

# Territorial Cleavages and Constitutional Transitions\*

Political Mobilization, Constitution-Making Processes,  
and Constitutional Design

*George Anderson\*\* and Sujit Choudhry\*\*\**

## Introduction

The constitutional politics of territorial cleavages—that is, territorially concentrated, politically salient, collective demands for constitutional accommodation—are a pervasive feature of modern political life. These claims arise in very diverse contexts. Claims for territorial constitutional accommodation are being made in the advanced industrial democracies of the global north, such as Spain and the United Kingdom, as well as in some of the poorest countries of the global south, like Yemen. Territorial claims are a central issue in the negotiations over the reunification of Cyprus. In Bosnia-Herzegovina, territorial power-sharing may have ended a civil war but resulted in a dysfunctional democracy. In Nepal, the federal restructuring of the country was a central element of a civil war settlement and is still a fragile work in progress. Territorial claims have also arisen in peripheral regions with insurgencies seeking special autonomy, such as the Bangsamoro in the Philippines and Aceh in Indonesia. Claims for constitutional accommodation of territorial cleavages often arise as part of a broader process of democratization, as is currently occurring in Myanmar.

What precisely is a territorial cleavage? Political cleavages are the principal axes of political mobilization, around which political claims are framed, political parties formed, elections contested, and governments composed. They can also be the basis on which constitutional claims are made and resisted. In countries where political cleavages are territorial, of territory is a central divide around which political argument occurs. Territorial cleavages can also overlap with and incorporate cleavages on the basis of ideology, class, religion, ethnicity, and race. Moreover, diversity among territories within a state does not necessarily become a territorial cleavage; it is only when

### \* Acknowledgments

We thank Sumit Bisarya, Mattias Kumm, and the audience at a session of the Berlin Colloquium on Global and Comparative Law for helpful comments. All remaining errors are ours. A policy manual drawing on this chapter—George Anderson and Sujit Choudhry, *Territory and Power in Constitutional Transitions*—will be jointly published by the Center for Constitutional Transitions, the Forum of Federations and International IDEA in 2018.

\*\* Center for Constitutional Transitions; Center for Democracy and Diversity, Queen's University.

\*\*\* Center for Global Constitutionalism, WZB Berlin Social Science Center.

*Territory and Power in Constitutional Transitions*. First Edition. Edited by Michael Anderson and Sujit Choudhry. Territorial Cleavages and Constitutional Transitions: Political Mobilization, Constitution-Making Processes, and Constitutional Design © George Anderson and Sujit Choudhry 2019. Published 2019 by Oxford University Press.

territorial differences are activated by political action that are they transformed into grounds for political division.

Constitutional transitions dealing with significant territorial cleavages face political dynamics and challenges that are quite distinct from such transitions where such cleavages are absent. They can involve different Constitution-making processes, sometimes with representatives of territorial groups having a formal or informal role, and certainly different political dynamics, whatever the defined role of territorial groups in the process. Such transitions also involve very different constitutional design options from those in countries in which territorial cleavages have little political salience; some form of federal, quasi-federal, or asymmetric devolution is usually at issue, and sometimes special power-sharing or minority rights protection arrangements are as well. Debates and choices around the procedural and institutional options relating to territorial cleavages can in turn affect the dynamics of conflict—whether peaceful or violent—within a society.

There is a global discourse surrounding the constitutional politics of territorial cleavages, in both the policy and scholarly domains.<sup>1</sup> Thinking across cases, about lessons learned and dangers to be avoided, continues to grow. Claims for the constitutional accommodation of territorial cleavages have generated substantial literatures on political mobilization, Constitution-making, and constitutional design, but there is little work that addresses the intersection of these three strands of research. This project seeks to integrate these three strands of research by posing this overarching question: **how do patterns of territorial political mobilization shape the processes of Constitution-making and the choices of constitutional design?** The anticipated payoff is both analytical and normative. Scholars can deepen their understanding of mobilization, process, and design by studying how these three factors interact. Seasoned practitioners know that political mobilization, process, and design are at play simultaneously, and that coming to grips with how they interact enables order to provide more informed constitutional advice.

This volume answers this question by bringing together analysis of political mobilization, Constitution-making processes, and constitutional design in societies that have very different structures of territorial cleavages and that have opted for very different constitutional designs—including both countries that have opted to accommodate territorial cleavages in their constitutional design and those that have not, even after a long constitutional debate. The seventeen cases chosen are all relatively recent examples of constitutional transitions and they were highly varied in what might be called the political geometry or configurations of territorial and other cleavages around which politics was mobilized. In addition to differing in the structure of their politically salient territorial cleavages, the cases differ in the characteristics of their other political cleavages (ethnic, linguistic, religious, economic), in their past histories of intergroup relations, including experiences of conflict, violence, and democracy, in the relative power of the key political actors, as well as in the levels of economic development, and the geopolitical situations and influences. They provide material for rich comparative analysis.

Within each case, we examine periods in which there has been intense political engagement over how to respond to significant demands for territorial accommodation from one or several regions. We call these periods of heightened political engagement around potential constitutional change “constitutional moments.” Some constitutional moments are relatively brief, while others are spread out over years; some bring

<sup>1</sup> George Anderson and Sujit Choudhry, *Constitutional Transitions and Territorial Cleavages* (The Center for Constitutional Transitions and International IDEA 2015).

significant, enduring change, while others change little or nothing in formal constitutional arrangements; some settle constitutional disputes, whereas others do not, leading to further rounds of engagement over future changes. Whitehead has noted that democratization is a “complex, dynamic, long-term and open-ended process” that requires coordinated collective action over generations.<sup>2</sup> Constitutional moments are likewise slices of time in a much longer, and ongoing, story with twists, turns, and even reversals.

Our core argument is as follows. In constitutional moments in which political mobilization around demands for the constitutional accommodation of territorial interests is important, **three** crucial contextual variables shape the structure and dynamics of the constitutional moment:

1. the *political geometry* of territorial (and other) cleavages, which are products of demography and narratives;
2. the *antecedent circumstances* of *peaceful, legal and institutionalized means* or *violent and extra-legal means* used to advance or reject demands for territorial accommodation; and
3. the *relative power of the key actors*, as shaped by *tests of strength* both peaceful and violent.

The configuration of these variables in the lead-up to a constitutional moment shapes its dynamics as well as the agenda for Constitution-making processes and the options for constitutional design. While each constitutional moment is unique, there are patterns in their configuration across cases which show similarities, and which share a presumptive structure. Of course, the configuration of the three variables can alter over time through the dynamics of the constitutional moment—especially through political tests of strength among the leading actors. But thinking in terms of these contextual patterns can help scholars and policy-makers in particular cases to understand the relevant issues, the prospects and possibilities, and the trade-offs among them. While our argument emphasizes the structural constraints within which political actors make their choices, those actors do retain agency so there is no simple determinacy.

Our emphasis is largely on constitutional moments where the relative power of the key actors is divided, and no party is dominant so that the outcome of the constitutional process cannot be dictated by one side. In these constitutional moments, the principal agenda items are to frame a process that engages the key power holders as well as the possible options to deal with claims for territorial accommodation. The constitutional design option being considered, especially by those seeking territorial accommodation, will closely track political geometry, but the actual choice will be influenced by power relations as well. A critical issue will be whether the ensuing constitutional design, with whatever degree of territorial accommodation, can be interpreted, implemented, and adapted in a sustainable way over time. Our cases include both transitions to democracy—of which they are a subset—and transitions within democracies; they also include cases of significant constitutional change and of little or no change. In all cases, the assumption is that democracy is the end goal of constitutional reform.

Violent struggles can lead to a military stalemate, either in a civil war or with a regional insurgency, in which case the key actors must design a process that combines peace negotiations and Constitution-making, which can pull in opposite directions.

<sup>2</sup> Laurence Whitehead, *Democratization: Theory and Experience* (Oxford University Press 2003) 201; North, Wallis, and Weingast also emphasize that there is no one path but bringing the ruler under the law is fundamental in Douglass C North, John Joseph Wallis, and Barry R Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (Cambridge University Press 2009).

There may have been a collapse of the legal order requiring the invention of a new process and constitutional design, or the government may insist on the existing legal and constitutional order being maintained while seeking to reconcile the combatants to accepting it on revised terms—most notably with respect to peripheral rebellions. Violent struggles can also end in victory by one side or the other, in which case the victor is largely able to determine what process will be adopted regarding constitutional change. By contrast, where the conflict over territorial claims has developed within a peaceful context of competitive politics, political actors address the issues of process and design within a context of constitutional and institutional continuity, which can bring significant constraints especially regarding process. However, on occasions, existing processes for constitutional deliberation and change may lack political legitimacy among one or more actors—perhaps precisely because they do not adequately accommodate the claims of territorial or other actors for change—so there may be a need to negotiate modified or supplementary processes, while preserving legal continuity.

The approach we adopt is one of structured analytical comparisons of different historical cases. It is retrospective or historical, which is consistent with the approach taken by recent work on democratization.<sup>3</sup> The previous work that most compares with this volume is Amoretti and Bermeo's *Federalism and Territorial Cleavages*,<sup>4</sup> which, despite its title, also looked at special autonomy and unitary regimes, but its case studies were not structured around a common template as ours are. Our chosen three main variables (political mobilization, Constitution-making processes, constitutional design) are interdependent and influence each other, in a process where they are all both dependent and independent variables over time. The law itself can be part of the Constitution-making process variable in cases of continuity because it then influences both processes and design. This causal nexus can make it difficult to disentangle the relative importance of factors.

Any consideration of causation in politics necessarily raises the issue of agency. As important as underlying social conditions and major institutional arrangements, may be as determinants, political actors do face choices, even in the most constrained circumstances. Actors in similar situations will make different assessments of their interests, of the possibilities and of the constraints; they may be deemed to be rational or irrational, bold or cautious, visionary or parochial—and their choices will matter. While the choices of political leaders receive particular attention, there is also agency in the polling booth, in the public square and on fields of battle as well. Moreover, O'Donnell and Schmitter have emphasized the enormous uncertainty during transitions from authoritarian rule (which can also apply to other transitional contexts) where there are “insufficient structural or behavioural parameters to guide and predict outcomes” and they argue that the conceptual tools for normal politics are inadequate for periods with a high degree of indeterminacy.<sup>5</sup> We are limited in our ability to generate general theories about constitutional transitions and territorial cleavages; it should steer us more in the direction of probabilities or tendencies rather than deterministic models. We have taken inspiration from Charles Tilly's work. In considering the historiography of state-making in the West, Tilly argued for comparative work that is historical in nature, consistent in its use of terms and units of analysis, clear regarding

<sup>3</sup> Giovanni Capoccia and Daniel Ziblatt, “The Historical Turn in Democratization Studies: A New Research Agenda for Europe and Beyond” (2010) 43 (8–9) *Comparative Political Studies* 931.

<sup>4</sup> Ugo M Amoretti and Nancy Bermeo, *Federalism and Territorial Cleavages* (Johns Hopkins Press 2004).

<sup>5</sup> Guillermo O'Donnell and Philippe C Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Johns Hopkins University Press 1986) 3–5.

what is to be explained (with general development being too broad), and open-ended and prospective in avoiding rigid assertions of determinants and suggesting rather the probability of different paths.<sup>6</sup> We have strived to follow Tilly's counsel.

A final point on method. Large-n statistical studies of political conflict, Constitution-making process, and constitutional design have been increasing in number in recent years. They can be very enlightening regarding how different variables may affect the probabilities of different political phenomena. But they are necessarily limited in what they can achieve given the very large number of variables at play and the restricted number of cases, even if there are scores of them.<sup>7</sup> Moreover, decisions as to how to code data are fundamental to the questions being examined, and even some of the most suggestive studies around ethnic conflict and politics have not factored the territorial dimension into their analysis.<sup>8</sup> Progress in the study of large-scale political phenomena will necessarily be iterative between methodological techniques, where insights and findings arising from one method are tested and refined using alternative techniques.

This chapter is structured as follows. In "Political Mobilization and the Context for Constitutional Moments," we examine some of the three central factors that influence political mobilization, setting up the conditions precedent for constitutional moments. We then proceed to an initial consideration of how these different factors shape the dynamics of constitutional moments, in terms of both the process and design options chosen or considered ("Context and Dynamics of Constitutional Moments"). We then review Constitution-making processes, their importance, the participants, and the stages, all as they relate to the politics of territorial cleavages ("Constitution-Making Processes"). The last major section looks at constitutional design options as they relate to different configurations of our variables, notably political geometry ("Constitutional Design and Territorial Cleavages"). We conclude with some reflections on the forces shaping the dynamics of constitutional moments and what this might mean for principals or advisors and future research ("Conclusion"). Throughout, we draw on our case studies for examples.

## **Political Mobilization and the Context for Constitutional Moments**

Many factors influence the intensity, duration, means, extent, and goals of territorial political mobilization.<sup>9</sup> We group these contextual factors into three categories: (a)

<sup>6</sup> Charles Tilly, "Western State-Making and Theories of Political Transformation" in Charles Tilly (ed), *The Formation of National States in Western Europe* (Princeton University Press 1975).

<sup>7</sup> Martin Ottman and Johannes Vullers, "The Power-Sharing Event Dataset (PSED): A new dataset on the promises and practices of power-sharing in post-conflict countries" (2015) 32 (3) *Conflict Management and Peace Science* 327; and Pippa Norris, *Driving Democracy: Do Power-Sharing Institutions Work?* (Cambridge University Press 2008) are examples of the suggestiveness of large-n studies. On the limits of such studies, see Stefan Wolff, "Building Democratic States after Conflict: Institutional Design Revisited" (2010) 12 *International Studies Review* 128.

<sup>8</sup> For example, see Andreas Wimmer, Lars-Erik Cederman, and Brian Min, "Ethnic Politics and Armed Conflict: A Configurational Analysis of a New Global Data Set" (2009) 74 (2) *American Sociological Review* 316. This study does not distinguish between regionally concentrated and regionally dispersed ethnic populations; this distinction is key to our analysis. See also Andreas Wimmer and Brian Min, "From Empire to Nation-State: Explaining Wars in the Modern World, 1816–2001" (2006) 71 (6) *American Sociological Review* 867.

<sup>9</sup> From a vast literature, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1998); Rogers Brubaker, *Ethnicity without Groups* (Harvard University Press 2006); Ernst Gellner, *Nations and Nationalism* (Cornell University Press 1993); Ted Gurr, *Peoples vs. States: Minorities at Risk in the New Century* (United States Institute for Peace 2002);

the *political geometry* of territorial and other salient political cleavages in the country; (b) the antecedent choices of *peaceful, legal, and institutionalized* or *violent, extra-legal means* to advance regional demands for territorial accommodation; and (c) the *relative power of the key actors*, as shaped by *tests of strength* both peaceful and violent. As we illustrate in “Constitution-Making Processes,” while each constitutional moment is unique, the configuration of these three factors across cases show patterns and share a presumptive logic around the agendas for Constitution-making processes and constitutional design.

### Political geometry: demography and political entrepreneurs

The relative size, number, and character of political cleavages, including their geographic distribution, is what we term a country’s political geometry. Understanding variations in political geometry is crucial in coming to grips with important variations in constitutional design and Constitution-making processes. For territorial cleavages, political geometry is a product of the interaction of *demography* and the *narratives* deployed by regional political entrepreneurs.

The interaction of demography and political entrepreneurship shape a country’s political geometry through political mobilization.

The cases chosen were all relatively recent examples of constitutional transitions and they were highly varied in the political geometry or configurations of territorial and other cleavages around which politics was mobilized. For the cases under study, we identify *four different patterns of political geometry*:

- First, states characterized by *multiple politically salient territorial cleavages*. Other salient cleavages may be present but the force of claims around territorial accommodation makes the territorial issue central to engagement on the issue of constitutional change, which typically involves the general architecture of the regime, e.g. federal or devolved. Ethiopia, India (with respect to its linguistic groups), Nigeria, and Spain are examples.
- Second, states characterized by *a majority group and one or two territorially based, minority groups of significant size*. The minority group(s) typically raise(s) demands for territorial autonomy, and if large enough it may advocate a constitutional structure of central institutions to reflect a pact or partnership with special power-sharing provisions among these groups. Examples include Cyprus, with a Greek-Cypriot majority and a Turkish-Cypriot minority (18 percent of the country’s population); and, Bosnia-Herzegovina, with a Bosniak majority (51 percent) and Serbian (31 percent) and Croatian (15 percent) minorities. Yemen, with its (divided) northern majority and southern minority (20 percent) has some of these characteristics.
- Third, states with *peripheral, politically mobilized regions*. Such regional groups make claims for territorial autonomy, but without demands for power-sharing in the central institutions, given their small size. Examples include the northeast tribes in India (whose many small ethnic groups total less than 1 percent); the Acehese (2 percent) in Indonesia; the Moro (5 percent) in the Philippines;

Scotland (8 percent) in the UK; the northern Tamils (5 percent) in Sri Lanka; and the Russophones in Ukraine's Donbas (15 percent).

- Fourth, states characterized by *politically salient cleavages that are both territorial and non-territorial*. In these cases, the issue of territorial accommodation is part of a larger constitutional agenda in which the strength of demands for devolution may be offset by other claims. Examples include Nepal, where ethnicity, indigenous, and even caste identities can be territorially concentrated but are often dispersed; South Africa, where the non-territorial identity of race exists alongside linguistic or tribal differences among blacks which are territorially based; Kenya, where there has been extensive intermingling of ethnic communities that historically were more territorially based; Bolivia, where major differences between the lowlands and highlands are mitigated by divisions within each and by other non-territorial dimensions; and Iraq, where the Kurds (15 percent) are distinct from the Arabs, but where both groups have significant internal divisions.

These four patterns of political geometry are ideal types, and not every country fits neatly into one pattern. For example, Yemen falls into both the second and fourth categories, because it has a major cleavage between the majority in the north and a territorial minority in the south (17 percent), but both north and south are internally fractured by tribes and religion. Moreover, there is no hard-and-fast threshold between categories two and three. Moreover, claims for territorial accommodation don't always fit the expected pattern. For example, while the Tamil-majority region of Sri Lanka might count as a peripheral region, but aside from a demand for secession, it has focused on a restructuring of the state into a decentralized federalism rather than on special autonomy, perhaps because the latter option seemed foreclosed.

Each of these patterns reflects elements of an underlying demography that have been mobilized by political entrepreneurs. But cutting across them all are important variations in the intensity, internal coherence, and durability of group identities, which affect the nature of territorial political mobilization, and subsequently, the agenda for Constitution-making and constitutional design. Consider the contrast between Aceh and Papua in Indonesia. Aceh is relatively internally cohesive, built around a single ethnic identity and a common language—and a shared grievance related to their petroleum resources. By contrast, Papuans have both an overall identity and many local identities, based on tribe, dialect, and geography, while the migration of large numbers of settlers from the rest of Indonesia into Papua has left indigenous Papuans as only a slight majority. Papua's internal heterogeneity has led to less frequent and sustained political mobilization. These differences made Aceh more determined and successful in pursuing its constitutional goals than Papua. Understanding how variations in political geometry shape the negotiating strategies and goals of actors may increase the chances for principals and advisors to successfully frame Constitution-making processes, or at least highlight challenges.

However, demography is not destiny. Demography does not determine political geometry, which can shift over time through political entrepreneurship, in response to changing structural conditions or exogenous or endogenous events. Constitutional process and design must address these changed realities. Bolivia, for example, has gone through three distinct cleavage patterns. Historically, wealth was concentrated in the Andes because of mining, creating a territorial cleavage with the lowlands. Territorial cleavages were replaced by class cleavages in 1952, yielding class-based political parties. Economic policy decisions on infrastructure and gas transformed Bolivia's economic geography and shifted economic power to Santa Cruz, leading to the return of the

territorial cleavage, but with relative economic power reversed. At the same time, indigenous communities whose financial support from the state was withdrawn under neo-liberal economic reforms used the democratic opening of the 1980s and 1990s to mobilize on the basis of ethnicity, demanding the plurinational reconfiguration of Bolivia and land rights, and the redistribution of wealth to the Andes.<sup>10</sup> This shift in cleavages led to the collapse of the political party system and its replacement with a new one that tracked these cleavages.

Now we look more closely at political entrepreneurs. A long tradition in political sociology roots territorial political mobilization as a defensive response to central state-led projects of nationalism. In *Imagined Communities*, Benedict Anderson argued that nationalism is a modern phenomenon and that national identity arises in the particular political and economic context of the “nation-state” system.<sup>11</sup> In many countries, nation-building political elites sought to invigorate the power of the central state and to develop a common national identity, often by assimilationist means. The classic liberal, nineteenth-century version of nation-building saw it as a way to promote democratic equality and self-government, to enhance the effectiveness of the state, and to promote national unity. Classic nation-building policies consist of the centralization of political and legal authority, the fashioning of a common identity around a shared culture and history, and usually, the adoption of a single language becomes the official or quasi-official medium for political and economic life.

The content and contexts of nation-building policies vary. Imperial Ethiopia, which was never colonized, sought to build a nation around language and religion, in the manner of European nation-states. In monarchical Nepal, which also was not colonized, central elites fashioned a nation built not just on language and religion but also caste, ethnicity and region. American colonial authorities in the Philippines sought to integrate Mindanao, a historically Muslim island, through internal colonization by Roman Catholic settlers from Luzon. In Iraq, national governments imposed Arabic on the Kurdish-speaking minority.

Constitutions have often been used to centralize political, legal, and economic power and to impose a national language. This happened in the transitions to independence with Indonesia’s 1949 Constitution and India’s 1950 Constitution. It has also occurred through democratic politics when majority groups seek to impose their language and symbols, as happened in Sri Lanka, with the replacement of the post-independence Soulbury Constitution with the 1972 Constitution. In Nepal, the 1990 constitutional process, which established responsible government and multi-party competitive politics, was designed to confer democratic legitimacy on the nation-building approach of the monarchy.

Nation-building creates winners and losers by redistributing access to cultural, economic, and political power and privileging central elites and the dominant community. When Constitutions have been used as instruments of nation-building, they have often triggered contestation and defensive constitutional politics by minorities, who may seek constitutional change—either through democratic politics or violent means. Indeed, if the principal object of ethnonational contestation is competition over access to state power, then violent conflict should be more likely when groups are excluded from power, and likelier still when groups lose or fear losing power. Cederman et al. have found that ethnic violence is defensive and dynamic: it arises in response to

<sup>10</sup> Deborah J Yashar, “Contesting Citizenship: Indigenous Movements and Democracy in Latin America” (1998) 31 (1) *Comparative Politics* 23.

<sup>11</sup> Anderson, *Imagined Communities* (n 9).

exclusion, and even more so to a worsening of political status. Since violent conflict arises from the breakdown of politics, the same forces should also lie at the root of non-violent territorial political mobilization.<sup>12</sup>

But exclusion or discrimination does not necessarily produce political mobilization. Our approach follows the constructivist tradition in political sociology, which argues that political entrepreneurs are critical to the success of political mobilization, by framing a case, developing strategies, and marshaling resources.<sup>13</sup> Political entrepreneurs typically form elite coalitions drawing from various sectors, and the composition of these coalitions can change over time. Indeed, there may be political competition among different regional elite coalitions contending for power. Moreover, territorially based populations, even when they are distinct minorities nationally, may not have a high level of internal political cohesion, which underlines the importance of political entrepreneurs.

To be successful, subnational political entrepreneurs must construct narratives regarding the past and present that resonate with a population's sense of grievance and of its rights. Such narratives often focus on lost political and legal status compared to an earlier period, as well as on past and ongoing cultural, economic, and political discrimination. History is particularly useful if a group once enjoyed political autonomy or even independent statehood: this can support arguments about the group's right to new arrangements (rooted in the right to self-determination) and the practical viability of the arrangements they seek. Past arrangements can also provide a natural benchmark for assessing the adequacy of current offers, which may be condemned as falling short.

There are many contemporary examples where political entrepreneurs have deployed past memories to promote current demands for greater autonomy or independence. For example, the Moro areas of Mindanao were independent sultanates before the Spanish arrived, and Spanish colonial authorities did not assert practical control over the area. It was only after the United States acquired control of the Philippines in the late nineteenth century that the Moro were brought under central authority. In Spain, Catalonia was a county that was part of an independent kingdom (Aragon) through the Middle Ages, with its own laws and legal system operating in Catalan, which survived the unification of Spain in the late fifteenth century. At the beginning of the eighteenth century, the Spanish monarchy abolished Catalonia's separate institutions in favor of a highly centralized structure. In Indonesia, Aceh had been an independent sultanate from 1511 until it was conquered by the Dutch in 1871. In Yemen, it was only in 1990 that South Yemen united with the North. If self-governing territories were incorporated by consent conditioned on certain substantive or procedural commitments which have been breached, this vitiates the original consent on the basis of a retained right to self-determination. Scottish nationalism has invoked the argument that the terms of the 1707 Act of Union, which abolished the Scottish Parliament, have not been respected. Papua was integrated into Indonesia under a United Nations-brokered agreement requiring the holding of a referendum to put this issue to the population, which has never been held.

Even without a past history of independence, subnational political entrepreneurs can build narratives around historical grievances. For example, in Cyprus, attempts to unite Cyprus and Greece—*enosis*—coupled with massacres and the fear of genocide, are

<sup>12</sup> Lars-Erik Cederman, Andreas Wimmer, and Brian Min, "Why Do Ethnic Groups Rebel? New Data and Analysis" (2010) 62 (1) *World Politics* 87.

<sup>13</sup> See the works by Anderson *Imagined Communities* (n 9); Brubaker (n 9); Gellner (n 9); Wimmer (n 9).

still deployed by political leaders in the Turkish Cypriot part of the island. Grievances can also be rooted in fears of a future that has not yet materialized. Serb political leaders in Bosnia-Herzegovina interpreted a decision of the Badinter Commission that recognized Bosnian Serbs as a national minority as downgrading them from their status as a constituent people and placing them in physical danger. The Bosnian Serbs then armed themselves with Serb support and engaged in ethnic cleansing with a view to securing control of certain territories and secession to join neighboring Serbia. These anxieties were also fed by Croatia's failure to guarantee minority rights to its Serb minority, which created the fear Croats would do the same in Bosnia-Herzegovina.

The framing of narratives is an important tool for political entrepreneurs seeking to shape the mobilization of a group. For ethnic relations, Loizides defines framing as "the conscious strategic effort to shape shared understandings about an ethnic group, its recent memories, grievances and boundaries (identity or physical), particularly with regard to its perceived territorial entitlements."<sup>14</sup> Frames link past experiences with contemporary policy dilemmas and transform abstract grievances into specific courses of action. The choice of frame affects the nature and strength of claims, as well as the ability to accept possible trade-offs. For example, the internal migration and resettlement of majority populations in areas of minorities have been encouraged by many states as a nation-building policy, but this has often been framed by regional political entrepreneurs as a form of internal colonialism. The charge of colonialism admits of no compromise because it delegitimizes the central state, and justifies calls for constitutional autonomy or even secession. Moreover, it puts the question of property—ownership, restitution, and compensation—on the constitutional agenda. Political entrepreneurs in Kenya, Iraq, the Philippines, Cyprus, Indonesia, and Sri Lanka have used this frame. But in states where ethnic intermixing occurred through labor migration but not internal settlement policies, such as Nepal and Bosnia-Herzegovina, this frame is unavailable.

Because frames can help mobilize political constituencies and shape constitutional agendas, they can be deeply contested. Often, two populations are attached to diametrically opposed narratives in a true dialogue of the deaf. In Cyprus, Greek Cypriot leaders have framed their claims through justice and rights discourses, which have led them to demand a right of return for displaced persons to their properties in the Turkish zone of control. Turkish Cypriot leaders have offered a counter-framing to justify the new realities on the ground, built around persecution by the Greeks which led to the mass movement of population, the property rights of current users, and security concerns to counter a right of return. Underlying this disagreement is a more fundamental one over how to frame the possible reunification of the island: Greek Cypriots see it as a "holding together" of the existing Cyprus while Turkish Cypriots argue that it would be a "coming together" of two states to form a federation, to adopt Al Stepan's terminology.<sup>15</sup> These radically different frames have implications not only for constitutional design, but also for structuring the process of Constitution-making so that parties with such incompatible frames can engage and potentially reach agreement.

While claims for territorial accommodation are often framed in terms of group identity and cultural difference, they may be driven by an underlying economic dispute even if there are minimal differences in territorial identity. Such disputes may be

<sup>14</sup> Neophytos Loizides, *Designing Peace: Cyprus and Institutional Innovations in Divided Societies* (University of Pennsylvania Press 2016) 54.

<sup>15</sup> Alfred Stepan, "Federalism and Democracy: Beyond the U.S. Model" (1999) 10 (4) *Journal of Democracy* 19.

rooted in the structure of the economy, the distribution of natural resources revenues, decisions regarding public sector expenditure, the rules governing public sector employment, or the allocation of public debt, among other issues. These situations are all characterized by political claims for territorial accommodation over the distribution of material resources. In Bolivia, the new wealth from natural gas of the eastern lowlands sparked political battles over sharing the benefits, with the lowlands seeking more autonomy, and the highlands and indigenous groups favoring greater central control and redistribution. In India, one major outcome of the creation of linguistic states was the development of state-level bureaucracies that would operate in regional languages, thereby opening public sector employment more broadly to regional populations. In Ukraine, a trigger for territorial mobilization was the breakdown of a Faustian bargain in which both eastern oligarchs, who had obtained state subsidies for their industries from Kiev, and nation-building parties from western and central Ukraine both had favored centralization. The demand for autonomy for the east by Russophiles has fluctuated depending on whether eastern interests could obtain power, and material benefits, at the center.

Natural resources play a role in many conflicts, sometimes as the principal object of the conflict, at other times as a contributing factor.<sup>16</sup> Paul Collier and Anke Hoefler have identified possible links or “channels of causation” between natural resources and conflict. These include resources being “honeypots” over which people fight; giving secessionist movements credibility about future wealth; and financing rebel groups.<sup>17</sup> All of these were evident in the secessionist movements in Aceh, Nigeria, and South Yemen, whereas in Mindanao it was the prospect of yet-to-be-developed resources that were a motivation for the rebels. Resources were also a key part of the political conflict between the Kurds and Arabs in Iraq, and that between the highlands and lowlands of Bolivia.

Existing regional institutions of self-government provide important resources for territorial political mobilization. They can be used to promote territorial political identity around culture, history, and language, to provide institutional resources in political contests or negotiations with the central government, and to provide embryonic institutions which can serve as a foundation for more extensive forms of territorial self-government. Democratically elected regional institutions can provide the benefits of incumbency for regional political parties that can mobilize support. Spain and the UK show how existing institutions of regional self-government, and regional political parties, have been key resources for territorial political mobilization. However, they also illustrate how Constitutions simultaneously empower and constrain. Both regional governments could not hold referendums within the existing constitutional framework. In the UK, the central government and Scotland negotiated the terms of the referendum, especially on the question to be posed. In Spain, there was no such negotiation with Catalonia, and as a result, the central government and the Spanish Constitutional Court declared a regional referendum in Catalonia to be illegal. In Bolivia, the administrative structure of departments became a focus for territorial empowerment, even before elected officials had much voice within departments;

<sup>16</sup> Edward Aspinall, “The Construction of Grievance: Natural Resources and Identity in a Separatist Conflict” (2007) 51 (6) *Journal of Conflict Resolution* 950; Nicholas Sambanis and Branko Milanovic, “Explaining Regional Autonomy Differences in Decentralized Countries” (2014) 47 (13) *Comparative Political Studies* 1830.

<sup>17</sup> Paul Collier and Anke Hoefler, “High-value Natural Resources, Development, and Conflict: Channels of Causation” in Paivi Lujala and Siri Aas Rustad (eds), *High-Value Natural Resources and Post-Conflict Peacebuilding* (Routledge 2011).

departmental political power then increased dramatically once department heads were elected.

Even *de facto* self-governing powers can be a vital institutional resource. This was certainly the case in Iraq, where after the 1991 Gulf War, the Kurdish region enjoyed *de facto* independence. The existence of a government in the Kurdish region was a central reality in the constitutional processes after the Iraq War. While the Kurdish region failed to secure constitutional recognition of its independence, it achieved extensive autonomy that would have been highly unlikely otherwise. Similarly, the extensive *de facto* autonomy enjoyed by the LTTE in northeast Sri Lanka in 2001–09 increased the LTTE's leverage in ceasefire and peace negotiations. The decisive defeat of the LTTE by the Sri Lankan government illustrates that the ultimate foundation for *de facto* autonomy is armed force—and that if it is overwhelmed by force of arms, there is no legal recourse domestically or internationally.

The example of institutionalized territorial self-government arrangements in one part of a country can create a constitutional logic for claims for their replication. In India, the creation of a single state on linguistic lines—Andhra Pradesh, in 1953—led to the formation of the States Organization Commission and the eventual redrawing of India's entire political map along linguistic lines over the next several years. In addition, an arrangement for one unit can serve as the basis for a presumption of symmetric treatment, in terms of powers and status, for other units. In Spain, when autonomous communities were created in the 1978 Constitution, it was expected that the “historic nationalities” would have significantly more devolved powers than the other regions, but every other region said they wanted the same through a process that has come to be known as “café para todos.”

### **Means antecedent to a constitutional moment: peaceful and institutionalized politics or violent and extra-legal**

Political entrepreneurs must choose the means to pursue claims for territorial accommodation. On the one hand, they may seek change through peaceful means, working through existing institutional channels and under legal—including constitutional—constraints. Or they may reject the existing constitutional order and decide to work outside of it, extra-legally, through violence. The choice of means is influenced by the nature of the political regime in which political entrepreneurs are operating, by their positions on constitutional options, and by past history or experience in pursuing their goals. While a society may have many underlying tensions that suggest latent territorial cleavages, in an autocracy, or an intolerant and assimilationist majoritarian regime, territorial minorities may find no effective peaceful outlet for debate and mobilization. Thus, the political lid can come off when such regimes liberalize or even break down. Such events often open a major constitutional moment, where territorial and other groups mobilize to promote their objectives. The exact triggers of democratic openings or regime change may be sudden and unexpected. The death of Franco in Spain allowed for the re-emergence of Catalan and other sub-national groups, which mobilized politically. The end of the Cold War led to the democratic transition in South Africa, with claims for territorial accommodation made by Zulu and Afrikaner nationalists; it also triggered the breakup of Yugoslavia. The Asian financial crisis led to the fall of the Suharto regime and a broader process of democratization that created an opening for Achenese and Papuans to demand special autonomy. The First and Second Gulf Wars provided the opportunity for the Kurds to *de facto* establish and then seek

to constitutionally entrench their autonomy. The Arab Spring brought the fall of Saleh and an intense period of constitutional dialogue in Yemen.

The choice of means will also be influenced by political leaders' assessments of the substantive distance between themselves and the government or other influential actors and of their political leverage. Regional political parties are often the key instrument for non-violent, mass mobilization around territorial claims through institutionalized channels. The creation of a regional political party reflects an assessment that this is the most effective way to promote regional claims, often because other political parties are indifferent or opposed to accommodating the claims of a territorial group or groups. In Kenya, the Kenya African Democratic Union (KADU) was formed in 1961 as a consortium of medium-sized tribes to lobby for ethnic regionalism, and to protect them from the larger tribes that dominated the Kenya African National Union (KANU) and its agenda of centralization. On other occasions, the leaders of a territorial group may choose to work within a non-regional party, making the contingent judgment that this will maximize their political leverage. It is worth emphasizing that even when there may be a regional party or parties advancing strong territorial claims, regional populations are often not politically unified, and it is not uncommon to see them split their votes among regional and national parties with opposing agendas.

Pursuing constitutional change peacefully occurs in a context of legal and institutional continuity. The procedures for constitutional amendment and ordinary law-making apply, channeling debates over territorial accommodation into existing institutions and rules. These rules determine the leverage that different groups have. They can be highly contested, as they are currently in Spain regarding the drive for Catalan independence. Moreover, legal and institutional continuity is often inherently conservative in terms of substance if there are high hurdles for constitutional change, which may make the amendment of the existing Constitution more likely than the adoption of a new one. However, with a large enough consensus, as in Bolivia and Spain, a new Constitution can be adopted within the rules of its predecessor. Moreover, in certain cases, as in Nepal and South Africa, the new political configuration results in an agreement to prepare a new Constitution under conditions of formal legal continuity long enough to create, through the established (or adapted) procedures, an interim regime with new rules, which reflect the different forces at play and lay the ground for a developing a new Constitution.

Depending on a group's grievances and circumstances, regional political elites may reject normal politics, perhaps because they have failed, and turn to violence. Arguably, violence is the continuation of political mobilization by other means, but it also brings a shift in the character of politics, notably in giving those with guns (both government and rebels) a central role while marginalizing others. Indeed, some leaders of violent action have no experience of normal politics, which has important downstream implications for Constitution-making processes and the objective of developing normal political life. Violent instruments of political action range from small-scale insurgencies, through guerrilla warfare, to full-scale armed conflict and civil war.

Territorial groups who turn to violence typically do so with a deep sense of grievance and frustration with peaceful means. Such a choice is easily understandable in a context of repressive autocracies, but it can happen in democracies, especially fragile democracies or democracies that strongly favor nation-building over the accommodation of differences. This is particularly true in former colonies, where the post-independence political environment was largely one of nation-building and hostility to territorial claims for constitutional accommodation, which were perceived as an existential threat. In many post-colonial states, the legacy of the anti-colonial struggle

produces a unitary state mindset. For example, although India has been effectively federal since its inception, its Constitution characterized it as a “Union” and never used the term “federal,” given the concern for a strong center. For the same reason the Constitution’s drafters initially rejected linguistic states out of the fear that identity-based subunits would undermine national integrity. In Indonesia, the Dutch colonial authorities created a federal republic that was rejected by the independence movement as a divide and conquer strategy. Accordingly, violence in India, the Philippines, and Sri Lanka all took place (or continued) in contexts of reasonably democratic regimes where the demands for territorial accommodation had been refused.

Our cases run the gamut from highly peaceful to murderously violent. They include the civil wars in Nigeria and Sri Lanka, where the governments defeated attempts at secession, as well as the civil war in Bosnia-Herzegovina, which saw ethnic cleansing during a state’s breakup. In Ethiopia, a coalition of regional insurgents won a long-running civil war against a brutal, highly centralizing dictatorship. In Nepal, the government and Maoists fought to a standstill. In Cyprus, a breakdown of public order and trust between the two communities led to military intervention by an outside power and the partition of the country. South Africa never experienced full-scale civil war, but its history of armed insurgency and violent suppression by the authorities was critically important to framing the conflict and bringing the parties to the negotiating table. A number of the violent conflicts concerned peripheral regions: the Bangsamoro in the Philippines; Aceh in Indonesia; the Houthis in Yemen; and various tribal communities in northeastern India. Iraq had a unique history, with the Kurdish region achieving effective partition after the Gulf War and then being reunited after the fall of Saddam, in both cases because of foreign military intervention.

Indeed, very few of our cases lacked violence of some kind leading up to the constitutional moment. There had been bloody riots in Kenya, and violent demonstrations in Bolivia. Spain had experienced violent struggle from Basque nationalists and memories of its terrible civil war were still strong when the post-Franco era was under consideration. The UK had faced a long insurgency in Northern Ireland (although Scotland has been entirely peaceful). While Ukraine was peaceful following its independence from the USSR as it entered its constitutional moment, this peace was eventually shattered by uprisings in the capital and Russian incursions in the Crimea and Donbas.

The choices leaders make about whether to work through peaceful, legal, and institutional mechanisms or turn to violence depend in part on political geometry. Does the political constellation provide reasonable prospects for the group to have sufficient leverage for its grievances or aims to be addressed? The answer is contextual. Even a relatively small population in an environment of highly contested politics amongst many political parties may well find that a regionally based party can influence the formation of governments, even join a coalition, and affect the content of legislation and the system’s engagement on constitutional change. The power wielded by small regional Indian political parties in national politics for nearly two decades, and of the Catalan and Basque parties on the drafting of Spain’s Constitution during a period of minority governments, are examples. By contrast, if a small population is up against a dominant party representing an intransigent majority, it may find that even with overwhelming support in its region, it can achieve little with normal politics and eventually turns to violent means. This was the political trajectory in Sri Lanka, where over the course of fifty years of constitutional politics, the Tamil minority was frustrated by the rejection of their claims by the major Sinhalese parties. Over time its politics became radicalized with the demand for a separate state, and eventually a faction within the community promoted the rise of the LTTE, which then crushed internal dissent

using unrestrained violence against moderates and used terrorism against the majority Sinhalese. Sometimes, political entrepreneurs pursuing a territorial claim choose to operate within a national party, where their region's support gives them leverage.

Of course, the frustration of political demands does not necessarily result in secessionist demands or outright violence: groups may have more limited demands and resort to non-violent measures outside of normal politics, such as strikes, mass demonstrations, blockades, and various disturbances. In Nepal, secessionist demands by the Hindi-speaking residents of the Madhesh are still rare, and they have thus far only used disruptive tactics—but no serious violence—to promote their demands for linguistic equality, a fair share of resources, and a single province that would constitute 40 percent of Nepal's population.

Very small, peripheral regional populations present a different context. For them, a regional political party would at best secure minimal representation and leverage in the central legislature. The low returns from such political mobilization may discourage them from forming a political party, especially if their grievances are not too strongly felt. However, if they are deeply aggrieved, leaders may appear who advocate recourse to violence. In Aceh and Papua in Indonesia, and the northeast of India, there was little or no evidence of the mass political mobilization around regional political parties before the rise of insurgencies. However, the fact that electoral politics has only been attempted briefly or not at all before the turn to violence does not mean that it cannot follow from a properly structured constitutional settlement that addresses major grievances (as we explain later).

A dominant majority's insistence on constitutional orthodoxy can also serve as a source of frustration driving political mobilization off the track of legal and institutional continuity into extra-legal action and violence. The established rules can be seen as raising too many procedural and substantive hurdles to the accommodation of the territorial cleavage—for example, as in Sri Lanka, by constitutionally entrenching the commitment to a unitary state and requiring a referendum with a supermajority requirement to amend it, which is politically infeasible. Relatedly, the existing constitutional order may empower “institutional spoilers”—for example, courts, opposition parties, the government backbench, and/or elements of the political executive—to block a territorial accommodation in the name of a vision of a centralized, unitary state (discussed later). As we consider below, a puzzle is how to reconstitute constitutional order in a context where at least one party has rejected legal and institutional continuity.

### **Tests of strength and relative political power**

The third variable that defines constitutional moments is that of the relative power positions of the different political actors, including governments and the leaders of territorially mobilized groups. The issue of constitutional accommodation of territorial demands may have been around for a long time before the key actors decide to actively engage with one another on the question of constitutional change. Government leaders and others who are facing these territorial demands must also consider how to react, both with respect to goals and means. Do they see the claims for territorial accommodation as extreme and constitutionally unthinkable (e.g. secession in many countries) or as reasonable or at least open to discussion and possible political resolution? Where subnational political entrepreneurs have mobilized peacefully, formed regional parties, and contested elections, they have been able to do so because of the

space offered by constitutional democracy, thereby creating a political presumption for central governments to respond through peaceful means as well. But even among constitutional democracies, states have set outer boundaries around the domain of constitutional politics. Most Constitutions explicitly or implicitly prohibit the unilateral secession of a region, and some states—for example, Spain—have inferred from this prohibition a series of restrictions on political activity that arguably extend back into ordinary politics. The use of violence by the central state is nearly a certainty when subnational political entrepreneurs have opted for violence themselves.

At the point when actors launch into the process of constitutional reform, they may have had tests of their relative strength, whether through competitive politics or violent clashes. The outcome of such tests of strength can determine when and how a constitutional process is engaged and the relative power of the different actors to influence the outcome. Power positions for territorial leaders are influenced by the size of the territory's population, the political cohesion of that population, and the leverage these assets provide in light of the power positions of other actors—so, for example, others things being equal, a regional movement of a certain size may have more influence in a context where the larger party system is relatively fractured and fluid than in a context where one party has a solid majority of the population.

In democratic politics, the most important tests of strength are electoral. These can permit a group or coalition to capture governmental power, either nationally or (if territorial governments exist) regionally. In the UK, the Scottish National Party was able to form a majority government in Scotland, which put it in a position to push for a referendum. The UK government used its legal powers to negotiate the terms of the referendum, and did so in part because public opinion polls made it confident that there was no majority in Scotland for secession. In Kenya, the results of the election of 2007 were close enough that the opposition contested the result and violence ensued; this led in due course to an internationally mediated agreement for a power-sharing government and a new constitutional process. In Ukraine, the constitutional positions of key politicians from the eastern region shifted according to whether they were in government in Kyiv; there was regular tension between the president and parliament about constitutional reform, with the president having considerable leverage because of his apparent support in public opinion polls. The constitutional agenda in Bolivia was shaped by the confrontation brought on by Morales's election to the presidency, and subsequent electoral tests of strength nationally and in departments as well as through referendums. Spain's constitutional transition was shaped by the fact that no one party had the majority to form a government, so this, plus the broader concern for a broad consensus to ensure a successful transition to democracy, gave significant political leverage to opposition parties, including territorially based parties, in shaping the new regime.

A genuine process of constitutional transition cannot take place during a raging civil war or insurgency. With violent conflicts, the critical issue is whether the two sides have reached the point of a stalemate, with neither being able to defeat the other so they turn to negotiations—or whether a clear victor has emerged. Victors will be in a strong position to determine the substance of constitutional change, including how to deal with the territorial claims that gave rise to the civil war in the first place. Moreover, they are likely to have great control over process. Our main interest regarding post-conflict situations centers on those arising from stalemates. Stalemates led to negotiations with regional groups in India, Indonesia and the Philippines and stalemated civil wars that led to negotiations in Bosnia-Herzegovina, Cyprus, and Nepal. In Sri Lanka, the intractable nature of the conflict led to some, ultimately unsuccessful, efforts to find

negotiated solutions. In South Africa, the government concluded that it could not maintain the regime in the face of the insurgency, especially given how the end of the Cold War had weakened its geopolitical situation. For stalemates, conflict theorists refer to a conflict needing to be “ripe” as a precondition for effective bargaining, which means that when both sides see little possibility of outright victory and the cost of continuing as insupportable, they may enter into a ceasefire and then negotiations for a peace agreement and a reunification of the state under a unified constitutional order.

While power relationships at the outset of a constitutional moment weigh heavily in shaping the Constitution-making process and agenda, they can shift significantly once the process has started: different sides can be strengthened or weakened as the process unfolds. In Sri Lanka, after the breakdown of negotiations, the LTTE and the government returned to war and the government ultimately prevailed militarily. The possibility of shifts in power is especially true when elections and referendums occur—as happened in Bolivia, Kenya, Nepal, Scotland, South Africa, Spain, and Ukraine. In Cyprus, a referendum killed a possible agreement. These examples also show that even when constitutional moments emerge from an initial context of violence, elections and referendums can become an important factor in subsequent phases. More generally, negotiations may not reach a successful conclusion; there is no guarantee the parties will agree, and the possibility of violence resuming can affect how negotiations unfold.

In some cases, a decisive component in the power equation is the role and influence of external actors. There is a considerable literature on the important role of external factors in democratic transitions, including diffusion, democracy assistance and promotion, and multilateral conditionality.<sup>18</sup> In Bosnia-Herzegovina, Cyprus, and Iraq, external powers had real power to influence developments directly because of their military interventions.

## Context and Dynamics of Constitutional Moments

The actual start of serious engagement on the possibility of constitutional change—a constitutional moment—may be triggered by any number of events, such as the end of or a halt to a conflict, the arrival in office of a new political party, or a decision by power holders to address a major issue of institutional design. But whatever the trigger, the nature, and interrelationships of the crucial variables—political geometry, the choice of peaceful, legal and institutionalized or violent and extra-legal means, and relative political power as determined by tests of strength—will set the agenda for the choice of Constitution-making process and the menu of potential options for constitutional design. Constitutional moments can carry on over extended periods, and during that time there can be developments or shifts in the political geometry and the relative power positions of key actors. There are often major tests of political strength during a constitutional moment that are decisive as to how the political contest is resolved. The situation is evolving and dynamic, not static and pre-determined. There is no simple causal relationship that leads from initial context to eventual outcome.

Table 20.1 locates our different cases in terms of how they relate to the three dimensions of the variables: four categories of political geometry; two regarding the means for the antecedent contest; and two with respect to the power distribution, with

<sup>18</sup> See Steven Levitsky and Lucan A Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (Cambridge University Press 2010) 38–54.

a dominant actor vs. divided or diffuse power arrangement. The table is indicative and not every case fits neatly into a single box. The different structures of these political contexts each presents an inherent logic regarding how the leading political actors set their constitutional goals and pursue them. These variations in contextual factors shape the agenda for process and design for the different constitutional moments.

We note at the outset that not all cases led to a consensual accommodation of a territorial claim within a state: Croatia was a case of unilateral secession; Sri Lanka in 2009 saw a military defeat of the LTTE; Yemen failed to achieve a new Constitution and descended into civil war; Cyprus is still a frozen conflict; and Corsica has had minimal success in achieving its demands for autonomy. In other cases, territorial populations seeking accommodation of their demands have achieved less than they desired. So these factors are more predictive of the characteristics of the process and the constitutional options under consideration than they are of the eventual substantive outcome.

Table 20.1 Antecedent Power Political Context Distribution Geometry<sup>a</sup>

		<b>Multidimensional territorial cleavages</b>	<b>Majority-minority territorial configuration</b>	<b>Small, distinct peripheral regions</b>	<b>Mixed territorial and non-territorial cleavages</b>
<b>Violent</b>	<b>Victory</b>	Ethiopia, Nigeria		<i>Croatia</i> Sri Lanka (2009)	
	<b>Stalemate</b>		Bosnia-Herzegovina, Cyprus	NE India Aceh/Indonesia Moro/Philippines Sri Lanka (2002)	Nepal S. Africa Iraq
<b>Non-violent</b>	<b>Dominant</b>	India (linguistic states)	<i>Pakistan</i> (1956)	<i>Corsica</i>	<i>Russia</i>
	<b>Divided</b>	Spain	<i>Belgium</i>	Scotland Ukraine	Bolivia Kenya Yemen

<sup>a</sup>Moreover, our cases do not cover all the boxes or possibilities, so for illustrative purposes we have inserted a few cases (in italics) outside the scope of our study to illustrate other possibilities: Pakistan, where in 1956 the Prime Minister forced through a federal Constitution giving equal power to the West, which was opposed by representatives of the majority in East Pakistan; Russia, where a dominant party in a peaceful, constitutional context has been able to rewrite the Constitution into a very centralized form of federalism; Corsica, where the (mostly) non-violent political push for autonomy has encountered resistance from the dominant national parties in France. We have also included Belgium, whose periodic constitutional moments in a bi-communal and peaceful, constitutional context have resulted in a federal, consociational system. The situation in Sri Lanka changed between 2002, when there were negotiations, and 2009, when the government had prevailed militarily. Finally, Yemen is hard to place: its North-South cleavage suggests it be assigned to the majority-minority column, but both the North and South are themselves very divided, territorially and in other ways, which led to it being placed in the mixed territorial and non-territorial column.

We begin with design, where there is a close correlation between political geometry and the main constitutional option considered during a Constitution transition. In cases of multidimensional territorial cleavages, the design option is generally significantly decentralized symmetrical devolution or federalism combined with a

majoritarian central government. For majority-minority territorial configurations, in which the minority is relatively large, the design option is presumptively highly devolved federalism, with a consociational central government. For small, distinct peripheral regions, the design option is typically special, asymmetric autonomy and a central government that is majoritarian. Finally, countries with a mix of territorial and non-territorial cleavages may consider devolution or federalism, which may be quite centralized and perhaps with a large number of units with a majoritarian central government. We elaborate upon these models and link them to political geometry in “Constitutional Design and Territorial Cleavages” below. While our descriptions of these options are necessarily high level, the distinct configurations of political geometry tend to drive the options considered for designing a Constitution that reflects the territorial dimension. The logic of such options is no guarantee that they will be considered or adopted, because depending on the power configuration the majority may be resistant to accommodating territorial claims, or at least to doing so within certain models. The case of Sri Lanka is a case in point, where the only option to the status quo that found even a brief possibility of agreement was federalism, when special autonomy might have been considered a more logical alternative (but was rejected by the majority).

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

Let us now consider process. Arising out of tests of strength, relative political power can be dominant or divided. It is important and interesting that constitutional design to accommodate territorial cleavages can occur under both conditions. If there are dominant actors—as was the case in Ethiopia and Nigeria, with their military victors, and in India in the 1950s, with its dominant Congress Party—they control the process. To the extent there is a political process it may be largely within the army or party of power. Even so, such dominant actors may encourage a constitutional design that responds to territorial claims to enhance legitimacy or regime stability. These cases are not our primary focus, but such dominant actors should consider territorial accommodations as possible mechanisms of cooptation or control, which may be prudent ways to prevent future conflict.

Our main focus is on constitutional moments where the relative power of the key actors is divided, with no party able to dictate the outcome, so that there needs to be some kind of agreement if the issue is to be resolved. The political geometry and power positions of the main actors will be key to determining the nature and character of the constitutional process. The process will also be shaped by whether the constitutional moment arises out of antecedents of peaceful, legal, institutionalized politics or extra-legal, violent conflict.

Where power is divided because of electoral results, political actors address the substantive agenda items in a context of legal and institutional continuity within a

constitutional democracy. The existing Constitution provides a procedural framework to debate, adopt, and implement constitutional change, including possible territorial accommodation. In Bolivia, Kenya, Spain, and the UK, the process of constitutional change unfolded within the existing rules of the constitutional framework. However, there may be political reasons to seek a broader consensus, beyond what is required by the Constitution; such a consensus may bring greater political legitimacy to the result than would have happened with a decision that met the minimal constitutional requirements for approval. Thus, in Spain there was an informal political agreement to work for a broad political consensus, while in Kenya, the need for a broad consensus was tied to the constitutional process taking place during a period of a government of national unity. In Bolivia, there was a special mechanism designed for constitutional change that was to supplement the established procedure—a Constituent Assembly—but in the end this failed and the established procedure, relying on Congress, prevailed.<sup>19</sup>

Where there is a military stalemate, the agenda must combine peace negotiations and Constitution-making. These can work at cross-purposes in that a peace agreement is backward-looking and focused on ending violence, while Constitution-making looks forward to creating effective institutions that operate under constitutional democracy and peaceful, legal politics. The question is how to design a peace process among armed parties that can thicken and broaden into a constitutional process among many parties, including the public, with a much broader agenda. The process needs to provide “on ramps” from armed conflict and peace negotiations to peaceful, democratic politics for the armed parties.

A cross-cutting issue for constitutional moments with divided power—regardless of whether the antecedents are violent or peaceful—is the risk of a lack of credible commitment. In the short term, where the constitutional system continues to exist in all or part of the state, it can potentially empower institutional spoilers to prevent the government from implementing any territorial accommodation. This is particularly true in cases of peripheral rebellion, such as in the Philippines and Sri Lanka, where apex courts struck down draft agreements as unconstitutional. In “Constitution-Making Processes,” we discuss how negotiators can try to mitigate these risks by involving potential political spoilers, or by working around them—for example, in some cases, by opting for ordinary legislation over constitutional amendment. Credible commitment problems can also occur in the medium-term across multiple electoral cycles because opposition parties can campaign against agreements and proposed constitutional arrangements and may dismantle them if they win power. For example, in Sri Lanka, the Sri Lankan Freedom Party (SFLP) led by Mahindra Rajapaksa campaigned against the LTTE peace process while in opposition, and once in power, formally abrogated the ceasefire agreement and defeated the LTTE militarily. A potential response by negotiators to this risk may be to constitutionally entrench any deal reached against easy repeal—or to create a pluralistic process that provides space for divergent political views, in the hopes of building a broad consensus from an early stage. Finally, just as spoilers within the system may undermine a constitutional commitment, so can excluded political actors. In Nepal, the 1990 constitutional process did not include the Maoists, whose demands for constitutional reform in 1996 were not met, leading to the civil war and ultimately the replacement of the 1990 Constitution.

<sup>19</sup> In this chapter, we use the generic term “constitutional assembly” to refer to elected bodies with a mandate to produce a constitutional text. However, in the case of Bolivia, we refer to that body as the “Constituent Assembly,” to accord with its usage in that context.

This brief review gives an initial sense of how the three main variables influence both process and design. The next two sections go into these issues in greater depth.

## Constitution-Making Processes

### The importance of process

There has been a subtle but clear shift in recent scholarship and practice, away from a nearly exclusive focus on constitutional design, to one where process is given equal attention.<sup>20</sup> Vicki Jackson, for example, sees a need for less emphasis on static constitutional design because “post-conflict situations motivate constitution-making but create conditions unlikely to produce lasting constitutions,”<sup>21</sup> creating a need for a greater focus on staged constitutional or political processes. Andreas Wimmer goes so far as to argue for the primacy of process over design in determining the viability of a Constitution. He suggests that “the best strategy of conflict prevention for institutionally weak states is to encourage a gradual, endogenously sustained process of state formation and nation-building,” and expresses deep skepticism about the importance of institutional design, since “formal political institutions either don’t influence conflict dynamics in any systematic way, or only show a rather unstable and fragile association with infighting between power-sharing partners.”<sup>22</sup> While we disagree with Wimmer, it is nonetheless clear that the process whereby a constitutional settlement—even a provisional one—is reached can have a determining influence on its acceptance by key actors and its sustainability.

Most of the transitions considered in this volume have been from some form of authoritarian or undemocratic rule. O’Donnell and Schmitter have argued that such large-scale transformations often have insufficient structural or behavioral parameters to guide and predict outcomes and that the tools for normal political analysis are inadequate given high degree of indeterminacy, even regarding the roles of key actors.<sup>23</sup> This is a useful caution, but we suggest that attention to political geometry, the means of political contests prior to a constitutional moment, and the power distribution amongst the key players can help reduce the scope of such uncertainty. Nancy Bermeo has pointed to the critical role of elites in democratic transitions, even when there are high levels of popular mobilization.<sup>24</sup>

Saunders helpfully sets out three stages to Constitution-making processes, which we follow: agenda-setting, deliberation, and decision or ratification.

<sup>20</sup> Some examples of the literature include: Andrew Arato, *Post Sovereign Constitution Making* (Oxford University Press 2016); Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan, *Constitution-making and Reform: Options for the Process* (Interpeace 2011); Sujit Choudhry and Tom Ginsburg (eds), *Constitution-Making* (Edward Elgar 2016); Laurel Miller and Louis Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace Press 2010); Abrak Saati, *The Participation Myth* (Umea University 2015); Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012).

<sup>21</sup> Vicki C Jackson, “What’s in Name? Reflections on Timing, Naming and Constitution-Making” (2008) 49 (4) *William and Mary Law Review* 1249.

<sup>22</sup> Andreas Wimmer, *Waves of War: Nationalism, State Formation and Ethnic Exclusion in the Modern World* (Cambridge University Press 2013) 196, 177.

<sup>23</sup> Guillermo O’Donnell and Phillippe C Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Johns Hopkins University Press 1986) 3–5.

<sup>24</sup> Nancy Bermeo, “Myths of Moderation: Confrontation and Conflict during Democratic Transitions” (1997) 29 (3) *Comparative Politics* 305, 314–17.

## Agenda-setting

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

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

When the antecedents to a constitutional moment are legal, peaceful and institutionalized, established constitutional procedures govern. The procedures may be well established, such as the creation of a constitutional assembly and recourse to a constitutional amending formula. If constitutionalized, these procedures may serve as constraints. These procedures also presumptively designate the constituent actors in the process, which may include national and regional governments, opposition parties, civil society, and (in the case of referendums), the electorate. For example, in the UK, since the adoption of the Scotland Act in 1998, the agenda for discussions around further devolution and the holding of a referendum have been set by bilateral discussions at the cabinet level between Westminster and Holyrood. Ensuing agreements are essentially political in nature, such as a pact, joint statement, or accord, which may then require legislative implementation at both the regional and central level. However, Constitutions often give no direct role to regional governments or legislatures in constitutional change. Thus, in Bolivia in 2006–08, the newly elected departmental prefects had to play on the outside, while it was the elected members of regional parties in Congress—and later, in the Constituent Assembly—who were the main actors in the formal process, which was distinct from the larger political contest. The negotiations to create the Constituent Assembly occurred in Congress and through the steps of the legislative process, including committees, and were reflected in the terms of legislation. Similarly, in Spain and India, the elected heads of the regional governments had no formal role in initiating and determining the process of constitutional change. However, later on, they came to play a role, because in India existing states are asked for their consent to changes to their boundaries (although it is not required), and in Spain the governments of Autonomous Communities negotiated and ratified the quasi-constitutional Statutes of Autonomy, once the 1978 post-Franco Constitution had been approved. In practical terms, depending on circumstances and the political strength of the political parties, this phase may be largely determined by the government alone (e.g. India) but more frequently there is interparty discussion and debate (e.g. Bolivia, Kenya, Spain, Yemen).

Under conditions of legal and institutional continuity, there can still be latitude about various non-constitutional forums, such as special commissions and public consultations. Sometimes a national conference or dialogue outside the normal institutional framework can be important in setting a constitutional agenda. Membership

and rules of procedure can depart significantly from normal parliamentary or inter-governmental procedures; indeed, they can be loose and fluid. The participants may include political parties and governments (blending legislative and intergovernmental processes), as well as a much broader range of non-elected actors, including labor, business, organized religion, and other civil society organizations. In Scotland during the 1990s, much of the political elite joined an informal, cross-party Constitutional Convention, which developed a blueprint for evolution in the absence of any elected regional representatives. When the Labour Party came to power in 1997, it endorsed this plan and submitted it to a Scotland-wide referendum before passing the Scotland Act of 1998. In Spain, debates over territorial accommodation had occurred even before the transition to democracy formally started. Several national political parties came together before Franco's death in 1975 to agree on principles of a democratic transition and were joined following his death by the main regional parties. A first step was to legalize all parties and adopt a general political amnesty. The outgoing Francoist parliament approved a law on political reform, which set the framework for a peaceful transition to democracy and a new Constitution. This was approved in a popular referendum. This led to free election, after which the democratic parties agreed to resolve their differences so that the army or other anti-democratic forces would have no pretext to usurp the transition to democracy. Whatever the exact mix of forums, under conditions of legal and institutional continuity, having political elites (including elected political representatives where possible) participate in agenda-setting is integral to ensuring that the constituencies they represent will accept the legitimacy of the rest of the Constitution-making process, participate in it, accept it, and implement the resulting constitutional settlement.

After violence, if there are winners, they can decide on the agenda, as happened in Ethiopia and Nigeria (and after the defeat of the LTTE in Sri Lanka). However, our main focus is on stalemates. The parties to the conflict normally negotiate to set the agenda and this can be an elaborate and time-consuming process, as in South Africa. The process may be assisted by mediators or external parties, as in Cyprus, Nepal, Indonesia (regarding Aceh), and the Philippines (to deal with the Bangsamoro). Unusually, in Bosnia-Herzegovina and Iraq, outside powers largely set the agenda and the process for negotiations. Very occasionally, as in Cyprus, external powers are direct parties in the conflict and so play a role in agenda-setting.

For stalemates after violent conflicts, the participants in agenda-setting are normally by default the main armed combatants, as happened in Nepal in 2006, though for Bosnia-Herzegovina the Americans largely determined the process and it was the presidents of Serbia and Croatia who were the lead negotiators, rather than local leaders of their communities. In many long-running territorial conflicts, armed combatants have evolved into *de facto* regional governments, as was the case in Sri Lanka with the LTTE. In this context, President Chandrika Kumaratunga decided, prior to the 2002 ceasefire, to lead a constitutional reform process during the Sri Lankan civil war that on paper could have gone some way to meeting the demands of Tamil nationalists; however, the LTTE was excluded from the process and therefore had no stake in the ultimate result, which was one reason for the failure of that effort. In Kurdish Iraq and North Cyprus, regional institutions, with elected assemblies and leaders, asserted sovereign powers, making them state-like entities that have to be central to any constitutional negotiations. The resolution of peripheral rebellions, even without *de facto* regional governments—such as in the Philippines, Indonesia, and northeastern India—has required armed rebels be at the table, with the central government representing the state.

In situations of violence, both the constitutional process and peace process begin with a ceasefire. A ceasefire agreement, in principle, can memorialize agreement on the substantive and procedural constitutional agenda. However, the capacity of a ceasefire agreement to do so must reckon with the legal and institutional context. In some cases, the constitutional order and its institutions have effectively collapsed. The ceasefire and agenda-setting negotiations determine the Constitution-making process, and also set substantive constitutional principles or parameters that must be respected by the ultimate Constitution. This presents both an opportunity—because existing constitutional amending rules and legislative procedures need not constrain the creative crafting of process—and a challenge, because there is no default script for process, which may be contested. The rules of the game would have to be constructed as they are being used. Moreover, as we explain below under deliberation, in cases of state collapse, parties will often create provisional governing arrangements—including constituent assemblies which wield legislative functions as well. In Nepal, for example, the civil war came to end with a twelve-point agreement between seven political parties and the Maoists in 2005; that agreement included key commitments to an interim government including Maoists, and an elected Constituent Assembly. The parties and Maoists created a small, representative commission to prepare an interim Constitution, which took over a year. In 2006, the parties reconvened the 2002 Parliament that had been dissolved in 2005, which then adopted the interim Constitution that designated this body as the Interim Parliament; that body then admitted Maoist members and passed an electoral law for constituent assembly elections.

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

This conundrum has been addressed in some cases through hybrid processes which formally comply with the Constitution but work around them to determine both the process and substantive principles of a constitutional transition. A striking example was in South Africa, where there was a stalemate between the African National Congress (ANC), which rejected the existing constitutional system as racist and illegitimate, and the South African government, which insisted on legal and institutional continuity. This process began with years of “talks about talks” before the National

Party government repealed the ban on the ANC and informal negotiations began. This bilateral process culminated in the National Peace Accord, which set the stage for the Convention for a Democratic South Africa (CODESA) among nineteen groups. Because these talks took place outside of formal parliamentary institutions, they could include the ANC, which had no elected representatives, as well as other entities—such as the leadership of Bantustans, especially KwaZulu, as well as the Afrikaaner-nationalist Vryheidsfront—which also lacked parliamentary representation. After CODESA collapsed, it was succeeded by another multiparty forum underpinned by consensus between the ANC and the National Party.

These observations suggest a challenge in the Ukraine at present. Ukraine has launched constitutional reform processes, with a presidentially mandated constitutional commission and other activity centered on the Rada. But since the Russian intervention in Donbas, citizens in the non-government controlled areas have no effective representation in Kyiv. Moreover, the Ukrainian government will not engage with the leaders of the self-proclaimed republics in Donbas. Negotiations on the reintegration of Donbas are occurring within the Minsk process, an international forum where negotiations take place with Russia, an external actor, as well as with Western powers. Thus, the challenge is how to give voice to those in the non-government-controlled areas as the constitutional and Minsk processes proceed.

*Substantive agenda:* Regardless of whether the antecedent to the constitutional moment is peaceful or violent, agenda-setting agreements can include significant substantive provisions, and can do so in a way that constrains the content of an eventual constitutional settlement. The substantive scope of the constitutional exercise can influence the nature of the process—for example, a process that aims to fundamentally rewrite a whole Constitution should be quite different from one aimed at a far more targeted issue, such as the accommodation of a particular region's territorial claims.

When territorial claims for autonomy are a potential driver of constitutional reform, an important decision during the agenda-setting phase is whether to broaden the scope of the process to include other issues. There are good arguments for doing so. Regional autonomy may be seen as the sole means to diffuse political power and accommodate the country's various cleavages, when other mechanisms might be considered. Including certain rights in the Constitution—such as language rights, especially for education and local government—can reduce the pressure for a proliferation of federal units. Electoral system design at the national level can enhance the prospects of minorities being represented in national institutions. And when the central issue is relations between a majority and a large minority, the prospect of some power-sharing in central institutions may be potentially valuable and lessen the degree of regional autonomy needed. In Nepal, for example, a provision in the interim Constitution stated that the “restructuring of the state . . . by eliminating the centralized and unitary form of the state” would be a tool to address all forms of social exclusion, including those that are non-territorial, such as caste, class, religion, and gender. In addition, it is important to offset the centrifugal pressures created by self-rule with arrangements for shared rule designed to support the viability and functioning of the shared state. The idea of power-sharing in central institutions was entirely absent from the 2003–08 Sri Lankan peace process, when federalism was briefly considered, thus creating legitimate concerns about the long-term viability of any such settlement (but the fact that the northern Tamils represent only 5 percent of the population would have put considerable limits on power-sharing as well). Finally, having many possible instruments for addressing territorial and minority concerns on the constitutional agenda can permit trade-offs and bargaining among them, facilitating agreement.

The scope for broadening the constitutional agenda also depends on the relative importance of the territorial issue. In India and the UK, the pressures from peaceful large regional movements made addressing the territorial issue central to the constitutional moments on state reorganization or Scottish autonomy. However, in Spain and Bolivia, where the territorial issue was fundamental, the constitutional agenda was much broader and encompassed the whole constitution; this was also true in countries such as Kenya, Nepal, South Africa, and Ukraine, where the territorial issue was one among several issues associated with a comprehensive constitutional agenda. Normally, agendas after a broad civil war involve a host of constitutional and non-constitutional issues beyond whatever territorial question might arise: these include issues such as transitional justice, resettlement of displaced populations, property restitution, security arrangements, and rule of law reform. However, the agenda to resolve peripheral rebellions is normally focussed narrowly on the territorial issue.

Placing territorial accommodation on the agenda of a constitutional process does not guarantee a desired outcome if there is no indication as to the expected substantive resolution. In some contexts, its mere inclusion with no substantive constraints may be an insufficiently strong guarantee for armed groups or groups inexperienced with politics. Thus, groups advancing territorial demands may seek guarantees during agenda-setting that bind the process to a certain substantive outcome on key points. In South Africa, for example, a schedule to the Interim Constitution contained thirty-four Constitutional Principles that legally bound the Constitutional Assembly, including one principle that required that the Final Constitution create a multi-tier constitutional system with national, provincial, and local levels of government, and further stipulated that provincial powers “shall not be substantially less than or substantially inferior” to those under the Interim Constitution. The Interim Constitution also provided that the Constitutional Court would have to certify that the Final Constitution complied with these principles for the Constitution to come into force; the Court rejected the first version of the Final Constitution on the basis that it did not, necessitating that the text be amended. Nepal’s Interim Constitution also bound the Constitution-making process to require territorial accommodation.

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

## **Deliberation**

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

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

When the antecedents of the constitutional moment are violent and extra-legal, at least one party will be an armed group. The lack of political pluralism can be an acute problem within armed groups, whose leaders are not elected and may in fact oppose an electoral test of their strength. An extreme example was the LTTE in Sri Lanka, which was notorious for its opposition to political pluralism, and ruthless in attacking and even murdering moderates within the Tamil community. To be sure, if a region is internally unified politically behind a single rebel group, that internal coherence can actually drive bargaining success, as occurred in Aceh in Indonesia. But if there are excluded armed groups that command significant support and possess sufficient capacity, they may turn into spoilers that can undermine a settlement, as happened with early agreements with the Moro in the Philippines. When one group has won a civil war, it will be able to determine both the process and the substance of Constitution-making; thus in Ethiopia, there was constitutional convention for the deliberative phase, but its members were decided by the victors, who chose to exclude some former allies. A cautionary tale comes from Bosnia-Herzegovina where the local combatants were completely marginalized. NATO was able to force the belligerents to a constitutional lock-up in Ohio, where the Americans designated the Serbian and Croatian presidents as the representatives of those communities—with the leadership of the Bosnian Croats and Bosnian Serbs reduced to consulting with the two presidents outside the room. The Americans controlled the process and their central objective was peace, not the terms of the new Constitution. The three ethnic communities had no buy-in to the Constitution agreed to under the Dayton Accord, though paradoxically, they were institutionally empowered by it to spoil it from within once it was implemented.

“On ramps” for armed groups to transition from violent conflict to peaceful, multiparty politics provide a way to broaden a constitutional process to promote political pluralism, by enmeshing such groups in a system of electoral competition and political pluralism. In Nepal, for example, the armed Maoist rebels agreed to take seats in an Interim Parliament which then quickly held elections for a CA which they contested with considerable success, winning the greatest number of seats and heading the first post-civil war government. This kind of sequenced approach, from peace negotiations to a democratically elected constituent assembly, was acceptable to the Maoists because they anticipated sufficient representation in the CA to drive their agenda. The CA elections also permitted a broad cross-section of political parties to field candidates and win seats, which had the effect of promoting political pluralism at the deliberation phase. However, these disparate groups could not reach the required degree of consensus after five years of deliberation, so the assembly was dissolved, new elections held, and its successor completed the job.

In India’s northeast, this process of an “on ramp” from violent conflict to electoral contestation for rebel groups occurred in a number of stages, and with a focus on regional politics. It converted armed militants into stakeholders in political life as they achieved greater autonomy and promoted political stability. The Nagaland Peace Accord of 1947 carved the Naga Hills out of the state of Assam and made a Union Territory under central control, but with some local autonomy. In 1963, the government and Naga representatives negotiated a sixteen-point agreement that led to the creation of the Nagaland state in which former rebels competed in elections as a political party. While India is basically a symmetric federation (with limited exceptions for Kashmir and Goa), the government acceded to rebel demands for special autonomy

on such subjects as religious and social practices, customary law, and ownership of land and resources; these accommodations were uncontroversial at the national level, largely because of the small population and remoteness of these regions. In parallel fashion, Tripura, Manipur, Mizoram, and Arunachal Pradesh acquired status first as Union territories, with little or no autonomy, as a stage before acquiring statehood—as part of a strategy to provide “on ramps” to politics for armed rebels. Meghalaya achieved autonomy within Assam, and then was granted statehood. “On ramps” may require locally specific accommodations for political competition. In Aceh, for example, the peace agreement provided for the right to organize local political parties, which was an exception to an Indonesia law that requires all political parties to have a national outlook; this enabled the Free Aceh Movement to become a political party.

The deliberative phase can also be broadened to promote political pluralism and the legitimacy of the process when there are elected governments—whether the antecedents of the constitutional moment are peaceful or violent; however, this too can pose issues and play out differently according to the institutional arrangements as well as the political context. In parliamentary systems, which operate on the basis of simple majorities, opposition parties could be excluded or marginalized if the government controls the legislature. To counteract this risk, most parliamentary constitutions require a supermajority for constitutional amendments, potentially giving opposition parties leverage. Semi-presidential regimes may have cohabitation, in which the President and the government hail from different political parties. While in principle cohabitation provides an opportunity for political pluralism, its potential to do so depends on political culture. In Sri Lanka during the 2003–08 process, notwithstanding cohabitation, the hyper-partisan nature of Sri Lanka’s political party system acted as an impediment to building a cross-party consensus on the peace negotiations. The exclusion of the People’s Alliance (PA) President Chandrika Kumaratunga from the negotiations conducted by United National Party (UNP) Prime Minister Ranil Wickremesinghe led her to dismiss three cabinet ministers and trigger early elections, which led to the collapse of the talks. Presidential systems present a genuinely hard case. In the Philippines, control of the Presidency and the Senate by different political parties has blocked the implementation of commitments made at the negotiating table—as occurred in 2015—even though the Bangsamoro agreed to this route because they thought the President could secure passage in the Senate. There is no easy solution to this difficulty.

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

*Forums and decision-rules:* The options available for the forum for constitutional deliberations are a function of the nature of the constitutional moment—including

political geometry, and whether the antecedents have been peaceful and legal or violent and extra-legal. Legal and institutional continuity can determine or constrain choices of forums as well as the decision-rules, whereas with rupture everything is to be decided.

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

While supermajorities are the norm for constitutional change, the UK is very much the outlier in requiring no more than a simple majority as part of the ordinary legislative process. Regional devolution occurred through ordinary statute, but there were political decisions to incorporate non-binding referendums into the process—first prior to the creation of the Scottish Parliament, and more recently on the question of Scottish independence. The threshold is also low in India; although a constitutional amendment is required to alter state boundaries and create new states, it can be enacted through a simple majority in the parliament (a state whose borders are changed is consulted but has no veto). In the other cases of legal continuity under study, Kenya required a double simple majority (legislative and referendum), and Spain required a supermajority in parliament and a simple majority in a referendum. In Bolivia, Congress had the power to amend the constitution, but there was a political agreement to hold a referendum to ratify.

When the antecedent of a constitutional moment is a stalemate in a regional insurgency or rebellion, the government will assert legal continuity for constitutional change, but this may channel deliberations into fora, such as the national parliament, where elected representatives representing the rebels would be too small to have any weight. In bilateral peace negotiations between rebels and the government, the failure to address this issue carefully may undermine the ratification or success of an agreement. In Indonesia, for example, the central government initially had the parliament, where representatives from Aceh and Papua had a minimal presence, enact autonomy laws unilaterally. These laws were unsuccessful in stemming armed struggle—even though for Aceh, the laws had some favorable terms, especially on resource revenues. By contrast, the 2006 Aceh autonomy law has been largely successful because its terms were spelled out in the negotiated peace agreement of 2005. So too in the Philippines, non-consensual, unilateral change has been unsuccessful. The adoption of the 1987 Constitution authorized Congress to enact legislation to create the autonomous regions, which it did in 1989 through a law setting up the Autonomous Region in Muslim Mindanao (ARMM). It did this over the objections of the Moro National Liberation Front (MNLF). The legislation required a referendum to determine the geographic scope of the ARMM, and the two big cities voted to stay out. Although the smaller region with limited powers won the support of some Moro politicians, it failed to satisfy Moro insurgents, and did not succeed. In 1996, there was a peace agreement with the MNLF, but in 2001 Congress acted unilaterally to enact legislation that only partially implemented it. Moreover, the government ousted the head of the

MNLF, which led the organization to split, and to a new round of violence. A later stage in the Philippines process illustrates a creative institutional solution for linking peace negotiations and the ordinary legislative process, providing a role to both regional minorities and to a broader set of statewide political elites within an overarching framework of legality. As part of the 2012 Framework Agreement on the Bangsamoro, the negotiating parties agreed to create the Bangsamoro Transition Commission, a hybrid body with 50/50 membership from the Moro Islamic Liberation Front (MILF) and the government which drafted legislation to implement the peace agreement to be adopted by Congress.

The initial and central forum for resolving a territorial insurgency becomes a bilateral table, government, and rebels, to negotiate peace and a constitutional settlement. But a single focus on the bilateral peace negotiations risks failure downstream in the process, when the normal procedures for constitutional review and deliberation and ratification must apply. There is a need, especially for governments, to consider how they will address all stages of the process. In the Philippines, the Supreme Court ruled that the 2008 Memorandum of Agreement on Ancestral Domain, negotiated by the government and MILF, was ruled unconstitutional by the Supreme Court because its terms promised to adopt any necessary constitutional amendments to implement it, whereas the power of constitutional amendment rested exclusively with Congress. In due course, the MILF entered into new negotiations and reluctantly opted to proceed by ordinary statute to avoid the difficulty in getting a constitutional amendment approved, given the very high threshold required. A hybrid body, with 50/50 government/MILF membership, drafted the Bangsamoro Basic Law, but legislative approval, which had seemed highly likely, was derailed in the Senate after a botched and very bloody government anti-terrorist raid.

Another example of the problems posed by institutional spoilers comes from Sri Lanka, where government backbenchers and opposition legislators challenged the constitutionality of an interim governing arrangement for LTTE-controlled areas (the P-TOMS), which was struck down by the Sri Lankan Supreme Court on the basis that the proposed entity's spending powers infringed on parliament's control of public finance. This decision ended any prospect of further cooperation between the parties. The different reactions of the LTTE and MILF to the respective court rulings—in Sri Lanka, ending negotiations, whereas in the Philippines, continuing to negotiate and search for alternative implementation mechanisms—may have reflected the very different political contexts: there was much greater polarization between the LTTE and the Sri Lankan political class than there was between the MILF and politicians in Manila. The Bangsamoro Basic Law probably would have passed had the bloody raid not soured the mood. There was never a strong prospect in Sri Lanka of an agreement, let alone one that would pass legal muster.

These examples show the potential challenges during constitutional moments posed by institutional spoilers, who have legitimate interest in the results of negotiations but can upset delicate negotiations because of their late involvement and negative opinions. The question is how to mitigate this risk. Legislators who must eventually implement an agreement could be brought into the negotiating process in some ways at the agenda-setting or deliberative stages, but this is a highly tactical matter that requires subtle political management. In the case of the courts, this is much harder, because they cannot be parties to negotiations. But the South African transition, which occurred under legal continuity, developed a creative option whereby the Interim Constitution created a new Constitutional Court, and an appointments procedure which ensured a court with judges acceptable to the major political parties. The

Constitutional Court was assigned the task of assessing the final constitutional text for compliance with the thirty-four Constitutional Principles agreed to by a multiparty consensus. The Constitutional Court was therefore an external judicial check on the constitutional process, and indeed, it found parts of the constitutional draft unconstitutional. However, because the Court was an institution of the transition, it conceived of its role as facilitating the adoption of a new constitutional order, a striking contrast to the regime-preserving mindsets of the Sri Lankan and Philippine courts. Of course, it may be more possible to adopt such a mechanism as part of a total constitutional overhaul than in dealing with a peripheral rebellion.

When a Constitution is being considered in a situation of complete legal and institutional rupture, as after large-scale civil wars, there may be no legal constraint on the choice of forums and decision-rules. The Dayton Peace Accord's constitutional premise was one of a complete break with the previous constitution, which opened the way for the Accords to be produced by a unique constitutional process, in which armed parties negotiated with direct international participation and yielded an agreement that simultaneously ended armed conflict and adopted a new Constitution within three weeks. Cyprus, where fighting stopped long ago in its "frozen conflict," resembles Bosnia-Herzegovina in that negotiations over a formal end to the civil war are tied to those for a new constitutional settlement, though they have had to deal creatively with the Greek Cypriot view that there is continuity of the state (not of the constitution) and the Turkish Cypriot view that two sovereignties are being brought together.

In most civil wars, the transition from civil war, to ceasefire, peace agreement, and Constitution takes place over an extended period. If the previous state has collapsed or the government lacks any effective presence and/or legitimacy, there is often a need to create provisional governing arrangements during the period in which longer-term Constitution-making process can occur. These provisional arrangements, whose negotiation will have been largely elite led, may be set out in an interim Constitution or other document that creates transitional governing institutions, determines their membership, defines decision-making procedures and establishes a Constitution-making process. Interim constitutions may set out these provisional arrangements in situations where at least the form of legal continuity is maintained, but where the existing regime is so tainted and weakened that it cannot continue even during an interim period. In such cases, interim constitutions occupy a middle ground between legal continuity and discontinuity. In South Africa, the transition from the old order to an interim Constitution preserved legal continuity but fundamentally changed the regime by providing for universal suffrage elections to a Constitutional Assembly and a power-sharing executive that would have carriage of the constitutional process. The story was similar in Nepal.

Interim constitutions can create path dependencies, substantive and procedural, for the shape of a more permanent constitution. Substantively, they can provide substantive baselines for negotiations over the final constitution. The right to self-determination in Ethiopia's Charter carried over to Article 39 of the 1995 constitution. Iraq's Transitional Administrative Law recognized Kurdish autonomy and created a procedure for ratifying a new Constitution by referendum that effectively gave the Kurdish region a veto, and thus set a baseline for Kurdish autonomy under the permanent constitution.

Procedurally, interim government arrangements that are inclusive can generate buy-in to the Constitution-making process and build trust among political opponents. Ethiopia illustrates the risks of rejecting an inclusive interim government. The victors in the civil war were a coalition led by the Ethiopian People's Revolutionary Democratic

Front (EPDRF) that included other parties, such as the Oromo Liberation Front (OLF). These parties formed the power-sharing Transitional Government of Ethiopia (TGE). However, the TGE ended with a disagreement over the timing of elections, with the EPRDF for early elections while the OLF demanded a delay to prepare. The elections proceeded, which led the OLF to withdraw and relaunch the civil war. The drafting of the Constitution was largely determined by the inner circle of EPDRF leaders, with a compliant constitutional convention providing formal review and ratification. The OLF did not support the constitution, and while weakened militarily it continued a low-level insurgency that has ended only very recently, with the new openness of the Ethiopian government to opposition groups. Conversely, South Africa illustrates the value of a power-sharing interim government for the success of a constitution-making process. Both the National Party and the Inkatha Freedom Party (representing Zulus) were represented in the cabinet, participated in the constitutional process, and supported the final constitutional text even though they were not able to achieve all of their goals.

*Constitutional assemblies:* Elected constitutional assemblies are often central to major Constitution-making processes. They are two kinds of constitutional assemblies. First, there are specialist constitutional assemblies with no ordinary legislative responsibilities which are elected as part of a specific constitutional reform process, at the end of which they permanently dissolve. Their appeal largely lies in the theory, which is questionable, that they may be put above ordinary politics and beyond the control of political parties (e.g., if political parties are expressly excluded from fielding candidates). Second, there are dual-purpose elected constitutional assemblies that simultaneously serve as legislatures. These bodies are also created as part of a specific constitutional reform process and are almost always elected in a public campaign where the constitutional agenda is the main or a central issue. Political parties openly field candidates and operate according to the conventions of government and opposition (though there may be a broad-based government). After the Constitution comes into force, this body may become an ordinary legislature exercising power under the constitution. (And, indeed, in many countries the legislature is a kind of standing constitutional assembly, *sans le nom*.)

A specialist constitutional assembly was elected in Bolivia (alongside the existing legislature, and named the Constituent Assembly) and dual-purpose constitutional assemblies were elected in India (as part of the lead-up to independence), Iraq, Nepal, South Africa, and Spain. There can also be alternatives to elected or fully elected constitutional assemblies. The Bomas process in Kenya used a hybrid body that brought together parliamentarians with non-politicians. A constitutional assembly has been proposed by some civil society organizations for Nigeria. Yemen opted for a national dialogue, which had many of the features of a specialist constitutional assembly in that it was meant to draft guidelines for a new constitution. As these examples illustrate, constitutional assemblies may be used in cases of regional movements mobilizing non-violently through institutionalized channels (India, Spain) and politically salient cleavages that are both territorial and non-territorial (Bolivia, Iraq, Kenya, Nepal, South Africa, Yemen). As well, they can be used as part of peaceful democratic politics (Bolivia, Kenya, Spain) or following civil war stalemates (Iraq, Nepal, South Africa), and ethnic political mobilization with both territorial and non-territorial dimensions through non-violent means (Kenya, South Africa). They are not useful for addressing peripheral rebellions, because of the small relative population of the region in question. In Bosnia elite (and foreign) driven peace negotiations and constitutional negotiations occurred simultaneously, which precluded a constitutional assembly, while in Cyprus the negotiations are led by the heads of the two elected governments, with ratification subject to approval in parallel referendums. These latter cases suggest that constituent

assemblies may be particularly difficult in dealing with contexts of a majority dealing with a large, territorially based minority.

The main argument made by proponents of specialist constitutional assemblies is to guard against the risks of institutional self-interest and self-replication that may occur in a body that is dominated by political parties.<sup>25</sup> However, there are good reasons to be skeptical of this argument. As a practical matter it is difficult to keep parties out of politics and their buy-in will be necessary for implementation. And comparative experience highlights that the unlimited mandate of constitutional assemblies can fall prey to abuse. As Andrew Arato observes, “[v]ery often . . . the constituent [i.e. constitutional] assembly turned out to be a mere instrument for whatever force was able to convene it.”<sup>26</sup> In Latin America and the former Soviet Union, for example, presidents have convened constitutional assemblies for partisan ends, in order to wrest control of the Constitution-making process from legislatures controlled by opposition parties. Urged on by the executive, these constitutional assemblies have also inferred from their unlimited constitution-making powers the authority to exercise plenary power unrestrained by any constitutional limitations. They have seized legislative powers and reconstituted other institutions at will and have expanded executive and shrunk legislative powers. Sometimes, presidents have used plebiscites to ratify a Constitution produced by a constituent assembly to provide democratic legitimacy. Usurpation is motivated by narrow political ends, not high-minded constitutional principle. Venezuela is the most recent illustration of these risks.

These experiences suggest the need for caution regarding the role of specialist constitutional assemblies, especially in the context of territorial cleavages, which are in large part claims for the dispersal of centralized public power. Bolivia is a cautionary tale. The Constituent Assembly (CA) was created by legislation that was the result of a compromise between the *Movimiento al Socialismo* (MAS), which favored a centralized regime, and *Poder Democrático Social* (PODEMOS), which advocated regional autonomy. Each party controlled a chamber of Congress, making agreement on regional autonomy and on any broader constitutional reform difficult, so they opted for a CA that could only approve a new Constitution by a two-thirds majority. The CA was obliged to create a framework for regional autonomy, which departments had already opted into via referendum. It was far from non-partisan, and although MAS won a majority in the CA, it fell short of the supermajority. The CA became deadlocked, which led MAS to argue that the CA had unlimited constituent authority to make decisions by a simple majority, and thus to overturn the two-thirds voting requirement. This led PODEMOS to walk out of the CA. MAS then used its control of the CA to draft a Constitution and then attempt to take it to a referendum, but this was blocked when the Electoral Court held that any referendum required Congressional assent. Given the risk of civil war, Bolivia’s neighbors intervened with an offer of mediation. The parties went back to the negotiating table, and Congress (not the CA) ultimately approved a new constitution, which passed by 60 percent in a national referendum.

In Ukraine the instrument of usurpation was a constitutional commission. The politics of constitutional reform shifted with President Kuchma’s reversal of his former support for federalism, and his attempts to build a coalition of western Ukrainophiles

<sup>25</sup> Jon Elster, “Legislatures as Constituent Assemblies” in Richard Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006).

<sup>26</sup> Andrew Arato, “Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making” (2012) 1 (1) *Global Constitutionalism* 173, 183.

and eastern economic interests in favor of strong centralization. He took control of the stalled constitution-making process by creating a commission that would support his views and threatened a consultative referendum on confidence in himself and the unpopular parliament if parliament did not agree. Parliament yielded and approved a temporary constitutional agreement for a year. Kuchma then created yet another commission, even more submissive to him, which produced a draft Constitution that was strongly presidential and widely opposed by political parties. Again, the president threatened to put this draft to a referendum; the parliament buckled in the face of this pressure and approved it by an overwhelming vote in a marathon session.

The purported defect of a dual-purpose constitutional assembly—that it vests a primary role for Constitution-making with the same political parties that will wield power under the constitution—may in fact be a strength. As Nathan Brown has argued, a Constitution-making process that excludes elites may ultimately be counterproductive, because it is those elites who will operate the gears of the constitutional democracy created and can undermine it from within.<sup>27</sup> Conversely, allowing political parties to bargain around self-interest favors the stability of the resulting constitution, whose framework they will see as being more advantageous than the alternatives of force and fraud. Even when a Constitution has been adopted in a referendum, if political leaders do not buy into it, they may not implement it. A vivid example is Iraq, where the hastily drafted and incomplete Constitution was approved by a referendum in October 2005. However, its provisions on federalism are unimplemented because most Arab political leaders, who dominate the central government, felt no ownership of the constitution-making process and resent the extensive autonomy of the Kurdish region, the provisions on federalizing the Arab areas, the call for a referendum on Kirkuk, and the provisions on oil and gas.

The Bomas process established in 2000 in Kenya provides another example of the potential risks of excluding political elites from Constitution-making. Public consultation and the initial preparation of a constitutional draft was overseen by the arm's length and largely non-partisan Constitution of Kenya Review Commission. This draft was then referred to a hybrid body, the National Constitutional Conference (NCC), with members drawn from the legislature, the districts, political parties, and civil society, which was to review, potentially amend and adopt the commission's draft and transmit it to Parliament. Parliament was then to vote on it without amendment, with a two-thirds majority required for approval. This arrangement was not sustainable because the earlier phases had not satisfactorily accommodated the views of the political parties, which used their control of the final, parliamentary step to make substantial revisions to the draft. This draft was rejected in a referendum in 2005 that was in many ways a plebiscite on the president. The subsequent Kenyan constitutional process set up a Committee of Experts in 2008 to work directly with Parliament via a Parliamentary Select Committee; this draft passed in a referendum in 2010. Yemen provides another example of the same problem because the national dialogue failed to engage, at least directly, the most important actors in the country. The members of this large body were in many cases non-partisan, but they were loosely organized and not truly capable of negotiating on difficult subjects. Those who were affiliated with political parties or interests had leaders who were pulling strings from outside and often trying to obstruct agreement. In the absence of elections, it was difficult to determine who could really speak for different parts of the population, but at no point did the major leaders come together with a view to negotiating.

<sup>27</sup> Nathan Brown, "Reason, Interest, Rationality & Passion in Constitution Drafting" (2008) 6 (4) *Perspectives on Politics* 675.

A crucial issue for regional and political minorities advancing claims in a dual-purpose assembly is to avoid majoritarian decision-making that disregards the wishes of regional minorities. For example, in the context of a civil war stalemate in Iraq, the Constitution Drafting Committee of the National Assembly acted on the basis of a simple majority, which meant that the views of the Kurds who were consistently outvoted. The Americans intervened and took control of the process, which gave the Kurds, who already had a well-established regional government, considerable weight in the final draft constitution. The most obvious and powerful tool for protecting minority interests in a constitutional assembly is to require supermajority agreement—such as through a two-thirds threshold, as was used in Bolivia, Nepal, Spain, and South Africa. But supermajority requirements increase the risk of deadlock, as happened for a time in both Bolivia and Nepal, which can be highly destabilizing in a major transitional context. And minorities may still be outvoted even when there is a super-majority requirement, as happened in Nepal, where the Madhesi and Tharus were marginalized.

There can be mechanisms to overcome deliberative deadlock set down in a Constitution or in an interim agreement. In India, if the upper house rejects a decision of the lower house, it may be resolved by a joint sitting. In Spain, under the post-Franco 1978 Constitution, constitutional amendments normally require 60 percent in both houses, but if the Senate falls short of this threshold, an amendment may be approved by two-thirds in the lower house and a simple majority in the Senate (with a referendum if requested by one tenth of the members of either chamber). For fundamental amendments to the first section of the Constitution, a two-thirds majority is required in each chamber, followed by a mandatory referendum.

South Africa's Interim Constitution provided that in the event the Constituent Assembly could not reach the supermajority of two-thirds, a simple majority in the assembly could submit a draft to referendum with a 60 percent approval threshold; if that referendum failed, there would be elections for a new assembly. In Cyprus, the two sides had trouble agreeing on substance so the UN Secretary General was mandated to prepare a proposal for submission to parallel referendums (which failed in the Greek Cypriot community). In cases where deadlock-breaking mechanisms have not been spelled out in advance, it has fallen to the courts to craft a solution, which may be to turn matters over to the electorate. In Nepal, the Supreme Court dissolved the deadlocked Constituent Assembly after a constitutionally imposed deadline had been extended four times; the new elections changed the composition of the Constituent Assembly, which finally succeeded in meeting the two-thirds threshold. In Bolivia, the Electoral Court ruled some proposed referendums unconstitutional, but held that Congress could enact referendum legislation, which it eventually did as part of a constitutional settlement. In effect, the court remanded the issue to Congress, which would have faced the electorate on a fixed timetable had it not resolved the issue.

While there are challenges in Constitution-making processes in achieving a broad-based consensus that includes territorial minorities and other minorities, there can occasionally be risks in the other direction, when somehow a majority has been marginalized in a constitutional settlement. Arguably this happened in Iraq. During the early stages of the process, the minority Kurds were consistently outvoted by simple majority in the Constitution Drafting Committee. However, the National Assembly failed to meet the deadline for an agreed Constitution imposed by the occupying powers, so the Americans short-circuited the legal process and transferred the drafting to an informal body called the "Leadership Council," an opaque group that met at the US Embassy and Kurdish Region's headquarters in Baghdad. The Kurds had outsized influence in this process, which excluded a large segment of Iraq's political class. As a

result, Shia political elites have refused to implement many key terms on federalism, as explained earlier.

Scotland offers another example. When the “Yes” side in the Scottish independence referendum appeared to be on the cusp of victory, the leaders of the UK-wide unionist parties made a collective “vow” to implement greater devolution if independence was rejected. The “No” side prevailed, and the British government set up an independent commission, which recommended how to proceed, but with little consultation with either the British or Scottish parliaments or publics. The British government introduced legislation to implement the report, which recommended extensive new powers for Scotland, and this legislation passed but with little deliberation, especially in the UK outside Scotland. A House of Lords committee has described the “haphazard approach to the United Kingdom’s constitution” in devolving powers “piecemeal” to Scotland, Wales, and Northern Ireland.<sup>28</sup> The lack of broadly based buy-in from the political majority has left unresolved issues, notably the continuing controversy over the role of Scottish MPs in the British Parliament.

## Ratification

The final stage of a constitutional process, ratification, is usually separate in time from agenda-setting and deliberation, though as we have seen, the decision-rules for ratification can very much influence the preceding process. When there is constitutional continuity, the ratification of a constitutional amendment by a legislature typically requires a supermajority, as opposed to the simple majority needed for ordinary legislation. Some ratification procedures end when the national legislature or constitutional assembly has voted in the required numbers (if necessary by recourse to the deadlock breaking mechanisms described above). Other procedures give the final say to the electorate in a referendum: in these cases, the legislature may be able to approve a draft by a simple majority, with final ratification then requiring a majority in the referendum. Several federations also require the consent of some proportion of regional legislatures or populations (by referendum); examples in our cases include Nigeria (two-thirds of state legislatures) and South Africa (two-thirds of provinces for fundamental provisions and changes affecting their boundaries or powers), but these rules were not operative during the constitutional moments examined. For most constitutional amendments (though not changes in state boundaries or the creation of new states) India requires a two-thirds majority in both houses of parliament, of which the upper house is indirectly elected by the states, so the states have an indirect role in amendment through this mechanism, which has applied to the creation of new states.

In both Nepal and South Africa the outgoing regimes wished to maintain legal continuity, but a constitutional process based on the old Constitution was unacceptable to the Maoists and ANC respectively, and the compromise was an interim constitution. A critical issue at the agenda-setting stage was to negotiate the provisions in the interim Constitution for the ratification of a new constitution. In Nepal, the Constituent Assembly could ratify the Constitution by a two-thirds vote, but there was also a constitutional commitment to making decisions by “consensus.” In the final stages of the Nepali process, there was major tension over whether ratification could proceed based on a two-thirds vote or whether there should in addition be consensus. Legally, the former was applicable, but the constitutional reference to consensus weakened the

<sup>28</sup> Select Committee on the Constitution, *The Union and Devolution* (HL 2015–16, 149-X) 3.

legitimacy of the two-thirds rule, which was opposed in major demonstrations by the Madhesis and Tharus, who did win some minor concessions. In South Africa, the constitutional assembly could ratify by a two-thirds majority, but failing that, a majority could approve a draft that would then be submitted to referendum, where 60 percent approval would be required. In the event, the ANC, which was short of two-thirds of the votes in the assembly, compromised with the National Party and the Inkatha Freedom Party to get over the two-thirds threshold. South Africa was also unique in the role given to its new Constitutional Court regarding ratification. The Court was empowered to review a draft constitution, which to be put to a final vote was required to conform with the thirty-four fundamental constitutional principles that had been established at the outset of the process; its judgment required important changes to the original draft.

Ratification is a whole different matter when there has been legal rupture, in that those who have the power can decide on the rules. The Nigerian military passed power to civilians through a Constitution that had no approval by an elected legislature or referendum. That is extreme, in that even victors in a civil war normally try to cloak a new Constitution with some kind of popular legitimacy, as the EPDRF did with its pliant Constitutional Assembly in Ethiopia. Another extreme case, also lacking in any normal legitimacy, was the Dayton Agreement, where the Americans basically drove the process and the principals to the negotiation, the presidents of Croatia and Serbia, did not hold office in Bosnia-Herzegovina. The Constitution was an annex to the peace agreement with no further process for ratification. However, even in such cases of arguably illegitimate constitutions, the politicians who are meant to operate within the new regime must decide whether or not to respect it or risk system breakdown. In Bosnia-Herzegovina, local politicians have certainly tested the limits of the regime, while in Nigeria the Constitution of 2001 has been respected, despite its perceived illegitimacy—mainly because there is no viable option. The procedure for ratification in Iraq was also essentially imposed by the occupying Americans, and consisted of approval by the transitional National Assembly and then a national referendum vote. Ratification in the referendum required a national majority, but would fail if more than two-thirds of registered voters in more than two governorates voted no. This latter rule was an interesting device, originally designed to protect the Kurdish minority, which in the end voted for the Constitution (partially because they had so much influence over it), but it was the Sunni-majority governorates that almost torpedoed ratification (in two, more than two-thirds voted no, and in one more the threshold was almost met).

A referendum is the most inclusive approach to ratification and it provides the whole public with a chance to pronounce on a draft Constitution (or amendment) prepared by their representatives. A positive result in a referendum can add to the legitimacy of constitutional change, and this was the result in Bolivia and Spain, as well as in Kenya in 2010. However, there are risks to taking this step, especially in polarized situations where the Constitution contains difficult and controversial compromises. For example, in Bolivia, although a statewide majority approved the new Constitution in 2009, majorities within each pro-autonomy department rejected it. In Cyprus, the Annan Plan was subject to two parallel referendums, one in each community, and was rejected by Greek Cypriots, so the frozen conflict continues (with renewed attempts at negotiation). Of course, a negative vote in a referendum may prove salutary. In Kenya, voters in the constitutional referendum in 2005 rejected the draft, partly because of its content, but equally because of opposition to then-president. Most Kenyans would

agree the defeat led to a better process and content in 2010, when a Constitution was approved by referendum.

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

There can also be important post-ratification steps for the full implementation of a constitutional settlement. In Spain, for example, the new Autonomous Communities (AC) had to be created, which in cases of mergers of provinces was done by votes of municipal councilors, and in a few cases by local referendum. Moreover, each AC needed to negotiate its Autonomy Statute, which then was ratified by legislatures both national and regional. A tough negotiating issue in the settlement on Bangsamoro related to the use of referendums at the implementation stage to determine the exact boundaries of the new territory.

While our case studies all involve the possible constitutional accommodation of territorial cleavages in some manner, very few recent Constitutions (in contrast to those in many established federations) give a formal, constitutional role to territorial representatives or populations in ratifying constitutional change. The Iraqi referendum rule stands out as an exception, as does the requirement that both communities in Cyprus ratify a new Constitution by referendum. In South Africa, the Interim Constitution required a two-thirds majority in the Senate (whose members are nominated by provincial legislatures) for changes affecting the powers and boundaries of provinces. The British government's acceptance of the legitimacy of a Scottish referendum on independence as a binding expression of opinion falls short of formal ratification, but certainly gives a decisive voice to the regional population. Similarly, the negotiation of settlements with insurgents in peripheral territories in northeast India, Aceh, and Mindanao gave these representatives a central role on the substance of agreements, but none in their formal ratification (which in the Philippines proved hostage to politics in Congress).

Supermajority rules can sometimes give significant political leverage to territorial minorities around the ratification of a Constitution, as happened in South Africa and Spain. However, these rules are not normally equivalent to a power of veto by a regional minority. In Nepal, the aim to achieve consensus prolonged the process but eventually gave way to a two-thirds majority overriding strong objections, notably from the Madhesis, who vociferously objected to the new provincial map. They eventually got some minor revisions, but far short of their goal. In Yemen, the national dialogue could not resolve the number and boundaries of the new regions, so the president created a mechanism to approve his preferred option, which both the Houthis and the Southern movement rejected. This was a key factor in the outbreak of civil war.

In summary, ratification rules as the end point of a constitutional process are fundamental for shaping the preceding events and for the legitimacy or acceptance of the eventual result. The principal parties may be constrained by the ratification rules, but in cases of state collapse, or even in cases of total regime change within a context of constitutional continuity, the lead actors may be able to determine or shape the rules of ratification. While some constitutions are virtually imposed by victors in a civil war or powerful outside actors, with little concern for popular legitimacy, in most cases there is a process in which elected representatives and possibly the electorate through a referendum are empowered to ratify constitutional change in a specified manner. However, it is rare, even in cases where the territorial issue is central, for a ratification procedure to guarantee territorial minorities a determining role in ratification. It may be that they can use their political leverage to promote their interests, but it is unlikely that the formal ratification procedure will suffice on its own.

## Constitutional Design and Territorial Cleavages

### Constitutional moments and constitutional design

A key test of constitutional designs or innovations is how well they function, which means how appropriate the design is to the context.<sup>29</sup> Even initially contested designs may come to be accepted if they function well, but this is not a static matter because the underlying politics of a country change with time. And while design does matter, the history of a Constitution-making process can also have lasting effects in terms of how different groups view the legitimacy of the outcome. There are often powerful political imperatives to develop “permanent” Constitutions, not least in conflict-inflicted countries; while the processes of making such Constitutions can take more or less time and be done in different ways, there comes a point when a new Constitution is deemed to be operational and that becomes a fact with its own consequences.

There are three major constitutional design options to respond to claims for the accommodation of territorial cleavages. The applicability of each option has a presumptive logic, most closely related to the underlying political geometry. These logics can be summarized briefly:

- *Symmetrical federalism or devolution with a majoritarian central government*: Symmetrical federalism or devolution is a common form of government covering many varieties and degrees of decentralization, and should be considered carefully in countries whose political geometry is highly territorialized, such as Ethiopia, India, Nigeria, and Spain, but also to those with a mix of territorial and other cleavages, such as Bolivia, Kenya, Nepal, and South Africa. (Moreover, symmetrical federalism may be combined with special autonomy arrangements for smaller units, as discussed below—with the leading example being India.)

<sup>29</sup> In general, see Sujit Choudhry (ed), *Constitutional Design in Divided Societies: Integration or Accommodation?* (Oxford University Press 2008); Yash Ghai and Sophia Woodman (eds), *Practising Self-Government* (Cambridge University Press 2013); Donald Horowitz, *Ethnic Groups in Conflict* 2nd edn (University of California Press, 2000); Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press 1977); John McGarry and Brendan O’Leary, *The Northern Ireland Conflict: Consociational Engagements* (Oxford University Press 2004); Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (Oxford University Press 2002).

The major design issues include the number and boundaries of the constituent units, the protection of minority rights (nationally and within constituent units), territorial representation within central institution (notably upper houses), the form of the legislature and executive, and the extent of devolution of powers. The political dynamics when there are multiple cleavages can be quite fluid, with governing coalitions varying over time, potentially limiting how often any group or territory is routinely excluded from power. In these circumstances, majoritarian government at the center is broadly accepted, but upper houses often give extra weight to representatives of small territorial units. Iraq and Yemen are hard to place. In principle, Iraq opted for symmetrical federalism, but the design was incoherent and has never been implemented, so the Kurdish region effectively has special autonomy. Yemen failed to agree on a constitution, but the design considered provided symmetrical devolution to six regions and twenty-one governorates, while providing special power-sharing between northern and southern representatives within the legislature.

- *Highly devolved federal government with a consociational central government:* This difficult institutional arrangement is sometimes chosen when the political geometry is of two (or sometimes three, as in Bosnia-Herzegovina) antagonistic and territorially separate communities that must cohabit within a single state. Typically, there is a majority and a minority community and the latter must be of significant size for this option to be considered. Mutual mistrust can push the communities to prefer maximum devolution or self-government for each community, but some important functions inevitably remain with the central government, for which the communities may turn to power-sharing or consociational arrangements. Consociational government is particular form of power-sharing in which the agreement of a majority of representatives of each community is necessary for certain specified, major decisions. Belgium has a highly developed form of consociational federalism. Yemen's regional character led the constitutional drafters to provide for symmetrical devolution to six (not two) regions (plus twenty-one governorates), but its north-south division was accommodated by special power-sharing within the national legislature. In principle, both parties in Cyprus agree on that a solution should have this form, but they have been unable to resolve the details, which shows the difficulties of negotiating such an arrangement, even when it appears necessary.
- *Special autonomy for territories in a federal or non-federal state with a majoritarian central government:* This option is most appropriate in cases where the political geometry includes very small, peripheral territorial populations with a strong sense of distinct identity (and often of grievance). The national majority may resist claims by such groups for special autonomy for ideological reasons, but as a practical matter such arrangements can work well if the population is very small relative to the total population, as in Aceh or northeastern India, or if the extent of special status is not too extensive. Special autonomy can be more problematic, as in Scotland, when the population is relatively large and the devolution very extensive. The Minsk agreement foresees this option for the districts in Donbas that are not government controlled, but this idea is strongly resisted by many from western Ukraine. Special autonomy might have made sense for the northern province in Sri Lanka, but it was never the focus of negotiations and has been foreclosed by the military defeat of the LTTE.

Of course, there are alternatives to these three options, even when a country is highly territorialized or has strong claims for autonomy in some regions. One is a centralized, unitary regime in which there is little or no accommodation of territorial cleavages, and possibly an attempt to assimilate minorities. And another is secession, where the breakup of the state is accepted as preferable to a difficult cohabitation.<sup>30</sup> Secession was the avowed aim of rebels in India, Indonesia, the Philippines, and Sri Lanka, but they were forced to settle for less. Majorities can often favor a strong, indivisible “nation” and resist options for devolving or sharing powers. As well, countries can sometimes have features of more than one of our basic types so that one than one architectural option is at least conceptually possible. Thus, there is no inevitability that the apparently most appropriate model for territorial accommodation will be adopted: that will depend on the details of political geometry and the relative strength and ideologies of the key players. Moreover, when a country is riven by particularly deep, territorially based conflicts, it may be that there is no constitutional design option that will produce relatively functional and sustainable democratic politics.

A common thread to these constitutional models is whether to devolve government—and if so, how. There is no shortage of failed federations, some of which were cobbled together by imperial powers as they exited their colonies<sup>31</sup> and others emerged from the collapse of communism. The more optimistic view is that federalism “does not guarantee ‘success’, but it is hard to see any form of successful accommodation of multiple nations within a single state that does not include federalism.”<sup>32</sup> There is a vast literature on the strengths and possible weaknesses of federalism, as well as the conditions that influence its success or sustainability, which we do not review here. Rather, we address three cross-cutting issues that arise out of our exploration of the nexus between mobilization, process, and design.

First, politics is about power, and devolution or federalism is an important way to diffuse power. Understood this way, while devolution or federalism is the main way to respond to demands for territorial constitutional accommodation, it can also respond to other demands for inclusion. Federalism or devolution, for example, promotes political pluralism and the diffusion of access to power by allowing political parties that lose power in central institutions to contest and potentially win at the subnational level, where they can have executive authority over local matters and the advantages of incumbency to pursue their interests in national politics. As well, devolution or federalism expands the institutional opportunities for citizens to participate in democratic self-government. Democratic theorists since Madison have long argued that federalism promotes democracy, because it brings government closer to the people.

Second, devolution can also pose its own problems or challenges. The devolution of some powers can pose issues for the coherence or effectiveness of governmental policy and for the mobility of citizens, goods, and services. This is why a number of federations, such as South Africa, have opted for German-style federalism, with a heavy emphasis on concurrent powers in which the central government has paramourcy.

<sup>30</sup> Thomas Chapman and Philip G Roeder have found secession emerges as a better solution than the alternatives in avoiding future conflict, in Thomas Chapman and Philip G Roeder, “Partition as a Solution to Wars of Nationalism: The Importance of Institutions” (2007) 101 (4) *American Political Science Review* 677. Of course, this option is often refused by the international community or a national government.

<sup>31</sup> Ursula Hicks, *Federalism: Failure and Success: A Comparative Study* (Macmillan 1978).

<sup>32</sup> Richard Simeon and Daniel-Patrick Conway, “Federalism and the Management of Conflict in Multinational Societies” in Alain-G Gagnon and James Tully (eds), *Multinational Democracies* (Cambridge University Press 2001) 362. Bermeo argues along the same lines.

However, this can result in federal legislation that is so detailed that it reduces the role of constituent units largely to administration in areas of concurrent jurisdiction. Another risk with federalism, especially when it is largely ethnic or linguistic in the design of the territorial units, is that minorities within these territories may have little effective political voice and be subject to various forms of discrimination. This risk can be mitigated in various ways, including constitutionalizing minority rights, affirmative action, and local autonomy where these minorities form the majority. But such mitigation requires a positive context of goodwill and effective institutions, such as courts, to protect minorities. In sum, there are major issues in the precise design of a devolved or federal system.

There can be bitter debates about the appropriate constitutional model for a country, which can make it difficult to predict the architectural model chosen. Majorities may see options such as devolution and power-sharing as concessions to minorities that weaken national unity, undermine national sovereignty, violate basic principles and symbols, and, potentially threaten territorial integrity by paving the way to secession. Proponents of these options may counter that concessions are the only way to secure national unity. Moreover, when a country is riven by particularly deep territorially based conflicts, it may be that there is no constitutional design option that will produce relatively functional and sustainable democratic politics. As Simeon and Conway have observed, “federalism is predicated on the existence of ‘nested identities,’ the ability to maintain dual loyalties” and its effectiveness is contingent and depends on the interaction between institutions and society.<sup>33</sup> This challenge exists for any institutional model that tries to accommodate deep cleavages and antagonisms within a single country.

### **Symmetrical federalism or devolution with a majoritarian central government**

Most federal and devolved systems are essentially symmetrical in that the territorial sub-units have the same powers and responsibilities and their national institutions are essentially majoritarian in design.<sup>34</sup> This system seems suitable for countries that are highly territorialized with several salient regions, such as India and Spain, and to those where there is a mix of territorial and non-territorial cleavages, such as Kenya or South Africa. Key design issues within this model are the number and boundaries of the constituent units, the type of central legislature and executive, the upper house, the electoral system, and the allocation of powers and fiscal resources between orders of government.

Of these design issues, the determination of the number and boundaries of the constituent units was a major issue in several of our cases (though in some cases this is essentially an historic given),<sup>35</sup> notably Bosnia-Herzegovina, Ethiopia, India, Kenya, Nepal, Nigeria, South Africa, Spain, and Yemen. The criteria for forming sub-units can include historic boundaries, sociocultural identities, economics, administrative efficiency, geographic features such as rivers and mountains, the desired number or size

<sup>33</sup> *ibid* 339, 361.

<sup>34</sup> Of course, at the municipal level this is not true: there are often quite different powers assigned to municipalities depending on their size. Similarly, in a few federations there are still territories with very small populations that have lesser powers.

<sup>35</sup> See George Anderson, *Creation of Constituent Units in Federal Systems* (“Meeting the Challenges of Emerging Constitutional Democracy” Working Paper Series, Center for Constitutional Transitions 2014) <[www.constitutionaltransitions.org/publications/creation-of-constituent-units-in-federal-systems/](http://www.constitutionaltransitions.org/publications/creation-of-constituent-units-in-federal-systems/)>.

of units, and, inevitably, political pressure. In Spain and South Africa, the approaches to creating units was largely successful. The redesign of the political maps of India and Nigeria has also been positive for stability and political dynamics, but there are still pressures for more states. In Nepal, the strong dissatisfaction among the Madhesi over their failure to get a single province poses a significant political challenge, but a single Madhesi province with 40 percent of the population could prove even more destabilizing. In Yemen the proposed regional boundaries in the north were a virtual *casus belli* for the Houthis, while the Southern Movement was hostile to the proposal for two regions in the south.

Most highly territorialized countries have more than one level of territorial cleavages—for example, the territories of big confederated tribes versus smaller sub-tribes—and this can provide an element of choice in drawing the political map, especially in relation to dealing with sociocultural identities, such as ethnicity, language, and religion, which are all potentially very symbolic and politically volatile. Ethiopia, India, Nigeria, and Spain are sometimes viewed as “ethno-federations,” because territorially based ethnic political mobilization has been at the root of demands for constitutional accommodation and has been important in determining unit boundaries. However, these countries have taken different approaches. In some cases, ethnic boundaries largely align with subunit boundaries. In India, the leaders of the independence movement feared for its unity and put off addressing the call for linguistically based states. But within a few years India proceeded with a fundamental state reorganization, which largely ceded to the call for linguistically defined states and this has progressed further over time. To be sure, with more than 100 languages, twenty-two of which are listed in a schedule to the Constitution, India has not created a state for every territorially concentrated linguistic group. But the earlier fears of linguistically based states proved largely unfounded in India; their creation helped bring government closer to the population and the dynamics of national politics remained fluid in terms of political alignments given that there were several states. In Spain, virtually everyone can speak the national language, but the three “historic nationalities,” which have their own languages and represent over a quarter of the population, harbored strong grievances about their treatment under the Franco regime. These regions led the push for major devolution, but the view was that the fifty provinces were too numerous to be the principal units of a quasi-federal regime based on Autonomous Communities (ACs). So the historic nationalities were guaranteed AC status, whereas most Spanish-speaking provinces of the mainland were required to amalgamate to reduce the total number of units to 17.

By contrast, in Nigeria, sub-unit boundaries have been designed to break up the major cleavages. Nigeria’s original three federal states each embraced a major tribe and language—Hausa, Yoruba, and Igbo—as well as many smaller tribes and sub-tribes. The political dynamics were dysfunctional, especially because the northern state had a majority of the population. After the army coup and war in Biafra, the generals, who showed themselves very sensitive to the politics of state creation, moved to restructure the federation into an eventual thirty-six states. Most of these have a dominant tribe and language, but this sub-unit design has tried to breakup the cleavages among the three major populations that were so destabilizing for the country’s politics. The chosen design of Kenya’s new devolution is somewhat similar. Kenya has some forty to sixty ethnic groups and three or four major tribes. Its politics have been heavily tribal, especially around the few large tribes, but there is no neat territorial division, especially among its largest tribes. Given the history of tribal rivalry and conflict, politicians feared a political map that would reinforce tribal tensions. In its constitutional debate,

the issue of the main units of devolution and their powers became hugely contentious, but tribal cleavages were not a significant issue. The centralizers preferred a presidential regime with many, weak districts, while others wanted larger, more powerful units. In the end, the former largely prevailed. Many of the forty-seven counties have a majority tribe, which has posed issues for local minorities, but devolution has enabled some groups in opposition nationally to form regional governments, thereby diffusing power.

The risk of discrimination against minorities within constituent units is a frequent challenge of devolution. In India, for example, linguistic minorities within states are disadvantaged with respect to public employment, political representation, and public services. In Nigeria, such discrimination has even given rise to the constitutional claim that those classified as “indigenes” have more rights—for example, to state employment and some educational programs—than “settlers” whose historic roots lie outside the state, even if their families have been in the state for generations. Some federal constitutions protect the rights of internal minorities in constituent units—notably rights to education and public services in a minority language as well as the protection of basic minority rights—but in practice such protections are often weak because politically, central governments can find intervening on behalf of a minority can alienate the majority.<sup>36</sup> So marginalized minorities within federal states may turn to civil unrest and, where a minority is regionally concentrated, may demand a new constituent unit, as has happened in India—although there is a limit to such logic. Sometimes minorities suffering discrimination within constituent units align with those in power nationally, which can provide some protection for them.

Not all devolved or federal regimes are in countries with a highly territorialized political geometry. There are strong arguments for federalism, as Ginsburg discusses in his chapter, which have nothing to do with territorial cleavages. Thus, federalism or devolution can be debated in a constitutional transition for several reasons, but even countries whose political geometry is a mix of non-territorial and territorial cleavages will tend to give careful attention to the territorial dimension in considering the design of its devolved arrangements. This has certainly been the case in Nepal. It is a country of astonishing diversity, with 125 recognized caste and ethnic groups, and a history of political dominance by the upper-caste Chetri and Bahuns, who form less than 30 percent of the population. While the country’s deep cleavages became evident in the People’s War, Nepal is not highly territorialized in that groups are territorially intermingled, with only fifteen of seventy-five districts having a single group as the majority. A key demand of the Maoists, who became the largest party in the first constitutional assembly, was for “ethnic federalism.” This was highly contentious, both because of the initial resistance of the old-line parties to federalism, but also because there were almost no natural ethnic units. Eventually, a consensus was reached on a form of federalism where provinces typically have at least two significant population groups. But, the Madhesi and Tharu argued that that the federal map was designed to disempower them, and this issue continues to fester.

South Africa is also a highly diverse country, with eleven official languages, but the African National Congress deeply resented the bantustans of the *apartheid* regime, and it, along with the white minority National Party, was determined, as Steytler writes, “to unmake the political salience of these manufactured territorial cleavages . . . (and

<sup>36</sup> George Anderson and Sujit Choudhry with David Vitale, *Minority Rights in Culturally Diverse Societies* (“Meeting the Challenges of Emerging Constitutional Democracy” Working Paper Series, Center for Constitutional Transitions 2014) <[www.constitutionaltransitions.org/publications/minority-rights-in-culturally-diverse-societies/](http://www.constitutionaltransitions.org/publications/minority-rights-in-culturally-diverse-societies/)>.

create) a new narrative of a non-racial, non-ethnicity society and thereby undercut the salience of territory.<sup>37</sup> The interim Constitution created nine new provinces to replace the four previous provinces and ten bantustans. These provinces were largely based on past economic development regions, not ethnic or linguistic criteria. The provinces were to have an essentially subordinate role to the central government, although Chief Buthelezi who headed the Inkatha Freedom Party managed to get some strengthening of provincial powers in the interim Constitution and a guarantee they would not be less in the final Constitution. South Africa's new devolved structure has brought some pluralism into its politics, including within the ANC, but "territorial cleavages" are relatively minor politically, though the prospect of abolishing the provinces, which once was mooted, now seems remote.

Nepal and South Africa illustrate how even in regimes where territorial cleavages have not been central to the debate on Constitution reform, the fact of such cleavages has been given careful consideration in the design of federal subunits. This may not always accommodate the demands of some territorially based groups, as in Nepal, but such cleavages have been a salient issue in the design of the new arrangements, if only on occasion to contain them or to break them up.<sup>38</sup>

While countries with multidimensional territorial cleavages or a mix of territorial and other cleavages tend not to have anything resembling power-sharing within their central institutions, they can nonetheless have arrangements that are designed to promote balance in terms of territorial interests and to reduce political confrontation between regions. Nigeria, with its concern to undermine regional cleavages, requires parties that compete in national politics to have a national character, which means a certain level of membership and candidates across the country. In a similar vein, to be elected president in Nigeria, a candidate must win not just a majority in the country, but also at least one-quarter of the vote in two-thirds of the states. Nigeria's cabinet must have a member from each state, and the composition of the civil service must reflect the country's "federal character." These arrangements have helped mitigate the country's political divisions.

Most federations have upper houses in their parliaments and these serve as the "regional chamber." Of our cases that have opted for new Constitutions with symmetrical federalism or devolution, Bolivia, Ethiopia, Kenya, Nepal, Nigeria, and South Africa all opted for such bodies. Most have equal representation of constituent units in the upper house, though their method of selection (e.g. direct vs. indirect election) and terms of office vary. The powers of upper houses in congressional systems is usually greater than in parliamentary systems, where the lower house is the confidence chamber and also controls finances. The upper houses in Ethiopia, Kenya, and South Africa are largely empowered to deal with issues relating to the territorial units, while the upper house in Nepal is essentially an advisory body (as is the one in South Africa on national issues). It is perhaps telling that Spain put off the reform of its Senate, while Iraq's Constitution provides for an upper house to be determined in due course. The experience with upper houses is that their members vote more along party than regional lines, thus limiting their regional role.<sup>39</sup> To the extent that they rebalance political weight compared to popularly elected lower houses this

<sup>37</sup> Nico Styeler, this volume.

<sup>38</sup> For a fuller discussion see Anderson, *Creation of Constituent Units in Federal Systems* (n 35).

<sup>39</sup> Ronald L Watts, *Federal Second Chambers Compared* (Working Paper 2008-02, Institute of Intergovernmental Relations Queen's University 2008).

favors smaller constituent units, so their role in accommodating major territorial cleavages is highly contextual and usually incidental to the design. The design of upper houses was a secondary issue in the constitutional transitions under study and this underlines the majoritarian character of central institutions in most federal and devolved regimes.

By contrast, the choice of the type of executive and legislature was highly contentious in many cases, though this was not always debated directly in relation to the issue of territorial cleavages. Bolivia, Kenya, and Nigeria opted for presidential-congressional arrangements, while Ethiopia, Nepal, South Africa, and Spain opted for parliamentary systems with responsible governments. The debate was central to Kenya's transition, where the opposition parties tended to favor a parliamentary regime on the basis that it was more likely to lead to coalitions and power-sharing, where they might have access to office, while the stronger parties preferred the winner-take-all approach of a strong presidency. There is a large literature on the respective strengths and weaknesses of presidential versus parliamentary regimes (and of hybrid semi-presidential regimes), but in practice the choice between them in our cases seemed little informed by such analysis and more influenced by past history of institutions or the preferences of the more powerful.<sup>40</sup>

Nigeria's constitutional prohibition on regional parties is unusual, but it points to the potential importance of electoral laws for translating territorial and other cleavages into electoral representation and the party system. In a highly territorialized system, first-past-the-post systems, which favor largest parties within ridings, can give a distorted representation of local sentiment (Scotland is an extreme example, where the Scottish National Party won 4 percent of seats with 22.5 percent of votes in the 1992 UK election and then 95 percent of seats with 50 percent of the vote in 2015.) Proportional representation systems limit these distortions and give a better sense of support for national and regional parties and so can limit the potentially destabilizing over-representation of regional parties. Constitutions may be silent on the choice of electoral system or, as in South Africa, indicate what kind of law should apply, while leaving the details to legislation. Brancati has argued that the effectiveness of decentralization hinges on the shape of the party system and the balance between statewide and regional parties: it is least successful when regional parties are in control, but it can be undermined as well if statewide parties fail to integrate regional interests.<sup>41</sup>

Finally, the allocation of powers and finances between the central government and the constituent unit governments is a critical issue, in that regimes that have a federal

<sup>40</sup> For example, see John M Carey and Mathew S Shugart, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge University Press 1992); José A Cheibub, Zachary Elkins, and Tom Ginsburg, "Beyond Presidentialism and Parliamentarism" (2014) 44 (3) *British Journal of Political Science* 515; Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in 36 Countries* (Yale University Press 1999); Juan J Linz and Arturo Valenzuela (eds), *The Failure of Presidential Democracy* (Johns Hopkins Press 1994); Pippa Norris, *Driving Democracy: Do Power-sharing Institutions Work?* (Cambridge University Press 2009); José Cheibub, *Presidentialism, Parliamentarism, and Democracy* (Cambridge University Press 2007); Alfred Stepan and Cindy Skach, "Constitutional Frameworks and Democratic Consolidation: Parliamentarism and Presidentialism" (1993) 46 (1) *World Politics* 1.

<sup>41</sup> Dawn Brancati, *Peace by Design: Managing Intrastate Conflict through Decentralization* (Oxford University Press 2009); also see David Lublin, *Minority Rules: Electoral Systems, Decentralization, and Ethnoregional Party Success* (Oxford University Press 2014).

or devolved structure vary considerably in the extent of true devolution of powers. Thus, South Africa opted for a centralized form of federalism, based on the German model, with extensive concurrency with the federal government having paramourcy. In Bolivia, a good part of the conflict was over revenue allocation, where the central government emerged strengthened while the gas-producing departments still retained significant advantages. In Iraq, the hurried effort to draft a Constitution led to a draft with significant ambiguity regarding the allocation of powers, nowhere more glaringly than on the critical issue of powers over petroleum resources. Of the countries in our cases writing new Constitutions, Spain probably created the most devolved regime, which reflects the depth of its territorial cleavages. In principle, Ethiopia and Nigeria, which are also highly territorialized, might have been expected to opt for major devolution, but in practice the control that the military and the EPDRF had, respectively, over the transitions resulted in centralized outcomes (though on its face the Ethiopian Constitution, with its openness to secession, appears highly accommodating to territorial claims).

### **Highly devolved federalism with a consociational central government**

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

A number of federations that had only two or three units broke up after a relatively brief existence (Pakistan in 1971, Czechoslovakia in 1992, Sudan in 2011), while Nigeria was fundamentally restructured to escape its dysfunctional three-state structure that aggravated north–south relations and contributed to civil war. None of these bi-polar federations had effective power-sharing in the central government, although Sudan was meant to have. Belgium, which was initially a unitary country, has become the one example of a democracy that has developed a federal system with a constitutionalized, consociational government at the center.<sup>42</sup>

As difficult as such federal-cum-consociational arrangements can be, their logic arises from two (or three) communities finding that they are forced to cohabit within one country, often because of international pressure; the populations are territorially largely separated—perhaps after regional homogenization following conflict, as in Bosnia and Cyprus—so it is possible to create territorially defined sub-national governments for the respective communities that can assume important powers. At the same time, it is inevitable that some decisions must be made by the central government; since the population of the smaller community or communities (Bosnia-Herzegovina) rejects majoritarian decision-making, which it fears would disempower it, arrangements for power-sharing at the center become essential for an accord. This logic led to the imposed settlement in the Dayton Accord, and still underlies negotiations regarding a possible settlement in Cyprus. There has been some very creative thinking about how

<sup>42</sup> Switzerland also has some consociational features within its collective executive. As well, the fact that a set number citizens can require by petition referendums on controversial questions has proven an important incentive for politicians to work for broad consensus.

to improve the design of such consociational arrangements,<sup>43</sup> but given its difficulties this model should be considered only in exceptional circumstances.<sup>44</sup>

While the consociational power-sharing in Bosnia-Herzegovina has brought peace, it is widely recognized to have created a deeply problematic government. It has hardened ethnic identities, so that despite international support for free and fair elections and incentives for multi-ethnic and moderate parties and constraints on ethnonationalist parties, multi-ethnic parties have fared poorly and moderate ethnic parties have been drawn to more extreme positions. The reason is that the Constitution organizes politics around ethnicity, giving rise to a system of (as Zahar puts it) “monoethnic non-competitive electoral competition”<sup>45</sup> with outbidding within ethnic communities. Moreover, because ethnic appeals occur across multiple offices simultaneously, there is a coattail effect of campaign appeals to hard-line ethnic positions even at the level of the constituent entities, where there should be space for greater political pluralism. The system of ethnic parties has become the basis of a political economy of patronage. The mechanism for corruption is the requirement that government appointments be ethnically representative, coupled with government ownership of a large percentage of the economy. This has led ethnic parties to reward their supporters and themselves via concessions, procurement, and financing. There has been great difficulty getting effective decision-making at the center because of mutual vetoes. For a long time, the system relied on the internationally appointed High Representative to break deadlocks.

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

Two of the most successful consociational (albeit non-federal) arrangements have been in Belgium and Northern Ireland, but in these cases the ratio of majority to minority is close to 60 to 40 or 55 to 45, which makes power-sharing difficult but potentially manageable.<sup>46</sup> Similarly, in Bosnia the minority Serbs and Croats represent

<sup>43</sup> See Loizides (n 14) 74–126. In most cases of power-sharing, the largest population group is between 60 and 45 percent of the total population, while in Cyprus the Greek constitute about 80 percent of the population, which makes power-sharing more difficult.

<sup>44</sup> And the breakdown of consociational government in Northern Ireland at the time of writing underlines this point. While based on a unitary model because the populations are so intermingled, this case had been widely seen as a model. It may still be the least bad option for Northern Ireland.

<sup>45</sup> Marie-Joelle Zahar, this volume.

<sup>46</sup> Brendan O’Leary suggests that to work consociationalism requires mutual commitments to cohabit a state and not try to assimilate the other and leaders must have the autonomy to make compromises, which may only be practicable in moderately divided societies. He does not mention

31 percent and 16 percent of the population compared to 51 percent for the Bosniaks. By contrast, in Cyprus, the Turkish population constitutes less than a fifth of the total. The constitutional deliberations in Yemen's national dialogue were driven toward a federal system, but the south's preferred option of two regions was rejected; the accommodation of the south was meant to come through significant power-sharing in the central legislature (but not in the presidency or the courts). In this case the focus was on giving southern representatives in the parliament vetoes on matters touching their interests, yet with southerners standing at only about 20 percent of the population, it was unclear how viable this arrangement would be. The already difficult challenges of consociational arrangements are much greater when the minority is relatively small—analogueous to how peripheral regions cannot plausibly make claims about the structure of central institutions. Indeed, for that reason, consociationalism has never been seriously considered in Iraq, where the Kurds are around 15 to 20 percent of the national population, or in Sri Lanka, where the Tamil-majority northern province represents around 5 percent.

While consociationalism is rare and difficult to achieve as a longer-term constitutional design, this type of power-sharing has been used quite effectively on an interim basis for a period of transitional government during a constitutional transition in which longer-term arrangements are to be worked out.<sup>47</sup> This strategy worked well in South Africa, and reasonably well in Kenya, but it was clear in both cases that the longer-term arrangements would be majoritarian—though with important constitutionalized protections for the formerly dominant minority in South Africa.

An apparent alternative to a complex federal-cum-consociational structure for two territorially distinct and mutually hostile populations would be partition and the creation of new independent countries. Circumstances matter greatly when it comes to breakup. The international community has been prepared to sanction mutually agreed breakups, as it did in several post-Communist countries, and has even set the stage for potential breakup, as it did in mediating the peace agreement in Sudan in 2005. By contrast, the international community is extremely reluctant to reward military intervention, as in Cyprus, or ethnic cleansing, as in Bosnia-Herzegovina; moreover, the majority population in these cases is still not prepared to let the minority Turks and Serbs secede. The international community is even reluctant to support more democratic attempts at promoting secession, as can be seen in the isolation of the Catalan and regional Kurdish governments following their attempts to force independence through referendums. In his chapter, Ginsburg discusses alternative constitutional treatments of secession, where few federations provide a right, or even a conditional right to secede. At the same time, there is some quantitative evidence that partition as a solution to nationalist wars is more likely to promote post-conflict peace and democracy than the alternatives of unitary government or regional autonomy, though this may depend on context.<sup>48</sup>

the respective sizes of populations. Brendan O'Leary, "The Elements of Right-sizing and Right-peopling the State" in Brendan O'Leary, Ian Lustick, and Thomas Callaghy (eds), *Right-sizing the State: The Politics of Moving Borders* (Oxford University Press 2001) 43–4.

<sup>47</sup> See Wolff (n 7).

<sup>48</sup> Chapman and Roeder (n 30); see also Lars-Erik Cederman, Simon Hug, Andreas Schädel, and Julian Wucherpfennig, "Territorial Autonomy in the Shadow of Conflict: Too Little, Too Late?" (2015) 109 (2) *American Political Science Review* 354–70.

## Special autonomy for small territories and a majoritarian central government

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

This option is one of asymmetric autonomy. It has been suggested that asymmetric autonomy “remains the tool of choice in the settlement of ethno-political and self-determination conflicts,”<sup>49</sup> but this is an overstatement. In our case studies, such demands for asymmetric treatment arose in Indonesia, for Aceh and Papua; in the Philippines, for the Muslims of Mindanao; in India, notably in the northeastern tribal areas; and in the UK for Scotland. (There are also special fiscal arrangements in Spain’s Basque country and Navarre, but this represents an historic arrangement.) In most of these cases in which special autonomy has been granted, the relevant territorial population is very small relative to the national population: Aceh, 2 percent; Bangsamoro, 5 percent; and in India’s northeast, the three new states carved out of Assam (Meghalaya, Mizoram, and Nagaland) together account for 1 percent of India’s population. This practice is consistent with other comparable cases, such as the Aland Islands, 0.5 percent; Jammu and Kashmir, 1 percent; and Zanzibar, 2 percent. There is a strong logic to special autonomy being largely restricted to territories with relatively small populations. Small peripheral populations do not expect or demand power-sharing in the central government. They can maintain their normal representation in central institutions and their representatives can even vote on matters that do not affect them because they are such marginal players. And in federations, the larger constituent units are more likely to accept special autonomy for a very small, very distinct territory than they would for a large constituent unit, which they would see as their equivalent.

The small relative size of most regions with special autonomy helps to explain the constitutional dynamics surrounding devolution for Scotland. Devolution in the UK is asymmetric, both because there is no devolution to England (and so nothing resembling federalism) and because the three devolved regions each have different arrangements. The three regions total 15 percent of the UK’s population, 8 percent of which is in Scotland. Thus, Scotland has the largest relative population of the territorial units in our cases having a special autonomy arrangement—and it also has exceptionally extensive devolved powers. This arrangement has posed the still unresolved structural issue of the role of MPs from Scotland and the other devolved regions voting on legislation that applies only to England. This is an especially acute question in a parliamentary regime in which the House of Commons is the confidence chamber for the government, for which there is no neat solution. The UK example shows the risks of special autonomy if it applies to a significant part of the country and to a wide range of powers. The Kurdish region in Iraq, with about 15 percent of the country’s population,

<sup>49</sup> Marc Weller, “Conclusion” in Marc Weller and Katherine Nobbs (eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflict* (University of Pennsylvania Press 2010) 298–306; Ferran Requejo would let 100 flowers bloom in terms of asymmetry and rights to secession: Ferran Requejo, “Value Pluralism and Multinational Federalism” in Alain-G Gagnon, Montserrat Guibernau, and Francois Rocher (eds), *The Conditions of Diversity in Multinational Democracies* (Institute for Research on Public Policy 2003).

effectively has very extensive special autonomy so this may pose similar issues about the role of its representatives in the national government longer term.

While special autonomy can function well in cases of small minorities, majorities can strongly object to special autonomy, even for very small and peripheral regions, often for symbolic reasons or out of fear of facilitating eventual secession. There has been frequent opposition to special autonomy for the Muslims of Mindanao from the Philippine majority, which reared its head again in the final year of the Aquino administration. Aquino's successor, President Duterte, however, supported the peace agreements and in mid-2018 Congress passed a bill that enshrined the major provisions of the peace deal in domestic law. But what special autonomy would mean within a federal Philippines that President Duterte is proposing is unclear and could be closer to state status. The idea of special autonomy for the Tamils in northern Sri Lanka never found its way onto the agenda, perhaps because it would have been unacceptable to the Sinhalese majority, but in principle the population in question (especially if the eastern province were excluded) was small enough that such an arrangement might not have been destabilizing. So structural indicators favorable to special autonomy are no guarantee it will be adopted. It may be that on occasion symmetric devolution across the whole country prepares the way for special autonomy in some region or regions. In Indonesia, for example, there were the 1999 and 2004 decentralization laws for all 292 regencies, prior to the special autonomy law in Aceh. The general decentralization law changed the political baseline and made Aceh's special autonomy more acceptable across Indonesia.

## Conclusion

This chapter has argued that three crucial variables shape the structure and dynamics of constitutional moments when claims for territorial accommodation are important. These contextual variables set the stage for a period of engagement by leading political actors on constitutional change, including, potentially, changes that address claims coming from politically mobilized, territorially concentrated, populations. The three variables are: the political geometry; the antecedent means of political engagement, whether peaceful, legal and institutionalized, or violent and extra-legal; and the relative power positions of key actors.

This volume has looked at seventeen very different case studies of constitutional moments, emerging from different contexts, developing through different processes and endings (to the extent that they have ended) with very different designs and outcomes. Part of the originality of this volume is to consider the constitutional transitions in which very different political geometries put very different potential constitutional options on the table. Thus, at the highest, architectural, level, our cases include symmetric federalism or devolution combined with majoritarian government at the center, bi-communal federalism combined with consociational power-sharing at the center, and asymmetric devolution, which combines with majoritarian decision-making at the center. Bringing these different cases together helps highlight how each architectural alternative is likely to be the presumptive option for constitutional revision in distinct contexts of political geometry. Political geometry captures the state of political mobilization in a country as defined by the cleavage pattern in terms of territorial and other groups.

Countries with multiple, salient territorial cleavages or with a mix of territorial and non-territorial cleavages are likely to consider some form of federalism or devolution,

with the central institutions of government being largely majoritarian in design. Highly territorialized countries may opt for a greater degree of devolution than those that are less territorialized or that are characterized by a mix of territorial and non-territorial cleavages. Countries in which there are two (or perhaps three) highly territorialized and antagonistic communities are likely to consider a very devolved form of federalism, but with power-sharing arrangements at the center. This is a very challenging architectural option, especially if there is a major disparity in the relative sizes of the communities because the majority may then be more resistant to power-sharing. Territorially concentrated, peripheral communities that are relatively small within a national context are more likely to campaign for special autonomy and this can function quite well if the community's population is not too large and the extent of devolved powers not too great; if these are large and great, this can pose potentially destabilizing issues regarding the role of the region's elected representatives at the center on laws that would not apply to their region. There is no guarantee these indicated options will be adopted or even considered. Sometimes majorities (and even minorities) foreclose options that may have seemed prospective.

Political geometry can also influence the shape of constitution-making processes, notably whether advocates of territorial accommodation are given voice as significant participants. Such processes are also shaped by the context preceding the initiation of a constitutional moment, notably whether it has been peaceful or violent, and this can be tied to political geometry. Violent conflict, whether a civil war or a regional insurgency, can end in victory for one party or a stalemate. If there is a victor, the victor will typically tightly control both the process and substance of constitution-making; that said, the underlying political geometry can still strongly influence the constitutional design chosen. However, our main interest in cases of violent conflict is when it has led to a military stalemate, which requires a process that combines peace negotiations with constitution-making, often in a situation where the constitutional order has collapsed or has been rejected by armed rebels. A constitutional moment in such cases starts when the fighting stops; violence has been fundamental to precipitating the constitutional moment and it also strongly colors the power distribution, where typically it is the leaders of the formerly fighting parties (typically the government is one) who sit down to negotiate. The first phase of negotiations, which may extend over a considerable period, sets the agenda for the subsequent Constitution-making process, but often it also establishes fundamental substantive features that must be part of any final constitution.

This volume and our analysis join a growing body of work that draws links between Constitution-making processes and conflict resolution, which until recently existed in intellectual and policy silos.<sup>50</sup> The former is backward-looking, is focused on ending violence among armed combatants, is oriented around negotiations for ceasefires and DDR (disarmament, demobilization, and reintegration) and it relies on mediation. The latter is future-oriented and directed at creating the institutions of constitutional democracy and peaceful political contestation; it draws in expertise from law and political science. The relationship between conflict resolution and Constitution-making has, for the most part, been viewed sequentially—that is, conflict resolution is prior to, and the condition for, Constitution-making. But the link between the two is actually conceptual, because ceasefires and initial peace agreement can be rich in constitutional content, in that they can determine the decision-making process for the future

<sup>50</sup> See, for example, Christine Bell and Kimana Zulueta-Fülscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process* (Policy Paper No 13, International IDEA 2016).

Constitution and stipulate key substantive terms.<sup>51</sup> This project has highlighted how conflict resolution and Constitution-making interpenetrate each other and both can aim to create a pathway toward ordinary politics. Peace agreements can create “on ramps” for armed groups to become political parties and participate in Constitution-making processes.

When a territorial conflict has been between a central government and a peripheral territorial rebel group, the framework for peace-making and Constitution-making is normally that of legal continuity within the existing Constitution (federal or unitary). Thus, the Constitution will constrain the parties, both in terms of the rules for any constitutional amendments and the possible compliance of any non-constitutional arrangement with the constitution. The scope of any constitutional negotiations in such a context will normally be limited to certain special autonomy arrangements for the territory in question. Indeed, the changes under consideration may not even be “constitutional” in the strict sense, especially if the politics of constitutional change are too difficult; a special law complying with the Constitution may be the chosen instrument. Our cases also show that when post-conflict negotiations take place within constitutional continuity, the way may be opened for “institutional spoilers” to undo what has been agreed at the negotiating table. This poses the problem of the government negotiators being able to provide credible commitments that the deal reached at the table will be implemented. Potential institutional spoilers may be the courts or politicians whose opinions or assent are required for ratification or longer-term implementation of a settlement; they are legitimate actors under the Constitution and a challenge for the negotiators, especially government negotiators, is to anticipate this risk and develop mitigating strategies.

The situation is quite different when there has been a wider conflict, a civil war, perhaps with major powers intervening, and where there are significant territorial (and perhaps other) cleavages; the issue is the re-founding of a state with a new Constitution. In these cases of post-conflict, a new Constitution is often drafted with a rupture in constitutional continuity, where the negotiating parties (which may include outside powers) face a constitutional tabula rasa and develop their own understanding on the process for considering and ratifying a new Constitution. In such a post-conflict environment, the parties may even maintain the form of legal continuity, but effectively put aside the old Constitution with an interim substitute that has been agreed by them (very rarely a peace agreement and new Constitution are negotiated and ratified simultaneously, with no interim arrangements). Designing interim and transitional arrangements can provide the first step in developing “on ramps” for former armed combatants to switch their engagement to democratic politics. Such general, post-conflict Constitution-making processes are typically negotiated by the relevant elites at the agenda-setting stage, but they can become more inclusive during the deliberative stage, with the introduction of competitive elections to new constitutional assemblies. Such large bodies can sometimes have difficulty resolving critical issues unless leaders are actively engaged and in some cases the deliberative stage is entirely elite controlled, even if there are broader deliberative forums. The final stage, ratification, can be the most inclusive if it requires approval by referendum (perhaps with a special voting requirement), but this carries obvious risks in upsetting delicately balanced settlements.

The dynamics of drafting a new Constitution when the preceding context was peaceful is different, in that it is constrained by the existing rules of constitutional

<sup>51</sup> Sujit Choudhry, “Civil War, Ceasefire, Constitution: Some Preliminary Notes” (2012) 33 *Cardozo Law Review* 1907.

amendment. But when there are significant territorial and other cleavages, the issue is similar to a post-conflict situation in that at its core it is about political negotiations that must take account of the power balance of key factions. Assuming they have proven themselves in political tests of strength, the negotiations include leaders of movements or parties asserting claims for the accommodation of territorial claims in the new regime. Because they are constrained by the existing rules, typically the elites have limited say at the agenda-setting stage over at least some aspects of the process. They may also have limited ability to impose substantive guidance as to what the new Constitution shall contain. In these contexts, the existing Constitution will stipulate a process relating to its amendment where elected representatives play a central role, but there is often room for creative use of consultative and advisory bodies in enlarging that deliberative phase that are not constitutionally mandated. There may also be a political understanding, beyond the minimum required for constitutional amendment, that a settlement should seek to achieve some kind of understanding with key factions around a new balance in the territorial provisions of the Constitution. An existing Constitution will specify the procedure for ratification, whether by a supermajority in the legislature or constitutional assembly or by popular referendum.

These brief outlines show how in analyzing political processes around claims for constitutional territorial accommodation we have sought to integrate the literatures on mobilization, process, and design in the context of concrete examples of constitutional moments. In this conclusion, we offer further reflections on the potential contributions to those bodies of scholarship arising from this intellectual encounter and suggest possibilities for future research.

This volume and our analysis brings the law, especially Constitutions and constitutional argumentation, into the heart of the literature on territorial political mobilization. That literature is rooted in political sociology and comparative politics. Although such mobilization has constitutional change at its center—both in demands for change and resistance to it—the role of Constitution-making processes and constitutional design have not been very closely studied in most work on territorially based challenges to regime design.<sup>52</sup> In earlier work, one of us argued that concrete debates over constitutional interpretation and design were arenas for debates around competing conceptions of political community, and that careful analysis of competing positions could sharpen our understanding of these phenomena for both political sociology and comparative politics.<sup>53</sup> This research project highlights the role of law and legal institutional frameworks within the constitutional politics of claims for territorial accommodation. When there is no constitutional rupture, these institutions both empower and constrain through their conferral (or non-conferral) of power on different actors and through the requirement that any decision must comply with the Constitution. Thus, the design of existing Constitutions and their deliberative institutions give rise to strategic behavior in constitutional transitions under legal continuity. However, a critical issue at the agenda-setting stage for a constitutional moment regarding a wholesale constitutional revision is whether or not legal continuity will be maintained—and if it is to be maintained, whether the existing institutions need to be replaced by interim arrangements that reflect the new power balance between the parties. If the existing

<sup>52</sup> An important exception is Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press 2004).

<sup>53</sup> Sujit Choudhry, “Constitutional Politics and Crisis in Sri Lanka” in Jacques Bertrand and André Laliberté (eds), *Multination States in Asia: Accommodation or Resistance* (Cambridge University Press 2010).

institutions are seen as favoring a status quo that is unacceptable to at least some key actors, then those actors, who may be advocates of territorial accommodation, may propose or insist on interim arrangements that will function during the transitional period. Paying close attention to the law at the outset of a constitutional moment can help us to better understand the opportunities, constraints faced, and choices made, by political actors. This volume and our analysis broadens debate over how constitutional design can accommodate territorial cleavages. The constitutional accommodation of territorial claims does not resolve these conflicts; rather, it provides an institutional framework within which to manage them through politics. We have shown how different architectural frameworks have a logical relationship with different configurations of political geometry.

We end with a final observation. The constitutional accommodation of territorial cleavages occurs within a broad framework of constitutional democracy and institutional architecture. How these accommodations function within an institutional framework depends on how the arrangements designed to accommodate territorial claims interact with other features of the constitutional structure, such as electoral laws, bureaucracies, and the courts, but also non-governmental institutions, especially those in civil society important to territorial or other communities. Of particular importance is the idea that all constitutional democracies share the goal of creating a framework for bounded pluralist partisan contestation among political parties.<sup>54</sup> Thus constitutional design has the potential to create conditions for fluid and cross-cutting coalitions through appropriate territorial accommodations. These may be part of a broader project of creating institutional arrangements for political pluralism.

<sup>54</sup> Sujit Choudhry, "Will Democracy die in Darkness? Calling Autocracy by its Name" in Mark Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracies in Crisis?* (Oxford University Press, 2018) 571–84; and Sujit Choudhry, "Resisting Democratic Backsliding: An Essay on Weimar, Self-Enforcing Constitutions, and the Frankfurt School" (2018) 7 (1) *Global Constitutionalism* 54.