

IALS Law Reform Project – A LITERATURE REVIEW

Law Reform in Post-Conflict Settings. An Overview

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1. Introduction

In post-conflict settings around the world there is often considerable law reform and legislative activity as part of the re-building, building or transformation of the state. Post conflict periods are generally marked not just by a movement towards peace, but also by multiple major changes. For example, democratisation, a move to a market economy and the (re)organisation of basic state structures and legislative frameworks may require amendment to conform with new constitutions. Isser describes societies emerging from conflict as characterised by «the condensed and accelerated process of shifting political and power structures, demographic movements, and mass social flux».¹ Thus these changes take place at a time when violence may be on-going, power struggles and sovereignty disputes exist and conflict may have affected the economy or the resources (financial, institutional and skilled staff) necessary for legislative reform.

This review seeks to focus primarily on literature available in English which addresses legislative reform in post-conflict settings in general or in multiple settings. It has tried to focus on texts which specifically relate to legislative reform (in the first part of the review) or place legislative reform in context (second part of the review). Despite the quantity of legislative activity following conflict relatively little appears to have been written specifically on post-conflict legislative reform. Perhaps this is unsurprising, the legal and legislative systems of post-conflict settings vary greatly and therefore the processes and issues relating to reform of law will be different in each one. Thus, much of the literature relates only to one post-conflict setting (this literature review is not a comprehensive survey of literature regarding legislative reform in any one particular post-conflict setting).

Despite the differences between settings the literature suggests that some issues may characterise post-conflict legislative reform. To highlight just some of the issues raised, these include for example, questions around the applicable law and the impact of conflict on legal frameworks, the role played by the international community and particular challenge-s around legislative policy in post-conflict settings.

2. Applicable law and the impact of conflict on legal frameworks

An initial issue for legislative/legal reform highlighted in the literature is the identification what law applies following conflict. The literature outlines the approach normally taken (providing that pre-conflict law applies subject to modifications such as compliance with international human rights norms) and identifies challenges. For example, that the legitimacy of pre-conflict law may be disputed and that very practically it may be difficult to locate existing legislation.

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¹ D.H. Isser (Ed.) *Customary Justice and the Rule of Law in War-Torn Societies*, United States Institute of Peace Press, Washington, 2011, p.5.

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Years of conflict may have affected formal legal frameworks. For example, in 2004 a report of the UN Secretary-General observed that «[i]n post-conflict settings, legislative frameworks often show the accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards. Emergency laws and executive decrees are often the order of the day. Where adequate laws are on the books, they may be unknown to the general public and official actors may have neither the capacity nor the tools to implement them»². The literature also highlights the existence of parallel legal systems in some post-conflict settings (including both parallel state systems of law and parallel systems of state and non-state law). Some authors discuss the importance of non-state law such as customary or religious law; these may have grown in importance during conflict when state structures have weakened.

3. Role of the international community

Much of the literature available in English focuses on the role of the international community in post-conflict legislative reform describing the activities of the international community and discussing the limits of and effectiveness of their work. The role of international/foreign lawyers in drafting legislation for countries in which they do not live entered a new phase with the UN post-conflict administrations in East Timor (1999-2002) and Kosovo (1999-2008) and the Coalition transitional administration in Iraq (2003-4)³. However, international assistance to the development and drafting of legislation has not been limited to international administrations, Sannerholm, observes «[l]aw reform has been one of the top priorities in justice system reconstruction in post-war states. Law reform means providing technical assistance and legal advisory services to governments, assisting them in ratifying or acceding to international conventions, and assisting legislatures in drafting new legislation»⁴.

4. Use of “model codes” and legal transplants

Some of the literature focuses on the use of legal transplants and “model codes” in post-conflict settings. Following challenges faced by the UN administrations and subsequent recommendation in UN Brahmani Report⁵ model criminal law and procedure codes were developed by the United States Institute for Peace and the Irish Centre for Human Rights. The merits and limitations of these codes are discussed in a number of pieces. The use and limitations of legal transplants in post-conflict settings are discussed by authors such as Jupp and Sannerholm.

5. Practitioners guides and drafting manuals

There are a number of practitioners’ guides aimed at both domestic and international actors involved in developing and drafting legislation in post-conflict settings. For example, UNODC’s guide to criminal law reform in post-conflict states highlights some poor practices in the past and gives guidance as to good practice in criminal law reform. Evan’s guide on implementing criminal codes and other legislation

² United Nations Secretary General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616, 23 August 2004.

³ See, K. Boon, ‘Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers’, *McGill Law Journal*, Vol. 50, 2005, pp. 285-326.

⁴ R. Sannerholm, ‘Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template’, *Journal of Conflict & Security Law*, Oxford University Press, Oxford, Vol. 12, No. 1, 2007, p. 79.

⁵ UN Doc A/55/305-S/2000/809, *Report of the Panel on United Nations Peace Operations*, 21 August 2000.

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addresses the difficulties in drafting enforceable criminal legislation for post-conflict settings and provides recommendations as to how to draft enforceable legislation.

Legislative drafting guides exist for some post-conflict settings – often written, or sponsored, by international actors. As a note of caution, since it is in the nature of post-conflict settings that the procedures and processes of legislative reform may be in development or changing, the procedures outlined in those guides may have changed since their publication.

6. Development of legislative policy and procedures

Another issue outlined in the literature is the challenge of legislative policy formulation during a time of rapid social and institutional change, power struggles and weak or developing procedures as well as varied approaches of different international actors. For example, this is highlighted by Trzcinski and Upham in relation to Cambodia and discussed by Lortie in relation to the provision of international technical assistance in law drafting.

7. Final

As remarked much of the literature available in English focuses on the role of and activities of international actors during post-conflict periods. Less exists on the approaches taken by domestic authorities and populations in those settings – both during post-conflict period and in subsequent times of greater stability.

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Literature review on Law Reform in Post-Conflict Settings

1. Legislative/Law Reform in Post-Conflict Settings

Books

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