Territory and Power in Constitutional Transitions

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Executive summary

This Policy Paper provides insights into how territorial claims relate to constitution-making processes and constitutional design during periods of intense political engagement over constitutional reform or 'constitutional moments'. It considers the factors that shape such constitutional moments, the dynamics of those constitutional moments themselves and how these factors and dynamics frame choices regarding constitution-making processes and constitutional design.

Factors shaping constitutional moments

Three principal factors shape the structure and dynamics of constitutional moments and set the agenda for constitution-making processes and constitutional design.

1. Political geometry

The relative size, number and character of salient political cleavages (including their geographic distribution) shape political mobilization. Cleavage patterns reflect demography and political narratives and fall into four broad types of political geometry:

1. cases in which there are multiple politically salient territorial cleavages and a widespread interest in devolved or federal governance;

2. cases in which there is a majority group as well as one or two territorially based, minority groups of significant size that may demand autonomy and also some power-sharing at the national level;

3. cases in which there are one or a few relatively small, peripheral, politically mobilized regions that seek special autonomy but no power-sharing in national institutions; and

4. cases in which the political salient cleavages are both territorial and non-territorial, so that demands for territorial accommodation are part of a larger constitutional agenda, in which demands for devolution may be offset by, and/or combined with, other claims.

2. Peaceful or violent political engagement around territorial claims

The political circumstances leading up to a constitutional moment can strongly influence the ensuing process of constitution-making. If the lead-up has been peaceful and within a constitutional order, the process will normally be bound by the rules governing constitutional processes and amendment set out in the existing constitution. If the lead-up was a regional insurgency that has led to negotiations between the government and the insurgents, there will probably be a bilateral negotiation but any resulting constitutional changes will have to be implemented through established constitutional procedures. If the lead-up was a state-wide conflict, the victor (government or rebels) or the parties to a new settlement (government and rebels) may opt to draft a new constitution according to new rules or, in the case of a government victory, to follow the process in the existing constitution.

3. Power positions of the key political actors

Whether the antecedents are peaceful or violent, a critical factor will be whether the ensuing constitution-making process requires agreement between the key political actors or whether one dominant party is in a position to impose a new constitutional settlement. A dominant party may emerge victorious from a violent combat or from an election; however, even in these cases, such a victor will need to consider whether or not to accommodate some of the losers' demands as a way to consolidate longer-term stability.

Constitution-making processes

Constitution-making processes influence the constitutional design that emerges from a constitutional moment. Although such processes have a high degree of indeterminacy, they fall into certain patterns when dealing with territorial cleavages. Such processes can be divided into three stages.

1. Agenda-setting

The initial phase of constitution-making should consider what processes and decision-rules should be adopted and who the participants should be. Quite often, there might also be substantive decisions on the principles or some key terms that must be reflected in the final outcome. During this phase, decisions may be made either through multiparty negotiations or unilaterally by a dominant party (if one has emerged). Typically, the agenda-setting phase is less inclusive in terms of participation than later phases. Major agenda-setting issues are both procedural and substantive.

Key *procedural issues* would include whether the existing constitutional procedures or new rules (perhaps with a break in constitutional continuity) will apply. Under existing rules, there may be latitude for non-constitutional forums or processes, including advisory or consultative commissions, national dialogues and consultative referendums. In stalemates after a state-wide civil war, the parties to the conflict usually negotiate ceasefire terms and often agree on new rules for making a constitution. In stalemates after small regional insurgencies, agreements from

negotiations may be ratified by constitutional amendment or by legislation, which will involve national institutions, but prior to that an indication of the support of the affected population may be sought, perhaps by referendum.

Given the stakes, especially after a violent conflict, agenda-setting may include major *substantive principles or arrangements* that must be respected in any final outcome. These could include commitments to federalism of some description, to the protection of minority rights, to the reintegration of former combatants into civilian or military roles, and to an amnesty for past crimes. There could also be elaborate interim governance arrangements with power-sharing or local autonomy.

2. Deliberation

This phase should normally be more inclusive and detailed than the agenda-setting phase. Very often the leading role on major constitutional reviews is given to an elected body, which may be an established legislature or a newly created one. There could be dual-purpose bodies, which serve simultaneously as legislatures and constitutional assemblies, as well as specialist constitutional assemblies that have no ordinary legislative responsibilities. The argument in favour of specialist assemblies is that they avoid the conflict of interest that members of a regular assembly might have in determining the future scope of their own powers, but the experience of specialist assemblies has been chequered and most countries use the dual-purpose model. In either case, expert commissions, consultative forums and national dialogues could supplement deliberation by these assemblies.

The deliberation phase following a negotiated settlement between a government and a territorial insurgent group may be difficult, given that the negotiations would typically have dealt with the critical issues in detail, which could leave little room for substantive input when the proposed deal is sent to the national legislature for consideration. On occasion, such deals have unravelled once they have come before the national legislature, which underlines the importance of government negotiators maintaining a channel to the legislature during negotiations with the insurgents.

When territorial cleavages are a central issue in a constitutional debate, a particular problem that can arise is the lack of constitutional provision for any particular role for regional representatives in the process of constitution-making. Although super-majorities are normally required for constitutional change, such a provision may not give much leverage to one or more territorial groups that are seeking accommodation. There may therefore be a need to pay particular attention to the role such territorial groups could play during the deliberative phase.

3. Ratification

The final stage of constitutional reform is ratification. This may be effected by a super-majority in the constitutional assembly (although in the United Kingdom a simple majority suffices) and in many federations some constitutional changes require a measure of assent from the constituent unit legislatures or populations. Referendums are required for ratification of certain constitutional changes in some countries, usually following majority or super-majority approval by the constitutional assembly. Referendums have also been used on a consultative basis in some countries. There can be a territorial dimension to approval by referendum, whether this be a

requirement that each of two territorial populations vote in favour (as in Cyprus) or that there be some degree of territorial support beyond a simple, national majority (as in Australia and Iraq).

Constitutional design and territorial claims

A key test of constitutional designs is how well they function within their context. Design options may try to respond to claims for accommodation of territorial cleavages within a country but they may also reject territorial accommodation by maintaining a centralized, unitary regime. In some cases, the option of maintaining the integrity of the country could give way to accepting the secession of one or more territories. For cases of accommodation within a country, there are three broad options, each being appropriate to specific contexts:

1. Symmetrical federalism or devolution with a majoritarian central government

This model is common and covers many varieties and degrees of decentralization. It is most appropriately applied in countries that have a highly territorialized political geometry or that encompass a mix of territorial and other cleavages. The major design issues include the number and boundaries of the constituent units, the protection of minority rights (nationally and within constituent units), territorial representation in central institutions (notably upper houses), the form of the legislature and the executive (e.g. parliamentary versus presidential-congressional), the nature and extent of devolved powers, and special autonomy arrangements. The political dynamics when there are multiple cleavages and several constituent units can be quite fluid, with governing coalitions shifting over time, thereby limiting how often any group or territory is excluded from power. In this model, majoritarian government at the centre is broadly accepted, although upper houses often give extra weight to smaller constituent units.

2. Highly devolved federal government with a consociational central government

When the political geometry is of two (or sometimes three) antagonistic and territorially separate communities of significant size that must cohabit within a single state, there may be recourse to this problematic model. Mutual mistrust favours maximum devolution for each territorial community, but, since there are important functions that must remain within the central government's control, there should be recourse to power-sharing at the national level in which the agreement of a majority of representatives of each community is necessary for certain specified major decisions. The power-sharing aspects of this model are particularly challenging, because they can lead to extended periods of blockage and weak government. However, in some situations, this may be the only model that has any possibility of being accepted by all communities.

3. Special autonomy for territories in a federal or non-federal state, with majoritarian central government

This option is more appropriate for cases in which the political geometry includes very small, peripheral populations with a strong sense of identity distinct from that of the majority. Although the majority may resist asymmetry for ideological reasons, this model can work in situations where the population of the relevant territory is very small relative to the total population and/or where the extent of the special status is not too extensive. If the relevant population is relatively large and its special powers are very extensive, the question of how its representatives function in national institutions, such as voting on issues that do not affect their region, can be difficult.

These three models may be considered 'ideal types' and there will be situations when the political geometry of a country has features that suggest the need for a hybrid model; these cases can be especially challenging. Moreover, devolution or federalism is a model that has been very widely adopted even in countries that do not have highly territorialized political geometries. Each of these models can be adapted to the specific context of the country in question in many ways. However, it is useful to bear the major models in mind when considering the likely constitutional design alternatives for a country.

Key recommendations

1. At an early stage in a constitutional transition, the various parties and groups should consider the implications of their country's political geometry for an appropriate constitutional architecture. Such a process of deliberation may help to create a consensus on the most likely general model, as well as an awareness of particular challenges in adapting the most likely architectural model to the country's particular circumstances.

2. There are three major constitutional design options:

    a. Symmetrical federalism or devolution with a majoritarian central government is appropriate for highly regionalized countries, but also for those with a mix of territorial and other cleavages; the extent of devolution and the number and boundaries of territorial units will be key issues.

    b. A highly devolved federal government with a consociational central government can be chosen when there are two (or three) antagonistic and territorially separate communities, each of significant size, that must cohabit within a single state; this is a difficult system to sustain so there must be careful attention to the mechanisms to promote political cooperation.

    c. Special autonomy for territories in a federal or unitary state with a majoritarian central government is most appropriate in countries that have one or more territories with relatively small populations with a strong distinct identity; this model is more problematic for larger territorial populations.

3. Not all countries have a political geometry that neatly relates to one of the major constitutional design options. This creates a need for more creative solutions, such as hybrid models. The fundamental objective should be to design a system that will permit peaceful, competitive politics on a sustainable basis.

4. The circumstances leading up to a period of constitutional engagement—whether these are peaceful and within pluralistic politics or violent, and whether they are dominated by a victorious government or faction or characterized by a balance of forces—will influence the process that is adopted, so they require careful consideration.

5. In a peaceful, constitutional transition in which territorial cleavages are salient, the political principals should consider how to achieve territorial accommodation within the established constitution-making process. Options might include a political pact among parties to work towards a consensus, the participation of territorial representatives, the creation of a commission to examine territorial options, a special ratification procedure or even an interim constitution and/or power-sharing arrangement during the transition period.

6. In negotiations with regional insurgents, the government side needs to consider how to manage a 'two-level game': reaching a satisfactory agreement with the rebels while having an agreement that in substance and legal form is likely to achieve legal ratification by national institutions. This includes considering the courts' reaction to the constitutionality of proposed arrangements as well as the politics in the legislature and, potentially, the population (if a referendum may be required).

7. Although the victors in a major civil conflict or war will naturally seek to implement a constitutional design that they have fought for, they should consider using their position of strength to try to build political bridges, with respect to both process and substance, with those they have defeated, to promote a longer-term, 'positive peace'. Limited concessions of a constitutional type may help reconcile their opponents to the new regime and help normalize the country's politics.

1. Introduction

Collective demands for the constitutional accommodation of territorial cleavages are pervasive across very diverse contexts. Territorial claims are being made in the Global North in Spain and the United Kingdom, as well as in the Global South in Myanmar and Yemen. Territorial claims are a central issue in the negotiations over the reunification of Cyprus, and were central to the civil war settlements in Bosnia and Herzegovina and in Nepal. Territorial claims have also arisen in peripheral regions that have had insurgencies seeking special autonomy, such as for a Bangsamoro Autonomous Region in Muslim Mindanao in the Philippines and for an autonomous Aceh in Indonesia.

In many countries, political identification on the basis of territory is a central basis of political mobilization, around which political claims are framed, political parties formed, elections contested, governments composed, and constitutional claims made and resisted. Constitutional transitions dealing with significant territorial cleavages face political dynamics and challenges that are quite distinct from such transitions where such cleavages are absent. They can involve different constitution-making processes, sometimes with representatives of territorial groups having a formal or informal role, and certainly involve different political dynamics, whatever the defined roles of territorial groups are in the process. Such transitions also involve very different constitutional design options from those in countries in which territorial cleavages have little political salience; some form of federal, quasi-federal or asymmetric devolution is usually at issue and sometimes special power-sharing or minority rights protection arrangements are as well.

This Policy Paper seeks to provide insights into how territorial claims relate to constitution-making processes and constitutional design, and to offer advice that may be useful to principals and advisors engaged in constitutional moments—that is, periods in which there has been intense political engagement over how to respond constitutionally to significant demands for territorial accommodation from one or more regions. The following chapter considers the factors that shape the dynamics of constitutional moments, and sets the agenda for design and process.

2. Constitutional dynamics and constitutional moments

2.1. Factors shaping constitutional moments

A constitutional moment may be triggered by any number of events, such as the end of or a halt to a conflict, the arrival in office of a new political party, or a decision by power-holders to address a major issue of institutional design. Moreover, they may be sudden and unexpected. Some constitutional moments are relatively brief, whereas others are spread out over years; some bring significant, enduring change, whereas others change little or nothing in formal constitutional arrangements; some settle constitutional disputes, whereas others do not, leading to further rounds of engagement over future changes. As one scholar has noted, democratization is a 'complex, dynamic, long-term and open-ended process' that requires coordinated collective action over generations (Whitehead 2003: 201). However, while the origin and trajectory of each constitutional moment is unique, there are patterns across cases that fall into different types, which can help policymakers in understanding the relevant issues, the prospects and the possible trade-offs in a particular context.

Three crucial contextual factors shape the structure and dynamics of the constitutional moment and set the agenda for the choice of constitution-making process and the menu of potential options for constitutional design. These are (a) the political geometry of territorial and other salient political cleavages in the country; (b) the antecedent circumstances of peaceful, legal and institutionalized means or violent, extra-legal means used to advance demands for territorial accommodation; and (c) the relative power of the key actors, as shaped by tests of strength both peaceful and violent.

Political geometry

Political geometry refers to the relative size, number and character of political cleavages, including their geographic distribution. Understanding variations in political geometry is crucial in coming to grips with important variations in constitutional design and constitution-making processes. Territorial cleavages are a product of the interaction of *demography* and the *narratives* deployed by regional political entrepreneurs. There are four main patterns of political geometry:

1. States characterized by *multiple politically salient territorial cleavages*. Other salient cleavages may be present but the territorial issue is central to engagement on the issue of constitutional change, which typically involves the general architecture of the regime (e.g. federal or devolved). Ethiopia, India (with respect to its linguistic groups), Nigeria and Spain are examples.

2. States characterized by *a majority group and one or two territorially based, minority groups of significant size*. The minority group(s) typically raise(s) demands for territorial autonomy and, if large enough, may advocate that central institutions are structured around a pact or partnership with special power-sharing provisions among these groups. Examples include Cyprus, which has a Greek-Cypriot majority and a Turkish-Cypriot minority; and Bosnia and Herzegovina, which has a Bosniak majority and Serbian and Croatian minorities. Yemen, with its (divided) northern majority and southern minority, also has some of these characteristics.

3. States that have *peripheral, politically mobilized regions*. Such regional groups make claims for territorial autonomy but do not make demands for power-sharing in the central institutions, given their small size. Examples include the tribes in north-east India; the Acehnese in Indonesia; the Moro in the Philippines; Scotland in the UK; the northern Tamils in Sri Lanka; and the Russophones in Ukraine's Donbas.

4. States characterized by *politically salient cleavages that are both territorial and non-territorial*. Territorial accommodation is part of a larger constitutional agenda in which the strength of demands for devolution may be offset by other claims. In Nepal, ethnicity, indigenous identities and caste identities can be territorially concentrated but are often dispersed. In South Africa, racial distinctions are largely non-territorial, but linguistic and tribal differences within the black population often have a territorial character. In Kenya, there has been extensive intermingling of ethnic communities that historically were more territorially based. In Bolivia, major differences between the lowlands and highlands are mitigated by divisions within each group and by other non-territorial dimensions. In Iraq, the Kurds are distinct from the Arabs and largely in one region of the country, but both Kurds and Arabs have significant internal divisions, which are partially territorial in character.

These four patterns of political geometry are ideal types, and not every country fits neatly into one pattern.

Peaceful or violent political engagement around territorial claims

Political entrepreneurs must choose *the means to pursue claims for territorial accommodation*. They may seek change through peaceful means, working through existing institutional channels and under legal—including constitutional—constraints. Alternatively, they may reject the existing constitutional order and decide to proceed extra-legally through violence.

The choice of means is influenced by the nature of the political regime in which political entrepreneurs are operating, by their positions on constitutional options, and by past history or experience in pursuing their goals. A society may have many underlying tensions that suggest latent territorial cleavages, but in an autocracy, or an intolerant and assimilationist majoritarian regime, territorial minorities may find no effective peaceful outlet for debate and mobilization. When such regimes liberalize or break down, this may open a major constitutional moment, when territorial and other groups mobilize to promote their objectives. The choice of means will also be influenced by political leaders' assessments of the substantive distance between themselves and the government or other influential actors and of their political leverage.

Regional political parties are often the key instrument for non-violent, mass mobilization around territorial claims through institutionalized channels. On other occasions, the leaders of a territorial group may choose to work within a non-regional party, making the contingent judgement that this will maximize their political leverage. Peaceful pursuit of constitutional change occurs in a context of legal and constitutional continuity, channelling debates over territorial accommodation through existing institutions and rules. These rules strongly influence the political leverage of different groups. In addition, high hurdles for amending a constitution through existing rules may have a conservative bias and therefore make incremental changes to the existing constitution more feasible than the adoption of a new one. However, in certain cases, as in Nepal and South Africa, a radically new political configuration can result in an agreement on new rules that reflect the current forces at play while finding a way to maintain formal legal continuity by adopting, through the established procedures, the new rules for developing a new constitution.

Depending on a group's particular grievances and circumstances, regional political elites may reject normal politics, perhaps because they have failed, and turn to violence. Violence brings a shift in the character of politics, notably in giving those with guns (both government and rebels) a central role while marginalizing others. Territorial groups that turn to violence typically do so with a deep sense of grievance and frustration with peaceful means. Such a choice is easily understandable in a context of repressive autocracies but it can happen in democracies, especially fragile democracies or democracies that strongly favour nation-building over the accommodation of differences. This is particularly true in former colonies, where the post-independence political environment was largely one of nation-building and hostility to territorial claims for constitutional accommodation, which were perceived as an existential threat. For small, peripheral regional populations, the low returns from such political mobilization may discourage them from forming a political party and may drive them to violence if they are deeply aggrieved. The outcome of violence may be victory for one side—either the government or the rebels—or a stalemate;

these different outcomes will influence the nature of the constitutional process that follows. A government victory would normally involve a process within the existing constitution (although in Nigeria the military, which took power through a coup, defeated the secessionist rebels in Biafra and then ruled by decree), whereas a victory by the rebels would lead to a legal rupture and the drafting of a new constitution.

Power positions of the key political actors

The third factor is the *relative power positions of the different political actors*, including governments and the leaders of territorially mobilized groups. The issue of territorial accommodation may have been around for a long time before the key actors decide to actively engage with it. Government leaders facing territorial demands must consider how to react. Do they see the claims for territorial accommodation as extreme and constitutionally unthinkable (e.g. secession in many countries) or are they open to discussion and possible political resolution? Where subnational political entrepreneurs have mobilized peacefully, formed regional parties and contested elections, they have done so in the space offered by constitutional democracy. However, most constitutions explicitly or implicitly prohibit the unilateral secession of a region and from this prohibition some states have inferred a series of restrictions on political activity. The use of violence by the central state is nearly always a certainty when subnational political entrepreneurs have opted for violence themselves.

When political actors actively engage with the question of constitutional change, they may have experienced tests of their relative strength, whether through competitive politics or through violent clashes. The outcome of such tests of strength can determine when and how a constitutional reform process is initiated and the relative power of the different actors to influence the outcome. In democratic politics, the most important tests of strength are electoral. These can permit a group or coalition to capture governmental power, either nationally or (if territorial governments exist) regionally. The power positions of territorial leaders are influenced by the size of the territory's population, its political cohesion and the leverage these assets provide in the light of the power positions of other actors (e.g. whether or not they can influence the formation of a government).

In violent conflicts, the critical issue is whether the two sides have reached a stalemate (with neither side being able to defeat the other so they turn to negotiations) or whether a clear victor has emerged. Victors will be in a strong position to determine the substance of constitutional change, including how to deal with the territorial claims that gave rise to the conflict in the first place. Moreover, they are likely to have great control over the process. Our main interest regarding post-conflict situations centres on those arising from stalemates. Stalemates typically lead to negotiations between governments and regional groups, although there is no guarantee that they will agree and the possibility of violence resuming can affect how negotiations unfold. Outside actors can also be important, most obviously when they have engaged militarily themselves (either as invaders as in Iraq or as 'peacemakers' as in Bosnia and Herzegovina), but also when they support one side in a conflict.

2.2. The dynamics of constitutional moments

Different countries' constitutional moments can be identified in terms of how they relate to the three dimensions of the contextual factors: four categories of political geometry; two regarding the means for the antecedent contest; and two with respect to the power distribution, with a dominant actor versus a divided or diffuse power arrangement. The structures of these political contexts each present an inherent logic regarding how the leading political actors set and pursue their constitutional goals. These variations in contextual factors shape the agenda, process and design of constitutional moments, which are illustrated with examples in Table 2.1.

Table 2.1. The contexts of constitutional moments in various political transitions

Antecedent context	Power distribution	Political geometry			
		Multidimensional territorial cleavages	Majority–minority territorial configuration	Small, distinct peripheral regions	Mixed territorial and non-territorial cleavages
Violent	**Victory**	Ethiopia Nigeria		Croatia Sri Lanka (2009)	
	Stalemate		Bosnia and Herzegovina Cyprus	NE India Aceh/Indonesia Moro/ Philippines Sri Lanka (2002)	Nepal South Africa Iraq
Non-violent	**Dominant**	India (linguistic states)	Pakistan (1956)	Corsica	Russia
	Divided	Spain	Belgium	Scotland Ukraine	Bolivia Kenya Yemen

Not every case fits neatly into a single box. The situation in Sri Lanka changed between 2002, when negotiations took place during a military ceasefire, and 2009, when the government had prevailed militarily. Yemen is hard to place: its North–South cleavage suggests that it be assigned to the majority–minority column, but both the North and South are themselves very divided, territorially and in other ways, which led to it being placed in the mixed territorial and non-territorial column. Not all cases have led to a consensual accommodation of a territorial claim within a state: Croatia was a case of unilateral secession; Sri Lanka in 2009 saw a military defeat of the Liberation Tigers of Tamil Eelam (LTTE); Yemen failed to achieve a new constitution and descended into civil war; Cyprus is still in a state of frozen conflict; Corsica has had minimal success in satisfying its demands for autonomy. In other cases, territorial populations that are seeking accommodation of their demands have achieved less than they desired.

The main focus in this Policy Paper is on constitutional moments where the relative power of the key actors is divided, with no party able to dictate the outcome, so that there needs to be some kind of agreement if the issue is to be resolved. The political geometry and power positions of the main actors will be the key to

determining the nature and character of the constitutional process. The process will also be shaped by whether the constitutional moment arises out of antecedents of peaceful, legal, institutionalized politics or extra-legal, violent conflict.

Where power is divided because of electoral results, political actors address the substantive agenda items in a context of legal and institutional continuity within a constitutional democracy. The existing constitution provides a procedural framework to debate, adopt and implement constitutional change, including possible territorial accommodation. However, there may be political reasons to seek a broader consensus, beyond what is required by the constitution; such a consensus may bring greater political legitimacy to the result than would have happened with a decision that met the minimal constitutional requirements for approval.

Where there is a military stalemate, the agenda combines peace negotiations and constitution-making. These can work at cross-purposes because a peace agreement is backward-looking and focused on ending violence whereas constitution-making looks forward to creating effective institutions that operate under constitutional democracy and peaceful, legal politics. The question is how to design a peace process among armed parties that can broaden into a constitutional process among many parties, including the public, with a much wider agenda. The process needs to provide the armed parties with 'on-ramps' from armed conflict and peace negotiations to peaceful, democratic politics.

A cross-cutting issue for constitutional moments that involve divided power—regardless of whether the antecedents are violent or peaceful—is the risk of a lack of credible commitment to the process of transition. In the short term, where the constitutional system continues to exist in all or part of the state, this risk can potentially empower 'institutional spoilers' (e.g. courts, opposition parties, the government backbench and/or elements of the political executive) to prevent the government from implementing any territorial accommodation. Credible commitment problems can also occur in the medium term across multiple electoral cycles because opposition parties can campaign against agreements and proposed constitutional arrangements and may dismantle them if they win power. Finally, just as spoilers within the system may undermine a constitutional commitment, so too can political actors who have been excluded from the process. We explore various solutions to credible commitment problems in section 3.2.

There is a close correlation between political geometry and the main design options that should be considered during a constitutional transition. In cases of multidimensional territorial cleavages, the design option should, in general, be significantly decentralized symmetrical devolution or federalism combined with a majoritarian central government. For majority–minority territorial configurations, in which the minority is relatively large, experience indicates that the option of a highly devolved federalism, with a consociational central government, should be considered. However, for small, distinct peripheral regions, experience points to the option of special, asymmetric autonomy and a majoritarian central government as being the most appropriate approach. Finally, countries that have a mix of territorial and non-territorial cleavages should consider devolution or federalism, which could be quite centralized and perhaps have a large number of units with a majoritarian central government.

3. Constitution-making processes

Constitution-making processes are critical in that they strongly influence the ultimate constitutional design that emerges from a constitutional moment. They also play a significant role in determining how that design is received by the different forces at play over time (Arato 2016; Choudhry and Ginsburg 2016). Although these processes, especially when they take place during transitions from authoritarian rule to democratic rule, can have a high degree of indeterminacy (O'Donnell and Schmitter 1986), we will show how they fall into certain broad patterns when dealing with territorial cleavages. It is helpful to divide constitution-making processes into three stages: agenda-setting, deliberation, and decision or ratification.

3.1. Agenda-setting

The initial phase of constitutional agenda-setting reflects the *scope* of the substantive issues to be addressed—i.e. either a broad constitutional review or one that is targeted on a specific territorial question—as well as the *process, participants and decision-rules* for constitution-making. Decisions on these matters will be influenced by the political geometry and the power distribution among political actors and they may be constrained by the existing constitution. In situations of deep mistrust after a conflict, agenda-setting may address and resolve some *principles or issues of substance* regarding the ultimate outcome. There is no one formula for this phase, which may be done quickly or over a very extended period. It can overlap, in varying degrees, with the ensuing phases of deliberation and ratification. The choices made may be recorded in a formal or informal document. Agenda-setting is typically led by elites, although the representativeness of the elites and their influence at this stage will reflect their relative power positions.

Procedural agenda

The crucial factor in the procedural agenda is whether the antecedents to the constitutional moment are legal, peaceful and institutionalized or violent and extra-legal.

When the antecedents to a constitutional moment are legal, peaceful and institutionalized, constitutional procedures govern the process, and may include the creation of a constituent assembly and recourse to a constitutional amending

formula. If constitutionalized, these procedures may serve as constraints. These procedures also presumptively designate the constituent actors in the process, which may include national and regional governments, opposition parties, civil society and (in the case of referendums) the electorate. For example, in the UK, since the adoption of the Scotland Act 1998, the agenda for discussions around further devolution and the holding of a referendum has been set by bilateral negotiations at the cabinet level between the governments in Westminster and Holyrood.

Ensuing agreements are political, such as a pact, joint statement or accord, which may then require legislative implementation. However, constitutions often give no direct role to regional governments or legislatures in constitutional change. For example, in Bolivia from 2006 to 2008, the newly elected departmental prefects had to act outside the official process, while the elected members of regional parties in Congress—and later, in the Constituent Assembly—were the main actors within the formal process. In Spain, in 1978, the elected heads of the regional governments had no formal role in initiating and determining the process of constitutional change, but came to play a role because the governments of autonomous communities negotiated and subsequently ratified the quasi-constitutional statutes of autonomy once the 1978 post-Franco Constitution had been approved. In practical terms, depending on circumstances and the political strength of the political parties, this phase may be largely determined by the government alone (e.g. in India) but more frequently there is interparty discussion and debate (e.g. in Bolivia, Kenya, Spain and Yemen).

In a situation of both legal and institutional continuity, there can be latitude about various non-constitutional forums, such as special commissions and public consultations. Sometimes a national conference or dialogue outside the normal institutional framework can be important. Membership and rules of procedure of these forums can be loose and fluid and depart significantly from normal parliamentary or intergovernmental procedures. Participants may include political parties and governments, as well as a much broader range of non-elected actors, including labour movements, businesses, organized religions and other civil society organizations.

In Scotland during the 1990s, a large proportion of the political elite joined an informal, cross-party Constitutional Convention that, in the absence of any such action from elected regional representatives, developed a blueprint for devolution. When the Labour Party came to power in 1997, it endorsed this plan and submitted it to a Scotland-wide referendum, before Parliament enacted the Scotland Act of 1998.

In Spain, debates over territorial accommodation occurred even before the transition to democracy formally started. In 1975, before Franco's death, several national political parties came together to agree on principles of a democratic transition; they were joined, following Franco's death, by the main regional parties. A first step was to legalize all parties and adopt a general political amnesty. The outgoing Francoist parliament approved a law on political reform, which set the framework for a peaceful transition to democracy and a new constitution. This was approved in a popular referendum. This led to free elections, after which the democratic parties agreed to resolve their differences so that the army or other anti-democratic forces would have no pretext to usurp the transition to democracy.

Whatever the exact mix of forums, under conditions of legal and institutional continuity, the participation of political elites (including elected representatives where possible) in agenda-setting is integral to ensuring that the constituencies they represent will accept the legitimacy of the rest of the constitution-making process, participate in it, and accept it and implement the resulting constitutional settlement.

In stalemates after violence, the parties to the conflict normally negotiate to set the agenda. This can be an elaborate and time-consuming process (e.g. in South Africa from 1982 to 1992). External parties or mediators can assist the process, as in Cyprus, Nepal, Indonesia (regarding Aceh) and the Philippines (regarding the Bangsamoro). Unusually, for Bosnia and Herzegovina in 1995 and Iraq in 2005, outside powers largely set the agenda and the process for negotiations. Very occasionally, as in Cyprus, external powers are direct parties in the conflict and are participants in agenda-setting.

The participants in agenda-setting are, by default, the main armed combatants, as happened in Nepal in 2006. In many long-running territorial conflicts, armed combatants have evolved into de facto regional governments, as was the case in Sri Lanka with the LTTE. Even as the civil war continued prior to the 2002 ceasefire, President Chandrika Kumaratunga decided to lead a constitutional reform process that, on paper, could have gone some way to meeting the demands of Tamil nationalists; one reason for its failure was that the LTTE was excluded from the process. In Kurdistan and in North Cyprus, elected regional institutions and leaders have created state-like entities that have had to be central to any constitutional negotiations. The resolution of peripheral rebellions, even without de facto regional governments—such as in the Philippines, Indonesia and north-east India—has required that armed rebels be at the table, with the central government representing the state.

In situations of violence, both the constitutional process and the peace process begin with a ceasefire. A ceasefire agreement, in principle, can honour the substantive and procedural constitutional agenda. However, the capacity of a ceasefire agreement to do so must reckon with the legal and institutional context. In some cases, the constitutional order and its institutions have effectively collapsed. The ceasefire and agenda-setting negotiations determine the constitution-making process and also set substantive constitutional principles or parameters that must be respected by the ultimate constitution. This presents both an opportunity—because there is no constitutional constraint on the creative crafting of the process—and a challenge—because there is no default script for the process, which may therefore be contested. Moreover, in cases of state collapse, parties will often create provisional governing arrangements, including constituent assemblies that wield legislative functions as well. For example, in Nepal the civil war came to an end in 2005 with a 12-point agreement between seven political parties and the Maoists; that agreement included key commitments to an interim government that included the Maoists and to an elected Constituent Assembly. The parties and the Maoists then created a small, representative commission to prepare an interim constitution, the drafting of which took over a year. In 2006, the parties reconvened the 2002 parliament, which had been dissolved in 2005; this parliament then adopted the interim constitution, which designated the reconvened parliament as the interim parliament; that body then

admitted Maoist members and passed a law for the election of a new constituent assembly.

In other cases of violence prior to a constitutional moment, there may be legal and institutional continuity across most of the state, even if the central government's presence in the regions under conflict may be greatly diminished or barely existent. The government views its constitutional order as extending to areas under armed conflict and as governing the constitution-making process. The challenge is to coordinate existing procedures for legislative and constitutional amendment, in which armed rebels have no formal role, with bilateral negotiations between armed parties and central governments. Institutional spoilers could raise constitutional objections at the agenda-setting stage (e.g. in Sri Lanka, where the mere fact of the ceasefire agreement with the LTTE was attacked as being unconstitutional because it was built around a line of control that de facto accepted the limited reach of the Sri Lankan state). Precisely because of this risk, armed rebels may seek to negotiate assurances regarding downstream processes during agenda-setting. In Sri Lanka, although the 2002 ceasefire agreement did not address constitutional issues, the bilateral dialogue launched by the ceasefire yielded the Oslo Declaration of 5 December 2002, which set down some key markers for the shape of a future constitutional process (an agreement would need to be 'acceptable to all communities') as well as for the substance of a constitutional agreement (a federal structure within a united Sri Lanka). This led Sinhalese hardliners to attack the ceasefire process for arising from an extra-constitutional process and for pursuing unconstitutional ends; their opposition was one reason why the constitutional process never got off the ground.

This conundrum has been addressed in some cases through hybrid processes that formally comply with the existing constitution but work around it to determine both the process and substantive principles of a constitutional transition. A striking example of this took place in South Africa, where there was a stalemate between the African National Congress (ANC), which rejected the existing constitutional system as racist and illegitimate, and the South African Government, which insisted on legal and institutional continuity. This process began with years of 'talks about talks' before the National Party government repealed the ban on the ANC and informal negotiations began. This bilateral process culminated in the National Peace Accord, which set the stage for the Convention for a Democratic South Africa (CODESA) among 19 political parties. After CODESA collapsed it was succeeded by another multiparty forum that was underpinned by a consensus between the ANC and the National Party. Because these talks took place outside formal parliamentary institutions, they could include the ANC, which had no elected representatives, as well as other entities—such as the leadership of Bantustans, especially KwaZulu, as well as the Afrikaner-nationalist VF (Vryheidsfront—Freedom Front), which also lacked parliamentary representation.

These observations suggest a challenge in Ukraine at present (2018). Ukraine has launched a constitutional reform process that involves a presidentially mandated constitutional commission and other activities that are centred around the executive body (the Rada). However, following the Russian invasion of the Donbas region of the country, citizens in the non-government-controlled areas have had no effective

representation in Kyiv and the Ukrainian Government has refused to engage with the leaders of the self-proclaimed republics in Donbas. Negotiations on the reintegration of the Donbas region into Ukraine took place in 2018 within the Minsk process, an international forum where negotiations took place with Russia, an external actor, as well as with Western powers. The challenge is therefore how to give voice to those in the non-government-controlled areas as the constitutional and Minsk processes proceed.

Substantive agenda

Agenda-setting agreements can include significant substantive provisions that must be respected in the content of an eventual constitutional settlement. The substantive scope of the constitutional exercise can influence the nature of the process—for example, a process that aims to fundamentally rewrite a whole constitution will be quite different from one that is aimed at a far more targeted issue, such as the accommodation of a particular region's territorial claims.

When territorial claims for autonomy are a potential driver of constitutional reform, an important decision is whether or not to broaden the scope of the agenda to include other issues. There are good arguments for doing so. Regional autonomy may be seen as the sole means to diffuse political power and accommodate the country's various cleavages, when other mechanisms could be considered. Including certain rights in the constitution—such as language rights, especially for education and local government—can reduce the pressure for a proliferation of federal units. Electoral system design at the national level can make minorities more likely to be represented in national institutions. When the central issue is relations between a majority and a large minority, the prospect of some power-sharing in central institutions may be potentially valuable and reduce the degree of regional autonomy that is ultimately needed. The idea of power-sharing in central institutions was entirely absent from the 2002–2008 Sri Lankan peace process, when federalism was briefly considered. The absence of that issue from the agenda created legitimate concerns about the long-term viability of any settlement. Finally, having many possible instruments for addressing territorial and minority concerns on the constitutional agenda also permits trade-offs and bargaining, which facilitate agreement.

The scope for broadening the constitutional agenda also depends on the relative importance of the territorial issue. In India and the UK, the pressures from large, peaceful regional movements made addressing the territorial issue a central concern, whereas in Spain and Bolivia, although the territorial issue was fundamental, the constitutional agenda was much broader and encompassed the whole constitution. In Kenya, Nepal, South Africa and Ukraine, the territorial issue was one among several issues associated with a comprehensive constitutional agenda. Agendas after a civil war usually involve a host of constitutional and non-constitutional issues beyond any territorial questions. They include transitional justice, the resettlement of displaced populations, property restitution, security arrangements and the reform of the rule of law. However, the agenda to resolve peripheral rebellions is normally focused narrowly on the territorial issue.

Placing territorial accommodation on the agenda of a constitutional process does not guarantee a desired outcome if there is no indication of the expected substantive resolution. Groups advancing territorial demands may therefore seek guarantees in the agreed agenda that bind the process to certain substantive outcomes on key points. In South Africa, for example, the Constitution of the Republic of South Africa Act 200 of 1993 created an Interim Constitution that contained 34 constitutional principles that legally bound the Constitutional Assembly, including one that required that the final Constitution create national, provincial and local levels of government, and further stipulated that provincial powers 'shall not be substantially less than or substantially inferior' to those under the Interim Constitution. The Interim Constitution also provided that the Constitutional Court would have to certify that the final Constitution complied with these principles for the Constitution to come into force. The Court rejected the first version of the final Constitution on the basis that it did not comply with this stipulation, necessitating that the text be amended. Nepal's interim constitution also bound the constitution-making process to require territorial accommodation.

Similarly, in Bolivia those favouring departmental autonomy insisted that the issue must not be left to future negotiations. In negotiating the terms of reference of the Constituent Assembly (CA), the parties adopted a law for a referendum on autonomy that obliged the CA to create a regime of departmental autonomy and automatically opted-in those departments where the 'yes' side in the referendum prevailed. This arrangement constrained the Constituent Assembly, where there would not have been a super-majority in favour of autonomy arrangements. Such an option was possible because institutionally departments already existed, so they could conduct referendums.

3.2. Deliberation

The deliberation stage is usually distinct from the agenda-setting stage in two respects: participation is more inclusive and the consideration of substantive issues is more detailed and concrete. Agenda-setting will normally have established some key terms regarding process (e.g. participation, forums, decision-rules and timing), but these often require significant elaboration and even modification. A major question is how to provide for political pluralism on all sides of the constitutional discussions in order to build a broad political consensus in support of any resulting framework, one that supports credible commitment in both the short and medium terms.

Participants

It is usual that the deliberation stage broadens participation beyond the actors who set the constitutional agenda.

When the antecedents of the constitutional moment are violent and extra-legal, at least one party will be an armed group. In these instances, the lack of political pluralism can be an acute problem because leaders of such a group are not elected and may in fact oppose an electoral test of their strength. An extreme example was the LTTE in Sri Lanka, which was opposed to political pluralism and ruthlessly attacked moderates within the Tamil community. Armed groups that command

significant support and possess sufficient capacity but are excluded may turn into spoilers that can undermine a settlement, as happened with early agreements with the Moro population in the Philippines. When one group has won a civil war, it will be able to determine both the process and the substance of constitution-making. In Ethiopia, for example, there was a constitutional convention for the deliberative phase, but its members were decided by the victors of the civil war, who chose to exclude some former allies. A cautionary tale comes from Bosnia and Herzegovina, where the local combatants were completely marginalized. Representatives from the United States designated the Serbian and Croatian presidents as the representatives of those communities—with the leadership of the Bosnian Croats and Bosnian Serbs reduced to consulting with the two presidents outside the official debate. The three ethnic communities had no buy-in to the constitution agreed to under the Dayton Accords, although, paradoxically, they were institutionally empowered by it to spoil it once it was implemented.

'On-ramps' for armed groups to transition from violent conflict to peaceful, multiparty politics provide a way to broaden a constitutional process to promote political pluralism, by enmeshing such groups in a system of political competition. In Nepal, for example, the armed Maoist rebels agreed to take seats in an Interim Parliament which then quickly held elections for a Constituent Assembly, which the Maoists contested with considerable success, winning the greatest number of seats and heading the first post-civil war government. This kind of sequenced approach, from peace negotiations to a democratically elected constituent assembly, was acceptable to the Maoists because they anticipated sufficient representation in the Constituent Assembly to drive their agenda forward. The Constituent Assembly elections also permitted a broad cross-section of political parties to field candidates and win seats, which had the effect of promoting political pluralism at the deliberation phase. However, these disparate groups were unable to reach the required degree of consensus after five years of deliberation, so the assembly was dissolved and new elections were held, its successor completing the job.

In India's north-east, this process of an 'on-ramp' from violent conflict to electoral contestation for rebel groups occurred in a number of stages, and with a focus on regional politics. It converted armed militants into stakeholders in political life as they achieved greater autonomy. The Nagaland Peace Accord of 1947 carved the Naga Hills out of the state of Assam and made it a Union Territory under central control with some local autonomy. In 1963, the government and Naga representatives negotiated a 16-point agreement that led to the creation of the Nagaland state in which former rebels competed in elections as a political party. The government acceded to rebel demands for special autonomy on such subjects as religious and social practices, customary law, and ownership of land and resources, which were uncontroversial at the national level because of the small population and remoteness of these regions. In parallel fashion, Tripura, Manipur, Mizoram and Arunachal Pradesh acquired status first as Union territories, with little or no autonomy, as a stage before acquiring statehood. Meghalaya achieved autonomy within Assam, and then was granted statehood. 'On-ramps' may require locally specific accommodations for political competition. In Indonesia, in Aceh, for example, the peace agreement provided for the right to organize local political parties,

which was an exception to the requirement that all political parties have a national outlook; this enabled the guerrillas to become a political party.

The deliberative phase can also be broadened to promote political pluralism and the legitimacy of the process when there are elected governments—whether the antecedents of the constitutional moment are peaceful or violent—but this too can pose issues and can play out differently depending on the institutional arrangements as well as the political context. In parliamentary systems that operate on the basis of simple majorities, opposition parties can be excluded or marginalized if the government controls the legislature. To counteract this risk, parliamentary constitutions usually require a super-majority for constitutional amendments, potentially giving opposition parties leverage. Semi-presidential regimes may have cohabitation, in which the president and the government come from different political parties. While, in principle, cohabitation provides an opportunity for political pluralism, its potential to do so depends on the prevailing political culture. In Sri Lanka during the 2002–2008 process, notwithstanding cohabitation, the hyper-partisan nature of Sri Lanka's political party system acted as an impediment to building a cross-party consensus on the peace negotiations. The exclusion of President Chandrika Kumaratunga of the People's Alliance (PA) from the negotiations conducted by Prime Minister Ranil Wickremesinghe of the United National Party (UNP) led her to dismiss three cabinet ministers and trigger early elections, which in turn led to the collapse of the talks. Presidential systems present a genuinely hard case. In the Philippines, the control of the presidency and the Senate by different political parties has blocked the implementation of commitments made at the negotiating table, as occurred in 2015. There is no easy solution to this difficulty.

Political leadership can be a major driver of inclusion and pluralism in deliberative processes when there is competitive, pluralistic politics. In Spain, given the objective of a successful transition to democracy, the outgoing Francoist parliament approved a democratic law on political reform, while a broad cross-section of parties, including those that had been excluded from politics, developed a broad consensus that kept the lid on partisanship during the critical transitional phase. By contrast, in Yemen, there was an absence of leadership in the wake of the fall of Ali Abdullah Saleh. The national dialogue, which conducted extensive consultations to address the constitution, did not engage the real power-holders in serious negotiations: Saleh was excluded in order to mark a sharp break from the past, and southern separatists boycotted the meetings. Political tests of strength during a constitutional process, whether through elections or referendums, can provide an occasion for greater inclusion in the debate and potentially shift the power positions of the players. In Bolivia, for example, the population was mobilized by elections, referendums and street demonstrations in repeated tests of strength, which in turn shaped negotiating dynamics to the favour of Evo Morales.

Forums and decision-rules

The options considered for the forum for constitutional deliberations are influenced by political geometry, and whether the antecedents have been peaceful and legal or violent and extra-legal.

Under legal and institutional continuity, the consideration of territorial claims occurs within existing constitutional provisions regarding constitutional amendment and the forum for deliberation. Most constitutions leave the power of constitutional amendment with the legislature voting with a super-majority, by implication making it the deliberative body, although some require ratification by referendum (and several federations require some level of approval by the legislatures or populations of the federal units). However, legal rules rarely foreclose the creation of supplementary deliberative bodies, such as the constitutional commissions in Kenya or the state reorganization commission in India. In Bolivia, while Congress possessed the formal authority over constitutional amendment, it passed a law creating the Constituent Assembly (although in the end the process reverted to Congress).

Although super-majorities are the norm for constitutional change, the UK is the outlier in that it requires no more than a simple majority for constitutional change as part of the ordinary legislative process. In the UK, regional devolution occurred through statute, although political decisions were made to incorporate referendums into the process prior to the creation of the Scottish Parliament, and later about the question of Scottish independence. In India, changes to state boundaries and the creation of new states can be enacted through the very low threshold of a simple majority in parliament (a state whose borders are changed must be consulted but has no veto), although most other changes require a super-majority. Kenya's Constitution required a double simple majority (legislative and from a referendum). Spain's required a super-majority in parliament and a simple majority in a referendum. In Bolivia, Congress had the power to amend the constitution, but there was a political agreement to hold a referendum to ratify any amendment.

When the antecedent of the constitutional moment is a stalemate in a regional insurgency or rebellion, the government will assert legal continuity for constitutional change, but this may channel the deliberations into forums, such as the national parliament, where elected representatives representing the rebels would be too few to have any significant influence. In Indonesia, for example, the central government initially had the parliament (where representatives from Aceh and Papua had a minimal presence) enact autonomy laws unilaterally. These laws were unsuccessful in stemming armed struggle even though, for Aceh, the laws had favourable terms regarding resource revenues. By contrast, the 2006 Aceh autonomy law has been largely successful because its terms were spelled out in the negotiated peace agreement of 2005. In the Philippines, non-consensual, unilateral change was also unsuccessful. The adoption of the 1987 Constitution authorized Congress to create the autonomous regions, which it did in 1989 through a law that set up the Autonomous Region in Muslim Mindanao (ARMM). It did this over the objections of the Moro National Liberation Front (MNLF). The legislation required a referendum to determine the geographic scope of the ARMM, which resulted in only one city, Marawi, voting to be included; even Cotabato City, the regional centre for Mindanao, voted to stay out. Although having a smaller region with limited powers won the support of some Moro politicians, the referendum result failed to satisfy Moro insurgents and did not succeed.

The initial and central forum for resolving a territorial insurgency is a bilateral table (between government and rebels), in which peace and a constitutional

settlement are negotiated. However, a single focus on bilateral peace negotiations risks failure downstream in the process, when the normal procedures for constitutional review and deliberation and ratification must apply. There is a need, especially for governments, to consider how they will address all stages of the process. In the Philippines, the 2008 Memorandum of Agreement on Ancestral Domain that was entered into by the government and the Moro Islamic Liberation Front (MILF) was ruled unconstitutional by the Supreme Court because its terms promised to adopt any constitutional amendments that were necessary to implement it, whereas the power of constitutional amendment rested exclusively with Congress. In due course, the MILF entered into new negotiations and reluctantly opted to proceed by ordinary statute to avoid the difficulty in getting a constitutional amendment approved, given the very high threshold required. A hybrid body, with 50:50 government/MILF membership, drafted the Bangsamoro Basic Law (also known as the Bangsamoro Organic Law), but legislative approval, which had seemed highly likely, was derailed in the Senate after a botched and very bloody government anti-terrorist raid. Another example of the problems posed by institutional spoilers comes from Sri Lanka, where government backbenchers and opposition legislators challenged the constitutionality of an interim governing arrangement for LTTE-controlled areas (the Post-Tsunami Operations Management Structure, P-TOMS), which was struck down by the Sri Lankan Supreme Court on the basis that the proposed entity's spending powers infringed on parliament's control of public finances. This decision ended any prospect of further cooperation between the parties.

These examples show the potential challenges that can be posed by institutional spoilers during constitutional moments. Spoilers have legitimate interests in the results of negotiations but can upset delicate negotiations because of their late involvement and negative opinions. The question is how to mitigate this risk. Legislators who must eventually implement an agreement could be brought into the negotiating process in some ways at the agenda-setting or deliberative stages, but this is a highly tactical matter that requires subtle political management. In the case of court systems, this is much harder because they cannot be parties to negotiations. The South African transition, which occurred under legal continuity, developed a creative option whereby the Interim Constitution created a new Constitutional Court, and an appointments procedure that ensured the creation of a court with judges who were acceptable to the major political parties. The Constitutional Court was assigned the task of assessing the final constitutional text for compliance with the 34 Constitutional Principles agreed to by a multiparty consensus. The Constitutional Court was therefore an external judicial check on the constitutional process; at the same time, however, the Court conceived of its role as being an institution of the transition to a new constitutional order.

In contexts of complete legal and institutional rupture, as is often the case after civil wars, there may be no legal constraint on the choice of forums and decision-rules. The Dayton Peace Accords' constitutional premise was one of a complete break with the previous constitution, which opened the way for the Accords to be produced by a unique constitutional process, in which armed parties negotiated with direct international participation and yielded an agreement that simultaneously ended

armed conflict and adopted a new constitution within three weeks. The case of Cyprus, where fighting stopped long ago in its 'frozen conflict', resembles that of Bosnia and Herzegovina in that negotiations over a formal end to the civil war are tied to negotiations for a new constitutional settlement, although they have had to deal creatively with the Greek-Cypriot view that there is continuity of the state (not of the constitution) and the Turkish-Cypriot view that two sovereignties are being brought together.

In most civil wars, the transition from civil war to ceasefire to peace agreement and, finally, to constitution takes place over an extended period. If the previous state has collapsed or if the government lacks any effective presence and/or legitimacy, there is often a need to create provisional governing arrangements during the period in which a longer-term constitution-making process can occur. These provisional arrangements, whose negotiation will have been largely led by elites, create transitional governing institutions, determine their membership, define decision-making procedures and establish a constitution-making process. Interim constitutions may set out these provisional arrangements in situations where the form of legal continuity is maintained but where the existing regime is so tainted and weakened that it cannot continue, even during an interim period. In South Africa, the transition from the old order to an interim constitution preserved legal continuity but fundamentally changed the regime by providing for universal suffrage elections to a Constitutional Assembly and establishing a power-sharing executive that would have responsibility for the constitutional process.

Interim constitutions can create substantive and procedural path dependencies for the shape of a more permanent constitution. Substantively, they can provide baselines for negotiations over the final constitution. Iraq's Transitional Administrative Law recognized Kurdish autonomy and created a procedure for ratifying a new constitution by referendum that effectively gave the Kurdish region a veto, and therefore set a baseline for Kurdish autonomy under the permanent constitution. Procedurally, inclusive interim government arrangements can generate buy-in to the constitution-making process and build trust among political opponents. The South African experience illustrates the value of a power-sharing interim government for the success of a constitution-making process. Both the National Party and the Inkatha Freedom Party (representing Zulus) were represented in the cabinet, participated in the constitutional process and supported the final constitutional text even though they were not able to achieve all of their goals.

Constitutional and/or constituent assemblies

Elected constitutional and/or constituent assemblies (this paper uses the terms interchangeably) may be proposed for major constitution-making processes. There are two kinds of constitutional assemblies. First, there are specialist constitutional assemblies that have no ordinary legislative responsibilities and are elected as part of a specific constitutional reform process, at the end of which they are dissolved permanently. The appeal of specialist constitutional assemblies lies largely in the theory, which is questionable, that they may be put above ordinary politics and beyond the control of political parties (e.g. if political parties are expressly excluded from fielding candidates). Second, there are dual-purpose elected constitutional

assemblies that simultaneously serve as legislatures. These bodies are also created as part of a specific constitutional reform process and are almost always elected in a public campaign in which the constitutional agenda is the main or a central issue. Political parties openly field candidates and operate according to the conventions of government and opposition (although there may be a broad-based government). After the constitution comes into force, this body may become an ordinary legislature that exercises power under the constitution. A specialist constitutional assembly was elected in Bolivia (alongside the existing legislature, and named the Constituent Assembly) and dual-purpose constitutional assemblies were elected in India (as part of the lead-up to independence) and also in Iraq, Nepal, South Africa and Spain. There can also be alternatives to elected or fully elected constitutional assemblies. The Bomas process in Kenya used a hybrid body that brought together parliamentarians and non-politicians.

As these examples illustrate, constitutional assemblies may be used in cases of multiple politically salient territorial cleavages (e.g. in India and Spain), and politically salient cleavages that are both territorial and non-territorial (e.g. in Bolivia, Iraq, Kenya, Nepal, South Africa and Yemen). In addition, they can be used as part of peaceful democratic politics (e.g. in Bolivia, Kenya and Spain) or in civil war stalemates (e.g. in Iraq, Nepal and South Africa). In Bosnia, peace negotiations and constitutional negotiations occurred simultaneously, driven by elite and international actors, which precluded a constitutional assembly, whereas in Cyprus the negotiations have been led by the heads of the two elected governments, with ratification subject to approval in parallel referendums. These latter cases suggest that constitutional assemblies may face particular difficulties when dealing with contexts of a majority alongside a large, territorially based minority.

The main argument made by proponents of specialist constitutional assemblies is that they guard against the risks of institutional self-interest and self-replication by a body dominated by political parties (Elster 1995). However, there are good reasons to be sceptical of this argument. As a practical matter it is difficult to keep parties out of politics, and their buy-in will be necessary for implementation. Additionally, constitutional assemblies can fall prey to abuse. In Latin America and the former Soviet Union, presidents have convened constitutional assemblies for partisan ends, in order to wrest control of the constitution-making process from legislatures controlled by opposition parties. Urged on by the executive, these constitutional assemblies have also inferred from their unlimited constitution-making powers the authority to exercise plenary power unrestrained by any constitutional limitations. They have seized legislative powers and reconstituted other institutions at will and have expanded executive powers and shrunk legislative powers. Sometimes, to provide democratic legitimacy, presidents have used plebiscites to ratify a constitution produced by a constituent assembly.

These experiences suggest that there is a need for caution regarding the role of specialist constitutional assemblies, especially in the context of territorial cleavages, which are in large part claims for the dispersal of centralized public power. Bolivia provides a cautionary tale. The Constituent Assembly (CA) was created by legislation that was the result of a compromise between the Movimiento al Socialismo (MAS) that favoured a centralized regime and Poder Democrático Social (PODEMOS) that

advocated regional autonomy. Each party controlled a chamber of Congress, making any agreements on regional autonomy and on broader constitutional reform difficult. They therefore opted for a CA that could approve a new constitution only by a two-thirds majority. The CA was obliged to create a framework for regional autonomy that departments had already opted into by referendum. It was far from non-partisan and although MAS won a majority in the CA it fell short of securing the super-majority. The CA became deadlocked, which led MAS to argue that the CA had unlimited constituent authority to make decisions by a simple majority, and therefore to overturn the two-thirds voting requirement. This led PODEMOS to walk out of the CA. MAS then used its control of the CA to draft a constitution and to attempt to take it to a referendum, which was blocked by the Electoral Court, which held that any referendum required congressional assent. Given the risk of civil war, Bolivia's neighbours intervened with an offer of mediation. The parties went back to the negotiating table and Congress (not the CA) ultimately approved a new constitution, which passed by 60 per cent in a national referendum.

The purported defect of a dual-purpose constitutional assembly—that it vests a primary constitution-making role in the same political parties that will wield power under the constitution—may in fact be a strength. A constitution-making process that excludes elites may be counterproductive because it is those elites who will operate the gears of the constitutional democracy created and can undermine it from within. Allowing political parties to bargain around self-interest favours the stability of the resulting constitution, whose framework they will see as being more advantageous than the alternatives of force and fraud. Even when a constitution has been adopted in a referendum, if political leaders do not buy into it, they may not implement it. A vivid example comes from Iraq, where the hastily drafted and incomplete constitution was approved by a referendum in October 2005. However, its provisions on federalism are unimplemented because most Arab political leaders, who dominate the central government, felt no ownership of the constitution-making process, resented extensive autonomy for the Kurdish region, and did not support federalism in the Arab areas.

The Bomas process in Kenya provides another example of the potential risks of excluding political elites from the process of constitution-making. Public consultation and the initial preparation of a constitutional draft were overseen by the arm's-length and largely non-partisan Constitution of Kenya Review Commission. This draft was then referred to the National Constitutional Conference (NCC), a hybrid body with members drawn from the legislature, the districts, political parties and civil society, which was to review, potentially amend and adopt the commission's draft and transmit it to Parliament. Parliament was then to vote on it without amendment, with a two-thirds majority required for approval. This arrangement proved unsustainable because the earlier phases had not satisfactorily accommodated the views of the political parties, which used their control of the final, parliamentary step to make substantial revisions to the draft. This draft was rejected in a referendum that was, in many ways, a plebiscite on the president. The subsequent Kenyan constitutional process set up a Committee of Experts to work directly with Parliament via a Parliamentary Select Committee; this draft passed in a referendum. Yemen provides another example of the same problem because the national dialogue

failed to engage, at least directly, with the most important actors in the country. The members of this large body were in many cases non-partisan, but they were loosely organized and not truly capable of negotiating on difficult subjects. Those who were affiliated with political parties or political interests had leaders who were pulling strings from outside the process and who often tried to obstruct agreement. In the absence of elections, it was difficult to determine who could really speak for different parts of the population, but at no point did the major leaders come together with a view to negotiating.

A crucial issue for regional and political minorities advancing claims in a dual-purpose assembly is to avoid majoritarian decision-making that disregards the wishes of regional minorities. For example, in the context of a civil war stalemate in Iraq, the Constitution Drafting Committee of the National Assembly acted on the basis of a simple majority, which meant that the views of the Kurds were consistently outvoted. However, senior representatives of the US Government intervened and took control of the process because of their concern to meet established deadlines. This gave the Kurds, who already had a well-established regional government, considerable weight in the final drafting of the Constitution (even beyond the advantages they enjoyed under the decision-rules for the ratifying referendum: see section 3.3). The most obvious and powerful tool for protecting minority interests in a constitutional assembly is to require super-majority agreement—such as through a two-thirds threshold—as was used in Bolivia, Nepal, Spain and South Africa. However, super-majority requirements increase the risk of deadlock, as happened for a time in both Bolivia and Nepal, which can be highly destabilizing in a major transitional context. Minorities may still be outvoted even when there is a super-majority requirement, as happened in Nepal, where the Madhesi and Tharu minorities were marginalized.

Mechanisms can be set down in a constitution or in an interim agreement to overcome deliberative deadlock. South Africa's Interim Constitution provided that, in the event that the Constituent Assembly could not reach the super-majority of two-thirds, a simple majority in the assembly could submit a draft to carry out a referendum with a 60 per cent approval threshold; if that referendum failed, there would be elections for a new assembly. In cases where deadlock-breaking mechanisms have not been spelled out in advance, it has fallen to the courts to craft a solution, which may be to turn matters over to the electorate. In Nepal, the Supreme Court dissolved the deadlocked Constituent Assembly after a constitutionally imposed deadline had been extended four times; the new elections changed the composition of the Constituent Assembly, which finally succeeded in meeting the two-thirds threshold. In Bolivia, the Electoral Court ruled some proposed referendums unconstitutional, but held that Congress could enact referendum legislation, which it eventually did as part of a constitutional settlement. In effect, the court remanded the issue to Congress, which would have faced the electorate on a fixed timetable had it not resolved the issue.

Finally, although there are challenges in achieving agreements that include support from territorial and other minorities, occasionally there can be risks in the other direction, when somehow a majority has been marginalized in a constitutional settlement. Arguably this happened in Iraq, as discussed above.

3.3. Ratification

The final stage of a constitutional process is ratification. When there is constitutional continuity, the ratification of constitutional amendment by a legislature typically requires a super-majority as opposed to the simple majority needed for ordinary legislation. Some ratification procedures end when the national legislature or constitutional assembly has voted in the required numbers (if necessary, by recourse to the deadlock-breaking mechanisms described above). Other procedures give the final say to the electorate in a referendum. In these cases, the legislature may be able to approve a draft by a simple majority, with final ratification then requiring a majority in the referendum. Several federations also require the consent of some proportion of regional legislatures or populations (by referendum). In South Africa, for example, constitutional amendments that affect the powers of the upper house (the National Council of Provinces), provincial boundaries, functions, powers or institutions, or provincial competences require the approval of two-thirds of the provincial delegates in the upper house as well as two-thirds of the members of the lower house. In India, most constitutional amendments require a two-thirds majority in both houses of parliament; given that the upper house is indirectly elected by the state legislature, the states therefore have an indirect role in the process. India is unique among federations in providing that the creation of new states or changes to state boundaries can be approved by simple majority in the two houses of parliament, without requiring the consent of the affected states (though they must be consulted).

In Nepal in 2005, the seven-party alliance of Nepali political parties that entered into negotiations with the Maoists wished to maintain legal continuity, but a constitutional process based on the old constitution was unacceptable to the Maoists, and the compromise was an interim constitution. The interim constitution provided that the Constituent Assembly could ratify the constitution by a two-thirds vote, but there was also a constitutional commitment to making decisions by 'consensus'. In the final stages of the Nepali process, there were major tensions over whether ratification could proceed based on a two-thirds vote or whether there should be consensus in addition. Legally, the former was applicable, but the constitutional reference to consensus weakened the legitimacy of the two-thirds rule and the process was opposed in major demonstrations by the Madhesis and Tharus, who did win some minor concessions.

Ratification is a different matter when there has been legal rupture, in that those who have the power can decide the rules. An extreme case was the Dayton Agreement, where the USA basically drove the process, and the principals to the negotiation, the presidents of Croatia and Serbia, did not hold office in Bosnia and Herzegovina. The constitution was an annex to the peace agreement with no further process for ratification. However, even in such cases of arguably illegitimate constitutions, the politicians who are meant to operate within the new regime must decide whether to respect the new constitution or risk system breakdown. In Bosnia and Herzegovina, local politicians have certainly tested the limits of the regime. The procedure for ratification in Iraq was also essentially imposed by the occupying forces of the USA and consisted of approval by the transitional National Assembly and then a national referendum vote. Ratification in the referendum required a national

majority, but would fail if more than two-thirds of registered voters in more than two governorates voted no. This latter rule was originally designed to protect the Kurdish minority, which in the end voted for the constitution (partially because they had so much influence over it). Ultimately, Sunni governorates almost torpedoed it (in two governorates more than two-thirds voted no, and in one more governorate the two-thirds threshold was almost met).

A referendum is the most inclusive approach to ratification in that it provides the electorate with a chance to pronounce on a draft constitution (or amendment) prepared by its representatives. A positive result in a referendum can add to the legitimacy of constitutional change; this was the result in Bolivia and Spain. However, referendums are risky, especially in polarized situations where the constitution contains difficult and controversial compromises. In Cyprus, the Annan agreement was subject to two parallel referendums, one in each community, and was rejected by Greek Cypriots. Of course, a negative vote in a referendum may prove salutary, as in Kenya, where voters in the constitutional referendum in 2005 rejected the draft, partly because of its content, but equally because of opposition to the then president. A new constitution was approved in Kenya by referendum in 2010.

Referendums are sometimes used not for formal ratification but as tests of public opinion. This was true in Scotland, where voters rejected independence in a referendum that had no legal status but was accepted as politically decisive. In Bolivia, national and local referendums were used as tests of strength (along with elections) in the contest over the country's constitutional reform; these eventually set the context for the final negotiations and the ratification of the new constitution by referendum. In Ukraine, President Kuchma's threats to hold consultative, non-binding referendums (which public opinion polls suggested he would win) gave him the leverage to force the Rada to adopt his constitutional proposals. Elections, whether to constitutional assemblies or to ordinary parliaments, are the usual field of political battle in democracies and they can critically influence the course of a constitutional process. This happened in Nepal, when the configuration of the new Constitutional Assembly was able to reach the two-thirds majority necessary to ratify a constitution after the previous Constitutional Assembly had failed, over many years, to do so.

Important post-ratification steps can also be required for the full implementation of a constitutional settlement. In Spain, for example, the new autonomous communities (ACs) had to be created. In cases of mergers of provinces this was done by votes of municipal councillors, or in a few cases by local referendum. Moreover, each AC needed to negotiate its autonomy statute, which then was ratified by legislatures both national and regionally. In the Philippines, in the settlement on Bangsamoro a tough negotiating issue related to the use of referendums at the implementation stage to determine the exact boundaries of the new territory.

Very few recent constitutions (in contrast to many established federations) give a formal role to territorial representatives or populations in ratifying constitutional change. The Iraqi referendum rule stands out as an exception, as does that of Cyprus, which requires both the Greek-Cypriot and Turkish-Cypriot communities to vote in favour of it for ratification. The British Government's acceptance of the legitimacy of a Scottish referendum on independence as a binding expression of opinion falls short

of formal ratification, but certainly gives a decisive voice to the regional population. Similarly, the negotiation of settlements with insurgents in peripheral territories in north-east India, Aceh and Mindanao gave representatives from these areas a central role in the substance of the agreements, but no role in their formal ratification.

Super-majority rules can sometimes give significant political leverage to territorial minorities around the ratification of a constitution or amendment, as happened in South Africa and in Spain. However, these rules are not normally equivalent to a power of veto by a regional minority. In Nepal, the aim to achieve consensus prolonged the process but eventually gave way to a two-thirds majority that overrode strong objections, notably from the Madhesis, who vociferously objected to the new provincial map. In Yemen, the national dialogue could not resolve the number and boundaries of the new regions, so the president created a mechanism to approve his preferred option; both the Houthis and the Southern Movement rejected the proposed regional structure, which was a key factor in the outbreak of civil war.

In summary, ratification rules are fundamental for shaping the events preceding ratification and for the legitimacy or acceptance of the eventual result. The principal parties may be constrained by the ratification rules, but in cases of state collapse, or even in cases of total regime change within a context of constitutional continuity, the lead actors may be able to determine or shape the rules of ratification.

4. Constitutional design and territorial cleavages

4.1. Constitutional moments and constitutional design

A key test of constitutional designs or innovations is how well they function, which means how appropriate the design is to the context. Even designs that were contested initially may come to be accepted if they function well. And although design does matter, the history of a constitution-making process can also have lasting effects in terms of how different groups view the legitimacy of the outcome. There are often powerful political imperatives to develop 'permanent' constitutions, not least in conflict-affected countries. Although the processes of making such constitutions can take more or less time and be done in different ways, there comes a point when a new constitution is deemed to be operational, and that becomes a fact with its own consequences (Choudhry 2008).

Nonetheless, there are three major constitutional design options to respond to claims for the accommodation of territorial cleavages. The applicability of each option has a presumptive logic, most closely related to the underlying political geometry, and therefore should be considered closely in the appropriate political context. These logics are summarized briefly in the following subsections.

Symmetrical federalism or devolution with a majoritarian central government

Symmetrical federalism or devolution is common and covers many varieties and degrees of decentralization. It should be considered in countries whose political geometry is highly territorialized (e.g. Ethiopia, India, Nigeria and Spain) but also in those countries that have a mix of territorial and other cleavages (e.g. Bolivia, Kenya, Nepal and South Africa). Moreover, symmetrical federation may be combined with asymmetric, special autonomy arrangements for smaller units (see section 4.2). The leading example is India. The major design issues with symmetrical federalism include the number of the constituent units and their boundaries, the protection of minority rights (nationally and within constituent units), territorial representation within central institutions (notably upper houses), the form of the legislature and the executive, and the extent of the devolution of powers. When there are multiple

cleavages the political dynamics can be quite fluid, with governing coalitions varying over time, which potentially limits how often any group or territory is excluded from power. Majoritarian government at the centre is broadly accepted, but upper houses often give extra weight to representatives of small territorial units. The examples of Iraq and Yemen are hard to place. In principle, Iraq opted for symmetrical federalism, but as the design was incoherent and was never implemented the Kurdish region effectively has special autonomy. A constitution could not be agreed to in Yemen, but the design that was considered provided symmetrical devolution to 6 regions and 21 governorates, while having special power-sharing provisions within the legislature between northern and southern representatives.

Highly devolved federal government with a consociational central government

This difficult institutional arrangement is sometimes chosen when the political geometry is of two (or sometimes three, as in Bosnia and Herzegovina) antagonistic and territorially separate communities that must cohabit within a single state. Typically, in this system of government there is a majority and a minority community and the latter must be of significant size for this option to be considered. Mutual mistrust suggests that the communities should carefully consider maximum devolution or self-government for each community. However, the inevitable fact that some important functions remain with the central government should draw these communities to consider consociational government, a particular form of power-sharing in which the agreement of a majority of representatives of each community is necessary for certain specified major decisions. Belgium has a highly developed form of consociational federalism. The example of Cyprus illustrates the difficulties of negotiating such an arrangement, even when it appears to be necessary.

Special autonomy for territories in a federal or non-federal state with a majoritarian central government

This option is most appropriate in cases where the political geometry includes very small, peripheral territorial populations that have a strong sense of distinct identity. The national majority may resist claims by such groups for special autonomy for ideological reasons, but as a practical matter such arrangements can work well if the population is very small relative to the total population (as in Aceh in Indonesia or in north-eastern India) or if the extent of special status is not too extensive. Special autonomy can be more problematic, as in Scotland, when the population is relatively large and the devolution is very extensive. In Ukraine, the Minsk agreement envisages special autonomy for the districts in Donbas that are not government controlled, but this idea has attracted no support in the Rada. In Sri Lanka, special autonomy might have made sense for the Northern Province, but it was never the focus of negotiations and this option has been foreclosed by the military defeat of the LTTE.

Of course, there are alternatives to these three options, even when a country is highly territorialized or has strong claims for autonomy in some regions. One is a centralized, unitary regime in which there is little or no accommodation of territorial cleavages, and there is possibly an attempt to assimilate minorities. Another is secession, where the break-up of the state is accepted as preferable to a difficult

cohabitation. Secession was the avowed aim of rebels in India, in Indonesia, in the Philippines and in Sri Lanka, but in all of these cases the rebel factions were forced to settle for less. Majorities can often favour a strong, indivisible 'nation' and resist options for devolving or sharing powers. It is therefore not inevitable that the apparently most appropriate model for territorial accommodation will be adopted: that will depend on the details of political geometry and the relative strength and ideologies of the key players. Moreover, when a country is riven by particularly deep territorially based conflicts, it may be that there is no constitutional design option that will produce relatively functional and sustainable democratic politics.

Although a constitutional moment that results in change is usually thought to end with an agreement on a new or revised constitution, in reality it is one step in a longer process, which includes the critical issue of implementation. A territorial accommodation, whether in the form of a constitutional amendment or a statute, launches further processes whereby that accommodation is operationalized in practice, in the course of which it will be interpreted, reviewed and adapted over time to changing circumstances. Moreover, on many occasions, the very same disagreements that gave rise to the demand for the territorial accommodation in the first place will resurface in debates over how to translate that accommodation into practice. Constitutional territorial accommodations do not necessarily resolve issues; rather, they may manage them by establishing some points of consensus and channelling remaining issues into institutional mechanisms, where they are dealt with through continuing political processes.

4.2. Symmetrical federalism or devolution with a majoritarian central government

Most federal and devolved systems are symmetrical in that the territorial subunits have the same powers and responsibilities and their national institutions are majoritarian in design. This system seems suitable for countries that are highly territorialized with several significant regions, such as India and Spain—which also have asymmetric, special autonomy arrangements for some subunits—and to those where there is a mix of territorial and non-territorial cleavages, such as Kenya or South Africa. Key design issues within this model are the number and boundaries of the constituent units, the type of central legislature and executive, the upper house, the electoral system, and the allocation of powers and fiscal resources between levels of government.

Of these design issues, the determination of the number and boundaries of the constituent units was a major issue in several countries (e.g. Bosnia and Herzegovina, Ethiopia, India, Kenya, Nepal, Nigeria, South Africa, Spain and Yemen). The criteria for forming subunits can include historic boundaries, sociocultural identities, economics, administrative efficiency, geographic features such as rivers and mountains, the desired number or size of units, and, inevitably, political pressure (Anderson 2014). In Spain and in South Africa, the approach to creating units was largely successful. The redesign of the political maps of India and Nigeria has also helped stability and political dynamics but there are still pressures for more states. In Nepal, the strong dissatisfaction among the Madhesi over the failure to get a single

province poses a significant political challenge, but a single Madhesi province with 40 per cent of the population could prove even more destabilizing. In Yemen, the proposed regional boundaries in the North were a *casus belli* for the Houthis, while the Southern Movement was hostile to the proposal to establish two regions in the south.

Most highly territorialized countries have more than one level of territorial cleavage (e.g. the territories of big confederated tribes versus smaller subtribes) that can provide an element of choice in drawing boundaries, especially in relation to dealing with sociocultural identities, such as ethnicity, language and religion, which are all potentially very symbolic and politically volatile. Ethiopia, India, Nigeria and Spain are sometimes viewed as 'ethno-federations', because territorially based ethnic political mobilization has been at the root of demands for constitutional accommodation and has been important in determining unit boundaries. These countries, however, have taken different approaches. In some cases, ethnic boundaries largely align with subunit boundaries. In India, the leaders of the independence movement put off addressing the call for linguistically based states, as they feared the potential impact of linguistic states on national unity. But within a few years of independence India acceded to the call for linguistically defined states. The earlier fears about linguistically based states proved largely unfounded; their creation helped bring government closer to the population, and increased the competitiveness and fluidity of national politics because of the rise of new regional political parties that could enter into coalition governments at the central level. In Spain, virtually everyone can speak the national language, but the three 'historic nationalities' (the Basque Country, Catalonia and Galicia), who have their own languages and represent over a quarter of the population, harboured strong grievances about their treatment under the Franco regime. These regions led the push for major devolution, but the view was that the 50 provinces were too numerous to be the principal units of a quasi-federal regime based on ACs. The three historic nationalities and the island provinces were therefore guaranteed status as ACs, whereas the primarily Spanish-speaking provinces of the mainland were required to amalgamate to reduce the number of units.

By contrast, in Nigeria, subunit boundaries have been designed to break up the major cleavages. Nigeria's original three federal states each embraced a major tribe and language—Hausa, Yoruba and Igbo—as well as many smaller tribes and subtribes. The political dynamics were dysfunctional, especially because the northern state held a majority of the country's population. After the army coup and war in Biafra in 1967, the generals moved to restructure the federation into an eventual 36 states where the subunits were designed to break up the cleavages between the three major populations that were so destabilizing for the country's politics. The chosen design of Kenya's new devolution is somewhat similar to the example of Nigeria above. Kenya has 40 to 60 ethnic groups and three or four major tribes. Its politics have been heavily tribal, especially around the few large tribes, but there is no neat territorial division, especially between its largest tribes. Given the history of tribal rivalry and conflict, politicians feared drawing up a political map that would reinforce tribal tensions. The centralizers' preferred option was a presidential regime with many, weak districts; others wanted larger, more powerful units. Ultimately, the

former option largely prevailed. Many of the 47 counties in Kenya have a majority tribe, which has posed issues for minorities, but devolution has enabled some groups in opposition nationally to form regional governments, thereby diffusing power.

The risk of discrimination against minorities within constituent units is a common challenge of devolution. In India, for example, linguistic minorities within states are disadvantaged with respect to public employment, political representation and public services. In Nigeria, such discrimination has even given rise to the constitutional claim that those classified as 'indigenes' have more rights (e.g. to state employment and some educational programmes) than 'settlers' whose historic roots lie outside the state, even if the families of these 'settlers' have been in the state for generations. Some federal constitutions protect the rights of internal minorities in constituent units—notably rights to education and public services in a minority language—but in practice such protections are often weak because central governments can find that intervening on behalf of a minority can alienate the subunit's majority. Marginalized minorities within federal states may therefore turn to civil unrest and, where a minority is regionally concentrated, may demand a new constituent unit, as has happened in India—although there is a limit to such a logic. Sometimes minorities that have suffered discrimination within constituent units align with those in power nationally, which can provide some protection for them.

Not all devolved or federal regimes are in countries with a highly territorialized political geometry. Even in countries whose political geometry is a mix of non-territorial and territorial cleavages, careful attention should be given to the territorial dimension when considering the design of its devolved arrangements. This has certainly been the case in Nepal. It is a country of astonishing diversity, with 125 recognized caste and ethnic groups, and a history of political dominance by the upper-caste Chetri and Bahuns, who form fewer than 30 per cent of the population. Although the country's deep cleavages became evident during the People's War (1996–2006), Nepal is not highly territorialized; groups are territorially intermingled, with only 15 of 75 districts having a single group as the majority. A key demand of the Maoists, which became the largest party in the first constitutional assembly, was for 'ethnic federalism'. This demand was highly contentious, both because of the initial resistance of the old-line parties to federalism and because there were almost no natural ethnic units. A consensus was ultimately reached on a form of federalism in which provinces typically have at least two significant population groups. However, the Madhesi and Tharu groups argue that the federal map was designed to disempower them, and this issue continues to fester.

South Africa is a highly diverse country, with 11 official languages. The ANC deeply resented the Bantustans (the territories set aside for black-only populations) of the apartheid regime, and it, along with the white minority National Party, was determined to erase these manufactured territorial cleavages. The interim constitution created 9 new provinces to replace the 4 previous provinces and 10 Bantustans. These provinces were based largely on past regions of economic development, not ethnic or linguistic criteria. South Africa's new devolved structure has brought some pluralism into its politics, including pluralism within the ANC, but 'territorial cleavages' are relatively minor, although the prospect of abolishing the provinces, which once was mooted, now seems remote.

Although countries that have multidimensional territorial cleavages (or a mix of territorial and other cleavages) generally do not adopt power-sharing within central institutions, they can nonetheless use other means to balance territorial interests and reduce political confrontation among regions. The Nigerian Constitution requires that (a) parties that compete in national politics have a national character, which means a certain level of membership and number of candidates across the country; (b) a president must win not just a majority in the country, but also at least one-quarter of the vote in two-thirds of the states; (c) the cabinet has a member from each state; and (d) the composition of the civil service must reflect the country's 'federal character'. These arrangements have helped mitigate the most dangerous cleavages.

Nigeria's constitutional prohibition on regional parties is unusual, but it points to the potential importance of electoral laws for translating territorial and other cleavages into electoral representation and the party system. In a highly territorialized system, first-past-the-post systems, which favour the largest parties within electoral districts, can give a distorted representation of local sentiment (Scotland provides an extreme example, in which the Scottish National Party won 4 per cent of seats with 22.5 per cent of the vote in the 1992 UK election and then 95 per cent of seats with 50 per cent of the vote in the 2015 election). Proportional representation systems limit these distortions and give a better sense of support for national and regional parties and so can limit the potentially destabilizing over-representation of regional parties. Constitutions may be silent on the choice of electoral system or, as in South Africa, indicate what kind of law should apply but leave the details to legislation.

Most federations have upper houses in their parliaments that serve as the 'regional chamber'. Countries that have opted for new constitutions with symmetrical federalism or devolution—Bolivia, Ethiopia, Kenya, Nepal, Nigeria and South Africa —all opted for such bodies. Most have equal representation of constituent units in the upper house, although their methods of selection (e.g. direct versus indirect election) and terms of office vary. The powers of upper houses in congressional systems are usually greater than those of upper houses in parliamentary systems, where the lower house is the confidence chamber and also controls finances. The upper houses in Ethiopia, Kenya and South Africa are largely empowered to deal with issues that relate to the territorial units, while the upper house in Nepal is essentially an advisory body (as is the one in South Africa on national issues). It is perhaps telling that Spain put off the reform of its Senate, and Iraq's constitution provides for an upper house to be determined in due course. The experience with upper houses is that their members vote more along party than regional lines, thereby limiting their regional role. To the extent that they rebalance political weight compared with popularly elected lower houses, this favours smaller constituent units, so their role in accommodating major territorial cleavages is highly contextual and usually incidental to design. Another issue that can be very contentious in designing federal constitutions is the choice of a presidential-congressional regime, a parliamentary regime or a semi-presidential regime. In practice, the choice made tends to reflect past institutional history and other factors more than a conception of how to manage territorial issues, even though these institutions do have implications for the functioning of the federal or devolved system.

Finally, a critical issue is the allocation of powers and finances to the central government versus the constituent unit governments. South Africa opted for a centralized form of federalism, based on the German model in which there is extensive concurrent jurisdiction whereby federal law prevails in the event of conflict between federal and provincial legislation. In Bolivia, a good part of the conflict was over revenue allocation; the central government emerged strengthened, yet the gas-producing departments still retained significant advantages. In Iraq, the hurried effort to draft a constitution led to a draft that was significantly ambiguous regarding the allocation of powers, nowhere more glaringly than on the critical issue of powers over petroleum resources. Of the countries that have written new constitutions in recent times, Spain probably created the most devolved regime, which reflects the depth of its territorial cleavages.

4.3. Highly devolved federalism with a consociational central government

Countries whose political geometry is characterized by two or three major and highly territorialized communities that are antagonistic to one another should consider the option of a highly devolved federal structure combined with formal power-sharing or consociational arrangements at the centre. However, although such arrangements can have a strong underlying logic, it is important to note that they are difficult both to design and to manage, and they risk reifying political divisions in the country. They may be especially difficult if the regional populations are significantly different in size.

A number of federations that had only two or three units broke up after a relatively brief existence (Pakistan in 1971, Czechoslovakia in 1992, Sudan in 2011). Nigeria was fundamentally restructured to escape its largely bipolar north–south dynamic—although initially with three states—which had contributed to the outbreak of civil war. None of these bipolar federations had effective power-sharing in the central government, although Sudan was meant to. Belgium, which was initially a unitary country, has become the one example of a democracy that has developed a federal system with a constitutionalized, consociational government at the centre.

As difficult as such federal-cum-consociational arrangements can be, their logic arises from two (or three) mutually antagonistic communities finding that they are forced to cohabit within one country, often because of international pressure. The populations are territorially largely separated—perhaps after regional homogenization following conflict, as in Bosnia and in Cyprus—so it is possible to create territorially defined subnational governments for the respective communities that can assume important powers. At the same time, it is inevitable that some decisions must be made by the central government. As the population of the smaller community or communities fears majority decision-making would disempower it, an accord requires arrangements for power-sharing with each community having a collective veto within the central government. In Bosnia and Herzegovina, this logic led to the imposed settlement in the Dayton Accords, and the same logic still underlies negotiations regarding a possible settlement in Cyprus. There has been some very creative thinking about how to improve the design of such consociational arrangements

(Loizides 2016) but, given its difficulties, this model should be considered only in exceptional circumstances.

Although the consociational power-sharing arrangement in Bosnia and Herzegovina has brought peace, it is widely recognized to have created a deeply problematic government. The arrangement has hardened ethnic identities, so that, despite international support for free and fair elections and incentives for multi-ethnic and moderate parties and constraints on ethno-nationalist parties, multi-ethnic parties have fared poorly and moderate ethnic parties have been drawn to more extreme positions. The reason is that the constitution organizes politics around ethnicity, which gives rise to outbidding within ethnic communities. Moreover, because ethnic appeals occur simultaneously across multiple offices, there is a coattail effect of campaigns that appeal to hard-line ethnic positions, even at the level of the constituent entities, where there should be space for greater political pluralism. The system of ethnic parties has become the basis of a political economy of patronage. The mechanism for corruption is the requirement that government appointments be ethnically representative, coupled with government ownership of a large percentage of the economy. This has led ethnic parties to reward their supporters and themselves via concessions, procurement and financing. There has been great difficulty in achieving effective decision-making at the centre because of mutual vetoes. For a long time, the system relied on the internationally appointed High Representative to break deadlocks.

The Annan Plan for Cyprus was based on the idea of a bizonal, bicommunal federation, with consociational arrangements in the central government. The plan was rejected by the Greek population by referendum in 2004, but this model remained the basis for the negotiations that failed to reach an agreement in 2017 and is the likely basis for future negotiations. Although there are many difficult issues in the negotiations, including security, rights of return, property and territorial adjustment, the possible arrangements for governance have proven very difficult. As the Turkish population is only 15 to 20 per cent of the population on the island (depending on how it is counted), the Greek community has understandable concerns about equal power-sharing, while the Turkish community feels the need for it to avoid Greek dominance. The Senate that was proposed in the Annan Plan would have had an equal number of representatives from both communities, while the Chamber of Deputies would have had no fewer than 25 per cent of its members from the Turkish-Cypriot community. Special voting arrangements would have meant that a significant minority of members from both communities had to approve the appointment of the executive and make other decisions of vital interest. As in Bosnia and Herzegovina, the Supreme Court would have had an equal number of judges from each community plus foreign judges to avoid deadlocks.

Two of the most successful consociational arrangements have been in Belgium and in Northern Ireland, but in these cases the ratio of majority to minority is close to 60 to 40 or 55 to 45, which makes power-sharing difficult but potentially manageable. Similarly, in Bosnia and Herzegovina, the minority Serbs and Croats represent 31 per cent and 16 per cent of the population compared with 51 per cent for the Bosniaks. In Cyprus, the Turkish community constitutes less than a fifth of the total population. The constitutional deliberations in Yemen's national dialogue were

driven towards a federal system, but the South's preferred option of two regions was rejected; the accommodation of the South was meant to come through significant power-sharing in the central legislature (but not in the presidency or the courts). In this case the focus was on giving southern representatives in the parliament vetoes on matters that touched their interests, yet, with southerners standing at only about 20 per cent of the population, it was unclear how viable this arrangement would be.

In summary, the already difficult challenges of consociational arrangements are that much greater when the minority is relatively small in that the majority is less prepared to share power. For the same reason, small peripheral regions that obtain special autonomy lack sufficient power to plausibly make claims for power-sharing in central institutions. Indeed, for that reason, consociationalism has never been seriously considered in Iraq, where the Kurds make up around 15 to 20 per cent of the national population, or in Sri Lanka, where the Tamil-majority Northern Province represents around 5 per cent of the national population.

Although consociationalism is rare and difficult to achieve as a longer-term constitutional design, this type of power-sharing has been used quite effectively on an interim basis for a period of transitional government during a constitutional transition in which longer-term arrangements are to be worked out. This strategy worked well in South Africa and reasonably well in Kenya, but it was clear in both cases that the longer-term arrangements would be majoritarian—although with important constitutionalized protections for the formerly dominant minority in South Africa.

An apparent alternative to a complex federal-cum-consociational structure for two territorially distinct and mutually hostile populations would be partition and the creation of new independent countries. Circumstances matter greatly when it comes to break-up. The international community has been prepared to sanction mutually agreed break-ups, as it did in several post-communist countries, and has even set the stage for potential break-up, as it did in mediating the peace agreement in Sudan in 2005. However, the international community is extremely reluctant to reward military intervention, as in Cyprus, or ethnic cleansing, as in Bosnia and Herzegovina; moreover, the majority populations in these cases are still not prepared to let the minority Turks and Serbs secede. The international community is even reluctant to support more democratic but unilateral attempts at promoting secession, as can be seen in the isolation of the Catalan and regional Kurdish governments following their attempts to force independence through referendums. Most constitutions explicitly or implicitly exclude secession, but there are several significant exceptions. Moreover, there is some quantitative evidence that partition as a solution to nationalist wars is more likely to promote post-conflict peace and democracy than the alternatives of unitary government or regional autonomy, though this may depend on context (Chapman and Roeder 2007).

4.4. Special autonomy for small territories and a majoritarian central government

Countries with one or more peripheral regions that are highly territorialized relative to the rest of the country should consider special autonomy arrangements for these

territories, especially if the population of the territory is small relative to the rest of the country. Such arrangements may be considered following a stalemated secessionist insurrection and/or in a liberal democratic country that is not doctrinaire about centralized sovereignty. Given their small size, peripheral territories with special autonomy are not accorded power-sharing arrangements at the centre.

This option is one of asymmetric autonomy. Such demands for asymmetric treatment arose in Indonesia, for Aceh and Papua; in the Philippines, for the Muslims of Mindanao; in India, notably in the north-eastern tribal areas; and in the UK, for Scotland. (There are also special fiscal arrangements in Spain's Basque Country and Navarre, but these represent a historical arrangement.) In most of these cases in which special autonomy has been granted, the relevant territorial population is very small relative to the national population: Aceh, 2 per cent; Bangsamoro, 5 per cent; and in India's north-east, six new states carved out of Assam together account for 1 per cent of India's population. This practice is consistent with other comparable cases, such as the Åland Islands, 0.5 per cent; Jammu and Kashmir, 1 per cent; and Zanzibar, 2 per cent. There is a strong logic to special autonomy being largely restricted to territories with relatively small populations. Small peripheral populations do not expect or demand power-sharing in the central government. They can maintain their normal representation in central institutions, and their representatives can even vote on matters that do not affect them because they are such marginal players. In federations, the larger constituent units are more likely to accept special autonomy for a very small, very distinct territory than they would for a large constituent unit, which they would see as their equivalent.

The small relative size of most regions that have special autonomy helps to explain the constitutional dynamics that surround devolution for Scotland. Devolution in the UK is asymmetric, both because there is no devolution to England (and so nothing that resembles federalism) and because the three devolved administrations each have different arrangements. The devolved administrations cover 15 per cent of the UK's population, with Scotland accounting for 8 per cent. In comparative terms, Scotland has a very large relative population for a unit with special autonomy and it also has exceptionally extensive devolved powers. This arrangement has created the still unresolved structural issue of the role of MPs from Scotland and the other devolved regions voting on legislation that applies only to England. This is an especially acute question in a parliamentary regime in which the House of Commons is the confidence chamber for the government. There is no neat solution. The UK example shows the risks of special autonomy if it applies to a significant part of the country and to a wide range of powers. The Kurdish region in Iraq, with about 15 per cent of the country's population, effectively has very extensive special autonomy so this may pose similar issues about the role of its representatives in the national government in the longer term.

Although special autonomy can function well in countries that have small minorities, majorities can object strongly to special autonomy, even for very small and peripheral regions, often for symbolic reasons or out of fear of promoting eventual secession. There has been frequent opposition to special autonomy for Mindanao from the Philippine majority, so the deal done by the Aquino administration has not been ratified and it may yet be replaced by the alternative of

'state status within a federal Philippines' proposed by President Duterte. The idea of special autonomy for the Tamils in northern Sri Lanka never found its way onto the agenda, perhaps because it would have been unacceptable to the Sinhalese majority, but in principle the population in question (especially if the Eastern Province were excluded) was small enough that such an arrangement might not have been destabilizing. Structural indicators favourable to special autonomy are therefore no guarantee it will be adopted. It may be that, on occasion, symmetric devolution across the whole country prepares the way for special autonomy in some region or regions. In Indonesia, for example, decentralization laws in 1999 and 2004 for all 292 regencies preceded the introduction of the special autonomy law in Aceh. The general decentralization law changed the political baseline and made Aceh's special autonomy more acceptable across Indonesia.

5. Conclusions

Constitutional transitions can be difficult and even perilous. Many transitions fail to reach a conclusion or produce a result that does not endure. Although transitions in which significant territorially based populations assert claims for autonomy can face an extra level of difficulty, there are well-established models (e.g. federalism, devolution, special autonomy for small regions, or even highly devolved federalism with central power-sharing) that have provided many countries with a political architecture that suits their needs. This paper has indicated how these different models should be considered in particular contexts of political geometry—that is, of particular arrangements of territorial and non-territorial political cleavages. That said, there is no 'best' model, even for societies that may have broadly similar political geometries; each country must work to develop its own arrangements, taking inspiration and lessons from others as appropriate. Whatever general architecture is adopted, myriad details must be worked out. Some deeply divided societies have a political geography that is particularly challenging. They may have little sense of a shared national identity, and the disaffected territorial minority or minorities may seek very substantial autonomy (even secession) that would not be acceptable to the majority as the basis for either symmetrical federalism or asymmetrical special autonomy. This might be especially the case if the territorial minority's (or minorities') relative population size is not large enough to make consociational power-sharing at the centre acceptable to the much larger majority, but is large enough that extensive special autonomy could destabilize the functioning of representative institutions at the centre.

There are some cases where a potentially applicable model is not considered or is excluded from consideration because one side or the other insists on one major option or a very limited range of options. This is often for ideological and nationalistic reasons; majorities often resist territorial accommodation because they fear it will eventually lead to secession. Empirically, there is little evidence to support this fear, and territorial accommodation has often been a critical part of stabilizing democratic regimes. Unitary regimes themselves are not immune to secessionist movements; some unitary countries have fallen into civil war or dissolved.

Whatever the political context or design options to be considered, the process of constitution-making itself deserves careful thought, and different actors may try to shape it to their advantage. In circumstances where constitutional continuity is being

maintained and the political context is peaceful, the forums and formulas for constitutional change will be established and act as a constraint. Depending on the circumstances, an amending formula that requires a super-majority may give a territorial group (or groups) political leverage, but often this will not be the case. Most unitary constitutions are silent on how to deal with the special issues of territorial politics in constitution-making, but the many examples of significant process innovations serve as supplements to constitutionally mandated processes; these can be important when dealing with claims for territorial accommodation.

Constitution-making in post-conflict situations is distinct from that in peaceful circumstances of constitutional continuity. When the violence has been an insurgency in a small, peripheral region in which there has been a stalemate in the fighting, attempts at resolution will normally be through negotiations between the government and insurgents. The government will maintain that the existing constitution and its processes apply; however, constitutions do not establish procedures for dealing with rebels. The substantive issue in such cases is almost always special autonomy, but a major question can be whether the new arrangements will be effected through a constitutional amendment or through ordinary statute. The former provides greater protection, but often involves a high threshold of approval that may be difficult to achieve politically. Resort to an ordinary statute may be easier politically, but it needs to comply with the existing constitution in the view of the courts. The courts, the political opposition and the government backbench are potential institutional spoilers in giving effect to a political agreement, which will require a strategic response by government negotiators.

The situation is quite different after a conflict in which a clear victor has emerged. If it has been a general civil war, the substantive issue may be the drafting of a new constitution. Victorious rebels can do this in a rupture from the previous constitutional order; however, sometimes victorious generals on the government side operate by decree, unencumbered by the constitution they purportedly defended. In these cases, it is natural that the victors will move to impose their preferred constitutional model, but in doing so they may alienate the losers or even some of their allies. When the combat has been more regional and the government has prevailed, it may be constrained procedurally by the constitution, but in any case have little interest in substantive reform that would accommodate the wishes of the territorial insurgents. In both of these cases, there is a risk of 'victor's justice' in which the political arrangements that emerge do little or nothing to address underlying structural problems in the country.

The processes adopted for constitutional transitions will be shaped by many of the same factors that influence the range of possible constitutional designs. Each of the three major design options that accommodate territorial cleavages within a state (federalism-devolution; asymmetric autonomy; federalism with consociational power-sharing) has particular relevance in the context of a specific type of political geometry, and they are all subject to many possible variations and refinements. Even so, there can be political contexts where no one of these seems quite right and where a hybrid might be considered. Of course, secession and strongly enforced unitary government are also options, but they do not respond to the political call to accommodate territorial cleavages within a continuing state.

References and further reading

References

Anderson, G., Creation of Constituent Units in Federal Systems ('Meeting the Challenges of Emerging Constitutional Democracy'), Center for Constitutional Transitions Working Paper (2014), <http://www.constitutionaltransitions.org/publications/creation-of-constituent-units-in-federal-systems>, accessed 19 November 2018

Arato, A., *Post Sovereign Constitution Making* (Oxford: Oxford University Press, 2016)

Chapman, T. and Roeder, P., 'Partition as a solution to wars of nationalism: the importance of institutions', *American Political Science Review,* 101/4 (2007), pp. 677–91

S. Choudhry (ed.), *Constitutional Design in Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008)

S. Choudhry and T. Ginsburg (eds), *Constitution-Making* (Cheltenham: Edward Elgar, 2016)

Elster, J., 'Forces and mechanisms in the constitution-making process', *Duke Law Journal*, 45 (1995), pp. 364–96

Loizides, N., *Designing Peace: Cyprus and Institutional Innovations in Divided Societies* (Philadelphia, PA: University of Pennsylvania Press, 2016)

O'Donnell, G., and Schmitter, P., *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore, MD: Johns Hopkins University Press, 1986)

Whitehead, L., *Democratization Theory and Experience* (Oxford: Oxford University Press, 2003)

Further reading

Amoretti, U. and Bermeo, N., *Federalism and Territorial Cleavages* (Baltimore, MD: Johns Hopkins Press, 2004)

Anderson, B., *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London and New York: Verso, 1998)

Anderson, G. and Choudhry, S., *Constitutional Transitions and Territorial Cleavages* (Stockholm: International IDEA, 2015), <https://www.idea.int/publications/catalogue/constitutional-transitions-and-territorial-cleavages?lang=en>, accessed 13 December 2018

Bell, C. and Zulueta-Fülscher, K., *Sequencing Peace Agreements and Constitutions in the Political Settlement Process*, International IDEA Policy Paper No. 13 (Stockholm: International IDEA, 2016), <https://www.idea.int/publications/catalogue/sequencing-peace-agreements-and-constitutions-political-settlement-process?lang=en>, accessed 28 November 2018

Brancati, D., *Peace by Design: Managing Intrastate Conflict through Decentralization* (Oxford: Oxford University Press, 2009)

Cheibub, J., Elkins, Z. and Ginsburg, T., 'Beyond presidentialism and parliamentarism', *British Journal of Political Science*, 44/3 (2014), pp. 1–30

Collier, P. and Hoeffler, A., 'High-value natural resources, development and conflict: channels of causation', in P. Lujala and S. Aas Rustad (eds), *High-Value Natural Resources and Post-Conflict Peacebuilding* (Abingdon: Routledge, 2011), pp. 297–312

Ghai, Y. and Woodman, S. (eds), *Practising Self-Government* (Cambridge: Cambridge University Press, 2013)

Gurr, T., *Peoples vs. States: Minorities at Risk in the New Century* (Washington, DC: United States Institute for Peace, 2002)

Horowitz, D., *Ethnic Groups in Conflict,* 2nd edn (Berkeley, CA: University of California Press, 2000)

Kymlicka, W., *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2009)

Levitsky, S. and Way, L., *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (New York: Cambridge University Press, 2010)

Lijphart, A., *Patterns of Democracy: Government Forms and Performance in 36 Countries* (New Haven, CT: Yale University Press, 1999)

Norris, P., *Driving Democracy: Do Power-Sharing Institutions Work?* (New York: Cambridge University Press, 2009)

Simeon, R. and Conway, D.-P., 'Federalism and the management of conflict in multinational societies', in A. Gagnon and J. Tully (eds), *Multinational Democracies* (Cambridge: Cambridge University Press, 2001), pp. 338–65

Watts, R., *Federal Second Chambers Compared*, Queen's University Institute of Intergovernmental Relations Working Paper 2008-02 (2008)

Wimmer, A., *Ethnic Boundary Making: Institutions, Power, Networks* (Oxford: Oxford University Press, 2013)

Wimmer, A., *Waves of War: Nationalism, State Formation and Ethnic Exclusion in the Modern World* (Cambridge: Cambridge University Press, 2013)

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Collective demands for the constitutional accommodation of territorial cleavages are pervasive across very diverse contexts. In many countries, political identification on the basis of territory is a central basis of political mobilization, around which political claims are framed, political parties formed, elections contested, governments composed, and constitutional claims made and resisted.

Constitutional transitions dealing with significant territorial cleavages face political dynamics and challenges that are quite distinct from such transitions where such cleavages are absent. They can involve different constitution-making processes, sometimes with representatives of territorial groups having a formal or informal role, and certainly involve different political dynamics, whatever the defined roles of territorial groups are in the process.

This Policy Paper seeks to provide insights into how territorial claims relate to constitution-making processes and constitutional design, and to offer advice that may be useful to principals and advisors engaged in constitutional moments: periods in which there has been intense political engagement over how to respond constitutionally to significant demands for territorial accommodation from one or more regions.