State-building and Constitutional Design after Conflict

IPA REPORT

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Executive Summary

This paper examines the strengths and weaknesses of constitutional choices made after conflict, drawing upon comparative studies of six constitutions and peace agreements. The paper attempts to synthesize the practical lessons drawn from the cases, with a focus on (i) the constitution-making process; (ii) the extent of reliance on executive and geographical power-sharing; (iii) the viability of checks and balances; (iv) the electoral model; (v) the role of political parties in the transition; and (vi) issues of implementation.

Although every case is specific, such efforts face comparable obstacles, and many recent post-conflict constitutions bear remarkable similarities. Constitutional realism requires an understanding of why different choices have been made in different situations, how these choices have been implemented, and to what effect, and whether or not any of these lessons are transferable to future cases.

While participatory and inclusive processes are championed in post-conflict contexts, they can present a threat to ruling elites. Constitution makers must find a way to reconcile the need to tie in powerful elites with the demand for a consultative process that fosters political dialogue and empowers the people. This may be best accomplished through an opportunistic approach that achieves results though incremental and iterative processes over a long period of time.

Formal executive power-sharing arrangements both reflect and reinforce a fragile peace where the parties are not reconciled and governments remain vulnerable to collapse. Not surprisingly, power-sharing governments have been repeatedly immobilized by the clauses intended to ensure moderation and consensus, and such arrangements have served to entrench the divisions that fueled the conflict, rather than ameliorate them. In contrast to executive power-sharing, decentralization or federal power-sharing requires less constant negotiation and compromises between parties coming out of conflict and is an option that should be explored.

In established democracies, the legislature serves as a primary check on the power of the executive. However, in post-conflict environments, legislatures are consistently weak and ineffective. This appears to be true regardless of whether a presidential or parliamentary system is adopted. International assistance should be channeled towards ensuring that presidential term limits are enforced and strengthening the legislature to serve as a more effective check on executive power.

Using electoral design in an attempt to engineer certain outcomes, such as moderation or intra-ethnic compromise, is not a straightforward proposition. The results of such attempts are hard to predict, and in some cases may serve the opposite effect to that intended by perversely funneling votes to the radical parties. Sophisticated electoral models may be too complicated for politicians and electorate alike, despite the enthusiasm of some scholars.

The role of political parties in post-conflict democratic transitions is complex. While the support of parties is essential, such parties may be no more than thinly disguised incarnations of the armed groups that waged the conflict, and can play a damaging and divisive role. National liberation movements, in particular, have found it difficult to transform themselves into political parties since they usually lack electoral competition. The role of leadership is hugely important in dictating the behavior of political parties, and political will generally trumps formal provisions contained in the constitution.

Even the most carefully negotiated and nuanced agreements will be rendered moot if they are not implemented or enforced. Failure to implement is a fundamental difficulty undermining the impact of post-conflict constitutions and peace agreements; but it is also a reflection of the value placed on such agreements. Explicit enforcement and implementation provisions can be included in the constitution, but if the political will to implement does not exist, formal implementation provisions are irrelevant.

The cases explored in this study illustrate the complexity of constitutional design in post-conflict settings and the wide variety of factors affecting the outcome of constitution building processes. In many cases, the governance and electoral structures adopted to manage division and violent conflict had at best unpredictable, and at worst negative, consequences, even serving to entrench and radicalize group divisions. Above all, the case studies demonstrate the primacy of politics, and the difficulty in attempting to engineer specific outcomes through constitutional design.

Introduction

Recent experiences in Iraq and Afghanistan have stimulated a rising awareness among scholars and policymakers of the importance of post-conflict constitution-making. Such processes represent moments of great opportunity, the outcomes of which can have significant and lasting impacts on the peace and stability of a state and the sustainability and quality of its democracy. Yet the difficulty of these enterprises cannot be exaggerated. Constitutional negotiations in deeply divided or post-conflict societies must often navigate profound ethnic or sectarian divisions while attempting to overcome a history of violence. Once adopted, the enforcement of the constitution may be hampered by weak democratic traditions, damaged or nonexistent government institutions, an inexperienced or corrupt public service, and a weak rule of law tradition and civil society.

These processes are made even more difficult by an increasing tendency to conflate constitutional negotiations and peace processes. In many instances, negotiations over governance provisions—historically the substance of constitutions—now form the core of peace agreements. Such compromises between warring factions over resources and power, which may be necessary in the short term to end violent conflict, can undermine later attempts at democratic reform and jeopardize the long term stability of the state. Informed choices are particularly vital in these contexts where peace is fragile, populations are sharply divided, leaders tend to be inexperienced in governance, and traditional checks and balances are likely to be very weak.

This paper examines the strengths and weaknesses of constitutional choices made after conflict, drawing upon comparative studies of six constitutions and peace agreements: Bosnia-Herzegovina, Fiji, Lebanon, Northern Ireland, South Africa, and Uganda.[1] Rather than describing each case in turn, the paper attempts to synthesize the practical lessons drawn from the cases.

Why these cases?

In policy and academic circles, the choice of democratic governance frameworks in highly divided societies has been theorized as a choice between, or combination of, *consociational* and *integrative* models of governance.[2] Consociational models involve power sharing between autonomous groups, whereas integrative governance aims to transcend group differences by encouraging groups to cooperate around common political goals. Consociational models are a form of consensus democracy which require that the major sub-groups of the society (usually defined along ethnic, sectarian or communitarian

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[1] IPA asked leading experts with experience with constitutional choices in conflict contexts to produce these six case studies (Bosnia-Herzegovina: Sumantra Bose; Fiji: Yash Ghai and Jill Cottrell; Lebanon: Paul Salem; Northern Ireland: Adrian Guelke; South Africa: Paul Graham; Uganda: Miria Matembe). Unless otherwise noted, all references to these cases will draw upon their papers, available for download on IPA's website at the URL's noted on p. 4-5.

[2] See Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven and London: Yale University Press, 1977) and Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985).

lines) rule the state jointly, making decisions through some form of consensus mechanism. Integrative power sharing models will tend to rely on non-ethnically based decentralization and an electoral system structured to encourage multi-ethnic coalitions within the political system.

Half of the cases selected for this study can be considered predominantly consociational (Northern Ireland, Lebanon, Bosnia-Herzegovina), whereas the other half have adopted more integrative features (Uganda, Fiji, South Africa). Most, however, represent a combination of both consociational and integrative aspects—perhaps reflecting increasing recognition that "pure" models are rarely successful when applied to real-world cases. The constitutional frameworks investigated were all adopted following violent conflict or in an atmosphere where conflict was ongoing. They have been in place for eight to sixteen years, which in some instances only represents two election cycles. While it may be premature to evaluate long term success, sufficient time has elapsed from the adoption of the constitution or peace agreement to allow for a realistic evaluation of medium-term outcomes. Despite these parallels, the cases are dissimilar in terms of regional diversity, range of models adopted, and varying roles of international actors in the constitutional process, as is evident in the brief descriptions that follow:

> **Bosnia-Herzegovina**: The General Framework Agreement for Peace in Bosnia and Herzegovina, negotiated on a US air force base in Dayton, Ohio, formally ended the bloody 1992-1995 war in the former Yugoslavia. Serving as both peace agreement and constitution, the 1995 Dayton agreement preserved the Bosnian state by creating a consociational confederation of two radically autonomous 'Entities' and three peoples, with a complicated system of power-sharing structures to be overseen by an international governor with wide-ranging authority. Sumantra Bose's case study on Bosnia examines the implementation and outcomes of this agreement ten years after its adoption. www.ipacademy.org/PDF_Reports/Bosnia.pdf

> **Fiji**: In 1997, Fiji adopted its third constitution, reversing discriminatory provisions contained in the post-coup constitution of 1990. Yash Ghai and Jill Cottrell's case study examines the impact of sophisticated provisions in the 1997 constitution aiming to reduce tensions between ethnic Fijians and Indo-Fijians, particularly in the aftermath of the subsequent coup in 2000. www.ipacademy.org/PDF_Reports/Fiji.pdf

> **Lebanon**: The 1989 Taif Agreement marked the beginning of the end of the 15-year civil war in Lebanon. While calling for the abolition of political sectarianism, the agreement formalized previously unwritten intercommunal power-sharing arrangements and also attempted to restructure the political system in Lebanon by transferring power away from the historically overrepresented Maronite Christian minority. Paul Salem's case study examines the Lebanese system, which is still based on quotas, coalitions, and consociational government sixteen years after Taif. www.ipacademy.org/PDF_Reports/Lebanon.pdf

Northern Ireland: The Good Friday Agreement of 1998 represented a turning point in the Northern Ireland peace process. Providing for devolved government and an inclusive power-sharing executive, as well as targets for paramilitary decommissioning, polls on Irish reunification, and parity of esteem for the two communities in Northern Ireland, the agreement enjoyed broad popular support among Catholics and Protestants. Yet continued disputes between unionist and nationalist parties have hindered its implementation and the province remains under direct rule from Westminster. Adrian Guelke's case study examines the politics of implementing devolved government in Northern Ireland. www.ipacademy.org/PDF_Reports/NIreland.pdf

South Africa: South Africa's post-apartheid constitutional process that culminated in the 1996 constitution has been used as a template for other constitutional negotiations in divided societies. Eschewing formal power-sharing arrangements and quotas, and instead relying on broad participation, inclusion of all parties in an interim national unity government, and sunset clauses with pre-determined expiration dates, the South African model is universally hailed as one of the world's most progressive and successful post-conflict constitutions. Paul Graham's case study examines the process and its implementation under ANC rule. www.ipacademy.org/PDF_Reports/SAfrica.pdf

Uganda: Uganda's 1995 constitution was the culmination of a ten-year national process launched after Yoweri Museveni's rise to power in 1986. Miria Matembe's study examines the highly participatory Ugandan process, the impact of controversial provisions such as the no-party "Movement" system, and constitutional implementation and enforcement under two decades of Museveni's rule. www.ipacademy.org/PDF_Reports/Uganda.pdf

The challenge of evaluating outcomes

There has been limited research on the impact of constitutional design in conflict contexts, perhaps because such outcomes are so difficult to measure. It is difficult to establish causality between choices made during constitutional negotiations, and the strength and sustainability of the regimes that emerge from such transitions. The practical outcome of any constitution always involves a complex interaction between formal and informal institutions and processes and a unique historical and cultural environment. There are two sides to the constitution-making process: the choices made while drafting a constitution; and the implementation of that constitution. Both are affected by contextual factors and political considerations; but the reasons why certain choices are made may be different from the political constraints affecting implementation. Political frameworks in post-conflict states are therefore simultaneously reflected in, and guided by, the constitution.

Some believe that each case is *sui generis*, that solutions and institutions are not transferable, and that most constitutional choices are preordained by political constraints. Indeed, each situation is highly specific and many factors may impact the choice of

governance frameworks. Yet although the specific character of the problems might differ, such efforts essentially face comparable obstacles, and many recent post-conflict constitutions bear remarkable similarities. This can be explained in part by the reliance on previous constitutions as models and the participation of the same expert advisors in different cases. Some of these choices have also resulted from poorly-understood attempts to graft the successes of one case onto the challenges of another.[3] Constitution-makers must approach their task with realism, which means understanding why different choices have been made in different situations, how these choices have been implemented, and to what effect, and whether or not any of these lessons are transferable to future cases.

This paper is not a comprehensive analysis of every choice facing constitution-makers; rather, it selects certain elements that have been the subject of intense debate in recent political transitions and that constitutions often seek to address. In doing so, it focuses on the following elements: (i) the constitution-making process; (ii) the extent of reliance on executive and geographical power-sharing; (iii) the viability of checks and balances; (iv) the electoral model; (v) the role of political parties in the transition; and (vi) issues of implementation.

Discussion

The constitution-making process

Does the process by which constitutions are made affect the results? There is no one model for a "successful" process—the choice of process and the impact that it may have will vary depending on the political, historical, and regional context of each case. Much attention is given to public participation, but there are other elements to constitutional processes that go beyond the immediate question of participation. Each of the cases considered faced similar dilemmas in constructing constitutional negotiations.

> *Public participation versus elite incentives.* Constitution makers must find a way to reconcile the opposing requirements of creating incentives to tie in powerful elites with the demand for a consultative process that fosters political dialogue and empowers the people. Many consider participatory processes to be essential for constitutional success,[4] although the evidence to support such claims remains elusive: a recent study of 194 post-conflict constitutions found that differences in the degree of participation in the drafting of constitutions had no major effect on post-ratification levels of violence in some parts of the world, but did make a difference in others.[5] Advocates for participation emphasize that the people in post-conflict states have

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[3] For instance, many nations have relied on the South African constitution for inspiration, often with little understanding of how or why those options played out as they did in South Africa.

[4] Jamal Benomar, Kirsti Samuels & Yoonie Kim, "Constitution Making and Peacebuilding: Lessons Learned From UN Constitution-Making Experience: East Timor, Afghanistan" UNDP Roundtable Report (December 2005).

[5] Jennifer Widner, "Constitution Writing and Conflict Resolution," UNU-WIDER Research Paper No. 2005/51, August 2005, available at http://www.wider.unu.edu/publications/rps/rps2005/rp2005-51.pdf.

frequently suffered under years of traumatic and repressive regimes, or violent conflicts which were rooted in exclusion. As Hart points out, "[W]here conflict is essentially over governance by, and respect for, a diversity of people and peoples, those people and peoples must be heard in the process of constitution making."[6] A participatory process, while not necessarily determinative of success in implementing the constitution, can benefit the political transition in other important ways: by signaling a break with the past; providing a forum for dialogue and national education; and setting a precedent and creating demand for ongoing public participation. However, while participatory and inclusive processes have often resulted in constitutions representing broader interests of the population, they have at the same time presented a threat to ruling elites who have often reacted by undermining the constitutional process.

Local ownership versus international assistance. The international community—be it the UN, bilateral donors, or neighboring states—plays a significant role in post-conflict transitions. Despite their rhetoric, international actors are not disinterested third parties, but are deeply involved as political players with a vested interest in the outcome of the constitutional process. This makes it difficult in some cases to assess whether the demand for constitutional change is internally or externally driven. In some instances, support provided to civil society in the hopes of fostering an endogenous process can be perceived as interference. As in any endeavor, the best intentions can have unintended impacts, sometimes even distorting the social environment and creating new elites that are not rooted in society. International actors often fail to realize that national actors are not a monolithic "people," but represent different interest groups and agendas. The challenge of converting these diverse interests into a coherent set of proposals is complicated enough without international actors bringing political pressure to bear on the outcome.

Grand design versus incremental change. Constitution-making is a serious matter: the constitutional process structures the interactions that will occur between various interest groups in ways that often endure long after the constitution is adopted. There is an unavoidable tension between the need for a speedy outcome to satisfy popular expectations or international demands, and the time needed to build consensus for an outcome which will prove enduring, which raises the whole question of interim mechanisms. It is important to keep a window open to the emergence of new issues and newly self-conscious or mobilized groups that the process itself may foster. An opportunistic approach that achieves results though an incremental or staged process, over a longer period of time may be a good option, and can be especially useful in separating peace negotiations from constitutional processes. There have been several cases, South Africa chief among them, which made good use of interim constitutional structures in a phased process. Perhaps inspired by this model, the Bonn process for Afghanistan envisioned a similar phased process that gradually widened participation

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[6] Vivien Hart, "Constitution-making and the Transformation of Conflict," *Peace and Change* 26, 2001, p. 160.

with each iteration. Of course, if a phased process is adopted, constitution makers must be careful not to enshrine institutions in interim agreements that could later prove counterproductive and hard to dissolve. South Africa's use of sunset clauses proved to be a successful approach to this dilemma.

Rhetoric versus resources. There is a need for an adequate infrastructure—including a secretariat and staff—to support the constitutional process. Participatory mechanisms require considerable time and personnel to plan and implement effectively, including sufficient time to analyze the results of consultations. Too often, agreements on constitutional processes lay out grand plans for participatory processes without securing the necessary resources to conduct those processes appropriately. The international community invests only a fraction of the time and money it spends on elections on supporting constitutional processes. Without a centralized body around which parties to the negotiations, civil society actors and representatives from the international community can organize, the constitutional process will be marred by a lack of transparency.

As illustrated in the cases, a participatory process can provide an opportunity for the democratic education of the population and begin a process of healing and reconciliation. The South African process prompted a national dialogue on the country's political future, allowing all sides to discuss plans and to reach a maximum level of consensus over the future of the country. Uganda undertook a highly participatory constitution making process that took place over five years, resulting in a constitution with high levels of public support that reduced the importance of ethnicity in the political environment. However, as will be discussed in the section on implementation, participatory processes do not protect the constitution against being later undermined: consider, for instance, Museveni's successful effort to remove presidential term limits in his bid for a third term in Uganda.

With the exception of South Africa and Uganda, the other cases adopted elite negotiated processes without widespread participation (though in the case of Bosnia-Herzegovina the constitution was more or less imposed by the international community). These constitutions all show signs of being weakened—for example, key provisions in the Taif agreement dismantling communal segregation were never implemented in Lebanon, and Northern Ireland's Good Friday Agreement institutions are currently dissolved—and those societies show little progress towards genuine reconciliation. It may be that non-participatory processes may result in constitutions that are more vulnerable to undermining, either by popular interests excluded from the bargaining process or by elites involved who are able to utilize excluded interests as drivers of protest. However, in Lebanon and Northern Ireland, failure of implementation has little to do with process: the problem in both cases is unwillingness by parties to actually abide by what they themselves negotiated.

Power-sharing

In many cases, constitution-making takes place before the actual conflict is settled, and the constitution is then treated as part of the process of conflict resolution. In such cases,

a power-sharing model is often the only option that will bring the parties to the table and stop the violence—in South Africa, for instance, interim power-sharing structures played an essential role in peace negotiations. However the same power-sharing provisions that have been commonly used in peace negotiations have different implications when formalized and made permanent in constitutions. To what extent do power-sharing models entrench initial positions and condition debate so that there is little margin for maneuver, paralyzing the political process?

Executive power-sharing

From a mediator's point of view, the consociational model is a measure of last resort, adopted when communities can only live 'back to back' without integration. And yet all of the cases under consideration adopted some element of executive power-sharing, if only on a temporary basis. In these cases, power-sharing did provide an alternative to violent conflict. However, implementation has been a key difficulty. Such agreements generally represent none of the parties' preferred outcome—in Bosnia-Herzegovina, for instance, many preferred partition. Moreover, there is a deep trust deficit. As Bose writes, there is a "deep sense of injury, betrayal and distrust that continues to dominate mutual perceptions and relations between the Bosnian communities in the post-war phase."

The cases highlight the fragility of a power-sharing government and the degree to which it is reliant on genuine commitment by the political leadership. Such governments are vulnerable to collapse when parties pull out or threaten to do so. Working through consensus requires substantial commitment and compromise, which is difficult to achieve in highly divided societies. Given these constraints, it is unsurprising that power-sharing governments have been repeatedly immobilized by the clauses intended to ensure moderation and consensus. In Lebanon, for instance, Paul Salem points out that "decision making is complex, slow and often paralyzed. Prime Ministers that come in with a clear agenda find themselves unable to form a cabinet fully responsive to them or to implement the policies they are proposing." In Fiji, lack of minority veto or other consociational provisions has meant that the failure to implement power-sharing provisions has not brought the government to a halt. Nevertheless, it has resulted in ongoing court battles and growing tension, and occasional violence between the ethnic Fijian and Indo-Fijian communities.

Power-sharing arrangements are often the result of agreements between elites over access to power and resources, not real attempts to resolve divisions between ethnic communities. In many cases, the formal organization of power along identity or ethnic lines seems to entrench the divisions that fueled the conflict, rather than ameliorate them, and divisions appear to become radicalized during the power-sharing phase. Moderate leaders that have agreed to participate in power-sharing arrangements are too often undermined by more extreme factions that decry compromises or conciliatory actions as 'selling out.'

These observations are illustrated by the experience of cases that adopted formal executive power-sharing arrangements along ethnic lines. Northern Ireland, Fiji and

Bosnia-Herzegovina have seen increased support for radical political parties over more moderate parties since the adoption of power-sharing structures. In Northern Ireland, support has increased for the more radical DUP and Sinn Fein since the Good Friday Agreement. This radicalization could be seen as a result of the failure of the power-sharing government, although it seems more likely that this is an incremental trend. In Bosnia-Herzegovina, the only significant party with a cross national ideology is the Social Democratic Party, but even it has largely mono-ethnic Bosniac support. In Fiji, even though power-sharing is not formally ethnically based, elections have favored more radical nationalist and ethnically based parties. No new cross-ethnic parties have been created since implementation of the Fijian constitution, and those that previously existed have split into their constituent parts. Even in Lebanon, which has relied on power-sharing along confessional lines for close to a hundred years, the Taif agreement was only partially implemented and the divisions remain as strong as ever.

South Africa and Uganda also adopted executive power-sharing arrangements, but with two key differences: the criterion was not ethnic, racial or sectarian, and inclusion was a voluntary decision by the dominant party. In South Africa, after the end of the formal power-sharing government during the transition, the ANC continued to run a power-sharing government on a voluntary basis. Chief Buthelezi of the Inkatha Freedom Party has been a minister in the government since the transition, and while the National Party left the official power-sharing transitional government to stand in opposition in 1996, it rejoined the voluntary government of national unity in 2004 (until the party dissolved itself in April 2005). In Uganda, a unique no-party inclusive government model was adopted by President Museveni after the war. Although the system has become less accommodating to divergent views in recent times, for a decade or more it provided a relatively effective inclusive government.

In both South Africa and Uganda, these measures were voluntary choices; a demonstration of political will to foster rapprochement and reconciliation that simply did not exist in the other four cases. These voluntary power-sharing measures seem not to have entrenched or radicalized existing divisions; rather, they may have actually lessened the role of ethnicity in politics. The voluntary nature of these agreements reflects a commitment by the political leadership to an inclusive government of national unity, whereas a formal executive power-sharing agreement is generally seen by all parties as an uncomfortable compromise.

Overall, there is an urgent need for the development of new approaches to executive power-sharing. Formal executive power-sharing arrangements both reflect and reinforce a fragile peace where the parties are not reconciled and tensions remain below the surface. Power-sharing agreements are often susceptible to deadlock and collapse, require extensive international intervention and risk both entrenching and radicalizing underlying divisions. If power-sharing can be achieved on a voluntary basis, this seems to produce a more effective inclusive government, although the leadership required for such a model is rare. The willingness to enter into voluntary power-sharing arrangements seems to indicate the political will required for genuine reconciliation, but there are few ready alternatives when such commitment does not exist.

Geographic power-sharing

Power can also be shared between geographic entities. The cases illustrate a range of decentralization options: a highly decentralized federal model in Bosnia-Herzegovina; a form of non-territorial ethnic decentralization in Fiji; and an integrative, non-ethnic form of decentralization in South Africa and Uganda. Geographic power-sharing may co-exist with executive power-sharing arrangements, such as in Bosnia, or it may be seen as an alternative, as in Uganda. In many ways, decentralization or federal power-sharing requires less constant negotiation and compromises between parties coming out of conflict than executive power-sharing arrangements. Of course, federal systems require more negotiation than systems based on geographic autonomy, and in many countries emerging from conflict, "federalism" is treated as a dirty word around the negotiating table, particularly in cases where the conflict was sparked by claims of secession.

Ethnically neutral decentralization may be a more flexible tool that can promote inclusivity in governance without further entrenching divisions. In Uganda and South Africa, the more diffuse form of geographic decentralization has minimized ethnic radicalization, while at the same time offering flexibility and opportunities for change over time. In Uganda, local decentralization has helped to create inclusivity in governance. In South Africa, the division into regional structures allowed ethnically-defined regions to evolve over time—in early elections the National Party and the Inkatha Freedom Party won a majority in one province each, which reduced fear and political tension during an interim phase. However, the system left open the option of evolution of the political atmosphere, and those regions have since elected the ANC to represent them.

Even decentralization along ethnic lines can play an important role in reducing tensions by devolving decision-making authority and providing ethnic or sectarian groupings with a sense of local security. The potential negative side effects of such an approach, such as ethnic apartheid and the creation of new minorities, must be weighed against the potential for such a system to prevent a return to violent conflict. Even though the ethnically-based geographic divisions in Bosnia-Herzegovina have created new minorities within the entities, and have encouraged ethnic flight in some areas, it is difficult to envision what option, other than outright partition, would have brought the conflict to an end. In contrast, the Fijian model of non-geographic autonomy for ethnic Fijians (e.g. the council of chiefs and Fijian affairs board), which explicitly aims to maintain dominance of ethnic Fijians over Indo-Fijians, seems to have exacerbated divisions and conflict.

Checks and balances

The executive and legislative balance of power

There is a long-running debate over the merits of presidential versus parliamentary systems in emerging democracies, with many arguing that presidential systems encourage autocratic behavior. In established democracies, the legislature serves as a primary check on the power of the executive. However, in post-conflict environments, legislatures are consistently weak and ineffective. Some scholars have claimed that the observed instability of newly established presidential democracies has more to do with the legacy

of military rule, and the competence of the executive and legislature, than with the way constitutions are written.[7]   In some cases, this would then argue for spending less political capital on trying to influence adoption of a specific constitutional framework and for devoting more attention to the dynamics and preferences of people on the ground. However, this assertion remains contested and many constitutional experts would strongly disagree with such an approach.

The cases reviewed include a full range of presidential, parliamentary, and mixed systems. Uganda represents the only traditional presidential model; Lebanon and Bosnia-Herzegovina have mixed presidential models with strong power-sharing elements; South Africa and Fiji have essentially parliamentary cabinet models, although both have an office of the president; and Northern Ireland has adopted a traditional parliamentarian model with a form of power-sharing in the office of the prime minister. In all cases, the post-conflict legislature was uniformly weak. In the less consociational models, this weak legislature was dominated by a strong executive, whereas in the consociational power-sharing models (Lebanon, Northern Ireland, Bosnia-Herzegovina), the executives are also weak or stalemated. In some instances, such as Bosnia-Herzegovina, the ethnic balance has been used as a check on power. This has frequently resulted in immobility.

In the early post-conflict phase, there may be benefits to a strong executive who can lead reconstruction. However, increases in executive power can lead to more autocratic governments. Uganda illustrates the difficulty of transitioning from a centralized power structure to a more democratic model. The lack of competition for political parties formed from national liberation movements also tends to lead to a strong executive and weak legislature. There are, indeed, multiple considerations that will vary with each context. For example, if a leadership has particularly broad-based credibility, such as in South Africa, parties may more gravitate more confidently to a presidential system. If instead there are strong long-standing group interests, a multiparty parliamentary system may make more sense, which can facilitate different kinds of coalitional politics and power-sharing, for better or worse.

The choice of institution in the post-conflict context is more likely to be determined by historical and other circumstances than some rational calculation. In most cases, international actors will have limited influence on the type of system adopted, whether presidential or parliamentary.   Instead, international assistance should be channeled towards ensuring that presidential term limits are enforced and strengthening the legislature to serve as a more effective check on executive power.

The role of the judiciary

In many of the cases considered (other than Northern Ireland, which adheres to the Westminster doctrine of parliamentary supremacy), courts with constitutional jurisdiction have played a useful, if limited, role in imposing limits on government action. Many of

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[7] See José Antonio Cheibub and Fernando Limongi, "Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered," *Annual Review of Political Science,* Vol. 5, 2002.

these courts have attempted to protect democratic ideals against governments that stray from their promises. The extent of their impact depends largely on how the courts are set up, the competence of those appointed to the bench, and how judicial independence is secured.

In Uganda, South Africa, Bosnia-Herzegovina and Fiji, courts with constitutional jurisdiction have sought to uphold the constitution, even ruling against the government on occasion. In Fiji, court intervention restored the constitution after the 2000 coup. In Uganda, the court is currently the only institution acting to counterbalance the president, even going so far as to rule against the law banning multi-partyism outside of the capital. Nonetheless, the Ugandan courts can have only limited impact given President Museveni's political power. In South Africa, the constitutional court has arbitrated disputes over the meaning of the constitution, where it has proved itself to be a key source of legitimacy and a moderating force. The court regularly upholds restraints on government authority—for instance, by refusing to certify the first constitution as sufficiently protective of provincial government and forcing the constituent assembly to give more powers to the provinces.

In Fiji and Bosnia-Herzegovina, the constitutional courts have also served as a moderating influence, partly due to the presence on the bench of impartial outsiders. In Fiji, a panel of Commonwealth judges on the Court of Appeal held that the 2000 coup was illegal, a ruling that led to the constitution's reinstatement. The remainder of the Fijian judiciary has been somewhat inconsistent in its response to such issues, however, with some courts showing extreme lenience towards those convicted of involvement in the coup. In Bosnia-Herzegovina, the constitutional court is strengthened through the appointment of a number of experienced foreign judges selected by the President of the European Court of Human Rights. Here, the constitutional court also passed an important decision finding that provisions of the constitutions of both entities discriminated against the Dayton requirement that all three constituent peoples enjoy equal rights throughout the country—a 5-4 decision with all three international judges in the majority. However, the decision has been controversial and is seen by some as a further example of international intervention. According to Bose, the remainder of the Bosnian judiciary remains divided along ethnic lines and has failed to be neutral or objective.

Weak rule of law or a judiciary historically perceived as biased and untrustworthy are obstacles that can be partially overcome if judicial independence is secured and careful appointments are made. In Uganda, despite a weak rule of law tradition where judges were frequently under physical threat and cases were rarely heard to conclusion, the constitution entrenched the principle of separation of powers and the independence of the judiciary. In South Africa, the new constitutional court circumvented the reputation of the apartheid courts through the appointment of respected anti-apartheid lawyers as judges. In both Fiji and Bosnia-Herzegovina, the appointment of foreign judges played an important role. However, judicial independence cannot be imposed by the constitution if no political will exists to support it. In Lebanon, the Taif Agreement was only partially implemented, a fact which undermined the role of the new constitutional court, as did the lack of constitutional protection of judicial independence. The constitutional court had a

brief moment of independence in determining that the election law of 1996 was unconstitutional. However, the court was rapidly undermined by the government, which weeded out strong-minded judges and appointed more compliant ones.

The cases illustrate that a carefully constituted and strengthened constitutional court can play an important role in moderating anti-democratic government actions and upholding democratic principles. This is an important finding given the lack of checks and balances on the executive in most post-conflict environments. However, this important role for courts can be undermined by a weak rule of law culture, an inexperienced judiciary, or insufficient constitutional protection of judicial independence. If there are no social and political costs to political leaders' disobedience of court decisions, the courts are unlikely to serve as effective checks on executive authority no matter what provisions are contained in the constitution.

The electoral model

It is now conventional wisdom that the timing of post-conflict elections can have a significant impact on electoral outcomes. However, the electoral model chosen can also affect the outcome, both in terms of who gains power and the extent to which, in the post-conflict context, elections become divisive and undermine the chance of building a sustainable democracy.[8] An inappropriate electoral model can close the door to change and prevent more moderate voices from emerging or discourage more conciliatory voters from expressing their preferences. Scholars have hotly debated the merits of different electoral models in post-conflict contexts, and detailed and increasingly complex electoral provisions are becoming more common in peace agreements and post-conflict constitutions.   However, using electoral design in an attempt to engineer certain outcomes, such as moderation or intra-ethnic compromise, is not a straightforward proposition.   See Box 1 for an overview of the different electoral models under discussion. The electoral systems in the six case studies range across all of these models.

Box 1: Overview of electoral models

First Past the Post (FPTP) and **Block Vote** (BV) are the two most common majoritarian systems. In FPTP, the candidate with the most votes (not necessarily a majority) in a single member constituency wins election. BV takes place in multi-member districts and voters have as many votes as there are seats to be filled. Lebanon has a BV system with confessional quotas. Uganda has FPTP with reserved seats for women and other groups (e.g. military).

The **Alternative Vote** (AV) model aims to encourage moderation and cooperation. Electors rank the parties in order of preference in single member districts and votes are allocated through these preferences until a winner emerges. AV is often promoted as providing the strongest incentives for moderation by encouraging candidates to seek to appeal to other groups. Both Fiji and Republika Srpska in Bosnia-Herzegovina have used the AV model.

Single Transferable Vote (STV), a preferential system with multi-member districts, is a

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[8] See also Ben Reilly, "Democratic Validation," in John Darby and Roger Mac Ginty, eds., *Contemporary Peacemaking: Conflict, Violence and Peace Processes* (New York: Palgrave Macmillan, 2003).

mid-point model between AV and list Proportional Representation. It produces largely proportional results but aims to encourage party appeals beyond ethnic or communitarian groups. Northern Ireland combines STV with a complex system of ministerial allocation according to a particular formula (the D'Hondt system).

Under a list **Proportional Representation** (PR) model, elections are held in multi-member districts where each party presents a list of candidates. Electors vote for a party rather than a candidate and the proportion of votes a party receives determines in the number of seats it holds in parliament. South Africa and the Federation of Bosnia-Herzegovina both use list PR systems.

Majoritarian models with quotas or reserved seats

A complex majoritarian model with fixed quotas can encourage the election of moderates in sufficiently mixed districts, but tends not to do so in districts dominated by one group. In Lebanon, for instance, a candidate running for a Christian seat in a mixed district will be required to appeal to the Muslim community, but in districts dominated by one confessional group this moderating impact will not be realized. Results consistent with this analysis occurred in Fiji in the pre-1997 period, although most constituencies did have a clear ethnic majority. In practice in Lebanon, however, elite collusion has led to the creation of pre-agreed lists, undermining electoral competition. Another disadvantage of the system is that the rigidity resulting from the fixed confessional quotas has frozen the divisions in place at the time the electoral system was adopted. Provisions of the Taif Agreement aiming to abolish political sectarianism have not been implemented.

By contrast, quotas or reserved seats for women or other interest groups appear to encourage the participation of new actors in politics without entrenching ethnic or sectarian divides. In Uganda, for instance, such quotas seem not to have further entrenched sectarian or ethnic divisions, and in combination with the 'no party' system, seem to have refocused the political discourse away from religion and ethnicity, at least temporarily.

Preferential models

One striking finding to emerge from the case studies is the unpredictability of preferential voting models (such as AV or STV). There is little support in the cases for the view that preferential voting systems encourage moderation and compromise across ethnic lines in a consistent fashion. Instead, results are hard to anticipate, and in some cases the system perversely funneled votes to the radical parties. Given the fact that preferential models are often championed in post-conflict environments, this warrants further exploration. Perhaps the lesson is that sophisticated electoral models may be too complicated for politicians and electorate alike, despite the enthusiasm of some scholars.

Northern Ireland adopted multi-member district STV, considered one of the most sophisticated electoral systems because it has both a proportional and preferential basis.[9] While the electoral results under STV were more moderate and balanced in comparison to a simple majoritarian model, the model had a somewhat unpredictable outcome in comparison to list PR. AV has been strongly promoted as providing the greatest moderating influence of the preferential electoral models. However, this model has also proven difficult to implement in practice. Republika Srpska experimented with AV for the 2000 presidential elections. This system resulted in a decisive victory for the hard-line Serb candidate, as the Bosniacs refused to cross ethnic boundaries and instead gave their second preference to Bosniac parties that had no hope of winning, rather than support moderate Serb parties. Moreover, the AV model proved to be a get-out-the-vote strategy for the hardline Serb parties, who claimed that the electoral changes were designed to undermine them. This campaign tactic seemingly resulted in increased voter support as Serb voters realized the aim of the electoral changes and sought to defeat them. The electoral system was changed back to open list PR in 2002.

Fiji has also adopted AV, but there the impact is limited as only a small proportion seats are open, with the remainder allocated on the basis of ethnic quotas. It was initially hoped the AV system would lead to the development of multi-racial parties or foster deals among moderate parties. However, even the small proportion of open AV seats seem not to have delivered moderate outcomes. In the 1999 elections, the Indian FLP party won a majority of seats although it only had 33 percent of first choice support. Under a list PR system, the FLP would have been forced to govern with one of the other parties, either Fijian or moderate Indian. The electoral model, and the FLP's reluctance to make a power-sharing government work, may have contributed to the distrust by ethnic Fijians and the 2000 coup overthrowing the FLP government. In the 2001 elections, the electoral system funneled votes towards more radical parties, and the parties that had explicitly endorsed the idea of cross ethnic cooperation during the constitution making process were electorally wiped out.

List proportional representation

A list PR model based on electoral support for parties has the advantage of ensuring proportional representation of minorities in parliament, and seems to provide the greatest opportunity for evolution away from ethnic or sectarian divisions. This appears to be happening in South Africa, where factors such as class and geography are increasingly playing a role in elections.

However, list PR models, particularly closed list PR models, can be problematic: they place large influence in the hands of parties, and can undermine candidates' sense of accountability to voters. Open list PR systems, which allow voters to choose who on the list will be elected (as recently adopted in Bosnia-Herzegovina) can ameliorate these difficulties. However, one disadvantage of open list systems is that it can be difficult to

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[9] See Ben Reilly and Andrew Reynolds, "Electoral Systems for Divided Societies," in Peter Harris and Ben Reilly, eds., *Democracy and Deep-Rooted Conflict: Options for Negotiators* (Stockholm: International IDEA, 1998).

implement agreements on women's participation. In closed lists, women can be placed high on lists. In open lists, quotas for number of women on the lists may not result in their election. One possible approach may be to add reserved seats for women.

Political parties

The role of political parties in democratic transitions is complex. It is usually assumed that parties are essential to such transitions.[10] However, they can also play a damaging and divisive role. Often, elections are contested on the same basis that the war was fought, with political parties no more than thinly disguised incarnations of the armed groups that waged the conflict. In many transitional environments, political parties serve to represent the interests of competing elite groups, rather than policy or ideological platforms. National liberation movements, in particular, have found it difficult to transform themselves into political parties since they usually lack electoral competition.

In all of the cases investigated, the country inherited political parties that had been associated with sectarian or ethnic struggles and divisive ideologies. In most cases, some (if not all) of the parties were also associated with private militias and wartime violence. All of the constitutions in these cases required political parties to renounce violence; Uganda, Bosnia-Herzegovina and South Africa went a step further in adopting measures specifically designed to influence the conduct of parties and moderate divisive rhetoric. These ranged from adopting a no-party system in Uganda, to banning extremist parties in Bosnia-Herzegovina, to maintaining tight government control on parties in South Africa. The impacts of these strategies varied in each case. However, on the whole they have had minimal success in modifying party conduct.

In Uganda, the 'no-party' system did, in the early years, seem to create an inclusive political environment where new individuals were encouraged to enter politics. More recently, however, it has evolved into a more intolerant monolithic 'one-party' system against which political factions are rebelling. In Bosnia-Herzegovina, the High Representative has sought to moderate political discourse by banning some parties outright, and using incentives to encourage policy reform or change of leadership in others. However, the Bosnian parties remain highly confrontational and continue to rely on divisive ethnic rhetoric.

The approach in South Africa represents a middle ground. There, a constitutional clause banning racial hatred and exclusive membership in parties has seemingly restrained explicit campaigning on racial ideology. It is difficult to evaluate this approach, however, as parties still remain associated with racial groups, even through they appear not to have encouraged increased division or conflict. Clearly, the role of leadership is hugely important in dictating the behavior of political parties, and political will generally trumps formal provisions contained in the constitution.

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[10] See Seymour Martin Lipset, "The Indispensability of Political Parties," *Journal of Democracy*, Vol. 11, No. 1, 2000.

Implementation and enforcement

Even the most carefully negotiated and nuanced agreements will be rendered moot if they are not implemented or enforced. In all but one of the cases reviewed, there have been dramatic failures in implementing and enforcing the constitution—South Africa stands out as the exception. In Fiji, constitutional provisions providing for power-sharing in government have not been implemented. In Uganda, President Museveni rejected the presidential term limits, a decision which was ratified by the Ugandan parliament. In Northern Ireland, the IRA failed to decommission as required by the Good Friday Agreement, leading to the collapse of the power-sharing government.[11] The Taif Agreement in Lebanon was at best only partially implemented. Failure to implement is a fundamental difficulty undermining the impact of post-conflict constitutions and peace agreements; but it is also a reflection of the value placed on such agreements.

Explicit enforcement and implementation provisions can be included in the constitution, although most factors affecting constitutional enforcement are not so easily addressed. Formal provisions may include mechanisms geared towards accountability that create sanctions for breaches, such as a leadership code, ombudsman, human rights commission, independent auditor, or requirements to submit reports to international bodies (e.g. the UN Human Rights Committee). A constitutional implementation commission could also be set up for a limited period. However, if the political will to implement does not exist, formal implementation provisions are irrelevant. At the very least, formal provisions that create new institutions or rely upon complex monitoring mechanisms should be accompanied by training programs to ensure that those entrusted with these essential responsibilities are given the skills to perform their roles.

The international community and powerful states play a central role in enforcing peace agreements. In Bosnia-Herzegovina, peace could not have been secured without the presence of NATO and the Office of the High Representative. However, international actors can also undermine constitutions: many would say that Syria's continuing influence over Lebanese politics was the main factor impeding the full implementation of the Taif Agreement. In other cases, international actors merely play a supporting role. Further consideration ought also to be given to the role the international community could play in supporting constitutional implementation and enforcement. International monitoring of elections is fairly standard practice; why not similar international monitoring of constitutional implementation? Encouraging rights of appeal to international or regional courts or commissions (such as the European Court of Human Rights), or incorporation of international judges on domestic constitutional courts (as in Bosnia-Herzegovina, Fiji and East Timor) can help to strengthen the checks and balances capabilities of the courts. There may be scope as well to use constitutional implementation and enforcement as a criterion for admittance to economic organizations, as has proved successful with EU accessions, or as an element of aid conditionality.

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[11] The proximate cause of the suspension of the institutions under the Good Friday Agreement was a spying scandal in 2002, but in essence, the Good Friday Agreement was suspended because of insufficient progress on decommissioning. As of 26 September 2005, the IRA has in fact decommissioned its weapons arsenal to the satisfaction of the body overseeing decommissioning.

Conclusion

Constitutions play a key role in established democracies, protecting minority rights and setting standards and rules by which power is exercised. They are central to a culture of rule of law and underpin the fundamental belief that those in power are subject to checks and balances and can be expected to rule in the best interest of the population. The review of the six conflict cases reveals situations in which constitutions have not effectively or unproblematically served these functions, and highlights the myriad challenges facing constitution makers in post-conflict or conflictual environments.

The cases explored in this study illustrate the complexity of constitutional design in post-conflict settings and the wide variety of factors affecting the outcome of constitution building processes. The potential for a constitution to establish the basis for the rule of law and regulation of executive power, let alone as a tool for peace and reconciliation between aggrieved groups, was rarely fulfilled in the cases considered. Institutions that are effective in developed democracies proved less successful in the weak institutional environments considered. In many cases, the governance and electoral structures adopted to manage division and violence conflict had at best unpredictable, and at worst negative, consequences, even serving to entrench and radicalize group divisions. Above all, the case studies demonstrate the primacy of politics, and the difficulty in attempting to engineer specific outcomes through constitutional design.