INTERNATIONAL
IDEA
INSTITUTE FOR
DEMOCRACY AND
ELECTORAL
ASSISTANCE

Constitutional Transitions and Territorial Cleavages

www.idea.int

Constitutional Transitions and Territorial Cleavages

George Anderson and Sujit Choudhry

Edited by Sumit Bisarya,
International IDEA Constitution Building Programme

Constitution Building Processes

International IDEA publications are independent of specific national or political interests. Views expressed in this publication do not necessarily represent the views of International IDEA, its Board or its Council members.

CONTENTS

INTRODUCTION

On any given day, perhaps 15 or 20 countries around the world are debating significant changes to their constitutional arrangements. Some may be engaged in a transition from authoritarian to democratic rule, while others may already be democracies but are engaged in constitutional debate over how that democracy is structured. Increasingly, an important—even central—issue in constitutional transitions is dealing with the diversity of populations in different regions, i.e., with territorial cleavages. When this territorial dimension is important, it can greatly complicate both the process of constitution making and the design of legitimate and stable constitutional institutions. Put simply, the theory and practice of constitution making often implicitly presupposes that there is a single people, and that the purpose of constitution making is for that entity to decide on the constitutional framework under which this people will govern itself. However, in many cases the very idea of a single people is not accepted—or is seriously qualified by deep diversity that creates a layered or composite national identity. Such demographic diversity can have serious implications for how constitutional processes are conducted and how constitutional institutions are designed, especially when it has a strong territorial dimension.

This is an increasingly pervasive phenomenon in contemporary constitution making. In the last two or three decades, many countries that have engaged in constitutional debates have had to address (or are continuing to address) the territorial character and structure of the state.[1] The diversity of these countries suggests that no single process or institutional design provides policy makers with a simple formula to address their different circumstances.

This paper presents a framework for considering constitutional transitions that involve significant territorial cleavages. It is designed to assist political leaders, citizens and advisers engaged in a process of constitutional transition where the territorial character and structure of the state is an issue alongside other constitutional questions. After briefly discussing the significance of constitutions and the nature of constitutional transitions, it considers the political nature of territorial cleavages, the challenges they can present for constitutional processes that are not always framed with territorial issues in mind, and some options for constitutional design that may help manage or accommodate such cleavages. The paper is the first output of a collaborative project between International IDEA, the Forum of Federations, the Center for Constitutional Transitions and the Manuel Giménez Abad Foundation.

---

[1] These include: Belgium, Bolivia, Bosnia and Herzegovina, Canada, Columbia, Cyprus, Democratic Republic of Congo, Ethiopia, India, Indonesia, Iraq, Italy, Kenya, Libya, Myanmar, Nepal, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russia, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Ukraine, the United Kingdom and Yemen.

Constitutions and constitutional transitions

Constitutions, which are the supreme law of a country that establishes the organization of the state, vary enormously in substance and detail. They can be very short (simply establishing the most important political and judicial institutions of the central government, setting out some rights and principles, and providing a few other elements of state organization) or very long (with extensive preambles, great detail about major institutions, provisions for many special institutions, extensive schedules of social and economic rights in addition to civil and political rights, and frameworks for programmes or policies that might elsewhere be dealt with through ordinary legislation). Whatever their substantive content, constitutions also have great symbolic importance as embodying the identity of the political community and its basic commitments. Because of the substantive and symbolic importance of constitutional texts, debates around them can be heated.

Constitutional transitions—political transitions marked by constitutional replacement or significant reform—are often significantly more difficult in countries with marked territorial cleavages than in more homogeneous countries. Territorially divided countries can confront very divisive questions about their nature, and even their legitimate existence. The territorial issue can go to the very heart of defining political communities and of legitimate democratic institutions.

Democratization may increase levels of tension between ethnic or other identity groups. Indeed, transitions to democracy have very often emphasized procedural or majoritarian democracy, with a heavy focus on elections rather than a more substantive approach that is sensitive to minority rights and aspirations. The principles of majoritarian democracy may not be accepted by one or more populations in some regions of the country, which fear domination by a majority that is different in important ways from themselves. Under authoritarian rule, there may have been little political space for these contending constitutional claims, and the transition to democracy may provide the space for these issues to come to the fore. Major political transitions can be periods of great promise, but also of significant risk. A process that fails to address these issues successfully can lead to majority oppression; the breakdown of democratic order and civil war. Thus constitutional processes must be carefully framed in such a context.

This paper explores these issues in relation to three major, interconnected dimensions:

1. *Political mobilization*: What factors make territorial cleavages politically salient in a constitution-making context? And what makes them more (or less) difficult to manage?

2. *Constitution-making processes*: How do territorial cleavages affect the processes of making a constitution? What options find their way onto the agenda? Who

will represent territorial interests, and how are they included in the constitution-making process?

3. *Constitutional design*: How do territorial cleavages relate to the possible character, principles and structure of the central state? How can major options such as federalism and devolution, special autonomy regions, power sharing within central institutions, and linguistic and religious arrangements potentially address different societal contexts? Where federalism is an option, how should sub-units be determined and delimited, and to what extent can they determine their own internal arrangements?

While the focus of this paper is on factors directly related to constitution making, the success or failure of many constitutional transitions is closely tied to broader contextual matters, such as the quality of governance and the security situation during a transitional period. Given their complexity, constitutional debates and reform can take many months—even years—and the public's attitude toward the political class and the products of a constitutional process may be strongly coloured by the economic and security situations and general government performance. It is a familiar story that success builds upon success, while difficulties in one area can undermine even a well-executed approach in another—in this case, a major constitutional review. Moreover, if the security and economic situations become too dire, it may prove impossible to manage or complete a constitutional process with any degree of legitimacy.

Territorial cleavages and political mobilization

While some societies are relatively homogeneous across their territory, in other cases regional differences become a defining characteristic of a country. Societies may have many potential social and political cleavages, but not all of them become politically organized and salient. The extent and nature of political mobilization around territorially concentrated populations depend on many factors, including the past history of discrimination and conflict between groups, a group's geographic concentration or dispersion, whether a group defines itself as a 'nation', the strategies of group leaders and the group's internal dynamics, the organizational resources and opportunities available to groups and international influences and interference.

Understanding the context in which mobilization around territorial cleavages has developed is therefore essential to appreciating the likely implications and consequences of different constitutional process and design options. The political mobilization of a territorial population is affected by many factors, and the form it takes can be critical for shaping the evolution of a constitutional transition.

The history of inter-group relations

A central factor that shapes group identities and political mobilization is the history of relations among groups. In particular, a population or group that has faced a history of oppression, dominance, discrimination or attempted assimilation is more likely to develop a heightened group consciousness and political agenda; its disadvantage may have been political, economic or cultural—or a combination. While politically mobilized minorities are often motivated by economic discrimination or disadvantage, some economically advantaged regional minorities, such as the Catalans and Basques in Spain, have mobilized around other issues, including past attempts at cultural assimilation. Historically dominant groups, which may be either a minority (e.g., the whites in apartheid South Africa) or a majority (e.g., the Sinhalese in Sri Lanka), may feel threatened by the political mobilization of the majority, or of an important minority, and mobilize themselves in reaction. Periods of political transition can be particularly unsettling as the power relationships between groups shift, which may cause a larger breakdown in relations, including violent clashes.

The nature of different identity groups

Some groups within a country define themselves as 'nations' or 'nationalities', which typically distinguishes them from other populations in their constitutional demands. National groups often seek the means to ensure not just their survival but also their full expression. When they are minorities, this often means seeking autonomous arrangements—up to and including the right to independence. Seemingly similar

groups can be quite different in this regard: for example, in Sri Lanka, the Northern Tamils see themselves essentially as a nationality, but the hill Tamils, who descend from more recent immigrants, do not; thus the Northern Tamils assert much stronger claims to autonomy. When a national group constitutes a majority, it is more likely to promote a strong central government. However, in some cases, as with the Flemish in Belgium, majorities may prefer more regional autonomy to avoid joint decision making or subsidizing minorities. Majoritarian nationalities sometimes define the country narrowly as the political extension of their groups—in which case they may see minorities as illegitimate or second-class and perhaps subject to an assimilationist policy—but in other cases they view the country broadly in pluralistic terms, with their nationality as only one among others, which creates the potential to accommodate other nationalities.

Elites' ambitions and strategies

Ambitious political leaders can sometimes mobilize a group by 'playing the ethnic (religious, etc.) card' and stirring up resentment or fear in order to win elections or political advantage. While there can be largely spontaneous mass movements that are not elite-driven, even these require leadership if they are to function effectively over time. And a group's leaders may have very different personal or political agendas, which can cause the group to splinter into opposing factions. Competition among leaders can expose the complex composition of a social group, so that different parts of a community may advance conflicting objectives during a constitutional transition.

Organizational resources

The organizational structure of a country undergoing a constitutional transition can often have a major influence in shaping the political forces because groups with established organizational resources are more able to mobilize. These resources can be well-known traditional leaders or sub-units that provide a platform for political mobilization; political parties that existed under the previous regime; groups with a history of organization through unions, religious organizations, community groups or non-governmental organizations; or an armed rebel group that fought in an insurgency. While constitutional transitions, especially those ending an authoritarian regime, are often characterized by mass demonstrations, these mass groups frequently prove incapable of coming together and forming effective organizations, while more established networks, such as the Muslim Brotherhood in Egypt, often become electorally very effective. When very oppressive regimes such as Gaddafi's in Libya fall, there may be almost no organizational resources on which political forces can build quickly, which can lead to major problems in terms of structuring a coherent transition. Of course, if a transitional period lasts long enough, there may eventually be political mobilization around new groups and issues.

International influences and foreign actors

Outside actors and developments often strongly influence political transitions. This may be through contagion, as was seen in the spread of mass political mobilization across countries during the Arab Spring. It can also be via the direct intervention of outside actors, including foreign governments, regional organizations and international organizations. Outside actors may sometimes support constitutional transitions, but

outside intervention is not always benign. A foreign power can sometimes intervene to support a political movement within a country, to mediate a transition or even to topple a regime. Diasporas can provide funding for insurgencies or political groups and are often a source of returnees, who may assume leadership positions.

The geographic concentration or dispersion of groups

Territorially concentrated populations often have a sense of shared history and identity around which they can mobilize. They can have major organizational advantages over more dispersed groups: communication is easier (as is organizing demonstrations and mass disobedience) and so they may be able to win political assets—e.g., seats in parliament, control of local governments—that give them leverage. In extreme cases a regional group may resort to insurgency, and this too is easier to manage in the territory of a supportive population. A regionally concentrated group can also credibly threaten with secession. Some small but geographically concentrated insurgencies (e.g., Aceh in Indonesia, Bougainville in Papua New Guinea) have won concessions that would have been unimaginable for similarly small populations scattered across a country. This potential of regionally concentrated minorities means that some countries, such as Nigeria, try to limit their right to mobilize politically by requiring political parties to have a multi-regional character.

Internal group dynamics

All groups—minority or majority—have their internal divisions and differences, which may find expression through competition among elites or in other ways. Identity groups have fluid boundaries, in that their members identify with the group with differing degrees of attachment and have other, sometimes cross-cutting, identities as well. Thus the political mobilization of territorial cleavages, like political mobilization around other factors, is dynamic; not every territorially concentrated identity group mobilizes in a united fashion. For example, the populations of Quebec and Scotland are deeply divided over the issue of whether to seek independence.

Dealing with territorial cleavages in the constitution-making process

In some constitutional transitions, one or more territorially-based populations may be mobilized around certain constitutional objectives, such as devolution, autonomy or power sharing. The transition process may be either accommodating or resistant to the claims of such groups. This is partly a question of legal framework and rules, but more fundamentally of the attitude of other groups. The influence of territorial groups may depend on the process that is adopted, including such elements as negotiations, national dialogues, elections, the composition and rules of the drafting body, and the ratification mechanisms.

Minorities' fear of majoritarianism

While constitutional transitions address important issues about the desired character and structure of a state, they often must first deal with the more immediate issue of the *process* of resolving these longer-term questions. In many constitutional transitions, the major objectives that need to be addressed are clear and widely shared, such as moving a regime toward democracy. But some cases are complicated by the issue of how the state's principles and structures should reflect the existence of different groups, including one or more territorially concentrated groups. While the objective of moving toward democracy may be common to all groups, the precise kind of democracy may be a major issue of contention. In particular, certain populations, which may be territorially concentrated, may fear that majoritarian democracy would lead to their long-term domination by a distinct—perhaps unsympathetic, or even hostile—majority, so they may seek special protections, autonomy and power-sharing arrangements. This fear can be especially prevalent in a post-conflict situation in which armed groups that have been engaged in violent conflict may still have little mutual trust, but now must find a long-term institutional solution to enable them to live together. Where a minority that is territorially concentrated believes that it would not be treated fairly in a governance structure that could be controlled by the majority, it is natural for it to seek some degree of autonomy through the devolution of responsibilities to a territorial government in which it would form the majority.

Legal continuity or revolutionary break in constitution making

An early question in many transitions is whether the process of constitutional reform should be conducted within the legal framework of the predecessor regime, which would involve respecting the amending procedures set out in that regime's constitution. Some who are attached to the old regime will insist that legal continuity is necessary if the reform is to be legitimate. But respecting the rules and institutions of the old regime may favour one group over another, and thus put certain groups at a serious disadvantage in the reform process. Such groups may argue that there needs to be a clean

break from the old regime, and that new, fair rules and institutions must be developed that are more appropriate to the current situation. There may be a revolutionary break, in which the new regime bases its legitimacy on the notion of popular sovereignty or the rights of the revolutionary group. But abandoning the old constitutional framework raises the question of how to define the rules and institutions that guide the process of making the new constitution. Because of the difficulty of resolving these questions, many constitutional transitions are characterized by unclear or contested rules, and a good deal of muddling through. Territorially-based minorities may find that operating within a context of legal continuity makes it more difficult to achieve their aims, because the existing rules of amendment may require supermajority support, which gives 'spoilers' in the majority group a veto over constitutional change.

DURATION AND DIFFERING ELEMENTS OF CONSTITUTIONAL TRANSITIONS

Constitutional transitions vary greatly in length. When a clear victor has taken over the government, or when a peace settlement is imposed through international mediation, the process may be completed in a year or even less. However, it is not unusual for a transitional process to take many years (or even decades) and go through several phases, especially if there is intense politics, with different parties seeking advantage or working toward mutual understanding and agreement. Each phase of a process may be characterized by specific activities. The key types of activities include:

- negotiations among political principals;

- national dialogues involving a broader cross-section of political actors;

- elections to formal political institutions;

- drafting of constitutional texts, which often involves technical legal advice; and

- ratification by a legislative body or referendum.

Not all processes will have all of these activities; the activities may also overlap, and their sequence can vary. The approach taken to each of these activities will be shaped by the objectives and strengths of the key actors, and by whether the process is taking place within an existing constitutional framework (which will set various rules for representation, processes and approval of changes) or in a legal rupture (which will leave more discretion as to the rules and processes adopted). When territorial cleavages must be managed as part of the constitutional process, there can be issues around representation, participation and approval by representatives of territorial groups, especially minorities, in each of these activities. We briefly review these activities to consider how they may reflect the territorial dimension of a constitutional transition.

Negotiations

Negotiations are usually central to post-conflict situations in which no clear victor has emerged, and in post-authoritarian transitions that involve representatives of the old regime and democratic forces. In either scenario, if there is a territorial cleavage, careful attention should be paid to how to include territorial parties. For example, territorial parties may be negotiating with each other (e.g., Bosnia and Herzegovina, Cyprus) or with the central government (as in Indonesia for Aceh and in the Philippines for the Bangsamoro of Mindanao). In South Africa, the early phase of the constitutional

transition consisted of negotiations between the apartheid government and the African National Congress (ANC). The negotiations were broadened in due course to include regional parties (one of which won key concessions, even though its support was not technically required for an agreement). Of course, negotiations take place in legislatures and constitutional conventions as well, but the dynamic is different in a plural, political context than in a bilateral negotiation for a peace agreement or a post-conflict settlement. And the dynamic is different again when a strong leader or dominant party can impose a new constitution with minimal negotiations, which may make it hard to accommodate a distinct regional presence.

National dialogues

Some countries sponsor a national dialogue process on their constitutional future before entering the more formal phase of drafting a constitution or electing a constitutional assembly. Sometimes, as in Yemen, the dialogue process serves as a substitute for elections, which cannot be held for security or other reasons. National dialogues typically have several hundred participants who are chosen, not elected, through a process that is meant to produce an assembly that is broader than the traditional political and military elites and includes representatives of civil society, often with a strong emphasis on women, youth and certain marginalized groups. A dialogue can be given an ambitious mandate, but these mechanisms are rarely capable of producing the kinds of detailed decisions required to create a complete constitution. However, they may help set the broad context, establish some key principles to govern the constitution-making process and perhaps make a few strategic decisions. When territorial cleavages are important, a dialogue process can help populations from different regions express their different perspectives and become sensitized to one another's concerns. The dialogue process in Yemen was designed with a strong focus on the Southern question, so southerners were heavily over-represented and there was a working group on southern issues (and another on a northern province). Such dialogue processes tend to seek broad consensus, which can mean that they may help create a more favourable environment for subsequent decision making, but typically they leave many issues unresolved. Given the limitations of dialogues, relying too much on them can discredit the constitutional review process as the population becomes impatient for results (though this also happens in some large constituent assemblies).

Elections

It may seem natural to hold elections early in a constitutional transition in order to select a legislature or constitutional convention that has popular legitimacy. There is a case for doing so, especially in relatively homogeneous countries where the major issue is the transition to democracy and the previous regime lacks legitimacy. Yet even in such situations an election may be a polarizing event that does not include all major political interests in a constitutional negotiation. In divided societies with a deep political cleavage between a majority population and one or more minorities, elections can also be threatening to territorial minorities, who may fear an elected body operating on majoritarian principles because elections tend to be based on 'representation by population'. The first elections of a constitutional assembly in Nepal produced a body that was deeply divided, notably on federalism issues, and incapable of reaching an agreement. Eventually, new elections were held that produced a body capable of achieving the necessary supermajority for constitution making. However, even this majority may find it politically impossible to impose a constitution without

some agreement with the opposition.

Drafting

Various bodies can be given responsibility for preparing a draft constitution—for example, an expert commission or a committee of the legislature or constitutional assembly. In some cases, such as Nigeria under the generals or Ethiopia after the civil war, the government effectively controls the drafting and there is minimal room for political discussion, including for territorial minorities. In Ethiopia, for example, a large Oromo faction left the government coalition in frustration over the constitution that was being imposed by the government. In countries where the politics is more fluid, expert commissions with some genuine independence may be mandated to prepare a draft. The membership of such commissions can be representative of different groups, including territorial minorities (as in Yemen, where the Constitution Drafting Committee, which followed the National Dialogue, had equal representation from the North and South). Moreover, hearings may be held throughout the country and in minority languages, which allows for greater input from territorial minorities. However, even very representative independent commissions risk having their proposed draft rejected if there is no buy-in from elected politicians, as happened in Kenya in 2004.

Ratification by legislative bodies or referendums

Legislatures or constitutional conventions can have the final authority to ratify a new constitution or constitutional amendment. Often such bodies will be organized into thematic sub-committees, some of which may deal with issues relating to territorial cleavages. Representation for territorial minorities on such committees is crucial, as is representation on the committee responsible for collecting and harmonizing the work into a draft text (often called the 'Constitution Committee' or 'Consensus Committee').

In addition, while special decision rules, such as a supermajority of 60 to 75 per cent, may give some protection to territorial minorities, depending on their size, there is little precedent in such cases for giving a particular territorial minority a veto if it does not meet a more generic criterion, such as population size. In Nepal, a threshold of two-thirds of the Constitutional Assembly is formally required to adopt a new constitution, but this may not prove politically sufficient because the Maoist and other opposition parties have threatened civil disobedience if the constitution is passed without their approval. Threshold requirements for constitutional change can be particularly high in established federations, which often have very rigid amending formulas that require majorities—sometimes supermajorities—both in the central legislative bodies and in voting by the legislatures or populations of the constituent units. They can even give vetoes to individual units of the federation.

There is also the alternative of submitting the proposed draft to the population in a referendum. If the rule is simply majoritarian, this may not be satisfactory to a territorial minority. A number of federations use referendums to ratify constitutional amendments and require a special majority, e.g., Switzerland and Australia, which require a double majority of voters nationally and of voters in a majority of constituent units. However, even supermajority requirements may not be enough to protect a particular territorial minority if it is small. The alternative to supermajority requirements is vetoes. For example, in Cyprus, ratification of the constitution by referendum required a majority

in both the Greek and the Turkish communities: the minority Turks voted in favour but the majority Greeks voted against, and the constitution was not adopted. In Iraq, the Kurds negotiated an agreement before the constitution was drafted that its ratification would be by referendum, and that any three provinces voting no by a two-thirds majority would defeat it. This gave Kurdistan an effective veto and enabled it to exact major concessions in the preparation of the draft constitution. Paradoxically, it was the three Sunni provinces that almost defeated ratification in the eventual vote.

While referendums are sometimes thought to offer greater legitimacy to ratifying a constitution or constitutional amendment, they are also politically riskier than assigning ratification authority to the body that has drafted the constitution. The likelihood of the constitution not being ratified, or at least not being approved by an important part of the population—especially in highly fraught situations—may be higher if the draft must be approved by the constitutional assembly or legislature as well as the population.

The critical issue of inclusion

This brief review shows that it is possible to design virtually all of the main activities potentially associated with a transitional process to include the representation of one or more territorial minorities. Whether minorities will be included in practice—and to what extent their interests will be accommodated—will depend heavily on the objectives of the strongest players guiding the process. If their objectives include reaching an accommodation with a territorial minority, then they will consider how to bring representatives of that minority into the process and how they might accommodate them substantively in the constitution. But if they are hostile toward the minority, they may not seek to accommodate it in the process or in the final result. The Rajapaksa government in Sri Lanka, heavily supported by the Singhalese majority, was not prepared to accommodate the Tamils after their military defeat. However, the electoral defeat of President Rajapaksa in 2015 reversed this stance, and the minorities and a significant number of the Singhalese banded together in the election to advance a new constitutional agenda that is more accommodating of minority concerns. In Bolivia, President Morales did not want to grant representatives of the Eastern lowlands the autonomy they sought, but once he had clearly defeated them in elections and a referendum, he was prepared to negotiate minor accommodations—a striking contrast to Sri Lanka under Rajapaksa. There can also be situations, as in Nigeria, in which the rulers (in that case, generals) impose a new structure for territorial relations (in Nigeria, many new states) with minimal consultation or agreement. Similarly, outside powers can play a strong role in a constitutional process, and their priorities regarding timing and substance can profoundly affect the outcome—as in Iraq, Bosnia and Herzegovina, and Cyprus. In most cases, however, outside powers play little role or largely serve as facilitators.

Thus any constitutional process is shaped by the objectives and strengths of the different parties. While dictators or victorious dominant parties may largely impose constitutional settlements (sometimes ignoring the amendment procedures set down in the existing constitution), in more balanced situations there is usually some need for mutual accommodation. Paradoxically, territorial minorities often have a stronger voice in post-conflict peace negotiations, where their consent is required for an agreement, than in more majoritarian arrangements, such as elected assemblies. Thus the very small minorities in Aceh and Mindanao were able to negotiate directly with the national governments and win major concessions, which they probably never could have achieved

in an elected assembly operating with majoritarian rules (though the results had to be confirmed by the national legislatures).

Another factor that differentiates negotiations in the context of territorial cleavages is the threat of secession. On the one hand, this 'exit threat' may give more power to territorially concentrated minorities than if minorities are dispersed throughout the country. However, fear that increased autonomy will lead to secession may also lead the majority to reject territorial demands or to design the constitution-making process to weaken or divide the representation of certain territorial groups.

Just as many factors influence the constitutional transition process, the process itself is an important factor in shaping the final constitution design.

Constitutional design and territorial cleavages

While constitutional design can be critical for the political sustainability of a regime, the design chosen in a particular transition will reflect the power configuration and objectives of key actors, as well as the process adopted. Where territorial cleavages are salient, the design options include devolution—to what territorial units and for what powers or resources—and accommodation regarding the role of territorial minorities in national decision making, symbols, language policy and so on. The relevance of different design options will depend on the political configuration of the territorial groups within the country.

The units of devolution

Countries moving to federalism or devolution often face uncertainty about the number, character and borders of the new constituent units. In several unitary countries, it has been necessary to draw a new political map, which may involve merging some existing units into more viable sizes or bringing several criteria to bear in drawing a fundamentally new map. Decisions about a new map are normally made when the constitution is being written, but Spain and India left this to a subsequent stage of redefining their states. Some established federations have merged units or created new ones long after approving their constitutions. There have also been instances in which a failure to settle a disagreement over the political map has blocked agreement on the constitution itself.

Defining a political map raises issues including the criteria for defining constituent units, the timing of and procedures for drawing the map, and the constitutional provisions for changing or adding new units.

Criteria for defining constituent units

The criteria considered can include:
- *economic factors* such as efficiency, effectiveness and viability (an argument for avoiding many small or economically poor units) and grouping economic regions;
- *socio-cultural factors* such as nationality, ethnicity, language, religion, tribe and clan;
- *geographic features* such as natural boundaries like rivers and mountains;
- *political balance*, which may mean breaking up one or more dominant regions, or a region that may have separatist tendencies, or avoiding a structure with just two or three units (which are often characterized by divisive politics and political instability);

- *public opinion*, which may be assessed through elections, referendums or public consultations; and

- *historical boundaries* with which people often identify, which can serve as a useful reference point and obviate the need to consider other factors in detail when drawing boundaries.

In practice, the drawing of new political maps seems always to be based on a combination of some of these criteria, though there can be heated debates around the basic philosophy for creating units. Perhaps the most contentious issue is the extent to which boundaries should reflect socio-cultural factors, which can turn on the choice between 'ethnic' or 'territorial' federalism. Ethiopia and Bosnia and Herzegovina, for example, both have explicitly ethnic forms of federalism, and there are strong advocates of ethnic federalism in Nepal's current constitutional debate. While many federations have a strongly ethnic or linguistic character in their structure, a pure form of ethnic federalism gives rise to serious practical issues as well as issues of principle.

It is difficult to implement ethnic federalism in practice, because ethnic groups almost always have significant territorial overlap and mixing (unless there has been 'ethnic cleansing' as happened in the Bosnian conflict). So trying to draw boundaries on this basis can be very difficult and contentious—and even impossible. It can also lead to the demand for ever-smaller units, which would be expensive and ineffective. Philosophically, ethnic federalism can undermine common citizenship and minority rights. If a constituent unit is deemed to belong to a particular ethnic group (or groups), those from other groups who live there risk being second-class citizens. For example in Nigeria, groups that are considered indigenous to a state have more rights (such as access to government employment and some educational programmes) than those who are 'settlers'—even if they have lived in the state for generations.

Thus very few federations have opted for a pure form of ethnic federalism, and many, such as India and South Africa, have avoided drawing boundaries strictly on the basis of language or ethnicity, even if these factors weighed heavily. These complications also explain the frequent recourse to established boundaries when new maps are being drawn, because this helps limit potentially dangerous conflicts at the local level. Combining this approach with provisions to ensure the rights of minorities within the new units can greatly lower the political stakes—and risk of conflict—of drawing a political map.

Timing and procedures for drawing the map

While some countries, such as Belgium, Kenya and South Africa, determined their new political map prior to adopting their new federal or devolved constitution, several others adopted their constitution without having resolved this issue in whole or in part. India adopted its constitution in 1949 on the basis of a state structure that was viewed as temporary, which permitted the federation to operate immediately and take its time restructuring the states. Germany adopted its constitution in 1949 without having resolved the status of three provinces that were candidates for a merger, which happened in due course after a referendum. Bosnia and Herzegovina had an unresolved issue regarding the district of Brcko, which was eventually settled via international arbitration. Spain's new constitution in 1978 established criteria and procedures for creating new autonomous communities, which took place after the adoption of the constitution. Iraq's 2005 constitution established a procedure whereby governorates

could become regions, singly or in combination, but only Kurdistan was a region at the time the constitution was adopted (and no further regions have been created). Finally, Nigeria's constitution originally established three states, which proved highly dysfunctional; since then, the number of states has grown to 36, which has created a healthier dynamic in terms of relations between regions and tribes, though it has also strengthened the central government.

These examples suggest that, while a comprehensive political map is necessary to fully implement a devolved or federal arrangement, it is not always necessary to complete the drawing of a new map when approving a constitution, especially if doing so will be contentious and time-consuming, in which case what is needed is an agreed procedure for creating constituent units. Thus, the constitution may establish criteria for this, but delay their creation to the implementation phase. A federation may start with an interim map, subject to a thorough review in due course. If there are issues regarding the boundaries, merger or de-merger of particular units, these may be dealt with after the constitution is adopted. Revisions are likely to be possible even in mature federations, though the ease of doing this, as discussed below, will depend on the decision rules specified in the constitution.

Constitutional provisions for changing or adding new units

Processes for drawing political maps during or after constitutional transitions differ significantly in how they provide for public consultations or a local role in the formal decision making. Many new maps have been drawn using an essentially top-down approach, in which the government or key parties may engage in some consultations, but take the final decision themselves. Thus, in Ethiopia, the decision was essentially taken within the governing coalition (including merging what had temporarily been four states in the south), while in Nigeria the successive re-drawings were done by unconstitutional fiat of the ruling generals. South Africa created a multiparty commission to propose a map based on a number of criteria; the commission consulted the population and then made its recommendations, which were largely accepted (although slightly revised) by the political leaders. Similarly, India used a small commission of experts that consulted widely for its first major state restructuring exercise, and the commission's recommendations were largely adopted.

By contrast, Spain's new constitution combined top-down and bottom-up approaches: it specified criteria for the creation of autonomous communities, but then let locally elected officials in each province decide through a voting procedure on their possible merger with neighbouring provinces. Iraq's constitution of 2005 provided a similar procedure, but the Malaki regime was hostile to federalism and did not allow new regions to emerge.

Once federations are established, there can be an interest in marginal changes, rather than a wholesale redrawing of the map. In these circumstances, it can be easier to accommodate a formal role for public opinion. Germany and Russia have used referendums on possible mergers (only some of which proceeded), and Germany voted against a possible de-merger. Australia had a referendum on the possible creation of a new state out of the existing state of New South Wales. Switzerland, with its long tradition of direct democracy, created the new canton of Jura out of the existing canton of Berne, but this required the consent of Berne, and the use of sub-cantonal voting to

determine which parts of Berne would be transferred to Jura. The creation of the new canton had to be confirmed in a national referendum, but even then the boundary issue was not fully settled and there were further modifications; others are under discussion.

The rules that federations include in their constitutions for the creation of new constituent units or revisions to boundaries range from very flexible to extremely rigid. Procedures may give the authority to the national parliament alone (by simple majority of both houses, as in India, or by special majority, as in Kenya and Belgium), to the national parliament plus the affected constituent units (by simple majority, as in the United States and Australia, or by special majority, as in Pakistan), to the national parliament plus both the affected and all constituent units (as in Canada), or to a special majority of constituent units (as in Nigeria). There can also be procedures for public initiatives or petitions to start the process of considering boundary revisions or creating new units (Germany, Nigeria, Iraq). In practice, the division or merger of existing units in established federations has been rare, because most federations require existing units to consent to their dismemberment—which few would—and the politics of territorial division can be especially volatile (as in Nigeria, where the process has been made almost impossibly difficult).[2]

The form of devolution

Federal and devolved forms of government vary tremendously in name and form, as well as in the extent of devolution. There are both symmetrical and asymmetrical models for devolution.

Symmetrical models

The most common models of devolution, whether in federal or unitary regimes, are symmetrical, in that the constituent units are assigned the same (or very similar) law making and administrative powers. While federations are typically symmetrical, the political demands for devolution usually vary in intensity from one region to another. Thus in a constitutional transition, there may be a consensus on adopting a federal or devolved structure, but regional representatives may differ on how many powers should be assigned to the regional versus the national level. Even so, the usual conclusion is a symmetrical model, which gives all constituent units essentially the same legal powers. Spain is in some ways the exception that proves the rule: it was expected to be asymmetrical in form but is now largely symmetrical. The strongest demands for devolution during the transition from the Franco era came from the so-called historical nationalities, notably Catalonia, the Basque Country and Galicia. These groups were expected to have greater powers than other regions, and the constitution permitted each autonomous community to negotiate its own autonomy accord within the framework for the possible devolution of powers. The historical nationalities were the first to negotiate, and sought as many powers as they could legally have. The surprise was that the new governments in the other autonomous communities decided that they wanted essentially the same powers. This may have been because provincial politicians simply wanted as much power as they could have. Or, symbolically, no one may have wanted to accept less—or a lesser status—than the others. For whatever reason, and with the

---

2   In the Western Hemisphere, there were thinly settled areas that were deemed 'territories', which did not have the status of constituent units. Over time, new units were created out of these territories in Argentina, Brazil, Canada and the United States. However, such creations are not our subject here.

exception of the historical fiscal privileges of the Basque Country, Spain ended up with a very symmetrical form of quasi-federalism.

During constitutional transitions in some developing countries, such as Ethiopia, there may be a temporary exception to symmetry, in that the transitional provisions of the constitution can wait for the constituent units to develop the capacity to assume the powers before they are officially transferred. However, this normally represents a question of timing, rather than differences in the units' constitutional capacity to receive such powers. Some federations also consider some very thinly populated regions—or regions with tribal populations or limited capacity—to be 'districts' or 'territories' without the full status and autonomy of constituent units.

Asymmetrical models

Asymmetrical models arise most notably where one or a few regions have a much stronger desire for local autonomy than elsewhere in the country. There may be one or more regionally concentrated minorities whose identities are distinct from that of the majority population. Such minorities usually seek more devolved autonomy than the majority wants in its regions, so a symmetrical approach to devolution could result in too little devolution for one or more territorial minorities, and too much for the majority. This can arise in both federal and unitary regimes.

Even so, federations tend to be symmetrical; relatively few have provisions that give greater powers to certain constituent units. For historical reasons, Jammu and Kashmir in India, Sarawak and Sabah in Malaysia, the Basque Country in Spain, and the Tirol and Aosta in Italy all have greater powers than other constituent units in their regimes. For the most part, this has not proved problematic, partly because the populations of these units are small relative to the national population (e.g., 1 per cent for Jammu and Kashmir, 5 per cent for the Basque Country, 20 per cent for Sarawak and Sabah), but also due to a recognition of the 'specialness' of these units. However, the special fiscal arrangements enjoyed by the Basque Country permit this relatively rich region to keep more of its own revenues than other autonomous communities, which has become a source of tension in Spanish politics. Kurdistan in Iraq has a very large measure of autonomy in a supposedly federal regime, and in principle other parts of the country were to be eligible for similar autonomy; yet extending so much autonomy to all the regions would be unsustainable.

Special autonomy arrangements can be a feature in unitary or 'union' regimes as well—for Scotland, Wales and Northern Ireland in the United Kingdom; for Åland in Finland; and for Zanzibar in Tanzania. Recently, special autonomy arrangements have been agreed for Aceh in Indonesia, Bougainville in Papua New Guinea and Bangsamoro on the island of Mindanao in the Philippines.

Special autonomy arrangements are often decided through limited negotiations or processes, rather than as part of a general constitutional transition. They can also be the product of international agreements (such as between Finland and Sweden, and Italy and Austria), reflect historical rights (e.g., the Basque Country in Spain), or follow an insurgency (e.g., Aceh, Bangsamoro). In Malaysia, the special arrangement for Sarawak and Sabah was negotiated as terms of their late entry into the federation.

Asymmetrical arrangements, whether in unitary or federal regimes, are most appropriate[3] when the autonomous unit is not too populous relative to the rest of the country. Thus Scotland, with 8 per cent of the United Kingdom's population, is rather large to have such extensive devolution. Most special autonomy areas, whether contiguous or overseas, are less than 2 per cent of the national population. A large region with extensive autonomy poses problems regarding the number and powers of its elected representatives in the national parliament, because they might determine the outcome of votes on matters that do not affect their region. Such representatives could be denied the right to vote on such matters, but since that would create procedural complications regarding the functioning of the legislature and the constitution of the government, this measure has not been adopted in most cases. This issue is actively debated in the United Kingdom, where the Celtic regions could determine which party formed the government, even when many of the government's responsibilities would not apply to their regions.

Autonomous units are frequently heavily subsidized or favoured fiscally, which can discourage secession. Citizens of the autonomous territory are citizens of the host country. A right of secession does not usually extend to contiguous autonomous territories (Scotland is an exception), but it often does to overseas territories that were colonies.

In Sri Lanka, a secessionist movement failed to win a special autonomy arrangement for its territory. The Indo-Lanka Accord of 1987 provided for a weak form of symmetrical devolution to all the country's provinces (the temporary merger of the Northern and Eastern provinces was the only special concession to the Northern Tamils), but the accord soon failed, in part because the liberation movement known as the Tamil Tigers never supported it. Attempts at negotiations between the Tigers and the government obtained little traction and, when they did, the possible compromise option was limited symmetrical devolution, not a Tamil area with significant autonomy. It remains to be seen how the very devolved special autonomy arrangements in Indonesia, the Philippines and Papua New Guinea develop over time. However, it appears that they were made possible by the central governments' fatigue with the insurrections and the relatively small size of the regions in question.

National institutions and decision making

In federations and other constitutionalized forms of devolution, the central government institutions are often designed to reflect the country's territorial character to some extent. This often provides for the representation of regions or minorities in certain central institutions, which may enhance their decision-making power. Yet for most territorial minorities, such arrangements at the centre are a lower priority than devolution, which would give them clear control of their powers. Enhanced representation at the centre will always fall short of giving the minority the final say—the most it will get is a role in the decision. Of course, there are powers that cannot (and should not) be devolved, so the minority may have a real interest in maintaining its role in those decisions. Regions or regional governments may also be given a formal role in the procedure for amending the constitution, which can provide a measure of protection for acquired rights.

---

[3]   France, Denmark and the Netherlands all have special autonomy arrangements for former overseas colonies, which have been integrated into the metropolitan governments as overseas territories. This paper focuses on special autonomy arrangements for contiguous territories.

A few countries have gone even further and developed 'consociational' arrangements for formal power sharing between territorially or culturally defined communities.

Arrangements for a regional role in national decision making

Upper houses. While the legal powers of all constituent units are normally the same, their political weight in a federal regime will vary according to their population size, wealth and other factors. This can be an issue for representative arrangements in the central government, notably in upper houses. Almost all federations have a bicameral legislature in which representation in the lower house is based primarily on population, while in the upper house it is organized by reference to the constituent units in some way. The roles (and methods of selecting members) of upper houses also vary considerably.

- *The number of seats or votes assigned to each constituent unit*. Less populous constituent units tend to be quite heavily over-represented in federal upper houses, because representation is either equal for all units or weighted to favour the less populous ones. This can give extra weight to territorially-based minorities in national law making.

- *The method of selecting members of the upper house*. Members can be elected directly by the population, or indirectly by constituent unit legislatures (in which case, upper house seats usually correspond to party shares in the legislature). Germany is unusual in that the members of the upper house represent the provincial governments (and so usually vote as a bloc). South Africa uses the German system for some seats and indirect election by provincial legislatures for other seats. When members of the upper house are directly or indirectly elected, they normally vote by party, which means that members from the same region often vote differently, thus attenuating the 'regional' dimension of representation. Even in Germany, where the upper house is composed of provincial government delegations, the party dimension is very powerful. While German delegations normally vote along party lines, there is considerable bargaining within the party groups because of different provincial views, and on occasion provincial delegations break party ranks to vote according to their provinces' interests.

- *The role of the upper house*. Upper houses in presidential regimes tend to have more power than those in parliamentary regimes, because in the latter the government is based on the confidence of the popularly elected lower house. In some federations, such as Belgium and Canada, the upper house is no longer a significant political chamber. In a few federations (e.g., Germany, South Africa) the upper house is designed as a forum for intergovernmental relations, with all or some members named by the constituent unit executives, and the house's role relates primarily to laws affecting the units—and on these matters it can be very important. The Ethiopian upper house is indirectly elected by the state legislatures, and it focuses on resolving interstate conflicts, interpreting the constitution and overseeing how the national budget allocates funds to states; it has no role in legislation. While the representation and powers of an upper house may provide some extra protections for a territorially-based minority, this tends to be limited, because they rarely get an effective veto.

In some federations, constituent units with small populations are also heavily over-represented in the lower house—Brazil is the most extreme example.

Electoral laws. Many factors shape the choice of electoral laws, including designs that may influence the representation, and weight, of territorial minorities in both houses of the national legislature. While proportional representation with large constituencies and a low threshold for representation in the legislature can be important for geographically diffused minorities, geographically concentrated minorities may benefit most from a first-past-the-post electoral system (in which a territorially-based party may sweep all or most of the seats in minority areas simply by having a plurality in each electoral district). For example, Indian politics has changed dramatically over time with the decline of the Congress Party and the emergence of regional parties, which have been in strong positions to bargain over the formation of coalitions and various government measures. Nigeria and some other African countries have designed their electoral laws to forbid narrowly-based regional parties and require all parties to have cross-regional support, but regional interests still play out within the broadly-based parties in ways that may compare with countries that permit regional parties. Constitutions can be silent on electoral laws or merely indicate the very general type of law that is to apply.

Constitutional amendment procedures. Constitutional amending formulae always involve special procedures and usually stipulate special majorities. These usually give less populous units extra weight in such decisions that is greater than they have for normal laws through upper houses. This can be because of a requirement for a special majority in the upper house or among the units voting by referendum or through their legislatures. Such rules normally fall short of giving any particular territorial minority a veto over constitutional change, with the exception of changes to the boundaries of sub-units, for which many federal constitutions require the consent of the sub-unit(s) involved. The constitution of Malaysia is unique in providing that other provisions, which governed the entry of Sabah and Sarawak into Malaysia, may only be changed with their consent.

Representation in central state bodies. There can also be arrangements to promote the representation of minorities or particular regions in the executive, judiciary, civil service and military. The Swiss constitution requires that at least two of seven federal councillors who collectively form the executive are from the minority francophone population. The Nigerian constitution requires that the cabinet has a representative from each state, and that all federal institutions reflect the 'federal character' of the country in terms of linguistic, ethnic, religious and geographic diversity. The Federal Character Commission charged with implementing this principle remains controversial because of the difficulty of balancing these requirements with the merit principle. Many countries have less rigid, and often informal, arrangements to try to ensure that their institutions are reasonably representative of different groups in the population.

Consociational arrangements

While minorities may obtain some extra protection from arrangements that give constituent units an enhanced role or weight in national institutions or decision making, sometimes this is not enough for a minority, and it seeks formal power sharing with the majority, at least on certain items. Such 'consociational' arrangements may be chosen where there are deep communitarian cleavages, notably as part of a negotiated settlement of a conflict, which may have been violent (e.g., Bosnia and Herzegovina, Northern Ireland) or not (as in Belgium). Consociational arrangements have been adopted between populations that are intermingled on the same territory (as in

Northern Ireland), but when the cleavage is also territorial, a consociational structure at the national level is usually associated with substantial devolution to territorial units as well. The consociational model is based on the notion that key governance decisions should be made by agreement among representatives of two or more communities, thus limiting the actions of the majority group.

Recourse to consociationalism is relatively rare, both because it breaks so substantially from majoritarian democracy and because it can be difficult to make it function satisfactorily over time. It is typically an arrangement between two (or sometimes three) communities, each of which is reasonably large relative to the others. Accordingly, this approach is not adopted where a territorial community is very small relative to the national population: the communities of Aceh, the Bangsamoro and the Bougainvillians are too small to consider sharing power at the national level; special autonomy is more likely to be relevant.

Consociationalism is usually thought of as an element of constitutional design, but there can also be consociational elements in the processes of constitutional transition. For example, in South Africa, the initial stages of the process were centred on negotiations between the National Party government and the ANC, each of which had to agree on issues of procedure and substance. But the ANC always insisted that the ultimate model of government must be majoritarian. The transitional solution was found in the ANC and National Party negotiating 34 basic principles that had to be respected when the draft constitution was sent to the popularly elected Constitutional Assembly for final revision and ratification. These principles protected the vital interests of the minority while giving a 60 per cent majority of the assembly, largely made up of the black population, the final authority to approve the constitution.

Consociational arrangements typically emerge from negotiations rather than from popularly elected constitutional assemblies. Negotiations are about finding a mutual agreement, and if parties must agree, they are effectively in a consociational relationship. However, while bi- or trilateral negotiations can give some constitutional processes a consociational character, it is relatively rare for constitutions to adopt a consociational structure. Bosnia and Herzegovina, with its Bosniac, Serb and Croat communities, illustrates this point, since its constitutional settlement was imposed by the United States and the European Union as part of the Dayton Accords. The resulting constitutional structure is built around the ethnically homogeneous territories that were the product of the civil war and population transfers, and a form of consociational federalism, with a maximum devolution of powers to the governments of the entities (which even keep their own armies for a considerable period) and a consociational arrangement for the 'central authority' (which was not even deemed to be a government), in which decisions require the consent of all three communities. It may be that no other arrangement could have yielded peace, but Bosnia's central institutions have been dysfunctional and often incapable of taking a decision. Moreover, the arrangement has reified the distinctions between communities and left no real space for developing any kind of common citizenship.

It is sometimes argued that there are 'liberal' models of consociationalism that limit the strictly communitarian dynamic and open a space for different political groupings—even potentially across communities—to play a role in government. The Northern Ireland model, which is unitary rather than federal in design because the Roman

Catholic and Protestant populations are so intermingled, has an arrangement whereby cabinet positions are allocated on the basis of how many votes a party received, which could include secular or bi-communal groupings. Thus the representation of the two communities is not locked into a rigid bi-communal model. Variations on this approach have also been considered in Cyprus. In Belgium, a form of liberal, federal consociationalism has emerged peacefully through normal electoral politics. The system was substantially devolved through several stages, but important responsibilities remain with the federal government. The federal cabinet must be composed equally of Dutch-and French-speakers (the prime minister is not included and could be either), and because both linguistic communities have several parties, the partisan character of governments can change over time. Parliament normally deals with issues through majority votes, but a proposed measure deemed to be of vital interest to one of the cultural communities will require a double majority of deputies from both communities, with each deputy voting as an individual. The Belgian system has proved difficult to manage—as exemplified in the record amounts of time taken to form new federal governments after elections. When consociational models seem inescapable, there are advantages to trying to design such liberal models in order to create some positive cross-community dynamics. It would also be desirable to build in arrangements for their review and revision over time, which has proved difficult.

The extent of devolution

Because of the difficulty of decision making by joint agreement, consociational regimes that are structured around territorially defined communities tend to have a very high degree of devolution, creating a hybrid model of federalism and consociationalism, which minimizes the need for joint decisions. This is clear in Bosnia and Herzegovina, but it has also been a strong factor in the drive for devolution in Belgium (where the counter-force has been the desire of the poorer francophone minority to keep some major social programmes at the national level because this benefits it fiscally). Attempts to negotiate a consociational federalism in Cyprus have also assumed a very devolutionary regime.

Similarly, special autonomy arrangements, especially for very small minorities, can facilitate very extensive devolution, as in the cases of Aceh and the recent accord with the Bangsamoro of the Philippines, because the central government appears able to tolerate having very limited power over such small populations. When the population of the special autonomy unit is larger, as Scotland is within the United Kingdom, there are more constraints on how much can be devolved (or on what terms). The British government is committed to substantial further devolution to Scotland following the referendum of 2014, but this has drawn further attention to the role of Scottish members of parliament voting on laws in that do not apply to Scotland.

Devolution in more symmetrical arrangements, federal or otherwise, ranges from modest to quite extensive. But even the weakest federal governments have significantly more powers over their devolved units than do national governments in very consociational regimes such as Bosnia, or with special autonomy arrangements for very small territories such as Aceh. The extent of devolution can be a major issue during a constitutional transition, with regions populated by minorities often pushing for much more devolution than other regions: the end result will reflect a compromise based on the balance of forces. Thus in South Africa, the white and black communities, and some black tribes, were able to win the concession of a quasi-federal structure, but it is quite

centralized. Ethiopia's federalism appears radical in recognizing a right to secession for the country's nations and nationalities, but in practice the extent of devolution is quite limited, especially with one-party dominance. By contrast, the political weight of Spain's minority nationalities proved sufficient to bring about a substantial devolution of powers (even if the term 'federal' was not used). And the peace deal concluded between the Sudanese government and South Sudan in 2005 provided for radical decentralization (with the South becoming a federation within a federation), which eventually led to the break-up of the country. In general, multi-ethnic federations seem more inclined toward greater devolution than more homogeneous federations.

SYMBOLIC, LINGUISTIC AND RELIGIOUS ISSUES

While territorial minorities may often seek devolution or a share of national power during a constitutional transition, some of their demands are often not about powers as such, but about symbolic issues or community rights. Symbols are important, because they can either be inclusive of minorities or marginalize them: flags and anthems sometimes reflect the symbols of the dominant population, preamble clauses in constitutions characterize the nature of the country (which may, for example, refer to the 'nation' in the singular or to the 'peoples' of the country), and the designation of only an 'official' language or religion privileges that identity over others. These symbolic issues can cause very emotional reactions within both majority and minority communities, and can be important in constitutional transitions. For example, the constitution of the Former Yugoslav Republic of Macedonia refers to the 'Macedonian people' in its preamble, even though over 30 per cent of the population is of other ethnicities. Minority group demands for increased autonomy and recognition eventually led to conflict between ethnic Albanians and the majority government, which forced the introduction of some power-sharing measures and increased decentralization.

Minorities, depending on their size, often seek to have their language recognized as 'official' or given some other formal recognition. They may also seek to guarantee its status in the educational system, as a language of service to the public, and as a language of work within the national or regional administrations. Of course, these objectives may coincide with a demand by a linguistic minority for its own unit of government (a federal constituent unit if the minority is large enough, or even a local or district government), but if a linguistic population is a minority in a region, it may simply be seeking to have its rights constitutionalized so that the local majority must respect them.

The priority of religious minorities is usually to be able to practise their religion without persecution or discrimination; the classic rights of freedom of religion, conscience and assembly normally protect such practice. However, some religious groups also seek to have their own schools or other social institutions (perhaps funded by the state), or to be able to be governed by certain religious laws (notably in the area of family law) or to proselytize. It may be easier to accommodate some of these demands when a religious minority constitutes the majority in one or more territorial units.

Conclusions

This working paper has provided a high-level sketch of elements that shape constitutional transitions in which territorial cleavages are salient. The possible configurations of political groups within countries are almost limitless. Territorial cleavages are only one of many potential political cleavages, and they can overlap and blur with others. That said, many constitutional transitions must address significant territorially-based demands. This paper is intended to provide a useful analytical backdrop or conceptual map to help those engaged in constitutional transitions to consider relevant factors and options.

There is no doubt that territorial cleavages present special challenges for constitutional processes and design. Territorial populations that are majorities in one region but a minority nationally may fear majoritarian government at the national level and seek devolution, in addition to enhanced representation in central institutions and processes as well as special provisions relating to symbols and their communities' linguistic or religious priorities. Democratic transitions involve both promise and risk. Those that achieve compromise in certain areas can mark historic turning points in finding a framework for governance that is acceptable to significant groups. Thus a critical question in any constitutional transition will be the standing that other actors give to those who seek territorial autonomy or other special governance arrangements: are they open to some form of accommodation, or do they reject the demands? If they are open to accommodation, a first issue will be the process that is to be followed in constitution making. Will it abide by the amending rules of the existing constitution, or will new rules—perhaps representing a break in the legal order—be developed? There are many ways in which minorities can be accommodated in constitution-making processes, but a key decision will involve defining the ultimate decision-making rules, and the leverage they give to minorities. Of course, minorities can be accommodated even when they have limited formal leverage if other actors see their proposals as being in their interest.

'Self-rule', at least in a limited form, is a normal demand from territorial groups with a strong sense of distinctiveness. This can take the form of special autonomy arrangements if the minority is relatively small and there is little interest in devolution within the rest of the population. Or it can be part of a general devolution, which may be federal in form, perhaps with enhanced powers for certain regions. However, it may be impossible to define regions that are ethnically, linguistically or religiously homogeneous, which poses the question of the place and rights of minorities within the devolved units. An excessive focus on the rights of local majorities can create its own problems. On occasion, there can be consensus among the key political actors that devolution in some form is in their mutual interest, but majorities sometimes resist devolution—or at least devolution of the type demanded by certain minority groups. The outcome will depend on the strength and views of key actors, the urgency of an agreement (and, clearly,

negotiations to end a conflict or reach a post-conflict entente play a distinct role in this regard), and on the decision rules and procedures adopted.

Even if a political regime is substantially devolved, important powers will normally remain with central political, judicial, military and administrative institutions. Territorial groups may accept that these institutions are largely structured around majoritarian principles, but if the level of trust is low—or if there has been a history of severe discrimination and exclusion—such groups may seek special arrangements to represent their interests in central institutions. These may be principles related to fair representation in major institutions, or the use of their language in national institutions and national symbols, but they can also include arrangements that provide for general joint decision making (consociationalism) or on a limited number of issues. Such arrangements may be the only way to resolve a conflict, but they are typically very challenging to manage.

Those engaged in constitutional transitions in which the territorial dimension is salient might work their way through the issues discussed above to assist in their analysis of the forces and possibilities that may be relevant in their cases. Every case is unique, and most are also dynamic. Thus as the process progresses the politics shift, and alternative forums or methods may be tested, and new or revised options may be more applicable.

References

Anderson, George, *Federalism: An Introduction* (Toronto: Oxford University Press, 2008)

Arato, Andrew, 'Conventions, Constituent Assemblies and Round Tables: Models, Principles and Elements of Democratic Constitution-making', *Global Constitutionalism*, 1/1 (2012), pp. 173–200

Bermeo, Nancy, 'Conclusion: The Merits of Federalism', in Ugo M. Amoretti and Nancy Bermeo (eds), *Federalism and Territorial Cleavages* (Baltimore, Md: Johns Hopkins University Press, 2004)

Bertrand, Jacques and Haklai, Oded (eds), *Democratization and Ethnic Minorities: Conflict or Compromise* (London: Routledge, 2013)

Choudhry, Sujit and Hume, Nathan, 'Federalism, Devolution and Secession: From Classical to Post-conflict Federalism', in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011)

Horowitz, Donald, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict Societies', *William and Mary Law Review*, 49 (2008), pp. 1213–48

Zahar, Marie-Joelle, 'A Problem of Trust: Can Federalism Silence the Guns?, in Grace Skogstad, David Cameron, Martin Papillon and Keith Banting (eds), *The Global Promise of Federalism* (Toronto: University of Toronto Press, 2013)

This working paper provides an overview of factors that shape constitutional transitions and their outcomes in countries where territorial cleavages are politically very salient. The territorial dimension is increasingly prominent in many constitutional transitions and it presents distinct challenges. There is no single or best way to address them. This paper examines a variety of case studies, including federal regimes, 'consociational' power sharing within governments, special autonomy arrangements for particular regions and unitary regimes. It starts with an analysis of the factors associated with political mobilization around territorial cleavages, which are fundamental to the political dynamics. The politics will also shape—and be shaped by—the structure and organization of the constitutional process, which in turn affects the choice of constitutional design. Thus the factors shaping a constitutional transition in a territorially divided country form a complex and highly interdependent system with a good deal of path dependency. This paper highlights the factors that need to be analysed during transitional processes, as well as the procedural and substantive options that may need to be considered.