explicit statements about the status of interim constitutions; amendment provisions and amendment histories in relation to interim texts, and decisions of constitutional courts regarding the implementation or status of interim constitutions. Before delving into these three topics, it is necessary to develop a fuller understanding of the notion and significance of constitutional supremacy.

It is also worth noting that although in this Chapter in particular I focus on interim constitutions as *texts*, this is not to suggest that the text of a written constitution exhausts the constitution of any given state. Rather, it is an acknowledgement that the text of a constitution is typically the central locus of constitutional law, and particularly so on questions of procedure.

In addition to Raz's requirement that a constitution is superior, two other relevant and related elements of the definition include that the constitution is *justiciable*, and that it is *entrenched* (difficult to amend). Each of these is linked to the notion of superior or supreme law. Raz defines the superiority requirement as follows: '[t]his means that ordinary law which conflicts with the constitution is invalid or inapplicable. (The

constitution is *superior law*.)'[589] John Gardner echoes the sentiment in clear terms: '[c]onstitutional law is as high as the law goes'.[590] Practically, the superiority of ordinary constitutions is expressed in rules such as that parliament may not enact legislation contradicting the constitution, and that in the event of an inconsistency between a constitutional law and any other law, the constitutional law prevails, or that the ordinary legislation be interpreted in a manner that ensures that it complies with the constitution.

Justiciability is necessary to support a superior law: Raz stipulates that a constitution requires that 'there are judicial procedures to implement the superiority of the constitution, that is judicial processes by which the compatibility of rules of law and of other legal acts with the constitution can be tested, and incompatible rules or legal acts can be declared inapplicable or invalid'.[591] Such a proceeding might involve an analysis of whether a particular legislative or executive decision was constitutional, or it might, for example, involve the enforcement of a constitutionally enshrined right. The entrenchment of a constitution means that, as a superior law, it is more difficult to amend than ordinary legislation.[592] As discussed in Chapter 4: Time and Consequences, some constitutions have unamendable provisions, but generally all constitutions provide for the possibility of their own amendment, according to standards that are often demanding, such as referenda or a vote supported by a special majority of parliament.

[589] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 324.
[590] John Gardner, 'Can There Be a Written Constitution?' in Leslie Green and Brian Leiter (eds), *Oxford studies in philosophy of law*, vol 1 (Oxford University Press 2011) 179.
[591] Raz (n 1) 324–5.
[592] ibid 325.

In the sections that follow I argue that interim constitutions enjoy a 'complex supremacy', as texts that sit at the top of their legal hierarchies, but that are unusually subject to amendment, review, and in some ways treated in a manner more consistent with ordinary legislation. In order to make this argument it is first necessary to demonstrate the ways in which interim constitutions are presented as supreme or claim their own supremacy. I will then go on to discuss the ways in which amendment and review complicate that claim to supremacy.

The potential for the supremacy of a constitution to be undermined is not unique to interim constitutions; political instability and judicial decisions may have this effect in any number of constitutional states. However, interim constitutions are unique in that their supremacy is deliberately temporary, and because of the other factors discussed throughout this chapter, more subject to negotiation, instability and review. This is not to say that any of these factors, or indeed even the complex supremacy of the interim constitution is a negative feature of these constitutions. Rather, as Teitel has observed

> from a transitional perspective [if] a political regime is not yet consolidated, it makes little sense to insist on constitutional permanence. To the contrary, the constitutional opening may well be contingent on its transience. The possibility of reform associated with the first interim constitution is often predicated on and bounded by the assumption of a deferred, more plenary constitutional process.[593]

The complex supremacy asserted by interim constitutions is by and large upheld in relation to other, non-constitutional laws; they act as the supreme law during the period of their duration. However, high levels of amenability and judicial review mean that supremacy in an interim context has a different meaning than in ordinary constitutions.

[593] Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 199.

6.1 The Interim Constitution as a Supreme or Fundamental Text

In this section I explore the ways in which interim constitutions claim the status of a supreme law explicitly. Of course, the absence of such a provision does not show that the constitution is not a superior law; arguably, the supremacy of constitutional law in a legal system is sufficiently self-evident that by declaring a text to be 'constitutional', the intention of supremacy may be assumed. Nonetheless it is worthwhile to survey the ways in which different interim constitution discuss this issue, where it is mentioned.

Many constitutions simply assert in some way that the Constitution is the superior or fundamental law of the state. A search of the Constitute Project's Database reveals that 72 constitutions contain the phrase 'supreme law',[594] 31 employ the words 'fundamental law',[595] twelve contain the phrase 'law of the land',[596] and one (the current Constitution of Albania) contains the phrase 'highest law'.[597] In **Iraq**, Article 3(A) of the TAL provides simply that '[t]his Law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception'. The **SA-IC** contains a more detailed provision in Article 4, that

> (1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency;

[594] 'Search Results 'Supreme Law'' (*The Constitute Project*) <https://www.constituteproject.org/search?lang=en&q=%22supreme%20law%22> accessed 10 May 2014.
[595] 'Search Results "Fundamental Law"' (*The Constitute Project*) <https://www.constituteproject.org/search?lang=en&q=%22fundamental%20law%22> accessed 10 May 2014.
[596] 'Search Results "Law of the Land"' (*The Constitute Project*) <https://www.constituteproject.org/search?lang=en&q=%22law%20of%20the%20land%22> accessed 10 May 2014.
[597] 'Search Results "Fundamental Law"' (n 7).

> (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.[598]

This constitutional supremacy, and protection of entrenched rights against 'unconstitutional parliamentary Acts'[599] was a historic development in South African constitutional law. As Basson observes, the introduction of constitutionalism over parliamentary supremacy was

> a radical departure from the constitutional dispensation of the past according to which Parliament reigned supreme in the true tradition of the so-called Westminster system (inherited from the British Parliament with the South Africa Act of 1909 and carried through to the so-called 1983 Constitution).[600]

The **Nepali** IC also establishes the text as the 'fundamental law' of the nation, and stipulates a similar rule as to the outcome of inconsistency between constitutional and other legislation. Additionally, the Nepali provisions establish the duty of 'every person'[601] to uphold the constitution. In the Small Constitution of **Poland** there are no directly comparable provisions, although the President is given the duty of ensuring that the Constitution is observed, and is himself or herself subjected to the constitution, with Article 50(1) providing that the president may be accountable for the infringement of the constitution and other laws. The amended 1952 constitution, like that of Nepal, establishes the duty of citizens to 'abide by the provisions of the Constitution and laws'. The **Hungarian** IC describes the constitution as the 'Fundamental Law' of Hungary, and establishes that the Constitution and 'the constitutional statutes shall be binding upon all organizations of society, all state organs and citizens'.[602] Further, it is established in

[598] Interim Constitution of the Republic of South Africa 1993 s 4(1).

Chapter IV 'Constitutional Court' that the Court is empowered to review statutes for constitutionality, and that it 'shall annul' laws that are determined unconstitutional.[603]

In **Albania**, the IC is described in several instances alongside other state laws and fundamental principles: for example, Article 2 states that the 'constitutional order', and '[m]an's dignity, his rights and freedoms, free development of his personality…' are the 'foundations of this state, whose duty is to respect and protect them'[604].[605] Although the IC of Albania does not explicitly declare itself to be the supreme law, in every way it establishes the structure and principles[606] of the state, the powers and limitations of government organs,[607] the rights of citizens,[608] the principles governing Albania's foreign relations,[609] and the rest of the legal system.[610] Additionally, it declares the capital of Albania to be Tirana, establishes its flag, emblem, National Day, and National Anthem;[611] and in this way officially recognises or creates the basic facts of the state.

Section 3 of the Interim Constitution of the Republic of **Sudan** states that it 'shall be the supreme law of the land', and also states that 'The Interim Constitution of Southern Sudan, state constitutions and all laws shall comply with it'.[612] Similarly, the

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[599] Dion Basson, *South Africa's Interim Constitution: Text and Notes (Revised Edition)* (Juta & Co 1995) 7.
[600] ibid.
[601] Interim Constitution of Nepal 2063 2007 Article 1(1).
[602] Act No. XXXI of 1989 (Act No. XX of 1949 (as amended)) (1989 Constitution of Hungary), Article 77(1),(2).
[603] Act I of 1989 (Act No. XX of 1949 (as amended)) 1989 Article 32/A(1),(2).
[604] Law on the Major Constitutional Provisions (Albania) 1991 Article 2.
[605] See also, for example ibid Articles 36(2), 41(a).
[606] For example, 'The Republic of Albania is a secular state.' ibid Article 7.
[607] ibid II, III, IV, V, VI.
[608] ibid VII.
[609] Law on the Major Constitutional Provisions (Albania) (n 16) Articles 8, 9.
[610] ibid Chapter VI.
[611] ibid Chapter VIII.
[612] Interim National Constitution of the Republic of the Sudan 2005 s 3.

2011 constitution of **South Sudan** states that the Constitution 'shall be the supreme law…[of] the independent and sovereign South Sudan'.[613]

The **Thai** Interim Constitution of 2006 does not specifically declare that it is the supreme law of the land, but it claims a central role for the constitution in Section 2, which states: '[t]he sovereign power emanates from the Thai people. The King who is Head of State exercises such power through the National Legislative Assembly, the Council of Ministers and the Courts in conformity with the provisions of this Constitution'.[614] Additionally, the Constitutional Tribunal is given the power to assess legislation and determine its constitutionality.[615]

The Constitution of the Transition of the **DRC** was adopted in 2003, and replaced in 2005 by the permanent constitution of the DRC. The 2003 Constitution was adopted following the 2002 'All Inclusive Agreement' ('**AIA**'),[616] and somewhat unusually, the first article of the Constitution establishes the *joint* supremacy of both the AIA and the Constitution:

> The Constitution of the Transition of the DRC is developed on the basis of the [AIA].
>
> The AIA and the Constitution constitute the sole source of power during the transition in the DRC.

[613] Transitional Constitution of the Republic of South Sudan 2011 Preamble, Article 3(1).
[614] Constitution of the Kingdom of Thailand (Interim Edition) of BE 2549 2006 s 2.
[615] ibid 35.
[616] Global and Inclusive Agreement on Transition in The Democratic Republic of the Congo, Inter-Congolese Dialogue, Political Negotiations on the Peace Process and on Transition in the DRC 2002.

> During the Transition period, all powers are established and exercised in the manner determined by the AIA and by this Constitution.[617]

The incorporation of the AIA into the constitutional text is represented in a number of ways; for example, the Presidential oath recognises that the President's authority is based both on the AIA and the Constitution, the AIA is included and published together with the Constitution, and the AIA is referenced in a number of other places in the constitutional text.[618]

In differing ways, each of the case study countries makes a claim to supremacy; some directly, others by placing the constitution at the apex of a legal order, as a text that prevails over other legislation, and binds legal officials, politicians, and citizens. The degree to which this supremacy is recognised in practice differs widely, but each constitution is conceived of as the central text and regulating force of a legal and political system. As will be discussed in the following two sections, this claim to supremacy can be complicated in a number of ways.

6.2 Change and amendment of Interim Constitutions

In this section I explore the theme of constitutional supremacy in connection to the change and amendment of interim constitutions. My research on the case study countries leads to several conclusions: interim constitutions employ a range of amendment standards and tests for constitutional amendment, but these standards typically require more than a simple majority of a legislative or constitutional assembly. Moreover, I argue

[617] Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') 2003 Article 1, translation author's own.
[618] ibid Preamble, Articles 76, 85-86, 99, 102, 105, 108, 153, 157-9.

that although interim constitutions are temporary and intended to be short-lived, they often exhibit high levels of amendment and change. The two key reasons for amendment to interim constitutions are the rapidly changing nature of political and societal concerns in interim periods, and also a failure to foresee or address key issues in the drafting of the interim text. Conversely, where change does not occur, it does not always reflect either a lack of political turmoil, or a well-drafted interim text; rather it may reflect a political stalemate, high amendment requirements, or willingness on behalf of a governing party to ignore or violate the constitution. I identify three different categories of constitutional change of interim texts, and argue that perhaps the most significant kind of change is the meta-amendment, or a constitutional amendment that changes the jurisdiction, timeframe or replacement process of the interim text. I conclude by observing that the amendment of interim constitutions is not inherently problematic, but that frequent and substantial changes to interim texts might undermine the supremacy of the constitutional text. Before delving into these arguments, it is necessary to introduce some background and theoretical concerns about constitutional amendment in general.

6.2.1 On general constitutional amendment

Raz describes the importance of constitutional stability as follows: '[c]onstitutions are meant to provide a framework for the public life of a country, giving it direction and shape. For this to be achieved, widespread knowledge of the constitution has to be secured…[where there is uncertainty, it] 'affects people's ability to function. It is made worse if it generates fear of continuous change…'.[619] In Raz's formulation, therefore,

[619] Raz (n 1) 350–1.

constitutional stability is important both in terms of the provision of a stable framework in itself, and also in public knowledge and trust in that stable framework. This connects with the ideas discussed in Chapter 5, about constitutional legitimacy, and the ability of a constitutional system to operate as an effective coordinating system. A constitution is and should be more difficult to amend the ordinary legislation; even in the United Kingdom, which lacks a single unifying constitutional text, this is the case.[620] As Basson notes in his discussion of South Africa, the entrenchment of a constitution, in putting it above ordinary law (and thus the ordinary powers of a given legislature), and subjecting governmental authority to constitutional regulation, can be a novel and significant development in a state that is emerging from a repressive or unrepresentative era.[621] Put another way, a certain level of entrenchment, or a sufficiently high threshold to amendment is necessary to secure the superiority of the constitution not only over other laws, but over law-makers, or at least the bare and changeable majority of law-makers; to ensure that the legal system allows for the rule of law, not the rule of men.

However, constitutional stability should not be understood as requiring constitutional stasis, or even an inflexible approach. As Alexander Hamilton argued, 'the ability to remedy defects and unintended consequences of a constitutional text can make constitutions more enduring'.[622] Ginsburg and Melton discuss the role of flexibility in constitutional law, and argue that two factors influence rate of amendment in constitutions: *demand*, which 'reflect[s] factors like the degree to which the current

[620] See discussion in Gardner (n 2) 2.
[621] **Basson (n 11) 7.**
[622] Federalist Paper n.85, cited in Tom Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty' [2014] Coase-Sandor Institute for Law & Economics Working Paper No. 682 1 <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2348&context=law_and_economics>.

constitution is out of sync with society, and the rate of social change', and *supply*, which in the authors' 'conception, has two components: flexibility (…of the formal structure), and amendment culture'.[623] In their work on the Comparative Constitutions Project, Ginsburg *et al* have found that amendment rates differ wildly: 'the 1946 Constitution of Japan has never been amended; the Constitution of India adopted two years later has been amended over 100 times', but that 'an amendment rule is an essential feature of written constitutions, with over 98% of documents in force having such a provision'.[624]

It is clear that the possibility or occurrence of amendment of a constitution does not undermine its status as a supreme or superior document, or even undermine its general status as an entrenched, long-term document. In this section, I analyse amendment in interim constitutions, and argue that in some cases the level and scope of amendments to interim texts means that they enjoy a complex supremacy.

6.2.2 Rules and rate of amendment in interim constitutions

Intuitively, it might seem that interim constitutions would have low levels of amendment. Ginsburg and Melton observe in their general study of constitutional amendment

> First, as expected, the length of the constitution is positively correlated with the amendment rate. Length is a significant predictor in model 3, where the unweighted amendment measure is used. In that model there is expected to be about 1 additional amendment every 10 years a constitution survives for every additional 1,000 words in the constitution.[625]

[623] ibid 3.
[624] ibid 7.
[625] ibid 21.

Using Ginsburg and Melton's framework, one might expect the *demand* for amendment to be low in an interim scenario. Given that interim constitutions are temporary documents, and are intended to be replaced within a relatively short timeframe, the demand for change to such an ephemeral document might seem low. However, the fluidity and in some cases volatility of political and constitutional circumstances in states adopting interim texts can be such that the rate of social change or the mismatch between the constitution and the polity can emerge quickly.

This possibility for rapid change connects with the idea explored in previous chapter about critical junctures. As Capoccia and Kelemen argue,

> The concept of critical junctures is an essential building bloc of historical institutionalism. Many causal arguments in the historical institutionalist literature postulate a dual model of institutional development characterised by relatively long periods of path-dependent institutional stability and reproduction that are punctuated occasionally by brief phases of institutional flux- referred to as critical junctures- during which more dramatic change is possible.[626]

Critical junctures are periods in which ordinary institutional restraints on change are loosened, and in which the tendency towards gradual reform is replaced by a *possibility* of rapid and wide-reaching reform. As examples of critical junctures in history, Capoccia and Kelemen cite Henry Turner's work *Hitler's Thirty Days to Power*, in which he examines the events of January 1933, arguing that '[d]uring that month…the return to a fully democratic regime was no longer possible, but options other than the establishment of a Nazi regime were still on the table, most importantly, the establishment of a military

[626] Giovanni Capoccia and R Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341, 341.

regime in Germany'.[627] Capoccia and Kelemen observe that based on Turner's research, contingent 'micro-decisions' made in that month had far-reaching consequences. Similarly, they cite a number of moments in the history of the EU—citing the negotiation period for the Treaty of Rome and the ECJ's rulings on supremacy and direct effects—as critical junctures in which the development of the EU was significantly altered.[628]

However, it is not necessarily the case either that critical junctures will be seized upon by institutional actors,[629] or that changes made will involve a total break from past institutional structures and norms.[630] In this context, I argue that the circumstances in which interim constitutions are adopted are critical junctures, and thus associated with a loosening of institutional controls, and the possibility for rapid change, both institutional and societal. Amendments, and the demand for constitutional amendments, are to some degree a by-product of the nature of critical junctures.

In this section, I present a comparative analysis of the levels and nature of amendment amongst the interim constitutional texts of the case study countries. I identify three types of constitutional amendment in the context of the interim constitutional text: the *meta-amendment*, which adjusts the application of the interim text or the nature of its replacement; *structural amendments*, which involve a substantive change to the constitutional structure of the state (such as the introduction of a justiciable bill of rights/a constitutional court); and *topical amendments*, which introduce discrete, or topic-specific changes. It is worth noting the three types of constitutional amendment do not

[627] ibid 364.
[628] ibid 366.
[629] "[C]ritical junctures are too often equated with moments of change. However as counterintuitive as it may seem, change is not a necessary element of a critical juncture." ibid 348.
[630] ibid 349.

correspond with the scale, significance or practical effect of a given constitutional amendment; a meta-amendment may deal with a minor procedural fact, whereas a topical amendment might deal with a matter of vital importance (such as the pyramid scheme amendment to the Albanian constitution).

Throughout this discussion I explore the demand and supply side factors that affect rates of constitutional amendment. At the outset, it is necessary to foreshadow the fact that a lack of constitutional amendment does not imply a lack of demand, or a lack of social change; it may reflect supply side factors such as the difficulty of amendment thresholds, or the amendment culture. It is not possible to conduct a detailed examination of amendment histories in each of the interim constitutional contexts; rather I draw on several examples to illustrate the factors leading to amendments, and the consequences of these amendments.

6.2.3 Studies on amendment histories in interim constitutions

In **South Africa**, the Interim Constitution required that in order to amend the constitution, a joint sitting of the National Assembly and the Senate would have to pass the amending bill, with at least a two-thirds majority of the total number of members from both houses.[631] The amendment procedure was varied slightly for changes affecting the legislative and executive powers of the provinces.[632] The Constitutional Principles contained in Schedule 4 of the Interim Constitution, and against which the final constitution's validity would be certified by the Constitutional Court, were declared to be

[631] Interim Constitution of the Republic of South Africa (n 10).
[632] ibid 62(2), 126, 144.

unamendable.[633] The CPs were crucial to the deal struck in the adoption of the South African Interim Constitution, and as such, were 'cast in stone [and] are the only absolute entrenchments in terms of the interim Constitution.'[634] The CPs covered some of the basic values and facts of the new South African state, including: democracy;[635] fundamental human rights;[636] the supremacy of the constitution;[637] equality in the legal system;[638] provisions associated with the separation of power and accountable government;[639] federalism and lower levels of government;[640] the role of traditional leaders,[641] among others.

The requirement of a two-thirds majority of both houses sitting jointly was not an insignificant one. As Basson writes, 'The fact that the interim Constitution is an entrenched and inflexible Constitution is an important principle because it will mean very little in practice to expressly declare that the Constitution is supreme (s4(1)) if the Constitution can nevertheless be easily amended by way of ordinary legislative procedures'.[642] The first democratic elections were such that the majority party 'failed to obtain a two-thirds majority. The support of at least one other party [was] therefore necessary for an amendment'.[643] During the short life of the South African Interim Constitution, some ten amendments were introduced, between 1994 and 1996. Some related to matters concerning local government powers and jurisdiction; the renaming of

[633] ibid 74, Schedule 4.
[634] Basson (n 11) 96.
[635] Interim Constitution of the Republic of South Africa (n 10) Schedule 4 (I) .
[636] ibid Schedule 4 (II), (III).
[637] ibid Schedule 4 (IV).
[638] ibid Schedule 4 (V).
[639] ibid Schedule 4 (VI-IX).
[640] ibid Schedule 4 (XVI-XIX, XXVI).
[641] ibid Schedule 4 (XIII).
[642] Basson (n 11) 7–8.
[643] ibid 97.

states; the possibility of *Volkstaats*; and relatively isolated matters like pension provisions for public officials; and the provision for a person who is not an Member of Parliament to be a member of cabinet. In Act 13 of 1994, some structural amendments were introduced, slightly amending the continued operation of existing courts until the new judicial organs and powers were established.[644] Topical amendments were made with respect to judicial officers, allowing for acting judges of the Constitutional Court[645] and creating the position of Deputy-president of the Constitutional Court.[646]

As discussed above, the SA-IC protects itself against significant meta-amendment, absolutely entrenching the Constitutional Principles, and provisions relating to the certification of the final constitution. Nonetheless some minor meta-amendments were made, in terms of increasing from five to seven the number of people to serve on the panel of recognised constitutional experts to be appointed for the purposes of the constitution making process.[647] The final amendment to the IC in April 1996 provided a slight alteration in terms of the adoption of the new constitution, and procedure in the event of a non-certification judgment by the Constitutional Court.

In analysing the amendments made to the SA-IC, several factors emerge. First, the demand for constitutional amendment was high: ten amendments were introduced in a relatively short period of time. Secondly, the demand was arguably driven by ongoing and complicated discussions relating to the division of power between levels of

[644] See amendments to s241; (15) of Amendment.
[645] Constitution of the Republic of South Africa Fifth Amendment Act, Act 29 of 1994.
[646] Constitution of the Republic of South Africa Eighth Amendment Act, Act 44 of 1995.
[647] Constitution of the Republic of South Africa Sixth Amendment Act, Act 24 of 1994, amending s72.

government. Issues around regional or provincial government and of federalism[648] were controversial in the drafting of the IC, were entrenched in the CPs, and were ultimately among the sticking points in the first non-certified draft of the permanent constitution. As Gloppen observes, the 'principles regarding federal arrangements are open to various interpretations and leave scope for bargaining, and this is where much of the hard negotiations took place in the second phase of the constitution-writing process…[They] are also what caused the most trouble for the Constitutional Court during the certification process.'[649] Further, in the South African case, it is arguable that the constitutional amendments reflect a relatively high degree of congruence between the SA-IC's requirements, and the procedures followed. That is, the process was quite legalistic, with the parties and organising institutions attempting to hew closely to the constitutional requirements of the Interim text, a feature that is not characteristic of all interim constitutional processes.

In contrast with South Africa, where it is arguable that frequent amendments reflected a close mirroring of constitutional law and practice, and an effective and transparent constitutional drafting process, in **Albania**, frequent amendments were a symptom of what was for many years a highly dysfunctional transitional constitutional process.

In Albania, the People's Assembly has power (Article 16(2)) to 'adopt and [amend] the constitution and laws'; and

[648] Siri Gloppen, *South Africa: The Battle Over the Constitution* (Ashgate/Dartmouth 1997) 204.
[649] ibid.

> Draft amendments to this law [the IC] may be submitted by the President of the Republic of Albania, by the Council of Ministers or by one fourth of all the deputies. The adoption of amendments is made by the People's Assembly with a majority equal to two third of all the deputies.[650]

The Albanian Interim Constitution was amended on many occasions between its adoption in April 1991 and its replacement in 1997.[651] These amendments added to the text and scope of the constitution in a significant way, or as Imholz puts it, 'fleshed it out substantially'.[652] Structural amendments, meta-amendments and topical amendments were each represented in the changes made. A total of 92 new articles were introduced through the amending legislation. These included: a 13 Article Chapter (new Chapter V) on Local Government, a 30 Article Chapter (new Chapter VI) on the judicial system, notably containing a number of provisions as to natural justice or procedural rights[653], as well as establishing the Constitutional Court; and a 41 Article Chapter on Fundamental Freedoms and Human Rights, including Article 39, which establishes that '[n]one, suffering encroachment of a [Constitutional right] may be denied judicial restitution of such a right'. The transitional period in Albania, from even before the adoption of the 1991 constitution, until the time of the adoption of the 1998 constitution, was characterised by tension, political conflict, and civil unrest.

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[650] Law on Major Constitutional Provisions 1991 ch. IX, Article 43.
[651] Law No. 7367 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1992; Law No. 7555 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1992; Law No 7558 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1992; Law No. 7561 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1992) 1992; Law No. 7570 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1992; Law No. 7596 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1992; Law No. 7692 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1993; Law No. 8234 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1997; Law No. 8255 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1997; Law No. 8257 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1997; Law No. 8266 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) 1997.
[652] Kathleen Imholz, 'A Landmark Constitutional Court Decision in Albania' (1993) 2 Eastern European Constitutional Review 23, 24.
[653] See for example Law on the Major Constitutional Provisions (Albania) (n 16) Amended Chapter VI Articles 11-16.

The Chapter on Rights was added in a constitutional amendment of 31 March 1993. Prior to the amendment, it is arguable that there was some basis for the enforcement of human rights through the references in Article 4 to the rights and freedoms guaranteed by international texts. Article 4 had 'filled the lacuna'[654] until the adoption of the amending Chapter on Fundamental Freedoms and Human Rights. Albania was driven to adopt the Chapter on Rights in part because of its campaign to join the Council of Europe, which 'repeatedly protested the absence of a comprehensive human rights statement'[655] in the Albanian constitution.

Kathleen Imholz describes the evolution of the freedom of expression provision in the constitution: the Albanian drafters, taking into account Albania's unusually (even for a communist state) repressive history, formulated an absolute right to freedom of expression, treating it as a 'sacred right which cannot be infringed upon, even in contexts where other rights may be curtailed'.[656] However, the European advisers persuaded the Albanians to adopt a provision that mirrored the ECHR right to freedom of expression, which contains a clause limiting freedom of expression on a number of bases, including 'for the defense of security and public order'.[657] As Imholz observes, the consequence was that the 'complete list of exceptional reasons for curtailing press freedom, copied from the European Convention, was incorporated into the Albanian Constitution without

[654] Stiliano Ordolli, *Histoire constitutionelle de l'Albanie: des origines à nos jours* (Schulthess 2008) 332 (Translation author's own).
[655] Kathleen Imholz, 'Word Play at Albania's Constitutional Court' (1997) 6 East European Constitutional Review 57, 59.
[656] ibid.
[657] Law No. 7692 (Amendment to Albania's 'Law on Major Constitutional Provisions', 1991) (n 63) Article 2; (n 67) 59.

such a debate and apparently without even considering the other articles in the draft'.[658] The new provision created a conflict with Chapter VI Article 41, on 'Temporary Restriction of Rights', which excludes freedom of expression from those rights that may be limited in times of emergency or war. This clash became an issue in 1997, following the declaration of a state of emergency in Albania, and a subsequent court challenge brought by the Albanian Helsinki Committee against the imposition of censorship.[659] The jurisprudence of the Albanian Constitutional Court is discussed more at 6.3.1, on Judicial Involvement in Interim Constitutions. However it is worth noting at this point simply for the way in which amendments, and the drafting process of amendments to the interim constitution, had a significant impact upon the content of the Albanian interim text, and the constitutional law that governed the interim period.

As Ordolli notes, in spite of the introduction of the Chapter on Human Rights, violations of human rights continued, or perhaps even multiplied, following this amendment- the government used force to shut down strikes and workers' unions, limited the freedom of the press, and interfered with opposing political parties.[660] As with the human rights amendment, other amendments reflected the chaotic state of the nation and the tense and complicated political situation of the time.

The **Sudanese** constitution has, on paper, a relatively high bar for amendment of the interim constitution—a three-quarters majority of 'each Chamber of the National Legislature sitting separately and only after introduction of the draft amendment at least

[658] Imholz (n 67) 60.
[659] Law No. 8194 (Albanian Declaration of Emergency Law) 1997; Law No. 8195 ('On Some Measures in the Framework of the State of Emergency') (Albania) 1997.
[660] Ordolli (n 66) 293.

two months prior to deliberations'.[661] Additionally, any amendment that would affect the provisions of the Comprehensive Peace Agreement (of January 2005) 'shall be introduced only with the approval of both Parties signatory to the Comprehensive Peace Agreement'.[662] In this way the Sudanese provisions are similar to those of South Africa and the DRC, enshrining and entrenching the provisions that were crucial to the initiation of the transitional period and the agreement about initiating constitutional change.

In the case of Sudan, it is necessary to recall that the Comprehensive Peace Agreement that preceded the interim constitution by six months is unusually detailed, and covers 'all aspects that one would expect in a constitution', including chapters on rights, rules for resource sharing, the nation's institutional framework, and key agreements on contentious issues such as the north/south relationship, federalism, and the right to self-determination, as well as guidance on the constitutional drafting procedure.[663]

In spite of what appears to be a high amendment threshold, in practice the three-quarters majority required by s224(1) has operated as a mere formality. The President of Sudan, Al-Bashir—who was indicted by the International Criminal Court for war crimes and crimes against humanity[664] in 2009 (see discussion in Chapter 7 'International Law and Transitional Justice')—has been leader of Sudan since seizing power in 1989 in a military coup is the leader of what is widely regarded as an authoritarian ('majoritarian

[661] Interim National Constitution of the Republic of the Sudan (n 24), Article 224(1).
[662] ibid 224(2).
[663] Philipp Dann and Zaid Al-Ali, 'The Internationalized Pouvoir Constituant - Constitution-Making Under External Influence In Iraq, Sudan and East Timor', *Max Planck Yearbook of United Nations Law*, vol 10 (2006) 25 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799308>.
[664] UNSC Res 1593 (31 March 2005) S/RES/1593.

authoritarianism'[665]) regime. The election of April 2010 did not meet international standards for a range of reasons.[666] In the election of April 2015, President Bashir was re-elected with 94% of the vote.[667] Major opposition parties had boycotted the election, and many in the international community rejected the result, criticising Sudan's 'failure to create a free, fair, and conducive election environment'.[668]

By virtue of their dominance (holding 90% of seats in parliament[669]) in Sudanese politics, the National Congress Party (NCP) was able to introduce a range of amendments in January 2015 which increased the power of the President and the ruling party, authorising the president to appoint governors, and arranging various parts of the state apparatus (Rapid Support Forces; judicial officers) to the advantage of the ruling party.[670] These changes were strongly criticised by both major opposition parties,[671] and 'significantly increased the powers of the presidency and effectively negated efforts by the opposition to transition the country to democratic governance.[672] The case of Sudan illustrates the fact that neither an ostensibly high bar to constitutional amendment nor a

[665] Ahmed T el-Gaili, 'Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan' (2004) 45 Harvard International Law Journal 503, 508.
[666] Problems included: 'delays in administration, logistical difficulties, a lack of sufficient safeguards and transparency during the voting process, insecurity, and in many cases direct intimidation and violence by security forces against citizens, poll workers, and candidates', 'Observing Sudan's 2010 National Elections April 11–18, 2010 Final Report' (The Carter Center) 1 <https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/FinalReportSudan-Apr2010.pdf>.
[667] 'Omar Al-Bashir Wins Sudan Elections by a Landslide' *BBC* (27 April 2015) <http://www.bbc.co.uk/news/world-africa-32481013> accessed 1 May 2015.
[668] 'Joint Statement on Elections in Sudan' (Governments of the United States of America, the United Kingdom, and Norway) <https://www.regjeringen.no/en/aktuelt/troika_elections_Sudan/id2407289/> accessed 1 May 2015.
[669] 'Omar Al-Bashir Wins Sudan Elections by a Landslide' (n 79).
[670] 'Sudan's NUP Rejects Constitutional Amendments' *Sudan Tribune* (7 January 2015) <http://www.sudantribune.com/spip.php?article53590> accessed 30 March 2015.
[671] '"Constitutional Amendments Demise of Sudan's Bill of Rights": Opposition' *Dabanga* (8 January 2015) <https://www.dabangasudan.org/en/all-news/article/constitutional-amendments-demise-of-sudan-s-bill-of-rights-opposition> accessed 8 April 2015.
[672] 'Sudan's NUP Rejects Constitutional Amendments' (n 82).

relatively low rate of amendment necessarily show that the constitution is truly the supreme legal text, or that it is a law above law-makers. Rather, the situation in Sudan reflects a government willing to disregard the constitution, and when necessary, alter it in questionable circumstances.

In 2011 the Transitional Constitution of the **Republic of South Sudan**, 2011, the first constitution of the newly independent South Sudan came into force, superseding the 2005 Interim Constitution of Southern Sudan which had governed the region prior to its independence from the Republic of the Sudan. The Transitional Constitution has been amended once, in 2013, chiefly to extend the mandate and period of operation for the National Constitutional Review Commission, the body charged with preparing a permanent constitution. Since fighting broke out in late 2013 between supporters of President Kiir (former leader of the SPLM) and former Vice-President Riek Machar, South Sudan has been mired in conflict and political discord. In 2014, it displaced Somalia as the first-ranked state on the 'Fragile States Index' compiled by the Fund for Peace.[673] The 2013 amendment was a meta-amendment necessary to extend the constitution drafting process, which has stalled due to a combination of the general political climate and a lack of funding.[674] The amendment reflects some degree of governmental engagement with the constitution, but in many other areas the government has been content to disregard the constitution.

[673] 'The Fragile States Index 2014' (The Fund for Peace 2014) <http://library.fundforpeace.org/library/cfsir1423-fragilestatesindex2014-06d.pdf>.
[674] 'No Permanent Constitution in South Sudan before 2015: Bill' *Radio Tamazuj: Sudanese News Crossing Borders* (Juba, 20 February 2015) <https://radiotamazuj.org/en/article/no-permanent-constitution-south-sudan-2015-bill> accessed 27 February 2015.

The amendment history of the Small Constitution of **Poland** reflects the nature of the constitutional drafting process in that country. The Small Constitution itself was a constitutional amendment of the 1952 Stalinist constitution, and not the first following the end of communism. The most significant predecessor amendment to the Small Constitution was the 'April Amendment' of 7 April 1989, which was passed by the Sejm but based on the agreement reached by the Round Table discussions. The April amendment restored the Senate as the Polish upper house, and reinstated the office of the Presidency.[675] As Garlicki and Garlicka observe, '[m]ost people in April 1989 anticipated a long period of cohabitation between the old regime and new political forces',[676] not yet anticipating the total collapse of the communist system within the regime.

The April amendment was followed by the 'December Amendment', which 'removed all the features of a socialist state'; it 'restored the traditional name of the Polish state (the Republic of Poland) and it re-introduced the principle of the Nation being the sovereign and the principle of a democratic law-observing state'.[677] This new constitutional amendment was meant not as a compromise, but 'as an instrument of change', and was a 'courageous attempt to rewrite the axiological foundations of the constitution'.[678] Four other amendments were passed by the Sejm, before the Small Constitution was adopted in October 1992, 'replacing most provisions'[679] of the amended

[675] Lelch Garlicki and Zofia Garlicka, 'Constitution Making, Peace Building and National Reconciliation: The Experience of Poland', *Framing the State in Times of Transition* (United States Institute of Peace 2010) 392.
[676] ibid.
[677] Krzysztof Prokop, *Polish Constitutional Law*, vol 7 (Białystok Law Books 2011) 27.
[678] Garlicki and Garlicka (n 87) 394.
[679] ibid.

Soviet constitution. The Small Constitution then governed Poland as an interim text until the adoption of the permanent text in 1997. A significant amendment to the Small Constitution was adopted on April 22 1994; it was a meta-amendment relating to the drafting of the permanent constitution, and allowed for the public to submit draft constitutions, if supported by at least 500 000 voters. It also allowed for 'prereferenda' on constitutional principles. As allowed under the amendment, a popular draft was submitted by the leader of the Solidarity movement, and with the support of almost one million citizens; the supporters of the draft wanted it to be put directly to a referendum, but the Constitutional committee rejected this elevation of the popular draft over other competing drafts.[680] Prereferenda were considered but ultimately not employed; it proved too difficult to formulate short questions to be submitted to the people.[681]

The amendments that preceded and followed the Small Constitution demonstrate the way in which the Polish constitutional transition unfolded at a slower pace than anticipated, and with a high degree of political and constitutional debate. The early 'April' and 'December' Amendments were intended to be short-lived; so too was the Small Constitution- ultimately the procedure was prolonged, with Poland finding agreement only in 1997. Garlicki and Garlicka argue that the drafting of the permanent constitution was such that by 1997, the political context was 'detached, in time and political context' from the Round Table or 'peace agreement' which had informed the early amendments, and the Small Constitution.[682] As discussed in Chapter 5 in relation to the possibility of a two-stage constitutional drafting process to foster legitimacy, the

[680] ibid 398.
[681] ibid.
[682] ibid 403.

Polish process allowed for considerable public interest, debate and participation; the 1994 amendment, allowing for publicly supported constitutional drafts, contributed to that popular involvement, but also contributed to a degree of confusion caused by the plurality of possible drafts.

The interim constitutions of **Thailand** (2006), the **DRC** (2003) and **Iraq** (2004) were short-lived documents that were quickly replaced by successor constitutions. The Thai IC of 2006 governed the state for less than a year, the DRC constitution for just under three years, and the Iraqi text for less than two years. The Thai interim constitution was not amended, the Iraqi interim constitution amended only once, in questionable circumstances. As discussed in Chapter 5, the 'All Inclusive Agreement' which preceded the 2003 Transitional Constitution of the DRC was an extremely detailed peace agreement, in many ways constitutional in character. It is arguable that the Constitution of the Transition can be viewed as a kind of amended and expanded version of the AIA. The Constitution itself was extended for six months, according to the terms of the constitution, but not otherwise amended.

The **Iraqi** constitution demonstrates the issues that may arise where the bar to amendment is particularly high. An earlier draft of the Iraqi interim text, the Agreement on the Political Process between the Coalition Provisional Authority and the Iraqi Governing Council, had established that the 'Fundamental Law' (ie the interim constitution) could not be amended; a proposal which Arato describes as 'a remarkable postulate, given the low legitimacy its enactment (and the agreement itself) would have in

Iraq'.[683] The reason for the resistance against amendment of the interim constitution is arguably tied to concerns about maintaining the basic tenets of the federal system negotiated in the TAL, and the maintenance of the position of the Kurdish population in the consociational agreement.[684]

Arato argues that the existence of an amendment procedure in an interim text is necessary in order to fulfil the dual purpose of an interim constitutional process, which he describes as being 'to impose constitutionalist restraints on government and to allow learning during the period of political transition'.[685] Arguing from this principle, he suggests that interim constitutions should have *lower* amendment requirements than ordinary or permanent constitutions. I submit that it is not *necessarily* the case that an interim text must have an amendment rule, or an easy rule; the lack of possibility of change during an interim period (especially if the interim period is conceived of as being relatively brief) can still allow for constitutional learning, which may be channelled into the final text. However it is generally the case that amendment procedures contribute to the goals and evolution of interim constitutional processes, and Arato's formula that interim constitutions should be harder to amend than ordinary laws but easier to amend than permanent constitutions is probably a good heuristic.

The threshold for constitutional amendment in the Iraqi TAL that was ultimately adopted was significant: Article 3 states that:

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[683] Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press 2009) 117.
[684] ibid 224.
[685] ibid 185.

> (A) This Law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception. No amendment to this Law may be made except by a *three-fourths majority of the members of the National Assembly* and the *unanimous approval of the Presidency Council*. Likewise, *no amendment may be made that could abridge in any way* the rights of the Iraqi people cited in Chapter Two; extend the transitional period beyond the timeframe cited in this Law; delay the holding of elections to a new assembly; reduce the powers of the regions or governorates; or affect Islam, or any other religions or sects and their rites.[686]

The timeline for the election of the National Assembly and its appointment of the Presidency Council meant that the entire interim text would be unamendable for at least seven months. Arato points out that, pragmatically, the representatives of Shi'a Arab, Sunni Arab, and Kurd groups were likely at any time to hold more than one quarter of seats in the National Assembly, thus giving any key group the ability to block potential change. In the Iraqi case, Arato rightly observes that the rigidity of the constitutional amendment provisions 'encouraged full abrogation or illegality (and their anticipation as well, as pre-emptive moves) during a potentially extended period, especially long if the TAL were preserved because of the failure of constitution making'.[687] Ultimately, there were at least two ways in which the terms of the TAL were manipulated, rather than being amended through the clear terms of the text.

The National Assembly purported to amend the TAL 'minutes before midnight'[688] on August 15 2005, the day by which the National Assembly was to have produced a draft of the permanent constitution. Although the Assembly followed the general provisions regarding the amendment of the TAL, some questioned the legality of the

[686] Law of Administration for the State of Iraq for the Transitional Period 2004 Article 3, emphasis added.
[687] Arato (n 95) 224.
[688] Dexter Filkins, 'Iraqi Assembly Agrees to Extend Constitution Deadline by a Week' (15 August 2005) <http://www.nytimes.com/2005/08/15/international/middleeast/15cnd-iraq.html?pagewanted=all&_r=0> accessed 3 May 2015.

August 15 amendment, because Article 61(F) provides a special procedure that an extension might be made 'no later than 1 August 2005' if extra time was needed;[689] and that the failure otherwise of the Assembly to adopt a constitution by the 15th would result in a series of measures, including the dissolution of the National Assembly and the election of a new representative body.[690] Jonathan Morrow, reporting for the United States Institute of Peace, argues convincingly that in following the general (and high) test set for amendment of the TAL, the National Assembly 'acted lawfully, albeit in a way that the TAL drafters may have thought eccentric' because they avoided using the more specific rule on extensions.[691] However, two further ad hoc and 'illegal' extensions were made by the National Assembly on August 22 and 25 before the constitution was (dubiously) pronounced final on August 28th; the ad hoc extensions were based on a spurious reading of Article 60, but as Arato notes, 'here illegality was an irrelevant detail almost no one cared about'.[692] A further manipulation of the TAL came in October 2005, when the National Assembly voted to enforce a reinterpretation of the TAL's referendum requirement for the permanent constitution as requiring a two-thirds majority of *eligible* rather than *actual* voters to reject the draft text, in order to ensure that it would pass. The Assembly was forced, under US and UN pressure, to reverse that decision, but it

[689] "If necessary, the president of the National Assembly, with the agreement of a majority of the members' votes, may certify to the Presidency Council no later than 1 August 2005 that there is a need for additional time to complete the writing of the draft constitution. The Presidency Council shall then extend the deadline for writing the draft constitution for only six months. This deadline may not be extended again."
[690] Law of Administration for the State of Iraq for the Transitional Period (n 98) Article 61(E),(G).
[691] Jonathan Morrow, 'Iraq's Constitutional Process II: An Opportunity Lost' (United States Institute for Peace 2005) 155 15 <http://www.usip.org/sites/default/files/sr155.pdf> accessed 3 May 2015.
[692] Arato (n 95) 240. See also Morrow (n 103).

underscored the willingness of the Assembly to attempt to perform an end-run around the TAL.[693]

The failure to seek a six month extension before 1 August, as envisaged in the TAL, and the questionable extensions that resulted were caused in part by the insistence of the US that the constitutional process be wrapped up according to the initial timeline, and the 'pressure-cooker'[694] environment that this created.

In addition to the high amendment requirements in the Iraqi TAL, there were significant factors relating to 'amendment culture' that contributed to the lack of amendment during the interim period. The role of the US as the background governing force, the democratic deficit in the constitutional drafting process, and the general desire of the United Nations and the international community to embrace any progress and avoid re-opening of constitutional negotiations all created strong incentives to proceed with the interim text as adopted.

The Interim Constitution of **Nepal** has been amended twelve times since it came into force in January 2007. The amendments have included changes to structural features of the constitution, such as the declaration that Nepal is a federal state,[695] or the reallocation of procedural responsibilities previously allocated to the King and then the Prime Minister to the President of Nepal.[696] A number of topical amendments were also

[693] Arato (n 95) 241–2.
[694] Morrow (n 103) 21.
[695] As established in the The Interim Constitution of Nepal (First Amendment) 2007 Article 138(1).
[696] See, for example, Article 61A(2), The interim constitution of Nepal (Third Amendment) 2007; see also discussion in 'A Simple Guide to the Interim Constitution of Nepal' (United Nations Development Programme 2010) 16 <http://www.ccd.org.np/publications/2010-10-13-NEPAL_Interim_Constitution_8amd.pdf>.

introduced, on diverse issues such as the guarantee of equality in inclusion of marginalised groups such as women and indigenous people in Nepal's Army, to the disposition of the property of the former monarchs of Nepal.[697] The most significant amendments, however, have been connected to the repeated failure of the Constituent Assembly to produce a permanent constitution. In particular, the Eighth and Ninth Amendments to Nepal's interim text concerned extensions to the drafting timetable beyond those constitutionally envisaged, and were ultimately found to be invalid (though saved through a doctrine of necessity, and not declared void) by the Supreme Court. The Court's interaction in the process is discussed further below, in 6.3 'Judicial review: the courts and supremacy'. The Interim Constitution was amended by the 12th amendment in 2012 across a range of topical provisions; the interim text remains the constitution of Nepal, and there is no clear end in sight for the adoption of the permanent text.

Both Nepal and **Hungary** have experienced interim constitutions that, for different reasons, may be described as having failed into permanence. In the case of Nepal, in spite of a clear procedural framework and detailed timeline, the interim constitution remains in power almost six years after it was to have been replaced. In Hungary, the initial interim text was framed as an amendment to the constitution of 1949,[698] but the text of the earlier constitution was virtually hollowed out, so that almost none of the original remained; as Szikinger observes, it was a 'formally old, substantially

[697] The interim constitution of Nepal (Fourth Amendment) 2008 Article 159(1),(2).
[698] As Dupré discusses, the Constitution of 1949 "was modelled on the 1936 Society Constitution. It had been substantially amended on two occasions: in 1975 (Act I/1975) and in 1983 with the creation of the Council for Constitutional Law (Act II/1983)". Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003) 31.

new' constitution.[699] The 1989 IC or amendment was adopted 'in strict compliance with rules set out in the communist constitution'.[700]

As described in Chapters 2 and 4, substantial constitutional change (or a constitutional drafting project for the permanent text) in Hungary in the 1990s failed. Nonetheless, ten constitutional amendments were adopted between 1990 and 1994.[701] The result was that the constitution 'was not a very stable and reliable text as it was always in the process of being amended and no clear political agreement seemed to emerge as to the substance of a new constitution'.[702] The amendment requirement was a two-thirds majority of parliament,[703] which proved to be too demanding for wholesale replacement, but easily enough surpassed for frequent and minor change. Some of the amendments made include an extension of the presidential term from four to five years, and a provision that in the event of a presidential impeachment, the Constitutional Court would have jurisdiction to try the case. Further, 'a habeas corpus provision was established, and parliament reversed the limits on rights that the last undemocratic parliament [had] inserted into the NKA (National Round Table) package'.[704] Arato and Miklósi observe that the Constitutional Court effectively asserted a right to constitutional

[699] Istvan Szikinger, 'Hungary's Pliable Constitution' in Jan Zielonka (ed), *Democratic Consolidation in Eastern Europe*, vol 1 (Oxford University Press 2001) 408. Dupré disputes this claim somewhat, noting that the news constitution dealt with constitutional matters in a similar order, for example retaining the placement of the chapter on fundamental rights at the end of the constitution, in spite of their newfound significance. Dupré (n 110) 33.
[700] Dupré (n 110) 30.
[701] ibid 32.
[702] ibid 33.
[703] Act I of 1989 (Act No. XX of 1949 (as amended)) (n 15) Article 19(3(a).
[704] Andrew Arato and Zoltán Miklósi, 'Constitution Making and Transitional Politics in Hungary', *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 366.

amendment, and (as is discussed below in relation to the role of the Court) thereby introduced a range of changes.[705]

The various case study states demonstrate a range of approaches, and outcomes, in terms of amendment of interim constitutions. Amendment rates do not track with constitutional success, or constitutional observance by political actors. In some cases, a high rate of constitutional amendment, as in South Africa, can be a sign of a constitutional drafting process that is responsive to a democratic and effective drafting process, and a climate in which political actors hew closely to constitutional norms. At other times, high rates of constitutional amendment can be a sign of dysfunction, and an inability to complete a constitutional drafting process (as in Nepal), or a tendency of ordinary politics to blend with constitutional debates (as in Albania). Rather than focussing on rates of amendment, therefore, it is more profitable to focus on the creation of amendment thresholds which are likely to allow for amendment where necessary, and foster what Arato calls 'constitutional learning', but which are not so low as to render interim constitutions vulnerable to frequent and politically-motivated amendment. As Arato argues, the standard for amendment of an interim constitution should be higher than that of ordinary legislation, but lower than that of ordinary constitutions.

Jackson disputes the notion that further discussion or time leads to consensus (citing the work of Cass Sunstein), and rather than constitutional learning, suggests that

> [a] more modest conception of interim agreements is that their goal is only to maintain the use of law talk, rather than violence, through a series of interim agreements. On this view, the idea of post-conflict

[705] ibid 369.

> constitutionalism may be committed to a vision of constitutions as a form of continuous conversation…[706]

On this more modest account, the question still arises as to how best to manage this 'continuous conversation', and how it should be regulated through amendment rules and judicial powers. I consider those questions throughout this Chapter.

It is arguable that the critical juncture that occurs during the period of interim constitutionalism is best served and regulated by reasonable – but not overly stringent – amendment laws. This kind of approach supports the view that interim constitutions enjoy a complex supremacy; the superior law during the period of their rule, but more subject to debate, revision and change than ordinary constitutions.

6.3 Judicial review: the courts and supremacy

In this Chapter I have discussed the ways in which interim constitutions are established as superior documents – the highest law of the land – and yet this supremacy is tempered and complicated by their very temporariness. In addition to amendment by constitutional drafting bodies or legislative assemblies, another way in which interim constitutions enjoy a complex supremacy is that they are often subjected to the need for judicial approval or regulation, or unusually high degrees of judicial review.

In Chapter 4, 'Time and Consequences', I discussed the idea that interim constitutions, although temporary documents, may have permanent effects. This included an analysis of the way in which constitutional courts operating in interim periods often

[706] Vicki C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2007) 49 William and Mary Law Review 1249, 1287.

have the power to make far-reaching decisions (such as in the field of human rights) that have long-term consequences in the constitutional law and culture of the state, long after the interim text has been replaced by a permanent constitution. In this Chapter, I focus in particular on a certain kind of constitutional review of interim texts: constitutional or judicial decisions that regulate the validity or drafting process of either the interim texts themselves, or the permanent constitutions that they are charged with creating.

Most states have some form of judicial or constitutional review, whereby superior courts may strike down legislation or executive action that is incompatible with constitutional provisions.[707] Indeed, justiciability is one of the seven features of Raz's definition of a constitution. Interim constitutions often provide for higher levels of judicial involvement than in most ordinary constitutions, giving them powers to regulate the operation of the interim text, or the drafting of the permanent text.

In this section I analyse two ways in which interim constitutions may be subject to unusual or unusually high levels of judicial review, looking first at those instances in which constitutional courts review or regulate the operation of the interim constitution itself, and then secondly at instances in which constitutional courts regulate the drafting of the permanent constitution which is mandated by the interim text. I argue throughout this section that this unusual level of judicial scrutiny is one of the ways in which interim constitutions enjoy a complex supremacy.

[707] In 2008, 158 out of 191 states had constitutions including a provision for judicial review. Ginsburg, Tom, 'The Global Spread of Constitutional Review' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford handbook of law and politics* (Oxford University Press 2008) 81.

6.3.1 Judicial involvement in interim constitutions

In Chapter 5, I explored the way in which interim constitutions involve a two-stage drafting process, and a new way of approaching constitutional legitimacy. Interim constitutions are often created by unelected bodies in situations where there is a vacuum of legality or legitimacy, and a lack of clarity around the correct method of adoption of a new constitutional text. One of the ways that constitutional courts become involved in interim constitutions arises in connection with this vacuum; constitutional courts are called upon to adjudicate on the validity of the creation or adoption of interim constitutions. Later, constitutional courts may be asked to adjudicate on the temporal or other jurisdictional limits on the interim constitution.

Jackson considers the South African creation of a Constitutional Court certifying the constitution on the basis of the CPs:

> Although it is difficult to justify this court's creation through a theory of democratic consent, its independence from the prior regime and its high stature enabled it to perform the vital role of offering assurance to all parties that the rights and structures they negotiated for would be carried forward.[708]

Although the different constitutional bodies adopted in different interim constitutions vary widely in terms of their jurisdiction and level of constitutional oversight, ideally they should each possess these qualities of independence from the previous regime, and a high stature that offers assurance throughout the interim period. I explore these themes throughout this section.

[708] Jackson (n 118) 1295.

The Constitutional Tribunal of **Poland** is an example of the first kind of judicial review, where the Tribunal was asked to rule upon the validity of the adoption of the Small Constitution. The Constitutional Tribunal of Poland was established *during* the communist era, in 1985, and began operating in 1986. During this period the Tribunal heard a range of constitutional matters, and made decisions in a more expansive way than had been expected,[709] but the Sejm had the authority to decide whether to 'approve' of Tribunal decisions. As Łączkowski argues, the Tribunal, along with the Supreme Administrative Court (created 1980) and the Ombudsman (1987) were 'supposed to authenticate the tendencies of change taking place…[but] were sort of an incongruity in the simple reality of the declining period of the communist system in Poland'.[710] It was not until February 1990 that the Tribunal truly began its work, with newly appointed judges who were sworn in with a new oath not requiring allegiance to the outgoing communist regime.[711]

The *Small Constitution* had been adopted subsequent to an amendment of a Sejm Standing Order concerning voting rules. The Tribunal heard a case adjudicating the validity of the Standing Order, and found that it was constitutional; this amounted to an

[709] Leonard Łukaszuk and Marek Jan Łukaszuk, 'The Constitutional Court in Poland at the Beginning of Its Activity' (2011) 1 Revista europea de historia de las ideas políticas y de las instituciones públicas 1. The authors note that "As a result of the Court's activities in the years 1966–1988 – 257 provisions of 54 normative acts (i.e.: 4 acts of the Sejm, 25 enactments of the Council of Ministers and of ministers, 6 resolutions of the Council of Ministers, 6 executive regulations (Arreté) of the minister and one statue of the social organization of nationwide importance) were directly examined during proceedings before the Court, and 127 among those provisions were quashed or radically changed. They concerned also 46 cases of the rights of many groups of citizens, and the proceedings resulted in a considerable extension of those rights".

[710] Wojciech Łączkowski, 'The Polish Constitutional Tribunal in the Period of the Political Transformation' in Tadeusz Guz, Jan Głuchowski and Maria R Pałubska (eds), Hanna Grygielska-Michalak (tr), *A synthesis of Polish law: Part 1* (Peter Lang 2009) 287.

[711] ibid 289. See Łączkowski's discussion of his own personal struggle with accepting his nomination to the Tribunal and the contentious issue of the communist-era judicial oath.

indirect declaration that the *Small Constitution* was correctly enacted.[712] In holding that sections 1-5 of the Sejm's Standing Order (or Resolution) were valid,[713] the Tribunal assumes throughout the judgment that the Constitution is a valid source of law, and the supreme law of the land.[714]

In **Nepal**, rather than adjudicating on the adoption of the interim constitution, the Supreme Court has been heavily involved in determining the temporal jurisdiction and duration of the interim text. The Court was required to rule on the constitutionality of repeated extensions of the interim constitution of Nepal beyond what was envisioned in the text.

[712] Garlicki and Garlicka (n 87) 45 footnote 40.
[713] The Standing Orders of the Sejm of the Republic of Poland 1992.
[714] Jerzy Oniszczuk (ed), *A Selection of the Polish Constitutional Tribunal's Jurisprudence From 1986 to 1999* (Constitutional Tribunal) 80–90 citing; *Decision dated 26 January 1993* Constitutional Tribunal of Poland U. 10/92.

6.3.1(a) Table of Decisions of Supreme Court of Nepal on Extensions of Interim Constitution/Constituent Assembly

Amendment	**Extending**	**Considered in decision**	**Verdict**
8th Amendment	Ext from June 2010- June 2011 (1 year)	*(a) Advocate Vijaya Raj Sakya…* (Writs No. 066-WS-0050) (2011)	Upheld validity of amendment.
8th Amendment	Ext from June 2010- June 2011 (1 year)	*(b) Advocate Bal Krishna Neupane…* (Writ No. 066-WS-0056) (25 May 2011)	Amendment invalid; extension allowed on grounds of necessity; overturned decision (a).
9th Amendment	Ext from June 2011- August 2011 (3 months)	(c) *Advocate Bal Krishna Neupane…* (Writ No. 067-WS-0071) (28 August 2011)	Upheld 9th amendment, applied decision (b) in reference to principle of necessity.
10th Amendment	Ext from September 2011- November 2011 (3 months)	(d) *Bharatmani Jungam…* (Writ No. 068-WS-0014) (25 November 2011)	Allowed 10th amendment/allows final extension of 6 months. Applies but limits principle of necessity.
11th Amendment	Ext from December 2011- May 2012 (6 months	***Constituent Assembly dismissed, having not completed its task; 2nd Constituent Assembly elected***.	

The table above summarises the complex series of cases heard by the Supreme Court that dealt with the constitutionality of the 8th-11th amendments to the Interim Constitution of Nepal, each of which granted extensions of time to the jurisdiction of the Constituent Assembly and thus the life of the Interim Constitution.

As has been discussed earlier, the Supreme Court of Nepal held[715] (overruling a previous decision[716]) that the 8th Amendment (2010) one year extension was invalid, because it violated Article 18A of the interim constitution, but found that there was an implied 'doctrine of necessity', which would allow 'additional time to complete constitution-making'.[717] Dahal argued in 2011 that the April 2010 decision of the Supreme Court of Nepal amounts to a decision that

> all the articles of [IC-N] can be amended as per the doctrine of necessity except those relating to democratic republic, human rights and an independent judiciary. The reasoning though may sound to be a political victory for the supremacy of parliament; it comes with the imminent danger of having serious implications in the future.[718]

In the *Bharatmani Jungam* Case (Writ No. 068-WS-0014) (25 November 2011) the Supreme Court ruled that no further extension of the interim constitution would be allowed past May 2012; in May 2012 the Court again denied the Constituent Assembly an extension, and the CA was dismissed, and replaced by a second CA. The possibility of

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[715] *Advocate Bal Krishna Neupane v The Office of the President, Maharajgunj, Kathmandu & Ors and Bharatmani Jangam v The Office of the President, Maharajgunj, Kathmandu & Ors (Supreme Court of Nepal)* [2011] Supreme Court of Nepal Special Writ No. 066-WS-0056.
[716] *Advocate Vijaya Raj Sakya v President of Nepal, Mr Ram Baran Yadav, Office of the President, Sital Niwash, Kathamandu & Ors and in Advocate Kamlesh Dwivedi v President of Nepal, Mr Ram Baran Yadav, Office of the President, Sital Niwash, Kathmandu & Ors (Supreme Court of Nepal)* [2011] Supreme Court of Nepal Writ No. 066-WS-0050.
[717] Arun Sahgal, 'Constitutional Rumblings in Nepal: Three Scenarios' [2011] Institute of Peace and Conflict Studies <http://www.ipcs.org/article/ nepal/constitutional-rumblings-in-nepal-three-scenarios-3388.html> accessed 4 October 2011.
[718] Rajib Dahal, 'Nepal: (Un)Necessary—Doctrine of Necessity' *Telegraph Nepal* (21 September 2011) <http://www.telegraphnepal.com/views/2011-09-21/nepal:-unnecessary-doctrine-of-necessity.html>.

a second CA was not foreseen in the original constitution, but elections were held, and the Second Constituent Assembly met for the first time in January 2014. In a controversial[719] move, the serving Chief Justice, the Rt. Honourable Chief Justice Khil Raj Regmi, was appointed as Prime Minister of an interim unity government – a 'non-party government of bureaucrats'[720] – charged with leading the nation to the November 2013 elections for a second constituent assembly. Following the election and commencement of the Second CA, in the face of opposition from the Nepal Bar Association,[721] Regmi resigned as Prime Minister, and also from the position of Chief Justice.

The complicated series of events in Nepal demonstrates several things. First, it reveals the way in which constitutional amendment and judicial review can become intertwined, and the possibility for Supreme or Constitutional courts to be drawn into adjudicating on the temporal jurisdiction of an interim text. An interim constitution that lacks clear and progressing solutions in the event of stasis or deadlocks opens itself to collapse, or to creative interpretation by a court. Secondly, the example of Nepal shows that where there is political and legal uncertainty during an interim period, courts may play an outsized role, and the judiciary and legislature can enter into an almost dialogic relationship. Constitutional dialogue has been defined as:

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[719] 'ICJ Calls on Nepali Chief Justice to Step down as Judge after Appointment as Prime Minister' (*International Commission of Jurists*, 14 March 2013) <http://www.icj.org/icj-calls-on-nepali-chief-justice-to-step-down-as-judge-after-appointment-as-prime-minister/>. See also David Gellner, 'The 2013 Elections in Nepal' XLV Asian Affairs 243, 243.

[720] Gellner (n 131).

[721] 'Regmi Calls Its Quits as CJ' *EKantipur* (Kathmandu, 11 February 2014) <http://www.ekantipur.com/2014/02/11/top-story/regmi-calls-its-quits-as-cj/385214.html> accessed 12 May 2015; 'Regmi Steps down as Chief Justice' *My Republica* (Kathmandu, 11 February 2014) <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=69426> accessed 12 May 2015.

> a sequel of implicitly or explicitly shaped communications back and forth between two or more actors characterized by the absence of a dominant actor – or at least by a bracketing of dominance –, with the shared intention of improving the practice of interpreting, reviewing, writing or amending constitutions.[722]

In Nepal, a series of constitutional 'communications' (in this case explicit) occurred. The CA amended (or purported to amend) the Constitution; the Court invalidated the mode of amendment but allowed amendment on the grounds of necessity; the CA shaped its justification according to the Supreme Court rulings in future amendments; the CA continued and then limited the concept of necessity (and the permissibility of amendment) in response to the endless extensions and delays. In his judgment in the *Bharatmani Jungam…* (Writ No. 068-WS-0014) case of November 2011, then Chief Justice Regmi[723] stated:

> The trend of extending time period once and again in this way and the relative progress in relation to making the constitution [if] not achieved within the time period…will hinder the making of constitution [until] the uncertain future. The doctrine of necessity should not become the reasons for making the Article 64 inoperative.

As Dahal observes, the Court repeatedly states the importance of the CA drafting a constitution, and within a reasonable timeframe, but 'does not clearly state what the government and CA should do in case they fail'[724] to do so. In the November 2011 decision of *Bharatmani Jungam…* (Writ No. 068-WS-0014), the court not only approved the 10th amendment (albeit with 'lots of displeasure'[725]) which it was charged with evaluating, but foresaw and allowed a further extension of six months (what became the

[722] Anne Meuwese and Marnix Snel, '"Constitutional Dialogue": An Overview' (2013) 9 Utretch Law Review 123, 126.
[723] With whom the other four Justices agreed.
[724] Rajib Dahal, 'Doctrine of Necessity and Its Application in Nepalese Constitutional Law-An Overview' 20 <http://ssrn.com/abstract=2037059> accessed 10 May 2015.
[725] ibid 21.

11th amendment), thus permitting the legislature to adopt it. Dahal, a barrister who is critical of the Supreme Court's reasoning in the necessity and amendment cases, argues that

> the reasoning of the courts revolves around aspiration and their own desire to see [a] new Constitution. There are not enough precedents cited in judgment to back their writings. The Learned Justices put down a continuous circle of arguments [about the CA's responsibilities, but] finally, [the Court] realised that the drama of 'necessity' and 'compulsion' would not be a strong fortress forever for [the] CA to hide its incompetency.[726]

This critique of the Supreme Court of Nepal highlights a potential feature of judicial review of interim constitutions. I have argued that interim constitutions enjoy a complex supremacy due to judicial review, and that in the absence of legitimacy or legal clarity around the authority of a constitution, courts are used as an alternative source of legitimacy and accountability. However, it is arguable that courts are likely to defer to the constitutional and political realities of the day; in Poland, this involved the Constitutional Tribunal simply assuming the legitimacy of the *Small Constitution*, and in Nepal it has involved what might be viewed as a dialogic or negotiated approach to constitutional government. However, constitutional courts, even where they display deference to interim governments, may nonetheless exert considerable influence and an external check on government action, as demonstrated in the November 2011 decision of Nepal's Supreme Court, which limited the extension of the CA, and ultimately triggered a fresh election.

[726] ibid 22.

It is not a characteristic unique to interim constitutions that they sometimes result in court decisions reviewing the application of constitutional rules, or that a complicated dialogic relationship emerges between courts and law-makers. However, what is unique is that cases involving interim constitutions have a tendency to be engaged with the existence of the constitution itself and its validity in a way that is normally settled in an ordinary constitution.

The Constitutional Court in **Albania** was established not at the beginning of the interim period, but following April 1992 amendments to the constitution; it represented the first time in Albania's history that it had had a constitutional court.[727] The new Chapter V, which deals with the judicial system, establishes a number of important principles, including the independence of the judiciary;[728] and that the courts are the 'sole authorities' to resolve dispute in relation to the Interim Constitution,[729] with other courts to refer constitutional issues to the Constitutional Court.[730] Chapter V establishes the procedure for the appointment of judges, and the competencies of the Court, which include the ability to judge 'whether laws and acts…are compatible with the Constitution and the law', and the Court is empowered to suspend or repeal unconstitutional laws.[731] Notably, under Chapter V Article 25, the Constitutional Court 'may initiate constitutional review either upon a motion (ie of an applicant to the court) or on its own initiative'.[732] The Court delivered twelve decisions in its first year of operation, and went on to deliver

[727] Ordolli (n 66) 347.
[728] Law on Major Constitutional Provisions (n 62) Chapter V, Article 1.
[729] ibid Chapter V, Article 2.
[730] Law on the Major Constitutional Provisions (Albania) (n 16) Chapter V, Article 8.
[731] Law on Major Constitutional Provisions (n 62) Chapter V, Article 24(3),(4),(10).
[732] ibid Chapter V, Article 25.

239 judgments overall from 1992-1998.[733] In a report of 1995, the Council of Europe's Venice Commission observed that in general, 'the guarantees provided for the independence of the Constitutional Court are far more satisfactory than those applying to the ordinary courts'.[734] However, the Constitutional Court was not an unqualified success; on occasions it displayed marked signs of judicial independence, and on other occasions it appeared to bow to political pressure. The Court was involved in many decisions that touched on controversial political issues, and related to political procedures, appointments, and transitional justice (lustration) issues. It is not possible to discuss all of these cases in detail, rather, in this section I highlight a few of the cases that demonstrate the role played by the Court in adjudicating on matters relating to the nature and power of the constitution itself.

In an early decision of May 1992, the Constitutional Court found that the *Law on Weapons* (of May 25 1992), which allowed police to search private properties for illegal firearms without prosecutorial approval, was unconstitutional. The Court ruled that the Prosecutor General 'lacked standing to bring such a challenge, but found itself empowered to consider *sua sponte*'[735] the constitutionality of the Law. The Court found it was a violation of the right against search and seizure, and then proceeded to amend the law so as to allow searches without prosecutorial approval only in limited or emergency

[733] 'History' (*Constitutional Court of the Republic of Albania*) <http://www.gjk.gov.al/web/History_97_2.php> accessed 18 May 2015.
[734] 'Opinion on the Albanian Law on the Organisation of the Judiciary (Chapter VI of the Transitional Constitution of Albania)' (Venice Commission 1995) CDL(1995)074e-rev-restr 4 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1995)074rev-e> accessed 17 February 2015.
[735] John Paul Jones, 'The Tribunal In Tirana (The New Constitutional Courts: Albania)' (1993) 2 Eastern European Constitutional Review 52.

circumstances. As Jones observes, rewriting legislation by 'judicial fiat' signalled that the Court was willing to take an interventionist approach in reviewing legislation.[736]

This inclination was repeated in the Court's landmark judgment of May 1993, when it struck down a lustration law as unconstitutional. In a similar manner to the early post-communist decisions of the Polish Constitutional Tribunal, this case represented an application of the nascent Interim Constitution, and in effect, a confirmation of its legality. The Court struck down what was, on the surface, a validly enacted law, on the basis of constitutional provisions and the international agreements to which Albania was a party. Under the lustration law, a commission was empowered to re-evaluate licences to practice law, and 'summarily revoked the licences of 47 lawyers' because of their association with the previous regime; the Court held that this violated the separation of powers, because the legislature was in effect ruling on guilt.[737] As Imholz observes, this decision was 'particularly impressive' in light of the fact that Albania's communist regime had been 'the region's most isolationist and brutal'.[738] The specifics of the lustration scheme and its implications for transitional justice debates in Albania will be discussed in greater length in Chapter 7.

In 1995, the Albanian Court ruled on the constitutionality of legislation which was introduced by President Berisha in late 1994, and which allowed for constitutional amendment by popular referendum following Presidential decree. A referendum on a new constitutional draft was held (on the basis of this law) in November 1994, and it failed,

[736] ibid 53.
[737] Imholz (n 64) 23. See also discussion in Ruti Teitel, 'Post-Communist Constitutionalism: A Transitional Perspective' (1994) 26 Columbia Human Rights Law Review 167, 182.
[738] Imholz (n 64) 23.

with 53.8% of voters (with a two-thirds voter turnout) rejecting the new text.[739] The opposition parties (the Socialist Party and the Social Democratic Party) petitioned for constitutional review of the referendum procedure, and following the Chair of the Court's failure to act on the petition prior to the referendum,[740] three members of the Court resigned.[741]

Constitutionally, the correct method of amendment, as established in Article 43 of the interim text, was the adoption of amendments by a two-thirds majority of the People's Assembly. Berisha proposed the referendum law due to his inability to obtain a two-thirds majority in the Assembly. As Robert Elsie writes,

> [t]his enraged the opposition, but [Berisha's] Democratic Party, under severe pressure from a frustrated and disappointed electorate, were hoping to gain a token of popular approval by the vote on a new democratic Constitution, which, they thought, no freedom-loving voter would dare oppose in its entirety.[742]

This perspective is rather sympathetic to the utilitarian outlook of the DP; the Court ultimately echoed this approach, holding that Article 2 did not violate the constitution. Analysing the Court's reasoning, Ordolli argues that the Court's approach is not convincing, and that it ended up with an interpretation far from the reality of the Albanian constitution.[743] As Ordolli contends, the decision supplanted the fundamental basis of the

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[739] Ordolli (n 66) 296.
[740] The Court said that the Socialist Party's complaint had been 'misplaced'. Scott N Carlson, 'The Drafting Process for the 1998 Albanian Constitution' in Laurel E Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 313.
[741] 'Constitution Watch: Albania' (1995) 4 East European Constitutional Review 2, 3.
[742] Robert Elsie, 'Why They Said "No!"' (2007) 24 Index on Censorship 11, 11.
[743] "Cette interprétation de principe est toutefois loin de la réalité constitutionnelle albanaise…l'argumentation de la cour n'est pas convaincante… Contrairement à la cour…nous soutenons donc que l'article 2 de la loi sur les référndum du 6 novembre 1994 qui s'appuie entièrement sur cette loi.". Ordolli (n 66) 372–3.

Albanian polity as a parliamentary republic, and abrogated the parliament's responsibility and right to modify the constitution. From this point on, constitutional amendments could be made either by a two-thirds majority of parliament, or by the people through referendum, thus elevating Article 2 of the referendum law to the same status as Article 43 of the IC.[744] In this case the Albanian Court was given the power to assess and regulate the possible amendment or replacement of its interim constitution, and it misused of that power in unjustified deference to a ruling party.

The Constitutional Court in **Hungary**, which was created by the **NKA** (National Round Table), was given 'such extensive powers that until the later creation of the South African Court, it was regarded as the most powerful institution of its kind around the world'[745]; although the Court primarily exercised its powers in relation to human rights issues, it also played a role in 'clarifying the relationship between various branches of government'.[746] Its decisions touched a wide range of issues, including freedom of speech, capital punishment; the competence of the presidency and the prime minister.[747] The rich constitutional jurisprudence of the Constitutional Court, particularly in the early years of its operation (1990-1993), is discussed in greater detail in relation to the permanent effects of interim constitutions (in Chapter 4) and in Chapter 7 on the connections between interim constitutions and transitional justice. In one noteworthy decision, the Court ruled that constitutional amendment must be done through the

[744] Ordolli (n 66).
[745] Arato and Miklósi (n 116) 363. Dupré cites Georg Brunner, a "long-time observer of socialist and then post-socialist systems", who describes Hungary's first Constitutional Court as "the most powerful and perhaps even the most active specimen of its kind in the world…", Dupré (n 110) 37. See also discussion in ibid 33–34.
[746] Arato and Miklósi (n 116) 363.
[747] ibid 369.

stipulated procedure for parliamentary-based amendment, and that 'covert amendment' through the adoption of an international treaty is unconstitutional.[748]

6.3.2 Judicial involvement in drafting of permanent constitutions

In some cases judicial involvement in interim constitutions comes in the form of sanctioning the legitimacy of the permanent constitution or its constitutional principles. **South Africa's** Certification decisions have already been discussed in Chapter 4, in terms of the effects that the principles enshrined in the interim text ended up having for the constitutional law of South Africa. In this section I discuss the Certification decisions in connection with the notion of the complex supremacy enjoyed by interim constitutions.

There are a number of interesting currents running between the IC, the Constitutional Court in its certification decisions, and the ultimate Constitution of South Africa. The IC is established in CP IV as 'the supreme law of the land…binding on all organs of state at all levels of government'; not only it is it the supreme law during the interim period, but through the 34 Constitutional Principles, and other structural features of the interim text, it governs the form and content of the permanent Constitution to a significant degree. In this respect the IC appears to enjoy a supremacy akin to an ordinary constitution, governing not only the interim period, but being determinative of many of the principles which are to structure the state on an ongoing basis. However, due to the unique inclusion of the certification procedure, the IC is subject to considerable degree of interpretation and judicial scrutiny, both in its own reign and in how it is applied to the

[748] Márta Dezső, A Vincze and B Vissy, 'Part I. Sources of Constitutional Law' in Márta Dezső (ed), *Constitutional Law in Hungary* (Kluwer Law International) 60.

draft final constitution. As Siri Gloppen observes, the interim constitution 'gives no details of the [certification] procedure, [and] only states that the outcome is final and binding'.[749] The Constitutional Court, which was created by the Interim Constitution, was thus left to develop its own method of performing the 'unprecedented' task of '[j]udicial certification of a national constitution'.[750] As discussed in Chapter 4, the Court adopted the approach that in order to certify the draft constitution against the 'solemn pact'[751] of the IC (as embodied in the CPs) they were required to undertake a holistic, global review of the constitutional text. The Court explicitly clarified that its task was legal, rather than political, noting that the 'wisdom or otherwise of any provision of the NT [new text] is not this Court's business'. [752]

Another unusual feature of the Certification process was that political parties and members of the public were invited to make submissions as to whether the draft constitution complied with the constitutional principles; written submissions were made[753] and some oral submissions allowed, and most political parties (excluding the ANC) made such submissions.[754]

The original draft of the final constitution was not certified by the Constitutional Court in the First Certification of September 6th,[755] on the grounds that it was inconsistent with a number of the Constitutional Principles, including those relating to: federalism; the

[749] Gloppen (n 60) 208.
[750] ibid.
[751] Preamble, Interim Constitution of the Republic of South Africa (n 10).
[752] *Certification of the Amended Text of the Constitution of The Republic Of South Africa* (1996) 2 SA 97 [27].
[753] *ibid.*
[754] Gloppen (n 60) 212.
[755] *Certification of the Constitution of the Republic of South Africa* (1996) 4 SA 744 (Constitutional Court of South Africa).

independence of offices such as the Public Services Commission, Public Protector, and Attorney-General; rights-related provisions; and because of the 'impermissible immunisation of certain statutes from constitutional review'.[756] In denying Certification of the first draft, the Constitutional Court imposed the authority of the interim text into the future of the permanent draft of the constitution. This decision was not made in a political vacuum: the court had to contemplate the 'potentially grave consequences of sending the carefully stitched compromise back to the Constitutional Assembly',[757] including the possibility of reopening a host of contentious issues, and practical issues such as the dispersion of staff that had worked on the CA's draft. However, the Court must also have been cognizant of the significance of the decision, and the importance of establishing the Court's reputation and efficacy. [758]

The consequence of the denial of Certification in the First decision was that the drafting process returned to the CA; the parties agreed to focus on the issues that had been referred back by the Court, albeit with some 'elasticity'[759] to address related concerns. The CA agreed on a second draft by 11 October, and it was duly certified by the Court by 4 December 1996.

Another unique feature of the Certification process is that it involved judicial review and scrutiny of both a current and future constitution, and an attempt by a Constitutional Court to attempt to reconcile the Interim text (adopted following a partially representative Roundtable process) with the draft created by the Constitutional Assembly,

[756] Gloppen (n 60) 213.
[757] ibid 211.
[758] ibid 211–212.
[759] ibid 213.

a body created by the authority and text of the Interim process. This represents another way in which the Interim Constitution of South Africa enjoyed a complex supremacy; being unusually subject to judicial review, but also able to exert unusually strong influence on its permanent, successor constitution.

The 1997 Constitution of **Poland** was subject to judicial review due to the scrutiny of the Supreme Court over the popular referendum in which it was adopted. There was a turnout of 43% of eligible voters, and the referendum was carried by a positive vote of 52.7% of voters.[760] There were 433 challenges to the validity of the referendum,[761] but the Supreme Court held that the referendum was valid, and the President duly signed the constitution into law.[762] In spite of the Court's decision, some scholars such as Spiewak have argued that the constitution is of questionable validity because of the low turnout and slim majority in the constitutional referendum,[763] and yet as Cole notes, this 'assessment displays a certain naïveté about the nature and history of constitution-making—few, if any, constitutions in world history have been adopted by consensus and ratified by a majority of the population'.[764] Indeed, the 1997 Constitution was the first in Polish history to be adopted with the approval of a popular referendum.[765] Compared to the Certification decisions in South Africa, which dealt with substantive and content-based issues in approving the permanent constitution, the Supreme Court's

[760] Daniel H Cole, 'Poland's 1997 Constitution in Its Historical Context' (1998) 1 St Louis-Warsaw Transatlantic L.J. 2 <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1592&context=facpub>.
[761] Garlicki and Garlicka (n 87) 401.
[762] Cole (n 172) 3.
[763] Pawel Spiewak, 'The Battle for a Constitution' (1997) 6 Eastern European Constitutional Review 89, 96.
[764] Cole (n 172) 4.
[765] ibid 42.

decision in Poland related to the procedural validity of the referendum, and was thus more within the standard scope of judicial review.

6.4 Conclusions

In this Chapter I have explored the way in which interim constitutions enjoy a complex supremacy. This involves first of all the claim that interim constitutions, much like ordinary or 'permanent' constitutions, claim to be the superior law of the land, above other laws, and binding on officials. However, this claim to supremacy is complicated in a number of ways that are connected to the very temporariness of interim texts, as well as the particular and often contentious times in which they are adopted. Interim constitutions are often highly amendable, whether due to low amendment requirements, or political factors leading to high demand for constitutional change. In this Chapter I explored the different possibilities open to drafters of interim texts in terms of amendment requirements and the rigidity of these temporary constitutions.

Further, interim constitutions are unusually subject to judicial review, whether in relation to the validity of the interim text, the jurisdiction of the interim constitution, or the control or certification of the drafting process for the permanent constitution. This last possibility has only been fully realised in South Africa, and the Constitutional Court there played an unprecedented role in exercising the authority of the interim text over the content of the permanent text.

CHAPTER 7: INTERNATIONAL LAW AND TRANSITIONAL JUSTICE

Interim constitutions are typically adopted in the context of a large-scale political and societal transition. Often, constitutional transitions follow or coincide with periods of conflict, repression or tension, and the transitions may involve peace-making or ceasefires. As such interim constitutions are often connected to substantial issues in international law, and in transitional justice. In this Chapter, I explore the interconnections between interim constitutions and international law (in Part I), and between interim texts and transitional justice (Part II).

7.1 Part I: Interim constitutions and international law

This Part of the Chapter addresses the way in which interim constitutions reference, depend upon and are informed by international law. I argue that interim constitutions, as deliberately temporary and interstitial documents, enjoy a heightened relationship with international law. The increased relevance of international law within the municipal law of a state during a period of interim governance and constitutional drafting may be explained in part by a lack of legitimacy or authority of domestic institutions; greater links to regional and international legal norms and law-making bodies provide links to an alternative form of accountability and legality. In connection with Chapter 5, it is argued that reliance on international law is one of the instrumental ways in which the drafters of interim constitutions attempt to achieve greater constitutional legitimacy.

The connections between interim constitutions and international law come in many forms, and in this Chapter I analyse these different forms, and the way in which

interim constitutional processes may affect -or be affected by- international law. The contention is not that this link is uniform, neither that when present, it is always positive, merely that in order to understand interim constitutions it is necessary to understand the ways in which they are grounded in issues governed or affected by international law and its institutions. Further, I do not claim that interim constitutions are unique amongst constitutional documents in containing references to international law or in being affected by international legal norms or issues; rather, the claim is that interim constitutional texts are adopted in a time-limited space in which international legal norms have a heightened role, due to the search for alternative forms of legitimacy and authority.

It is worth noting that interim constitutional processes differ not only in the ways and extent to which they involve international legal issues and international actors, but as to the timing and duration of these involvements. Jackson observes that the phased nature of transitional constitution making—exemplified here in interim constitutions—means that the international community might play a part at one segment of the constitutional making process, but not at others. Jackson suggests that international actors and advice might be better provided in the early phases associated with the international transition, and that this approach might thereby 'offer some possibility of mediating among the interests of insiders and outsiders to the end of legitimate constitutions and working constitutionalism'.[766]

In this Part, I undertake a textual analysis of each of the case study constitutions in order to understand the scope of explicit incorporation and provision for international

[766] Vicki C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2007) 49 William and Mary Law Review 1249, 1286–7.

law in interim constitutions. This is a descriptive project but an important one in order to understand the basis of constitutional links with international law. Secondly, I analyse the way in which constitutional processes and texts may be linked to international law through structural dependency upon international legal instruments, or international legal norms. Thirdly, I examine states such as the Democratic Republic of Congo which have adopted and operated under interim (and permanent) constitutions during a state of an ongoing internal conflict (which has at times been characterised as rising to the level of an international armed conflict), a situation which attracts the regulation of international humanitarian law- or the *jus in bello*. Finally, I focus on international institutions such as the United Nations, and the way in which they support and contribute to constitutional transition processes, including drafting of interim constitutions and subsequent negotiations and elections leading to the adoption of permanent constitutions. International criminal law is another arena in which interim constitutions and public international law interact; this connection is explored in the second section of this Chapter, on Interim Constitutions and Transitional Justice.

A number of the issues explored contain links to other themes within this thesis; in the South African case, the theme of interim constitutional texts having permanent effects connects with the incorporation of international law in the context of cases such as *Makwanyane*, where Constitutional Court judges quashed the death penalty after having consulted the required international legal texts. These interconnected ideas will be noted throughout the Chapter.

7.1.1 Explicit incorporation in the interim constitutional text

The first and most obvious way in which international law is connected to interim constitutions is through the explicit incorporation of international legal norms into constitutional texts. Many permanent constitutions invoke international law in some way; the work of the Comparative Constitutions Project demonstrates that the frequency with which this occurs has increased in the post-Cold War era. Historically, approximately 25% of constitutions have referred to customary international law, and as at 2000, 40% of constitutions included such a provision.[767] My analysis refers not only to customary international law, but to the full range of international law, including treaties and decisions of international tribunals. I seek to identify the ways in which international law is used in interim constitutional texts, and the way in which this evolves in the permanent texts that supersede them. The interaction between transitional constitutional systems and international law is complex; as with many other aspects of interim constitutions, the actual texts of the documents provide us with only an introduction to the nature of this interaction, perhaps overstating or underestimating the role that international law and institutions will play in the interim constitutional period.

There are a number of ways in which international law is incorporated into constitutional texts. The most basic, and near-universal reference to international law is a category which I describe as **procedural powers**, which establish and regulate the powers of domestic government actors in relation to international law - in particular,

[767] The Project's survey involves 547 of the ~800 constitutions adopted since 1789, including more than 90% of post-WWII constitutions. Comparative Constitutions Project, 'Option Reports: Customary International Law' (27 January 2009) 1–2 <Previously hosted at constitutionmaking.org/files, copy on file with thesis author> accessed 5 October 2011.

treaty-making - and international relations. Secondly, there is a category that may be referred to as **ideological or aspirational commitments**, whereby a constitutional text, either in the preamble or body of the document, declares a commitment to international law and treaties generally, the United Nations or other institutions, peace and communication and other similar ideals. Thirdly, treaties or customary international law may be explicitly given a constitutional or legal status - **status provisions.** As a variation of this, many interim texts specifically incorporate international human rights documents into the constitutional framework or bill of rights- **human rights incorporation provisions.** Sometimes these provisions are directly incorporated; at times they are incorporated on an aspirational or non-enforceable basis, and at other times their precise status is unclear. A fourth category of **international institution provisions** links interim constitutional texts to international law via reference to United Nations Security Council Resolutions, or by giving an international organisation responsibility in relation to the constitutional drafting or transition process. A fifth category involves reference to international law specifically as it concerns **transitional justice** processes, such as the subjection of an amnesty program to the requirements of international law. Finally, a small number of interim constitutional texts contain references to 'soft law' or international standards or benchmarks that might fall outside of public international law itself, but demonstrate a desire to be governed by standards that are internationally acceptable- **benchmark provisions.**

7.1.1(a) The Sudan, and South Sudan

The discussion that follows will focus primarily on the original Interim Constitution of the Republic of the Sudan 2005, which governed both the northern areas of Sudan and what has since become South Sudan. The Interim Constitution of the Republic of the Sudan contains a number of explicit references to international law, institutions, and standards. It frequently refers to international law and its instruments, and expressly incorporates the Sudan's treaty obligations in the arena of human rights into the Constitution's 'Bill of Rights'. Article 17, which deals with foreign policy, establishes that the government should pursue its diplomacy with a view to several objectives, including the national interest, and extending to

> the promotion of international cooperation, especially within the United Nations family and other international and regional organizations, for the purposes of consolidating universal peace, respect for international law, treaty obligations, and fostering a just world economic order.[768]

The Article goes on to establish a range of other considerations in foreign policy, including cooperation and integration in various ways with Arab and African nations, the global South, the Sudan's neighbours, and the international community as a whole, and the promotion of respect for human rights and peaceful relations amongst nations. Obligations undertaken in 'international human rights treaties, covenants and instruments' ratified by the Republic are declared to be 'an integral part of this Bill (the Interim Constitution)',[769] and the government is specifically obliged to 'protect the rights

[768] *Interim National Constitution of the Republic of the Sudan 2005 s 17(a).*
[769] ibid 27(3).

of the child as provided in the international and regional conventions ratified by the Sudan'.[770]

In addition to a number of incidental references to treaties or international agreements,[771] the Sudanese IC refers to the Comprehensive Peace Agreement, which is annexed and included as part of the interim text, and requires that it be enforced, declaring that it 'shall be *internationally monitored* and fully respected by all Sudanese'.[772] The drafting of this Article reflects that the government is to enforce the CPA, the international community is to monitor this enforcement, and the people are given the more passive role of 'respect[ing]' this process. The international community is given a further role in being tasked with the supervision of a referendum, six months prior to the end of the interim period.[773]

There are a number of references in the Sudanese IC to international standards or benchmarks, imposing duties on government agencies. These relate to the police force,[774] land regulation,[775] and regulatory and prudential standards.[776] As with references to international law proper, these repeated links to international standards arguably reflect a turn to external sources of legality and measurement in an absence of effective domestic counterparts. International actors are referenced in Article 200(1), which establishes a 'Southern Sudan Reconstruction and Development fund', which is to seek donations from domestic and international donors for the rehabilitation and reconstruction of Sudan.

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[770] ibid 32(5).
[771] ibid 58(1)(k), 109(4), 72(c), 91(3).
[772] ibid 147(1),(2). Emphasis added.
[773] ibid 222(1).
[774] ibid 148(1).
[775] ibid 186(3).
[776] ibid 202(8).

The Transitional Constitution of the Republic of South Sudan ('***TCR-SS***') 2011, as an amendment to the (sub-national) Interim Constitution of Southern Sudan ('***INCR-S***') 2005, contains a number of similar or identical provisions to its predecessor. Rights and freedoms enshrined in human rights treaties are again an 'integral'[777] part of the Bill. An INCR-S provision concerning promotion of international cooperation is repeated virtually verbatim in Article 43(a), and provisions relating to international benchmarks are also repeated.[778] There are a number of procedural provisions regarding the ratification of treaties,[779] and the Human Rights Commission established in the INCR-S is readopted, with duties including the monitoring of governmental compliance with 'international and regional human rights treaties and conventions ratified by the Republic of South Sudan'.[780] In an unusual provision, it is provided that a wildlife service shall be established, and wildlife 'protected and managed in accordance with the international standards and obligations'.[781]

7.1.1(b) Iraq

The Transitional Administrative Law explicitly refers to international law in a number of places. In the Preamble, the signatories '[affirm] their respect for international law, especially having been amongst the founders of the United Nations…'. Article 26(C) establishes that the laws of the CPA 'pursuant to its authority under international law shall remain in force until rescinded…'. Under Article 27(E) the Iraqi Transitional

[777] Transitional Constitution of the Republic of South Sudan 2011 pt. 2 (9).
[778] Transitional Constitution of the Republic of South Sudan (n 12), Article 180(5).
[779] ibid, Articles 57(d), 86)7), 101(p), 136(6)(a), 146(1)(i), Schedule A [3], [25].
[780] ibid, Article 146(1)(i).I
[781] ibid, Article 157.

Government 'shall respect and implement Iraq's international obligations regarding the non-proliferation... of weapons'. In Article 58(B) in relation to administrative boundaries, there is the possibility of the UN Secretary General appointing a neutral international arbitrator in event of disagreement.

7.1.1(c) Thailand

The Thai Interim Constitution of 2006 contains relatively few references to international law. The extended Preamble, which explains the context of the crisis that led to constitutional change, expresses the need for an interim measure that takes into account various factors or objectives, such as the rule of law, and also lists 'compliance with the United Nations Charter, obligations under treaties or international agreements, [and] the promotion of friendly relations with other countries'.[782] Arguably, the inward-looking nature of the Thai IC reflects the domestic nature of the conflict, and an underlying sense that the conflict exists between key parties in an ongoing military-political power struggle, where there is not so much an absence of power and control, but a surfeit of both. In contrast to other transitional constitutional environments, there is a sense of a lack of desire for international involvement, or United Nations or third-party monitoring; Thailand's national mythology places some value on its (regionally) unique history of remaining a sovereign state without ever having been invaded. As Matthew Phillips has

[782] *Constitution of the Kingdom of Thailand (Interim Edition) of BE 2549 2006.*

argued, the idea of Thai exceptionalism or individuality has been used by both internal and external actors to support heavy-handed rule.[783]

7.1.1(d) South Africa

In South Africa, international law was used in a way to effect and represent the sharp break from the country's history and the legacy of apartheid, which is a crime against humanity[784] and for which South Africa had been sanctioned and condemned.[785] Jeremy Sarkin notes that in the apartheid era, international law was viewed as irrelevant, citing a 1989 statement of the South African Law Commission:

> It cannot be envisaged that human rights norms as enshrined in international law can to any extent play a part- let alone a significant part- in the decision of the protection of group and individual rights in South Africa. Safety does not lie in the hope that our courts will apply the norms of international law.[786]

As Sarkin observes, for 'almost half a century the apartheid state had defied the United Nations and dismissed its Universal Declaration of Human Rights as communist propaganda', as well as 'vilify[ing] the declarations and resolutions of various United Nations agencies'.[787] Thus one of the many revolutionary changes in the interim and then final South African constitutions was the introduction of international law and its norms.

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[783] Matthew Phillips, 'Myths That Have Kept Thailand Together Now Risk Tearing It Apart Following Military Coup' <http://theconversation.com/myths-that-have-kept-thailand-together-now-risk-tearing-it-apart-following-military-coup-27082>.
[784] International Convention on the Suppression and Punishment of the Crime of Apartheid 1976 (GA res 3068).
[785] See summary of UN response here: 'The United Nations: Partner in the Struggle against Apartheid' (*The United Nations*) <http://www.un.org/en/events/mandeladay/apartheid.shtml> accessed 29 May 2014.
[786] Jeremy Sarkin, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 Journal of Constitutional Law 176, 179.
[787] ibid.

Chapter Eight of the SA-IC, concerning the Human Rights Commission, establishes that the HRC's Powers and Functions include, in addition to a general obligation to promote observance of human rights:

> If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law it shall immediately report that fact to the relevant legislature. [788]

In Chapter 13 concerning General and Transitional Provisions, it is established in addition to any obligations or agreements binding on South Africa, that 'the rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic', thus directly incorporating general provisions of international law into municipal law. Additionally, Section 35(1) of the IC, in a provision that was maintained in the permanent constitution, establishes that the Court is required to have regard to public international law, and allows it to have recourse to foreign case law in ruling on municipal constitutional matters. Whilst neither of these provisions create a fully monist legal system, they are nonetheless significant in giving international and foreign law a role in domestic constitutional law.

7.1.1(e) Albania

The Albanian IC states broadly that legislation of the Republic of Albania 'considers, recognises and observes the principles and norms of the international law generally

[788] *Interim Constitution of the Republic of South Africa 1993 s 116(2).*

accepted'.[789] Article 9 on foreign relations outlines the policy of 'cooperation, and international peace and security', and there are general provisions in relation to governmental responsibilities for treaties and their ratification and denouncement.[790]

7.1.1(f) Hungary

The interim constitution of Hungary contains a general provision that '[t]he legal system of the Republic of Hungary *shall* adopt the generally accepted rules of international law, and shall ensure harmony between the assumed international law obligations and domestic law'.[791] Similarly, the constitution recognises human rights as inviolable[792] and inalienable. The Hungarian IC directs an unusual amount of attention to war, and concerns about territory and borders. Reflecting the prohibition on the use of force and the violation of sovereignty contained in Article 2(4) of the United Nations Charter (which refers to 'territorial integrity or political independence of any State' [793]), Article 5 of the H-IC states that

> The state of the Republic of Hungary shall protect the freedom and power of the people, the *independence and territorial integrity of the country* as well as its frontiers determined by international treaties.[794]

The following Article continues with this theme, stating that Hungary 'rejects war as [a] means of settling disputes between nations and shall refrain from applying force directed

[789] Law on Major Constitutional Provisions 1991 s 8(1).
[790] *Law on the Major Constitutional Provisions (Albania) 1991 ss 16(4), 28(10), 28(12),(16).*
[791] Emphasis added. *Act I of 1989 (Act No. XX of 1949 (as amended)) 1989 s 9.*
[792] ibid 8(1).
[793] 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". Charter of the United Nations 1945.
[794] Emphasis added. *Act I of 1989 (Act No. XX of 1949 (as amended)) (n 26).*

against the independence or territorial integrity of other states, and from applying threats[795] of violence'.[796] The United Nations is mentioned explicitly in a later discussion of war powers: Article 40B(1) states that '[e]xcepting the cases of military exercises under international agreements and peace-keeping activities at the request of the U.N. Organization, the armed forces may cross the frontiers only with the prior consent of the National Assembly'.[797] It goes on to declare that Hungary shall strive for 'cooperation with all the peoples and countries of the world',[798] and undertakes 'responsibilities' towards expatriate Hungarians.[799] A range of other provisions establish the roles of the various branches of government with respect to international agreements.[800]

7.1.1(g) Nepal

The Interim Constitution of Nepal (IC-N) also incorporates international law. Article 33(m) establishes that one of the state's responsibilities is '[t]o effectively implement the international treaties and agreements of which the State is a party'; and it elsewhere provides that

> The state shall adopt the foreign policy of Nepal guided by the principles of the UN Charter, nonalignment, the Panchsheel, international laws and the norms of world peace.
>
> The State shall pursue a policy of making continuous efforts to institutionalise peace for Nepal through international recognition, by promoting cooperative and good relations in the economic, social and

[795] Note that 'threats' are also banned in Article 2(4) *Charter of the United Nations (n 28).*
[796] *Act I of 1989 (Act No. XX of 1949 (as amended)) (n 26).*
[797] *Act I of 1989 (Act No. XX of 1949 (as amended)) (n 26) 40B(1).*
[798] ibid 6(2).
[799] ibid 6(2).
[800] ibid 19(3)(f);(g);(h); 19A; 19B; 30/A(1)(b); 35(1)(j); 39B.

other spheres on the basis of equality with neighboring and all other countries of the world.[801]

7.1.1(h) Republic of Somaliland

The Interim Constitution of the Republic of Somaliland, as with many other interim constitutions, contains a number of references to international law, and respect for international law. Although it is not stated explicitly in the IC, or its successor, it is clear that the Republic of Somaliland is not a state for the purposes of international law; it lacks a seat at the United Nations, and recognition by other states. Without such recognition, the Republic of Somaliland is not, in practical terms, a state, in the eyes of international law or the international community. Before turning to the complicated issues associated with Somaliland's putative statehood, I will first address the more ordinary ways in which international law is connected to the Interim Constitution.

Somaliland's IC has standard provisions relating to parliamentary and executive powers in connection with international law and treaties,[802] and a general statement that the Republic 'recognises and shall act in conformity with the United Nations Charter and with international law; and shall respect the Universal Declaration of Human Rights'.[803] The Constitution clarifies that as a successor or secessionary state to the Republic of Somalia, the new Somaliland will continue on its predecessor's commitments and treaties under international law 'provided that these do not conflict with the interests of'[804]

[801] Interim Constitution of Nepal 2063 2007, Article 35(21), (22).
[802] Interim Constitution of the Republic of Somaliland 1997 ss 61(b), 78(3).
[803] ibid 12(2).
[804] ibid 12(1).

Somaliland. In line with the principles of the Friendly Relations Declaration,[805] the IC 'accepts the principles of co-operation amongst the nations of the world',[806] and commits Somaliland to 'dialogue and peaceful resolution of disputes', noting that it shall 'respect the territorial integrity of other countries'.[807] Conscious of Somaliland's place in the world, the IC makes reference to a desire to resolve the 'long standing dispute in the Horn of Africa',[808] and states that the Republic shall 'endeavour to join the United Nations, the Organisation of African Unity, the Arab League and the Islamic Conference'.[809] In the same Article of the Constitution, Somaliland commits itself to opposing the international crime of 'terrorism…(and similar acts), regardless of the motives for such acts'.[810]

In relation to the rights, freedoms and duties established in the Constitution, it is stated that these sections 'shall be interpreted in a manner consistent with the international conventions on human rights and international laws referred to in this Constitution'.[811]

The Interim Constitution contains a number of provisions which relate, explicitly or by implication, to the Republic's status as a state, and to issues in international law. Article 1 of the Constitution details the way in which the Republic of Somaliland came

[805] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations 1970 (2625 (XXV)).
[806] *Interim Constitution of the Republic of Somaliland (n 37).*
[807] Interim Constitution of the Republic of Somaliland (n 37), Article 12(4), echoing the words of the Charter of the United Nations (n 28) Article 2(4) on the illegality of the threat or use of force.
[808] *Interim Constitution of the Republic of Somaliland (n 37).*
[809] ibid 12(6). See also Preamble '(g)' which states that 'peaceful and proper co-existence with states in the region and world wide" is one of the factors, alongside others such as Sharia law, to be considered in constitutional drafting.
[810] ibid 12(7).
[811] ibid 34(2).

into being, recounting its status as a Protectorate under the United Kingdom, brief independence following the end of the Protectorate, and incorporation in the Somali Republic from 1960 to 1991, when it regained its independence. It states that the territory 'shall hereby and in accordance with this Constitution become a sovereign and independent country known as the Republic of Somaliland'.[812] Article 2 of the Interim Constitution establishes, somewhat unusually for a constitution, the precise scope of the territory of Somaliland, including latitude and longitude; read together with Article 1 (concerning political independence), Article 12(1) on entering into treaties, and Article 4 on citizenship, the early sections of the Constitution appear to address the requirements for statehood under international law.[813]

7.1.1(i) Poland

The Small Constitution of Poland contains basic **procedural** provisions restricting the Council of Ministers from making laws *inter alia* in relation to the consent to the ratification of international treaties,[814] and granting to the President the power to ratify treaties.[815] In keeping with the generally minimalist nature of the Small Constitution, there is little other discussion of international law. However, Article 24, which deals with the circumstances under which Poland may go to war, hews closely to the rules at customary international law regarding the permissible use of force, applying the UN

[812] ibid 1(1).
[813] Drawn from the classic statement of the requirements of statehood in international law, the Montevideo Convention on the Rights and Duties of States 1934, Article 1, as well as general customary international law on the topic.Drawn from the classic statement of the requirements of statehood in international law.
[814] *Constitutional Act of 17th October 1992, on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government Dziennik Ustaw Nr 84 Poz 426 1992 Article 23(4).*
[815] ibid Articles 33(1),(2), 28.

Charter formulation that self-defence is allowed only after an armed attack or in pursuit of mutual self-defence.[816]

In Poland, the Chief Justice of the Constitutional Tribunal in 1993, Zoll, discussed the way in which the Tribunal used the broad *Rechtsstaat* principle embodying the rule of law to engage with international law. Although the Tribunal lacked an 'explicit right' to refer to public international law, Zoll states that the court 'do[es] it anyway…relying on the democratic Rechtsstaat. [The judges] declare that international norms constitute the basis of any rule-of-law system, and then [they] adopt the norm'.[817]

7.1.1(j) Democratic Republic of the Congo

The *Constitution de la Transition de la République Démocratique du Congo* (2003) (the 'Constitution of the Transition'), which was superseded by the 2005 permanent constitution of the DRC, establishes a number of links with international law. In addition to preambular references to the importance of international law and rights (including the UDHR and the African Charter on Human and Peoples' Rights), the Constitution of the Transition creates a governmental duty to ensure through education and publication 'the respect of human rights, fundamental freedoms and duties of citizens enshrined in the Constitution', naming the UDHR and the ACHPR in particular.[818] Article 193 establishes

[816] *08/07/2015 16:45*:00
[817] Irena Grudzinska-Gross, 'Interview with Professor Andrzej Zoll, Chief Justice of the Polish Constitutional Tribunal' (1997) 6 Eastern European Constitutional Review 77, 77.
[818] Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') 2003, Article 47. Note that translations are automatic translations produced by Google Translate, and verified by the thesis author.

that treaties gain supreme legal status, a provision re-adopted in the permanent Constitution of 2005,[819] while Article 194 clarifies that if the Supreme Court of Justice declares a treaty to contain a clause contrary to the Constitution, ratification may 'only be given after revision of the Constitution'. Interestingly, the Constitution of the Transition contains a permissive clause allowing for treaties in aid of partial surrender of sovereignty to the African Union.[820] Finally, the Constitution establishes transitional justice as a priority, requiring that at its first meeting, the legislative National Assembly adopt a law on amnesty for 'acts of war, political offences and opinion' (excepting war crimes, crimes against humanity and genocide) 'in accordance with universal principles and international law'.[821] The explicit subjection of an amnesty law to the requirements of international law displays an awareness of the connection of municipal acts to international legal norms.

7.1.2 Structural dependence and legitimacy

7.1.2(a) Statehood and independence

International law regulates the way in which new states come into being, are recognised by others, and the connections that the state has with the state which it has succeeded, or from which it has seceded. Interim constitutions of new or potential states must grapple with these issues of international law, and this is another way in which interim constitutional texts demonstrate a heightened and interdependent relationship with

[819] *Constitution of the Democratic Republic of Congo 2005 Article 215.*
[820] Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') (n 53), Article 195.
[821] ibid, Article 199.

international law. This is a particularly important issue in the context of the IC of the **Republic of Somaliland**. On its face, the text demonstrates an awareness of the necessity of, and legal issues surrounding the establishment of the new state's bona fides for the purpose of international law and recognition by other states. However, what it does not grapple with is the ongoing failure of any other state to recognise the statehood of Somaliland, or the difficulties in terms of legitimacy and efficacy that the state would face in light of continued non-recognition by the international community.

It is necessary to examine the claim of the Republic of Somaliland to be a state; if it is not a state, then the document under consideration is not the interim constitution of a state, but an interim document adopted as part of an unsuccessful unilateral attempt at secession from the sovereign state of Somalia. Professor Crawford's work on the creation and recognition of states, both generally and in relation to Somaliland, is particularly instructive. In the chapter 'Secession' in his seminal work *The Creation of State in International Law*[822], Crawford lists the Republic of Somaliland alongside Tibet, Kashmir and Nagorny-Kharabakh (*inter alia*) as one of 'numerous (unsuccessful) attempts unilaterally to secede by groups or territories within independent States'.[823]

Any discussion of the legal requirements for statehood must begin with the Montevideo Convention, Article 1 of which has long represented the classic – if incomplete – formulation on the topic.[824] Article 1 states that

[822] James Crawford, *The Creation of States in International Law* (Oxford University Press 2007).
[823] ibid 403.
[824] *Montevideo Convention on the Rights and Duties of States (n 48).*

> The state as a person of international law should possess the following qualifications:
>
> a) permanent population;
> b) a defined territory;
> c) government; and
> d) capacity to enter into relations with the other states.

These criteria, Professor Crawford argues, are 'based on the principle of effectiveness among territorial units', rather than more normative concerns such as legitimacy. On the basis of the Montevideo Convention's requirements alone, Somaliland's claim to statehood appears strong. Its population is relatively stable, and exists within a defined territory (stipulated in detail in Article 2 of the Somaliland IC). Although there are ongoing conflicts or 'skirmishes' in Somaliland, it is not necessary for a state's borders to be wholly uncontested,[825] merely that they demonstrate a reasonable degree of stability and certainty. The criterion of government is not merely formalistic; it requires *effective* government. The Republic of Somaliland has a constitutional government with credible legislative, executive and judicial branches, and

> It is said that from 1993 onward, a Somaliland government has functioned effectively in the territory, restoring and maintaining public services and infrastructure. The port of Berbera in Somaliland became the chief entry point for international aid to Ethiopia, as well as local aid. The UN Secretary-General has described conditions in Somaliland by and large, as 'calm', in contrast to conditions elsewhere in Somalia, which 'can be described as anarchic'. [826]

However, while Somaliland meets the requirement of possessing a government that exercises general control over its territory, it is not 'to the exclusion of other entities

[825] *North Sea Continental Shelf Cases (FRG/Denmark; FRG/Netherlands)* (1969) 1969 ICJ Rep 3 (International Court of Justice).
[826] Crawford (n 57) 414.

claiming through or under it'.[827] Somalia's claims, as a sovereign state, to control over the territory comprising the putative Republic of Somaliland, effectively defeat the territory's independence.

While some have claimed an emerging norm of self-determination under international law – even a developing *erga omnes* obligation – international law and the international community have not yet recognised such a norm. It is notable that outside of cases arising from decolonisation, no seceding state has been recognised by the international community or admitted to the United Nations without the consent or support of its 'parent' state.[828] Without a capacity to enter into full relations with other states (although Somaliland, as with other potential states, has had some interactions with other states or international organisations), Somaliland cannot, in any practical sense, achieve or enjoy statehood.

The Interim Constitution of the **Republic of Sudan** of 2005 (ICR-Sudan 2005) was an attempt to govern both the northern and southern parts of what was then Sudan. It remains in force in the north to the present day, whereas in the south, it has been replaced by the Transitional Constitution of South Sudan (TC SouthSudan-2011). The ICR-Sudan 2005 included the annexed Comprehensive Peace Agreement,[829] also of 2005. The two interim constitutions emerging from the Sudanese context are intimately connected to issues and debates concerning statehood and independence. Unlike in the putative Somaliland, however, the legal existence of the state in question was not in doubt in

[827] ibid 59.
[828] ibid 415.
[829] The Comprehensive Peace Agreement Between The Government of The Republic of The Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army 2005.

either iteration. Nonetheless, the drafting and operation of the constitutions of both Somaliland and South Sudan are fundamentally regulated by and situated in international legal norms regarding statehood.

7.1.2(b) Occupation

The **Iraqi** TAL is deeply connected to international law. The issue of the highly questionable legality of the invasion of Iraq itself, while obviously relevant to the background circumstances leading up to the constitutional process in Iraq, is the subject of a great deal of academic debate,[830] and beyond the scope of this thesis. The legal basis for the TAL derives from the authority given to it by the occupying power, and was regulated through the adoption of UN Security Council Resolutions. SCR 1483 of May 2003 called upon the Coalition Authority to 'promote the welfare of the Iraqi people through the effective administration of the territory', *inter alia*.[831] SCR 1511 of October 2003[832] recognised the Coalition Provisional Authority as temporarily exercising authority in Iraq, as well as recognising the Iraqi Governing Council as embodying the sovereignty of the state of Iraq. Later, in Resolution 1546 of June 2004,[833] a resolution drafted by the United Kingdom, the Security Council failed to mention the TAL at all, raising questions as to what role the IC would play in transitional Iraq, or whether Coalition forces would attempt to abandon it.

[830] For an excellent summary of the issues and arguments involved, see Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008) 198–221.
[831] UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.
[832] UNSC Res 1511 (16 October 2003) S/RES/1511.
[833] UNSC Res 1546 (8 June 2004) S/RES/1546.

Under international humanitarian law, an occupying military power owes duties to the occupied state and its citizens, as encapsulated in the Fourth Geneva Convention.[834] The Fourth Geneva Convention establishes obligations for the occupying power—in this case the Coalition authorities—including in relation to: protected persons; the education of children and provision of other social goods; and a range of other topics.[835] The Convention also empowers the occupying force to introduce legal provisions relating to the administration of the territory, subject to a range of limitations and requirements, including that laws should generally not be altered beyond what is necessary;[836] this has been labelled the 'conservationist principle'.[837]

Within the confines of this project it is only possible to highlight a few of the key issues that arise in relation to violations of international humanitarian law and occupier obligations in Iraq. A number of scholars have identified ways in which the Coalition authorities breached their obligations under the law of occupation, both in terms of failures to protect individuals (including the torture and mistreatment of detainees), and in terms of over-stepping the traditional limits on authority of an occupying military power.[838]

Benvenisti's work *The International Law of Occupation* provides a comprehensive analysis of the legal issues associated with occupation, with a particular

[834] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) 1949.
[835] ibid Articles 35-63.
[836] ibid Articles 64-78.
[837] Eyal Benvenisti, *The International Law of Occupation (2nd Edition)* (Oxford University Press 2012) 268, citing Gregory Fox.
[838] See generally Hamada Zahawi, 'Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom' (2007) 95 California Law Review 2295.

focus on the occupation of Iraq between 2003-2005.[839] The changes made to the law and government of Iraq included the abolishing of existing political and military institutions, amendments to criminal law, changes to the court system, new human rights legislation, economic reforms, and changes to the management of natural resources.[840]

Benvenisti observed of the changes made by Coalition authorities in Iraq that 'what amounts to a complete re-programming of the Iraqi legal, political, and economic system by the occupants, has struck many commentators as clearly exceeding the mandate under the law of occupation'.[841] While beyond the scope of the historical understanding of an occupier's roles, there is some argument that UNSCR 1483 (which was made under the Security Council's Chapter VII powers) empowered the Authority to take wide-ranging action in reforming the Iraqi state.[842] It is also possible to argue that Resolution 1483 signals a growing support for an 'enhanced' view of the powers of occupiers to reform a state in circumstances such as occurred in Iraq.[843] The matter is the subject of some debate in international law, and there are a number of troubling features both about the extent of power exercised by the Authority, as well as the *duration* of that power: the time in which 'inhabitants lose the opportunity to make important choices about the nature of their own society'.[844] These many issues underline the problematic foundations of constitution making in Iraq, and the ongoing issues in the state's constitutional development.

[839] Benvenisti (n 72) 9.
[840] See generally ibid.
[841] ibid 268.
[842] Fox, cited in ibid 270.
[843] ibid.
[844] ibid.

In SCR 1546, the Security Council called for the end of the occupation and looked forward to a fully sovereign and independent Interim Government of Iraq by 30 June 2004.[845] In context, the TAL had been adopted in March 2004, and the Coalition Authority formally relinquished control, through a CPA Order that took effect on June 28. Nonetheless, the US-led authorities continued to exercise considerable control in Iraq, including throughout the period of the drafting of the permanent Constitution.[846]

7.1.3 Wartime

In many cases, interim constitutions have been negotiated in the immediate aftermath of a war, or even during the war itself. As noted above in the discussion of Bell's work on the *lex pacificatoria*, interim constitutional texts, along with other transitional constitutional documents, are often negotiated as, or alongside of peace agreements. In some cases the peace agreement is the constitution itself, and in other cases a peace agreement precedes or follows an interim constitutional text. In any case, the concurrence of these processes means that interim constitutions are inherently enmeshed in the laws of war, and in the *jus post bello* or law of peace, as it is increasingly known. Constitutional negotiations in Albania, the Sudan and South Sudan, the DRC, South Africa, Somaliland, Thailand, Nepal, and Iraq, have all been conducted in the context of hostilities, or in the recent cessation of hostilities. In South Sudan at present, the ignition of hostilities is deeply connected to the constitutional reform process. In this sense, transitional constitutional texts are one part of a broader process of negotiation for peace, and are themselves influenced by the conflict and the desire to prevent its continuation.

[845] UNSC Res 1546 (8 June 2004) S/RES/1546 (n 68).
[846] Benvenisti (n 72) 255.

7.1.4 International organisations

International actors such as United Nations agencies and other non-governmental or inter-governmental organisations often participate or support constitutional transitions. Sometimes this is done directly, through assistance to the constitutional drafting process, or supervision or intervention in elections or referenda, and at other times UN missions play a more general administrative and leadership role in the area, as in Nepal. The notion of constitutional diffusion and importation of constitutional ideas will be discussed further in Chapter 8. It is worth noting briefly, however, that interim constitutional processes, particularly in the second phase of drafting, are often supported and influenced by international actors.

The constitutional transitions in Hungary, Poland and Albania were all characterised by immense international interest, and international advisers played a role in informing the constitutional reform as well as the 'shock therapy' economic reforms[847] that were introduced throughout the region. In **Albania** international experts played a significant role in the second phase of constitutional drafting, for the permanent constitution. As discussed in Chapter 5, the final phase of constitution drafting in Albania achieved a high degree of public debate and involvement. In addition, the constitutional committee effectively used expert international opinion. As Carlson writes, the constitutional drafters viewed international approval as an important step from the

[847] Alina Mungiu-Pippidi, 'Whatever Happened with Transition in Central and Eastern Europe?' (South East European Studies at Oxford (SEESOX), Oxford, 3 February 2014).

outset.[848] The Venice Commission had had a long-running involvement in the constitutional process since the adoption of the Law on Major Provisions, with mixed results, as discussed in Chapter 6 in relation to the Commission's influence on the adoption of an amendment containing limitations on the right to speech. But in the 1998 drafting process, the Venice Commission played a renewed and positive role, sending a delegate to participate in all constitutional debates, and ultimately approving that the draft constitution conformed with 'European and international standards'.[849] This approval was particularly important to the Albanian government given its recent membership of the Council of Europe, which made law-makers 'anxious to avoid any potential inconsistencies with the European Convention on Human Rights'.[850]

Writing on **South Sudan**, Kevin Cope has demonstrated that international involvement in constitution drafting can have complicated outcomes. In his article on South Sudan's 'Intermestic' (international and domestic) constitution he observes that international influences were largely confined to the Bill of Rights, whereas domestic interests controlled structural reforms. He argues that the South Sudanese IC represents a case of 'institutional self-dealing' whereby the institutional interest of domestic drafters—towards the consolidation of power—governed the constitutional drafting process. Conversely, the Bill of Rights 'replicates an international template reflecting an emerging global consensus on human rights'.[851] Cope notes that in relation to the sub-

[848] Scott N Carlson, 'The Drafting Process for the 1998 Albanian Constitution' in Laurel E Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 325.
[849] ibid 326.
[850] ibid.
[851] Kevin Cope, 'The Intermestic Constitution: Lessons from the World's Newest Nation' (2013) 53 Virginia Journal of International Law 667, 697.

national 2005 IC of South Sudan, there was also substantial international involvement. The Max Planck Institute claims substantial involvement in that process, including drafting an initial version of the text, reviewing the Southern Sudanese constitutional drafting committee's output, and claiming that the Assembly 'adopted most of the suggestions the [Institute] gave'.[852] The National Democratic Institute claimed it had contributed to the process of constitution-making, and USAID claimed it made both procedural and substantive contributions to the process.[853]

As Cope has observed however, all of the international contribution to the Bill of Rights may have been a distraction from the structural 'power grab' that occurred in the 2011 South Sudan IC.[854] The 2011 text consolidates the powers of the president, giving the executive the power to dismiss judges and dissolve parliament in the case of emergency, and it diminishes the powers of the states in the federal compact. The country's former Vice-President Riek Machar opposed the changes, arguing that 'South Sudan cannot tolerate 'one man's rule', and calling Kiir's actions a 'step towards dictatorship'.[855] In December 2013, conflict between factions of Kiir's and Machar's supporters began; although there are many other factors in this conflict, the constitutional power grab is certainly key amongst them.

In **Nepal**, the UN played a significant role in the establishment of the IC-N, including assisting substantially in the drafting of the interim and permanent constitutions

[852] ibid 701.
[853] ibid 693.
[854] Kevin Cope, 'Sudan's Dualistic Constitution' in Denis J Galligan and Versteeg, Mila (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 316.
[855] Kevin Cope, 'South Sudan's Constitutional Bait-and-Switch' <http://www.constitutionnet.org/news/south-sudans-constitutional-bait-and-switch> accessed 26 February 2014.

through its UNMIN, and in assisting with logistical issues such as the holding of elections. The Secretary General of the UN has been directly involved, making multiple reports to the Security Council, and meeting with the leaders of the political parties in Nepal to discuss issues related to the peace agreement and the interim constitution. UNMIN has played a substantial role in the interim period, acting on issues related to arms monitoring, child protection, and political affairs—including monitoring the terms of the CPA and observing parliament—and other issues. The Security Council has, additionally, issued Resolutions (although no binding resolutions under its Chapter 7 powers, relating to international peace and security), calling upon all parties to fulfil the terms of the peace agreement and to take advantage of the presence of the United Nations mission. In his 2009 report to the Security Council, the Secretary General observed that '[i]t is and will remain a Nepalese-led process, but the United Nations will continue to be available to assist as may be requested'.[856]

As in Nepal, the United Nations has had a significant and ongoing role in the **DRC**. The United Nations Organization Stabilization Mission in the DRC (MONUSCO), which was until 2010 known as the UN Mission in the DRC (MONUC), has acted as a peacekeeper and monitor of peace since 1999. Generally speaking, the DRC is an example of a process that involved a substantial contribution from international actors. France, Mauritius, Belgium, and the United States assisted the DR Congo in drafting the constitution. A number of international partners provided assistance,[857] with the US-

[856] United Nations Security Council, 'Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of Its Peace Process' (2009) S/2009/1.
[857] Including the Electoral Institute of South Africa (EISA), the Konrad Adenauer Foundation (FKA), USAID, UNDP, and the United Nations office in DR Congo; see Renee Dopplick, 'DR Congo-Constitutional Reform'

based National Democratic Institute for International Affairs (NDI) providing technical support and proposed revisions of the draft constitution.[858] USAID also funded two NGOs in 2002 to work with the Justice and Peace Commission of the Catholic Church to develop, print, and widely circulate a draft constitution that served as the precursor to the 2005 draft constitution; it proposed the semi-presidential republic with a president, parliament, and prime minister.[859]

These case studies demonstrate that there is a range of ways in which international law may be involved in an interim constitution, and a range of degrees of involvement. The involvement of international law and international institutions in the interim constitutional drafting process reflects an attempt to invoke an additional source of legality and legitimacy—as seen in South Africa—and assists a state in attempting to secure certain goals, such as peace and human rights protection, for its citizens.

7.2 Part II: Transitional justice and interim constitutional models

In this section, I explore the links between interim constitutions and transitional justice, and argue that constitution drafting and transitional justice are complementary and interrelated processes. Teitel has argued recently that there is a 'mutual influence between transitional justice and constitutionalism',[860] highlighting the links between constitutional notions of limitations on state power, accountability, state responsibility,

<http://www.insidejustice.com/law/index.php/intl/2005/12/21/dr_congo_new_constitution> accessed 10 February 2014.
[858] ibid.
[859] ibid.
[860] Ruti Teitel, 'Transitional Justice and the Transformation of Constitutionalism' in Tom Ginsburg and Dixon, Rosalind (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 57.

the rule of law, and the goals associated with transitional justice: responding to the human rights abuses perpetrated or permitted by the state, holding hearings to account for what has occurred, trying those most responsible, and seeking to establish the rule of law through the strengthening of governmental institutions and encouraging broader public participation in the affairs of the state.

In this section, I identify some of the ways in which this mutual influence operates in relation to interim constitutions. Analysis in this section takes two forms. First, it involves a reflection on the way in which transitional justice concepts, such as dealing with the past, ending impunity, and eliminating the possibility of racial discrimination, are embodied in interim constitutional texts, and in the permanent constitutional texts that supersede them. Secondly, it involves a reflection on the role that constitutional drafting plays in the broader transitional justice context, that is, in relation to processes of reconciliation, healing, amnesty and negotiation of criminal and civil trials or reparations. It is not possible to complete a comprehensive analysis of the complex interrelationship between constitution drafting and transitional justice; rather, this section aims to identify a few key issues and examples of this process in each of the case study countries. Moreover, it is not possible to speak comprehensively on the mechanisms of transitional justice that have operated in each of these states: these processes are frequently multi-faceted, multi-phased, complex, and in some cases still ongoing. In order to narrow the scope of the inquiry, I focus on two transitional justice processes: Truth and Reconciliation Commissions, and lustration or vetting laws. Additionally, in order to delve into particular case studies in more details, I focus on the TRC processes of South Africa and Nepal, and the issue of lustration with particular

reference to Poland and Iraq. After this more detailed analysis, I briefly survey some of the other transitional justice mechanisms that have been of relevance in other interim constitutional processes.

Before beginning this analysis, however, it is necessary to establish a working definition of 'transitional justice', and the goals associated with it. The term 'transitional justice 'emerged with reference to the transitions from authoritarian rule in Eastern Europe and Central America in the late 1980s and early 1990s';[861] and a recognisable field of 'transitional justice' emerged only after 2000.[862] In a narrow sense, transitional justice may be defined as 'efforts by a new regime to deal with crimes or wrongdoing of a previous regime',[863] with a focus on structures such as criminal trials and truth commissions. This approach, adopted by the 'Option Report' on Transitional Justice from the Comparative Constitutions Project, reflects an understanding of transitional justice that is oriented to formalised legal procedures to deal with criminal offences occurring under a past regime. These issues are at the core of transitional justice, but transitional justice may be characterised more broadly as a category concerned with responding to past wrongs, not only through criminal accountability mechanisms or inquiries, but through constitutional, legal, and political change.[864] It includes specific methods such as reparations and civil remedies, and extends to an attempt to move away from the ideology and politics of a past regime.

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[861] Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (2009) 3 International Journal of Transitional Justice 5, 7.
[862] ibid 8.
[863] Comparative Constitutions Project, 'Option Reports: Transitional Justice' (*Constitutionmaking.org*, 26 July 2009) 2 <Previously hosted at http://constitutionmaking.org/files/transitional_justice.pdf, copy on file with thesis author> accessed 5 October 2011.
[864] 'Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (United Nations Secretary General (UNSG) 2004) Report of the Secretary-General S/2004/616.

András Sajó, the Hungarian legal theorist and now a judge of the European Court of Human Rights, developed the theory of a 'constitutionalism of fear', in which the makers of a constitution enact and respond to fears related to the previous regime.[865] Teitel describes the way in which the founders of various transitional constitutions have responded to the regimes of the past, noting the way in which the German Basic Law, which in its first Article establishes the *inviolability* of human dignity, responds to the crimes and obsessions of the past.[866] Teitel contends that 'these historically derived approaches – arguably [should be] understood as transitional justice in its constitutional modality';[867] meaning that constitutional rights and statements of value should be understood as transitional justice expressed in its constitutional form. I adopt this approach in arguing that interim constitutions can play a key role in responding to the issues of the past, and in pursuing transitional justice; and that the two-staged nature of interim constitutions allow for a response, and then a renewed, reconsidered response to the issues surrounding transitional justice. This is not to claim that this path is necessarily—or even ordinarily—followed in interim constitutional models, merely that the possibility exists, and is supported by the structure of a two-stage constitution drafting procedure.

7.2.1 Constitutional incorporation of transitional justice provisions and themes

[865] András Sajó, *Limiting Government—An Introduction to Constitutionalism* (Central European University Press 1999) ch 1.
[866] Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) 1949 Article 1.
[867] Teitel (n 95) 59.

It is useful to establish the general status of transitional justice provisions in constitutions, before examining their presence in interim constitutions and in the case study constitutions in particular. The Comparative Constitutions Project – looking only at transitional justice in the narrower sense discussed above – provides some helpful data on this issue. Analysing a sample of '599 of the roughly 800 constitutions put in force since 1789 including more than 90 per cent of constitutions written since World War II',[868] the authors find that only 1.3 per cent of constitutions studied refer to a truth and reconciliation commission ('***TRC***'),[869] and that only 2.2 per cent of constitutions contain provisions relating to the crimes of the previous regime.[870] This constitutional data is not exhaustive of TRC provisions and criminal accountability measures in transitional countries; many such bodies are simply established extra-constitutionally. Moreover, this data deals only with the narrower question of specific accountability measures in transitional justice, and does not establish the prevalence of broader responses to transitional justice themes, as discussed above. Nonetheless, it is a useful starting point to note the relative rarity of reference to such mechanisms in constitutions, and the recency of their appearance in constitutional law.

To take a recent example, the ***IC-N*** contains extensive provisions related to transitional justice. A quick review of the case study countries shows relatively little attention is given to issues surrounding transitional justice in the narrower sense- criminal accountability mechanisms, etc. It will be argued, however, that themes relating to

[868] "Comparative Constitutions Project (n 98) 1.
[869] Examples cited include: Nepal 2007; Burundi 2004; DRC 2003; Rwanda 2003; East Timor 2002; Sudan 2005. See Comparative Constitutions Project (n 98).
[870] Examples cited include: Cuba 1940 Article; South Africa 1993,1996; Estonia 1992; German Democratic Republic 1949; Bosnia and Herzegovina 1995; Rwanda 2003; East Timor 2002; Malawi 1994. See ibid.

transitional justice in the broader sense involving a rejection of the past are evident throughout these constitutional documents. Further, in cases where such mechanisms have been established in a state, but outside of constitutions, it will be submitted that negotiations concerning such developments often occur in connection with—or are informed by— the constitution drafting process. In particular, it appears that there are several issues connected to transitional justice which play a role in constitutional negotiations: the question of how to deal with individuals involved in the wrongs of the past regime, both in terms of criminal and civil liability and restrictions on the roles they might play in public life; the rehabilitation of public institutions; peace-building; the finding of truth and accounting for the past; and the rejection of the ideology of the past and the attempt to foster a new state ideology. In the analysis that follows I focus on a few key examples of transitional justice issues in relation to interim constitutions, in order to highlight certain possibilities.

7.2.2(a) Contrasting Experiences of Truth Commissions; South Africa

The South African Truth and Reconciliation Commission, one of the more prominent institutions of its kind, was not established in the *SA-IC*. However, the negotiations concerning amnesty and the TRC were intimately connected to the constitutional negotiations. The task group assigned to resolving the question of amnesty during the constitutional negotiations failed to reach agreement, and so instead of being included in a specific provision, the matter fell to be incorporated through the 'Postamble', which was 'written on one of the last nights of negotiations at Kempton Park, and tacked on to

the Interim Constitution at the last minute'.[871] The Postamble discussed amnesty but did not establish the TRC; that was done through the *Promotion of National Unity and Reconciliation Act* of 1995. Nonetheless, the Postamble contains the basic elements of the conditions on which amnesty was ultimately granted before the TRC; it stipulates that

> amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.[872]

The TRC played a major role in attempts in South Africa to account for the past, and to deal with the problem of the scope and breadth of involvement in the wrongs of the previous regime. Teitel uses the example of the South African TRC - and the interim constitution – as being mutually reinforcing, in that the promise of amnesty was crucial to the bargain reached in the interim constitution, and then that the promise of the interim constitution for sweeping societal change made the reality of amnesty for political crimes palatable, and acceptable, as part of a new constitutional bargain. In Teitel's words, '[w]ithout this commitment it would be hard to understand amnesties as a form of justice rather than the denial of justice'.[873]

Furthermore, the constitutional negotiations around amnesty were connected with the challenges of peace-building, and of the rehabilitation of democracy and democratic

[871] Richard Spitz and Matthew Chaskalson, *The Politics of Transition- A Hidden History of South Africa's Negotiated Settlement* (Hart Publishing 2004) 413.
[872] Note that this provision and others in the IC under the heading of 'National Unity and Reconciliation' were deemed to be part of the permanent constitution, Schedule 6, s22 Constitution of the Republic of South Africa 1996.
[873] Teitel (n 95).

institutions. As the TRC noted in its *Report* of 2003,[874] the dates outlined in the Postamble were stipulated to 'serve as a deterrent to those who wished to use violence to disrupt the elections'; the dates were ultimately extended to 10 May 1994, the date of the inauguration of President Mandela, because some 'of those who had been involved in continued violence later agreed to participate in the democratic process'.[875] In connexion with this idea, Teitel cites the decision of the Constitutional Court, which, in upholding the legality of the amnesty process against a challenge by a victims' group, noted that if the constitution had

> kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had the bridge itself would have remained wobbly and insecure…. It was for this reason that those who negotiated the constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, *ubuntu* over victimization.[876]

As Dyzenhaus argues, the negotiated nature of the transition, and the surrender of power by the NP meant that 'Nuremberg-type' criminal trials were out of the question, in the scope of the political negotiations.[877]

7.2.2(b) Contrasting Experiences of Truth Commissions; Nepal

In Nepal, the *IC-N*, Article 33, in a chapter detailing the State's responsibilities, provides that it is incumbent upon the state to 'make arrangements,

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[874] 'Final Report: Truth and Reconciliation Commission of South Africa' (Truth and Reconciliation Commission of South Africa 2003) <http://www.justice.gov.za/trc/report/index.htm> accessed 5 October 2011.
[875] 08/07/2015 16:45:00
[876] *Azanian Peoples' Organisation (AZAPO) & Ors v President of the Republic of South Africa & Ors* (1996) 4 SA 672 (Constitutional Court of South Africa).
[877] David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing 1998) 2.

for appropriate relief, recognition and rehabilitation for the family of the deceased persons, the disabled and helpless persons due to injury during the course of armed conflict'. There are a number of other provisions relating to redressing the wrongs of the civil war, including Article 33(s), which establishes the responsibility of the state to create a Truth and Reconciliation Commission, alongside another Commission which it is obliged to establish, concerning Disappearances.[878]

The TRC was mandated not only in the Interim Constitution, but in the Comprehensive Peace Agreement that preceded it.[879] However, Rishikesh Wagle, a Nepali District Court Judge and doctoral researcher challenges the assertion that the peace process envisaged a TRC that would provide blanket amnesties for serious crimes. Wagle argues that the Nepali peace process 'has never recognised—in available records—amnesty for the past human rights abuses', and yet both parties 'intend to use it as an instrument to bypass the accountability of the wrongdoers'. [880] Wagle examines various pre-CPA understandings,[881] as well as the CPA and IC-N to argue that both documents affirm a commitment to international human rights and humanitarian law, as well as a commitment to reparations for victims.

[878] Interim Constitution of Nepal 2063 (n 36) Article 33(s).
[879] Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal 2006 Article 5.2.5.
[880] Rishikesh Wagle, 'An Overview of Accountability Measures in Nepali Peace Process' (2014) 8 National Judicial Academy Law Journal 127, 127.
[881] ibid 128–132. These include the '12 Points Understanding', the 'Code of Conduct of Ceasefire', and the 'Eight Point Understanding of the Top Leaders of SPA and CPN (M), and the Decision of the Meeting of the High Level Leaders of the Seven Parties and Communist Party of Nepal (M), the last of which represents the first time that provisions relating to transitional justice were adopted. As Wagle observes, the provision relating to the TRC is placed in connection to the "management of conflict victims", and the "impression is given that the intention is to bring perpetrators to justice, a logic "supported with the absence of clear amnesty provision[s] in the document".

7.2.2(b)(i) History of TRC Bills in Nepal

A Truth Commission was established in February 2015, eight years after the signing of the CPA, alongside a Commission to Investigate Enforced Disappearance.[882] Neither Commission has yet begun to operate. Interestingly, part of the delay in the creation of the TRC has been due to the nature of the draft Bill, which—like the South African model—granted amnesties for serious crimes, so long as they were connected to political objectives, and the applicants provided full disclosure of their crimes.

The first draft Bill for the TRC in Nepal made amnesty available for crimes including gross violation of human rights and crimes against humanity.[883] In the years since the South African TRC, international law has moved away from the acceptability of amnesties for widespread violations of international humanitarian law,[884] a trend reflected in the debate surrounding complementarity in the *Rome Statute for the International Criminal Court*, and whether having been granted an amnesty would be sufficient to prevent an individual being prosecuted by the ICC.[885] Christine Bell refers to the 'new law' of transitional justice, which includes the following rules in relation to amnesties:

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[882] John Child, 'Nepal Fears a Truth and Reconciliation Commission' *News Blaze* (12 September 2011) <http://newsblaze.com/story/ 20110912102102chil.nb/ topstory.html> accessed 5 October 2011.
[883] Bhimarjun Acharya, 'Nepal: Truth and Reconciliation Commission' *Telegraph Nepal* (1 September 2008) <http://www.telegraphnepal.com/views/2008-01-09/nepal:-truth-and-reconciliation-commission> accessed 5 October 2011.
[884] 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (United Nations Economic and Social Council 2005) E/CN.4/2005/102/Add.1 Principles 19, 24.
[885] Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 Journal of International Criminal Justice 695, 712–718.

> 1) Blanket amnesties that cover serious international crimes are not permitted.
>
> (2) Some amnesty is required to facilitate the release, demilitarization and demobilization of conflict-related prisoners and detainees.[886]

The Nepali government was 'forced to withdraw its [first] draft version, and launch consultations with the stakeholders', in 'the face of stiff opposition from national and international human rights groups'.[887] The attempts of the Nepali government to establish a TRC against the prevailing norms of international law contributed to its derailing, reflecting the significant role that international legal norms can play in times of weakened municipal law. Further, the prolonged failure of the government to introduce appropriate TRC legislation has contributed to a sense of impunity that has reigned in Nepal. This failure has ultimately undermined the constitution, and transitional justice related goals. This situation reflects an interesting case of the borrowing of a particular legal formulation from the regime of one interim constitution by another, mediated and affected by international law and international actors.

In March 2013, the Bhattari caretaker government reopened the TRC issue, introducing an ordinance that was the product of an 'agreement reached earlier among major political parties to form a Truth and Reconciliation Commission (TRC) with a provision of blanket amnesty'.[888] In a case challenging the legislation (filed by the National Network of Families of the Disappeared and the Missing), the Supreme

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[886] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 240.
[887] Warisha Farasat, 'Can We Have 'Truth and Reconciliation' without Justice?' *Kashmir Dispatch* (20 September 2011) <www.kashmirdispatch.com/others/20095940-can-we-have-truth-and-reconciliation-without-justice-kashmir.htm> accessed 22 September 2011.
[888] 'SC Rejects TRC Ordinance over Blanket Amnesty' *My República* (2 January 2014) <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=67287>.

Court held that the Commission could not provide blanket amnesties for serious human rights violations, and required amendment of certain sections.[889] The Court held that the Act would be a violation both of the Interim Constitution and of Nepal's international legal obligations to investigate and prosecute serious crimes.[890]

7.2.2(b)(ii) Legal issues facing the newly formed Nepali TRC

In spite of the decision of the Nepali Supreme Court, as Thomas Bell notes, the 'transitional justice law which was passed a few months later [in April 2014] included the same provisions'.[891] A second Supreme Court decision on the topic, delivered in February 2015, again declared the amnesty provisions unlawful, but the position of the law and the Commissions remains uncertain. In a February 2015 interview, the TRC Chair Surya Kiran Gurung declined to comment on the matter, which was then *sub judice*.[892] Gurung acknowledges in that interview the many legal ambiguities and practical challenges which the Commission faces, including: questions about the relationship between the TRC and the courts (parallel jurisdiction); various procedural matters; the difficulty of collecting evidence eight

[889] 'Nepal's TRC: Top Court Rules on Proposed Powers' *eNews Channel Africa* (Kathmandu, 4 January 2014) <http://www.enca.com/world/nepals-court-rules-out-amnesty-serious-war-crimes>.
[890] Tariq Ahmad, 'Nepal: Supreme Court Strikes Down Amnesty Provision in Truth and Reconciliation Law' (*The Law Library of Congress*, 17 March 2015) <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404343_text> accessed 1 June 2015.
[891] Act on Commission of Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (Nepal) 2014. Thomas Bell, 'Nepal's Transitional Injustice (Opinion)' *Aljazeera* (11 March 2015) <http://www.aljazeera.com/indepth/opinion/2015/03/nepal-transitional-injustice-150309101407122.html>. For discussion of criticisms of the legislation by victim groups, see Dewan Rai and Pranaya SJB Rana, 'Interview Ram Bhandari' *The Kathmandu Post* (21 April 2014) <http://www.ekantipur.com/the-kathmandu-post/2014/04/20/editorial/interview-ram-bhandari/261902.html>.
[892] Dewan Rai and Darshan Karki, 'TRC Has Been Formed to Restore Justice System, Reconcile Society (Interview with Surya Kiran Gurung, Newly Appointed Chair of the TRC)' *EKantipur* (16 February 2015) <http://www.ekantipur.com/2015/02/16/oped/trc-has-been-formed-to-restore-justice-system-reconcile-society/401742.html>.

years after the cessation of hostilities; and contention about whether certain actions were connected to hostilities.[893] Thomas Bell, a journalist expert in the political situation in Nepal, argues that the Commissioners recently appointed to the TRC 'are seen as party loyalists, with neither political independence nor relevant expertise'.[894] The International Commission of Jurists has also highlighted problems with the Commission's ability to remain independent and impartial, both in connection to appointments of Commissioners and funding of the TRC.[895]

The international legal community has echoed the Court's criticisms of the April 2014 TRC Act; the UN High Commissioner for Human Rights issued a Technical Note, stating that the Act

> could also result in the avoidance or delay of criminal investigations and prosecutions, which would be inconsistent with international law. Truth-seeking does not absolve States of their legal obligations with regard to criminal justice. The Commission must not be used to avoid or delay criminal investigations and prosecutions, which should be reinforced or completed, not replaced, by truth-commissions.[896]

As the Commissioner observes, where violations covered by an amnesty 'amount to gross violations of international human rights law or serious violations of international humanitarian law, the amnesties are inconsistent with international law and the UN's policy against amnesties', including obligations to which Nepal is a party.[897] One positive note observed by Alison Bisset in a report for the Bingham Centre, is that s29(4)

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[893] ibid.
[894] Bell, 'Nepal's Transitional Injustice (Opinion)' (n 126).
[895] 'Briefing Paper: Compromising Justice: Nepal's Proposed Ordinance on Disappeared Persons, Truth and Reconciliation (2012)' (International Commission of Jurists 2012) <http://reliefweb.int/sites/reliefweb.int/files/resources/TJ-Ordinance-Briefing-Paper-FINAL-VERSION.pdf>.

of the 2014 Act makes reference to a 'Special Court' which will have the authority to 'adjudicate on conflict related crimes', with the possibility that matters could be referred from the Commission to the Court for prosecution.[898]

In contrast to the relationship between accountability measures and the constitution in South Africa, the situation in Nepal thus far has been closer to a mutual *de*legitimising, rather than legitimising. It remains to be seen as to exactly how this relationship might evolve in the coming months.

7.2.2(c) Truth Commissions in other interim constitutions

There are other examples of Truth Commissions or amnesties being incorporated as a transitional justice measure in other interim constitutional case studies. In the Transitional Constitution of the **DRC**, Article 199 provided that the government would adopt, in its first session, and in accordance with universal principles and international law, a law regarding amnesty for acts of war, political offences, *excluding* genocide, war crimes and crimes against humanity.[899] A similar provision had been included in the Global and

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[896] 'OHCHR Technical Note: The Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014) – as Gazetted 21 May 2014' (Office of the United Nations High Commissioner for Human Rights 2014) 1 <http://www.ohchr.org/Documents/Countries/NP/OHCHRTechnical_Note_Nepal_CIDP_TRC_Act2014.pdf>.

[897] ibid 2. Including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; International Covenant on Civil and Political Rights 1966.

[898] Alison Bisset, 'Transitional Justice in Nepal: The Commission on Investigation of Disappeared Persons, Truth and Reconciliation Act 2014' (Bingham Centre for the Rule of Law 2014) 2014/07 <http://binghamcentre.biicl.org/documents/334_nepal_update_-_bisset.pdf>.

[899] Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') (n 53) Article 199.

Inclusive Agreement.[900] Additionally, in Chapter II of the Transitional Constitution on Institutions Supporting Democracy, a Truth Commission was established.[901] There is no explicit discussion in the text as to how these two provisions are linked, if at all.

In many states that give amnesties, there is no link between amnesty and participation in a truth or evidence gathering process. Indeed amnesties of various kinds were granted by a number of interim constitutional states, including Albania in 1997 (concerning the pyramid schemes), Iraq in 2004, Sudan in 2006 and 2008, and in Thailand in 2006[902].[903] In Nepal amnesties preceded the adoption of the *IC-N*, and were offered in 2006 alongside cash rewards to guerrillas who gave up arms.[904]

However the DRC Truth Commission followed the South African model in providing amnesty in exchange for participation in the Commission. As Louise Mallinder argues,

> Where…amnesty is linked to truth-recovery mechanisms, particularly by granting amnesty in exchange for truth, it differs from the traditional understandings of amnesty as amnesia, as rather than casting the crime into oblivion, amnesty becomes a tool to facilitate greater truth recovery.[905]

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[900] Global and Inclusive Agreement on Transition in The Democratic Republic of the Congo, Inter-Congolese Dialogue, Political Negotiations on the Peace Process and on Transition in the DRC 2002 Point III [8].
[901] Alongside other institutions such as the Independent Electoral Commission, and the National Observatory for Human Rights. Constitution de la transition de la République Democratique du Congo ('Constitution of the Transition') (n 53) Article 154.
[902] Constitution of the Kingdom of Thailand (Interim Edition) of BE 2549 (n 17).
[903] Louise Mallinder, 'Global Comparison of Amnesty Laws' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia 2010) 6.
[904] Shirish B Pradhan, 'Nepal: Rs 1 Million Offered to Senior Maoists' *Rediff India Abroad* (Kathmandu, 14 March 2006) <http://www.rediff.com/news/2006/mar/14nepal.htm>.
[905] Mallinder (n 138) 6.

In spite of this promising start, however, the Truth Commission in the DRC is not viewed as a successful program. As has been observed before, the adoption of the Transitional Constitution of the DRC, as well as the permanent constitution which came into force in 2006, occurred alongside ongoing conflict and considerable violence.[906] The conflict was one of a number of factors that hampered the work of the Commission, alongside a lack of independence, and insufficient funding. As Arnould recently observed, 'the Commission failed to produce any findings and subsequent calls for a new truth commission faced political resistance over concerns that it might undermine stability and threaten powerful individuals'.[907]

7.2.3 Contrasting approaches to lustration

A key issue that arose in Poland and Iraq in connection to transitional justice is the status of individuals who participated in the previous regime. In particular, the question of how to deal with ruling party officials of the previous regime, and whether to attempt to exclude such individuals from the new regime. For both states, this was an issue that played out in multiple stages over the course of the transitional period. In the Eastern European context, the issue of 'lustration', 'the screening of officials suspected of improprieties under the auspices of the *ancien regime*',[908] played a major role in the post-communist discussion on transition. As Teitel notes, the word lustration derives 'from

[906] 'Democratic Republic of the Congo: Confronting Impunity Human Rights Watch Briefing Paper' (2004) 2 <http://www.hrw.org/sites/default/files/reports/drc0104.pdf>.
[907] Valérie Arnould, 'Transitional Justice's Uneven Path in the DRC' (*JusticeInfo.Net (Fondation Hirondelle)*, 16 June 2015) <http://www.justiceinfo.net/en/component/k2/741.html?Itemid=102>.
[908] Wojciech Sadurski, 'Postcommunist Constitutional Courts in Search of Political Legitimacy' [2001] European University Institute Law Working Paper No. 2001/11 2.

the Latin *lustrare*, "to shed light on" the past'; [909] it consisted chiefly of preventing former communists or informants to the secret police from obtaining civil service positions. Ellis identifies the motivation behind lustration policies as emanating from the wide perception 'that former Communists could not be trusted to carry out democratic reforms', [910] and argues that lustration procedures and related trials have been the primary response to accountability issues in Eastern Europe. One of the key risks of lustration processes is that of a 'miscarriage of justice by assigning collective guilt without a determination of an individual's responsibility for any harm caused'.[911] Natural justice and other administrative law protections can be threatened by a failure to adopt proper processes. In this section I analyse the lustration processes of Poland and Iraq, and then conclude by reflecting on lustration in other case study countries.

7.2.3(a) Lustration in Poland

Polish lustration practices have been an ongoing presence in Polish political life since 1990-1992, when the Sejm first began debating procedures. The saga of lustration and transitional justice in Poland is intertwined with the process of constitutional reform. In Poland, the interim constitutional period represents an uneasy mid-point between the communist era represented by the Constitution of 1952, and the liberal democratic era represented by the 1997 Constitution and beyond. The *Small Constitution* itself contains no provisions relating directly to transitional justice, and barely any details relating to the

[909] Teitel (n 95) 98.
[910] Mark S Ellis, 'Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc' 59 Law and Contemporary Problems 181.
[911] Roman Boed, 'An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice' (1998) 37 Columbia Journal of Transnational Law 357, 359.

transition itself, but it does authorise related constitutional texts, such as the amended version of the 1952 Constitution. The decision to maintain the 1952 Constitution, albeit with many sections repealed or amended, alongside the *Small Constitution* resulted in a patchwork effect. Parts of the 1952 Constitution contain amendments and principles vital to the transition towards a democratic state, the *Rechtsstaat* principle discussed in Chapter Two, and the references to international law and the legality of government action. Yet other parts are redolent of communist era drafting, emphasizing the duties of the citizen towards the state, and the socio-economic structure of the state. In the July 1992 amended Constitution, the description of the 'realisation of the great ideas of socialism'[912] from the preamble of the original 1952 Constitution was repealed. In a move away from the Soviet era, private property rights are asserted and protected, with expropriation valid only for just purposes, and compensation; conversely, in Chapter 8 on the Fundamental Rights and Duties of the Citizens, there is greater continuity with the original constitutional text, with a focus on socio-economic rights, and detailed provisions as to the duties of citizens towards the state.[913]

However, the main lustration policies, like Poland's constitution, were not adopted until 1997. In 1997, a lustration court was established to respond to cases of complicity with the Special Police, and most recently in 2007,[914] extensive lustration provisions allowed for screening for 53 categories of jobs, including for journalists and

[912] Wenceslas J Wagner, 'The New Constitution of Poland' 2 American Journal of Comparative Law 59, 60.
[913] Constitutional Act of 17th October 1992, on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government Dziennik Ustaw Nr 84 Poz 426 (n 49), Articles 90-93.
[914] Act of 18 December 1998 on the Institute of National Remembrance – Commission for Prosecution of Crimes against the Polish Nation.

lawyers. Parts of this new legislation have been judged unconstitutional by the Constitutional Tribunal.[915]

Lustration policies play a role in determining who may participate in constitutional drafting and early post-transitional elections; in Poland, the delays meant that figures who had played a key role in post-transitional politics between 1990 and 1997 were only targeted at the end of this transitional period; both the incumbent President in 1997, Aleksander Kwaśniewski, and Lech Wałęsa, the popular Solidarity leader and previous President, were brought before the lustration court; both were alleged to have been complicit with the secret police. Both were cleared of the charges, and it appears that evidence may have been forged or unreliable. Rohozinska argues that 'lustration is an ongoing quest for political and personal integrity and a pure democracy', a kind of Holy Grail quest that may never be realised.[916] Lustration in Poland illustrates the complicated links between constitutional reform and transitional justice and political change; Rohozinska attributes the 'confusion' surrounding lustration to the lengthy and complicated period of constitutional change and renegotiation between 1992 and 1997, and the gradual removal of communists from power.[917]

7.2.3(b) De-Baathification in Iraq

In Iraq, the *TAL* explicitly defined itself in opposition to the past regime; the Preamble begins '[t]he people of Iraq, striving to reclaim their freedom, which was usurped by the

[915] Renata Uitz, 'Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?' (2007) XIII Juridica International 47, 48.
[916] Joanna Rohozinska, 'Struggling with the Past: Poland's Controversial Lustration Trials' (2000) 2 Central European Review <http://www.ce-review.org/00/30/rohozinska30.html>.
[917] ibid.

previous tyrannical regime'.[918] The *TAL* presents the state and its characteristics as including the formal, structural characteristics—such as republicanism, and having a federal system—and also identifies particular values and ideals: democratic and pluralistic; the federal system based on geographical and historical realities and separation of powers, rather than on race or ethnicity.[919]

Federalism is presented throughout the constitution as one means of preventing the concentration of power in one central authority, and linking that concentration with the 'decades of tyranny…under the previous regime'.[920] Particular mention is made of the gerrymandering and manipulation of administrative boundaries that occurred under the previous regime, and a promise made that the Transitional Government will recommend remedies for these issues in the permanent constitution. Further, Article 6 of the TAL requires the transitional government to 'take effective steps to end the vestiges of the oppressive acts of the previous regime', albeit without the stipulation of the procedure for so doing. Elsewhere, the *TAL* assures citizens that the military shall not be used to 'terrorize or oppress the people of Iraq'.[921] There are other provisions relating to transitional justice to be found in Article 58, entitled 'Steps to Remedy Injustice', dealing with issues such as forced settlement, restoration of residence and addressing property claims with compensation, land and opportunities.[922] The *TAL* 'confirm[s]'[923] the December 2003 statute creating the Iraqi Special Tribunal, which was established to try

[918] *Law of Administration for the State of Iraq for the Transitional Period 2004 (Iraqi National Council) Preamble.*
[919] ibid Article 4.
[920] ibid Article 52.
[921] ibid Article 59A.
[922] ibid Article 58.
[923] ibid Article 48(A).

individuals accused of committing genocide, crimes against humanity, war crimes or other serious crimes between 1968 and 2003.

Lustration or screening practices are embodied in the Iraqi constitution in several articles – for example, members of 'the dissolved Ba'ath Party with the rank of Division Member or Higher' are excluded from being nominated to the National Assembly.[924] Some exceptions were provided, with the possibility of a former full Member being nominated if he 'sign[ed] a document renouncing the Ba'ath Party and disavowing all of his past links with it before becoming eligible to be a candidate'. Additional provisions prevent candidates from being nominated for the National Assembly if they were members of 'the former agencies of repression [or] contributed to…the persecution of citizens',[925] or if they had enriched themselves in an 'illegitimate manner'. No exceptions or renouncement provisions are made for those in these categories. Similar provisions limit those who can serve on the Presidential Council, requiring that a candidate who was a member of the Baath Party must have 'left the dissolved Party at least ten years before its fall', and must not have participated in 'repressing the intifada of 1991…and must not have committed a crime against the Iraqi people'.[926]

Baathism is a 'secular Arab nationalist political ideology' that emerged from Syria in the 1940s, and is thought to have been brought to Iraq in 1949.[927] The International Centre for Transitional Justice ('***ICTJ***') describes the movement's ideology

[924] ibid Article 31(B)(2).
[925] ibid Article 31(B)(4).
[926] ibid Article 36(B)(4).
[927] Miranda Sissons and Abdulrazzaq Al-Saiedi, 'A Bitter Legacy: Lessons of De-Baathification in Iraq' (International Centre for Transitional Justice 2013) 3 <https://www.ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf>.

as ‘vague and heavily nationalistic’, but notes that it emphasises ‘a goal of Arab nationalism under the motto of ‘Unity, Freedom, Socialism’’.[928] The Baathists came to power in Iraq following a coup of 17 July 1968; they operated as a secretive group, relying on ‘personal and kinship relationships’ in its early years.[929] From 1988 onwards, it became increasingly easy, and was then encouraged, to join the party; there were economic benefits, and increased educational and employment opportunities for party members.[930] Although no full membership lists have been found, according to the Higher National De-Baathification Commission (HNDBC) there were around 400, 000 full party members, with estimates of party membership and sympathisers approaching 1.2-2 000 000.[931]

In contrast to the protracted lustration process in Poland, the De-Baathification process in Iraq began almost immediately post-regime change. After debates both within the group of Iraqi exiles and Washington power sources, a hard-line approach had been adopted, instead of the favoured method of the US State Department and CIA which was that only Hussein and a few top officials should be removed.[932] De-Baathification began under the CPA, was enshrined in the provisions discussed in the *TAL*, and ultimately was continued on by the Iraqi Governing Council. The CPA initiated the complete dissolution of the Iraqi army as well as other Baathist organisations (including

[928] ibid.
[929] ibid 4.
[930] ibid 5.
[931] ibid 6.
[932] ‘International Centre for Transitional Justice: Briefing Paper: Iraq’s New “Accountability and Justice” Law’ (International Centre for Transitional Justice 2008) 10 <http://ictj.org/sites/default/files/ICTJ-Iraq-Accountability-Briefing-2008-English.pdf> accessed 5 October 2011.

intelligence services and the Olympic Committee) in May 2003.[933] This was in spite of the fact that the Army and other military institutions had been established 'well before'[934] the Baathist coup, were not trusted by Hussein,[935] and could have been retained, if reformed.

The 'Coalition Provisional Authority Order Number 1' was entitled 'De-Ba'athification of Iraqi Society', and it initiated the dismissal of 'many thousands'[936] of civil servants of a certain rank. This process was continued by the HNDBC, which acted under the purview of the Iraqi-led Governing Council. The purpose of the process was to keep former officials out of positions of power, and to ensure that the Baathist party never returned to power in Iraq.[937] The scope of de-Baathification expanded after power had been handed over to the IGC: the range of people subjected to the process was widened; a de-Baathification committee was installed into each Ministry; and reappointments and appeals were tightly controlled.[938]

This process has been extremely controversial, and has been 'widely criticized as secretive, all-powerful, and manipulative',[939] and as the International Centre for Transitional Justice notes, by 2007 De-Baathification 'had become an important symbolic

[933] Coalition Provisional Authority Order Number 2: Dissolution of Entities (CPA/ORD/23 May 2003/02).
[934] Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press 2014) 69.
[935] Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press 2009) 46.
[936] 'International Centre for Transitional Justice: Briefing Paper: Iraq's New "Accountability and Justice" Law' (n 167) 4.
[937] Sissons and Al-Saiedi (n 162) 9.
[938] ibid 12–13.
[939] 'International Centre for Transitional Justice: Briefing Paper: Iraq's New "Accountability and Justice" Law' (n 167) 5.

issue in political negotiations between Sunni and Shi'a factions'.[940] One of the key criticisms of the de-Baathification process is that unlike other vetting or lustration processes (here the ICTJ authors cite the cases of Bosnia and El Salvador), it eschewed individual evaluations and fact-finding in favour of dismissing employees solely based on their membership or rank in the Party.[941] Moreover, it created a 'presumption of guilt',[942] rather than of innocence.

During the interim period, the powers of the HNDC were limited somewhat, but the January 2005 elections ushered in a government based on a Kurdish-Shiite alliance (including Ahmad Chalabi, a key supporter of aggressive de-Baathification, who became Deputy Prime Minister) that restored the HNDC to its full power.[943]

In January 2008, following US pressure,[944] the *Accountability and Justice Law* was introduced, clarifying and reforming the approach to de-Baathification, which in many ways represents an improved but largely continuous trajectory with the system from 2003-2008.

The role that *TAL* played in establishing and continuing the practice of De-Baathification is clear, but it also evident that issues surrounding De-Baathification affected the drafting of the constitutions, and the nature of political change. For example, in part, the calls by Al Sistani and others for quick elections were refused, and therefore the transitional period extended, because of the concern that if elections were held early,

[940] ibid.
[941] Sissons and Al-Saiedi (n 162) 9.
[942] ibid 11.
[943] ibid 15.
[944] ibid 18.

'well-organised Ba'athists and Islamic parties would dominate'.[945] In the drafting of the constitution, scholars have argued that women were effectively locked out of constitutional negotiations, because existing women's networks capable of advocating were reliant on prior Baathist networks; it was difficult to '[identify] experienced women, who had remained in Iraq but were not affiliated with the Baathist regime, to work within the interim government'.[946] The General Federation of Iraqi Women, a large organization established in 1969, was dissolved by the CPA on account of its connections with the Baathist regime.[947] As a consequence, as Cardosa acknowledges, '[c]ritics of the *TAL* have listed several concerns with provisions dealing with women's rights', including lack of guarantees in relation to equality in marriage and personal spheres.[948]

The long-term effects of the de-Baathification process have been considerable. Arato writes that there is little argument that it contributed to the 'polarization of Iraqi society on ethnic grounds and almost certainly to fuelling the Sunni-based insurrection'.[949] Sunnis felt that de-Baathification was in effect 'de-Sunnification,' and Shias saw the erratic application and gaps in the process as evidence that, in some respects, vetting had not gone far enough.[950]

Jackson has reflected on the interconnected nature of the aggressive de-Baathification program and the overall approach to the Iraqi occupation. She writes that

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[945] David L Phillips, *Losing Iraq: Inside the Postwar Reconstruction Fiasco* (Basic Books 2006) 179.
[946] Amy Cardosa, *Iraq at the Crossroads* (Nova Publishers 2007) 120.
[947] ibid.
[948] ibid 121.
[949] Andrew Arato and Zoltán Miklósi, 'Constitution Making and Transitional Politics in Hungary', *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 23.
[950] Sissons and Al-Saiedi (n 162) 17.

given 'the radical discontinuities in governance capacity produced by the invasion, the overthrow of the Hussein government, and the de-Baathification that followed, building from the existing national legal infrastructures (as in Eastern Europe) was not an option'.[951]

Myriad practical problems were created by the sweeping de-Baathification, including a number relating to the state industries and attempts to privatise state firms, endeavours made more difficult by the firing of 'expert managerial staff'.[952] In 2013, the ICTJ released a major report on the de-Baathification process, which was highly critical of the approach adopted in Iraq.[953]

The report highlights the interference by the HNDC with the Iraqi High Tribunal, a body created to try alleged perpetrators of genocide, crimes against humanity and war crimes. The HNDC interfered with the work and staff of the IHT on multiple occasions in connection with the trial of Saddam Hussein (the 'Dujail Trial'),[954] and meddled in the work of the Independent Electoral Commission of Iraq in its task of regulating candidates for election.[955]

On the basis of the experience in Iraq, the ICTJ developed seven key recommendations for a lustration procedure following regime change. They were: design

[951] Jackson (n 1) 1277.
[952] See discussion in Arato and Miklósi (n 184) 51–52. See also discussion of the case study of the Ministry of Finance in Sissons and Al-Saiedi (n 162) 4.
[953] Sissons and Al-Saiedi (n 162).
[954] An Internal De-Baathification Committee for the Tribunal was created in 2006. It dismissed some staff on the basis of their Baathist connections, and induced other judges to leave their positions, thus assuring the death penalty in the Hussein case. See ibid 17. The ICTJ Report cites interviews with a IHT judge as evidence for this claim.
[955] ibid 15–16.

a vetting program, not a purge; know your target (this relies on having accurate data); set clear, realistic objectives; 'don't create a monster' (avoid giving a vetting body untrammelled power); consult and educate the public; design a program that is future-looking; and observe basic standards of fairness.[956] As Zaid Al-Ali observes in his book, *The Struggle for Iraq's Future*, de-Baathification in Iraq is often considered to be 'among the worst transitional justice processes in living memory', and has indeed been used in the region as an example of 'what *not* to do'.[957]

In recent times, the de-Baathification process and the disbanding of the Iraqi army have been linked to the development of the Islamic State of Iraq and the Levant (ISIL). It is far beyond the scope of this thesis to assess the complicated factors—some relating to Iraq, others independent—that led to the formation and the success of ISIL, but I want to highlight the links between ISIL fighters and the nature of the post-invasion transition in Iraq. In *Iraq After America*, Joel Rayburn, a former senior adviser to US General David Petraeus, elaborates a nuanced understanding of different political and religious movements in Iraq, beginning even before the Baathist coup.

For some time since the invasion of Iraq, former Iraqi army officers had been joining Al Qaeda, and became—to the surprise of the US, according to Rayburn—'core members of the jihadist group'.[958]

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[956] ibid 1–2.
[957] Al-Ali (n 169) 69.
[958] Liz Sly, 'The Hidden Hand behind the Islamic State Militants? Saddam Hussein's' (4 April 2015) <http://www.washingtonpost.com/world/middle_east/the-hidden-hand-behind-the-islamic-state-militants-saddam-husseins/2015/04/04/aa97676c-cc32-11e4-8730-4f473416e759_story.html>.

ISIL leader Abu Bakr al-Baghdadi deliberately targeted and recruited former Iraqi officers, rebuilding the insurgent campaign and embarking 'on an aggressive campaign to woo the former officers, drawing on the vast pool of men who had either remained unemployed or had joined other, less extremist insurgent groups'.[959] As an article in *The Washington Post* observes, this effort was assisted after a fresh wave of de-Baathification following the departure of US troops in 2011, in which 'then Prime Minister Nouri al-Maliki…set about firing even those officers who had been rehabilitated by the US military'.[960] Brigadier General Hassan Dulaimi, an officer in the pre-invasion Iraqi army (and who was recruited by the US in 2006), argues that 'The people in charge of military operations in the Islamic State were the best officers in the former army'.[961] This theme has been adopted in analysis of why the current Iraqi Army has lost so much ground to the Islamic State, including a disparity in military skill, with the Iraqi Army facing 'battle-hardened officers trained under Saddam Hussein who have spent the past 12 years moving in and out of Anbar province fighting both American and Shiite-led Iraqi forces'.[962] I do not mean to suggest that de-Baathification is the sole or even primary cause of the Islamic State. Rather, I simply wish to highlight the role that de-Baathification played in fomenting sectarian divisions, and the connections between the disbanding of the Iraqi Army and the recruitment of ISIL fighters.

[959] ibid.
[960] ibid.
[961] ibid.
[962] Paul McLeary, 'Why Are the Islamic State's Commanders So Much Better Than the Iraqi Army's?' *Foreign Policy* (26 May 2015) <http://foreignpolicy.com/2015/05/26/why-are-the-islamic-states-commanders-so-much-better-than-the-iraqi-army/>.

7.2.3(c) Other experiences of lustration

Lustration measures were common in post-communist states, and were adopted in the Czech Republic, Bulgaria, the reunited Germany, and in Poland, Albania and Hungary. Within its region, **Albania** was unique: Austin and Ellison, writing on transitional justice in Albania, observe that it was the only state in 'the Western Balkans that brought the issue to the table and passed several lustration laws between 1993 and 1996'.[963] In many respects, transitional justice approaches appear to reflect the general pattern of constitutional development in interim cases. In Albania, for instance, the transitional justice process between 1991 and 1997 has been described as 'disorganised, politicised, and unsuccessful', and used by political leaders 'to maintain power and as a weapon…against opponents'.[964] In this environment transitional justice was used as blackmail or revenge rather than as a measure of reconciliation, a fact consistent with 'Albania's twentieth-century political culture, which has always left open the door to be a hero one day and a traitor the next'.[965]

Austin and Ellison observe a number of phases in the lustration process. First, lustration began in a peculiar way, sparked by a hastily prepared report by a member of the first post-communist government, which detailed the 'luxurious spending of the communist elite', which was reprehensible in light of the country's dire economic state, but nonetheless legal at the time.[966] Ramiz Alia, the outgoing communist leader, was

[963] {Citation}
[964] ibid 374.
[965] ibid.
[966] ibid 379.

arrested in September 1991 in connection with 'economic crimes'; Alia and others were duly convicted, but the prosecutions failed to generate a great deal of public interest.[967]

Lustration of the civil services began in December 1991; Austin and Ellison describe this process as 'pseudo-lustration', because no real vetting or individual evaluation was conducted. Instead, up to 250 000 people lost their jobs following the election of the Democratic Party in 1992, and many of those affected were mere sympathisers.[968]

In the next phase, 'selective lustration' began: a process purportedly designed to rid politics of anti-democratic forces, but in fact used by the Democratic Party to remove those who opposed its government.[969] Following the politically damaging failed Constitutional Referendum, and fearing its possible loss of government, the Democratic Party introduced two key laws, the Genocide Law and the Verification Law, in late 1995. The Genocide Law was mostly for political effect; it discussed prosecutions that were already possible under the criminal law, and did not 'effectively lustrate'.[970] On the other hand, the Verification Law had considerable effects: it established a system of screening people in a wide range of professions: politics; the police force; the judiciary; the education system and the media, and empowered the Verification Committee to review any appointments in those fields. The Committee lacked independence. Its proceedings were conducted in private, and its work targeted the political enemies of the

[967] ibid 381.
[968] ibid 382–3.
[969] ibid 385–6.
[970] ibid 386.

DP, including seven members of the Socialist Party's eleven-member cabinet.[971] There was significant criticism of the Verification Law and its application by bodies such as Human Rights Watch, and Berisha and others would later admit that it was a mistake to have such a partisan policy.

In many ways, the Albanian lustration process reflected broader issues in the transition. A challenge to the Verification Law was rejected by the Constitutional Court,[972] in one example of the Court's patchy track record of deferring to questionable government decisions. Moreover, the lustration process reflected the shifting fortunes of different political parties, and a willingness amongst politicians to use corrupt or partisan methods to retain power. The connection between the failed constitutional referendum and the subsequent decision of the DP to adopt the Genocide and Verification Laws reflects the interconnected nature of the constitutional project and transitional justice issues.

The lustration process contributed to the decision of opposition parties to boycott the 1996 elections,[973] and was a point of negotiation in the OSCE-brokered talks in May 1997.[974] Following victory of the Socialist Party in June 1997, the Genocide Law became a 'dead letter',[975] and the SP engaged in some minor lustration of its own, before the Verification Law was allowed to expire in 2001. There was an ongoing debate throughout

[971] ibid 388.
[972] ibid 384.
[973] ibid 391.
[974] ibid 392.
[975] ibid 394.

the 1990s about the possible release of files collected by the 'ubiquitous and ruthless'[976] communist-era secret police, the Sigurimi; in April 2015, the Albanian parliament finally enacted legislation allowing citizens to access these files.[977]

7.2.4 Criminal trials

In a number of states, criminal trials have been conducted as part of the transitional process. These trials have been both domestic and international in nature. In the international category, the most notable cases are those in the DRC and Sudan.

In 2003, during the period that the Transitional Constitution of the **DRC** was in power, Joseph Kabila, leader of the interim government, referred the situation in the DRC to the International Criminal Court.[978] Since the Court accepted jurisdiction over the situation, seven arrest warrants have been issued, and the first arrest warrant resulted in the arrest, extradition and conviction of Thomas Lubanga Dyilo for war crimes associated with the recruitment of child soldiers.[979] Lubanga was convicted in 2012,[980] with the decision confirmed on appeal only in 2014.[981] This was a significant decision, and the

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[976] 'Trimming the Cat's Claws: The Politics of Impunity in Albania' (The Minnesota Lawyers International Human Rights Committee 1992) 8 <http://www.theadvocatesforhumanrights.org/uploads/catsclaws_3.pdf>.
[977] 'Albania Opens Communist Secret Police Files' *BBC* (Europe) <http://www.bbc.co.uk/news/world-europe-32552372>.
[978] 'ICC - Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (ICC-OTP-20040419-50)' (19 April 2004) <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx> accessed 10 February 2014.
[979] *Warrant of Arrest, the Prosecutor v Thomas Lubanga Dyilo* [2006] International Criminal Court (Preliminary Chamber I) ICC-01/04-01/06.
[980] *The Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)* [2012] International Criminal Court (Trial Chamber I) ICC-01/04-01/06- 2842.
[981] *The Prosecutor v Thomas Lubanga Dyilo (Appeal against conviction)* [2014] International Criminal Court (Appeals Chamber) ICC-01/04-01/06-3121-Red.

imprisonment of Lubanga for fourteen years showed that impunity is not 'an acquired fact'.[982] Other cases arising from the situation in the DRC have been or are underway, but these seven cases represent only a small number of those responsible for hostilities and crimes in the DRC. The ICC is complementary[983] to domestic criminal justice, meaning that it only steps in where a member state is unwilling or unable to prosecute—thus prosecutions before the ICC will necessarily serve a limited role in an overall transitional justice process. In addition to the small number of the ICC's prosecutions, there is also the problem that its scope appears somewhat limited: all prosecutions have focused on the Ituri region, to the exclusion of other regions, and known perpetrators continue in positions of authority within the army.[984] Arnould writes that although an international tribunal for the DRC was mooted, the proposal 'failed to garner the support of the international community and [was] trumped by the logic of accommodation that prevailed during the political transition'.[985] Arnould observes that in recent years 'greater emphasis [has been placed] on domestic criminal justice', including through the use of mobile courts.[986] However, as observers such as the Open Society Foundation have found, there are myriad practical problems in achieving justice domestically in the DRC, including a shortage of trained lawyers and judges, problems in court management, a lack of physical equipment, corruption, and significant difficulties in protecting witnesses.[987]

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[982] *The Prosecutor v Thomas Lubanga Dyilo (Appeal against conviction)* [2014] International Criminal Court (Appeals Chamber) ICC-01/04-01/06-3121-Red.

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[984] Arnould (n 142).

[985] ibid.

[986] ibid.

[987] See generally 'Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya' (Open Society Foundation 2011) <http://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>. Louise Oliver discusses the operation of these courts with the example of Lt Colonel

In spite of its limitations, the ICC's intervention can have significant ramifications for the relevant state, and for international relations. The 2009 indictment of Sudanese President Bashir, for war crimes and crimes against humanity, represented the first time a sitting head of state had been indicted by the ICC. The International Court's jurisdiction in that case arose not through self-referral, as in the DRC, but through a 2005 Security Council Resolution.[988] Bashir continues as President of Sudan, and continues to be received in various states; Sudan is not a member state of the ICC, and protests the exercise of ICC jurisdiction over its territory on this basis. Bashir came closest to arrest and extradition in South Africa (which is a party to the Rome Statute) in June 2015, but managed to leave the country in spite of an order for him to remain, and the ultimate decision of the Pretoria court that he should remain.[989] Whether Bashir will ever face justice before the ICC remains highly uncertain.

7.3 Conclusions

This section has attempted to highlight the way in which interim constitutions and interim regimes engage with transitional justice, and the way in which transitional justice processes affect constitutional drafting. It is difficult to summarise the transitional justice approach of any given state; most states adopt a mixture of methods over time, with processes that evolve and respond to contemporary political issues. For example, in Iraq,

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Mutuare Kibibi, a Senior Commander in the Congolese army found guilty of crimes against humanity for ordering a mass rape. The case was held in a mobile military court applying terms of a Military Code that complements the Rome Statute, and was conducted over a period of months. Louise Oliver, 'Complementarity in Action: Complementarity in Action': (Open Society Initiative for Southern Africa 2012) 39–40 <http://www.osisa.org/sites/default/files/complementarity_in_action_-_louise_olivier.pdf>.

[988] UNSC Res 1593 (31 March 2005) S/RES/1593.

[989] 'Omar Al-Bashir Wins Sudan Elections by a Landslide' *BBC* (27 April 2015) <http://www.bbc.co.uk/news/world-africa-32481013> accessed 1 May 2015.

Albania and Poland, lustration evolved over a period of time and went through different phases, with different standards. Issues such as access to files and an attempt to deal with the documentary evidence of the past sometimes emerge years after other, more obvious transitional justice processes.

Truth Commissions and the granting of amnesties in exchange for testimony are a relatively recent development, with South Africa the paradigmatic case. In this section I explored the way in which the prospect of amnesties before the TRC enabled the initiation of the transition, and equally, that the promise of wholesale change made the prospect of amnesties palatable. In Nepal, the Truth Commission project has been mired in ongoing constitutional and political debates, and the recent establishment of the Commission appears fraught with problems. In this example, as in the case of the DRC, the problems associated with the Truth Commission process reflect the general dysfunction either of the constitutional process or the polity as a whole.

The role of the International Criminal Court in Sudan and in the DRC has been a significant and historic development towards the end of impunity, or at least towards the end of the *assumption* of impunity. The conviction of Lubanga and the fact-finding associated with it represent a significant step in international criminal justice. However such findings play a limited—if important—role in any transition.

In this Chapter, I have explored the nature of interim constitutions in connection with the interrelated themes and issues of international law and transitional justice. I have argued that interim constitutional regimes have a heightened relationship to international law, driven in part by a desire on behalf of political actors to seek additional sources of

accountability, legality and legitimacy in the face of a deficit of those values. Additionally, I explored the possibly mutually reinforcing or mutually undermining relationship between interim constitutions and transitional justice. This analysis represents the final part of my *typology* of interim constitutions; in the next Part of the thesis, I go on to discuss how we should assess and consider interim constitutions.

PART C

CHAPTER 8: SUCCESS AND FAILURE OF INTERIM CONSTITUTIONS

Writing on the state of public affairs in Afghanistan in 2014, Tom Ginsburg and Aziz Huq reflect upon the political gridlock, the potential chaos associated with a looming military withdrawal of western forces, and the failure of the Afghan government to control the country much beyond the capital. They observe that for many, Afghanistan is a 'case study in state failure waiting to be written'.[990] And yet, Ginsburg and Huq advance what might seem like a surprising answer to the question of whether the 2004 Constitution of Afghanistan should be deemed a failure:

> Not necessarily. For one thing, the Afghan Constitution has already outlived many of its counterparts. Of the 964 constitutions promulgated during the last two centuries, only 406 remained in force for more than a decade. Moreover, Afghanistan has experienced some elements of democratic governance during the last ten years.[991]

The 'elements' of democratic governance include the holding of elections with genuine turnover in elected representatives, and the apparent independence of the Parliament in rejecting and overriding certain decisions made by President Karzai.[992] Ginsburg and Huq's argument that the constitution of Afghanistan is not a case study of abject failure— and in some ways can be deemed to be successful— is a reminder that it in judging a constitution it is necessary to do more than simply assess the overall health of the polity. Rather, it involves a nuanced analysis of the contributions the constitution has been able

[990] Tom Ginsburg and Aziz Huq, 'What Can Constitutions Do? The Afghan Case' (2014) 24 Journal of Democracy 116, 116.
[991] ibid 116–117.
[992] ibid 117.

to make, an understanding of the limitations on what constitutions can achieve, and an analysis that attempts to grapple with counterfactual scenarios about the makeup of the state.

In this thesis, I have explored the nature of interim constitutions and argued that they represent a new form of constitutionalism with a new approach to legitimacy and constitutional development. I gave context to the circumstances in and reasons for which constitutions are adopted: they are often adopted following the end of an oppressive regime, as part of a peace settlement emerging from a civil war, or from the context of external oppression. Interim constitutions are chosen as a method of constitutional development because they allow parties to move forward where there is an agreement on the need for constitutional change but a lack of agreement as to what that change should look like; adopting a placeholder constitution allows for previously silenced opposition groups to organise for the development of an open and democratic political culture, and to give the power to make a permanent constitution to a more representative body than would have been feasibly convened in the beginning of the period of change. After analysing these reasons, I advanced a typology of interim constitutions, arguing that: they are temporary documents that have permanent effects; they utilise a two-stage constitutional drafting procedure as a new method of obtaining greater constitutional legitimacy; they enjoy a complex supremacy due to high levels of judicial review and amendment; that they rely on international law and international organisations to foster legitimacy; and that they can have a mutually reinforcing relationship with transitional justice mechanisms.

This typology and analysis of interim constitutions through comparison is in response to the primary research question of this thesis, about the *nature* of interim constitutions, and my attempt to understand the category in its diversity. In this final part of the thesis, I consider the related but separate question of what makes a successful or unsuccessful interim constitution, and whether the category of constitutions as whole should be considered a desirable model of constitutional development. In order to do this it is necessary to consider possible *indicia* or measurements of success and failure, as well as to reflect upon the factors that affect the likelihood of success and failure. There is a preliminary nature to my analysis in this Chapter; a full application of the criteria suggested here to the case study countries would represent another, distinct project. This is in part due to the fact that it involves analysis that is perhaps best completed some years after a constitutional process has been completed, and which includes a full analysis of the nature of *permanent* constitutions in addition. Nonetheless I draw out and suggest the key issues and criteria that I think are relevant to success and failure in interim constitutions.

The question of how to reflect upon success and failure in constitutions and across constitutions has been little addressed. As Ginsburg and Huq note,

> Despite all the aspirational homilies about how new constitutions can bring about the rule of law, human rights, and democracy, however, there is a surprising dearth of tools with which to judge the success or failure of such documents. We need a set of tractable metrics to gauge a new constitution's success at attaining certain goals. Such concepts and measures would aid in the design of new constitutions and inform decisions about when to abandon those that are ineffective.[993]

[993] ibid.

Throughout the first part of this Chapter, in particular, various works by Ginsburg and his collaborators are cited. As discussed in Chapter 2: Methodology, the advent of quantitative and database-based analysis of constitutions is a relatively recent development, pioneered and exemplified by Ginsburg and others associated with the Comparative Constitutions Project. As such, they are responsible for much of the rigorous and current work in this field.

In summary, in this Chapter I argue that interim constitutions should be judged as a success or failure according to three metrics, each of which comprise a number of criteria or issues within them:

1. To what extent does the interim constitution effectively secure a solution to the constitutional impasse?

2. To what extent does the interim constitution govern effectively during the period of its operation; does it act effectively as a coordinating device for the citizens of the state?

3. To what extend does the interim constitution establish an effective foundation for the drafting and adoption of an effective permanent or successor constitution?

Before beginning this analysis however, I will briefly discuss the threshold question of *why* we should reflect upon the success or failure of interim constitutions.

8.1 Why analyse interim constitutions for success and failure

If interim constitutions are temporary documents, replaced by permanent texts that render their temporary predecessors irrelevant, then why reflect upon the success and failure of interim constitutions? The answer to this question is two-fold. First, interim constitutions are significant documents in that they govern states for what can be extended periods of time, as seen in Hungary (over 22 years), Albania (over seven years), Poland (nearly five years), and in several states which currently have interim constitutions that have been in power for some time- Sudan (ten years); South Sudan (four years) and Nepal (over eight years). Even in states where an interim constitution operated for a relatively short period of time, such as Thailand (under a year), Iraq (under two years) and the DRC (under three years), interim texts nonetheless operate as the supreme legal text governing the state during crucial periods of change.

Secondly, interim constitutions matter because, in spite of being temporary texts, they have permanent effects on the constitutional law, culture and political affairs of the states that they govern. This theme was explored extensively in Chapter 4: Time and Permanence, in which I analyse the different ways in which interim texts have permanent effects, including through: rules as to the content of a permanent constitution; the influence of procedural rules; the difficulty of reopening negotiated decisions; the maintenance of institutions or practices established under the interim regime; and the decisions of constitutional courts in the interim period; and where constitutions 'fail into permanence' and persist as long-term constitutional texts.

Interim constitutions are therefore significant not only because they govern interim periods, but because they have a long-term influence on constitutional affairs. Given their significance, it is useful to attempt to define what constitutes a successful interim constitution, and what factors influence success and failure amongst interim texts. This is a worthwhile endeavour not only as an exercise of comparative constitutional law, but in order to assist constitution-makers in deciding whether an interim constitution is an appropriate model in a constitutional transition, and if so, what kind of interim text and provisions should be adopted.

8.2 Quantifying success: measures of general constitutional success and failure in existing literature

There are a number of possible ways of measuring constitutional success and failure. Broadly speaking, I believe that these methods of measuring success may be divided into metrics that are directly related to the constitution, and those that are indirectly related data that can be used as a proxy for constitutional success.

8.2.1 Direct effects

First, endogenous measures are those that attempt to measure the success of constitutions or constitutional provisions directly. One way of doing this is by measuring the degree to which the text of a constitution is reflected in the reality of constitutional practice, or the

degree of constitutional 'congruence'.[994] As Law and Versteeg observe in their study of 'sham' constitutions,

> Even under ideal conditions, as in the case of a wealthy, well- established democracy, there inevitably exists a gap between the state as envisioned by a country's formal or "large-c" constitution, and the state that actually exists pursuant to the body of rules, understandings, and practices that make up the informal or "small-c" constitution.[995]

Before analysing the gap between the formal and informal constitutions, however, it is necessary to consider what is the appropriate unit of analysis. As Ginsburg, Elkins and Melton (self-described as 'Melkinsburg') observe in their paper 'Do Constitutions Matter?', '[o]ne problem with the existing literature is that by and large it treats efficacy as a property of constitutions, rather than a property of individual provisions of constitutions'.[996] That is, even within a given constitution, there will be diversity as to the degree to which any individual constitutional provision is effectively realised in practice. As Melkinsburg observe in their paper, certain kinds of provisions, such as those to do with the structure of the state—or those that work as a kind of operating manual for the state— are more likely to be reflected closely in constitutional practice than say certain rights provisions which function more like a 'blueprint' that requires action or change from constitutional participants.[997] Melkinsburg are even able to identify particular subjects of constitutional provisions that are more likely to be effective in determining

[994] James Melton, Zachary Elkins and Ginsburg, Tom, 'Do Constitutions Matter? Some Conceptual Considerations' (2013) 2.
[995] David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 California Law Review 863, 867.
[996] Melton, Elkins and Ginsburg, Tom (n 5) 3.
[997] ibid 6–15.

the reality of constitutional practice: constitutional term limits are highly likely to be respected.[998]

Even if it is possible to measure constitutional congruence at a given point in time, it is not possible to simply adopt congruence as a measure of success. First of all, the measure of congruence is neutral as to the normative and practical content of the provision; a provision that 'all people with blue eyes should be imprisoned' might be fully realised, and thus the constitution might achieve its goal, but that would not make the constitution successful at promoting values such as democracy, the rule of law, or equality. Similarly, a constitution that is frequently amended to reflect political realities might have a high degree of congruence, but not in a way that supports a value of constitutionalism, or the ability to rely upon the constitution as an entrenched, stable text.

Secondly, as Melkinsburg argue, there are different kinds of constitutional provisions- the 'operating manual' which are typically descriptive of the current system and likely to be realised, and the more aspirational 'blueprint' provisions. As Melkinsburg observe, the permanent constitution of South Africa, for example, contains a number of socio-economic rights, including that 'Everyone has the right to have access to adequate housing'.[999] This right was adjudicated in the case of *Grootboom*[1000] in the Constitutional Court; as the Court observes, the Constitution requires the 'progressive realisation' of the right to housing:

[998] ibid 25.
[999] Constitution of the Republic of South Africa 1996 s 26(1).
[1000] *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) 1 SA 46 (Constitutional Court).

> The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.[1001]

Whereas a constitutional right to vote might be immediately and fully realised, a constitutional right to housing is subject to definition and limitation, and might still be a significant constitutional success if it leads, over a longer period of time, to a reduction in homelessness and a reframing of expectations around the provision of welfare. There are many cases in which the success of a constitution would be judged differently at different periods in time; in the US, it was not until *Marbury v Madison*[1002] that the Supreme Court truly began to conduct judicial review, and as Michael Dorf argues, it was not until after the Civil War in the 1860s that the Bill of Rights began to be fully realised.[1003]

A third difficulty in tracking constitutional congruence and the success of a constitution is the complexity of determining the degree to which the constitution may be said to have *caused* a certain state of affairs. In some cases, the constitution reflects practice because it is descriptive or reflective of an existing state of affairs; Melkinsburg label this the problem of reverse causation.[1004] One example is evident in the American constitution; the 8th Amendment states that 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted', a provision that closely mirrors the English Bill of Rights of 1688, and which had already been adopted in

[1001] ibid 45.
[1002] *Marbury v Madison* (1803) 5 US 137.
[1003] Cited in Melton, Elkins and Ginsburg, Tom (n 5) 11.
[1004] ibid 8.

many US states.[1005] In other cases, there might be a third, deeper cause that accounts for both constitutional practice and text.[1006] It can be difficult to puzzle through counterfactuals, or the question of what would have happened *but for* the constitutional provision; does a respect for freedom of speech arise from a constitutional provision, from pre-existing cultural values, or from international pressure and funding?

Given these various difficulties in measuring constitutional congruence, and interpreting data in order to track constitutional success or failure, what if anything can be gained from such analysis? Melkinsburg cites David Strauss on the point that 'text matters most for the least important questions',[1007] that is those sometimes trivial coordination style provisions, such as, for example, the rule in the US Constitution that the President is inaugurated on January 20th. Certain provisions, such as executive term limits, and the protection of freedom of association, have been proven to produce high levels of congruence with practice.[1008] However, in many cases in relation to rights or other values-based constitutional provisions, it is difficult or impossible to prove a causal relationship between the adoption of constitutional principles and their practical realisation. It therefore becomes necessary to look to other possible markers of constitutional success, either of an external quantitative basis, or to look more deeply at constitutions on a qualitative basis.

[1005] 'That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted'. Bill of Rights (UK) 1688.
[1006] Melton, Elkins and Ginsburg, Tom (n 5) 8.
[1007] ibid 9.
[1008] ibid 24–25.

8.2.2 Indirect or proxy measures

There are a number of sources that may be used to track the performances and effects of a constitution. These data points do not focus on the realisation of constitutional values specific to the relevant text or state, but represent certain generally held values such as peace and nonviolence, transparency, or general human rights protection. Some possible measures include the Global Peace Index,[1009] the Fragile States Index,[1010] and Transparency International's 'Corruption Perceptions Index'.[1011] Some scholars use these as measures of the overall health of a polity, and trace connections between statistical measures and the contribution or success of a constitution. In their article reflecting on the constitution of Afghanistan, Ginsburg and Huq reflect upon the difficulties in using these statistics as proxies for constitutional success:

> [C]onstitutions do not exist outside the stream of world history. They may be one cause of state success or failure, but they are hardly the whole story.
>
> As a result, national-level economic statistics, such as GDP or the balance of payments, are by themselves inadequate measures for assessing a constitution's success. The same is true of a country's geopolitical successes and failures. All these are the result not only of constitutional rules, but also of many other factors. On their own, they are not reliable proxies for judging a nation's basic law.[1012]

[1009] 'Global Peace Index 2014' (Institute for Economics & Peace) <http://www.visionofhumanity.org/sites/default/files/2014%20Global%20Peace%20Index%20REPORT.pdf> accessed 6 May 2015.
[1010] 'Fragile States Index 2014' (Foreign Policy Magazine) <http://fsi.fundforpeace.org/> accessed 7 June 2015.
[1011] 'Corruption Perceptions Index 2014' (Transparency International 2014) <http://issuu.com/transparencyinternational/docs/2014_cpibrochure_en?e=2496456/10375881> accessed 6 June 2015.
[1012] Ginsburg and Huq (n 1) 120.

The political situation in the DRC, for example, is affected not only by the constitution, but a range of domestic political and conflict related issues, as well as conflicts happening in neighbouring constitutions. Clearly, it is insufficient simply to correlate constitutional success to these proxy measures; it might wrongly credit or discredit a text and process that represents only a small part of the picture.

Similarly, it is problematic to use duration or longevity of a constitutional text as a marker of constitutional success. Even if it is stipulated that—all things being equal—constitutional longevity is desirable,1013 a constitution is a positive only insofar as it serves the needs of the people it governs. As members of the Princeton Workshop on Constitution Building reflected, longevity is 'not as straight-forward a metric as it may first appear', noting that 'a constitution that is amended or replaced is not necessarily a failed effort. It may have achieved an important aim and it may be an essential precursor to an arrangement that is more enduring'.1014 Additionally, duration or longevity is obviously a problematic measure in assessing interim constitutions, that are intended to be replaced, and where longevity might demonstrate failure of a constitution-drafting process.

In light of the difficulty of assessing constitutions either in terms of constitutional congruence or by proxy measures alone, how should we proceed in assessing constitutional success and failure? In the following section I elaborate a criteria-based approach to assessing the success and failure of interim constitutions. It is my contention

[1013] See generally George Tsebelis and Dominic J Nardi, 'A Long Constitution Is a (Positively) Bad Constitution: Evidence from OECD Countries' [2014] British Journal of Political Science 1.
[1014] Bobst Center for Peace & Justice, Princeton University, in conjunction with Interpeace and International IDEA, 'Proceedings, Workshop on Constitution Building Processes' (2007) 7.

that while measures such as statistical proxies and constitutional congruence might provide some helpful information in studying the success of constitutions (and interim constitutions in this case) they are best used in support of detailed case study analysis.

8.3 Advancing a framework for success and failure of interim constitutions

In the first section of this Chapter, I elaborated three basic questions that can be asked to determine the degree of success in an interim constitution, relating to: the extent to which an interim text provides a solution to a constitutional impasse; the extent to which the interim constitution provides effective governance during the period it is in power; and the extent to which an interim constitution establishes the foundations for an effective successor text. However, each of these categories reflects a number of other concerns and subsidiary questions. In this section I explore each of the key criteria or questions that I believe provide the best framework for establishing the success of an interim constitution. In exploring these *indicia* or measures of constitutional success I reflect also on the *features* that contribute to constitutional success. It is not suggested that this is an exhaustive list of indicia or features of success, neither that it is necessary for each of these criteria to be met (or met equally) in order for an interim constitution to be deemed a success. As I explore in the following framework, it is arguable that constitutional success is relative to the constitutional goals of a polity; in some cases securing transition or equal representation might be the most important feature; in others, it may be securing a constitution that assures freedom of speech and association. Moreover, this framework is elaborated with the knowledge that at times these criteria or

desiderata can be in tension or even in conflict, and it may not be possible to achieve each of them in any given case. Nonetheless these are the features that appear to be relevant to reflecting on the success or failure of interim texts.

Jackson masterfully sums up the complexity of making assessments and predictions about constitutional transitions. She cites a number of 'confounding factors' that affect constitutional success:

> These include the nature of current leadership elites; the nature of the prior regime; the nature of any indigenous preparatory work on a new constitution; and the presence or absence of deep cleavages in society not resolved by the prior conflict. Social welfare inequalities, group identification and inter-group relationships, existing legal institutions and political culture, existing layers of law and functioning (*vel non*) government infrastructures, and other broader issues of history and context are also important, as are questions of appropriate "lustration" (and containment of various forms of revenge), and the role of neighboring or powerful states or transnational actors.[1015]

These factors contribute to our analysis and understanding of constitutional processes, and give us reason for a certain modesty in assessing different cases.

In their article on the Constitution of Afghanistan, Ginsburg and Huq, reflecting on the limitations of constitutions in effecting change, and the limits on measuring constitutional success, argue that in spite of all of these difficulties, 'drafters of new constitutions still need some realistically attainable goals'.[1016] They elaborate four 'midrange goals' that they argue can plausibly be attributed to or measured against constitutions. They suggest assessing constitutions by the extent to which they: generate

[1015] Vicki C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2007) 49 William and Mary Law Review 1249, 1271.
[1016] Ginsburg and Huq (n 1) 120.

legitimacy for the state; channel political conflict through formal institutions rather than violence; limit the agency costs of government; and facilitate the production of public goods'.[1017] These goals seem to be a plausible way of assessing constitutional success in general, and involve the kind of detailed case-study based analysis that I think is important to measuring constitutions for success or failure. Elements of each of these criteria resemble or are incorporated in the criteria I develop below, but the framework I elaborate differs in the way that it attempts to assess the success of *interim* constitutions in particular.

8.3.1 Providing a solution to a constitutional impasse

In one sense, an interim constitution succeeds almost immediately if it successfully achieves the purpose for which it is adopted; to begin resolving a constitutional impasse. It is worth reflecting on the different circumstances in which interim constitutions are adopted: to ease an oppressive regime out of power; as a peace agreement following conflict; as part of a bargain to end an unrepresentative and oppressive form of government (as in South Africa); or to begin the handover of power to national authorities after external invasion and occupation, as in Iraq. There are other *reasons* for adopting interim constitutions, as explored in Chapter 3, including allowing oppositions groups to mobilise, or the fuller participation of oppressed groups, and to allow for the postponing of issues that are too controversial to be resolved at the beginning of a transition period (such as the role of the Catholic Church in Poland), and the notion that an extended interim period might allow for greater sophistication in constitution making.

[1017] ibid.

In analysing an interim constitution, the first criterion must be the extent to which it has succeeded in achieving its first and arguably most fundamental goal: securing constitutional change with the agreement for further discussion as to the precise nature of that change. In *On the Law of Peace*, Bell writes that 'A peace agreement's claim to constitutional validity lies in the lack of legitimacy of the previous constitution (and by implication the state) and the need to negotiate an end to the violence…'.[1018] Here, I make a similar argument about interim constitutions, which tend to be both backward and forwards looking- they are premised on a rejection of the past, and the promise of change in the future (encapsulated in the IC), to be brought about by a body more democratic and representative than the current one.

At times this criterion or goal of interim constitutions is reflected in the constitutional text itself. The Postscript to the Interim Constitution of South Africa describes the text as an 'historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering…and a future founded on the recognition of HR, democracy, and peaceful co-existence..'.[1019]

8.3.2 The Interim Constitution is replaced according to its specified terms

I contend that the Interim Constitution being replaced according to its specified terms is an index of success. There are three aspects to this: that the interim constitution is replaced according to the procedure outlined in the interim text, that it is replaced within the timeframe specified in the text (or in absence of this, within a reasonable period of

[1018] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008) 152.
[1019] Interim Constitution of the Republic of South Africa 1993 Postscript.

time, ideally less than five years), and that any extensions or deviations from suggested procedure occur according to planned failsafe clauses.

Using this criterion as an index of success is not to say that it is impossible for an interim constitution to be successful, or for its permanent successor to be successful, if one of these elements is not met. Neither is it my position that meeting this criterion is a necessary and sufficient condition, guaranteeing constitutional success. Rather, it is argued that meeting this criterion shows effectiveness in government and in the drafting procedure, and demonstrates a willingness to conform to the negotiated agreements.

When an interim constitution is replaced by a permanent constitution according to the terms of the first text, it is a sign of parties valuing legality and hewing closely to procedure. As discussed in Chapter 5 in relation to Two-Stage Drafting, interim constitutions demonstrate considerable diversity in terms of how specific they are about the procedure for the adoption of an interim text. At one extreme, there is the 1989 Constitution of Hungary, which provides no detail or procedure as to the way in which the permanent constitution was to be adopted; similarly, the Polish and Albanian constitutions provided minimal guidance on this topic. At the other end of the spectrum, the interim constitutions of South Africa and Nepal provided detailed guidance on this topic. Those two cases demonstrate the way in which replacement according to the specified procedure is one indicator of whether an interim constitution is operating effectively; whereas the successor Constitution of South Africa of 1996 was adopted according to the terms (including the drafting process, and the Certification by the Constitutional Court) of the interim text, the interim Constitution of Nepal remains in

place, and with deviations from the procedure initially specified in the Interim text, including in relation to the election of the second Constituent Assembly. In observing this distinction, I am not attempting to claim that the conditions of the Interim Constitution of Nepal about its replacement could easily have been met, or that it is a distinct problem: rather, it is a *reflection* of dysfunction and failure in the drafting process.

Similarly, interim constitutions are more likely to be a success if they are replaced within the timeframe specified in the text, or where not specified, within a reasonable period of time. There are two key reasons for the significance of the timeframe requirement: first, as with the argument about procedure detailed above, adopting a permanent text within the contemplated timeframe is an indicator that the process is being managed effectively, and that parties are participating according to a negotiated agreement. Secondly, acting within a reasonable timeframe is important because of the way in which enthusiasm for constitutional reform can dissipate over time.

In a number of cases where the interim constitution has been in place for several years, scholars have observed variations in the level of public involvement and appetite for reform. In Poland, it was observed that public interest in the long drafting process fluctuated over time, culminating in a referendum in which less than half the population voted on the permanent constitution. In Albania, the early enthusiasm for reform dissipated as the country became submerged in internecine fighting and the grind of daily politics. As Biberaj, an Albanian journalist wrote, by 1996, the ‘optimism and hope’ of

the early 1990s had mostly faded away.[1020] Although interim constitutions are valuable partly because they provide greater space and time for discussion of key constitutional issues, they risk squandering that advantage if they are in power for too long. It is not possible to state an ideal period of time for the adoption of an interim text, but it might be reasonably expected that a transition could take place within five years: with a maximum of three years to write a constitutional text, a year to go through any approval processes (such as judicial certification, public referenda, etc), and then a year to effect a transition.

Thirdly, successful interim constitutions have a way of effectively handling unforeseen circumstances and delays. Frequently, this arises in the context of the need for time extensions- as seen in Iraq, Nepal, and the DRC. In the DRC, a one-off extension was legally achieved in accordance with the terms of the interim constitution, and the permanent text was adopted in a timely fashion. In Iraq, as explored in Chapter 6 'A Complex Supremacy' in relation to amendments, brief extensions were necessary, but achieved through questionable means. In Nepal, there have been many constitutional amendments and extensions, and the Supreme Court has inevitably become embroiled in deeply political decisions[1021] about the extension of the term of the Constituent Assembly. It is a feature of successful interim constitutions that they have clear failsafe provisions, allowing for extensions or amendments to procedure if necessary to achieve a solution to the constitutional impasse.

[1020] Elez Biberaj, Challenges To Democracy In Albania: 'Albania's Democratization: Sucess, Problems, and Prospects' 1996 4.
[1021] See discussions in Chapter 6.

8.3.3 Using a two-stage drafting process to foster legitimacy

Successful interim constitutions use the two-stage constitution-drafting process—that is the key premise of interim models—to foster greater legitimacy in the constitution and the political regime. My argument here returns to the extensive discussions in Chapter 5. Interim constitutions are typically adopted by a small group of (typically unelected) elites with bargaining power, but the interim texts establish or assume that the drafting of the permanent text will be done by a body that has been democratically elected, and which has greater representativeness. To recall the discussions earlier in the thesis, I drew upon concepts of legitimacy as developed by theorists such as Weber, Raz, and Hardin. Raz's 'Normal Justification Thesis' says that authority is justified where it is demonstrated that a subject will better conform with their reasons for action by following the directives of an authority than by trying to conform directly with a reason for action.

The phrase 'two-stage constitutionalism' is itself something of a misnomer. In reality, most if not all constitution making processes involve multiple stages of drafting; 'false starts and half-steps',[1022] each of which may consist of a number of events, processes, and actors. In employing this phrase I attempt to highlight the way in which the two-stage process divides the task of constitutional transition, broadly speaking, into two distinct chunks. The first, the drafting of the interim constitution, consists of agreement upon key terms necessary to secure transition, and to put in place a drafting process for a longer-term constitutional project. The second, the drafting of the

[1022] Stephen Holmes, 'Back to the Drawing Board: An Argument for Constitution Postponement in Eastern Europe' (1993) 2 Eastern European Constitutional Review 21, 22.

permanent constitution, occurs under the aegis and authority of the interim text, but with a guarantee of change, and a more legitimate and participatory process.

The first stage, the drafting (or early planning stages) of an interim text, is often conducted via roundtables—Timothy Garton Ash's work on the roundtables of Eastern Europe is instructive on this point, as is Andrew Arato's work on the role (or absence) of roundtables in a number of transitions, including in Hungary, Iraq and Nepal. Roundtables may secure, even prior to the negotiation or preparation of an interim agreement, certain key concessions that allow for the adoption of the interim text. In Poland, the Roundtable's key achievements included the legalisation of Solidarity as an opposition party, preparation for elections, and certain guarantees required by the Communists.[1023] In other cases, interim constitutions are adopted as—or alongside—peace agreements. In Sudan, the Interim Constitution of 2005 followed from the Comprehensive Peace Agreement of earlier in 2005, which had been signed by the Sudan People's Liberation Movement (SPLM, the South Sudanese group) and the Government of Sudan. Having secured this initial change, however, the interim constitution is only truly successful if it fosters a second phase of constitution drafting for the permanent text, and one that is created through a more representative and legitimate process. This second phase might take the form of an elected Constitutional or Constituent Assembly- as in South Africa. However, this is not to say that a democratically elected constitution making body ensures constitutional success, as has been seen in Nepal, where the initially elected 601 representatives failed to reach agreement.

[1023] Bobst Center for Peace & Justice, Princeton University, in conjunction with Interpeace and International IDEA (n 25) 16.

In addition to the drafting of the permanent constitution being conducted by a more democratic or representative body, this second phase of drafting can benefit from the assistance of technical advisers, and from public participation. As discussed in Chapter 5, interim constitutional models differ in the extent to which they incorporate public comments, participation and feedback. Arguably more important than actual direct public *participation* in constitution making is the degree to which the public is aware of the constitution drafting process, and the extent to which this awareness leads to a greater public endorsement of the text as a legitimate and effective coordinating device. The public can also be involved through final approval at a referendum, as seen in Poland, Albania, the DRC, Iraq and Thailand. The case of Albania is an interesting—and somewhat surprising—success story in terms of how it managed to produce a constitution that involved a high degree of political debate and public participation and awareness. From this process the drafters created a constitution that has been described as having a 'masterful fundamental charter, [being] both firm, in providing specific protection of certain fundamental human rights and freedoms, and flexible, in allowing possibilities for future growth in this area'.[1024]

8.3.4 The constitution acts as an effective coordinating device during the interim period

This criterion connects to the notion of legitimacy elaborated in 8.4.3. It is recalled that Weber wrote that a political system is legitimate when 'its participants have certain

[1024] Emin S Toro, 'Of Courts and Rights: Constitutionalism in Post-Communist Albania' (1999) 25 N.C.J. Int'l. L. & Com. Reg 485, 516.

beliefs or faith in regard to it'.[1025] Their reasons for having certain belief or faith in a constitutional system are arguably closely linked to the extent to which it acts as an effective coordinating device for public activities. As Hardin argues, government derives its power to rule through two conventions: conventions of coordination and acquiescence.[1026]

In relation to this criterion, government must do many things to establish itself as an effective coordinating device. It may be difficult for a government to do all of these things, and an interim era government, in particular, may simply be beginning to achieve these features, or lay the foundation for them.

In their paper on the constitution of Afghanistan, Ginsburg and Huq write that

> Ultimately, a constitution prevails if it puts the country's people in a better material position. In this regard, a central function of any scheme of government is to produce what economists call "public goods"- a free market, national defence, and a regulatory environment in which development can flourish.[1027]

An interim constitution succeeds if it begins to create or foster public goods in the society that it governs. Measuring this is difficult; in discussing Afghanistan, Ginsburg and Huq use certain proxy measures such as changed rates in life expectancy, school enrolments, and percentage increase in GDP. These measures are, of course, difficult to attribute solely to the constitution, but if government (established under a constitution) is the only body likely to provide for these public goods, then measuring their relative change can be

[1025] Peter Fabienne, 'Political Legitimacy' [2010] The Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legitimacy/> accessed 30 January 2014.
[1026] Russell Hardin, 'Why a Constitution' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 52.
[1027] Ginsburg and Huq (n 1) 128.

of assistance. However, as Ginsburg and Huq note in the case of Afghanistan, perhaps the most important thing that the government has achieved is to maintain its ability to be a credible government 'capable of interacting with international donors'[1028] and thus attracting substantial aid to the country.

In a similar way, the government of Somaliland, operating under the putative state's Interim Constitution[1029] of 1997, has arguably secured public goods simply through being a credible (if not formally recognised) government that international actors can do business with,[1030] and through whom they might provide aid.[1031]

Expectations and progress must be measured in a way that is specific to the starting point of the given state; as Ginsburg and Huq observe, '[n]o one expected Kabul to resemble Stockholm or Oslo a decade after adopting a new constitution'.[1032]

Additionally, in order to work as an effective coordinating device, a government must create governmental institutions—including courts and bureaucracies, that function effectively to meet the needs of the citizens. The creation of Constitutional Courts or courts with the power to judicially review legislative and executive action has been discussed in some detail. But in addition to these high-level instances of citizen-governmental interaction, there are many other, lower-level functions that must be filled:

[1028] ibid.
[1029] Interim Constitution of the Republic of Somaliland 1997.
[1030] 'Can't Get No Recognition' [2014] *The Economist* <http://www.economist.com/blogs/baobab/2014/01/somaliland>.
[1031] 'On-going, mostly multi-year EU-funded programmes in Somaliland currently amount to approximately €62 million', 'Examples of EU Projects in Somaliland' (*European Commission: Press Release Database*, 6 July 2011) <http://europa.eu/rapid/press-release_MEMO-11-486_en.htm?locale=en> accessed 2 October 2014.
[1032] Ginsburg and Huq (n 1) 129.

reasonably effective policing; the provision of drivers' licences and effective regulation of corporate and tax structures allowing for the creation of businesses, to name but a few examples. It is notable that, as discussed in Chapters 4 and 6, Constitutional Courts or Tribunals often play—as in Hungary, South Africa and Poland—significant roles in the early transitional period. This category is difficult to assess, because it contains a significant number of component elements; the success of a given state may vary across these different elements.

8.3.5 Constitutional learning during the interim period

In discussing constitutional learning as a goal or criterion of success for interim constitutions, I am by necessity referring back to one of the stated reasons for adopting interim constitutions: the possibility of conducting the drafting of a permanent constitution with more time, and the possibility of greater, considered reflection and debate on the nature of constitutional reform in a country.

Constitutional learning may be expressed or embodied in a number of ways. First, it may be expressed through constitutional amendment designed to reflect necessary changes to an interim text, or to reflect newly won bargains that will allow for a more fruitful interim period. My argument is not that constitutional amendments are necessary to demonstrate that constitutional learning has taken place and that an interim text is therefore successful, but rather that successful interim constitutions allow for the possibility of constitutional learning, and therefore amendment. As discussed in Chapter 6, I adopt Arato's position that an interim text should be easier to amend than a

permanent constitution, and not so difficult to amend as an ordinary piece of legislation. The South African case is a good example of amendments demonstrating constitutional learning and improvement, especially around the controversial issues of federalism and traditional authorities, issues that were ultimately central to the Certification decisions.

Another method of constitutional learning is more difficult to define or measure; the kind of constitutional learning that allows for greater sophistication in the drafting of the permanent constitution. It is arguable that certain issues are simply too divisive to be resolved at the point of transition, for example the role of God in the constitution, or the role of trade unions, as seen in Poland.

8.3.6 Effective engagement with international law, international organisations, and transitional justice issues

In Chapter 7, I explored the relationships between interim constitutions and international law, and international organisations. I examined the multiple kinds of links between interim texts and international law, including through direct incorporation as a source of law. I argued that international law is one of the way in which constitution makers in transitional periods 'turn towards legitimacy' and attempt to find new sources of legality and accountability in what can sometimes resemble a legal vacuum. In South Africa, there is an effective example of a turn towards international law, without letting international law or outside experts dominate constitution-drafting procedures. In contrast, Kevin Cope's critique of the 'intermestic' constitution of South Sudan

demonstrates the way in which international actors and NGOs can have a deleterious effect on constitution making.

Interim constitutions can allow time for reflection and analysis of the best way to proceed in relation to transitional justice. In some cases transitional justice and the interim constitutional bargain can go hand in hand, as in the case of amnesties in South Africa. In other cases, the adoption of an interim constitution can allow for a slow and phased approach to transitional justice and accountability measures, as with the multiple-staged approach to lustration in Poland. In Iraq, we have an example of the way in which lustration in an interim period was extremely poorly managed, and arguably led to very negative consequences in the recruitment of former Baathist soldiers into the Islamic State.

8.3.7 Providing a principled basis for the permanent constitution without exercising effective control over it

In assessing a number of interim constitutions, it is my submission that it is a sign of a successful interim constitution that its most important principles, or the motivating animus of reform that prompted the interim constitution, are adopted and embodied by the permanent text. However, it is arguably not generally desirable that the interim constitution exercise substantial control over the precise content of the final constitution. Although certain agreements—such as an agreement that the state will have a federal structure—might necessarily be mirrored closely in the permanent text, to predetermine the contents of the permanent text *in the interim text* undercuts the very reason for the

two-stage drafting process, and disempowers the democratically elected representatives charged with effecting the constitutional transition to a permanent text.

The obvious challenge to this prescription is the Interim Constitution of South Africa, which represents, to date, the highest level of control exercised by an interim constitution over a permanent constitutional text, in this case through the 34 Constitutional Principles enshrined in Schedule 4 to the Interim Constitution.

As I discussed in Chapter Four in relation to the permanent effects of interim constitutions, interim texts can exercise direct control on the contents of their successors in two ways: through procedural controls, and content-based requirements. In South Africa, Ebrahim and Miller observe that the IC's

> democratic credentials can be seen as weak, as is often the case with interim measures in transitional and post-conflict settings. Given the control the interim constitution exercised over the final constitution through the CPs, that weakness is not insignificant.[1033]

This point, perhaps better than any other, reflects the way in which these criteria of success can be in tension, or even in conflict. It is difficult to argue that the Interim Constitution of South Africa is not a success story; it governed effectively during the period of its operation; made effective use of international law while eschewing control by international bodies; began to create public goods including a highly respected Constitutional Court; fostered public legitimacy through public engagement and involvement; and demonstrated constitutional learning through amendments. Jackson

[1033] Hassen Ebrahim and Laurel E Miller, 'Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid' in Miller, Laurel E (ed), *Framing the State in Times of Transition* (United States Institute of Peace 2010) 122.

writes that the constitutional process in South Africa was a 'substantial success in the direction in which it has moved the country on measures of justice and constitutionalism'.[1034]

However the considerable control exercised over the permanent text by the interim constitution on most key and controversial questions, must undermine the democratic credentials of the permanent text. Although the Constitutional Assembly played an active role, negotiating and shepherding in a permanent text, and responding to the sections of the draft Constitution rejected by the Court, the Constitutional Assembly was significantly constrained by the parameters set in the interim constitution.

In other cases, procedural requirements can have either intended or unintended effects. An example of what was arguably an unintended effect of a procedural structure is evident in Poland. The Small Constitution, when combined with a subsequent constitutional amendment allowing for publicly-submitted drafts of the constitution (with the support of 500, 000 signatories), led to a highly complicated constitution drafting situation. The Constitutional Committee was tasked with considering a multiplicity of drafts, including a publicly-submitted proposal, and the final constitution ended up closely resembling the 1992 text in many ways, in part because of inertia and the sheer difficulty of dealing with so many competing ideas.

[1034] Jackson (n 26) 1287.

8.4 Reflecting on interim constitutions as a method of constitutional change

The preceding analysis has focussed largely on how to measure the success of an interim constitution *qua* interim constitution, and thus implicitly in comparison to other interim texts. The question remains of how and whether to measure the success of interim constitutions as against ordinary constitutions or other constitutional models, and also how to assess the success and failure of interim constitutions as a *group*, in order to determine whether they are a helpful approach in constitution making.

It is very difficult to conclude, even given the preceding analysis, which interim constitutions might be deemed most successful. The constitutional transformation that occurred in South Africa is rightly held up as a paradigmatic case for constitutional and societal transition. But, as has been explored earlier in this chapter, this is attributable not only to the constitutions (both interim and permanent) and their drafting, but a complex range of factors. For example, these include, in the South African case, a pre-transition history of relatively stable and functional (if unrepresentative and undemocratic) government and bureaucracy, charismatic and effective leadership figures such as Nelson Mandela who proved skilled in negotiation, and a functioning economy. As Nathan Laurie observes, 'By the standards of the developing world, it had a relatively strong state, political sector, economy and civil society... By contrast, there are many African countries where, as a result of civil war, the state crumbled or was smashed'.[1035]

[1035] Laurie Nathan, 'Accounting for South Africa's Successful Transition to Democracy' (Crisis States Development Research Centre, London School of Economics 2004) Discussion Paper No 5 5 <http://eprints.lse.ac.uk/28355/1/dp05.pdf>.

Similarly, the discord and governmental crisis that has occurred in states such as Albania, and that is ongoing in Nepal, cannot solely—or even largely—be attributed to constitutional processes, so much as deep underlying issues to do with conflict, the economy, and social divisions.

Nonetheless, weaknesses in, for example, the interim Constitution of Albania (including the ease with which it could be amended), arguably contributed to the political tension in the state. The Interim Constitution of the DRC in many ways appears to be a success, relative to the context of the ongoing conflict: it was replaced in a timely fashion, and according to the terms of the permanent constitution – it influenced without overly determining the contents of the final text. The constitutions of Sudan and South Sudan cannot be said to have been a success; particularly in South Sudan, where the executive power runs rampant over all other constitutional actors. And yet the relevant comparator is not the state of government and society in the Netherlands, or even South Africa or the Ukraine; it can only be what might otherwise have been done in South Sudan. In some ways the interim constitutional processes of Sudan and South Sudan secured the independence and secession of South Sudan, and in that way might be viewed as somewhat successful.

None of the cases studied has succeeded on all of the criteria described above, and none has failed on all of the criteria. Nonetheless, each state can be said to have differing degrees of success on each criterion. The analysis in this Chapter is dedicated, rather than an attempt to rank interim constitutions amongst one another, to developing a list of indicia of success, and thereby to generate *desiderata* which may be considered in

analysing interim texts, or in decision-making about the adoption and nature of interim texts.

Clearly, the difficulty of judging relative success among interim constitutions increases exponentially when one attempts to judge the success of interim constitutions as a group against other constitution-making methods, and to therefore conclude whether they are or are not a desirable method of constitutional change. To do so would be far beyond the scope of this thesis, and involve a breadth and depth of comparison potentially across the 800+ constitutions adopted since 1789, as identified by the Constitute Project.[1036] However, throughout this thesis, I have attempted to show the nature of interim constitutions, and the ways in which they hold possibilities for constitutional change and transformation following regime change. Jackson, speaking of both interim and 'incremental' constitutional change, writes that

> Each case study, when more fully elaborated, may involve instances of potential failure averted, of potential opportunities lost, and many distinguishing characteristics. Yet one can perhaps say at least this: the apparent success of some forms of "transitional" or incremental constitutional change should plainly caution against assumptions that final constitution-making is necessarily the best first step towards establishing constitutionalism in post-conflict societies.[1037]

8.5 Conclusions

In this section I have reflected upon the nature of success and failure in relation to interim constitutions. This involved an analysis of the difficulty of using measures such as

[1036] Comparative Constitutions Project, 'Constitute Project' <https://www.constituteproject.org/> accessed 6 March 2015.
[1037] (n 26) 1271.

constitutional congruence, duration or longevity, and proxy measures, as indicia of success. I then elaborated a framework of indicia of success, and highlighted not only the indicia or criteria of success, but factors that contribute to those criteria, or affect how a state will perform on a given measure. In doing so, I acknowledged that there is no universal set of principles to which each interim process must adhere; rather, the framework is an attempt to highlight key indicia and features of success that are generally, if not universally applicable. I highlighted the way in which these indicia of success might be in tension, or even in direct conflict with another, and discussed the example of South Africa and the degree of control exercised by the interim constitution over the permanent constitution. In spite of the difficulties of measuring interim constitutional success, and the impossibility of coming up with a universal set of principles, I believe that the framework elaborated is capable of providing a solid working understanding of indicia of success and failure among interim constitutions, and an idea of what constitution makers should aim for and avoid in drafting temporary texts. Finally, I reflected that it is extremely difficult to assess interim constitutions as a category—as against—all kinds of constitutions, and thus to make claims about the overall success rates of interim constitutional texts. However, I argued that interim constitutions, in certain circumstances, provide a way of dealing with questions of legitimacy and constitutional disagreement that hold unique possibilities. An awareness not only of these possibilities, but of pitfalls associated with interim constitutional processes, will help to improve the quality of both the interim constitutional text adopted, and the permanent text that follows it.

CHAPTER 9: CONCLUSIONS

The key research questions outlined at the beginning of this thesis concerned the nature of interim constitutions. More particularly, I set out to determine the nature of interim constitutions as deliberately temporary texts that nonetheless act as the supreme legal texts in their jurisdictions. In the context of a dearth of comparative analysis in the field, I set out to develop a typology of interim constitutions, and argued that they are a diverse but coherent category with a unique approach to a range of issues. It is not possible within this Chapter to summarise all of the many arguments made in the preceding discussions; however I wish to highlight the main arguments and findings made in this thesis.

This analysis was conducted in three main Parts. In Part A, Chapter 1, I introduced the topic, the category under consideration, and posed the key questions that I proposed to answer, as well as the main arguments of the thesis. I located my work within a wider body of literature, and presented the case for a broad-based comparative study that unites an analysis of actual interim constitutional experiences with a theoretical approach and understanding of issues associated with constitutional temporariness.

In Chapter 2, I provided the context for my work, within the history and evolution of comparative constitutional law, a field now currently experiencing a renaissance. I then went on to elaborate my own methodological approach: a qualitative comparative analysis of nine key case study countries. I considered the practical and theoretical difficulties involved in a comparative constitutional project of this kind, including the

difficulty of defining and delimiting the borders of relevant cases. This involved an extended definition and conceptualisation of the notion of an 'interim constitution', going beyond the preliminary definition advanced in Chapter 1. On the borderlines of this category, I argued for the inclusion of the 1989 Constitution of Hungary, and for the exclusion of the constitution of the German Basic Law.

Chapter 3 involved an analysis of the Reasons for which and Circumstances in which interim constitutions are adopted. The circumstances in which interim constitutions are adopted are united by a common thread: a situation in which there is a general need for constitutional change, but insufficient agreement as to what that change should look like. Beyond that common thread, interim constitutions arise in a number of circumstances. I examined the regime change from: the apartheid era in South Africa; the end of an oppressive regime as in post-communist states; an external occupation, as seen in Iraq; and the interim constitutions that have emerged as or alongside peace agreements at the end of civil conflict, as in Nepal, Sudan, and the DRC; and considered the peculiar case of Thailand, with its history of coups and shifting political power. The key reason for which interim constitutions are adopted, I contended, was to secure a transition, to allow for more time to debate contentious issues, and to allow previously oppressed or excluded groups to participate. I also explored other justifications sometimes offered for interim constitutional approaches, including the possibility of greater sophistication or constitutional learning in the interim period.

In Part B, I began to elaborate a typology of interim constitutions, drawing upon a comparative analysis to explore the nature of these temporary texts. In Chapter 4, I

analysed the way in which interim constitutions, although temporary documents, have significant permanent effects. After cataloguing the range of ways in which different interim texts manage their temporariness, I identified several ways in which these temporary texts have permanent effects. These include effects through: rules as to the content of final texts; procedural rules; the difficulty of re-opening negotiations of matters resolved for the interim text; the continuance of institutions established in the interim era; the decisions of constitutional courts made in the interim period; and finally 'failure into permanence', whereby failed ICs achieve *de facto* permanence. The last point is of particular relevance, in different ways, to the interim constitutions of Nepal and the border case of Hungary.

In Chapter 5 I argued that interim constitutions, through their embrace of a two-stage drafting process, possess unique possibilities for constitutional legitimacy. This Chapter in particular involved reference to the work of Andrew Arato on post-sovereign constitution making. Interim constitutions are typically adopted by unelected bodies of elites, ideally as representative as possible of relevant interest groups and stakeholders. The interim text is adopted through a procedure—often a Roundtable of sorts—and then operates for a time while the drafting process for the permanent constitution begins. The drafting process for the second, permanent constitution, is, ideally, markedly different: it involves drafting by a body of democratically elected representatives, public consultation, and external checks and balances prior to adoption, such as a referendum or judicial supervision. Chapter 5 explored the ways in which various interim constitutions have or have not followed this path, although all have followed the structure of the two-stage process to some degree.

In Chapter 6, I advanced the notion of interim constitutions enjoying a 'complex supremacy'. I detailed the ways in which interim constitutions, like ordinary constitutions, purport to be the supreme laws of their legal systems, prevailing over other legal rules. However, as discussed in this Chapter, this claim to supremacy is complicated in the case of interim texts by high levels of amendment, and judicial review. Many interim constitutions are frequently amended; I argued that amendment of an interim text is not necessarily negative, and in many cases may be indicative of constitutional learning during the interim period, as in South Africa. However, in other cases, as in Albania or Hungary, highly amendable interim constitutions resulted in frequent amendment that at times subjected issues of constitutional amendment to passing whims of ordinary politics and political manipulation. Judicial review in interim constitutional environments, through newly introduced constitutional courts or tribunals, can represent a check on legislative and executive powers, and a new source of legitimacy and accountability in states that have lacked them. Courts exercise power over interim constitutions and drafting processes in different ways: some relating to procedural issues, others to more substantive constitutional principles. In arguing that interim constitutions enjoy a complex supremacy, complicated by amendment and judicial review, I am not arguing that this complexity is a negative fact. Instead, it merely highlights the ways in which interim constitutions are a novel and interesting category of constitutional development.

In Chapter 7, I explored the links between interim constitutions and international law and legal organisations, and transitional justice processes. International law, as discussed by Christine Bell in *On the Law of Peace*, can provide a source of legality and legitimacy in times of great change. International law is incorporated in interim

constitutions through explicit reference to customary international law and treaties, and is otherwise relevant to interim constitutions on issues such as the law of occupation, the law of statehood, and overlap with the laws of war in the case of states in conflict. In relation to transitional justice, I explored detailed case studies concerning lustration and truth commissions, and found that interim constitutions and transitional justice processes can enjoy mutually reinforcing, or mutually destabilising, relationships.

Finally, in Part C, Chapter 8, I developed a framework for assessing interim constitutions for their success and failure. This involved a study of some of the possible methods of judging constitutional success, including constitutional congruence, and using external data points as proxies for constitutional success. Relying on the work of Ginsburg and others, I documented the many difficulties in developing arguments around causation or even correlation between these various measures and the adoption of constitutional text. I advocated the approach of qualitative, case study analysis of individual constitutional transitions, in comparison and conversation with one another. I developed a suggested framework for interim constitutional success, within three key questions regarding: to what extent the IC effectively secures a solution to the constitutional impasse; the extent to which the IC governs effectively (as a coordinating device) during the period of its operation; and to what extent the IC establishes an effective foundation for the drafting and adoption of an effective permanent or successor constitution.

In the Introduction to this thesis, I cited the recent Discussion Report of an IDEA workshop on Interim Constitutions:

> The timeliness of analysing the role of interim constitutions or constitutional provisions as peace-building mechanisms is self-evident [and] [t]here is a clear need to establish linkages between the normative literatures on constitution making on the one hand, and conflict resolution and peace building on the other. There is also a need for more in-depth comparative research of case studies…; there is no similar comparative study of interim constitutions or collection of lessons learned. These gaps in the academic literature are replicated in policy practice.

In writing this thesis, I have positioned my work within the very gap identified by the Discussion Report. I have attempted to develop a broad-based comparative study of a range of interim constitutions, and to unite this with a theoretical analysis about the nature of deliberately temporary constitutions. In future research, I believe that fruitful avenues for research would include interviews with key figures in interim constitutional transitions, to gain insight into the decision-making process around choosing an interim approach in different states. In this separate but related research, a study of deliberately temporary constitutional provisions—within otherwise stable constitutional texts—would invite a consideration of the issues of temporariness and constitutionality in a different context. Further, greater access to documents in translation would contribute to the depth of any expanded version of this work. These future steps were not possible within the limitations of this doctoral project, but the topic remains open for much more analysis, as more interim constitutions continue to be considered.

The notion of interim constitutions and both forwards and backwards looking texts has been discussed throughout this thesis. I argued that interim constitutions are backwards looking in that they are legitimated by their rejection of the past, and an agreed need for a rejection of the past regime. Interim constitutions are forward looking in that they are adopted, without full democratic credentials, on the basis not only of

rejection of the past, but of the promise of considerable future change, conducted on a more democratic and inclusive basis. In this thesis, I have attempted to complete a backwards and forwards looking analysis; considering the evolution and history of individual interim constitutions, and looking forward to how this analysis may be applied to future constitutional transitions.

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