



A Practical Guide to

Constitution Building



A Practical Guide to Constitution Building

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International IDEA resources on Constitution Building

A Practical Guide to Constitution Building

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The oldest constitutions in the world were framed in the 17th century and have been described as revolutionary pacts because they ushered in entirely new political systems. Between then and now, the world has seen different kinds of constitutions. Quite a number following the end of the cold war in 1989 have been described as reformatory because they aimed to improve the performance of democratic institutions.

One of the core functions of any constitution is to frame the institutions of government and to determine who exercises the power and authority of the state, how they do so and for what purpose. But constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle.

In the democratic system, the citizen claims the right of original bearer of power. For him or her, the constitution embodies a social contract that limits the use of power by government to benefit the citizen in exchange for his or her allegiance and support. The term ‘constitutionalism’ sums up this idea of limited power.

At the same time, the core importance of constitutions today stretches beyond these basic functions. Constitutions come onto the public agenda when it is time to change to a better political system. People search for constitutions that will facilitate the resolution of modern problems of the state and of governance. Today, these problems are multifaceted and increasingly global—from corruption to severe financial crises, from environmental degradation to mass migration. It is understandable that people demand involvement in deciding on the terms of the constitution and insist upon processes of legitimizing constitutions that are inclusive and democratic. The term ‘new constitutionalism’ has entered the vocabulary of politics as further testament to this new importance of constitutions. Its challenge is to permit the voices of the greatest cross section of a society to be heard in constitution building, including women, young people, vulnerable groups and the hitherto marginalized.

Conflict still impugns constitutions. Older constitutions were the legacy of conflict with colonialism; newer constitutions have aimed to end violent internecine rivalry between groups with competing notions about the state and to whom it belongs. Certainly, these new constitutions are loaded with the expectation that they will herald a new era of peace and democracy, leaving behind authoritarianism, despotism or political upheaval.

Constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world. This would have taken longer without the role of international organizations, in particular the United Nations and others such as International IDEA. It is noteworthy that declining levels of violent conflict between states have also catalysed international dialogue on shared values, such as human rights, the rule of law, freedom, constitutionalism, justice, transparency and accountability—all of them important ingredients of any constitutional system. Shared values

permit organizations such as the African Union and the Organization of American States to be stakeholders of constitutional governance in their member states which may legitimately intervene when constitutions are not respected, for instance in the holding and transfer of power after free elections.

I encourage constitution builders to take advantage of the lessons and options that other countries and international agencies can offer. There is little need to reinvent the wheel to deal with issues such as incorporating human rights in constitutions, guaranteeing the independence of the judiciary, subsuming security forces under civilian democratic control, and guaranteeing each citizen the exercise of a free, fair and credible vote. The mistake is to believe that this superficial commonality justifies a blueprint approach to framing constitutions.

The idea of shared norms and values should not discount the fact that constitution builders have been learning by doing. Each instance of constitution building will present tough issues to be resolved, for instance, what to do with incumbents who refuse to leave power and use all means in order to rule. The concentration of power observed recently by Mikhail Gorbachev in his assessment of the world today, after the legacy of the 1990s, is indeed a real threat to constitutional democracy everywhere.

The world is changing at a rapid pace. The constitution builder today has an advantage lacked by his or her predecessor. National constitutions have become a world-wide resource for understanding shared global values and at the click of a button information technology permits an array of constitutional design options to be immediately accessed.

What this new Guide from International IDEA offers actors who are engaged in the constitution-building process is a call for more systematic ways for reviewing constitutions and an emphasis that there are neither inherently stable or superior constitutional systems nor one-size-fits-all formulas or models. The Guide highlights the fact that each country must find its own way in writing its own constitution. Furthermore, designing a constitution is not a purely academic exercise in which actors seek the best technical solution for their country. The drafters and negotiators of constitutions are political actors aiming to translate their political agendas into the text of the constitution. Thus, the constitutional documents that result are rarely the best technical option available, but the best constitutional compromise achievable.

The Guide aims to enhance debates in the search for a model that reflects the needs of a particular country as the result of a political compromise. Addressing constitution builders globally, it is best used at an early stage during a constitution-building process. It supplies information that enriches initial discussions on constitutional design options and will prove extremely useful as an introduction to the understanding of the complex area of constitution building.

The world may soon witness a regional wave of democratic constitution building as a result of the current dynamics in the Arab world. Thus, this Guide is published at a timely moment.

*Cassam Uteem,
former President of Mauritius*

In recent decades countries from all continents have reframed their constitutional arrangements—in the last five years alone Bolivia, Ecuador, Egypt, Iceland, Kenya, Myanmar, Nepal, Sri Lanka, Sudan, Thailand and Tunisia have all been involved in one stage or another in a constitution-building process. In the aftermath of the people-led uprisings in the Arab world in 2011, constitution building is set to play a fundamental role in creating sustainable democracy in the region.

Constitution building often takes place within broader political transitions. These may relate to peace building and state building, as well as to the need for reconciliation, inclusion, and equitable resource allocation in a post-crisis period. Many constitutions are no longer only about outlining the mechanics of government, but also about responding to these broader challenges in a way which is seen as legitimate and widely accepted. As the demands placed on constitutions have increased, they have often become complex and lengthy, and hence more challenging to design, as well as implement. As a result, those involved in shaping constitutions require access to broad, multidisciplinary and practical knowledge about constitution-building processes and options.

The sharing of comparative knowledge about constitution building is one of International IDEA's key areas of work, and this publication draws together this comparative knowledge and expertise for the first time in a *Practical Guide to Constitution Building*, which has been carefully compiled by expert authors.

This publication aims to respond to the knowledge gaps faced by politicians, policymakers and practitioners involved in contemporary constitution building. Its principal aim is to provide a first-class tool drawing on lessons from recent practice and trends in constitution building. It is divided into chapters which can be read as individual segments, while the use of a consistent analytical framework across each chapter provides a deeper understanding of the range of issues and forces at play in processes of constitutional development.

The *Practical Guide to Constitution Building* reflects how fundamental constitution building is to the creation of sustainable democracy. Constitution building is a long-term and historical process and is not confined to the period when a constitution is actually written. While focusing on constitutions as key documents in themselves, this publication stresses understanding constitutional systems as a whole, including the relevant principles (chapter 2) and the need to build a culture of human rights (chapter 3), as well as the provisions for institutional design (chapters 4 to 6) and decentralized forms of government (chapter 7). It does not offer a blueprint or model for constitutions, but draws lessons from recent practice and knowledge. Among those lessons is that constitutions may well say one thing on paper but work differently in practice.

I would like to express my sincere gratitude to the authors, to the practitioners who contributed insights derived from their experience, and to the government of Norway for its support. *A Practical Guide to Constitution Building* would not have become a reality without them.

*Vidar Helgesen
Secretary-General, International IDEA*

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Acronyms and abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ECOSOC	economic and social
FYROM	Former Yugoslav Republic of Macedonia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
International IDEA	International Institute for Democracy and Electoral Assistance
NGO	non-governmental organization
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
USIP	United States Institute of Peace
USA	United States of America

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CHAPTER 1

CHAPTER 1

Introduction

Winluck Wahi

1. Overview

1.1. The aim of this chapter

Constitution builders aim to ensure that the outcomes of constitution-building processes are legitimate and broadly accepted. Outcomes of constitution building are legitimate when they are broadly accepted and nationally owned. Yet constitution building is a long-term and historical political process that may be highly contentious, particularly given experiences of severe conflict and prolonged, embedded social divisions. The legitimacy of its outcomes in terms of process and substantive options may hinge significantly on the decisions that constitution builders take at the initial stages of constitution building. By looking at comparable experiences, this chapter aims to help constitution builders think about and plan for how to achieve a good start. It begins by underscoring that constitution building is a sovereign process, whose practice differs across regions and countries. It highlights the main challenges that have been faced by constitution builders in the context of conflicts. It takes the view that the legitimacy of constitution-building processes and outcomes can be improved through the design of inclusive and participatory processes of constitution building.

In getting started, constitution builders often have to make two kinds of decisions: those related to the *process* dimension, for example, the procedures, institutions, rules, timing and responsibilities for decision making; and, second, those related to *content*. In conflict-affected contexts, legitimacy often will hinge on these two decisions. This chapter emphasizes the importance of context as the key guide to constitution builders as they start a process of constitution building. It is structured as follows.

- (a) First, the general observations and key assumptions that underlie the chapter are identified.
- (b) Second, based on a short overview of global constitution-building practice,

general challenges likely to be found across contexts of conflict-affected constitution building are framed.

Constitution building is defined as a long-term process. It is not an event and is not equated with the drafting of a constitution. It includes establishing institutions, procedures and rules for constitution making or drafting, giving legal effect to the constitution, and implementation.

- (c) Third follows discussion of aspects of the process dimension in relation to securing legitimate outcomes.
- (d) Fourth, the discussion is connected to some of the content issues that flow or emerge from the process outlined above.
- (e) Fifth, it introduces the Guide and how to use it and contains an overview of the other chapters that comprise the Guide.

1.2. General observations

1. *Constitution building is defined expansively as a long-term and historical process.* It is not an event and is not equated with constitution making—the period when a constitution is drafted. In this chapter, *constitution building entails several steps*: (a) agreeing on the need for constitutional change and its scope, which in practice often is one part of broader processes of historical change in a country; (b) under the relevant principles, establishing institutions, procedures and rules for inclusive and participatory constitution making or drafting, which may entail the use of interim measures; (c) giving legal effect to the constitution or ratification; and (d) the implementation stage, which is critical, particularly in the early years subsequent to ratification.
2. *Constitution building has often entailed ‘grand design’ and wholesale redrafting and implementation of a new constitution,* even though substantial revision and reform of an existing constitution is another option. This is particularly the case for constitution building in the period after 1990.
3. Constitution builders are engaged in the pursuit of legitimate constitutional outcomes, rather than only a constitutional text as such. *The legitimacy of a constitution is multidimensional.* It includes:
 - legal legitimacy—gained through conformity to relevant legal rules, principles and norms;
 - political legitimacy—reflected in the national ownership or sovereign independence of the people who adopt constitutions, a collective that may be composed of distinct plural groups; and
 - moral legitimacy—embodied by a close relationship between the constitution and the shared values that underlie the moral basis of the state; in addition, the constitution may aim at goals such as societal reconciliation, forgiveness after prolonged victimization, social inclusion and moral rejuvenation of the state.
4. The legitimacy of a constitution can be buttressed through the process by which it is built. It can also grow over time as a constitution is implemented, gains

widespread respect and becomes embedded as a living instrument in the life of the state. Both the process by which a constitution is built and its substantive content are the two keys to legitimacy. Yet each faces unique challenges in contexts of conflict-affected constitution building. By overcoming these challenges and remaining responsive to the context, constitution builders are able to build more legitimate constitutions.

Both the process by which a constitution is built and its substantive content are the keys to legitimacy.

1.3. Key assumptions

Key assumptions underlie the approach in the Guide and this chapter.

- *Context*, and particularly the *power dynamics within it, is supremely important.*
- The aim of constitution building in polarized and conflict-affected societies is to *support democratic outcomes.*
- Societal diversity, when it is polarized in identity politics, is a major challenge that needs to be overcome to build broad consensus on the purpose and application of constitutions.
- *The emergence of plural drivers of change within the state and outside the state is a key factor* for constitution-building processes.
- Constitution building *takes place in states that have previous experience of constitutions, constitutional transition and constitutional governance;* rarely does it start with a clean slate.
- Conflicted-affected states may be involved in domestic violent conflict or post-conflict (that is, the actual violence is over) dynamics of change. Most globally significant violent conflict could be taking place within states.
- Global trends and the movement towards globalized constitutionalism and democratization should be considered.

1.4. Overview of constitution-building practice

The practice of constitution building will vary within and between countries and regions. The practice of constitution building is older in the Latin American region than in Africa, Asia and even parts of Europe, considering that, for instance, Costa Rica and Bolivia first established constitutions in 1825¹ and 1826². During the 1990s, South American constitutions were rewritten, for example in Colombia, Paraguay and Peru, or revised substantially, as in Argentina and Uruguay. Ecuador and Bolivia both underwent multiple constitutional redrafting exercises in slightly over a decade. The perceived failures of previous processes—including the quality of inclusion and participation of all social groups in constitutional decision making—justified newer ones. More recently, an unprecedented low in the level of public trust in political institutions has characterized South American constitution building. The driving forces of constitution building have included social and political movements in opposition to largely democratic governments. By contrast, parliamentary majorities drove

constitutional change in Eastern Europe in the late 1980s and 1990s, facilitating the transition to democracy and the full acceptance of European constitutional norms, such as the free market economy and private property.³ In Hungary (amendments in 1989–90) and Bulgaria (1989–91), the constitutional process helped transform former ruling communists into democratic socialist parties. As discussed below, forces of conflict and armed insurgencies have prompted Africa's recent constitution-building experience, as demonstrated in Angola, Burundi, Chad, the Democratic Republic of the Congo, Ethiopia, Mozambique, Namibia, Niger, Nigeria, South Africa, Sudan and Uganda. On the other hand, in Kenya, Zambia and Zimbabwe, normative content has driven the constitution-building process towards democratization.

The circumstances immediately preceding constitutional change often determine the need and justification for a constitution. In reality, a constitution acting alone may not accomplish desired goals such as peace, democracy or economic growth. Constitutions

A constitution alone may not accomplish desired goals such as peace, democracy or economic growth. Constitutions are not self-executing. Leaders and citizens must engage as the constitution contemplates. This commitment to engagement the Guide envisions as 'constitution building'.

are not self-executing: to achieve desired outcomes, interest groups must vigilantly press for, bargain for and demand nearly all the positions already agreed in the constitution. A constitution will set out a framework for accomplishing particular objectives. Institutions matter, but it also matters when leaders and citizens engage as the constitution contemplates.

It is this commitment to engagement that the Guide envisions as 'constitution building'. Many reformers take a long-term view of constitutional issues. But short-term partisan interests—such as re-election to office, enjoyment of resources, retention of privileges, and immunity from criminal prosecution—often preoccupy the constitutional process. In this sense, constitution building is political—there are real winners and losers. If there are strong conflicts of interest between short- and long-term requirements, constitution builders may have to adopt a 'veil of ignorance' and turn a blind eye to short-term interests. An altruistic

From experience, constitution builders will not adopt most long-term provisions that oppose vital short-term interests. Many pragmatic practitioners therefore opt to frame constitutions for the short term while achieving long-term objectives only incrementally, through interim and transitional devices.

outcome is perhaps politically unachievable. From empirical experience, constitution builders will not adopt most long-term provisions that oppose vital short-term interests. Many pragmatic practitioners therefore opt to frame constitutions for the short term while achieving long-term objectives only incrementally, through interim and transitional devices.

2. General challenges faced by constitution builders

Two kinds of challenges that confront constitution builders in general are considered here:

- a) building a constitution in contexts of extensive violent conflict, resulting in very weak political and institutional capacity to support constitution building; and
- b) building a constitution in order to defuse conflict in the particular setting through democracy or democratization.

2.1. Challenges posed by violent conflict

The Guide treats conflict as a salient feature of every society, and assumes that constitutions attempt to manage conflicts of interest between societal groups and individuals by means of fair rules and neutral institutions. Accurately diagnosing the nature and type of conflict will help constitution builders to find a corresponding constitutional solution. Violent conflict is treated as a special category of conflict. Often constitution building must include actors who have engaged in violent conflict, perhaps without a clear military victor, or where peace agreements between governmental actors, opposition groups and armed rebels have required constitutional changes. Many internal conflicts spawn important regional dimensions in terms of political support, training, and the acquisition of armaments. To negotiate constitutional solutions to recent armed conflicts in Colombia, the Democratic Republic of the Congo, Nepal, Sri Lanka and Sudan, practitioners shifted from traditional bilateral talks to stakeholder negotiations with disparate groups, with the implication that the ensuing constitutional change processes became tied to concerns for security and stability as a priority.

Often constitution building must include actors who have engaged in violent conflict, perhaps without a clear military victor, or where peace agreements have required constitutional changes.

Violent conflict also strongly affects power relations along the concentration–dispersal dimension. Post-conflict constitutional settlements in Angola, Colombia and Mozambique created governments that are executive-centred through the executive branch's command of the security forces and powers to declare states of emergency and make peace agreements. Gross violations of human rights during conflict have tested the credibility of reconciliation efforts. For instance, in the Cambodian and Rwandan genocides and subsequent reconciliation processes, deep suspicion of the political use of identity resulted in strong legal measures to protect citizenship.

Generally, if conflicts of interest are also addressed through both legal (detailed rights of minorities, autonomy) and political options, this tends to minimize or remove the 'winner-takes-all' factor of politics. Experience has shown the importance of building on pre-existing structures instead of utilizing conflict as a basis on which to start afresh constitutionally. The failure of new institutions can halt constitution building and cause the recurrence of conflict.

It may be impossible to start the process of constitution building before a peace agreement or interim security pact is in place; but giving priority to achieving peace at all costs also poses risks to the constitution-building process, as the example of the Dayton Peace Agreement shows.

Extensive violence in society may enfeeble governmental and institutional capacity because conflict has dissipated resources or expelled qualified administrators. It may also result in a government which, while able to administer the country, nonetheless lacks functional legitimacy. Both cases can expose citizens to deprivation of basic needs, and make them vulnerable to shocks including natural disasters, leading to extreme poverty

and fuelling cycles of violent conflict.

Challenges will include the following:

- It may be impossible to start the process of constitution building inside a country before a peace agreement or interim security pact is in place to stop the violent conflict and allow constitution builders to begin their work. The peace-building work that precedes constitution building may take different forms but, in general, it can stipulate the process to be followed for constitution building, or even go as far as outlining some details to be included in the constitution. Constitution building in Afghanistan illustrates the former: the Bonn Accords of 2001 set out as a fourth step in a road map to peace a constitution-making process to re-establish permanent institutions of government. In Nepal, an Interim Constitution agreed between political parties in 2006 had already established specific targets for constitution builders, namely to frame a constitution for a democratic and federal republic. Mozambique may offer an exception to both situations, since the government in place had introduced a more democratic constitution in 1990 to pressure the rebels into peace and advance ongoing negotiations. In fact, the comprehensive peace protocols signed after 1991 were politically superior to the Constitution but later subordinated to it.
- Easy access to still widely distributed weaponry may lower the cost of violence and ‘spoilers’ may be able to stoke dissatisfaction over the constitution-building process.
- Giving priority to achieving peace at all costs also poses risks to the constitution-building process. For instance, prioritizing the management of violence and insecurity at the expense of building constitutional consensus may doom the entire process. Parties to the Dayton Peace Agreement of 1995 agreed to the Constitution of Bosnia and Herzegovina as an appendix to the peace agreement. In retrospect, this approach did not allow sufficient political deliberation among citizens and constitution drafters, and may reasonably be considered a causal factor in the subsequent difficulty of implementing the constitution there.
- Ascertaining the perspectives on a constitution of those who have suffered mass violations of human rights, and who understandably focus on resettlement and justice, may prove challenging. Many citizens may remain displaced internally or outside the country, raising the logistical and security costs of including them in the constitution-building process.

- While constitution building requires patience, the threat of violence may mean that particular issues have to be addressed quickly. Peace process time frames and milestones can override spreading awareness among the citizens and encouraging civic debate on constitutional solutions, as happened in Iraq (in the process leading up to the Constitution of 2005).
- Constitution builders who seek to address only the conflict dimension of state fragility will face significant challenges, including overemphasizing power sharing in order to appease armed groups or repressive rulers, which may sacrifice electoral accountability for the sake of stability. In addition, corruption and abuse of power may become stronger where the focus is skewed more towards reducing violence than towards constitution building for more accountable government.
- With all efforts focused on alleviating state fragility, constitution builders may have little time to establish a legal framework to guide the many other aspects of constitution building. By contrast, in some contexts, undertaking aspects of constitution building may constitute a condition precedent to minimizing state fragility.

Constitution builders who seek to address only the conflict dimension of state fragility will face significant challenges, including overemphasizing power sharing in order to appease armed groups or repressive rulers. Where possible, peace building should be disconnected from constitution building.

In the contexts of constitution building where violence is or has been present, constitution builders in the ‘getting started’ phase are therefore confronted with the challenges of ensuring that peace building, in the narrow context of stopping armed conflict, does not unduly dominate the final constitutional agreement. Different experiences have suggested some good practice in this situation.

Suggested good practice:

- Design two-step processes of constitution building that: (i) use an interim or transitional constitutional plan, specifically addressing stability and concluding the peace process; and (ii) allow final constitutions to emerge with a stronger focus on a long-term vision of institutional design.
- Identify whether particular constitutional solutions that may succeed in preventing or stopping violence also effectively address other constitutional issues, such as corruption, accountable government and the mass abuse of human rights.
- Where viable, disconnect peace building from constitution building in order to prevent spillover and to permit the division of specialized labour so that all constitutional issues receive adequate and properly informed attention.
- Practitioners also should allow scope for power brokers to examine certain problems later.

2.2. The demand for democracy

Democracy has been an important feature of a legitimate constitution and has been demanded during constitution building as a system that is needed in order to manage societal conflict. At a minimum level, democracy connotes equality between citizens and their effective engagement in governance, through representation and participation in governmental decision making. The *State of Democracy Assessment tool* developed by the International Institute for Democracy and Electoral Assistance (International IDEA) has a set of 14 questions that constitution builders can use to design constitutions bearing in mind its multiple dimensions.

Interactions between drivers of change and their institutional interests affect democratization. In India, proportional representation of minorities in the Constituent Assembly, which was completely dominated by the Indian National Congress, succeeded in enacting inclusive provisions in the Constitution of India (1949)—provisions that were later extended over time by social justice movements enabled by the same constitution. Thus, constitution building that includes and permits the participation of

Constitution building that includes and permits the participation of all legitimate groups, actors and stakeholders is more likely to result in institutional choices that strengthen democratization.

all legitimate groups, actors and stakeholders is more likely to result in institutional choices that strengthen rather than weaken democratization. Practitioners then can formulate criteria to gauge the quality or level of democratic constitution building, premised on inclusion and participation.

There are some specific institutional designs and processes that are more likely to strengthen democratization, though much depends on context. Such designs and processes include protections for human rights such as access to official information, the degree of political, administrative and economic concentration or decentralization, and power relations between the legislature and the executive branch, all of which the Guide covers in subsequent chapters. The challenges to designing these institutions at the initial stages often include the following:

- The absence of democratic institutions to initiate constitution building may be a problem.
- Frequently, a great deal of attention needs to be given to the type of electoral system which will determine representation in the constitution-building process. New conflicts may arise in connection to the choices made.
- A new legal framework may focus attention on the election of representatives to the main organs of constitution building; within these organs, however, less attention may have been given to the rules of procedure that will be required to sustain democratic decision making.
- In some cases, constitution building features bargains struck with the old guard in order to facilitate change. Yet these bargains may result in undemocratic features in otherwise democratic constitutions. If members of an autocratic old guard bargain to win positions in the new constitutional order, their role in

new leadership positions often reduces the availability of recourse to redress for their victims. These deals may also contradict normative commitments, striking many as unprincipled or even unjust.

- In these contexts, the need for a constitution-making mandate from the electorate, or the treatment of elections as a priority following the adoption of a new constitution, may become associated with successful constitution building. The risk is that democratization is understood as an electoral feat with overall focus on the most obvious aspects of electoral competition. Democratization in constitution-building practice has actually proved to be a more complicated process, requiring a plurality of groups in order to be able to build consensus on political issues.
- Not all the actors demanding constitution building are committed to democracy as an outcome, even though they agree to participate in a democratic process of constitution building. They may reduce democratization to nothing more than a process for attaining power rather than a process aimed at ensuring popular control over government.
- Constitution builders also need to be aware that different political actors use constitution-building processes to entrench their interests in the new institutions of government. An emerging threat to democracy taking root is that new institutions are used to carve out constitutional zones of exclusive dominance, contributing to more conflicts of interest.
- Finally, democratization may be sought even though the constitutional process is in practice dominated by a single political party or group. In some cases, the dominant party also has predetermined positions on the constitution and even possibly its own constitutional draft. The risk that emerges is that the entire process is then used to focus on the power and privilege that should be accorded to the dominant group rather than on other pressing constitutional dilemmas.

In some cases, constitution building features bargains struck with the old guard in order to facilitate change, but these bargains may result in undemocratic features in otherwise democratic constitutions. Different political actors can use constitution-building processes to entrench their own interests.

It is worth noting that the delivery side of democracy is equally important in constitution building. If constitution builders aim to tie democratization to economic advance, this raises the following question: does the constitution building aid the poor? The answer may depend on whether constitution building is sustaining the status quo or attempting new political, social and economic relations, for instance, by breaking up a feudal type of rule or setting targets for the political inclusion of economically

Treating elections as a priority following the adoption of a new constitution carries the risk that democratization is equated with electoral competition. Democratization in constitution-building practice is a more complicated process, requiring a plurality of groups in order to build consensus.

marginalized groups. If constitution building uses democracy to channel the root causes of grievance, this implicitly requires a long-term view, rather than merely responding to the current demands of a particular group. Serious inequities surviving from an old constitutional order may be a sign of constitutional failure.

3. Challenges in designing processes of constitution building

The period when constitution building is started is often loaded with promises of ‘new beginnings’. It is also a relatively rare period, when people have a historic opportunity to affirm the fundamentals and basic principles of government, going beyond ‘normal politics’. It is also observed that a constitution-building process has often been distinguished as a part of broader processes of conflict transformation or democratization, as seen above. Its starting point as a process may be contained in these larger processes.

The decisions taken during the initial stages of constitution building, regarding both the process of constitutional change and the substantive issues, are particularly critical.

- the scope of change;
- the use of interim and transitional devices;
- transitional justice issues;
- democratic representation during the process;
- popular participation; and
- the role of external actors.

3.1. The scope of change

Constitution builders may envisage a *grand design* which entails comprehensive constitutional change achieved by drafting a new constitution to replace a previous one. Acts of grand design establish a new constitutional order. In some contrasting cases,

Constitutional change may be a process of grand design which entails drafting a new constitution to replace a previous one, perhaps where a complete break with the past is needed, or one of graduated design, continually reforming the existing constitution.

To ensure the best outcome, the decisions taken during the initial stages of constitution building regarding both the process of constitutional change and the substantive issues to be framed are particularly critical. Some of the critical process questions are often the following:

constitutional change by *graduated design* is sought by continually reforming the existing constitution. Incremental and progressive reforms may accumulate and ultimately reflect a new, or at least substantially different, constitutional order.

Experiences of conflict or authoritarianism may be adduced in order to demand a clean

break from the past. South Africa’s past of official segregation between races under apartheid or the official sanction of genocide in Cambodia and Rwanda offer some clear-cut examples of the immediate past being completely rejected and delegitimized. In Iraq, the regime had been militarily completely defeated. Constitution building was expected also to symbolize, if not manifest, a clean break with the past. The scope of change in these contexts was essentially to re-establish institutions of state. Other countries faced similar ambition in the scope of change due to a history of state failure, for instance Afghanistan.

In contrast, there have also been contexts where constitution builders also faced a demand for change after authoritarianism or conflict that qualified the nature of change either to restore past traditions or to retain elements of an older constitutional order in the new constitution. Indonesia in the *reformasi* period reached back to the 1945 Constitution and its essential *pancasila* principles (see chapter 2), and amended the constitution several times, not completely throwing away the past but bringing in modifications.

The scope of change may therefore be seen in terms of grand designs or graduated change. It is dependent on what is viable in the particular context. In Afghanistan, deliberations in the Constitutional Loya Jirga or ‘grand council’ swung between 2003 and 2004, from initial support for a semi-presidential system with a president and prime minister towards favouring a presidential system by the end of the talks. Ostensibly this happened so as to guarantee executive action, even though many constitution builders suspected that a parliamentary system would be a stronger basis for longer-term governance. During inauguration of the Constitution, the President suggested that the scope of change in the immediate period was focused on state building and the imperatives of establishing a functional government, and suggested that perhaps after 10 years the issue could be reconsidered if the circumstances then justified the choice of a parliamentary system. Here, the questions of scope of change and over what duration were practically determined by immediate concerns in the prevailing environment rather than a long-term view of the needs of Afghanistan as underlined by a constitution. The context determined the scope of change because of the need for bargaining with elements of the older order, by virtue of a new dominant group emerging onto the scene and so on.

In the Kenyan case, it was agreed as early as 1997 that comprehensive constitutional change was needed. A commission was established to collate views and draft a constitution. In 2004 a National Convention was constituted comprising elected parliamentarians and representatives of diverse groups to deliberate on the draft. During this stage, a number of issues centring on the system of government in the draft emerged as contentious, resulting in a walkout by some of the parties. Subsequently, the governmental party made changes to the draft constitution, principally replacing a semi-presidential system with a fully presidential system and limiting the extent of devolution, and submitted this draft to a referendum. In November 2005, the draft proposed was rejected in the referendum by 58 per cent of those voting. Following the election-related violence in 2008, a grand coalition government was formed to share power. In the agenda of reforms to be carried out to prevent more violence, completion of the constitutional change was the fourth

item. A committee of experts was formed to reconcile the differences over the major contentious issues. It proposed, once again, a semi-presidential system, but this time round the parliamentary committee of the grand coalition substituted the proposal with a purely presidential system, but committed to extensive decentralization of institutions and services. The new constitution was adopted by means of a referendum in 2010 with nearly 70 per cent of those participating voting ‘yes’. In this case, it was clear that the scope of change was grand design but it was dependent on political agreement by all concerned about the demise of the old system. In Kenya, building this consensus in the political class took over a decade and was catalysed by the need to prevent further violence after the 2008 experience. In South Africa, consensus on the scope of change took six years to achieve, between 1990 and 1996, and went through two failed democratic conventions, an interim constitution and a government of national unity under an interim constitution. In Guatemala, the failure to involve all the military groups in talks essentially guaranteed that the process of change could not be successfully

The scope of change will depend on what is viable in the particular context. The question of whether a scope of change is achievable may also be tied to flexibility on the time needed and to all key parties accepting the new rules, institutions and procedures.

completed and the conflict in the society proved too resilient for the scope of change proposed in the constitutional talks. Hence, the question of whether a scope of change is achievable may also be tied to flexibility on the time that can reasonably be needed and to all key parties accepting constitutional transformation concerning new rules, institutions and procedures.

In some cases, constitution builders have had the benefit of existing institutions and rules offering something to build on. This has been particularly useful where there has been an existing parliament with adequate legitimacy to drive the process to completion.

Table 1. Constitutional processes between 1975 and 2002: the events or institutions that initiated them

Type of process	% of total process
a. Executive-directed	23%
b. Peace negotiations/round tables	5.6%
c. National conference/transitional legislature	7.2%
d. Legislature or constitutional assembly	62.6%

Source: Jennifer Widner, Princeton University

Notably, parliaments may provide the only route to constitutional change. Their advantage is that constitution builders do not have to focus on establishing new institutions that would need to gain the political acceptance of new as well as current players. Existing parliaments can stabilize such transitional environments, and provide or

maintain legality in addition to legitimacy. They have, however, three limitations. First, parliaments, like any other actor engaged in constitutional bargaining, have *institutional interests* that they seek to advance when controlling the constitution-building process, often but not always to the disadvantage of other institutional actors. The danger is that parliament will focus on consolidating its own authority. Second, parliament hosts political parties. In many contexts, these parties lack internal democratic structures and are dominated by a small leadership circle. Given the importance of constitution building, interested parties may object to a small and powerful clique deciding key issues, perhaps through horse-trading. Third, individual political parties in parliament are likely to support party designs and electoral systems that favour themselves in elections. Because party and electoral rules determine how parliament distributes power, such preferences may distort the constitutional framework to the detriment of democracy and stability, particularly if excluded actors return to armed conflict and violence.

Even entirely new bodies, created for the purpose of constitution building, can further their own institutional interest. For instance, elected constituent assemblies in India and Israel consolidated legislative power before converting into regular legislatures. Practitioners should therefore expect institutional interests to manipulate constitutional outcomes. Thus constitution builders should recognize their own self-interest in constitutional outcomes, which might influence the design of constitutional institutions and processes.

Practitioners should expect institutional interests to manipulate constitutional outcomes. Existing parliaments, while they may give the process legality and legitimacy, have institutional interests that they seek to advance—as indeed will new bodies created for the purpose of constitution building.

3.2. Interim arrangements

In conflict-affected constitution building or after prolonged crisis, the moment at which hostilities or crisis cease may not constitute the most opportune time to draft a constitution. The challenge here is to permit as much change as possible while demonstrating a clear break from the past. Interim arrangements can take many forms and are sometimes described as transitional measures.

Interim measures are short-term: they are intended to (a) allow constitution builders to work on the basis of new legal and political frameworks that take over from the older ones to allow change with less disruption, and (b) open up space for constitution building in stabilized conditions that improve the chances for successful completion of the development of a new constitution.

The moment at which hostilities or crisis cease may not be the most opportune time to draft a constitution. Interim arrangements might facilitate the framing of a constitution between warring parties, but designing them will be challenging.

Interim arrangements might succeed in facilitating the framing of a constitution between warring parties. Designing acceptable interim arrangements will prove challenging. Equally challenging will be agreeing on the mandate and duration of interim

arrangements, including how to link them to long-term constitutional arrangements. They can bind final arrangements by stipulating the principles and norms that are to be embodied, or even include a greater level of compliance. The current Interim Constitution of Nepal (2007), negotiated to end a 10-year armed conflict, has also altered the governance structure from a unitary monarchy to a federal republic and directed the elected Constituent Assembly to draft a new Constitution to embed the change. In South Africa, the Interim Constitution articulated 34 principles to which the final Constitution had to adhere.

Context will determine the duration of interim arrangements. Nepal and South Africa established a two-year period for drafting of the constitution (in Nepal this original timeline has had to be extended). Other countries have enacted shorter and longer periods. While exigencies might dictate the time permitted for drafting a constitution, practitioners must include sufficient time for political deliberation, without which the chances of failure rise significantly.

Both the grand scale and the graduated design approaches may require an interval to ensure their completion. Sequencing is important to allow national actors a bridge to focus on the long term and on a broader consensus where the interests of many are brought under the constitutional umbrella. Many practitioners have tried to separate out stages in a sequence for this purpose, and their choices have had implications for the inclusion and exclusion of actors in different stages. These strategies are always problematic for this reason—the errors of the present committed in the interest of keeping the eye on the ball.

3.3. Transitional justice

Resolving transitional justice claims satisfactorily can complicate the already challenging task of establishing a constitutional culture after conflict or in the midst of deep division. Concerns may include the following: How should we deal with the past? How can we learn to coexist with former oppressors and perpetrators of crimes? How can we reconcile and forgive? After conflict, practitioners may have to heal divisions between former rulers, combatants, victims of human rights violations and their sympathizers, whether family, friends or civil society organizations. Such healing may require an outlet for mass anger and trauma, and a process to uncover the historical facts that have led to victimization, perhaps as a component of a larger process of reconciliation or of a substantive justice solution for crimes and violations. The practical challenge is to rehabilitate an entire society successfully without tearing the country apart, particularly when the conflict has stalemated, without a clear victor, forcing a negotiated settlement.

3.4. Inclusiveness and representation

Inclusive representation during constitution building has been an ideal. In theory, it is an important factor in the legitimacy of the process. Democratic constitution building has been associated with stability as well as broadly acceptable outcomes that imply that the constitution is likely to enjoy political will for its implementation, and hence its endurance.

Constitution builders focused on increasing democratic representation have also rejected the secret drafting and promulgation of constitutions. Instead, options have been considered to bring on board the broadest representation of all segments of society, as reflected in the current Constituent Assembly in Nepal. Democratic constitution building has also been viewed as a deliberative process, which needs adequate time and stable conditions.

The options that will expand democratic constitution building are institutional as well as procedural. Institutional devices considered have included the dialogue forums of *national conferences* used in parts of Africa. These were convened by the political authorities in Benin, Ghana, Kenya and Mali as devices to bring on board additional representatives of groups to join the ruling party in deliberations on constitutional change towards democracy. Where participation has been slanted and the conference opaque, conflicts have increased, for example, in Mali. The case of Benin, where the Constitutional Conference was more successful, illustrates greater successes in using the national conference to democratize governance.

Inclusive representation during constitution building is important to the legitimacy of the process. Skewed representation carries the risk that deliberations will be dictated by the partisan interests of a dominant party or be distorted around the power and privileges enjoyed by a dominant group.

The *constitutional convention* has also been considered. The convention is also a body of representatives which is convened either through election or by appointment with a single purpose—to draft, debate and agree on the constitution. It can be contrasted with *constituent assemblies*, which are elected bodies that have the purpose of constitution making but have also served as legislative assemblies with the usual legislative functions of oversight over the executive, accountability and law-making power. Countries influenced by the French constitution-making approach have usually adopted a constituent assembly, which has also been the traditional instrument of constitution making in Latin America. With two separate assemblies operating at once, the constituent assembly can adopt a long-term approach when addressing constitutional issues, not encumbered by legislative functions and ordinary politics. However, rivalry between the constituent assembly and the regular parliament can cause institutional and governmental paralysis, or even violent conflict. This has occurred in Latin America, where some constituent assemblies elected separately from legislative assemblies have sought to establish their supremacy over, and even to supervise, the legislative assemblies. On the other hand, an assembly that combines the functions of a constituent assembly with those of a legislature may also face operational constraints. In Nepal, since the Constituent Assembly is also designated as the legislature, in the latter function it enables the formation of a government—a task complicated by practical problems of power sharing and decision making by consensus. Both functions also require ample time, as demonstrated by the extensions of the time frame for completion of the constitution drafting in Nepal.

The key problem with these deliberative forums involves the issue of representation. In some cases one party has effectively dominated representation and hence the deliberations—the

Revolutionary Front for an Independent East Timor (Frente Revolucionária de Timor-Leste Independente, Fretilin) in Timor Leste, the Congress Party in India (1947–9), the Rwandan Patriotic Front in Rwanda and the Eritrean People’s Liberation Front (EPLF) in Ethiopia. Skewed representation carries the risk that deliberations will be dictated by the partisan interests of the dominant party or will be distorted around the power and privileges to be enjoyed by the dominant group. To deal with this problem, the *electoral system* used to elect the body becomes important. Electoral rules and procedures governing the election of constituent assembly men and women will usually specify the criteria for citizens to gain membership through membership of associational groups, or political parties, territorial linkages, or minority or other political identity criteria. Electoral system design has important implications for the membership composition of such a body, and to some extent its size as well. The Bolivian Constituent Assembly, elected in 2006, had 301 members while the Nepali Constituent Assembly, elected in 2008, had a total of 601 members. In South Africa, where it was clear that the African National Congress would dominate the Constituent Assembly after elections, the minority parties successfully insisted that the outcome of the Constituent Assembly also be certified by a newly set-up Constitutional Court.

3.5. Popular participation

The role of popular participation has increased. It is increasingly viewed as vesting popular legitimacy in the constitution-building process and its outcomes when people are consulted and their views taken into account. In South Africa, 2 million submissions were collated from the people.

Benefits of popular participation

- People may participate democratically in the framing of a constitution that will govern their relationship with government.
- A referendum enhances transparency and accountability by sharing information on the constitution and the constitution-making process with the public.
- People can educate and familiarize themselves on the content of constitutional issues prior to voting.

Costs

- Popular participation is very expensive, will absorb resources which may be scarce, and may not have any proven link to the subsequent legitimacy of a constitution.
- Power brokers can manipulate popular participation either through the framing of questions to be answered by the public or through partisan campaigns to influence voters.
- In societies that are divided along lines of political identity, popular participation crudely may allow an ethnic or religious majority simply to adopt or reject a constitutional proposition on their own terms.
- Popular participation can add legitimacy to populist measures that infringe or violate minority rights.

The quality of popular participation in countries emerging from conflict and where citizens have been excluded from governance for prolonged periods suggests a practical need for civic education. It has been suggested that civic education, for this reason, should precede the collation of views into the draft constitution at the drafting stages. The quality of popular participation may also be perceived as stronger where civic education is undertaken by an independent body rather than by partisan actors in the constitutional process, including the government. In Bolivia, the Constituent Assembly organized public participation and then formed committees to collate the public input. In other cases, for example that of Uganda, an independent commission educated the public and collated views.

Popular participation is increasingly seen as giving legitimacy to the constitution-building process, but it may not have any proven link to the subsequent legitimacy of a constitution, and it is open to manipulation.

The role of the public is also gaining increasing visibility in the ratification stages. Some processes have allowed popular participation in popular referendums to ratify the constitution as well as in the collation of views, for example, in Afghanistan and Kenya, where previously ratification by parliament acting alone was usually adequate. However, the use of referendums in contexts of serious societal division would need more careful attention so that it does not polarize an already divided public.

Given the influence exercised by ruling groups in constitution building, achieving the objective of inclusive and broadly participatory constitutional negotiations will depend largely on the degree to which the political and legal framework provides meaningful opportunities for outsider groups to shape any resulting constitutional settlement. Even with open structures of political dialogue, ruling groups frequently retain inordinate control over constitutional negotiations. If the process does not permit open dialogue structures or public ratification, constitution building can amount to a small range of insider groups dividing power behind closed doors according to self-interest. While elite influence over constitution building is a political fact, experience also demonstrates that a more open dialogue, including a broader range of voices, can generate independent constitutional momentum and legitimacy. On the other hand, broadening the ‘tent’ can alter the balance and structure of real power and can lead to settlements that ruling groups neither intended nor desired.

Constitution builders cannot avoid the role of leaders; the question may be how to use senior leaders during constitution building without necessarily limiting the roles for those not in key positions. There may for example be principles that mean using leaders in some strategic moments and not in detailed working sessions. There may be examples of leaders facilitating breakthroughs or becoming bottlenecks. Moreover, leaders may be hostage to the demands of their groups of supporters; and there are various leaders who are influential during constitution building although they lack a political mandate, in particular tribal chiefs, religious leaders, warlords, heads of the media and corporate leaders. Constitution builders in each context may have to understand why some leaders promote constitution building and others resist or hinder or object to it and under

what conditions trade-offs between leaders are secured to allow successful completion of constitution building.

3.6. The role of external actors

While stressing the principle of national ownership of constitution building, constitution builders can make meaningful use of the support offered by external actors. These actors are varied: they include donors who can offer financing assistance, for instance for public participation, civic education and effective study tours; specialists on particular issues who are invited to advise on specific options; multilateral and bilateral actors who can be trusted to offer mediation, neutral facilitation of sensitive talks, and security guarantees; international bodies of which states are members, which may have important principles and declarations of norms that can be used to bind national actors to certain courses of action; and international civil society organizations which can offer useful advocacy tools and independent monitoring. External actors have also been used to break specific deadlocks between national actors. In processes that are dominated by one party or group, external actors have been asked to examine options and offer alternatives or to help alternative views remain visible in the talks.

External actors can offer financing, expertise, mediation or neutral facilitation of talks, and security guarantees; but the roles of most are not value-free or neutral. In some cases, the values they espoused have been in conflict with the goals, ambitions or priorities of national constitution builders.

What is important is for constitution builders to understand that the roles of most external actors, if not all, are not value-free or neutral. On the one hand, the values represented by multilateral bodies such as the United Nations (UN), of which most states are members, may be useful to national constitution builders. This was the case when Namibian national actors negotiating

with armed forces for self-determination decided to base their constitutional principles on a resolution of the UN Security Council. In this case, the history of UN engagement in Namibia prior to its independence in 1990 provided a basis for national actors without full control of their national situation to derive constitutional principles that drove the course of constitution building towards outcomes that would be legitimate both domestically and internationally. On the other hand, the same United Nations has used the commitment to international human rights as a crucial factor of legitimacy in all cases of its involvement in constitution making, through the UN Secretary-General. *Guidance Note on the Role of the United Nations in Constitution Making.*⁴

In some cases, the values espoused by external actors are openly or covertly in conflict with the goals, ambitions or priorities of national constitution builders. For instance, external actors may be in a position to determine the timing and duration of the process of constitution building, while laying most emphasis on the drafting stage. In Cambodia, the Paris Peace Accord (1991) required drafting to be completed in 90 days, resulting in the Constitution of 1993. Many Cambodians could have argued that the time frame was limiting; at any rate, a coup d'état in 1997 is seen as proof of the accuracy of warnings that not all contentious actors had been included in the constitutional process.

The decision on the timing and duration of the process is one that national constitution builders should insist on making.

In other cases, constitution builders have incorporated substantive options into constitutions under pressure from or the influence of external actors. This may become a legitimacy issue, but the immediate practical effect may be non-implementation or failure due to misfit with the context. To forestall this, external actors are normally warned to avoid conspicuous roles when it comes to choice of options or to operate under the cover of seemingly transparent principles and normative frameworks. The responsibility also lies with national constitution builders to design constitution building in such a way as to deliver legitimate processes and substantive outcomes. Where feasible, a good start is to define national priorities and goals and embed any external actor role within this framework. It is however simplistic to react by politicizing the roles of external actors as a 'protectionist' measure, since this may not deal with the real problem and may jeopardize other useful contributions of external actors to the constitution-building process.

4. Substantive options issues

Many interest groups are often uncertain exactly on which side they come down on an issue. This type of uncertainty propels concern about achieving the broadest consensus on constitutional content. The greater the degree of consensus needed, the more time practitioners are likely to need to spend to reach decisions and the higher the costs of decision making. In addition, many groups with different interests and backgrounds will calculate how to maximize their own benefits from the institutional choices made during constitution building.

A constitution may not settle every material issue. Constitution builders have debated what issues to include in the constitution and at what level of detail. In a nationally driven process, they are of course free to design constitutions according to local judgement. As issues become controversial and intractable, the risk of *spoilers* grows. These are the actors who can cause the non-implementation of a constitutional provisions that they object to or are growing resistant to. In choosing their substantive options, constitution builders have often needed time to manage potential spoilers through bargains or persuasion so that the constitution enters into force with the trust of a wider range of actors, in order to permit consolidation in public institutions and government. At the same time, constitution builders may need to manage expectations, particularly those of the marginalized.

A constitution may not settle every material issue.

Some issues have been more controversial and more debated than others. In general, some of the areas where constitution builders have often sought guidance or taken much time to settle substantive options have been related to the schemes of power—who has it, how much of it and for what purpose—as well as the question of rights, particularly in view of contradictory but widespread beliefs or customs, the plurality of political actors and stakeholders, including their diversity, and the subjection of political action

to an effective legal framework in order to prevent abuse of office and check impunity. Challenges in resolving conflicts concerning these issues are highlighted below.

4.1. Institutional design

Constitution builders often deliberate at length on what institutional design to adopt in response to conflict. Institutional design in constitutions is often theorized from existing constitutional practice, which however is not consistent; particularly because of conflict, practice is extremely context-sensitive. This Guide also theorizes design on the basis of recent practice and trends in constitution building. Its primary theoretical lenses are (a) the dynamics that concentrate or disperse ‘power’ and (b) the dynamics that legalize issues in constitutions compared to those that seek to make more room for politics. In addition, the relationship between a constitutional text and its broader purposes beyond embodying the supreme law is also highlighted.

4.1.1. The constitutional architecture

Constitutional architecture is a term that connects constitutional texts to underlying functions and intentions. The elements included in a constitution are closely related to the purposes it is intended to serve. Later, in the implementation stages of a constitution, understanding the constitutional architecture is a useful guide for interpretation of the constitution’s text. One architectural option is to consider the constitution as a ‘framework’ instrument. By design, the text includes only those normative and substantive issues and principles for which a consensus exists. The framework constitution may assign a large number of issues, on which currently there is no consensus, for future legislative deal-making, although it may stipulate the general principles that will guide legislation. If constitution builders in Nepal’s current process had agreed in 2010 to adopt a framework constitution containing a legislative agenda, they might have avoided a delay to the two-year calendar of the Constituent Assembly. The cost would have been deferring other loaded issues, such as the conclusion of the peace process.

The ‘basic structure’ approach offers an option whereby constitution builders stress key government functions and prioritizes establishing institutions that will exercise governmental authority, such as the three branches of government—the legislature, the executive and the judiciary. The basic structures approach may include decentralized levels as well. A presumption exists that government has legal authority to act unless a limitation appears within the constitution or another law. Different governmental

structures may exert dominance in particular areas, thus limiting and checking governmental authority, safeguarding individual freedoms, and creating a political equilibrium.

A ‘rights-based’ approach may also be mentioned. Modelled mainly on the French Revolution of 1789, this approach considers

The elements included in a constitution are closely related to the purposes it is intended to serve. One option is to consider it as a ‘framework’ instrument that includes only those normative and substantive issues and principles on which a consensus exists.

the rationale of the state as the protection of the rights and welfare of citizens. The government is established to give effect to these rights as its priority. The option may emphasize a legal constitutional culture and articulate options for the legal and administrative enforcement of rights. This approach has seeped into constitutions that predominantly use the language of rights to signify dramatic change. Constitution builders emphasize the approach through placing rights in pride of place, up front in the text of the constitution. The first article of the Constitution of Guatemala (1985) states that the Constitution is the basis for the formation of the Guatemalan government whose responsibility is to protect the person and the family. This particular constitution closed one of Central America’s bloodiest civil wars, between 1962 and 1985, but this architectural form and styling, emphasizing rights, actually accords with constitutional tradition in the Spanish Americas. The approach may also signify the level of commitment to rights. As an example, the Constitution of South Africa (1996) used the approach to provide for the legal enforcement of economic, social and cultural rights and the application of the Bill of Rights ‘horizontally’ in relations between private citizens, and it recognized a right of members of military forces to strike. Each of these is striking in itself, and the inclusion of both is usually part of the reason why this constitution is considered the most rights-friendly.

Another option is the ‘rights-based’ approach, emphasizing a legal constitutional culture, articulating options for the legal and administrative enforcement of rights, and signifying the level of commitment to rights.

4.1.2. ‘Legal’ and ‘political’ constitutions

The ‘legal constitution’ emphasizes the supreme aspect of constitutional law, placing the constitution above all other forms of law, imposing legal obligations, and subject to judicial adjudication. A ‘political constitution’, on the other hand, elevates the settlement of issues through political processes and within a larger political framework, typically under the authority of a political institution such as a legislature or state council.

A ‘legal constitution’ emphasizes the supremacy of the constitution and makes it subject to judicial adjudication. Protections should prevent transient majorities from easily altering fundamental principles. A ‘political constitution’, on the other hand, elevates the settlement of issues through political processes and within a larger political framework.

Legal and political constitutions arise from the strategies of interested actors. Supporters of legal constitutions prefer legal certainty to protect their interests from future political bargains. Opting to address disputes as legal could also allow actors to avoid a real or perceived political backlash. For example, South African delegates in the Constituent Assembly (1994–6) specifically deferred a decision on the abolition of the death penalty, popular among voters, to the newly created Constitutional Court. Notwithstanding that popular support, the Court declared the death penalty unconstitutional, premising its decision on the entrenchment of human rights in the Interim Constitution (1994–

6). This Guide refers to the approach of addressing legal disputes as ‘legalization’.

Practitioners opting for legalization often argue that:

- The ruling regime does not equate with a democratic majority (it could be a minority government or one with only a bare majority), so the constitution should always impose legal controls on rulers and politicians.
- Any fundamental change requires the greatest consensus, which is rarely present outside of constitution building. Once agreed in constitutions, protections should prevent transient majorities from easily altering fundamental principles.
- In deeply divided societies, those advocating a political view of the constitution can often secure electoral wins and thus domination of political institutions—legislatures, the executive branch, and political parties—for the benefit of their power base; legalization is more egalitarian.
- Greater clarity in the constitution can bolster the accountability of officials. For instance, a clause that requires police to charge a person within 48 hours of arrest defines when an infringement will occur and identifies the perpetrator; because life and liberty are at stake, clarity is necessary. Minority groups may demand greater detail in the establishment of minority rights in order to reduce the future scope for legislative intervention.

Few constitutions in contexts of deep division still subject decisions to purely political majority rule. To offer real protections, their checks and balances must be practical and workable. The constitutional principle that the power of any majority is limited is extremely important in multicultural or plural nation states. In such contexts, the understanding that the constitution is the supreme law gains considerable importance.

At the same time, constitutions express ideas and arrangements as political bargains, reflecting the balance of power when they are agreed. Not infrequently, these agreements have been the only adequate and politically viable way to make the transition from the old to the new. Advancing a political view inherently opposes legalization and the aggrandizement of the judicial branch. Incumbent leaders and parties often claim an entitlement, or even a duty, to interpret the constitution on the basis of their electoral mandate. Proponents of the political approach prefer the government or executive to benefit from a strong presumption of the constitutionality of political action. Moreover, they

Constitutions express ideas and arrangements as political bargains, reflecting the balance of power when they are agreed. A constitution might reflect general principles, leaving political convention and customary practice to fill unwritten gaps. This, the political, approach emphasizes dialogue over adjudication of constitutional problems.

ask that limitations to government authority appear not only in the constitution but also in legislation, which alternating groups in power can amend. The constitution even might state that elected representatives exercise sovereignty. The Constitution of the Federal Democratic Republic of Ethiopia (1995) recognizes the supremacy of the Constitution, but when disputes requiring interpretation of the Constitution arise, the Council of Constitutional Inquiry must

investigate and recommend further action to the House of Representatives, which is the only body that can decide constitutional disputes.

Supporters of a political approach have argued that:

- Instead of legal detail, the constitution ought to reflect general principles and permit greater ambiguity, so that political convention and customary practice can fill unwritten gaps, for example, the convention that states cannot secede from a federal union (the United States) or that the presidency rotates between the northern and southern parts of the country (Nigeria).
- Only removable public officials should decide constitutional issues with finality. Amendment should follow from direct democracy and public initiative in such a way that the constitution should develop primarily through political contests.
- A constitutional democracy resolves the vast majority of disputes by political deliberation and voting.
- Judiciaries will often lack the information needed to arrive at informed decisions. For instance, what consequences follow from judges invalidating a peace agreement between an elected government and armed rebels because it infringes a constitutional provision requiring the indivisibility of a unitary state? Or what if the judiciary finds that an elected government should resign because members of the ruling political party have committed electoral fraud? Unlike legislators taking a similarly contentious decision, judges will not face the electoral consequences of their decision. Even if it is assigned to a constitutional court, the nature of a political problem will require the court to make a political decision.
- The legal culture may be too weak to support the legal enforcement of highly contentious issues.

The political approach emphasizes dialogue over adjudication of constitutional problems. From this perspective, consultation mechanisms are scattered in constitutions, taking the form of constitutional councils, security councils, mandatory bipartisan parliamentary committees, dual-head executives, constitutionally-mandated power sharing, electorally-mandated power sharing, upper chambers of parliament with distinct roles, economic councils and the like. In addition, there are ample references to the ‘how’ of making decisions not only in terms of placing rules for legislative processes in the constitution, but requiring executive decisions to take certain forms. Exhortations for consensus and cooperative government may be included. All these are in essence dialogue-sustaining options.

It is emphasized that legal and political constitutions are interrelated. Upon closer examination, many constitution builders adopt both legal and political constitution approaches. One approach may be dominant to deal with certain problems (e.g. human rights, constitutional interpretation) and the other for other kinds of problems (e.g. foreign relations, economic governance). Current constitutional trends however favour legalization, manifested by the increasing detail in constitutions, the extension of judicial supremacy over a growing number of issues, and the establishment of new constitutional

courts, for example, most recently in Indonesia, Mongolia and Thailand.

Table 2. Legal constitutions and political constitutions

Legal constitution	Political constitution
<ul style="list-style-type: none"> • Emphasis on boundaries around governmental action • Judicial review of the constitutionality of government action • Idea of judicial supremacy; the constitutional court is the independent custodian of the constitution • More prominent independent constitutional watchdogs • More issues capable of judicial adjudication; greater jurisdiction of courts over constitutional issues • Clarity, details placed in constitution for ease of legal enforcement • Expanded bills of rights and greater legal enforcement • Rights-focused constitutions, hence lengthier constitutions • Constitution and courts resolve an increasing number of issues rather than deferring to politics • Strict rules for amendment of the constitution; referendums used to toughen amendment procedures 	<ul style="list-style-type: none"> • Strong presumption of the constitutionality of governmental action • Idea of legislative supremacy • Fewer external or independent constitutional watchdogs • Political contestation over issues rather than judicial adjudication • General principles rather than details in constitution; ambiguous language • Enforcement of rights distinguishes fundamental freedoms from claims needing policy measures • Short, compact constitutions, including framework constitutions and basic structure constitutional approaches • Direct democracy and popular initiatives also resolve constitutional questions

4.1.3. 'Aggregation' and 'dispersal' of power

Current trends favour the legal approach, manifested by the increasing detail in constitutions, the extension of judicial supremacy over a growing number of issues, and the establishment of new constitutional courts.

On the one hand, democracy needs pluralism in political ideas and checks and balances in relations between the institutions of government. What undermines it is the concentration of power in the hands of a few. The institutional design logic in a democratic system should then support the establishment of multiple power centres at

the national level, and even vertically, between a national and sub-national level.

Dispersal of power is a term used to describe the effect of assigning exclusive authority to make certain constitutional decisions to multiple autonomous constitutional organs or offices. If the design needs to disperse power, this can be done through horizontal (separation of powers, a higher number of constitutional watchdogs) and vertical (forms of decentralization from devolution to federalism) options. It is possible to disperse power and still create strong national institutions since the dispersal takes place at the national level, where strong executives, legislatures and judiciaries and other watchdogs check each other. Power can be dispersed within the executive, so that it is shared between a president and a prime minister and cabinet, and through constitutional councils that can coerce the executive.

On the other hand, a country which was initially democratic may move towards concentration of power in the hands of an executive due to conflict or persistent national crises, for instance through accretion from prolonged use of state-of-emergency powers. Successful pacification may be needed before power can be de-concentrated from the executive where it had accumulated. *Aggregation* is the term used to describe the effect of reducing the number of autonomous actors or offices that have exclusive power to take constitutional decisions. It can also be seen in the effect of allowing particular constitutional offices to take unilateral action without serious opposition from any other quarter.

Constitution builders may also elevate the goal of maximizing the use of power for the general welfare in contexts of deep division. The constitutional options chosen should then be able to give the government adequate power and the mandate to act. Aggregating power can be seen in terms of scope and within particular institutions and groups. Its net effect is that the institutions at the top have greater scope for action in relation to a number of problems, and that powers are vested in narrowed-down groups which have more power in fusion than they have alone.

The British Westminster Parliament offers an example of great accumulation of power. In terms of group, power is narrowed down to a single political actor, and in terms of scope the Parliament, which is made up of the monarch, Cabinet and legislature, is supreme in all areas. There are drivers of constitutional change who argue that modern states are confronted by problems that require a government with a greater capacity to respond to deal with complex, internationalized and technical problems. This will include the issues mentioned above in relation to constitutional design for democratization—to create equality between groups, to provide mechanisms that offer compensation for redress, and to ensure that no important power relations are insulated from constitutional politics. Lay people mostly want government power to sort out the major post-conflict problems, which may include rampant criminality, restarting a schooling system, lack of telecommunications and transport infrastructure, state officials who are not restrained by law and so on, and in such cases the governmental capacity will require enabling.

Aggregation becomes more conceivable when connections among people are social, economic and cultural with some form of collective identity, so that even distinct groups in the society—women, and racial and religious minorities—who are concerned with equal treatment within the system seek fair opportunity in it, not outside it. Aggregation then emerges as a possibility because focused power is not only more effective at driving a reform agenda through in favour of the general welfare for all, but it also does so

Democracy needs pluralism in political ideas and checks and balances in relations between the institutions of government. What undermines it is the concentration of power in the hands of a few.

according to rational calculations, with more efficiency. Options that aim to aggregate power when the ties that bind are not strong therefore carry a risk of hegemony of some over others using power for the benefit of those steering the controls at the expense of others.

Aggregation may also be pushed or demanded by constitution builders who are grappling to clarify why the government exists in the first place, usually where political consciousness and citizen awareness are low. It could also be a way to direct capacity building in the state, by identifying the measures to be adopted in policy to improve the capacity of the state to satisfy the needs of its citizens. Politicians tend to be attracted to more powerful and prestigious offices. They frequently cite conflict as the reason first to shape constitutional aggregation of state power and second to empower government to survive crisis and be a better risk manager.

Aggregation and dispersal represent a dynamic; they are not static. There is a trend in some states with rich but peaceful or tolerant diversity, such as Spain, to recognize this fact in constitutional systems that disperse power. The experience of conflict or severe national crises in other diversity-rich states, such as Ecuador, has recently pushed the trend towards concentration of power in the executive. Globalization of the terms of inclusion and exclusion has promoted a reflex to adopt power-dispersing designs. Dual citizenship arrangements materialize this factor at the personal level. At the same time, the spin-off from globalization is that the state is weaker but power concentration is a reality, except that power is concentrating in private hands—economic groupings, wealthy families, religious groups and the global media. In response, the trend in some states is to push power back into public politics and to make it effective, leading to the aggregation side. This is a dynamic cycle.

4.2. The system of government

During constitution building, a common approach that has emerged in the last few decades is the establishment of governments of national unity or grand coalitions to oversee the process. In this approach, representation in the executive is not based on a simple majority; rather there is a recognition that national unity requires that differing interests be taken into account. The result is that the executive has consisted of the different parties with a sharing of responsibilities. Whilst this approach has been very popular because it provides key spaces for the most senior leaders, its success is very limited according to empirical studies. If sustained in the design of a system of government in

a constitution, the result may be that the executive can become a contested terrain and space for continuing political battles that could undermine good government.

In an alternative approach, the majority of the national leadership has been accommodated in deliberately enlarged legislative bodies. If the legislative body in this form drives the constitution-building process, a result may be that the political agreement is translated into a parliamentary system that elevates the broadest representation. Proportional representation may then be mandated to allow parties to enter the assembly with a low threshold. The risk however is that representation of parties in the assembly undermines the ability and capacity of the legislative assembly to perform its core functions, including making law. In this system, the executive may become hostage to fractional party politics in the assembly.

A common approach that has emerged in the last few decades is the establishment of governments of national unity or grand coalitions to oversee the process of constitution building. This approach has had very limited success.

Constitution builders may also need to note the consequences of designing systems of government in relation to size of government, and therefore its cost. The most obvious consequence is that a bigger government is a more costly government. However, a bigger government also means that new vested interests are created.

4.3. The role of human rights

Democracy as a normative framework requires constitution builders to support and guarantee civil and political rights. Since rights are indivisible, there are many rights recognized as economic, social, cultural or collective whose recognition completes political rights and makes it possible to realize them. In the context of diversity described below, effective constitutional protection that is broad and equal across all categories of people is not possible except on the basis of a right to equality and non-discrimination. Human rights allow the constitutional dismantling of unjustifiable inequality. The human rights of women, children and people living with disabilities are examples of rights that cut across cultures and identity groups, and which should be guaranteed because of the vulnerabilities faced by these groups, which are sharpened by violent conflict and deep division.

The recognition of economic, social, cultural or collective rights completes political rights and makes it possible to realize them.

4.4. The recognition of diversity

A legitimate constitution in a deeply divided and diverse society cannot be made without the full participation and inclusion of the potentially contentious groups in the country. It is also accepted that even minority groups have a right to be represented and included in constitution building. Planning for the inclusion of diversity at the initial stages is therefore part of the good start. Constitution builders have considered electoral options when bodies to deliberate the constitution are composed; there are

also nomination options in relation to groups that may be under-represented once these bodies are composed. It is particularly important to ensure diversity in the group that will carry out the actual drafting, which may be a committee or commission rather than an entire plenary of an assembly, convention or conference.

Democratic consent requires procedures to ascertain the general will. Yet nothing is more challenging than ensuring that democratic methods in conflict-affected and polarized states will decide the general will, particularly when it is reduced to an electoral or legislative majority. In contexts where political identities are embedded and not easily changed, elections in themselves will hardly embody a general will and their outcomes

Nothing is more challenging than ensuring that democratic methods in conflict-affected and polarized states will decide the general will, particularly when it is reduced to an electoral or legislative majority. In a deeply divided and diverse society a legitimate constitution cannot be made without the full participation and inclusion of the potentially contentious groups in the country.

are constantly contested. Decisions made by the majority may be illegitimate if they infringe upon constitutional guarantees; yet agreeing on these guarantees requires the broadest consent which takes time to obtain in contexts of deep division. India, the world's largest democracy, is also one of the most diverse states. So far India has addressed its diversity challenges through liberal individual rights while constitutionally defining special minority status, on the understanding that all rights are derived from the constitution itself.

Ethnicity, nationality, caste, and other identity-based groups often oscillate in their support for democratization and constitution building depending on what they stand to substantively gain or lose. Recognition in the constitution of principles related to diversity is a starting point. However, to really ensure that official action of the right sort is taken to protect diversity, substantive options will need to guarantee entitlements. Human rights may be one gateway to offer real protection to diversity and are particularly well developed by now in relation to minorities and indigenous people. The recognition of legal or judicial pluralism is also useful, although constitution builders will need to

To ensure that official action of the right sort is taken to protect diversity, entitlements must be guaranteed. Human rights may be one gateway to offer real protection to diversity and are particularly well developed in relation to minorities and indigenous people.

think about how to resolve conflicts between legal systems. Addressing the representation of diverse groups at the national and other levels of government may require electoral rules and power-sharing arrangements, usually pegged to numerical formulae. The institutional design for substantive options therefore involves several options for consideration.

Ultimately, the key question underlying the selection of options depends on the goal: whether to recognize diversity in terms of developing a common basis of identity and official action with all groups in one mainstream or, alternatively, to recognize diversity in terms of measures such as reservations and autonomy guarantees, which preserve

different spaces in which different diversity groups can operate. Democracy in contexts of polarization along embedded identity lines is both a solution to problems and a source of other, new problems. Constitution builders in such contexts may need to pay attention to the principles, rules and institutions that deserve to be elevated and protected from normal majoritarian politics in diversity-rich societies. On the whole, practice shows that common proposals to assign religious, ethnic, racial and other well-organized social categories their own distinctive niches, including territorial niches, within national constitutional regimes, are a formidable barrier to problem resolution because they will impede constitutional coordination and not offer incentives for collective action. Bottom-up social movements and the formation of political parties have happened around citizenship identities held in common, not in embedded ethnic identities. Second, political party coalitions and self-interest associations that will deal with widespread inequalities through public politics are more likely to flourish when they are premised on citizenship, not on tribe and native authority.

Diversity can be recognized in terms of developing a common basis of identity with all groups in one mainstream or by recognizing diversity in measures such as reservations and autonomy guarantees. Democracy in contexts of polarization along embedded identity lines is both a solution to problems and a source of other, new problems.

4.5. The rule of law

Ultimately, a primary purpose of constitution building is to codify agreements into a legal text that courts will enforce as the supreme law. This is part of constructing a rule of law. The rule of law is important to ensure that constitution building is not ultimately only about sharing the spoils among different political actors. The rule of law will have to be upheld in order to impose necessary limits on political actions. If the process of framing the constitution is driven only by the political interests of the political groups in it, there may be nothing subsequently to constrain their power. It is therefore important that some form of legality is established up front to ensure that even the constitution-building process is bound within a predictable framework of legal rules. In implementation, this helps ensure that the playing field is level for all players who play by the rules that are applicable for everyone.

In terms of substantive outcomes, the rule of law is predicated on the supremacy of a constitution in all spheres of public life. Essentially, each state has a legal framework or system that determines how a constitution becomes supreme law. If still in force, that framework can be used to influence the procedures that negotiators will use to effect constitutional change. If it is weak or non-existent, an alternative legal framework, such as an interim constitution or a previous constitution, may need to be established urgently. The pre-existing legal framework may permit interested parties or new players to question the legality or validity of proposed constitutional changes, hence reducing monopolization of the process by political forces.

Constitution builders could opt for a sovereign body with a legal mandate to frame the constitution, such as the constituent assemblies of Nepal and South Africa. Since

the assembly acts from an original and sovereign mandate, the option implies that the constitution flowing from the body is sanctioned by an original power and is the supreme law. This is the case unless the constitution itself also embodies the supremacy of other laws, as seen in the discussion on building a culture of human rights. In other cases, constitution builders have used a popular referendum to manifest the sovereign will by voting to endorse a new constitution as the supreme law. In Kenya, the referendum was used despite the lack of a precedent in the country once it was popularly accepted that an incumbent executive and legislature, being themselves creations of a pre-existing constitution, lacked the legal mandate to replace the Constitution in its totality. Only the people could do this by virtue of the idea that sovereignty was vested in the people. This option would also be used to substantiate amendments to parts of constitutions that are entrenched.

One question is what should happen where the new constitution excludes the possibility of legal continuity of existing laws. One challenge is whether to revoke all the existing laws immediately, for instance so as to install an entirely new legal order. If some laws must be retained, which ones and for how long? In South Africa one of the earliest implementation problems centred on the issue of legal continuity or its absence. The new Constitution had discontinued local government but the new institutions had not had time to institute new rules for the operation of local government. In the event, President Nelson Mandela invoked executive power to decree new rules to allow local government to operate. This executive action quickly became the subject of a judicial challenge to its constitutionality, principally because the Constitution recognized the separation of powers as a fundamental principle, which was also taken to mean that the legislature could not delegate its law-making power. As though to forestall such a possibility, some constitutions expressly recognize the mandate of the executive to enact by decree bridging laws which last until the legislature enacts legislation under its proper power to deal with the issue. In cases where the old law is defunct, there may be no other option than to allow a temporary remedial action through decree. In cases where the constitution itself revokes the pre-existing law, constitution builders may have to consider transitional options such as the famous *sunset* and *sunrise* clauses from South Africa.

Invalidating old laws has consequences: societal order may depend on legal decisions taken under the old regime. For the sake of good governance and for normative rule-of-law reasons, the constitution may negate all previous laws yet still uphold particular decisions taken in their name. Constitution builders can appoint a special committee or court to examine the validity of such decisions, mandating a case-by-case approach rather than applying sweeping general principles.

Even where constitutions are ushering in an entirely new legal order, there will always be some legal continuity in some areas. For example, new constitutions usually provide for the continuation of citizenship rights accrued in the previous legal order. Most legal systems create rights that constitution builders should not dismiss arbitrarily, particularly if they are protected by other regional or international agreements that precede the new constitution. While constitution drafters can rewrite substantive law, for institutional and rule-of-law reasons they should retain familiar procedural forms

and frameworks, such as tribunal hearings determining the status of accrued rights. By reforming only substantive law, institutional actors such as judges and military staff can continue to apply particular competencies, even if the new constitution will modify their institutions as needed.

5. Using this Guide

5.1. Goals of the Guide

This Guide is intended for a target audience of people who are involved in building constitutions in their country. It is a tool developed with the benefit of a recent history of widespread constitution building, during which a majority of countries in the world have experienced a constitution-building process. Its goal is to share a growing understanding of constitution building among its practitioners.

The Guide is important first because it is one of only a few tools of this nature that are available to practitioners. Second, it handles issues by emphasizing the importance of contextual learning rather than a one-size-fits-all approach. Its importance will be seen in the way knowledgeable practitioners use it to search for more answers.

5.2. The approach of the Guide

The Guide underscores the importance of context in determining constitution-building processes and their outcomes. It is not a blueprint for constitution-building options or a one-size-fits-all manual to be consulted by constitution builders; rather it aims to highlight some of the options that constitution builders have considered and may consider regarding some of the familiar substantive constitutional issues in the context of conflict-affected constitution building.

While the focus of the Guide is on constitutions as key documents in a political system, the approach stresses understanding the constitutional system as a whole. The Guide encourages constitution builders to distinguish between what constitutions say or imply and how they actually work. Examples are often given from constitutions from around the world. These examples should not be taken as endorsements of any given constitution or the provisions being presented. Instead, constitution builders are encouraged to use the examples to think through options that are available and suitable to their own context of constitution building.

Since constitutional issues are interconnected, the meaning of one article may be altered by another article in a constitution. To facilitate this comprehensive view of constitutions, each chapter while dealing with a specific institution approaches it holistically. Therefore each chapter is also self-standing; it allows the target audience to use it according to needs.

The Guide is a tool. It is supported by additional expertise available from International IDEA through direct assistance, training and a dedicated website.

5.3. Chapter overviews

5.3.1. Chapter 1: Introduction

In getting started, constitution builders often have to make two kinds of decisions: those related to the process dimension—for example, the procedures, institutions, rules, timing and responsibilities for decision making—and, second, those related to content. In conflict-affected contexts, legitimacy often will hinge on these two decisions. This chapter emphasizes the importance of context as the key guide to constitution builders as they start a process of constitution building. It is structured as follows.

- First, the general observations and key assumptions that underlie the chapter are identified.
- Second, based on a short overview of global constitution-building practice, general challenges likely to be found across contexts of conflict-affected constitution building are framed.
- Third follows a discussion of aspects of the process dimension in relation to securing legitimate outcomes.
- Fourth, the discussion is connected to some of the content issues that flow or emerge from the process.
- Fifth, chapter 1 introduces the Guide and how to use it and gives an overview of the other chapters that comprise the Guide.

5.3.2. Chapter 2: Principles and Cross-cutting Themes

Constitutions play a role in establishing and elevating certain principles that are central to creating a sense of unity and shared values. Their meaning is more than merely symbolic, however. Principles have the capacity to cast light on a constitution's meaning and operation. This chapter explores how constitutional principles develop, whether through negotiation and explicit incorporation into the constitution, or by subsequent emergence from the text, structure, and implementation of the constitution. It also explores the role that constitutional principles play within government—whether they provide support for certain constitutional interpretations or give guidelines to policymakers. This chapter also explores how the embracing of constitutional principles relates to cross-cutting themes addressed in a constitution. It discusses selected themes—the rule of law, the management of diversity, gender equality, religion, and international relations—and how a constitution may address them, through its language or through specific provisions. The chapter explores how contextual forces and trends within a country can shape the form and meaning of constitutional principles and provisions related to these themes.

5.3.3. Chapter 3: Building a Culture of Human Rights

There are several reasons for having *human rights* in a constitution; they indicate

restrictions on governmental power, they are a building block for democracy, they establish a foundation for building a human rights culture, and they are integral to the legitimacy of the constitution. A *human rights culture* gives individuals and groups space to organize and aggregate their interests. It permits ordinary people to challenge public officials and state institutions. It is about how human rights 'work' and therefore goes beyond the constitution and touches on other complex dimensions of society. In terms of international law, human rights are universal, inalienable and indivisible. Yet the reason for including and protecting some rights in the constitution has become as contested as the nature and purpose of the constitution itself. A key challenge is not only to agree on a bill of rights, but to use human rights protections to contribute to the peaceful coexistence of socially diverse and conflict-affected groups. This goal is not tension-free, as can be seen from the sometimes intractable debates on human rights issues between different segments of society during constitution building. Minority group rights to benefit from special measures, economic rights that touch on claims on national resources, and the rights of women to equality in family relations are among these. Another challenge is to implement rights, which clearly needs institutional guarantees to be in place. While the legal enforcement of fundamental rights is comparatively pervasive across legal traditions, constitution builders have also sought out dynamic implementation frameworks that also give room for politics to evolve broader consensus on human rights.

5.3.4. Chapter 4: The Design of the Executive Branch

According to textbooks, the executive branch represents one of the three potential branches of government, traditionally with a distinct objective—to enforce or implement the law as drafted by the legislature and interpreted by the judiciary. Practically, the executive branch can play a uniquely powerful role and is often viewed as the natural leader or ruler of a country, personifying the country's image nationally and globally. Unsurprisingly, then, the election of the chief executive is an important event that can sow great disharmony, particularly in post-conflict societies with pronounced ethnic identification. Indeed, many internal conflicts start or re-emerge as part of a struggle about keeping, aggregating and/or extending executive power, be it within or beyond the constitutional framework.

The process of drafting a constitution is not a purely academic exercise in which actors seek the best technical solution available for their country. The drafters and negotiators of a constitution are also political actors/parties aiming to translate their own political agendas into the text of the constitution. Thus, constitutional design often represents a compromise between various actors with different interests and expectations.

By offering constitutional options in a comparative, structured and coherent manner, the chapter on the executive branch attempts to support relevant actors to translate their agendas into a constitutional format as well as to facilitate the accommodation of various competing interests towards a viable constitutional compromise. The chapter predominantly focuses on constitutional options to de-concentrate executive powers. Without ignoring the potential benefits of a strong national executive in specific cases,

the chapter presumes that many violent conflicts are at least in part caused or sustained by an overly centralized executive, concentrating powers on a few and marginalizing many. The bottom line of de-concentrating executive powers is to allow more actors to be involved in decision-making processes, be it within the executive or as part of institutional checks and balances vis-à-vis other branches of government.

5.3.5. Chapter 5: The Design of the Legislature

The three basic functions of the legislature are representation, law-making, and oversight. As the most representative institution in politics, at its best, the legislature represents the political arena at which society's divergent opinions compete. In a post-conflict setting, previously warring groups struggle to replace violence and hatred with politics. Legislative design in such a setting can facilitate this evolution, by constructing a forum for the expression, consideration and accommodation of different opinions.

More pragmatically, constitutional design often represents a compromise between various actors with different interests and expectations. Several post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Thus, constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available. Because political parties predominantly provide the members of the legislature, their interests—in addition to the visions of their leaders—often dominate the process of designing the legislature. Dominant parties might negotiate a 'winner-takes-all' model not only concerning the electoral system, but also concerning the entire legislative design—aggregating legislative power by permitting a simple majority to exercise far-reaching authority. Parties representing a minority group, be it religious or cultural, might prefer a different design.

Often there are high expectations of the legislature and its role in the governmental structure. Especially in scenarios where people have suffered from authoritarian rulers running a country on the basis of a strongly centralized executive branch, relief is awaited from a viable legislature. Adherents of democracy might not find anything problematic about a potent legislature that aggregates considerable powers. The legislature is perceived as a deliberative branch in which bargaining and compromise, followed by elections, are the order of the day.

However, designing a legislative branch of government also comes with challenges: constitution builders may consider that untrammelled legislative power under simple majority rule can also pose a threat of tyranny for minority groups that are not sufficiently represented.

The chapter on the legislature examines a variety of constitutional options for a legislative design. It organizes this variety along the three basic functions: representation, oversight, and law-making. It adds two further elements: the degree of the autonomy of the legislature and additional substantive tasks of the legislature next to law-making.

5.3.6. Chapter 6: The Design of the Judicial Branch

Constitutions assign to the judicial branch the responsibility for settling disputes and interpreting the law. Most constitutions also provide the judiciary with the power of constitutional review as a safeguard to ensure that legislation and government action conform to the requirements of the constitution. The powers and procedures of constitutional review vary greatly among constitutions. A number of options related to the design of constitutional review are explored in this chapter. Additionally, the chapter discusses the balance of power between the judiciary and other branches. While securing judicial independence is vital, accountability and transparency in legal rulings are also essential. Finally, the chapter explores one element of the internal structure of the judiciary that is especially interesting in contexts of division: legal pluralism and the possibilities for the harmonious coexistence of multiple legal systems under a single constitution.

5.3.7. Chapter 7: Decentralized Forms of Government

Decentralization generally occurs for two reasons: (a) to locate the delivery of services closer to the people, for efficiency and accountability reasons; and (b) to promote harmony among diverse groups within a country, permitting a certain degree of self-governance. Particularly in societies fragmented by violent conflict, decentralization may support the peaceful coexistence of diverse groups, cultures and religions.

Decentralization includes a formal and a substantive element. Whereas the formal element addresses the structural configuration of government, the substantive element concerns the actual depth of decentralization, perhaps best measured in terms of administrative, political and fiscal decentralization.

6. Conclusion

Constitution building is a political process that is vulnerable to prevailing circumstances. While constitution builders attempt to design processes and substantive outcomes that will be legitimate and respond to short- and long-term problems, the future remains uncertain. The success of constitution building may depend on factors beyond the constitution itself. However, constitution builders can influence how a process is designed and in particular its inclusiveness and the reduction of political monopolization by a few groups. Getting the start right can give a major impetus to the successful completion of constitution building, leading to implementation of a constitution that functions the way it was meant to.

In getting started at constitution building, practitioners must anticipate a number of challenges, which can take multiple forms. These challenges will be context-specific, rooted in a state's history or in the immediate circumstances prompting the constitution-building process, and others will emerge as the process progresses. Constitution builders can identify general and particular challenges and plan to overcome these from the start.

Processes of constitution building that include all legitimate groups, actors and stakeholders for the sake of democratic inclusion are more likely to result in institutional choices that strengthen the constitution-building process in addition to democratization. Knowing this, constitution builders may then be in a position to set criteria to gauge the quality or level of their democratic constitution building, premised on inclusion and participation.

A constitution may not settle every material issue. Practitioners may debate what issues to include in the constitution and at what level of detail. Practitioners of course are free to design constitutions according to local judgement. Constitution builders may need to manage spoilers so that the constitution enters into force with the trust of a wider range of actors, to permit entrenchment in public institutions and government. Finally, constitution builders may need to manage expectations, particularly of the marginalized: while attaining their support may require expanding official safety nets, drawing them into the mainstream may take time.

Practitioner quote

‘Constitution-drafting is an exercise for historians, sociologists, anthropologists, philosophers, writers and poets—for all the men and women who have suffered injustice throughout generations and have mastered the courage to bare their souls and put them into binding words; to leave it to professional politicians is to invite in a moral hydra; to leave it to jurists alone is to invite in the soulless abstraction of normativism. History can hardly teach a more painful lesson.’

Torquato Jardim, former Minister and constitutional advisor to the Constitutional Commission, Brazil

Notes

- ¹ These are some of dates that illustrate the process of constitutional building since the independence of Costa Rica:
- Independence from Spain 1821;
 - Member of the Federal Republic of Central America from 1823 to 1840;
 - Constitution of 1825, Ley fundamental del estado libre de Costa Rica;
 - Constitution of 1844, Constitución Política del Estado Libre y Soberano de Costa Rica;
 - Constitution of 1847, Constitución Política de Costa Rica;
 - Constitution of 1848, also called the ‘reformed constitution’; and
 - later constitutions: 1859, 1869, 1871, 1917, 1949.
- Universidad de Costa Rica, *Constituciones políticas de Costa Rica 1821–2010* (2010), <http://esociales.fcs.ucr.ac.cr/index.php?option=com_content&view=article&id=46

&Itemid=193>; Obregón Quesada, Clotilde, *Colección: Las constituciones de Costa Rica* (5 vols) (2009).

- ² The first Constitution of Bolivia was approved on 19 November 1826 by the Constituent Assembly (Congreso General Constituyente de la República Boliviana). Later constitutions are those of 1831, 1834, 1839, 1843, 1851, 1861, 1868, 1871, 1875, etc. See <<http://www.constituyentesoberana.org/info/?q=historia-constituciones-bolivia>> and <<http://www.cervantesvirtual.com/portal/constituciones/constituciones.shtml>>.
- ³ East European countries have also been increasingly active in constitution building and many states have adopted new constitutions in the last two decades, such as Belarus, Bulgaria, the Czech Republic, Estonia, Kazakhstan, Kyrgyzstan, Lithuania, Romania, Russia, and Slovenia. Ludwikowski, Rett R., *Constitution-Making in the Region of Former Soviet Dominance* (Durham, NC: Duke University Press, 1996).
- ⁴ United Nations, ‘United Nations Assistance to Constitution-making Processes’, Guidance Note of the Secretary-General (April 2009; no document number), available at <http://www.unrol.org/doc.aspx?n=Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf>.

Key words

Interim arrangements, Role of international actors, External actors, Fragile states, State fragility, Transitional justice, Government of national unity, Enactment, Referendum, Promulgation, Participation, Constituent assembly.

Additional resources

Many institutions are engaged in researching and publicly providing knowledge options for discussion. Some of these actors specialize in a particular policy area or work only in particular regions. Other resources that can support practitioners’ work include the following.

- **UNDP Crisis Prevention and Recovery Programme**

<<http://www.undp.org/cpr/>>

The United Nations Development Programme (UNDP)’s Crisis Prevention and Recovery Programme works to aid countries struggling with conflict and violence by providing risk reduction, prevention, and recovery support. The website has programmes and resources concerning early crisis recovery, gender equality, the rule of law, and state building. It also has a ‘Practical Guide’ to needs assessment in a post-conflict situation.

- **USIP Center for Post-conflict Peace and Stability Operations**

<<http://www.usip.org/programs/centers/center-post-conflict-peace-and-stability-operations>>

The United States Institute of Peace (USIP), an independent organization

funded by the US Congress, created the Center for Post-Conflict Peace and Stability Operations to conduct research, identify best practices, support training and education efforts, and develop tools for post-conflict and peace stability operations. The USIP also has programmes and publications on peace building, the rule of law, and constitution building to promote stability in conflict-affected areas of the world.

- **ConstitutionNet**

<<http://www.constitutionnet.org>>

ConstitutionNet, a global online resource, was established as a joint initiative of International IDEA and Interpeace and is maintained by International IDEA with funding from the government of Norway. It aims to service the knowledge needs of an expanding group of those involved in constitution building. The site provides an online edition of this Guide, as well as access to and information about other knowledge tools, including a training curriculum, discussion papers and a virtual library of materials compiled from selected processes globally.

- **International Institute for Democracy and Electoral Assistance**

<<http://www.idea.int>>

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. Its mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics. IDEA's website provides information on regional constitution-building processes, interviews with national practitioners, and the State of Democracy tool which practitioners may use to gauge citizens' perceptions of democracy deficits, including from a constitutional angle.

- **ConstitutionMaking.org**

<<http://www.constitutionmaking.org/>>

ConstitutionMaking.org is a joint project of the Comparative Constitutions Project (CCP) and the USIP. Its goal is to provide designers with systematic information on design options and constitutional text. The organization's website compiles resources, drafts reports on constitution-making trends, and provides a forum for discussion of a range of constitutional issues, as well as a database of constitutions. It also has a blog on constitutional developments around the world.

- **Venice Commission**

<http://www.venice.coe.int/site/main/Presentation_E.asp>

The European Commission for Democracy through the Law is an independent legal think tank that deals with crisis management, conflict prevention and constitution building. It is dedicated to promoting European legal ideals, including democracy, human rights and the rule of law, by advising nations on constitutional matters. The website offers country-specific opinions and comparative studies on European constitution-building processes.

- **University of Richmond**

<<http://confinder.richmond.edu/>>

The University of Richmond, located in Richmond, Virginia, is the home of the Constitution Finder tool. This search-powered database of constitutions, charters, amendments and other relevant documents provides links to official postings of national documents.

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CHAPTER 2

CHAPTER 2

Principles and Cross-cutting Themes

Nora Hedling

1. Overview

This chapter examines the various ways in which practitioners have used constitutions to establish and elevate certain principles. The chapter also explores the relationship between those principles and the constitution's meaning and operation. It investigates how principles develop, whether through negotiation and explicit incorporation into the constitution, or by subsequent emergence from the text, structure and implementation of the constitution. Moreover, it looks at how constitutional principles can guide the policies of government or support the establishment of certain rights and legal structures. Finally, it explores a selected number of cross-cutting themes that commonly arise in the development of constitutions. Six cross-cutting themes are briefly explored: democratic governance, the rule of law, the management of diversity, gender equality, religion, and principles related to international law. In briefly discussing how constitutions address these concepts, the chapter explores how forces and trends within a country can shape the form and meaning of related constitutional principles and provisions. It provides examples of constitutional principles from different constitutions and constitutional processes for the purpose of illustration, but not necessarily as recommendations. Constitution builders are encouraged to further explore the constitutions and contexts of intriguing examples but should remember that provisions work differently in different contexts and should not be copied or imported from one constitutional setting to another without careful consideration.

Key ideas

- A constitution embodies certain moral and ethical norms and values in the form of constitutional principles, sometimes explicitly stated and at other times derived subsequently through judicial interpretation. Constitutional principles can either set out general but obligatory rules or serve as aspirational

standards to be met to the greatest extent possible. Constitutions are legal documents which are written, enacted, interpreted and accepted in the light of the principles they explicitly or implicitly advance.

- This chapter discusses principles explicit in, supported by, or developed from constitutions. However, societal values derived from other sources, such as religious or cultural norms and values or the values of international law, may also influence the implementation of the constitution, whether or not they are explicitly embraced by the constitution.
- Drafters may articulate constitutional principles explicitly in the text of the constitution. Principles may also be implied or derived from the structure and interaction of provisions. Political choices made and negotiations during constitution building often determine whether a given principle is explicitly embraced.
- In contexts of serious conflict, agreement on common values among individuals and groups who have experienced violence, lawlessness and human rights violations may prove particularly challenging. In some cases, as the implementation of the constitution unfolds, constitutional principles may come to be identified as fundamental, even though the drafters did not specifically designate them as such. Constitutional principles may later emerge from specific provisions and commitments contained in the constitution, as well as customary understanding and the norms of international law.
- Constitutional principles may serve as expressions of shared values, and can thereby provide a general framework for managing differences, even where divisions run deep. Where agreement on specific provisions proves impossible, constitution builders may instead be able to agree on broadly-worded principles, expecting that judges or subsequent legislation will develop them more fully. For instance, all parties may support a firm commitment to equality yet disagree on the wording of specific provisions designed to effectuate that equality. Nevertheless, agreement on principles will often constitute a great achievement. In states affected by conflict, failure to agree on common values and principles can transform constitution building into a dividing rather than uniting process.
- Many constitutional principles relate to the constitutional status of identity. Multi-ethnic, multiracial, multi-religious, multicultural, pluri-national, interracial and non-racial represent just a few terms that are likely to appear in the constitutions of diverse states. These terms highlight different notions about the relationships between diverse groups and the state. Identity issues are also raised by a constitution's relationship to religion and the way in which it addresses gender equality.

2. The role of constitutional principles

Each constitution contains a set of principles that explain its purpose and normative foundation and guide the understanding of the constitution as a whole. These principles are often rooted in a country's historical experience; they may reflect values that are commonly held or respected by the people. Principles may demonstrate and embrace international and regional standards, either in an obligatory or in an aspirational sense. Other principles generally address current problems confronting the state. Some result directly from a collective experience of conflict and a desire to establish peace.

Each constitution sets out principles that explain its purpose and normative foundation and guide the understanding of the constitution as a whole. Enshrining shared values, these principles can contribute to a sense of unity and enhance belief in and commitment to the constitution among citizens.

2.1. Embodying values

Generally, the principles set out in a constitution serve as a broad definition of the aims and purposes of government. Constitutional principles can reflect the ideology or identity of the state. As such, and at the most basic level, they serve as the symbolic embodiment, as well as a celebration, of a society's commitment to an idea, value, or way of life. Similarly, the articulation of principles also serves an educational purpose. They inform the public and other governmental institutions about the purposes and objectives of the constitution and the government. As the enshrinement and symbol of shared values, constitutional principles can contribute to a sense of unity. Furthermore, principles, as clear statements of the purpose and priorities of the constitution, may increase belief in and commitment to the constitution among citizens, a crucial element for its successful implementation.

2.2. Creating agreement

Constitutional principles have a great capacity to unify even a diverse society with various competing interests. They may permit agreement amidst great conflict, by articulating shared values and aspirations at a level of generality that diverse groups can often accept. Principles can be used to guide, and sometimes limit, negotiations. Commitment to a certain principle up front, such as a certain form of government, can effectively take an issue off the table, limiting the influence of those opposed to that principle. A commitment to certain principles can also be a tool for breaking political deadlock and creating consensus on the basis of which negotiations can be taken forward during the drafting process. Once broad principles can be agreed upon, a commitment to creating a constitution that complies with them can be a motivating reassurance to different

Constitutional principles may permit agreement amid conflict by articulating shared values and aspirations at a level of generality that diverse groups can accept. Commitment to certain principles can also be a tool for breaking political deadlock and creating consensus.

groups. One example of principles serving as this kind of commitment is found in the drafting experience of South Africa, where the principles agreed upon served as a form of agreement or a pact among the parties involved. All parties were assured that the agreement established would not be breached—the principles agreed upon became a legally binding, judicially enforceable basis for building the constitution (see box 1).

Box 1. South Africa: principles setting the course of constitutional development

Constitutional principles played an important and unique role in the development and implementation of the South African Constitution. Early political negotiations produced agreement on 34 fundamental and legally binding principles, including commitments to a unitary state with common citizenship, racial and gender equality and constitutional supremacy. These principles served not only as a foundation for the Interim Constitution but also as a framework for negotiating and drafting the 1996 Constitution. Before the 1996 Constitution entered into force, the Interim Constitution required the newly constructed Constitutional Court to certify that the 1996 Constitution complied with all 34 fundamental principles. The binding commitment made to these principles exemplifies how legal safeguards can entrench certain norms in the constitutional order: the 34 Principles established by the Interim Constitution guided and—perhaps more importantly—limited the scope of negotiation concerning the final text of the 1996 Constitution.

The South African Constitutional Court rejected the first draft of the 1996 Constitution because it did not fully uphold the 34 Principles. The draft Constitution failed, for example, to allocate sufficient power to provincial governments.* During the drafting process, the various political parties hotly contested decentralization: the Democratic Party and the Inkatha Freedom Party sought increased decentralization while the majority party, the African National Congress (ANC), sought a highly centralized state.** The draft Constitution presented to the Constitutional Court in May 1996 favoured centralization, reflecting the interest of the ANC. Meanwhile, the 34 Principles emphasized the necessity for ‘legitimate provincial autonomy’ and explicitly stated that ‘The powers and functions of the provinces defined in the Constitution . . . shall not be substantially less than or substantially inferior to those provided for in this [Interim] Constitution’*** The Court struck down the centralization bias favoured by the ANC. By upholding this principle of decentralization, the Constitutional Court provided a legal safeguard against majoritarian rule. The binding commitment made to the 34 Principles demonstrates how legal safeguards can entrench certain norms in the constitutional order.

* Certification of the Constitution of the Republic of South Africa, 1996. Constitutional Court of South Africa, Case CCT 23/96, paras 471–81.

** Sarkin, Jeremy, ‘The Political Role of the South African Constitutional Court’, *South African Law Journal*, 114 (1997), p. 138.

*** Principle 20, Schedule 4 of the Constitution of the Republic of South Africa, Act 200 of 1993; and Principle 18, Schedule 4 of the Constitution of the Republic of South Africa, Act 200 of 1993, as amended by section 13(a) of Act 2 of 1994. See the annex.

As points of agreement, principles provide the foundation for creating an effective government. As discussed above, they may even set concrete limits to and guidelines for the development and enforcement of the constitution. However, providing expressions of shared values that serve as points of agreement for parties in opposition is not the only sense in which principles are meaningful. Though often broad and general, they need not be seen as mere lip service to the ideas they represent. They may also carry significance for matters arising in the future as decision makers rely on principles to determine their course of action, especially where the constitution does not provide more detailed guidance. Furthermore, clarity about a principle’s meaning within the constitution often follows from decisions which acknowledge particular principles as the basis for substantive policies or powers. This clarity may, in turn, increase the influence of that principle as constitutional authority. As discussed in the following sections, constitutional principles can carry a significant degree of influence as both courts and government actors rely on constitutional principles to guide their decisions.

Constitutional principles provide the foundation for creating an effective government.

2.3. Informing the meaning of the constitution

Constitutional principles guide the decisions and actions of governmental institutions and officials of the executive and legislative branches, and inform the interpretation of the constitution by members of the judiciary. Constitutions by their nature are not able to provide detailed rules for every conflict or question that will arise in their implementation. Therefore, general principles are sometimes the only basis on which to understand the demands and requirements of the constitution in a given situation. Additionally, ambiguous constitutional language or an absence of direction on a particular matter is sometimes an intentional characteristic of a constitution. Ambiguity can result from a lack of consensus among the drafters of a constitution who, rather than let the constitution-building process stall, choose to defer particularly contested questions to the decision makers implementing the constitution. When a constitution is silent on particular questions, constitutional principles may become the key source of guidance to later decision makers.

Constitutions cannot provide detailed rules for every conflict or question that will arise in the course of their implementation. General principles are sometimes the only basis on which it is possible to understand the requirements of the constitution in a given situation.

Principles, both written and unwritten, guide courts and governments in their reactions to unforeseen issues or issues otherwise not specifically addressed in the constitution. One example of the influence of principles in the absence of more specific direction

comes from Canada, where the Supreme Court has relied on derived constitutional principles to resolve the question of Quebec's ability to secede.¹ Because the constitution does not explicitly address the question of secession, the Court analysed the Constitution and found four fundamental, though unwritten, constitutional principles: federalism, democracy, the rule of law, and respect for minorities. The Court determined that the principles are 'not merely descriptive, but ... also invested with a powerful normative

Clarity about the meaning of a principle within the constitution often follows from later decisions which acknowledge particular principles as the basis for substantive policies or powers.

force, and are binding upon both courts and governments'. Under this analysis, the Court found that, while unilateral secession was not constitutional, the principles demanded that the federal and provincial governments enter into negotiations if the citizens of Quebec were to vote for secession.

Another example of reliance on constitutional principles to answer such contested questions comes from the South African Constitutional Court, which, in its landmark decision banning the death penalty, referred to and relied on the principle of *ubuntu*.² *Ubuntu* is a philosophical concept about human existence and interrelation. It has helped drive the nation's political development and has been at the centre of many political debates, including those over reconciliation and labour relations.³ While the Constitution in force did not explicitly address the question of whether the death penalty amounted to an unlawful violation of fundamental rights, it did embrace the principle of *ubuntu* in a concluding section,⁴ which guided the Court's decision on the matter: capital punishment did not accord with the principle of *ubuntu* and was not constitutional. The principle thus became an important instrument in understanding the meaning of the Constitution for a difficult and disputed question.

3. Enshrining and enforcing constitutional principles

As discussed above, principles may emerge from a process of negotiation and contestation, arising from the voices of the various groups participating in the constitution-building process. Though principles may sometimes reflect the interests of dominant groups, they often represent compromises among participating groups. Principles may also be rooted in norms and values emerging from the cultural, traditional, religious, economic and political spheres. Allowing vigorous debate and encouraging the inclusion of competing voices with divergent opinions about core state values can therefore support the creation of meaningful and enduring constitutional principles. Just as drafters may find it easier to reach agreement on broader levels, other stakeholders including citizens will probably be eager to share input on the broad questions addressed by principles.

Constitutional principles often represent compromises among groups participating in the constitution-building process. Vigorous debate and the inclusion of competing voices with divergent opinions can help to create meaningful and enduring constitutional principles.

Once principles have been identified and agreed upon in this way, they should inform every provision of the constitution, ensuring consistency and harmony throughout. They are also usually written into the constitution in specific sections, sometimes with specific guidelines for their enforcement.

Not all constitutional principles, however, are explicitly identified as such in the constitution. They may not even emerge directly from the process of negotiation, debate and public participation. Instead, they may emerge over time from a deeper understanding and development of the constitution as it is implemented and its provisions are carried out. This section now discusses the ways in which constitutional principles are enshrined in the constitution as well as the various ways in which they may be enforced.

Constitutional principles may take the form of founding provisions embodied in the text of the constitution or its preamble; or of directive principles, which set out the fundamental objectives of the state; or of derived principles, underlying the text.

3.1. Founding provisions

A number of constitutions contain sections dedicated to highlighting constitutional principles. The South African Constitution's first chapter sets out its Founding Provisions (see the annexe). These lay out the foundational values of the state and include commitments to human dignity, equality, human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution, universal adult suffrage, regular elections, and a multiparty system of democratic government. The section also identifies the official languages and calls for their promotion, as well as for respect for and the promotion of all languages commonly used in South Africa.⁵ Turkey's Constitution follows its Preamble with a section dedicated to General Principles, providing the form and characteristics of the state, and describing its fundamental aims and duties, which include safeguarding democracy and ensuring the welfare, peace and happiness of the individual and society.⁶ Sections such as these, dedicated to foundational principles, provide the opportunity to set out an unambiguous commitment to the values at the heart of the constitution and the state, providing clear guidance on the interpretation and implementation of the constitution.

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3.2. Preambles

Drafters often articulate principles in the preamble of a constitution or in a section devoted to founding principles. Preambles set out the purposes and aspirations of the constitutional text, expressing embraced norms, values and principles, often making reference to values developed throughout a country's history. Drafters and judges rarely attach legally enforceable rights to these promises and principles, and the preamble therefore

The preamble to a constitution sets out the purposes and aspirations of the text, expressing norms, values and principles often developed throughout a country's history. Drafters and judges rarely attach legally enforceable rights to these principles, but judges have relied on them to support an understanding of other constitutional provisions.

generally serves as a broad benchmark to which political institutions and officials can aspire, but is not necessarily accepted as a source of legal rules. Nevertheless, judges have relied upon the preamble to support an understanding of other constitutional provisions. For example, the Supreme Court of India referred to the Preamble of India's Constitution in its interpretation of other constitutional provisions, thereby endowing the Preamble with a degree of legal force. In the *Kesavananda* case, for example, the Supreme Court ruled that Article 368, which outlines the amendment process, did not permit the passage of amendments that alter the Constitution's basic structure.⁷ The Court relied on norms set out in the Preamble to arrive at this decision. Thus, though often lacking direct legal enforceability, preambles can colour legal interpretation. Furthermore, though experience indicates that preambles are unenforceable in the legal context, this is not always so. Barring an explicit constitutional statement declaring the inapplicability of principles found in the preamble, the judiciary, in interpreting the constitution, will act as the final arbiter of principles found in preambles, determining their influence and application. Moreover, principles found in the preamble are nonetheless meaningful in providing guidance to decision makers on the values of the constitution and as a symbol that creates certain expectations and understandings of the ideals of the constitution.

3.3. Directive principles

Directive principles set out the fundamental objectives of the state. They direct and inspire policy and are often intended to guide (but not bind) future governments. They are not usually considered judicially enforceable but may be used to inform interpretation of the constitutionality of legislation.

Constitutional principles are also found in sections dedicated to directive principles,⁸ which set out the fundamental objectives of the state and generally sketch the means by which governments can achieve them. Directive principles direct and inspire legislative policy, as well as provide the impetus for reform. They can potentially address and influence a wide range of constitutional issues, including socio-economic development, reconciliation of divided groups, official ethics, cultural development, or environmental issues. Directive principles often promote social and economic policies intended to guide—rather than tightly bind—future governments.

Directive principles serve mainly to guide or influence political power. If they attain widespread political acceptance, political enforceability will follow, as politicians contravene directive principles at their political peril. Unless enacted in legislation, directive principles are usually not considered to be judicially enforceable. This is not, however, always the case: directive principles can have legal force even without

implementing legislation. The Supreme Court in Ghana, for instance, in the *Lotto* decision, determined that all constitutional provisions, including directive principles, are legally enforceable unless the constitution explicitly states otherwise.⁹ Similarly, directive principles may be used to inform interpretation of the constitutionality of legislation. The Supreme Court of Sri Lanka and the Supreme Court of India have both recognized and explored the constitutional significance of directive principles.¹⁰

Whether exhibiting legal force or influence on political decisions, directive principles may prove influential in other ways as well. They can serve to educate the electorate on the government's duties, providing a standard by which to measure a particular government's progress or efforts. They can also help rally political support around the subsequent implementation of those principles into specific legislation. This dynamic can in particular develop when the directive principles reflect concerns for the welfare and economic development of ordinary people. On the other hand, directive principles may be less successful in providing help and service to politically under-represented or marginalized groups since those groups may lack the political support necessary to motivate action under the directive principles.

3.4. Derived principles

The written text of a constitution may not explicitly state all of the norms relevant to its interpretation. Yet the totality of a constitution's provisions or structure may indicate the presence of important underlying principles. As these principles gain prominence and widespread acceptance—through court decisions, academic examination, or general acceptance as such—their impact on the functioning of the state may become significant, influencing conventions, practice, and the considerations of political actors. Moreover, emerging norms may ultimately take on legal force. When the judiciary acknowledges constitutional norms, those norms can inform constitutional interpretation and even drive legal decisions.¹¹ For instance, politicians and judges may come to interpret a federal structure laid out in the constitution as a commitment to the principle of federalism, though constitutional drafters may not have explicitly identified it as such. An example of reliance on such implied principles by the Supreme Court of Canada was discussed above.

The legitimacy of derived constitutional principles, also known as implied or unwritten principles, is not universally accepted. Though most observers agree that courts and other governmental actors sometimes rely on derived principles, some question whether they should do so. The practice is problematic because it can be seen as undemocratic. Judges are usually not elected officials, subject to the democratic will. Moreover, when a constitution is ratified, it is uncertain what exactly is being ratified if potential unwritten principles emerge later. On the other hand, precisely because future

Derived constitutional principles are also known as implied or unwritten principles. The written text of a constitution may not explicitly state all the norms relevant to its interpretation but the underlying values may be drawn on to inform future decisions. Emerging norms can ultimately take on legal force.

circumstances are not foreseeable, the judicial branch may need to rely on an examination of the underlying values of a constitution in arriving at a decision. This matter need not be settled by the drafters of a constitution but should be noted. Because courts have derived principles from the constitutional text, drafters and other constitution builders may not fully control or be well aware and carefully considerate of the existence of constitutional principles, which will also depend on developments in society at large and the underlying facts of particular cases. Drafters and constitution builders should, however, be aware of the principles supporting and linking the provisions of a coherent constitution, as well as the governmental framework it creates, which sets the background for constitutional interpretation.

Box 2. Directive principles in the Indian Constitution

Article 37 of India's 1950 Constitution declares that its Directive Principles of State Policy shall not be enforced by any court.* Instead, they constitute socio-economic guidelines, not guarantees, which the government should strive to achieve—a political blueprint for the development of government policies. Although directive principles influence the Supreme Court's interpretation of legally enforceable fundamental rights, they operate mainly as a political safeguard, creating a benchmark against which the electorate can hold political representatives to account. Directive principles include equitable access to property, a prohibition against discrimination based on gender or race, an independent judiciary, proportional representation and empowerment of provincial governments.

Consider education, a field where directive principles have greatly affected Indian society and law. One such principle states that legislation should guarantee children below the age of 14 a free and compulsory education.** In the case *Unni Krishnan JP v. State of Andhra Pradesh*, the Supreme Court cited the directive principle to support its holding that children have an enforceable right to free education until the age of 14.*** After the ruling, non-governmental organizations (NGOs) and other independent actors attempted to build on these achievements by lobbying for legislation that recognized education as a fundamental right. They succeeded in 2001, when the government passed a constitutional amendment recognizing the right to education as a fundamental right. This example illustrates that, while not directly enforceable by courts, directive principles can influence both judicial interpretation and legislative enactments. The example also demonstrates how, through active political and legal engagement, norms and principles can transform law.

* Article 37 of the Constitution of the Republic of India (1950 as amended to 1995).

** Article 45 of the Constitution of the Republic of India (1950 as amended 1995).

*** *Unni Krishnan J.P v. State of Andhra Pradesh*, 1993 SCC (1) 645.
See also the annex.

4. Exploring selected themes

In addition to examining the nature and purpose of constitutional principles, this chapter looks briefly at a number of issues that constitutions frequently address. This section explores selected cross-cutting or over-arching themes and discusses how constitutions might take up issues related to them in the form of constitutional principles as well as other provisions. The topics covered are democratic governance, the rule of law, diversity, gender, religion, and the principles of international law. In discussing each issue, this section addresses two factors that are part of the underlying analytical framework of this Guide. The first is whether the relevant drivers of change are using the constitution-building process to disaggregate power from, or aggregate power to, the central government or a particular governmental institution. The second is whether constitution builders adopt legal mechanisms or rely on political accountability to enforce the relevant constitutional arrangements and constitutional principles.

4.1. Democratic governance

A commitment to democratic governance exists across modern constitutions. The principle of popular sovereignty, or governance by the people, identifies the people as the source of governmental power and provides legitimacy for the exercise of that power. Many constitutions contain a direct expression of commitment to this principle. The Russian Constitution of 1993 states that the bearer of sovereignty and the source of power in the Russian Federation is the multinational people.¹² This provision both recognizes the diversity within the state and identifies the people as the source of governmental power. In other constitutions the commitment to democratic governance underlies systems and structures put in place by the constitution, such as the creation of mechanisms for direct democracy or representative electoral systems. Drafters can acknowledge popular sovereignty by simply including a provision guaranteeing universal voting rights or a declaration that legitimate government must serve the will of the people. Article 7 of the Constitution of East Timor, for example, guarantees universal suffrage and underscores the value of the multiparty system.¹³

Many constitutions directly express commitment to the principle of democratic governance. This can give rise to many forms of government—a federation, a unitary system that centralizes power, and provisions that devolve particular legislative or administrative powers to regional or local governments.

Constitutional commitments to democratic governance can give rise to many forms of government. Some constitutions call for democratic governance in the form of a federation that decentralizes some amount of government control to regional entities. Others may establish democratic governance through a unitary system centred on an elected legislative or executive body. Where trends toward aggregation exist, constitution builders will tend to aggregate power at the national level, often within particular institutions. For example, those who favour the aggregation of power may support a unitary system of government and the concentration of decision making in a powerful

legislature or executive, the same institution that will control the military or the country's natural resources. Alternatively, drafters can disperse power by including provisions that devolve particular legislative or administrative powers to regional or local governments. Decision making will occur increasingly at lower levels of government. Regional or local authorities may act independently or jointly with federal authorities in areas such as the police force or educational systems. Dispersal may require the distribution of power among the different branches of government at the national level—better known as the separation of powers. A strong separation of powers reflects no single centre of governmental authority, even if the constitution does not devolve power to regional or local authorities.

Democratic governance requires both political and legal safeguards to operate effectively. Political safeguards include periodic elections through which the public holds its representatives accountable for drafting laws and implementing policy. The prospect of losing power has proved historically effective at aligning representatives' and

Democratic governance requires both political and legal safeguards. Political safeguards include periodic elections but a uniformly political approach may not be enough to prevent powerful interests exerting excessive influence. Legal safeguards guaranteeing rights, as well as designating and limiting governmental power, can counter this, as can oversight by independent bodies.

constituents' interests. Fair elections thus serve both as an expression of the people's will and as a check on governmental power. Some constitutions afford politically elected officials and institutions greater discretion when exercising governmental power and trust the electorate to right any resulting wrongs. Direct democracy also provides political safeguards: constitutions might require or permit popular referendums to answer particular policy questions.

Nevertheless, history has demonstrated weaknesses in a uniformly political approach. A democracy that is reliant exclusively on political checks and balances could permit powerful interests—whether corporations, the military, foreign governments or individual politicians—to skew public policy by exerting excessive influence on voters or representatives. Oversight by independent bodies may serve to limit opportunities for such influence. Furthermore, minority interests often lose out in a process that is driven exclusively by majority vote. Legal safeguards guaranteeing rights, as well as designating and limiting governmental power, can counter this majority bias. Legal safeguards generally constitute judicially enforceable provisions protecting individual rights against government violation and separating and limiting governmental powers. In a system of legal controls, constitution builders will have articulated the design of government, the specific powers of particular institutions, and the protections afforded to citizens in the form of individual rights, removing these questions from the discretion of political actors. Oversight bodies—chiefly courts—usually enforce these provisions.

4.2. Principles related to the rule of law

Another principle which most modern democracies embrace within their constitutions is the rule of law. The rule of law dictates that comprehensible and accessible written laws,

whether constitutional or legislative, guide government decisions and actions. Moreover, the government must apply these laws fairly and consistently to everyone, including government officials, and everyone must have access to justice and the enforcement of the laws. Therefore, a commitment to the rule of law also requires vigilance against political corruption and the abuse of power, which can uniquely damage a society and a government politically, economically and socially.

A commonly accepted and practical, rather than theoretical, conception of the rule of law adds an element of justice. So, in addition to law being predicable, accessible and universally applicable, the rule of law requires a just legal system. Moreover, the rule of law demands more than merely adhering to the law or the valid enactment of law. It must encompass equality and human rights and must not discriminate unjustifiably among classes of people.

Constitutions contain the fundamental and, most often, supreme law of the state and the rule of law dictates the enforcement of those principles above all other laws.

Many constitutions contain express commitments to the principle of the rule of law. Constitutions can promote the rule of law in a number of other ways, most fundamentally by adopting a coherent legal framework. The doctrines of constitutional supremacy, judicial review, and independent oversight bodies can buttress that framework. Ensuring the enforcement of constitutional guarantees is also fundamental. Many constitutions contain supremacy clauses. For instance, the Constitution of Rwanda, in both the Preamble and a separate provision, declares the supremacy of the Constitution.¹⁴ Any conflicting law is null and void. Thailand features a similar provision declaring the unenforceability of any law that is inconsistent with the constitution.¹⁵ Supremacy protects rule-of-law measures such as legal structures, checks and balances, and guarantees of rights.

Constitutions also preserve fundamental principles and values by making amendment processes burdensome. A higher standard for amendment of the constitution than for the passing of legislation discourages rash changes to fundamental law. In many constitutions, such as Brazil's, any amendment requires the support of a super-majority.¹⁶ Other constitutions further ensure the permanence of certain principles and values by prohibiting amendment. The German Constitution, for instance, entrenches a number of principles, including a commitment to human rights, democracy, and the separation of powers.¹⁷ The rule of law does not *require* entrenched principles; instead, entrenched provisions should be seen as only one possibility among myriad ways in which the rule of law is pursued constitutionally. Constitutions which are more comprehensive and contain more detail may benefit from less restrictive amendment processes in some areas, enabling development and improvement over time. On the other hand, shorter framework constitutions may benefit from higher barriers to amendment as a protection of the basic rights and principles they enshrine.

Constitutions also preserve fundamental principles and values by making the process of amendment burdensome. Some constitutions ensure the permanence of certain principles and values by prohibiting amendment.

Because the judiciary applies the law to individual cases, it acts as the guardian of the rule of law. Thus an independent and properly functioning judiciary constitutes a prerequisite for the rule of law. The rule of law also requires the right to a fair hearing and access to justice. Judicial processes, including constitutional review, ensure that the other branches of government also adhere to the rule of law. The chapter of this Guide on the judiciary (chapter 6) discusses review mechanisms in greater detail.

The rule of law is also very much concerned with combating corruption. Increasing transparency within the bodies and branches of government, guaranteeing the

The judiciary, which applies the law to individual cases, acts as the guardian of the rule of law. Thus an independent and properly functioning judiciary is a prerequisite for the rule of law, which requires a just legal system, the right to a fair hearing and access to justice.

independence of corruption monitors such as the media and civil society organizations, and establishing designated bodies to fight corruption—all effectively reduce corruption. Checks and balances between the branches of government can also combat corruption by allowing government branches and bodies to oversee each other.

4.3. Principles related to diversity

Post-conflict settings often require that constitutional principles address the management of diversity and promote a particular concept of identity. Diversity and identity principles are particularly important where ethnicity and religion divide groups. Yet no consensus exists on how constitutions should address diversity, and different conceptions significantly affect both the content of the constitution and the operation of government.

One approach promotes norms that recognize and accept diversity, though it does not view them as a decisive factor in ordering the state. The focus here is on building unity rather than empowering groups based on their identities. These norms emphasize that governments can manage difference partly by highlighting a shared identity rather than

Post-conflict settings often require that constitutional principles address the management of diversity, particularly where ethnicity and religion divide groups. Yet no consensus exists on how constitutions should address diversity. One approach is to promote norms that recognize diversity; at the other end of the spectrum, particular rights can be granted on the basis of group identity.

divisions. From this perspective, there is also an argument for maintaining equality among diverse groups by invoking and relying on policies such as non-discrimination. Especially in the presence of aggregated power—which may pose a particular threat to minority or marginalized groups which may have limited access to power—this conception of diversity may require robust legal safeguards to protect equality. A strong bill of rights and oversight mechanisms such as judicial review can provide such safeguards.

At the other end of the spectrum, another set of norms seeks not only to acknowledge diversity but also to grant particular rights or powers on the basis of group identity. These norms often promote the dispersal of power rather than its aggregation, providing for greater power and autonomy on a regional level. Canada has adopted an approach that allows for a degree of autonomy on the basis of nationality, resulting in asymmetric decentralization. Asymmetric decentralization distributes powers unequally or differently to different regional governments. That is, not all sub-states or regions exercise the same powers. One region might reflect a distinct identity with distinct needs. Thus the constitution might empower that region—and only that region—to provide for those needs. In Canada, following the nationalist movement in Quebec, the constitutional framework has allowed for the decentralization of certain powers to Quebec but not to other provinces.¹⁸

Power-sharing arrangements also fall at this end of the spectrum, creating particular rights or powers on the basis of identity. In Bosnia and Herzegovina, for example, the Constitution provides for a presidency that consists of three elected members, one Bosniac, one Croat and one Serb. Each member operates as chairperson of the presidency on a rotating basis.¹⁹ These structures attempt to ensure the political participation and representation of distinct groups on the basis of that group identity. Other countries have adopted multilingual policies, proportional electoral systems, or other governmental structures that attempt to promote the representation of minorities—such as reserved seats for minority groups or quota systems. For example, under the Constitution of Pakistan, 10 seats of the National Assembly are reserved for non-Muslims.²⁰

Constitution builders have employed both political and legal safeguards to support the conception of a diverse state. Political enforcement can be based on directive principles or other non-binding guidelines. Subsequent legislation or administrative decisions will elaborate on the meaning of these provisions and what they require—such as devolved powers, or enforceable rights and guarantees, or increased protection of minority languages through education. Constitution builders should also consider that vague constitutional principles will probably require political support, since subsequent judicial or political enforcement will shape the meaning of relevant provisions in everyday life. Article 125 of the Iraqi Constitution guarantees the ‘administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians and all other constituents’.²¹ While such provisions may be read as straightforward and even expansive guarantees, a lack of detail leaves questions of the extent and manner of enforcement to political bodies and actors who will create and administer supporting legislation and regulations. Without further legislative implementation or judicial interpretation, the open-ended nature of this provision prevents a predictable understanding of how it will be applied.¹⁸

Reserved seats for minority groups or quota systems and other measures may aim to ensure the political participation and representation of distinct groups on the basis of group identity.

Constitutions can also permit legal mechanisms for the management of diversity. Legal controls are more likely to appear as explicit and detailed provisions addressing equality and identity rights. The controls may proscribe discriminatory practices on the basis of ethnicity, sexual orientation or gender; offer entitlements for historically oppressed or under-represented groups—such as positive discrimination provisions to promote inclusion in society and government; or create enforceable rights to protect religious and cultural freedom. Legal efforts include constitutional provisions that guarantee rights aimed at cultural preservation—such as a guarantee of education in one’s native language. Legal controls may also appear as constitutional provisions mandating representation according to identity, through reserved legislative seats—seats filled only by a member of an under-represented group—or through quota systems that reserve a threshold number of candidates or governmental positions for under-represented groups.

A key characteristic of legal controls is judicial enforcement or other independent oversight to monitor and potentially override political power, whether decentralized

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or otherwise dispersed. That is, even if particular regions exercise autonomy, a constitution may require that all government institutions respect diversity and ensure equality. If they fail, it may be possible for alleged victims to bring their complaints to the judiciary or another non-political authority such as an ombudsperson, who is charged with investigating and representing their interests.

Box 3. Addressing diversity: Bolivia’s pluri-national state

In 2006, Bolivia, which has the highest indigenous population of any South American country, elected its first indigenous President, Evo Morales. He had won popular support as part of the nationwide indigenous movement aimed at restoring indigenous rights and rewriting the Constitution. Upon taking office, Morales instigated a series of political changes designed to disperse power to indigenous communities. The 2009 Constitution emphasizes the ‘pluri-national’ character of the state. Entitled the Constitution of the Pluri-national State of Bolivia, it highlights the importance of diversity within Bolivia, a norm that is particularly apparent in the Preamble, which recalls Bolivia’s diverse origins and the other aspects of indigenous culture, such as an intimate relationship with land and territory.

The Constitution further addresses the issue of diversity within a unified state. Confronting a history of under-representation and inequality, the drafters of the Constitution included several commitments to empowering Bolivia’s indigenous population. The Constitution focuses on affirming the rights of indigenous people throughout and devotes an entire chapter to ‘Derechos de las Naciones

y Pueblos Indígena Originario Campesinos’, which can be translated ‘Rights of the Nations and Rural Native Indigenous Peoples’. In addition to officially recognizing numerous indigenous groups and their languages, the Constitution extends territorial autonomy and self-government rights by vesting a number of exclusive competences in indigenous regional authorities while also creating other concurrent or shared competences between the regional and national authorities. Bolivia’s extension of power to regional and ethnic authorities represents a significant disaggregation of power in support of empowering traditionally under-represented groups.

* Chapter 4 of the Constitution of the Pluri-national State of Bolivia, 2009.

4.4. Principles related to gender

Constitution builders also should consider gender equality and women’s rights. Though a commitment to gender equality is commonly proclaimed, the forms of these commitments vary widely among constitutions. Some constitutions require a strict commitment to non-discrimination. Others articulate affirmative action or positive discrimination policies to support gender inclusion and participation. Under other constitutions, equality provisions result in political bodies passing enforcing measures. In addition to provisions directly and specifically related to gender equality, constitutional principles regarding gender are expressed in human rights provisions, general equality provisions, provisions addressing citizenship, and even the language of the constitution.

Constitution builders should consider gender equality and women’s rights—in some cases a strict commitment to non-discrimination, in others affirmative action or positive discrimination policies to support gender inclusion and participation.

4.4.1. Constitutional language

To ingrain principles of gender equality, one immediate and simple method is to include gender-neutral language in the text of the constitution. The use of gender-neutral language signifies an apparent commitment to equality between men and women. Though a preference for ‘masculine’ language over gender-neutral language can be seen as a reinforcement of a hierarchy of men over women, it is commonly found in constitutions and other official documents. Masculine pronouns (such as he or him) are often used in reference to individuals described in a constitution. Indeed, masculine language is often embedded throughout the constitution in terms such as ‘mankind’ or the ‘founding fathers’. While some view masculine pronouns as encompassing males *and* females, exclusive use of masculine pronouns and masculine language can obscure and undermine the inclusion and experiences of women, since most often in other settings, including everyday speech, masculine pronouns are used to refer only to men.²³ A number of modern constitutions therefore refer to both individuals and groups without using pronouns, or use pronouns relating to both genders—for instance, ‘he

The use of gender-neutral language in a constitution signifies an apparent commitment to equality between men and women.

or she’ or ‘every person’—in an effort to eliminate any aspect of gender inequality. Constitutions that employ gender-neutral language include those of Fiji, South Africa, Switzerland and Uganda.²⁴

4.4.2. Equal rights

Equal rights provisions provide another opportunity to address gender equality. Under many constitutions, a guarantee of equal rights does not entail a separate delineation of gender rights, but rather ensures the application of rights to everyone, including women. Provisions prohibiting discrimination on the basis of identity, including on the basis of gender, frequently accompany such provisions. Other constitutions specifically refer to women in discussing equality generally or in specific areas such as familial rights and labour rights. The Swiss Constitution contains an article which guarantees equality generally and prohibits discrimination on a number of grounds, including race, origin, gender and lifestyle (see the annex). The same article then goes on to emphasize the equal rights of men and women, stating “Men and women have equal rights. The law provides for legal and factual equality, particularly in the family, during education, and at the workplace. Men and women have the right to equal pay for work of equal value”.²⁵ Another set of constitutions contain provisions that specifically refer to the rights of women, committing the state to certain actions, such as the promotion of gender equality and eradicating gender discrimination. The Constitution of Paraguay states a commitment to ‘foster the conditions and create the mechanisms adequate for making this equality real and effective by removing those obstacles that prevent or curtail its realization, as well as by promoting women’s participation in every sector of national life’.²⁶

4.4.3. Representation

Equal participation and representation in politics is another key constitutional concern. Many constitutions introduce quota systems to ensure women’s inclusion in law-making bodies, as well as other governmental institutions. Such systems compel the integration of women into political processes and governance. Some reserve a certain number of seats for women in a legislative or other government body. The Interim Constitution of Nepal required at least one-third of the members of the Constituent Assembly, the body responsible for drafting the new Constitution, to be women.²⁷ The Rwandan Constitution contains such provisions, reserving 24 out of 80 seats in the legislature’s lower house as well as 30 per cent of the seats in the Senate for women.²⁸ The numbers of elected women in parliament in various countries has frequently exceeded the quotas or number of reserved seats. Not long after the implementation of these quotas, women held 56.3 per cent of the seats in the Rwandan Parliament, the highest level of female parliamentary representation in the world.²⁹

Another form of quota system is found in constitutions that require that a certain minimum number of women to stand as candidates in elections. To prevent political parties from placing women at the bottom of their electoral lists, and thus limiting

their chance of election, many constitutions further require a certain proportion of women candidates across the party list or at the top of a party list. Such a system exists in Argentina, which has a constitutional provision mandating affirmative action as a measure to ensure equal opportunity to run for elected office and an implementing decree setting in place a mechanism to ensure that parties put up women candidates.³⁰ Quotas may also be used to achieve equality in representation outside legislatures. Some constitutions employ quota systems or other measures to maintain a level of gender balance in governmental positions in other areas or levels of government. Pakistan’s Constitution institutes reserved seats for women in provincial assemblies.³¹ The Colombian Constitution features a provision calling for the ‘adequate and effective participation of women in the decision-making ranks of the public administration’.³²

Notably, many countries employ quota systems designed by the legislature or by political parties rather than the constitution. That is, constitutions are not the only, nor necessarily the most desirable, level at which to introduce quota systems. Moreover, quota systems alone do not guarantee the full inclusion of women in political life. There are often also deep-seated social, cultural, and economic factors that contribute to disproportionate gender representation. In striving for a constitution of gender equality, focus should be placed on identifying and combating the structural disincentives that limit women’s participation, as well as increasing positive mechanisms that promote participation.³³ However, although quota systems may have limited effect on the participation and inclusion of many women, they invariably increase the number of women in politics and improve their chances of participation.

Women’s participation and representation in politics is a key constitutional concern. Many constitutions introduce quota systems to ensure women’s inclusion in law-making bodies (as well as within political parties and at different levels of government) but in themselves are not enough to guarantee the full inclusion of women in political life.

The dispersal of governmental power through decentralization or other means may introduce a complicating factor for gender rights. As earlier discussed, decentralization can be a significant means of empowering traditionally disadvantaged groups. However, because women do not constitute a homogeneous, insular group in society but rather exist in every social class, ethnic group and religion, decentralization may fail to advance women’s rights to the same extent as it can strengthen minority rights. To put it another way, a decentralized system may permit a minority group greater autonomy to govern itself, but no degree of decentralization will affect women similarly. On the contrary, in some circumstances progress on women’s rights may require a powerful national centre. Some experts have concluded that decentralization may neglect the needs of groups that are not defined regionally or territorially.³⁴ Furthermore, traditional and religious beliefs can support the exclusion of some for certain roles on the basis of gender; yet preserving the culture embodied in traditional or religious beliefs may actually motivate the devolution of power. As such, regional authorities may favour traditional beliefs over gender equality, particularly if the two principles conflict. Moreover, in a system of dispersed power, efforts to promote equality could look very different across regions,

depending on decisions made by different departments, regions or bodies. On the other hand, in some situations decentralized governments may have greater information and a greater capacity to address the particular needs and conditions of women in a given region. While seemingly unrelated, the degree of aggregation or disaggregation of governmental power will have implications for the protection and promotion of women's equality. For this reason alone, constitution builders should carefully consider these issues together.

Enforcement mechanisms ought to accompany constitutional provisions mandating gender equality. Some provisions forbid action by the government or private parties and these are often enforceable in the courts. Such provisions often prohibit discrimination on the basis of ethnicity, religion, sexual orientation, or gender. Or the constitution may guarantee, as Poland's has, non-discrimination in governmental services, such as education.³⁵ Particular provisions may outlaw gender discrimination in the private sphere, constitutionally guaranteeing equal pay for equal work, as in Mexico.³⁶ Other provisions that require government action, such as the constitutional quotas or reservation systems mentioned above, may also be enforceable by courts which can compel the government to put into action the promises of the constitution. Particularly in a government characterized by dispersed power, such provisions can support a uniform standard of gender equality, a floor below which various regions and government institutions may not descend.

Enforcement mechanisms ought to accompany constitutional provisions mandating gender equality. They may rely on legal and/or political means, being enforceable by the courts or dependent on political support.

On the other hand, constitutional measures aimed at gender equality may additionally or alternatively rely on political enforcement. For example, provisions which allow or require affirmative action or positive discrimination but do not outline specific systems for implementing them leave room

for political actors to make choices in how the constitution's requirements will be met. Consider also directive principles, which express a government's commitment or signal the direction of state policy but do not bind it to a specific course of action. Such general provisions provide constitutional recognition of gender equality yet still permit political actors to determine how that equality should be realized. The form of implementation depends on political support—on the formation of interest groups with a mandate to promote equality and on political representatives passing and implementing legislation advancing gender equality and women's rights.

Box 4. A foundation for gender equality: Ecuador's 2008 Constitution

The struggle for gender equality and women's rights has cast light on intractable problems in Ecuador. According to the Office of Gender in the Ministry of Government, women reported over 50,794 cases of sexual, psychological or physical mistreatment in the year 2000 alone.* As of 2009, the wage differential between men and women was as high as 30 per cent.** Maria Soledad Vela began a lively discussion in the Ecuadorian Constituent Assembly on women's rights and

the enshrinement thereof during the drafting process for the 2008 Constitution. This issue gained salience given the repeated failures to implement gender equality after the 1998 Constitution and the Quota Act and the consequent heightened demands from the NGO and civil service sectors.***

The resulting Constitution not only guarantees equal treatment for men and women—including in education, health care, voting, social security and work—but also provides women with sexual and reproductive rights, property rights, and equal rights in the household. Furthermore, it bans media sexism and intolerance towards women and acknowledges women as a vulnerable constituency—particularly pregnant women, victims of domestic violence, sexually abused children, and elderly women.**** Importantly, the Constitution recognizes an origin of discrimination by distinguishing between gender and sexual identity.***** By recognizing different sexual orientations as well as comprehensively addressing rights guaranteed to women, the Constitution maximizes the chances of effective implementation and enforcement of equality, and represents an advancement of human rights protection.

* US Department of State, Country Reports on Human Rights Practices 2002, *Ecuador*, 31 March 2003, available at <<http://www.state.gov/g/drl/rls/hrrpt/2002/18330.htm>>.

** 'Ecuadorian Legislators Face Gender Equality Challenge', available at <http://www.idea.int/americas/ecuador/legislators_face_gender.cfm> (last accessed October 2010).

*** Rosero, Rocío and Goyes, Solanda, 'Los derechos de las mujeres en la constitución del 2008', *La Tendencia: Revista de Analisis Político*, 8 (October/November 2008), pp. 77–82, available at <<http://library.fes.de/pdf-files/bueros/quito/05108/tendencia2008,8.pdf>>.

**** See, for example Article 11(2) of the Constitution of Ecuador (2008) in the annexe to this chapter.

***** Rosero Garces, Rocío and Goyes Quelal, Solanda, 'Los derechos de las mujeres en la constitucion del 2008'. See also the Constitution of Ecuador 2008, Article 11(2).

4.5. A constitution's relationship to religion

Religious belief undeniably shapes group and individual identities, as well as societies. Religion has historically provided the foundation on which many legal systems have developed. Because of the deep-rooted and inextricable link between religion and society, religion can also contribute to constitution building. Yet in post-conflict settings, religious belief may constitute a source of conflict and thus is a key matter to address in the constitution-building process.

Constitution builders have taken many different paths in incorporating religion into the constitutional order. Constitutions may embrace one or many religions; they may incorporate religious teachings into the legal order or use religious ideology to support or guide their laws; or constitutions may simply recognize religion or religious freedoms. Where religious beliefs are diverse or there are religious conflicts, constitution builders may aim to address religion in a constitution in order to contribute to the creation of a society in which people of different faiths can live peacefully together.

Religious belief has been the foundation on which many legal systems have developed and can contribute to constitution building, but it may itself constitute a source of conflict and thus be a key matter to address in the constitution-building process.

Constitutional provisions related to religion reflect a country's history, culture, traditions and belief systems. They also establish a relationship between religion and the constitution and constitutional laws. There are numerous ways in which constitutions incorporate religion or religious principles but one area of focus in understanding the relationship between religion and a constitution is the degree to which the constitution binds law to religion. The relevant question here is how much influence the principles of any one religion have over the law. A constitution may be closely linked to a specific religion. Conversely, a constitution may embrace many religions, be silent on the question of religion, or draw a clear line between religion and the state.

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A legal system that identifies completely with a particular religion lies at one end of the spectrum. Some constitutions prioritize or favour one religion above others. Indeed, several countries decree an official religion in their constitutions. Under the constitution of Costa Rica, Roman Catholicism is the country's official state religion.³⁷ Yet even within countries that adopt official religions, the influence of religion over government varies. Some constitutions proclaim that the legal system must conform to the tenets of a particular religion. A religious body or actor may interact with government or government functions, as in Iran.³⁸ In other countries, while the official religion may serve as the foundation of the legal system, the constitution may derive force independent of religious law, as in Iraq.³⁹ In still other countries, the recognition of an official religion may be largely symbolic or historical and religious leaders may not exert significant influence over governmental policy. Another example of dispersal has occurred in Indonesia, which recognizes multiple religions but does not privilege one above another.⁴⁰

A constitution may be closely linked to a specific religion, or embrace many religions, or be silent on the question of religion, or draw a clear line between religion and the state. The principle of freedom of religion is considered internationally to be a fundamental human right, and a state's relationship to religion must not lead to any discrimination against non-believers or adherents to a particular belief.

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A number of constitutions sponsor no official religion. The constitutions of some countries, such as France, emphasize secularity, creating a strict separation of religion from the legal system and public life.⁴¹ Although the constitution guarantees religious freedom, it relegates religion to the private sphere and closely protects the legal system from its influence. Government policies or laws address religion and delineate the borders between the public and private

sphere. Where the exercise of private religious beliefs tests those borderlines, courts may be called upon to arbitrate.

Another important aspect of the relationship of religion to the state is the establishment of freedom of religion. Regardless of whether constitutions acknowledge official religions, derive their principles or laws from religious teachings, or strictly limit the influence of religion in governmental activity, democratic constitutions recognize and provide protection for the right to religious freedom. Freedom of religion is considered internationally to be a fundamental human right and is protected by the 1966 International Covenant on Civil and Political Rights (ICCPR).⁴² A state's relationship to religion must not impair the enjoyment of any of the rights established in the Covenant, including freedom of religion and the right to religious practice, nor must it result in any discrimination against non-believers or adherents to a particular belief.⁴³

Box 5. Uniting a religiously divided country: Indonesia's *pancasila*

The Preamble of Indonesia's 1945 Constitution referenced *pancasila*, the state philosophy that serves as a basis of Indonesian law. When drafting the five principles listed under *pancasila*, President Sukarno intended to unite the disparate islands of Indonesia under particular state principles and to provide a resolution of the relationship between Islam and the state. The five principles of *pancasila* are: (1) one and only God; (2) just and civilized humanity; (3) the unity of Indonesia; (4) democracy; and (5) social justice. Putting it another way, these principles together seek to promote unity while accepting Indonesia's diversity. Despite its dated origins, *pancasila* and its traditional principles have survived to this day: the People's Consultative Assembly (Majelis Permusyawaratan Rakyat, MPR) re-adopted these principles in the country's recent constitutional amendment process (1999–2002) for the stated reason that *pancasila* had become a symbol of tradition and national unity.* When the MPR began the constitutional reform process in 1999, it made the important decision to amend the Constitution instead of drafting an entirely new one, in part to keep the existing Preamble, which included *pancasila*, retaining the pan-religious state ideology it embodies.**

* Morfit, Michael, 'Pancasila: The Indonesian State Ideology According to the New Order Government', *Asian Survey*, 21/8 (1981), pp. 838–51; Weatherbee, Donald E., in *Asian Survey*, 25/2 (1985), pp. 187–97; Prawiranegara, Sjafruddin, 'Pancasila as the Sole Foundation', *Indonesia*, 38, Southeast Asia Program Publications at Cornell University (1984), pp. 74–83; and Denny Indrayana, Kompas, 'Indonesian Constitutional Reform, 1999–2002: An Evaluation of Constitution-Making in Transition', Book Publishing, Jakarta, December 2008, available at <http://www.kas.de/wf/doc/kas_19023-544-1-30.pdf>.

** Morfit, 'Pancasila: The Indonesian State Ideology According to the New Order Government'; Weatherbee in *Asian Survey*, 25/2; Prawiranegara, 'Pancasila as the Sole Foundation'; and Denny Indrayana, 'Indonesian Constitutional Reform, 1999–2002'.

4.6. Principles related to international law

International law provides a number of principles that inform modern constitutions. To attain legitimacy in the global community, constitutions must adhere to the most fundamental norms of international law, such as respecting fundamental human rights. However, beyond implementing minimum requirements to achieve international recognition and acceptance, constitutions vary in their treatment of international law and international relations.

Constitutions usually incorporate a means by which states can fulfil treaty obligations undertaken, though such means vary as between constitutions, often reflecting diverging visions of the relationship of the state and the international order. Some constitutions provide that international obligations become part of the legal order directly. The Constitution of East Timor provides an illustration, stating that the rules of international agreements apply internally ‘following their approval, ratification or accession by the respective competent organs and after publication in the official gazette’.⁴⁴ This conception of international obligations, often designated *monism*, can also mean that international obligations will have primacy over domestic law. This is the case, for instance, under the Constitution of the Czech Republic, which provides that treaties ‘constitute part of the legal order’ and that international treaty provisions should be applied even where they are ‘contrary to a [domestic] law’.⁴⁵ The Constitution of Hungary also explicitly recognizes international obligations but does not give them supremacy. Instead, it calls for domestic law to harmonize with international obligations.⁴⁶

Constitutions vary in their treatment of international law and international relations. Some provide that international obligations become part of the legal order directly. Some incorporate particular international charters. Others require international obligations to be incorporated into domestic law before they become binding.

Furthermore, the Hungarian Constitutional Court has determined that the Constitution and domestic law should be interpreted in a manner that gives effect to generally recognized international law.⁴⁷ Under other constitutions, such as Germany’s, customary international law has primacy over domestic law, but treaty obligations are treated as domestic law. When treaty obligations and domestic law conflict, the last-in-time provision prevails.⁴⁸

Alternatively, some constitutions embrace a so-called *dualist* conception which requires that the government incorporate international obligations into domestic law before they become binding. Such an arrangement requires action by the legislature before a treaty gains force in the domestic legal system, even though under international law the treaty already binds the country.

Box 6. Perspectives on international law at the national level

Monism is the view of international law that domestic and international laws are united into a single system.

- International law does not need to be translated into domestic law in order to take effect.
- Ratification of international law, by treaty for example, incorporates the law into the domestic legal scheme.
- Accepted international law may be relied upon by judges and invoked by citizens.
- In some countries with an monist perspective, the international law has precedence over domestic law.
- In some countries, a ratified treaty is equal to domestic law and the last in time has precedence.

Dualism is the view of international law that national and international legal systems are distinct.

- International law must be incorporated into domestic law in order for it to have force at a national level.
- Ratification of international law alone is not sufficient to give it effect at the national level. The domestic law must adapt to comply with the international law in order to give effect to a treaty.
- Judges and citizens must rely on the national law that gives international law effect, rather than directly on the international law.
- If domestic law conflicts with treaty obligations, the domestic law is still valid at a national level, even though the conflict may result in a violation of international law.

Not only do most constitutions provide a framework for ratifying and enforcing treaties, but many constitutions actually incorporate particular international charters—such as those relating to human rights—or model certain provisions on those charters, all of which can legally constrain the operation of government. Some constitutions merely reference specific treaties but others incorporate the charters into their constitutional law. Under Nicaragua’s Constitution, the rights contained in a number of charters, including the 1948 Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man (also of 1948), apply fully to all government institutions.⁴⁹ Similarly, Ghana’s Constitution calls for the government to ‘adhere to the principles enshrined in or as the case may be, the aims and ideals of’ a number of charters and treaties, as well as other international organizations of which Ghana is a member.⁵⁰ Constitutions can also refer to particular treaties. For instance, the Preamble to the Constitution of Cameroon affirms an ‘attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of United Nations and The African Charter on Human and Peoples’ Rights’.⁵¹

In the area of international relations, the national executive often assumes primary authority, usually holding the power to enter or withdraw from international agreements. However, some constitutions require legislative approval of treaties or even judicial involvement in treaty making. Other limitations on the national executive's discretion in this area may include mandatory or optional referendums that pose questions influencing international relations—such as joining a supranational organization such as the European Union—directly to a country's citizens.

In a constitutional structure that disperses governmental power, principles related to international relations may incorporate greater involvement or even control by regional or local authorities. In some cases, the constitution may permit regional authorities to enter into international agreements. For example, Argentina's Constitution provides that provinces may join treaties under certain prescribed circumstances, though they cannot contradict national foreign policy or domestic law.⁵² Conflicting practices and commitments among regions may be problematic and national governments may fear collapse if regions secure too much autonomy in international relations, therefore the majority of states retain the authority to conduct international relations and to control the military at the national level.

Box 7. International law as a mechanism for dispersal: Nicaragua and indigenous rights

The 1986 Political Constitution of the Republic of Nicaragua made great advances towards codifying human rights principles in domestic law by constitutionally adopting the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights of the Organization of American States.^{*} The human rights principles in these treaties have proved a significant factor in promoting indigenous rights in Nicaragua. In accordance with these treaties, the 1986 Constitution guaranteed the rights of the indigenous and created decentralized governance structures for their communities.^{**} By upholding international human rights laws, Nicaragua's courts have promoted the policy of decentralization espoused in the constitution.

The impact of international law is particularly evident in the court case *Awas Tingni v. Nicaragua*. The Awas Tingni, an indigenous group, resides in the Atlantic Coast region. In 1995, the Nicaraguan government gave logging rights to a private company in Awas Tingni territory, an act that the Awas Tingni believed violated their right to customary land and resource tenure. After gaining much international awareness and support, particularly from the NGO sector, the Awas Tingni prevailed in Nicaragua's highest court of law. The Supreme Court upheld the property rights based on the American Convention on Human Rights and further ruled that the government no longer had authority to decide the fate of traditional communal lands of indigenous groups. This case not only upheld

international law in a domestic setting, but also increased the autonomy accorded to indigenous peoples.

- * Article 46 of the Political Constitution of the Republic of Nicaragua (1986 as amended to 2005).
- ** Article 181 of the Political Constitution of the Republic of Nicaragua (1986 as amended to 2005).

5. Conclusion

Constitutional principles embody the most fundamental ideas and aims of a society, which inform the constitution's interpretation and application. Constitutional principles play a wide range of roles—from serving as a symbol or expressing an ideal, to empowering and guiding political actors or guaranteeing adherence to legal structures and rights. Frequently, similar principles can reflect different meanings depending on the trends at play during a constitution-building process or in the political dynamics that arise later, such as whether the relevant drivers of change have sought or seek to aggregate or disperse power. The impact of constitutional norms also depends on whether political or legal safeguards attach—whether the constitution obliges government actors and institutions to adhere to and enforce them, or whether these norms merely act as guidelines. The answer to this question often depends on the language and placement of these norms within the constitution. Broad language or placement within a preamble often means that the principle functions as a guideline, rather than a dictate. Similarly, some principles are labelled 'directive', which often is taken as shorthand to mean they are reinforced through political, rather than legal, means. As discussed above, however, the political–legal distinction is not absolute, nor is the correlation between directive principles and political enforcement. Constitutional principles may also emerge as a natural consequence of the design of the constitution and the totality of its provisions or from a deeper reading or interpretation of the constitution by courts. These derived principles, though not expressly written into a constitution, may come to have real impact on the constitution's meaning, and drafters should therefore be aware that the potential symbolism, understandings, and ultimate meaning of the constitution often exceed its stated principles and mechanisms.

Certain constitutional principles or commitments inform the entire constitutional order. How will diversity be managed? How can equal rights be achieved for all, regardless of gender? These questions and other fundamental concerns should be thought through by constitution builders and addressed in the constitution with careful consideration for how different provisions will support positive change and the fulfilment of constitutional values within a specific country context.

Table 1. Issues highlighted in this chapter

Issues	Questions
1. Different roles that constitutional principles can play	<ul style="list-style-type: none"> • What purposes can the expression of broad principles serve in a constitution? • How do constitutional principles represent the values, aims and purposes of a government? • What value do principles have as symbolic, educational, legitimizing elements of constitutions? • How do constitutional principles help to create agreement among divided groups? • How do principles inform the meaning of the constitution?
2. Enshrining and enforcing constitutional principles	<ul style="list-style-type: none"> • Where are constitutional principles found in constitutions? • What are founding provisions? • What is a preamble? • What are directive principles? • Are some principles unwritten? Can principles be derived from a constitution? • Do constitutional principles provide guidance to governments? • Are constitutional principles enforced by courts?
3. Democratic governance	<ul style="list-style-type: none"> • How do constitutions commit countries to democratic governance? • Does the form of government express a commitment to democratic governance? • What legal safeguards are there to protect this principle? • What political safeguards are there to protect this principle?
4. Rule of law	<ul style="list-style-type: none"> • How do constitutions promote the rule of law? • What legal safeguards are there to protect this principle? • What political safeguards are there to protect this principle?
5. Principles related to diversity	<ul style="list-style-type: none"> • How can constitutional principles contribute to the management of diversity? • What legal safeguards are there to protect principles related to diversity? • What political safeguards are there to protect principles related to diversity?

6. Principles related to gender	<ul style="list-style-type: none"> • How do constitutional principles contribute to promoting gender equality? • How does the language of the constitution reflect a commitment to gender equality? • How can systems of representation contribute to gender equality? • How can rights provisions contribute to gender equality? • What legal safeguards are there to protect this principle? • What political safeguards are there to protect this principle?
7. A constitution's relationship to religion	<ul style="list-style-type: none"> • How does a constitution express the state's relationship to religion? • How can a constitution maintain a commitment to freedom of religion?
8. Principles related to international law	<ul style="list-style-type: none"> • How do constitutions incorporate a commitment to international law? • How are international obligations incorporated into a state's internal legal order?

Notes

- ¹ McLachlin, Beverley, 'Unwritten Constitutional Principles: What is Going On?', Remarks by Chief Justice Beverley McLachlin, Supreme Court of Canada. Given at the 2005 Lord Cooke Lecture, Wellington, New Zealand, 2005, available at <http://www.canadianjusticereviewboard.ca/NZ_Speech.pdf> (accessed November 2010).
- ² *The State vs T Makwanyane and M Mchunu*. Constitutional Court of the Republic of South Africa, Case no. CCT/3/94.
- ³ Masina, Nomonde, 'Xhosa Practices of Ubuntu for South Africa', in William Zartman (ed.), *Traditional Cures for Modern Conflicts: African Conflict 'Medicine'* (London: Lynne Rienner, 2000).
- ⁴ See Act 200/1993, the Interim Constitution of South Africa, Section (251). See the annexe.
- ⁵ Chapter 1 (§1-6) of the Constitution of the Republic of South Africa (1996 as amended 2007). See the annexe.
- ⁶ Article 5 of the Constitution of the Republic of Turkey (1982 as amended 2007). See the annexe.
- ⁷ *His Holiness Kesavananda Bharati v. The State of Kerala and Others*, Supreme Court of India (AIR 1973 SC 1461). See also, for instance, the French Constitutional Council's reliance on the Preamble and the Declaration of the Rights of Man and of the Citizen, which is referenced in the Preamble, as legally enforceable: Decision 77-44 DC 16 July 1971.

- ⁸ See, for example, I–XXIX of the Constitution of the Republic of Uganda (1995 as amended to 2005). See also Part IV of the Constitution of the Republic of India (1950 as amended 1995).
- ⁹ *Ghana Lotto Operators Association v. National Lottery Authority*. Supreme Court of Ghana [2007–2008] SCGLR 1088.
- ¹⁰ See, for example, Re the Thirteenth Amendment to the Constitution Bill, [1987] 2 Sri LR 312; *His Holiness Kesavananda Bharati v. The State of Kerala and Others*; and *Minerva Mills v. Union of India* (AIR 1980 SC 1789), 1981 SCR (1) 206.
- ¹¹ For example, the Hungarian Constitutional Court has relied on the idea of a ‘common constitutional law of Europe’ in arriving at decisions. See also Scheppele, Kim Lane, ‘Declarations of Independence: Judicial Reactions to Political Pressure’, in Stephen B. Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, CA: Sage, 2002), p. 258.
- ¹² Article 3 of the Constitution of the Russian Federation (1993). See the annexe.
- ¹³ Article 7 of the Constitution of the Democratic Republic of East Timor (2002). See the annexe.
- ¹⁴ Article 200 and Preamble, Constitution of the Republic of Rwanda (2003). See the annexe.
- ¹⁵ Section 6, Constitution of the Kingdom of Thailand (1997). See the annexe.
- ¹⁶ Article 60, Constitution of the Federative Republic of Brazil (1988 as amended 1993). See the annexe.
- ¹⁷ Article 79 of the Basic Law of the Federal Republic of Germany (1949 as amended 2006). See the annexe.
- ¹⁸ Béland, Daniel and Lecours, André, ‘Federalism, Nationalism, and Social Policy Decentralisation in Canada and Belgium’, *Regional and Federal Studies*, 17/4 (2007), pp. 405–19, esp. p. 412.
- ¹⁹ Article V of the Constitution of Bosnia and Herzegovina (1995). See the annexe.
- ²⁰ Article 51(4) of the Constitution of Pakistan (1973 as modified 2004). See the annexe.
- ²¹ The Permanent Constitution of the Republic of Iraq (2005).
- ²² McGarry, John and O’Leary, Brendan, ‘Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription’, *International Journal of Constitutional Law*, 5/4 (2007), pp. 670–98.
- ²³ Irving, Helen, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2008), p. 41, citing Sandra Petersson.
- ²⁴ The Federal Constitution of the Swiss Confederation (1999); the Constitution of the Republic of South Africa (1996 as amended 2007); the Constitution of the Republic of Uganda (1995 as amended 2005); and the Constitution (Amendment) Act of 1997 of the Republic of the Fiji Islands (1997 as amended 1998).
- ²⁵ Article 8(3) of the Federal Constitution of the Swiss Confederation (1999). See the annexe.
- ²⁶ Article 48 of the Constitution of Paraguay (1992). See the annexe.
- ²⁷ Article 63 of the Interim Constitution of the Federal Democratic Republic of Nepal (2063), 2007. See the annexe.
- ²⁸ Articles 76 and 82 of the Constitution of the Republic of Rwanda (2003). See the annexe.
- ²⁹ 2008. <<http://www.quotaproject.org/aboutQuotas.cfm>>, accessed 27 August 2010.
- ³⁰ Article 37 of the Constitution of the Argentine Nation (1994) (see the annexe); and Article 4, Decree 1246.
- ³¹ Article 106 (1), Constitution of the Islamic Republic of Pakistan (1973 as amended 2004). See the annexe.
- ³² Article 40, Political Constitution of Colombia (1991 as amended 2005). See the annexe.
- ³³ Irving, *Gender and the Constitution*, p. 115.
- ³⁴ Irving, *Gender and the Constitution*, p. 82, citing Jill Vickers.
- ³⁵ Article 33 of the Constitution of the Republic of Poland (1997). See the annexe.
- ³⁶ The Sixth Title (Labor and Social Security), Article 123 (A)(VII) in the Political Constitution of the United Mexican States (1917, as amended 2007). See the annexe.
- ³⁷ Article 75 of the Constitution of the Republic of Costa Rica (1949 as amended to 2003): ‘The Roman Catholic and Apostolic Religion is the religion of the State, which contributes to its maintenance, without preventing the free exercise in the Republic of other forms of worship that are not opposed to universal morality or good customs’. See the annexe. See also Article 2 of the Constitution of the Kingdom of Norway (1814 as amended to 1996) in the annexe.
- ³⁸ Constitution of the Islamic Republic of Iran (1979 as amended 1989).
- ³⁹ Article 2 of the Constitution of the Republic of Iraq (2005). See the annexe.
- ⁴⁰ Chapter XI, Article 29 of the Constitution of the Republic of Indonesia (1945 as amended 2002). See the annexe.
- ⁴¹ Article 1 of the Constitution of the French Republic of 4 October 1958 (1958 as amended 23 July 2008). See the annexe.
- ⁴² Articles 18 and 27 of the International Covenant on Civil and Political Rights, 1966. See the annexe.
- ⁴³ United Nations, Office of the High Commissioner for Human Rights, General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18) CCPR/C/21/Rev.1/Add.4).
- ⁴⁴ Article 9(2) of the Constitution of the Democratic Republic of East Timor, 2002. See the annexe.
- ⁴⁵ Article 10 of the Constitution of the Czech Republic (1992 as amended 2009). See the annexe.

- ⁴⁶ Article 7 of the Constitution of the Republic of Hungary (1949 as amended 2003). See the annexe.
- ⁴⁷ Decision of the Constitutional Court No. 53/1993. (X.13) AB.
- ⁴⁸ Ginsburg, Tom, Elkins, Zachary and Chernykh, Svitlana, ‘Commitment and Diffusion: How and Why National Constitutions Incorporate International Law’, *University of Illinois Law Review*, 2008, p. 205, citing Cassese.
- ⁴⁹ Ginsburg, Elkins and Chernykh, ‘Commitment and Diffusion’, p. 207, citing Article 46 of the Nicaraguan Constitution.
- ⁵⁰ Article 40(d), Constitution of the Republic of Ghana (1992 as amended 1996). See the annexe.
- ⁵¹ Preamble, Constitution of the Republic of Cameroon (1972 as amended 1996). See the annexe.
- ⁵² Articles 124–125 of the Constitution of the Argentine Nation (1994).

Key words

Constitutional principles, Shared values, Governance, Rule of law, Diversity, Gender equality, Women’s rights, Religion, International relations, Explicit principles, Derived principles, Preamble, Directive principles, Founding provisions

Additional resources

- **United Nations Rule of Law**
<http://www.unrol.org/article.aspx?article_id=31>
The United Nations (UN) Rule of Law seeks to strengthen the rule of law at the national and international levels. Constitution making is one of the cross-cutting themes addressed on this site, which contains links to documents on constitutional assistance and constitution making in post-conflict settings.
- **iKnow Politics**
<<http://www.iknowpolitics.org/>>
The International Knowledge Network of Women in Politics, iKNOW Politics, is an interactive network of women in politics from around the world who share experiences, access resources and advisory services, and network and collaborate on issues of interest.
- **Quota Project**
<<http://www.quotaproject.org/>>
The Global Database of Quotas for Women contains information on the use of electoral quotas for women, including electoral quotas found in constitutions. The website provides a searchable database about the use of quotas for women in countries around the world.
- **UNDP Crisis Prevention and Recovery: Gender and Crisis**
<http://www.undp.org/cpr/how_we_do/gender.shtml>

Through its Eight Point Agenda for Women’s Empowerment and Gender Equality in Crisis Prevention and Recovery, the United Nations Development Programme (UNDP) focuses on making a positive difference in the lives of women and girls affected by crisis.

- **United Nations Entity for Gender Equality and the Empowerment of Women**
<<http://www.un-instraw.org/>>
UN Women aims to accelerate progress towards the goals of gender equality and women’s empowerment. It provides support to intergovernmental bodies in the formulation of policies, global standards, and norms, and aims to help member states to implement these standards. It also aims to provide suitable technical and financial support to countries that request it and to forge effective partnerships with civil society.
- **United States Institute of Peace**
<<http://www.usip.org/>>
The United States Institute of Peace (USIP) provides analysis, training, and tools to prevent and end conflicts and promote stability. Of particular interest may be the site’s sections devoted to the issues in the areas of the rule of law, young people and women.
- **Westminster Foundation for Democracy**
<<http://www.wfd.org>>
The Westminster Foundation for Democracy (WFD) promotes participation in the political process. As a part of this effort, the encouragement of women to participate in the decision-making process, together with support for the development of an environment that will ensure their inclusion, has been a priority for the Foundation. The WFD also supports works in the area of the rule of law.
- **Inter-Parliamentary Union, Women in Politics**
<<http://www.ipu.org/iss-e/women.htm>>
The Inter-Parliamentary Union is a focal point for worldwide parliamentary dialogue with a commitment to the firm establishment of representative democracy. This site contains a section that focuses on the role of women in legislatures.
- **United Nations Treaty Collection**
<<http://www.ipu.org/iss-e/women.htm>>
This site provides a searchable database and links to the full texts of all multilateral treaties, as well as some bilateral treaties, deposited with the Secretary-General of the United Nations and those formerly deposited with the League of Nations.
- **Center for the Study of Law and Religion**
<<http://cslr.law.emory.edu/>>
The Center for the Study of Law and Religion (CSLR) is dedicated to studying

the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions, norms and practices.

- **United Nations Educational, Scientific, and Cultural Organization**

<<http://www.unesco.org/most/rr2nat.htm>>

The Management of Social Transformations (MOST) Programme is the United Nations Educational, Scientific and Cultural Organization (UNESCO) programme that fosters and promotes social science research. To strengthen a comparative perspective in social science research on governance in multi-faith societies as well as in policymaking, the MOST Programme has collected constitutional provisions pertaining to the rights to non-discrimination and equality, to the freedom of religion or belief, and to the rights of persons belonging to religious minorities.

Annexe. Constitutional and statutory provisions referenced in this chapter

These texts appear in the order in which they are referred to in the endnotes and the chapter text. The constitutional provisions are reprinted here from the International Constitutional Law (ICL) Project (<<http://www.servat.unibe.ch/icl/info.html>>), unless otherwise noted.

Principle 20, Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognizes the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

Principle 18, Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993, as amended by sec. 13(a) of Act 2 of 1994

The powers, boundaries and functions of the national government and provincial governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

From Act 200/1993, the Interim Constitution of South Africa, Section 251

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

Chapter 1 (§1–6) of the Constitution of the Republic of South Africa, (1996 as amended 2007)

Section 1 Republic of South Africa

The Republic of South Africa is one sovereign democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Section 2 Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.

Section 3 Citizenship

- (1) There is a common South African citizenship.
- (2) All citizens are -
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

Section 4 National anthem

The national anthem of the Republic is determined by the President by proclamation.

Section 5 National flag

The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

Section 6 Languages

- (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
- (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- (3) National and provincial governments may use particular official languages for the purposes of government, taking into account usage, practicality, expense,

regional circumstances, and the balance of the needs and preferences of the population as a whole or in respective provinces; provided that no national or provincial government may use only one official language. Municipalities must take into consideration the language usage and preferences of their residents.

- (4) National and provincial governments, by legislative and other measures, must regulate and monitor the use by those governments of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
- (5) The Pan South African Language Board must -
 - (a) promote and create conditions for the development and use of
 - (i) all official languages;
 - (ii) the Khoi, Nama and San languages; and
 - (iii) sign language.
 - (b) promote and ensure respect for languages, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telugu, Urdu, and others commonly used by communities in South Africa, and Arabic, Hebrew, Sanskrit and others used for religious purposes.

Article 5 of the Constitution of the Republic of Turkey (1982 as amended 2007)

Fundamental Aims and Duties of the State

The fundamental aims and duties of the state are; to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence.

Article 37 of the Constitution of the Republic of India (1950 as amended 1995)

Part IV Directive Principles of State Policy

The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Article 45 of the Constitution of the Republic of India (1950 as amended 1995)

Provision for free and compulsory education for children

The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

(Note that this provision has since been amended)

Article 3 of the Constitution of the Russian Federation (1993)

- (1) The multinational people of the Russian Federation is the vehicle of sovereignty and the only source of power in the Russian Federation.
- (2) The people of the Russian Federation exercise their power directly, and also through organs of state power and local self-government.
- (3) The referendum and free elections are the supreme direct manifestation of the power of the people.
- (4) No one may arrogate to oneself power in the Russian Federation. Seizure of power or appropriation of power authorization are prosecuted under federal law.

Article 7 of the Constitution of the Democratic Republic of East Timor (2002)*

Article 7 Universal Suffrage and Multi-Party System

1. The people shall exercise the political power through universal, free, equal, direct, secret and periodic suffrage and through other forms laid down in the Constitution.
2. The State shall value the contribution of political parties for the organised expression of the popular will and for the democratic participation of the citizen in the governance of the country.

* Reprinted from and available at <<http://www.constitutionnet.org>>

From Article 200 and Preamble of the Constitution of the Republic of Rwanda (2003)*

Article 200

Any law which is contrary to this Constitution is null and void.

Preamble

Now hereby adopt, by referendum, this Constitution as the supreme law of the Republic of Rwanda.

* Reprinted from and available at <<http://mhc.gov.rw>>

Section 6 of the Constitution of the Kingdom of Thailand (1997)

The Constitution is the supreme law of the State. The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable.

Article 60 of the Constitution of the Federative Republic of Brazil (1988 as amended 1993)

Amendment of the Constitution

- (0) The Constitution may be amended on the proposal of:
 - I. at least one third of the members of the House of Representatives or of the Federal Senate;

II. the President of the Republic;

III. more than one half of the Legislative Assemblies of the units of the Federation, each of which expresss itself by a simple majority of its members.

- (1) The Constitution may not be amended during federal intervention, state of defense or state of siege.
- (2) The proposal is discussed and voted in each Chamber of Congress, in two rounds, and it is considered approved if it obtains three-fifths of the votes of the respective members in both rounds.
- (3) An amendment to the Constitution is enacted by the Presiding Boards of the House of Representatives and of the Federal Senate, with a respective sequence number.
- (4) No resolution is discussed concerning an amendment proposal which tends to abolish:
 - I. the federative form of the State;
 - II. the direct, secret, universal, and periodic vote;
 - III. the separation of the Government Branches;
 - IV. individual rights and guarantees.
- (5) The subject dealt with in an amendment proposal that is rejected or considered impaired cannot be the subject of another proposal in the same legislative term.

Article 79 of the Basic Law of the Federal Republic of Germany (1949 as amended to 2006)

Amendment of the Basic Law

- (1) This Constitution can be amended only by statutes which expressly amend or supplement the text thereof. In respect of international treaties, the subject of which is a peace settlement, the preparation of a peace settlement or the phasing out of an occupation regime, or which are intended to serve the defense of the Federal Republic, it is sufficient, for the purpose of clarifying that the provisions of this Constitution do not preclude the conclusion and entry into force of such treaties, to effect a supplementation of the text of this Constitution confined to such clarification.
- (2) Any such statute requires the consent of two thirds of the members of the House of Representatives [Bundestag] and two thirds of the votes of the Senate [Bundesrat].
- (3) Amendments of this Constitution affecting the division of the Federation into States [Länder], the participation on principle of the States [Länder] in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible.

From Article V of the Constitution of Bosnia and Herzegovina (1995)

The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb

directly elected from the territory of the Republika Srpska.

Article 51 of the Constitution of Pakistan (1973 as amended 2004)*

51. National Assembly

- (1) There shall be three hundred and forty-two seats of the members in the National Assembly, including seats reserved for women and non-Muslims.
- (2) A person shall be entitled to vote if—
 - (a) he is a citizen of Pakistan;
 - (b) he is not less than eighteen years of age;
 - (c) his name appears on the electoral roll; and
 - (d) he is not declared by a competent court to be of unsound mind
- (3) The seats in the National Assembly referred to in clause (1), except as provided in clause (4), shall be allocated to each Province, the Federally Administered Tribal Areas and the Federal Capital as under:

	General Seats	Women	Total
Balochistan	14	3	17
Khyber Pakhtunkhwa	35	8	43
Punjab	148	35	183
Sindh	61	14	75
The Federally Administered Tribal Areas	12	–	12
The Federal Capital	2	–	2
Total	272	60	332

- (4) In addition to the number of seats referred to in clause (3), there shall be in the National Assembly ten seats reserved for non-Muslims.
- (5) The seats in the National Assembly shall be allocated to each Province, the Federally Administered Tribal Areas and the Federal Capital on the basis of population in accordance with the last preceding census officially published.
- (6) For the purpose of election to the National Assembly—
 - (a) the constituencies for the general seats shall be single member territorial constituencies and the members to fill such seats shall be elected by direct and free vote in accordance with the law;
 - (b) each Province shall be a single constituency for all seats reserved for women which are allocated to the respective Provinces under clause (3);
 - (c) the constituency for all seats reserved for non-Muslims shall be the whole country;
 - (d) members to the seats reserved for women which are allocated to a Province

under clause (3) shall be elected in accordance with the law through a proportional representation system of political parties' lists of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly:

Provided that for the purpose of this sub-clause the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates;

- (e) members to the seats reserved for non-Muslims shall be elected in accordance with the law through a proportional representation system of political parties lists of candidates on the basis of the total number of general seats won by each political party in the National Assembly:

Provided that for the purpose of this sub-clause the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates.

* Reprinted from and available at <<http://www.pakistani.org>>

Article 125 of the Permanent Constitution of the Republic of Iraq (2005)*

This Constitution shall guarantee the administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians, and all other constituents, and this shall be regulated by law.

* Reprinted from and available at <<http://aceproject.org>>

Article 8 of the Federal Constitution of the Swiss Confederation (1999 as amended 2010)

Equality

- (1) All humans are equal before the law.
- (2) Nobody may be discriminated against, namely for his or her origin, race, sex, age, language, social position, way of life, religious, philosophical, or political convictions, or because of a corporal or mental disability.
- (3) Men and women have equal rights. The law provides for legal and factual equality, particularly in the family, during education, and at the workplace. Men and women have the right to equal pay for work of equal value.
- (4) The law provides for measures to eliminate disadvantages of disabled people.

Article 48 of the Constitution of Paraguay (1992)

About Equal Rights for Men and Women

Men and women have equal civil, political, social, and cultural rights. The State will foster the conditions and create the mechanisms adequate for making this equality real and effective by removing those obstacles that prevent or curtail its realization, as well as by promoting women's participation in every sector of national life.

Article 63 of the Interim Constitution of the Federal Democratic Republic of Nepal (2063), 2007*

Formation of the Constituent Assembly

- (1) There shall be a Constituent Assembly constituted to formulate a new Constitution by the Nepalese people themselves, subject to the provisions of this Constitution.
- (2) After the commencement of this Constitution, the Election of the Constituent Assembly shall be held on the date as specified by the Government of Nepal.
- (3) The Constituent Assembly shall consist of the following four hundred twenty five members, out of which four hundred and nine members shall be elected through Mixed Electoral System and sixteen members shall be nominated, as provided for in the law:-
 - (a) two hundred and five members shall be elected from among the candidates elected on the basis of First-Past-the-Post system from each of the Election Constituencies existed in accordance with the prevailing law before the commencement of this Constitution.
 - (b) two hundred and four members shall be elected under the proportional electoral system on the basis of the votes to be given to the political parties, considering the whole country as one election constituency.
 - (c) sixteen members to be nominated by the interim Council of Ministers, on the basis of consensus, from amongst the prominent persons of national life.
- (4) The principle of inclusiveness shall be taken into consideration while selecting the candidates by the political parties pursuant to sub-clause (a) of clause (3) above, and while making the list of the candidates pursuant to sub-clause (b) above, the political parties shall have to ensure proportional representation of women, Dalit, oppressed tribes/indigenous tribes, backwards, Madhesi and other groups, in accordance as provided for in the law.
Notwithstanding anything contained in this clause, in case of women there should be at least one third of total representation obtained by adding the number of candidature pursuant to sub-clause (a) of clause (3) to the proportional representation pursuant to sub-clause (b) of clause (3).
- (5) The election of the members of the Constituent Assembly shall be held through secret ballots, as provided for in the law.
- (6) For the purpose of election of the Constituent Assembly, every Nepali citizen who has attained the age of eighteen years by the end of Mangsir, 2063 (15th December 2006) shall be entitled to vote, as provided for in the law.

- (7) Subject to the provisions of this Article, election for the Constituent Assembly and other matters pertaining thereto shall be regulated as provided for in the law.

* Reprinted from and available at <<http://www.constitutionnet.org>>

Articles 76 and 82 of the Constitution of the Republic of Rwanda (2003)*

Article 76

The Chamber of Deputies is composed of eighty (80) members as follows:

1. fifty-three (53) are elected in accordance with the provisions of Article 77 of this Constitution;
2. twenty-four (24) women; that is: two from each Province and the City of Kigali. These shall be elected by a joint assembly composed of members of the respective District, Municipality, Town or Kigali City Councils and members of the Executive Committees of women's organizations at the Province, Kigali City, District, Municipalities, Towns and Sector levels;
3. two (2) members elected by the National Youth Council;
4. one (1) member elected by the Federation of the Associations of the Disabled.

Article 82

The Senate is composed of twenty-six (26) members serving for a term of eight (8) years and at least thirty per cent (30%) of whom are women. In addition, the former Heads of State become members of the Senate upon their request as provided for in paragraph 4 of this article.

These twenty-six (26) members are elected or appointed as follows:

1. twelve (12) members representing each Province and the City of Kigali are elected through secret ballot by members of the Executive Committees of Sectors and District, Municipality, Town or City Councils of each Province and the City of Kigali;
2. eight (8) members appointed by the President of the Republic who shall ensure the representation of historically marginalized communities;
3. four (4) members designated by the Forum of Political organizations';
4. one (1) university lecturer of at least the rank of Associate Professor or a researcher elected by the academic and research staff of public universities and institutions of higher learning;
5. one (1) university lecturer of at least the rank of Associate Professor or researcher elected by the academic and research staff of private universities and institutions of higher learning.

The organs responsible for the nomination of Senators shall take into account national unity and equal representation of both sexes.

Former Heads of State who honorably completed their terms or voluntarily resigned from

office become members of the Senate by submitting a request to the Supreme Court.

Dispute relating to the application of Article 82 and 83 of this Constitution which may arise, shall be adjudicated by the Supreme Court.

* Reprinted from and available at <<http://mhc.gov.rw>>

Article 37 of the Constitution of the Argentine Nation (1994)

- (1) This Constitution guarantees the full exercise of political rights, in accordance with the principle of popular sovereignty and with the laws derived therefrom. Suffrage shall be universal, equal, secret and compulsory.
- (2) Actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system.

Article 106 (1) of the Constitution of the Islamic Republic of Pakistan (1973 as amended 2004)*

106. Constitution of Provincial Assemblies

- (1) Each Provincial Assembly shall consist of general seats and seats reserved for women and non-Muslims as specified herein below:

	General seats	Women	Non-Muslims	Total
Balochistan	51	11	3	65
Khyber Pakhtunkhwa	99	22	3	124
Punjab	297	66	8	371
Sindh	130	29	9	168

- (2) A person shall be entitled to vote if—
 - (a) he is a citizen of Pakistan;
 - (b) he is not less than eighteen years of age;
 - (c) his name appears on the electoral roll; and
 - (d) he is not declared by a competent court to be of unsound mind.
- (3) For the purpose of election to a Provincial Assembly—
 - (a) the constituencies for the general seats shall be single member territorial constituencies and the members to fill such seats shall be elected by a direct and free vote;
 - (b) each Province shall be a single constituency for all seats reserved for women and non-Muslims allocated to the respective Provinces under clause (1);
 - (c) the members to fill seats reserved for women and non-Muslims allocated to

a Province under clause (1) shall be elected in accordance with law through a proportional representation system of political parties lists of candidates on the basis of the total number of general seats secured by each political party in the Provincial Assembly:

Provided that for the purpose of this sub-clause, the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates.

* Reprinted at and available from: <<http://www.pakistani.org/>>

Article 40 of the Political Constitution of Colombia (1991 as amended 2005)*

Article 40. Any citizen has the right to participate in the establishment, exercise, and control of political power. To make this decree effective the citizen may:

1. Vote and be elected.
2. Participate in elections, plebiscites, referendums, popular consultations, and other forms of democratic participation.
3. Constitute parties, political movements, or groups without any limit whatsoever; freely participate in them and diffuse their ideas and programs.
4. Revoke the mandate of those elected in cases where it applies and in the form provided by the Constitution and the law.
5. Act in public bodies.
6. File public actions in defense of the Constitution and the law.
7. Hold public office, except for those Colombian citizens, native-born or naturalized, who hold dual citizenship. The law will regulate this exception and will determine the cases where it applies.

The authorities will guarantee the adequate and effective participation of women in the decision making ranks of the public administration.

* Reprinted from and available at <<http://confinder.richmond.edu>>

Article 33 of the Constitution of the Republic of Poland (1997)

- (1) Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.
- (2) Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

The Sixth Title (Labor and Social Security), Article 123 (A)(VII) in the Political Constitution of the United Mexican States (1917 as amended 2007)*

Every person has a right to work in a dignified and socially useful way, in order to enforce

such a right both employment creation and labour organization shall be promoted under the law.

According to this article's rules, the Congress shall enact labour laws which will regulate:

Contracts of work -- including those in which workers, employees, domestic workers or craftsmen are parties to the contract -- prescribing that:

VII. The principle of equal remuneration for men and women workers for work of equal value without discrimination based neither on sex nor on nationalism, shall be enforced;

* Reprinted from and available at <<http://biblio.juridicas.unam.mx;>> Translation by Carlos Pérez Vázquez

Article 11 of the Constitution of Ecuador (2008)*

The exercise of rights shall be governed by the following principles:

1. Rights can be exercised, promoted and enforced individually or collectively before competent authorities; these authorities shall guarantee their enforcement.
2. All persons are equal and shall enjoy the same rights, duties and opportunities.

No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.

The State shall adopt affirmative action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality.

* Reprinted and available from the Political Database of the Americas (<http://pdba.georgetown.edu/>)

Article 75 of the Constitution of the Republic of Costa Rica (1949 as amended 2003)

The Roman Catholic and Apostolic Religion is the religion of the State, which contributes to its maintenance, without preventing the free exercise in the Republic of other forms of worship that are not opposed to universal morality or good customs.

Article 2 of the Constitution of the Kingdom of Norway (1814 as amended 1996)

- 1) All inhabitants of the Realm shall have the right to free exercise of their religion.
- (2) The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same.

Article 2 of the Constitution of the Republic of Iraq (2005)*

First: Islam is the official religion of the State and is a foundation source of legislation:

- A. No law may be enacted that contradicts the established provisions of Islam
- B. No law may be enacted that contradicts the principles of democracy.
- C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.

Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandaean Sabaeans.

* Reprinted from and available at <<http://www.uniraq.org>>

Chapter XI, Article 29 of the Constitution of the Republic of Indonesia (1945 as amended to 2002)

- (1) The State is based upon the belief in the One and Only God.
- (2) The State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

Article 1 of the Constitution of the French Republic (1958 as amended 2008)

- (1) France is an indivisible, secular, democratic and social Republic. It ensures the equality of all citizens before the law, without distinction of origin, race or religion. It respects all beliefs. It is organised on a decentralised basis.
- (2) The law promotes the equal access by women and men to elective offices and posts as well as to professional and social positions.

Article 18 of the International Covenant on Civil and Political Rights*

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

* Reprinted from and available at <<http://www.ohchr.org>>

Article 27 of the International Covenant on Civil and Political Rights*

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or

to use their own language.

* Reprinted from and available at <<http://www.ohchr.org>>

Article 9(2) of the Constitution of the Democratic Republic of East Timor (2002)*

Section 9 (International law)

1. The legal system of East Timor shall adopt the general or customary principles of international law.
2. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.
3. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.

* Reprinted from and available at www.constitutionnet.org

Article 10 of the Constitution of the Czech Republic (1992 as amended 2009)*

Promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order; should an international agreement make provision contrary to a law, the international agreement shall be applied.

* Reprinted from and available at <<http://www.hrad.cz/en/czech-republic/index.shtml>>

Article 7 of the Constitution of the Republic of Hungary (1949 as amended 2003)

- (1) The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.
- (2) Legislative procedures shall be regulated by law, for the passage of which a majority of two-thirds of the votes of the Members of Parliament present is required.

Article 40 of the Constitution of the Republic of Ghana (1992 as amended 1996)*

40. INTERNATIONAL RELATIONS.

In its dealings with other nations, the Government shall—

- (a) promote and protect the interests of Ghana;
- (b) seek the establishment of a just and equitable international economic and social order;
- (c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means;
- (d) adhere to the principles enshrined in or as the case may be, the aims and

ideals of—

- (i) the Charter of the United Nations;
- (ii) the Charter of the Organisation of African Unity;
- (iii) the Commonwealth;
- (iv) the Treaty of the Economic Community of West African States; and
- (v) any other international organisation of which Ghana is a member.

* Reprinted from and available at www.constitutionnet.org

Preamble, Constitution of the Republic of Cameroon (1972 as amended 1996)*

We, the people of Cameroon,

Proud of our linguistic and cultural diversity, an enriching feature of our national identity, but profoundly aware of the imperative need to further consolidate our unity, solemnly declare that we constitute one and the same Nation, bound by the, same destiny, and assert our firm, determination to build the Cameroonian Fatherland on the basis of the ideals of fraternity, justice and progress;

Jealous of our hard-won independence and resolved to preserve same; convinced that the salvation of Africa lies in forging ever-growing bonds of solidarity among African Peoples, affirm our desire to contribute to the advent of a united and free Africa, while maintaining peaceful and brotherly relations with the other nations of the World, in accordance with the principles enshrined in the Charter of the United Nations;

Resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and declare our readiness to co-operate with all States desirous of participating in this national endeavour with due respect for our sovereignty and the independence of the Cameroonian State.

We, people of Cameroon,

Declare that the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights;

Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and The African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, in particular, to the following principles:

- all persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development;
- the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law;
- freedom and security shall be guaranteed to each individual, subject to respect for the rights of others and the higher interests of the State;

- every person shall have the right to settle in any place and to move about freely, subject to the statutory provisions concerning public law and order, security and tranquillity;
- the home is inviolate. No search may be conducted except by virtue of the law;
- the privacy of all correspondence is inviolate. No interference may be allowed except by virtue of decisions emanating from the Judicial Power;
- no person may be compelled to do what the law does not prescribe;
- no person may be prosecuted, arrested or detained except in the cases and according to the manner determined by law;
- the law may not have retrospective effect. No person may be judged and punished, except by virtue of a law enacted and published before the offence committed;
- The law shall ensure the right of every person to a fair hearing before the courts;
- every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence;
- every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances. Under no circumstances shall any person be subjected to torture, to cruel, inhumane or degrading treatment;
- no person shall be harassed on grounds of his origin, religious, philosophical or political opinions or beliefs, subject to respect for public policy;
- the State shall be secular. The neutrality and independence of the State in respect of all religions shall be guaranteed;
- freedom of religion and worship shall be guaranteed;
- the freedom of communication, of expression, of the press, of assembly, of association, and of trade unionism, as well as the right to strike shall be guaranteed under the conditions fixed by law;
- the Nation shall protect and promote the family which is the natural foundation of human society. It shall protect women, the young, the elderly and the disabled;
- the State shall guarantee the child's right to education. Primary education shall be compulsory. The organization and supervision of education at all levels shall be the bounden duty of the State;
- ownership shall mean the right guaranteed to every person by law to use, enjoy and dispose of property. No person shall be deprived thereof, save for public purposes and subject to the payment of compensation under conditions determined by law;
- the right of ownership may not be exercised in violation of the public interest or in such a way as to be prejudicial to the security, freedom, existence or property of other persons;
- every person shall have a right to a healthy environment. The protection of the environment shall be the duty of every citizen. The State shall ensure the protection and improvement of the environment;

- every person shall have the right and the obligation to work;
- every person shall share in the burden of public expenditure according to his financial resources;
- all citizens shall contribute to the defence of the Fatherland;
- the State shall guarantee all citizens of either sex the rights and freedoms set forth in the Preamble of the Constitution.

* Reprinted from and available at <<http://confinder.richmond.edu>>

Articles 46 and 181 of the Political Constitution of the Republic of Nicaragua (1986 as amended 2005)

Article 46

In the national territory, all persons enjoy State protection and recognition of the inherent rights of the individual, unrestricted respect, promotion and protection of human rights and the full enjoyment of rights enshrined in the Universal Declaration of Human Rights, in the American Declaration of the Rights and Duties of Man, in the International Covenant on Economic, Social and Cultural Rights, in the International Covenant on Civil and Political Rights of the Organization of the United Nations, and the American Convention on Human Rights of the Organization of American States.

Article 181

The State shall organize, through a law, the system of autonomy for indigenous peoples and ethnic communities of the Atlantic Coast, which shall contain, among other provisions: the powers of their governing bodies, their relationship with the Executive and legislative and municipalities, and the exercise of their rights. This law, for enactment and amendment, shall require the majority established for the constitutional law reform.

The concessions and contracts for the rational exploitation of natural resources provided by the State in the autonomous regions of the Atlantic Coast, must be approved by the corresponding Autonomous Regional Council.

Members of the Autonomous Regional Councils of the Atlantic Coast will lose its status on the grounds and procedures established by law.

Building a Culture of Human Rights

Winluck Wahiu

CHAPTER 3

CHAPTER 3

1. Overview

There are several reasons for building *human rights* into a constitution; they indicate restrictions on government power, are a building block for democracy, establish a foundation for building a *human rights culture*, and are integral to the legitimacy of the constitution. A human rights culture gives space to individuals and groups to organize and aggregate their interests. It permits ordinary people to challenge public officials and state institutions. It is about how human rights ‘work’ and therefore goes beyond the constitution and touches on other complex dimensions of society.

In terms of international law, human rights are universal, inalienable and indivisible. Yet the reason for including and protecting some rights in the constitution has become as contested as the nature and purpose of the constitution itself. For many constitution builders in societies affected by conflict, knowledge of the menu of options concerning substantive rights is often derived from treaties already ratified by a state. Yet a key challenge is not only to draft a modern bill of rights but to use human rights protections to contribute to the peaceful coexistence of socially diverse and conflict-affected groups.

The process adopted for constitution building as well as the type of constitution to be framed will be among the first factors that will shape the scope of a human rights culture. The goal of a human rights culture is not tension-free, as can be seen in the sometimes intractable debates on human rights issues between different segments of society during constitution building. Minority groups’ rights to benefit from special measures, economic rights that touch on claims on national resources, and the rights of women to equality in family relations are among these issues. Some tensions arise from the need to strike a balance between protecting human rights and redressing past violations, compatibility with the system of power distribution, and applicable international human rights obligations, as well as competing domestic sources of law.

Another challenge is implementing rights; this clearly requires institutional guarantees to be in place. Less clear, however, is how implementation will work when rights are used by different groups to mobilize their own interests in what the groups themselves often perceive as winner/loser equations. Hence the architecture of power and the distribution of responsibility to make decisions concerning human rights need more practical scrutiny. While the legal enforcement of fundamental rights is comparatively pervasive across legal traditions, constitution builders have sought out dynamic frameworks for implementation that give room for politics to evolve and produce a broader consensus on human rights. What implications should constitution builders consider in order to achieve a viable balance between legally based approaches to human rights and those based on political consensus?

2. Defining the human rights culture

The **Universal Declaration of Human Rights** of 1948 states in paragraph 1 of its Preamble that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Human rights are legal and moral entitlements that have evolved as a basis for constructing how state power is used, and particularly to limit its use against the rights of citizens. From a religious perspective, human rights are derived from the divine endowment of man as a moral and rational creation. From a secular or moral perspective, they have evolved as entitlements surrounding the human dignity of all individuals from natural law. In both cases, human rights have been viewed as notions of entitlements that individuals or groups can claim in spite of, rather than because of, the prevailing framework of man-made law. They could not therefore be alienated through the latter. At the same time, rights that are enforced through the constitution are creations of the law. Quite often, they perpetuate the interests and beliefs that a society holds as fundamental for its identity and the building of its political community.

In the concept of popular sovereignty, the people delegate authority and power to a state's institutions of governance and do not derive their rights from the state. Constitutions are the legal and political devices through which this delegation of power and reservation of rights are accomplished.

Human rights are legal and moral entitlements that have evolved as a basis for constructing how state power is used, and particularly to limit its use against citizens. In the absence of a culture of respect for human rights, constitutional guarantees become worthless.

A human rights culture is therefore premised on what constitutions provide, but can also be seen as extending beyond the actual provisions. Human rights can be expressly or implicitly recognized in constitutions. Nor is the inclusion of rights in a constitution itself an end-state; rather it triggers new ways of articulating and contesting individual and group interests.

A *human rights culture* is one in which society values human rights to the extent that most, if not all, official decisions aim to maximize these rights. A strong or vibrant human

rights culture evolves when the actions of public officials and institutions, and those of other dominant actors in society, habitually honour rights, prevent violations and assist victims. In the absence of a culture of respecting rights, constitutional guarantees become worthless.

Box 1. Human rights principles

- Rights are premised on universal humanity.
- They are recognized under the law but should not be abused or denied by virtue of the law.
- They treat all human beings as equal in human dignity.
- Rights are interrelated and interdependent, and therefore indivisible.

The reason for having rights in the constitution, and specifically the purpose of stipulating specific rights, has tended to be contested. This is because rights are tied to core societal beliefs. In some instances, the contestation has increased feelings of deep grievance and irreconcilability, and risked more societal violence. Increasingly, constitution builders also intend rights in the constitution to have a broader purpose than the classic limitation of governmental power. They have aimed to use human rights to connect the institutions and powers established in the constitution to the pursuit of prescriptions for justice, peace, reconciliation, welfare and the public good.

Many constitutions today embody the language of human rights, their substantive content and the means of their implementation that are stipulated as obligations which states have assumed under international human rights law. The United Nations (UN) has contributed to this internationalization, particularly through the seven 'core' international human rights instruments (see box 2).

Human rights have been viewed as entitlements that individuals or groups can claim in spite of, rather than because of, the prevailing framework of man-made law. At the same time, rights that are enforced through the constitution are creations of the law.

Box 2. The seven core international human rights instruments adopted by the United Nations

- The Universal Declaration of Human Rights (UDHR), 1948 (not a legally enforceable treaty)
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965
- The International Covenant on Civil and Political Rights (ICCPR), 1966
- The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

- The Convention on the Rights of the Child (CRC), 1989
- The Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT), 1984

3. Constitution-building processes and human rights options

During constitution building the inclusion of human rights options, and therefore the scope of a human rights culture, will be shaped by:

The process adopted for constitution building and the type of constitution are among the first factors that shape the scope of a human rights culture.

- (a) the type of process used to frame the constitution; and
- (b) the nature or type of the constitution.

3.1. Type of process

Different kinds of processes have been used in different countries and periods to agree on the substantive options to be included in constitutions. Processes that were managed as a series of incremental reforms could allow different groups to gain or win human rights recognition in the mainstream of society, still under continuing constitutional principles. Processes where a dominant group set all or the key terms of constitutional design essentially stipulated in their own terms the scope of human rights for other groups and segments of society. In some cases, constitution building was a process negotiated between groups in a conflict where there was no clear victor or

In some cases, constitution building has been a process negotiated between groups in a conflict where there was no clear victor or political leadership. Some groups will be perceived as ‘winners’ or ‘losers’ depending on whose rights have been included in or omitted from the constitution.

political leadership. In many of these cases, the paramount consideration was conflict resolution and peace building, which set the scope for human rights. Each process in its unique context had practical implications for who emerged as the perceived ‘winners’ and ‘losers’ in relation to groups whose rights were included and those whose rights were omitted.

A demand for greater public participation in constitution building has emerged with force. In some cases, public participation has successfully supported a broader consensus on the importance of rights and even given the constitution greater legitimacy. In other cases, participation has narrowed the rights in the vision of dominant groups and contributed to more public disagreement on the scope of constitutional guarantees. In El Salvador, for instance, national leaders made a concerted effort to write a legitimate constitution reflecting the national culture and political aspirations and based on actual input from citizens, nearly all of whom were Catholic. A majority of citizens demanded a right-to-life provision in the Constitution that would have criminalized abortion. In

fact, the provision in the 1999 Constitution was changed to define human life from the moment of conception. Few leaders could have opposed this provision if they intended to run for office under the new Constitution. Hence the effect of popular participation was ambivalent, owing to factors such as the influence of religion on society, the economic situation, the prevalence of illiteracy, the experience of conflict and the country’s constitutional history.

In some cases public participation in constitution building has given the constitution greater legitimacy. In others, its effect has been ambivalent or has narrowed the rights in the view of some groups and contributed to more disagreement on the scope of constitutional guarantees.

3.2. Type of constitution

The character and nature of the constitution and the society to which it is responding crucially underlie the shape, extent and realization of a human rights culture. It is not possible to understand these key variables by reading the language of human rights in different constitutions, which shares formulations across legal traditions and divergent constitutional systems.

There are different kinds of constitutions and constitutions have different meanings for different groups. Some practitioners view constitutions as ‘organic’ because they are rooted in and have evolved over a long time from long-established conventions and traditions, for example, that of the United Kingdom. Other constitutions are viewed as basic frames for institutions of government and the way in which they relate with each other in the system of government. These mainly use human rights as a safeguard against abuse of official power. The famous example is the more than 200-years old Constitution of the United States (1789), which was drafted by delegates representing a confederation of 13 pre-existing states. Constitutions may be described as ‘revolutionary’ because they aim at particular societal outcomes, and are used to authorize the re-engineering of both society and the state. The new Constitution of Bolivia (2009), the drafting of which was driven by the country’s first elected indigenous President aims, to ‘re-establish’ the legitimacy of the state based not only on a recognition that it is composed of plural nations, but also on its re-engineering for greater participation of indigenous nations in the political and economic mainstream. A Constituent Assembly designed the Constitution of South Africa (1996) to root out the old order and to completely reorder the state as a democracy founded on ‘non-racialism and non sexism’ (Article 1(b)). Following its six-year civil war, in 2007 Nepal promulgated an Interim Constitution that has established a federal republic in place of a 240-year old monarchy. This Interim Constitution authorized the framing of a new Constitution to ‘restructure’ a new Nepal.

The character and nature of the constitution and the society crucially underlie the shape, extent and realization of a human rights culture. Each type of constitution supports and is in turn supported by specific moral choices and values, and the letter of the law is applied in the context of a given reality.

Bolivia, Nepal and South Africa are among the countries that exemplify the fundamental need to build constitutions that acknowledge that the character of the state and its citizenship are problematic and therefore require explicit social contracting. These constitutions use human rights as an agent of social empowerment; sometimes human rights are used to represent an ideal picture of the state. Finally, continental European constitutions have been described as ‘codes’ intended to ensure that state authorities are mandated and confined by sovereign law.

Constitutions may grow ‘organically’ because they have evolved over a long time from long-established conventions and traditions, or they may aim to authorize the re-engineering of both society and the state. They may use human rights as an agent of popular empowerment.

Each type of constitution supports and is in turn supported by specific moral choices and values. Constitution builders may have to be aware of the need not to focus only on cataloguing rights in constitutions, overlooking the fact that this letter of the law is applied in the context of a given reality. The moral underpinnings of some constitutions may be encapsulated in code

words such as ‘non-racial democracy’ in South Africa, ‘pluri-nationality’ in Bolivia and Ecuador, and ‘restructuring’ in Nepal. This moral dimension, which shapes political behaviour within constitutional systems, expresses the political culture of the people it serves, and allows constitution builders to refer to a constitution as a ‘living document’. It is not possible to separate the actual human rights culture from it.

In the sections below, the focus is on building a human rights culture in constitution building in fractured and conflict-affected states. These constitutions have required explicit, negotiated consent often in a context of stalemate. They have been designed to cope with pre-existing social orders, with territorial groups with rooted power systems and with competing sources of legal norms and values.

4. A human rights culture in conflict-affected constitution building

Many tensions accompany and are caused by a demand for human rights language in constitutions. Common sources of tensions and disagreement include:

- (a) the need to deal with past gross violations;
- (b) the general system of power distribution;
- (c) legal versus political visions of the constitution; and
- (d) domestic legal norms versus international human rights law.

4.1. Dealing with past gross violations

There may be valid reason to acknowledge not only that gross violations have occurred during past conflicts, but that they will need to be specially dealt with in ways other than through ordinary court processes. In some cases, it has not been viable to contemplate

constitution building without first, or at the same time, resolving historical injustice. There is a risk that failure or inability to resolve past gross violations may hinder or derail efforts at constitution building and laying the foundations for a new human rights culture. At the same time, attempts to resolve historical injustice can endanger a new peace and resuscitate deep divisions.

In many cases, the paramount considerations in constitution building have been conflict resolution and peace building and it has not been viable to build the constitution without first, or at the same time, resolving historical injustice. Victims have emerged as important actors in processes of constitution building.

Systematic, identity-based discrimination coupled with state repression, long periods under emergency rule, or state violence against citizens may have created a culture of gross violations of human rights. In Central and Latin America, where truth and reconciliation procedures were pioneered, questions of state violence and state-enforced ‘disappearances’ were central to the constitutional dialogue. In Rwanda, the experience of the 1994 genocide framed the way in which rights were addressed in the Constitution of 2003, as was also the case with Cambodia. In Iraq, framers of the 2005 Constitution were pressured by the demands of groups that had hitherto been brutally repressed. In addition, the victims of gross human rights violations by state and non-state actors, and their supporters, have emerged as important actors in processes of constitution building.

Given such histories, some states in the initial stages of constitution building have required different special mechanisms to deal with reconciliation and transitional justice questions. A wide range of formal mechanisms have been used such as truth and reconciliation commissions, forensic inquiries into past crimes, ‘memory-making’ measures, conditional or qualified immunities or amnesties, criminal trials, and interim measures and transitional ‘sunset’ or ‘sunrise’ laws to mediate the expiry of the status quo ante and the commencement of new measures.

4.2. The general system of power distribution

Constitutions assign power and authority, which is why they are greatly fought over, particularly where outcomes are still couched in partisan terms of winners and losers. Constitution building is fundamentally political. The system of power is indelibly shaped by pre-existing conflicts and lines of division. Ecuador’s recent process of constitution building illustrates this perspective. Given widespread disillusionment with a political system that had generated eight presidents in the 11 years between 1995 and 2006, 82 per cent of Ecuadoreans voted to convene a Constituent Assembly in April 2007 to frame a new Constitution. The new Constitution introduced significant changes to end stalemates between the executive branch and the legislature by increasing the power of the executive, which could now dissolve Congress once per term provided the President also resigns and calls general elections. Also under the new Constitution, the President can serve unlimited consecutive four-year terms and gains authority over the Central Bank, which can exercise increased powers of expropriation, including the authority to raise taxes and to redistribute unproductive lands. To channel popular democracy and localize politics, citizen assemblies were authorized at the local level. In addition,

the state was reordered as composed of plural nations and the central government was required to consult—though not necessarily to obtain the approval of—indigenous groups prior to developing mines on their traditional lands. Of the Ecuadoreans who voted on 28 September 2008, 63.9 per cent approved the new Constitution.

Human rights issues may be shaped by questions of broader power dynamics, for example, will the country function with or require a strong centre and a nationalized

Constitution building is fundamentally political. The system of power is indelibly shaped by pre-existing conflicts and divisions. Human rights issues may be shaped by questions of broader power dynamics.

human rights culture in order to keep deep divisions and societal fractures in check? Or will diverse groups practise loyalty only towards their representative organizations, reinforcing the decentralization of power to sub-national levels, which will equally decide on the human rights culture?

4.3. 'Legal' or 'political' visions of the constitution

Constitutions rarely settle with finality the substantive content of a human rights culture. Instead, they are general instruments that may be constructed to allow room for interpretation, particularly in the face of deep division over their contents. Constitution builders have had to deal with the question of who will shape the human rights culture through the power of interpreting human rights provisions.

On the face of it, *bills of rights* are considered legally enforceable and therefore the best locations for all human rights provisions. Most democracies today generally refer to the constitution as the supreme law and reveal a trend for citizens increasingly to seek to use litigation in courts of law to secure their rights against official actions, including through activist-driven '*public interest litigation*'. This trend reflects a legalization of the human rights culture. The drivers of change behind it may be groups that are concerned that future political changes will jeopardize their claims. Bills of rights are increasingly expansive and lengthy, and also buttressed by the fact that they are increasingly difficult to amend compared with other provisions in the same constitution. More states have ratified international human rights instruments, which have also increased in number,

Constitutions rarely settle with finality the substantive content of a human rights culture; they are instead general instruments that may be constructed to allow room for interpretation. But who will shape the human rights culture through the power of interpreting human rights provisions?

and ratification has had an impact on legalization of the human rights culture. In practice, the impact of legalization of the human rights culture has its own limitations: it extends only insofar as the judiciary is independent, autonomous and competent, and its true beneficiaries may remain only those with the resources to file and win individual cases.

Practitioners have also recognized that the ability of a constitution to confront pre-existing social and political norms in situations of deep division may actually depend on winning a broad consensus on these issues among diverse groups and actors. This is a

political rather than a legal process. Popular participation drawing in different segments of the society to frame the constitution has also meant that constitution building is no longer the exclusive domain of elite lawyers. In fact, popular participation means that human rights are seen beyond a legal prism. In deeply divided states, constitution builders have also recognized the limitations of legal processes in dealing substantively with the pressing causes and outcomes of deep divisions, such as severe social inequality, for instance because of a shortage of qualified lawyers and judges. Politicians and their supporters may also take the view that decision making over substantive controversies should remain a democratic process that allows consensus on values in divided societies to evolve organically, with elected and therefore removable officials remaining responsible for key decisions.

There is a trend towards legalization of the human rights culture through litigation; but the ability of a constitution to confront deep divisions in society may depend on winning a broad consensus among diverse groups and actors, and this is a political rather than a legal process.

4.4. Domestic legal norms versus international human rights law

Most of the constitutions in force today have been framed since the International Covenant on Civil and Political Rights (ICCPR) of 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. Countries with Muslim majorities have based constitutional provisions on the Cairo Declaration on Human Rights in Islam (1990). Constitution builders have aimed to embody international human rights norms in national constitutions. At the same time, in deeply divided states they have also tried to use the constitution to formally recognize and integrate other domestic sources of legal norms, such as custom and religion, into the formal constitutional system. The result is that constitutions incorporate international human rights and also promote domestic values by giving formal recognition to locally valid sources of legal norms. In practice, international human rights norms and local legal norms are different entities. Underlying the international instruments mentioned above is the principle that human rights are equal, universal and inalienable from the individual. Customary law, on the other hand, is based on traditional values that often reify social hierarchies. The constitution is thus a vehicle for two competing notions.

Constitution builders can give guidance on the relative weight to be given to the constitution and to competing sources of legal norms generally. Many constitutions do this by expressly stating that the constitution is the supreme law. In addition, they contain clauses that allow the invalidation of competing legal norms that are found to be inconsistent with the constitution. On the other hand, it is less straightforward if other provisions in the constitution include competing sources of legal norms in the form of exceptions.

Constitution builders have aimed to embody international human rights norms in national constitutions, but there may be competing domestic sources of legal norms, such as custom and religion. If customary law is to be formally recognized in and integrated into the constitution, it will become a vehicle for competing notions.

5. Democracy and human rights

Democracy is a system or form of government in which citizens are able to hold public officials to account. Constitution building can embody democratization through the design of institutions and processes that entrench the protection of political pluralism. These include varied measures such as limitations on terms of office in the executive, guarantees related to freedom of political party activity, independent electoral management and electoral dispute resolution bodies, civilian control over the armed forces and law enforcement officials, balanced relations between the executive and the legislature, constraints on the use of emergency powers and martial law, guarantees for free and independent media, and measures to boost accountable, transparent government.

Participation in the ‘marketplace of political ideas’ may be impossible without effective rights to vote, to freely form and join political associations, to freedom of expression and information, to freedom of movement (in order to campaign and propagate political messages), and to institutional guarantees for free and independent media. The demand for these ‘political rights’ was in fact a common feature of constitution building in many countries that made the transition to democratic rule after 1989.

Democracy thrives when citizens are politically active and informed, which in turn requires an open civil society. Constitution building can be used to enhance the protection of civil rights—freedom from discrimination, equal treatment before the law, the right to freedom of the person and personal integrity, the right to a privacy, the right to property, the right to a fair trial and the administration of justice, protection from servitude and forced labour, freedom from torture, the presumption of innocence, and entitlement to due process in all situations where one’s rights may be affected.

Constitution building can embody democratization through the design of institutions and processes that entrench the protection of political pluralism. Constitution building can be used to enhance the protection of political and civil rights.

It is quite common to include in constitutions the rights that are included in the international human rights instruments. This has the advantage that it connects the enjoyment of rights to a ‘neutral’ source, so that no group can claim that the rights are derived from its own culture, religion or custom.

In recent decades, the importance of citizen participation in plural political institutions has gained in recognition. This is seen in the growing popularity of *direct democracy* and *participatory democracy*. Both these concepts are about citizens engaging directly in key decision making rather than relying solely on elected representatives. Constitution builders may respond to these ideas by extending or increasing the number of instances when referendums can be used. In addition, constitutional designs for participatory democracy include innovations such as citizen assemblies and participatory resource management, usually at the level of local government. Even areas traditionally reserved for specialists, in particular the judiciary, can allow for greater popular

participation through the expansion of rights to trial by jury as well the recognition of people’s courts and traditional, communal or customary courts.

6. Human rights options in the constitution

One straightforward option is to include the rights that are included in the international instruments. If we compare the rights that are specified in countries’ constitutions with those in the international instruments, it can be seen that the transfer is quite common. Ratification of an international instrument has a practical implication for the language of rights in a constitution. In terms of this approach, civil and political rights are individual rights against the state. They are partly seen as negative rights since their purpose is to constrain the state from doing certain things which are viewed as only harmful, for instance, limiting the freedom of expression or association. These rights are also seen as first-generation rights, signalling their historical development. Economic, social and cultural rights also refer to rights that require the state positively to do certain things. For this reason they are described as positive rights, for instance, the rights to education for all citizens or to welfare for citizens in need. A third classification clusters rights that are considered vital for society, for community, and these are also termed solidarity rights; they include the rights of indigenous people, ethnic nations and religious groupings, minorities, women, children, people with disabilities, and so on.

In deeply divided and conflict-affected states, this option has two practical attractions. First, the language is already framed and only needs slight adjustment if any. Second, and perhaps more significantly, it connects the enjoyment of rights to a ‘neutral’ source, so that no group is able to claim that the rights are derived from its own culture, religion or custom. While constitutions generally affirm, either expressly or tacitly, their status as supreme legislation in the national legal system, it is necessary to take into account international human rights and humanitarian law, which have progressed in creating obligations that constitution builders should recognize. International practice does not accept constitutional shields for violations of rights that are now considered to be part of what is described as *customary international law*. This fundamental law rests on widespread consensus between states that certain acts are always impermissible, such as torture, slavery, genocide, war crimes and crimes against humanity. Some new constitutions in fact expressly subject themselves to international or supranational legal instruments, for example, those of Bolivia (Article 257), Ecuador (Article 11) and Guatemala (Article 46).

Constitution builders may also consider what rights must be included based on historical antecedence. These will tend to be the rights that have emerged from political struggles in a country, sometimes lasting

Civil and political rights are individual rights against the state. Economic, social and cultural rights on the other hand require the state positively to do certain things, such as provide education for all or welfare for citizens in need. A third group of rights are those that are considered vital for society, for community, and these are termed solidarity rights: they include the rights of indigenous people, ethnic nations and religious groupings, minorities, women, children and so on.

years and with constituencies of ardent supporters. In India and Nepal, for instance, a right to be protected against untouchability is specifically included in the constitution. Similarly, other countries may have no choice but to protect the right to education in the mother tongue. In Ecuador, environmentalists successfully demanded the inclusion of the inalienable ‘rights of nature’ in the new (2008) Constitution, while Bolivian activists have contemplated the rights of Mother Earth. Rights embodied in constitutions as a legacy of conflict are likely to be enduring if people have struggled for them and are still prepared to fight to secure them. Finally, some constitution builders have recognized the importance of considering the inclusion of other individual or collective rights, such as those related to the elderly, children, people living with disability, young people or even prisoners, when this can also act as a pathway to building consensus.

Some rights must be included in a constitution based on historical antecedence, such as those that have emerged from political struggles in a country, sometimes over a long period.

Two issues tend to come up in constitution building across diverse contexts. These are:

- (a) the distinction between citizens’ rights and human rights; and
- (b) the distinction between basic or fundamental rights and rights in general.

6.1. The distinction between citizens’ rights and human rights

While the terms *citizen rights*, *fundamental rights*, *basic rights* and *human rights* have been used as synonymous outside expert circles, the nomenclature of rights has in fact signified different priorities for constitution builders. In the light of conflict, constitution builders have deliberately used citizen rights to consolidate a nationality while attaining, defending or redefining statehood. Most of the new East European republics used constitution building after 1989 to enhance nationality as a marker of citizenship, in some cases retaining a principle of consanguinity or bloodline affiliation as a transmitter of citizenship. Their situation mirrored Greece’s dilemma at the time of its creation as a new state, summed up in the line ‘having created modern Greece, let us search for the Hellenes’.¹ Some countries such as Bulgaria, Georgia, Hungary and Ukraine remained single states attempting to fashion a national identity through citizenship rights, which on the one hand recognized the rights of exiled citizens to return while using assimilationist laws to negate the human rights of minorities, in particular the Roma. For instance, Hungary’s Constitution (1949, amended 1989) includes the clause that: ‘*The republic of Hungary shall bear a sense of responsibility for the fate of Hungarians living outside her borders and shall promote the fostering of their links with Hungary*’ (Article 6). The clause, which was reiterated as a fundamental principle in respect to a new constitution-building process, echoes the provision in Germany’s Basic Law which defines a German to include a person of German ethnic origin returning to the country, in the context of the upheaval of the Second World War (Article 116). Unlike the examples above, the former Yugoslavia and Czechoslovakia split into new nation states.

With these countries committing themselves to European norms that they have to respect and abide by as new or potential members of the European Union, clear fractures have emerged between constitutionalized identity supported by official languages and traditional religions on the one hand, and multi-ethnic characteristics on the other. A similar problem plagued Andean nations with sizeable and hitherto neglected indigenous first nations: here constitution builders used the human rights language to strengthen the citizenship rights of previously marginalized communities. In Africa, the problem of who belongs is still plaguing most constitution builders and citizenship continues to be used as the main determinant of belonging in a context where ethnic nations straddle international borders and the state is in reality only existent at the centre. Recent conflicts have complicated citizenship further, first by virtue of the great numbers of migrants leaving some countries, and second because of the equally great numbers of scattered members of the diaspora arriving from others.

Citizens’ rights, fundamental rights, basic rights and human rights mean different things, and the nomenclature of rights has signified different priorities for constitution builders. In the light of conflict, constitution builders have deliberately used citizen rights to consolidate a nationality while attaining, defending or redefining statehood.

Clear fractures have emerged between constitutionalized identity supported by official languages and traditional religions on the one hand, and multi-ethnic characteristics on the other. In Africa, where ethnic nations straddle international borders, the problem of who belongs still plagues most constitution builders, and citizenship continues to be used as the main determinant of belonging.

A constitutional system may prioritize the protection of human rights through common citizenship rather than membership of any particular group. This distinction matters when practitioners intend to withhold certain rights from non-citizens, which can result in acute problems of discrimination. In Colombia aliens have the same civil rights as citizens, but political rights are reserved to citizens (although legislation can extend particular voting rights to aliens). Citizens may be able to exercise and retain the enjoyment of rights outside the state’s territory. There are some risks entailed in using the criterion of territorial presence as the basis of recognizing rights in favour of some groups but not others during the specific time frame of constitution building. Here one has in mind the distortion in the population that conflict produces in the form of displacement, migration en masse and any major changes in the size and composition of the population.

Sometimes constitution builders have treated human rights as additional or supplementary to citizens’ rights. For instance, constitution builders in Brazil (the 1988 Constitution) specified that in addition to existing citizenship rights,

A constitutional system may prioritize the protection of human rights through common citizenship rather than membership of any particular group. This distinction matters when practitioners intend to withhold certain rights from non-citizens, which can result in acute problems of discrimination.

minorities and indigenous peoples or first nations have rights to the use of a particular minority language, the reservation of their lands and the preservation of their customs. In the Interim Constitution of Nepal (2007) the same language was used to elevate the advancement of untouchables from a ‘directive principle’ in the defunct Constitution of 1990 to a fundamental and enforceable right. In some cases, the language of human rights has also been used to permit de facto non-citizens to earn their livelihood without discrimination, for example, in South Africa where the Constitutional Court rejected the contention that non-citizens could not be permanently employed to teach in state-funded schools. On the other side of the coin, constitution building could also modify the understanding of human rights, resulting in some previously recognized rights being ‘omitted’ or ‘downgraded’, for example, the disappearance of a ‘right to work’ in Hungary’s post-communist-rule Constitution, and counting the Parliament’s intentions to stipulate it as a ‘state goal’ in a new Constitution.

Constitution builders who base rights on citizenship may need to carefully consider safeguards for citizens who lack proper documentation and formulate adequate procedures to allow people to attain citizenship. The process of formulating such procedures risks providing some political groups with an opportunity to package xenophobic attitudes as citizenship values, supporting a nationalist view of rights and opposing the extension of rights to non-citizens, foreign nationals and undocumented citizens. If the government cannot easily ascertain citizenship or if various parties contest the citizenship of particular groups, the resulting disputes can ignite fresh conflict. If the constitution ties rights to citizenship, then government officials might prioritize evidence of citizenship at the expense of individuals who lack proper documentation. To avoid such outcomes, the constitution might expand citizenship rights to those with a parent who is or was a citizen of the country, permit dual citizenship, create a presumption of citizenship, and guarantee the resumption of citizenship for returnees and the non-revocability of citizenship.

6.2. The distinction between basic or fundamental rights and other legal rights

‘Fundamental rights’ or ‘basic rights’ are protected from political interference through legal enforcement by an independent judiciary. In addition, constitution builders have increased the hurdles against future political tampering with fundamental rights, usually through entrenching bills of rights for which the amendment procedures are more

Fundamental rights trump legislation since they are not derived from law, and they can therefore be used to limit political and official actions within the rule of law. ‘Fundamental’ or ‘basic’ rights are protected from political interference through legal enforcement by an independent judiciary.

rigorous. ‘Human rights’ is a generic term; it connotes constitutional content included in but extending beyond a legally enforceable bill of rights. Human rights touch on the substance of preambles, the principles according to which a state is governed, citizenship, institutional arrangements, electoral system design, security sector arrangements and even financial provisions.

Fundamental rights trump legislation since they are not derived from law, and can therefore be used to limit political and official actions within the rule of law. Due process, equality under the law, protection from discrimination and similar fundamental rights set legal standards to be followed by administrators. Determining whether these standards are upheld when a dispute arises between parties is a judicial and not a political question.

Constitutional derogation or suspension of fundamental rights ought to be expressly stated and authorized in situations of emergency; and even then not all fundamental rights can be derogated. For example, international law does not consider protection from freedom of torture to be derogable. Different countries have different rules on which rights can be derogated during an emergency and the rules that apply. Options to permit judicial review in cases where fundamental rights are directly affected by the exercise of emergency power, that is, when someone can show a direct infringement on their rights, are actually quite common across legal traditions. Derogation is a measure which partially suspends the application of one or more of the provisions of the rights, at least on a temporary basis. This should not be done as a discriminatory measure, which is a problem when a state of emergency is in place in some parts of a country but not the entire country for prolonged periods of time. Constitutional limitations on fundamental rights, for example, to curtail the rights to freedom of expression in order to prevent hate speech, should be stipulated as legal standards. If they are not, the consequence (using hate speech as an example) may risk allowing partisan politicians to make the electoral field uneven by deciding what hate speech is while curtailing freedom of expression, most likely of their opponents.

Not all fundamental rights can be derogated, even in situations of emergency. A constitution should state expressly in what circumstances fundamental rights can be derogated or suspended, for example, by curtailing the rights to freedom of expression in order to prevent hate speech.

Human rights that extend fundamental rights may need political consensus, which places them partly if not wholly in the domain of legislative politics. Constitution builders may be keen to prevent a ‘judicialization of politics’ whereby judges try to square the circle by proffering technical legal solutions to political problems. Not only would this increase institutional conflicts between the judiciary and other branches of government; it may also risk raising the stakes of politics dangerously high while jeopardizing fragile, conflict-affected democratic institutions that are no longer usable to channel fundamental disagreement. The question of how to deal with rights that are controversial and not necessarily fundamental plagues many practitioners.

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7. Enforcement

Once rights are included in the constitution, what is the practical effect? As noted, nearly all constitutions of the world catalogue rights. But the entrenchment of rights in the constitution does not always result in a culture of respect for these rights, and there is sometimes a huge gap between rights into the constitution and rights in practice. While the incorporation of human rights in constitutional texts itself delivers benefits over time, as empowerment develops, constitution builders do need to consider carefully a second aspect of this entrenchment—the enforcement of these rights.

Constitution builders need to consider carefully the enforcement of the rights specified in the constitution. The state is obliged to protect rights but there are not many means of implementation.

Under international law, the primary instrument of enforcement is the state which guarantees the rule of law. The obligation to protect rights is addressed to the state which is required to take measures to give effect to rights and ensure access to a legal system from which victims can secure effective remedies.

While constitutions can include rights and expand them considerably, there are not as many actual means of implementation. Practitioners have, however, considered multiple devices to catalyse implementation and ensure enforcement.

7.1. Interpretation aids

Constitutions per se may not be able to grapple with the substantive issues of human rights. While some provisions of human rights in constitutions are detailed and specific, many others are formulaic, general and abstract. Generalization may be required by a tradition of drafting rules that will have general application, or as a result of a particular compromise. However, enforcing general formulations is problematic because it calls for interpretation. Constitution builders have aimed to set guidelines for interpretation. Principles and statements in preambles are one option. Setting out the moral basis of the constitution is an option, but one that is problematic if this morality is not universally shared in the state or itself conflicts with or contradicts other provisions of the constitution. Some constitutions have provisions that call for those interpreting them to do so conjunctively instead of disjunctively, and constructively with the intent to give

Enforcing general formulations is problematic because it calls for interpretation. Constitution builders have aimed to set guidelines for interpretation.

it purposeful application. Some practitioners have attempted to facilitate enforcement by instead writing the constitution as a practical legal guide, and to put in a great deal of detail, for example, in relation to what rights a minority group have.

7.2. Procedures to enforce human rights provisions

Courts are not only called upon to adjudicate in existing and clear-cut human rights disputes; an important part of their enforcement mandate is to adjudicate the grey areas of human rights where uncertainty is high and opinions are widely divided. During the negotiations on the new Constitution in South Africa (1994–6), the leaders of an elected Constituent Assembly agreed that the death penalty violated human rights principles. But the death penalty was hugely popular; a universal referendum would probably have supported it. Negotiators opted to leave the resolution of this question to a newly created Constitutional Court. In due course, this Court indeed pronounced the death penalty unconstitutional and a violation of human rights principles. The Court's legitimacy, although it was a new body and in spite of widespread social distrust of state institutions, helped it to be an arbiter with a result that was broadly accepted. However, this did not put the issue to rest and in electoral campaigns in 2005 some leaders touted the possibility of a referendum on the same question as a way to build their own credibility as taking a firm line against spiralling crime in the country.

Courts are called upon to adjudicate the grey areas of human rights where uncertainty is high and opinions are widely divided. Political actors view attempts to use courts to pronounce on the rights of minorities and other peripheral groups with suspicion.

Courts engaged in these exercises can be perceived as 'making the law' rather than interpreting it. This is important when the charge is changing or amending the constitution without democratic consent. Political actors view attempts to use courts to pronounce on the rights of minorities and other peripheral groups with suspicion, partly because they wish to monopolize 'law-making' power and partly out of partisan protection of their own constituency. To support Ethiopia's delicate ethnic constitutional balance, which hinges human rights on membership of nations and nationalities, the Constitution expressly authorizes the legislature to be the sole body entitled to interpret any provision of the Constitution, including in relation to disputes in court.

7.3. Complaint procedures in the constitution

Who can initiate complaints and seek the enforcement of rights? Is it only the individual who is directly aggrieved or can a concerned group acting on his/her behalf take up a case? What of any group acting in the public interest? These are important questions where judicial enforcement is concerned. At the same time, the rules of procedures on access to courts for human rights enforcement are dealt with at a highly generalized level in constitutions. This could be out of consideration of the level of detail involved. The trend has been for constitution builders to guide courts to make rules that will be simple and facilitate easier access. Constitutions do expressly guarantee a right of individual complaint in respect of infringements on rights rather than defer the entitlement to future legislation or court rules.

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7.4. Institutional guarantees

Human rights commissions are increasingly common, and many follow the guidelines endorsed by the UN for national human rights institutions. The main issue is the extent to which these bodies can offer ‘effective remedies’ to individuals and groups complaining of rights violations. The range of options stretches from commissions that have power to award remedies, including compensation, to those that can only offer recommendations intended for other public institutions to act upon.

8. Tensions in relation to specific rights

During constitution building, the mobilization of groups in terms of ‘our’ rights versus others’ means that certain rights more than others raise conflicts and tensions. These include:

Certain rights more than others raise conflicts and tensions. These include minority rights, women’s rights and the ECOSOC rights.

- (a) minority rights;
- (b) women’s rights; and
- (c) economic and social (ECOSOC) rights.

8.1. Minority rights

Contestation for legal and political recognition of different groups and actors in constitutional dialogue has often taken the form of contestation over the human rights of diverse minorities and indigenous peoples. In Brazil (1988), Bolivia (2009) and Ecuador (2008), there was constitutional agitation about the recognition of rights of indigenous people. In Indonesia, deliberation on constitutional reform was intertwined with the *pancasila* concept of plural cultures and the minority rights of natives of Aceh and other territories (see chapter 2 of this Guide on principles and cross-cutting themes). In Nepal’s ongoing constitution building following the ten-year armed conflict that ended in 2006, demands by ethnic minorities have been at centre stage. In Eritrea and Ethiopia, the constitutional processes in 1994 largely resulted from a demand for recognition of distinct ethnic groups as self-determining entities. In South Africa, contention between the rights of the racial majority vis-à-vis the racial minority was central to the 1990–6 negotiation that resulted in a ‘non-racial’ democratic Constitution (1996). In Afghanistan rights of religious affiliation and of women transfused the 2003 talks in the Constitutional Assembly or Loya Jirga. Discrimination in the past and prevailing identity classifications had an important bearing on the demand for constitutional change. Resolving rights claims by minority groups did in many cases become a focal point for constitution building and the biggest source of tensions.

The concept of the human rights of minorities may imply not only that individuals who happen to belong to defined minority groups are entitled to the same rights as all citizens, but also that a minority group as a group can legitimately claim particular rights.

The concept of the human rights of minorities may imply two things: first, that individuals who also happen to belong to defined minority groups are still entitled to the same rights, on an equal basis and

without discrimination, as everyone else; and, second, that a minority group can itself legitimately claim particular rights. An alternative way of seeing the second proposition is that individuals are able to acquire or lose certain specified rights through joining or belonging to minority groups.

Minority rights issues are multivalent and complex. It helps for constitution builders to first define the main issues through questions such as: What is the nature of the ‘minority’ problem? Why is the ‘minority’ issue a national problem that needs constitutional measures? What measures are required of the constitution and how will they contribute to alleviating the problem?

8.1.1. Who is a ‘minority’?

Defining who constitutes a minority is itself challenging. Not only do some groups reject the term as demeaning, but constitution builders have found a firm ‘boundary’ of identification to be rather elusive. Moreover, most boundary-drawing classifications of minorities include conceptual criteria and categories developed in the sociological or anthropological sphere, among others, which may give rise to conflicting legal and political impacts in different constitutions. The same may happen with generic or very broad denominations when the question of who is then included in such categories generates areas of conflict.

The legitimacy of a self-defined minority group may be questioned or casually dismissed by non-members, whether or not they are a majority. A self-defined minority may, in addition to claiming legal rights, need to overcome stigma and the idea that it can be dismissed as ‘deviant’. Yet even relatively ‘objective’ criteria of minority status, such as population size, can still be arbitrary. In devising special measures to protect minorities, the Indian Constituent Assembly sitting in 1949 did not consider Indian Muslims to be a constitutional minority even though in numerical terms they were a de facto minority. But it considered low-caste Hindus and the untouchables a minority even though, in religious terms, they were undeniably members of the dominant Hindu faith of the majority. At the same time, when constitutional talks peg minority status to numbers, the risk is that the important principles will be overshadowed by a calculus of division of groups and multiplication of minorities that may be counterproductive. International law may be a guide but it is not adequate since, while it recognizes some categories of minority status, some are more defined than others. For instance, ‘indigenous peoples’ are better defined than ‘ethnic group’ in the **UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**. There are also multi-ethnic conflict-affected states where the dominant group is actually a de facto numerical minority. Yet in other cases, a numerically dominant group has been held at a political disadvantage through election-driven alliances of minority groups.

Defining who constitutes a minority is challenging. The legitimacy of a self-defined minority group may be questioned by non-members. Even relatively ‘objective’ criteria of minority status, such as population size, can still be arbitrary. International law may be a guide but is not adequate.

Part of the effort required of constitution builders entails avoiding generating areas of discussion which prolong tensions deriving from definitions of diverse groups and their identifying elements. With respect to minorities, it is important to note that definitional categorizations often vary in the same way as with the classification of majorities. For instance, in the Bolivian case, the original, indigenous farmer population could be described as a single distinct group. The result was that some of the diverse peoples who constitute it would cease, within this context, to be minorities, with resulting limitations on the exercise of their rights. Generic classifications can lead to excluded minorities or majorities becoming invisible.

Moreover, the ambition of constitution builders may be to change the terms of differentiation as a valid attempt to break out of recurrent cycles of conflict. Human rights may offer an option to standardize all groups. This has usually been done by putting the terms of recognition of difference into the constitution and by prohibiting discrimination on these terms. In fact, these terms may move the contestation away from the minority–majority axis. For instance, differentiation by terms such as origins,

Constitution builders may aim to change the terms of differentiation as part of a valid attempt to break out of recurrent cycles of conflict, but they need to avoid generating areas of discussion which prolong tensions deriving from definitions of diverse groups and their identifying elements.

age and even gender may be used to prohibit discrimination even though it may be the majority of young people and women, relative to numerically fewer older citizens and males, who are disadvantaged. Finally, there is a problem of the assumption of homogeneity. In reality, every ‘minority’ group is itself dynamic and may consist of minorities within minorities. Some minority classifications can also reinforce others.

Mobilization of minority groups during constitution building in order to demand specific rights has been a common feature in deeply divided and conflicted-affected states. Minority groups may be insular and concentrated in a defined territory, for example, indigenous peoples, or dispersed across the state, for example, homosexuals. In contexts of deep social division, minorities may be mobilized in terms of ‘fixed’ identity boundaries, in response to which constitution builders frame various rights options, for instance:

- *Religious minorities.* Assuming that some kind of constitutional protection of particular religions is accepted, constitution builders have devised different specific measures to protect religious minorities. Special protection for minorities has been accommodated in constitutional systems that are nominally secular and do not in general recognize rights rooted in religion. Other measures have been needed precisely because constitution builders have come under pressure to designate a particular religion as ‘official’ or ‘traditional’ or because of the actual influence of a particular religion on society. Measures can be tangible, rather than merely recognize principles such as freedom of conscience. For instance, the right of religious groups to organize their own schools and other communal services (hospitals, shelters etc.) is important and tangible, considering that in

conflict-affected states a key role of religious groups is to supplement public services on behalf of their communities. Measures to apply religion-based laws have also been considered where religious groups had a distinct normative framework. Either room could be made in the formal legal system to recognize and enforce religion-based norms that benefit only specific groups or parallel legal systems could be accommodated. The inclusion of Islamic law within the formal legal system under the new Constitution of Kenya (2010) was one of the most controversial and intractable issues. As a show of respect and accommodation for the country’s Muslims, who make up approximately 9 per cent of the population, the new Constitution has permitted the establishment of *Kadhi* courts within the formal system which will specialize in family law disputes involving private parties who are both Muslims. In many countries the discussion has unfolded under a rubric of secularism and its implications.

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- *Racial minorities.* International human rights law dealing with discrimination on racial grounds is one of the oldest, dating back to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which entered into force in 1969 as a reaction to widespread anti-Semitism. Article 1 of the CERD defines racial discrimination as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’. Less clear is the actual meaning of ‘race’ which the instrument does not distinguish from ‘ethnic origin’. Under the CERD, racial profiling, racial segregation and apartheid are all inadmissible. At the national level, some countries have provided options for groups to mobilize on the basis of ‘race’ even though constitution builders treated it as an inadmissible criterion of differentiation. South Africa offers an illustration. The Constitution of 1996 expressly states that the state is founded as a ‘non-racial democracy’. In talks leading to the establishment of a Constituent Assembly in 1994, the term ‘multi-racial’ was considered and rejected ostensibly because it could open the door to the sustenance of race-based classifications, hence allowing some validation of the apartheid-era distinctions that the constitution builders set out to invalidate completely. A constitutional principle was then agreed between the key parties that the Constitution to be framed would provide for a non-racial democracy. At the same time, consideration of the inequality between the racial white minority

and the huge black majority was not rejected. In fact, since the establishment of the Constitution, South Africa has pursued policies that are highly debated and contested, which aim for the empowerment of ‘black South Africans’ as a racial category. These policies were closely modelled on Malaysia’s preferential treatment for Malays as a racial group, which were designed to transfer control of the economy to the majority racial group. Finally, a number of constitutions have specifically prohibited racial hate speech and/or withheld recognition from political parties that are not compatible with racial harmony.

- *Ethnic minorities.* If constitution builders have accepted moving away from assimilationist ‘nation building’, then options for recognizing the organization and mobilization of people for involvement in public affairs along ethnic lines are admissible. Constitution builders have for instance allowed ethnic minorities to enjoy language rights, to benefit from territorial reserves whose resources they can exploit, to be represented in decision making at different levels of government, to use their own law and customs, and to retain their traditional forms of authority within or outside the formal system of government. These measures are context-sensitive; in some cases, the impact of ethnic leadership in formal government is in fact considerable even though the constitution relegates

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them to civil society, for example, in Nigeria. In others, their impact on formal government is marginal even though the constitution allows formal recognition of their roles, for example, in South Africa. To organize the options, constitution builders could consider whether the goal is to permit ethnic minorities to set a stamp on the evolution of national politics, or merely to be permissive to cultural differences in society. As regards the former, the constitution may need to cater for representation and participation in

government at different levels.

- *Indigenous peoples.* Constitutional recognition of indigenous peoples is sometimes conflated with that dealing with ethnic minorities. Indigenous people may be distinguished by pointing out their ‘first nation’ status. This means recognizing that they were the original dwellers of the territory (in whole or in part) that is now subsumed by the state whose constitution is being framed. Most constitutional options related to these groups are closely intertwined with the issues of ownership and control over their lands and the right to cultural self-determination. The two are seen as integral elements to the expression of an indigenous identity. In other cases, as in the Philippines, demands by first nations may extend to political claims. Distinguishing cultural from political claims may be part of resolving the demands, and international law, specifically the International Labour Organization (ILO) Convention 69, has been used as a guide for the former. Political claims on the other hand will require options

for real autonomy and/or participation and representation in mainstream public life. It may be worthwhile to stipulate what happens when valuable resources are discovered or are being exploited in the lands of indigenous peoples as this is usually a factor in serious conflicts. In addition, constitution builders have used options such as resettlement of the people concerned in equally viable lands where this is possible and where the environmental harm to original lands does not permit continued residence anyway. These options may include a right to restitution to a people’s original lands if forced evictions are part of the issue. Yet other options involve consultation devices which may or may not be binding, intended to enable indigenous people to have a say (and benefit) in the exploitation of their lands.

- *Refugees and displaced people.* Surprisingly, many constitutions are silent on the rights of refugees and people displaced from their homes by conflict. This is surprising because the numbers may in fact be quite high in conflict-affected states. Part of the problem is that this issue is considered to be a ‘temporary’ administrative issue that will be resolved once these people are resettled somewhere. Partly it is also due to the politics of cultivating citizen allegiance through recognition of rights. Yet in addition to conflict, many people are displaced when their citizenship is denied. With a constitutional design that largely assigns the transfer of citizenship to family descent and naturalization of individuals, the mass of displaced people and refugees have few options. In addition, their chances of lobbying the constitution builders are limited in practice, bearing in mind that citizenship has been a condition for political participation. This calls for constitution builders to have an enlightened and proactive approach to use the constitution to redress the vulnerability of these minority groups.

Mobilization of minority groups during constitution building in order to demand specific rights has been a common feature in deeply divided and conflicted-affected states.

8.1.2. The prohibition of discrimination and the provision of special measures

Depending on the kind of claims presented by the groups that are driving constitutional change towards recognition of minority rights, and the opposition thereto, constitution builders may consider two approaches. These are to protect minorities by means of:

- the prohibition of discrimination; and
- the provision of special rights and measures (not to be confused with privileges).

The prohibition of discrimination

Entitlement to non-discrimination or equal treatment per se is straightforward. Nearly all constitutions are unanimous in including provisions to prohibit discrimination on grounds such as origin, language, gender, age, ethnicity, race and so on. Constitution builders also aim to change the terms of recognition of differences from fixed identity terms to fluid ones. An example is the prohibition of self-identification in ethnic terms

or the prohibition of single-ethnicity political parties. This can be done in tandem with constitutional encouragements for the formation of civic associations, in order to benefit from the enjoyment of rights that are denied to other kinds of associations. The

Besides prohibiting discrimination on grounds such as origin, language, gender, age, ethnicity, race and so on, constitution builders have also aimed to change the terms of recognition of differences from fixed identity terms to fluid ones, for example, by prohibiting self-identification in ethnic terms or single-ethnicity political parties.

idea here is that all individuals are able to exercise similar rights by forming voluntary associations instead of permitting rights to be claimed only by those who belong to groups whose identity is fixed. The result is that the constitution is the only recognized common basis of exercising rights and the only source of rights, not custom or religion. Second, this approach comes across as inclusive: the protection of minorities is part and parcel of protections covering everyone

else. Encompassing protections may be easier to agree on during negotiating processes than special measures for the benefit of particular groups.

Reliance on an equality clause assumes sufficient public knowledge and access to courts; it also assumes that members of minority groups confronted with violations are aware of these rights and are actually in a position to turn to constitutional courts for a solution.

The provision of special rights and measures

In conflict-affected societies, recognition of minority rights may require special measures either to protect particular groups from persecution or to enable them to move away from marginalized status and join mainstream society. Special rights are granted in order to enable minorities to preserve their identity, characteristics and traditions. Grant of special rights suggests that constitution builders are prepared to accept resulting differences in treatment between minorities and the rest of the society. This resulting difference in treatment may be justified as promoting effective equality and the welfare of a community as a whole, in terms of the overall intentions of the constitution being built.

Special measures can embrace multiple forms, with constitution builders exercising preference for one or several depending on context. In general, these may include:

- territorial autonomy or decentralization or the ‘vertical separation of power’ (see chapter 7 of this Guide on decentralization);
- power-sharing devices (see chapter 4 on the executive branch);
- legal pluralism (see chapter 6 on the judiciary);
- cultural autonomy (or constitutional recognition of and authorization for cultural diversity);
- consociation arrangements (which are a special form of power sharing considered for some conflict-affected states);
- electoral system-based power sharing (particularly elevating forms of proportional representation—see the International IDEA Handbook on electoral system design);²

- the right to self-determination; and
- affirmative-action rules and policies.

The rights to self-determination and affirmative action are highly contentious and divisive issues, which may also have to do with the possibility that they are misunderstood and highly politicized terms.

The right to self-determination

Self-determination is not the same thing as formal independence. International law recognizes a right to self-determination within an existing state. In effect, a legitimate group has a right to choose its own destiny, but the choice does not have to be exercised in any particular way. The concept can include claims for different forms of autonomy; it can embrace complete separation and secession at one extreme and limited forms of autonomy at the other. In practice, any claim for autonomy could be seen as controversial irrespective of its form. This includes cultural autonomy of a minority group when it is perceived as negatively affecting the aggregated interests of those who do not belong to the minority group. However, while self-determination does not automatically imply independence, nor does it deny the possibility of seeking and successfully achieving it.

Self-determination conflicts that involve claims to international recognition of statehood have been multivalent and extremely complex, lasting over many years and usually involving international third parties in their resolution. In some cases, settlements have been reached after years of gruelling negotiations, resulting in the cessation of armed conflict, and in forms of autonomy and power sharing that are still in the implementation stages. Examples are Northern Ireland and the United Kingdom’s Good Friday Agreement, signed in 1998; the complexities of the two entities that form Bosnia and Herzegovina (the Federation of Bosnia and Herzegovina and the Republika Srpska) following the 1995 Dayton Agreement; the power-sharing and autonomy arrangements of 2001 for Bougainville’s autonomy from Papua New Guinea, and that of tribal minorities from Azawad in Mali (1996 agreement); and, most recently, the 2006 autonomy agreements for South Sudan that resulted in a peaceful vote for independence via referendum in 2011. In other cases, the situations are still unresolved. This is so with the self-determination of Kosovo Albanians in 2008, and in the same year the breaking away of South Ossetia and Abkhazia from Georgia. Reflecting on these cases may be useful to help constitution builders appreciate the stakes involved when constitutional means are still within reach to resolve minority claims to self-determination in deeply divided and conflict-affected states. Considering that the risk of conflicts in recent years has been highest in conditions where the state is fragile—in big as well as

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Special rights may be granted in order to enable minorities to preserve their identity, characteristics and traditions if constitution builders are prepared to accept the resulting differences in treatment between minorities and the rest of the society. These differences in treatment may be justified as promoting equality and the welfare of a community as a whole.

small states—the evolution of constitutional measures that ‘work’ in different contexts is extremely useful.

By granting the right of self-determination to minorities, the Ethiopian Constitution adopted in December 1994 has been characterized as a minority-friendly constitution. It was framed by an elected Constituent Assembly that was in fact dominated by an armed group that had militarily deposed a ruling Marxist junta. The Constituent Assembly, with the objective of establishing political legitimacy among different ethnic groups of Ethiopians, a number of which were actually involved in insurgencies against the state, decided to reconfigure the unitary Ethiopian state into an ethnic federation. The new Constitution has recognized for every officially recognized ethnic group in Ethiopia the right to self-determination up to secession (Article 39.1). It recognizes a wide range of individual and collective human rights according to the treaties which Ethiopia has ratified. At the same time, the Constitution establishes that the ‘nations, nationalities and peoples’ of Ethiopia are the minimum component parts of the country as opposed to individuals. When it comes to implementation, the Constitution has clearly made ethnicity the most relevant marker of identity in the state. Since a great deal of power is consolidated in the Prime Minister, to whom the Cabinet is accountable and who is also the commander of all armed forces, the evolving human rights culture is designed to be

dependent on political negotiation with the centre. To reinforce the political dimension, the Constitution vests all authority to interpret any provision of the Constitution, including in disputes in courts, in the National Assembly. Ethiopia’s approach to self-determination is quite unique in conceding self-determination to the extent of including a prospect of secession.

Self-determination conflicts that involve claims to international recognition of statehood have been multivalent and extremely complex, lasting over many years and usually involving international third parties in their resolution.

Spain offers a different approach. The country consists of three ‘historic nations’—Catalonia, the Basque Country and Galicia—each with its own identity and nationalist movements. The Constitution of Spain (1978) attempted to create self-government within the three historic nationalities while extending that principle to any other region that requested it. It established varied degrees of autonomy in the three historic nations and in the remainder of Spain, though in principle all eventually could attain the same level. Autonomy movements quickly spread and 17 autonomous governments sprang up. Despite recognizing the rooted nature of these nations, the constitution builders deliberately rejected any contention that any group had legal rights other than those provided in the constitution itself.

Hence, while there are many contexts in which claims to self-determination will be pushed by diverse drivers of change, in practice constitution builders view self-determination as a flexible legal and political framework in which the expression of substantive rights is dynamic. Within the given context, constitution builders may work with options that are interrelated, emphasizing dispersing autonomy and consolidated commonalities as needed. It is also crucial that constitution builders take account of

the difficulty of implementation by catering for the means of adjudicating disputes between autonomous self-determining entities and other entities that are involved in these complex cases.

Affirmative action/positive discrimination

Affirmative action can take many forms—preferential treatment of minority groups in public education or employment; cultural measures such as state-funded support for education in the local language; or symbolic measures such as official apologies. Within these forms, further distinctions can be drawn. First, the state may be able to benefit one group without harming another—for instance, by providing state education in the local language. Second, by contrast, the state can engage in positive discrimination, which distributes finite resources—such as entry to universities—to a favoured group, thereby harming other groups. Since the state is redistributing resources between groups, these issues are politically charged.

Initial key questions here include: has the state historically marginalized any particular group? If so, can constitutional measures remedy their plight and secure equality? What is the optimal constitutional design for these measures—legally enforceable measures or authorization by legislation of discretionary measures that are politically viable and subject to available resources?

If affirmative action is on the agenda, the issue may also be what forms are appropriate in order to achieve desired goals. Practitioners could consider the following issues.

- Should constitutions employ *quotas or reservations*? Should such devices be binding or non-binding?
- What form or type should affirmative action take? Should the programme be of fixed duration or be open-ended? By what measures should potential beneficiaries qualify? By simply belonging to a particular group?
- Can many groups benefit from affirmative action at the same time?
- Should courts enforce or delineate the bounds of affirmative action?

Quotas and reservations are two common constitutional mechanisms for affirmative action. Both embrace special positions for specific groups but serve different functions. Quotas may be required to give effect to the principle of equality of opportunity, so that individuals in specified minority groups can ‘catch up’. Quotas assuage fears of continued repression and promote integration because they bring these victim groups into the architecture of power. Reservations are about spaces for these groups that may not affect power. They create separate zones where minority groups are the only players.

Constitutions may distinguish between equalization in terms of opportunity and

Affirmative action can take many forms. The state may be able to benefit one group without harming another—for instance, by providing state education in the local language—or engage in positive discrimination, which distributes finite resources to a favoured group, thereby relatively harming other groups.

in terms of outcome. In practice, constitution builders target most affirmative action schemes at procedural equality—or equality of opportunity—rather than substantive results.

Implications of affirmative action

These measures remain hotly contested. In fact, many affirmative-action policies generate new controversies over time. In one sense, they contradict the purpose of a constitutional ambition to move the society beyond labile classifications of identity. Studies may also show mixed results in relation to their specific purpose to uplift specific groups. Whether implementation is by legal means or through political programmes, it may be seen in practice that more legal conflicts ensue.

The second implication seems to be that once affirmative action is constitutionally sanctioned it acquires its own political impetus. Subsequently, it may become difficult to do away with it even when it is doubtful that it is needed. Once it has been implemented—as in Malaysia, where constitution builders originally intended affirmative action to extend for 30 years—popular pressure may prevent the cessation of affirmative action: the Malaysian programme has survived for 40 years and is still in being.

The third implication has to do with a general ‘law of unintended consequences’. Instead of bringing reconciliation, the policies may risk driving wedges between groups as the winner/loser equations change in specific cases. Lowered standards for participation by some groups, for instance in employment in public service, may actually reduce the quality of services, raising new collective protests. In spite of the existence of affirmative action programmes, inequality may persist, breeding resentment among affected groups that constitutional implementation is taking too long to redress their situation, resulting in de-legitimization of the constitution. Constitution builders may need to create systems for constant review of affirmative-action programmes—whether constitutionally recognized or not—to ensure that the programmes remain an engine of growth for historically disadvantaged groups.

Affirmative-action measures remain hotly contested. Many such policies generate new controversies over time. Studies can also show mixed results. Once they are constitutionally sanctioned they acquire their own political impetus, and they may risk driving wedges between groups as the winner/loser equations change.

Finally, in some countries—such as Bolivia, Malaysia and South Africa—the group historically discriminated against and deprived of economic opportunities is actually the numerical majority. Affirmative action as applied to majorities rather than minorities has a very different impact at the societal level.

8.2. Rights of women

Demands for constitutional guarantees of the rights of women are also not tension-free; in fact, such tensions are not unique to post-conflict or conflict-affected constitution building. Many of these rights are often construed within the framework of the international human rights law of individuals, in particular the United Nations

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which entered into force on 3 September 1981 (see box 3).

The areas that produce the greatest tensions are revealed by the number and nature of reservations by states parties to CEDAW, with most substantive reservations in the areas of *equality in political and public life, equality in employment, equality before the law, and equality in marriage and family relations*.

Box 3. The Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW provides for:

- embodiment of the principle of equality between women and men in national constitutions and other laws (including its practical realization);
- modification of cultural patterns with a view to eliminating prejudices against women and stereotypes of their inferiority;
- the suppression of all forms of trafficking in women and the exploitation or prostitution of women;
- equal participation in politics and public life;
- equal rights to acquire, retain or change nationality (including equal rights to transfer nationality to children);
- equal rights in education;
- the elimination of discrimination in the field of employment;
- no discrimination on grounds of marriage or maternity;
- equal access to health care (including family planning);
- entitlement to equality before the law; and
- equality in the field of marriage and family relations.

8.2.1. Equality in political life

Equality between men and women is at face value generally accepted; equality provisions commonly appear across very different constitutional systems. The Constitution of Egypt (1971) recognized the equality of men and women and even specifically guaranteed the equality of women in the economic, political, social and political spheres, while still complying with Islamic jurisprudence. The Constitution of Greece (1975), which recognizes the Eastern Orthodox Church of Christ as a dominant religion, also decrees that Greek men and women have equal rights and obligations. In the relatively new Constitution of Swaziland (2005), which established a hereditary monarchy, women also have the right to equal treatment, a right that entails equal opportunities in political, economic and social services. Additionally, that Constitution states that no one can compel a woman to follow or uphold any custom that her conscience opposes. The Constitution of East Timor (2002), framed for a country where some women were even armed combatants in the liberation struggle, states that women and men shall have the

same rights and duties in all areas of family life and in the political, economic, social and cultural spheres. In practice, the application of these provisions differs, a fact that is explained by power dynamics and the scope of constitutions to affect social, cultural and economic life.

There is a trend to encourage gender-neutral language in constitutions. It is common for constitutions to mention the term ‘gender’, for instance, to prohibit discrimination, but without attempting to define the term explicitly. Practitioners can go even further.

A real practical barrier and challenge to women’s equal participation in politics, rather than religion or societal culture, is the behaviour of political parties in many countries.

Proposals submitted to the Constituent Assembly in Nepal, if adopted, will transcend binary gender options—male and female—and include ‘third gender’ and ‘trans-gender’ categories. Gender-neutral drafting as such is not necessarily enough to establish which rights women actually enjoy.

A real practical barrier and challenge to women’s equal participation in politics, rather than religion or societal culture, is the behaviour of political parties in many countries. Previously, constitutions have not regulated political parties. Increasingly some are doing so with examples such as Brazil and Rwanda (which so far has a very high proportion of female representation in the legislature). Constitution builders may need to consider options that will influence political parties’ selection of candidates and the advancement of women as political actors, with real penalties for parties that do

Quotas for women’s political representation, while not a panacea, have enabled the presence of women in politics at the national level.

not comply. In addition, quotas for women’s political representation, while not a panacea, have enabled the presence of women at the national level, even without grass-roots support, to participate in deciding important political and legal issues; this is a tangible accomplishment.

8.2.2. Equality in marriage and family relations

The main tension here is between on the one hand commitments to the equality of women and men in family life and on the other hand a commitment to provide formal recognition for competing legal norms that in practice embrace inequality between women and men in family life. As noted earlier, constitution builders aim and should aim to use constitutions to embody international commitments, for example, those under CEDAW. At the same time, the resolution of conflict, especially where it requires formal recognition of ethnic nations or religious groups in order to win the support of key actors in society, may result in constitutions that contain a contradiction.

Constitution builders may have an option to use the principle of supremacy of the constitution to prevail over contradictory legal norms. This may be justified on conflict resolution grounds, as an incentive to harmonize the ways in which diverse groups are treated in the state. A starting point may be to enumerate the applicable legal norms

under the express recognition that those which contradict the constitution are invalid. Since this is within the legal domain, an institutional guarantee may empower the courts to strike down other legal norms on the basis of a legal finding of inconsistency. Constitution builders have evolved approaches that ensure that the actions of courts are viewed as legitimate by the groups whose concern is the continued existence of and respect for alternative legal norms. One approach borrowed into the South African Constitution from the practice of Latin American constitutional treatment of indigenous peoples’ rights is to conflate the contentious issues into a legal problem that is assigned to the formal judicial system and its appeal structures. This means that consistency in legal interpretation is assured and that all legal norms are treated seriously. In the Latin American example, adjudication over the application of indigenous laws is part of the formal judiciary’s job. In the South African example, the Constitutional Court has the power to ‘develop’ customary law, which is often based on patriarchy. In a famous case, the Court used this power to strike down the practice of primogeniture—succession to property along the male line—and required concerned groups to modify the practice of succession to permit female inheritance. For the courts to enjoy legitimacy in performing this job, constitution builders will need to address their composition. The absence of pluralism on the bench may be used to reject decisions arrived at by judges who are not schooled in or have no appreciation for the legal norms concerned or the interests of the groups advocating them.

There may be a tension between on the one hand the commitments in the international instruments to the equality of women and men in family life and on the other hand a commitment to provide formal recognition for competing legal norms that in practice embrace inequality between women and men in family life.

Implications

What should constitutional protections of the rights of women achieve? As a start, the very participation of women in constitution building is consequential: if women are mobilized to decide constitutional issues they will generally ensure that constitutions address issues that are pertinent to the legal and societal status of women. Such groups often create space on the constitutional agenda for women’s issues, including in difficult post-conflict negotiations.

The rights of women are likely to improve if the national government is committed to such an objective and if it subordinates customary and local gender laws despite resistance from traditional leaders. If a society is fractured along the lines of plural nations or tribes, national politicians may be less willing or committed to legally elevating a particular type of cultural/social life at the national level.

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If political channels are closed to women, constitution builders may consider allowing them to turn to legal measures that provide the opportunity to present rights claims. A legal decision in some cases may actually work politically, allowing politicians to support a legal finding and acquiesce, where a similar decision by political bodies would spark a backlash. Constitution builders will then need to consider the existence and ambit of exceptions to equality clauses in the constitution.

If the constitutional system is intended to multiply the number of power centres, the implications for the rights of women will still vary. Women may need to negotiate rights in both local and national spaces. This is particularly the case if local governments are fairly independent or able to resist the national assertion of authority. Women's rights may hinge on local customs and regional political opinion. The actual protection of their rights will vary from one region to another. In some cases the existence of general constitutional principles concerning women's rights may provide a basis for lobbying local governments to comply. Increasing the local participation of women in political decision making would strengthen women's positions. And a 'race to the top'

Women's rights may hinge on local customs and regional political opinion. The protection of their rights will vary from one region to another. Increasing the participation of women in local political decision making and their bottom-to-top mobilization would strengthen their positions.

may ensue, as regions consider affirmative-action policies operating in other regions as 'best practice'. Mobilization here may follow the bottom-to-top mobilization of women's rights, as seen in Bolivia. In the absence of a national consensus on the rights of women, practitioners in each setting will have to weigh whether to address local discriminatory practices in the constitution.

Finally, constitution builders have recently established special constitutional bodies that are dedicated to advancing or protecting the rights of women. The range of their functions actually differs, from those with power to redress individual cases to those that are restricted to advising policymakers and legislators. The creation of bodies such as gender ombudspersons and women's human rights commissions presumes an ability to monitor public officials independently. Debate is ongoing as to whether women's rights are best protected through institutions that are solely concerned with the concerns of women, insofar as these are ascertainable, or whether women's rights are not best served by requiring all public institutions to foster a human rights culture that respects the equality of women and men. Emerging options for the latter include the requirement in Kenya's new Constitution that the composition of all public bodies must include one-third of members from each gender. In addition, there is encouragement for public offices to ensure that their heads and deputy heads represent both genders.

8.3. Economic, social and cultural rights

During constitution building in conflict-affected societies, negotiation over the role, status and application of the ECOSOC rights is also fraught with tensions. The ECOSOC rights give rise to acrimony precisely because they concern who gets a share of limited resources, although if resources are adequate this can limit the acrimony. The

Iraqi Constitution guarantees enforceable ECOSOC rights—including a right to free education, both child and adult health care, a safe environment (though this is undefined), social security, a suitable income, appropriate housing and a decent standard of living for all Iraqis—without regard to the availability of resources, partly because the country has oil revenues. In addition, the Constitution mandates the complete eradication of illiteracy without qualification. In contrast, most countries operating under resource constraints guarantee citizens only their most immediate concerns such as access to education, health care and housing.

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The major practical tensions involve two issues: first, what to include and to omit in the constitution with respect to these rights; and, second, what implications will arise from their inclusion in the constitution and how to redress those that spur new conflicts.

8.3.1. What to include?

Prolonged and intractable conflict may propel support for the expansive inclusion of economic, social and cultural rights in the constitution in order to:

- provide a framework within which decisions affecting the development, use and allocation of resources can be evaluated, particularly where one cause of conflict concerns who gets access to and benefits from state resources;
- bind the legislative and policymaking authorities and decision-making processes to new constitutional standards on resource use;
- symbolize that the economic, social and cultural agency of individuals is an important attribute of citizenship in the state, and that these entitlements mean citizens are not to be seen as dependent on patronage in ethnic, religious, clan, political party or other associations;
- advance reconciliation through recognition of the ECOSOC rights of specific groups who have been pushed into conflict with the state due to prolonged and unfair displacement into the economic, social or cultural periphery of the state; and
- as with all human rights, under the concepts of the indivisibility of rights, win legitimacy for a constitution that stipulates the ECOSOC rights and consequently allegiance to the new 'social contract'.

The core ECOSOC rights are formulated in an international UN treaty—the ICESCR, which entered into force on 3 January 1976 (see box 4).

Box 4. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR provides, inter alia, for:

- the right of peoples to self-determination (which includes ownership and control of their own natural resources and means of subsistence);
- the right to work (which includes a right to free choice of livelihood);
- the right to just and favourable conditions of work (which includes fair pay, equal remuneration for equal work, safety at work, decent living standards, promotion based on merit, and reasonable periods of rest/vacation);
- the right to form and join trade unions and associations (including a right to strike subject to applicable laws);
- the right to social security (pension, social insurance);
- the protection of the family (reasonable and paid maternity leave, punishment for the social and economic exploitation of children and young persons);
- the right to an adequate standard of living (freedom from hunger, adequate food, clothing and housing);
- the enjoyment of the highest attainable standard of physical and mental health (including medical treatment and service for all in the event of sickness);
- the right to education (including compulsory and free primary education for all); and
- participation in cultural life and the opportunity to benefit from scientific progress (including the protection of the scientific, literary and artistic rights of authors).

Since most states have by now ratified this instrument, the inclusion of economic, social and cultural rights in constitutions in recent processes of constitution building has been the rule rather than the exception. Many constitutional provisions have adopted the human rights language of the ICESCR. Even countries such as India, whose Constitution of 1949 predates the ICESCR, have found a way to ‘constitutionalize’ them through a Supreme Court decision in that country that these rights concern basic needs that are integral to a right to life, which is protected in the Constitution. The ICESCR requires states to promptly remove obstacles to the immediate fulfilment of a right. While rights may be progressively realized, obstacles and elements of discrimination should be removed immediately. Authorities violate the Covenant if they fail to meet a human rights standard that is already within their means and ability to meet. In the course of

progressive realization of rights, limitations should be kept in check and avoided save where resources become limited, so these rights call for constant improvement of the situation and the resumption of progressive realization as soon as resources allow.

The inclusion of economic, social and cultural rights in constitutions in recent processes of constitution building has been the rule rather than the exception.

Rather than being a blueprint, the ICESCR leaves it to national actors to determine the degree of variation required by their circumstances, their legal system and the available means. Constitution builders may expand on it to provide for additional rights that are not included in the instrument, for example, the right to clean drinking water in the Interim Constitution of Nepal.

The adoption in the constitution of the ECOSOC rights does not necessarily imply the adoption of a specific economic system (a liberal or centrally planned economy), but this may be expressly or implicitly the result of the way in which the corresponding constitutional provisions are introduced. The underlying question for anyone drawing up a constitutional text is whether it is admissible to use people as means to achieve medium- or long-term economic objectives. Many constitution builders do not support this perspective and insist that economic objectives should be sacrificed when the rights and well-being of people are thereby negatively affected.

Economic, social and cultural rights require systematic governmental action and depend on the availability of resources for their fulfilment. Under the ICESCR, they may be progressively realized depending on the available means, but states are obliged to take steps to remove obstacles and elements of discrimination immediately.

In the same regard, adopting an economic system or model may lead to the opening up of ongoing discussion areas, but this is almost inevitable where the constitution is identified as an instrument which sets out a specific government programme.

8.3.2. What are the implications?

Demands for constitutional protection of these rights have been hotly contested, particularly on the issue of how they will be enforced and implemented.

Who will be the ‘real’ bearers of these rights?

A starting point is consideration of the issue of on whose behalf these rights will be implemented. Are there groups that constitution builders intend to benefit on account of any particular circumstances, for example, individuals and groups living in extreme poverty? For instance, in reaction to a problem of chronic malnutrition in mountainous Bolivia, a right to food was included in the new Constitution with the intention of supporting redistribution of a tax on hydrocarbons to feed people. Or can social rights aim at reinforcing demand for social safety nets that are calibrated to reduce social or gender inequalities? It is often the case that groups demanding the inclusion of these rights in the constitution view this as a means to an end. Constitution builders may opt to consider provisions in the constitution that merely stipulate these rights as a starting point that needs to be reinforced by directive guidance. For instance, the guarantee of a right to education may be reinforced by a commitment to a goal of achieving universal primary education. This may lead to an integrative design between the rights guaranteed in the constitution and the broader developmental and other goals of the state as well as its major priorities that are also catered for in the constitution.

The question whether these rights should be pegged to citizenship is not easily resolved. Rights that are stipulated in constitutions should have a general application to everyone and constitutions should aim to avoid discriminating between individuals and groups on arbitrary grounds. At the same time, the issue of who actually bears the various economic and social rights is heavily contested. For instance, will non-citizens also be entitled to claim a right to work or to access to adequate housing? Considering the nature of the obligations incurred, meeting which will require the deliberate allocation of a state's assets and resources, officials may prefer the entitlements to be restricted to citizens. This line is also strongly supported by nationalists and related groups and is often a major factor in xenophobic and anti-migration sentiment. The inclusion of these rights is furthermore often framed as a social contract between citizens, as essential contributors to taxes, and officials who ensure that public services benefit contributors. Politically, the arrangement helps to secure the support and allegiance of those who contribute to the government that provides services through their taxes. But this equation excludes those who cannot prove citizenship or are in fact non-citizens, such as refugees and other aliens.

In addition, even the use of these rights as an important attribute of citizenship does not resolve the contestation between different groupings within the state. Public officials naturally resist the implication that members of the armed forces or the public service can realistically enjoy a right to strike. In some countries, constitution builders have used the opening in the ICESCR to qualify who is entitled to enjoy this kind of right. There are varied options. In South Africa the judiciary has stated that the members of the defence forces can strike; in other countries this is expressly ruled out. In a context affected by conflict, the idea that members of the armed forces have a right to strike may appear astonishing, particularly when constitution builders are even contemplating making it a citizen's duty to undertake national service.

How will the rights be implemented?

Constitution builders have considered options for implementing and enforcing these rights through (a) legal and (b) political measures.

Typical criticisms of the constitutionalization of economic and social rights can be summarized as follows. First, since these rights require systematic governmental action, it is clear that they depend on the availability of resources for their fulfilment. Yet the resources may be scarce. Given the assessment by the World Bank that conflicts set back development by 10–15 years, it can be assumed that constitution building in countries affected by conflict is dealing with resources made even scarcer by conflict. Second, determining the use and allocation of scarce resources is a political process subject to electorally competing ideas of the good life. From this perspective, the attempt to calculate a 'core minimum content' for what will be a right to a claim on scarce resources is too contentious to be couched as a constitutional right. Third, even if it is accepted that state assets and resources should be used according to a rights-based approach, here the rights-based claims are in competition between different contesting groups and the constitution should not elevate any particular claim over any other. Fourth, it cannot

be within the mandate of unelected judges to decide on the varied contests that arise. Moreover, they lack adequate policy-relevant information, such as statistical data, to make a competent decision.

How will economic, social and cultural rights be implemented? Including them in the constitution per se does not end contests between competing claims.

Despite these criticisms, many vulnerable individuals and groups whose access to and involvement in political processes limit their ability to secure political action in their favour have tended to use constitution building to demand legal enforcement of these rights. Opposed to them have been groups which preferred, for various reasons, to let elective institutions decide on the contestation. Constitution builders ought to be aware that constitutionalization per se does not end these contests. In general, however, some rights have been made legally enforceable, perhaps in recognition of the impact of international law under the ICESCR. Labour relations and related rights (to strike, to form trade unions and associations, not to be subjected to forced labour, to protection from work-related harm, etc.) are generally legally enforceable.

Legal enforcement

The direct consequence of permitting legal enforcement is that judges may be required to deal with implementation of the ECOSOC rights when disputes arise concerning them between litigating parties. To facilitate this, constitution builders have generally considered:

- clearly enumerating the ECOSOC rights in the bill of rights without any distinctions and with as few limitations as politically acceptable;
- recognizing the mandate of a judicial body such as a constitutional court to determine disputes involving any provision of the constitution;
- providing that people should face no discrimination in the enjoyment of the ECOSOC rights; non-discriminatory enjoyment of the ECOSOC rights is in terms of the ICESCR immediately realizable;
- directly authorizing and mandating legislatures to make laws to make the ECOSOC provisions operational; in some few cases, time frames have been used;
- articulating principles and criteria to guide legislation on the ECOSOC rights in order to strengthen judicial scrutiny of the latter;
- expressly bolstering civic-minded groups so that they have the legal standing to initiate and prosecute court cases; and
- expressing the connection with international law to augment domestic law.

Implications of legalization

Under international law, the legal obligation to implement economic, social and cultural rights is pegged to minimalist standards of 'core content'. One key aim is to achieve global standardization in the ways in which different states with different legal systems treat these rights. Core content is a baseline for future progressive realization. While the

ICESCR allows for ‘progressive realization’ of the rights contained in the Convention, there are two obligations that apply fully and immediately to all economic, social and cultural rights irrespective of the availability of resources: the obligation to ensure non-discrimination and the obligation ‘to take steps’ towards the realization of these rights.

Enforcement may also need several pieces of new legislation. Practitioners can also refrain from using language in the constitution that allows indefinite delay in enacting the required legislation. A violation of the ICESCR can still occur in spite of progressive realization if a state party does not take a measure that is within its existing means to achieve. Greater standardization at a global level has been aimed at through clarification of the nature of states’ obligations under the ICESCR. States have an obligation to take measures and provide the means that facilitate the fulfilment of these rights, for example, to establish the necessary legislation. This is an *obligation of conduct*. In addition, the fulfilment of these rights is embodied in particular results in specific cases, including those that the ICESCR Committee may require of state parties when following up on their reports. Here, there is an *obligation of outcome*. In embodying the ICESCR in the constitution, constitution builders may find it useful to evaluate the nature of the obligations it will impose.

Legalization of implementation in national constitutions may allow judiciaries to align themselves with the developing international law, or to develop their own lines of implementation in the interest of the domestic legitimacy of their actions. That means that more variations can be seen in legal enforcement since it is subject to the existing legal system and tradition in each state.

South Africa offers an illustration of the effect of the legalizing option. The Constitution of 1996 not only recognizes economic, social and cultural rights; it also includes them in a legally enforceable Bill of Rights, and it establishes a Constitutional Court as the custodian of the Bill of Rights. Since 1996 the Court has issued orders dealing with the implementation of these rights in relation to access to adequate housing, access to HIV medication, and the right to clean drinking water, in a case where it even developed a calibration of individual entitlement in terms of litres per day. In one of its early decisions, the Court formally departed from the ‘minimum core content’ rule and adopted a new judicial standard of ‘reasonableness’. When deciding over the government’s conduct in relation to one of these rights, the Court will aim to consider whether it was reasonable in the light of the circumstances surrounding it. Reasonableness is actually a fairly common judicial approach in common law countries, which also take the view that rights do not as such have a ‘minimum content’. South Africa’s Constitution was certified by the same Constitutional Court, as part of the negotiating process, ahead of its promulgation. The Court had a good opportunity to weigh in on the issue of enforceability of the ECOSOC rights, which partly explains their legal enforceability in that context. From its perspective during the certification procedures, rights only grow through use by citizens and their content evolves through legal interpretation. The Court mentioned the right to freedom of expression as an example of a right that has grown through judicial interpretation. It also mentioned that, at least in South Africa, courts adjudicating on rights follow a cardinal rule of not deciding more than

is absolutely necessary in a particular case in disputes between parties. Hence a key to what judiciaries can be able to do via legal enforcement could be seen in the light of the need for domestic legitimacy for their roles as such, rather than as being based on an international legal regime that says how these rights should be legally implemented.

In India, the legalization of a human rights culture, spurred on by the unique role of public interest litigation, has also permitted the country’s top court—the Supreme Court of India—to develop an Indian approach to enforcement. The Constitution of India of 1949, predating the ICESCR, unsurprisingly did not include economic, social and cultural rights. Instead the Constituent Assembly agreed to open the door to influence policymakers by means of directive policy guidelines that were stipulated to facilitate a socialist transformation of the new nation. Yet the Supreme Court was able to decide that these rights embody the basic needs of any individual and as such must be an integral part of the legally enforceable right to life. The Supreme Court’s assumption of its role has not been free of controversy; in fact, institutional conflicts between the Supreme Court and the legislature in India around the implementation of human rights are not new. A conflict arose between the Supreme Court and the legislature after the former adopted a legalistic approach to strike down a redistributive property law. Due to protracted debate, the Constituent Assembly of India had opted to recognize property rights in sections dealing with ‘directive principles’ rather than in an enforceable bill of rights. The legislature vocally opposed the ruling in *Sankari Prasad Singh versus Union of India*, stating that the Constitution of India does not protect private property as such, but instead promotes measures that permit the majority of capital-poor Indians to access property in an equitable fashion. To protect agrarian reform from court action, the legislature passed the Ninth Schedule Amendment (1951) to the Indian Constitution, which curtailed the jurisdiction of courts in this and other areas.

Courts will not always be in a position to deal with all the issues that will arise in enforcing economic, social and cultural rights. Constitution builders may also have to rely on political actors to address these rights, but they will still need implementation procedures.

With legalization, constitution builders will need to consider the effect of permissible constitutional limitations in relation to these rights. Limitations on constitutional rights may be justified; it is common for constitutions to include a clause that lays down the standards that apply for limitations. Some of these standards are concerned with specific rights or the purpose of the limitation.

One concern has been that legalization of economic, social and cultural rights will overburden the judiciary with litigation. In the case of South Africa, where the rights are legally enforceable, the workload in the courts, counting decisions of the Constitutional Court from 1996, reveals that a greater proportion of the caseload is still related to civil and political rights, and in particular rights within the criminal process. Constitution builders, however, should be aware that legalization does not always mean that courts will be in a position to deal with the issues that will arise. They may therefore also have to rely on political actors to address the ECOSOC rights.

Political choices

Many of the issues that are raised by the contestation for economic, social and cultural rights extend beyond constitutional frameworks; in particular, the role and impact of economic development and globalization since 1990 cannot be ignored. On the one hand, some of the international resources that conflict-affected states could rely on to reinforce expansive economic and social rights are now greatly diminished. On the other hand, the dominant ideological context is pushing states to adopt free-market choices in which private actors rather than the state assume a greater responsibility for the delivery of many of the services contemplated by these rights. If the reality is one of state deregulation of industry, privatization of state assets, investor-friendly tax incentives, austere public spending budgets, and a flexible job market, then what scope will constitution builders give to the ECOSOC rights? How much of a public space will there be to support all segments of society to participate fully in the economic life of the state, including in the choice of economic policy, when the state's sovereignty over the economy is shared with technocratic, supranational entities? These kinds of questions are critical. They need not lead to symbolic and token constitutional measures, but they may be a reason to assign the implementation of these rights to political actors and to leave more room for politics to negotiate the available spaces.

The treatment of the ECOSOC rights as part of a political foundation of the constitution, rather than a predominantly legal one, still requires implementation procedures. Constitution builders have considered several options whose common or underlying character is the reliance on non-judicial enforcement procedures. Options have included the following.

- ECOSOC rights are included in the constitution, including in a bill of rights, subject to express limitations on judicial enforcement.
- The rights are included as 'directive principles of state policy' aimed at political actors and policymakers.
- The ECOSOC rights can still be reinforced by other enforceable rights. Since the enjoyment of these rights depends on policies, as well as the use of tax money, practitioners can weigh in to enable citizens to scrutinize government policy and spending and their implications for the ECOSOC rights. This can be done through a constitutional obligation to recognize the right to access to official information and by authorizing the legislation to give it operative effect.
- Another arm of implementation is to establish an institution that can assist ordinary citizens to get help. Ideally, such an institution is independent of the executive policymakers and the legislators who determine budgets. Its distinctive feature is its non-judicial character. The ombudsman is one such public protector. In many countries, these can investigate violations of the ECOSOC rights and make recommendations for legal and administrative reform.

These kinds of options may, crucially, make it clear who is to be held accountable for non-implementation of these rights. The language of directive principles can clearly state who is responsible; if legislation is expressly required, the information can be used

to lobby parliaments and to monitor the record of parliamentarians. In Latin America, civic groups pushing for meaningful 'economic citizenship' on behalf of indigenous peoples and other vulnerable groups have used provisions in directive principles to demand human rights impact assessments in official development projects. For the drivers of change in different ethnic groups, the ECOSOC rights might provide a tangible measure for examining claims of discrimination—to separate the perception of discrimination from actual discriminatory practices.

A stable and flexible human rights culture may require courts and legislatures to strike a balance between legal and political safeguards. Constitution builders can also link developmental goals to the ECOSOC rights and create an economic council to advise the executive or all public authorities on economic policies, including the implementation of rights.

The constitution may not definitely resolve the issue of economic, social and cultural rights but it can set out principles to guide decision makers. If they are deeply contested in meaning and effect, enshrining these rights in a constitution may prove counterproductive.

The constitution may not definitely resolve the issue but can set out principles to guide decision makers. If they are deeply contested in meaning and effect, enshrining the ECOSOC rights in a constitution may prove counterproductive. That conflict will persist unless economic and material conditions improve for the poor, a result that is perhaps beyond the reach of a constitution. Enshrinement can also expand institutional conflict between the executive and the judiciary or between courts and parliaments. There is no single road to the full realization of the ECOSOC rights, and successes and failures have been seen in different constitutional systems.

9. Conclusion

The relationship between a human rights culture and constitution building is complex given the centrality of demands for and contests over rights in societal divisions and conflicts. Human rights play a central role in conflict settlement between groups, yet their inclusion in the constitution of a conflict-affected state is not tension-free. Over time, the scope and significance of human rights have expanded. They not only limit the powers of government vis-à-vis individuals in a free society; marginalized individuals and groups also claim them as vehicles for continued involvement in political and economic governance. In socially diverse, deeply divided and conflict-affected states, the constitution has become a contested framework for the way in which individuals and groups will live their lives. Its purpose extends beyond the narrow scope of a constitution as law. Because constitutions cannot guarantee their own protection, but need political will and dynamic institutions that are able to act, constitution builders need to focus beyond the inclusion of rights in bills of rights. It may be possible to give more attention to defining appropriate constitutional measures that will support rights within the given power system, rather than separate from it. Constitution builders also have to consider how different institutional designs assign political power, and how differing visions of

Human rights play a central role in conflict settlement between groups, yet their inclusion in the constitution of a conflict-affected state is not tension-free. In socially diverse, deeply divided and conflict-affected states, the constitution has become a contested framework for the way in which individuals and groups will live their lives.

the constitution contribute to shaping a human rights culture. In that way the rights could serve as an integral limb of the moral basis for the legal and political foundations of the constitutional system, rather than in parallel to it.

It is true that conflict and deep division can compound the problems of building a human rights culture under a durable constitution.

The experience of authoritarianism, ethnic

fractures, violence, possibly long periods under emergency rule where suspension of rights was prolonged, a weak judicial oversight culture and lack of legal literacy among ordinary people, the absence of strong pressure groups if they are not recognized or encouraged, the problem of multiple organizations concerned with rights only to the extent that they involve their own constituencies and so on—all these factors point to the difficulties faced by many countries that are grappling with building constitutions. Practitioners have to strike the balance, recognizing the limitation of constitutions and human rights foundations, but also see possibilities to open spaces that did not exist before and to allow mobilization of groups in public affairs that was not possible before.

Table 1. Issues highlighted in this chapter

Issues	Questions
1. Defining your human rights culture	<ul style="list-style-type: none"> • Why should human rights be included in a constitution? • Which rights will be included in a constitution? • How do the experience of conflict and the contextual situation determine which rights will be included in or excluded from the constitution? • How does thinking in terms of a human rights culture rather than focusing only on human rights options in constitutions assist constitution builders to approach rights more holistically or comprehensively?
2. Constitution-building processes and human rights culture	<ul style="list-style-type: none"> • How does the process used to frame a constitution relate to what it ultimately contains concerning human rights? • How do the nature or rationale of a constitution and the kind of political system it establishes provide a textual framework to shape the scope of human rights?

3. Human rights culture in a conflict context	<ul style="list-style-type: none"> • How should constitution builders treat a past culture of gross violation of human rights in order to build a new constitutional culture of human rights? • How does the system of allocating power in the light of societal conflict shape the constitutional human rights culture? • Does it matter for the implementation of human rights if a constitution elevates political dialogue or (alternatively) treats judicial or legal approaches as preferred processes for the resolution of serious social disputes? • How do conflicts between domestic laws and international human rights law affect a human rights culture?
4. Deciding on human rights options in constitutions	<ul style="list-style-type: none"> • What criteria do constitution builders generally consider before deciding on what human rights options to build in to a constitution? • What implications do distinctions between individuals, groups and peoples have for the human rights language in a constitution?
5. Enforcement of human rights	<ul style="list-style-type: none"> • Why is it critically important that constitution builders think carefully about enforcement up front when framing human rights options in a constitution? • What issues concerning enforcement will generally arise?
6. Human rights as factors of social tension	<ul style="list-style-type: none"> • Can constitutional guarantees for human rights risk increasing conflicts in societies, instead of mitigating them? • What kinds of tensions arise in the discussion of human rights during constitution building? • Which issues are likely to draw greater tensions during constitution building in diverse contexts? • What risks accompany implementation of the constitution when it comes to guarantees for rights that are highly contested, and how can these be minimized?
7. Consensus on human rights culture amidst divisiveness of specific rights	<ul style="list-style-type: none"> • Are there rights that are more likely to spark divisiveness than others? • What tensions do guarantees of minority rights give rise to and how can constitution builders increase consensus on these rights? • What tensions do guarantees of the rights of women give rise to and how can constitution builders increase consensus on these rights? • What tensions do guarantees of economic, social and cultural rights give rise to and how can constitution builders increase consensus on these rights?

8. Conclusion

- When it comes to using the constitution-building process to build a culture of human rights, what is it important for constitution builders to be aware of?

Notes

- ¹ Glenny, Misha, *The Balkans 1804–1999: Nationalism, War and the Great Powers* (London: Granta, 2000), paraphrasing from pp. 32–38.
- ² International IDEA, *Electoral System Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2005).

Key words

Human rights, Fundamental rights, Civil liberties, International standards, Human rights culture, Civil rights, Political rights, Cultural rights, Economic rights, Social rights, ECOSOC rights, Citizenship, Affirmative action, Positive discrimination, Women's rights, Religious rights, Minority rights, State of emergency, Ombudsman, Human rights commission, Vulnerable groups, Marginalized community, Gross violations, Amnesty, Immunity, Transitional justice

Additional resources

- **United Nations Office of the High Commissioner for Human Rights**

<<http://www.ohchr.org/EN/Pages/WelcomePage.aspx>>

The High Commissioner is the principal human rights officer for the UN and leads its human rights efforts by conducting research, education and the dissemination of public information. The website has programmes for implementing human rights and resources on human rights, as well as training materials and a forum on current human rights challenges.

- **UN Human Rights Council**

<<http://www2.ohchr.org/english/bodies/hrcouncil/>>

The Human Rights Council is an intergovernmental body within the UN system made up of 47 states responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and making recommendations on them.

- **United Nations Development Programme Democratic Governance focus on Human Rights**

<http://www.undp.org/governance/focus_human_rights.shtml>

The United Nations Development Programme (UNDP) supports human rights development by building the capacity of human rights systems and institutions, engaging with international organizations, and promoting national judiciaries.

The UNDP website provides resources and has a support programme for human rights practitioners.

- **African Commission on Human and Peoples' Rights**

<<http://www.achpr.org/>>

The Commission was established under the African Charter on Human and Peoples' Rights to ensure compliance with the Charter by member states.

- **Charter of Fundamental Rights of the European Union**

<http://europa.eu/lisbon_treaty/glance/rights_values/index_en.htm>

All member states of the European Union (EU) are bound by the Charter of Fundamental Rights, in force since 2007. The core values of the EU are set out in the Treaty of Lisbon and include human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

- **Arab Human Rights Index**

<<http://www.arabhumanrights.org/en/>>

The Human Rights Index for the Arab Countries, sponsored by the United Nations Development Programme on Governance in the Arab Region (UNDP-POGAR), is a repository for the entire set of UN documents pertaining to human rights and the responses, including reservations, by the Arab member states to the committees that monitor the core international human rights treaties.

- **Inter-American Commission of Human Rights**

<<http://www.cidh.oas.org/what.htm>>

The Inter-American Commission on Human Rights (IACHR) is one of two bodies in the inter-American system for the promotion and protection of human rights under the umbrella of the Organization of American States (<<http://www.oas.org/>>). The Commission has its headquarters in Washington, DC. The other human rights body is the Inter-American Court of Human Rights, which is located in San José, Costa Rica.

- **Inter-Parliamentary Union**

<<http://www.ipu.org/english/whatipu.htm>>

The Inter-Parliamentary Union (IPU) is the focal point for worldwide parliamentary dialogue and works for peace and cooperation among peoples and for the firm establishment of representative democracy. The IPU carries out work on thematic human rights issues.

- **World Legal Information Institute**

<<http://www.worldlii.org/>>

The World Legal Information Institute maintains a rich catalogue of legislation and key judicial decisions from different countries. The catalogue can be searched by country and subject matter.

- **Government Legal Information Network**

<<http://www.glin.gov/search.action>>

The Law Library of the US Congress maintains this online network which has information on legislation from a number of countries across the world and is searchable by subject.

- **International Network for Economic, Social and Cultural Rights**
<<http://www.escr-net.org/>>
The ESCR advocates a link between human rights and economic and social justice in order to reduce poverty and inequality by providing a resource for national actors to reach out globally for new disciplines and approaches to addressing these issues. This non-profit, non-governmental organization provides on its website an interactive network of experts and practitioners working to support the development of economic, social and cultural human rights around the world.
- **Council of Europe**
<<http://www.coe.int>>
The Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. The website has resources, publications and training materials geared towards strengthening human rights enforcement.
- **HUDOC: The Case Law of the European Court of Human Rights**
<<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>>
HUDOC is a database of cases and decisions by the European Court of Human Rights and the former European Commission of Human Rights.
- **Asian Legal Resource Center**
<<http://www.alrc.net/>>
The non-governmental organization the Asian Legal Resource Center (ALRC) promotes cultural, economic and social rights while working closely with national and international actors and emphasizing national autonomy. The website provides resources and training for legal professionals to strengthen human rights enforcement and the rule of law.
- **International Centre for Transitional Justice**
<<http://www.ictj.org>>
The International Centre for Transitional Justice (ICTJ) is an international non-profit organization that works to help societies address human rights violations by building trust in national institutions as human rights guardians. The site advises states and policymakers on issues of transnational justice and human rights and offers a publications library relating to research on these same topics.
- **United for Human Rights**
<<http://www.humanrights.com/home.html>>
United for Human Rights (UHR) works at the international, national and local

levels to implement the Universal Declaration of Human Rights by providing educational resources and information on human rights history, efforts and terminology, along with a database of organizations devoted to human rights issues.

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Constitutions

(English versions accessed from <<http://confinder.richmond.edu>>)

Constitution of Brazil, 1988

Constitution of Colombia, 1991

Constitution of Bolivarian Republic of Venezuela, 1999

Constitution of Ecuador, 2008

Constitution of Bolivia, 2009

Constitution of India, 1949

Constitution of Malaysia, 1957

Constitution of East Timor, 2002

Constitution of Afghanistan, 2004

Interim Constitution of Nepal, 2007

Constitution of Iraq, 2005, Articles 20, 30, 37

Constitution of Hungary, 1949, amended version 1989

Basic Law, Germany, 1949

Constitution of Greece, 1975

Constitution of Spain, 1978

Constitution of Egypt, 1971

Constitution of Ethiopia, 1994

Constitution of South Africa, 1996

Constitution of Nigeria, 1996

Constitution of Rwanda, 2003

Constitution of Swaziland, 2005

Constitution of Kenya, 2010

CHAPTER 4

CHAPTER 4

The Design of the Executive Branch

Markus Böckenförde

1. Introduction

The executive branch is one of the three branches of government, which are central to the institutional design of a constitution. The allocation of powers and the interrelation between the three branches of government—the executive, the legislature, and the judiciary—are key elements of such a structure. Beyond the broad and general distinction that the legislature makes the laws and approves the budget, the executive implements the laws, and the judiciary adjudicates on laws, many questions need to be addressed and answered in order to design the appropriate balance between the three. The extent to which these branches should be separated from one another and the different degrees of reciprocal checks and controls between them are a source of constant debate in the process of drafting a new constitution or reforming an existing one. Thus, the design of the executive branch cannot be discussed in clinical isolation, but requires an understanding of the governmental structure within which it operates.

Before addressing design options for the executive in more detail, a brief overview of the interrelation of the three branches seems helpful. In particular, the institutional balance between the executive and the legislative branches of government offers a variety of different arrangements and design options. People who study and debate constitutions often sort the wide array of systems into three categories: the presidential system, the parliamentary system, and, in between the two, with characteristics of both, the mixed systems. The elementary difference between the presidential and parliamentary system is that in a presidential system the legislature and the head of government are both directly elected for a fixed term, whereas in a parliamentary system only Parliament is

The allocation of powers and the interrelation between the three branches of government, the executive, the legislature, and the judiciary, are key elements of institutional design of a constitution. Each constitution designs its own specific and context-related balance between the three.

directly elected, and the head of government is selected or elected by Parliament and requires its constant support. Other distinctions between systems can be made, but opinions vary as to whether these distinctions support the classification of a given system as presidential, parliamentary, or semi-presidential.

2. Systems of government and their impact

One central issue in democratic constitution building and constitutional design is the framing of the state structure.

Generally, constitutions do not expressly declare that they have adopted a presidential, parliamentary or mixed system. Instead, each constitution designs its own specific and context-related balance between the two branches of government, and political scientists then categorize them as following a specific model design. Since different scholars rely on different parameters to define those models, a number of countries are categorized differently by different authors. This vagueness makes it very difficult, if not impossible, to argue reliably the potential strengths and weaknesses of one system.¹ Acknowledging this caveat, the following paragraphs briefly introduce the systems and give a general overview. Those characteristics that are commonly acknowledged as a generally accepted

The quest for a stable, democratic constitution to establish peace and functioning government is often accompanied by an evaluation of the relative merits and consequences of different systems of government.

parameter to describe a specific system of government are indicated in bold type in boxes 1–3. Criteria that are often referred to by some observers but which others regard as irrelevant are also added though they are not considered defining elements of the respective governmental system.

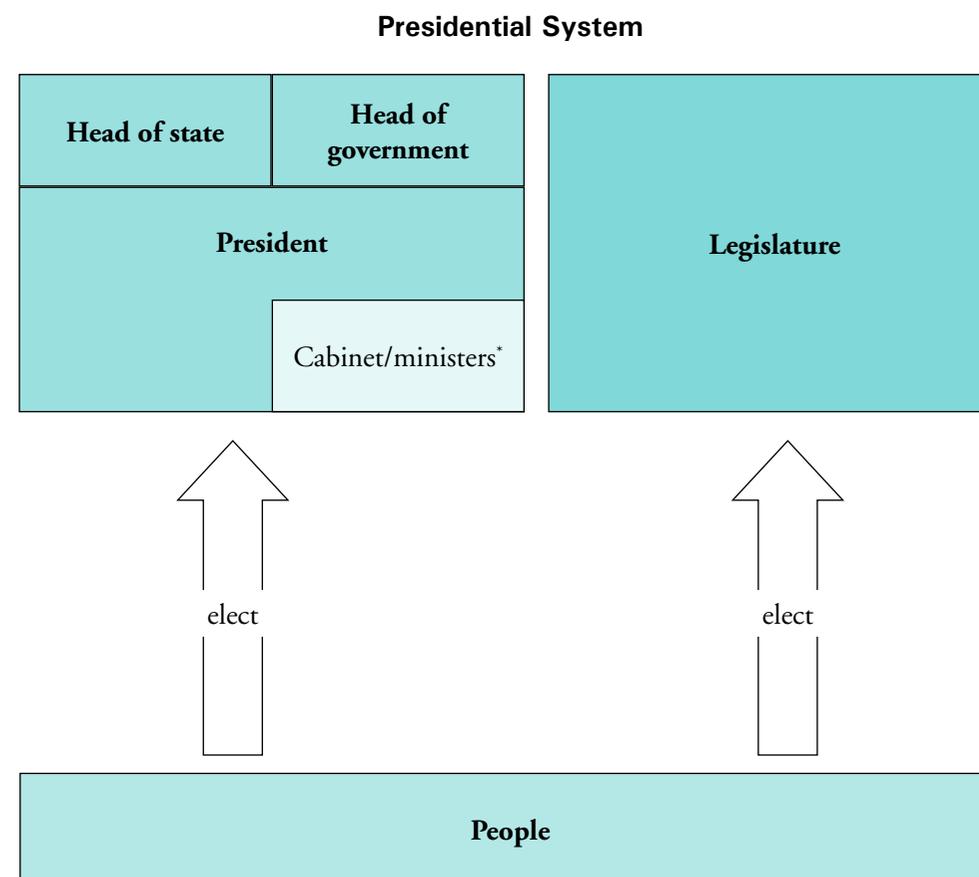
2.1. A presidential system

Box 1. Characteristics of a presidential system of government

The key characteristic of the presidential system is that the executive and legislature are separate agents of the electorate, and their origin and survival are thus separated (which creates the possibility of an impasse between the two without a constitutionally available device to break the impasse).

- The President is both the head of state and the head of government.
- The President is elected by popular vote (or by an intermediate institution that carries out the popular preferences).
- The President's term of office is fixed (there is no vote of no confidence). S/he is neither politically accountable to the legislature nor dependent on his/her party's support to stay in office.
- Generally, the Cabinet derives its authority exclusively from the President.
- Often, the President has some political impact in the process of law-making.

Figure 1. A presidential system of government



* Ministers are generally appointed and dismissed by the President.

Source: Adapted from Diehl, Katharina et al., *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009).

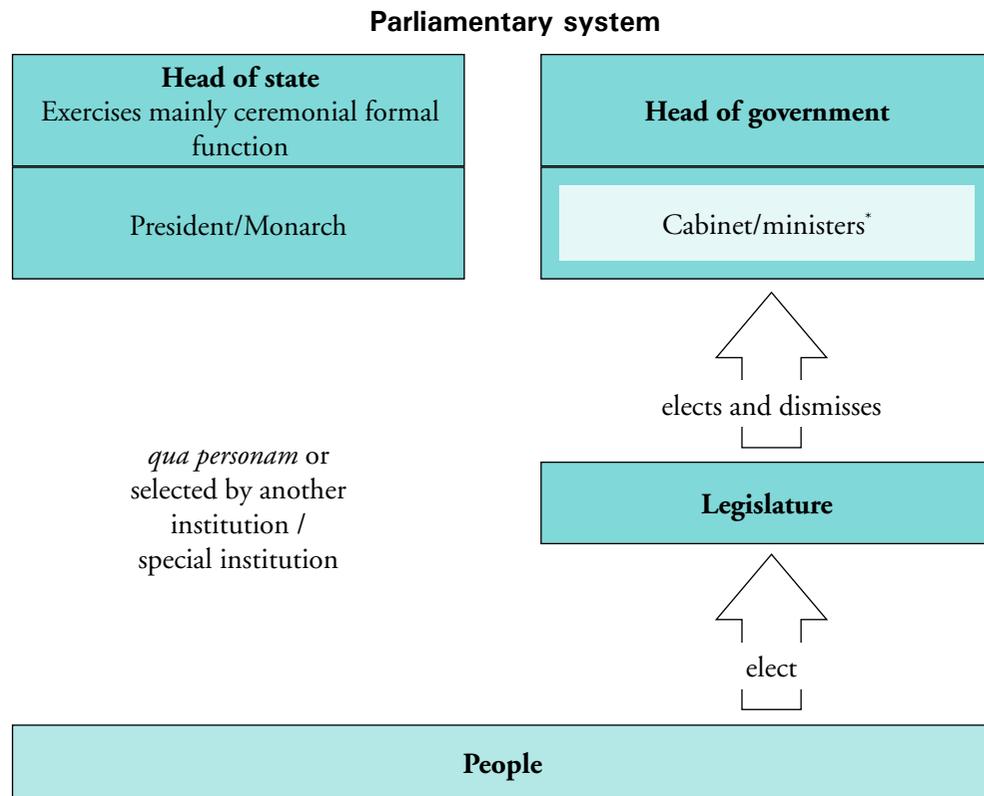
2.2. A parliamentary system

Box 2. Characteristics of a parliamentary system of government

The key criterion is the fusion of powers: the executive is hierarchically subordinated to the legislature, thus its origin and survival depend on the legislature.

- The head of government is elected by the legislature.
- The head of government is accountable to Parliament (through a vote of no confidence) and dependent on his/her party's support.
- Generally, the head of state (often a monarch or ceremonial President) is not the same person as the head of government.

Figure 2. A parliamentary system of government



* Ministers are either appointed/dismissed by the head of government, sometimes subject to legislative approval.

Source: Adapted from Diehl, Katharina et al., *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009).

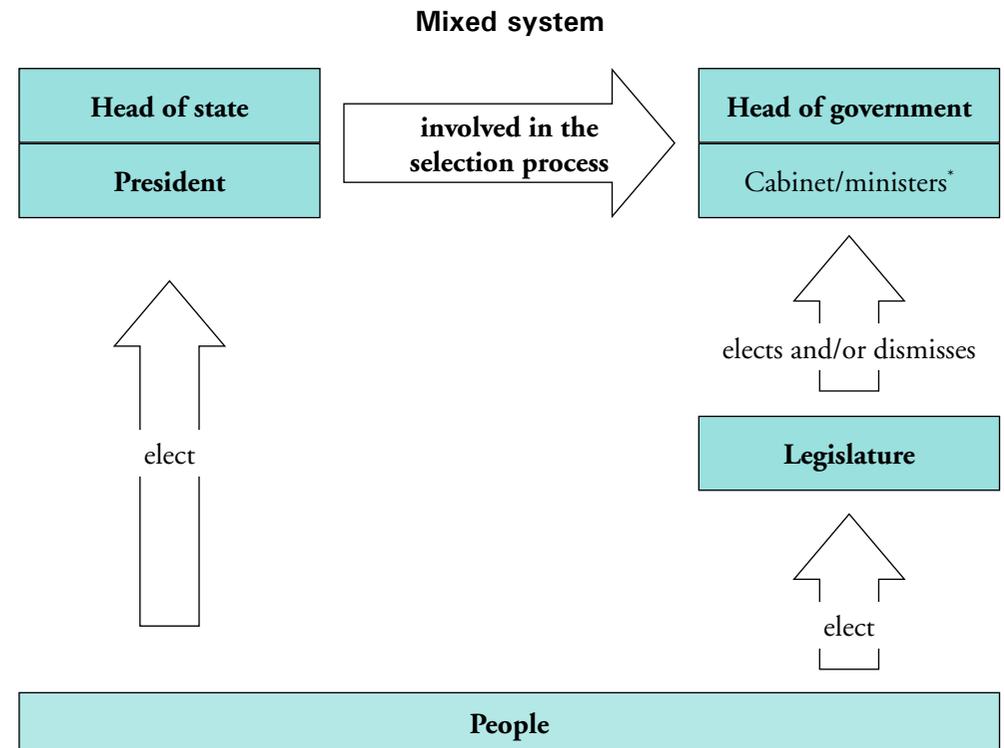
2.3. A mixed system (often referred to as a 'semi-presidential system')

Box 3. Characteristics of a mixed system of government

The key characteristic of a mixed system is a dual executive. It combines a transactional relationship between the executive and the legislature with a hierarchical one.

- The President, who serves as the head of state, is elected by popular vote.
- Neither the President nor the legislature is in full control of selecting/appointing and removing the Prime Minister.
- The Prime Minister as the head of government is accountable to Parliament (through a vote of no confidence).
- Generally, the President possesses quite considerable executive powers.

Figure 3. A mixed system of government



* Ministers might be part of the appointment / dismissal process that applies for the head of government; or ministers are either appointed/dismissed by the head of government, sometimes subject to legislative approval.

Source: Adapted from Diehl, Katharina et al., *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009).

2.4. Potential strengths and challenges of different systems of government

Constitution builders are expected to design a constitution that provides peace, stability, reconciliation and (often) a democratic transition as well as capable governments that are effective and do not abuse their powers. The quest for the appropriate system of government is thus often accompanied by evaluating the relative merits and consequences of the respective systems of government to reach those ends. Indeed, a vast literature exists that explores the strengths and challenges of each system. Table 1 illustrates the strengths that are commonly attributed to the respective systems of government and the challenges associated with each.

Table 1. The potential strengths of and challenges to different systems of government

	Strengths	Challenges
Presidential system	<p>Direct mandate. The direct mandate provides citizens with more choices, allowing them to choose a head of government and legislative representatives who can more closely reflect their specific preferences; furthermore, it provides citizens with a more direct mechanism by which to hold the executive accountable.</p> <p>Stability. Fixed terms of office for the President provide more predictability and stability in the policymaking process than can sometimes be achieved in parliamentary systems, where frequent dismantling and reconstructing or Cabinet instability might impair the implementation of governmental programmes and destabilize the political system.</p> <p>Separation of powers. The executive and the legislature represent two parallel structures, allowing each to check the other. It also provides more freedom to debate alternative policy options, since opposition to the government does not endanger the survival of the government or risk the calling of new elections.</p>	<p>Tendency towards authoritarianism. Due to the ‘winner-takes-all’ nature of presidential elections, presidents are rarely elected with more than a slim majority of voters, but gain sole possession of the nation’s single most prestigious and powerful political office for a defined period of time. Despite sometimes thin margins of majority support, the sense of being the representative of the entire nation may lead the President to be intolerant of the opposition, inclining him or her to abuse executive powers in order to secure re-election, or even create a feeling of being above the law.</p> <p>Political gridlock. Dual legitimacy often results in political stalemate if the President does not have the required majority to get his/her agenda through the Parliament.</p>

Parliamentary system	<p>Inclusiveness. A parliamentary system may offer the possibility of creating a broad and inclusive government in a deeply divided society.</p> <p>Flexibility. The head of government can be removed at any time if his/her political programme no longer reflects the will of the majority; the head of government might call new elections if s/he lacks the support of Parliament.</p> <p>Effectiveness. The legislative process might be faster since no political veto of the executive retards or blocks the process.</p>	<p>Instability. Government could collapse by majority vote; coalition governments especially might have difficulty sustaining viable cabinets.</p> <p>Lack of inherent separation of powers. Parliament may not be critical of the government due to the intimate relationship; in turn, there is a risk that the government may not be able to introduce bold policies and programmes for fear of being ousted.</p>
Mixed system	<p>Inclusiveness. A mixed system can allow for a degree of power sharing between opposing forces. One party can occupy the presidency, another can occupy the premiership and, thereby, both can have a stake in the institutional system. In a best case scenario, it might combine some of the strengths of both the other systems.</p>	<p>Stalemate. In a mixed system, there is potential for intra-executive conflict between the President and the Prime Minister, especially during periods of ‘cohabitation’ where the President and the Prime Minister come from different parties. Under cohabitation, both the President and the Prime Minister can legitimately claim that they have the authority to speak on behalf of the people (similar to the presidential system). In a worst case scenario, it might combine some of the challenges of both the other systems.</p>

Source: author’s compilation.

2.5. The limited significance of indicators of strengths of and challenges to different systems of government

To predict the effect of a system of government on political life in a country is a difficult task. Table 1, which gathers together the different opinions of various authors with regard to the strengths and challenges of those systems, needs to be read with caution, for several reasons.

First, as stated above, there is no general agreement on the definition of each system. At present, at least three different definitions of a mixed/semi-presidential system are commonly applied, and each categorizes countries differently. Some countries are still considered parliamentary or already perceived as semi-presidential (Austria, Ireland) or counted as presidential instead of semi-presidential (Republic of Korea, or South Korea), depending on the respective definition. It is difficult to argue reliably that presidential or semi-presidential regimes are potentially problematic if there is no common agreement on how to define each concept.

Second, within the set of presidential systems there is a tremendous variety among types of presidentialism, encompassing different degrees of presidential power and accountabilities. Thinking in terms of a generic category—the presidential system—and trying to generalize about the consequences of presidentialism might give an inaccurate picture. Explaining political outcomes requires greater focus on the details of institutional structure.

The wide array of political systems are often sorted into three categories: the presidential system, the parliamentary system, and in between, with characteristics of both, the mixed systems. There is no general agreement on the definition of each system.

Third, determining the viability of a constitution and its potential for stable and effective government by focusing on one institutional variable only (the system of government) is sometimes misleading. For example, parliamentary systems with disciplined political parties and single-member plurality electoral districts promote a ‘winner-takes-all’ approach more than many presidential systems do. Indeed, as a result of the points raised above, there is a controversy about the actual impact of the type of governmental system on political behaviour. Whereas some researchers argue that presidential systems are more likely than parliamentary systems to experience breakdown and be replaced by an authoritarian regime,² others make the opposite argument,³ while still others argue that there is no relationship whatsoever.⁴

Determining a country’s potential for stable and effective government by focusing on one institutional variable only (the system of government) can be misleading.

Fourth, next to the country-specific context, individual actors also matter. Russia, for example, has a dual executive consisting of both a President and a Prime Minister. While some prime ministers during Boris Yeltsin’s presidency were able to exert influence on the direction of government policies, prime ministers when Vladimir Putin was President were resigned to executing his policy decisions. Despite its formal structure, political scientists considered Putin’s government as hyper-presidentialist. This evaluation altered once more when Putin became Prime Minister and Dmitriy Medvedev was elected President. Without any amendment to the Russian Constitution, actual executive power shifted due to the identity of individual players.

Fifth, the drafters of constitutions do not necessarily choose between one model and the others. In the real world the issue is most often not whether one should choose

a parliamentary or presidential system, but rather looking for a system that works. Often, there are contextual, historical and symbolic reasons for an institutional system existing in a country, and only under very specific circumstances is a dramatic change from one institutional system to another pursued.

The drafters of constitutions do not necessarily choose between one model and the others. In the real world the issue is most often not whether to choose a parliamentary or presidential system, but rather finding a system that works given the specific context of the constitution-building process.

Considering these statements, this chapter relies more on identifying specific aspects of institutional design reflecting the interaction within a branch of government and between the branches of government. By addressing particular constitutional devices (for example, the dissolution of the legislature, the selection of the Cabinet, presidential term limits, modalities for second chambers in the legislature, etc.) the chapter acknowledges that these aspects are part of a larger whole. The way in which they work and interact depends on the broader context in which they are adopted. However, singling them out in the first place and initiating a debate on these lesser issues may help to identify which system best meets the actual needs. Agreeing on specific institutional powers, institutional checks, and intra-institutional decision-making processes may allow a mosaic to be formed. This inductive approach is not meant to be applied exclusively, but it might help to avoid getting gridlocked in an early political debate on which governmental system to choose.

There is another factor that is not captured by analysing systems of government but that plays an important role in the broader picture of checks and balances and the separation of powers—the role of the judiciary, its institutional independence including the appointment procedure, and the authority to review laws or even check on the constitutionality of constitutional amendments. This is the topic of chapter 6 of this Guide.

3. Aim/overview

Reading the relevant textbooks, the executive is one of three potential branches of government, traditionally with a distinct objective—to enforce or implement the law as drafted by the legislature and interpreted by the judiciary. Practically, the executive can play a uniquely powerful role and is often viewed as the natural leader or ruler of a country, personifying the country’s image nationally and globally. Unsurprisingly, then, the election of the head of the executive branch is an important event that can sow great disharmony, particularly in societies emerging from conflict with pronounced ethnic identification. An election separates winners and losers, and the losers justifiably may fear that the new leader may deal preferentially with his or her supporters at the expense of the opposition or even

The election of the head of the executive branch is an important event that can sow great disharmony, particularly in societies emerging from conflict with pronounced ethnic identification.

anyone not deemed an ally. Indeed, many internal conflicts start or re-emerge as part of a struggle about keeping, aggregating and/or extending executive power, be it within or beyond the constitutional framework.

However, the process of drafting a constitution is not a purely academic exercise in which actors seek the best technical solution available for their country. The drafters of constitutions and negotiators are also political actors/parties aiming to translate their own political agendas into the text of the constitution. Thus, constitutional design often represents a compromise between various actors with different interests and expectations. Several post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Thus, constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available. As a consequence, constitutional designs will differ depending on whether a strong executive is present and influences the course of a constitutional process.

By offering constitutional options in a comparative, structured and coherent manner, this chapter attempts to help the relevant actors to translate their agendas into a constitutional format as well as to facilitate the accommodation of various competing interests towards a viable constitutional compromise. The chapter focuses mainly on constitutional options to de-concentrate executive powers. Without ignoring the potential benefits of a strong national executive in specific cases, the chapter presumes that many violent conflicts are at least in part caused or sustained by an overly centralized executive, concentrating powers on a few and marginalizing many. The bottom line of de-concentrating executive powers is to allow more actors to be involved in decision-

The bottom line of de-concentrating executive powers is to allow more actors to be involved in decision-making processes, be it within the executive or as part of a system of institutional checks and balances vis-à-vis other branches of government.

making processes, be it within the executive or as part of a system of institutional checks and balances vis-à-vis other branches of government. Including more players in running the executive or checking its powers, at the same time, creates more potential veto players, delaying decision-making processes. Thus a careful balance needs to be found between an inclusive and an effective executive design.

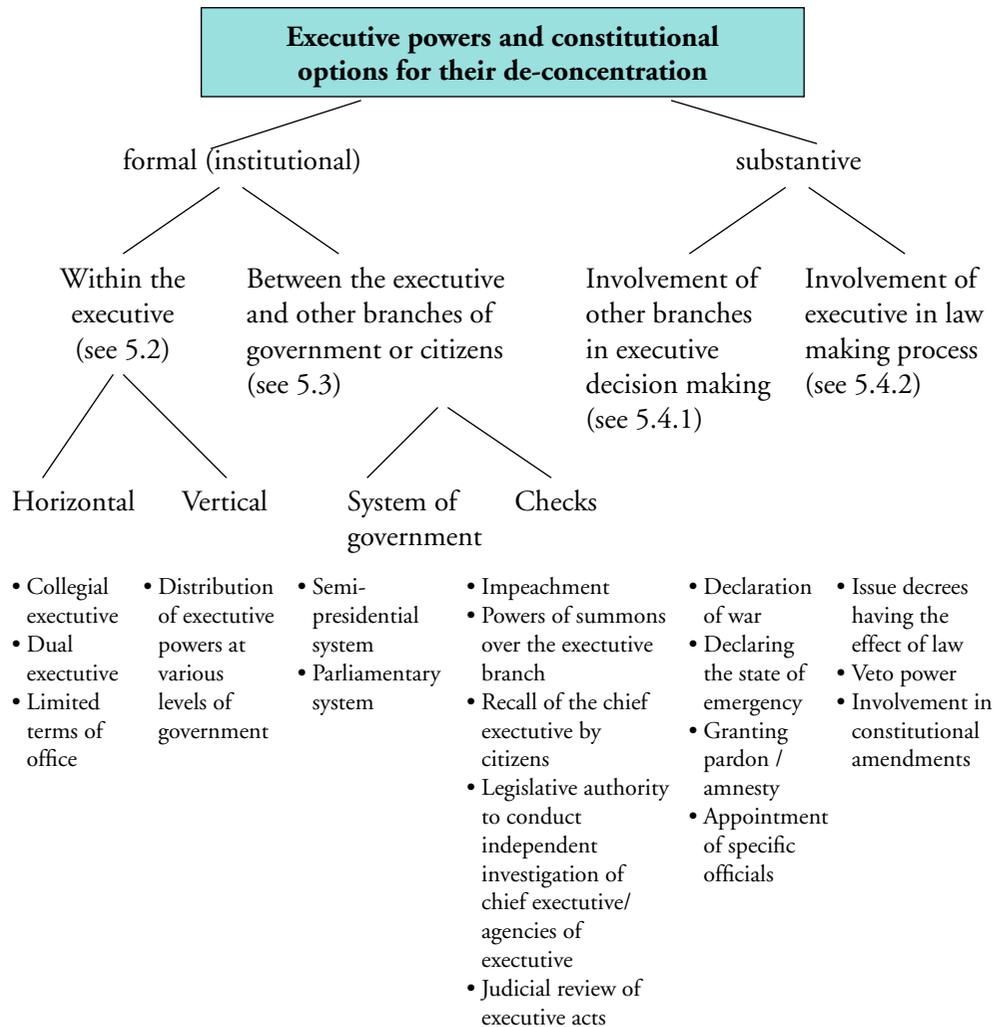
Figure 4 highlights the different segments of executive design options addressed in this chapter and is divided into two parts. The first addresses formal or institutional design options of the executive, and the second focuses more on the substantive powers actually assigned to the executive within the institutional design.

1. With regard to the first part, again two different aspects of institutional design are highlighted: the institutional design within the executive, and between the executive and other branches of government. The institutional design within the executive comes in two different dimensions: horizontal and vertical. The horizontal dimension explores options for de-concentrating the executive

structure at the national level, be it through the formation of a collegial presidency (more than one person is involved in running presidential affairs), a dual executive (President and Prime Minister) or the regulation of presidential term limits. The vertical dimension addresses the allocation of executive powers at various levels of government through different forms of decentralization. Next to the constitutional design within the executive, the institutional relationships between the branches of government are of great importance. Different systems of government have different impacts on the executive in an overall setting of the separation of powers and checks and balances. In addition, more specific institutional design options offer various opportunities to check the performance of the executive and different degrees to which this can be done.

2. The specific powers assigned to the chief executive determine the degree of substantive concentration of executive powers. One might draw a distinction between those powers that traditionally rest with the executive—such as declaring a state of emergency, granting pardons or an amnesty, or declaring war—and those tasks traditionally under the authority of the legislature, but with executive involvement. Among the chief executive's legislative powers might be the authority to veto bills approved by the legislature, enact legislation by decree, take executive initiative in some policy matters, call referendums or plebiscites, and shape the budget.

Figure 4. Executive powers and constitutional options for their de-concentration



4. Context matters

There is an enormous literature on hypotheses and predictions about the implications and consequences of specific forms of constitutional design for political behaviour, public policy, political stability and social cohesion, and so on.⁵ But reality proves that there are very few clearly established generalizations in this area. As stated by one author, the world of constitutional predictions is littered with failed predictions and unanticipated consequences.⁶ This is because there are so many different variables—political, economic and social—that intervene between the wording of a constitutional text and its impact or effect.⁷ Acknowledging these dynamics, the chapter presents a comparative analysis of a range of constitutional options as drafted and promulgated around the globe without attempting to explain the historical pedigree of particular provisions in any particular national context, since the same norm, when applied to different contexts, can yield different results; similarly, competing norms can produce identical effects.

‘The music of the law changes, so to speak, when the musical instruments and the players are no longer the same.’

Damaška, Mirjan (Sterling Professor of Law, Yale University), ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments’, *45 Am. J. Comp. L.* 839 (1997)

Because no two constitutions are identical, lessons from one may apply differently in another context, to another people, or against another cultural background. Some institutional arrangements that work very well in one set of social conditions may be useless or even destructive in other. Constitutions can lay down the rules and principles, but by themselves these rules and principles will not change society.

There are many different variables—political, economic and social—that intervene between the wording of a constitutional text and its impact or effect. The same norm, when applied to different contexts, can yield different results.

For instance, the Constitution of Thailand assigns the King a predominately ceremonial role, yet the Thai people nevertheless afford him great adoration and respect, which in turn bestow upon the King significant informal powers to direct the political affairs of the country. Likewise, implicit legal or political conventions in other countries, which may be imperceptible to outsiders, may distribute power extra-constitutionally. Although neither provided for nor supported in the constitution, these conventions can shape and structure political actions. This is especially apparent in some Commonwealth countries: the greatest political and constitutional crisis in Australia—the Dismissal⁸—did not exactly constitute an unconstitutional act, but rather reached that status by aggregating several acts that, while technically constitutional, opposed long-standing Australian conventions.

Governmental systems may shape the structure of executive power in a distinct manner, but can only indicate the power dynamics derived from the actual context. Implicit legal or political conventions which may be imperceptible to outsiders may distribute power extra-constitutionally.

Governmental systems may shape the structure of executive power in a distinct manner, but can only indicate the power dynamics derived from the actual context. A President endowed with strong constitutional powers may nonetheless be weak in the face of a highly fragmented political party system and an unreliable base of support in the legislature. Similarly, a President with fairly weak constitutional powers may appear to dominate the policymaking process if his or her party controls a majority of seats in the legislature and is highly disciplined. On the other side, even in parliamentary systems in which the legislative majority selects the Prime Minister, political parties fighting parliamentary elections often link the campaign to the personality and character of their leaders rather than to particular programmes. When announcing electoral results, the media crown an individual ‘winner’. Individual actors also matter if it comes to the actual power design, as the example of Russia underlines (see above).

Considering the interplay of factors that determine the actual impact of constitutional provisions, one can hardly predict the effect of those provisions without intimate knowledge of a specific context. Abstract theorizing as to which model might fit best is doomed to failure without a careful understanding of both the context from which a particular provision is taken and the context in which a particular provision will apply. Therefore, while the discussion below should facilitate the understanding of constitutional design for the executive, this chapter does not endeavour to provide

One can hardly predict the effect of constitutional provisions without intimate knowledge of a specific context.

specific case studies or advice, but rather recommends that we look deeper into the specific context once a constitutional option from a specific country has prima facie been identified as helpful.

5. Design options

5.1. Design for a centralized executive in a democratic setting

In a centralized executive, power is concentrated in one individual at the national level, representing both the government and the country. Politically, the authority of the head of the executive will not originate in the legislature, which may not dismiss him/her by a vote of no confidence. He or she, moreover, has full control over the Cabinet. Except at periodic elections, therefore, the head of the executive branch is largely free from political oversight and has only limited exposure to questioning by the legislature. These characteristics are often reflected in the institutional design of a presidential system. However, centralized executives are not only found in countries with a presidential system. In part, this is due to the fact that not only institutional design matters, but also the strength and structure of the political party system (see section 2.5) or the authoritarian character of the government. In part, various institutional structures in parliamentary systems may also have an impact on centralizing executive power. One aspect, for example, is how far the prime minister in a parliamentary system has full and exclusive control over the Cabinet (see also section 5.3.2.). Thus, although the core element of a parliamentary system is the government's political dependence on the legislature, it makes a considerable difference whether the individual composition of the Cabinet is the sole responsibility of the Prime Minister (see for example Germany⁹). Next to the institutional structure, the tasks assigned to the chief executive contribute to the actual concentration of executive authority: the extent to which s/he is involved in declaring a state of emergency (and the increasing executive powers that come along with it), granting pardon or amnesty, or declaring war and so on are indicators of the strength of the executive branch, as is the chief executive's impact on the law-making process.

A strong executive is not destructive by nature. It might provide stability and hold together a country in which there are many divisive forces (see for example the case of Brazil). It may also strengthen the executive to ensure that policies are consistent and facilitate long-term planning. In the United States of America (USA), for instance, some

of the challenges currently facing President Barack Obama's administration regarding implementing the reform agendas promised in the electoral campaign are due to the legislature being opposed. This example highlights the challenge facing an executive that needs to accommodate veto players from other branches of government. The main challenge for strong executive design is to prevent its structure facilitating a shift to autocracy and undemocratic rule. Managing autocratic tendencies becomes an even greater challenge if executive power is largely free from legal oversight and/or there is too close a link between the supreme judges and the executive because appointment procedures are predominately in the hands of the latter.

The main challenge for designing a strong executive is to prevent its structure facilitating a shift to autocracy and undemocratic rule. Managing autocratic tendencies becomes an even greater challenge if executive power is largely free from legal oversight and/or there is too close a link between the supreme judges and the executive branch.

The Egyptian Constitution and its development over the last 40 years highlight the challenges of an overly centralized executive. It allowed an autocratic system to grow in the first place, which then was further strengthened by executive-driven constitutional amendments that redefined the institutional imbalance later on. In its 2007 version, the Constitution of Egypt not only centralized executive power in the President with no term limits (although formally it qualified as a semi-presidential system); it also authorized him/her to dissolve the legislatures if deemed necessary, and to appoint some members in the first legislative assembly and quite a few in the second chamber (one-third of them), and gave him/her strong legislative veto powers and far-reaching authorities under the label of the 'fight against terrorism', next to being the supreme commander of the armed forces and the supreme chief of the police. Constitutional reforms in countries with similar structures might want to focus on ways and means to de-concentrate executive powers.

5.2. Options for institutional de-concentration within the executive

Drafters can seek a dispersal of executive powers within the executive by two different means: (a) horizontally, by instituting a collegial executive or a dual executive, and (b) vertically by adding additional levels of government.

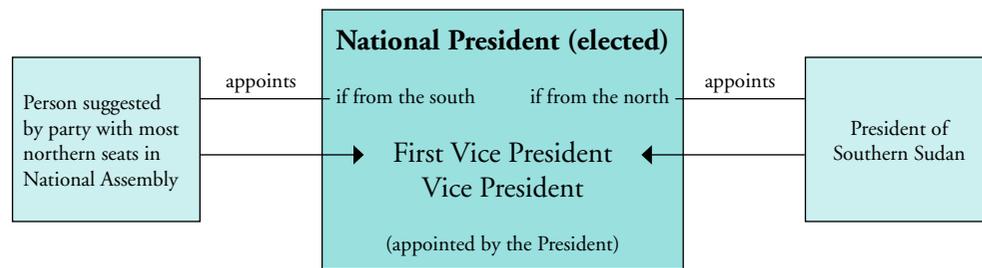
Executive powers can be dispersed by instituting a collegial executive or a dual executive, or by adding additional levels of government.

5.2.1. A collegial executive

A collegial executive comprises various actors in the institution of the head of state/ chief executive. Collegial executives can take several forms. Following a peace protocol signed in 2004, Sudan established a fairly loose form consisting of a President, a First Vice-President and a Vice-President with a clear hierarchy (see figure 5). Before the independence of South Sudan in July 2011, the President of Sudan served as the single

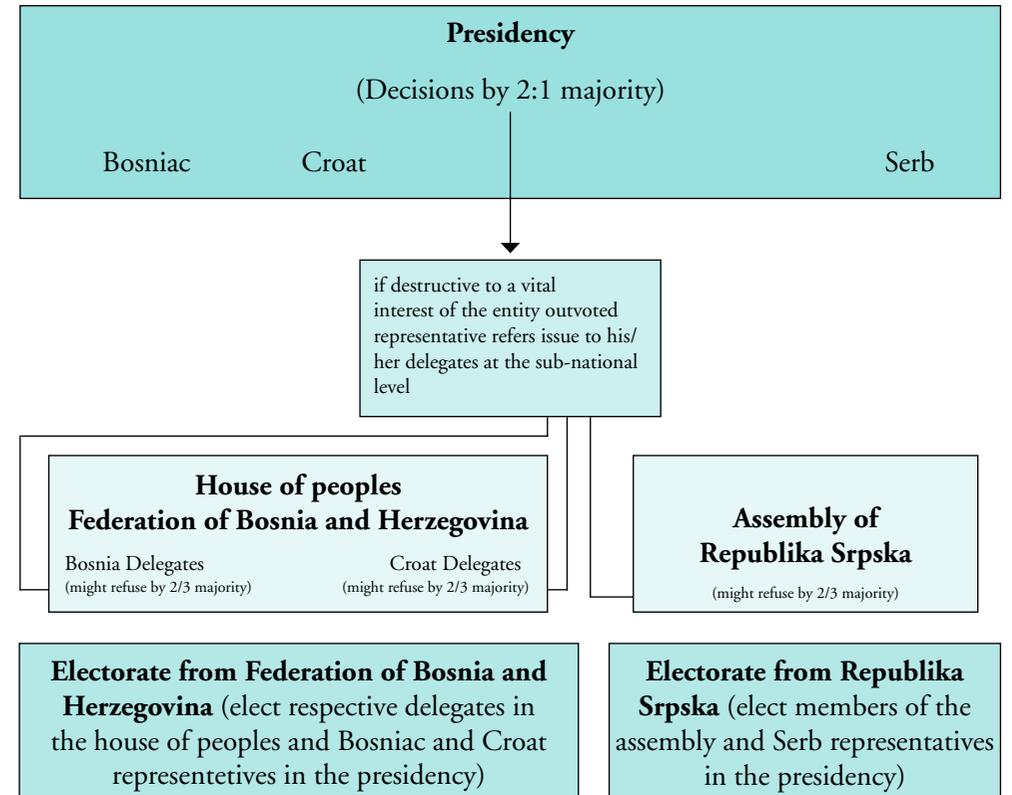
head of state, but several decisions required consultation within the presidency or even the consent of the First Vice-President. While the President appointed both subsidiary positions, one had to hail from ‘northern’ Sudan, and the other from ‘southern’ Sudan (now independent South Sudan). Moreover, the First Vice-President could not come from the same region as the President. The First Vice-President did not hold office at the will of the President, rather the Constitution predetermined their length of service by other means.

Figure 5. The defunct collegial executive in Sudan prior to its partition



Constitution drafters in Bosnia and Herzegovina designed a stronger form of collegial executive, in which power flows equally to all three co-executives (see figure 6). Ethnicity determines membership in the presidency: each territory elects a representative—one must be a Croat, one a Serb, and the other a Bosniac. One will act as the nominal President representing the country in external affairs, but each will serve on a rotating basis, ‘primus inter pares’. The executive must make most decisions by consensus if possible and ultimately by majority decision if not. Consensus is preferred, however, since a dissenting President may declare a decision ‘destructive’ to a vital interest of his territory. The legislature from that region can then vote to block that decision by a two-thirds majority.

Figure 6. The collegial executive of Bosnia and Herzegovina

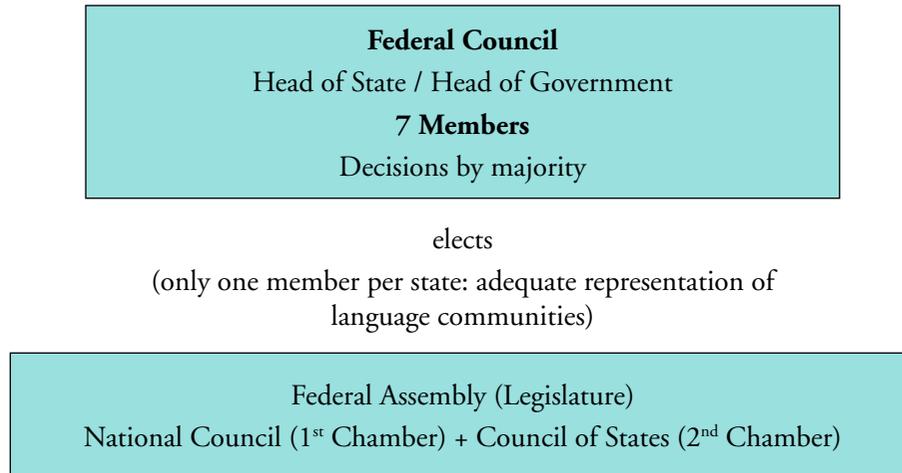


Both models of collegial executives were part of peace deals brokered after severe civil wars along ethnic lines (the 2005 Comprehensive Peace Agreement with respect to Sudan and the 1995 Dayton Peace Agreement with regard to Bosnia and Herzegovina). In both cases, power brokers could not have struck a peace deal without representatives in the executive at the highest level. Though critical to end hostilities between warring factions, these compromises have made governing significantly more challenging. Particularly in Bosnia and Herzegovina, mutual mistrust between ethnic groups still prevails, significantly hampering efforts to build a common way forward.

A third model of a collegial executive is practised in Switzerland (see figure 7). The Federal Council is the highest executive institution in the country, constitutes the national government and serves as a collective head of state. It comprises seven members, who must come from different states (cantons) with due consideration of adequate representation of the different language communities.¹⁰ The seven federal councillors are elected individually by the Federal Assembly (legislator) for a four-year mandate, which is not subject to a vote of no confidence. They are elected as equals although every year one of them is nominated President, mainly for representative and ceremonial purposes. The Federal Council decides as one body. Each councillor administers a specific sphere of competences. Although this is not mandated by the Constitution, since 1959 the four

biggest parties have been represented in the Federal Council. The rationale for the grand coalition is a consequence of the strong direct democracy instruments in Switzerland.

Figure 7. The collegial executive of Switzerland



As the three examples demonstrate, a collegial executive is not linked to any specific system of government. It is applied in a presidential system (Sudan), a semi-presidential system (Bosnia and Herzegovina) and a quasi-parliamentary system (Switzerland).

5.2.2. A dual executive

Horizontal dispersal also can occur by establishing a dual executive composed of a head of state and a head of government. 'Dual executives' in the literal sense have a long tradition and are widespread. For example, in many countries, the head of government manages the government's affairs and sets policy, while the head of state, often a President or a monarch, holds a ceremonial position with little political authority (the head of state 'reigns', the head of government 'rules'). Over the last two decades, a more evenly matched dual executive, a system often referred to as semi-presidentialism, has become more common. A dual executive in a semi-presidential system divides the executive into two independently legitimized and constitutionally distinct institutions: an indirectly selected head of government, the Prime Minister, subject to majority support in the legislature, and a popularly elected head of state, the President. The precise balance of authority between the two heads of the executive can vary widely. Depending on the power balance, some models of a dual executive resemble rather a presidential system, others rather a parliamentary system. For example, in Egypt, the Constitution of 2007 defined the government as the supreme executive and administrative organ of the state with a Prime Minister at the top. However, this definition cannot obscure the fact that the government's main function was to assist the presidency in the implementation of its policies. Ultimate decisions on all important policy issues rested with the President, on whose confidence the Prime Minister depended (next to the confidence of the Legislative

Assembly). At the other end of the spectrum, the powers and functions conferred on the directly elected President in Ireland 'shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion [...]'. In both cases, one of the two heads of the executive does not have the power to act as a veto player within the executive. Many other countries have chosen a more balanced approach in assigning powers to the two respective heads of the executive. Next to actual powers (which functions are considered presidential and which are considered governmental) the involvement of the President in the process of selecting or dismissing the Prime Minister and the Cabinet is crucial. Because the Prime Minister is responsible and accountable to the legislature, dual executive designs are also addressed in section 5.3.1 (Authority to appoint/select/dismiss the head of government (Prime Minister)).

Dual executives in the literal sense have a long tradition. In many countries, the head of government manages the government's affairs and sets policy, while the head of state holds a ceremonial position with little political authority.

Relying on the potential of dual executives in dispersing power, some countries introduced the dual executive as an interim solution to defuse conflict after contested elections and to craft a 'coalition government'. In the case of both Kenya (2008) and Zimbabwe (2008), these interim measures saw the appointment of opposition leaders as prime ministers but with the president in each case retaining both functions of head of state and head of government. Instead of governing together in a coalition, the prime ministers were squeezed into the presidential structure with few substantive executive powers.

Over the last two decades, a more evenly matched dual executive, a system often called semi-presidentialism, has become more common. Drafters of constitutions have also recently introduced the dual executive as an ad hoc interim solution to defuse conflict after contested elections and to craft a coalition government.

Between 1996 and 2001, Israel's governmental system relied on a reverse electoral approach of its dual executive: whereas the head of state (a mainly ceremonial figure) was elected by the legislature, the head of government (Prime Minister) was directly elected by the people, simultaneously with the new legislature. In Israel, due to the highly fragmented legislature, this system failed to produce a stable government, since the Prime Minister's party was too weak in the legislature to allow for a stable government. Different contexts elsewhere (e.g. a different party landscape) may have led to a different appreciation of this unique approach, but in the specific case of Israel it was not a success story.

The involvement of the President in the process of selecting or dismissing the Prime Minister and the Cabinet is crucial.

5.2.3. Presidential term limits

One might also consider the dimension of time as an important factor in de-concentrating executive power from an individual person by constitutionally regulating the chief executive's term of office. Although term limits, on the surface, restrict the full democratic choice of the people as to whom they want to have in office, they are one of the most important devices that support democratic transformation and strength in electoral authoritarian regimes or infant democracies. Or, as two authors put it, 'the combination of term limits and regular elections has displaced the coup d'état as the primary mode of regime change and leadership succession in contemporary Africa'.¹¹ Notably, neither Tunisia nor Egypt had term limits enshrined in the constitution.

Individual alternation of the chief executive is considered important for various reasons. Prima facie, term limits only restrict the time for which a chief executive rules, but not his/her authorities at any one point in time. However, without term limits, chief executives often have been unable to resist the temptation to use their powers to create an environment that guarantees their constant re-election under authoritarian rule. Thus, the introduction of term limits preventing the chief executive from being re-elected indefinitely is crucial. Two different types of term limits are available. The first sets limits on the number of consecutive terms in office permitted. For example, Russia¹²

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and Austria¹³ only allow for two terms in succession, but do not prevent a former President from standing for election again after pausing for one term; in Panama¹⁴ this pause is increased to the next two following terms. The second type of term limit establishes an absolute restriction on the number of terms an individual can serve. Whereas some countries have opted for one term only (e.g. Paraguay,¹⁵ South Korea¹⁶), the majority of countries introducing term limits decided on two terms (e.g. South

Africa,¹⁷ Turkey¹⁸).

Probably no other single constitutional provision has been amended, repealed or reinterpreted around the globe as often as the one that establishes presidential term limits (e.g. in Algeria, Belarus, Burkina Faso, Côte d'Ivoire, Gabon, Kazakhstan, Namibia, Peru, Sri Lanka, Uganda). Although de jure they are rarely involved as key actors in the constitutional amendment process themselves, presidents have managed to arrange for particular constitutional adjustments. In an attempt to restrict these dynamics, some drafters of constitutions have added additional safeguards. In El Salvador,¹⁹ Honduras²⁰ and Niger,²¹ the constitutional provisions on presidential terms are immutable, and in Honduras²² the army is even empowered to safeguard its immutability. The Constitution of South Korea²³ takes a different approach: here, amendments to the Constitution concerning the extension of the term of office of the President shall not be effective for the President who is in office at the time when the proposal for such amendments to the

Constitution was made.

5.2.4. Distributing executive powers to various levels of government through decentralization

Models of a collegial or a dual executive offer opportunities to distribute the highest executive powers at the national level of government between more than one person, either by their making decisions together or by assigning different executive powers to different persons. In addition or alternatively, executive powers can also be distributed in a vertical manner by allocating executive powers to different levels of government. Creating executive elements at different levels of government (regions, provinces, villages etc.) is another way to involve and include more stakeholders in the executive. By delegating/devolving particular competences to a lower level of administration/government, responsibility and substantive powers seep down from the national executive. For example, the US Constitution allocates the making of much of the penal law to the subunits (states). Thus the governors of states must answer requests for pardons, including those of capital offenders in those states where capital punishment exists. Without legally eliminating the President's right to pardon, which still reaches offenders in cases of national crimes, this devolution of powers in the United States has contributed to the dispersal of presidential power.

Different forms of decentralization can impact on the executive differently. The degree and depth of dispersal depend on two questions. What types of responsibilities does the constitution devolve to other levels of administration/government? And what level of oversight does the national executive retain? The more significant the executive powers devolved to lower levels of administration/government—such as penal law or police powers—the higher the degree of decentralization. The degree of decentralization ranges on a continuum across systems, from those that are strongly centralized to the heavily decentralized.

Powers can also be redistributed by allocating executive powers to different levels of government. Creating executive elements at different levels of government (regions, provinces, villages etc.) is another way to involve and include more stakeholders in the executive.

To measure the amount of decentralization more accurately, its three core elements—administrative decentralization, political decentralization, and fiscal decentralization—need to be considered. Administrative decentralization refers to the amount of autonomy non-central government entities possess relative to the central government. Political decentralization refers to the degree to which central governments allow sub-governmental units to undertake the political functions of governance such as representation. Finally, fiscal decentralization refers to the extent to which central government surrenders fiscal responsibility to sub-central units. These three elements of decentralization are addressed in more detail in chapter 7, section 3.2.1.

Administrative decentralization can mean de-concentration, delegation and devolution.

While distinguishing between these three elements facilitates measurement, effective decentralization requires coordinating all three. Decentralization of authority will remain shallow if, for example, administrative and fiscal decentralization does not support and follow political decentralization.

5.3. Institutional checks on the executive

Another way to control executive powers is by designing a system of checks by and dependencies on the other branches of government. As highlighted at the beginning of the chapter, two institutional designs are particularly adept at checking executive power: a parliamentary system and the dual executive in a so-called semi-presidential system. To maintain political authority and thus power in both, the executive cannot alienate the legislature. In parliamentary systems, executive authority (a) arises from the legislature and (b) is subject to a legislative vote of no confidence that can bring down

Another way to control executive powers is by designing a system of checks by and dependencies on the other branches of government. Two institutional designs are particularly adept at checking executive power: a parliamentary system and the dual executive in a semi-presidential system.

the government. These dynamics create a hierarchical relationship between the branches of government in the legislature's favour. The power of the executive might be even further controlled if the legislature also has a direct impact on the composition of the Cabinet. A dual executive in a semi-presidential system literally divides the executive into two independently legitimized and constitutionally distinct institutions: an indirectly selected head of government, the

Prime Minister, subject to majority support in the legislature, and a popularly elected head of state, the President.

The precise balance of authority between the executive and the legislature can vary greatly. Four indicators may help to identify the appropriate degree of executive powers and legislative checks: (a) authority to appoint/select/dismiss the head of government (Prime Minister) in a dual executive; (b) control over the Cabinet; (c) the possibility of a vote of no confidence/censure; and (d) ability to dissolve the legislature.

5.3.1. Authority to appoint/select/dismiss the head of government (Prime Minister)

Many constitutions that have opted for a dual executive permit the President to select the Prime Minister (e.g. those of France, Mongolia, Mozambique, Namibia, Peru, Poland, Russia, Senegal). In some countries, the discretion of the President is somewhat reduced by obliging him/her in the constitution to take 'the opinion of the parties represented in the Assembly of the Republic and with due regard for the results

One indicator of the degree of executive powers and legislative checks on the executive is the President's authority to appoint/select/dismiss the head of government in a dual executive.

of the general election' (Portugal).²⁵ Often, the authority to remove the Prime Minister rests exclusively with the majority of the legislature (e.g. in France, Portugal, Senegal). As a consequence, the President cannot guarantee that his or her choice can remain in post. S/he is restricted in his/her selection insofar as s/he must identify a person whom s/he expects to obtain support (or at least acquiescence) from the legislature. In addition, once the Prime Minister is selected, s/he is no longer under the control of and subordinated to the President, but subordinated to the legislature and therefore more inclined to align governmental policies with the legislature's. Some constitutions avoid this dynamic and strengthen the President's position by providing him/her with the discretion to dismiss the Prime Minister (e.g. Mozambique, Namibia, Peru, Russia). As a result, the Prime Minister is sandwiched between and dependent on the President and the legislature and their political strategies.

In parliamentary systems the way of selecting the Prime Minister also varies, although his/her origin ultimately depends on the will of the legislature. In some countries, the election of the prime minister is exclusively in the hands of the legislature. In Sweden, for example, the Speaker of the legislature nominates the Prime Minister. In other countries, the Prime Minister is nominated by the President, but the legislature may elect another person if no absolute majority of votes supports the presidential nomination (as in Germany). The President then has to appoint that person. Again, in other constitutions, the President has to nominate the Prime Minister from the party obtaining the highest number of seats in the election of the legislature (Greece). Some countries in turn constitutionally oblige the head of state to appoint the person elected by the legislature (Japan) and might even determine that the person so elected becomes Prime Minister *ipso jure* if the President does not appoint him/her after a certain period of time has passed (Ethiopia).

5.3.2. Control over the Cabinet

Designing control over the Cabinet is another way to influence or fine-tune the relation between the executive and the legislature. In most presidential systems, the Cabinet is appointed by the President and serves exclusively at his/her pleasure. However, a few presidential systems also allow the legislature to intervene politically in the composition of the Cabinet. For example, in Colombia, individual ministers are subject to legislative censure²⁶ and in Argentina the same applies to the Chief of the Ministerial Cabinet.²⁷ In dual executives, the challenge is to strike a diligent balance between the impact of the President, the Prime Minister and the legislature in selecting/dismissing the members of the Cabinet. According to the French Constitution, the Prime Minister recommends candidates for appointment or removal to the President, who then decides. Parliament's vote of no confidence affects only the government as such, not its individual composition. In Peru, the legislature has the authority to censure individual members of the Cabinet, thereby weakening the Prime Minister's position. In

Designing control over the Cabinet is another way to influence or fine-tune the relation between the executive and the legislature. By influencing the design of the Cabinet, the legislature can shape the direction of the executive branch.

Mongolia, the Prime Minister proposes the Cabinet's composition after consulting the President, and Parliament approves the members individually. Again, by influencing the design of the Cabinet, the legislature can shape the direction of the executive.

The Interim Constitution of South Africa (1994–6) took a different approach: the composition of the legislature determined the composition of the Cabinet, which in turn selected the President. A party gaining more than 5 per cent of the total number of seats in the legislature had the right to one post in the Cabinet.²⁸ The purpose of this provision was to form an all-inclusive government after apartheid rule.

5.3.3. Votes of no confidence

The legislature's power to censure the head of government as part of the political setting may also be designed in various ways to channel potential dynamics. Several constitutions have introduced some restrictions to the authority of the legislature to withdraw its confidence from the Prime Minister. In Russia, the President may reject Parliament's vote, which can then proceed by expressing a vote of no confidence again three months later. Other options include the dismissal of the Prime Minister only after s/he has been in post for a set period of time, or the legislature can dismiss only a limited number of cabinets per term.²⁹ Some constitutions go even a step further, requiring that the no-confidence vote needs to be 'constructive', meaning that the majority dismissing the Prime Minister must simultaneously select a new one (Germany,³⁰ Hungary,³¹ Lesotho,³² Poland,³³ Spain³⁴). As a result, a motion of no confidence does not automatically force

The legislature's power to censure the head of government by a vote of no confidence may also be designed in various ways to channel potential dynamics.

either the resignation of the Cabinet or a new election. Instead, the Prime Minister may continue as leader of a minority government if the opposition is unable to agree to a successor. In a system with a dual executive (Poland), a constructive vote of no confidence can have two implications: it

potentially permits the President greater leeway in the initial appointment of the Prime Minister/Cabinet, since s/he is harder to remove. On the other hand, after the vote of no confidence, the President is sidelined in the process of establishing a new government.

5.3.4. Dissolution of the legislature

The ability of the President to dissolve the elected assembly is another issue in determining the relation between the executive and the legislature. Giving the President power to dissolve the assembly allows him/her to shorten the term of the legislature originally assigned to it by the electorate. Depending on the actual design of the power of dissolution, it might have some considerable impact on the balance of power: if there are no meaningful restrictions in the setting of a dual executive, the President could appoint a government without the legislature's consent, and threaten it with dissolution if the legislature intends to introduce a motion of no confidence, thereby pre-empting the no-confidence vote. The power of dissolution would also allow the President to

influence the timing of elections to the legislature to suit his/her political agenda. In governmental systems where the head of government is elected by the legislature, the power of dissolution may become an even more tactical tool to increase the probability of his/her own re-election (through his/her party's majority in the legislature). For example, in Japan, the House of Representatives of the Diet can be dissolved at any time by the initiative of the Prime Minister (followed by a ceremonial act of the Emperor), but it needs to be dissolved at the latest at the end of the legislature's four-year term. Only once in over 60 years has a dissolution occurred at the end of the four-year term; all other legislatures have been dissolved prematurely.

The power of the President to dissolve the elected assembly is another issue in determining the relation between the executive and the legislature. Depending on its design, this can have considerable impact on the balance of power.

In the light of the various challenges illustrated above, several constitutions give the President the authority to dissolve Parliament, subject to additional requirements or restrictions, of which there can be many, including a limitation on the time of dissolution (Portugal: not within the first six months after parliamentary elections); on its frequency (France: once per year); Gabon (once a year but not more than twice during one presidential term); the cause for dissolution (Austria: only once for the same cause); or establishing a prerequisite for dissolution such as parliamentary (in)action (Mozambique, Poland). In some countries, dissolution of the legislature by the President simultaneously triggers presidential elections (Namibia³⁵); in others, the President may only initiate the legislature's dissolution, subject to a final decision by the electorate in a referendum (Egypt 2005³⁶).

5.3.5. Impeachment

Impeachment constitutes another method to control the executive. In contrast to the *political* control exercised by a vote of no confidence, impeachment authorizes the removal of the head of the executive on the basis of his/her legal wrongdoing. In presidential systems where the political removal of the head of the executive by the legislature is not part of the institutional arrangements, impeachment becomes particularly relevant. In general, two factors should be considered: the type of offence that can trigger an impeachment procedure, and other branches' involvement in that procedure. Some constitutions limit the initiation of impeachment to severe offences such as high treason. Others are much broader, only requiring a violation of the constitution or any other law while in office (Hungary). At one extreme is the case of Tanzania, where presidential conduct that damages the esteem in which the office is held can trigger impeachment. Such vague and/or broad thresholds risk transforming impeachment into a political tool, particularly if the decision rests solely with the legislature

Impeachment—the removal of the head of the executive on the basis of legal wrongdoing—is another method to control the executive. Where the removal of the head of the executive by the legislature is not part of the institutional arrangements, impeachment becomes particularly relevant.

(as in Moldova). Generally, however, the judiciary plays the role of gatekeeper, either by ruling on the constitutionality of the President's behaviour or by participating in the work of the investigation committee. Honduras has followed a very particular approach: if the President brings the constitutional order into disrepute by, among other things, amending the limitations to his tenure, the armed forces may intervene pursuant to Article 272(2) of the Constitution: 'They [the military] are established to defend the territorial integrity and sovereignty of the Republic, to maintain peace, public order and the rule of the Constitution, the principles of free suffrage *and alternation in the exercise of the Presidency of the Republic*' (emphasis added).

5.3.6. Citizens' recall

Next to institutional control within or between the different branches of government, the citizens' right to remove the chief executive before the end of his/her term is another way to check executive power. In general, there are two different types of recall at national level, mixed recall and full recall. The latter means that both the initiative and the final decision rest exclusively with the citizenry. With regard to the executive, this type of recall is less common and only applicable in some Latin American countries (e.g. Ecuador³⁷). Mixed recall is the process in which the citizenry is involved only in one of the steps, either initiating it or deciding it in a referendum. Whereas in some countries the citizens' involvement is part of a suspension procedure as a result of presidential wrongdoing (as in Romania³⁸), in most cases citizens become part of a purely political debate, in which they have to approve the recall of the President (as in Austria³⁹ and Iceland⁴⁰).

Citizens' recall has to balance principles of participation and effective governance and the need to harmonize recall procedures with effective institutions of representative democracy. On the one hand, frequent recall votes may undermine the idea of a representative democracy and may hamper the executive in implementing its mid- and long-term political agendas. On the other hand, making the process overly cumbersome in order to avoid excessive use may limit its original intent to allow citizens to hold their representatives directly accountable.

5.4. Designing the executive's substantive powers

In addition to the disaggregation of executive powers through institutional design, as discussed above, the drafters of constitutions might also want to control executive powers through the involvement of other actors in a decision-making process. Two options are worth considering: first, the involvement of other actors in decision-making processes traditionally under executive control; and, second, the limitation of executive influence in the substantive domains of other branches of government.

5.4.1. Involving other actors in substantive executive decision-making processes

The first category—diluting executive authority—might include decisions concerning

the declaration of a state of emergency, granting pardons or amnesty, or formally declaring war. The powers to declare a state of emergency and granting pardons or amnesty are the subject of chapter 5, sections 4.3.1 and 4.3.2. The second category—insulating decisions that are traditionally the legislature's against executive influence, for instance—might include limiting the executive's ability to issue legal acts or decrees that have the force of law, or attempts by the executive to choreograph the formal law-making process.

State of emergency

The constitutional questions of *who* declares a state of emergency and *by what method* this is done both offer different degrees of involvement of institutions other than the executive. A constitution can delineate clearly those occasions—and only those occasions—when the government can declare a state of emergency, such as invasion or a natural catastrophe. But the drafters of constitutions may want to leave room for discretion: consider for instance threats to public health or to internal order. Attempting to articulate all such circumstances will probably prove impossible and unwise. Someone must determine when a threat level rises to the level of an emergency; and, to avoid abuse, someone else must be empowered to evaluate that determination. Peru's Constitution requires prior approval by the Cabinet before the chief executive can declare an emergency, an internal dispersal of powers within the executive. Malawi's Constitution permits the executive to declare a state of emergency but requires retroactive parliamentary approval within a defined period of time. The constitutions of Ethiopia and Fiji mandate prior parliamentary approval before the executive may declare a state of emergency. The Constitution of Mongolia states that only Parliament may declare a state of emergency—which constitutes the broadest dispersal of power from the executive in declaring states of emergency. Only if Parliament is in recess can the President act, but such a declaration lasts for only seven days and lapses if Parliament remains passive.

Declaring a state of emergency can arguably aggregate power like no other executive act, removing many checks to unilateral action. Many post-conflict countries have suffered severely from emergency rule applied in an abusive way. Wary of that eventuality, many drafters of constitutions have overcompensated by mandating overly cautious prerequisites for a declaration of a state of emergency to be valid. In true emergencies, the absence of functioning institutions can make it impossible to meet prerequisites. In Haiti, for example, any declaration of an emergency recently required the countersignature of the Prime Minister and all other government ministers—in addition to an immediate determination by Parliament concerning the scope and desirability of the President's

The powers of the executive branch can be controlled through the involvement of other actors in a decision-making process (for example, the declaration of a state of emergency) or by limiting executive influence in the substantive domains of other branches of government (such as law-making powers).

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decision. Also recently, under the Haitian Constitution, only foreign invasion and civil war—but not a natural disaster—constituted a state of emergency. Because of this restrictive wording and the exigencies of the situation—including an unprecedented earthquake and the death of many ministers and parliamentarians—the Haitian government ignored the applicable constitutional provisions and declared a state of emergency anyway, protecting sovereignty but forced to disregard the principles of the rule of law.

Granting amnesty/power of pardon

Another function traditionally exercised by the executive is the right to grant pardons or amnesty. In post-conflict scenarios, constitutional regulations for transitional justice that also include elements of amnesty are of paramount importance and often the prerequisite for a peaceful start to a new era. Amnesty as part of transitional justice after violent conflict is not covered in this chapter. Instead, it looks at provisions on granting amnesty and pardon that are meant to be applied during the ordinary course of constitutional life. But even in this context the power to grant amnesty/pardon is sensitive and carries the potential to influence the administration of justice on a large scale if used unwisely. Thus, identifying the proper balance of actors involved in the process of granting amnesty/pardon is crucial. Also here, various constitutional options are available, ranging from exclusive executive authority to grant amnesty (Burkina Faso, the Czech Republic) or pardons (Georgia, Kenya) to the complete exclusion of the executive from

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amnesty decisions (Hungary). Between these extremes, the array of options includes both the executive and the legislature exercising parallel pardon and amnesty powers (Mozambique 1990); executive power to grant amnesty and pardons under limited circumstances (Haiti); joint powers requiring both the executive and the legislature to approve amnesty or pardons (Indonesia, South Korea); or even a combination of the last two arrangements—in Greece, amnesty

is available only for political crimes and only if approved by both the executive and Parliament.

5.4.2. Limiting the executive's impact in law-making activities

Traditionally, the authority to draft law rests with the legislature, not the executive.

The executive may aggregate power to block, check or influence central activities of other branches of government, such as law-making. Moderating the degree to which the executive can influence the law-making process is thus another consideration when designing executive power. Two different

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kinds of executive involvement in law-making activities can be distinguished: (a) the power of the executive to legislate by decree, and (b) the involvement of the executive in the legislative law-making process itself.

Legislating by decree

It is important not to confuse the power to issue decrees of a regulatory or administrative nature with the power to legislate by decree. Most executives, at least those where the head is directly elected, enjoy the power to issue executive orders to implement the political agenda. In some cases, the President has extensive discretion in interpreting the intentions of the legislature in implementing the law.⁴¹

Legislating by decree comes in two forms: (a) as powers delegated from the legislature; or (b) as original constitutional powers. In the former, the legislature itself controls and may revoke the delegation of such authority at any time (Croatia). If this power is given temporarily by a majority of the legislature and its content is carefully circumscribed this might help in getting individual measures enacted in a specific area more efficiently. With regard to the law-making authority directly assigned to the executive, again two facets are worth considering: first, the power to legislate in exceptional circumstances only, and, second, the power to legislate on particular matters. A common exceptional circumstance is periods when the legislature is not in session. However, those decrees commonly lapse if they are not confirmed by the legislature within a certain period of time after it reconvenes (e.g. Brazil). Another exception is the state of emergency. However, if it is not designed carefully (see chapter 5, sections 4.3.1 and 4.3.2), such a provision potentially opens the door to a fairly extensive form of legislative power and is prone to misuse, as can be seen in Egypt, Sudan, and elsewhere.

The power of the executive to legislate by decree can mean powers delegated from the legislature or original constitutional powers.

Alternatively, a constitution may permit the executive to issue decrees with the force of law in particular policy areas, thus circumventing the legislature in those fields (e.g. France).

Involvement of the executive in the law-making process

The legislative process includes various stages, starting with the initiation of legislation and ending with a bill's promulgation into law. Substantive executive involvement in this process may occur at two stages—(a) at the very beginning, and (b) after the legislature has passed the bill.

(a) Initiative to legislate

In most constitutions, the legislature holds the unlimited authority to initiate the law-making process in all matters, and sometimes even exclusively (e.g. the USA). In many countries, however, the authority to introduce bills is at least in part shared with the executive. In some constitutions, the executive even has the exclusive capacity to introduce budgetary laws, international treaties or trade and tariff legislation. This authority might extend to other policy areas as well (e.g. Brazil, Chile and Columbia).

Such a ‘gatekeeping’ function enables the executive to maintain the status quo in the particular policy areas to which it applies. A President who wants to keep a legislature that is dominated by the opposition from making changes in a given area can just refrain from introducing legislation.

(b) Presidential veto powers

After the legislature passes a bill, many constitutions enable the President to influence, impede or even block it. Thus, the way in which a constitution defines veto powers can also aggregate or disperse power. Two different types of presidential intervention can be distinguished: the President may (a) reject a bill strictly for political reasons, or (b) challenge the constitutionality of a bill. The first is considered a *political* veto, the second a veto on the *constitutionality* of a bill. Political vetoes are more common in presidential and semi-presidential systems where the electorate, rather than the legislature, elects the President directly. If the legislature can overrule a veto by a majority equal to or greater than the majority by which the bill in question was originally passed (e.g. Botswana, India, Turkey), then the presidential veto is weak and only amounts to a right of delay. A veto may require the lapse of several months before the legislature can reconsider a bill. The intervening time may permit further discussion or media attention (e.g. Uruguay). If the threshold required for the legislature to overrule the veto rises, however, then the presidential veto becomes more substantial. Higher thresholds can vary significantly, from an absolute majority (Peru), to a 60 per cent majority (Poland), to a 67 per cent majority (Chile) of all members of the legislature who are *present*, to a 67 per cent majority of the *full* membership of the legislature (Egypt). Depending

Involvement of the executive in the law-making process may mean the power to initiate legislation or powers of veto. In many countries the authority to introduce bills is at least in part shared with the executive, or the veto can be overridden under various conditions.

on the composition of the legislature and the strength of the opposition, a presidential veto might equate to a de facto absolute veto that can block all legislative initiatives if it is applied. A *de jure* absolute veto rarely exists; where it does, it usually applies only to limited policy areas (e.g. Cyprus).

In addition to a so-called ‘package veto’ that allows the President to register only a yes or

no opinion, a ‘partial veto’ permits him/her to object to portions of a bill (Uruguay). The partial veto arguably engages the President more closely in the law-making process by authorizing a more limited interjection into the details of legislation. That limited intervention cumulatively permits great influence over the final form of legislation.

Another option allows the President to broaden the spectrum of approval required for a proposed law to be passed. The executive also may influence the legislative process by sending a bill to referendum for approval or rejection by direct majority vote (France, Peru). The power to convoke a referendum or plebiscite can be an important tool, used by a President to put pressure on the legislature to go along with his/her policy proposal. Next to a debate on the purely substantive content of a bill, it may also be used by presidents to reaffirm their popular mandate and legitimacy.

A constitution may authorize the President to challenge the constitutionality of a bill by forwarding it to the appropriate court for review (Croatia, South Africa). Here, the President’s concern as to the constitutionality of the law delays and—if it is supported by the appropriate court—ends the process on legal instead of political grounds. Permitting the President to veto a bill only on constitutional grounds allows for a legal check at an early stage.

6. Conclusion

The ways in which the executive branch of government can be designed are manifold and the options illustrated above have only provided some examples of the rich menu available. The various suggestions on disaggregating executive powers will enhance discussions to transform political ideas into a legal setting. But constitutionally constructing institutional relationships that strike the right balance of power and responsibilities, both within the executive branch and between all three branches of government, can only be a first step. Political dynamics and actors can work around constitutional provisions and generate results that are inapposite to what the drafters of the constitution intended. Occasionally, constant support and vigilance from the relevant political actors might be required to avoid overly expansive interpretation of the law by the executive. For instance, the Constitution of Brazil provides the President with the power to issue ‘provisional measures’ in times of ‘relevance and urgency’. Under the provisions of the 1988 Constitution, such measures expired after 30 days unless passed by law. However, this provision was interpreted as allowing presidents to reissue the provisional measures indefinitely. A 2001 reform lengthened the pertinent time period to 60 days, but also specified that the provisional measures could only be renewed once. However, sometimes the principles of separation of power and institutional checks and balances, both designed to control the executive, may prove irrelevant if the Prime Minister de facto controls his/her political party.

The constitutional dilemma of preventing executives from extending their tenure beyond that permitted in the constitution also illustrates the limited reach of constitutional provisions that lack political support: although rarely involved in the constitutional amendment process, chief executives repeatedly have managed to initiate and direct those processes, resulting in extensions of their terms (Burkina Faso, Côte d’Ivoire, Gabon, Uganda). To avoid this outcome, some constitutions have declared presidential terms immutable (El Salvador, Honduras, Niger), and Honduras’s Constitution has even empowered the armed forces to enforce that provision (see above). It may be more than a coincidence that when presidents have sought to overcome this limitation in Honduras and Niger they failed and were removed from power. Flagrant disrespect of this norm and the ignorance of the other branches’ interventions to safeguard it

mobilized opposition and resistance. In the end, the constitutional coups of both presidents were stopped at different stages by military intervention.

Table 2. Issues highlighted in this chapter

Issues	Questions
1. System of government	<ul style="list-style-type: none"> • Shall the head of government be directly elected by the people for a fixed term or shall s/he derive his/her legitimacy from the legislature, making his/her origin and survival dependent on the legislature? • Shall the head of state also be the head of government? If so, shall s/he be elected by the people (presidential system) or by the legislature (South Africa, Botswana)? • Shall there be a dual executive with a directly elected head of state and a head of government that is selected by both the head of state and the legislature?
2. Designing the executive branch at the national level	<ul style="list-style-type: none"> • Shall the position of head of government (and head of state) be exercised by one single person or rather by a collegial executive, where the presidency is composed of several members? • If the latter, shall all members of the presidency have the same powers or shall they have weighted powers, requiring the presidency to decide collectively only on important issues? • In the case of a dual executive, shall the head of state have the power to appoint/select/dismiss the head of government? • In a dual executive, shall the head of state be involved in appointing and/or dismissing Cabinet members or shall this power vest exclusively in the head of government?
3. Presidential term limits	<ul style="list-style-type: none"> • Shall there be term limits for a directly elected President? How can term limits be protected against easy amendment?
4. Decentralization of executive powers	<ul style="list-style-type: none"> • From a vertical perspective, shall there be various levels of administration or levels of government in the country? • If the latter, shall the respective head of administration be elected by the people of that unit or shall s/he be appointed by the national executive? • Shall the head of administration/government implement national policies only or shall s/he be empowered to determine the policies with regard to specific issues autonomously (either by himself/herself or through a legislative assembly at that level) and represent that level of government? • Shall the level of government be able to raise its own revenues?

5. Institutional powers of the executive	<ul style="list-style-type: none"> • Shall the head of the executive have the power to dissolve the legislature? If yes, under which circumstances?
6. Institutional checks on the executive	<ul style="list-style-type: none"> • Shall the head of the executive have exclusive control over the Cabinet or shall the control be shared with the legislature? • Shall there be a political vote of no confidence of the legislature against the head of government? • Who shall be involved in an impeachment procedure against the head of state/head of government? • Shall there be the opportunity for citizens to recall the head of state under specific circumstances?
7. Substantive powers of the executive	<ul style="list-style-type: none"> • Shall the executive have exclusive control over declaring a state of emergency or should other actors (e.g. the legislature) be involved as well? • Shall the executive have exclusive control over declaring war or should other actors (e.g. the legislature) be involved as well? • Shall the executive have exclusive control over granting pardons/amnesty or should other actors (e.g. the legislature) be involved as well? • Shall the executive be involved in the law-making process? If so, shall there be the possibility for the executive to legislate by decree and what kind of limitations shall apply? • Shall the executive have the right to initiate legislation, in some areas even exclusively? • Shall the executive have the right to veto bills? If so, shall it be a purely suspensive veto or shall a super-majority of the legislature be required to overcome the presidential veto, or shall there even be an absolute veto in some areas? • Shall the executive have the right to question the constitutionality of a bill before it becomes law?

Notes

- ¹ See Mainwaring, S. and Shugart, M. S., 'Juan Linz, Presidentialism, and Democracy: A Critical Appraisal', *Comparative Politics*, 29/4 (1997), pp. 449–71.
- ² Linz, J. J., 'The Perils of Presidentialism', *Journal of Democracy*, 1/4 (1990), pp. 51-69.
- ³ Horowitz, D., 'Constitutional Design: Proposals Versus Processes', in A. Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford and New York: Oxford University Press, 2002), pp. 15–36.
- ⁴ Carey, J. and Shugart, M. S., *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: Cambridge University Press, 1992).

- ⁵ Simeon, R., ‘Constitutional Design and Change in Federal Systems: Issues and Questions’, *Publius: The Journal of Federalism*, 39/2 (2009), pp. 241–61.
- ⁶ Horowitz, ‘Constitutional Design: Proposals Versus Processes’.
- ⁷ Simeon, ‘Constitutional Design and Change in Federal Systems’.
- ⁸ For an in-depth analysis of the ‘Dismissal’ see Kelly, P., *The Dismissal* (Melbourne: Angus & Robertson, 1983). A similar dynamic framed the 2008–09 Canadian parliamentary dispute, which opposition parties in the House of Commons triggered by supporting a motion of no confidence against the minority government.
- ⁹ Article 64 of the German Basic Law (1949) as of 2009.
- ¹⁰ Article 175 of the Swiss Constitution.
- ¹¹ Posner, D. N. and Young, D. J., ‘The Institutionalization of Political Power in Africa’, *Journal of Democracy*, July 2007, p. 131.
- ¹² Article 81 (3) of the Constitution of the Russian Federation (1993) as of 2008.
- ¹³ Article 60 (5) of the Constitution of the Republic of Austria (1920) as of 2004.
- ¹⁴ Article 178 of the Constitution of the Republic of Panama (1972) as of 2004.
- ¹⁵ Article 229 of the Constitution of Paraguay 1992.
- ¹⁶ Article 70 of the Constitution of the Republic of Korea (1948) as of 1987.
- ¹⁷ Article 88 (2) of the Constitution of South Africa (1996) as of 2007.
- ¹⁸ Article 101 (2) of the Constitution of the Republic of Turkey (1982) as of 2008.
- ¹⁹ Article 248 of the Constitution of El Salvador (1983).
- ²⁰ Article 374 of the Constitution of Honduras (1982).
- ²¹ Article 36 and 136 of the Constitution of Niger (1999).
- ²² Article 272 of the Constitution of Honduras (1982).
- ²³ Article 128 (2) of the Constitution of the Republic of Korea (1948) as of 1987.
- ²⁴ The term ‘de-concentration’ is used here as a technical term to describe a specific degree of decentralization. If not related to administrative decentralization, the term is used more generally.
- ²⁵ Article 187 (1) of the Constitution of Portugal (1976) as of 2004.
- ²⁶ Article 135 (9) of the Constitution of Colombia (1991) as of 2005.
- ²⁷ Article 101 of the Constitution of Argentina (1994).
- ²⁸ Article 88 of the Interim Constitution of South Africa (1994–96).
- ²⁹ Article 87 of the Constitution of Ukraine (1996) as of 2004.
- ³⁰ Article 67/Article 68 of the German Basic Law (1949) as of 2009.
- ³¹ Article 39 A of the Constitution of Hungary (1949) as of 2007.
- ³² Article 87 (8) of the Constitution of Lesotho (1993).
- ³³ Article 158 (1) of the Constitution of Poland (1997).
- ³⁴ Article 113 of the Constitution of Spain (1978) as of 1992.
- ³⁵ Article 57 of the Constitution of Namibia (1990) as of 1998.

- ³⁶ Article 136 of the Constitution of Egypt (1971) as of 2005 (before the 2007 amendments).
- ³⁷ Article 105 of the Constitution of the Republic of Ecuador (1998) as of 2008.
- ³⁸ Article 95 of the Constitution of Romania (1991) as of 2003.
- ³⁹ Article 60 (6) of the Constitution of the Republic of Austria (1920) as of 2004.
- ⁴⁰ Article 11 of the Constitution of the Republic of Iceland (1944) as of 1999.
- ⁴¹ Payne, J. M. et al., *Democracies in Development: Politics and Reform in Latin America* (Washington, DC: Inter-American Development Bank, International IDEA et al., 2007).

Key words

Collegial executive, Dual executive, Vertical separation of executive powers, Institutional dependence

Additional resources

- **Peacebuilding Initiative**

<<http://www.peacebuildinginitiative.org/index.cfm?pageId=1759>>

This site provides an in-depth overview of democracy and governance issues in post-conflict peace-building contexts. It addresses definitions and conceptual issues related to the notions of democracy, governance and the rule of law. It also examines how democratic governance has become a central political framework for post-conflict peace building over the last two decades and contains a discussion specifically dedicated to constitutions.

- **ACE Electoral Knowledge Network**

<http://aceproject.org/ero-en/index_html?filter&topic=&country=&type=Essays and Papers>

The ACE Electoral Knowledge Portal—a joint initiative of International IDEA, the Electoral Institute of Southern Africa (EISA), Elections Canada, the Federal Electoral Institute of Mexico, the International Foundation for Electoral Systems (IFES), the United Nations Department of Economic and Social Affairs (UNDESA), the United Nations Development Programme (UNDP) and the UN Electoral Assistance Division (UNEAD)—is an online knowledge repository that offers a wide range of services related to electoral knowledge, assistance and capacity development. The website contains in-depth articles, global statistics and data, an Encyclopedia of Elections, information on electoral assistance, observation and professional development, region- and country-specific resources, daily electoral news, an election calendar, quizzes and expert networks.

- **Institute of Federalism**

<<http://www.federalism.ch/index.php?page=22&lang=0>>

The Institute of Federalism is a centre for research and academic expertise that

focuses on federalism and cultural diversity. Its website offers an international research and consulting centre that focuses on the peaceful creation of multicultural societies.

- **Geneva Centre for the Democratic Control of Armed Forces**

<<http://www.dcaf.ch/>>

The Centre for the Democratic Control of Armed Forces (DCAF) is an international foundation supporting the development of security forces which are accountable to the state and its citizens. This site contains a number of publications, including a policy paper that discusses states of emergency—‘Securing Democracy? A Comparative Analysis of Emergency Powers in Europe’ (2009).

- **National Democratic Institute**

<<http://www.ndi.org/>>

The National Democratic Institute (NDI) is a non-profit, non-partisan organization that seeks to support democratic institutions worldwide through citizen participation, openness and accountability in government. The website offers a library of key documents as well as other publications.

- **Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights**

<<http://www.osce.org/odihr>>

The Organization for Security and Co-operation in Europe (OSCE) is a regional security organization that aims to offer a forum for political negotiations and decision making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation. Funded by its member states, the organization puts the political will of the participating states into practice through its network of field missions. The website contains multimedia resources, news services, databases and a documents library.

- **Semi-presidential One website**

<http://www.semipresidentialism.com/The_Semi-presidential_One/Blog/Blog.html>

This website features posts about semi-presidentialism and semi-presidential governments by the political scientist Robert Elgie.

The Design of the Legislature

Markus Böckenförde

CHAPTER 5

CHAPTER 5

1. Introduction and overview

The allocation of powers and the interrelation between the three branches of government—the executive, the legislature, and the judiciary—are key elements of the institutional design of a constitution. As with the design of the executive branch, the design of the legislature cannot be discussed in clinical isolation, but requires an understanding of the governmental structure within which it operates. Chapter 4, which discusses the design of the executive branch in a constitution, has introduced the issues of the framing of the state structure—the presidential, parliamentary and mixed systems of government. Their features are summarized in figures 1–3 and boxes 1–3 in chapter 4, and their potential strengths and the challenges to them are shown in table 1 of the same chapter. This chapter now turns to the legislative branch of government.

The three basic functions of the legislature are representation, law-making, and oversight. As the most representative institution in politics, at its best, it represents the political arena in which society's divergent opinions compete. In a post-conflict setting, previously warring groups struggle to replace violence and hatred with politics. In such a setting the design of the legislature can facilitate this evolution, by constructing a forum for the expression, consideration and accommodation of different opinions.

More pragmatically, constitutional design often represents a compromise between various actors with different interests and expectations. Several post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Thus, constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available. Because political parties predominantly make up the legislature, their interests—in addition to the visions of their leaders—often dominate the process of designing the legislature. Dominant parties might negotiate a 'winner takes all' model not only concerning the electoral system, but also concerning the entire legislative design—aggregating legislative

power by permitting a simple majority to exercise far-reaching authority. Parties representing a minority group, be it religious or cultural, might prefer a different design.

Often there are high expectations of the legislature and its role in the governmental structure. Especially in scenarios where people have suffered from authoritarian rulers running a country on the basis of a strongly centralized executive, relief is awaited from a viable legislature. Adherents of democracy might not find anything problematic about a potent legislature that aggregates considerable powers. The legislature is perceived as a deliberative branch in which bargaining and compromise, followed by voting, are the order of the day.

The three basic functions of the legislature are representation, law-making, and oversight. As the most representative institution in politics, at its best, it represents the political arena in which society's divergent opinions compete.

However, designing a legislative branch of government also comes with challenges. Constitution builders may consider that untrammelled legislative power under simple majority rule can also pose a threat of tyranny for minority groups that are not sufficiently represented.

'If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with one another; nor does their patience in the presence of obstacles increase with their strength. For my own part, I cannot believe it; the power to do everything, which I should refuse to one of my equals, I will never grant to any number of them.'

Source: Alexis de Tocqueville, 'Tyranny of the Majority', chapter XV, Book 1, *Democracy in America*.

This chapter examines a variety of constitutional options for a legislative design. It organizes this variety along the three basic functions: representation, oversight, and law-making. It adds two further elements: the degree of the autonomy of the legislature and additional substantive tasks of the legislature next to law-making. Figure 1 explains the organizational structure of the chapter in more detail.

Section 3 of this chapter looks into the institutional design of the legislature and addresses three issues: (a) different institutional structures that allow for different forms of representation, (b) the institutional structure of legislative oversight/control over the executive, and (c) different forms of checking the legislature.

- (a) There are different angles by which to allow for inclusive representation of the people in the legislature. One angle looks at the composition of the legislature, which ultimately depends on the electoral system that translates the votes of the citizens into seats in the legislature. Another, related issue tackles the question of whether quotas or reserved seats should have an impact in the composition

of the legislature. A third is the question whether a legislature should introduce a minority protection device into the voting procedure within the legislature by allowing for different means to count votes of members of Parliament (double voting). Yet another angle is the question whether the legislature as such should consist of one or two chambers. A second chamber would allow a pattern of representation different from that of the first chamber. Next to increasing the degree of representation by a second chamber at the national level, the drafters of constitutions may also consider whether to have legislatures at different levels of government (provinces, local government) each vested with its own distinct authorities.

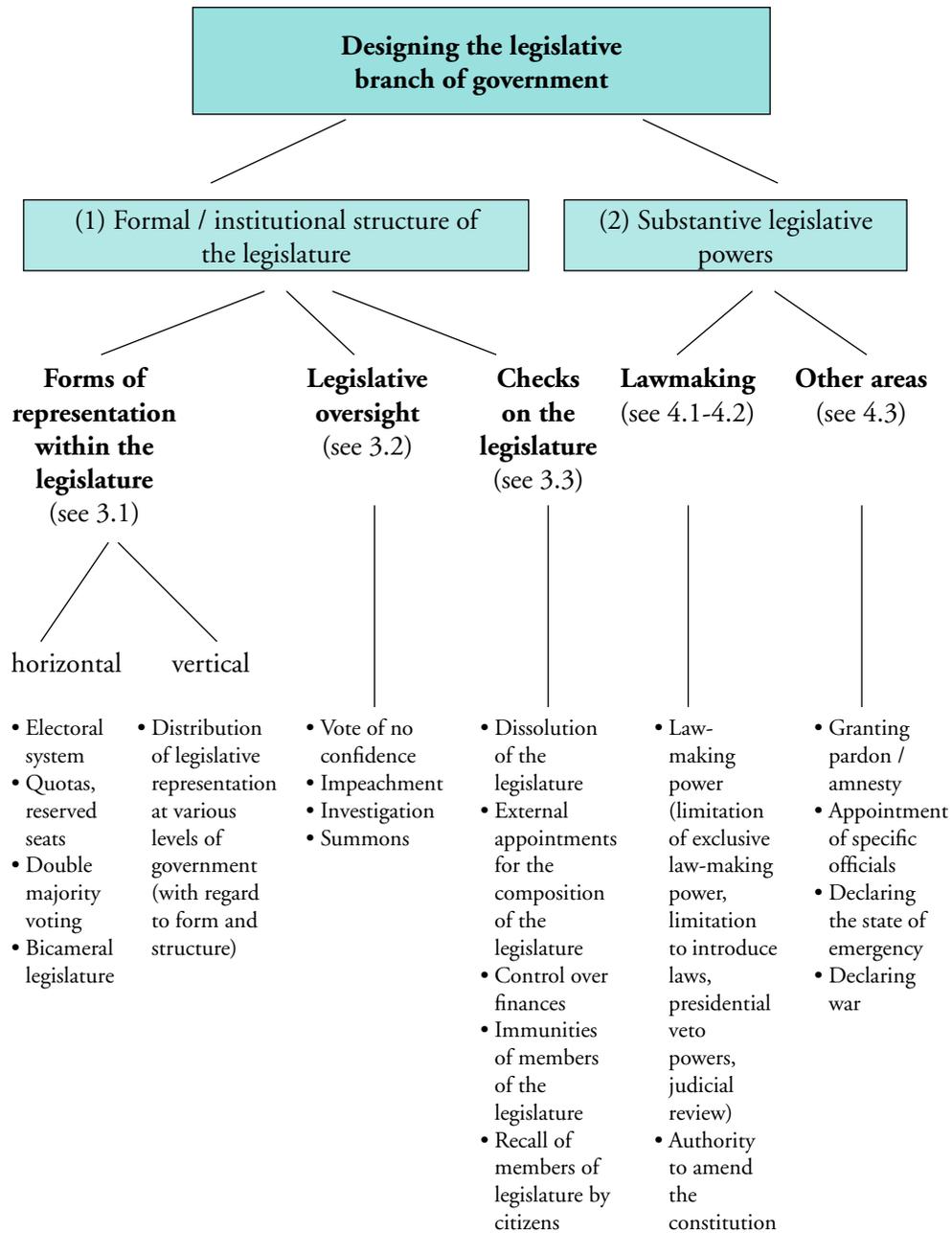
- (b) Oversight/control is another task of the legislature, and comes in different forms: (i) as a specific legislature-executive relationship in which the origin and/or survival of the executive depends on the legislature; (ii) as part of a quasi-judicial mechanism for handling executive wrongdoing (impeachment); or (iii) as part of more day-to-day accountability checks on the executive.
- (c) On the other hand, the degree of the legislature's own autonomy needs to be determined. Various ways and means of checking or influencing the legislature in an overall system of checks and balances might be considered.

Often there are high expectations of the legislature, especially where people have suffered under authoritarian rulers. However, untrammelled legislative power under simple majority rule can also pose a threat of tyranny for minority groups that are not sufficiently represented.

Constitutional design often represents a compromise between various actors with different interests and expectations. Post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available.

Section 4 focuses on the substantive powers of the legislature, predominately the law-making power, including the power to amend the constitution. Here again, this substantive power might rest exclusively with the legislature or be shared with other institutions. Finally, the substantive powers of the legislature are not restricted to law-making only. Thus the substantive legislative involvement in other areas is addressed as well.

Figure 1. Designing the legislative branch of government



2. Context matters

Designing an effective legislature for post-conflict scenarios presents various challenges. Empirical evidence and experience too often do not support general parameters and theoretical assumptions. If we focus on the institutional approach that defines the authority patterns of the legislature and the other branches of government and how they are constitutionally related to each other, we will fail to consider extra-constitutional factors, such as party discipline and leadership dynamics. For example, a parliamentary system theoretically permits the direct selection and removal of the chief executive. In practice, however, the structure and operation of the political party system, in addition to a host of other factors, often drive legislative governance. Disciplined political parties in many countries have curtailed the doctrine of ‘parliamentary supremacy’ as the head of a majority party sets policy, relying on his/her fellow party members in the legislature to adopt supportive legislation instead of questioning the political agenda.

‘Because of the combination of disciplined parties, single member plurality electoral districts, and the prime minister’s ability to dissolve the parliament, Westminster systems provide a very weak legislative check on the premier. In principle, the MPs of the governing party control the cabinet, but in practice they usually support their own party’s legislative initiatives regardless of the merits of particular proposals because their electoral fates are closely tied with that of the party leadership.’

Source: Mainwaring, Scott and Shugart, Matthew J., ‘Juan Linz, Presidentialism, and Democracy: A Critical Appraisal’, *Comparative Politics*, 29/4 (July 1997).

Often, the personality and affability of individuals standing for Prime Minister, rather than the respective party platforms, determine the results of elections to the legislature. Electoral campaigns for the legislature advertising with the potential head of the executive if the respective party gains the majority of seats can reflect the factual balance of strength between the two branches. Even in a presidential system, a President endowed with strong constitutional powers in a political party system that is highly fragmented and where support from the legislature is unreliable might wield less power than a President governing with fairly weak constitutional powers but with disciplined majority support in the legislature. Additionally, it cannot be assumed that even an appropriate constitutional provision, by its mere existence, will conjure up the social conditions that are preconditions of success. Informal cultural norms and conventions may exert considerable influence over the means by which legislatures use and apply their constitutional powers. For example, the Canadian Constitution grants the second

Context matters. Extra-constitutional factors, such as the operation of the political party system, party discipline and leadership dynamics, personality and informal cultural norms and conventions may exert considerable influence. A design option borrowed from another country may result in political dynamics and outcomes that are quite different from those observed in the country of origin.

chamber of the legislature an absolute veto power, but by convention the second chamber hardly exercises that veto.¹ In short, the drafters of constitutions should be aware that a specific design option borrowed from another country may result in political dynamics and outcomes that are different from those observed in the country of origin. In turn, constitutional options that did not work in one country may well fit in the context of another. Thus, analysing and understanding the context of the country of origin and comparing it with the experiences in the country concerned is an indispensable second step in the drafting of a constitution.

3. Institutional design options

3.1. Forms of representation within the legislature

It is commonly agreed that one task of a democratic legislature is to represent the people. Discussions about the design of the legislature include various aspects of representation. However, representation can come in different forms. It can be geographical, linking the representative to a specific area and constituents within it. It can be based on ethnic, tribal

The design of the legislature depends on the choices made about what forms of representation are most important in the historical and cultural context of a country.

or other identity. It can be party-political and it can be descriptive, seeking to ensure that an elected legislature contains women and men. The design of the legislature depends on the choices made about what forms of representation are most important in the historical and cultural context of a country.

Legislative representation might be achieved with one chamber at the national level. Within that chamber, a single party might assume majority control, buttressed by a ‘winner-takes-all’ electoral system without allocating any seats for minorities or women. Especially in a diverse society that has suffered from conflicts due to marginalization, this form of representation does not ideally reflect the diversity of and various interests in the country.

Representation can come in different forms. It can be geographical, or based on ethnic, tribal or other identity. In a diverse society that has suffered from conflicts due to marginalization, a ‘winner-takes-all’ electoral system does not ideally reflect the diversity of and various interests in the country.

Constitution builders might disaggregate legislative power by various means: (a) adopting a constitutional framework that requires the legislature to better reflect the variety and diversity of a country—not only by mandating better representation of minority groups generally but also by mandating their influence in sensitive areas of legislation; or (b) discouraging single-party government through an appropriate electoral system. Constitution builders also

could achieve formal disaggregation and space to accommodate different aspects of representation (c) horizontally within the legislature by introducing a second chamber, or (d) vertically between levels of government by creating regional legislatures.

3.1.1. Designing representation through electoral systems

The task of an electoral system is to translate the citizens’ vote into seats in the legislature. The design of systems for electing legislative representatives impacts upon which parties obtain representation and to what extent their share of seats equates with their share of votes. For example, First Past The Post systems, where one legislator is elected by a simple plurality in each electoral district, have the direct effect of under-representing minority parties. Even if those parties managed to receive as much as 10 or 20 per cent of the national vote, they might not gain a single seat in the legislature if their support and that of other parties were distributed evenly across the country.² By contrast, electoral systems based on proportional representation support diversity of opinion by allowing a number of political parties to secure seats in the legislature—which encourages multiparty coalitions. On the other hand, if a large number of parties obtain representation, it is less likely that the governing party will enjoy reliable support in the legislature. It then becomes more difficult for legislators to reach the level of agreement required to enact necessary reforms. Electoral systems that favour proportional representation therefore need to some degree to balance representation and effectiveness. They often rely on a minimum threshold for representation. This threshold has to be carefully determined in order not to nullify its original purpose of broad representation. Otherwise, as in Turkey (2002), a threshold of 10 per cent excludes the vast majority of parties and almost 46 per cent of all votes. At the other extreme, the current 2 per cent threshold in Israel (after 1 per cent until 1992 and 1.5 per cent until 2006) has allowed as many as 12 parties to sit in the Knesset (120 members), making it extremely challenging to form a stable government. Those differences are not only a result of the respective percentage, but are also linked to the party landscape and the electoral systems chosen. The International Institute for Democracy and Electoral Assistance (International IDEA) has published a Handbook on electoral systems that explains the importance of those systems and highlights how different systems have worked in different countries.³

Constitution builders can accommodate different aspects of representation in different ways. One is to design representation through the electoral system. First Past The Post systems tend to under-represent minority parties, while electoral systems that favour proportional representation need to some degree to balance representation and effectiveness.

3.1.2. Reserved seats

Another way to increase the representation of minorities or women in the legislature is by introducing reserved seats or quotas. Reserved seats set aside a certain number of seats for specific minorities/women in the legislature. They are used in countries as diverse as Colombia (‘black communities’), Croatia (ethnic minorities), India (scheduled tribes and castes), Jordan (Christians and Circassians), Niger (Tuareg) and Pakistan (women and non-Muslims). Representatives from these reserved seats are usually elected in the same manner as other representatives, but are sometimes elected only by members of the particular minority community designated in the electoral law/constitution.⁴ Article 51

of the Constitution of Pakistan illustrates a constitutional set-up of reserved seats in the legislature and its integration into the overall electoral scheme (see box 1).

Box 1. Reserved seats in the National Assembly of Pakistan

Article 51 of the Constitution of Pakistan

National Assembly

(1) There shall be three hundred and forty-two seats of the members in the National Assembly, including seats reserved for women and non-Muslims.

(1A)

(3) The seats in the National Assembly referred to in clause (1), except as provided in clause (2A), shall be allocated to each Province, the Federally Administered Tribal Areas and the Federal Capital as under:

	General Seats	Women	Total
Balochistan	14	3	17
The North-West Frontier Province	35	8	43
The Punjab	148	35	183
Sindh	61	14	75
The Fed. Adm. Tribal Areas	12	–	12
The Federal Capital	2	–	2
Total	272	60	332

(2A) In addition to the number of seats referred to in clause (1A), there shall be in the National Assembly, ten seats reserved for non-Muslims.

...

(4) For the purpose of election to the National Assembly—

(a) the constituencies for the general seats shall be single member territorial constituencies and the members to fill such seats shall be elected by direct and free vote in accordance with the law;

(b) each Province shall be a single constituency for all seats reserved for women which are allocated to the respective Provinces under clause (1A);

(c) the constituency for all seats reserved for non-Muslims shall be the whole country;

(d) members to the seats reserved for women which are allocated to a Province under clause (1A) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly:

Provided that for the purpose of this sub-clause the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates;

(e) members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system of political parties lists of candidates on the basis of total number of general seats won by each political party in the National Assembly:

Provided that for the purpose of this sub-clause the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates.

Source: Constitution of Pakistan; table redrawn by the author.

Opinions on the usefulness of reserved seats differ. On the one side it is considered to be a normative good to represent minority groups; on the other it has been argued that designing structures which give rise to a representative legislature without overt manipulation of the electoral system is the better strategy since reserved seats may cause resentment on the part of the majority population and create mistrust between different cultural groups.

3.1.3. Candidate quotas

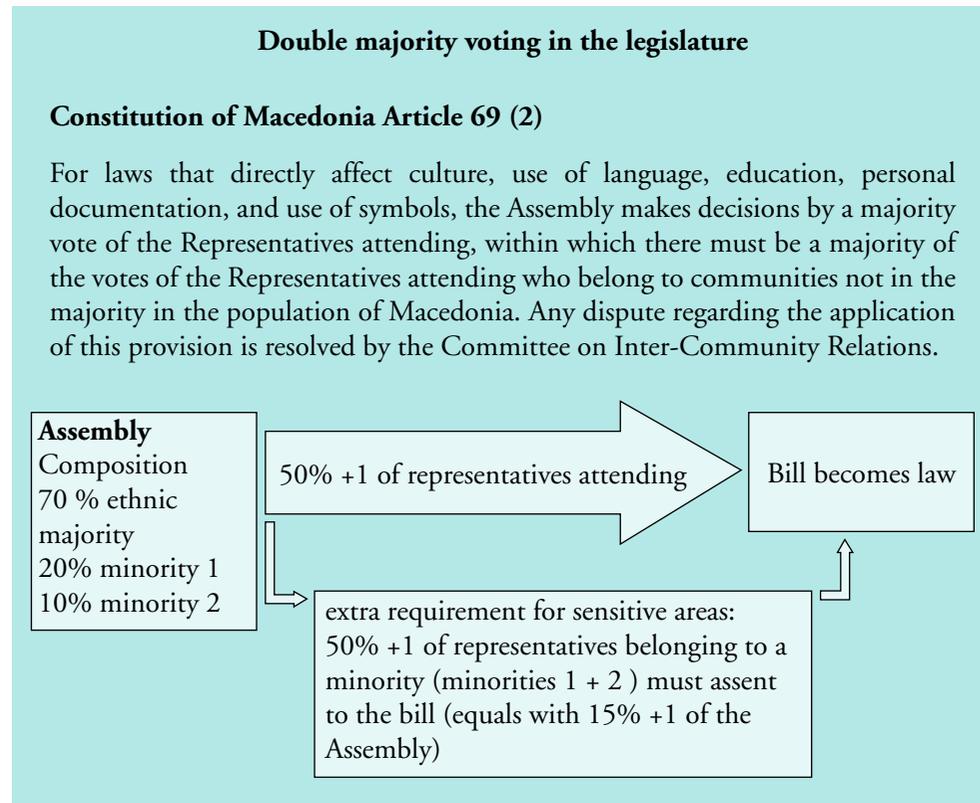
Candidate quotas are generally applied to increase the representation of women. They specify the minimum percentage of candidates for elections that must be women and apply to political parties' lists of candidates for election. Candidate quotas are predominately regulated in electoral laws but not in the constitution.

International IDEA's *Electoral System Design: The New International IDEA Handbook* (2005)⁵ provides more detailed information on reserved seat and candidate quotas. With regard to women's representation in the legislature, International IDEA has published another Handbook which is worth exploring—*Women in Parliament: Beyond Numbers* (1998, rev. 2005).

3.1.4. Double majority voting

Beyond its composition, designing the voting process within the legislature can ensure minority influence on particularly sensitive issues of concern, such as language, culture and so on: the constitution might require both an ordinary majority *and* within that majority also a majority of minority members sitting in the legislature on such issues. Double majority voting offers minorities a veto power against the ordinary majority rule. Box 2 illustrates the concept of double majority voting in the Former Yugoslav Republic of Macedonia (FYROM), but it can be also found in Belgium (with regard to laws affecting the boundaries of the linguistic communities).

Box 2. The concept of double majority voting in the former Yugoslav Republic of Macedonia



3.1.5. A bicameral legislature

Establishing a second legislative chamber may be another option to allow constitution builders to accommodate different forms of representation in the legislature. Whereas in the first chamber—the lower house, congress or assembly—representation often is proportional and population-based, with each member (ideally) representing the same number of citizens, class, territorial or interest group representation customarily

dominates the principles on which the the second chamber—the upper house or senate—is formed. A bicameral legislature is a common model of constitutional design, adopted by around 80 countries worldwide

Historically, constitution builders have introduced bicameral systems to address the separation of interests between noblemen and commoners. As the second chamber in the United Kingdom, the House of Lords captures that dichotomy, although the British government has drastically curtailed its power over the decades, transforming the chamber into an almost advisory body. In addition to the United Kingdom, partly ‘aristocratic’ second houses still exist in some countries (e.g. Lesotho).

Recently, second chambers have reserved representation for certain societal groups. For example, elected and appointed members of traditional ethnic groups constitute the House of Chiefs in Botswana. Although the House of Chiefs has limited legislative powers, Parliament must consult it on tribal matters and on proposed changes to the constitution. In Morocco, trade unions and industrial and agricultural representatives select two-fifths of the members of the second chamber. In Ireland, the cultural, educational, agricultural, labour, industrial and commercial, and administration and social service sectors select 70 per cent of the members of the second chamber. In Malawi, about one-third of the members of the second chamber are chiefs, elected by a caucus of chiefs in the respective districts, and another third are selected from a list of candidates nominated from interest groups (women’s organizations, the disabled, the health, education, farming and business sectors, trade unions), as well as society (reputable persons) and religion.

However, territorial units constitute the most prevalent representational base for second chambers around the world. In all federal bicameral states, representation in states, provinces or regions determines membership of the second chamber. The same holds true for roughly a quarter of unitary states.

In recent years, several countries have introduced a second legislative chamber as part of their constitutional reforms (the Czech Republic, Poland). At the same time, other countries have abolished their second chambers (Croatia, Kyrgyzstan, Senegal). Thus whether to have a second chamber and what kind of second chamber is an appropriate design option again depend on the specific context.

Table 1 summarizes the rationales in favour of a bicameral or unicameral legislature.

Representation can also be enhanced by disaggregating the power of the legislature, horizontally, by introducing a second chamber, or vertically by creating regional legislatures. Territorial units constitute the most prevalent representational base for second chambers around the world.

Table 1. The rationales for a bicameral or unicameral legislature

Bicameral legislatures may ...	Unicameral legislatures may ...
<ul style="list-style-type: none"> increase forms of representation or at least provide a more convenient and flexible institutional solution than attempting to house alternative representation under a single institutional roof 	<ul style="list-style-type: none"> provide greater accountability since legislators cannot blame the other chamber if legislation fails to pass, or if citizens' interests are ignored
<ul style="list-style-type: none"> hinder the passage of hastily drafted laws motivated by sudden impulses; allows for more deliberations and additional review 	<ul style="list-style-type: none"> enact proposed legislation more efficiently
<ul style="list-style-type: none"> avoid simple majority tyranny 	<ul style="list-style-type: none"> allow the passage of straightforward laws to implement important agendas and avoids them being watered down through too many compromises
<ul style="list-style-type: none"> provide enhanced oversight control of the executive 	<ul style="list-style-type: none"> be easier to monitor by the people since fewer legislators are sitting
<ul style="list-style-type: none"> provide more responsiveness to powerful interests. When power is divided, as in a bicameral system, the lobbyists of powerful interests must win the support of a larger number of leaders. 	<p>The transparency of unicameral systems may reduce the influence of lobbyists of powerful interests.</p>

To effectively provide viable representation of different interests through a second chamber, two criteria are worth considering when designing a bicameral legislature: first, the method by which the constitution outlines selection to the second chamber; and, second, the powers and competences that the constitution assigns to the second chamber. If the same electoral system applies for both chambers, the second chamber will simply reinforce the majority in the first chamber. This is even more likely if elections occur simultaneously. Thus, meaningful disaggregation of legislative power demands a distinct system of selection for the second chamber. The actual powers assigned by

the constitution to the second chamber also determine the extent of legislative disaggregation. In assessing the powers of the second chamber, this chapter focuses not on its relative powers compared to those of other branches of government (the US Senate approves Supreme Court justices and high executives, for instance) but on the

To provide viable representation of different interests through a second chamber, the method by which members of the second chamber are selected and its powers and competences should both be considered.

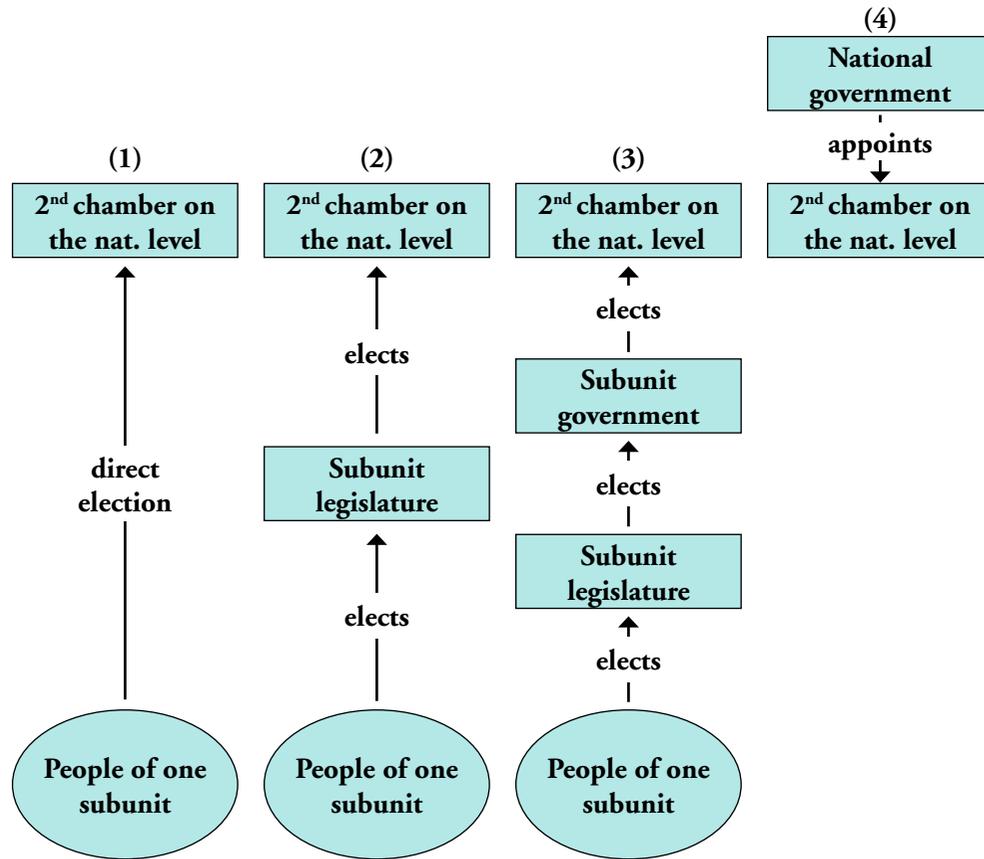
qualitative involvement of the second chamber in exercising legislative functions such as passing a bill or amending the constitution.

The selection of members to the second chamber

Essentially four methods of selecting members to the second chamber exist.

1. Representatives of subunits (states or regions), elected directly by the people of that subunit, compose a number of second chambers (Argentina, Australia, Indonesia, Italy, Nigeria, Switzerland, the United States). Direct elections have come in two forms. In Nigeria, for instance, the Constitution divides subunits into three senatorial electorates; for each electorate, the candidate with the highest vote wins the seat. In Australia, by contrast, the people elect six members per state through a proportional system; the six candidates with the highest number of votes become senators.
2. In a number of countries, the legislatures of the subunits elect representatives, though not necessarily members, to the second chamber (Austria,⁶ Ethiopia⁷, India⁸). Again, two different variations exist. In some countries, a majority vote in the legislature of the subunit determines the members of the second chamber; consequently, majority parties in the subunit legislature (either alone or as a coalition) can elect their members exclusively. Certain countries have avoided such results by employing a proportional method: political parties represented in the subunit legislature select their candidate who then represents the subunit in the second chamber (e.g. if each subunit has three seats in the second chamber, the three strongest parties sitting in the subunit legislature qualify for selection). France offers a variation on this method: senators are elected by an electoral college composed of representatives from the respective (quasi-) legislative assemblies of various levels of government (national level, level of *départements*, level of regions, municipality level). In fact, 95 per cent of the members of the electoral college come from the municipality level.
3. In yet other countries, state *governments* appoint members to the second chamber (e.g. Germany).
4. Based on nominations by state governments, the federal government appoints members to the second chamber (Canada).

Figure 2. The selection of members of second chambers



Source: drawn by the author based on Böckenförde, M., *UNDP Manual on Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan* (Khartoum: United Nations Development Programme, 2007).

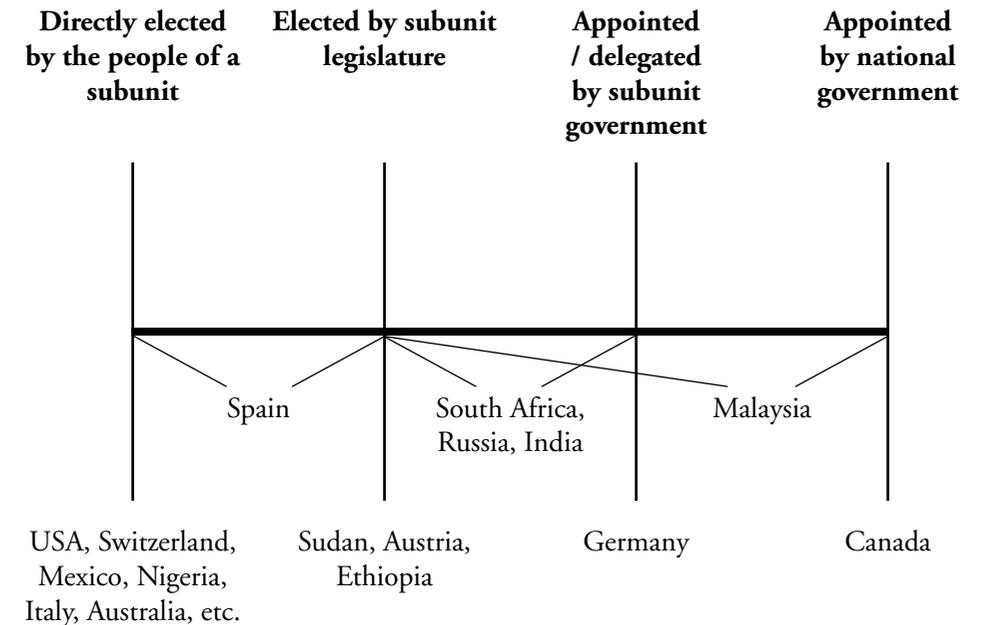
The various methods of selecting members of the second chamber can divide the loyalties of members. The relevant question becomes whose interests the members represent or whose interests the public will perceive the members as representing. Directly elected members of the second chamber (column (1) of figure 2) may serve rather as representatives of the people than of the sub-national government; thus they are unlikely to formulate collective regional views and are more inclined to represent the interests of their political parties. By contrast, members elected from the subunit legislature (column (2)) often form an institutional link to the sub-national government, a link that can allow members to support both regional and national interests together. Yet dual mandates result in dual responsibilities, which might limit the members' effectiveness on behalf of either interest. Creating a strong link to local government through the composition of the second chamber may strengthen the relevance of local government politics at the national level.

If state governments appoint and instruct members to the second chamber (column (3)), they will primarily represent the views of those governments, essentially acting as bureaucrats, not representatives of the people. When the national government appoints members to the second chamber (column (4)), the members lack political credibility as spokesmen for the subunits; both constituents and regional governments will view the representatives as mere agents of the national government.

The different methods of selecting members to the second chamber can divide the loyalties of members. The relevant question becomes whose interests the members represent or whose interests the public will perceive the members as representing.

Given these competing costs and benefits, several countries have combined two or more voting methods to various degrees. While South Africa (60 per cent : 40 per cent), Russia (50 per cent : 50 per cent) and India (95 per cent : 5 per cent) combined categories (2) and (3), Spain (80 per cent : 20 per cent) opted for categories (1) and (2), and Malaysia (37 per cent : 63 per cent) combined categories (2) and (4). Applying several categories at once not only mitigates some of the dynamics discussed above; the approach also allows representatives of the second chamber to accommodate various political actors simultaneously.

Figure 3. Examples of the selection of second chambers



Source: drawn by the author based on Böckenförde, M., *UNDP Manual on Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan* (Khartoum: UNDP, 2007).

If the subunit electorate directly elects members to the second chamber, a distinct method of allocating seats needs to apply vis-à-vis the first chamber if a different

kind of representation is envisaged. Often, each subunit features the same number of representatives, regardless of size or population. Critics argue that this type of seat allocation in the second chamber infringes the democratic principle that the legislative process at the national level should represent each individual citizen equally. In Switzerland,⁹ for example, 23 senators from the smallest cantons (representing just 20 per cent of the population) hypothetically could veto *any* legislative decision.

Creating a strong link to local government through the composition of the second chamber may strengthen the relevance of local government politics at the national level.

The assignment of legislative competences to the second chamber

Participation in the legislative process

Since one of the reasons for creating second chambers is to increase the type of representation in the legislature, the question arises how the constitution addresses the existence of different views and interests between the first and second chambers. Should the second chamber be designed as a true veto player whose consent to legislation is required in whatever case, or only if specific interests are at stake? Or is the role of the second chamber rather consultative to allow for a broader discussion introducing additional views without having the power to block or delay decisions? Or does it have no role at all? In most countries, the law-making process will include the second chamber—whether in an advisory role, to delay the passage of legislation, or to wield a veto. Some systems allow the second chamber to initiate legislation—though often only legislation that directly affects the

One of the reasons for creating second chambers is to increase the type of representation in the legislature. How can the constitution address the existence of different views and interests between the first and second chambers? In most countries, the law-making process will include the second chamber, whether in an advisory role, to delay the passage of legislation, or to wield a veto.

interests of the subunits (South Africa) and not finance bills.

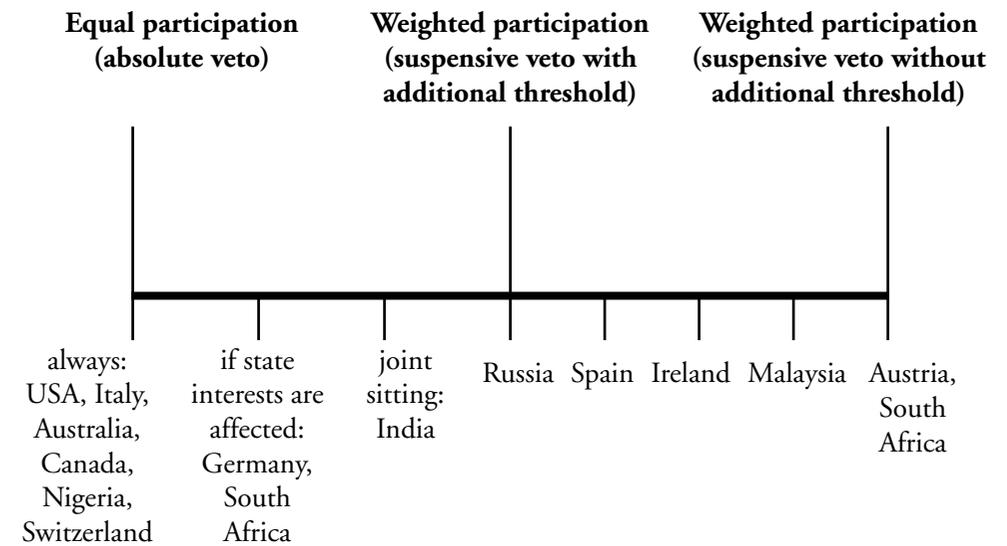
Next to an absolute veto that allows the second chamber to block the process, various shades of impact can be identified.

1. Upon rejection by the second chamber, for a piece of legislation to pass, the first chamber must vote again in favour of the bill (Austria and South Africa concerning bills not affecting the interests of states).
2. Other constitutions also require a second round of voting, but only after a period of time has elapsed (one year in Malaysia). The idea here is to create space for public discussion and new perspectives. This model only delays the legislative process; it does not impose a higher threshold for the first chamber to overcome.
3. Referendums have also resolved disputes. In Ireland, a vote by the second

chamber striking down a bill—if supported by one-third of the first chamber as an issue of national importance—triggers a referendum through which citizens decide whether the legislation becomes law.

4. A fourth model permits the first chamber to override the second chamber's veto either with a two-thirds majority (Russia) or at a voting percentage that matches the second chamber's rejection of the bill (Germany concerning bills not affecting the interests of the states).
5. Finally, other models resolve second-chamber dissent through a joint sitting of both chambers, with the second house permitted a reduced presence (India and Nigeria (concerning finance bills)).

Figure 4. Examples of the legislative powers of second chambers



Source: drawn by the author based on Böckenförde, M., *UNDP Manual on Bicameral Models in Federal States: A Comparative Analysis with a Specific Focus on Sudan* (Khartoum: UNDP, 2007).

In cases where the second chamber possesses absolute veto power, three different strategies to end the stalemate are used:

- *Absolute veto followed by a referral to a mediation committee.* Once a bill has been rejected by the second chamber, a mediation committee consisting of an equal number of members from both houses is formed and tries to hammer out a compromise bill for each house to adopt. If the mediation committee does not find a way out of the deadlock after a certain period of time or number of sittings, the bill will lapse (as in Germany and South Africa with regard to bills that affect the interest of the states; similar in Switzerland).
- *Absolute veto followed by a shuttle system.* After rejection by the second chamber, the disputed bill shuttles between the two chambers until each house has adopted it in the same form, or the bill fails (Canada, Italy, Nigeria, the USA).

- *Absolute veto followed by the dissolution of both chambers.* Inter-cameral disagreement can yield drastic results in Australia: in the case of a deadlock, and if the second chamber fails twice to pass a bill coming from the first chamber, a double dissolution may be precipitated and national elections called for members of both houses.

Participation of the second chamber in the constitutional amendment process

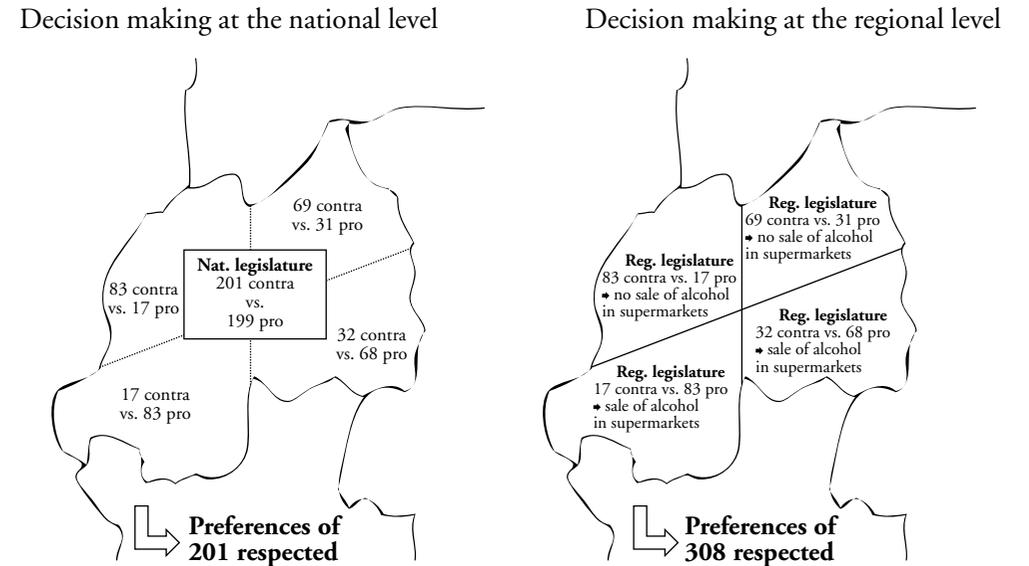
In amending the constitution, the second chamber often exercises greater authority—in the form of an absolute veto—than when passing ordinary legislation. Some constitutions, however, require the second chamber’s consent only when the amendment affects the interests of subunits (Austria, South Africa). Constitutions can also combine other requirements with qualified majority consent by both chambers (see section 4 on the dispersal of substantive tasks).

3.1.6. Legislatures at different levels of government

Constitution builders may create different types of representation not only by adding a second chamber at the national level, but also by providing legislatures at different levels of government. Especially in a diverse country, minorities at the national level may be accommodated through the opportunity to be prominently represented in a regional legislative body and to enact legislation reflecting the specific customs or interests of specific regions. Figure 5 illustrates how legislative representation at a regional level may support the accommodation of different interests. The left-hand figure shows a country where the relevant legislation falls within the authority of the national level. Regardless of the different views in the different regions of the country, the national law applies throughout all the four regions regardless of the differences between majority opinion within the different regions. As a result, the decision taken is unfavourable to almost half of the entire population (199 out of 400). In contrast, if the legislative authority over the pertinent issue is transferred to the sub-national (regional) legislatures (see the right-hand figure), the decisions taken are only unfavourable to less than one-quarter (98 out of 400). Consider the following example. In country X there are two religious groups, one dominant in the northern part of the country, the other in the south. In line with the religious culture of the group prevalent in the northern part, the majority of people living there want to restrict the selling of alcohol in supermarkets. In contrast, the majority of people in the south are more liberal and prefer to be able to buy alcohol in supermarkets. If the legislative power to regulate this issue is at the national level, one group might be outvoted by the other. However, if regional legislatures in the respective regions decide about the issue, a larger number of people can live according to their preferences.

Constitution builders may create different types of representation not only by providing legislatures at different levels of government. Especially in a diverse country, minorities at the national level may be accommodated through the opportunity to be prominently represented in a regional legislative body and to enact legislation reflecting the specific customs or interests of specific regions.

Figure 5. Legislative representation at a regional level



Three related factors determine the degree and extent of the actual shift of legislative powers to different levels of government (see also chapter 7 of this Guide, on decentralization): (a) the authority that the constitution allocates to the legislatures at the regional or local level; (b) the kind of legislative authority and supremacy in specific areas of regulation: is there exclusive or concurrent authority to enact law, and which level’s law prevails in case of overlap and conflict?; and (c) the legal autonomy of the regional or local legislatures.

(1) Scope of authority

The allocation of powers to legislative subunits depends on the diversity of a particular country. Many criteria—geographical, historical, religious, economic and demographic—have significantly influenced the negotiators of constitutions, determining the degree of actual decentralization of legislative powers. Some subject matters—international relations, national defence, currency and citizenship—are typically reserved to the national level, but the devolution of powers in many policy areas depends on the circumstances and the balance of interests at stake. In Brazil, India and South Africa, the constitution also distributes specific powers to a third, local, level of government.

The allocation of powers to legislative subunits depends on the diversity of a particular country. The devolution of powers in many policy areas depends on the circumstances and the balance of interests at stake.

(2) Variations in the form of distributing legislative authorities

A constitution might assign legislative authority exclusively to the national or sub-national levels. Such an allocation, however, confronts two challenges. First, particularly

after a violent conflict caused by the marginalization of certain regions, competing factions will probably not agree to assign power exclusively to any level of government. The second challenge to the exclusive allocation of power is more practical: relying only on exclusive powers may ignore the fact that there is often inevitably a subject matter and jurisdictional overlap in many areas of regulation. Many constitutions, in a bid for flexibility, have opted to distribute legislative powers concurrently between national and regional governments.

Concurrent powers can operate in different ways. Given the vertical overlap of concurrent powers between national and regional legislatures, the question of which regulation prevails will arise. Generally, the constitution prioritizes the national legislature. Regional critics may argue, with some force, that areas of concurrent jurisdiction are simply areas where national legislation predominates and in the long run pre-empts regional legislation. But certain conditions can attach to national priority: the German

How will legislative powers be distributed between national and regional governments? Given the vertical overlap of concurrent powers between national and regional legislatures, the question will arise which regulation prevails.

Constitution, for example, grants supremacy only to national legislation that is ‘necessary’ and ‘in the national interest’: ‘[I]f and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.’¹⁰

Other constitutions hold differently. Canada provides one single notable exception to national supremacy: where provincial and national law conflict—as laws concerning old-age pensions have done—provincial law prevails.¹¹ Another approach empowers the national legislature to draft a national framework while allowing regional governments to fill in details according to local circumstances (sometimes referred to as framework legislation). Other constitutions have adopted a third approach to sorting out concurrent powers, essentially permitting both levels of government to regulate simultaneously. Only where national and regional legislation directly conflict will constitutional dispute resolution measures take effect, as applied by judges on a case-by-case basis (Sudan).

The Constitution of South Africa provides a very diligently drafted set of provisions on how to settle potential conflicts in the functional areas where concurrent powers apply (see chapter 7, box 5).

(3) Legal autonomy of dispersed legislative authorities

The third determinant of vertical disaggregation of legislative powers is the degree to which the constitution protects the allocation of authority. In some countries, the national legislature has delegated authority to subunit legislatures and thus may revoke that authority unilaterally with the required quorum. While revoking legislative authority might give rise to political resistance, there are no legal obstacles to such a reversal. Even if the text of the constitution protects the vertical dispersal of legislative power, such provisions might provide little solace if only national actors—without the

participation of subunit representatives—may amend the constitution. Actual legal protection requires sub-national consent to any reorganization of powers away from subunit legislatures.

In some constitutional settings—even if the constitution legally protects against the unilateral revocation of dispersed legislative powers—national institutions may override regional legislation in particular circumstances. Even so there may be certain constraints on this power—for example, the South African national government may override provincial legislation that threatens national unity or national standards.

How will the constitution protect the allocation of authority to regional legislatures? In some constitutional settings national institutions may override regional legislation in particular circumstances.

3.2. Legislative oversight

One measure of legislative power is the authority to oversee other branches of government, particularly the executive. Aside from political control—manifested in actually appointing or voting no confidence in the chief executive—legal control or at least quasi-legal control also can exist: the constitution might, for example, empower the legislature to initiate legal investigations, including the ability to subpoena officials of the executive branch, up to and including a legislative role in impeachment proceedings. Other tools of legislative oversight—such as summons and investigations into the work of the executive—are more closely related to the legislative routine. The legislature’s power to censure the head of government by way of a vote of no confidence, and impeachment as another way of controlling the executive branch, are discussed in chapter 4, sections 5.3.3 and 5.3.5, respectively.

One measure of legislative power is the authority to oversee other branches of government, particularly the executive. There are forms of political control—manifested in actually appointing or voting no confidence in the chief executive—and legal or quasi-legal control: the constitution might, for example, empower the legislature to initiate legal investigations and take a role in impeachment proceedings.

Most constitutions offer the opportunity to question the executive and force it to explain its policies. Some even provide clear time frames in which interpellations need to be answered (Albania).¹² In a number of constitutions, the legislature can conduct an independent investigation of the executive. In some countries, if requested by a certain number of its members (usually between 10 per cent and 30 per cent), the legislature is constitutionally obliged to set up an investigatory committee. A relatively low threshold permits the opposition in the legislature to initiate investigation into the executive. This can be an important tool of control in those systems in which the executive’s origin and survival vest in the legislative majority which may have an interest in backing and

There is no democratic governmental system in place in which the legislative branch does not sustain its legitimacy directly from the people.

protecting ‘its’ government. In other countries a somewhat weaker form of control applies: the legislature has to address another institution (for example, an Ombudsman Commission) that has been generally set up to investigate the executive upon complaints (Papua New Guinea).

3.3. Checks on the legislature/legislative autonomy

In contrast to the executive in a parliamentary system, there is no democratic governmental system in place in which the legislative branch does not sustain its legitimacy directly from the people (at least one elected chamber). Governmental systems that rely (at least in part) on direct elections for the executive leaders increase executive powers and/or de-link the executive from the legislature’s control. The institutional dependency of the legislature vis-à-vis the executive occurs rather on a smaller scale and in distinct areas. Four forms of institutional dependency/interference common to many national legislatures are discussed below: dissolution of the legislature (section 3.3.3); external appointments to the legislature (section 3.3.2); control over the financing necessary to fund the

The legislature can be dependent on the executive branch if it can be dissolved; if the executive branch can appoint members to the legislature; if the executive must approve the legislature’s requests for financing; and to the extent to which members of the legislature are immune from prosecution.

work of the legislature (section 3.3.3); and immunity for acts undertaken within the normal scope of the legislature’s work (section 3.3.4). Some constitutions allow the electorate itself to check on the legislature beyond regular election day. The following discussion excludes substantive dispersal of legislative power—which encompasses, for instance, drafting laws and amending the constitution.

3.3.1. Dissolution of the legislature

The ability to dissolve the legislature constitutes a particularly invasive infringement of institutional autonomy. Dissolution comes in three forms (in addition to self-dissolution), the boundaries of which depend on its source. First, dissolution can be a mandatory aspect of a specific process. In Belgium and the Netherlands, for instance, the introduction of a constitutional amendment triggers the immediate dissolution of the sitting legislature. After the holding of new elections, however, the newly elected legislature must approve any amendment by a two-thirds majority. Another institution, predominantly the executive, initiates the second form of dissolution. It might occur either after a legislature’s vote of no confidence in ministers of the executive branch

By clearly defining the circumstances under which dissolution of the legislature is appropriate, constitution builders can protect against the executive using dissolution as a coercive device.

(Peru) or the Prime Minister (Estonia), or as a result of the legislature’s failure to form a government (Germany). And, although the executive initiates dissolution, specific legislative action or inaction triggers the process. By clearly defining the circumstances under which dissolution is appropriate,

constitution builders can protect against the executive using dissolution as a coercive device. The third form entrusts the authority to dissolve the legislature entirely to other actors. Some constitutions grant the President discretion to dissolve the legislature (e.g. India).

3.3.2. External appointments to the legislature

A constitution that permits the executive—rather than voters—to appoint members to the legislature reduces the institutional autonomy and independence of the legislature. Different types of appointment power exist, having varying influences and effect on legislative action. The first category of appointment powers only influence the legislative function minimally because appointees either lack voting rights (children of the King of Belgium in the Belgian Senate) or are members of a largely ceremonial second chamber, only exercising advisory functions (Lesotho). The second category of appointment powers permits greater influence, as appointees sit in a second chamber that does impact upon legislative functions, though the second chamber is subsidiary to the first (Ireland, Malaysia). In the third category, the executive appoints members to a second chamber that substantially influences the legislative process, perhaps by wielding an absolute veto (Canada, Italy) or, in a unicameral system, appoints some members of the legislative assembly (Gambia). This third category represents the greatest breach of institutional autonomy by power of appointment.

A constitution that permits the executive—rather than voters—to appoint members to the legislature reduces the institutional autonomy and independence of the legislature. Different types of appointment power exist.

3.3.3. Control over the legislature’s own finances

The power to tax and spend is an integral part of legislative autonomy. Executives that must approve requests from the legislature for funding (Cameroon, Laos, Russia) can exert significant leverage over the work of the legislature.

3.3.4. Legislative immunity

To secure the institutional autonomy of the legislature, immunity should extend to its members. The threat of legal repercussions can stifle its members’ ability to speak, debate and vote freely, which can harm the law-making process significantly. In many countries, only the legislature itself can remove legislative immunity (Estonia). Other countries vest the power to revoke legislative immunity in the judiciary (e.g. Guatemala), and this is another strong form of protection.

To secure the institutional autonomy of the legislature, immunity should extend to its members.

3.3.5. Recall by the electorate

Next to inter-institutional checks, certain constitutions allow the electorate to recall its representatives in the legislative assembly prior to the end of its term. In general, there

are two different types of recall, full recall and mixed recall. The latter refers to the process in which the citizenry is involved only in one of the steps, either initiating it or deciding on it in a referendum. The former means that both the initiative and the final decision rest exclusively with the citizenry. With regard to the legislature, this type of recall is more common than the mixed type. (It is available in Uganda only as part of an impeachment procedure.)

Conceptually, the recall procedure is associated with the idea that representatives in the legislature must remain accountable to the people who elected them.

Requirements for a total recall vary considerably. Whereas certain countries permit the respective constituency to recall his/her legislative representative individually (Bolivia, Ecuador, Ethiopia, Nigeria, Venezuela), others only allow a vote for the dissolution of the entire legislature by referendum (e.g. Liechtenstein).

The recall procedure is associated with the idea that representatives in the legislature must remain accountable to the people who elected them.

In general, three different aspects determine the setting of a recall:

- (a) the threshold of support that a popular petition must achieve (ranging between 10 per cent (Ecuador) and 50 per cent + 1 (Nigeria) of the registered electors in the constituency;
- (b) the type of majority and the voter turnout required for enforcing the recall, ranging from a simple majority of votes (Micronesia) via an absolute majority of votes (Ecuador) or a vote equal to or greater than the number of voters who elected the officer in question as long as the voter turnout reaches at least 25 per cent (Venezuela) to a majority of registered electors in the constituency concerned (Nigeria); and
- (c) the period of time for a revocation. How soon after elections and how closely to the next election can petitions be tabled? In Bolivia, the recall can only be attempted once per term and only after half of the term has elapsed, and not during the last year of the term. In Ecuador, similar regulations apply: a petition can only be tabled after the first year and before the last year of the term.

A recall is a highly polarizing mechanism which causes serious confrontation and disrupts the normal work of elected representatives. In its favour, it is argued that it encourages close oversight of members of Parliament on the part of the citizens, thus creating an effective mechanism of vertical accountability. Recall has to balance the principles of participation and effective governance.

Various arguments in favour of and against recall are raised. From the critic's perspective, a recall is a highly polarizing mechanism which not only causes serious confrontation but also disrupts the normal work of elected representatives during their mandate. In its favour, it is argued that the procedure encourages close oversight of members of Parliament on the part of the citizens, thereby creating an effective mechanism of vertical accountability.

In the end, recall has to balance the principles of participation and effective governance. Achieving this balance is difficult, and failure to achieve it might lead to extreme consequences. As stated in *Direct Democracy: The International IDEA Handbook*: 'On the one hand, if recall is very easy to initiate, this may lead to the trivialization of the recall. On the other hand, tough requirements may make it ineffective as citizens may feel discouraged from using it because of the difficulty of meeting the legal requirements needed to remove a public official through a vote.'¹³

4. Substantive powers of the legislature

There are basically two groups of legislative powers, law-making powers and other powers. With regard to the former, constitution builders have to determine how far other branches of government may have the authority to interfere with responsibilities traditionally controlled by the legislature. Second, the constitution may provide for limited legislative authority in policy areas that are traditionally controlled by other branches of government, such as declaring a state of emergency, waging war, or granting pardon or amnesty.

A legislature has law-making powers and other powers. Constitution builders have to determine how far other branches of government may have the authority to interfere with law-making responsibilities that are traditionally controlled by the legislature.

4.1. Law-making powers

The central function of a legislature is making laws. Absolute law-making authority, free from interference from any other governmental actors, symbolizes the sovereignty of the British Parliament. This monopoly in law-making hardly exists any longer, as most constitutions disperse law-making authority in various ways.

Generally, five categories of external interference in law-making authority exist: (a) the first limits the exclusivity of law-making power by distributing portions of it to the executive; (b) the second relates to the authority to initiate legislation—if the constitution assigns that power exclusively to the executive branch, the legislature may not frame or craft but only consider legislation, a significant loss of authority; (c) a third category focuses on blocking legislative initiatives either directly through a presidential veto or indirectly by referring a bill to the judiciary or to the electorate through referendum; (d) next to the executive, citizens might also intervene in law-making by initiating either a rejective or an abrogative referendum; and (e) judicial review is the last category—the judiciary reviews the constitutionality of laws either before or after enactment.

4.1.1. Limitation of exclusive law-making power

Constitutions may permit the legislature to delegate certain law-making powers to the executive branch. Because the legislature itself controls and may revoke at any time the delegation of such authority, the dispersal of legislative authority is purely political

(Croatia). Other constitutions give the executive law-making authority only in exceptional circumstances, such as a state of emergency or when the legislature is not in session. If not confirmed by the legislature within a certain period of time, however, such decrees commonly lapse (e.g. Brazil). Alternatively, a constitution may permit the executive to issue decrees with the force of law in particular policy areas, thus circumventing the legislature altogether. This power merges the executive and legislative functions and constitutes an extreme form of aggregation in the executive. Law-making by referendum represents an extreme form of dispersing legislative power. In certain countries, the constitution authorizes citizens to initiate a legislative process by introducing a draft bill on specific issues and subjects at bill to a referendum prior to promulgation if it is not adopted by the legislature (e.g. Latvia¹⁴).

The legislature's law-making power may be limited by distributing portions of it to the executive branch; by sharing authority to introduce legislation with the executive and/or the citizens through agenda initiatives or referendum; by enabling the President to influence, impede or block it; or by providing for judicial review.

4.1.2. Limitations on the power to introduce laws

Law-making powers include the ability to introduce legislation. In most constitutions, the legislature holds unlimited authority to initiate the law-making process in all matters, and sometimes even exclusively (the USA). In many countries, however, the authority to introduce bills is at least in part shared with the executive and/or the citizens through agenda initiatives. A constitution may limit this right of the legislature either generally or concerning specific policy areas. For instance, the executive might have the exclusive capacity to introduce budget laws, international treaties or trade and tariff legislation. This authority might extend to other policy areas as well (Brazil, Chile, Columbia). Such a 'gatekeeping' function enables the executive to maintain the status quo in particular policy areas.

4.1.3. Presidential veto powers

After the legislature passes a bill, many constitutions enable the President to influence, impede or block it. The President may apply either a political or a legal check. S/he may (a) reject a bill strictly for political reasons, or (b) challenge the constitutionality of a law. Political vetoes are more common in presidential and semi-presidential systems where the electorate, rather than the legislature, elects the President directly. If the legislature can overrule a veto by a majority vote equal to or greater than the majority by which the bill in question was originally passed (Botswana, India, Turkey), then the presidential veto is weak and only amounts to a right of delay. If the threshold required for the legislature to overrule the veto rises, however, then the presidential veto becomes more substantial. Higher thresholds can vary significantly, from an absolute majority (Peru), to a 60 per cent majority (Poland), to a 67 per cent majority (Chile) of all members of the legislature who are *present*, to a 67 per cent majority of the *full* membership (Egypt). Depending on the composition of the legislature and the strength of the opposition, a presidential veto might equate to a de facto absolute veto that can block all legislative

initiatives if applied. A de jure absolute veto rarely exists; where it does, it usually applies only to limited policy areas (e.g. Cyprus).

In addition to a so-called 'package veto' that allows the President to register only a yes or no opinion, a 'partial veto' permits him/her to object to portions of a bill. The partial veto arguably engages the President more closely in the law-making process by authorizing a more limited interjection into the details of legislation. That limited intervention cumulatively permits great influence over the final form of legislation.

Another option allows the President to broaden the spectrum of approval required for a proposed law to be passed, which can give the President significant influence in the law-making process.

A constitution may authorize the President to challenge the constitutionality of a bill by forwarding it to the appropriate court for review (Croatia, South Africa). Here, the President's concern over the constitutionality of the law delays and—if it is supported by the appropriate court—ends the process on legal instead of political grounds.

4.1.4. Citizens' power to reject bills or repeal laws

Certain constitutions give citizens the authority either to reject a bill before its promulgation (Switzerland) or to demand a law's abrogation by rejective/abrogative referendum on its own initiative. In Uruguay,¹⁵ a petition for an abrogative referendum must be initiated within one year after the law's promulgation. Italy, in turn, only allows for such an initiative after the law has been in force for at least one year. All the variations have in common that citizens have a say in the law-making process beyond periodic elections, thereby dispersing powers from the representative legislature.

4.1.5. Judicial review

While a presidential veto and the citizens' power to reject bills or even repeal laws generally represent a political dispersal of legislative power, a constitution may also permit the legal dispersal of legislative power in the form of judicial review. Although this is clearly a legal control, practitioners should not underestimate the political dimension inherent in constitutional review. A striking example is the South African Constitutional Court's decision on the unconstitutionality of the death penalty. Although the South African Constitution nowhere mentions the death penalty, the Constitutional Court struck down the relevant provision in the Criminal Procedural Law on the basis of human rights values, international and comparative precedents, and judicial pragmatism.¹⁶

Constitutions have permitted judicial review prior to the promulgation of a law if the executive so requests (see above). Other countries have required that the legislature refer the law to the relevant judicial institution prior to enactment (France). Most common is constitutional review after the enactment of a law. Some constitutions provide the opportunity to challenge a law in abstracto (Germany). In still other countries, a court can review the constitutionality of a law only if it is challenged during a specific case or controversy at trial.

4.2. Powers to amend the constitution

Traditionally, only the legislature can amend the constitution. Most countries adhere to that principle today, even if the constitutions of some countries require the approval of three levels of legislative institutions (the national legislature—including both the first and the second chamber—and the legislative assemblies of the sub-national units (Mexico, Nigeria, Russia, the USA)). The amendment procedure generally requires a higher voting threshold that is often equal to the threshold required to overcome a presidential veto (if it exists). In those countries, the veto usually only delays the eventual passage of the amendment, since it does not require a higher threshold. But other amendment procedures also exist: in Italy, for instance, a constitutional amendment requires only an absolute majority in both chambers. Yet just 20 per cent of members of the legislature may call for a referendum unless overruled by a two-thirds majority in both chambers. Such a process remains a legislative-centric method of amending the constitution and thus disperses legislative powers minimally. In many countries, constitutional amendments have to be approved in a referendum (Guatemala, Switzerland). In France, the President may waive this requirement if supported by a 60 per cent majority in the legislature.

4.3. Other powers of the legislature

Increasing the extent of the legislature's impact in issues such as declaring a state of emergency, declaring war, granting a pardon or an amnesty strengthens its powers.

In quite a few decision-making processes that are traditionally under the control of the executive, constitutions involve the legislatures to various degrees. Increasing the extent of the legislature's impact in issues such as declaring a state of emergency,

declaring war, granting a pardon or an amnesty strengthens its powers.

4.3.1. State of emergency

The constitutional questions of *who* declares a state of emergency and *by what method* both offer different degrees of involvement of institutions other than the executive. A constitution can delineate clearly those occasions—and only those occasions—when the government can declare a state of emergency, such as invasion or natural catastrophe. But the drafters of constitutions may want to leave room for discretion: consider for instance threats to public health or internal order. Attempting to articulate all such circumstances will probably prove impossible and unwise. Someone must determine when a threat level rises to the level of an emergency; and, to avoid abuse, someone else must be empowered to evaluate that determination. In some constitutions, this power is left entirely with the executive, sometimes subject to internal executive control. For example, in Peru's Constitution prior approval by the Cabinet before the chief executive can declare an emergency is required. In other countries, the legislature is not involved in the actual decision-making process, but it requires retroactive parliamentary support within a defined period of time (Malawi). The constitutions of Ethiopia and Fiji mandate prior parliamentary approval before the executive may declare a state of

emergency. The Constitution of Mongolia states that only Parliament may declare a state of emergency—which constitutes the broadest authority of the legislature. Only if Parliament is in recess can the President act, but such a declaration lasts for only seven days and lapses if Parliament remains passive.

Declaring a state of emergency can arguably aggregate power like no other executive act, removing many checks to unilateral action. Many post-conflict countries have suffered severely from emergency rule applied in an abusive way. Wary of that eventuality, many drafters of constitutions have overcompensated by mandating overly cautious prerequisites for a declaration of a state of emergency to be valid. In true emergencies, the absence of functioning institutions can make it impossible to meet prerequisites. In Haiti, for example, any declaration of an emergency recently required the countersignature of the Prime Minister and all other government ministers—in addition to an immediate determination by Parliament concerning the scope and desirability of the President's decision. Also recently, under the Haitian Constitution, only foreign invasion and civil war—but not a natural disaster—constituted a state of emergency. Because of this restrictive wording and the exigencies of the situation—including an unprecedented earthquake and the death of many ministers and parliamentarians—the Haitian government ignored the applicable constitutional provisions and declared a state of emergency anyway, protecting sovereignty but forced to disregard the principles of the rule of law.

Declaring a state of emergency can arguably aggregate power like no other executive act. Many drafters of constitutions have thus mandated overly cautious prerequisites for a declaration of a state of emergency.

4.3.2. Granting amnesty/power of pardon

Another function traditionally exercised by the executive is the right to grant pardons or an amnesty. In post-conflict scenarios, constitutional regulations for transitional justice that also include elements of amnesty are of paramount importance and often the prerequisite for a peaceful start to a new era. Amnesty as part of transitional justice after violent conflict is not covered in this chapter. Instead, it looks at provisions on granting amnesty and pardon that are meant to be applied during the ordinary course of constitutional life. But even in this context the power to grant amnesty/pardon is sensitive and carries the potential to influence the administration of justice on a large scale if used unwisely. Thus, identifying the proper balance of actors involved in the process of granting amnesty/pardon is crucial. Also here, various constitutional options are available, ranging from exclusive executive authority to grant amnesty (Burkina Faso, the Czech Republic) or pardons (Georgia, Kenya), to the complete exclusion of the executive in amnesty decisions (Hungary). Between these extremes, the array of options includes both the executive and the legislature exercising parallel pardon and amnesty powers (Mozambique 1990) or joint powers requiring both the executive and the legislature to approve amnesty or pardons (Indonesia, South Korea); or even other arrangements with additional requirements—in Greece, amnesty is available only for political crimes and only if approved by both the executive and the legislature.

5. Conclusion

In post-conflict scenarios, constitutional regulations that include elements of amnesty are of paramount importance and often the prerequisite for a peaceful start to a new era. The power to grant amnesty or pardon is sensitive and carries the potential to influence the administration of justice on a large scale if used unwisely.

Constitutions around the globe offer a wide variety of options to structure and empower the legislature. This variety witnesses the constant demand to establish a democratic setting beyond a simplistic majority rule. Accommodating various groups with distinct interests in the body that is meant to represent the people is the challenge to be met by the drafters of a constitution in designing the legislature. Disaggregating legislative power within the legislature is not

an end in itself, but allows for a more accurate reflection and inclusion of diversity beyond majority rule.

Table 2. Issues highlighted in this chapter

Issues	Questions
1. System of government	<ul style="list-style-type: none"> • Shall the choice and the survival of the head of government depend on the legislature? • Or, if the functions of a head of state and head of government are held by one person, shall that person depend on the will of the legislature (Botswana, South Africa)? • Or, in a dual executive, where substantive executive powers are shared between a directly elected head of state and a head of government, what role shall the legislature have in the selection/dismissal of the head of government? Shall the legislature be involved in the selection procedure? Shall the right of dismissal fall within the exclusive competence of the legislature? • Or shall the head of the executive (being the head of state and the head of government) be separated from the legislature and directly elected by the people?

2. Designing the composition of the legislature: electoral systems, reserved seats, candidate quotas, external appointments	<ul style="list-style-type: none"> • According to which electoral system shall the legislature be composed? Shall there be a simple plurality system or a proportional representation system or a mixture of the two? • In the case of proportional representation systems, shall there be a minimum threshold for representation? • Shall there be reserved seats for minorities and women, and if so, how should those seats be filled? • Shall there be candidate quotas for women? • Shall the legislature be exclusively elected by the people or shall some seats be filled through appointments (in a unicameral legislature)?
3. Designing the voting procedure	<ul style="list-style-type: none"> • Shall all laws in the legislature be passed by a simple/absolute majority of members or shall there be a double majority voting system with regard to some sensitive issues in order to protect minorities?
4. Second legislative chamber	<ul style="list-style-type: none"> • Shall the national legislature be composed of one or two chambers? If there is a second legislative chamber, who shall be represented in it? Territorial units or chiefs and elders, or interest groups, or a mixture of the three? • How should members of the second chamber be selected? Shall they be elected by the respective groups or from the people in the territorial units or shall they be appointed by the national government or a mixture of both? • If the second chamber represents territorial units, shall all units be represented equally (e.g. two members per region regardless of the size and population of the regions)? • What are the powers of the second chamber in relation to the first chamber? • With regard to the legislative process, shall both chambers have equal powers (absolute veto of the second chamber)? Or shall the second chamber only be able to delay the process? Or shall it be determined depending on the subject?

5. Decentralization of legislative powers	<ul style="list-style-type: none"> • From a vertical perspective, shall there be legislatures at various levels of government in the country? • If so, what kind of powers shall be transferred to the lower level of governments? • How shall legislative powers be shared? Shall there be exclusive powers for the regional level or even the local level of government? Or shall there be concurrent powers, or shared powers? Which regulation prevails in the case when both the national level and the regions regulate? • What powers are of special importance for the lower levels of government, e.g. for the protection of their identity?
6. Institutional powers of the legislature	<ul style="list-style-type: none"> • Shall the legislature have the power to dismiss the head of government for political reasons? • Shall the legislature have the exclusive power to dismiss the head of the executive for legal wrongdoings (impeachment)? Or shall it at least be involved in the impeachment process? • Shall the legislature have the power to summons members of the executive or even start investigations? • Shall the legislature have some immediate control with regard to the composition of the Cabinet?
7. Institutional checks on the legislature	<ul style="list-style-type: none"> • Shall the legislature be subject to dissolution before the end of its term? • If yes, shall the dissolution be based on prior legislative (in)action or shall it be at the full discretion of the head of the executive? • Shall there be the opportunity for citizens to recall members of the legislature under specific circumstances?
8. Law-making powers of the legislature	<ul style="list-style-type: none"> • Shall the legislature be the sole lawmaker or should there be the opportunity for the executive to legislate by decree in certain areas? • Shall the legislature be the only relevant actor in the legislative process? Or shall the executive have the right to veto bills? If so, shall it be a purely suspensive veto or shall a super-majority of the legislature be required to overcome the presidential veto, or shall there even be an absolute veto in some areas? • Shall the executive have the right to question the constitutionality of a bill before it becomes law?
9. Other legislative involvement	<ul style="list-style-type: none"> • Shall the legislature be involved in declaring a state of emergency? • Shall the legislature be involved in declaring war? • Shall the legislature be involved in granting pardons/an amnesty?

Notes

- ¹ Böckenförde, M. et al., *Max Planck Manual on Different Forms of Decentralization*, 3rd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2008).
- ² Payne, J. M. et al., *Democracies in Development: Politics and Reform in Latin America* (Washington, DC: Inter-American Development Bank, International IDEA et al., 2007).
- ³ International IDEA, *Electoral System Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2005).
- ⁴ International IDEA, *Electoral System Design*.
- ⁵ International IDEA, *Electoral System Design*.
- ⁶ Article 34 of the Constitution of Austria (1920) as of 2008.
- ⁷ Article 61 of the Constitution of Ethiopia (1995).
- ⁸ Article 80 and Fourth Schedule of the Constitution of India (1950) as of 2005.
- ⁹ In Switzerland, each of the cantons (the name for states in Switzerland) is represented in the second chamber by two members, regardless of size and population. Three of those cantons, however—for historical reasons—are divided into half-cantons; each of the six half-cantons is represented by one member only. Thus 20 cantons are represented by two members, and one member each represents six half-cantons.
- ¹⁰ Article 72 of the Constitution of Germany (1949) as of 2010.
- ¹¹ Article 94 A of the Constitution of Canada (the Constitution Acts 1867 to 1982, current consolidation) as of 2008.
- ¹² Article 80 of the Constitution of Albania (1998).
- ¹³ International IDEA, *Direct Democracy: The International IDEA Handbook* (Stockholm: International IDEA, 2008), p. 123.
- ¹⁴ Article 78 of the Constitution of Latvia (1922) as of 2005.
- ¹⁵ Article 79 of the Constitution of the Oriental Republic of Uruguay (1966) as of 1996.
- ¹⁶ See *State v. Makwanyane & Anr*, Case no. CCT/3/94.

Key words

Systems of government; Presidential system; Parliamentary system; Mixed system; Semi-presidential system; Electoral system; Reserved seats; Candidate quotas; Bicameral legislature; Types of legislative representation; Dual majority voting; Decentralization of legislative powers/representation; Legislative oversight; Impeachment; Vote of no confidence; Impeachment; Summons; Investigation; Dissolution of the legislature; External appointments to the legislature; Financial autonomy; Legislative immunity; Recall by the electorate; Presidential veto; Judicial review; State of emergency; Granting Amnesty/pardon; Law-making powers

Additional resources

- **Agora Portal for Parliamentary Development**

<<http://www.agora-parl.org/>>

The Agora Portal for Parliamentary Development is a multilateral initiative that seeks to share knowledge on parliamentary development. The website offers a network for coordinating donor and practitioner information and queries, with resources from and options to contact experts. The website also provides a virtual library on parliamentary development, knowledge modules including multimedia features, and a calendar that lists forthcoming events on parliamentary development.

- **UNDP Democratic Governance Focus on Parliamentary Development**

<http://www.undp.org/governance/focus_parliamentary_dev.shtml>

Parliamentary development is one focus area of the United Nations Development Programme (UNDP)'s Democratic Governance Group. The UNDP provides technical assistance to build the capacity of legislators and promote institutional reform. The website offers key publications as well as resources and programmes regarding developing parliamentary structures and functions within the government as a whole.

- **Southern African Development Community Parliamentary Forum**

<<http://www.sadcpf.org/index.php>>

The Southern African Development Community (SADC) Parliamentary Forum is a regional inter-parliamentary body composed of 13 parliaments in the SADC region. The Forum's mission is to provide a platform for parliaments and parliamentarians to promote and improve regional integration and to facilitate communication among practitioners in the region to communicate best practices on parliamentary development. The website provides reports and other key documents on the Forum's area of expertise, a model law on AIDS, and contact information on the parliaments of the member countries.

- **Inter-Parliamentary Union**

<<http://www.ipu.org/english/home.htm>>

The Inter-Parliamentary Union (IPU) is an international organization funded by its member parliaments and associate members. The organization works in close cooperation with the United Nations and seeks, amongst other things, to establish standards for representative democracies and to provide assistance to countries working to develop their own parliamentary system. The website compiles key documents, guides, questionnaires, project documents and other publications.

- **UNDP Democratic Governance Focus on Electoral Systems and Processes**

<http://www.undp.org/governance/focus_electoral.shtml>

Electoral systems and processes are one of the focus areas of the UNDP's Democratic Governance Group. The UNDP aims to assist strategically throughout the electoral cycle in order to achieve free and fair elections. The website compiles resources such as guides and brochures on developing democratic electoral systems.

- **Peace Building Initiative Electoral Processes and Political Parties**

<<http://www.peacebuildinginitiative.org>>

Electoral processes and political parties represent one of the thematic areas of the Peace Building Initiative, which is a project of HPCR International, in partnership with the United Nations Peacebuilding Support Office and in cooperation with the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University. The main goal of the initiative is to build and share knowledge and experience of peace building among relevant actors and to present a diversity of perspectives on the understanding of peace building. The website offers resources and case studies on elections around the world, as well as information on the formation and activities of political parties and other relevant actors in the field.

- **Council of Europe Venice Commission**

<<http://www.venice.coe.int/default.asp?L=E>>

The European Commission for Democracy through Law is an advisory body to the Council of Europe on constitutional matters as well as an independent legal think tank that deals with crisis management, conflict prevention and constitution building. It is dedicated to promoting European legal ideals, including democracy, human rights and the rule of law, by advising nations on constitutional matters. The website offers country-specific opinions and comparative studies on European constitution-building processes, elections and political parties.

- **ACE**

<http://aceproject.org/ero-en/index_html?filter&topic=&country=&type=Essays and Papers>

The ACE Electoral Knowledge Portal—a joint initiative of International IDEA, the Electoral Institute of Southern Africa (EISA), Elections Canada, the Federal Electoral Institute of Mexico, the International Foundation for Electoral Systems (IFES), the United Nations Department of Economic and Social Affairs (UNDESA), the UNDP and the UN Electoral Assistance Division (UNEAD)—is an online knowledge repository that offers a wide range of services related to electoral knowledge, assistance and capacity development. The website contains in-depth articles, global statistics and data, an Encyclopedia of Elections,

information on electoral assistance, observation and professional development, region- and country-specific resources, daily electoral news, an election calendar, quizzes and expert networks.

- **Governance and Social Development Resource Centre**

<<http://www.gsdr.org/>>

The Governance and Social Development Resource Centre (GSDRC), established by the UK Department for International Development (DFID) in 2005, seeks to share knowledge across agencies and to provide information to support international development projects and programme planning, policymaking and other activities in the area. The website comprises a document library and different research services, as well as topic and gateway guides.

- **National Democratic Institute**

<<http://www.ndi.org/>>

The National Democratic Institute (NDI) is a non-profit, non-partisan organization which seeks to support democratic institutions worldwide through citizen participation, openness and accountability in government. The website offers a library of key documents as well as other publications.

- **Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights**

<<http://www.osce.org/odihr>>

The Organization for Security and Co-operation in Europe (OSCE) is a regional security organization which aims to offer a forum for political negotiations and decision making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation. Funded by its member states, the organization puts the political will of the participating states into practice through its network of field missions. The website contains multimedia resources, news services, databases and a documents library.

CHAPTER 6

CHAPTER 6

The Design of the Judicial Branch

Nora Hedling

1. Overview

This chapter explores the role of the judiciary within a constitutional democracy by considering some selected topics that are relevant to the allocation of judicial power in deeply divided states. The judiciary's most basic function is to settle disputes and administer justice by applying the law in the cases that come before it. In order to do so and uphold the rule of law (see also chapter 2 in this Guide), judicial systems and bodies must be designed to ensure accessible and impartial justice. This chapter cannot provide a comprehensive discussion of all aspects of judicial design, but rather focuses on three main aspects of the design of a judiciary that are contained in constitutions: judicial powers, including constitutional review; judicial independence; and legal pluralism.

As a part of the judiciary's role in administering justice, constitutions often charge judiciaries with enforcing the guarantees of the constitution, which sometimes entails oversight of government actors, bodies, and processes. For instance, most judiciaries are vested with some form of power of constitutional review, which allows them to review legislative or executive action for compliance with the constitution. Through constitutional review, judiciaries can place an important constitutional check on the political branches of government. However, the judiciary is rarely omnipotent: most constitutional systems limit the independence of the judiciary to some extent by affording the other branches a degree of influence over its composition and functions. Designing the judiciary therefore represents an important opportunity for constitutional practitioners to safeguard and ensure observation of the constitution. At the same time, the design of the judiciary, like that of other branches, requires careful reflection on the appropriate balance of power between the branches.

Designing the judiciary represents an important opportunity to safeguard and ensure observation of the constitution. At the same time, the design of the judiciary, like that of other branches, requires careful reflection on the appropriate balance of power between the branches.

Likewise, the internal design of the judiciary, and particularly the incorporation of a plural legal system, presents unique opportunities and challenges. The context of the constitution-building process—a nation’s circumstances and history—should be at the heart of design of the judiciary.

The following sections outline various constitutional design options for the judiciary, flagging key considerations for practitioners. After briefly canvassing these options, the chapter analyses them through the prism of two factors, which are part of the underlying analytical framework of this Guide. The first factor is whether a particular judicial design tends to disaggregate or centralize governmental power, either in the judiciary or in another branch of government. Second, while judicial enforcement can be thought of as the quintessential legal safeguard and the last defence against infringement of individual rights, it is important to remember that political forces can be present in all branches and parts of government. Though judges are called upon to make decisions in service to the constitution and its laws only, they are also humans, with unique experiences and beliefs that may be impossible to separate entirely from their interpretation and application of the law. Options are therefore also considered in the light of both political and legal forces that can shape judicial functions and influence.

To achieve an optimal balance of powers, constitution builders must carefully consider their own objectives and circumstances. This chapter does not present one template that would be applicable to all systems; rather, it discusses several elements of judicial design, each with corresponding costs and benefits. Furthermore, when considering the judiciary, constitution builders should remember that, while the principles discussed here may prove helpful, the achievement of a particular objective—judicial independence, for instance—may require a closer look at constitutional arrangements and structures that go beyond the judicial branch. In other words, no single branch of government operates in isolation. Most of the examples given discuss constitutional provisions that expressly grant powers to the judiciary. It is important to note, however, that the lack of an express grant of authority within the constitution does not necessarily mean that the judiciary lacks the power in question under a given constitution. Judicial powers may be established by statute, or, especially in common law countries, may be developed through case law. For example, some constitutions do not directly address the question of judicial review

The achievement of a particular objective—such as the independence of the judiciary—may require a closer look at constitutional arrangements and structures that go beyond the judicial branch. No single branch of government operates in isolation.

but the power is nevertheless exercised by the judiciary and is considered constitutionally valid practice. In the landmark decision of *Marbury v. Madison*, the Supreme Court of the United States firmly established the constitutionality of judicial review, elsewhere known as constitutional review, as a logical consequence of the Constitution’s distribution of powers.¹

Constitution builders must therefore be careful to consider not only provisions that are explicitly incorporated into the constitution, but also the practices, traditions and precedents that are likely to be accepted or tolerated, as well as the possible consequences

of the arrangements and principles enshrined in the constitution. Constitutional provisions do not operate in isolation but interact with other constitutional provisions, other sources of law, and relevant circumstances, both historical and political, in a given society. Societal norms and traditions, as well as other sources of law—such as statutory law, common law, custom, or practice—will probably inform the meaning, accepted understanding and implementation of particular constitutional provisions.

Box 1. The judiciary: key ideas

- The judiciary is traditionally the branch of government that interprets—rather than ‘creates’ or enforces—the law. Under modern constitutions this function can encompass many powers, but at a fundamental level the judiciary settles disputes and administers justice by determining facts and then applying existing law to those facts.
- Constitutional review is a cornerstone of the judicial power in most modern democracies. This entails ensuring that law and government action accord with constitutional guarantees, whether concerning the government’s authority to act, its structure, or the separation of powers—or what it is prohibited from doing, such as infringe individual liberties recognized by the constitution. The extent of review powers, as well as the involvement of other branches of government, varies widely.
- Modern judiciaries also exercise a number of other powers, many of which constitute either checks on other branches of government or other oversight mechanisms, possibly including powers such as the ability to monitor and regulate elections or political parties.
- Preserving judicial independence is critical to preserving the rule of law and to ensuring the proper functioning and impartiality of the court system. At the same time, constitutions should also promote a judicial system that is accountable and transparent. Judicial design should strive to maintain a balance among these sometimes competing values. Designing for these values can include the promotion of clarity and consistency in judicial processes and standards, rights to public hearings, and access to judicial information, as well as mechanisms that place a check on the exercise of judicial powers, such as a functioning appeals system, and oversight by other branches in the form of appointment and removal procedures. A key consideration in determining which mechanisms will be successful in achieving this balance will be the context in which the constitution will operate.
- Legal pluralism encourages the operation of several legal systems within a single constitutional order. Stated differently, it makes it possible to incorporate existing legal norms and systems into the constitutional order and to provide legal autonomy to indigenous peoples and religious groups. Yet legal pluralism also raises important questions about the jurisdictional reach of each system,

and the legal hierarchy of systems in the constitutional order. Legal pluralism raises particular challenges to enforcing constitutional rights across all the applicable legal systems.

2. Judicial powers

The core function of courts is to apply the law impartially to the many disputes that arise before them. This function is linked closely to the stability and legitimacy of the judiciary and the constitutional order. Impartiality is critical. That is, judges are called on to examine without prejudice the facts before them, and apply the law even-handedly and without regard to political views or personal preferences. Not only does impartiality provide the best possibility to provide justice in the dispute at hand; it also builds credibility and trust in the judiciary as an institution. Impartiality also sets the standard for judges in their performance of their other functions, including, importantly, their role in protecting the integrity of the constitution.

At the same time, judges are human, and it is possible that two impartial judges will arrive at different decisions when given the same set of facts. Applying the law to a unique set of facts to settle a specific dispute or case may require the interpretation of the law or the investigation of the question of what the law requires in a specific, possibly unforeseen, situation. The responsibility to apply the law thus entails a degree of power

The core function of courts—to apply the law impartially to the disputes that arise before them—is linked closely to the stability and legitimacy of the judiciary and the constitutional order. Impartiality is critical.

in determining its meaning. While some degree of creative function is unavoidable, it is by no means absolute. Different tools, such as appeals systems, detailed statutes, or a respect for the precedents established by earlier cases, temper the creative function and help to maintain consistency in the application of law throughout the judiciary.

Nevertheless, the activity of interpreting and applying the law is an essential power of the judiciary and is also essential to the concept of the rule of law, which requires, among other things, equality before the law, fairness in the application of the law, and access to instruments of justice such as functioning courts. The function of applying the law also touches on the core activities of the other branches of government, particularly in the legislative process. In addition to its day-to-day function of administering justice, the judiciary is also a branch of government. Constitutions vest power in the judiciary and other branches as part of a design intended to create a functioning system of government. The judiciary, therefore, has a relationship to the other branches. It provides checks on the activities of the other branches; it is also shaped in some ways by them. The rest of the chapter will focus on the judiciary's role in upholding the constitutional order and the way in which it interacts with the other branches of government. It will also look into some aspects of the internal structure of the judiciary, and specifically into the possibility of multiple court and legal systems operating together under one constitution.

2.1. Constitutional review

One of the core roles of modern judiciaries is to uphold constitutional guarantees. The judiciary performs this function through the exercise of constitutional review, also known as judicial review. Constitutional review takes many forms and can involve the exercise of various oversight mechanisms, but its objective is the same across jurisdictions—to uphold constitutional principles and provisions against any legislation, regulation, or other governmental action that might contravene them. Through constitutional review processes, courts evaluate legislation and other government acts to ensure that they are in compliance with the constitution. If the legislation or action contravenes the constitution, the courts will invalidate it. Constitutional law generally represents a higher law, with which all other laws and government action must comply. By engaging in constitutional review, the judiciary enforces this hierarchy. While constitutions usually bestow the power to enact laws upon the legislature, this distribution of authority is contingent on the passage of laws that do not contradict or ignore constitutional provisions and principles. Constitutional review is one mechanism that enables the preservation and implementation of the constitution. It is a means of giving force to constitutional provisions and preventing acts that violate them.

Most judicial systems are endowed with some form of power to review legislative or executive action for compliance with the constitution.

2.1.1. What can be reviewed?

Constitutional review can extend to various types of law. At a basic level, constitutional review permits the judiciary to evaluate legislation for compliance with the requirements of the constitution. However, it usually extends to examination of other laws or actions, such as administrative decisions or executive acts, for compliance with the constitution as well. For instance, some constitutions allow judicial review of laws arising under international treaties.² Constitutional review can further extend beyond national legislation to laws passed at lower levels of government. In South Africa, the Supreme Court's review powers under the 1996 Constitution extend to all levels of government, including the provinces' constitutions, which must also comply with the national Constitution.³ Similarly, under the Constitution of Serbia, the Constitutional Court has jurisdiction to review the general acts of autonomous provinces and local self-government units for compliance with the Constitution.⁴

It is also possible for the judiciary to review activities by the legislative or executive branches of government that raise questions concerning the division or separation of powers set out in the constitution. Constitutional review of this sort aims to settle disputes not between private parties but between branches and bodies of government—to determine the competences of the various branches of government, including those of the judiciary itself. The Constitutional Court of the Republic of Korea (South Korea), among others, has the power to review the division of power among branches of government.⁵ A court may also have the power to review the division of power between different levels of government, for example, between a regional government and the national government. The Constitution of Cameroon, for example, endows the

Constitutional review can extend not only to evaluating legislation for compliance with the requirements of the constitution but also to examination of other laws or actions, the division of power between different levels of government, and possibly review of government omissions, rather than actions.

judiciary with the power to settle disputes between the state and the regions, as well as disputes among the regions themselves.⁶ The constitutions of India, Malaysia, Mexico and Nigeria, among others, also allow for review of the distribution of powers among the levels of government.⁷

Finally, constitution builders may permit the judiciary to review government *omissions*,

rather than actions. In Uganda, the Court of Appeal, sitting as the Constitutional Court, has such authority. Article 137(3)⁸ allows an individual to petition the court that ‘any act or omission by any person or authority’ contravenes the Constitution. If the petition is deemed to be well founded, the court may provide redress.

2.1.2. Who reviews?

Just as the extent of constitutional review varies across countries, so too does the process it involves. The process of constitutional review relates closely, though not strictly, to the type of courts established by the constitution and to the operative legal system. The so-called American model of judicial review differs from the so-called European model of constitutional review in authorizing different institutions to engage in constitutional review. Under the American model, courts throughout the judiciary have inherent jurisdiction to engage in constitutional review. In other words, even lower courts may find that a law or a governmental action violates the constitution. In making such a determination, the court must decide the case in line with the demands of the constitution and refuse to apply the law in question on constitutional grounds.

These decisions are subject to appeal but, nevertheless, a form of constitutional review is performed. A Supreme Court, as the highest court of appeal, usually sits atop this system, with final say over the constitutionality of the laws being challenged. Because most supreme courts hear only a tiny fraction of all constitutional challenges made on the American model, lower courts decide the vast majority of constitutional issues. The Constitution of Estonia, among others, incorporates a form of judicial review that permits lower courts to decide questions of constitutionality.⁹ Portugal, though it has a Constitutional Court system, also enables lower courts to engage in review.¹⁰ The empowerment of lower courts can be seen as a dispersal of the power of constitutional review across the judiciary (see also chapter 7 of this Guide, on decentralization).

In some countries, even lower courts may find that a law or a governmental action violates the constitution, although these decisions are subject to appeal. In others, constitutional review is functionally separated from the normally operating judicial branch.

However, it ultimately requires all courts to align their decisions with the constitution, thereby in some ways limiting the source of their decisions to a centralized authority—the constitution itself. One benefit of this model of review is the possibility of appealing against a decision. Both lower and upper courts examine the issues and weigh

in on questions of constitutionality before they are decided with finality. This process takes time, however, which is a drawback. Under this model it could be years before a constitutional question reaches the highest court and a final decision is made. It can also result in inconsistency until a final decision is reached at the highest level, with lower courts deciding similar cases differently.

An alternative model of review, the European model, functionally separates constitutional review from the normally operating judicial branch. Under this model, a distinct Constitutional Court exercises exclusive jurisdiction over all constitutional claims. Some experts have argued that such a system—one that vests the power of constitutional review outside of the ordinary judiciary—better preserves the separation of powers. Under this conception, the Constitutional Court is thought of as an oversight body apart from all the branches of government with the only task of upholding the demands of the constitution. Therefore, theoretically, the system does not allow any single branch to hold too much power over another, thus preserving a clear division of power. Furthermore, it does not vest one *branch* with the ability to determine constitutionality. In contrast to the American model, the European model aggregates authority in one *court*, as no other judicial body can decide constitutional issues. Examples of constitutional courts that follow the European model of constitutional review are found in Benin, Germany, the Russian Federation, Turkey and Ukraine, among others.¹¹ A number of other countries feature institutions similar to constitutional courts that conduct constitutional review. Table 1 summarizes the features of the two systems.

Table 1. The American and European models of constitutional review

‘American’ model judicial review	‘European’ model constitutional review
Review of constitutional issues is decentralized: all courts possess the power to void or refuse to apply a statute on the grounds that it violates the constitution.	Constitutional review authority is centralized: only the Constitutional Court may void a statute for unconstitutionality.
The Supreme Court is the highest court of appeal in the legal order, not just for constitutional issues.	The Constitutional Court’s jurisdiction is restricted to resolving constitutional disputes.
Review is ‘concrete’: it is exercised pursuant to ordinary litigation.	Constitutional review is typically ‘abstract’. The Constitutional Court answers questions about constitutionality referred to it by judges or elected officials.

Source: Adapted from Sweet, Alex Stone, ‘Constitutions and Judicial Power’, in Daniele Caramani (ed.), *Comparative Politics* (Oxford and New York: Oxford University Press, 2008), box 9.1, p. 222.

2.1.3. Circumstances and timing of review

The timing of review and the circumstances under which it may take place are two additional elements affecting the process of review. The rules about when and under which circumstances a court is allowed to take up the question of constitutionality have great potential to expand or limit the strength of the constitutional review power. Constitutions vary on the timing and circumstances of review. As to timing, while some courts are empowered to assess the constitutionality of legislation prior to it

The rules about when and under which circumstances a court is allowed to take up the question of constitutionality have great potential to expand or limit the strength of the constitutional review power. In some countries, review of legislation is only possible prior to it becoming law; under other constitutions, constitutional review occurs only in the context of a specific case or controversy.

becoming law, others may entertain a legal challenge only after enactment. Sri Lanka's Constitution allows the Supreme Court to review and reject pending legislation, but it cannot review laws once they have been enacted.¹² Proponents of pre-enactment constitutional review value the certainty it provides as to pending legislation. On the other hand, the effects and consequences of legislation may only be fully understood and felt after legislation is in place. Some observers therefore regard the possibility of review after enactment as essential.

Similarly, some constitutions grant the judiciary great discretion in determining when to review while others locate that discretion in other bodies or allow for review only upon some 'triggering event'. Some constitutions require automatic judicial review of legislation prior to implementation. The French Constitution, for instance, requires review of 'institutional acts'—statutes which are specifically required by the Constitution to give greater detail to constitutional provisions—before promulgation.¹³ Similarly, in Chile, the Constitutional Tribunal reviews all organic laws before promulgation.¹⁴ Under other constitutions, constitutional review occurs only in the context of a specific case or controversy. Under some constitutions, review procedures take place when an individual complains directly to the Constitutional Court alleging a violation of the constitution.¹⁵ Given these myriad options, it is clear that endless combinations are possible to establish the rules of constitutional review. Though these processes may play out differently in different country contexts, some allow for greater freedom and opportunity in conducting constitutional review, thereby expanding judicial authority over questions of constitutionality. A greater level of freedom and opportunity for the judiciary to conduct constitutional review represents a greater degree of aggregation of power in the judicial branch.

Countries have altered review powers over time. One example is found in the Constitutional Council (Conseil Constitutionnel) in France. In the past, the Constitutional Council could probe the constitutionality of legislation only prior to the President's signing it. In addition to the narrow timing of review, the Court could review many forms of legislation only upon the initiative of another branch—the President, Prime Minister, President of the Senate (Sénat) or National Assembly (Assemblée

Nationale), or by 60 members of the Senate or National Assembly. As of March 2010, however, parties to individual cases could also request that the Constitutional Council review a law at issue for constitutionality.¹⁶ The timing of review therefore also changed. In addition to review of laws before their promulgation, the Council may now also hear complaints about the constitutionality of a law that is already in effect. By expanding the scope of the Constitutional Council's review powers, the French legislature aggregated power in the Council. Moreover, the legislature also moved France closer to a legal model of law-making, relying less on political accountability to reverse unconstitutional law.

Notably, the subject and circumstances of constitutional review are not always regulated in the constitution. Even where the existence of constitutional review is provided for and guaranteed constitutionally, many constitutions give little instruction regarding its operation. Instead, some constitutions provide the details of the review process by statute. Hungary provides an example of legislative influence over the processes of judicial review: while Article 32(A) of the Hungarian Constitution establishes a Constitutional Court and empowers it to exercise binding constitutional review, a legislative act sets the scope and various forms of review. Act XXXII of 1989 establishes this scope through detailed provisions on topics such as the standing, organization, and procedural rules of the Constitutional Court.¹⁷

2.1.4. Absence of constitutional review

Finally, some countries do not vest the power of constitutional review in the judiciary. These countries preserve the complete sovereignty of the legislature, insulating its enactments from oversight by a separate institution. In such a system, which is rare, the legislature, along with other branches and official actors, is charged with ensuring its own adherence to the constitution's edicts. This is the case under the Constitution of the Netherlands which states: 'The constitutionality of laws and treaties shall not be reviewed by the courts'.¹⁸ Other constitutions provide for consultative bodies to offer input on questions of constitutionality but stop short of requiring the legislature to abide by their opinions. In Finland, the Constitutional Law Committee issues statements regarding the constitutionality and compliance with human rights treaties of proposals for legislation and other matters brought before it.¹⁹ The legislature retains the authority to enact legislation regardless of the Constitutional Law Committee's stance and regardless of whether the President refuses to confirm the act. If the President refuses to confirm it, the Parliament may readopt the act, in which case it passes without confirmation.²⁰

2.1.5. Further analysis

An analytical lens is used throughout this Guide which looks at the extent to which provisions or systems tend to aggregate or disperse power. This approach applies aptly to constitutional review. Constitutional review itself aggregates power in the judiciary, which has the final say on the requirements of the constitution, including what they mean for other branches. To a certain extent, the political branches must answer to the judiciary. From a broader perspective, however, constitutional review effectively disperses

power among the branches so that no single branch exercises too much authority without the involvement of the other branches. The political branches of government draft and enforce laws, control taxes and spending, command the military, and manage the majority of government institutions. Constitutional review allows the judiciary to participate in or to oversee some of these processes. However, constitutional review arrangements also usually entail limits on the reach of the judiciary by requiring certain triggering events or by limiting the subjects of review. In some cases, the judiciary can consider

Constitutional review itself aggregates power in the judiciary, which has the final say on what the requirements of the constitution mean for other branches. From a broader perspective, however, it effectively disperses power among the branches of government. Most functioning constitutions provide arrangements that both aggregate power and disperse it across the branches of government.

only cases or controversies or laws brought before it by litigants or other branches of government. Under other constitutions, the judiciary is limited to review of only certain laws. Thus, even independent judiciaries wield limited powers. Therefore, while constitutional review processes can be seen as tools to aggregate power or to disperse it across the branches, most functioning constitutions provide arrangements that do both. An appropriate balance can improve the functioning of the government and improve the legitimacy of the actions of other branches.

Most constitutional review arrangements constitute a strong form of legal protection. As a branch that is charged with the consistent and unbiased application of the constitution, the judiciary's oversight serves as a legal safeguard against breaches of the constitution. However, as this chapter discusses, constitution builders should not assume that the judiciary will be isolated from political pressure. Though there are mechanisms to reduce the political influence of judiciaries, they do not operate in isolation and are not immune from political forces. Political actors generally appoint judges, and one

Most constitutional review arrangements constitute a strong form of legal protection. Oversight by the judiciary serves as a legal safeguard against breaches of the constitution. However, judiciaries do not operate in isolation and are not immune from political forces. Political actors generally appoint judges, and judges are not oblivious to what the people will accept or to what the executive will enforce.

can expect them to select individuals who share their political outlook. While judges apply law to facts, this art permits space for judgement and discretion. And in deciding cases judges are not oblivious to what the people will accept or to what the executive will enforce. For these and other reasons, constitutional review constitutes both a legal and a political act. Again, it is desirable to strike a balance as to the extent and form of constitutional review powers by considering the specific country context.

2.2. Additional powers

In addition to enabling constitutional review, constitutions can empower courts to influence law-making by other means. One such means is by issuing advisory opinions on the constitutionality of laws, either prior to or after enactment. A second method is to involve the judiciary in the process of amending the constitution. The powers of the judicial branch can also extend to include general oversight powers on other branches of government or on administrative bodies. A constitution may give the judiciary a role in impeaching the head of state or in dissolving parliament. Courts furthermore can regulate political parties or oversee electoral processes. Many constitutions—to preserve order and to avoid abuses of power during potential crises—require the executive to seek judicial authorization before declaring a state of emergency.

Constitutions can empower courts to influence law-making by means other than constitutional review, for example, by issuing advisory opinions on the constitutionality of laws, either before or after enactment, or being involved in the process of amending the constitution.

2.2.1. Advisory opinions

Advisory opinions can be thought of as a non-binding version of constitutional review. They are a means through which a court can advise other branches on the constitutionality of actions they are considering without obligating them to follow the court's opinion. For instance, an advisory opinion may be sought by the legislature while it is debating a law. Because advisory opinions are non-binding, they lack legal force. They constitute political, rather than legal, safeguards of the constitution. Nevertheless, as a political device, they can significantly influence the law-making process. Armed with an advisory opinion that doubts the constitutionality of a particular law, opponents of that law can rely on the opinion to increase the legitimacy of their arguments to great political effect. Similarly, a positive advisory opinion can insulate particular laws from political challenge. But advisory opinions still lack the influence of a binding legal decision; such opinions are not the final word on a matter. Political actors can overcome their legitimizing or de-legitimizing force. One example of this type of mechanism is found in Canada. In addition to its other review powers, the Supreme Court may issue advisory opinions which are not legally binding in response to 'reference questions' posed by the government, usually regarding the constitutionality of laws.²¹

2.2.2. Amendment of the constitution

Judicial powers may also extend to the process of amending the constitution. Constitutional amendment permits political actors to fundamentally change the legal and political framework of government. To promote stability, most constitutions thus permit only an arduous amendment process, which frequently involves several governmental bodies, political actors and branches of government. Some constitutions even allow judicial input. According to the South African Constitution, the Constitutional Court may have the opportunity to weigh in on the constitutionality of amendments.²² Constitution builders may wish to include such a significant role for the judiciary in the amendment

process, emphasizing the importance of particular constitutional principles. Indeed, without judicial support, political actors may be unable to amend certain provisions, no matter how politically unpopular they are. This arrangement removes particular issues from the political process, relying instead on the judiciary to effect constitutional change; it also concentrates significant authority in the judiciary. Ukraine features a similar amendment process.²³

2.2.3. States of emergency

In order to facilitate swift and efficient responses in times of crisis, many constitutions endow a branch or actor with the power to declare a state of emergency or siege. This power is often vested in the executive branch because it is thought to be the best able to respond rapidly and decisively. The ability to declare a state of emergency can be a sweeping power, which often allows for the temporary suspension of constitutional provisions, including guarantees of certain rights and freedoms. Therefore, to prevent abuse of this potentially far-reaching power, most constitutions limit the ability of the executive to declare a state of emergency by placing limits on the circumstances that qualify as an emergency or by requiring the support of other branches, including the judiciary. The constitution of Thailand, for instance, empowers the judiciary with the possibility of blocking the executive from declaring a state of emergency.²⁴ While the King may issue an emergency decree, it will not enter into effect without the support of the Council of Ministers and the National Assembly. A threshold number of National Assembly members, in turn, can trigger review by the Constitutional Court, which will decide whether the King's decree complies with constitutional requirements. To an extent, however, the Constitution does curtail the Constitutional Court's ability to block an emergency decree: any such decision requires a two-thirds majority of its members.²⁵ Nevertheless, the potential for judicial review surely curtails executive discretion in issuing an emergency decree.

2.2.4. Impeachment processes

The judiciary can also enforce legal safeguards against the political misuse of the impeachment process or of the executive's authority to dissolve Parliament. Again, the mere potential of judicial involvement will probably reduce the number of calls by the legislature for the executive to be removed without a sound reason, just as it imposes an additional barrier making it more difficult for the executive to dissolve the Parliament. Judicial censure of the legislature or the executive will probably have adverse political repercussions for those branches. Legal safeguards should thus improve the veracity of allegations that would lead to removal of the executive or the bases for dissolving Parliament. The judicial branches in Afghanistan and Sudan, for example, play a role in impeachment processes.²⁶

The powers of the judicial branch can also extend to a role in impeachment of the head of state or in the dissolution of parliament; regulating political parties or overseeing electoral processes; or authorization before a state of emergency can be declared.

2.2.5. Electoral administration

The judiciary can also exert a degree of influence over the political process by assisting the administration of elections or by regulating political parties. Constitutions in Germany, South Korea and Turkey, for example, empower the courts to regulate and even prohibit, under certain circumstances, political parties.²⁷ Courts in a number of countries such as France and Mongolia are constitutionally mandated to supervise elections and referendums.²⁸ The Constitutional Council wields particular influence in France's political process: as the guardian of fair elections, it can declare an election invalid. It also oversees the implementation of procedural rules affecting political parties, including campaign finance regulations.

3. Judicial independence and accountability

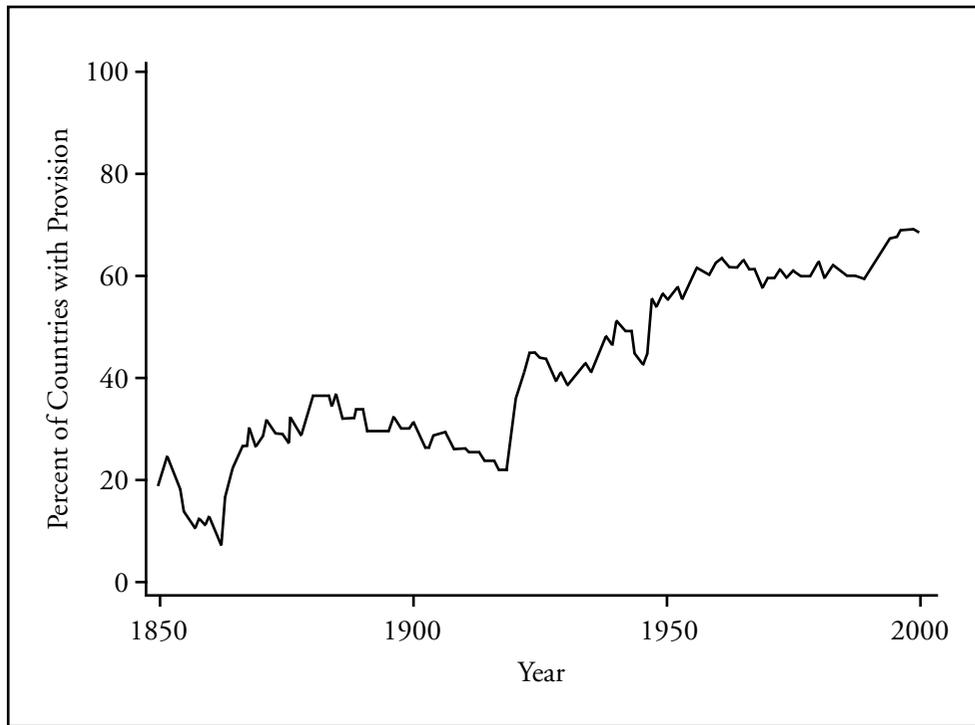
Having explored the various powers that the judiciary may exercise, this chapter now moves on to a discussion of the importance of judicial independence and the various constitutional mechanisms by which the other branches of government exercise influence or oversight over the judiciary. An independent judiciary, regardless of the specific powers and tasks assigned to it, is essential to a properly functioning constitution. Judicial independence is a touchstone of the rule of law, which demands the impartial application and interpretation of the law. It is also essential to the enforcement of human rights provisions and other constitutional guarantees, and to the strengthening of the judiciary's ability to engage in independent and meaningful dispute resolution and constitutional review.

Many constitutions make an express commitment to the principle of judicial independence. Of constitutions in force today, 65 per cent contain some such commitment.²⁹ The number has increased steadily with time. Figure 1 shows this trend towards an explicit commitment to judicial independence.

Judicial independence is a touchstone of the rule of law.

A docile and dependent judiciary leaves power unchecked in the political branches, weakens the defence of individual rights, and opens up possibilities for corruption. An overly assertive judiciary, on the other hand, can significantly frustrate self-governance and political accountability. Moreover, in order to maintain the guarantees of the rule of law, the judiciary must be accountable for the effective and timely administration of justice. A constitution may therefore provide for some degree of influence over or oversight of the judiciary by the political branches or other oversight bodies, such as judicial councils, to fulfil the demands of judicial accountability. To strike the proper balance between judicial independence and judicial accountability, constitution builders must carefully consider the context of their own country. Many factors, both within the four corners of the constitution and outside it, affect judicial independence. This section focuses on three constitutional design options that directly affect judicial independence and accountability.

Figure 1. The percentage of constitutions that contain an explicit declaration regarding the independence of the central judicial organs, by year (N=550)



Note: N is the sample size—the number of historical (since 1789) and current constitutions surveyed for these statistics. According to the source, 550 out of roughly 800 constitutions in force since that time, including over 90 per cent of constitutions introduced since the Second World War, contain an explicit declaration regarding the independence of the central judicial organs.

Source: constitutionmaking.org, Report on judicial independence, available at <<http://www.constitutionmaking.org/reports.html>>.

The first concerns the selection of judges, a particularly effective means by which other branches of government can influence the judiciary. In many countries, given the stakes, this issue has turned contentious. The second issue relates to judicial independence is term limits. Long terms of service insulate judges from political reprisals for unpopular decisions; they reduce the inappropriate consideration of personal concerns in deciding cases; and they grant judges the autonomy and independence to rule on legal—rather

Three design options directly affect judicial independence and accountability—the way in which judges are selected and appointed, limits to the term for which judges can serve, and the ways in which judges can be removed.

than political—grounds. On the other hand, long terms of service may also be seen as limiting change and progress within the law. The third issue is the removal of judges from the bench. Constitutional protections against arbitrary or politically motivated dismissal of judges can take many forms.

3.1. The selection of judges

As is apparent from the discussion above, the authority to select judges significantly affects the balance of power. Most constitutions allocate this power to the political branches, generally the President or the Prime Minister, though it is rare that a constitution allows the President and Prime Minister to make appointments without the support, input, or approval of another body or branch. Nevertheless, some executives are powerful in this area. In Zimbabwe, the President, in consultation with a Judicial Service Commission, appoints judges.³⁰ Yet the President also appoints most of the members of this commission, which in some ways defeats the purpose of a shared appointment power.

In some countries the legislature exercises more control in the appointment of judges. In the Former Yugoslav Republic of Macedonia (FYROM), the legislature elects members of both the Constitutional Court and the Republican Judicial Council, which proposes the election and discharge of judges, evaluates competence, and oversees accountability measures.³¹ Under many constitutions, the executive and legislative branches are both involved in the appointment of judges to the highest courts. In Hungary, the legislature alone appoints members of the Constitutional Court, whereas the President appoints members of the Supreme Court.³² In Indonesia, the legislature and the executive are both involved in the appointments to the Supreme Court, the Judicial Commission, and the Constitutional Court.³³

Even if judges strive to set aside their political or personal beliefs when interpreting the law, their experiences and perspectives will inevitably influence decisions. Political actors who appoint judges will naturally attempt to select individuals who share their first principles. The power of appointment—when involving the executive or the legislature—thus represents a political check on the judiciary. That is, constitutions that permit the political branches to appoint judges support a measure of political influence on the character and composition of the judiciary.

The power of appointment by the executive branch or the legislature represents a political check on the judiciary.

By delegating the responsibility for selecting judges to numerous actors, a constitution can mitigate the risk that any one individual will exert too much influence over the development of the law. Such a system may also weed out the most ideologically extreme judges, as most candidates will represent a compromise reached through political negotiation. The constitutions of both Ethiopia and South Africa, for example, involve a Judicial Council in the process of appointing Constitutional Court judges.³⁴ In Brazil, the President nominates candidates for the judiciary who must then win approval by the legislature.³⁵ To maximize diversity of opinion within the judiciary, the Italian Constitution entrusts the President, the Parliament and the lower courts with designating one-third of the members of the Constitutional Court each.³⁶

Legal safeguards may reinforce judicial independence. Many constitutions contain explicit selection criteria that narrow the pool of potential judges. Such criteria may include age limits, ethnicity, regional origin, legal qualifications and experience

requirements.³⁷ Constitution builders may select certain criteria to achieve a particular balance in the judiciary, to ensure diversity of views, or to encourage a professional, rather than political, judiciary.

Another kind of legal safeguard involves the appointment of judges by an independent, impartial body. The Constitution of Bosnia and Herzegovina commissions an international body, the European Court of Human Rights, to select three of the nine judges sitting on its Constitutional Court.³⁸ Other constitutions include domestic independent bodies in the selection of judges, though such bodies usually act alongside the political branches. In Uganda, for example, a Judicial Service Commission appoints lower-court judges but in appointing the judges of the highest court its role is to advise the President on appointments which are then approved by the Parliament.³⁹

Another kind of legal safeguard is the appointment of judges by an independent, impartial body.

Impartial judicial councils or judicial service commissions with appointment authority certainly safeguard and even strengthen judicial independence by significantly reducing political control over the issue.

The judiciary itself can participate in, or even exclusively control, the appointment process. Such arrangements would maximize judicial independence but also aggregate power within the judiciary. While the judiciary, as compared to the political branches, might select more impartial and capable judges—although no evidence exists to support this claim—it would most likely select judges who were less representative of a nation's citizens. Moreover, vesting appointment authority strictly within the judiciary would remove a significant political check against an already non-political institution, and may require—as a countermeasure—infringements on judicial independence elsewhere. Under the Constitution of Portugal, elected judges are authorized to appoint a portion of members to the bench.⁴⁰ The judiciary also exercises appointment powers in Bulgaria where the judges of the highest courts may appoint members to lower courts.⁴¹ Similarly, under Afghanistan's Constitution, the Supreme Court recommends judges for lower-court appointments.⁴² Table 2 illustrates the appointment procedure under selected constitutions.

Table 2. The selection of judges

Executive appointment without a commission	Executive appointment with a commission	Appointment by a commission	Appointment by the legislature	Career judiciary
Afghanistan	Albania	Algeria	China	France
Argentina	Angola	Bulgaria	Cuba	Germany
Australia	Canada	Croatia	Laos	Italy
Bangladesh	Dominican Republic	Cyprus	FYROM	Japan
Belarus	England and Wales	Lebanon	Mexico	Portugal
Belgium	Greece	Spain	Montenegro	
Cambodia	Israel	Yemen	Rwanda	
Chad	Namibia			
Czech Republic	Poland			
New Zealand	Russia			
Turkey	South Africa			
Uzbekistan	Zimbabwe			

Note: Some constitutions call for multiple methods of selection of judges; the table lists the primary one.

Source: adapted from Liptak, Adam, 'Rendering Justice, With One Eye on Re-election', *New York Times*, 25 May 2008, available at <<http://goo.gl/80vUZ>>.

3.2. Term of service

A judge's term of service can also affect judicial independence, as job security empowers judges to decide cases without regard to considerations of personal welfare and employment. Political safeguards here serve no function and would defeat the object of judicial independence. The strongest form of legal protection is life tenure, which is provided for in the constitutions of Argentina⁴³ and Estonia,⁴⁴ among others. To a lesser extent, a standard retirement age promotes judicial independence by freeing judges of reappointment concerns.⁴⁵ Other options include defined long terms, or short initial terms followed by life tenure.⁴⁶

Although long terms of service can strengthen judicial independence, they can also weaken judicial accountability, both to the other branches of government and to the electorate. Short terms of service and systems of reappointment obviously have

the opposite effect: judges will need to perform effectively—as determined by the appointment, or reappointment, body, usually the executive or, as happens, although rarely, the electorate, to keep their jobs. In Guatemala, for instance, Supreme Court justices serve five-year terms, after which they must be re-elected by the legislature in order to continue serving.⁴⁷ In Japan, justices of the Supreme Court are appointed by the Cabinet but are subject to a review by the people after selection and every 10 years thereafter.⁴⁸ Finally, another option regarding term limits for judges in the highest court is to exclude the possibility of re-election or reappointment. This is the case for members of the Constitutional Court in Germany, who serve 12 years without the possibility of re-election, although the rule is found in the federal law regulating the Constitutional Court rather than in the German Constitution.⁴⁹

Job security allows judges to decide cases without regard to considerations of personal welfare and employment, but long terms of service could weaken judicial accountability, both to the other branches of government and to the electorate.

3.3. Removal of judges

The questions of how and under what circumstances a sitting judge can be removed from the bench also significantly affect judicial independence. To maintain impartiality and the unbiased application of the law, judges must not fear arbitrary dismissal or transfer. Yet because a judge's behaviour actually may warrant dismissal or transfer, many constitutions clearly articulate the limited circumstances that would justify removal. Some constitutions designate political actors as the proper authority to remove judges. The Constitution of Albania, for instance, allows the legislature to effect removal.⁵⁰ In Gambia, the President, in consultation with the Judicial Service Commission, may terminate the appointment of a superior court judge while the National Assembly is empowered to set in motion proceedings for removal on the grounds of misconduct or infirmity.⁵¹

To maintain impartiality and the unbiased application of the law, judges must not fear arbitrary dismissal or transfer. Many constitutions clearly articulate the limited circumstances that would justify their removal.

The greater the number of actors involved, the more likely it is that competing political forces will be able to deter improper removal. In India removing judges requires the approval of both the Parliament and the executive branch.⁵² Although this arrangement does not eliminate the potential for political abuse, requiring agreement between the branches reduces its likelihood.

Involving the judiciary in the removal process constitutes one means of protecting judicial independence. A judicial council or judicial service commission, used to appoint judges, might also act as a gatekeeper blocking politically-motivated dismissals.⁵³ Another method of involving the judiciary in dismissals—thereby protecting judicial independence and aggregating power in the judiciary—is requiring, as Sweden does, a

judicial finding supporting dismissal.⁵⁴ Germany's Constitution similarly institutes legal safeguards to ensure judicial independence by mandating that the removal, transfer or suspension of a judge cannot proceed without a judicial decision supporting removal or without strict adherence to removal protocol.⁵⁵ Impeachment of German federal judges—that is, removal of judges for violating principles of the Basic Law or constitutional order—requires both the involvement of the legislature and a two-thirds majority supporting removal in the Constitutional Court. Germany, therefore, has constructed significant barriers—including the dispersal of power to multiple bodies, as well as both legal and political safeguards—to removing a judge for politically motivated reasons, thereby significantly strengthening judicial independence.

The greater the number of actors involved, the more likely it is that competing political forces will be able to deter improper removal of a judge. Involving the judiciary in the removal process is one means of protecting judicial independence; other legal safeguards to prevent arbitrary removal include vesting oversight of the process in independent bodies.

Other legal safeguards preventing arbitrary removal include vesting oversight of the process in independent bodies, and instituting immunity protections. Croatia appoints independent bodies to decide removal cases.⁵⁶ Provisions granting immunity to judges for acts within their official capacity also aim to support independent judicial decision making.⁵⁷ On the other hand, immunity clauses, if improperly applied, can promote corruption and prevent judicial accountability.

An independent judiciary requires not only the formal provisions mentioned above, but also a commitment by political leaders to the rule of law—to abiding by constitutional provisions and judicial decisions. The other branches of government must also avoid involving the judiciary in political disputes or in activities outside the judiciary's core capacity to settle disputes and interpret the law.

An independent and properly functioning judiciary also may necessitate practical considerations such as adequate funding. While constitutional provisions may support judicial independence and impartiality, the executive must implement measures to fight corruption, enforce judicial decisions, and promote public confidence in the judiciary. While constitutions often compel transparency concerning some judicial functions—such as the right to a public hearing—legislative and administrative measures can also promote transparency, particularly as to other aspects of judicial proceedings and to the processes of selecting and retaining judges.

An independent judiciary requires not only the formal provisions mentioned above, but also a commitment by political leaders to abide by constitutional provisions and judicial decisions. The other branches must also take measures to fight corruption, enforce judicial decisions, and promote public confidence in the judiciary.

4. Legal pluralism

The final section of this chapter considers the concept of legal pluralism. Legal pluralism is most frequently incorporated into the constitutional design in divided societies where different groups adhere to competing legal norms or systems. By recognizing the multiple legal norms, legal systems and sources of law that exist in a country, constitutions can bestow a unique legal status on certain groups or in certain regions. Legal pluralism allows constitution builders to acknowledge marginalized legal systems—such as those based on religious norms or indigenous legal systems—and provides an opportunity to empower oppressed groups and to legitimize and preserve traditional cultural norms and practices. Particularly in post-conflict settings, constitutional recognition of multiple sources of law can significantly resolve societal tensions. Moreover, because legal pluralism allows not only for the incorporation of multiple sources of law but also for multiple court systems, it can create an opportunity for diversity in the administration of justice. By decentralizing the administration of justice, legal pluralism can also provide increased possibilities of justice administered at regional and local levels, by courts at levels closer to the communities they serve. However, legal pluralism presents challenges: constitution builders must construct a coherent constitutional framework and legal system from

Legal pluralism may be incorporated into the constitutional design in divided societies where different groups adhere to competing legal norms or systems, such as those based on religious norms or indigenous legal systems.

disparate and sometimes conflicting legal systems and norms. In order for plural legal systems to function properly, constitution builders must determine the scope of each legal system and identify the fundamental rights applicable across all legal systems. Before exploring these questions, we first survey the various sources of law that can constitute legal systems.

In contrast to legal pluralism, a unified legal system constitutionally recognizes only one legal system. Though constitution builders may trace the legal norms represented in a unified legal system to numerous sources—including religious tenets or international law, for example—the constitution legitimizes one system for interpreting and applying the law.

Civil law represents the most prevalent legal system, which predominantly relies on written legal codes as the source of law. Civil law judges apply constitutional provisions and general legislation to reach decisions.

Particularly in post-conflict settings, constitutional recognition of multiple sources of law can significantly reduce societal tensions. By decentralizing the administration of justice, legal pluralism can also provide increased possibilities of justice administered at regional and local levels, by courts at levels closer to the communities they serve.

Under the common law system, by contrast, judges rely not only on statutory codes and constitutional provisions, but also on a body of judge-authored legal opinions or case law that acts as legal precedent, binding inferior judges presented with similar facts, though precedent can be overturned and cases that involve even slightly different facts can be distinguished from precedential cases. Under common law systems, the precise contours

and meaning of law emerge as the body of case law on a particular subject grows. In this sense, the common law intrinsically changes and develops over time.

Customary systems, often unwritten, develop from the societal norms, customs and practices of a particular community. Indigenous law provides one example; religious law—based on religious texts and practices—provides another. The most widespread religious legal system is Sharia, or Islamic law; its main sources are the Qur'an and the Sunnah teachings.⁵⁸ While Sharia functions as the sole legal system in some countries, it often coexists with others under a pluralist legal framework.

Legal pluralism can boost judicial legitimacy.⁵⁹ Multiple legal systems can often exist within a single country regardless of constitutional recognition, particularly in countries with religiously or ethnically diverse populations. Many of the systems have deep roots and are relied upon by the communities they serve. Similarly, post-colonial countries often have a number of legal systems operating simultaneously because colonial powers implemented aspects of their own legal systems, such as commercial law, while also maintaining aspects of traditional legal systems. Thus most constitutions actually do not impose or create legal pluralism, but rather accept or incorporate it into the existing constitutional order. The strength and legitimacy of the judiciary hinge almost exclusively on the perception of the political branches and the people. That perception suffers when the constitutional order fails to recognize legal systems that are actually used and respected by the people—and weakens the force of judicial decisions, which are based on the pre-existing constitutional order. Thus legal pluralism can enhance judicial authority.

However, legal pluralism presents challenges. Constitution builders must construct a coherent constitutional framework and legal system from disparate and sometimes conflicting legal systems and norms. For plural legal systems to function properly, constitution builders must determine the scope of each legal system and identify the fundamental rights applicable across all legal systems.

As mentioned previously, however, legal pluralism also creates significant challenges. One relates to questions of jurisdiction—which courts have authority to decide which cases over which people? Sometimes a legal system may apply on a regional basis. This often occurs in federal systems, where each region—perhaps applying a distinct system of law—has jurisdiction over matters within the region that are not reserved for the federal centre. In another form of legal pluralism, one or more legal system may apply exclusively to a group based on membership. Such an arrangement could have a regional element but not always. For example, indigenous groups may have the right to maintain and apply indigenous law as part of a broader constitutional grant of territorial autonomy. Under some

Which courts will have authority to decide which cases over which people? Sometimes a legal system may apply on a regional basis; one or more legal system may apply exclusively to a group based on membership; religious law may apply to disputes among members of a particular religion in certain areas of law, such as family or inheritance law.

constitutions, the application of religious law to settle disputes among members of that religion is possible, as in India.⁶⁰ The application of a legal system also may be limited to certain areas of law in which a case arises.⁶¹ For instance, religious law and courts may govern family law matters in certain cases.

4.1. Legal pluralism and constitutional conflict

Even if the constitution clearly delineates the circumstances under which, or people to which, different legal systems apply, conflicts still may arise. If fundamental rights enshrined in a constitution conflict with legal systems recognized by that constitution, drafters must determine which will prevail, or how this determination will be made. Critics have pointed out that legal pluralism can threaten the rights of the vulnerable, particularly women. Under some legal systems, the standard of gender equality set by constitutions and international instruments is not met. Difficulties can arise especially in the area of social and family law settings. The Committee on the Elimination of Discrimination against Women is among organizations that have expressed concern over legal pluralism where it is linked to discrimination.⁶²

If fundamental rights enshrined in a constitution conflict with legal systems that are also recognized by that constitution, drafters must determine which will prevail, or how this determination will be made.

Though many constitutions have attempted to address any tensions between competing constitutional and legal values, no one single approach has emerged. Constitution builders have granted varying levels of discretion to individual legal systems.

Many constitutions have adopted the principle of constitutional supremacy, declaring that if laws or principles in recognized legal systems conflict with constitutional provisions, constitutional provisions prevail. International law has reinforced this approach.⁶³ The Constitution of Mozambique, for example, embraces legal pluralism only ‘insofar as [different legal systems] are not contrary to the fundamental principles and values of the Constitution’.⁶⁴ To enforce this hierarchy, another provision creates links between

Many constitutions have adopted the principle of constitutional supremacy, declaring that if laws or principles in recognized legal systems conflict with constitutional provisions, constitutional provisions prevail.

courts and other forums whose purpose is the settlement of interests and the resolution of disputes⁶⁵ —a provision that allows for legislation to ensure that higher national, and often constitutional, courts can review the decisions of indigenous or religious courts.

Colombia offers an example of a Constitutional Court that has narrowly tailored the supremacy principle. The Colombian Constitution of 1991 granted significant autonomy to indigenous groups, including the authority to apply their own law within their territories.⁶⁶ In a series of cases, the Constitutional Court balanced this grant of autonomy against individual rights recognized by the Constitution. In 1996 the Court issued a decision in *Gonzalez Wasorna v. Asamblea General de Cabildos Indigenas Region Chami y Cabildo Mayor* that recognized the supremacy of fundamental rights but limited interference in indigenous laws only to narrowly defined circumstances.⁶⁷ Specifically, the

Court found that restrictions on indigenous laws must satisfy two conditions: they must be necessary to protect a superior constitutional guarantee and they must do so in the least restrictive way. The Court further found that ‘superior’ constitutional guarantees reach only the highest human values—the right to life, the prohibition against torture and the prohibition against slavery.

At the other end of the spectrum, some constitutions recognize—in so-called exclusionary clauses—not the supremacy of the constitution, but the complete autonomy of legal systems in defined areas of the law. These arrangements amount to a significant dispersal of judicial and national power. Literally, exclusionary clauses specifically exclude certain areas of law, very often family law, from constitutional guarantees against discrimination. The Constitution of Lesotho 1993 provides one example: Article 18(4)b prohibits any law from discriminating on the basis of ‘race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’—but this provision does not reach laws concerning ‘marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description’. Botswana and Gambia feature similar provisions.⁶⁸

Some constitutions have exclusionary clauses, recognizing the complete autonomy of legal systems in defined areas of the law, for example, excluding certain areas of law, often family law, from constitutional guarantees against discrimination.

Exclusionary clauses prevent constitutional protections in the areas covered, such as family law and wills and estates. It is therefore possible for otherwise prohibited discrimination to occur. Because of this possibility, exclusionary clauses have been criticized as inconsistent with the requirements of international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women.⁶⁹ This is not to say, however, that any single legal system has a monopoly on the value of equality. Nor are legal pluralism and a broader constitutional embrace of multiculturalism necessarily at odds with the preservation of equality.⁷⁰ The consequences of various judicial design choices and other constitutional design options should be contemplated by constitution-building practitioners with careful regard for the particular historic, social, and political contexts of the countries in which they work.

5. Conclusion

The judicial branch is indispensable to a properly functioning constitutional democracy. The rule of law cannot hold without the judiciary settling disputes by impartially applying the law. The judiciary also plays a unique role in upholding the arrangements and guarantees of the constitution by exercising judicial review, which empowers the judiciary to ensure that the other branches of government act within the bounds of the constitution. To meet this great responsibility adequately, the judiciary requires a certain degree of independence and freedom. But judicial independence does not equate with judicial autonomy, or rule by judges. The political branches also may command a degree of accountability and transparency from the judiciary, mostly to preserve judicial

integrity. Constitution builders must also carefully consider the internal structure and organization of the judiciary to ensure not only the coherent operation of the law, but also its legitimacy. Constitutional recognition of multiple legal systems simultaneously can strengthen judicial legitimacy while respecting different cultures, traditions, and norms in a divided society. But legal pluralism raises significant challenges to the constitutional order. Before adopting legal pluralism, constitution builders must sort out issues of jurisdiction, the hierarchy of laws, and the constitutional protection of rights.

Table 3. Issues highlighted in this chapter

Issues	Questions
1. Role of the judiciary	<ul style="list-style-type: none"> • What is the role of the judicial branch? • How does the judiciary contribute to ensuring the rule of law? • What checks and balances exist between the judiciary and other branches?
2. Constitutional review	<ul style="list-style-type: none"> • What is the role of the judicial branch in enforcing the guarantees of the constitution? • What laws and decisions can be reviewed in a process of constitutional review? • Which courts can exercise judicial review? • What are the circumstances under which review can take place? • When does constitutional review take place?
3. Judicial powers	<ul style="list-style-type: none"> • What is the role of the judiciary in law-making? • What is the role of the judiciary in amending the constitution? • What checks may the judiciary exercise over other branches? • How is the judiciary involved in the administration of elections and political parties?
4. Judicial independence and accountability	<ul style="list-style-type: none"> • Why is judicial independence important? • What mechanisms exist to ensure accountability of the judiciary? • How are judges selected? Who selects them? Under which criteria? • How long might judges serve? • How are judges removed?
5. Legal pluralism	<ul style="list-style-type: none"> • How can a constitution bring together multiple legal systems? • How does legal pluralism contribute to the legitimacy of legal systems? • What happens when legal systems existing under a constitution conflict?

Notes

All the articles of constitutions referred to in the endnotes are reproduced in the Annex.

- ¹ *Marbury v. Madison*, 5 U.S. 137 (1803).
- ² See, for example, Article 121 of the Constitution of Afghanistan (2004).
- ³ Articles 167, 143 and 144 of the Constitution of the Republic of South Africa (1996).
- ⁴ Article 167(4) of the Constitution of the Republic of Serbia (2006).
- ⁵ Article 111(1) of the Republic of Korea (1948 as amended 1987).
- ⁶ Article 47(1) of the Republic of Cameroon (1972 as amended 1996).
- ⁷ Article 232 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1999); Article 131 of the Constitution of the Republic of India (1950 as amended 1996); Article 128 of the Constitution of Malaysia (1957 as amended 1994); Article 105 of the Political Constitution of the United Mexican States (1917 as amended 2007).
- ⁸ Article 137(3) of the Constitution of the Republic of Uganda (1995).
- ⁹ Section 152 of the Republic of Estonia (1992).
- ¹⁰ Article 204 of the Constitution of the Portuguese Republic (1976 as amended 2005). See also the Constitutional Courts site, available at <<http://www.concourts.net/>>.
- ¹¹ Mavčič, Arne, articles in the *Constitutional Review* (2001), updated texts available at <<http://www.concourts.net>>.
- ¹² Articles 80(3) and 120 of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978 as amended 2000).
- ¹³ Articles 46(5) and 61 of the Constitution of the French Republic (1958 as amended 2005).
- ¹⁴ Article 82 of the Political Constitution of the Republic of Chile (1980).
- ¹⁵ Article 32/A (3) of the Constitution of the Republic of Hungary (1949 as amended 2007); Article 167(6) of the Constitution of the Republic of South Africa (1996 as amended 2007).
- ¹⁶ See Conseil Constitutionnel of France, <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/a-la-une/juin-2010-la-publicite-des-audiences-au-conseil-constitutionnel.48374.html>>.
- ¹⁷ Hungarian Act XXXII on the Constitutional Court, 19 October 1989.
- ¹⁸ Article 120 of the Constitution of the Kingdom of the Netherlands (1983 as amended 2002).
- ¹⁹ Section 74 of the Constitution of the Republic of Finland (2000 as amended 2007).
- ²⁰ Section 77 of the Constitution of the Republic of Finland (2000 as amended 2007).
- ²¹ Section 53 of the Canadian Supreme Court Act (R.S., 1985, c. S-26), available at <<http://laws.justice.gc.ca/eng/S-26/page-1.html>>.
- ²² Article 167(4)(d) of the Constitution of the Republic of South Africa (1996 as

- amended 2007).
- ²³ Articles 157 and 159 of Constitution of Ukraine (1996).
- ²⁴ Section 185 of the Constitution of Thailand (2007).
- ²⁵ Section 185 of the Constitution of Thailand (2007).
- ²⁶ Article 69 of the Constitution of the Islamic Republic of Afghanistan (2004); Article 60(2) of the Interim National Constitution of the Republic of the Sudan, 2005 (Revised).
- ²⁷ Article 69 of the Constitution of the Republic of Turkey (1982 as amended 2007); Article 21 of the Basic Law of the Federal Republic of Germany (1949 as amended 2006); Article 8(4) of the Constitution of the Republic of Korea (1948 as amended 1987).
- ²⁸ Article 58 of the Constitution of the French Republic (1958 as amended 2008); Article 66(2)(2) of the Constitution of Mongolia (1992).
- ²⁹ constitutionmaking.org, Report on judicial independence available at <<http://www.constitutionmaking.org/reports.html>>.
- ³⁰ Article 84 of the Constitution of the Republic of Zimbabwe (1979).
- ³¹ Articles 104 and 109 of the Constitution of the Republic of Macedonia (1991 as amended 2005).
- ³² Articles 19(3)(k), Article 32A(4), and Article 48 of the Constitution of the Republic of Hungary (1949 as amended 2003).
- ³³ Articles 24A-C of the Constitution of the Republic of Indonesia (1945 as amended 2002).
- ³⁴ Section 174 of the Constitution of the Republic of South Africa (1996); Article 81 of the Constitution of the Federal Democratic Republic of Ethiopia (1995).
- ³⁵ Article 101 of the Constitution of the Federative Republic of Brazil (1998).
- ³⁶ Article 135 of the Constitution of the Italian Republic (1948 as amended 2003).
- ³⁷ Article 118 of the Constitution of the Islamic Republic of Afghanistan (2004); Article 182(VI) of the Constitution of the Plurinational State of Bolivia (2009); Articles 106 and 135 of the Constitution of the Italian Republic (1948 as amended 2003).
- ³⁸ Article VI(1)(a) of the Constitution of Bosnia and Herzegovina (1995).
- ³⁹ Articles 142 and 148 of the Constitution of the Republic of Uganda (1995).
- ⁴⁰ Article 222 of the Constitution of the Portuguese Republic (1976 as amended 2005).
- ⁴¹ Article 147 of the Constitution of the Republic of Bulgaria (1991); see also Article 135 of the Constitution of the Italian Republic (1948 as amended 2003).
- ⁴² Article 132 of the Constitution of the Islamic Republic of Afghanistan (2004).
- ⁴³ Article 110 of the Constitution of the Argentine Nation (1994).
- ⁴⁴ Article 147 of the Constitution of the Republic of Estonia (1992).
- ⁴⁵ Article 77 of the Political Constitution of the Republic of Chile (1980); Article 291 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1999).
- ⁴⁶ Article 105 of the Constitution of the Republic of Korea (1948 as amended 1987).
- ⁴⁷ Articles 207 and 215 of the Constitution of the Republic of Guatemala (1985 as amended 1993).
- ⁴⁸ Article 79 of the Constitution of Japan (1946).
- ⁴⁹ Article 4 of the Federal Constitutional Court Act of Germany (1951 as amended 2009).
- ⁵⁰ Article 128 of the Albanian Constitution (1998).
- ⁵¹ Article 141 of the Constitution of the Gambia (1997).
- ⁵² Article 124 of the Constitution of the Republic of India (1950 as amended 1995).
- ⁵³ Article 123 of the Constitution of the Republic of Croatia (1990 as amended 2001); Article 105 of the Constitution of the Italian Republic (1948 as amended 2003).
- ⁵⁴ Chapter 12, Article 8 of Sweden's Instrument of Government (1975 as amended 2002).
- ⁵⁵ Articles 97 and 98 of the Basic Law of the Federal Republic of Germany (1949 as amended 2009).
- ⁵⁶ Article 122 of the Constitution of the Republic of Croatia (1990 as amended 2001).
- ⁵⁷ Article 134 of the Constitution of the Republic of Slovenia (1991 as amended 2003).
- ⁵⁸ Otto, Jan Michiel, *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy* (Leiden: Leiden University Press, 2008).
- ⁵⁹ Lee Van Cott, D., 'A Political Analysis of Legal Pluralism in Bolivia and Colombia', *Journal of Latin American Studies*, 32 (2000), pp. 207–34.
- ⁶⁰ Lubin, Timothy, Davis, Donald R. Jr and Krishnan, Jayanth K. (eds), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press, 2010).
- ⁶¹ See Article 121 and 'State List' of the Constitution of Malaysia (1957 as amended 1994) which designate certain areas of jurisdiction to Syariah courts.
- ⁶² See for example CEDAW Annual Report, UN document A/58/38, 18 August 2003, para. 160, available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/468/20/PDF/N0346820.pdf?OpenElement>>, commenting on reporting by the Republic of the Congo: 'The Committee expresses concern at the continued existence of legal pluralism with discriminatory components and obsolete provisions in customary law and statutory law, the latter including criminal law regarding adultery; the labour and taxation laws; and family law, particularly with regard to the difference in the age at which women and men may enter into marriage.'
- ⁶³ Yrigoyen Fajardo, Raquel, 'Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries', *Beyond Law, Informal Justice and Legal Pluralism in the Global South*, 10/27 (2004), citing Agreement 169 of the 1989 International Working Group on Indigenous People and Tribes in Independent Countries, which states that there should not be incompatibility between customary law and the fundamental rights defined by the national legal system or with

internationally recognized human rights.

- ⁶⁴ Article 4 of the Constitution of the Republic of Mozambique (16 November 2004), available at <<http://www.unhcr.org/refworld/docid/4a1e597b2.html>> (accessed 27 February 2011).
- ⁶⁵ Article 212 (3) of the Constitution of the Republic of Mozambique (16 November 2004), available at <<http://www.unhcr.org/refworld/docid/4a1e597b2.html>> (accessed 27 February 2011).
- ⁶⁶ Article 246 of the Political Constitution of Colombia (1991 as amended 2005).
- ⁶⁷ *González Wasorna v. Asamblea General de Cabildos Indígenas región Chamí y Cabildo Mayor Único*, Decision, T 349/96.
- ⁶⁸ Article 15(4)(c) of the Constitution of Botswana (1966); Article 7(f) of the Constitution of the Gambia (1997).
- ⁶⁹ Articles 2(f), 5, 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, 3 September 1981; Article 5, 1249 U.N.T.S. 13.
- ⁷⁰ For a closer analysis of exclusionary clauses and the relevant issues, see Bond, Johanna, 'Constitutional Exclusion and Gender in Commonwealth Africa', 20 August 2010, *Fordham International Law Journal*, 31 (2008), available at <<http://ssrn.com/abstract=1662654>>; Volpp, Leti, 'Feminism versus Multiculturalism', *Columbia Law Review*, 101/5 (June 2001), pp. 1181–1218 published by the Columbia Law Review Association, Inc., available at <<http://www.jstor.org/stable/1123774>>; Okin, Susan Moller, 'Is Multiculturalism Bad for Women?', in Joshua Cohen et al. (eds), *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999).

Key words

Judiciary, Judicial power, Judicial systems, Constitutional review, Judicial review, Concrete review, Abstract review, Advisory opinions, Reference questions, Constitutional amendment, Judicial independence, Judicial accountability, Judicial appointment, Term limits, Rule of law, Legal system, Legal pluralism, Conflict of laws, Indigenous law, Traditional law, Legal safeguards, Checks and balances, Separation of powers, Judicial activism, Legal interpretation, Judicial access, Supreme Court, Constitutional Court, High Court, Civil law, Common law

Additional resources

- **UN Basic Principles on the Independence of the Judiciary**

<http://www.abanet.org/rol/docs/judicial_reform_un_principles_independency_judiciary_english.pdf>

This document contains information about the United Nations Resolution, adopted in 1985, outlining basic principles for securing and promoting the independence of the judiciary in national settings.

- **Constitutional Courts: Comparative constitutional analysis**

<<http://www.concourts.net/index.php>>

Concourts.net presents comparative analyses of the system of constitutional review systems in more than 150 countries. It provides tables, charts and maps, as well as explanations of different aspects of constitutional review.

- **Constitution Making**

<<http://www.constitutionmaking.org/>>

Constitutionmaking.org is a joint project of the Comparative Constitutions Project (CCP) and the United States Institute of Peace (USIP). Its goal is to provide designers with systematic information on design options and constitutional texts, drawing on the CCP's comprehensive dataset on the features of national constitutions since 1789.

- **United States Agency for International Development (Guidance for Promoting Judicial Independence and Impartiality)**

<http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/>

The United States Agency for International Development (USAID)'s Rule of Law programme provides resources on rule-of-law issues to USAID field missions and bureaux, other US government entities, and the broader democracy and governance community. This page contains information about the programme and links to a number of relevant publications, including 'Guidance for Promoting Judicial Independence and Impartiality'.

- **Legal and Judicial Reform in Central Europe and the Former Soviet Union**

<http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2003/08/08/000094946_03073004032060/Rendered/PDF/multi0page.pdf>

This report was compiled using the experience of the judges, lawyers, legislators, business people and development assistance officials who are working day by day to bring legal reform to five key transition countries.

Annexe. Constitutional and statutory provisions referenced in this chapter

These texts appear in the order in which they are referred to in the endnotes and the chapter text. The constitutional provisions are reprinted here from the International Constitutional Law (ICL) Project (<<http://www.servat.unibe.ch/icl/info.html>>), unless otherwise noted.

Article 121 of the Constitution of Afghanistan (2004)

The Supreme Court upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law.

Article 167 of the Constitution of the Republic of South Africa (1996)

- (1) The Constitutional Court consists of a President, a Deputy President and nine other judges.
- (2) A matter before the Constitutional Court must be heard by at least eight judges.
- (3) The Constitutional Court -
 - (a) is the highest court in all constitutional matters;
 - (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
 - (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
- (4) Only the Constitutional Court may -
 - (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
 - (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
 - (c) decide applications envisaged in section 80 or 122;
 - (d) decide on the constitutionality of any amendment to the Constitution;
 - (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
 - (f) certify a provincial constitution in terms of section 144.
- (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.
- (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -

- (a) to bring a matter directly to the Constitutional Court; or
 - (b) to appeal directly to the Constitutional Court from any other court.
- (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

Article 143 of the Constitution of the Republic of South Africa (1996)

- (1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for -
 - (a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or
 - (b) the institution, role, authority and status of a traditional monarch, where applicable.
- (2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraphs (a) or (b) of subsection (1) -
 - (a) must comply with the values in section 1 and with Chapter 3 ; and
 - (b) may not confer on the province any power or function that falls -
 - (i) outside the area of provincial competence in terms of Schedules 4 and 5; or
 - (ii) outside the powers and functions conferred on the province by other sections of the Constitution.

Article 144 of the Constitution of the Republic of South Africa (1996)

- 1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution or constitutional amendment to the Constitutional Court for certification.
- (2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified -
 - (a) that the text has been passed in accordance with section 142; and
 - (b) that the whole text complies with section 143.

Article 167(1)(4) of the Constitution of the Republic of Serbia (2006)

Article 167 Jurisdiction

- (1) The Constitutional Court decides on:
 4. compliance of the Statute and general acts of autonomous provinces and local self-government units with the Constitution and the Law, . . .

Article 111 (1) of the Republic of Korea (1948 as amended 1987)*

- (1) The Constitutional Court shall have jurisdiction over the following matters:
 1. The constitutionality of a law upon the request of the courts;
 2. Impeachment;

3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and
5. Constitutional complaint as prescribed by Act.

* Reprinted from and available at the Constitutional Court's website <<http://www.ccourt.go.kr/home/english/index.jsp>>

Article 47(1) of the Republic of Cameroon (1972 as amended 1996)*

Article 47 (1) The Constitutional Council shall give a final ruling on:

- the constitutionality of laws, treaties and international agreements;
- the constitutionality of the standing orders of the National Assembly and the Senate prior to their implementation;
- conflict of powers between State institutions; between the State and the Regions, and between the Regions.

* Reprinted from and available at <<http://confinder.richmond.edu/>>

Article 232 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1999)*

- (1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.
- (2) In addition to the jurisdiction conferred upon it by subsection (1) of this section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly.

Provided that no original jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter.

* Reprinted from and available at <<http://www.nigeria-law.org/>>

Article 131 of the Constitution of the Republic of India (1950 as amended 1996)

Original jurisdiction of the Supreme Court

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute -

- (a) between the Government of India and one or more States; or
- (b) between the Government of India and any State of States on one side and one or more other States on the other; or
- (c) between two or more States.

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute.

Article 128 of the Constitution of Malaysia (1957 as amended 1994)*

- (1) The Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction -
 - (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
 - (b) disputes on any other question between States or between the Federation and any State.
- (2) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Supreme Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.
- (3) The jurisdiction of the Supreme Court to determine appeals from a High Court or a judge thereof shall be such as may be provided by federal law.

* Reprinted from and available at <<http://confinder.richmond.edu/admin/docs/malaysia.pdf>>

Article 105 of the Political Constitution of the United Mexican States (1917 as amended 2007)*

The Supreme Court of Justice shall resolve, under the related legislation, legal affairs as follows:

- I. The constitutional controversies -- except those involving an electoral dispute -- between:
 - a) The Federation and a State or the Federal District;
 - b) The Federation and a municipality;
 - c) The Executive Branch of Federal Government and the Congress: the Executive Branch of Federal Government and at least one congressional Chamber or the Executive Branch of Federal Government and the Permanent Commission acting as representatives of either the federation or the Federal District;
 - d) A couple of States;

- e) A State and the Federal District;
- f) The Federal District and a Municipality
- g) Two municipalities located at different States;
- h) A couple of Powers within a single State disagreeing about the constitutionality of their actions or executive orders;
- i) A State and one municipality located within it disagreeing about the constitutionality of their actions or executive orders;
- j) A State and a municipality located within a different State disagreeing about the constitutionality of their actions or executive orders: and
- k) A couple of governmental agencies of the Federal District disagreeing about the constitutionality of their actions or executive orders.

The resolutions taken by a majority of eight votes of justices of the Supreme Court shall declare the general invalidation of an executive order as long as the respective controversy has been generated by State or municipal executive orders appealed by the Federation, by municipal executive orders appealed by the States or by the application of paragraphs c), h) and k) of this article.

In any other case, the effects, of the Supreme Court of Justice's resolutions shall affect only the contesting parties.

II. The unconstitutionality lawsuits directed to resolve a probable contradiction between a general norm and this Constitution;

The unconstitutionality lawsuits shall be submitted to the Supreme Court of Justice during a period of time of thirty days which shall be computed from the contested general norm's publishing date onwards. Those entitled to submit such legal actions shall be:

- a) A thirty three percent out of the total number of members of the Chamber of Deputies appealing a law enacted by the Congress including the Federal District's legislation;
- b) A thirty three percent out of the total number of members of the Chamber of Senators appealing a law enacted by the Congress, including the Federal District's legislation or appealing any international treaty ratified by the Mexican State;
- c) the Attorney General appealing a federal or state legislation, including the Federal District's legislation, or the international treaties ratified by the Mexican State;
- d) A thirty three percent out of the total number of members of a State Legislature appealing a law enacted by such State Legislature;
- e) A thirty three percent out of the total number of members of the Federal District's Assembly of Representatives appealing a law enacted by such an Assembly: and
- f) The national chairmen of the political parties registered at the Federal

Electoral Institute appealing federal and local electoral laws; the state chairmen of the political parties registered at the state electoral authorities shall also be authorized to appeal electoral laws enacted by the representative State Legislature.

Such shall be the only procedure available to appeal the unconstitutionality of electoral laws.

Both federal and local electoral legislations shall be published and promulgated at least ninety days before the starting date of their respective electoral process. During electoral processes, electoral laws shall not be modified.

The Supreme Court of Justice's resolutions taken by a majority of eight justices shall declare invalid the challenged norms.

III. The appeals submitted either by a Unitary Circuit Tribunal or the Attorney General against the District Judge's rulings resolving the trials in which the Federation is a contesting party and which are particularly interesting and important. The same procedure shall be applied to those appeals selected by the Supreme Court itself.

The invalidity declarations which paragraphs I and II of this article refer to, shall not have a retroactive effect except those related to the resolution of criminal offences which shall be regulated by general principles and criminal law.

Any defiance of the resolutions mentioned at paragraphs I and II of this article shall be punished under article 107, paragraph XVI, subparagraphs 1 and 2 of this Constitution.

* Reprinted from and available at <<http://biblio.juridicas.unam.mx>>; Translation by Carlos Pérez Vázquez

Article 137(3) of the Constitution of the Republic of Uganda (1995)*

137. Questions as to the interpretation of the Constitution.

(3) A person who alleges that—

- (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
- (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

* Reprinted from and available at <<http://www.constitutionnet.org>>

Section 152 of the Constitution of the Republic of Estonia (1992)

- (1) If any law or another legal act is in conflict with the Constitution, it shall not be applied by the Court in trying a case.
- (2) If any law or other legal act is in conflict with the provisions and spirit of the Constitution, it shall be declared null and void by the National Court.

Article 204 of the Constitution of the Portuguese Republic (1976 as amended 2005)

Compliance with the Constitution

In matters that are brought to trial, the courts shall not apply rules that contravene the provisions of this Constitution or the principles enshrined therein.

Article 80(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978 as amended 2000)*

80. When Bill becomes law.

- (3) Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such Act on any ground whatsoever.

* Reprinted from and available at the official government website <<http://www.priu.gov.lk/>>

Article 120 of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978 as amended 2001)*

120. Constitutional jurisdiction of the Supreme Court.

The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution:

Provided that-

- (a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;
- (b) where the Cabinet of Ministers certifies that a Bill which is described in its long title as being for the amendment of any provisions of the Constitution, or for the repeal and replacement of the Constitution, intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such Bill;
- (c) where the Cabinet of Ministers certifies that any provision of any Bill which is not described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with paragraphs (1) and (2) Of Article 82; or

- (d) where the Cabinet of Ministers certifies that any provision of any Bill which is not described in its long title as being for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether any other provision of such Bill requires to be passed with the special majority required by Article 84 or whether any provision of such Bill requires the approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82.

* Reprinted from and available on the official government website at <<http://www.priu.gov.lk/>>

Article 46(5) of the Constitution of the French Republic (1958 as amended 2005)

Institutional Acts shall not be promulgated until the Constitutional Council has declared their conformity with the Constitution.

Article 61 of the Constitution of the French Republic (1958 as amended 2005)

- (1) Organic laws, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and standing orders of the parliamentary Assemblies, before their implementation, must be submitted to the Constitutional Council which rules on their constitutionality.
- (2) To the same end, acts of Parliament may, before their promulgation, be submitted to the Constitutional Council by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty deputies, or sixty senators.
- (3) In the cases provided for by the two preceding paragraphs, the Constitutional Council must rule within one month. However, at the Government's request, this period is reduced to eight days if a matter is urgent.
- (4) In these same cases, referral to the Constitutional Council suspends the time limit for promulgation.

Article 82 of the Constitution of the Republic of Chile (1980)*

Article 82 - Powers of the Constitutional Court are:

1. To exercise control of the constitutionality of the constitutional organic laws prior to their promulgation, and of the laws that interpret some precept of the Constitution;
2. To resolve on questions regarding constitutionality which might arise during the processing of bills or of constitutional amendment and of treaties submitted to the approval of Congress;
3. To resolve on questions which should arise over the constitutionality of a decree having force of law;
4. To resolve on questions which should arise regarding constitutionality on calling

a plebiscite, without prejudice to the powers corresponding to the Elections Qualifying Court.

5. To resolve on complaints in case the President of the Republic does not promulgate a law when he should, or when he promulgate a text different from that which constitutionally corresponds or when he issues an unconstitutional decree;
6. To decide, when required by the President of the Republic in conformity with Article 88, on the constitutionality of a decree or resolution of the President which the Office of the Comptroller General may have objected to, for deeming it unconstitutional;
7. To declare the unconstitutionality of organizations, movements or political parties, in accordance with the provisions of Article 8 of this Constitution;
8. To declare, in conformity with Article 8 of this Constitution, the responsibility of persons who attempt or who should have attempted against institutional order of the Republic. However, if the affected person were the President of the Republic or the President-elect, said declaration shall, in addition, require the agreement of the Senate, adopted by a majority of its members in office;
9. To report to the Senate on the cases referred to in Article 49, No 7, of this Constitution;
10. To decide on the constitutional or legal inabilities preventing a person from being appointed Minister of State, from remaining in that post, or from performing other functions simultaneously;
11. To pronounce itself on ineligibilities, incompatibilities and grounds for ceasing the terms of office of congressmen; and
12. To decide on the constitutionality of supreme decrees issued by the President of the Republic within his reglamentary powers, when such decrees are issued on matters that might be reserved to the law by mandate of Article 60.

The Constitutional Court may conscientiously analyze facts when taking cognizance of the powers indicated in Nos 7, 8, 9 and 10; likewise, when dealing with grounds for ceasing the post of a member of Congress.

In the case of No 1, the Chamber of origin shall forward to the Constitutional Court the respective bill within the five days following completion thereof by Congress.

In the case of No 2, the Court may only take cognizance of the matter at the request of the President of the Republic, or of either of the Chambers, or of a fourth of their members in office, provided such request is made before the law has been promulgated.

The Court must take a decision within a period of ten days counted from the date on which the request has been received, unless it decides to postpone it for another ten days for serious and justified reasons. The request shall not suspend consideration of the bill; however, the part thereof which is objected to may not be promulgated until the aforementioned period has expired, except when it deals with the Budgetary Law Bill or with the Bill related to the declaration of war proposed by the President of the Republic.

In the case of No 3, the questions may be formulated by the President of the Republic within a period of ten days, when the Comptroller General objects to a decree having force of law on grounds of unconstitutionality. The questions may also be raised by either of the Chambers or by a fourth of their members in office in case the Office of the Comptroller General should have registered a decree having force of law objected to for being unconstitutional. This request must be made within a period of thirty days from the time of publication of the respective decree having force of law.

In the case of No 4, the question may be raised at the request of the Senate or the Chamber of Deputies, within ten days of the date of publication of the decree which sets the date for the plebiscite. The Court shall establish the definitive text of the questions submitted to plebiscite in its decision when appropriate. If the decision is issued less than thirty days prior to the date on which the plebiscite should be held, the Court shall establish a new date, extending between thirty and sixty days following the decision.

In the cases of No 5, the question may be raised by either of the Chambers or by one-fourth of their members in office, within thirty days following publication or notification of the objected text, or within sixty days following the date on which the President of the Republic should have promulgated the law. If the Court accepts the demand, it shall promulgate in its decision the law which had not been promulgated or rectify the incorrect promulgation thereof.

In the case of No 9, the Court may only take cognizance of the matter at the request of the Chamber of Deputies or of a fourth of its members in office. Public action shall be available to petition the Court regarding the powers conferred thereupon by Nos 7,8 and 10 of this Article. However, if in the case of No 8, the person affected were the President of the Republic or the President elect, the petition shall be filed by the Chamber of Deputies or a fourth of its members in office.

In the case of No 11, the Court may only take cognizance of the matter at the request of the President of the Republic or of at least ten Congressmen in office.

In the case of No 12, the Court may only take cognizance of the matter at the request of either Chamber made within thirty days following the publication or notification of the objected text.

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Article 32/A (3) of the Constitution of the Republic of Hungary (1949 as amended 2007)

- (3) Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by law.

Article 167(6) of the Constitution of the Republic of South Africa (1996 as amended 2007)

167 Constitutional Court

- (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -
- (a) to bring a matter directly to the Constitutional Court; or
 - (b) to appeal directly to the Constitutional Court from any other court.

Article 120 of the Constitution of the Kingdom of the Netherlands (1983 as amended 2002)

The constitutionality of laws and treaties shall not be reviewed by the courts.

Section 74 of the Constitution of the Republic of Finland (2000 as amended 2007)

Section 74 Supervision of constitutionality

The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.

Section 77 of the Constitution of the Republic of Finland (2000 as amended 2007)

Section 77 Confirmation of Acts

- (1) An Act adopted by the Parliament shall be submitted to the President of the Republic for confirmation. The President shall decide on the confirmation within three months of the submission of the Act. The President may obtain a statement on the Act from the Supreme Court or the Supreme Administrative Court.
- (2) If the President does not confirm the Act, it is returned for the consideration of the Parliament. If the Parliament readopts the Act without material alterations, it enters into force without confirmation. If the Parliament does not readopt the Act, it shall be deemed to have lapsed.

Section 53 of the Canadian Supreme Court Act (R.S., 1985, c. S-26)

SPECIAL JURISDICTION

References by Governor in Council

Referring certain questions for opinion

53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
- (a) the interpretation of the Constitution Acts;
 - (b) the constitutionality or interpretation of any federal or provincial legislation;
 - (c) the appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or

- (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

Article 167(4)(d) of the Constitution of the Republic of South Africa (1996 as amended 2007)

- (4) Only the Constitutional Court may -
 - (d) decide on the constitutionality of any amendment to the Constitution;

Articles 157 and 159 of the Constitution of Ukraine (1996)*

Article 157

The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.

Article 159

A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution.

* Reprinted from and available on the Constitutional Court's website at <<http://ccu.gov.ua/en/index>>

Section 185 of the Constitution of Thailand (2007)*

Before the House of Representatives or the Senate approves an Emergency Decree under section 184 paragraph three, members of the House of Representatives or senators of not less than one-fifth of the total number of the existing members of each House have the right to submit an opinion to the President of the House of which they are members that the Emergency Decree is not in accordance with section 184 paragraph one or paragraph two, and the President of that House shall then, within three days as from the receipt thereof, refer it to the Constitutional Court for decision. After the Constitutional Court has given a decision thereon, it shall notify its decision to the President of the House referring such opinion.

When the President of the House of Representatives or the President of the Senate has received the opinion from members of the House of Representatives or senators under paragraph one, the consideration of such Emergency Decree shall be deferred until the decision of the Constitutional Court under paragraph one has been notified.

In the case where the Constitutional Court decides that any Emergency Decree is not in accordance with section 184 paragraph one or paragraph two, such Emergency Decree shall not have the force of law ab initio. The decision of the Constitutional Court that an Emergency Decree is not in accordance with section 184 paragraph one or paragraph two must be given by votes of not less than two-thirds of the total number of members of the Constitutional Court.

* Reprinted from and available on the Constitutional Court's website at <<http://www.constitutionalcourt.or.th/english/>>

Article 69 of the Constitution of the Islamic Republic of Afghanistan (2004)

- (1) The President is responsible to the nation and the House of Representatives [Wolesi Jirga] in accordance with this article.
- (2) Accusations of crime against humanity, national treason or crime can be leveled against the President by one third of the members of the House of Representatives [Wolesi Jirga].
- (3) If two third of the House of Representatives [Wolesi Jirga] votes for charges to be brought forth, the House of Representatives [Wolesi Jirga] shall convene a Grand Council [Loya Jirga] within one month.
- (4) If the Grand Council [Loya Jirga] approve the accusation by a two-thirds majority of votes the President is then dismissed, and the case is referred to a special court.
- (5) The special court is composed of three members of the House of Representatives [Wolesi Jirga], and three members of the Supreme Court appointed by the Grand Council [Loya Jirga] and the Chair of the Senate [Meshrano Jirga].
- (6) The lawsuit is conducted by a person appointed by the Grand Council [Loya Jirga].
- (7) In this situation, the provisions of Article 67 of this Constitution are applied.

Article 60(2) of the Interim National Constitution of the Republic of the Sudan, 2005 (Revised)*

Article 60 Immunity and Impeachment of the President and the First Vice President

- (2) Notwithstanding sub-Article (1) above, and in case of high treason, gross violation of this Constitution or gross misconduct in relation to State affairs, the President or the First Vice President may be charged before the Constitutional Court upon a resolution passed by three quarters of all members of the National Legislature.

* Reprinted from and available at <http://www.sudan-embassy.de/c_Sudan.pdf>

Article 69 of the Constitution of the Republic of Turkey (1982 as amended 2007)

Article 69 Principles to be Observed by Political Parties

- (1) The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities.
- (2) The activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law.
- (3) Political parties shall not engage in commercial activities.
- (4) The income and expenditure of political parties shall be consistent with their objectives. The application of this rule is regulated by law. The auditing of the income, expenditure and acquisitions of political parties by the Constitutional Court as well as the establishment of the conformity to law of their revenue and expenses, methods of auditing and sanctions to be applied in the event of unconformity shall also be regulated by law. The Constitutional Court shall be assisted in performing its task of auditing by the Court of Accounts. The judgments rendered by the Constitutional Court as a result of the auditing shall be final.
- (5) The dissolution of political parties shall be decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic.
- (6) The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.
- (7) The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities. A political party shall be deemed to become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly.
- (8) Instead of dissolving them permanently in accordance with the above-mentioned paragraphs, the Constitutional Court may rule the concerned party to be deprived of State aid wholly or in part with respect to intensity of the actions brought before the court.
- (9) A party which has been dissolved permanently cannot be founded under another name.
- (10) The members, including the founders of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the official gazette of the Constitutional Court's final decision

and its justification for permanently dissolving the party.

- (11) Political parties which accept financial assistance from foreign states, international institutions and persons and corporate bodies shall be dissolved permanently.
- (12) The foundation and activities of political parties, their supervision and dissolution, or their deprivation of State aid wholly or in part as well as the election expenditures and procedures of the political parties and candidates, are regulated by law in accordance with the above-mentioned principles.

Article 21 of the Basic Law of the Federal Republic of Germany (1949 as amended 2006)

Article 21 Political parties

- (1) The political parties participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They have to publicly account for the sources and use of their funds and for their assets.
- (2) Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.
- (3) Details are regulated by federal statutes.

Article 8(4) of the Constitution of the Republic of Korea (1948 as amended 1987)

If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring action against it in the Constitutional Court for its dissolution, and, the political party is dissolved in accordance with the decision of the Constitutional Court.

Article 58 of the Constitution of the French Republic (1958 as amended 2008)

- (1) The Constitutional Council ensures the regularity of the election of the President of the Republic.
- (2) It examines complaints and proclaims the results of the vote.

Article 66(2)(2) of the Constitution of Mongolia (1992)

Article 66 (2) The Constitutional Court, in accordance with Paragraph (1), issues judgements to the National Parliament on:

- 2) the constitutionality of national referendums and decisions of the central election authority on the elections of the National Parliament and its members as well as on presidential elections;

Article 84 of the Constitution of the Republic of Zimbabwe (1979)

Article 84 Appointment of judges

- (1) The Chief Justice, Deputy Chief Justice, Judge President and other judges of the Supreme Court and the High Court is appointed by the President after consultation with the Judicial Service Commission.
- (2) If the appointment of a Chief Justice, Deputy Chief Justice, Judge President or a judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (1), the President causes the Senate to be informed as soon as is practicable.
- (3) The appointment of a judge in terms of this section, whether made before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 4) Act, 1984, may be made for a fixed period and any judge so appointed may, notwithstanding that the period of his appointment has expired, sit as a judge for the purpose of giving judgment or otherwise in relation to any proceedings commenced or heard by him while he was in office.

Article 104 of the Constitution of the Republic of Macedonia (1991 as amended 2005)

- (1) The Republican Judicial Council is composed of seven members.
- (2) The Assembly elects the members of the Council.
- (3) The members of the Council are elected from the ranks of outstanding members of the legal profession for a term of six years with the right to one reelection.
- (4) Members of the Republican Judicial Council are granted immunity. The Assembly decides on their immunity.
- (5) The office of a member of the Republican Judicial Council is incompatible with the performance of other public offices, professions or membership in political parties.

Article 109 of the Constitution of the Republic of Macedonia (1991 as amended 2005)

The Constitutional Court of the Republic of Macedonia is composed of nine judges.

The Assembly elects the judges of the Constitutional Court by a majority vote of the total number of Representatives. The term of office of the judges is nine years without a right to re-election.

The Constitutional Court elects a President from its own ranks for a three year term without a right to re-election.

Judges of the Constitutional Court are appointed from the ranks of outstanding members of the legal profession.

Article 19(3)(k) of the Constitution of the Republic of Hungary (1949 as amended 2003)

Article 19

- (3) Within this sphere of authority, the Parliament shall--
- k) elect the President of the Republic, the Prime Minister, the members of the Constitutional Court, the Parliamentary Ombudsmen, the President and Vice-Presidents of the State Audit Office, the President of the Supreme Court and the General Prosecutor;

Article 32A(4) of the Constitution of the Republic of Hungary (1949 as amended 2003)

The Constitutional Court shall consist of eleven members who are elected by the Parliament. Members of the Constitutional Court shall be nominated by the Nominating Committee which shall consist of one member of each political party represented in the Parliament. A majority of two-thirds of the votes of the Members of Parliament is required to elect a member of the Constitutional Court.

Article 48 of the Constitution of the Republic of Hungary (1949 as amended 2003)

- (1) Based on the recommendation made by the President of the Republic, the Parliament shall elect the President of the Supreme Court; based on the recommendation made by the President of the Supreme Court, the President of the Republic shall appoint the Deputy Presidents of the Supreme Court. A majority of two-thirds of the votes of the Members of Parliament is required to elect the President of the Supreme Court.
- (2) The President of the Republic shall appoint professional judges in the manner specified by law.
- (3) Judges may only be removed from office on the grounds and in accordance with the procedures specified by law.

Articles 24A-C of the Constitution of the Republic of Indonesia (1945 as amended 2002)

Article 24A

- (3) Candidate justices of the Supreme Court are proposed by the Judicial Commission to the DPR for approval and shall subsequently be formally appointed to office by the President.

Article 24B

- (3) The members of the Judicial Commission are appointed and dismissed by the President with the approval of the DPR.

Article 24C

- (3) The Constitutional Court is composed of nine persons who must be constitutional justices and who must be confirmed in office by the President, of whom three shall be nominated by the Supreme Court, three nominated by the DPR, and three nominated by the President.

Section 174 of the Constitution of the Republic of South Africa (1996)

Section 174 Appointment of judicial officers

- (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a citizen of South Africa.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are being appointed.
- (3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the President and Deputy President of the Constitutional Court; and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice.
- (4) The other judges of the Constitutional Court are appointed by the President as head of the national executive, after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
- (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
- (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
- (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
- (5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
- (6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.
- (7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.
- (8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

Article 81 of the Constitution of the Federal Democratic Republic of Ethiopia (1995)

Article 81 Appointment of Judges

- (1) The President and Vice-President of the Federal Supreme Court shall, upon recommendation by the Prime Minister, be appointed by the House of Peoples' Representatives.

- (2) Regarding other Federal judges, the Prime Minister shall submit to the House of Peoples' Representatives for appointment candidates selected by the Federal Judicial Administration Council.
- (3) The State Council shall, upon recommendation by the Chief Executive of the State, appoint the President and Vice-President of the State Supreme Court.
- (4) State Supreme and High Court judges shall, upon recommendation by the State Judicial Administration Council, be appointed by the State Council. The State Judicial Administration Council, before submitting nominations to the State Council, has the responsibility to solicit and obtain the views of the Federal Judicial Administration Council on the nominees and to forward those views along with its recommendations. If the Federal Judicial Administration Council does not submit its views within three months, the State Council may grant the appointments.
- (5) Judges of State First-Instance Courts shall, upon recommendation by the state Judicial Administration Council, be appointed by the State Council.
- (6) Matters of code of professional conduct and discipline as well as transfer of judges of any court shall be determined by the concerned Judicial Administration Council.

Article 101 of the Constitution of the Federative Republic of Brazil (1988)

The Justices of the Federal Supreme Court shall be appointed by the President of the Republic, after the choice is approved by the absolute majority of the Federal Senate.

Article 135 of the Constitution of the Italian Republic (1948 as amended 2003)

- (1) The constitutional court consists of fifteen justices; one third being appointed by the president, one third by parliament in joint session, and one third by ordinary and administrative supreme courts.
- (2) Justices are chosen from among magistrates including those in retirement, from among supreme ordinary and administrative courts, from among university full professors of law, and from among lawyers with at least twenty years of practice.
- (3) Justices are appointed for nine years, their term beginning the day they are sworn in and with no re-appointment.
- (4) At the end of this term justices have to leave office and may no longer exercise its functions.
- (5) The court elects from among its members and according to rules established by law its president who shall remain in office for three years and may be re-elected, but not exceed the ordinary term of justices.
- (6) The office of justice is incompatible with membership in parliament or in a regional council, with the exercise of the legal profession, or with any other position and office defined by law.
- (7) When sitting to decide on a case of impeachment against the president, the court consists of sixteen additional members, who are drawn by lot from a list

of citizens elected by parliament every nine years, from among those possessing the qualifications for election to the senate, by the same procedures as for the appointment of the ordinary justices.

Article 118 of the Constitution of the Islamic Republic of Afghanistan (2004)

A member of the Supreme Court shall have the following qualifications:

- The age of the Head of the Supreme Court and its members should not be lower than forty at the time of appointment
- Shall be a citizen of Afghanistan.
- Shall have a higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan.
- Shall have high ethical standards and a reputation of good deeds.
- Shall not have been convicted of crimes against humanity, crimes, and sentenced of deprivation of his civil rights by a court.
- Shall not be a member of any political party during the term of official duty.

Article 182(VI) of the Constitution of the Plurinational State of Bolivia (2009)*

In order to become a Magistrate of the Supreme Court of Justice one must satisfy the general requisites established for public servants: be thirty years of age; have a law degree, having performed judicial functions, practiced as a lawyer or have been a university professor, honestly and ethically, for eight years and not have been sanctioned with dismissal by the Judiciary Council. The determination of merit will take into account the performance as an originary authority under its system of justice.

* From Constitution of the Plurinational State of Bolivia, Translated to English by Luis Francisco Valle V.

Article 106 of the Constitution of the Italian Republic (1948 as amended 2003)

- (1) Appointment to the judiciary is based on competitive examinations.
- (2) The law on the organization of the judiciary may provide for honorary magistrates, possibly by election, to perform the duties of single judges.
- (3) By proposal of the superior council of the judiciary, full professors of law as well as lawyers with at least fifteen years practice and registered for practice in higher courts, may be appointed to the court of cassation for exceptional merits.

Article 135 of the Constitution of the Italian Republic (1948 as amended 2003)

- (1) The constitutional court consists of fifteen justices; one third being appointed by the president, one third by parliament in joint session, and one third by ordinary and administrative supreme courts.
- (2) Justices are chosen from among magistrates including those in retirement, from among supreme ordinary and administrative courts, from among university full

professors of law, and from among lawyers with at least twenty years of practice.

- (3) Justices are appointed for nine years, their term beginning the day they are sworn in and with no re-appointment.
- (4) At the end of this term justices have to leave office and may no longer exercise its functions.
- (5) The court elects from among its members and according to rules established by law its president who shall remain in office for three years and may be re-elected, but not exceed the ordinary term of justices.
- (6) The office of justice is incompatible with membership in parliament or in a regional council, with the exercise of the legal profession, or with any other position and office defined by law.
- (7) When sitting to decide on a case of impeachment against the president, the court consists of sixteen additional members, who are drawn by lot from a list of citizens elected by parliament every nine years, from among those possessing the qualifications for election to the senate, by the same procedures as for the appointment of the ordinary justices.

Article VI(1)(a) of the Constitution of Bosnia and Herzegovina (1995)

- 1) The Constitutional Court of Bosnia and Herzegovina shall have nine members.
 - (a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.

Article 142 of the Constitution of the Republic of Uganda (1995)*

142. Appointment of judicial officers.

- (1) The Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.
- (2) Where—
 - (a) the office of a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is vacant;
 - (b) a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is for any reason unable to perform the functions of his or her office; or
 - (c) the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires, the President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a justice of the Supreme Court or a Justice of Appeal or a judge of the High Court to

act as such a justice or judge even though that person has attained the age prescribed for retirement in respect of that office.

- (3) A person appointed under clause (2) of this article to act as a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall continue to act for the period of the appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is the earlier.

* Reprinted from and available at <<http://www.constitutionnet.org>>

Article 148 of the Constitution of the Republic of Uganda (1995)*

148. Appointment of other judicial officers.

Subject to the provisions of this Constitution, the Judicial Service Commission may appoint persons to hold or act in any judicial office other than the offices specified in article 147(3) of this Constitution and confirm appointments in and exercise disciplinary control over persons holding or acting in such offices and remove such persons from office.

* Reprinted from and available at <<http://www.constitutionnet.org>>

Article 222 of the Constitution of the Portuguese Republic (1976 as amended 2005)*

Article 222 (Composition and status of judges)

1. The Constitutional Court shall be composed of thirteen judges, ten of whom shall be appointed by the Assembly of the Republic and three co-opted by those ten.
2. Six of the judges who are appointed by the Assembly of the Republic or are co-opted shall obligatorily be chosen from among the judges of the remaining courts, and the others from among jurists.
3. The term of office of judge of the Constitutional Court shall be nine years and shall not be renewable.
4. The judges of the Constitutional Court shall elect its President.
5. Constitutional Court judges shall enjoy the same guarantees of independence, security of tenure, impartiality and absence of personal liability and shall be subject to the same incompatibilities as the judges of the other courts.
6. The law shall lay down the immunities and other rules governing the status of Constitutional Court judges.

* Reprinted from and available at <<http://www.en.parlamento.pt/>>

Article 147 of the Constitution of the Republic of Bulgaria (1991)

- (1) The Constitutional Court shall consist of 12 justices, one-third of whom shall be elected by the National Assembly, one-third shall be appointed by the President, and one-third shall be elected by a joint meeting of the justices of the Supreme Court of Cassation and the Supreme Administrative Court.

- (2) The justices of the Constitutional Court shall be elected or appointed for a period of nine years and shall not be eligible for re-election or re-appointment. The make-up of the Constitutional Court shall be renewed every three years from each quota, in a rotation order established by law.
- (3) The justices of the Constitutional Court shall be lawyers of high professional and moral integrity and with at least fifteen years of professional experience.
- (4) The justices of the Constitutional Court shall elect by secret ballot a Chairman of the Court for a period of three years.
- (5) The status of a justice of the Constitutional Court shall be incompatible with a representative mandate, or any state or public post, or membership in a political party or trade union, or with the practicing of a free, commercial, or any other paid occupation.
- (6) A justice of the Constitutional Court shall enjoy the same immunity as a Member of the National Assembly.

Article 135 of the Constitution of the Italian Republic (1948 as amended 2003)

- (1) The constitutional court consists of fifteen justices; one third being appointed by the president, one third by parliament in joint session, and one third by ordinary and administrative supreme courts.
- (2) Justices are chosen from among magistrates including those in retirement, from among supreme ordinary and administrative courts, from among university full professors of law, and from among lawyers with at least twenty years of practice.
- (3) Justices are appointed for nine years, their term beginning the day they are sworn in and with no re-appointment.
- (4) At the end of this term justices have to leave office and may no longer exercise its functions.
- (5) The court elects from among its members and according to rules established by law its president who shall remain in office for three years and may be re-elected, but not exceed the ordinary term of justices.
- (6) The office of justice is incompatible with membership in parliament or in a regional council, with the exercise of the legal profession, or with any other position and office defined by law.
- (7) When sitting to decide on a case of impeachment against the president, the court consists of sixteen additional members, who are drawn by lot from a list of citizens elected by parliament every nine years, from among those possessing the qualifications for election to the senate, by the same procedures as for the appointment of the ordinary justices.

Article 132 of the Constitution of the Islamic Republic of Afghanistan (2004)

- (1) Judges are appointed with the recommendation of the Supreme Court and approval of the President.
- (2) The appointment, transfer, promotion, punishment, and proposals to retire

judges are within the authority of the Supreme Court in accordance with the law.

- (3) The Supreme Court shall establish the General Administration Office of the Judicial Power for the purpose of better arrangement of the administration and judicial affairs and insuring the required improvements.

Article 110 of the Constitution of the Argentine Nation (1994)*

The Justices of the Supreme Court and the judges of the lower courts of the Nation shall hold their offices during good behavior, and shall receive for their services a remuneration to be ascertained by law and which shall not be diminished in any way while holding office.

* Reprinted from and available at <http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf>

Article 147 of the Constitution of the Republic of Estonia (1992)

- (1) Judges shall be appointed for life. The bases and procedures for recalling judges shall be determined by law.
- (2) Judges may be recalled only by a Court decision.
- (3) Judges may not hold any other elected or appointed office, except in cases prescribed by law.
- (4) Guarantees for the independence and the legal status of judges shall be determined by law.

Article 77 of the Political Constitution of the Republic of Chile (1980)

As long as Judges perform their duties properly, they shall remain in office; however, lower court Judges shall perform their respective judgeship for the period determined by law.

Notwithstanding the above, Judges shall cease their functions upon completing the age of 75 years; or resignation or legal supervening disability or in case they are deposed from their positions for legally sentenced cause. The norm relative to age shall not apply with regard to the President of the Supreme Court who shall remain in his post through the end of his term.

At any rate, the Supreme Court may, upon demand by the President of the Republic, upon request made by an interested party or by an official letter, declare that Judges have not performed their duties properly, and, subject to the statement by the defendant and to a report from the respective Court of Appeals, the majority of its members may agree to remove them from office. These agreements shall be communicated to the President of the Republic in order that they may enter into effect.

The President of the Republic, at the proposal or decision of the Supreme Court, may authorize exchanges or order the transfer of Judges or other officials and employees of the Judiciary from one post to another of equal rank.

*Reprinted from and available at <<http://confinder.richmond.edu/>>

Article 291 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1999)

- (1) A judicial officer appointed to the Supreme Court or the Court of Appeal may retire when he attains the age of sixty-five years and he shall cease to hold office when he attains the age of seventy years.
- (2) A judicial officer appointed to any other court, other than those specified in subsection (1) of this section may retire when he attains the age of sixty years and he shall cease to hold office when he attains the age of sixty-five years.
- (3) Any person who has held office as a judicial officer -
 - (a) for a period of not less than fifteen years shall, if he retires at or after the age of sixty-five years in the case of the Chief Justice of Nigeria, a Justice of the Supreme Court, the President of the court of Appeal or a Justice of the Court of Appeal or at or after the age of sixty years in any other case, be entitled to pension for life at a rate equivalent to his last annual salary and all his allowances in addition to any other retirement benefits to which he may be entitled;
 - (b) for a period of less than fifteen years shall, if he retires at or after the age of sixty-five years or sixty years, as the case may be, be entitled to pension for life at a rate as in paragraph (a) of this subsection pro rata the number of years he served as a judicial officer in relation to the period of fifteen years, and all his allowances in addition to other retirement benefits to which he may be entitled under his terms and conditions of service; and
 - (c) in any case, shall be entitled to such pension and other retirement benefits as may be regulated by an Act of the National Assembly or by a Law of a House of Assembly of a State.
- (4) Nothing in this section or elsewhere in this Constitution shall preclude the application of the provisions of any other law that provides for pensions, gratuities and other retirement benefits for persons in the public service of the Federation or a State.

* Reprinted from and available at <<http://www.nigeria-law.org/>>

Article 105 of the Constitution of the Republic of Korea (1948 as amended 1987)

- (1) The term of office of the Chief Justice is six years and he cannot be reappointed.
- (2) The term of office of the Justices of the Supreme Court is six years and they may be reappointed as prescribed by law.
- (3) The term of office of judges other than the Chief Justice and Justices of the Supreme Court is ten years, and they may be reappointed under the conditions as prescribed by law.
- (4) The retirement age of judges is determined by law.

Article 207 of the Constitution of the Republic of Guatemala (1985 as amended 1993)

Article 207 - Requirements to be a magistrate or judge

Magistrates and judges must be of Guatemalan origin, of recognized integrity, be in enjoyment of their rights as citizens and be registered lawyers, with the exceptions established by law with respect to the latter requirement in relation to specific judges of private jurisdiction and judges of lower courts.

The law shall specify the number of judges as well as the organization and functioning of courts and procedures to be observed, according to the matter in question.

The role of magistrate or judge is incompatible with any other employment, with leadership positions in unions and political parties, and with the quality of minister of any religion.

The magistrates of the Supreme Court of Justice take an oath before the Congress, swearing to promptly and fully administer justice. The other magistrates and judges, take an oath before the Supreme Court.

* Translated from the Spanish version available at <<http://pdba.georgetown.edu/>>

Article 215 of the Constitution of the Republic of Guatemala (1985 as amended 1993)*

Article 215 - Election of the Supreme Court.

The magistrates of the Supreme Court shall be elected by the Congress of the Republic for a period of five years, from a list of twenty-six candidates proposed by a nominating committee composed of one representative of the rectors of the universities of the country, who shall chair the committee, deans of law schools and legal and social science departments from each university in the country, an equal number of representatives elected by the General Assembly of the College of Lawyers and Notaries of Guatemala and an equal number of representatives elected by the magistrates of the Court of Appeals and other courts referred to in Article 217 of this Constitution.

The choice of candidates requires the vote of at least two-thirds of the members of the committee.

In voting to integrate on the Nominating Committee or the list of candidates, no representation will be accepted.

The magistrates of the Supreme Court shall elect from among its members, by the affirmative vote of two-thirds, the chief justice, who shall hold office for a year and may not be reappointed during the period of the Court.

* Translated from the Spanish version available at <<http://pdba.georgetown.edu/>>

Article 79 of the Constitution of Japan (1946)

- (1) The Supreme Court shall consist of a Chief Judge and such number of judges

as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

- (2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter.
- (3) In cases mentioned in the preceding paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.
- (4) Matters pertaining to review shall be prescribed by law.
- (5) The judges of the Supreme Court shall be retired upon the attainment of the ages as fixed by law.
- (6) All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Article 4 of the Federal Constitutional Court Act of Germany (1951 as amended 2009)

- (1) The term of office of the judges shall be twelve years, not extending beyond retirement age.
- (2) Immediate or subsequent re-election of judges shall not be permissible.
- (3) Retirement age shall be the end of the month in which a judge reaches the age of 68.
- (4) Upon expiration of his term of office a judge shall continue to perform his functions until a successor is appointed.

Article 128 of the Albanian Constitution (1998)

The judge of the Constitutional Court can be removed from office by the Assembly by two-thirds of all its members for violations of the Constitution, commission of a crime, mental or physical incapacity, acts and behavior that seriously discredit the position and reputation of a judge. The decision of the Assembly is reviewed by the Constitutional Court, which, upon verification of the existence of one of these grounds, declares the removal from duty of the member of the Constitutional Court.

Article 141 of the Constitution of the Gambia (1997)*

141. Tenure of office of judges

- (1) No office of judge shall be abolished while there is of judges a substantive holder thereto.
- (2) Subject to the provisions of this section, a judge of a Superior Court-
 - (a) may retire on pension at any time after attaining the age of sixty five years;
 - (b) shall vacate the office of judge on attaining the age of seventy years; or
 - (c) may have his or her appointment terminated by the President in consultation with the Judicial Service Commission.

- (3) Notwithstanding that he or she has attained the age at which he or she is required to vacate his or her office as provided in this section, a person holding the office of judge may continue in office for a period of six months after attaining that age to enable him or her to deliver judgment or do any other thing in relation to proceedings that were commenced before him or her previously thereto.
- (4) The Chief Justice, a justice of the Supreme Court, the Court of Appeal and the High court and members of the Special Criminal Court may only be removed from office for inability to perform the functions of his or her judicial office, whether arising from infirmity of body or mind, or for misconduct.
- (5) A judge may be removed from his or her office if notice in writing is given to the Speaker, signed by not less than one-half of all the voting members of the National Assembly, of a motion that judge is unable to exercise the functions of his or her office on any of the grounds stated in subsection (4) and proposing that the matter should be investigated under this section.
- (6) Where a notice of a motion is received by the Speaker under subsection (5), the Speaker shall forthwith cause a vote to be taken on the motion without debate
- (7) If such motion is adopted by the votes of not less than two-thirds of all the members of the National assembly-
 - (a) The National Assembly shall, by resolution, appoint a tribunal consisting of three persons, at least one of whom shall hold or shall have held high judicial office who shall be the chairman of the tribunal;
 - (b) the tribunal shall investigate the matter and shall report to the National Assembly through the Speaker whether or not it finds the allegations specified in the motion have been substantiated.
 - (c) If the tribunal reports to the National Assembly that it finds the particulars of any such allegation have not been substantiated, no further proceedings shall be taken under this section in respect of that allegation;
 - (d) If the tribunal reports to the National Assembly that it finds that the particulars of any such allegation have been substantiated, the National Assembly shall consider the report at the first convenient sitting and if, on a motion supported by the votes of not less than two-thirds of all the members, the National Assembly resolves that the judge be removed from office, the judge shall immediately cease to hold office.
- (8) Where a tribunal is established under this section in respect of any judge, the judge shall stand suspended from office. The suspension shall cease to have effect if the tribunal reports that none of the allegations against the judge has been substantiated or if a motion for his or her removal from office is not supported as provided in paragraph (d) of subsection (7).
- (9) All proceedings in a tribunal under this section shall be held in camera and the judge concerned shall have the right to appear and be legally represented before the tribunal.

* Reprinted from and available at <<http://www.ncce.gm/files/constitution.pdf>>

Article 124 of the Constitution of the Republic of India (1950 as amended 1995)

Article 124 Establishment and Constitution of Supreme Court

- (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.
- (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that -

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
 - (b) a judge may be removed from his office in the manner provide in clause (4).
- (2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.
- (3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and -
 - (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
 - (b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
 - (c) is, in the opinion of the President, a distinguished jurist.

Explanation I: In this clause “High Court” means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II: In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocateshall be included.

- (4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.
- (5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge

under clause (4).

- (6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.
- (7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court of before any authority within the territory of India.

Article 123 the Constitution of the Republic of Croatia (1990 as amended 2001)

- (1) Judges shall, according to the Constitution and law, be appointed and relieved of duty by the National Judicial Council, which will also decide on all matters concerning their disciplinary responsibilities.
- (2) In the process of appointment and relief of judges the National Judicial Council shall obtain the opinion of the authorized committee of the Croatian Parliament.
- (3) The National Judicial Council shall consist of eleven members elected by the Croatian Parliament in conformity with law, from among notable judges, attorneys-at-law and university professors of law. The majority of members of the National Judicial Council shall be from the ranks of judges.
- (4) Presidents of courts may not be elected as members of the National Judicial Council.
- (5) Members of the National Judicial Council shall be elected for a four-year term and no one may be a member of the National Judicial Council for more than two subsequent terms.
- (6) The President of the National Judicial Council shall be elected by secret ballot by a majority of the members of the National Judicial Council for a two-year term of office.
- (7) The jurisdiction and the proceedings of the National Judicial Council shall be regulated by law.

Article 105 of the Constitution of the Italian Republic (1948 as amended 2003)

The superior council of the judiciary, as defined by organizational law, has the exclusive competence to appoint, assign, move, promote, and discipline members of the judiciary.

Chapter 12, Article 8 of Sweden’s Instrument of Government (1975 as amended 2002)

- (1) Proceedings under penal law on account of a criminal act committed by a member of the Supreme Court or the Supreme Administrative Court in the exercise of his official functions shall be brought before the Supreme Court by a Parliamentary Ombudsman or by the Justice Chancellor.
- (2) The Supreme Court shall likewise examine and determine whether, in accordance with the provisions laid down in this connection, a member of the Supreme Court or the Supreme Administrative Court shall be removed from office or suspended from duty, or shall be obliged to undergo a medical examination.

Proceedings to this effect shall be initiated by a Parliamentary Ombudsman or by the Justice Chancellor.

Article 97 of the Basic Law of the Federal Republic of Germany (1949 as amended 2009)

Independence of judges

- (1) The judges are independent and subject only to the law.
- (2) Judges appointed permanently on a fulltime basis in established positions cannot, against their will, be dismissed or permanently or temporarily suspended from office or given a different posting or retired before the expiration of their term of office except by virtue of a judicial decision and only on the grounds and in the form provided for by statute. Legislation may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Article 98 of the Basic Law of the Federal Republic of Germany (1949 as amended 2009)

- (1) The legal status of the federal judges is regulated by a special federal statute.
- (2) Where a federal judge, in his official capacity or unofficially, infringes the principles of this Constitution or the constitutional order of a State [Land], the Federal Constitutional Court may decide by a two-thirds majority, upon the request of the House of Representatives [Bundestag], that the judge be given a different office or retired. In a case of intentional infringement, his dismissal may be ordered.
- (3) The legal status of the judges in the States [Länder] is regulated by special State [Land] statutes, insofar as Article 74 I No. 27 does not provide otherwise.
- (4) The States [Länder] may provide that the State [Land] minister of Justice together with a committee for the selection of judges decides on the appointment of judges in the States [Länder].
- (5) The States [Länder] may, in respect of State [Land] judges, enact provisions corresponding to those of Paragraph II. Existing State [Land] constitutional law remains unaffected. The decision in a case of impeachment of a judge rests with the Federal Constitutional Court.

Article 122 of the Constitution of the Republic of Croatia (1990 as amended 2001)

- (1) Judicial office shall be permanent.
- (2) Exceptionally to the provision of section 1 of this Article, at the assuming of judicial duty for the first time, judges shall be appointed for a five-year term. After the renewal of the appointment, the judge assumes his duty as permanent. A judge shall be relieved of his judicial office:

- at his own request,
- if he has become permanently incapacitated to perform his office,
- if he has been sentenced for a criminal offence which makes him unworthy to hold judicial office,
- if, in conformity with law, so decides the National Judicial Council due to the commission of an act of serious infringement of discipline,
- when reaching seventy years of age.

- (3) Against the decision of being relieved from his duty the judge shall have the right to appeal to the Constitutional Court within the term of 15 days from the day the decision has been served, onto which the Constitutional Court shall decide in the procedure and composition determined by the Constitutional Act on the Constitutional Court of the Republic of Croatia.
- (4) Against the decision of the National Judicial Council on disciplinary responsibility, the judge shall have the right to appeal to the Constitutional Court of the Republic of Croatia within the term of 15 days from the day the decision has been served. The Constitutional Court shall decide on the appeal in the way and the procedure determined by the Constitutional Act on the Constitutional Court of the Republic of Croatia.
- (5) In the cases from sections 4 and 5 of this Article, the Constitutional Court shall decide within the term not longer than 30 days from the day the appeal has been submitted. The decision of the Constitutional Court excludes the right to the constitutional complaint.
- (6) A judge shall not be transferred against his will except in the case the Court is abolished or reorganized in conformity with law.
- (7) A judge shall not hold an office or perform work defined by law as being incompatible with his judicial office.

Article 134 of the Constitution of the Republic of Slovenia (1991 as amended 2003)

- (1) No one who participates in making judicial decisions may be held accountable for an opinion expressed during decision-making in court.
- (2) If a judge is suspected of a criminal offence in the performance of judicial office, he may not be detained nor may criminal proceedings be initiated against him without the consent of the National Assembly.

Article 121 of the Constitution of Malaysia (1957 as amended 1994)*

- (1) Subject to Clause (2) the judicial power of the Federation shall be vested into High Courts of co- ordinate jurisdiction and status, namely-
 - (a) one of the States of Malaya, which shall be known as the High Court in Malaya and shall have its principle registry in Kuala Lumpur; and
 - (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principle registry at such place in the

States of Sabah and Sarawak as the Yang di- Pertaun Agong may determine;

(c) (Repealed);

and in such inferior courts as may be provided by federal law.

(2) The following jurisdiction shall be vested in a court which shall be known as the Mahkamah Agung (Supreme Court) and shall have its principle registry in Kuala Lumpur, that is to say-

(a) exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decision of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the Court);

(b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law.

(3) Subject to any limitations imposed by or under federal law, any order, decree, judgement or process of the courts referred to in Clause (1) or of any judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.

(4) In determining where the principal registry of the High Court in Borneo is to be, the Yang di-Pertuan Agong shall act on the advice of the Prime Minister, who shall consult the Chief Ministers of the States of Sabah and Sarawak and the Chief Justice of the High Court.

* Reprinted from and available at <<http://confinder.richmond.edu/admin/docs/malaysia.pdf>>

Article 4 of the Constitution of the Republic of Mozambique (16 November 2004)*

The State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution.

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Article 212(3) of the Constitution of the Republic of Mozambique (16 November 2004)*

The law may establish institutional and procedural mechanisms for links between courts and other forums whose purpose is the settlement of interests and the resolution of disputes.

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Article 246 of the Political Constitution of Colombia (1991 as amended 2005)

The authorities of the indigenous [Indian] peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system.

* Reprinted from and available at <<http://confinder.richmond.edu/>>

Article 15(4)(c) of the Constitution of Botswana (1966)*

15. Protection from discrimination on the grounds of race, etc.

- (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression “discriminatory” means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—
 - (a) for the appropriation of public revenues or other public funds;
 - (b) with respect to persons who are not citizens of Botswana;
 - (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

* Reprinted from and available at <http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf>

Article 7(f) of the Constitution of the Gambia (1997)*

7. The laws of The Gambia

In addition to this Constitution, the laws of The Gambia consist of—

- (a) Acts of the National Assembly made under this Constitution and subsidiary legislation made under such Acts;
- (b) Any orders, Rules, Regulations or other subsidiary legislation made by a person or authority under a power conferred by this Constitution or any other law;

- (c) The existing laws including all decrees passed by the Armed Forces Provisional Ruling Council;
- (d) The common law and principles of equity;
- (e) Customary law so far as concerns members of the communities to which it applies;
- (f) The sharia as regards matters of marriage, divorce and inheritance among members of the communities to which it applies.

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CHAPTER 7

CHAPTER 7

Decentralized Forms of Government

Markus Böckenförde

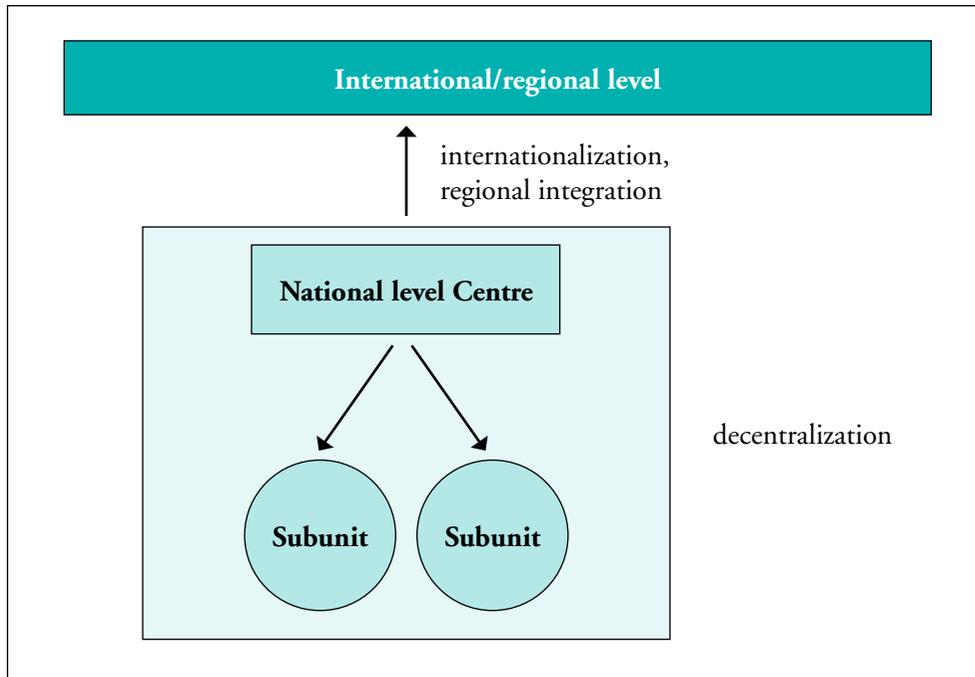
1. The aim of this chapter and an overview

1.1. What is decentralization?

The term ‘decentralization’ can capture a variety of phenomena. Political actors, stakeholders and multilateral institutions have considered decentralization a solution to the problems of many countries—particularly in post-conflict settings. Consequently, various concepts have become associated with the term ‘decentralization’, and some experts have further conflated it with other meanings. This confusion complicates the task of analysing and applying the concept of decentralization in the context of constitution building.

This chapter and the International IDEA Guide—*A Practical Guide to Constitution Building*—more generally understand ‘decentralization’ as a generic term for the dispersal of governmental authority and power away from the national centre to other institutions at other levels of government¹ or levels of administration.² Decentralization is thereby understood as a territorial concept. Authorities and powers are allocated to regional, provincial or local levels (see figure 1).

Figure 1. The transfer of powers upwards to an international or regional institution



Source: Böckenförde, M., *Decentralization from a Legal Perspective: Options and Challenges* (Gießen: TransMIT, 2010).

Decentralization is a two-way street. Experts use the term mainly to describe the transfer of power and authority from the national level to *provincial* or *local* levels of government within a country, but decentralization also might occur through the transfer of powers upwards from the national level to an *international* or *regional*^B institution. The latter form of ‘upward’ decentralization is often referred to as ‘regional integration’

‘Decentralization’ is a generic term for the dispersal of governmental authority and power away from the national centre to other institutions at other levels of government or levels of administration.

or ‘internationalization’ of certain powers. Although the transfer of authority to international bodies implies elements of shifting central powers, this chapter focuses on aspects of decentralization *within* a country and addresses only briefly the effects of ‘upward decentralization’ and its relevance for constitutional practitioners (see box 1).

Box 1. Regional integration and internationalization

Decentralization not only provides the opportunity to disperse power within a country; it also allows the transfer of power and authority to an international or regional level. In most international or regional treaties, upon ratification, countries commit themselves to implement explicitly-stated international or

regional requirements through mechanisms and institutions which are adopted nationally. However, other international treaties also establish free-standing international or regional institutions that exercise certain functions that member countries have transferred to them (the African Union (AU), Association of South-east Asian Nations (ASEAN), North American Free Trade Agreement (NAFTA), East African Community, League of Arab States, etc.). Some international or regional institutions might even evolve into quasi-governmental settings over time. Over the last few decades, the European Union (EU) has gained continuously greater power and authority from its member states, a transfer that has created a supranational government with executive, legislative and judicial authority. Historically, a continuous process of ‘upward’ decentralization created countries such as Switzerland, the United Arab Emirates and the United States.

‘Internationalization’ and ‘regional integration’ will probably exert only indirect and remote influence when a new constitution is being negotiated and drafted: generally, subsequent governments and parliaments—rather than the constitutional assembly—will consider signing and ratifying international agreements that transfer power to supranational bodies. However, as the case of Spain illustrates, the two issues may have to be addressed at the same time: after the death of General Francisco Franco, constitution builders in 1975–8 had to consider the potential constitutional requirements for joining the European Economic Community (EEC) after filing an application for membership in 1976.

Beyond regional integration, the issue retains salience for constitution builders at a universal level as well. The criteria for accession to the World Trade Organization (WTO) or the Rome Statute of the International Criminal Court, for instance, require that members adopt a particular constitutional structure. To comply with some requirements of the Rome Statute as well as EU integration, Germany had to adjust provisions of its Constitution concerning the extradition of German nationals. Article 16(2)* of the Basic Law now reads: ‘No German may be extradited to a foreign country. A different regulation providing for the extradition to a member state of the European Union or to an international court of law may be made as long as the fundamental principles of a state governed by law are observed.’ More generally, several constitutions now include provisions that explicitly authorize a shift in sovereignty to international institutions (e.g. articles 23 and 24 of the Constitution of Germany;** Article 7 of the Constitution of Singapore;*** Article 70 of the Constitution of the Central African Republic (2004); Article 2(A) of the Constitution of Hungary****).

Aside from considering future opportunities for ‘internationalization’ and ‘regional integration’ while drafting the constitution, constitution builders must also acknowledge powers already transferred to international or regional bodies. In post-conflict settings (after the end of a civil war) or in other contexts of decisive change (e.g. the transition to democracy), according to international law, constitution builders and new governments must abide by international

obligations previously entered into. Drafters must therefore understand particular treaty obligations that will continue to bind the new government.

* *Grundgesetz* [Basic Law] of the Federal Republic of Germany (1949) as of 2010.

** Ibid.

*** Constitution of the Republic of Singapore (1965) as of 2008.

**** Constitution of the Republic of Hungary (1949) as of 2007.

Decentralization can involve two facets: first, assigning sub-national levels of government elements of ‘self-rule’ by which they obtain the authority to regulate and/or run certain functions or services on their own (e.g. health care, primary education, etc.); and, second, by establishing a system of ‘shared rule’, allowing sub-national entities to be involved in national rule making, often through a second chamber at the national legislature or by providing a list of ‘concurrent powers’ that allows various levels of government to regulate a specific area together. Often, both facets are part of a decentralization scheme.

1.2. Objectives of decentralization

While the motivation for decentralization will often vary from state to state, the following two sets of objectives are the most prevalent:

- to design efficient service delivery based on the principle of subsidiarity: services that can be effectively provided by lower levels of government should fall in their responsibility; to distribute public power broadly so as to achieve more effective and responsive government; to broaden access to government services and economic resources; and to encourage greater public participation in government; and
- to construct a government structure in which diverse groups can live together peacefully; and to allow stakeholders representing a minority or marginalized regions to identify their space in the system, thereby underpinning the stability of the state by persuading them to remain loyal.

The objectives that apply in the particular context will often influence the design of decentralization efforts. Textbooks suggest that transferring responsibilities from the national to the *local* level of government can improve service delivery and accountability, whereas transferring authority to the *regional, provincial* or *state* level might best accommodate ethnic diversity. However, especially in post-conflict societies, caution

and prudence should apply in designing the appropriate form of decentralization in order to avoid reverse effects: weak local structures and lack of skilled human resources may produce an incompetent and corrupt local government, whereas ill-tailored ethnic decentralization may fuel secessionist movements even more.

One objective of decentralization can be to construct a government structure in which diverse groups can live together peacefully and to allow stakeholders representing a minority or marginalized regions to identify their space in the system.

This chapter offers a menu of options for decentralization to facilitate the search and negotiations for the appropriate design for decentralization. Decentralization is not a priority for every political actor. Some political stakeholders in the process of constitution building may aspire to concentrate power at the centre. Controlling the state usually provides access to economic power since the state—especially in developing and transitional countries—represents the predominant concentration of capital. Thus, power brokers often compete hard to control the state apparatus at the expense of delivering local or regional services efficiently. Indeed, constant marginalization of the periphery is one cause of internal conflicts.

A second set of challenges arise from attempts to adopt state symbols rooted in the religion, identity or traditions of one particular community or ethnicity. Such provocative gestures permit rulers to strengthen their power base but alienate other communities in the process. Neutral symbols or a strong commitment to anti-discrimination laws will have the opposite effect but might not inspire the desired loyalty among supporters or citizens more generally.⁴

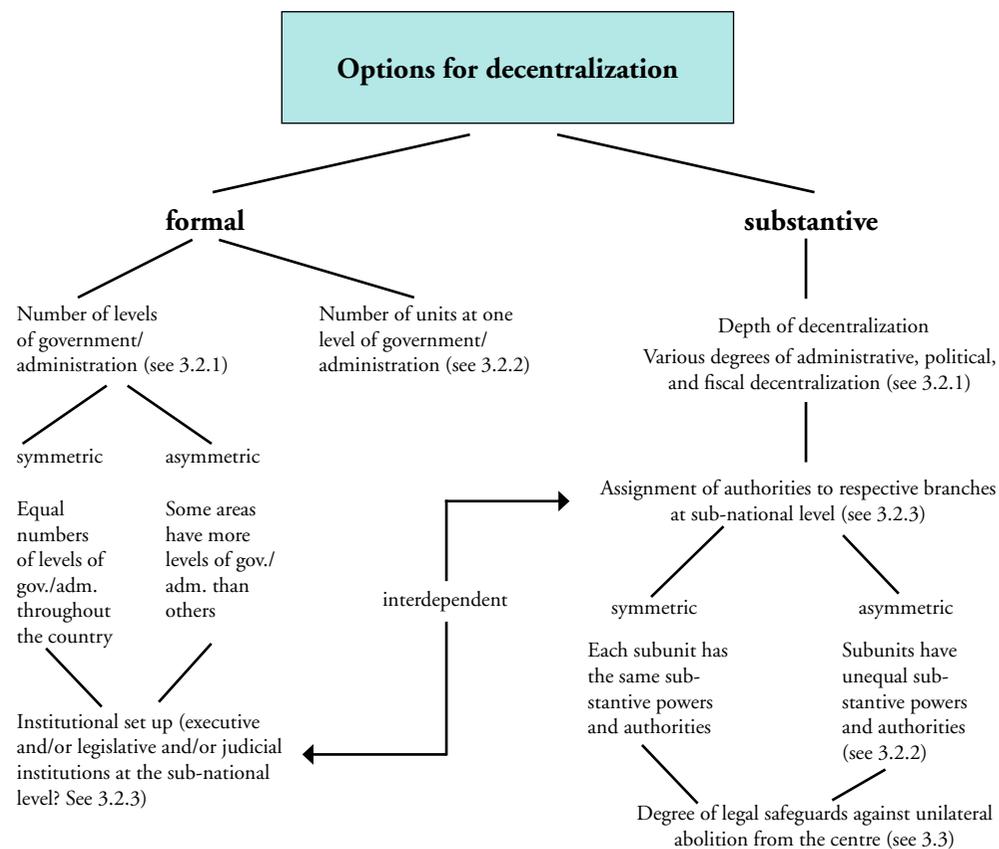
1.3. Components and aspects of decentralization

A pure form of centralized government concentrates powers and resources from both a territorial and a functional perspective. A purely centralized government hardly exists—with the possible exception of the Vatican State and other micro-states. Once the central government creates substructures or shifts any powers or resources to existing substructures, a form of decentralization occurs. Decentralization comes in many forms, offering numerous options for meeting different challenges. A wide variety of models exist to meet the two sets of objectives addressed above, each often containing a formal and a substantive component. The chapter discusses those issues as laid out in figure 2.

Decentralization takes many forms. A wide variety of models exist, each often containing a formal and a substantive component.

The formal component of decentralization (sometimes referred to as ‘geographic decentralization’) addresses the structure of government by determining both the levels of government, from local to national, and the number of subunits within each level of government (see the left-hand column in figure 2). In other words, it answers the following set of questions. How many levels of government or levels of administration should the country have? (See section 3.1.1.) Within one level of government or administration, how many units should it entail (for example, how many regions should be established at the regional level)? (See section 3.1.2.) Either inquiry can identify asymmetric structures, which means that some levels of government or administration might not exist throughout the country, but only in some parts of the country. The next, more specific, task is about the actual institutional set-up in the units: should there be an executive/administrative branch of government only, implementing national policies, or should there also be a legislature, enacting regional policies, or even a judiciary adjudicating on regional law? (See section 3.2.3.)

Figure 2. Options for decentralization



Previous agreements and historical events can determine the applicable territorial and governmental structure. However, particularly after violent conflict or internal crisis, constitution builders can reconfigure that structure to reflect new substantive deals or reforms. Examples include Germany after World War II and South Africa after the apartheid regime.

The formal component of decentralization addresses the structure of government by determining both the levels of government, from local to national, and the number of subunits within each level of government, as well as the actual institutional set-up in the units. These are interdependent.

the various levels (often referred to as the 'depth of decentralization').

The substantive component of decentralization (see the right-hand column of figure 2) measures how the formal structure is actually filled with substantive authorities (sometimes referred to as 'functional decentralization'). What actual powers are assigned to the lower levels of government? Some countries may have a similar formal structure, but differ considerably with regard to the powers and competences assigned to

The depth of decentralization varies across systems on a continuum, from those characterized as centralized to those considered strongly decentralized. Distinguishing between the following three aspects of decentralization greatly assists in measuring its cumulative degree—administrative decentralization, political decentralization, and fiscal decentralization (see section 3.2.1). How deep does a country intend decentralization to go?

The substantive component of decentralization measures how the formal structure is actually filled with substantive powers—the depth of decentralization. It can be measured by considering three aspects: administrative, political and fiscal decentralization.

Although the formal structure of decentralization will hardly determine its depth, it narrows the substantive options of decentralization. As indicated by the arrow in figure 2, the formal structure and actual substantive power are interdependent: the allocation of far-reaching powers at lower levels of government requires an adequate institutional setting in the first place. If, for example, the formal structure does not provide for an elected legislature at the sub-national level, substantive legislative powers cannot be assigned to that level. Thus, the creation of separate branches of government—an executive, a legislature or a judiciary—at the sub-national level will influence the depth of decentralization by any measure (see section 3.2).

The overall viability of decentralization depends not only on the structure and depth of dispersal but also on whether there are legal safeguards against unilateral revocation by the national centre.

The overall viability of decentralization depends not only on the structure and depth of dispersal but also on whether constitution builders legally safeguard dispersal against unilateral revocation by the national centre (see section 3.3). At this stage, the term 'federalism' is introduced as a specific form of decentralization. Probably the most specific characteristic of a federal structure is the legal safeguard it provides for the subunits—a legal framework that the national centre cannot amend easily at the expense of the subunits, and a legal watchdog—most commonly the judiciary—to enforce any constitutional bargain on decentralization. Thus, a constitutional structure delineating a federal legal relationship between the different levels of government can support any constitutional bargain against unilateral changes by the centre.

2. Context matters

Experts can point to various means by which decentralization can be designed to resolve challenges in conflict-prone countries. However, specific national and regional contexts can have adverse impacts and can neutralize the positive effects of decentralization on conflicts (see table 1). Empirical studies underscore that, whereas some countries have successfully settled a previous conflict by introducing decentralization, others have failed, occasionally falling into deeper conflict. Identifying the proper form and design of decentralization may be one of the most challenging tasks for constitution builders.

Success depends not only on the individual characteristics of a country and conflict. It might also turn on the power brokers involved and their commitment to building a nation. Contentious issues can differ depending on the level of decentralization. While transferring authority to the *regional, state or provincial* level typically involves a struggle over controlling and balancing power, decentralizing authority to *local* governments more often concerns service delivery.

The political culture can impede decentralization, particularly when it values the idea of final authority—whether for certain governmental institutions or for the ‘nation’ as such. The perception that all law must apply uniformly to everyone regardless of the subject matter can further complicate the decentralization process, as can the assumption that citizens owe loyalty only to the central state. Self-interest on the part of political leaders can exacerbate such problems. To achieve effective decentralization, leaders at each level

Decentralization can be designed to resolve challenges in conflict-prone countries, but the national or regional context can have adverse impacts. Some countries have successfully settled a conflict by introducing decentralization, while others have failed.

of government must commit themselves to the concept, particularly the national leaders, who must relinquish power and authority. The political leaders of minority or regional groups can exchange the struggle against the state—which might even include a desire for secession—for an opportunity to participate peacefully and constructively in governing the state, albeit at a sub-national level.

As table 1 illustrates, the positive effects of decentralization can turn negative if constitution builders ignore context or fail to commit themselves to decentralization.

Table 1. The positive and negative effects of decentralization

Positive: decentralizing power can assist in:	Negative: decentralizing power might cause:
<p>... <i>limiting authoritarianism at the national level.</i> Some forms of decentralization require power sharing, thereby diffusing power vertically.</p>	<p>... <i>the strengthening of local elites who could misuse power.</i> Powerful interests can misuse the community or local government for private interests. Corruption is hard to eradicate at the level of small and potentially inefficient local governments.</p>
<p>... <i>increasing responsiveness to the needs and preferences of the people.</i> Local communities are more likely to respond to local needs.</p>	<p>... <i>ineffectiveness due to deficient human and financial resources.</i> Communities can be too small and overwhelmed to fulfil their functions properly because they do not have sufficient human and financial resources.</p>

<p>... <i>managing tensions and potential conflicts within countries featuring a diverse population.</i> Decentralization might enable minority groups to enjoy a degree of self-governance as well as to acquire a majority status in their own region. Political leaders of minority groups can fill a formally recognized leadership position at the regional level.</p>	<p>... <i>local elites and politicians to demand greater autonomy.</i> ... <i>the establishment of new regional majorities.</i> Assigning majority status to a national minority in a specific region might create new minorities, thereby only shifting instead of resolving the problem.</p>
<p>... <i>encouraging positive, active approaches to government and policy development.</i> By creating alternative sources of governing authority, decentralization promotes policy competition, policy experimentation and policy innovation.</p>	<p>... <i>harmful competition between regions.</i> Decentralization might lead to inequality and rivalry between regions, since natural resources, industries and employment opportunities differ by region. Moreover, a ‘race to the bottom’ might result as regions progressively weaken regulation in order to attract business and capital.</p>
<p>... <i>structuring the complexity of government.</i> By distributing suitable powers to regional or local governments, decentralization spreads the burden of government and enables the national centre to focus on key challenges and priorities.</p>	<p>... <i>duplication of work and greater operating expenses.</i> Decentralization can duplicate government functions and permit inefficient, overlapping or contradictory policies in different parts of the country. Decentralized systems also cost more given the greater number of elected or paid officials at several levels of government.</p>

Another important context-related variable that influences the effectiveness of decentralization is the dynamics of the political party system in a country—in particular whether parties are regionalized. For instance, the degree to which regionalized national parties or independent regional parties dominate the regional political landscape might determine how far decentralization as a constitutional design materializes into the decentralization of political power.⁵

Identifying the proper form and design of decentralization may be one of the most challenging tasks for constitution builders. Success can also turn on the power brokers involved and dynamics of the political party system in a country. Powerful interests can misuse decentralization for private interests.

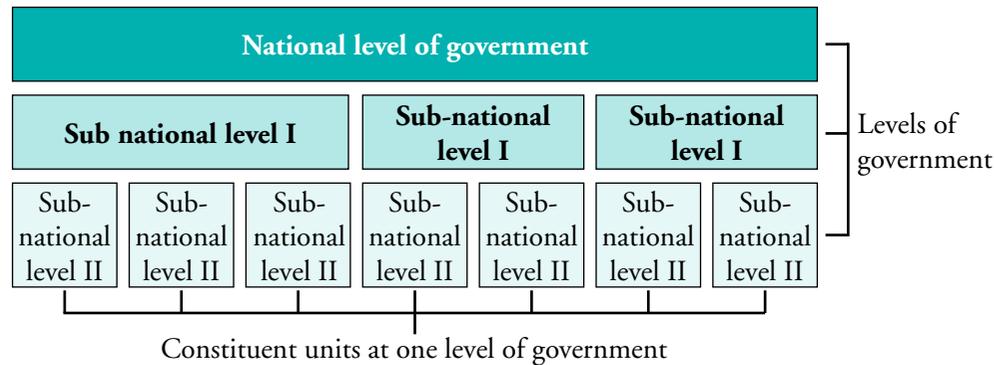
3. Design options

3.1. The configuration of decentralization: setting the formal structure

The configuration of decentralization provides the territorial structure of a country. Several questions are worth considering in this respect.

- How many levels of government should operate in a country? Are there reasons to add or subtract levels of government compared to the previous governmental structure? What consequences will follow such a change?
- Should all territories in the country implement a uniform level of government?
- How many constituent units at a specific level are feasible? For example, at a local level, how many would maximize the delivery of governmental services at the lowest costs?
- Can and should constitution builders postpone certain aspects of decentralization for a later stage?
- At a later stage, what options exist to adjust the internal decentralized structure?

Figure 3. Levels of government



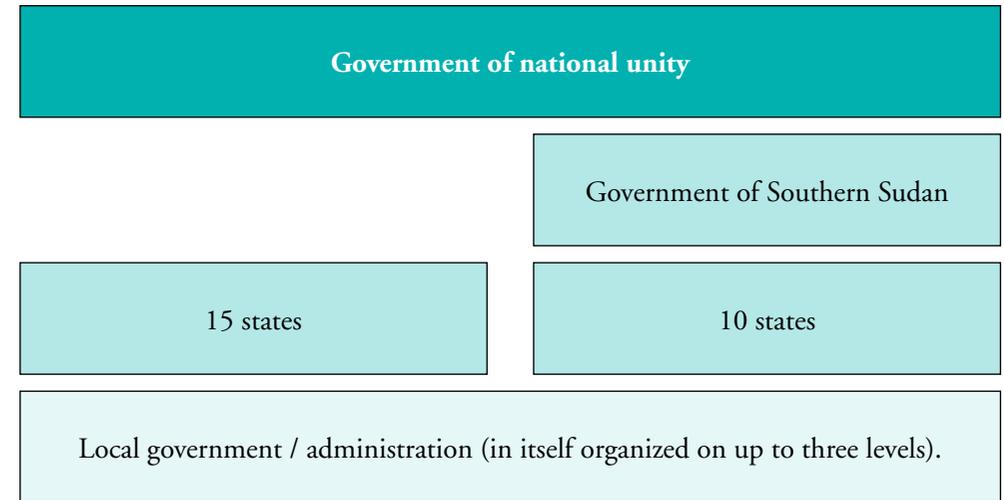
3.1.1. Number of levels of government

Three levels of government/administration generally dominate the discussion: a national level, a regional/provincial/state level, and a local level. Yet reality is not so neat, as the 'local level', for instance, can comprise various sub-levels of government/administration.

Previous compromises or historical events may have determined the number of levels of government. Governmental levels often exist symmetrically throughout the country. Occasionally, however, countries have opted for an asymmetric formal structure, creating more levels of government in some parts of the country than in others (see e.g. figure 4).

Transferring authority to the regional, state or provincial level typically involves a struggle over controlling and balancing power. Decentralizing authority to local governments more often concerns service delivery.

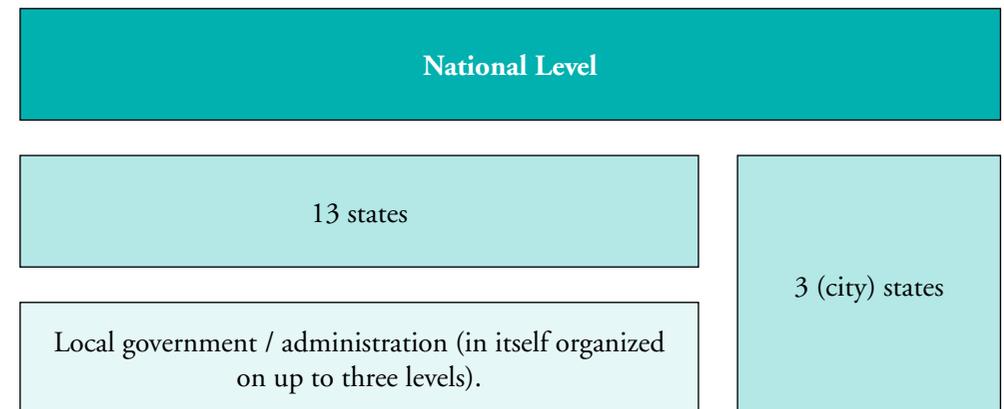
Figure 4. The configuration of levels of government in Sudan



In some countries, the level of government immediately below the national level only covers parts of the territory (Sudan between 2005 and 2011⁶ and Tanzania⁷). In Sudan, for instance, the interim constitution created an additional and unique level of government with jurisdiction over just the south of Sudan (see figure 4). In the peace negotiations that led to the new Sudanese Interim Constitution, the southern rebels demanded this additional layer of government in order, after decades of war, to secure a common region for the people of southern Sudan.

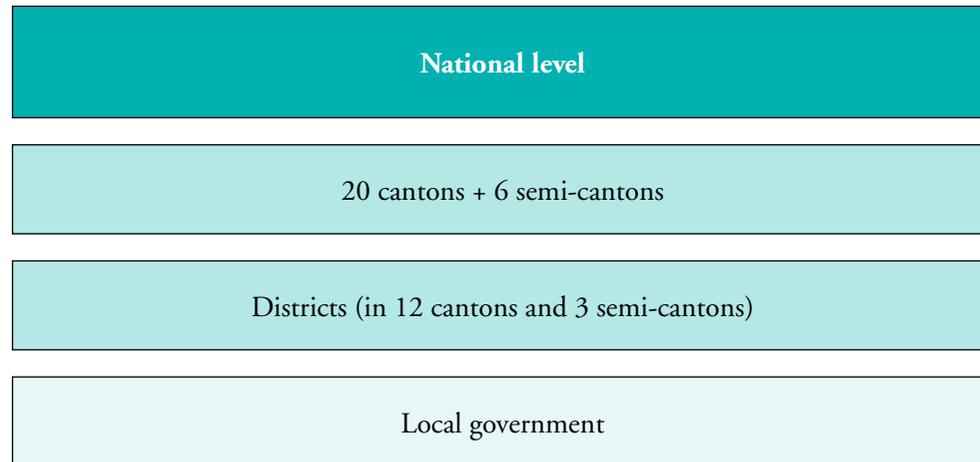
In other countries, the metropolitan level of government falls directly beneath the national level, with no governmental subunits in between. In Germany, for historical reasons, three cities constitute both municipalities and states, which eliminates the third level of government present in other parts of Germany (the Prime Minister or Governor of the city-state of Hamburg is also the Mayor of the city of Hamburg) (see figure 5).

Figure 5. The configuration of levels of government/administration in Germany



In other countries, constitution builders have inserted an additional level of administration in larger territorial subunits. Those administrative units support the governments in implementing their policies. In Switzerland, the cantons (the equivalent of states or provinces in Switzerland) have districts as administrative units to implement the cantons' policies. However, smaller cantons do not need these units to administer their affairs and thus do not have administrative districts.⁸

Figure 6. The configuration of levels of government/administration in Switzerland



Importantly, the mere fact of an asymmetrical structure with various levels of government or levels of administration does not indicate per se the degree of decentralization: whereas the additional level of government in southern Sudan greatly influences the political balance, as it has substantial powers and was a precondition for the peace agreement, the asymmetric administrative levels in Switzerland have had no real impact.

Constitution builders can create subunits on the basis of economic and administrative viability, or of the efficiency of each unit, or of identity. A peace treaty might require identity-based governmental subunits.

3.1.2. Designing territorial units within a level of government

In addition to the number of levels of government/administration, constitution builders need to determine the number of governmental/administrative units at each of those levels. Of critical importance are the criteria that constitution builders will use to construct subunits. Though these criteria are often predetermined by the character of a previous conflict, constitution builders can create subunits on the basis of economic and administrative viability, on the basis of the efficiency of each unit, or on the basis of identity. A choice on the merits of each option may not materialize because ratification of the constitution might depend on the success of a peace treaty that itself requires identity-based governmental subunits (Bosnia and Herzegovina, Sudan etc.). Determining subunits based on the criterion of identity might create a cycle of dispersing central powers, given that such a subunit will often demand further

continuous concessions that strengthen its own identity (Catalonia in Spain). Identity-based subunits might create new minorities, since territorial subunits rarely feature only one identity. Failure to consider adequately the interests of this new minority could ignite conflict. On the other hand, opting for the economically 'optimal size', based purely on criteria such as infrastructure, geography, resources and capacities, does not necessarily guarantee effective and efficient governance. If ethno-political conflicts and marginalization are replicated at the level of the subunit due to its demarcation, this will not resolve the conflicts but only shift them to lower levels. Thus, a mix of approaches to create economically viable units which the relevant populations accept is needed.⁹ The continuing discussions in Nepal concerning the criteria for delimiting internal boundaries illustrate the challenges associated with resolving such issues (see box 2).

Box 2. Discussion on the configuration of a decentralized system of government in Nepal*

In Nepal, the Committee on State Restructuring and Distribution of State Power has debated the number, names and boundaries of states under the future decentralized/federal structure, a discussion that has included the delineation of subunits on the basis of identity, economic and administrative viability, resource distribution and other factors. Two alternative maps were prepared under these parameters—one with 14 provinces, the other with six provinces.

* See Centre for Constitutional Dialogue Nepal (CCD), *Update on the Constitutional Process and the CCD*, 18 January 2010.

Another important issue is whether the constitution should include an option to alter internal boundaries after its ratification, and, if so, who might participate in such a process. The more internal borders create self-governing entities rather than administrative districts, the more sensitive this question becomes. Such a process encompasses two aspects—the right to initiate and the right to decide. In strongly centralized systems, both aspects will belong exclusively to a national institution—for example, the legislature by initiating and passing an ordinary law (Benin¹⁰). Another constitution might state that a law shifting internal boundaries requires not only a majority in the national legislature but also a two-thirds majority of those representatives belonging to the affected groups (Belgium¹¹). Other countries require the legislatures of the affected regions to consent (Malaysia¹²). In addition to a legislative vote at the national and sub-national level, a constitution also may require referendum support from the citizens in the subunits (Switzerland¹³).

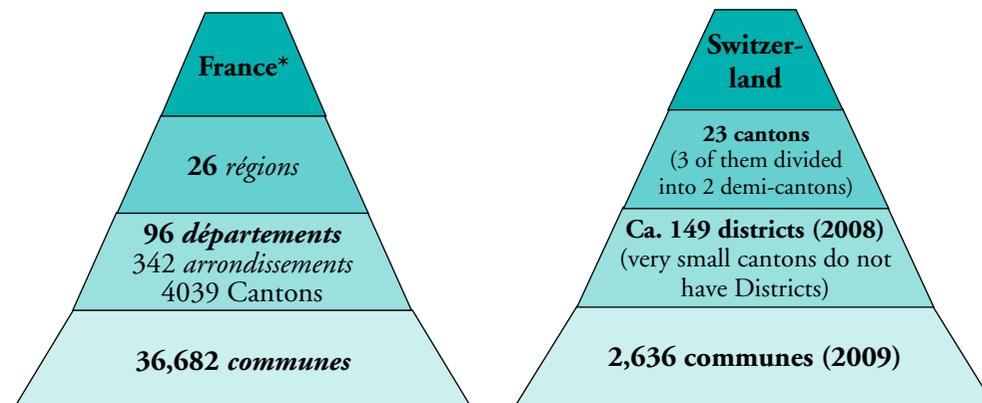
3.2. Determining the depth of decentralization

Beyond the formal structure of decentralization, constitution builders should also consider the depth of decentralization. The depth of decentralization (also referred to as substantive decentralization in this chapter) is determined by the actual powers that are transferred from the centre to lower levels of government. In such an inquiry, the following issues warrant careful review.

- Which administrative, political and financial functions should constitution builders decentralize and to what tier of government?
- Should constitution builders devolve powers equally throughout the country or asymmetrically depending on the specific context (population density, minorities, etc.)?
- Should some levels act merely as administrative agents of a higher level? Should other levels of government receive self-governing authority?
- Which of the three branches of government should constitution builders establish at the lower levels?

Figure 7 reflects the formal structure of decentralization in France and Switzerland. Although they look quite similar, France—even after its decentralizing reforms in 1982—has a much more centralized government than Switzerland, which many consider one of the most decentralized countries. The pyramids underscore that the formal structure of government does not determine the substantive degree of decentralization; rather, the depth of decentralization turns on the powers and resources allocated to the different levels of government. For instance, the cantons in Switzerland have considerably more authority and autonomous powers than the regions in France, as reflected, for instance, in the cantons' significant tax-raising authority. Although the Swiss districts constitute purely administrative units supporting the implementation of canton policy, their leaders are elected, whereas the presidency appoints French 'prefects' who serve as agents in the *départements* and implement central government policy.

Figure 7. Structures of decentralization in France and Switzerland



* The communes of France d'outre-mer are not considered.

3.2.1. Administrative, political and fiscal dimensions of decentralization

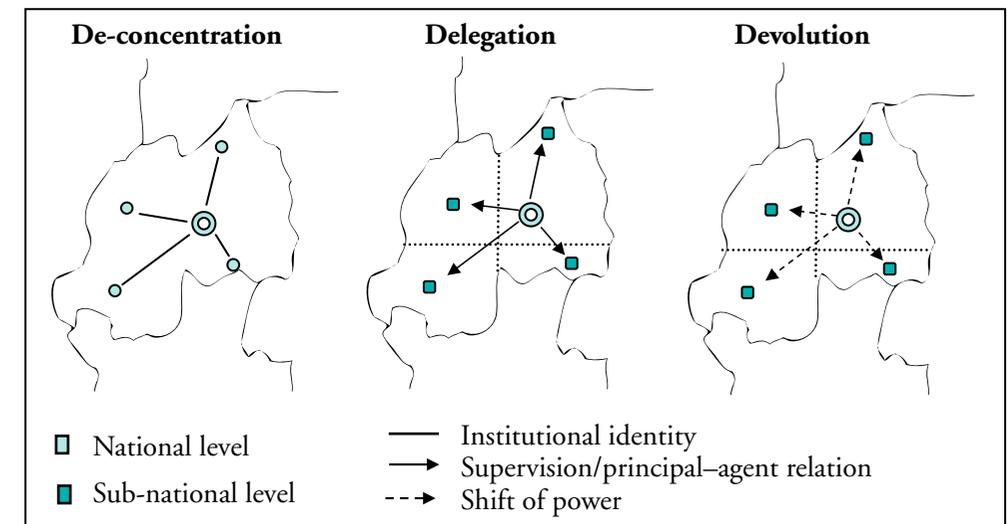
Substantive decentralization means the assignment of authority and power to different levels of government. The degree of decentralization ranges on a continuum across systems, from those characterized as strongly centralized to those that are heavily decentralized. To measure the amount of decentralization more accurately, we

need to consider its three core elements—administrative decentralization, political decentralization, and fiscal decentralization. Administrative decentralization refers to the amount of autonomy non-central governmental entities possess relative to the central government. Political decentralization measures the degree to which central governments allow sub-governmental units to undertake the political functions of governance such as representation. Finally, fiscal decentralization means the extent to which central governments surrender fiscal responsibility to sub-national units. While distinguishing between these three elements facilitates measurement, effective decentralization requires coordinating all three. Decentralization of authority will remain shallow if, for example, administrative and fiscal decentralization does not support and follow political decentralization. All three are discussed in detail below.

Administrative decentralization

Administrative decentralization comes in three varieties—'de-concentration', 'delegation' and 'devolution'—with each term encompassing additional administrative autonomy (see figure 8).

Figure 8. De-concentration, delegation and devolution: the distinctions



Source: Böckenförde, M., *Decentralization from a Legal Perspective: Options and Challenges* (Gießen: TransMIT, 2010).

De-concentration occurs when the central government shifts responsibility for implementing a policy to its field offices. This transfer alters the geographic distribution of authority, but responsibility and power remain at the centre. De-concentration does not transfer actual authority to lower levels of government and thus fails to create additional levels of government. For example, high schools are a national issue, governed by national law and implemented by national agencies—building schools, administering schools, setting up curricula, hiring and paying teachers: in short, everything is done by the national level. However, since high schools are not only in the capital, but spread

There are administrative, political, and fiscal decentralization. Effective decentralization requires coordinating all three.

throughout the country, national civil servants and teachers are sent out in the country to run them, without changing the nature of a national institution.

Delegation requires the central government to refer decision-making and administrative responsibilities for various public functions to another level of government. Delegation features a principal-agent relationship, with the central government acting as principal and the local institution acting as agent. The degree of supervision varies and might include substantial central control, permitting little discretion at the lower level. Conversely, though enforcing adherence to formal guidelines, the central government might fully allocate the administration and implementation of policy to the subunits. For example, high schools are still national institutions and governed by national laws, but the implementation lies with the subunits under the general supervision of the national Ministry of Education.

Devolution represents the strongest form of decentralization and involves the transfer or shift of a portfolio of authority to regional or local governments. Again, various models exist. The portfolio may include either limited powers to implement a set of national laws concerning a particular area—with potentially significant discretion over implementation—or may more closely resemble self-governance in that the subunit exercises legislative powers—adopting rules and norms and devising policies and strategies. Depending on the degree of devolution, the central government might interfere only to a limited extent, if at all. A degree of political decentralization must accompany devolution, given that the central government no longer has sanctions over the subunits; the electorate must assume that responsibility by voting in popular elections. For example, high schools are a sub-national issue, governed by sub-national law and implemented by sub-national agencies—building schools, administering schools, setting up curriculums, hiring and paying teachers: in short, everything is done by the sub-national level. Sub-national units coordinate among themselves a coherent education policy for the country.

Political decentralization

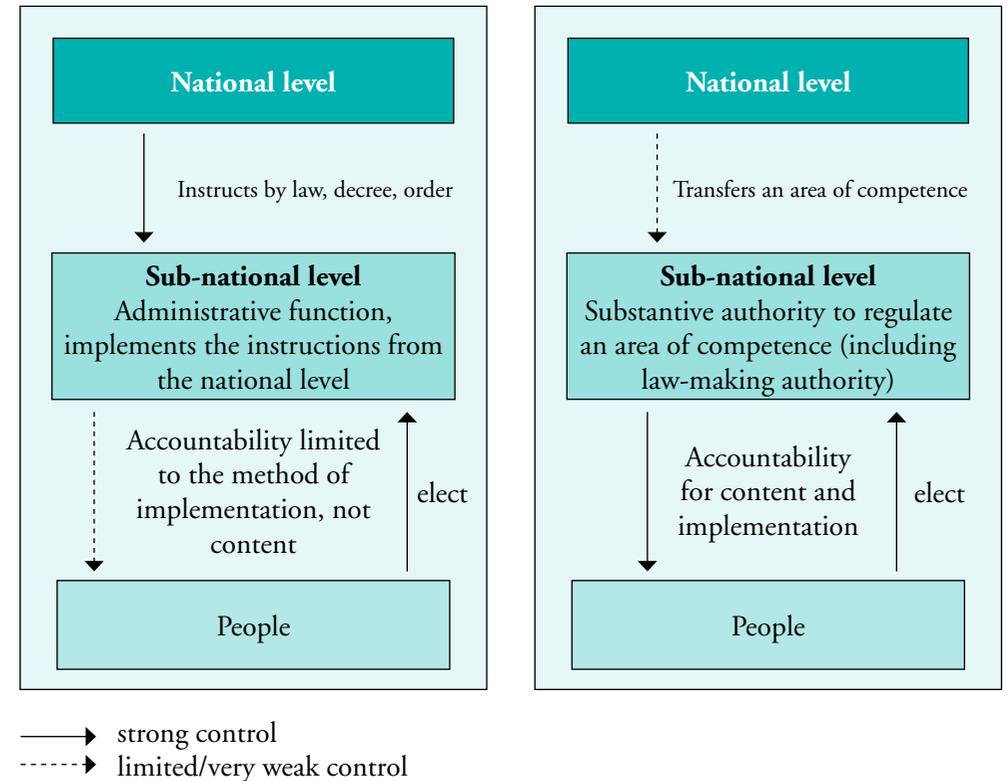
Political decentralization involves two elements: (a) transferring the power to choose and appoint local officials from the central governments to local governments; and (b) transferring the authority to structure government at the regional or local level. The first element could be named electoral decentralization, which allows citizens to elect representatives who will serve in regional or local subunits. Yet even with the ability to elect local officials, citizens will only be able to influence policy to a limited extent if policies are still decided at a higher level. For example, while citizens elect the Swiss Head of District, his/her mandate extends only to implementing administrative directives

from the cantons (see above). Citizens can thus hold this representative accountable only for implementation, not for substantive policies that are developed at cantons' level.

Administrative decentralization can mean de-concentration, delegation or devolution.

Promoting the second element of political decentralization requires—in addition to permitting voters to select their local leadership—a structural arrangement and practice that also empower the local level to formulate, monitor and evaluate the task transferred from the national centre. This may even be done by legislative or quasi-legislative bodies whose remit extends to designing and elaborating on policy issues transferred from the national government.

Figure 9. Examples of political decentralization



Source: Böckenförde, M., *Decentralization from a Legal Perspective: Options and Challenges* (Gießen: TransMIT, 2010).

Fiscal decentralization

Fiscal decentralization determines the degree of financial autonomy. Without sufficient financial resources, regional or local authorities will not be able to perform their newly assigned tasks adequately, thus weakening accountability and legitimacy. Omitting or delaying fiscal decentralization, moreover, often renders other aspects of decentralization ineffective.

There are three main elements to fiscal design in decentralized states: (a) the assignment of responsibility for expenditure—which level pays; (b) the assignment of responsibility for revenue raising—which level taxes; and (c) intergovernmental transfers—how different levels of government share revenues and equalize imbalances. To guarantee

efficient administration, the ability to assign tasks and competences must accompany the assignment of responsibility for expenditure—the level of government performing a task should pay for it. It might be assumed that spending responsibility often correlates with revenue-raising responsibility, or the power to raise taxes, but this does not occur anywhere. Good reasons exist for striking the right balance here. If the constitution assigns the greater part of taxing authority to regional or local governments, the national government will lack the tax instruments necessary for macroeconomic management. Likewise, assigning all taxing authority to the national government also results in

Omitting or delaying fiscal decentralization often renders other aspects of decentralization ineffective. The assignment of responsibility for expenditure must accompany the assignment of tasks and competences.

undesirable consequences: by separating spending authority from revenue-raising responsibility, it might obscure the link between the benefits of public expenditure and its cost—namely, the taxes levied to finance them, so that the separation does not promote fiscal responsibility among regional and local politicians and their electorate.

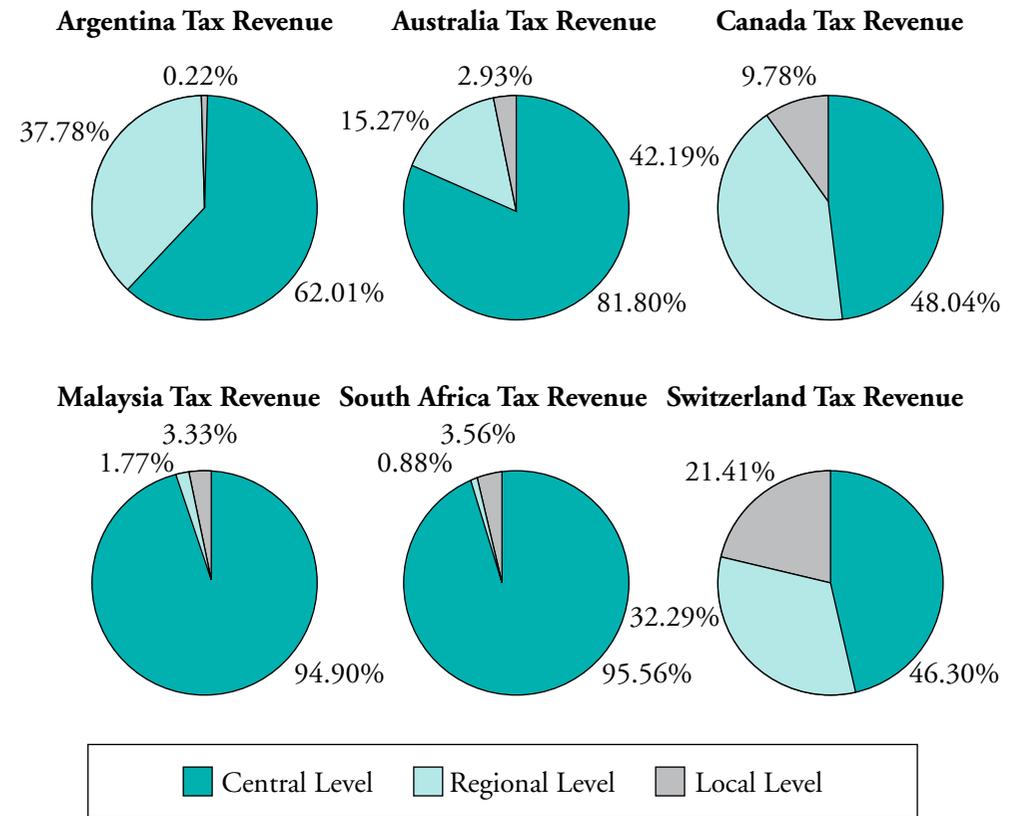
Constitution builders should thus consider the following two principles when determining whether to assign tax-raising and spending authority to regional or local governments: (a) revenues assigned to the regional or local governments should suffice—at least for the wealthy regional or local governments—to finance all locally provided services that primarily benefit local residents; and (b) the local government should collect sub-national revenues from local residents tied to the benefits received from local services. Ensuring a link between taxes paid and benefits received strengthens the accountability of local officials and thus also the delivery of government services.

As highlighted above, an imbalance often exists between taxing and spending in that the national level usually collects the bulk of taxes but assigns substantial spending responsibilities to the regional or local level, the governments of which must spend more than they can collect in revenues. Pre-transfer fiscal deficits, so-called vertical imbalances, arise. Horizontal imbalances—imbalances between sub-national levels—also exist. Usually sub-national-level governments do not all have the same capacity to raise revenues—as rich residents cannot live in every region—nor do they all face the same costs—some regions provide additional services, or more people live there. Such imbalances make intergovernmental transfers—vertical if the payments proceed from the national government to the sub-national governments, or horizontal if between sub-

Usually sub-national-level governments do not all have the same capacity to raise revenues, and intergovernmental transfers—from the national government to the sub-national, or between sub-national governments—may be necessary.

national governments—necessary. The term ‘grants’ covers intergovernmental transfers from higher to lower tiers of government. Depending on the type of grant—general-purpose grants, specific grants, grants in aid, or supplementary grants—and the conditions attached, such transfers can increase the autonomy of subunits.

Figure 10. Revenue-raising competences: examples from six countries



Source: International Monetary Fund, *Government Finance Statistics Yearbook 2008*, XXXII (Washington, DC: International Monetary Fund, 2008).

3.2.2. Symmetric and asymmetric decentralization

The depth of decentralization along administrative, political and fiscal lines need not be symmetrical throughout the country. Asymmetrical decentralization might prove an effective policy tool. If constitution builders have agreed to decentralization to mitigate internal conflicts between particular regions, then assigning autonomous authority only to those regions makes sense. For examples, see Finland (Åland), Indonesia (Aceh), Italy (South Tyrol), Malaysia (Borneo) the Philippines (Mindanao), Sudan (Southern Sudan) and Tanzania (Zanzibar). Some such schemes combine differences in the *substantive* depth of decentralization with the country's existing asymmetric *formal* structure, as in Sudan and Tanzania. Often, however, the constitution affords some regions greater authority over language or culture, for instance, while maintaining an otherwise symmetrical formal structure; examples here are offered by Indonesia¹⁴ or the Philippines.¹⁵ State nationalists often object to asymmetrical arrangements that discriminate between regions on the basis of ethnicity or religion, arguing that such arrangements risk further fragmentation and the promotion of irredentism. But minority regions which historically have suffered

from marginalization and discrimination will often demand autonomous status as a condition of support for the constitution. Depending on the relative political strengths of the actors involved, asymmetric arrangements vary considerably. Some countries have featured different decentralization packages for different regions. The United Kingdom (UK) and Spain provide good examples of the variety of decentralization design options (see box 3 and box 4).

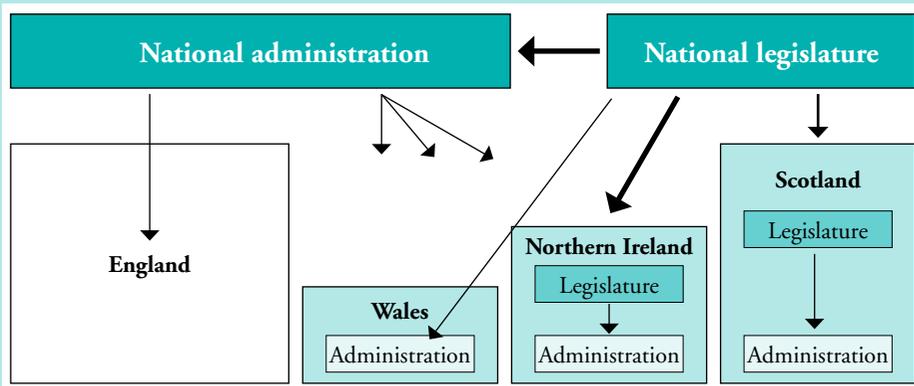
Box 3. Case study: asymmetric decentralization in the UK



The United Kingdom has applied various designs of decentralization to Scotland, Wales and Northern Ireland. Compared to England, where the British Parliament enacts laws that the national administration implements, the other three regions feature various levels of delegation.

Scotland has a Parliament and an executive developed from the Westminster model. Under the *Scotland Act 1998*, the Scottish Parliament can pass acts* and the Executive can enact administrative regulations (often called secondary legislation) in all areas not reserved to the British Parliament. Although

the Act permits the British Parliament to legislate concurrently in the devolved areas, it will do so only if asked by the Scottish Parliament (Sewel Convention).



The *Government of Wales Act 1998* delegated powers in certain devolved areas to the National Assembly for Wales, powers previously exercised by British ministers. But the British Parliament still passes primary legislation for Wales even in the devolved areas, limiting the Assembly to enacting administrative orders and regulations.

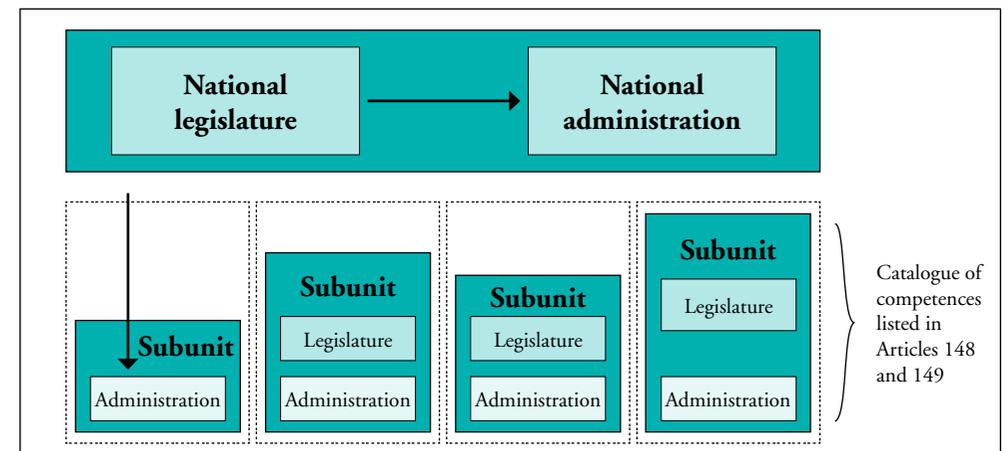
Devolution in Northern Ireland has been inextricably bound up with the peace

process. Problems there have prompted the British Parliament to suspend the Northern Irish Assembly and Executive four times, most recently in October 2002. When functioning, the Northern Ireland Assembly can enact primary and delegated legislation in those policy areas transferred from the British Parliament, which still legislates in ‘excepted’ and ‘reserved’ areas. Unless the British Parliament amends the *Northern Ireland Act 1998*, it will continue to govern ‘excepted’ areas. By contrast, the British Parliament can transfer ‘reserved’ subjects by order at a later date given cross-community consent. This triple division of responsibilities is unique to Northern Ireland devolution.

* In addition, the Scottish Parliament has the power to vary the standard rate of income tax by up to 3 percentage points from the UK level (although it has not yet used this power). See Böckenförde, M., Schmidt, J. and Wiesner, V., *Max Planck Manual on Different Forms of Decentralization*, 3rd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009), p. 46.

The Constitution of Spain offers another approach often referred to as ‘decentralization à la carte’. After some 40 years of totalitarian centralization under the dictatorship of General Franco, the drafters of the Constitution created a unique mechanism to accommodate the diversity of the country in the 1978 Constitution. The main inventive feature of the Spanish Constitution is to provide for a constitutional system in which different provinces/municipalities could achieve the status of a high degree of autonomy at different paces, in part depending on their own initiative. Territorially, Spain is organized into ‘municipalities, provinces, and any Autonomous Communities that may be constituted’ (Article 137). Accession to autonomy is a voluntary right for municipalities and provinces and the constitution specifies how this right can be exercised and the status of an Autonomous Community may be achieved. A list of powers of autonomous communities is listed in Article 148. In addition, according to Article 150, the national government may transfer powers from its list (Article 149) to the autonomous communities.¹⁶

Box 4. Case study: decentralization à la carte in Spain



3.2.3. Which kinds of powers to which level of government?

Constitution builders will determine the depth of decentralization and its institutional structure by channelling powers to the three branches of government at the regional or local level. The first step, as mentioned above, requires a decision on which branch of government should be set up at which level of government or administration (see table 2). Only if the institutional design provides for a legislature or judiciary at a lower level of government can actual substantive powers be transferred to that level.

Table 2. Which kinds of powers to which level of government?

	Executive	Legislature	Judiciary
National level	✓	✓	✓
2 nd Level (e.g. subunits, regions, etc.)	?	?	?
3 rd level (e.g. local level)	?	?	?

As illustrated by the United Kingdom, the second level of government may have an executive only, as in Wales, or consist of both legislative and executive branches of government, as in Scotland. Other countries, such as India and the United States, have set up an autonomous judicial branch at the sub-national level, responsible for adjudicating issues and disputes concerning sub-national laws.

In a second step, the constitution must then identify the tasks and powers that an autonomous executive, legislature or judiciary will exercise.

Constitution builders will need to determine which of the three branches of government—executive, legislative and judicial branches—will be set up at different levels of government. Distributing appropriate responsibilities will depend on the task concerned.

Constitution builders may need to design executive, legislative and judicial authorities at various levels of government. Distributing appropriate responsibilities will depend on the task concerned, and on whether it is closer to drafting laws (a legislative function), implementing or executing the law (an executive function), or interpreting and applying the law (a judicial function).

Decentralizing legislative powers

Decentralizing legislative functions requires considering which level of government should write laws concerning particular tasks (e.g. public services) and whether that authority should be exclusive or shared between levels of government.

A constitution might assign legislative authorities exclusively either to the national or to sub-national levels. Such an allocation, however, confronts two challenges. Particularly

after a violent conflict caused by the marginalization of certain regions, competing factions will probably not agree to assign power exclusively to any level of government. The second challenge to the exclusive allocation of power is more practical: relying only on exclusive powers may ignore the fact that there is often inevitably a subject matter and jurisdictional overlap in many areas of regulation. Many constitutions, in a bid for flexibility, have opted to distribute legislative powers concurrently between national and regional governments.

Concurrent powers can operate differently. Given the vertical overlap of concurrent powers between national and regional legislatures, the question of which regulation prevails will arise. Generally, the constitution prioritizes the national legislature. Regional critics may argue, with some force, that areas of concurrent jurisdiction are simply areas where national legislation predominates and in the long run pre-empts regional legislation. But certain conditions can attach to national priority: the German Constitution, for example, grants supremacy only to national legislation that is ‘necessary’ and ‘in the national interest’: *‘[I]f and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.’*¹⁷

Which level(s) of government shall be able to make law? Should that authority be exclusive to one level or shared between levels of government? Particularly after a violent conflict caused by the marginalization of particular regions, competing factions will probably not agree to assign law-making power exclusively to any level of government.

Other constitutions hold differently. Canada provides one single notable exception to national supremacy: where provincial and national law conflict—as laws concerning old age pensions have—provincial law prevails.¹⁸ Another approach empowers the national legislature to draft a national framework while allowing regional legislatures to fill in details according to local circumstances (sometimes referred to as framework legislation or shared powers). Other constitutions have adopted a third approach to sorting out concurrent powers, essentially permitting both levels of government to regulate simultaneously. Only where national and regional legislation directly conflict will constitutional dispute resolution measures take effect, as applied by judges on a case-by-case basis (Sudan).

The Constitution of South Africa provides a very diligently drafted set of provisions as to how to settle potential conflicts in the functional areas where concurrent powers apply (see box 5).

Box 5. Concurrent powers: the South African example

Art. 146 of the Constitution of South Africa

Conflicts between national and provincial legislation

- (1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4 [concurrent powers].

- (2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
 - (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
 - (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
 - (c) The national legislation is necessary for—
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.
- (3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—
 - (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
 - (b) impedes the implementation of national economic policy.
- (4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) (c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.
- (5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.
- (6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.
- (7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.
- (8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

Source: Constitution of South Africa (1996) as of 2007. Available at <<http://www.constitutionnet.org>>.

One approach is to empower the national legislature to draft a national framework while allowing regional legislatures to fill in details according to local circumstances.

To avoid the situation in which none of the levels of government has the power to assume a specific task, one of the levels is normally attributed with the general or residual power. In some countries, the national level

is vested with the residual power (Canada, India), while in others the residual power is with the subunits (Germany, the United States of America (USA)).

There are different methods by which to embody the distribution of powers in the constitution. Some countries apply a system of enumerated powers. The constitution enumerates the national powers. The subunits have the residual power; therefore it is not necessary to specifically list the subunit's powers. Probably more common is a system of schedules: the constitution lists exclusive powers of the national level and the subunit level, a list of concurrent powers and shared powers, and may propose a list for the lower level of government.

The degree of substantive allocation of powers to legislative subunits depends on the diversity of a particular country. Many criteria—geographical, historical, religious, economic and demographic—have influenced the negotiators of constitutions significantly, determining the degree of actual decentralization of legislative powers. Although several of the subject matters of legislation—international relations, national defence, currency and citizenship—are typically reserved to the national level, the dispersal of many policy areas turns on the relevant circumstances and the balance of interests at stake. In Brazil, India and South Africa, the constitution also distributes specific powers to a third, local level of government.

Decentralizing executive functions

Prior to decentralizing executive functions, constitution builders should consider whether the local or regional executive will execute and implement: (a) only national law, due to the absence of a legislature at the regional or local level; (b) only regional or local law drafted by the regional or local legislature, given that the national administration exclusively will implement national laws; or (c) substantial portions of national law in addition to regional or local law—if, for instance, the regional or local level executes national regulations more effectively (often referred to as 'cooperative decentralization' or 'cooperative federalism'). Experts generally agree that to ensure the most effective and cost-efficient delivery of public services constitution builders should assign authority for delivering those services to the level of government that most closely represents—and is most closely accountable to—the beneficiaries of those services (often referred to as the principle of subsidiarity).¹⁹ Such an arrangement fosters transparency and accountability because citizens can more easily recognize who is spending their money and how. (This reasoning does not always compel the conclusion that sub-levels ought to provide particular services: determining the most efficient size of a programme can also reveal which governmental level should provide the service. For instance, some programmes, such as the weather forecast, might function efficiently only if provided to the whole country.)

Experts generally agree that to ensure the most effective and cost-efficient delivery of public services constitution builders should assign authority for delivering those services to the level of government that most closely represents—and is most closely accountable to—the beneficiaries.

Constitution builders might agree that the national level of government is better able to provide certain public services, such as old age pensions and unemployment benefits, to which all citizens should have equal access wherever they live, or to manage expenditure which affects aggregate demand or fluctuates with the economic cycle.

provide certain public services, such as old age pensions and unemployment benefits, to which all citizens, for equity reasons, should have equal access no matter where they live. Moreover, to avoid economic instability or budget imbalances, the national government might retain certain expenditure responsibilities which particularly affect aggregate demand or which fluctuate with the economic cycle, such as unemployment benefits. Public demand for minimum standards throughout the country covering certain public services, such as health and education, might call for national regulation, regulation that might merely set national guidelines for regional governments which will implement the programmes.

*Distribution of judicial powers in a decentralized system: two models*²⁰

Similarly, the question of whether to decentralize the judiciary will require constitution builders to consider whether national courts located throughout the country or regional courts set up by regional governments should interpret and apply regional or local laws.

In a decentralized system there usually exist several sets of law: the national law, enacted by the national legislature, and the laws of the subunits, drafted by the respective entities, be it at a regional level or even at a local level. Thus one crucial question is how the different sets of law are to be adjudicated; in other words, what kind of court system guarantees an effective and transparent way of adjudicating the different sets of law? Two basic models are therefore available in highly decentralized states: the separated/dual model and the integrated model. Both describe options for ways of sharing judicial competencies in a strongly decentralized system.

If judicial powers are to be decentralized, one option is for the national level and the state level each to have their own court system. The state courts will generally apply the laws of their respective states only, while national law is adjudicated by national courts. National local courts applying national law are dispersed throughout the country.

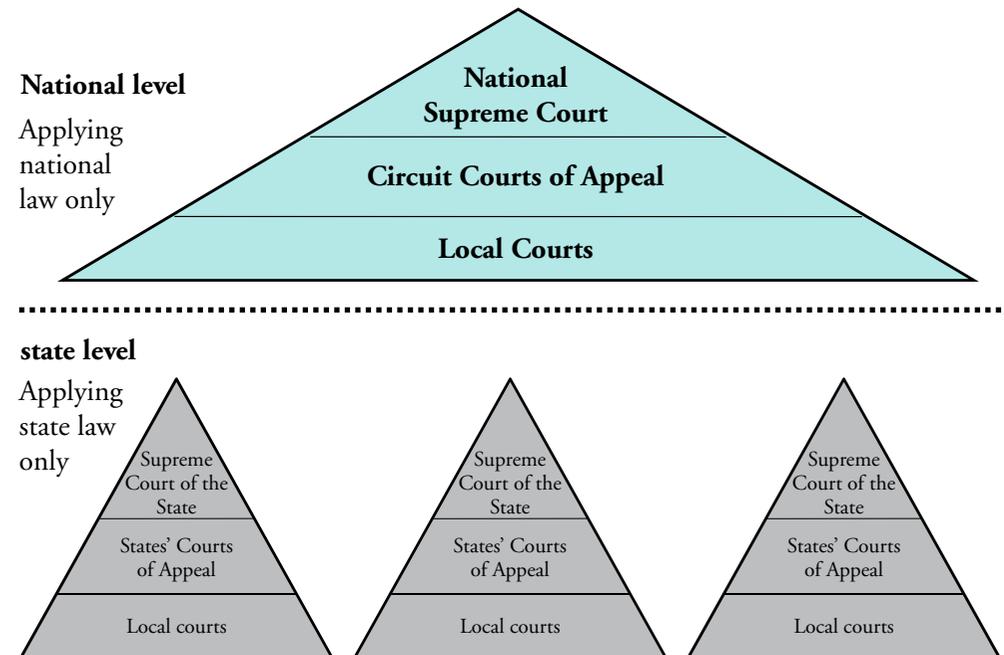
The separated/dual model*

According to the separated/dual model, as applied for example in the USA, both the national level and the state level each have their own three-tier court system (local courts, circuit courts of appeal and Supreme Court) (see figure 11). The state courts generally apply the laws of their respective states only, whereas national law is adjudicated by

Regional preferences also affect which governmental level should deliver particular public services. For example, many regions might favour a primary education curriculum that includes the teaching of local language(s) and culture, which sub-national governmental units can provide more efficiently. On the other hand, constitution builders might agree that the national level of government is better able to

national courts. As a consequence, national local courts applying national law are dispersed throughout the country. The separate model also affects the financing and the administration of the courts. While the national courts are financed and administered by the national level, the state courts are financed by the respective states.

Figure 11. The separated model in a decentralized system: as applied in the USA



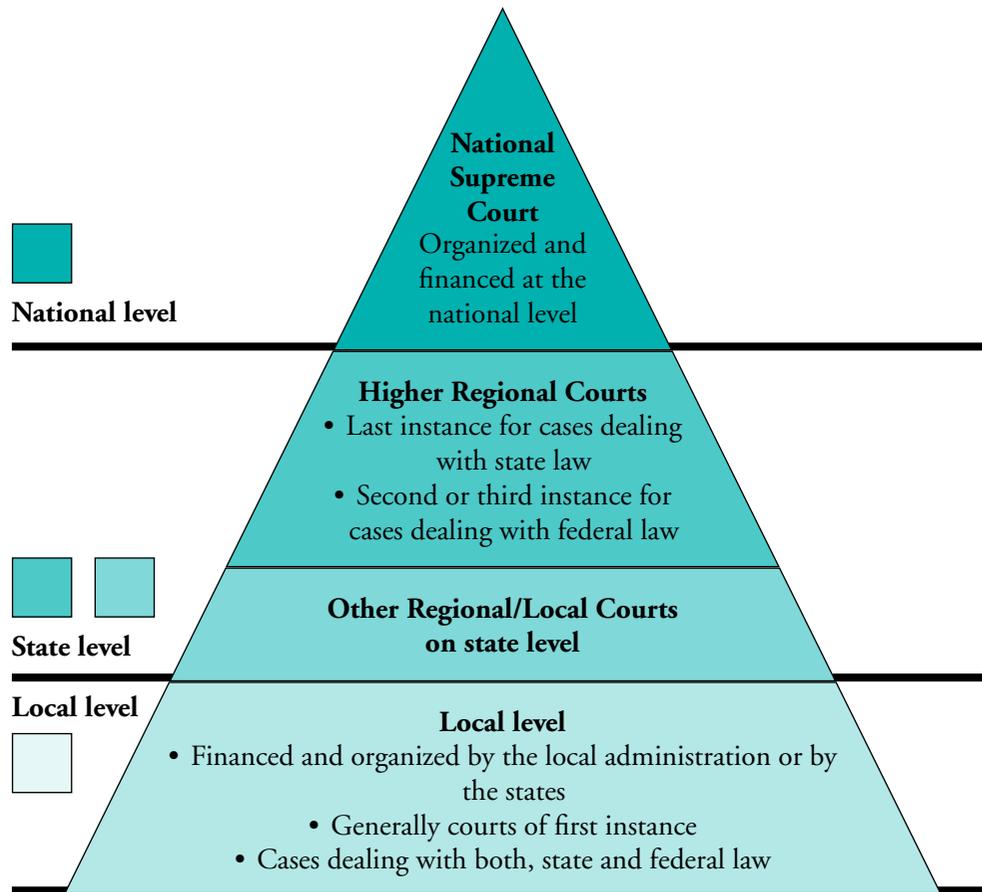
Adapted from Diehl, Katharina et al., *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009). See also Böckenförde, M. et al., *Max Planck Manuals on Constitution Building: Options for the Structure of the Judiciary* (Unpublished, 2009).

The integrated model*

In an integrated model (as the name suggests), national courts and state courts are integrated in one system. Whereas the highest court is a national one, the lower courts are courts of the respective states where they are situated. Courts have the power and the capacity to deal with both state law cases and national law cases. Judges are authorized and qualified to adjudicate two sets of law: the national law and the respective state law. In countries where the integrated model is in use, the highest court of the country at the national level only has jurisdiction over national law cases, whereas the highest court in the state is the court of last instance for state law (as in Germany and Sudan). In other systems, both types of cases, those involving state law as well as those involving national law, can be appealed before the Supreme Court (as in India).

* Adapted from a discussion in Diehl, Katharina et al., *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009).

Figure 12. The integrated model



Adapted from Diehl, Katharina et al., *Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution*, 2nd edn (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009). See also Böckenförde, M. et al., *Max Planck Manuals on Constitution Building: Options for the Structure of the Judiciary* (Unpublished, 2009).

Under an integrated judicial model, national courts and subunit courts function as one system. The highest court is a national one and the lower courts are courts of the respective states where they are situated. Courts have the power and the capacity to deal with both state law cases and national law cases. Judges are authorized and qualified to adjudicate two sets of law: the national law and the respective state law

Advantages of each model

Each system has some advantages over the other. An integrated court system usually raises fewer conflicts concerning jurisdiction or the respective competencies of the different courts. It is less expensive, since there are fewer courts and judges. With the integrated model the laws are applied more uniformly, thus providing a greater degree of predictability of judicial decisions. In contrast, the separated model ensures more

independence and variety. Different entities (states, tribes or regions) have more leeway to develop their own case law. This is even more important in countries where different legal systems are applied (common law–civil law (Canada, the UK)). Hence, within a country different laws and standards can exist in its different states at the same time. The separated model also provides for some competition between the legal orders of the different states.

3.3. Legal safeguards for decentralized arrangements: a key aspect of federal systems

3.3.1. Introduction

Constitution builders can evaluate the degree of decentralization by examining the substantive power and authority distributed to lower levels of government. A complementary perspective also exists: constitution builders can assess the legal relationship between the different levels of government, including the legal commitment to decentralization. Relevant questions include the following. Do national authorities exclusively determine whether to delegate, transfer or withdraw regional or local autonomy? Might a national legislature unilaterally restrict or even abolish regional and local autonomy at will (though that may prove politically difficult)? Or does the constitution protect certain elements of decentralization—requiring, for instance, a constitutional amendment to revoke regional powers? Does the constitution explicitly articulate a legal framework for decentralization that can guide governmental institutions attempting to decentralize? In short do political institutions—either at the national or regional level—or legal institutions, guided by an explicit legal framework, control decentralization?

Not surprisingly, constitutions around the world have addressed decentralization differently. Some fail to mention all applicable levels of government and provide little guidance on how particular levels should function.²¹ By default, these constitutions permit the national legislature to create the framework, whether legal or political, for decentralization. Other constitutions explicitly list the levels of government and design decentralization parameters and guidelines for the national legislature to follow.²² Still other constitutions devise a framework for decentralization between the national centre and governmental subunits directly below, neither prohibiting nor promoting further decentralization. Given such an arrangement, the national legislature will probably determine any further expansion of decentralization.

Many constitutions define governmental subunits as agents of the national government formed for administrative purposes only.²³ At the other end of the spectrum, the constitution

The legal relationship between the different levels of government is an important perspective. Do national authorities exclusively determine whether to delegate, transfer or withdraw regional or local autonomy? Might a national legislature unilaterally restrict or even abolish regional and local autonomy? Or does the constitution protect certain elements of decentralization?

can forge a partnership between the national government and subunits for the purpose of sharing the tasks and challenges of governance. Constitution builders can create such a partnership by ensuring that amendments to decentralization provisions can proceed only with the consent of governmental subunits.

Constitution builders can create a partnership between the national government and subunits by ensuring that amendments to decentralization provisions can proceed only with the consent of governmental subunits.

3.3.2. Federal vs unitary and decentralized vs centralized: legal differences

Two different, bifurcated concepts can complicate discussions on the vertical dispersal of governmental power: in designing a multilayered governmental structure, constitution builders must determine not only whether to centralize or decentralize governmental authority, but also whether to construct a unitary or federal government. Practitioners often use the two concepts interchangeably—with federalism meant to describe a strong form of decentralization, and unitary meant to signify a form of aggregated power at the national centre. However, while federalism inherently requires a degree of decentralization and thus is a form of decentralization, it has a distinct meaning, and understanding the difference might sharpen the debate and positions of constitutional negotiators.

Constitution builders can measure the depth of decentralization by the *actual distribution* of administrative, political and fiscal power from the centre to various sub-levels of government. By contrast, the terms ‘unitary’ and ‘federal’ capture the legal *relationship* between various levels of government. Five elements—predominately inspired by the creation of federal countries such as Switzerland and the United States, where previously independent but loosely-connected sovereign entities established a new state (‘coming together federalism’)—have characterized a federal state.²⁴

- At least two levels of government exercise sovereignty over the same land and people.
- Both the central government at the national level and the regional government at the subunit level possess a range of mutually exclusive powers (self-rule), which might include a measure of legislative and executive autonomy or fiscal independence.²⁵
- A legal document provides that neither level can alter unilaterally the responsibilities and authority of each level of government.
- National decision-making institutions include representatives from the subunit level, who might occupy a second chamber in the national legislature (shared rule).
- The constitution provides an arbitration mechanism—whether a constitutional court or a referendum mechanism—that can resolve disputes between the federal centre and the subunit level.

From these five elements, we can formulate one prerequisite for a federal state: one level of government cannot unilaterally revoke the existing distribution of powers, which include exclusive competences at the sub-national level. Rather, any alteration of authority between governmental levels requires the consent of all affected levels. This kind of pact or partnership, *foedus* in Latin, was actually the eponym for the term ‘federalism’. In most federal countries, the representatives of the subunits sitting in the second chamber of the national legislature meet this criterion through their involvement in the constitutional amendment process.

Box 6. Personal federalism

In recent years, the term ‘personal federalism’ has gained attention. Since federalism is a specific form of decentralization, and decentralization has been defined above as a territorial concept (see section 1.1), this term may create confusion. The rationale of ‘personal federalism’ is ‘the recognition of a community defined by cultural, religious or linguistic characteristics rather than by territory, and the constitution of that community on the basis of the identification or personal choice of an individual, rather than on the basis of territorial location’.* Thus, certain rights and powers are assigned not to a specific territory but to a group of people (communities) that are often not territorially concentrated but dispersed throughout the country.

Those communities may even have their own institutions to regulate some of their affairs, predominately in areas of their identification (culture, education, language and/or religion). For instance, in the Ottoman Empire some issues were left to the religious communities (*millets*). In India, Israel and Lebanon matters of marriage are still determined by the different religious communities. Fiji recognizes the right of indigenous people to their own administration. Belgium applies a mixed approach and is divided into regions and communities.** Elements of ‘personal federalism’ can accommodate ethno-cultural groups, but this also involves some practical challenges: it might be difficult to achieve the necessary level of organization, provide services efficiently to a dispersed group, and so on. Aspects of the idea of ‘personal federalism’ are reflected in some design options for the representation of minorities in the chapters in this Guide on the executive branch and the legislature (chapters 4 and 5, respectively).

* Thalmann, U. and Widrig, C., ‘Contemporary Diversity versus Swiss Federalism’, New Trends in Federalism Working Paper no. 2 (Fribourg: Institute of Federalism, 2004), available at <http://www.federalism.ch/files/documents/New_trends_in_federalism_WP2.pdf>

** Baechler, G., ‘Territorial vs Ethnic and Personal Federalism: Issues & Practices’, Swiss Agency for Development and Cooperation (2008), available at <http://www.swiss-cooperation.admin.ch/nepal/en/Home/Document_Archive>

Two important points follow. First, because federalism refers to a legally-defined intergovernmental relationship, it requires that only one such relationship among potentially numerous levels of government complies with the prerequisite above concerning revocation rights. For instance, all federal nations over the world have established the

Table 3. Issues highlighted in this chapter*

Issues	Questions
1. Levels of government	<ul style="list-style-type: none"> • How many levels of government shall there be and why? Just the national level and the regions or shall there be additional levels of government (e.g. local government)? • How many levels of administration shall there be to facilitate the implementation of governmental policies? • Shall a level of government be introduced symmetrically throughout the country or asymmetrically in some areas only? • If there are more than two levels of government (national level and regions), shall all levels of government be established and regulated directly in the constitution? • Or shall the regional level have the power to decide on additional lower levels of government or administration, define their boundaries, transfer competencies and/or transfer resources? • Or shall there be a middle way—some basic mandatory or optional organizational rules in the constitution as well as certain flexibilities for the regions?
2. Delimitation of regional boundaries	<ul style="list-style-type: none"> • What criteria shall be used (ethnic, linguistic, religious, geographic, historical, economic, pre-existing administrative units, conflict potentials, others, combinations of these)? • Shall there be minimum requirements (minimum number of regions, minimum number of population, minimum level of resources?) • Shall regional boundaries be defined in the constitution or shall only criteria be included in the constitution? • Shall the population of prospective provinces have a say in the delimitation process? Shall minorities within prospective regions have a say in the delimitation process? • Shall there be time lines in the constitution (transitory provisions) for deciding on establishing provinces? • Shall the constitution include a procedure for changing regional boundaries, for establishing new regions, or for merging regions? • If yes, by whom and how can boundary change be initiated? • Who shall have a say in the procedure—the national level, the regions concerned, minorities within concerned regions, or all of these? • Shall there be specific criteria, e.g. minimum number of population, economic viability, to limit boundary changes? • Shall there be special majority requirements, consultation procedures, referendums?

3. Depth of decentralization

- What degree of **administrative decentralization** is envisaged for the subunits?
- Shall issues be delegated to lower levels of administration to facilitate implementation of policies?
- Or shall subunits have the power to decide on how to address the issue?
- Shall the degree of administrative decentralization be symmetrical throughout the country or asymmetric, considering the existence of minorities in some areas?
- What degree of **political decentralization** is envisaged for the subunits?
- Shall the subunit be able to elect those responsible for implementing national policies?
- Or shall the subunits also elect a legislative assembly to enact relevant laws with regard to the issue devolved (requires devolution as well as administrative decentralization)?
- What degree of **fiscal decentralization** is envisaged for the subunits?
- What minimum resources do the respective levels of government need in order to exercise their powers?
- What sources of revenue shall be allocated to the different levels of government?
- Shall revenue bases be shared or attributed exclusively to one level only?
- Who will tax the income of persons and companies, sales, services, land, vehicles, others?
- How and by whom shall rates for taxes, duties and royalties be set?
- Shall there be fiscal competition between subunits and different financial burdens for citizens?
- How shall revenues be distributed? Who shall be in charge of revenue distribution? Shall there be conditional and non-conditional grants? Shall the rules/quotas for distribution be regulated in the constitution? Are there regular review mechanisms to readjust the attribution of revenues?
- How shall differences in the financial capacity and service provision costs of provinces be addressed? Shall there be equalization mechanisms? How shall equalization take place? To what level? By whom? Who decides?

4. Organization of decentralization

- If subunits have the right to self-organization, will the constitution provide an interim organization until provinces can decide on their own organization?
- Or shall the internal organization of subunits be defined in the constitution (and national laws)?
- Or shall the constitution establish standards and guidelines for the subunits on how to organize themselves or provide different forms of organization for the subunits to choose from?
- What kinds of **exclusive powers** shall the national level/ regional level or even local level have?
- What kinds of powers shall be concurrent? Which regulation prevails in the case when both the national level and the regions regulate?
- Shall there be **shared powers**, e.g. the national level defines the policy or standards, while the regional level administers and enacts bylaws?
- What criteria shall be applied for the distribution of powers? Who decides?
- What powers are of special importance for the lower levels of government, e.g. for the protection of their identity?
- Shall all subunits have the same amount of powers or shall **asymmetries** be possible?
- Who shall have the **residual power** (the power to decide when the constitution is mute), the centre or the provinces?
- How shall powers be listed in the constitution, e.g. in schedules?
- Shall all powers be shared in such a way that the national legislature has the power to draft a law, whereas it is within the competence of the subunit's executive to implement that law?
- How far shall the national level have the possibility to delegate powers to the subunits? Shall the national level have the possibility to delegate powers only to some selected regions? How far shall subunits have the possibility to delegate powers to the centre or to lower levels of government?
- Shall there be a **judiciary** at the level of subunits?
- If so, how shall it be organized? What is the relationship of the regional judiciary to the national judiciary (almost separate or all established under national law, or lower-level courts set up by the provinces and higher-level courts by the centre)?

5. Legal safeguards for the decentralization package

- Shall there be a mechanism established that requires the regions' consent if the decentralization package is to be altered?
- If there are substantive powers transferred to the local level, shall their consent be required as well for the alteration of that transfer?

6. Conflict resolution mechanisms for the decentralization package

- What kind of **dispute resolution mechanisms** shall be provided? Shall there be special courts, regular courts, direct jurisdiction of the supreme court for specific disputes?

* This is an adjusted and redesigned template informed by the 'roadmap to federalism' in [Töpferwien, Nicole], Input Papers on Federalism, Papers on Federalism prepared for the Nepali Swiss Forum on Federalism (Swiss Agency for Development and Cooperation, 2007–08), available at <http://www.swiss-cooperation.admin.ch/nepal/en/Home/.../resource_en_178456.pdf> (accessed 28 May 2011).

Notes

- ¹ The term 'level of government' refers to the part of the hierarchy through which state power is employed at a certain place in the vertical order of a country. Levels can be national, regional, or local.
- ² A 'level of administration' describes an institutional setting that supports administratively the implementation of governmental policies in the regions, at the local level, etc. It differs from a level of government as it does not make policies but only implements them.
- ³ The term 'regional' can refer (a) in an international or regional context, to a global region (e.g. Europe, East Africa, etc.), or (b) in a local or regional context, to the subunit between the national and the local level—synonymous with provincial or state.
- ⁴ Ghai, Y., 'The Structure of the State: Federalism and Autonomy', in International IDEA, *Democracy and Deep-Rooted Conflict: Options for Negotiators* (Stockholm: International IDEA, 2003), pp. 155–68.
- ⁵ Brancati, D., 'Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism?', *International Organization*, 60 (2006), pp. 651–85.
- ⁶ Article 24 of the Interim National Constitution of the Republic of Sudan (2005).
- ⁷ Article 2 of the Constitution of Tanzania (1977) as of 1995.
- ⁸ Since each Canton's constitution regulates the administrative or governmental structure of the respective cantons, the Swiss Constitution does not mention the establishment of administrative levels.
- ⁹ Baechler, G., 'Territorial vs Ethnic and Personal Federalism: Issues & Practices'

(2008), available at <http://www.swiss-cooperation.admin.ch/nepal/en/Home/Document_Archive>.

- ¹⁰ Article 150 of the Constitution of the Republic of Benin (1990).
- ¹¹ Article 4 of the Constitution of the Kingdom of Belgium (1994) as of 2008.
- ¹² Article 2 of the Constitution of Malaysia (1957) as of 1994.
- ¹³ Article 53 of the Federal Constitution of the Swiss Confederation (1999) as of 2010.
- ¹⁴ Article 18 A/B of the Constitution of the Republic of Indonesia (1945) as of 2002.
- ¹⁵ Article X of the Constitution of the Republic of the Philippines (1986).
- ¹⁶ Harty, S., 'Spain', in Ann L. Griffith (ed.), *Handbook of Federal Countries* (Montreal: McGill-Queen's University Press, 2005).
- ¹⁷ Article 72 of the Constitution of Germany (1949) as of 2010.
- ¹⁸ Article 94 A of the Constitution of Canada (the Constitution Acts 1867 to 1982, current consolidation) as of 2008.
- ¹⁹ Cf Ter-Minassian, T., 'Intergovernmental Fiscal Relations in a Macroeconomic Perspective: An Overview', in T. Ter-Minassian (ed.), *Fiscal Federalism in Theory and Practice* (Washington, DC: International Monetary Fund, 1997), p. 4.
- ²⁰ Böckenförde, M. et al., *Max Planck Manuals on Constitution Building: Options for the Structure of the Judiciary* (Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2009).
- ²¹ France (see above) has six different levels of government, four of which are listed in the Constitution. Aside from the national level, the Constitution only regulates one in detail.
- ²² Next to the national level, the Constitution of Peru lists regions, departments, provinces, and districts as tiers of decentralization and provides a whole chapter addressing detailed regulations. The Constitution of Greece provides in Articles 101 and 102 for 'the Organization of Administration', which indicates at least two levels of local government. South Africa provides for three layers of government in the constitution (national, provincial, and local government) that are quite extensively regulated. The local government itself is constitutionally subdivided into different classes of municipalities, thereby creating additional tiers of government. See also the Constitution of Mongolia (2000), Chapter IV, Articles 57–63, Administrative and Territorial Units and their Governing Bodies.
- ²³ Article 3 of the Constitution of Liberia states that Liberia is a unitary sovereign state divided into counties for administrative purposes.
- ²⁴ See United Nations Development Programme Somalia, 'Federalism and Decentralization: Options for Somalia', 2008, p. 10.
- ²⁵ Heywood, A., *Key Concepts in Politics* (New York: St Martin's Press, 2000), p. 141.

Key words

Administrative decentralization, De-concentration, Delegation, Devolution, Political decentralization, Fiscal decentralization, Asymmetric decentralization, Level of government, Level of administration, Exclusive powers, Concurrent powers, Federal system, Unitary system, Integrated model, Separated model/dual model, Personal federalism, Internationalization/regionalization

Additional resources and further reading

- **Forum of Federations**

<<http://www.forumfed.org/en/index.php>>

The Forum of Federations, funded by the Canadian government, attempts to construct democratic governments by fostering federalist ideas. In seeking to disseminate knowledge among practitioners on a global scale, the website provides resources and training on issues of federalism and governance.

- **International Association of Centers for Federal Studies**

<<http://www.iacfs.org/index.php?page=1&lang=0>>

The International Association of Centers for Federal Studies (IACFS), composed of international centres and institutes, conducts independent research and produces publication about issues regarding federal systems. The IACFS website has resources that promote federalism as a form of government for practitioners, including publications, studies of recent developments in federalism around the world, and a global dialogue project that allows practitioners to share their experiences.

- **Center for Policy Alternatives**

<<http://www.cpalanka.org/>>

The Center for Policy Alternatives is a Sri Lankan organization that seeks to strengthen institutions and capacity building by disseminating and advocating policy options, conflict resolution, and democracy. It focuses on governance options for diverse South Asian states and produces documents relating to public policy alternatives.

- **Swiss Agency for Development and Cooperation**

<http://www.deza.admin.ch/en/Home/Themes/Rule_of_Law_Democracy/Decentralization>

The Swiss Agency for Development and Cooperation (SDC) seeks to promote a better relationship between civil society and local governments through political, administrative and fiscal decentralization in order to make government more responsive to people's needs by providing funding, education and institutional support. The website contains links relating to decentralization processes and the SDC's activities in assisting the development of civil society globally.

- **Institute of Federalism**

<<http://www.federalism.ch/index.php?page=22&lang=0>>

The Institute of Federalism is a centre for research and academic expertise that focuses on federalism and cultural diversity. Its website offers an international research and consulting centre that focuses on the peaceful creation of multicultural societies.

- Barnett, Camille Cates, Minis, Henry P. and VanSandt, Jerry, ‘Democratic Decentralization’, Research Triangle Institute (RTI International), December 1997, <http://www.rti.org/pubs/Democr_Decen.PDF>, an article examining the link between decentralization and democratic behaviour
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- Saunders, Cheryl, ‘Federalism, Decentralisation and Conflict Management in Multicultural Societies’, Forum of Federations (no date), <<http://www.forumfed.org/libdocs/IntConfFed02/StG-Saunders.pdf>>—an article examining the development of democratic, federalist governments in multi-ethnic and multicultural societies
- Thalmann, Urs and Widrig, Catherine, ‘Contemporary Diversity versus Swiss Federalism’, New Trends in Federalism Working Paper 2 (Fribourg: Institute of Federalism, 2004), <http://www.federalism.ch/files/documents/New_trends_in_federalism_WP2.pdf>

Glossary

Absolute veto	A type of <i>veto</i> that blocks a decision and cannot be overruled by any other political actor (chapter 5)
Administrative decentralization	The degree of autonomy that governmental subunits possess relative to the central government in running governmental affairs. Forms of administrative decentralization are, for example, <i>de-concentration</i> , <i>delegation</i> and <i>devolution</i> . (chapter 7)
Advisory opinions	A non-binding opinion issued by a <i>Constitutional Court</i> advising the <i>legislature</i> as to the constitutionality of a proposed piece of legislation (chapter 6)
Affirmative action	A range of formal measures mandated by law or official policy, usually for a fixed or determined period, in order to give preferential treatment to specific individuals or groups so as to bring them to the same level as others, without intending thereby to disadvantage others (chapter 3)
Aggregation	The effect of concentrating or centralizing power, usually creating hierarchies (chapters 1, 2)
Amnesty/pardon	The excusing of political and non-political criminal offences against a government and the removal of related penalties (chapters 4, 5)
Asymmetric decentralization	An arrangement which distributes power unequally or differently to different regional governments (chapters 2, 7)
Basic structure approach	An approach to <i>constitution building</i> which stresses key government functions and prioritizes establishing institutions that will exercise governmental authority (chapter 1)
Bicameral legislature	A <i>legislature</i> composed of two chambers or houses (chapter 5)
Branches of government	Different sections of authority and power within the institutional design of a state. Traditionally there are three different branches with distinct powers in a modern state (executive, legislative and judicial). (chapters 1, 2, 4, 5)

Candidate quotas	A mechanism, either voluntary or set out in law, which requires that a certain proportion of the candidates standing in an election must be from a specific group of people, such as an ethnic group, gender, religious group or linguistic group (chapter 5)	Constituent Assembly	A body composed of representatives, usually elected, for the purpose of drafting or adopting a constitution. It may also have secondary legislative functions for practical reasons of avoiding the existence of two concurrent assemblies. (See also <i>Constitutional Convention</i>) (chapter 1)
Checks and balances	A system that allows each <i>branch of government</i> to exercise limited control over other branches in order to ensure proper and legal behaviour, as well as balance political powers and dynamics (chapters 1, 2, 4, 5)	Constitution building	Processes that entail negotiating, consulting on, drafting or framing, implementing and amending constitutions (chapters 1, 2, 3)
Citizen rights	Rights that the individual has on the basis of belonging to a state (chapter 3)	Constitutional amendment process	The means by which an alteration to a constitution, whether a modification, deletion or addition, is accomplished (chapter 6)
Citizenship	A formal or legal status of belonging to a state usually by being born to citizens of that state or by being conferred such status through formal procedures (chapter 3)	Constitutional Convention	A formal meeting of representatives or delegates that is convened for purposes of framing or amending a constitution and which, unlike a constituent assembly, is not self-governing or sovereign or legally autonomous, but works with a specified mandate or instruction from another body or group. (chapter 1)
Civil law	A legal system which places emphasis on the codification of laws (chapter 6)	Constitutional Court	A high court primarily responsible for interpreting the constitution and deciding whether or not other national laws are in compliance with it or are unconstitutional. A Constitutional Court is usually a specialized court that will not occupy itself with other types of cases that are not directly related to the constitution. (chapter 6)
Civil rights	Rights related to participated in an open civil society. Examples include freedom from discrimination, equal treatment before the law, the right to freedom of the person and personal integrity, the right to privacy, the right to property, the right to fair trial and the administration of justice, protection from servitude and forced labour, freedom from torture, the presumption of innocence, and entitlement to due process in all situations where one's rights may be affected. (chapter 3)	Constitutional review (also called judicial review)	The powers of a court to decide upon the constitutionality of an act of the <i>legislature</i> or the <i>executive branch</i> and invalidate the act if it is determined to be contrary to constitutional provisions or principles (chapter 6)
Collegial presidency	A system with more than one person involved in running presidential affairs, often used as a way to accommodate diverse groups (chapter 4)	Customary international law	Rules of international <i>human rights</i> and humanitarian law that are considered to be universally accepted and therefore always legally binding in all situations, for example, the prohibition of slavery (chapter 3)
Common law	A legal system which places emphasis on following precedent from earlier legal decisions to decide cases (chapter 6)	Customary law	Legal systems, often unwritten, developed from the societal norms, customs and practices of a particular community (chapter 6)
Concurrent powers	Powers that are shared by national and sub-national governments under a constitution. Where laws in an area of concurrency conflict, the national law is normally paramount. (chapter 7)	Decentralization	The dispersal of governmental authority and power away from the national centre to other institutions at other levels of government or levels of administration, for example, at regional, provincial or local levels. Decentralization is thereby understood as a territorial concept. The three core elements of decentralization are <i>administrative decentralization</i> , <i>political decentralization</i> , and <i>fiscal decentralization</i> . (chapters 4, 5, 7)
Conflict of laws	The situation when aspects of legal systems within the same country are contradictory (chapter 6)		

De-concentration	Occurs when the central government disperses responsibility for implementing a policy to its field offices without transferring authority (chapters 4, 7)	Dissolution	The formal dismissal of the <i>legislature</i> . Dissolution comes in three forms (in addition to self-dissolution), the boundaries of which depend on its source. It can be a mandatory aspect of a specific process, initiated by another institution, or introduced by other actors. (chapters 4, 5)
Delegation	A mechanism under which the central government refers decision making and administrative responsibilities for various public functions to other levels of government on a revocable basis. The degree of supervision varies and might include substantial central control, or might fully allocate the administration and implementation of policy to subunits. (chapter 7)	Diversity	The existence of distinct political, economical, social, cultural and demographic groups within a society (chapter 1)
Democracy	A system of government by and for the people. Literally means ‘rule by the people’. At a minimum democracy requires (a) universal adult suffrage; (b) recurring free, competitive and fair elections; (c) more than one serious political party; and (d) alternative sources of information. It is a system or form of government in which citizens are able to hold public officials to account. (chapters 1, 2, 3)	Double majority voting	A voting process that requires two majorities, first an ordinary majority and second a majority within the minority members sitting in the <i>legislature</i> . The procedure is often used on sensitive issues. (chapter 5)
Democratization	The process of creating or improving a democracy, which a constitution can aid by designing institutions and processes which entrench popular control, political equality and <i>human rights</i> (chapter 3)	Dual executive	A system with both a President and a Prime Minister (chapter 4)
Depth of decentralization	A measure of the comprehensiveness of the actual powers that are transferred from the centre to lower levels of government (chapter 7)	Dualism	The view of international law that national and international legal systems are distinct (chapter 2)
Derived principles	<i>See Implied principles</i>	ECOSOC rights	An acronym that refers to economic, social and cultural rights, such as those provided for in the International Covenant on Economic, Social and Cultural Rights and other similar international <i>human rights</i> instruments. These rights are considered to relate to economic wellbeing, social welfare and enjoyment of culture. (chapter 3)
Devolution	The strongest form of <i>decentralization</i> that involves the transfer or shift of a portfolio of authority to regional or local governments (chapter 7)	Electoral system	The part of the electoral law and regulations which determines how parties and candidates are elected to a representative body. Its three most significant components are the electoral formula, the ballot structure, and the district magnitude. (chapter 5)
Directive principles	Guidelines which set out the fundamental objectives of the state and generally sketch the means by which governments can achieve them (chapter 2)	Enforcement mechanisms	Laws or arrangements that give officials the necessary authority to ensure that constitutional provisions are carried out (chapter 2)
Disaggregation	The effect of dispersing power, usually among multiple branches, actors, or levels of government (chapters 1, 2)	Enumerated powers	The powers explicitly established in the constitution. The governmental subunits have the residual power; therefore it is not necessary to specifically list the subunit’s powers. (chapter 7)
Dispersal of power	The effect of assigning or distributing power or authority to distinct and multiple constitutional institutions, offices or territorial levels, each more or less autonomous of others, in order to foster multiple levers of power and avoid its concentration (chapter 1)	Executive branch	The executive branch is one of the three <i>branches of government</i> . Its main task is to implement the laws. (chapter 4)
		External appointments	The authority of the <i>executive branch</i> to appoint members to the <i>legislature</i> thereby diminishing the institutional autonomy and independence of the legislature (chapter 6)

Federal system	A system of government made up of a federation of organizations or states which maintain their own independent powers but cede authority to a central federal government in certain defined areas. One level of government cannot unilaterally change the existing distribution of powers or exclusive competences at the sub-national level. Any alteration of authority between governmental levels requires the consent of all affected levels. (chapter 7)	Human rights	Entitlements or claims that individuals have and enjoy on the basis of their humanity or human dignity and individual freedom (chapters 1, 2, 3)
First Past The Post electoral system	An electoral system in which the candidate who receives more votes than any other is elected (chapter 5)	Human rights culture	An environment where ordinary people are routinely in a position to challenge public officials and in which those in authority respect <i>human rights</i> in practice (chapter 3)
Fiscal decentralization	The extent to which governmental subunits are able to undertake fiscal responsibilities, such as revenue-raising and spending (chapter 7)	Impeachment	The process of bringing legal charges against a high constitutional authority, public official or judge, which would authorize their removal (chapter 4)
Founding provisions	Provisions or section of a constitution dedicated to expressing the foundational values of the state (chapter 2)	Implied (derived) principles	Principles not explicitly stated in the text of a constitution that are often drawn from a perception of the 'true meaning' or spirit of the text (chapter 2)
Framework constitutions	Brief constitutions that can be useful in establishing firm protections of certain basic rights and principles, while leaving many processes and details to be determined later through political or judicial processes (chapter 2)	Institutional interests	Interests held by specific sections of the government which they seek to advance during the constitution-building process. Often, this manifests itself in a government body or other actor attempting to maximize or protect its own power. (chapter 1)
Full recall	In constitutions providing for full recall, both the initiative and the final decision rests exclusively on the citizenry (chapter 4)	Integrated model	National courts and lower courts are integrated in one system. Courts have the power and the capacity to deal with both sub-national and national law cases. Judges are authorized and qualified to adjudicate two sets of law: the national law and the respective sub-national law. (chapter 7)
Government of national unity	A governing coalition of parties, usually in transitional democracies or emergency situations, formed to maintain national stability (chapter 1)	Interim constitution	A constitution that is considered to be in force for a limited and usually fixed period and which is commonly used to facilitate the framing of a permanent constitution (chapter 1)
Graduated design	An approach to framing constitutional changes through a series of procedures that may be stretched over time in order to deal with single issues at a time, usually involving incremental or iterative reform (chapter 1)	Internationalization	Upward transfer of powers from the national level to an international institution, for example, the United Nations, the Internal Criminal Court (chapter 7)
Grand design	An approach to <i>constitution building</i> that entails framing a constitution as comprehensively as possible in one major procedure rather than in multiple, separate reforms stretched over time (chapter 1)	Investigation	A tool of legislative oversight which allows the <i>legislature</i> to carry out a systematic or formal inquiry into activities of the <i>executive branch</i> . This power is usually exercised through a committee or special commission. (chapter 5)
Gross violations	Large-scale or systemic <i>human rights</i> abuses, often coupled with state repression and state violence against ordinary people (chapter 3)	Judicial accountability	A principle to ensure judicial compliance with the <i>rule of law</i> , enforced by other branches through oversight and <i>checks and balances</i> (chapter 6)
Horizontal separation of authority	A measure that explores options for de-concentrating power, either within one branch of government (for example, a <i>collegial presidency</i> in the <i>executive branch</i> or a second chamber in the <i>legislature</i>) or between branches of government at the national level (chapter 4)		

Judicial appointment	The mechanism by which members of the <i>judiciary</i> are selected. A common system has the <i>executive branch</i> offer nominations to the <i>legislature</i> which then has the power to confirm or reject nominees. (chapter 6)	Legislature	One of the three <i>branches of government</i> . Its most prominent tasks are the making and changing of laws, and the approval of the national budget. (chapter 5)
Judicial independence	Freedom from influence from other <i>branches of government</i> or actors; judicial independence is considered fundamental to a functioning <i>judiciary</i> and to a democratic society. (chapter 6)	Mediation committee	A committee consisting of an equal number of members from both chambers of the <i>legislature</i> that tries to compose a compromise bill for each house to adopt (chapter 5)
Judicial review/ constitutional review	The powers of a court to decide upon the constitutionality of an act of the <i>legislature</i> or the <i>executive branch</i> and invalidate that act if it is determined to be contrary to constitutional provisions or principles (chapter 6)	Minority rights	The individual rights applied to members of racial, ethnic, class, religious, linguistic or sexual minorities; the collective rights accorded to minority groups (chapter 3)
Judicial system	The entire judicial framework of a nation, including the court system, judicial norms and practices, and laws (chapter 6)	Mixed recall	In a mixed recall, the citizenry is involved only in one of the steps of the process of recall, either initiating it or deciding on it in a referendum. (chapter 4)
Judiciary	The branch of government that is endowed with the authority to interpret the law, adjudicate legal disputes, and otherwise administer justice (chapter 6)	Mixed system	A design of the executive branch that in some way combines aspects of the <i>presidential</i> and <i>parliamentary systems</i> (chapter 4)
Legal constitution	A constitution that is emphasized as a supreme law binding on all other laws and authorities, imposing legal obligations, and is subject to judicial enforcement (chapter 1)	Monism	The view of international law that domestic and international laws are united into a single system (chapter 2)
Legal interpretation	The act or process of determining the intended meaning of a written document, such as a constitution, statute, contract, deed or will (chapter 6)	Moral legitimacy	The attribute or quality of government or authority being accepted as legitimate mainly because it enjoys moral, religious or customary allegiance of the people (chapter 1)
Legal legitimacy	The attribute or quality of government or authority being accepted as legitimate mainly because of conformity to the law or legal process (chapter 1)	Negative rights	Rights that protect against improper action and decisions by government officials (chapter 3)
Legal pluralism	The existence of multiple legal systems under one constitution, often taking the form of multiple, separate, regional or specialized court systems (chapter 6)	Obligation of conduct	An obligation of the state to take measures and provide the means to facilitate the fulfilment of the <i>ECOSOC</i> rights (chapter 3)
Legal safeguards	Legal rules established to prevent the misuse of powers by branches of government. Often take the form of <i>checks and balances</i> to be exercised by one branch over another. (chapter 6)	Obligation of outcome	An obligation of the state to see that measures undertaken fulfil the <i>ECOSOC</i> rights, that is, have the desired result (chapter 3)
Legislating by decree	The ability of the <i>executive branch</i> to make law, manifested either as powers delegated from the <i>legislature</i> or original constitutional powers. In the former, the legislature itself controls and may revoke at any time the delegation of such authority. (chapter 4)	Ombudsman	An official who is mandated to receive complaints from the public and enabled to inquire into them, usually relating to behaviour of officials (chapter 3)
		Package veto	Allows the President to accept or reject a bill as a whole (chapter 5)
		Parliamentary system	The institutional design of the government in which the head of government is elected by the <i>legislature</i> and is accountable to it (chapter 4)

Partial veto	Permits the President to reject portions of a bill without blocking the entire bill (chapter 5)	Presidential veto	The competence of the President to block legislative policymaking. The President may reject a bill strictly for political reasons, or challenge the constitutionality of a law. (chapter 5)
Personal federalism	A system under which certain rights and powers are assigned not to a specific territory but to a group of people (communities) that are often not territorially concentrated but dispersed throughout the country (chapter 7)	Promulgation	The legal procedure, usually a formal declaration, of effecting or bringing into operational force a new constitution or law (chapter 1)
Political constitution	A constitution that is emphasized as a political settlement subject to enforcement by the institution that has the greatest political power, usually a <i>legislature</i> or parliament (chapter 1)	Proportional representation	A system of electing members of the <i>legislature</i> in which the number of seats allocated to a particular party is determined by the percentage of the popular vote won by that party (chapter 5)
Political decentralization	The degree to which governmental subunits are able to undertake the political functions of governance such as representation (chapter 7)	Recall	The competence of the electorate to recall its representatives in the <i>legislature</i> or the <i>executive branch</i> prior to the end of their term. Depending on the involvement of the citizens, a distinction is made between <i>full recall</i> and <i>mixed recall</i> . (chapters 4, 5)
Political legitimacy	The attribute of or quality of government or authority being accepted as legitimate mainly because it retains the support of a majority (chapter 1)	Referendum	A process by which people vote in favour of or against a proposal to introduce a change in the constitution or other law. The result of a referendum may be either binding or optional. Also known as a plebiscite (chapter 1)
Political rights	Rights relating to political participation such as the right to vote, to stand for election and be elected, to freely form and join political associations, to freedom of expression and information, and to institutional guarantees for free, independent media (chapter 3)	Regional integration	The upward transfer of powers from the national level to a regional institution, for example, the European Union (EU) or the Economic Community of West African States (ECOWAS) (chapter 7)
Popular participation	The involvement of people in the constitution-building process, through mechanisms such as consultation meetings, public hearings and referendums (chapter 1)	Reserved seats	Seats set aside for specific minorities and/or women in the <i>legislature</i> . Representatives from these reserved seats are usually elected in the same manner as other representatives, but are sometimes elected only by members of the particular minority community designated in the electoral law/constitution. (chapters 2, 5)
Positive discrimination	Deliberately permitting <i>affirmative action</i> measures to give an advantage to a specified group even though this will disadvantage others, usually justified by need to remove and reverse illegitimate inequality (chapter 3)	Rights-based approach	An approach to <i>constitution building</i> which embraces the rationale of the state as the protection of rights and the welfare of citizens and prioritizes giving effect to these rights in the design of the government and constitution (chapter 1)
Positive rights	Rights which require government officials to take certain actions to support the fulfilment of freedoms guaranteed by the law or the constitution (chapter 3)	Rule of law	A state of affairs whereby or a doctrine that holds that no individual or government is above the law and everyone regardless of their social status is equal before law. It is a condition in which every member of society including its ruler accepts the authority of the law. (chapters 1, 2)
Preamble	The introductory section of a constitution, which usually describes the purpose and intentions of the constitution (chapter 2)	Self-determination	The formal ability of a group to govern itself or to claim the right to take its own independent decisions over its collective welfare and political destiny (chapter 3)
Presidential system	The institutional design of the government in which the head of state and the head of government are typically the same individual who is directly elected by the people for a fixed term (chapter 4)		

Self-rule	Sub-national levels of government obtain the authority to regulate and/or implement certain issues on their own. (chapter 7)	Unitary system	A system in which one level of government can unilaterally revoke the existing distribution of powers, including exclusive competences at the sub-national level (chapter 7)
Separated/dual model	Both the national level and the sub-national level each have their own court system (usually three-tiered—local courts, circuit courts of appeal and <i>Supreme Court</i>). Lower courts generally only apply the laws of their respective states, whereas national law is adjudicated by national courts. (chapter 6)	Vertical separation of authority	A measure that explores options for allocating power among various levels of government through different forms of <i>decentralization</i> (chapter 4)
Separation of powers	The distribution of state power among different branches and actors in such a way that no branch of government can exercise the powers specifically granted to another (chapters 1, 2, 4, 6)	Veto	The ability of an official or body to block, impede or delay decision making or the passage of legislation (chapters 4, 5)
Shared rule	Sub-national entities are involved in national rule making. (chapter 7)	Veto players	Political actors and institutions, such as second legislative chambers, or presidents, that have the ability to veto, for example, legislative action (chapters 4, 5)
Solidarity rights	Rights that are meant to be claimed and enjoyed collectively or through membership in society, within communities, groups and associations (chapter 3)	Vote of no confidence	The competence of the <i>legislature</i> to withdraw its support from the government and/or individual executive officials and thus effect their removal. In some legislatures a ‘constructive’ vote of no confidence is required, in which a new Prime Minister is designated before the passage of a vote of no confidence. (chapter 5)
Spoilers	Actors who work against or hinder potential agreements, including constitutional provisions (chapter 1)	Women’s rights	Rights relating to women such as equality in political and public life, equality in employment, equality before the law, and equality in marriage and family relations (chapter 3)
State of emergency	A temporary period during which extraordinary powers are granted, usually to the <i>executive branch</i> , in order to deal with extenuating circumstances that are deemed an emergency (chapter 4, 5)		
Substantive decentralization	The assignment of authority and power to various levels of government. The substantive component of <i>decentralization</i> measures how the formal structure is actually filled with substantive authorities (sometimes referred to as functional decentralization). (chapter 7)		
Summons	A tool of legislative oversight which allows the <i>legislature</i> to submit questions which the <i>executive branch</i> is compelled to answer (chapter 5)		
Supreme Court	In most cases, the highest court within the legal system, which is often an appellate tribunal with high powers and broad authority within its jurisdiction (chapter 6)		
Transitional justice	Legal and other remedies or measures to redress grievances and wrongs, such as violations of <i>human rights</i> or acts of corruption, that were committed in the past; typically only used during periods of major political change (chapter 1)		
Unicameral legislature	A <i>legislature</i> composed of one chamber or house (chapter 5)		

About the authors

Markus Böckenförde is currently the Leader of the Advisory Team to the Policy Planning Staff at the Federal Ministry for Economic Cooperation and Development and Senior Researcher at the German Development Institute. From 2009 until April 2011, he was Programme Officer and in part Acting Programme Manager for the Constitution Building Programme at International IDEA, Stockholm. Before joining IDEA, he was the Head of the Africa Projects and a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (MPIL) in Heidelberg (2001–2008). In 2006–2007 he was seconded by the German Foreign Office to the Assessment and Evaluation Commission (AEC) in Sudan as its legal expert. The AEC has been mandated to support and supervise the implementation of the Sudanese Comprehensive Peace Agreement. From 1995 to 1997 he was research assistant to Justice Professor Helmut Steinberger, the German delegate to the Venice Commission (the Council of Europe's advisory body on constitutional matters).

Dr Böckenförde holds a law degree and a PhD from the University of Heidelberg and a Master of Laws degree from the University of Minnesota as well as the equivalent of a Bachelor degree in political science (University of Freiburg). He has been involved in the constitution-building processes of Sudan and Somalia, working together with the relevant constitutional assemblies, and has been otherwise involved in the processes in Afghanistan and Nepal. He has published widely in the area of constitutional law and constitution building and is the co-author of several Max Planck Manuals used as training materials for Max Planck projects. He has worked as a consultant for the United Nations Development Programme (UNDP), the German Society for Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit, GTZ, now the Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ), the German Foreign Office, the Konrad Adenauer Foundation and the Friedrich Ebert Foundation.

Nora Hedling is a key staff member with International IDEA's Constitution Building Processes Programme, where her work focuses primarily on the development of knowledge tools. She has previously researched in the areas of election law and judicial reform at the University of Minnesota and with the US Department of State, among others. She has also worked in both the non-profit and the education sectors. Ms. Hedling holds a Bachelor of Arts degree from Tufts University and a Juris Doctor degree from the University of Minnesota Law School and is a member of the Minnesota State Bar. Most recently she received a Master's in European Law at Stockholm University where she was awarded the Oxford University Press Law Prize.

Winluck Wahi joined International IDEA in 2006. In 2008, he was acting Head of Mission for IDEA in Nepal, where he helped to establish a programme in support of a participatory process of constitution building in the country. He was also involved in the process leading to the framing of Kenya's new Constitution in 2004–2005, primarily

as a legal advisor to the Ministry of Justice and the Parliamentary Select Committee responsible for the process. He has also advised the umbrella human rights organization in Uganda (2004) and the Law Society of Swaziland (2004) on the process of constitutional change in those countries. Between 2001 and 2005, Winluck coordinated the African Human Rights and Access to Justice Programme, a joint initiative of the Kenyan and Swedish sections of the International Commission of Jurists together with its Secretariat in Geneva, supporting the national implementation of human rights norms through constitutional litigation in 16 sub-Saharan countries. He is a constitutional practitioner and a graduate of the University of Nairobi, and has been honoured by a commendation (2005) of the Law Society of Kenya for his role in the country's constitutional process.

Our mission

In a world where democracy cannot be taken for granted, the mission of the International Institute for Democracy and Electoral Assistance (International IDEA) is:

to support sustainable democratic change through providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

In addressing our mission we focus on the ability of democratic institutions to deliver a political system marked by public participation and inclusion, representative and accountable government, responsiveness to citizens' needs and aspirations, and the rule of law and equal rights for all citizens.

We undertake our work through **three activity areas**:

- * **providing comparative knowledge and experience** derived from practical experience on democracy building processes from diverse contexts around the world;
- * **assisting political actors** in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- * **influencing democracy-building policies** through the provision of our comparative knowledge resources and assistance to political actors.

Our work encapsulates **two key principles**:

- * We are exponents of democratic change. The very nature of democracy is about evolving and adapting governance systems to address the needs of an ever-changing society.
- * We are supporters of change. The drivers of change must come from within societies themselves.

Our programme

Democracy cannot be imported or exported, but it can be supported. And, because democratic actors can be inspired by what others are doing elsewhere around the world, International IDEA plays an instrumental role in supporting their initiatives by:

Providing comparative knowledge and experience in:

- * elections and referendums
- * constitutions
- * political parties

- * gender in democracy and women's political empowerment
- * democracy self-assessments
- * democracy and development

Assisting political actors in national reform processes

As democratic change ultimately happens among citizens at the national and local levels we support, upon request and within our programme areas, national reform processes in countries located in:

- * Africa
- * Asia and the Pacific
- * Latin America and the Caribbean
- West Asia and North Africa

Influencing democracy building policies

A fundamental feature of strengthening democracy-building processes is the exchange of knowledge and experience among political actors. We support such exchange through:

- * dialogues
- * seminars and conferences
- * capacity building

Seeking to develop and mainstream understanding of key issues

Since democratic institutions and processes operate in national and international political contexts we are developing and mainstreaming the understanding of how democracy interplays with:

- * development
- * conflict and security
- * gender
- * diversity

Our approach

Democracy grows from within societies and is a dynamic and constantly evolving process; it never reaches a state of final consolidation. This is reflected in our work: in supporting our partners' efforts to make continuous advances in democratic processes we work step by step with them with a long-term perspective.

We develop synergies with those involved in driving democratic processes—regional political entities (the European Union (EU), the Organization of American States (OAS), and the African Union (AU) for example), policymakers, politicians, political parties, electoral management bodies, civil society organizations—and strategic partnerships

with the key regional, international and multi/bilateral agencies supporting democratic change and different United Nations bodies.

Quintessentially, we bring experience and options to the table but do not prescribe solutions—true to the principle that the decision makers in a democracy are the citizens and their chosen representatives.

International IDEA is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's Member States are all democracies and provide both political and financial support to the work of the Institute. The Member States include Australia, Barbados, Belgium, Botswana, Canada, Cape Verde, Chile, Costa Rica, Denmark, the Dominican Republic, Finland, Germany, Ghana, India, Mauritius, Mexico, Mongolia, Namibia, the Netherlands, Norway, Peru, Portugal, South Africa, Spain, Sweden, Switzerland and Uruguay. Japan has observer status.

