



Constitution Brief

August 2018

Summary

This Constitution Brief covers the spatial arrangement of public power through constitutional design. By changing the way in which public resources and power are allocated, and autonomy and identity are recognized, constitutional arrangements related to managing territorial divisions can be critical in transforming societal division and conflict to unity and peace.

About the author

Tom Ginsburg is Leo Spitz Professor of International Law at the University of Chicago Law School and a research fellow at the American Bar Foundation. He serves as a Senior Technical Advisor to International IDEA.

Disclaimer

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, or those of its Boards or Council members.

References to the names of countries and regions in this publication do not represent the official position of International IDEA with regard to the legal status or policy of the entities mentioned.

The views expressed in this brief do not necessarily reflect those of the Ministry of Foreign Affairs of Norway or the Grand Duchy of Luxembourg.

© 2018 International Institute for Democracy and Electoral Assistance

Constitutional Design for Territorially Divided Societies

Tom Ginsburg

1. Background

Territorial divisions come in many forms. They occur in both federal and unitary states, and may involve divisions based on religion, language, history and identity, as well as natural resources. They can involve one region within a country or several. Because of the close association of territory and sovereignty, territorial divisions raise very high stakes issues, going to the heart of the definition of the political community, national identity and statehood. They are often emotive and can seem intractable.

Territorial divisions can therefore be a major problem for peacebuilding. Resolution of territorially-based societal conflict regularly involves reorganization of the state to meet the demands of groups concentrated in particular areas of the country. This may involve a stronger voice in decision making at the national level, more autonomy to make decisions concerning the lives of the group, a larger share in the way national resources and finances are allocated, or recognition and protection for different cultures. The latter can involve explicit recognition of different peoples as equal members of the political community, for example, and allowing territorially-concentrated groups to use their own languages in schools and public forums. Inevitably, therefore, negotiations over peace will imply negotiations over constitutional design.

At one extreme, territorial divisions may pose a threat of secession or violence or both. At the other extreme there is the possibility of integration in a centralized, unitary state without any local autonomy. In between these two lie many possible configurations, which constitutional design helps to organize. Allocating powers, duties, and the level of autonomy is a critical task of national constitutions.

Once an allocation is made, constitutions must grapple with how arrangements can change over time, as well as how they will be monitored and enforced. By virtue of their entrenched nature, constitutions allow for greater reliance by citizens and foreigners on their promises than does ordinary law or policy, and so can help to stabilize governing arrangements even after bitter conflict.

Box 1. The formation of states and regions in Myanmar's Constitution

Myanmar is divided into a total of 21 administrative areas: seven States, seven Regions, six Self-Administered Areas, and one Union Territory. Of the six Self-Administered Areas, one is in the Sagaing Region and the remaining five are in Shan State. The Constitution allows the President to designate certain areas as Union Territories under the direct administration of the President. Currently, there is one such Union Territory: the capital city, Nay Pyi Taw. To redraw the territorial boundary of the Union and/or States and Regions, the final approval of three-quarters of the Union legislature is required.

Source: Article 9 (a), 56, 50 (a) and (b), 52 (d), 53 (f), Constitution of Myanmar (2008).

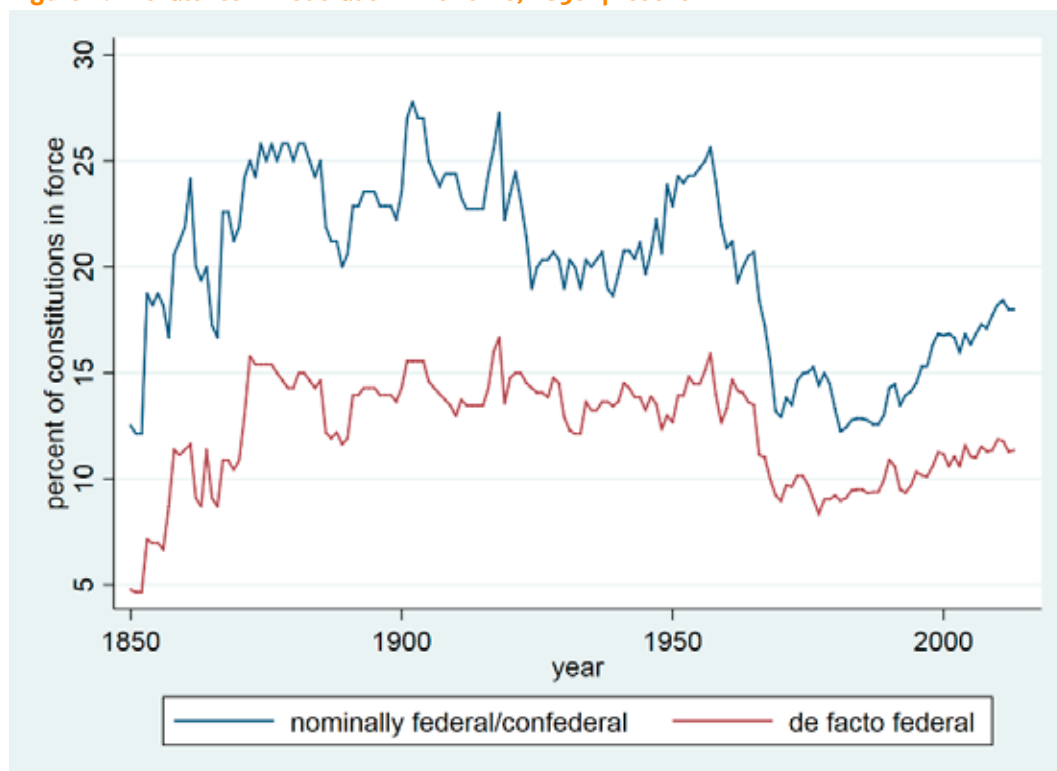
2. Allocating powers and duties: federalism

Constitutional federalism is a common mechanism for dealing with territorial difference and societal diversity within a single state. In a federal system there is a constitutional division of authority between a central government and one or more subunits, whereby there are some topics on which the subunit's rules will stand even if opposed by the centre. According to data from the Comparative Constitutions Project, roughly 11 per cent of all countries are nominally federal, in the sense that the constitution uses the term explicitly and roughly 18 per cent are actually so—that is, one or more regions has designated policy areas in which it has a veto or final authority, even if the Constitution does not use the term federalism. Figure 1 shows the global prevalence of federalism over time. The blue line shows nominally federal countries, and the red line adds other countries that are in fact federal as defined above.

Importantly, constitutional federalism need not treat all the subunits equally. In India, Kashmir and several other regions receive different constitutional treatment due to the terms of their accession to the Union or other historical legacies. Some Spanish regions were granted 'autonomy' over certain cultural policies in the 1978 Constitution as a reaction to the excessive centralism of the Franco regime. The United Kingdom has become a de facto federal system, with each of its component parts having different levels of autonomy.

Federalism is often characterized as 'self-rule and shared-rule'. This conveys the important notion that federalism involves not only spheres of autonomy for subunits, but also their representation in decision-making at the national level. Often this is achieved through a second house of the legislature whose composition is territorially defined, but there are many other ways to constitutionally guarantee a diversity of views at the centre (see section 4).

Figure 1. Prevalence of federalism over time, 1850–present



Source: Data from the Comparative Constitutions Project (2014).

Box 2. Language policies in India

Language has been a salient issue in India, where debates over a national language have exacerbated territorial cleavages. The 1956 States Reorganization Act and its successor statutes created several states with one dominant language, but also took into account the cultural boundaries and economic viability of each new region. The states, which generally have equal powers, have relative autonomy within the federation.

More demands for new states followed, especially in the north-east of the country. Three new states were created in 2000, mainly to address under-developed regions rather than language differences. The most recent creation, Telegana in 2014, did create a Telugu-speaking state.

The 1956 act and its successors seem to have succeeded at minimizing conflicts centred on language differences. By creating linguistically and ethnically defined states, in a larger diverse entity, the Indian state reduced the stakes of politics at the centre while ensuring that no one entity or group could dominate the country as a whole.

There are numerous general arguments in favour of federalism. The founding fathers of the United States argued that multiple governments would reduce the risk of tyranny by any one of them. Federalism would also ensure that no single region would be permanently dominated by another. With freedom of movement, minority interests (and rights) within any particular territory may be better respected, as there is freedom of exit to another jurisdiction. Another argument is that federalism allows for experimentation in policy. If a policy is successful in one state, it might provide the basis for the adoption at the centre or in other states. Finally, and especially important in the context of territorial divisions, federalism can allow for local preferences to be better satisfied, rather than having a single policy for the entire country on every issue.

For example, if a territorial cleavage overlaps with a distinct religious or ethnic identity, allowing religion or language policies to be determined locally may be appropriate (see Box 2). Federalism also allows for clear division of revenues from natural resources. This can be especially important if natural resources are concentrated in particular geographical areas. In Nigeria for instance, 13 per cent of revenues from natural resources are constitutionally allocated to the producing states.

Federalism has some costs, however. Because it creates state-level political autonomy and sometimes government capacity, it can lead to attempts to renegotiate the constitutional bargain further down the road. Regional parties can form based on emphasizing local identity. Even if it does reduce the pressure for secession in the shorter term, then, federalism can potentially undermine national integration. This is particularly true in cases where a territorial cleavage maps very closely onto an ethnic one. In Iraq, the historically disadvantaged status of the Kurdish minority culminated in the establishment of de facto autonomy after 1991 and a fully recognized Kurdish autonomous region in the 2003 Constitution: a de facto mini-state with its own military, revenues and other attributes of statehood. At the time of writing, this region is seeking secession, but it is not clear if it will succeed.

Federalism is a framework for allocation of power over time and provides a mechanism for ongoing dialogue between centre and periphery about that allocation. An initial constitutional arrangement may change over time, both through reorganization but also through the ebb and flow of power. For example, the United States has experienced greater centralization over time, while Canada has experienced greater decentralization within federal arrangements.

Whether opting for federalism takes countries in the direction of centralization or decentralization concerns, among other things, how heterogenous they are as a whole. When a territorial cleavage is quite distinct and limited to one or two discrete areas, it makes sense to decentralize power in that area as a means of accommodation and preserving overall unity. Where a high level of diversity is distributed throughout the country, it is sometimes argued that too much autonomy can invite centrifugal pressures and conflict. Afghanistan consciously chose a unitary constitutional design in 2004 for this reason but other diverse countries like India have shown how thriving federalism can resolve conflicts. In a more homogenous nation, as noted above, federalism might not be necessary at all.

In short, federalism can help to resolve territorial divisions and keep countries together. On the other hand, federalism might provide new sources of identity formation, political mobilization and tension. In this regard, making sure that subunits are represented in the central government is an important step in working out shared governance.

Box 3. Sharing of executive and legislative powers in Myanmar's Constitution

The Constitution of Myanmar sets out three schedules of legislative powers to be shared between the Union, States/Regions and Self-Administrative Areas. Schedule One covers a broad array of legislative powers allocated to the Union including over the military and police force, Union revenues, certain taxes, land management, and all judicial power. Under Schedule Two, States and Regions can legislate on the State/Region budget, small loans and local development matters. There are no judicial powers at the State/Region level. Under Schedule Three, the Self-Administered Areas have 10 legislative powers which include urban and rural projects, development affairs, natural resource preservation, and electricity matters in towns and villages.

Source: Articles 96, 188 and 196, Constitution of Myanmar (2008).

Box 4. Special autonomy in Aceh, Indonesia

In Indonesia, special autonomy laws were drawn up for Aceh and West Papua in 2001, and again for Aceh in 2006. The 2001 Law on Aceh failed to placate the secessionist movement, partly due to the government's refusal to negotiate or consult publicly. In 2006 a new agreement, produced with the help of external mediation from a former Finnish President, led to the passage of a new autonomy law. The negotiations may have been helped by the cooperation that occurred in the aftermath of the 2004 tsunami and the effort to rebuild devastated Aceh. Analysts believe the ultimate success of autonomy in Aceh depended on three conditions: negotiation between parties, precision and detail within the new law, and the involvement of an external mediator. In addition, Aceh had a good deal more internal unity than West Papua, and thus more leverage, as compared with other subunits of Indonesia. While special autonomy worked for Aceh it did not stabilize the situation in West Papua.

3. Allocating powers and duties: decentralization and special autonomy

Decentralization differs from federalism in that it involves the devolution of power from the centre to localities, but those local units do not have superior authority in any policy area. Decentralization is a major trend in governance around the world and has the potential to reduce conflict and improve the performance of government. However, in some cases it can also serve to expand corruption, and it leads to greater variation in the quality of governance. For example, in Kenya the 2010 Constitution set up 47 new county governments, and there is greater variation than when the central government made most decisions. Some counties have seen the emergence of corrupt leaders. There is also some evidence of better services in some localities, and perhaps a reduction in ethnic tensions, as a group that loses in one county may win in a neighbouring one. The long-term impact of the decentralization programme is not yet known.

Another design option is what is called special autonomy. Under this arrangement, one or more regions are given authority over certain subjects, but this does not extend to every region in the country. As compared with federalism, special autonomy is relatively flexible in design and can be tailored to particular needs. For example, the strategically located Åland Islands of Finland were once the subject of territorial disputes between Russia and Sweden. In 1856 the islands became demilitarized by treaty, and in 1921 they were granted autonomy by the League of Nations within Finland, then newly independent from Russia. Today the islands retain autonomy within Finland: the inhabitants are exempt from Finnish conscription, retain the Swedish language by law, and enjoy some exceptions from EU law to preserve the islands' territorial character. In this way, the arrangements have lowered the stakes of government for the region, defusing a potentially divisive issue.

Often autonomy will be used to recognize distinct histories within unitary states. In other circumstances, autonomy will be used to try to limit a secessionist movement. Just before the referendum on Scottish independence in 2014, the British government announced that it would create a commission that would devolve extensive new powers to the Scottish Parliament in the event voters rejected secession (which they did, by 55 to 45 per cent). Later, a government commission recommended that Scotland have the power to set personal income tax, be allowed to borrow, and have extensive control over local political processes, making Scotland one of the most autonomous subunits in the world. Scotland secured some of these powers as a result of a credible threat to secede, although the subsequent Brexit decision changed the calculus for both sides.

Special autonomy may be particularly useful when the population of the subunit in question is quite small and distinct, as in the Åland case. Larger subunits are likely to create greater costs for the rest of the polity, and thus may be more politically sensitive. Another crucial variable can be the presence of sub-minorities within the prospective autonomous regions, which might lead the national government to feel an obligation to protect those groups against the local majority. That said, where the root of the division is about local self-determination relating to particular cultural issues, autonomy may be a viable and indeed attractive option. For more on this issue see the International IDEA Constitution Brief, *Self-determination* (forthcoming 2018).

One of the risks of special autonomy is that grants of benefits will lead other subunits of the parent state to seek similar treatment. This has surely been the case in Spain, and arguably Indonesia, where the

Box 5. Citizens' rights in Myanmar's Constitution

Article 348:

The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth.

Article 354:

Every citizen shall be at liberty in the exercise of the following rights, if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility and morality: (a) to express and publish freely their convictions and opinions; (b) to assemble peacefully without arms and holding processions; (c) to form associations and organizations; (d) to develop their language, literature, culture they cherish, religion they profess, and customs.

Box 6. The division of power over natural resources between the Union and States/Regions in Myanmar's Constitution

Schedule One and Schedule Two of the Myanmar Constitution divide legislative powers on natural resources between the Union and States/Regions. Legislative powers relating to petroleum, natural gas, oil, minerals, mines, gems and forests are under the Union list, while the States/Regions can legislate with regard to medium and small-scale electric power production, salt production, and gem stones cutting.

secession of East Timor led to increased demands in Aceh and Papua. But when the beneficiaries of special arrangements are relatively small in number, or when they are the product of distinctive histories, other units may simply not care very much.

4. Central government design: rights, redistribution, representation and recognition

Another set of institutional arrangements to deal with territorial cleavages concerns the centre and they can be divided into four subcategories: rights, redistribution, representation and recognition. These are not mutually exclusive but can be deployed in different combinations.

Rights

Rights seek to protect the interests of greatest importance to people and are relevant to territorial divisions because strong rights protections may reduce the desire to leave the political system. Upholding the freedom of people to practice their religion, speak their language, and engage in communal life will mean that they will fear government less; even if this does not produce greater attachment to the country as a whole, it will reduce the desire to take drastic action with regard to the structure of the state.

Rights, both group and individual, are often a major component of constitutional arrangements that are relevant to territory. Guarantees of communal rights have been an important component of India's trajectory, and South Africa's constitutional bargain after apartheid focused on rights as a mechanism to protect not only minority interests but also those of the majority, who had suffered under a despotic regime. While strong rights alone are unlikely to be able to resolve territorial cleavages, they can supplement other mechanisms to help ensure peaceful governance.

Redistribution

Redistribution concerns the allocation of revenues throughout a territory. The presence of valuable resources in one part of the country or another may sometimes exacerbate territorial cleavages. Providing for mechanisms of fiscal redistribution can help to ameliorate some tensions, particularly if a resource-rich region's population is poorer than the rest of the country. On the other hand, if a region is rich with natural resources, it might seek to minimize flows of wealth to other regions: bargaining over the distribution of revenue from natural resources is often a key political issue implicated in territorial cleavages.

Redistribution between richer and poorer areas tends to receive the most explicit constitutional attention (e.g. guarantees) when oil or other valuable natural resources are at stake (see Anderson 2012). In the Nigerian case, described above, the formula for redistribution and retention of resource revenues has been central to iterations of the constitutional bargain over time. Resource revenues have also been a major issue in Iraq, although one that was not fully resolved by the constitution itself. South Africa has elaborated constitutional principles on resource sharing, which are implemented through a finance commission and federal law. Ethiopia gives the upper house a role in the distribution of revenues among states. In many other cases fiscal rebalancing is not explicit, instead taking place through the general budget process. It may nevertheless be an important implicit part of a constitutional settlement.

Box 7. Formation of the Pyithu Hluttaw (Lower House) and Amyothar Hluttaw (Upper House) in Myanmar's Constitution

The 2008 Constitution sets out a bicameral system for Myanmar. The Lower House (House of Representatives or Pyithu Hluttaw) is composed of 330 elected lawmakers and 110 military appointees, elected by township.

The Upper House (House of Nationalities or Amyothar Hluttaw) is composed of 224 lawmakers elected with equal representation of 12 representatives from each State/Region, one from each Self-Administered Area and four military appointees for each State/Region.

Source: Articles 109 and 141, Constitution of Myanmar (2008)

Representation

Representation in central institutions binds regions to the rest of the polity. On the other hand, inequalities of representation (per head of population, or as between regions) can generate resentment.

A common means of providing voice to subunits at the centre is through representation in an upper house. In the United States, each territorial state has equal representation in the Senate, meaning that smaller states have massively more political weight relative to their population than do large states. Upper house members may be directly elected at the level of the subunit, or selected by constituent unit executives or legislatures.

The jurisdiction of the upper house might focus primarily on legislation that affects federal arrangements. For example, Ethiopia's upper house has a role in resolving disputes over federal jurisdiction as well as the budget. Kenya and South Africa have upper houses, but with very limited powers: restricted for the most part to issues related to provinces or counties. Spain's upper house was designed to represent provinces and autonomous communities, but because most of its members are elected by popular vote it does not play a major role in this regard.

The efficacy of upper houses in managing territorial divisions depends on the broader system in which they are embedded, and also on the manner in which governments of the day are formed. In some systems (e.g. Germany) delegates are representatives of state governments. In others such as Ethiopia, they are elected by state legislatures, usually with seats being allocated in proportion to party weights there. In many parliamentary systems, upper houses lack power due to the lower house being the source of government formation, but in presidential systems they can have extensive powers which give smaller units an extra weight in central law-making.

A further mechanism of representation for territorial units that is sometimes provided is a special role in constitutional amendment, often over just some of the provisions in the text. Ethiopia involves its subnational units in approving all amendments, while in India, Nepal and South Africa, inclusion is restricted to amendments that affect the interests of the subunits themselves. Nearly half of countries that are nominally federal or confederal (and more than five per cent of constitutions in force globally) make such provision. Such rules can also prevent unilateral modification of the founding bargain.

In Australia, several proposed constitutional amendments that won a majority in national referendums nevertheless failed because they were unable to secure ratification by a majority of voters in a majority of states (as required by section 218 of the Constitution). The Constitution of the United States, meanwhile, does not allow changes to the equal representation of states in the Senate without their consent, and the Constitution of Malaysia provides Sabah and Sarawak with a veto over amendments to the provisions governing their entry into the country.

Providing a dual consent requirement for constitutional amendments with regard to territorial arrangements is a way of protecting them from easy modification. But sometimes mutual vetoes can be too strong: Sri Lanka's Constitution has a special requirement of a referendum for any amendment that would change the unitary character of the state, and this proved to be a barrier to negotiated settlements during the country's long civil war.

Regions may also have designated representation in executive, military or judicial institutions. In Canada for example, the culturally distinct province of Quebec is guaranteed three seats on the Supreme

Court. Informal arrangements may be effective in this regard, such as in Nigeria's principle of rotating the presidency between north and south. Nigeria also requires that the cabinet and other federal institutions—and the budget—reflect the 'federal character' of the country.

When representation is explicit and rigid, a country may have trouble adjusting its political system over time. Bosnia and Herzegovina's government involves a system of mutual vetoes, with a collective presidency and representation in the legislature and courts being explicitly divided among the three major ethnic groups. In this way, providing for power-sharing within the central machinery of government is a strong form of representation, but it tends to lead to rigid outcomes and reinforcement of differences.

Even if a territorial unit cannot veto a policy at the centre, it might be able to undermine it at the local level during implementation, to the extent that it has a role in that stage. In some cases, subnational units can ignore policies of the centre with which they disagree. This is an active issue in federalism today in the United States, where states that disagree with President Trump's policies on climate, immigration and drug enforcement are taking very different approaches from the national government.

Recognition

Typically, a constitution both describes the political community and lists a number of national symbols (e.g. the national flag). The narratives attached to these features may be different for dominant groups and minorities; constitutional recognition may therefore cause tension for territorially-concentrated groups. For them, it may be important to have their own symbols recognized, and/or to have national symbols that reflect the diverse nature of the country.

For example, the US flag expresses that the country is made up of 50 states (represented by the stars), with 13 founding states (represented by the stripes). The 2012 Provisional Constitution of Somalia explicitly allows each Federal Member State to design its own flag and symbols. Even the name of a country may have symbolic resonance for subunits. For example, in 1984 President Biya of Cameroon changed the name of the country from the 'United Republic of Cameroon' to the 'Republic of Cameroon'. The reversion to the original Francophone name of the country (as at independence, and prior to union with British Southern Cameroon) was perceived as exclusionary by many in Anglophone areas. In Nepal, the naming of states provided for by the 2015 Federal Constitution of Nepal could not be agreed and so was deferred to the decision of the eventual state legislatures, with states being known by numbers in the meantime.

The importance of elections

Institutional design also extends to electoral systems, which can have an important effect on territorial cleavages. Some models seek to incentivize bringing together different groups. Such integrationist approaches to electoral rules can play an important role in ensuring representation. For example, Nigeria has a dual threshold requirement for electing the president, in which a candidate must gain an overall majority and at least one-quarter of the vote in two-thirds of the states. This model seeks to produce candidates that truly represent the nation, in a country where north-south divisions are powerful. Nigeria requires political parties to have representation from multiple different regions to qualify in national elections, and bans parties based on ethnicity, with a view to ensuring that each party reflects the country's federal character. Such national

Box 8. The Constitutional Tribunal in Myanmar's Constitution

In Myanmar, the Constitutional Tribunal is mandated to interpret the provisions of the Constitution, to scrutinize the constitutionality of laws enacted by the Union and State/Region Parliaments, and to oversee the functions of the Executive to ensure that they are in conformity with the Constitution. The Constitutional Tribunal is also given power to decide on constitutional disputes between different levels of governments.

Source: Article 46, Constitution of Myanmar (2008)

parties can still be vehicles for a strong regional voice. This was arguably the case with the UK Labour Party in Scotland, when Scottish seats accounted for much of Labour's parliamentary strength and recruits to cabinet positions.

To some degree, a dominant political party at national level helped to keep India integrated for many years, and other countries with territorial divisions have had similar experiences. In South Africa territorial differences have been reduced over time, through special accommodations at the outset, but also through the presence of a dominant political party that integrated various interests. Ethiopia, too, has accommodated significant diversity in a federal scheme through a dominant (and not particularly democratic) party regime.

Conversely, multi-level elections may also open up electoral competition. For example, the Congress Party of India's hegemony at elections was broken over time through competition at state-level elections. A similar phenomenon may now be occurring in South Africa where the long-dominant African National Congress recently lost significant vote-share and city councils in the 2015 local elections.

5. Central government design: guarantors and dispute resolution

All constitutional agreements need monitoring and enforcement, and there are several options. Constitutional courts are very common in countries with territorial divisions, and disputes over territorial authority have played a major role in the jurisprudence of the German Constitutional Court, the American Supreme Court and others. The South African Constitutional Court (by virtue of article 144 of the 1997 Constitution) had to certify provincial constitutions for conformity with that of the centre and rejected the proposed Constitution of KwaZulu-Natal.

Sometimes courts can protect national integrity. In the Philippines in 2008, the Supreme Court ruled unconstitutional an initial agreement to establish an independent juridical authority in the Bangsamoro region. In Sri Lanka in 2004, after the Government and the Liberation Tigers of Tamil Eelam came to an agreement about post-tsunami reconstruction, the Supreme Court ruled the arrangement unconstitutional on the grounds that it undermined parliament's role in spending public funds.

In other cases, neutral institutions were able to refine and advance the understanding of the territorial settlement. In Bolivia, the presence of an electoral court and constitutional court became crucial in a situation of deep political divisions, as they helped to channel political attention to Congress on the question of how to institute departmental autonomy and constitutional reform.

Besides courts and independent institutions, the designated mechanisms for guaranteeing and interpreting territorial agreements may be political. In Ethiopia this role is played by the upper house. In Iraq, the Transitional Administrative Law provided for the collective presidency to appoint arbitrators for inter-regional disputes, with the backstop of the UN Secretary-General if the presidency could not agree.

Finally, international arrangements can play an important role in helping to resolve institutional problems of territorial divisions. In particular, international actors can play a role in crafting solutions, incentivizing cooperative agreements, monitoring performance of agreements, and even helping to enforce them. Of course, they can also muddy the waters by forcing deals before the parties are fully ready to agree to them. One problem is that the close neighbours who are best situated to act as guarantors of a territorial accommodation may, in fact,

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

About MyConstitution

The MyConstitution project works towards a home-grown and well-informed constitutional culture as an integral part of democratic transition and sustainable peace in Myanmar. Based on demand, expert advisory services are provided to those involved in constitution-building efforts. This series of Constitution Briefs is produced as part of this effort.

The MyConstitution project also provides opportunities for learning and dialogue on relevant constitutional issues based on the history of Myanmar and comparative experience.

Contact us

International IDEA
Strömsborg
SE-103 34 Stockholm
Sweden
Email: info@idea.int
Website: <http://www.idea.int>

Acknowledgements

This publication has been supported by the Norwegian Ministry of Foreign Affairs and the Government of Luxembourg.



Norwegian Embassy



GRAND DUCHY OF
LUXEMBOURG

have the least incentive to play that role. More systematic monitoring and enforcement mechanisms from the international community would be desirable but cannot be relied on in every case.

6. Conclusion

Where conflict is based on differences between one or more territorially-concentrated groups, conflict resolution and sustainable peace will inevitably involve some type of constitutional reform. Constitutional options for managing territorially-based conflicts are myriad. In terms of allocating power, they include federalism, decentralization and special autonomy. There are also numerous ways to structure the central government to accommodate territorial conflicts, including providing for protection of rights, redistributing resources to or from particular territories, ensuring that groups are adequately represented in the central government, and ensuring recognition of territorial identities in the national constitution.

In any particular situation, the best allocation of options may be highly contextual. In many cases a combination of representation and decentralization may be sufficient to stabilize territorial cleavages. Special autonomy has been useful in many others, especially where the territory in question is small relative to the whole. When special autonomy is used, knock-on effects have not often led to unravelling of the overall territorial bargain. Yet special autonomy will not be enough in the presence of a large outside power intent on exploiting territorial cleavages. Russia's annexation of the Crimea is an example here.

While in many cases, resolution of a territorial division may reflect concerns about tyranny, the primary driving force is often distribution of political and material goods, and contests over voice and identity. Federalism is, among other devices, an important part of the constitutional toolkit and can provide a framework for negotiation and adjustment over time.

References and further reading

Anderson, G., *Fiscal Federalism: A Comparative Introduction* (New York: Oxford University Press, 2010)

—(ed.), *Oil and Gas in Federal Systems* (Toronto: Oxford University Press, 2012)

Choudhry, S., 'Classical and Post-Conflict Federalism: Implications for Asia', in R. Dixon and T. Ginsburg (eds), *Comparative Constitutional Law in Asia* (Cheltenham: Edward Elgar, 2014)

Comparative Constitutions Project, Data Release 2.0 (2014), <http://www.comparativeconstitutionsproject.org>

Y. Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (New York: Cambridge University Press, 2013)

McGarry, J., O'Leary, B. and Simeon, S., 'Integration or Accommodation? The Enduring Debate in Conflict Regulation', in S. Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (New York: Oxford University Press, 2008)

Scott, K., *Federalism: A Normative Theory and its Political Relevance* (New York: Continuum, 2011)