C H A P T E R

4

Appropriately crafted
democratic institutions
are crucial to the
sustainability of any
negotiated settlement.

This chapter addresses the need to inform domestic political actors about the options available to them in terms of democratic institutions. It outlines the way in which basic institutions and policies can be purposely designed to maximize the prospects of democracy taking root in post-conflict societies. It also aims to draw these issues to the attention of interested external actors in the international community, who may be charged with the responsibility of crafting a settlement or supervising a period of state reconstruction. The following constitutional and policy levers are discussed, and the advantages and disadvantages of various options analysed.

Ben Reilly

Democratic Levers: An Introduction

Since the early 1970s a revised focus on the possibilities and prospects of democracy in divided societies has been evident around the world. At the base of this new wave of interest in democracy has been a recognition that democratic government, rather than oligarchy or authoritarianism, presented the best prospects for managing deep societal divisions. Democracy increasingly came to be seen as not just possible, but necessary, for the peaceful management of divided societies. This more optimistic assessment of the potential of democracy was greatly boosted by what has been characterized as the "third wave" of democratization which, beginning in the 1970s and gaining pace in the early 1990s, has seen a threefold increase in the number of democratic governments around the world.

This unprecedented expansion of democratic government, concentrated particularly in the developing world, has led to a renewed focus on the question of which institutional arrangements are most likely to secure stable and legitimate democratic government in divided or post-conflict societies. There is an increasing recognition that the design of political institutions is a key factor affecting the likelihood or otherwise of democratic consolidation, stability and longevity. A better understanding of the effects of political institutions also holds out the possibility that we may be able to design institutions so that desired outcomes – for example, co-operation and compromise – are rewarded. Three broad areas of constitutional design have received particular attention in this regard: the territorial structure of the state; the form of the state's legislative and executive functions; and the nature and structure of a state's rules of political representation. This has meant careful examination of the competing claims of different forms of power sharing, federalism, the benefits of parliamentary versus presidential government, the political consequences of different electoral laws, and so on. Recent transitions to democracy in South Africa, Chile, the Philippines and elsewhere have also focused attention on "extra-constitutional" institutions and policies which may be of particular util-

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ity to countries emerging from a period of deep hostility and conflict. These include the use of transitional justice mechanisms such as truth and reconciliation commissions, war crime tribunals, gender commissions, electoral administrations and so on. While there are many devices, these interlocking "constitutional" and "extra-constitutional" mechanisms will be the focus of this chapter.

A basic precept of this handbook is that robust democratic governance is itself a fundamental pillar of building any sustainable settlement of a violent conflict. Democracy is a system by which conflicts in a society are allowed to formulate, find expression and be managed in a sustainable way, via institutional outlets such as political parties and representative parliaments, rather than being suppressed or ignored. It is, in the words of Adam Przeworski, a system for *managing* and *processing* rather than resolving conflicts. Disputes under democracy are never definitively "solved"; rather they are temporarily accommodated and thus reformulated for next time. The best example of this is the electoral process itself, where parties and individuals may "win" or "lose", but where the losers may win next time and the winners know that their victory is only temporary.

Furthermore, the comparative experience of deeply divided societies to date strongly indicates that democratic procedures, which have the necessary inclusiveness and flexibility to manage deep-rooted identity-based conflicts, stand the best chance of delivering a lasting peace. In societies divided along identity lines, for example, the type of political institutions that protect group and individual rights, deliver meaningful devolution and encourage political bargaining are probably only possible within the frameworks of a democracy. Democracy is based, at least in part, on a common conception and adherence to the "rule of law", which protects both political actors and the wider civil society. Ultimately, as democratic practices and values become internalized in the workings of society, democratic governance creates the conditions for its own sustenance. That is why a valuable indicator as to whether a country is likely to continue to be democratic is to look at its history: the longer the democratic history to date, the better the prospects that such behaviour will continue in the future.

A "minimal" conception of democracy, in terms of the right to participate in free and fair elections, has rapidly emerged as a fundamental international norm for states to observe. For democracy to be meaningful, however, these "rules of the game"

Democratic Levers: An Introduction

must have a meaning for political competitors beyond the dry pages of statute books or constitutions. They must be valued, and observed, of and for themselves. This is what is meant by democratic *consolidation*: that democratic practices become so deeply internalized by political actors that acting outside the institutional "rules of the game" becomes unthinkable. This demands a faith in the integrity of the political process that may not always be forthcoming in situations of deep hostility or conflict.

There is a significant caveat concerning this rosy view of democracy, however, and it concerns the nature of democratic institutions. Different types of society require different types of institutions. Federalism, for example, may be irrelevant to small homogenous countries but a virtual necessity for large heterogeneous ones (and it is thus no surprise that many large diverse countries like Canada, India, Australia and the US are all federal states). Different types of electoral systems can ensure the proportionate representation of minority groups or single-handedly ensure their exclusion. Parliaments and executives can be structured in such a way as to give all groups a share of power, or to enable one group to dominate over all others. The use of truth and reconciliation commissions can be a way to help heal old wounds, or to re-open them. Appropriately *crafted* democratic institutions are thus crucial to the sustainability of any negotiated settlement.

Unfortunately, the significance of institutional design has often been overlooked or ignored by both disputants and negotiators in many recent attempts to resolve conflicts. Indeed, constitution-makers in new democracies have often been content to restore the very institutions that were conducive to the previous breakdown, or else to look for inspiration to the institutions of the apparently successful democracies of the West, even though these have seldom been fashioned for the demands of post-conflict societies. The constitutional choices made at these times can often have major repercussions for a nation's future prospects, so it is important to get them right from the start. We hope this chapter will help political actors make the best choices for their country by clarifying the range and consequences of the different institutional models.

The constitutional choices made during a settlement process can often have major repercussions for a nation's future prospects, so it is important to get them right from the start.

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Timothy D. Sisk

4.1 Power-Sharing Democracy: An Overview

In power-sharing political systems, decision-making ideally occurs by consensus. All major ethnic groups in the country are included in government, and minorities, especially, are assured influence in policy-making on sensitive issues such as language use and education. Power-sharing democracy is often contrasted with "regular" or majoritarian, winner-take-all democracy in which the losers of elections must wait out-of-power in loyal opposition for a later chance to replace the government of the day.

4.1.1   *Preventing or escaping deep-rooted conflict*
4.1.2   *Group building-block versus integrative approaches*
4.1.3–4.1.4 *When does power sharing work?*

4.1.1 Preventing or escaping deep-rooted conflict

The early introduction of power sharing can potentially prevent identity-based conflicts from turning violent. For example, many believe that getting a power-sharing agreement in Kosovo (an Albanian-majority province in Serb-majority former Yugoslavia) will be critical to keeping identity-related disputes in the region (e.g., education policy) from further escalating into another war in the Balkans. When governments are democratic *and* inclusive, the argument goes, violent conflicts can be prevented because minorities won't need to resort to violence to advance their interests.

Moreover, power sharing is seen as a viable route to escaping deadly conflicts. Following bitter wars such as in Bosnia, most observers agreed that the only way to preserve a united, multi-ethnic country – to keep the country from splitting up altogether – was to create a post-war system of government in which the Bosnian Croat, Bosniac (Muslim), and Bosnian Serb communities could share power (see Bosnia Case Study).

The 1995 Dayton Accord set up a political system in which the three communities would make decisions collaboratively through a joint presidency and a parliament that included, in rough proportion to the population, the three main groups. Although it doesn't function as well as it was designed on paper, Bosnia's nascent power-sharing system appears to be its best chance to create a viable multi-ethnic democracy after such an intense civil war. Power sharing is also seen as a way to end civil wars and get a negotiated settlement – and to build more legitimate democratic institutions – in current conflicts as far afield as Sri Lanka, Sudan and Tajikistan, as it was in other recent conflicts such as Angola, Sierra Leone or Cambodia.

4.1.2 Differences in approach

Policy-makers and scholars differ over whether a *group building-block* approach like that adopted in the Dayton Accord for Bosnia – in which groups (usually ethnically homogenous political parties) are viewed as the building blocks of a common society – leads to better conflict management than an *integrative* approach to power sharing. The latter approach emphasizes levers to build political alliances across lines of conflict.

The group building-block approach relies on accommodation by ethnic group leaders at the political centre and guarantees for group autonomy and minority rights. The key institutions are federalism and the devolution of power to ethnic groups in territory that they control, minority vetoes on issues of particular importance to them, grand coalition cabinets in a parliamentary framework, and proportionality in all spheres of public life (e.g., budgeting and civil service appointments). Like Bosnia, Lebanon has a political system in which representation and autonomy for the country's main religious groups is guaranteed in the constitution.

The integrative approach eschews ethnic groups as the building blocks of a common society. In South Africa's 1993 interim constitution, for example, ethnic group representation was explicitly rejected in favour of institutions and policies that deliberately promote social integration across group lines. Election laws (in combination with the delimitation of provincial boundaries) have had the effect of encouraging political parties to put up candidate slates – if they want to maximize the votes they get – that reflected South Africa's highly diverse society. And the federal provinces were created so as not to overlap with ethnic group boundaries (South Africa's groups are more widely dispersed in any event).

When governments are democratic and inclusive, the argument goes, violent conflicts can be prevented because minorities won't need to resort to violence to advance their interests.

4.1 Power-Sharing Democracy:
An Overview

Thus, the integrative approach seeks to build multi-ethnic political coalitions (again, usually political parties), to create incentives for political leaders to be moderate on divisive ethnic themes, and to enhance minority influence in majority decision-making. The elements of an integrative approach include electoral systems that encourage pre-election pacts across ethnic lines, non-ethnic federalism that diffuses points of power, and public policies that promote political allegiances that transcend groups.

The group building-block and integrative approaches can be fruitfully viewed as opposite poles in a spectrum of power-sharing institutions and practices. Which approach is best? To make such a determination, it is useful to consider power-sharing practices in terms of three dimensions that apply to both approaches: territorial division of power, decision rules, and public policies that define relations between the government and the ethnic groups. With these dimensions in mind, a "menu" of power-sharing institutions and practices is offered (see "Power-Sharing Mechanisms: A Menu of Options", pp. 144–145).

Like any menu, levers of democratic influence can be combined to suit individual tastes. In deciding which power-sharing institutions and practices might work, there is no substitute for intimate knowledge of any given country. In multi-ethnic Fiji, for example, an 18-month expert review of the country's political system produced a set of recommendations for a new constitution that combines measures to guarantee a minimum level of indigenous Fijian and Indo-Fijian representation in parliament (a group building-block option) with electoral incentives to promote the formation of political alliances across ethnic lines (an integrative option).

4.1.3 Promoting power sharing

Often, external parties in the international community have promoted power sharing by offering formulas – institutional blueprints for political structures – to prevent or escape ethnic conflicts. International mediators have also sought to induce the political leaders of contending groups to accept these blueprints through a combination of diplomatic carrots and sticks, such as offering aid or threatening sanctions.

For example, the United Nations secretariat has produced a "set of ideas" for a bi-zonal, bi-federal arrangement for power sharing between Greek Cypriot and Turkish Cypriot communities in Cyprus. Autonomy frameworks have been proposed to

help resolve the disputes between majority and minority communities in Indonesia (East Timor) and Sri Lanka. The peace accord for Northern Ireland sets up a number of cross-border power-sharing institutions and creates a new assembly in the disputed territory (see Northern Ireland Case Study). Each of these plans is backed by diplomatic initiatives to pledge international assistance in implementation if the parties agree to share power in parliament instead of contesting it on the battlefields or in the streets.

Increasingly, the international community is using linkages to other issues, such as membership in collective security, trade, and other international organizations, to persuade states to adopt power-sharing practices that promote ethnic accommodation. The European Union has invoked these conditionalities in its relations with some Eastern European states, such as Romania, to encourage management of ethnic-Romanian and ethnic-Hungarian differences through democratic political structures.

Promoting democratic conflict-regulating practices in this manner can be a useful tool of diplomacy to arrest the escalation of ethnic conflicts into violence or to bring them to an end after preventive efforts fail. Moreover, even when democracy may be a long way off, the international community can exert pressure for the adoption of conflict-regulating practices by non-democratic states, such as fair treatment of ethnic minorities and the creation of ethnically diverse security forces.

4.1.4 When can power sharing succeed?

Power-sharing agreements that looked good on paper have failed in recent conflict settings such as Rwanda and Burundi. In both of these countries in which majority-Hutu and minority-Tutsi ethnic groups have a history of violent strife, efforts to find solutions by creating power-sharing democratic institutions proved to be insufficient in overcoming deep distrust and the perception of mutual victimization. In both cases, the power-sharing experiments broke down and violent clashes ensued; in Rwanda, an incipient power-sharing pact was scuttled by the 1994 genocide there, a deliberate move by its perpetrators.

Similarly, before the outbreak of civil wars in Lebanon and Cyprus in the mid-1970s, these countries had power-sharing systems. Lebanon's civil war was eventually ended with a new power-sharing pact (the 1990 Taif Accord), and, as mentioned above, a revival of power sharing seems to be a preferred outcome to Cyprus's long-running communal conflict.

4.1 Power-Sharing Democracy: An Overview

Policy-makers and scholars with difficult choices in complex conflicts rightly ask straightforward questions about experiences with the various levers of democratic practice in divided societies. Under what conditions does power sharing work, and under what conditions does it fail? Under what conditions do power-sharing systems entrench group identities and collapse into violent conflict, and when do they lead over time to more pluralistic and sustainable patterns of democracy?

Naturally, there are no simple answers to the questions posed above, but some conclusions can be drawn. For power-sharing democracy to work, there must be a sufficiently strong core of moderates – including both political elites and the broader civil society – that seeks pragmatic coexistence in a multi-ethnic society. Moderates committed to sharing power in a multi-ethnic democracy must also be able to withstand pressures created by extremist politicians and publics who mobilize on divisive ethnic themes as a route to power. This critical core of moderates appears to exist in South Africa, it might exist or be created in Bosnia, and it is clearly absent in Rwanda and Burundi. Without the existence of a core of moderate voices, multi-ethnic countries are likely to succumb to inter-group violence and, potentially, state collapse or disintegration.

When a sufficiently cohesive core of moderates does exist, power sharing is a viable means of democratic conflict management. Although there is no single, transportable model of power sharing, there is a broad menu of public policies, institutions, and mechanisms to promote democracy in countries with deep-rooted identity conflicts. The actual form of power sharing (group building-block versus integrative) seems to be less important than the extent to which the agreement to create a power-sharing system is the result of good-faith bargaining and negotiation among the contending social forces. The negotiation process itself must be inclusive and legitimate.

Power-sharing systems work best when, ideally, they are a temporary measure to build confidence until more customary, sometimes-win-and-sometimes-lose democracy can be embraced. This appears to be the course that South Africa will take; its final constitution, adopted in 1996, is much more majoritarian even though minority rights are closely guarded. Whether the withering away of power sharing in a more conflicted society such as Bosnia is possible, or whether power sharing will fail leading to the country's dissolution, remains an open question. But the

POWER-SHARING MECHANISMS

POWER-SHARING POLITICAL SYSTEMS

- Decision-making ideally occurs by consensus;
- All major ethnic groups included in government; minorities, especially, are assured influence in policy-making on sensitive issues (i.e., language use, education);
- Can take two forms: *group building-block* approach and *integrative* approach.

GROUP BUILDING-BLOCK

- Ethnically homogenous groups (political parties) form building blocks of common society;
- *Key elements*: federalism and devolution of power to ethnic groups in the territory that they control; minority vetoes on sensitive issues; grand coalition cabinets; proportionality in all spheres of public life;
- *Example:* Dayton Accord for Bosnia.

INTEGRATIVE

- Political alliances across lines of conflict; thus creating incentives for political leaders to be moderate on divisive ethnic themes; and enhancing minority influence in majority decision-making;
- *Key elements*: electoral systems that encourage pre-election pacts across ethnic lines; non-ethnic federalism that diffuses points of power; public policies that promote political allegiances that transcend groups;
- *Example*: South Africa's 1993 interim constitution.

Although the following menu presents two conceptually distinct approaches, it is clear that in the real world, power-sharing options can be pieced together in a number of ways.

FIVE GROUP BUILDING-BLOCK OPTIONS

1. Granting territorial autonomy to ethnic groups and creating confederal arrangements;
2. Adopting constitutional provisions that ensure a minimum level of group representation (quotas) at all levels of government;
3. Adopting group proportional representation in administrative appointments, including consensus-oriented decision rules in the executive;
4. Adopting a highly proportional electoral system in a parliamentary framework; and
5. Acknowledging group rights or corporate (non-territorial) federalism (e.g., own-language schools) in law and practice.

FIVE INTEGRATIVE OPTIONS

1. Creating a mixed, or non-ethnic, federal structure, with boundaries drawn on other criteria such as natural features or economic development zones;
2. Establishing an inclusive, centralized unitary state without further subdividing territory;
3. Adopting winner-take-all but ethnically diverse executive, legislative, and administrative decision-making bodies (e.g., a purposefully diverse language board to set policies on language use);
4. Adopting an electoral system that encourages the formation of pre-election coalitions (vote pooling) across ethnic divides; and
5. Devising "ethnicity-blind" public policies and laws to ensure non-discrimination on the basis of identity or religious affiliation.

LESSONS LEARNED

1. For power sharing to work, there must be a strong core of moderates – both political elite and civil society – that seeks coexistence. Moderates must be able to withstand pressures by extremist politicians and publics.
2. More important than the actual form of power sharing (group building-block or integrative) is the extent to which agreement to create power-sharing system is the result of good-faith bargaining and negotiation.
3. Power-sharing systems work best when they are a temporary measure to build confidence until more permanent structures can be developed.

A MENU OF OPTIONS 2 [P. 145]

present alternative to power sharing in Bosnia is not "regular" or majoritarian democracy, it is the abandonment of Bosnia as a multi-ethnic country altogether. Unfortunately, this is the case in many other deep-rooted ethnic conflicts as well.

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Republika Srpska
Federation

SLOVENIA

HUNGARY

Zagreb

CROATIA

YUGOSLAVIA

Karlovac

Osijek

Novi Sad

Prijedor

Slavonski Brod

Bihać

Banja Luka

Gradačac

Brčko

Bijeljina

Šabac

Gospić

Ključ

Tuzla

Zenica

BOSNIA-HERZEGOVINA

Srebrenica

Valjevo

Šibenik

Livno

Sarajevo
Pale

Split

Foča

Pljevlja

Mostar

Podgorica

Dubrovnik

Cetinje

Shkodër

Adriatic Sea

Durrës

Tiranë

Bari

ALBANIA

ITALY

Christopher Bennett

BOSNIA-HERZEGOVINA

At its simplest, the Bosnian question boils down to two issues: how 2.2 million Muslim Slavs (Bosniacs) can live amid 4.5 million Croats and 8.5 million Serbs in the wider region of the former Yugoslavia; and how 750,000 Croats and 1.3 million Serbs can live together with 1.9 million Bosniacs within Bosnia-Herzegovina (Bosnia) itself. Depending on where borders are drawn and whether they are respected, Bosniacs either form a minority squeezed between two more powerful ethnic groups, or they comprise a relative majority in a territory shared with two large minority communities, both of which consider the neighbouring states of Croatia and rump Yugoslavia (Serbia and Montenegro) their mother countries.

The current arrangement, enshrined in the Dayton Accords, is the result of three years and nine months of fighting within Bosnia – much of it three-sided – and four and a half years of warfare within the former Yugoslavia. It was reached after more than 100,000 deaths (the exact figure is not known) and the expulsion of about half of Bosnia's 4.3 million population from their homes in so-called ethnic cleansing. It was agreed between Bosnia's Bosniac President, Alija Izetbegovic, on behalf of Bosnia; Croatia's President Franjo Tudjman, on behalf of Bosnian Croats; and Serbia's then President Slobodan Milosevic, on behalf of Bosnian Serbs. And it followed several years of failed attempts by international mediators to broker an agreement; massive, belated and concerted international pressure for a settlement; and three weeks of intense negotiations at a US airforce base in Dayton, Ohio during November 1995.

Power Sharing under Dayton

Under Dayton, Bosnia is defined as a single state with three main constituent peoples – Bosniacs, Serbs and Croats – divided into two entities: the Federation of Bosnia and Herzegovina (Federation), comprising 51 per cent of the territory, and Republika Srpska, 49 per cent. Despite being one country, both entities have their own armed forces (and the Federation army is effectively divided into Croat and Bosniac forces), whose strength is regulated and related to that of the neighbouring states. The ratio between the military stockpiles of rump Yugoslavia, Croatia and Bosnia is 5:2:2, and within Bosnia between the Federation and Republika Srpska is 2:1. The country which emerged out of Dayton nevertheless inherited the political independence, territorial integrity and sovereignty of the previous state, the republic of Bosnia-Herzegovina, a former republic of the Socialist Federal Republic of Yugoslavia but internationally recognized and admitted to the United Nations shortly after the outbreak of war in April 1992.

Dayton contains 11 annexes, of which only the first concerns the cease-fire and military matters. The remaining 10 cover civilian aspects of the peace plan, including the right of displaced Bosnians to return to their homes or to be compen-

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sated for the loss of their property. And the future shape of the country depends as much on the manner in which the civilian side of the peace plan is implemented, as on the political structures contained within it.

Bosnia's central institutions are weak. They are responsible for foreign policy, various aspects of foreign trade policy – including setting import tariffs (though critically not gathering the revenue) – inter-entity communications and criminal law enforcement. Other matters, including tax collection, are left for the two entities. Although the entities are able to establish "special parallel relationships with neighbouring states", these have to be "consistent with the sovereignty and territorial integrity of Bosnia". With the consent of the Parliamentary Assembly, the entities can enter into specific agreements with states or international bodies. The Federation may, therefore, form special links with Croatia, and Republika Srpska may form special ties with rump Yugoslavia, but neither entity can break away from Bosnia.

The Parliamentary Assembly has two chambers: the House of Peoples and the House of Representatives. The former has 15 members, five from each constituent people – 10 (five Bosniacs and five Croats) from the Federation and five (Serbs) from Republika Srpska. The Bosniac and Croat members are appointed from the House of Peoples of the Federation and the Serbs are nominated from the Republika Srpska Assembly. Nine delegates, with at least three from each community, have to be present for a quorum. The House of Representatives has 42 members, 28 of whom are elected from the Federation and 14 from Republika Srpska. A majority of those present in both chambers is the basic requirement for taking decisions in the Parliamentary Assembly. However, each constituent people has the right to declare any prospective decision "destructive of a vital interest", in which case the proposal requires "a majority of the Bosniac, of the Croat and of the Serb Delegates present and voting". In such a way, decisions are to be made by broad consensus and not against the declared vital interest of any community.

The "vital interest" mechanism is also a feature of the three-person Presidency. This is made up of one Bosniac and one Croat, both directly elected from the territory of the Federation, and one Serb, directly elected from Republika Srpska. Since each voter is only able to cast one ballot at the presidential level, Bosniacs effectively elect the Bosniac member, Serbs elect the Serb member, and Croats elect the Croat member. Although the Presidency should aim to reach decisions by consensus, a majority decision is possible, subject to certain limitations. In the event of a two-to-one decision, Presidency members can, in the following three days, declare a decision to be "destructive of a vital interest", in which case the decision is referred to either the Republika Srpska Assembly or either the Bosniac or Croat members of the House of Peoples in the Federation. A vote of two thirds of the relevant group within 10 days renders the decision null and void. The Presidency appoints the government, or Council of Ministers, of which no more than two thirds of ministers can

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come from the Federation and deputy ministers may not be of the same constituent people as the minister.

International Presence

Taken together, all these mechanisms mean that the system requires broad agreement and consensus to function. However, given the existing animosity and absence of trust, and the fact that both Serb and Croat political leaders continue to believe that union with their mother countries is a viable alternative to Bosnia, such consensus does not exist. Indeed, if left entirely up to the former warring factions, Dayton would never be implemented. The accord therefore includes provision for international involvement in all aspects of the peace process – in addition to a NATO-led peace-keeping force (initially consisting of 60,000 troops) – with overall co-ordination entrusted to a so-called High Representative, under the authority of the UN Security Council.

The Organisation for Security and Co-operation in Europe (OSCE) has a three-pronged mandate in Bosnia. It monitors the human rights situation; it oversees arms reduction; and it supervises elections. And a UN International Police Task Force (IPTF), made up of (initially 1,500) unarmed foreign police officers, assists, advises, monitors and observes the work of local police.

Foreign influence is equally crucial in a host of ostensibly domestic institutions. There is, for example, a foreign Human Rights Ombudsman who is appointed by the OSCE for the first five years of Dayton implementation; the Governor of the Central Bank is a foreigner appointed by the International Monetary Fund (IMF) for the first six years; and three out of the nine members of the Constitutional Court are foreigners appointed by the President of the European Court of Human Rights. And this massive presence is cushioned by a five-year $US 5.1 billion reconstruction plan, designed and guided by the World Bank.

Though critical to the peace process, the scale of the international presence is in some ways counter-productive to Bosnia's long-term future. On the one hand, domestic institutions and politicians have to a large extent given up responsibility for governing their own country. On the other, the massive international stake has led key players to declare the peace process a success, irrespective of how it is actually evolving, since failure would reflect badly on those statespeople, organizations and countries responsible for the agreement. For example, elections were scheduled to take place between six and nine months after Dayton came into force and were duly held exactly nine months from the day the agreement was signed. However, even though the poll succeeded only in cementing the results of ethnic cleansing, amounting to an inaccurate ethnic census of the population where more than 100 percent of the electorate voted, the event was hailed as a "triumph of democracy". Moreover, since the poll, the ethnically based parties which dominate

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Bosnian politics have refused to work together; the common institutions – whose formation was ostensibly the reason that elections needed to take place – have failed to function in a meaningful manner; and the international community, in particular the High Representative, has had to take on an increasing role, imposing solutions on recalcitrant Bosnian institutions, and even ruling on issues such as the design of the country's flag.

That the peace remains so fragile is hardly surprising, given the circumstances in which Dayton was arrived at. For the settlement was agreed by the very individuals who were responsible for the war in the first place and who were aiming, above all, to secure their own political future. Moreover, it was brokered by US diplomats, and in particular Richard Holbrooke, whose overriding concern was to stop the fighting and get events in Bosnia off the international political agenda because of the acrimony the conflict had created within the NATO alliance.

Why Dayton Worked

Dayton succeeded where earlier peace plans had failed because of the single-minded determination of the US negotiating team and the backing they received from other countries; because, after years of humiliation, there was a genuine threat that European troops (in particular British and French) who made up the backbone of the UN force in Bosnia would be withdrawn in the event of failure; and because of a fundamental shift in the military balance, which had been in part engineered by US diplomacy. In the course of 1995 the tide of battle changed, first in neighbouring Croatia and then in Bosnia. Two out of three Serb-held enclaves in Croatia were overrun in lightning strikes in May and August and, with the support of Bosnian Croat forces and the predominantly-Bosniac Bosnian Army, the offensive rolled forward into Bosnia reversing many of the early Serb war gains. Diplomatic pressure brought a halt to the offensive when the territorial division within the country corresponded to that envisaged in earlier peace plans proposed by international mediators.

Dayton was but the last in a long line of internationally brokered peace plans, one of which, the Vance-Owen plan (named after Cyrus Vance and David Owen, its sponsors) is worthy of special note. Unlike Dayton, the Vance-Owen plan attempted to build the concept of multi-ethnicity into the system throughout the country. Though it too entailed a territorial division and the creation of 10 regions – nine of which were deemed to have an ethnic majority of one people and one (Sarajevo) to be mixed – it guaranteed minority ethnic representation in each region via a complex constitutional plan designed by the Finnish diplomat Martti Ahtisaari. The Vance-Owen plan failed, however, because it did not receive international, in particular US, backing and was rejected by the Bosnian Serbs. No country was willing to risk deploying forces to reverse Serb military gains.

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Case Study: Bosnia-Herzegovina

When war broke out in the former Yugoslavia in 1991, the international community had no choice but to become directly involved because the fighting was so geographically close to key western European countries. The former Yugoslavia borders three European Union member states and literally divides 14 of them physically from Greece. International media devoted massive attention to the conflict and hundreds of thousands of refugees fleeing the fighting began making their way to western Europe, and in particular to Germany. But without the political will to address the massive imbalance in fire-power within the former Yugoslavia and neutralize overwhelming Serb superiority, the only strategy open to international mediators was one of appeasement – determining the minimalist Serb position and attempting to persuade Croats and Bosniacs to accept it. And the minimalist Serb position essentially amounted to the construction of a Serb state comprising all territory in the former Yugoslavia inhabited by Serbs, irrespective of the wishes of the non-Serb population.

Of Bosnia's 109 municipalities, 37 had an absolute Bosniac majority, 32 an absolute Serb majority and 13 an absolute Croat majority. A further 15 municipalities had a simple Bosniac majority, five a simple Serb majority and 13 a simple Croat majority. With the exception of Croat-populated western Herzegovina, an absolute majority rarely accounted for more than 70 per cent of the population, and as often as not neighbouring municipalities had majorities of one of the republic's other peoples. Bosnia could not therefore fragment neatly along an ethnic line, because there was no ethnic line to fragment along. Dividing Bosnia into ethnic territories would inevitably be messy and require massive population transfers.

The fundamental cause of conflict in the former Yugoslavia in the early 1990s was not, however, simply the drive by the country's Serbs to forge their own national state at the expense of their neighbours. Structurally speaking, this was only a manifestation of what was and remains a much deeper-rooted problem. For as communism disintegrated in eastern Europe, the gel that had held Yugoslavia together since World War Two disappeared and the country was ill-equipped institutionally to deal with the transition to democracy. Nearly half a century of communism had failed to resolve the national question. Indeed, it may even be argued that communist rule had exacerbated the potential for conflict within Yugoslavia since, in practice, it had stifled open dialogue on ethnic issues. Moreover, the planned economy had failed to sustain prosperity and had been disintegrating throughout the 1980s.

Although Bosnians had appeared to live together in reasonable harmony before the war, ethnic identities formed over centuries of Ottoman rule – when each religious community was governed separately under its own spiritual rulers – remained strong. As a result, when elections took place in 1990, the poll approximated to an ethnic census as the electorate divided along ethnic lines. Though the ethnically based parties were ostensibly in coalition and governing together, they rapidly fell out with each other and politics descended into a "zero-sum" game, much like the

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current situation, as Serbs, and later Croats, decided that they had an alternative to Bosnia. This pattern was repeated at Bosnia's post-Dayton 1996 elections, where the major parties based their campaign almost exclusively on nationalist appeals to their own ethnic group, thus reinforcing the divisions of the war rather than encouraging politics centred on other, less damaging, issues.

Though it is without doubt possible to contain the Bosnian conflict almost indefinitely, this requires policing and is an extremely costly approach. Moreover, international leaders who have troops deployed in Bosnia are acutely aware of the political risks they are running domestically, should, for example, any of their soldiers be killed. In addition to containing the conflict, therefore, they are hoping to find an exit strategy. Prospects of troop withdrawal or substantial reduction are poor, however, because of instability elsewhere in the region, and in particular in Yugoslavia and the southern Balkans. Indeed, as the predominantly Albanian province of Kosovo disintegrates in ethnic violence, international involvement and presence throughout the region is expanding, not contracting. And whether in Kosovo, Macedonia or Bosnia, the fundamental problem remains of how to reconcile the legitimate interests of different communities living side by side.

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Yash Ghai

4.2 The Structure of the State: Federalism and Autonomy

Most solutions to internal conflicts require adjustments to the structure of the state. In this section we discuss how federalist and autonomy arrangements can help defuse tensions within a state by devolving greater powers to ethnic groups.

Many conflicts centre on the role of the state in society and emanate principally from its structure and organization. In most countries, the state is the most powerful organization, even when it is not very effective in implementing policy. Control of the state usually provides access to economic power since the state is the major means of the reproduction of capital. Consequently, there is strong competition for control over the state apparatus and this struggle is the cause of many of today's conflicts. These conflicts can be prevented or mediated by re-structuring of the state, or by official policies, such as re-distribution through affirmative action mechanisms, recognition of personal laws and other forms of pluralism, fairer electoral laws and forms of power sharing (these elements are discussed in other parts of the handbook).

Problems also arise from attempts to adopt symbols of the state that are rooted in the religion or traditions of one community (Sri Lanka, Malaysia, etc.) which alienate other communities. A solution might be neutral symbols (like democracy, human rights and the rule of law), secularism as a kind of state nationalism, but many leaders consider that its capacity to inspire loyalty among their supporters is limited. A more productive strategy is often to look at ways of devolving power via federalism, autonomy or other adjustments to the structure of the state.

4.2.1 Means of devolving power

There are a wide variety of arrangements for the devolution of power. In considering these options, it is important not to see them as mutually exclusive or as either/or alternatives. Given the current variations in diversity, in terms of numbers, identity and resources, within one single state some combination of devices may be required (as the Canadian and Indian experiences reveal).

Federalism. The best known arrangement is federalism, where power is devolved equally to all regions and each region has an identical relationship to the central government. While traditionally federalism has not been used to solve problems of ethnic diversity, there have been instances where federalism has proven effective. For example, the adoption of federalism in Switzerland and Canada was partially motivated by the need to accommodate diverse communities. Also, the federal device was used frequently for the settlement of ethnic problems at the end of World War Two, for example in India, Malaysia, and Nigeria. Federalism has been argued for in other contexts as well, such as during the discussions in South Africa leading to the post-apartheid settlement.

If the need is to accommodate only one or two minority groups, however, the federal model may be unnecessary. Also, the federal model may not be seen to be sufficiently sensitive to the cultural and other needs of a community. Consequently, there have been two alternative responses: *asymmetrical federalism* and *autonomy.*

Asymmetrical federalism. In an asymmetrical federation, one or more federal states are vested with special powers not granted to other provinces, to allow for preservation of the culture and language of its settlers. An old example of this is Quebec, and a more contemporary instance is Kashmir's special status within the Indian federation.

Autonomy. An autonomous arrangement, in which only one or more regions have devolved to them special powers, is more common. Autonomy tends by its very nature to be asymmetric. Examples of autonomy include: two provinces in the Philippines (the Cordillera and Mindanao), Zanzibar in relation to Tanzania, Hong Kong in relation to China, Greenland in relation to Denmark, Puerto Rico in relation to the US, the Autonomous Communities in Spain, and Åland in relation to Finland.

There is strong competition for control over the state apparatus, and this struggle is the cause of many of today's conflicts. These conflicts can be mediated by looking at ways of devolving power by federalism, autonomy or other adjustments to the structures of the state.

4.2 The Structure of the State: Federalism and Autonomy

An important distinction between federalism and autonomy is that in federations the regions participate actively in national institutions and national policy-making, in addition to controlling devolved subjects within the region. In autonomy, the emphasis is on the region's power to control its own affairs, rather than to participate in national institutions. (The case of Zanzibar is somewhat anomalous, given its influence in the national parliament and in the executive disproportionate to its size, resulting in much resentment on the mainland.)

Reserves. These were first used by European settlers in the Americas, to isolate and dominate indigenous peoples, and were subsequently used in Australia, Africa and parts of Asia. The apartheid policy of Bantustans was a modern version. In recent years, however, the aspirations and historical claims of indigenous peoples have been recognized through the transformation of reserves into self-governing areas, particularly in Canada and the Philippines. The extent, however, to which they can opt out of national laws, which may be necessary for the preservation of their political and cultural practices, is variable.

Local government institutions. Another way to devolve power is through local government institutions or forms of decentralization. These differ from federations and autonomy in that they do not have a specific constitutional status or constitutional guarantees. Local government can be an effective way to give certain powers to a group since the geographical scale of local government is small and the population is likely to be homogeneous.

The developments regarding federalism and autonomy outlined above greatly increase the possibilities of devising flexible arrangements for forms of self-government to suit widely varying circumstances and contingencies. (In this section autonomy is frequently used in its generic sense to include all forms of spatial arrangements for self-government.) Added to these broad categories of self-government are variations in arrangements within each category, such as the division of powers between different layers and structures of government, the relationship between these structures at different levels, and the distribution of financial and other resources. While this flexibility is important in the negotiation process and facilitates compromises, there is a danger that it may lead to complex arrangements and systems, leading to a lack of cohesion and governability. Federal or autonomy arrangements are inherently hard to operate, and the embroidery on classical systems that tough negotiations may lead to can undermine long-term prospects of settlement by their sheer

weight or complexity (a good example of this experience are the regional arrangements in Kenya's independence Constitution, and more recently of Papua New Guinea's system of provincial government established in 1976).

4.2.2 International regional organizations

A new but uneven element in the spatial organization of government is the emergence of *international regional organizations* in which national sovereignty has been traded for a share in the participation and decision-making in these organizations. Common policies over larger and larger matters are determined by such organizations. In this way a measure of control over the affairs of a national region has been transferred from national to supranational authority. This diminution of national sovereignty opens up possibilities of new arrangements between the state and its regions. The benefits work both ways: the state feels less threatened by regions in a multi-layered structure of policy-making and administration; and the region becomes more willing to accept national sovereignty, which may be the key to its participation in the wider arrangements.

This trend is most developed in the European Union, where it is helping to moderate tensions between states and border regions previously intent on secession. For example, it has facilitated the interesting spatial arrangements for policy, administration and consultation in the two parts of Ireland, each under separate sovereignty, which underlie the new peace proposals (see Northern Ireland Case Study). Attempts to provide for unified Nordic arrangements for the Saami people, including a substantial element of autonomy, regardless of the sovereignty they live under, are another instance of similar kind.

4.2.3 Examples of federalism and autonomy

While, traditionally, federalism has not been used to deal with ethnic issues, there are nevertheless several examples of how federal and autonomy devices have helped to mitigate or even solve internal conflicts or have provided a basis for the peaceful co-existence of diverse communities. A particularly successful example of autonomy is Åland, where a predominantly Swedish-speaking population under Finnish sovereignty has enjoyed a large measure of cultural and political autonomy since 1921. Autonomy has diffused ethnic tensions between Italian-and German-speaking people in South Tyrol. Many of India's ethnic demands have been dealt with in this way, starting with the reorganization of states along linguistic lines in 1956, and the subse-

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quent divisions of the former Punjab and Bombay and the accommodation of Assam, Nagaland, and Mizoland as states.

The transition to democracy in Spain after the overthrow of Franco was greatly facilitated by the provision in the 1978 Constitution for the establishment of "autonomous communities". By giving "historic" communities, like the Basque and Catalans, a large measure of self-government, pressures for secession were reduced and terrorist activities consequently declined. In the Philippines, Muslim secessionist activity in Mindanao, lasting for a quarter of a century, has been abated due to an agreement in 1996 between the Moro National Liberation Front and the government. Under this agreement a council will be established under the chair of the leader of the Liberation Front to supervise development of 14 provinces in southern Mindanao island (regarded by it as traditional Muslim homelands), followed by a plebiscite and regional autonomy three years later. There are many lesser-known examples from the South Pacific where autonomy helped to bring disputes to some settlement (prominently the 1975 differences between Papua New Guinea and Bougainville and the francophone claims in Vanuatu).

A novel form of autonomy is represented by the arrangements under which Hong Kong returned to Chinese sovereignty in July 1997 (which Deng Xiaoping claimed had the potential to solve many world problems). Its novelty lies in the arrangements for the coexistence of very different, and in many respects opposed, systems of economy and politics within one sovereign state. Britain was prepared to return Hong Kong to China only on the basis of promises of Hong Kong's autonomy as set out in the 1984 Sino-British Joint Declaration. Macau's return to China in 1999 is based on similar principles.

More importantly, China is pursuing reunification of Taiwan with the mainland on the same policy of "One Country, Two Systems". It is likely that when serious negotiations between the two sides get under way, the principal issue will be the scope and modality of Taiwan's autonomy. Currently there are attempts to solve internal conflicts through autonomy arrangements, such as Sri Lanka-Tamils; Indonesia-East Timor; the Sudan-Southern Sudan; Georgia-Abkazia; and although not a conflict situation, the future relationship between the US and Puerto Rico.

Autonomy is often claimed by the disaffected group: white settlers and minority tribes in Kenya; kingdoms in Uganda; islands in Papua New Guinea, Tamils in Sri Lanka and so on. But sometimes the government offers autonomy as a way to fend off

secession or bring armed struggle to an end, as in the Philippines for Mindanao, north-east India, Palestine, Spain, or belatedly in Sri Lanka. The Indian National Congress, for example, was prepared to countenance a high degree of autonomy if the Muslim League accepted a united India; but once partition was declared by the British, it argued successfully for a strong central government, with weak states.

4.2.4 The legal basis for autonomy

Despite the increasing use of autonomy solutions, the legal bases for autonomy remain unclear. There are two principle bases for autonomy:

Minority rights. In recent years, the United Nations has shown more interest in minority rights. It has adopted a *Declaration on the Rights of Minorities* which goes further than Article 27 of the International Covenant of Civil and Political Rights in protecting minority rights (see "Human Rights Instruments" section 4.6.3). In addition, the UN Human Rights Committee has adopted some interpretations of Article 27 that recognize that a measure of autonomy may be necessary for the protection of cultural rights of minorities. Efforts have also been made by that committee and others to interpret the right to self-determination to mean, where relevant, "internal autonomy" rather than secession. The approach of the OSCE (in its various declarations as well as in practice) favours autonomy regimes, and its rules for the recognition of breakaway republics of Yugoslavia included adequate minority protection of this kind. The new *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (1991) and the draft declaration of the rights of indigenous peoples have endorsed autonomy regimes.

Self-determination. In itself a difficult and controversial concept, self-determination is increasingly being analysed in terms of the internal, democratic organization of a state rather than in terms of secession or independence. The UN General Assembly resolved many years ago that autonomy is a manifestation of self-determination. The increased involvement of the UN and other international organizations in the settlement of internal conflicts has helped to further develop the concept of self-determination as implying autonomy in appropriate circumstances.

Such a view of self-determination has some support in certain national constitutions, but it is no more than a trend at this stage. Often constitutional provisions for autonomy are adopted during periods of social and political transformation, when an

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autocratic regime is overthrown (when there is considerable legitimacy for autonomy) or a crisis is reached in minority-majority conflicts, or there is intense international pressure (in which case legitimacy is often granted rather grudgingly). Propelled by these factors, a number of constitutions now recognize some entitlement to self-government, such as the Philippines (in relation to two provinces, one for indigenous people and the other for a religious minority); Spain (which guarantees autonomy to three regions and invites others to negotiate with the centre for autonomy); Papua New Guinea (which authorizes provinces to negotiate with the central government for substantial devolution of power); Fiji (which recognizes the right of indigenous people to their own administration at the local level); and recently Ethiopia (which gives its "nations, nationalities, and peoples" the right to seek wide ranging powers as states within a federation and guarantees to them even the right to secession). The Chinese Constitution entrenches the rights of ethnic minorities to substantial self-government, although in practice the dominance of the Communist Party negates their autonomy. In other instances the constitution authorizes, but does not require, the setting up of autonomous areas. On the other hand, it should also be noted that some constitutions prohibit or restrict the scope of autonomy by requiring that the state be "unitary", or some similar expression; such a provision has retarded the acceptance or the implementation of meaningful devolution in countries such as Sri Lanka, Papua New Guinea and China.

The presence or absence of an entitlement in either international or national law to autonomy, as well as provisions limiting its scope, can play an important role in the conduct of negotiations and the relative bargaining position of parties, especially when there is international or third-party mediation.

4.2.5 The advantages of federalism and autonomy solutions

There are several advantages to federalism and autonomy mechanisms:

It ensures minorities a measure of state power. Minorities can enjoy executive, legislative and fiscal powers, not merely parliamentary representation with little prospect of a share in policy-making or distribution of resources.

It offers minorities better prospects of preserving their culture. Enabling minorities to make important decisions for themselves almost always offers better prospects for their own cultural preservation.

It may forestall or terminate demands for secession. The flexibility of the federal device in terms of the division of powers and the structure of institutions enables various kinds of accommodations to be made; it is more hospitable to compromise than other kinds of minority protection.

It can increase the political integration of ethnic groups. Autonomy devolves power to the state, which increases opportunities for people to compete in the political system; this political competition can, in turn, accentuate differences within groups, which can lead to the fragmentation of previously monolithic ethnic parties. The proliferation of parties enables coalitions of similarly situated ethnic parties (i.e., in Nigeria and India) across the state. Local problems that might otherwise have created a national crisis are dealt with by the locality itself. Territorial asymmetrical arrangements encourage demands for similar arrangements by other groups (India, Nigeria, and Papua New Guinea). The proliferation of these arrangements increases the prospects of national unity as it diffuses state power and enables central authorities to balance regional with national interests.

It can contribute to constitutionalism. Autonomy arrangements, and the mechanisms to enforce them, emphasize the rule of law, the separation of powers, and the role of independent institutions. The institutionalization of autonomy, particularly procedures governing the relationship between the centre and the region, must be based on discussions, mutual respect and compromise, thereby reinforcing and strengthening these qualities.

Autonomy enables ethnic problems to be solved without "entrenching" ethnicity, since its focus is on defining a region as a geographic entity and not as an ethnic entity. However, some forms of autonomy may indeed entrench ethnicity, as in the case of reservations where the cultural dimensions and the need to preserve the identity of the group may serve to sharpen boundaries against outsiders. An important qualification on the autonomy device is that it can operate only when a minority is concentrated geographically *and* is a majority in that area. One solution to the lack of geographical concentration is a kind of corporate federalism which can take various forms – the millet system used in the Ottoman Empire, Fijian system of native administration, Indian system of personal laws, consociationalism in Cyprus at the time of independence and now in Belgium. Aspects of this solution are discussed in sections 4.1 of this handbook.

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Even if autonomy solutions do not last, an end to hostilities provides breathing space. It is also important to recognize that even when agreement is reached on autonomy, the end of tensions or hostilities does not mean that tensions will not resurface, or that one party or the other will not subsequently repudiate or redefine the autonomy arrangements. This happened in many parts of Africa where some measure of regional autonomy was seen as a pre-condition of independence (as in Uganda, Kenya and Ghana). There are many other examples where federal or autonomy arrangements did not last (as in the Sudan, Eritrea and de facto in Kashmir).

However, even where the arrangements do not last or tensions re-emerge, the end of hostilities provides a breathing space, helps to define issues and points of difference, and may even provide the framework for negotiations in the future. The last point can be important since a frequent problem in many ethnic conflicts is finding a framework, and even sometimes parties, for negotiations (as in Sri Lanka, Punjab or Kashmir; India has managed to defuse some of its ethnic problems by providing for elections to provincial or assemblies in the "hill areas" before the start of negotiations). The party that wins also claims a mandate to negotiate (as with the 1996 elections in Kashmir). Sometimes merely the commitment to consider autonomy can serve to defuse tensions, as in South Africa where the agreement to consider a "white homeland" secured the participation of hard-line Afrikaners to the interim constitution.

4.2.6 Resistance to federalism and autonomy

Despite these obvious advantages, there has been resistance to the adoption of autonomy in cases of internal, particularly ethnic, conflicts. It involves the restructuring of the state and requires the redistribution of its resources, which upsets vested interests. Consequences can include:

Majority leaders fear losing electoral support. The leaders of the majority community may be reluctant to concede autonomy, fearing the loss of electoral support among their own community (a problem that has bedevilled Sri Lanka). Majority leaders, even if well disposed to autonomy, may not have the confidence that they would be able to implement the autonomy agreement, especially if it requires amendment of the constitution, a referendum or even merely fresh legislation.

Fears that autonomy will be a spring board to secession. This is seen to be an especially serious problem when the group

demanding autonomy is related, and contiguous, to a neighbouring kin state. Autonomy granted to a minority in its "homeland" may in turn create new minorities (as with Muslims in northeast Sri Lanka which the Tamil Tigers want under their control, or Christians in Mindanao, or the fear that Malaysian Borneo states may get too close to Indonesia). This may trigger demands for autonomy by the "new minorities" and lead to further fragmentation of the state. There may also be anxiety that the fundamental values of the state may be compromised by the recognition through autonomy of different cultural or religious values. There may also be a concern with economic and administrative efficiency that is frequently seen to be jeopardized by complex autonomy arrangements.

Unpredictability of its consequences. The adoption of the federal device changes the context of ethnic relations. Territorial or corporate federal arrangements are not purely instrumental. Merely by providing a framework for inter-ethnic relations, they affect and shape these relations. They may fashion new forms of identity or reinforce old identities. They may enhance or decrease the capacity of particular groups to extract resources from the state. They may provide new forms of contention and dispute.

May encourage other communities to mobilize for autonomy. Connected with the preceding point is the fear that if autonomy can be justified on ethnic grounds, the rules justifying the granting of autonomy (identity, a sense of discrimination/injustice) may encourage the mobilization of other communities along ethnic lines, indeed to manufacture "ethnic communities".

Autonomy arrangements for ethnic coexistence have not worked. The reluctance towards autonomy may be reinforced by a sense that autonomy arrangements for the purposes of ethnic coexistence have not worked. There are certainly many examples of failure, abandonment of autonomy, and attempted and even successful secession on the back of autonomy (as was demonstrated by the break-up of the former Yugoslavia). Even if such drastic consequences are not envisaged, there may be reluctance on the basis that the relevant political culture is alien to habits of consultation and compromise necessary for success.

4.2.7 Structuring autonomy arrangements

All of these are legitimate concerns. But they do not dictate the conclusion that autonomy should not be used to deal with ethnic conflict. What is necessary is to structure autonomy arrangements so as to increase the advantages and minimize the dis-

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advantages of autonomy. Below we outline some of the considerations relevant to the design of autonomy. But before that, we make three preliminary points. First, the concept of "success" of autonomy is itself problematic, since there is no clear consensus on the criteria. Second, it is difficult to isolate general factors that affect the operation of autonomy (e.g., a downturn in the economy) from factors that are specific to it. Third, autonomy is a *process* and there are inevitably changes in the context in which it operates, even in the original aims of autonomy. Options for structuring autonomy arrangements include:

Establish autonomy once and for all or through a phased, negotiating process. A choice has to be made between agreeing at one go on all the details of the autonomy system or to establish them through a series of phased negotiations. A middle ground is one where broad principles for autonomy are specified. Each option has its advantages and disadvantages and what is an optimum decision depends on the circumstances of the case. It is desirable to agree on the fundamental principles at least to start with. Experience in several countries has shown that matters left for future settlement are hard to negotiate successfully as immediate pressures, and a sense of urgency, abate. The opponents of autonomy have time to regroup. On the other hand, agreements made in rush without time for proper evaluation of alternatives may contain flaws.

In this context, some mechanism should be set in place to ensure that autonomy arrangements are implemented. Courts can play a role in certifying that the necessary arrangements have been legislated and implemented. Special political or administrative bodies can be set up to oversee the implementation process. Sometimes international supervision or conditionalities can be provided to ensure implementation (as with the Dayton Accord or the Paris Cambodian Accord).

The importance of the procedure. Autonomy established without adequate consultations tends to be controversial and lacking legitimacy. Many systems of autonomy imposed as part of the constitutional settlement at independence were dismantled soon afterwards at the instigation of the majority community. Autonomy may also affect relations in the relevant region and may be internally opposed by significant groups. In principle it is desirable that there should be wide consultations and referendums on autonomy proposals. Several national constitutions which provide for autonomy require that they be approved in a referendum (e.g., Spain, Ethiopia, and in an indirect form, Papua

New Guinea). Occasionally there is a requirement for constituent assemblies, which provide the mandate for negotiations.

While all these methods legitimize autonomy arrangements, there is also the danger that in a nation-wide referendum the proposal would be defeated if the majority community is opposed. Sometimes it is necessary to strike a fine balance between decisions by political leaders and the people.

Degree of entrenchment. Whatever method is used to arrive at decisions about autonomy, it is important that there should be firm legal guarantees for it. In particular it should not be possible for central authorities to unilaterally change the rules regarding autonomy. When the central government can change the rules on its own, the incentives for it to consult with regions diminish and mechanisms for developing consensus do not operate well.

Methods of dispute settlement. In principle the methods of dispute settlement should combine efforts first at consultation and mediation, and if that fails, judicial intervention. If the methods of settlement are impartial and accepted as such by both parties, it is possible to operate on the basis of broad principles (as has been possible in Spain); otherwise there would be pressures towards specification of details tending towards a rigid structure.

Consultative mechanisms. It is useful to provide for mechanisms for consultation between the centre and region/s, in part to avoid litigation, but also in recognition of the dynamics of autonomy. However serious an effort is made to separate off the areas of responsibilities between the centre and the region, there is likely to be some overlap as well as the need for co-ordination.

Problems with asymmetry. A particular problem with asymmetry is that all regions aspire to the completeness of powers that the best placed region has, while that region wants to keep its pre-eminence, as is evident from the experiences of Bougainville, Quebec, the Basque region and Catalonia. This can produce resentment against the privileged region in other parts of the country and put in some jeopardy its status (as with mainland resentment at the special powers of Zanzibar).

Protection of rights. Another problem with asymmetrical autonomy, especially that based on cultural differences, is that the community or region may be allowed to opt out of standard

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human rights provisions. This is most dramatically manifested in the "notwithstanding" clause of the Canada Charter of Human Rights under which a province can pass legislation in contravention of the Charter by making an express declaration to that effect – a concession at the instance of Quebec. Another example comes from the regime of personal laws in India where Muslim divorced women are subject to *sharia* for the purpose of maintenance from their previous husband instead of the more favourable provisions under the national laws. Problems of differential treatment arise even more extensively in regimes for indigenous peoples.

These provisions can also affect the rights of citizens outside the community. They can be subject to restrictions that do not apply to "locals" of the region (with respect to residence or employment, for example). New minorities that result from the conferring of autonomy on a region may need protection against victimization. The interests of the new minority can be secured through a further tier, that of local government (where they constitute a majority), or through special responsibilities of the central authorities.

Provisions recognizing differential values undermine the basic rights of individuals or groups within the community and cause resentment among the rest of the population. Thus autonomy can become a source of conflict rather than a solution to it. If too much importance is placed on accommodating differences and too little attention is given to building on those traditions, values and aspirations which a people share, it can lead to further fragmentation and weaken the sense of solidarity. While acknowledging cultural differences and sensitivities, it is important to emphasize national values and ensure the protection of human rights to all persons.

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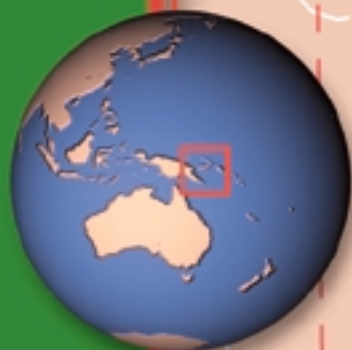
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New Ireland

Bismarck Sea

Madang

New Britain

Buka

Bougainville

PAPUA NEW GUINEA

Panguna

SOLOMON ISLANDS

Gulf of Papua

Port Moresby

Coral Sea

Cairns

PACIFIC OCEAN

Townsville

AUSTRALIA

Rockhampton

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Anthony J. Regan

BOUGAINVILLE

The almost 10-year old ethno-nationalist conflict in Bougainville – the most serious conflict in the Pacific island states in the 1990s – made significant progress towards peace in 1997–1998. The Bougainville conflict has had international repercussions, affecting Papua New Guinea's relations with its neighbours, especially the Solomon Islands and Australia, and involving the region in several attempts at conflict resolution. At the heart of the conflict lies the demand for independence made by the Bougainville Revolutionary Army (BRA), a demand opposed by Papua New Guinea and by many Bougainvilleans, including "resistance forces" armed by the government.

Background

Independent from Australian colonial control since 1975, Papua New Guinea (PNG) has a population of about four million people, occupying the eastern half of the island of New Guinea and many smaller islands. The province of Bougainville (population about 170,000) is the most distant from the mainland capital of Port Moresby, about 1,000 km to the east. Before the conflict, Bougainville's substantial initial contribution to the national economy was disproportionate to its small size, due to the enormous copper, gold and silver mine at Panguna on the main island which was operated by Bougainville Copper Ltd. (BCL) from 1972 until 1989.

Papua New Guinea is a country of immense ethnic diversity (it has more than 800 distinct languages, to cite just one example). Bougainville fits this pattern: it has 19 main languages and a population divided into numerous small semi-traditional societies. Bougainvilleans share a strong sense of a separate ethnic identity based on distinctive black skin colour and traditional affinities with the neighbouring Solomon Islands rather than with the rest of Papua New Guinea. Widely shared grievances about both the imposition of colonial boundaries and alleged colonial neglect have contributed to the sense of separate identity.

From the mid-1960s, a new grievance energized the emerging Bougainvillean identity: the imposition of the Panguna mine for the economic benefit of PNG despite detrimental effects on the Bougainville environment and people, and with limited fiscal benefits for the province. Distinct identity and grievances about the mine were factors in the attempted secession of Bougainville in 1975–1976. This was resolved peacefully by national government concessions, which gave Bougainville an effective and relatively autonomous provincial government; this was suspended, however, in 1990.

Rapid economic and social change resulted in major differences in regional economies within Bougainville, and significant economic inequality. Limited secondary education and employment opportunities produced a large pool of under-educated, under-employed and resentful youth. Many Bougainvilleans blamed the

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new economic inequalities on the mine operator, BCL, and the influx of non-Bougainvilleans attracted by employment with the mine and on plantations. Outsiders were also blamed for escalating social tensions and law and order problems. These tensions contributed to the eruption of secessionist conflict in 1988–1989.

Conflict Analysis

In 1988, an inter-generational dispute among landowners around the mine led to attacks on BCL property by young men from local landowner groups led by Francis Ona. They demanded the closure of the mine and massive compensation. Poorly judged and ill-disciplined responses by police and, later, the Papua New Guinea Defence Force (PNGDF), resulted in deaths and injuries for many Bougainvilleans and provoked demands for Bougainville independence. As a result, Ona's Bougainville Revolutionary Army (BRA) was able to transform the localized conflict into a wider ethnic uprising. Ona's support came from under-employed youth in many parts of Bougainville.

As the situation slipped out of control, the mine was forced to close in May 1989. All government authority collapsed. A cease-fire and withdrawal of the PNGDF was negotiated, but instead of disarming and negotiating as agreed, the BRA tried to take control. They made a unilateral declaration of independence in May 1990 and appointed the Bougainville Interim Government (BIG), which included some former provincial government figures.

Once the security forces left, the focus of the BRA groups became their perceived enemies *within* Bougainville. The BRA was a loose coalition of semi-independent groups of mainly young men, each group based in its own semi-traditional society, often with differing perceptions of the conflict. Bougainvilleans with wealth, education or status, and many non-Bougainvilleans were harassed, imprisoned, tortured or murdered. Ona developed and propounded an ideology based in part on a return to traditional society and rejection of outside influences.

Armed opposition to the BRA emerged in Buka, north of the main island of Bougainville. Local leaders there requested national government intervention, and after some violent clashes with the BRA late in 1990, government forces took control of Buka. At the invitation of local leaders, government forces returned relatively peacefully to the north and south-west of the main island in 1991–1992. New local governments ("interim authorities") drawing mainly on traditional leadership were also established in those areas.

Armed opponents of the BRA and surrendering BRA elements formed "resistance forces" which received material support from the PNGDF and gave it active support. Bougainville became an increasingly violent place as the BRA, resistance forces, armed criminal groups and – on occasion – PNGDF elements became embroiled in conflict over mainly localized issues, often resulting in spirals of revenge killings.

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Following national elections in mid-1992, a new PNG government encouraged military initiatives, most notably efforts to re-take the area around the provincial capital and the Panguna mine. Violence elsewhere was escalating as the BRA sought to consolidate its position in areas to which the PNGDF had returned, and resistance groups were also operating. Some Bougainvillean leaders and local associations (especially women's organizations) became increasingly aware of the need to bridge the gaps among themselves if there was to be progress to peace.

Finally in September 1994, the PNG Prime Minister established negotiations in the Solomon Islands. Agreement was reached on a cease-fire, and on the holding of a peace conference, with security to be provided by a South Pacific regional peace-keeping force. When, for some reason, the senior BIG/BRA leaders did not attend the peace conference, the resulting popular frustration led to the emergence of a strong moderate movement in much of the area of BRA core support in central Bougainville. Within weeks the moderates proposed an interim provincial government to act as an umbrella for "moderate" groups (those opposed to secession) and as a bridge to the BIG/BRA, and to negotiate a new political status for Bougainville. The new government – the Bougainville Transitional Government (BTG) – was established in April 1995.

Some in the national government were suspicious of the BTG, afraid it was a "Trojan horse" for the BRA. Building understandings with the BIG/BRA leaders was slow, and the national government had little patience. It did agree to meetings between the BIG/BRA and the BTG in Australia, but became increasingly suspicious that the two groups were becoming too close. In January 1996, as BIG/BRA leaders returned from the talks in Australia, they were attacked by PNGDF troops. The BRA retaliated, and the national government lifted the cease-fire. Both sides now committed themselves to force. The PNGDF launched major military operations against the BRA in mid-1996. Their failure, and subsequent massacres and hostage taking of security personnel, underlined the inability of the security forces to defeat the BRA. Desperate for clear progress towards resolving the conflict prior to impending national elections, in January 1997 the government engaged mercenaries who began to train with the PNGDF Special Forces Unit, intending to crush the BRA and capture the Panguna mine site. But in a surprise move, the PNGDF commander announced the refusal of his forces to work with the mercenaries. They were ejected from the country and the Prime Minister and two key ministers were forced to stand down during a judicial inquiry.

The Conflict Management Process

Interest groups and the issues that divide

The wide range of groups with interests in the conflict or its outcomes include: the BIG/BRA; the BTG; the resistance forces; other less organized Bougainvillean interests; the national government; and other governments in the region.

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The key issues include: the future political status of Bougainville and the method (and timetable) to decide it; interim arrangements for the governing of Bougainville in the period before the political status issue is determined; the presence of PNG security forces in Bougainville; arrangements for the disarming of the BRA and the resistance forces and restoration of civilian law; the future development of Bougainville; and the possible re-opening of the Panguna mine.

In Bougainville, three main parties are involved directly in the peace process, a range of interests and localized groups existing within each of them. The BRA and the BIG are concentrated in central and south Bougainville, but with some elements in most parts of the main island of Bougainville. The "hard-line" leadership under Ona is not prepared to negotiate anything other than independence. But during 1997, war-weariness and dissatisfaction with Ona's radical prescription for future development of Bougainville have enabled a relatively moderate leadership to emerge, willing to engage in an open-ended peace process involving other Bougainvillean groups and the national government.

With members from all parts of Bougainville, the BTG provides a focus for Bougainvillean leadership prepared to negotiate special political status for Bougainville within PNG. They include both those with sympathy for the BRA's aspiration for independence but who believe a compromise is needed to end the suffering of ordinary people, and those who are vehemently opposed to the BRA. In general, though, the BTG acts as a bridge between the national government and the BIG/BRA. As such, it tends to be suspected by both sides. The resistance forces constitute a third major group. While represented in the BTG, they have quite distinct structures and interests, in large part related to their combat roles, control of weapons and links to the PNGDF. A complex web of other Bougainvillean interests exists, including armed criminal groups; traditional leaders; women's organizations; churches; secular NGOs; and Bougainvilleans living elsewhere.

At the national government level, numerous ministers and government agencies have roles in the conflict, and conflicting agendas abound. At the international level, Australia has strong political and economic links with PNG, including support to the PNGDF during the conflict, while in the Solomon Islands, there is considerable sympathy for the cause of Bougainville independence.

Through most of the conflict, few democratic political institutions have functioned. Bougainville has elected national parliament members in the 1992 and 1997 elections, but they have all been based in the national capital, and have had limited roles in local politics. Provincial and local governments ceased operating in 1990. Since then, traditional leaders have provided local-level government in both government-controlled and BRA-controlled areas. They have strong legitimacy, reflecting a widespread popular concern for strengthening traditional authority as a means of re-establishing social control. The BTG comprises mainly members elected indirectly by such local government bodies.

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Peace-making initiatives

Several sets of negotiations between the national government and the BRA occurred but failed between 1988 and 1994. These efforts failed for a number of reasons: (a) the lack of trust between the main parties resulted in unrealistic assumptions; (b) each side tended to be confident of ultimate success, so contacts between them were often directed at seeking short- to medium-term advantage rather than conflict resolution; (c) differences in understanding about what actually was agreed prevented implementation of some agreements; (d) divisions within particular parties were also a factor, with concessions made by moderate negotiators being subsequently disowned by more hard-line groups.

But after the ejection of the mercenaries and the resignation of the prime minister in March 1997, conditions became conducive to progress. First, more than eight years of conflict had created deep war-weariness and leaders of all main groups were feeling popular pressure for progress towards peace. Second, the actions of the PNGDF in ejecting the mercenaries created more room on all sides for moderate leadership. Third, all parties were conscious of a military stalemate. Fourth, at the national level, the new government were willing to examine moderate alternatives. Fifth, New Zealand emerged as an independent facilitator. Sixth, a newly elected Solomon Islands government favoured resolution of the conflict.

From April 1997, the BTG and BRA/BIG started making direct contact for the first time since 1995. The New Zealand government hosted talks at Burnham military barracks outside Christchurch on New Zealand's south island in July, involving about 70 persons from all main groups. Francis Ona was absent, but key BRA/BIG leaders in attendance used his absence to build a coalition of "moderate" interests.

The resulting Burnham Declaration committed the Bougainvillean leadership to peaceful resolution of the conflict. Four developments at Burnham were crucial. The first was the development of trust and understanding among the divided Bougainville leadership. Second, New Zealand played a key role as neutral facilitator. Third, the timing of the Burnham meeting was fortuitous in building momentum for support for a negotiated settlement among the diverse elements of the PNG government. Fourth, the focus of the meeting was on process rather than outcomes, establishing a process for achieving peace while putting outcomes on the main divisive issues to one side. In past negotiations, efforts to address the key questions of the long-term political status of Bougainville and the BRA/BIG demand for immediate withdrawal of the PNG security forces had resulted in impasse. The focus on process meant that the Burnham Declaration was deliberately vague on the divisive issues.

The Burnham meeting agreed that Bougainvillean delegations should soon meet with PNG officials to plan a major leaders meeting. The meeting with officials was held in October 1997, again at Burnham. It involved over 80 Bougainvilleans, about

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20 PNG representatives, and six observers from the Solomon Islands government, including a cabinet minister who ultimately chaired the meetings. Leaders of most BRA "companies" and resistance forces elements attended. Remarkable progress was made at this "Burnham II" officials meeting. The emphasis continued to be on process, leaving outcomes on the most contentious issues to one side. However, contrary to expectations, a "Burnham Truce" was signed.

The Truce was monitored by a multinational unarmed monitoring group under New Zealand leadership and was in place by December 1997. New Zealand, Australia, Vanuatu and Fiji provided the personnel. The truce provided public education about the accelerating peace process, while also providing security for organizing reconciliation ceremonies at the local level, and for organization of the forthcoming leaders meeting. The dramatic progress was welcomed by almost all sides except Ona, who consequently became increasingly marginalized.

The leaders meeting was held at Lincoln University in New Zealand in early 1998, attended by PNG, New Zealand, Australia, Solomon Islands and other Pacific Island states, and representatives of most Bougainvillean interest groups. The meeting produced the "Lincoln Agreement on Peace, Security and Development on Bougainville". The emphasis was still on process, but there was some progress towards agreement on some of the major issues. A permanent cease-fire was agreed. To operate from May 1998, it was to be monitored by a further regional monitoring group with involvement of a UN observer mission. An elected "Bougainville Reconciliation Government" was to be established by the end of 1998. Provision was also made for withdrawal of the PNGDF, subject to the restoration of civil authority. Disarming of the BRA and other Bougainville groups was agreed, although no modalities were provided.

Some implementation of the Lincoln Agreement has occurred, notably with the cease-fire agreement coming into effect on 1 May, and the Truce Monitoring Group under New Zealand leadership becoming a Peace Monitoring Group led by Australia. There has been some progress towards developing civilian policing arrangements. There has been no progress towards establishing the Bougainville Reconciliation Government or disarming, in part because Ona has opposed the cease-fire, and thereby made it difficult for the moderate BIG/BRA leadership to be seen to make too many concessions prior to the leaders meeting expected in June.

Competition for power has been increasing. Both the BTG and the BIG recognize that ultimately there will need to be an elected Bougainville government. There are concerns, however, that it could be difficult to hold full elections without first making considerable progress on existing divisions and outstanding contentious issues. Many BIG/BRA leaders tend to favour a referendum on the question of independence. But that may cause major problems: campaigning could divide people still further.

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Ongoing issues

The peace process has not yet touched upon some significant issues. In particular, the question of the future development of Bougainville divides participants. Hard-line BRA elements favour a highly egalitarian society based largely on tradition. More moderate BRA/BIG leaders support a more open society, as do BTG and most other Bougainvillean leaders. However, many otherwise "moderate" Bougainvillean leaders also agree future economic development should be controlled by Bougainvilleans, and that there should be limited freedom of movement into Bougainville for other PNG citizens.

In general the BRA/BIG opposes any future mining or mineral exploration in Bougainville. Many Bougainvilleans support that stand. But there are moderate leaders who privately believe that an independent Bougainville will need mining revenue to develop, and would support re-opening the mine under local control, on fairer terms to landowners and with far greater environmental protection. Although new mining, petroleum and gas projects elsewhere have more than made up for the loss of revenue from Bougainville, there are national politicians keen to see mining activity renewed there.

Bougainville remains deeply divided, and hard-line BRA elements who are still outside the process, or future disagreement within the process, could de-rail progress. Nevertheless, progress in the year to June 1998 has been remarkable. The provision of the unarmed truce monitors has been of central importance in providing security for the process, giving participants confidence to continue. The focus on process rather than outcomes has been crucial in engaging a wide range of leaders in a long-term process where trust can be developed, to enable compromises to emerge. Future progress will depend on keeping them engaged in the process.

Lessons from the Bougainville Conflict Management Process

Some aspects of the Bougainville conflict management process may be of wider application.

– First, in a complex divided situation as in Bougainville, while it may be tempting for a national government embroiled by ethnic conflict to exploit divisions among its potential opponents, the danger is that those divisions themselves become a major obstacle to resolution of the conflict. Processes developed by Bougainvilleans have been crucial foundations for all subsequent progress. This highlights the importance of the national government permitting room for such local involvement.

– Second, conditions which have encouraged the emergence of moderate leadership on both sides have been vital.

– Third, Bougainville demonstrates that a military stalemate offers opportunities for making progress in conflict resolution.

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– Fourth, changes of government offer opportunities as new leadership seeks to distance itself from past policies, or seeks to make political capital from progress in resolving the conflict.

– Fifth, neutral outsiders such as foreign governments can play useful roles in creating conditions amenable to negotiations.

– Sixth, there are both advantages and problems inherent in a conflict management approach that focuses on process rather than outcomes. The obvious advantage is that it creates opportunities for building trust and understanding between the parties and engaging them in a process, which they may have difficulty walking away from. The main problem is that at some point the question of outcomes must be addressed. If this is done too early, tensions between and pressures on the parties may be so great that the whole process will be aborted. One solution is to negotiate a process where the key issues are addressed at a later date. In Bougainville, that might be done by establishing a highly autonomous Bougainville government in which all Bougainville factions can participate, whilst postponing a decision on the question of independence.

– Seventh, there may be dangers in pressures for democratization of the conflict resolution process, through acts of self-determination or establishing of elected institutions. In situations where parties are deeply divided, such processes and institutions may themselves exacerbate tensions and conflict.

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4.3 Executive Type: Presidentialism versus Parliamentarism

There are essentially three options for constituting an executive government: one based on a parliamentary system, one based on a presidential system, and one based on some combination of the two (sometimes called semi-presidentialism). This section analyses the major competing arguments in favour of and against these three choices.

4.3.1 *Parliamentary systems: advantages and disadvantages*

4.3.2 *Presidentialism: advantages and disadvantages*

4.3.3 *Semi-presidentialism: advantages and disadvantages*

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With the possible exception of Switzerland, every established democracy in the world today uses either a presidential, parliamentary or semi-presidential system of government. Parliamentary systems are characterized by the legislature being the principal arena for both lawmaking and (via majority decisions) for executive power. Presidential systems are characterized by the separation of the executive and legislative branches, with executive authority residing outside the legislature, with the president and his or her cabinet. The simplest definition of the differences between the two approaches can thus be summed up by the degree of relative independence of the executive, with pure presidentialism being characterized by executive independence and pure parliamentarism by the mutual dependence and intertwining of a state's legislative and executive capacities.

For the issue of democracy and deep-rooted conflict, however, the key distinction between parliamentarism and presidentialism focuses on the distinction between, on the one hand, the range of parties and opinions that can be represented in the executive under a parliamentary system, in contrast to the unavoidably singular nature of authority represented by the office of the president. Although this comparison is often over-drawn-

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culture and history.*

– presidential executives can and often do have a range of political and ethnic identities represented in the cabinet, while parliamentary systems are often dominated by a single party alone – it remains central to the debate concerning the relative merits of presidentialism, parliamentarism and semi-presidentialism.

As with many institutional choices, the debate over the merits of parliamentary versus presidential approaches is not so much a question of which is *best*, but rather of the most appropriate choice for a given society, considering its particular social structure, political culture and history. It is essential, before any of the options are examined in any detail, for due consideration to be given to the specific factors that need to be addressed in the country. This may include issues such as the need for a strong government, the degree of trust between the parties, their ability to set aside their differences in the national interest, the levels of checks and balances required, the extent of the trauma that the society has undergone, the presence of dominant personalities and their democratic credentials in the political arena, the need for compromise, the necessity to think long-term as well as short-term, the need for flexibility and so on.

4.3.1 Parliamentary systems

In practice, the institutional choices made by most new democracies in the "second wave" of democracy following the World War Two has favoured parliamentary systems as being the best choice for fragile or divided new democracies. Much of the scholarly debate in favour of parliamentarism has focused less on the desirability of parliamentary government than on the inherent difficulties of presidentialism. The majority of the world's "established" democracies use parliamentary systems, while a disproportionately large number of democracies which have experienced authoritarian interludes – especially in Latin America and Asia – use or have used presidentialism. Because of this record, many observers have argued that it is parliamentarism itself that has proved to be a positive factor in consolidating democracy. Under this rationale, parliamentary government has been identified as having a number of moderating and inclusion-promoting features that have assisted nascent democracies.

Advantages

The efficacy of a parliament as a mechanism of democratic governance will be substantially influenced by the composition

4.3 Executive Type: Presidentialism versus Parliamentarism

of that parliament in terms of the number of political parties represented. Therefore, any discussion of the advantages of parliamentary systems must bear in mind that it is closely related to the type of electoral system used in the election of that parliament; this will determine aspects such as inclusivity, particularly in relation to ethnic groupings. Such advantages include:

Ability to facilitate the inclusion of all groups within the legislature and the executive. Because cabinets in parliamentary systems are usually drawn from members of the elected legislature, parliamentary government enables the inclusion of all political elements represented in the legislature, including minorities, in the executive. Cabinets comprising a coalition of several different parties are a typical feature of many well established parliamentary democracies. This means that participation in government is not the preserve of one group alone, but can be shared amongst many, or all, significant groups.

In societies deeply divided by significant ethnic or other cleavages, this principle of *inclusion* can be vital. This is why a number of democratic transitions in recent years (e.g., South Africa) have featured "grand coalition" or "unity" governments – i.e., executives in which all significant political parties are represented in cabinet and take part in executive decision-making. Such arrangements are often made mandatory on the basis of primary electoral support – for example, a constitution may state that all parties which receive a minimum percentage of the vote should be included in the grand coalition executive in proportion to their overall vote share, as in Fiji and transitional South Africa. Grand coalitions are also common in non-divided democracies at times of great stress – such as times of economic crisis or when a country is at war – where "governments of national unity" bring together major parties from all sides into the cabinet.

Flexibility and capacity to adapt to changing circumstances. Because parliamentary coalitions can be made and unmade to suit changing circumstances, and because governments in many parliamentary systems can change on the floor of the legislature without recourse to a general election, advocates of parliamentarism point to its flexibility and capacity to adapt to changing circumstances as a strong benefit. A discredited government can be dismissed from office by the parliament itself, for example, as occurred in Ecuador in 1994. In the same way, many parliamentary systems (e.g., the United Kingdom, Canada, Australia and many others) enable elections to be called at any time, rather

than be subject to the fixed terms common to presidentialism.

"Checks and balances". By making the executive dependent, at least in theory, upon the confidence of the legislature, parliamentary systems are said to foster greater accountability on the part of the government of the day towards the people's representatives. Proponents argue that this means that there is not only greater public control over the policy-making process, but also greater transparency in the way decisions are made. However, such arguments often fail to take account of the degree of party discipline in many parliaments, where the legislature acts more as a "rubber stamp" than a check upon the power of the executive.

Relative stability and continuity of new democracies that have adopted parliamentary systems. Of the many states that became independent in the three decades following the end of World War Two, *all* the countries which could claim to have maintained a continuously democratic record to the late 1980s were parliamentary systems. The statistics are illuminating: of the 93 new democracies that gained their independence between 1945 and 1979, all of the 15 countries which remained democratic throughout the 1980s were parliamentary rather than presidential systems, including some of the developing world's most successful democracies like India, Botswana, Trinidad and Tobago and Papua New Guinea. Conversely, all the new presidential democracies from this period suffered some form of democratic breakdown. Overall, parliamentary systems have a rate of survival over three times that of presidential systems.

Disadvantages

The major disadvantages of parliamentary systems include:

Tendency towards ponderous or immobile decision-making. The inclusiveness that typifies grand coalitions can easily turn into executive deadlocks caused by the inability of the various parties to agree on a coherent position on issues of disagreement. This was typified by the "immobilism" that affected Fourth Republic France and that was partly responsible for General de Gaulle's assumption of presidential power. Decision-making deadlock was in part responsible for the breakdown of power sharing under Cyprus's 1960 constitution. The latter period of the National Party's participation in South Africa's government of national unity in 1996 is a more recent example of the potential for such arrangements to result in deadlock and to then have the potential to undermine the very unity that they were intended to stimulate.

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Lack of accountability and discipline. Critics also argue that parliamentary systems are inherently less accountable than presidential ones, as responsibility for decisions is taken by the collective cabinet rather than a single figure. This is especially problematic when diverse coalitions form the executive, as it becomes increasingly difficult for electors to establish who is responsible for a particular decision and make a retrospective judgement as to the performance of the government.

Propensity towards weak or fragmented government. Some parliamentary systems are typified by shifting coalitions of different forces, rather than by disciplined parties. Under such circumstances, governments are often weak and unstable, leading to a lack of continuity and direction in public policy.

Survival of new parliamentary democracies may be attributable to other factors. Finally, the successful record of survival of parliamentary democracies cited above is mitigated by the fact that almost all the successful cases are former British colonies, with the majority being small island nations in the Caribbean and the South Pacific – a concentration which suggests that other factors apart from parliamentarism may be responsible for their democratic success.

An alternative critique of parliamentarism sees it as being as or more conducive to unadulterated majority-rule than even the purest forms of presidentialism. In reality, many parliamentary governments, particularly in new democracies, are *not* comprised of inclusive multi-party coalitions but rather by disciplined single parties. In divided societies, such parties can represent predominantly or exclusively one ethnic group. When placed in a parliamentary system, a 51 per cent majority of the seats in such cases can result in 100 per cent of the political power, as there are few or no ameliorating devices to restrain the power of the executive – hence the term "elective dictatorship" associated with some cases of single-party parliamentary rule. Moreover, and in direct contrast to the separation of powers that occurs under presidentialism, many parliaments *in practice* provide a very weak legislative check on governments because of the degree of party discipline – which means that a slim parliamentary majority can win every vote on every issue in the parliament. In such cases, parliamentary government can lead to almost complete winner-take-all results.

4.3.2 Presidentialism

Presidentialism has been a popular choice amongst many new democracies in the last decade. In fact, almost all the new demo-

cracies in Asia, Eastern Europe and Latin America in this period have chosen presidential systems as the basis of their new democracy. While the influence of the United States, the world's best known presidential system, is probably partly responsible for this trend, recent experience has also highlighted a number of advantages of presidentialism.

Advantages

A directly elected president is identifiable and accountable to voters to a high degree. The office of the president can be held directly accountable for decisions taken because, in contrast to parliamentary systems, the chief executive is directly chosen by popular vote. It is thus easier for the electorate to reward or retrospectively punish a president (by voting him or her out of office) than is the case with parliamentary systems.

Ability of a president to act as a unifying national figure, standing above the fray of sectarian disputes. A president enjoying broad public support can represent the nation to itself, becoming a symbol of moderation of the "middle ground" between rival political groupings. To play this role, however, it is essential that the rules used to elect the president are tailored so as to achieve this type of broad support, rather than enabling one ethnic or regional group to dominate (see section 4.4 on "Electoral Systems for Divided Societies" for further details).

Higher degree of choice. The fact that presidential systems typically give voters a dual choice – one vote for the president and one vote for the legislature – means that voters are usually presented with a considerably higher degree of choice under presidential systems.

Stability of the office and continuity in terms of public policy. Unlike parliamentary governments, which can shift and change completely without recourse to the electorate, the president and his or her administration normally remains relatively constant. In many presidential systems, the terms of office are rigidly fixed, which can give greater stability in office and predictability in policy-making than some parliamentary alternatives. This leads, in theory at least, to more efficient and decisive governance, making it attractive for those cases where governments change frequently because of weak parties or shifting parliamentary coalitions, or where hard political decisions, such as contentious economic reforms, need to be taken.

Disadvantages

Presidency captured by one political or ethnic group. The major disadvantage of presidentialism for divided societies is the

4.3 Executive Type: Presidentialism versus Parliamentarism

propensity of the office to be captured by one political or ethnic group. This can create particular difficulties for multi-ethnic societies. In such situations – which are common in societies attempting to make a transition to democracy from a period of deep-rooted conflict – the office of the president can become a highly majoritarian device, ensuring almost complete political power with often a limited plurality of the total vote. This is particularly the case where there are two or three main groups all struggling for power. In such a case, the president can easily be perceived as the representative of one group only, and consequently has limited incentive to appeal to the needs and votes of these other groups. Under such a scenario, the office of the president can become a symbol of ethnic domination or subjugation: exactly the type of in-group/out-group symbolism that deeply divided societies need to avoid at all costs.

No real checks on the executive. This becomes even more true when there is a direct concordance between the president's party and the majority party in parliament. In this case (typified for many years by Mexico) the parliament has almost no real checks on the executive and can become more of a glorified debating chamber than a legitimate house of review. This problem can be exacerbated by the fact that a president, unlike a parliamentary prime minister, can become virtually inviolable during his or her term of office, with no mechanism for dismissing unpopular incumbents. Salvador Allende's election as president of Chile in 1970, for example, gave him control of the executive with only 36 per cent of the vote, and in opposition to the centre and right-dominated legislature. Some analysts have argued that Chile's 1973 military coup can be traced back to the system that placed an unpopular president in a position of considerable long-term power. While impeachment of the president by the legislature is a device built into many presidential systems, it remains the case that the presidency is a much less flexible office than the major alternatives.

Empirically associated with democratic failure. In marked contrast to the relative success of parliamentary democracies established between 1945 and 1979, *none* of the presidential or semi-presidential systems established during this period were continuously democratic. Presidential democracies were also twice as likely as pure parliamentary democracies to experience a military coup: in the period 1973–1989, five parliamentary democracies experienced a military coup compared to 10 presidencies. At the time of writing, there are only four presidential

democracies that have enjoyed 30 years of continuous democracy: the United States, Costa Rica, Colombia and Venezuela. The shining example of the US apart, this is not an encouraging record of democratic stability.

4.3.3 Semi-presidentialism

A final executive type is what we call "semi-presidentialism"; that is, a situation in which a parliamentary system and prime minister, with some executive powers, is combined with a president who also has executive powers. The ministry is drawn from and subject to the confidence of the legislature. This is a relatively unusual model – found today in France, Portugal, Finland, Sri Lanka and one or two other countries – but has nonetheless been cited by some experts as being the most desirable executive formulation for fragile nascent democracies.

Advantages

Can combine advantages of presidentialism and parliamentarism. The appeal of the semi-presidential model is its ability to combine the benefits of a directly elected president with a prime minister who must command an absolute majority in the legislature. A move to semi-presidentialism has been recommended as a good "half way house" for some countries that want to combine the benefits of both models.

Mutual consensus requirement. Proponents of semi-presidentialism focus on the capacity of semi-presidentialism to increase the accountability and "identifiability" of the executive, while also building in a system of mutual checks and balances and the need for consensus between the two executive wings of government. This mutual consensus requirement can be a particular advantage for highly divided societies, as it requires a president to come to an agreement with the legislature on important issues, and thus to be a force for the "middle ground" rather than the extremes.

Disadvantages

Propensity for deadlock between and within the executive arms of government. Because a government's powers are effectively divided between the prime minister and the president – for example, foreign affairs powers being the preserve of the president while the prime minister and the cabinet decide domestic policy – a structural tension exists within the government as a whole. This can lead to deadlock and immobilism, particularly if, as has occurred in several semi-presidential systems, the

prime minister and the president come from opposing political parties. The benefits of compromise and moderation can degenerate into a stand-off. This is especially the case when the division of responsibility between the two offices is not always clear (e.g., foreign policy in the French system), and where the timing and sequencing of elections between the houses differs.

4.3.4 Conclusion

The competing claims concerning the benefits of parliamentary and presidential systems of government are confusing and sometimes even contradictory. However, it is possible to glean several trends and tendencies.

Compromise, moderation and inclusion are keys to democratic stability. Firstly, both sides of the debate argue that their preferred model is, under particular circumstances, the best option for inducing compromise, moderation and inclusion. It is clear, therefore, that these characteristics are seen as being the key to democratic stability in deeply divided societies.

Size and distribution of competing groups are important factors in deciding on executive type. Two variables would appear to be of particular importance when choosing an executive structure: the *size* and *distribution* of the competing groups within society. Presidencies may have difficulty being perceived as unifying offices where there are three or four roughly equally sized groups, but likewise parliaments themselves have sometimes been an instrument of majority domination in divided societies where one group forms an absolute majority of the population. When Sri Lanka changed from a parliamentary to a presidential system of government in 1978, it did so partly because there was seen to be a need for a unifying national figure who could represent both the dominant (80 per cent of total) Sinhalese population, but also the minority Tamils. They did this by designing the electoral system so that Tamils could still influence the choice of president. In Kenya, by contrast, President Daniel arap Moi is typically perceived as representing his own Kalinjini tribe against the majority Kikuyu tribe, despite a distribution requirement which prescribes that to be elected president, a candidate has to receive at least 25 per cent of the vote in at least five out of the eight provinces.

Much depends upon the way in which the various offices are elected. As with all of the mechanisms described in this chapter, the competing benefits of parliamentary and presidential models cannot be viewed in isolation. For example, the nature of the

electoral system is key, as are the different checks and balances that can be put in place to address specific fears and concerns. Many of the power-sharing virtues advocated by proponents of parliamentarism are premised on the assumption that minorities as well as majorities will be represented in the legislature, and that coalition governments rather than single-party rule will be the norm. For many countries, this means that a proportional electoral system is crucial to the success of parliamentary democracy as an agent of conflict management.

Similarly, a president's ability to encourage inter-ethnic moderation and compromise is often dependent upon electoral arrangements that offer clear incentives for compromise. Some scholars of ethnic conflict have argued that electoral arrangements which require some geographic distribution of the vote, or in which the second and third choices of voters are taken into account, offer the best models for investigation, as they encourage the elected president to become a pan-ethnic figure. By contrast, presidential or parliamentary elections held under a first-past-the-post system are more likely to produce outcomes in which the victor's support comes primarily from one geographic and/or ethnic region.

There is considerable room for flexibility and opportunity for innovation to maximize the advantages and disadvantages of each. It is worth remembering that all three classifications – parliamentarism, presidentialism and semi-presidentialism – are more ideal types than definitive models. There is considerable room for flexibility and opportunity for innovation to maximize the advantages and disadvantages of each. Some parliamentary countries such as South Africa, for example, call their prime minister a "President", thus maximizing the symbolic powers of the office while maintaining the structural advantages of a parliamentary system. Israel recently introduced a hybrid system in which the people nonetheless directly elect the parliamentary prime minister. Finland's semi-presidential system allows the president to share power with the prime minister on a nearly equal basis, but with specific responsibility for certain areas such as foreign policy. Creative constitutional engineering thus provides opportunities for maximizing desired characteristics while minimizing perceived disadvantages.

CONSTITUTING AN EXECUTIVE GOVERNMENT

Parliamentary system: The legislature is the principal arena for both lawmaking and (via majority decisions) for executive power.

Presidential system: The executive and legislative branches are separated, with executive authority residing outside the legislature with the president and his or her cabinet.

Semi-Presidential: Combines a parliamentary system featuring a prime minister who has some executive powers, with a president who also has executive powers.

	Parliamentary systems	Presidential systems	Semi-Presidential systems
Advantages	■ inclusiveness (can include all groups within the executive) ■ flexibility (parliamentary coalitions can change without recourse to elections) ■ checks and balances (executive is dependent on the confidence of the legislature) ■ empirically associated with democratic persistence	■ can be a unifying national figure ■ highly identifiable and accountable to voters ■ greater degree of choice for voters ■ stability and continuity of policy-making	■ can combine advantages of both presidentialism and parliamentarism ■ "mutual consensus" requirement
Disadvantages	■ possibility of executive deadlocks, stalemates and immobilism ■ problems of accountability as decisions are taken by the collective cabinet ■ lack of governing stability	■ centralization of authority in one person ■ inherently majoritarian and exclusive ■ empirically associated with democratic failure	■ dangers of deadlock between president and parliament ■ division of governing powers can be unclear

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Ben Reilly and
Andrew Reynolds

4.4 Electoral Systems for Divided Societies

The collective evidence from elections held in divided societies to date suggests that an appropriately crafted electoral system can help to nurture accommodative tendencies, but that the implementation of an inappropriate system can severely harm the process of conflict resolution and democratization in a plural state. In this section, we identify a number of instances where the electoral system itself appears to have encouraged accommodation, and those cases where it played a part in exaggerating the incentives for ethnic polarization.

4.4.1 *Introduction*

4.4.2 *Electoral systems and conflict management*

4.4.3 *Needs of transitional versus consolidated democracies*

| Box 8 | Electoral Systems Around the World (pp. 193–196) |

| Box 9 | Ideal Qualities of Electoral Institutions for Transitional and Consolidated Democracies (p. 202) |

| A Menu of Options 4 | Electoral System Choices for Divided Societies (p. 203) |

4.4.1 Introduction

An electoral system is one of the most important mechanisms for shaping political competition, because it is, to quote Giovanni Sartori, "the most specific manipulable instrument of politics" – that is, it can be purposely designed to achieve particular outcomes. It can reward particular types of behaviour and place constraints on others.

In translating the votes in a general election into seats in the legislature, the choice of electoral system can effectively determine who is elected and which party gains power. Even with exactly the same number of votes for parties, one system might lead to a coalition government and another to a single party

assuming majority control. An electoral system also has a major influence on the type of party system that develops: the *number* and *relative sizes* of political parties in parliament, and the internal cohesion and discipline of parties. For example, some systems may encourage factionalism where different wings of one party are constantly at odds with each other, while others might force parties to speak with one voice and suppress dissent. Different electoral systems may encourage or retard cross-party alliances. They can provide incentives for groups to be accommodatory or for parties to base themselves on hostile appeals to ethnicity or kinship ties. The choice of electoral system is therefore one of the most crucial institutional decisions for any post-conflict society.

An electoral system is designed to do three main jobs. First, it acts as the conduit through which the people can hold their elected representatives accountable. Second, it will translate the votes cast into seats won in a legislative chamber. The system may give more weight to proportionality between votes cast and seats won, or it may funnel the votes (however fragmented among parties) into a parliament which contains two large parties representing polarized views. Third, different electoral systems structure the boundaries of "acceptable" political discourse in different ways, and give incentives for those competing for power to couch their appeals to the electorate in distinct ways. In deeply divided societies, for example, particular electoral systems can reward candidates and parties who act in a co-operative, accommodatory manner to rival groups; or they can instead reward those who appeal only to their own ethnic group. However, the "spin" which an electoral system places on a wider political system depends on the specific divisions within any given society.

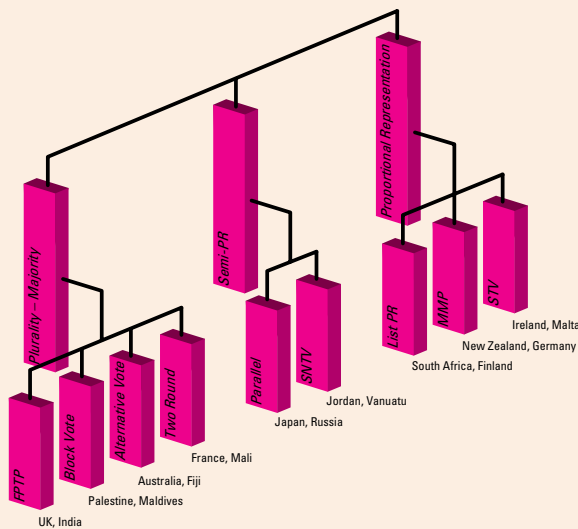### 4.4.2 *Electoral systems and conflict management*

The comparative experience suggests that four specific systems are particularly suitable for divided societies. These are usually recommended as part of overall constitutional engineering packages, in which the electoral system is one element. Some constitutional engineering packages emphasize inclusiveness and proportionality; others emphasize moderation and accommodation. The four major choices in this regard are (a) list proportional representation, (b) the alternative vote, (c) the single transferable vote, and (d) strategies which explicitly recognize the presence of communal groups.

4.4 Electoral Systems for Divided Societies

ELECTORAL SYSTEMS AROUND THE WORLD

There are countless electoral system variations, but essentially they can be split into nine main systems which fall into three broad families. The most common way to look at electoral systems is to group them by how closely they translate national votes won into parliamentary seats won; that is, how proportional they are. Most electoral system choices involve a trade-off: maximizing proportionality and inclusiveness of all opinions, or maximizing government efficiency via single-party governments and accountability. Figure One encapsulates the three main electoral system families of Plurality-Majority systems, Semi-Proportional systems and Proportional Representation systems.

Plurality – Majority

Semi-PR

Proportional Representation

FPTP

Block Vote

Alternative Vote

Two Round

Parallel

SNTV

List PR

MMP

STV

UK, India

Palestine, Maldives

Australia, Fiji

France, Mali

Japan, Russia

Jordan, Vanuatu

South Africa, Finland

New Zealand, Germany

Ireland, Malta

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Plurality-Majority Systems

These comprise two plurality systems, First Past the Post and the Block Vote, and two majority systems, the Alternative Vote and the Two-Round System.

1. **First Past the Post (FPTP)** is the world's most commonly used system. Contests are held in single-member districts, and the winner is the candidate with the most votes, but not necessarily an absolute majority of the votes. FPTP is supported primarily on the grounds of simplicity, and its tendency to produce representatives

beholden to defined geographic areas. Countries that use this system include the United Kingdom, the United States, India, Canada, and most countries that were once part of the British Empire.

2. The **Block Vote (BV)** is the application of FPTP in multi- rather than single-member districts. Voters have as many votes as there are seats to be filled, and the highest-polling candidates fill the positions regardless of the percentage of the vote they actually achieve. This system is used in some parts of Asia and the Middle East. A variation is the "Party Block", as used in Singapore and Mauritius: voters choose between parties rather than candidates, and the highest-polling party wins all seats in the district.

3. In the **Alternative Vote (AV)** system, electors rank the candidates in order of choice, marking a "1" for their favourite candidate, "2" for their second choice, "3" for their third choice, and so on. The system thus enables voters to express their preferences between candidates, rather than simply their first choice. If no candidate has over 50 per cent of first-preferences, lower order preference votes are transferred until a majority winner emerges. This system is used in Australia and some other South Pacific countries.

4. The **Two-Round System (TRS)** has two rounds of voting, often a week or a fortnight apart. The first round is the same as a normal FPTP election. If a candidate receives an absolute majority of the vote, then he or she is elected outright, with no need for a second ballot. If, however, no candidate has received an absolute majority, then a second round of voting is conducted, and the winner of this round is declared elected. This system is widely used in France, former French colonies, and some parts of the former Soviet Union.

Semi-Proportional Systems

Semi-PR systems translate votes cast into seats won in a way that falls somewhere in between the proportionality of PR systems and the majoritarianism of plurality-majority systems. The two Semi-PR systems are the Single Non-Transferable Vote (SNTV), and Parallel (or mixed) systems.

5. In **SNTV** systems, each elector has one vote but there are several seats in the district to be filled, and the candidates with the highest number of votes fill these positions. This means that in a four-member district, for example, one would on average need only just over 20 per cent of the vote to be elected. This system is used today only in Jordan and Vanuatu, but is most often associated with Japan, which used SNTV until 1993.

6. **Parallel systems** use both PR lists and single-member districts running side-by-side (hence the term parallel). Part of the parlia-

ment is elected by proportional representation, part by some type of plurality or majority method. Parallel systems have been widely adopted by new democracies in the 1990s, perhaps because, on the face of it, they appear to combine the benefits of PR lists with single-member district representation. However, depending upon the design of the system, Parallel systems can produce results as disproportional as plurality-majority ones.

Proportional Representation Systems

All Proportional Representation (PR) systems aim to reduce the disparity between a party's share of national votes and its share of parliamentary seats. For example, if a major party wins 40 per cent of the votes, it should also win around 40 per cent of the seats, and a minor party with 10 per cent of the votes should similarly gain 10 per cent of the seats. For many new democracies, particularly those that face deep divisions, the inclusion of all significant groups in the parliament can be an important condition for democratic consolidation. Outcomes based on consensus-building and power-sharing usually include a PR system.

Criticisms of PR are two-fold: that it gives rise to coalition governments, with disadvantages such as party system fragmentation and government instability; and that PR produces a weak linkage between a representative and her or his geographical electorate. And since voters are expected to vote for parties rather than individuals or groups of individuals, it is a difficult system to operate in societies that have embryonic or loose party structures.

7. **List PR systems** are the most common type of PR. Most forms of list PR are held in large, multi-member districts that maximize proportionality. List PR requires each party to present a list of candidates to the electorate. Electors vote for a party rather than a candidate; and parties receive seats in proportion to their overall share of the national vote. Winning candidates are taken from the lists in order of their respective position. This system is widely used in continental Europe, Latin America and southern Africa.

8. **Mixed Member Proportional** (MMP) systems, as used in Germany, New Zealand, Bolivia, Italy, Mexico, Venezuela, and Hungary, attempt to combine the positive attributes of both majoritarian and PR electoral systems. A proportion of the parliament (roughly half in the cases of Germany, New Zealand, Bolivia, and Venezuela) is elected by plurality-majority methods, usually from single-member districts, while the remainder is constituted by PR lists. The PR seats are used to compensate for any disproportionality produced by the district seat results. Single-member districts also ensure that voters have some geographical representation.

9. The **Single Transferable Vote (STV)** uses multi-member districts, where voters rank candidates in order of preference on the ballot paper in the same manner as Alternative Vote. After the total number of first-preference votes are tallied, a "quota" of votes is established, which a candidate must achieve to be elected. Any candidate who has more first preferences than the quota is immediately elected. If no-one has achieved the quota, the candidate with the lowest number of first preferences is eliminated, and their second preferences are redistributed among remaining candidates. And the surplus votes of elected candidates (i.e., those votes above the quota) are redistributed according to the second preferences on the ballot papers until all seats for the constituency are filled. This system is well established in Ireland and Malta.

List PR

List PR is an essential component of the constitutional engineering package known as *consociationalism.* Consociationalism entails a power-sharing agreement within government, brokered between clearly defined segments of society divided by ethnicity, religion and language. Consociational societies include Belgium, the Netherlands, Austria and Switzerland. The idea has four basic elements: (i) *grand coalition* (executive power sharing among the representatives of all significant groups); (ii) *segmental autonomy* (a high degree of internal autonomy for groups that wish to have it); (iii) *proportionality* (proportional representation and proportional allocation of civil service positions and public funds); and (iv) *mutual veto* (a minority veto on the most vital issues). These four basic elements ensure that government becomes an inclusive multi-ethnic coalition, unlike the adversarial nature of a Westminster winner-take-all democracy.

Proponents of consociationalism favour list PR because it: 1) delivers highly proportional election results; 2) is relatively invulnerable to gerrymandering; and 3) is simpler than many alternative systems for both voters and electoral officials and thus will be less open to suspicion. The successful use of list PR at South Africa's transitional 1994 elections is often cited as a good example of these qualities, and of the way list PR enables parties to place women or ethnic minorities in winnable places on their party list.

But there are also disadvantages. Because list PR relies on large, multi-member electoral districts, it breaks the geographical link between voters and their elected member. Geographically large multi-ethnic societies which have used list PR success-

4.4 Electoral Systems for Divided Societies

fully, such as South Africa and Indonesia, are now considering alternatives which would build in some geographic accountability via single-member electorates. Secondly, the wider argument for consociationalism rests on assumptions that may not always be viable in divided societies, such as the expectation that ethnic leaders will be more moderate than their supporters. Consociational structures may merely entrench ethnic politics, rather than work to encourage inter-ethnic alliances. So consociationalism may be a good strategy for deeply divided societies in *transition*, but less appropriate for promoting subsequent democratic *consolidation*.

The experience of list PR in post-Dayton Bosnia is a good example of how proportionality alone will not encourage accommodation. In Bosnia, groups are represented in parliament in proportion to their numbers in the community as a whole, but because parties can rely exclusively on the votes of members of their own community for their electoral success, there is little incentive for them to behave accommodatively on ethnic issues. In fact, the incentives work in the other direction. As it is easy to mobilize support by playing the "ethnic card", major parties in Bosnia have every incentive to emphasize ethnic issues and sectarian appeals. Bosnia's 1996 elections were effectively an ethnic census, with electors voting along ethnic lines and each of the major nationalist parties gaining support almost exclusively from their own ethnic group.

The Alternative Vote (AV)

An alternative approach to electoral system design is to choose a system which places less emphasis on proportional results but more emphasis on the need to force different groups to work together. The core of this approach is to offer electoral incentives to politicians to look for votes among other groups rather than just relying on supporters from their own group. The Alternative Vote (AV) enables voters to declare not only their first choice of candidate on a ballot, but also their second, third and subsequent choices amongst all candidates standing. This feature presents candidates with a strong incentive to try and attract the second preferences of voters from other groups (assuming that the voters' first preference will usually be a candidate from their own group), as winners need to gain an absolute majority of the vote under AV rules. Candidates who successfully "pool" their own first preferences and the second preferences of others will be more successful than those who fail to attract any second-order support. To suc-

ceed, candidates need to move to the centre on policy issues to attract floating voters, or to successfully accommodate "fringe" issues into their broader policy. There is a long history of both types of behaviour in Australian elections, the only established democracy to use AV, and in the ethnically fragmented state of Papua New Guinea, which has also used AV.

The more groups competing in a constituency, the more likely it is that meaningful "preference swapping" will take place. In many ethnically divided countries, however, members of the same ethnic group tend to cluster together, which means that the relatively small, single-member districts which are a feature of AV would, in these cases, result in constituencies which are ethnically uniform. Where a candidate is confident of achieving an absolute majority of first preferences due to the domination of his or her own ethnic group in an area, they need look no further to win the seat. This means that the "vote-pooling" between different ethnic groups which is a precondition for the accommodative influences of AV would not, in fact, occur. So AV works best either in cases of extreme ethnic fragmentation or, more commonly, where a few large ethnic groups are widely dispersed and intermixed. The use of AV-like systems for presidential elections in Sri Lanka and as part of the constitutional settlement in ethnically intermixed Fiji are both examples of this.

The Single Transferable Vote (STV)

STV stands as something of a mid-point between the use of list PR, which maximizes proportionality, and AV, which maximizes incentives for accommodation. Some scholars argue that under STV, the twin benefits of proportionality and accommodation can both be emphasized. As a PR system, STV produces largely proportional results, while its preferential ballot provides some incentives towards the vote-pooling approach outlined above, thus encouraging party appeals beyond defined ethnic boundaries. Segments of opinion can be represented proportionately in the legislature, but there is also an incentive for political elites to appeal to the members of other segments, given that second preferences are of prime importance.

STV has attracted many admirers, but its use for national parliamentary elections has been limited to a few cases – Ireland (since 1921), Malta (since 1947), the Australian Senate (since 1949), and at "one-off" elections in Estonia and Northern Ireland. As a mechanism for choosing representatives, STV is perhaps the most sophisticated of all electoral systems, allowing for

4.4 Electoral Systems for Divided Societies

choice between parties and between candidates within parties. The final results also retain a fair degree of proportionality, and since the multi-member districts are usually relatively small, the geographical link between voter and representative is retained. However, the system is often criticized because preference voting is unfamiliar in many societies, and demands a minimal degree of literacy and numeracy. STV counts are also quite complex, which can be a drawback. STV also carries the disadvantages of all parliaments elected by PR methods, such as under certain circumstances exaggerating the power of small minority parties.

The use of STV in divided societies to date has been somewhat limited and inconclusive. Two ethnically divided states have utilized STV in "one-off" national elections: Northern Ireland in 1973 and 1982, and Estonia in 1990. In both cases, little vote-pooling or accommodation on ethnic issues took place, and the elected parliaments exhibited little in the way of inter-ethnic accommodation. In contrast, however, STV has been used successfully in the Republic of Ireland and in Malta, maximizing both proportionality and, by using small multi-member electoral districts, an element of geographic accountability. STV was recently re-introduced to Northern Ireland as part of the Irish peace settlement (see Case Study), where it formed part of a wider prescription for power sharing between the Catholic and Protestant populations, and was successfully used there for the first post-settlement elections in 1998. Significant numbers of Catholics and Protestants used their preferences to transfer votes across group lines for the first time.

Explicit recognition of communal groups

A different approach to elections and conflict management is to explicitly recognize the overwhelming importance of group identity in the political process, and to mandate this in the electoral law so that ethnic representation, and the ratio of different ethnic groups in the parliament, is fixed. Four distinct approaches reflect this thinking:

Communal electoral rolls. The most straightforward way of explicitly recognizing the importance of ethnicity is a system of *communal representation.* Seats are not only divided on a communal basis, but the entire system of parliamentary representation is similarly based on communal considerations. This usually means that each defined "community" has its own electoral roll, and elects only members of its "own group" to parliament. Today, only Fiji (see Case Study) continues to use this system, and it remains as an optional choice for Maori voters in New

Zealand. Elsewhere communal systems were abandoned because communal electorates, while guaranteeing group representation, often had the perverse effect of undermining accommodation, as there were no incentives for political intermixing between communities. The issue of how to define a member of a particular group, and how to distribute electorates fairly between them, was also strewn with pitfalls.

Reserved seats for ethnic, linguistic or other minorities. An alternative approach is to *reserve* some parliamentary seats for identifiable ethnic or religious minorities. Many countries reserve a few seats for such groups: e.g., Jordan (Christians and Circassians), India (scheduled tribes and castes), Pakistan (non-Muslim minorities), Colombia ("black communities"), Croatia (Hungarian, Italian, Czech, Slovak, Ruthenian, Ukrainian, German and Austrian minorities), Slovenia (Hungarians and Italians), Taiwan (Aboriginal community), Western Samoa (non-indigenous minorities), Niger (Taurag), and the Palestinian Authority (Christians and Samaritans). But it is often argued that a better strategy is to design structures that nurture a representative parliament naturally, rather than to impose members who may be viewed as "token" parliamentarians with representation but no genuine influence. Quota seats can also breed resentment among the majority population and increase mistrust between minority groups.

Ethnically mandated lists under a block vote system. A third approach is to use *pre-determined ethnic lists* with the party block vote. Party block works like the standard block vote described earlier, except that electors vote for a party list of candidates rather than individuals. The party that wins most votes takes *all* the seats in the district, and its entire list of candidates is duly elected. Some countries use this system to ensure balanced ethnic representation, as it enables parties to present ethnically diverse lists of candidates for election. In Lebanon, for example, each party list must comprise a mix of candidates from different ethnic groups. Electors thus choose on the basis of criteria other than ethnicity. Singapore uses a similar system to increase the representation of its minority Malay and Indian community. But a critical flaw of the party block is the possibility of "super-majoritarian" results, where one party can win almost all of the seats with a simple majority of the votes. In the Singaporean elections of 1991, for example, a 61 per cent vote for the ruling People's Action Party gave it 95 per cent of all seats in parliament, while in 1982 and 1995 the Mauritian elections saw a parliament with no opposition at all. To counter this possibility, the

4.4 Electoral Systems for Divided Societies

Lebanese constitution pre-determines the ethnic composition of the entire parliament, and of key positions such as the president and the prime minister as well.

"Best loser" seats to balance ethnic representation in the legislature. A final mechanism sometimes used in conjunction with the party block vote is to assign seats to the "best loser" from a specified community. In Mauritius, for example, four "best loser" seats are allocated to the highest polling candidates of under-represented ethnic groups in order to balance ethnic representation. Recently, however, there has been a strong movement in favour of the abolition of such seats, which are seen as representing the last vestiges of communalism in Mauritian politics.

4.4.3 Needs of transitional and consolidated democracies

There is no perfect electoral system, and no "right" way to approach its design. But for all societies, not just divided ones, the major design criteria are sometimes in conflict with each other or even mutually exclusive. For example, increasing the number of seats in each district to increase proportionality will reduce geographic accountability between the electorate and the parliament. The electoral system designer must therefore go through a careful preliminary process of prioritizing which criteria are most important to their particular political context. For example, an ethnically divided state in Central Africa might want above all to avoid excluding minority ethnic groups from representation, in order to promote the legitimacy of the electoral process and avoid the perception that the electoral system was unfair. In contrast, while these issues would remain important, a fledgling democracy in a multi-ethnic state in Eastern Europe might have different priorities – e.g., to ensure that a government could efficiently enact legislation without fear of gridlock and that voters were able to remove discredited leaders if they so wished. Prioritizing among such competing criteria is the task of the domestic actors involved in the constitutional design process.

The respective needs of transitional versus consolidated democracies are often quite different. Put simply, the most important electoral requirement for democratic *transition* is usually a system that maximizes inclusiveness, is clearly fair to all parties, and presents minimal areas for potential pre-election conflicts (such as the drawing of electoral boundaries). These goals are best achieved by some form of regional or national list PR, which ideally leads to the election of a "grand" or "over-sized" coalition government. By contrast, democratic *consolidation* is more concerned with crafting a

system which is responsive to the needs of voters, is accountable in both geographic and policy terms, and which typically leads to a coalition or single-party government that the voters can "throw out" if they do not perform. Such goals are achieved by a system based, at least to some extent, upon geographically small electoral districts. Thus South Africa, which successfully conducted its transitional 1994 election using a national list PR system, may change to some form of constituency-based system after its next elections in 1999. The differences between the needs of transitional and consolidated democracies are represented below.

In divided societies, some or even all of these ideals may have to be considered secondary to the overriding need to encourage moderate, accommodative politics. There is a tension between systems that put a premium on *representation* of minority groups (list PR and ethnically defined lists) and those that try to emphasize minority *influence* (AV and STV). The best option, of course, is to have both: representation of all significant groups, but in such a way as to maximize their influence and involvement in the policy-making process. This is best achieved by building into the system devices to achieve proportionality and incentives for inter-ethnic accommodation. But these goals are not always

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Box 9

IDEAL QUALITIES OF ELECTORAL INSTITUTIONS FOR TRANSITIONAL AND CONSOLIDATED DEMOCRACIES

Transitional Democracy
– inclusive;
– simple for voters to understand;
– fairness in results (proportionality);
– minimize areas of conflict;
– simple to run;
– transparent;
– "grand" or "oversized" coalition governments.

Consolidated Democracy
– accountable;
– enables voters to express more sophisticated range of choice;
– ability to "throw the rascals out";
– responsive to electorate;
– promote sense of "ownership" of political process amongst voters;
– "minimal winning" coalitions or single-party governments.

ELECTORAL SYSTEM CHOICES FOR DIVIDED SOCIETIES

Electoral systems have been recognized as one of the most important institutional mechanisms for shaping the nature of political competition. Of the nine types of systems discussed, four are particularly suitable for divided societies. These four major choices are outlined below.

Type	List Proportional Representation (PR)	Alternative Vote (AV)	Single Transferable Vote (STV)	Communal rolls, Party Block vote
Description	Proportional representation elections that lead to an inclusive legislature which includes all significant groups. Under a full consociational package, each group is represented in cabinet in proportion to their electoral support, and minority interests are protected through segmental autonomy and mutual vetoes.	Majority system with in-built incentives for inter-ethnic party appeals. To maximize electoral prospects, parties need to cultivate the second preference votes from groups other than their own. There is a centripetal spin to the system where elites are encouraged to gravitate to the moderate multi ethnic centre. In ethnically mixed districts, majority threshold leads to strong incentives to gain support from other groups.	The electoral system delivers proportional results but also encourages politicians to appeal to the votes of members from other groups via secondary preferences. This can result in inclusive power sharing between all significant political forces, but also in incentives for politicians to reach out to other groups for preference support.	System explicitly recognizes communal groups to give them (relatively fixed) institutional representation. Competition for power between ethnic groups is defused because the ratio of ethnic groups is fixed in advance. Electors must therefore make their voting choice on the basis of criteria other than ethnicity.
Examples	Switzerland, the Netherlands, South Africa 1994	Papua New Guinea 1964–1975, Fiji 1997	Estonia 1990, Northern Ireland 1998	Lebanon, Singapore, Mauritius

mutually compatible. A second level of tension exists between those systems which rely on elite accommodation (especially list PR) and those which rely on the electorate at large for moderation (AV and, to a lesser extent, STV). Where elites are likely to be more moderate than the electorate, then list PR enables the major parties to include candidates from various groups on their ticket. Where the electorate is the major engine of moderation, then AV and other systems which encourage vote-pooling will result in the election of more moderate leaders and more accommodative policies. However, when neither group are likely to display moderation, then approaches which explicitly recognize the sources of conflict – such as reserved seats or ethnically mandated lists – may need to be considered, as this provides the best way of "defusing" ethnicity as an electoral issue.

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FIJI

Rotuma

Vanua Levu

Lomaloma island

Lautoka   Viti Levu   Levuka
Nandi

Suva

Kadavu island

PACIFIC OCEAN

Ben Reilly

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Fiji, a South Pacific island with a population of approximately 750,000, has been the site of one of the most comprehensive recent attempts at "constitutional engineering": inducing particular political outcomes by the design and structure of political institutions. Parliaments, executives, courts etc., can be purposely designed and structured to achieve particular outcomes. Electoral systems, for example, can enable minorities to be represented in parliament, or they can ensure domination by a single ethnic majority. And different types of incentives to gain votes can induce politicians to build support across all groups, or can encourage a narrow sectarian focus on one group alone. The story of the constitution review exercise conducted as part of Fiji's return to democracy represents a good example of this process in action.

The primary source of conflict in Fiji concerns relations between Fiji's indigenous population (a mixture of the Melanesian and Polynesian groups found throughout the South Pacific islands) and the Indian Fijian community (mostly the descendants of indentured labourers who came from India to Fiji to work on sugar plantations in the 19th century under British colonialism). While other groups such as Chinese and Europeans are also present, Fiji's primary ethnic cleavage runs between "Indo-Fijian" (i.e., Indian) and indigenous (i.e., Melanesian and Polynesian) communities. The two communities maintain a high degree of separation in all spheres of public and private life. They speak different languages, practice different religions, work in different occupations, join different social groups, play different sports, and have very little day-to-day contact. Inter-marriage between the two groups, one of the best indicators of communal relations, is almost unheard of. Fiji is thus a classic plural society where, in the words of Joseph Furnivall, "different sections of the same community … mix but do not combine".

Fijian society and politics have long been characterized by an uneasy coexistence between these two communities, with Indo-Fijians predominating in certain key areas of the economy (particularly the sugar-cane industry) and indigenous Fijians owning 90 per cent of the land but holding limited economic power. While the population ratios of the two groups are fairly similar (50 per cent indigenous Fijian, 44 per cent Indian on latest figures), there is very limited informal social or economic interaction between the two communities. Each group is also internally divided. The mostly Hindu Indian community has a sizeable (15 per cent) Muslim minority and a number of sub-identities, often based on their family roots in India. The indigenous Fijian population have retained significant and sometimes divisive elements from both original Melanesian and Polynesian social structures.

Following independence from Britain in 1970, Fiji appeared to make a relatively successful attempt at consolidating a new multi-ethnic democracy. But after the elec-

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tion of a government seen by the indigenous Fijian-dominated military as being overly close to the Indo-Fijian community, Fiji experienced two ethnically motivated military coups in the late 1980s. The coup leader, Major-General Sitiveni Rabuka, later justified the coups as necessary to prevent the bloodshed that would have resulted from outraged expressions of Fijian nationalism had the elected government continued in office. In 1990 a new, ethnically biased constitution enshrined a racial weighting in favour of the indigenous Fijian population, both in terms of civil rights and political representation. Through a new electoral system based completely on communal representation of ethnic groups (i.e., a separate electoral roll for Fijians, Indians and "general electors"), political competition between the groups was kept entirely distinct. These arrangements had their origin in the pre-coup electoral system, which was also based on communalism but where there was an additional proportion of "national" seats featuring open competition on a non-racial basis. Under the 1990 constitution the racial weighting under-represented the Indo-Fijian community, and reserved certain offices such as the prime ministership for indigenous Fijians. This, combined with the separate electoral roll for Fijian, Indian and other groups rendered true inter-ethnic political competition virtually impossible. Indigenous Fijians were guaranteed a majority in parliament, which thus turned into a classic in-group and out-group legislature: ethnic Fijians formed the government, while Indians and others formed the opposition.

In 1994, following economic difficulties, international condemnation (including expulsion from the Commonwealth of Nations) and high levels of emigration by the Indian community, the government established a Constitution Review Commission (CRC) to examine the constitution and recommend a more appropriate form of representation. The Commission's 1996 report, *The Fiji Islands: Towards a United Future*, recommended an entirely new non-racial constitution. It would combine strong constitutional guarantees of human rights (such as a Bill of Rights and a Human Rights Commission) with an innovative package of electoral arrangements designed to encourage the development of multi-ethnic politics in Fiji. The Commission recommended that Fiji move "gradually but decisively" away from communal representation in the direction of an open and non-racial electoral system.

The Commission thus viewed the electoral system as the most powerful tool for influencing the nature of Fijian politics. Political parties in many ethnically divided societies tend to be based around particular ethnic groups, and the Commission's stated objective was "to find ways of encouraging all, or a sufficient number, of them to come together for the purpose of governing the country in a way that gives all communities an opportunity to take part". The Commission carefully assessed and evaluated each of the major electoral systems against a set of specified criteria: the capacity to encourage multi-ethnic government; a recognition of the importance of political parties; the incentives presented for moderation and co-operation across ethnic lines; and effective representation of constituents.

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To maximize these requirements, the CRC recommended an Alternative Vote system. By making politicians from one group reliant on votes from the other group, the Alternative Vote could, the CRC argued, encourage a degree of "preference swapping" between the two, which could help to encourage accommodation between (and within) the deeply divided communities. Candidates who adopted moderate positions on ethnic issues and attempted to represent the "middle ground" would, under this logic, be more electorally successful than extremists, moving Fijian politics towards a more centralist, multi-racial competition for power. The CRC also argued that list Proportional Representation (list PR) would give too much power to party bosses and, because of the need for large national or regional districts, would fail to provide the necessary links between a voter and his or her member of parliament. Under PR systems, they argued, ethnic parties could expect to be represented in the legislature in proportion to their numbers in the community irrespective of whether they were inclined towards moderation or not. Hence PR, when combined with communal seats, offered "few incentives to parties to become more multi-ethnic in their composition or more willing to take account of the interests of all communities".

The ultimate success or failure of these measures in Fiji, however, is heavily dependent on the demographic distribution of ethnic groups and the way in which electoral boundaries are drawn. Rural Fiji has high territorial segregation, and the outer islands are almost entirely indigenous Fijian, so vote-pooling there will have to take place on issues other than ethnic ones, if it takes place at all. The situation on the main island and in urban centres is more mixed. The smallness of the island and the highly inter-mixed nature of many urban areas mean that electoral boundaries can be drawn so as to create districts which have reasonably mixed populations. If the makeup of these electorates are sufficiently diverse to enable genuine trading of preferences between groups, then the new system could well promote meaningful accommodation across cleavages, "the object being to force political parties to appeal for votes for their candidates from communities other than the one in which they are based". The issue of constituency boundaries and the demographic make-up of electorates are thus likely to be major points of contention as the electoral reforms are implemented.

But the 1997 constitution, as enacted, rejected some of the CRC's recommendations. Most importantly, the parliament did not make the recommended move away from communalism, and two thirds of all seats in the new 70-seat parliament will continue to be elected on a communal basis, leaving only one third of seats in which genuinely inter-ethnic competition will take place. The proportions of communal seats are set at 23 for indigenous Fijians, 19 for Indo-Fijians, one for Rotumans (a separate indigenous group from the outlying island of Rotuma) and three for "others". The remaining 25 seats will be allocated from an open electoral roll. A concern to make the system workable resulted in a choice of electoral system

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based on small single-member electoral districts, rather than the recommended larger multi-member districts. This meant that to achieve the type of "preference swapping" between different communities envisaged by the Commission, these small districts will have to be ethnically mixed – a difficult proposition. Finally, the new constitution adds mandated power sharing to the "integrative" electoral arrangements by providing that all parties who achieve at least 10 per cent of the vote must be represented in the cabinet in proportion to their vote share.

If the electoral system works as intended it should result in the election of a pool of moderate candidates dependent on the support of both political communities for their electoral survival, and thus a degree of accommodation between supporters of rival groups "on the ground" at the local level. But even if this does not occur, the mandated grand coalition cabinet provided by the constitution should ensure that both communities have to work together at the elite level at least. This double-dose of accommodation-inducing mechanisms means that there are a number of safety measures built into the new dispensation: if one should fail, backup measures are there to ensure at least a modicum of power sharing at another level.

Another aspect of the Constitution Review Commission, which may serve as a model for others, is the way in which the review process was actually conducted. The three-member Commission comprised representatives of both the Fijian and Indian communities, but was headed by a non-Fijian, former New Zealand governor-general Sir Paul Reeves, himself a highly respected representative of New Zealand's own indigenous (Maori) community. The Commission was thus structured to encourage both communities to have faith in its ability to arrive at a judicious outcome. The Commission also toured Fiji extensively, holding meetings and public hearings across the country. And they held extensive consultations internationally, holding public discussions with experts in Australia, Malaysia, Mauritius, South Africa, Great Britain and the United States. With the assistance of the UN Electoral Assistance Division, they commissioned papers from scholars on different aspects of democracy in divided societies, and met most of the major academic figures in the field. The Commission's inquiries were thus amongst the most comprehensive and well-planned of any recent exercise in constitutional engineering. The significance of process is thus a key lesson from the Fijian experience. By taking evidence as widely as possible and examining at first hand the experience of other multi-ethnic societies (e.g., Mauritius), the review process ensured that the final report could legitimately claim to be a comprehensive document.

The CRC report was widely seen as balanced and innovative. Moreover, the Commission was structured in such a way as to encourage acceptance of its outcome amongst the majority of both communities. It appealed to the middle ground. This was reflected in the response of parliament, which accepted most of the report *in toto* (bar the exceptions above) and tried to translate the recommendations into a new constitution. Opposition to the report's recommendations came from the more

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extreme elements of both communities. Nonetheless, the leadership and members of the major parties from both communities supported the new constitution. In late 1997, following the passage of the new constitution, the major parties formed a power-sharing government of national unity, with the leader of the 1987 coup, Sitiveni Rabuka, as Prime Minister and erstwhile leader of the Opposition, Jai Ram Reddy, invited to become Deputy Prime Minister. This itself represented a major breakthrough, which was as much a reaction to the co-operative spirit engendered by the constitution-making exercise, as it was to the provisions of the document itself.

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David M. Olson

4.5 Legislatures for Post-Conflict Societies

*In a democratic political system, the legislature is the
authoritative institution for the expression and resolution of
policy conflict. Its authority is derived from its representative
function in the state and its constitutional status as the
supreme law-enacting body, and expressed not only through
its constitutional status, but also via its composition and
internal procedures and organization. In this section, we
consider those features of legislatures that affect post-conflict
societies.*

4.5.1 *Introduction*

4.5.2 *Elections and members*

4.5.3 *Internal features: committees, floor, procedures,
leadership, staff and facilities*

4.5.4 *Sources of power*

4.5.5 *One or two chambers?*

4.5.6 *Conclusion*

4.5.1 Introduction

In addition to its lawmaking function, the legislature acts as
the main representative body of the state, reflecting society's
divergent opinions at the political level. Legislatures are thus
capable of expressing and resolving a wide variety of conflicts
within society. The structure and procedural rules of a legisla-
ture, as well as the electoral basis of its membership, reward the
ability to both express and resolve conflict. Legislatures create
the conditions for the emergence of co-operative antagonists.
Though they disagree on public policy, they must agree on
structure and rules to provide the basis for the expression of
their conflicts. Those same rules and structures make it possible
to find compromise solutions to their problems, and thus devel-
op the necessary skills to find solutions to other, more weighty,
conflicts.

The means by which conflicts are expressed within a legisla-
ture are also the means by which conflicts are resolved. Most leg-

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islatures are comprised of members of political parties representing particular electoral districts or geographic areas; yet few areas or electoral districts are homogeneous on all types of issues, and neither are political parties. Each forces a degree of compromise among its supporters on a wide range of issues. Each also becomes the means by which compromises are forged on those issues which divide them. The search for agreement and compromise is thus a defining feature of legislatures, both in terms of their composition and in their internal structure and procedures.

The terms "legislature" and "parliament" may be used interchangeably. About half of the world's parliaments are *unicameral* (having just one chamber); about half are *bicameral* (having two chambers), though usually one is more active and important than the other. Bicameral systems have a main chamber (House of Commons, House of Representatives, Chamber of Deputies, etc.,) and a secondary chamber (the "upper" chamber, Senate, and so on). In almost all cases the "lower" chamber is more important than the "upper" one.

The term "parliament" originated in Britain, where a "parliamentary system of government" means that the chief executive (prime minister) is selected and removed by parliament. Bodies that follow the British practice are sometimes termed "Westminster" model parliaments. The European continental parliaments, though selecting chief executives in the same manner, have developed distinctive internal practices and structures. The US Congress, both in its separateness from the president and in its internal characteristics, is a distinct type by itself. Many new nations, and newly democratized ones, incorporate selected features from these existing models into their new constitutions and legislatures.

In newly independent and in older authoritarian countries, one of the pervasive conflicts is often between the executive and the legislature. The executive, often drawn from powerful families or with military support, can dominate the political system, leaving political parties fragile and legislatures ineffective.

As countries become less authoritarian, or as new democratic systems are instituted, the legislatures have become more free to act, but are often handicapped by inadequate human and material resources as well as by the practices of the past. This "opportunities-resources gap" has been noted in many post-communist democracies, as well as in such Asian countries as the Philippi-

The search for agreement and compromise is a defining feature of legislatures, both in terms of their composition and in their internal structure and procedures.

nes and South Korea, and in African nations including Ghana and now South Africa.

4.5.2 Elections and members

Democratic legislatures are directly selected through competitive elections held at intervals, usually not exceeding five years.

The most direct means of expression of social conflict in legislatures is through the elected membership. In most cases, the members tend to reflect population attributes of ethnicity, religion, social status and economic function. In traditional societies, members of legislatures often come from elite families with large land holdings. New types of members, as societies change, tend to be educated persons from urban industrial and commercial occupations.

One measure of the social success of minority groups is their ability to run for and be elected to legislative membership. It took many years in Europe for deputies from religious minorities to be admitted to parliaments, for example. In contemporary society, the number of women members in parliament is often viewed as a similar indicator of inclusiveness.

In some societies, there can be some difficulty in finding parliamentary members with sufficient educational and professional skills to be capable legislators. This problem is doubly critical for representatives of minority population groups or groups newly incorporated in to the political system. In post-communist democracies, and in countries in transition in Africa, there has been a shortage of skilled and experienced members for their newly energized parliaments.

Members of parliament have many options in their attitudes toward their representational responsibilities. While some may consider themselves as direct spokespeople for an issue or a population group, others may consider the whole district, or the whole nation, as more their proper responsibility as elected representatives. As political parties nominate candidates or as individuals propose themselves for parliamentary elections, one immediate question concerns the socio-economic attributes of the candidates. Does each candidate match an essential element of the electorate as measured by ethnicity, religion, gender, occupation, place of residence, and also age?

4.5.3 Internal features

The procedures through which debate is conducted and legislation passed are essential elements of the legislative process.

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The most formal location of decisions is in plenary session, "on the floor". Legislative committees, however, are also an important forum within which policy conflict is both expressed and managed.

Committees

The mechanism of committees is a major method by which legislatures consider issues. The number of committees usually ranges from 10 to 25 in any one legislature.

Proposed legislation is considered in committee before final voting on the floor. Typically, many topics considered by committees are ultimately resolved through compromises among many, if not all, parties. Any original proposal, even if offered by the government, is subject to amendment within the committees.

Generally, committees are formed to address specific topical subjects, and to parallel the structure of the government's ministries. In Westminster systems, however, many committees are formed temporarily for the consideration of a single bill, although in recent decades permanent committees have become a more established feature of such parliaments (e.g., Australia). South Africa has similarly modified its Westminster model to now include 27 "portfolio" committees to parallel the ministries. Committees have also been revised and strengthened recently in South Korea and Mongolia. In the latter parliament, the number of committees was increased, and public hearings have been held.

Committees not only consider proposed legislation, they also can review the budget and examine the conduct of ministers. These opportunities for review of policy-related action, in addition to law enactment, permit members to raise issues that concern specific constituencies, issue orientations, and population subgroups. The small size of a committee and the absence of news reporting permit members to reach compromises across party lines more often than is expressed in floor debate. The structure and composition of committees is therefore crucial to parties and to governments, for committees can become one of the main organizational locations in which government and opposition parties negotiate compromises.

Committees are additional means of representation beyond the party system. Topical committees can attract members whose constituencies are particularly affected by the committee's subject matter. For example, deputies from rural districts tend

to become members of the legislature's committee on agriculture. Deputies may also express their training and personal interests through committee membership; for example, foreign policy committees tend to attract members who have a personal aptitude for international affairs, while committees on education and on justice tend to attract members with a background in teaching or the law, respectively. Not all members, however, are familiar with or even interested in the topics of their committees. In such cases, attendance may become a problem; in both Poland and South Korea, for example, committee absenteeism has been noted. A related problem is that parties can change their members on a committee, depending upon the specific topic at the moment.

The majority party or government coalition may be reluctant to share power in the committees with other and smaller parties. In most parliaments, committee chairs are distributed among all parties. In others, committee leadership is controlled exclusively by the majority, as for example in Romania, where the government parties hold the bulk of memberships of important committees.

Many different types of working groups can be developed within and across the formal and main committees. Some legislatures, such as Poland, form an ad hoc working group for each separate bill, which may include members from several different committees. Special problems are sometimes examined through the formation of a special purpose committee, the temporary character of which might extend from one week to several years.

Floor

When the whole legislature is assembled in plenary session, "on the floor", it is in its most authoritative but also most partisan form. The legislature makes decisions as a whole body through various forms of voting.

The arrangement of seats on the floor is usually in one of two patterns. In the Westminster model, two banks of seats face each other, typifying the adversarial arrangement of government and opposition. In the European continental model, the chamber is arranged as a semi-circle, symbolizing gradations of difference among many parties.

Although the dramatic moments of legislative conflict usually occur on the floor, and although the mass media usually concentrate on conflictual floor debate and votes, members will of-

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ten spend more time, and make more substantive progress, in committees.

Procedures

Rules define both the structure of committees and the procedures by which legislation is proposed and decided. The definition of committee jurisdiction, the right to offer amendments, and the sequence of floor debate, are all decided through rules of procedure.

Rules are very important: they prescribe and define the relationship between a majority and a minority. Rules permit the majority to act within defined procedures and thus within defined limits. Rules permit the minority to attempt to thwart or change action, but also within defined procedures and limits.

Rules typically are stated in general and inclusive terms, so that all types of motions and all types of controversies can be handled in similar ways. The great advantage of stable rules of procedure is that all members can know and work within the same framework of action. Rule stability brings predictability to proceedings, permitting members to negotiate across the issues and identities that divide them.

Many legislatures have experimented with rules to encourage the formation of consensus prior to the adoption of crucial legislation. Legislation to change the constitution, for example, frequently requires either extra-large majorities, or lengthened procedures, or both, prior to final adoption. These special procedures attempt to develop a broad consensus before final decisions are accepted.

Both structure and rules evolve over time. Within a competitive political party system, the likelihood increases that the party(ies) currently in the majority will become the minority in the next election, and vice versa. As each party experiences the circumstances of both government and opposition – majority and minority status – over a series of elections, they can learn through experience the value of stable and fair rules, and of efficient working structures within legislatures.

Leadership

A single presiding officer (the "Speaker", "President", "Talman", "Marshall", etc.) typically heads a legislature and oversees the rules and procedures. One or more central governing bodies will assist the presiding officer in creating the committee structure, in assigning bills to committees, in setting the legislative schedule,

and in resolving disputes over both schedules and procedures. The composition of the legislature's officials and governing bodies has implications for representation. They are usually composed of party leaders. In addition, population groups and issue orientations within society would also seek to have sympathetic members on these governing committees. They can do so, however, only through political parties within the legislature.

Staff and Facilities

A parliament requires full time professional support staff to function with both efficiency and expertise. A staff is required for the clerical functions of recording debates and votes on the floor. Committees and parties require staff to arrange their working papers.

In addition to the clerical functions, a professional staff is required by active legislatures that seek to know enough about policy problems and government actions to make effective decisions. Such staff can be allocated to individual members, to committees, to parties, or can be organized and managed centrally. For example, the US Congress mainly allocates staff to individual members and to committees, while the Westminster model has developed a centrally managed staff, and the continental European parliaments also provide staff to their parliamentary parties.

The development of a trained and politically neutral staff depends upon, among other things, the willingness of dominant political parties and even executives to retain the same legislative staff each time power shifts among the parties or executive coalitions. In Nicaragua, for example, the shift in power in 1993 led to the dismissal of and also job changes for many of the legislative staff members. Staff remaining from prior authoritarian political regimes presents a related problem.

Though parliamentary chambers are often constructed for ornate display and ceremonial functions, the whole legislative building is a work site. The chamber itself requires adequate seating, lighting, ventilation, sound systems, and secretarial facilities. Each committee needs its own meeting room, and adjacent office space for its specialized clerical and professional staff. Eating facilities and informal space are essential for members who may meet long into the night following a full working day. Because members often travel long distances from home to parliament, some parliaments provide hotels. Most parliaments also have a library which itself can become a large complex set of

rooms and facilities. Office buildings are needed, and must be located within easy walking distance of the main chamber.

As publicly visible institutions, legislatures are sometimes criticized for their cost. Whether or not a building is itself ornate, however, the more important consideration is that an efficient workplace is costly, and a competent policy analysis staff is also expensive. One essential element in the development of an active legislature is the provision of in-service training for people – both as members and as staff. Beyond financial cost, however, lies a broader issue. Post-dictatorship legislatures sometimes retain the secretive practices of the past, so that information about the legislature is made available to neither the public nor to the legislative members themselves. If some countries have "high information" parliaments, such as Britain, Sweden and Lithuania, others have "low information" parliaments, of which Moldova is but one example.

4.5.4 Sources of power: executives and political parties

Executives

Legislative autonomy varies with the parliament's relationship to the chief executive. Directly elected presidents can be a source of external constraint upon parliaments in a presidential system. In theory, a parliamentary system permits direct parliamentary selection and removal of the chief executive (prime minister, premier). In practice, however, disciplined political parties in many countries have curtailed this doctrine of "parliamentary supremacy". A majority party as in Britain, or majority coalition as in Germany, can expect parliament to adopt government legislation and to not raise embarrassing topics for investigation and complaint. The "rule of 80" applies in many parliaments: 80 per cent of all bills are from the government, and 80 per cent of government bills are adopted. Nonetheless, increasing fragmentation of the party system, in countries like India, Papua New Guinea and other well established democracies in the developing world, has seen parliaments re-assert their authority in recent years.

Typically, executives define the agenda of legislatures. More opposition to executive proposals may be expressed and acted upon in committee than on the floor. Cross-party alliances more easily develop in committee, while partisan views, both for and against the government, tend to be directly expressed on the floor.

The actual relationship between executive and legislature varies greatly. In authoritarian systems, executives dominate the legislature. In many others, the dominant party in the legislature is the agent of the executive. At the other extreme, illustrated by Scandinavian countries, the government is often a minority within its own parliament, and yet it governs effectively through issue-oriented temporary majorities and the striking of strategic alliances.

In between the British model of government ministers remaining as parliamentary members, and the American model of separation of powers, the European continental parliaments require ministers to resign their parliamentary seats, but also provide that they may attend and participate in parliamentary debates. Special seating arrangements both provide for and symbolize their distinctive office apart from, but intimate connection to, the parliament.

Political parties

Political parties are vital to legislatures in at least three respects: 1) organization and conduct of elections; 2) connection of executive to the legislature; and 3) internal management of the legislature. Through all three activities, parties and their leaders occupy a dual role: on the one hand, they define and express conflicts, while on the other, they seek ways to build majority consent to resolve those conflicts.

The leadership offices and committees of a legislature are filled through party negotiation. It is the parties and their leaders who decide the allocation of committee seats, and each party selects its own members to fill those seats. Parliamentary party leaders tend to treat each other as formal equals, with the result that small parties can participate in the collective structure and practices of decisions affecting the legislature as a whole body. The smaller the party, however, the less strength it possesses in a body in which the vote is the instrument by which decisions are made and power is allocated. Small parties may also suffer a shortage of members who have the time and expertise to sit on all committees and to monitor all proposed legislation.

4.5.5 One or two chambers?

Party dominance of legislatures often leads a country to create a second chamber with the intention of providing supplementary perspectives on public policy. Some are ineffective, e.g., the Canadian Senate, while others are very powerful, such as the

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Australian, American and Romanian upper chambers. Some are limited to a temporary veto function (e.g., the British House of Lords and the Polish Senate) where the upper chamber's rejection of a bill can be reversed by a second vote in the lower chamber. A few upper chambers are functional in composition, such as the Slovenian second chamber based on occupations, while some provide for special population subgroup membership – such as traditional chiefs in Fiji. Although federations all have a separate chamber of parliament formed by state or provincial electorates, their actual importance varies greatly, as illustrated by the varying powers of the Canadian and Australian Senates.

Because the lower chamber is directly elected, it is almost always the more active and politically powerful body in comparison to the other or second chamber. When joined with federalism, a second chamber presents regional majorities with the opportunity for direct representation in a country-wide parliament, even though they are themselves part of a national minority. Nigeria, as a federation during its Second Republic, is an example. So appropriate design of second chambers, like the choice of electoral system, can diversify opportunities for representation and sharing of power. Yet the results are not always predictable. In post-communist democracies such as Poland, for example, the Senate has a very different district and electoral system than the more active chamber, and yet the result in party shares of seats is about the same. In Romania, with similar district and election systems, the party results are similar, and yet the make-up of the two chambers is very different.

Two separate legislative chambers can create difficulties in basic organizational and procedural matters, as illustrated by both Chile and Argentina as new post-military democracies. The two chambers, when controlled by different party majorities, also hold very different views about the organization and functions of their separate professional staff offices. Resulting delays and mutual recriminations may lessen the sense of legitimacy of the whole institution.

Most of the extra features obtained through a second chamber can also be structured into a single chamber through the electoral and district system. In the single chamber of Hungary, for example, members are elected from three different sets of overlapping constituencies. The German Bundestag, likewise, has two sets of members elected from very different types of districts and using two different election systems. The main consi-

deration in designing two separate chambers is that the two sets of districts and election systems be calibrated to compliment one another. Nevertheless, neither the party nor policy consequences are clearly predictable in advance of application and experimentation in practice.

4.5.6 Conclusion

Legislatures as instruments of representation and conflict resolution present two major dilemmas, each of which is a combination of opportunity and challenge. First, a legislature's structure as a bicameral or unicameral institution features a dynamic tension between the electoral system for, and the powers of, the chamber(s). Second, legislatures face the daunting task of defining neutral rules of procedure and decision-making, and then of applying those rules evenly among all parties over a series of elections and terms during which the composition of majorities and minorities often change.

No one design for a legislature will work under all circumstances. In a democracy, the legislature, the executive, and the party system act as interdependent parts of the larger political system. The actions and characteristics of the others condition what each can do. The essential condition is that each element fit in some working relationship with the others.

There are examples of countries falling apart, such as Czechoslovakia, or turning to military rule, such as Nigeria, when the legislatures are unable to fulfil their tasks or are overwhelmed by outside events. In some instances, the lack of a stable majority in parliament has directly led to either military government or the institution of a strong executive, of which the current French Fifth Republic is an example. There are also many examples of legislatures that have instituted major reforms in their societies and also in themselves. The formerly aristocratic parliaments of Europe gradually introduced democracy. The formerly all-male legislatures of Europe and the United States adopted female suffrage. Parliaments elected under conditions of religious or ethnic exclusion gradually introduced religious toleration and abolished racial segregation. These reforms, unlike many of the failures noted above, have occurred slowly. The most dramatic examples of major shifts of political power in the 1990s include the former communist states, South Africa, and Mexico. In each case, bargaining replaced domination as the relationship among

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parties and between government and parliament, while the legislature itself was revitalized and reorganized.

The greatest restraint upon the propensity for a majority to exercise its power arbitrarily is the prospect of becoming a minority in the next election. The greatest restraint upon the propensity of the minority to unilaterally obstruct legislative action is the hope of becoming the majority in the next election. Some prospect of alternation in power is thus a basic precondition for the evolution and institutionalization of a functioning legislature.
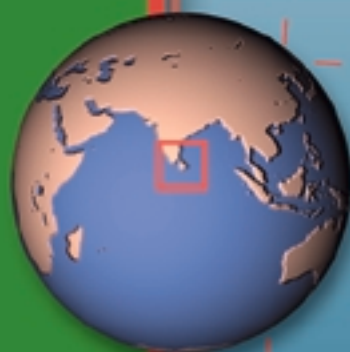
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INDIA

Tamil Nadu

Pudukkottai

Nagappattinam

Karaikkudi

Palk Strait

Point Pedro

Jaffna

Ramaad

Palk Bay

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Gulf of
Mannar

Mannar

Mullaittivu

Mankulam

Northern

Trincomalee

Anuradhapura

North Central

Puttalam

Galaya

Maho

Batticaloa

North Western

Kurunegala

Eastern

Matale

Negombo

Kalmunai

Kandy

Colombo

Central

Badulla

Moratuwa

Pattuvil

Opanake

Southern

Hambantota

Gale

Matara

INDIAN OCEAN

K. M. de Silva

Case Study: Sri Lanka

SRI LANKA

Sri Lanka was often referred to as a "model" colony in the early years after independence from Britain (1948 to the mid-1950s), since the national political leadership opted for a negotiated transfer of power, in contrast to the agitation in India. Indeed, the leadership deliberately chose to follow the constitutional evolution of the "settlement" colonies of Canada, Australia and New Zealand into independent statehood.

A decade of peaceful consolidation of power by the United National Party (UNP) governments of 1947 to 1956 was followed by several decades of conflict. Sri Lanka's descent to political instability came in three stages, beginning with the period mid-1955 to 1961 when two sets of communal riots broke out against the background of a unilateral change in language policy. After a period of quiescence in the mid- and late 1960s there was a second phase of confrontation and violence, culminating in the riots of 1977. Six years of relative quiet followed until the outbreak of anti-Tamil riots in 1983. Thereafter, ethnic violence has been a regular feature.

The conflicts in Sri Lanka illustrate the operation of some of the most combustible factors in ethnic relations: language, religion, long historical memories of tensions and conflict, and a prolonged separatist agitation. Sri Lanka's recent political experience also provides a case study in the internationalization of ethnic conflict. Internationalization of Sri Lanka's ethnic conflict has two aspects: Indian intervention, and the growth of a Tamil *diaspora* community – the direct consequence of the current ethnic conflict. In addition, the Sri Lankan experience illustrates the important point that minorities seeking redress of grievances, and guarantees of protection of their identities, are not always agents of democratic change or liberalism.

The current conflict is much more complex than a straightforward confrontation between a once well-entrenched minority – the Sri Lanka Tamils – and a now powerful but still insecure majority – the Sinhalese. These two groups constitute the principal, but not the only, players. They have two conflicting perceptions. Most Sinhalese believe that the Tamil minority has enjoyed a privileged position and that the balance must shift in favour of the Sinhalese majority. The Tamils for their part claim that they are now a harassed minority, victims of frequent acts of communal violence and calculated acts and policies of discrimination. Most Tamil fears and insecurity stem from the belief that they have lost the advantageous position they enjoyed under British rule in many sectors of public life in the country; in brief, a classic case of a sense of relative deprivation.

Major Issues and Efforts at Management

Despite the tensions and violence that have been a feature of life in post-independence Sri Lanka, there also has been an irrepressible strand of pragmatism,

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which eventually helped in moderating the outcome of many of the contentious issues. For instance, religious strife between Buddhists and Christians (especially Roman Catholics), one of the most divisive factors in Sri Lankan public life for 80 years, has ceased to be a contentious issue in politics since the early 1970s. Indeed, religious tensions are only of very limited significance in the current conflict.

Another example is the settlement reached on the status of immigrant Indian Tamils. The problem of the political status and voting rights of immigrant Indian communities overseas came to the fore, first in Sri Lanka, and as early as 1928–1931. Accommodation reached between 1964 and 1974 – on the number of Indians to whom Sri Lankan citizenship would be granted – and further elaboration of this policy between 1977 and 1988, constituted a major political accomplishment considering the passions and fears that this question had aroused since the late 1920s.

The accommodation reached after the violence associated with the introduction of language policy reform in 1956 is even more significant. Initiatives between 1958 and 1978 all but conceded parity of status to the Tamil language with Sinhala. Explicit parity of status of the two languages came in 1987–1988 as part of a political settlement brokered by the Indian Government. The political benefits, however, have proved elusive.

Employment

The bitterness underlying the controversies on employment is explained in part by the conflict between Tamils' traditional anxiety to maintain the employment levels in the state services they had grown accustomed to under British rule, and the attempts of Sinhalese to insist on what they regard as their legitimate share. The economic resources of the Northern Province, the principal area of Tamil settlement in the island, are severely limited. In the late 19th century it was evident that the increasing population of the region could not be accommodated in the traditional land-based occupations. The Tamils turned to the state's bureaucracy and the professions for employment. By the early 1900s, Tamils had become singularly dependent on government service; precisely because they had no deep roots in the island's plantation economy or trade, they sought to defend their dominant position in the public service all the more zealously – a reflection of the limited opportunities for employment available to them on the Jaffna peninsula. This made them exceptionally vulnerable and sensitive to changes in language policy, to educational reform before independence, and to changes in the mechanisms for admission to tertiary education in the 1970s.

After independence, competition for posts in the public service increased, especially with the rapid expansion of educational opportunities in Sinhalese areas. This greatly reduced traditional Tamil prospects of government employment. Over the next 25 years the Sinhalese would overtake them in almost every sector of state employment and in the professions. For a while they retained their advantageous

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position in some professions – medicine, law and engineering – but lost this by the early 1980s. This represented the intellectual capital of the past – carefully gathered, protected and augmented – but, in their eyes, not expanding rapidly enough to overcome what they saw as the disadvantages of the new policy changes; policies which would adversely affect the next generation of Tamils. Today the number of Tamils in *all* grades of state employment has declined to 10 per cent or less, a third or fourth of what it was in the early 1940s.

Education

Changes in university admissions policy have contributed substantially to the sharp deterioration of ethnic relations in Sri Lanka in the last two decades, and to radicalizing the politics of Tamil areas in the north and east. The crux of the problem was that the Tamils, who constitute about an eighth of the total population, had for years a dominant position in the science-based university faculties. In 1970, the United Front coalition introduced a system of standardization of marks by language for the university entrance examination. This placed Tamil students at a disadvantage in that they had to obtain higher aggregate marks to enter the university, in the medical, science and engineering faculties, than the Sinhalese. Thereafter, a district quota system was also introduced which gave an advantage to students in rural areas and underdeveloped communities. All this represented a departure from the traditional practice of selecting students on the basis of an open competitive examination. The Tamils saw this policy as deliberately discriminatory.

In the late 1970s and early 1980s the newly elected UNP Government changed this policy, and moved towards a more equitable admissions system, as well as affirmative action policies for rural areas (for Sinhalese, Tamil and Muslim alike). Nevertheless, memories of the unilateral and discriminatory change in university policy of the early 1970s remain fresh in the minds of Tamils, despite the substantial expansion of university places in medicine and engineering since 1979 for students from all sections of the population. The Tamils' share of places in the engineering and medical faculties has varied from 35 per cent to 25 per cent since 1978–1979, to around 15 per cent in more recent years.

This system has now developed powerful vested interests, which resist all attempts to return to a merit-based system. The most vocal supporters of the system are the Muslims and the Indian Tamils, with the Tamils of the Eastern Province and from parts of the Northern Province (outside the Jaffna peninsula) being joined by Sinhalese from more rural parts of the country. The most recent (1994–1995) development is that Tamils from the Jaffna peninsula, hitherto the most vocal critics of the system, joined in asking for the status of a disadvantaged district for Jaffna itself. They succeeded in securing this advantage.

Land distribution

Next, there is the accommodation reached on one of the Tamil's long-standing grievances, the distribution of state-owned land among landless peasants. Tamil

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politicians have generally claimed that the Sri Lankan state has used state-owned land as a means of changing the demographic pattern in what they call the "Traditional Homelands of the Tamils", primarily state-owned land in the Eastern Province. A formula for the distribution of state land was devised in 1984, after long negotiation between representatives of the Sri Lankan government and Tamil politicians led by the Tamil United Liberation Front (TULF): state-owned land on major irrigation schemes would be distributed on a quota system which reflected accurately the population profile of the island, with the Sinhalese getting 74 per cent and the Tamils, Muslims and Indians 12 per cent, six to seven per cent and five per cent respectively. The Tamils were permitted to use their island-wide quota in any area they chose, and naturally it was assumed that they would concentrate their quota in the Eastern and Northern Provinces. On minor irrigation schemes, the distribution of state land would reflect the demographic pattern of the district or province in which the scheme was based.

The wide support this formula received from almost all parties to the dispute, including the TULF, reflected a recognition, implicit more than explicit, that inevitably the Sinhalese, more than others, would benefit because they are the largest number of landless peasants.

The Politics of Devolution

Finally, we turn to the most intractable problem of all – devolution. Differences of opinion over devolution have proved to be more difficult to resolve than any other issue; this, despite the great deal that has been achieved between 1980 and 1987 in establishing a second tier of government (a major political achievement given the failure of previous attempts in 1957–1958 and 1965–1968). Politicians are caught between the Sinhalese electorate's deep-rooted suspicions about the political consequences of devolving more power to the provinces, and the Tamils' insistence on transferring greater power to the provinces or regions at the expense of the central government. Tamil demands range from the creation of a large Tamil-dominated North-Eastern Province, to the establishment of a federal political structure with a weak centre and more powerful provinces or regions. This is quite apart from the Liberation Tigers of Tamil Eelam's (LTTE) insistence on a separate state as a non-negotiable demand.

Devolution has proved to be an insuperable obstacle to practical political management because it touches on some of the most durable fears, suspicions and prejudices that divide the country. The resistance to transferring greater power to the provinces in Sri Lanka springs from such fears. The proximity of the Jaffna region in northern Sri Lanka to Tamil Nadu in southern India, formerly a reservoir of Tamil separatist sentiment in India (and a region that has encouraged, nurtured and protected Tamil separatist groups from Sri Lanka) presents one major concern. Devolution of power to provincial councils is suspect, even when it has been intro-

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duced, because of fears that it could spur separatist pressures in the north and east of the island. Large sections of the Sinhalese view the Tamils' pressure for devolution of power as the first step in an inevitable progression to separation of the Tamil majority areas of the country from the Sri Lankan polity. Historical memories contribute greatly to the disquiet and apprehensions the Sinhalese feel about South India, especially the perception of South India as the single most powerful and persistent threat confronting Sri Lanka and the Sinhalese.

Those in the forefront of the Tamils' agitation for devolution of power have always been vague, deliberately or unconsciously, in the terminology used in their arguments. The close links that were established in more recent times between Tamil political groups ranging from the TULF to various separatist groups, with the government and opposition in the southern Indian state of Tamil Nadu, have naturally aggravated the situation; the establishment of training camps in Tamil Nadu for separatist activists making forays into the northern and eastern coastal regions of Sri Lanka has further exacerbated this. The result is that decentralization which was, and should be, a purely Sri Lankan matter has taken on a cross-national dimension; India's role as mediator in the political negotiations between the Sri Lanka Government and representatives of Tamil opinion in the 1980s is the most conspicuous feature of this dynamic.

Pressure for decentralization of administration is limited to the Tamils, and largely to the Tamils living in the north and east of the island, where they are either a majority or form a substantial minority. There is no pressure from other ethnic groups; indeed, there is strong opposition to it. The demographic profile of the Eastern Province, where the Tamils are a minority (40 per cent of the population) remains a critical stumbling block in the long drawn out negotiations on the creation of a province or region amalgamating the Northern Province with parts or the whole of the Eastern Province. The LTTE will accept nothing short of a separate Tamil state. The deadlock over this issue continues to the present day. A section of Muslims, led by the Sri Lanka Muslim Congress, has reacted to this by urging the creation of a separate administrative unit in the Eastern Province in which the Muslims would constitute a majority. A more elaborate version of this demand calls for a Muslim province with its main base in the Eastern Province, but with enclaves or sub-units elsewhere such as in the Mannar district of the Northern Province.

One of the unfortunate consequences of concentrating attention on district and provincial units, and on supra-provincial units, has been the neglect of one of the less controversial and more viable forms of decentralization – local government institutions at the municipal and urban council levels and village council levels. The three principal municipalities, Colombo, Kandy and Galle, were established in 1865–1866, while the origins of smaller urban and town councils and village councils date back to the early 20th century. The last comprehensive examination of local

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government institutions and its problems took place as early as 1954–1955. Thereafter, largely because of the agitation of Tamil parties for the creation of district and provincial councils, the focus has been almost exclusively on the second tier of government.

The decision of the 1980 Presidential Commission on development councils to abolish village councils and transfer their functions to local level units of the District Development Councils and to informal (i.e., theoretically non-political) village organizations, did not yield any of the anticipated benefits. That decision was based on a mixture of political considerations and a misplaced idealism. The TULF, who argued in favour, hoped to strengthen the district councils, and to bring all other local government institutions under the supervision of district councils. Others argued that the administrative costs of running these village councils had increased to the point where little money was left for development programmes. In addition there was the belief that informal but popular village bodies could cut across party alignments and bring people of the village together for common development projects; in other words, that they would serve as means of de-politicizing the village between national and district council elections. It soon became clear that the mechanisms and informal institutions substituted for village councils did not provide either the administrative efficiency or the anticipated responsiveness to local needs. Village councils were re-established in 1988–1989 and the first elections were held in 1991. Nevertheless there has been no systematic attempt to examine the financial viability of village and urban councils, or the power, functions and resources of municipalities. While Sri Lanka has avoided the worst features of South Asian urbanization so far, its continued ability to do so will depend very much on the effective functioning of its local government institutions, especially its municipalities.

The External Factor

India has had three roles in Sri Lanka's ethnic conflict. The first, which was intensified with Indira Gandhi's return to power in 1980, was that of a covert supporter of Sri Lankan Tamil political activists operating in India. This covert support continued until 1987. Second, the Tamil Nadu factor forms an important facet of India's complex role in Sri Lankan affairs. Seldom has a constituent unit (a province or a state) of one country influenced the relationship between it and a neighbouring country with such intensity. The India-Tamil Nadu-Sri Lanka relationship is thus unique in international affairs. Admittedly India's own role is more complex than merely reacting to the pressures of domestic policies in Tamil Nadu. Nevertheless, concerns about the latter have been an important consideration. Tamil Nadu governments have provided Sri Lankan Tamil separatist activists with sanctuaries, training and bases. The Indian central Government was involved in this, and also tolerated the provision of training facilities and the existence of camps and bases in other parts of the country. These actions started with Indira Gandhi in the early 1980s, well before the riots of July 1983 in Sri Lanka.

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India's third role – that of mediator – began under Mrs Gandhi as a calculated political response to the anti-Tamil riots of July 1983 in Sri Lanka; the policy was continued under Rajiv Gandhi. India's policy shifted from mediator to active participant in late 1987 and continued until the mid-1990s. That too is almost unique in the history of mediation in ethnic conflict: never before, or very rarely indeed, has a mediator taken on the role of combatant, and waged a war against sections of a minority, for which it was a presumed guardian, and in a neighbouring state at that.

Indian intervention began with giving aid to one or other of the Tamil separatist groups. This assistance was given, in part, to sustain the struggle to the point of compelling or persuading the Sri Lanka Government to alter its strategy, and to negotiate a settlement under Indian auspices. Second, in 1987 the Indian Government sought to resolve the conflict itself, by acting as a mediator, applying sanctions to one, some or all parties to the conflict, and underwriting a settlement. In the process the Indians became a common enemy to all or some of the warring factions. The Indian intervention reveals how the consequences of the internationalization of an ethnic conflict are not necessarily those that the affected parties generally anticipate; indeed, the intervention was not advantageous to the presumed beneficiaries. On the contrary, internationalization actually prolonged the conflict and made many of the parties to the conflict more intractable. Again, when large regional or global powers enter a domestic ethnic dispute playing the role of sponsors and suppliers, the interests of the external contenders may supersede the original issues in the conflict.

The hard lesson that emerges from India's mediation and interventionist role in Sri Lanka's ethnic conflict is that most outside powers have less to offer by way of example from their own political system and political experience than they think they do. To be drawn into an ethnic conflict in a neighbouring state is the worst mistake that a regional power can make, as Israel and Syria have learned in Lebanon. The reluctance of the Sri Lankan Government to consider, much less accept, another episode of external mediation stems from the pronounced failure of Indian mediation, and the heavy political costs it inflicted on Sri Lanka's democratic system.

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4.6 Human Rights Instruments

Democratic procedures and values provide the means to deal sensibly and fairly with civil conflicts. But for democracy to serve as the framework for the peaceful coexistence of communities, it has to be defined in both procedural and substantive terms. Herein lies the importance of legal and constitutional norms, elaborated in recent years for the purpose of defining and protecting rights.

4.6.1 Introduction

Many of today's most pressing issues – human rights, self-determination, nationalism, international security and co-operation – are all connected with identity and ethnicity. In trying to formulate policies to deal with such issues, one particular difficulty is that religious or ethnic claims and identities are not always negative. Indeed, concession to some of these claims may help to allay minority fears and give them a sense of security. Furthermore, religious and ethnic affiliations may be important to the psychic and moral well-being of communities, which it would be wrong to deny. Thus a balance needs to be struck between the problems that ethnic, religious and national loyalties can cause and the difficulties that can result from their obstruction. Striking this balance presents one of the fundamental challenges of our time: the reconceptualization of the state to accommodate a diversity of cultures, religion, languages and groups.

Sometimes the difficulty in agreeing on a policy arises from a disagreement on values. Tensions frequently exist between those

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who espouse individual claims and preferences, and those who support religious and ethnic principles. For example, the acceptance of group rights, which frequently helps to resolve some claims, is problematic with respect to individual rights. In several Commonwealth countries, such problems have arisen in an acute form. The position women occupy under group (customary) law is often subordinate to that of men: they suffer discrimination with respect to the care and custody of children, marriage laws, division of labour, or entitlement to property or inheritance (as in India, South Africa, Canada, and many other states that recognize personal or customary law). Difficulties can also arise in the relations between members and non-members of groups that are given special treatment (as in Quebec). Even when a clear and effective policy can be discerned, a small dissident group intent on preventing or upsetting a settlement may frustrate implementation. A prime illustration is the persistent opposition to, or frustration of, a settlement in Sri Lanka by extremist groups within the Tamils and Sinhalese communities.

The relationship of such conflicts to democracy is often complex. Democratic ideas of self-determination have promoted quests by various communities within a state to emphasize their differences from other groups in order to establish their claim as a separate "people". Crude claims of majoritarianism have led to the oppression of minorities, leading to the suppression of their rights and their alienation from the state. There is no doubt, however, that democratic procedures and values also provide the means to deal sensibly and fairly with conflicts. But democracy can only provide a useful framework for the negotiation and settlement of conflict if it is defined in both procedural and substantive terms. This is why legal and constitutional norms that define and protect rights are so important. Based on principles of fairness, social justice and good practice, they provide a substantive framework for the operation of democracy and place a limit on the power of the majority.

The entitlement to democracy itself is now a principle that underlies norms that provide the framework for addressing ethnic and other conflicts. The principle of self-determination, recognized in the UN Charter as the basis of decolonization, was extended to "all peoples" in two covenants in 1966 – the *International Covenant on Civil and Political Rights* (hereafter ICCPR) and the *International Covenant on Economic, Social and Cultural Rights.* Together with the *Universal Declaration of Human Rights* these form the International Bill of Rights.

Legal and constitutional norms that define and protect rights provide a substantive framework for the operation of democracy and place a limit on the power of the majority.

> *The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*
>
> *Everyone has a right to take part in the government of his country, directly or through freely chosen representatives.*
>
> Universal Declaration of Human Rights, Article 21

International norms have developed through both the elaboration of these general human rights norms as well as the enunciation of specific instruments dealing with minorities, groups or anti-discrimination. Below we outline some of the major instruments that have been formulated to define and protect human rights.

4.6.2 Instruments dealing with religious and ethnic persecution

The first major instrument to deal with religious and ethnic bigotry and persecution was the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), which intended to "liberate mankind from such an odious scourge". It declared genocide a crime under international law (Art. I). Genocide may be punished in the courts of the state where the offence was committed or by an international penal tribunal.

> *Genocide: acts committed with a view to "destroy, in whole or in part, a national, ethnical, racial or religious group as such: (a) killing members of a group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent birth within that group; or (e) forcibly transferring children of the group to another group".*
>
> Article II

Another instrument that penalizes, under international law, conduct directed against an ethnic group is the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973).

> *Apartheid: the establishment and maintaining of "domination by one racial group of persons over any other racial group of persons and systematically oppressing them" by: (a) denial to*

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> *members of the second group right to life and liberty of person (including murder or other forms of inhuman treatment); (b) deliberate imposition on a racial group of living conditions calculated to cause their physical destruction; (c) deny to the group rights to participate in the political, social, economic and cultural life of the country, and restrictions on work, trade union activities, movement, freedom of expression, etc; (d) the division of the population along racial lines, including the prohibition of mixed marriages; (e) exploitation of the labour of one group, in particular through forced labour; and persecution of groups and individuals who oppose apartheid.*
>
> Article II

Such offences may be tried by the courts of any signatory state that may acquire jurisdiction over the accused or by an international penal tribunal (Art. V).

These two conventions are supplemented by the more general concept of crimes against humanity as part of customary international law (which constitute, among other things, the jurisdiction of the Yugoslavia and Rwanda war crimes tribunals). These instruments and rules essentially aim at prohibiting extreme forms of persecution, but they have not been particularly successful. Furthermore, they do not provide any positive rights to minorities. Indeed, the development of international law has been marked by significant ambivalence regarding the positive obligations of states with respect to persons or communities belonging to minority language, religious or ethnic groups. There has been reluctance, on the one hand, to recognize these communities as such, preferring to refer to the rights of *persons* belonging to such communities (which may not be sufficient to accommodate all the needs of the community). On the other hand, there has been a reluctance to impose any positive obligations on the state to protect the interests of these communities; rather it is considered sufficient that there should be a general prohibition of discrimination against them, an attitude typified by Article 27 of the ICCPR:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities should not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*
>
> ICCPR, Article 27

4.6.3 Specific instruments to protect minorities

All UN and regional instruments on rights proclaim the equality of all persons, regardless, *inter alia*, of race or religion; prohibit discrimination in the enjoyment of rights and freedoms; and guarantee the freedom of religion and conscience. The horrendous persecution on the basis of religion or ethnicity has changed perspectives somewhat, as has a growing concern, particularly in the west, with identity politics.

This change in perspective is reflected in several developments. First, the UN Committee on Human Rights has begun to give a more "positive" orientation to Article 27 of the ICCPR. It now holds the view that, in some instances, the state must take positive steps to ensure the effective enjoyment of rights guaranteed in the article. Also, it is prepared to hold, that, in some cases at least, the identity of a community can only be preserved by the recognition of what may be called the collective rights of the community (see its General Comment on Article 27 (1994)).

Second, realizing that negative obligations on the state to protect minorities were not sufficient in all instances, the international community formulated specific instruments for minorities. One of the earliest of these was the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), which condemns racial discrimination of any kind which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Art. 1). Signatory states condemn all propaganda and all organizations that are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. States have to take "immediate and positive steps" to eradicate all incitement to, or acts of, such discrimination (Art. 4). The state not only has to ensure that its own laws and practices comply with this obligation, but also that it does not sponsor, defend or support racial discrimination by any persons or organizations (Art. 2 (a) and (b)). It includes the positive duty on states to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division (Art. 2(e)).

In 1981, the General Assembly adopted the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.*

4.6 Human Rights Instruments

> *Religion or belief, for any one who professes either, is one of the fundamental elements in his conception of life and that freedom of religion should be fully respected and guaranteed.*
>
> Preamble

The expression "freedom of religion or conscience" is given a broad meaning to encompass worship and the right to assemble for purpose of worship; to establish and maintain appropriate charitable or humanitarian institutions; publications; instructions in belief; and to establish contact with individuals and institutions in matters of religion or belief at the national and international levels (Art. 6). The Declaration prohibits discrimination on the grounds of religion, any infringement of the right to religion or conscience, or coercion, which would impair a person's freedom to have a religion or belief (Art. 1). It requires that parents bring up children "in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of belief and belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men" (Art. 5(3)). The Declaration makes clear that the duty of the state is not merely the negative one to prevent discrimination, but that the state also has a positive obligation to ensure conditions in which tolerance can flourish.

The UNESCO *Convention against Discrimination in Education* (1960) not only prohibits discrimination in access to education on grounds of *inter alia* race or religion, but also requires signatory states to direct education to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; and to the promotion of understanding, tolerance and friendship among all nations, racial or religious groups (Art. 5(1)(a)). It also requires states to permit members of minorities to have their own schools and, under certain circumstances, education in their own language (Art. 5 (1)(c)).

4.6.4 Protecting women's rights

An instrument of particular significance is the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW, 1979). Although not directly concerned with discrimination or persecution on religious or racial grounds, its norms establish standards for the treatment of women (particularly, but not only, in equality with men) which have profound effects on religious dogma and practice. Women are guaranteed equal rights with men:

*The "recognition, enjoyment or exercise by women, irrespective of
their marital status, on a basis of equality of men and women,
of human rights and fundamental freedoms in the political,
economic, social, cultural, civil or any other field."*

Article 1

States have undertaken, *inter alia*, to refrain from engaging in
any act or practice of discrimination against women and to en-
sure that all public authorities and institutions act in conformity
with this obligation (Art. 2(d)). States have to take all appropri-
ate measures to modify the social and cultural patterns of con-
duct of men and women, with a view to achieving the elimina-
tion of prejudices and customary and other practices which are
based on the idea of the inferiority or the superiority of either
of the sexes or on the stereotyped roles for men and women
(Art. 5(a)). Women must be guaranteed the same legal capacity
as men (Art. 15). Women must also be granted the right freely
to choose a spouse and to enter into marriage only with their
free and full consent, and equal rights in marriage (Art. 16).

4.6.5 Recent initiatives

Attempts have been made in recent years to give some over-
arching unity or coherence to these developments for the pro-
tection of minorities, of which two are noteworthy. The more ge-
neral of the two is the *Declaration on the Rights of Persons Belonging
to National or Ethnic, Religious and Linguistic Minorities*, adopted by
the UN General Assembly in 1992. In the Preamble, the General
Assembly states that the "promotion and protection of persons
belonging to national or ethnic, religious and linguistic minori-
ties contribute to the political and social stability of states in
which they live". The Declaration requires that minorities be al-
lowed full participation in public affairs. There is a special em-
phasis on the rights of minorities to practice and develop their
culture. For example, states are required to take "measures in
the field of education, in order to encourage knowledge of the
history, traditions, language and culture of minorities" (Art. 4).

*States shall "protect the existence and the national or ethnic,
cultural and religious identity of minorities within their
respective territories, and shall encourage conditions for the
promotion of that identity" .*

Article 1

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> *States are required to "take appropriate measures so that, whenever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue".*
>
> Article 3

The other major initiative is the protection of the rights of indigenous peoples. A convention for the protection of indigenous peoples was adopted as early as 1959 under the auspices of the ILO. However, with the growing consciousness and cultural pride among indigenous peoples, the 1959 convention began to be resented for its patronizing and assimilationalist approach. Consequently a new ILO instrument, the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* was adopted in 1991. The principal objective is to ensure equal rights for indigenous peoples with the rest of the population of the country. However this equality is to be achieved "in a manner compatible with their aspirations and way of life" (Art. 2). Throughout there is an emphasis on the preservation and integrity of their culture and way of life. The participation of indigenous peoples in decisions that affect them is another principal theme. These objectives flow from recognition of the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind.

Of regional instruments, the most significant is the *Framework Convention for the Protection of National Minorities of the Council of Europe* (1994). It is based on assumptions that: (a) "upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace"; (b) "a pluralistic and genuinely democratic society should not only respect the ethnic, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity"; (c) "the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment of each society"; and (d) protection of minorities forms an integral part of the international protection of human rights, and thus of international co-operation.

Its substantive provisions emphasize the guarantee of individual rights as well as collective rights; equality, including special measures if necessary; culture and identity, prohibiting forcible

assimilation; promotion of cultural understandings and toler-
ance, particularly in education, media and culture; civil and po-
litical rights, including rights to establish institutions and associ-
ations; media for freedom of expression; the right to use minor-
ity languages; education about minority cultures; and the right
of minorities to establish contacts with kin groups in other sta-
tes. Also, it provides for the regional supervision of these provi-
sions in member states.

4.6.6 Conclusion

These developments toward the recognition of group rights
and the rights of the community are to be welcomed. They pro-
vide both a framework for negotiations to end conflicts as well as
some solutions for such conflicts. They also suggest ways in
which the state could be restructured. But as easy solutions can
be sought in the recognition of group rights, especially when
there is international mediation, it is equally important to realize
that most of these instruments place a primary value on human
rights. Human rights emphasize our commonality and our
solidarity. Solutions that are based excessively on groups and
their own sense of propriety tend to fragment people. They also
tend to place in danger the rights of certain sections of persons
within the group itself (such as women and children), as well as
the rights of persons outside the group. Such denials of rights
can be a further cause of conflict. The balance between hu-
man/individual rights and group rights needs to be established
with great care and with full regard to human dignity and soli-
darity.

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4.7 Language Policy for Multi-Ethnic Societies

The 20th century has been marked by innumerable ethnic conflicts based on the quest for native language rights. As with other issues of ethnicity, language diversity cannot simply be ignored. Indeed, demands for pluralist language policy are likely to accelerate in the future, and policy-makers will need to be prepared to accommodate language diversity while still promoting overall integration.

Most states in the contemporary world are multi-ethnic and multilingual. Consequently, policy-makers have to decide how to accommodate language diversity in a way that promotes rather than hinders overall integration. But what is the best and most democratic language policy? Is it one that promotes cultural assimilation or is it language pluralism? What are the political consequences of pursuing one or the other policy?

Some answers can be found, first, by looking at the comparative experience of multilingual states and second, by analysing the specific history and context of each particular case. As a rule, ethnic harmony is promoted if new states adopt a policy of *cultural pluralism* that recognizes the language rights of minorities while at the same timing to form a common civic and cultural identity. Yet circumstances and ethnic groups differ. Immigrant groups, for example, are far more accepting of language assimilation than are indigenous minorities or regional sub-nations. In addition, the rights of the latter are protected more thoroughly by international covenants and by international precedents. For this discussion, most of the propositions made relate to indigenous minorities or sub-nations of the state in question.

4.7.1 Why does language policy matter?

If a state's population consists of two or more language groups, policy-makers unavoidably have to make choices, whether they acknowledge this fact or not. In a multilingual state, language use is not just a private matter, since a particular language is used in any public communication. The central issue is which language or languages are used officially in the public sphere, i.e., in public education, state administration, the army, the courts and so on. Is one language designated as the state language, or are other languages given some space (either regionally, or in certain spheres such as education)? The state must decide on these issues, and its decisions will affect the power and identity of linguistic groups; this is the "politics of language". But why does language matter so much?

First, there is the psychological role that language plays: it ties into the self-esteem and pride of groups and individuals. This is especially true for smaller nationalities. Experts on the politics of multilingualism note that the status of the indigenous language is seen by emerging nations as a symbol of a new-found group dignity. The fate of a language has consequences for entire cultures, which may become endangered if that language is not used. In order for a language to survive, it must be used in many domains, including schools, the media and public interaction. Yet, while it is important to avoid raising cultural anxiety, it is also important to realize that the status of cultures reflects overall political power. Ethnic groups, and especially larger nationalities or sub-nations, want to exercise some degree of self-rule and avoid subordination. Native speakers of a dominant language gain certain social and career benefits; minorities, too, want equal opportunities.

Although language often is seen as having primarily a cultural significance, it also has a more practical value in a modern state. Language policy affects social and political access to careers and public goods. Which language is used when a citizen encounters public servants, and which language is used in tax forms or other papers produced by the state bureaucracy? Which language is used if one needs to call an ambulance or a fire fighter or seek assistance from police or social services? In modern states the sphere of interaction between citizens and the state is getting broader rather than narrower, and thus the scope of language use is expanding as well. The language that is used on electoral ballots, in parliamentary debates, or when the state publishes laws and regulations is also important, as it

The central issue is which language or languages are used officially in the public sphere, i.e., in public education, state administration, the army, the courts and so on.

impacts on a citizen's ability to participate in his or her community. In other words, if a citizen has to use a non-native language in interactions with the state, this will influence the extent of his or her attachment to or alienation from the state.

Other language issues, regulated by the state and tied to identity, include the naming of streets or public buildings, and the use of personal names. The latter seems like an innocuous issue, but it can be a very sensitive topic. For example, the forced "Bulgarization" of Turkic and Muslim names by the communist government of Bulgaria in the 1970s incited ethnic conflict that culminated in the exodus of a large part of the Turkic minority. A less dramatic case involved the bureaucratic "Russianization" of personal names in the Soviet Union by requiring non-Russian minorities to adhere to the Russian tradition of using a patronymic (a name derived from one's father). Italy's outlawing of the German spelling of personal names in South Tyrol encouraged terrorism. Interestingly, the same policy applied in the Alsace region of France was relatively uncontroversial. This illustrates that the same policy can trigger different reactions in different contexts and that it is essential to examine the local context when analysing the importance of a particular issue in a specific state. In sum, there are a number of political, economic, and psychological factors that must be taken into account in forming language policy. In addition, it should be noted that official policy can do little to influence what happens when languages are used informally, in personal interactions.

4.7.2 Assimilation or pluralism

Language pluralism is the most democratic approach for multilingual societies; but there are alternative policies as well. Many states that have engaged in nation building in modern times have had either an explicit or implicit policy of *language assimilation.* The US, for example, presents a case where language assimilation for the sake of civic integration has been an explicit policy; France, on the other hand, has had an implicit policy. Since the French Revolution, becoming a French citizen has meant that French was the only language used in schools, administration, the army, and public life in general. While the dominance of the French language in France appears "natural" today, it is in fact the result of deliberate ethnic engineering. Despite some minority protest, it has been a successful policy of assimilation. Similar examples of assimilationist success can be found in other parts of the world, but one also can find just as

many examples of assimilationist failure. Assimilation is most likely to fail if it is involuntary and if it involves territorially based minorities. Assimilation is no panacea, as it involves the loss of one identity for the sake of another.

Language pluralism, by contrast, begins with the assumption that assimilation is likely to lead to a backlash. It assumes that every group – as a group – wants to retain its identity, has the right to do so, and will fight to do so. To avoid the latter, and to create civic consensus, pluralists argue that, parallel with creating a joint identity, policy-makers need to grant convincing guarantees for the retention of sub-cultures. Pluralists safeguard the parallel use of two or more languages by saying "let us each retain our own language in certain spheres, such as schools, but let us also have a common language for joint activities, especially in civic life".

Language is a core issue in the politics of ethnicity. Fortunately, it is an easier issue to deal with than some other ethnic issues because language allows for multiple identities. Language knowledge is not an exclusive or immutable ethnic "given" similar to religion or race. People can speak several languages, and several languages can coexist. Specific arrangements differ from case to case, but all involve a two-track policy whereby one track gives space and guarantees for minority languages, and the other track promotes the learning of one or several state languages to allow communication and enhance mutual understanding.

Language conflicts can be managed by providing some spheres where minority languages are freely used and by giving incentives to learn other languages, especially a state language. People have a remarkable ability to learn languages when it is to their advantage to do so. It is commonplace in Europe and other parts of the world for people to speak more than one language. This can be promoted by an appropriate social reward structure, for example by making language facility a criterion for professional qualification and promotion.

4.7.3 Advantages of language pluralism

The advantage of a pluralist language policy is that, by granting minorities space within a society's culture, it represents both a policy of practical and symbolic inclusion. When two or more languages are accommodated in public schools or in other public domains, a state is demonstrating that there are "win-win" situations in ethnic politics. In this way, language pluralism has the

potential of preventing the ethnic polarization of the popula-
tion. In addition, by demonstrating a constructive solution to
ethnic issues in one sphere, it can have a spillover effect to other
spheres of ethnic relations.

Switzerland is a classic example of how culturally diverse groups
can coexist amicably and how the accommodation of diversity
can be a source of political consensus. Rather than trying to melt
ethnic groups into a new cultural whole, the Swiss have used the
affirmation of distinctiveness to bind them into a political unity.
Citizens need to have a shared sense of belonging; in fact, this is
the classic definition of a nation. A sense of belonging, however,
does not mean that a nation needs to be culturally homogenous.

4.7.4 Potential drawbacks

Pluralist language policies need to be developed carefully to
avoid any negative consequences. One potential problem is that
language differentiation can be perceived as negative discrimi-
nation. The politics of plurality must make sure that separate
ethnic institutions, such as minority schools or separate adminis-
trative offices, preserve rather than undermine the rights of
minorities. Ethnic accord is most likely to be enhanced if
such arrangements are voluntary and if ethnic groups are
autonomous in deciding on specific programmes and approaches.

Another possible limitation of language pluralism is that it
can turn into language separatism, i.e., the undermining of a
common language. This has been a danger in post-Soviet Latvia
and Estonia where a segment of the Russian settlers refuse to
learn the local languages. The citizenry needs a common lan-
guage, both literally and figuratively, to promote mutual under-
standing and to form and nurture one civic nation. Pluralist lan-
guage policies require a careful balancing of state support for
both the distinct languages of minorities and the common state
language.

4.7.5 Language boards

When a new policy is being explored or implemented a spe-
cial state language board needs to be created. Institutional vari-
ants of such boards have been instrumental in working out new
language policies in Quebec, Catalonia, and the Baltic States,
for example. Such boards include experts who analyse the socio-
lingual situation, draft policy proposals, and organize language
learning programmes. The latter are especially important if a
new language policy includes language requirements for civil

service jobs, licensing or naturalization. Once a state policy openly acknowledges that a certain language facility is required for access to public goods, it has a duty to assist and monitor its acquisition.

In the early stages of mapping out a new language policy, research needs to examine patterns of language behaviour, attitudes within language groups and interactions between groups. Social scientists should be consulted about the role that language plays in the identity of a particular group and how powerful the symbolic meaning of language is for that community. The importance of language differs from group to group: in some cases a nationality defines itself primarily by its distinct language; in other cases language is less significant than other ethnic markers such as religion or territorial homelands. The specific political context of language policy also needs to be taken into account. If there have been recent cases of language repression, such as is the case in the non-Russian areas of the former Soviet Union, public debates should be encouraged to deal with this legacy and to decide what sort of remedial action to take. Major shifts in language policy need broad public support.

The creation of a state language board with a permanent staff as well as expert commissions requires significant resources, as do language learning programmes. In addition, language pluralism has a cost in terms of parallel publication of state documents in more than one language.

4.7.6 Comparative lessons

In cases where language groups are territorially rooted, language pluralism tends to be linked with territorial autonomy. The dignity of language groups can be enhanced by symbolic recognition of their distinctiveness, for example through the constitution, as is the case in Belgium, and as has been ardently pursued by the Quebecois. In the case of the Baltic States, special language laws passed at the time of the restoration of independence served as reassurance to the indigenous Baltic nations that their native languages would be protected in the future. Such formal legal reassurance is politically significant even when it is clear that much more needs to be done to assure language equity in practice.

When new states are constituted there may be unique opportunities to resolve ethnic conflicts by negotiating an agreement that involves trade-offs for various groups. For example, it may be possible to negotiate more language autonomy in return for

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less territorial self-rule. Newly independent Malaysia illustrated a successfully negotiated *quid pro quo* according to which the Chinese settlers accepted the public dominance of the Malay language in return for a liberal naturalization policy. In this case it was also significant that the Chinese diaspora has had alternative ways to safeguard the survival of their language, through contacts with Chinese communities abroad, importing of books, and sending Chinese students to universities abroad.

The collapse of the Soviet Union and the death of Franco provide two recent examples of how democratization has led to more rights for minority languages. The two previously dominant languages, Russian and Spanish respectively, had to accommodate indigenous regional languages such as Latvian and Catalan. These cases also illustrate that language changes take time since subgroups of the population have to learn new languages.

Since 1991, as Latvia has been restoring its independent statehood, it has faced several major issues with respect to language policy. Most importantly, it has needed to reintroduce Latvian as the language of state and public affairs, without undermining the rights of Russophones. Also, it has needed to reintroduce language rights for smaller minorities. In 1988, Russian was the dominant language and Latvian was rarely used in official state and public activities. In order to redress this situation Latvian was made the formal state language in 1989 and was gradually reintroduced in practice as well. A massive state-sponsored language programme was begun to teach Latvian to Russian residents who in the past had relied on Russian as their only language; another major language programme was launched in the mid-1990s with the support of UNDP and several foreign aid programmes. The rationale for encouraging Russian bilingualism was that the Russian settlers needed to acquire Latvian in order to be able to fully function in Latvia and also to prevent a continuation of a situation where mostly bilingual Latvians had to accommodate monolingual Russians. Subsequently, the role and prestige of Latvian as the language of the land was slowly increased by what can be seen as a kind of linguistic "affirmative action". Since the first language laws were adopted in 1988, significant change has occurred; but it has been the result of great effort by the State Language Board, the Ministry of Education, and various minority cultural associations.

The logic of a democratic language policy is to protect the weaker languages and the languages of minorities. In the case of Latvia this meant that Latvian had to be promoted to reassert

the language rights of the indigenous nation, and the languages of smaller minorities had to be recognized in schools and cultural life. Latvia's language policy since 1988 also included the tenet that one minority group – the Russians – cannot assimilate other minority groups within Latvia, as they had been doing until then. Smaller minorities such as Poles, Jews, and Ukrainians, were provided with native language schooling. Russians on their part have been able to continue schooling in Russian-language public schools.

Any shift in the hierarchy of languages takes time and has to be undertaken with sensitivity. The case of Latvia illustrates a two-track policy whereby one policy track aims at enhancing the use of an official language as a tool of state-building and formation of a civic nation, and the other track maintains minority language space, in this case primarily in the schools. This policy is based on the assumption that trying to engineer total linguistic homogeneity is impossible and politically dangerous. A *pax linguistica* is possible only if all groups feel that their languages are safeguarded. This is especially true in cases where one deals with a territory that represents the only place where a certain language is used; groups using a language that is used in kin-states tend to be culturally less anxious.

Recent findings of social scientists emphasize the impact of politics on the formation of ethnic identity and on the management of ethnic conflict. Policy-makers typically aim for integration, but how is this vague term understood? Before policies are chosen, the people making the decisions need to reflect on their assumptions. All too often they implicitly assume that integration means assimilation. Comparative analysis shows that while the integration of a state requires some commonality of language, this can very well mean the accommodation of several parallel languages.

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4.8 National Conferences

National conferences and constituent assemblies have been a widely used mechanism for bringing together political groups to discuss and plan key aspects of a country's future development. They are a particularly useful means for reaching consensus on the political and institutional shape of a post-colonial or post-conflict state. In this section we consider the objectives of a national conference, how a national conference can be organized and implemented, and its advantages and weaknesses. In the case study that follows we look at how national conferences have impacted on the political development of five Francophone African countries.

4.8.1 Introduction

Constituent assemblies were a common mechanism during the post-World War Two "decolonization decades" to bring politicians and constitutional experts together to write a new constitution for an independent nation. India's independence Constitution, for example, was the result of three years of discussion and debate at a constituent assembly comprising eminent jurists, lawyers, academics and politicians. In other cases, such as Papua New Guinea, the elected parliament from the colonial era reconvened itself as a constituent assembly in 1975 to debate and then formally adopt a constitution. Other attempts have been less successful, such as the use of constituent assemblies to reach consensus on key political conflicts in Sri Lanka (1972) or to prepare an independence Constitution in Pakistan (1947–1954).

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During the 1990s, however, there has been a new trend towards utilizing large national conferences, not as a means of decolonization but as a mechanism for political transition to democracy. The distinctive features of such national assemblies are that they typically include wide representation from civil society; are able to act with considerable autonomy from governments; and have proved particularly useful in forging an internal consensus on democratization and transition from conflict. This type of national assembly was widely used in Francophone Africa in the early 1990s as a means of harnessing pro-democracy forces. It has proven to be a key mechanism in promoting democratic transition and in effecting substantive political change (see Case Study National Conferences in Francophone Africa).

4.8.2 What is a national conference?

A national conference (or national debate, as it is referred to in some countries) is a public forum, held over an extended period, at which representatives from key political and civic groups are invited to discuss and develop a plan for the country's political future, preferably on a consensus basis. By convening a national conference, the central government allows other political groups to participate in a decision-making process, while still maintaining its own authority and control. In agreeing to hold and participate in a national conference the central government is not guaranteeing political freedom or the sharing of power with other political factions; rather it is agreeing to conduct a nationwide political dialogue and ideally, to jointly plan steps toward increased political representation and liberalization.

National conferences are designed typically to fulfil two goals: first, to address the demands for political liberalization, by being inclusive and highly visible, especially to the international community; and second, to achieve gradual, "managed" transition, often with the incumbent leadership believing that it can maintain control over the process. In many African countries, for example, national conferences opened up previously one-party systems by bringing together different actors to address the country's political problems, formulated new constitutional rules, and established electoral timetables. Some national conferences even achieved peaceful alternations in power. In this way they can be seen as an indigenously generated African contribution to political institution building and regime transition.

National conferences in Africa were usually "one-off" assemblies representing a wide range of individuals and corporate in-

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terests. They lasted from a few days to several months; contained several hundred to several thousand delegates (i.e., 500 in Benin, 1,200 in Congo, 4,000 in Zaire); and were often chaired by a nominally neutral church leader. Occurring in 12 African countries between 1990 and 1993, national conferences were largely a Francophone phenomenon (Benin, Chad, Comoros, Congo, Gabon, Mali, Niger, Togo and Zaire) although similar bodies were also convened in Ethiopia in July 1991, in South Africa in December 1991, and in Guinea-Bissau in 1992. Some attempts were also made in Burkina Faso, Cameroon, Central African Republic, and Guinea. In Côte d'Ivoire and Senegal the national conference idea hardly took root, and multi-party elections only confirmed the old regimes in power. In the late 1990s, there has been a resurgence of calls for national conferences to build consensus on reforming state structures, initiating transitions to democracy and resolving deep-rooted conflicts, such as in Kenya in 1997 and in Nigeria after the death of Abacha in June 1998. The case study that follows elaborates on the use and results of national conferences in five Francophone countries.

4.8.3 Objectives of a national conference

Prevent conflict. Initially, the objective of a national conference may be simply to prevent conflict by motivating political opposition groups to postpone violence while testing the government's actual commitment to peaceful political change.

Build national consensus on a country's political future. A fundamental objective of a national conference is to provide an opportunity for representatives of all sides to discuss, plan, and reach a maximum level of consensus on a country's political future, hence addressing potential and actual political crises. National conferences can be seen as democratic conflict management tools designed to negotiate democratic transitions by establishing new rules and institutions. A national conference or national debate also may be interpreted as a preliminary move toward limited democracy, in that it lays the foundation for crafting more inclusive institutions and democratic mechanisms, legalizing multipartism, drafting a new constitution and electoral system, achieving peaceful alternation of power, and setting a timetable for democratic transition.

Bolster citizen's support for state institutions. A government may initiate or agree to participate in a national conference to bolster its own legitimacy and popular support by creating a

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more inclusive political climate, thereby reducing internal desta-bilizing factors. As a result of a national conference, the govern-ment may direct state institutions to be more representative and inclusive, in the hope that an increased perception of inclusive-ness will in turn bolster citizens' support for state institutions. Non-government political groups participate in a national conference in the hope of increasing the government's account-ability and expanding popular participation in the government.

"Level the playing-field". In certain instances, a national con-ference may be agreed to by parties in conflict when there is a clear recognition or acknowledgement that the government in power is no longer in a position to maintain the status quo; and because of a demand by the opposition parties that the govern-ment alone cannot deliver a solution to the conflict. In such a case, an all-party national conference is often the first step on the road to substantive negotiations. This process may be dis-empowering for the government, as a common precondition for such a conference is that all parties are regarded as equal in sta-tus. The key objective is to "level the playing-field" between the parties during the negotiations, with the ultimate aim being to forge a national consensus.

Governments often show resistance to a national conference because of this "equal status" dilemma, as it often has the effect of lowering their own status and according real status to parties that previously they may have regarded as enemies and "terror-ists". One way to address this obstacle is to structure the confer-ence so that "nothing is agreed until everything is agreed". This can mean that the government does not feel that it loses its power when the process begins, but only if an ultimate agree-ment is reached which is acceptable to it. In many ways, it is crit-ical that the negotiations simply commence, as that, in itself, may be the start of the process of dealing with perceptions and focusing on the real issues, both important objectives.

4.8.4 Implementation

Prerequisites. Prior to a national conference, *multipartism*, es-pecially the legalization of opposition parties, must be allowed. *Freedom of association, speech and assembly* must be guaranteed. In addition, the *media* must be involved to monitor and report on the events.

Organizers. While *governments* generally take the initiative in convening a national conference, internal and external pressu-

res often have a significant influence. A foreign third party and/or domestic political pressure may play a role in convincing the government to hold a conference. A national conference can be organized by a committee consisting of members of various political groups, including opposition groups, as well as government members and the international community.

Participants. Without the participation of members of the *existing central government*, a national conference would have little significance. To maximize the impact of the conference, participants must include representatives of the key *social, religious, professional, and political interest groups* who wish to participate in the process. All possible participants should be invited to endorse the results of the conference, within limits of reason.

The presence of *international observers* may be helpful in assuring the process and results of the conference. Other participants may include academics, local government personnel, representatives from non-governmental organizations, human rights organizations, women's associations, trade unions and religious authorities, peasant groups and students, and aid donors.

Activities. Organizers of a national conference must agree on and draft an *agenda*, clarify the issues to be discussed, and convey the goals of the conference to all the participants. Depending on the outcome of the conference, it may be necessary for parties to agree on additional issues as well as on the implementation of the conference agreement, if any is reached. In such a situation, a *follow-up or "implementation group"* consisting of key parties, and perhaps members of the international community, should be formed and given the appropriate responsibility to ensure that progress made at the conference is consolidated and translated into action.

Cost considerations. Costs, such as preparation, transportation, and accommodation for the conference participants, may be prohibitive. The primary cost of the conference should always, if possible, be borne by the country itself. However, *foreign financial assistance* may often be necessary to organize a national conference and to help support its follow-up functions. Conference requirements include technical assistance and logistical support.

Set-up time. *Several months* are generally needed to plan and organize a conference. National conferences can be held over a long period (several months) or a short duration (from several days to a few weeks). The comparative experience ranges widely:

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Benin (convened in February 1990 and lasted nine days), Congo (February 1991, three months), Togo (July 1991, one month), Mali (July 1991, 15 days), Niger (July 1991, 40 days), Zaire (August 1991, over a year, with interruptions), South Africa (December 1991, two years with interruptions), and Chad (January 1993, 11 weeks).

Timeframe. A national conference's ability to design sustainable institutional structures and mechanisms for conflict management is key. The impact of a national conference may be sustained if the conference is successfully used to develop a broad consensus on the country's "rules of the game" and political future, and if genuine follow-on actions are initiated. Adherence to the rules and mechanisms agreed upon largely depend on the political commitment of the parties and the underlying balance of power.

Limitations on government. Another consideration is the limitations placed on the powers of the government during the course of the conference. This may involve transitional arrangements aimed at ensuring that no action is undertaken that may affect the position of the parties or of the country. For example, the army may be confined to barracks, there may be a cease-fire agreement, or there may be a commitment to address key national issues such as education or economic policy jointly.

4.8.5 Impact

A national conference can have a different impact depending on the situation it seeks to redress: by *initiating political dialogue*, it can ease mounting tensions; as a *conflict resolution mechanism*, it can provide a framework for agreeing on the country's political institutions and rules through a negotiated democratic transition; and as a *conflict prevention forum*, it can create the rules and institutions for a stable democratic regime.

An announcement to organize a national conference can have a short-term effect on preventing conflict by groups previously involved in or planning political violence. These groups may adopt a wait-and-see attitude, and divert their efforts toward preparation for the conference. However, if no actual, substantive political changes result, such groups may return to violence with even greater zeal and additional disillusioned groups may choose to join them.

National conferences resulted in changes in government in Benin, Congo and Niger; and exerted significant political pres-

sure on incumbent rulers in Zaire and Togo. In many instances, national conferences laid the ground work for competitive founding elections (Benin, Congo, Gabon, Mali, Niger and South Africa). The comparative experience suggests the following lessons:

– A national conference can be a useful *democratic conflict management tool*, as it is both inclusive and participatory, and initiates political dialogue to ease political crises;

– National conferences can have a significant impact on *governance*, on the political system, and even on forming a new political culture based on negotiation and compromise, by persuading groups to participate more actively in the political decision-making process;

– As a conflict resolution mechanism, a national conference can have a decisive influence on *negotiating democratic transitions* from authoritarian rule to democratic pluralism. It can provide a framework for achieving a peaceful alternation in power, drafting a new constitution, designing a new electoral system and setting a democratic timetable;

– A national conference can have a significant impact on *promoting democracy*. However, to sustain the political results of national conferences, the public must continue to pressure the government to continue with democratic political development;

– Through a national conference, political groups and representatives from various sectors can negotiate a plan for the country's political future;

– A national conference may help state authorities *gain greater popular support and legitimacy*, and instil greater public confidence in the government. A national conference may lay the groundwork for establishing a transitional government and relatively open elections. An incumbent government may also gain greater legitimacy by actively participating in discussions on economic development, power-sharing arrangements, human rights, country management, etc;

– Conference participants, representing a country's diverse political groups, can set *guidelines for formulating new political institutions,* such as a legislature and an electoral system, that could contribute to easing tensions among various groups in the country. The result of a national conference may be government agreement to direct state institutions

4.8 National Conferences

to be more representative and inclusive. Such agreements may be made in the hope that the increased perception of inclusiveness would in turn bolster citizens' support for state institutions;

– A national conference can help establish stable civilian governance and control and, at least in the short term, reduce the attraction of resorting to armed opposition for achieving political change.

ORGANIZING A NATIONAL CONFERENCE

National Conference: *A national conference is a public forum at which representatives from key political and civic groups are invited to discuss and develop a plan for the country's political future, preferably on a consensus basis. National conferences are designed typically to fulfil two goals: first, to address the demands for political liberalization; and second, to achieve gradual, "pacted" or "managed" transition, often with the incumbent leadership believing that it can maintain control over the process.*

IMPLEMENTATION

Sequence of Events:
- Conferees acquire some degree of law-making authority;
- Existing constitutions are revised, legislatures suspended or reformed, and transitional governments established (in other words, a form of regime transition by peaceful means);
- Incumbent presidents are required to work with transitional governments or to surrender significant powers;
- Conference participants draft a new constitution, or establish an independent commission to do so, and submit it to a referendum;
- Free elections are held.

Prerequisites:
- Multipartism, especially legalization of opposition parties;
- Freedom of association, speech and assembly;
- Media involvement to monitor and report on events.

Organizers:
- Governments usually, often influenced by foreign third party and/or domestic political pressure;
- A committee, consisting of representatives of government, other political groups and the international community can organize national conferences.

Participants:
- Members of existing central government;
- Representatives of key social, religious, professional, and political interest groups;
- Other participants can include academics, local government personnel, NGOs, human rights organizations, women's organizations, trade unions, students, and aid donors;
- International observers.

FACTSHEET 2 [P. 260]

ORGANIZING A NATIONAL CONFERENCE

Activities:

- Draft an agenda; clarify issues to be discussed; convey conference goals to all participants;
- Depending on outcome, organize "implementation group" to ensure follow-up.

Cost Considerations:

- Primary cost of conference organization (preparation, transportation, accommodation, etc.) should be borne by the country itself, if possible;
- Additional foreign financial assistance may be needed for organization and follow-up.

Set-Up Time:

- Usually several months are needed to organize;
- Conference can last between several days and several months (Benin lasted nine days; Congo, three months; South Africa, two years with interruptions).

ADVANTAGES OF A NATIONAL CONFERENCE

Initiates new political dialogue:

- Initiates political dialogue that is both inclusive and participatory, to ease crises;
- Can help develop a *new political culture* by persuading groups to participate more actively in the political decision-making process and by emphasizing compromise and negotiation.

Conflict management mechanism:

- Can negotiate democratic transitions from authoritarian rule to democratic pluralism;
- Can provide a framework for achieving a peaceful alternation in power by drafting a new constitution, designing a new electoral system, and establishing a democratic timetable.

Conflict prevention forum:

- Can help state authorities *gain greater popular support and legitimacy*, and instil greater public confidence in the government.
- Conference participants, representing a country's diverse political groups, can set *guidelines for formulating new political institutions,* such as a legislature and an electoral system, that could contribute to easing tensions among various groups in the country.

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Gibraltar

Algiers

Tunis

Casablanca

Mediterranean Sea

Tripoli

Alexandria

Cairo

In Salah

Red Sea

MALI

Tombouctou

Port Sudan

Bamako

NIGER

CHAD

Niamey

Ndjamena

BENIN

Addis Ababa

TOGO

NIGERIA

ETHIOPIA

Monrovia

GHANA

Porto Novo

Accra

Lomé

Lagos

Port Harcourt

Bangui

UGANDA

Libreville

Kisangani

Kampala

Gulf of Guinea

GABON

Mbandaka

CONGO

DEMOCRATIC

RWANDA

Brazzaville

REPUBLIC OF CONGO

BURUNDI

Kinshasa

(formerly Zaire)

Kananga

TANZANIA

Luanda

Dar es Salaam

Likasi

ANGOLA

ZAMBIA

Lusaka

ATLANTIC OCEAN

BOTSWANA

Gaborone

Johannesburg

SOUTH AFRICA

NATIONAL CONFERENCES IN FRANCOPHONE AFRICA

In the late 1980s and early 1990s, sub-Saharan African countries were faced with simultaneous pressures from within and from outside to liberalize their political systems. The economic crisis and the social unrest it created increased the demands on the political elite to liberalize the political system. The international environment also changed dramatically, as the Cold War and its system of "protectorates" in the developing world gave way to a greater emphasis on democracy and democratization, especially by donor governments and the international community.

Confronted with strong resistance, increasing protest, and economic crises, authoritarian rulers in many countries recognized the need to renew legitimacy by opening up the political system and beginning a dialogue with opposition forces on democratic reform. Citizens began to pressure single-party regimes to expose themselves to multi-party elections. One mechanism that helped facilitate this process was the use of national conferences. These conferences opened up space for political dialogue and consensus by including opposition political parties and civil society organizations.

As we have discussed, a national conference can provide a forum for opposing groups to discuss and negotiate political issues in a peaceful, structured environment, before a violent conflict erupts. In terms of conflict management, national conferences can provide a structured institutional framework for negotiation and consensus building and can be used to try to resolve growing political demands and opposition to the current regime without resorting to repression and force.

In this section we look at the impact of national conferences in five Francophone countries.

Benin

By 1989, Benin was in a state of crisis. The economic and social unrest that broke out in 1989 became a mass movement for democratic renewal. When government repression failed to curb protest, the military-installed President Mathieu Kérékou, who had been in power for 17 years, began to make political concessions, first by appointing a prominent human rights activist and legal reformer to the government, and second by announcing a broad amnesty for political opponents. However, the demands for greater political liberalization were not assuaged. Attempting to re-capture the political initiative, Kérékou announced in December 1989 that the People's Revolutionary Party of Benin (PRPB) would abandon its Marxist ideology and its monopoly on power by permitting the legal formation of opposition parties, and by convening a national conference to discuss changes to the Constitution.

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A commission was created to prepare a "national reconciliation conference" that would include broad elements of political society to discuss the country's future. Participants would include the government, political parties (both from the nascent opposition and the majority), trade unions, religious associations, army representatives and women's groups. Initially, the conference was to have no more than an advisory role and was regarded by some in the opposition as a diversionary tactic. In a strict legal sense, the conference had no constitutional standing at the outset. Furthermore, none of the participants to the conference could claim a popular electoral mandate because the membership of the conference was appointed rather than elected. However, the appointment of the Archbishop of Cotonou as chairman of the conference gave it a moral legitimacy.

By the time the national conference was convened in February 1990, Kérékou had lost control of political events. He hoped that the national conference would provide an opportunity for him to retain power and enlarge his power base by opening up the political system and by making certain concessions. However, the 488 delegates soon declared themselves sovereign. Kérékou's immediate response was to describe this decision as a "*civilian coup d'état*". In the end, however, he accepted the decision given his weak position, the popular support enjoyed by the democratic opposition, and the uncertain support of the army. The conference agreed to allow Kérékou to retain the presidency, pending democratic presidential elections and provided that he accepted the decision of the conference; it also decided that Kérékou would not be prosecuted for any "crimes" he had committed while in office.

Subsequently, the conference suspended the constitution, dissolved the National Assembly, created the post of prime minister and appointed Nicéphore Soglo, a former World Bank official, as prime minister. A new constitution was drafted, which allowed presidential term limits and multi-party elections. The Constitution was approved by referendum in December 1990 by 96 per cent of the population. Competitive parliamentary elections were held in February 1991 and presidential elections were held in March 1991. Twenty-four political parties and 13 candidates, including Kérékou and Soglo, contested the parliamentary elections. Soglo's coalition, the Union for the Triumph of Democratic Renewal, won the largest share of parliamentary seats and Soglo became President.

Following this decisive electoral defeat, Kérékou asked for forgiveness for abusing power during his tenure in office. The interim Government agreed not to prosecute the outgoing dictator and Kérékou responded by pledging loyalty to the new government. Ultimately, Kérékou regained power through democratic elections in 1996.

What had begun as an assembly with no clearly defined agenda and somewhat arbitrary membership found itself within the space of a few days dismantling the

long established, albeit precarious, authoritarian regime and creating the institutional framework for the democratization of the political system of Benin.

Congo (Brazzaville)

Before democratization, the Congolese political system exhibited many similarities to that of Benin. The state was ruled by a militarized single party with strong Marxist-Leninist tendencies, the Congolese Labour Party (PCT) led by Col. Denis Sassou-Nguesso.

Deterioration of the economy and mounting social unrest led to the gradual erosion of the PCT's political monopoly, and by 1990, some liberalization of the political system was already underway. In July 1990, the principle of a transition to multipartism was accepted, political prisoners were released, and by the end of the year, Marxism-Leninism was abandoned. In January 1991, in the hope of controlling and neutralizing the process of political liberalization, Sassou-Nguesso took the initiative to legalize the formation of political parties. In early 1991, he convened an all-party national conference to chart the country's political future. The national conference comprised 30 political parties and 141 associations and was convened for a three-month period starting February 1991. However, almost immediately, the conference was suspended for one month because of a dispute between the PCT and the opposition concerning the balance of representation. In March, when the conference was reconvened, the various opposition groups gained an absolute majority of both conference delegates (700 out of the 1100) and seats on the conference governing body (seven of the 11 seats). As in Benin, a Roman Catholic bishop was elected as chairman of the conference.

Although Sassou-Nguesso had insisted that the conference should be consultative, he was forced to agree to opposition demands that the conference be declared a sovereign body that did not require government approval for its decisions. Having established its authority, the conference then proceeded to dismantle the existing authoritarian political structure before the conference itself was dissolved in June 1991. Sassou-Nguesso was allowed to retain the presidency for an interim period but lost most of his powers, including control of the army, which were transferred to the prime minister who became the head of the government. The conference established a new legislature, the High Council of the Republic, which drafted a new constitution to be submitted to a referendum. It also chose a new prime minister, André Milongo, a non-party political technocrat and World Bank official.

By December 1991, the interim legislature had produced a draft constitution but, in January 1992, the transition process was threatened by a mutiny by sections of the army. Popular protests and Sassou-Nguesso's unwillingness to support the coup foiled the attempt and the new constitution was approved by referendum in March 1992, after a five-month delay.

National Conferences in Francophone Africa

Multi-party elections took place in July–August 1992. Although Sassou-Nguesso and the PCT contested the presidential and parliamentary elections, they were defeated in both by the new opposition party, Pascal Lissouba's Pan-African Union for Social Democracy (UPDAS). The democratic experiment in Congo, however, collapsed in 1997–1998 when Sassou-Nguesso returned to power by force.

Mali

In contrast to Benin and Congo (Brazzaville), the national conference in Mali had a more limited role in the transition process and served more as a consensus-building mechanism after the overthrow of Moussa Traoré's dictatorship.

Widespread opposition to harsh conditions under Traoré's 22-year dictatorship, and mounting demands for a multi-party system, erupted in rioting in the streets of the capital Bamako and other towns during the first months of 1991. On 26 March 1991, Traoré was ousted by a military coup under the reform-minded leadership of Amadou Toumani Touré. A Transitional Committee for the Salvation of the People (CTSP), composed of 10 military and 15 anti-Traoré civilians and headed by Touré, was formed. The CTSP appointed Soumana Sacko, a highly respected senior UNDP official, as Prime Minister and a technocratic government was formed. On 5 April 1991, the CTSP authorized the formation of political parties and declared its intention to rule for a nine-month period ending with a constitutional referendum and multi-party elections. From the outset it was decided that the CTSP was to act as a transitional authority pending the establishment of democratic institutions. As part of this process, the CTSP established a national conference in July and August 1991.

The conference was composed of 1,800 delegates, 42 political parties and 100 associations. These groups discussed the precise details of the transition to democracy and the drafting of a new constitution. The principle of the transition itself had already been decided upon before the conference opened. Thus, in contrast to the two previous examples, the conference did not feel the need to assert its sovereignty and it was accepted that Touré and the CTSP would remain in power until democratic elections could be held. Unlike Kérékou and Sassou-Nguesso, Touré made it clear that he had no intention of taking part in the elections.

The national conference in Mali was not primarily an arena for managing conflict between an incumbent regime and a competing opposition. The main task of the conference was to detail the way forward from the legacy of the past regime and to draw up a new constitution that could then be approved through referendum. The new constitution for what was designated as the Third Republic confirmed the existence of a multi-party system, together with the independence of the judiciary, freedom of association, speech and assembly, and the right to strike. The constitution was approved by referendum in January 1992 with elections taking place soon after, won by Alpha Oumar Konaré of the Adema party.

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Togo

For more than a quarter of a century, the Togolese political system has been dominated by the daunting figure of Etienne Eyadéma, who came to power in a coup in 1967. Since 1969, Togo had officially been a single-party state with the Rally of Togolese People (RPT) as the ruling party. In reality, the RPT was a military-backed front for the highly personalized rule of Eyadéma and his Northern Kabre ethnic tribe.

Encouraged by events elsewhere in the region, popular pressure for democratization built up from early 1990. In March 1991, Eyadéma agreed to the establishment of a multi-party system but refused to concede opposition demands for a national conference. It was clear that both the enthusiasm of the opposition for a conference and the reluctance of Eyadéma were influenced by the way both sides perceived events in Benin: whilst the opposition was eager to replicate the Benin experience, Eyadéma was determined to avoid it.

In June 1991 a new coalition of opposition forces formed the Democratic Opposition Front (FOD), which included political parties and trade unions, and launched an indefinite general strike. In the short term, this pressure paid off and Eyadéma agreed to a national conference, which opened in July 1991 with 1,000 delegates and with the bishop of Atakpame as chairman. The conference soon proclaimed itself sovereign. Government representatives rejected such a proclamation and walked out of the conference. Although they returned one week later, they refused to accept the conference's self-proclaimed sovereignty: Eyadéma argued that sovereignty could only be based on universal suffrage, which the conference lacked. Although government forces were represented at and participated in the conference, they made it clear that they would not be bound by any decision taken.

In retrospect, it is clear that the Togolese national conference significantly overestimated its own real power and underestimated that of the incumbent regime. As in Benin, the conference decided to strip Eyadéma of most of his powers, establish a new interim legislature and government, dissolve the RPT and choose a human rights lawyer as interim prime minister. On August 26, Eyadéma suspended the conference and surrounded it with troops. Although he subsequently allowed the conference to proceed to its ceremonial ending on August 28, it was clear that real power remained in Eyadéma's hands. After the conference, Eyadéma used the army to harass his political opponents and maintain a firm grip on power. Although presidential elections were held in 1993, they can hardly be considered "free and fair".

Democratic Republic of Congo (formerly Zaire)

Zaire (now the Democratic Republic of Congo) also had a national conference, but former President Mobutu Sesi Seko managed to control and neutralize the process, frustrating all attempts by the national conference to accomplish any genuine and substantial regime change through multi-party elections. Until 1990, when Mobutu agreed to allow a multi-party system, Zaire was in theory a single-party state

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with the Popular Movement of the Revolution (MPR) the only legal party to which every citizen automatically belonged. In practice, the MPR was simply a vehicle for the one-man rule of Mobutu, resting on his control of the army and especially the Presidential Guard.

In 1990, following mass pro-democracy demonstrations, anti-government strikes and pressure from external patrons, Mobutu agreed to allow the existence of opposition parties; 130 were formed, which meant that the opposition was highly fragmented. In April 1991, he announced that a national conference would be convened. Mobutu, following widespread anti-government protest, suspended the conference even before it convened. A fragile coalition known as the Sacred Union was ultimately formed and the Zairian national conference eventually opened in August 1991. Although it remained in formal existence until December 1992 (far longer than the other West African national conferences), it was frequently suspended and clashes between government and opposition forces occurred regularly. The conference produced a draft constitution, but Mobutu remained in control, and the country became chronically unstable.

Zaire's National Sovereign Conference in 1991–1992, and the follow-up High Council of the Republic in 1993–1994, while not succeeding as an instrument of democratic transition from Mobutu's authoritarian, have contributed to the opening of political space. These forums allowed opposition forces to wield some influence, to the point where at times there were competing claims of governmental authority from the High Council and the decaying Mobutuist regime. Prominent opposition figures such as Etienne Tshisekedi emerged to challenge the regime and even to briefly share power as the democratization experiment was launched, but before it lagged. Furthermore, the process led to extensive planning for elections slated for 1997 – elections that did not take place, after civil war broke out in the country and the rebel forces of current President Laurent Kabila defeated Mobutu's military. Nevertheless, many Congolese politicians, especially opposition figures, continue to refer to the work of the national conference, and particularly its constitutional vision of a federal democracy with a high degree of devolution. This vision of a federal state could set the stage for renewed efforts to democratize the Democratic Republic of Congo under the Kabila Government.

Lessons Learned

The national conferences in Benin, Congo and Mali were relatively successful in providing an institutional mechanism for the transition to a more democratic political system. However, it would be misleading to view a national conference as some sort of institutional magic wand that can be used to produce a democratic transition. The Togolese and Zairian experience failed to produce a democratic transition, even though this was the hope of the opposition in both cases. In the case of Togo, Eyadéma succeeded in controlling and neutralizing the process, sometimes with the use of force and intimidation, while in Zaire the entire process was a farce designed to regain some international legitimacy.

Strengths

Forum for all sides to express view. A national conference provides a vehicle for all sides, from the national level to the grass-roots level, to express its views, interests and political objectives. This inclusive dialogue process facilitates the building of a national consensus on fundamental rights and interests with the intention of developing a stable and democratic social order. Arriving at a national consensus is critical especially during those times when government legitimacy is fading and political institution building is required. It is interesting to note that, without exception, all 11 countries that convened national conferences recorded advances in political liberalization up to 1992.

Weaknesses and lessons

Can be neutralized and manipulated by incumbent. It is very difficult to anticipate which issues will be addressed at a national conference and how participants will manage a conference. A national conference can begin with chaotic disagreement over conference membership and participation, as the government and the opposition struggle for control over conference management. Although structural factors are important, the degree of control over the process of democratic transition by autocrats and their ability to impose conditions on the process should not be ignored. The national conference process can be neutralized and manipulated by incumbent rulers.

Indeed, the Francophone African experience demonstrates that, as conferences were convened one after the other, incumbent rulers tried to control the process and gradually learned how to neutralize it. Mobutu's Zaire illustrates a case of a neutralized and manipulated national conference used more as a tactical tool than a genuine forum for negotiated political reform. Some leaders refused to countenance a national conference at all (like Biya in Cameroon or Kolingba in the Central African Republic). Others tried to twist the process to their advantage: Bongo, in Gabon, caught the opposition off-guard when he convened a national conference without warning and manipulated the proceedings. Others remonstrated and dissembled: Eyadéma withdrew his government delegation from the Togo conference after it declared itself sovereign and suspended it altogether when the conferees attempted to remove his powers over the armed forces. In South Africa, the opposition ANC walked out of CODESA in June 1992, interrupting proceedings for several months and using their participation as a bargaining tool (see South Africa Case Study). Sassou-Nguesso's experience was a sharp lesson for presidents on the importance of controlling the transition personally. Seibou, in Niger, having been stripped of all but his honorific powers within a month by the national conference, took the decision to stand down from the presidential nomination rather than face humiliation. In some instances, heads of state used the military to intimidate, incarcerate or even eliminate opponents. In Traoré's case it was counterpro-

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ductive, since the Malian army refused to be tools of oppression. By contrast, Eyadéma in Togo successfully used the army to direct the "democratization process" from 1990 until his re-election in 1993.

Timing. Although the different national conferences reflect different socio-economic contexts, they also were shaped by the different timing strategies used by the incumbent regimes: specifically a *fast/slow approach*. The fast approach by incumbents involved the establishment of the national conference at an early stage in order both to keep the initiative and not to give enough time to the opposition to organize; the slow approach consisted in delaying the speed of the subsequent process in order to buy time to construct support and deny that support to the opposition by, for instance, trying to split the opposition or co-opting it into the majority.

Instability. National conferences (with the exception of South Africa and Kenya) were predominantly a Francophone African phenomenon occurring in one-party regimes (10 out of the 11 countries) and in political systems resembling the French "semi-presidential" structure. This system can eventually lead to dual conflicting forces at the top if the parliamentary majority – and the government – is not congruent with the presidential majority (see section 4.3 on "Executive Type" in this handbook). This situation, when it occurred, tended to increase the instability of the political system.

High expectations. In some cases, national conferences raised exaggerated expectations regarding the efficacy of such a mechanism for democratic transition, irrespective of other circumstances – as the Benin experience reveals. Nevertheless, such a vehicle or mechanism may still present an opportunity to bring about genuine political change.

Balance of power. Comparison of the success and failure of the national conference in providing a genuine transition to a more democratic form of rule suggests that in many cases the outcome was largely determined by the resources of real power, especially economic and military power, which opposing sides in the conflict were able to employ against each other. These varied domestic power equations counted more than the procedural similarities or dissimilarities of the various conferences.

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4.9 Transitional Justice

4.9 Transitional Justice

Strategies for coping with the past have ranged from massive criminal prosecution of the supporters of the previous order to unconditionally closing the book. In this section we review some of these strategies and examine the pros and cons of prosecution and punishment. In the next section, we examine two mechanisms in greater detail – truth commissions and war crime tribunals.

4.9.1 *Policies for coping with the past*

4.9.2 *The case for and against prosecution and/or lustration*

4.9.3 *The case against punishment*

4.9.4 *Constraints*

4.9.5 *Conclusion*

| Box 10 | Policies for Coping with the Past (p. 274) |

4.9.1 *Policies for coping with the past*

Coping with the past during the transition from a repressive regime to a democracy has taken a wide variety of forms. All policy choices involve answers to two key questions: whether to remember or forget the abuses, and whether to impose sanctions on the individuals who are responsible for these abuses. Some of these policies are offender-oriented (amnesty, prosecution and lustration), others are victim-oriented (compensation and symbolic measures). Truth commissions are directed towards both offenders and victims.

Amnesty. The granting of absolute amnesty is at one end of the spectrum. In some cases the unrestricted pardon is the result of the self-amnesty that the outgoing elite unilaterally award themselves before the transition gets underway. In other instances impunity is the outcome of negotiations between old and new leaders. In Uruguay, for instance, the government that succeeded the military dictatorship enacted, under pressure from the military, an amnesty law in 1986. A third route toward impunity is when democratic forces agree to confer immunity to individuals who committed crimes defending or opposing the previous regime, as was the case in post-Franco Spain.

Truth commissions. Forgiving but not forgetting is the substance of a second major policy choice. Its usual format is the national or international truth commission (see following section). The first goal of such a commission is to investigate the fate of individuals, and of the nation as a whole, under the preceding regime. Its aim is not to prosecute and punish. Examples of truth commissions include the Chilean National Commission on Truth and Reconciliation (1990), the South African Truth and Reconciliation Commission (1995–1998) and the UN-sponsored Truth Commission in El Salvador (1991).

Lustration. Disqualification of agents of the secret police and their informers, of judges and teachers, of civil servants and military personnel is a third way to address the question of reckoning for past wrongs. It sometimes includes the loss of political and civil rights. In some of the post-communist countries of eastern and central Europe, the screening of officials has been the only policy step.

Policy choices involve answers to two key questions: whether to remember or forget the abuses and whether to impose sanctions on the individuals who are responsible for these abuses.

Box 10

POLICIES FOR COPING WITH THE PAST

1. **Amnesty.** Absolute amnesty can be granted through self-amnesty that the outgoing elite unilaterally award themselves, through negotiations between old and new leaders, or through agreement by the new democratic forces.

2. **Truth Commissions.** The main goal is to investigate the fate of individuals and of the nation as a whole, not to prosecute and punish.

3. **Lustration.** Disqualification of the agents of the secret police and their informers, of judges and teachers, of civil servants and military personnel.

4. **Criminal Prosecution.** This can be done by an international body (e.g., International Criminal Tribunal for the Former Yugoslavia), or by national courts.

5. **Compensation**. Compensation by the state (monetary reparation, free medical and psychological treatment, reduced interest on loans for education and home building) and the establishment of permanent reminders of the legacy of the past (monuments, museums, public holidays, etc.)

Criminal prosecution. The most radical interpretation of acknowledgement and accountability is outright *criminal prosecution* of the perpetrators. This task can be taken up by an international body, as in the case of the International Criminal Tribunal for the Former Yugoslavia. National courts also perform this function. A recent example is Ethiopia where some 5,000 officials of the fallen Mengistu regime have been named for trial. By contrast, as a strategy for dealing with the past, criminal prosecution has encountered almost no support in post-1989 Eastern and Central Europe and in the post-authoritarian regimes of Latin America.

Compensation. Prosecution and/or general knowledge of the truth might be seen as an incomplete dealing with the crimes of the previous regime. Additional steps may include *compensation* by the state (monetary reparation, free medical and psychological treatment, reduced interest on loans for education and home building) and the establishment of *permanent reminders of the legacy of the past*, such as monuments, museums, public holidays and ceremonies. In South Africa, such measures are seen to provide channels for the non-violent expression of pain and anger.

4.9.2 *The case for prosecution and/or lustration*

In the ongoing public debate over post-transition justice, political leaders, academics and other analysts are divided on numerous points. The most divisive question, by far, is how to balance the demands of justice against the many, mainly political, factors that make prosecution a major risk to the new regime. Those who emphasize the beneficial effects of prosecution bring forward two crucial reasons. First, punishing the perpetrators of the old regime advances the cause of building or reconstructing a morally just order. The second reason has to do with establishing and upholding the young democracy that succeeds the authoritarian system.

Reconstruct a morally just order. Proponents of prosecution argue that "justice must be done" in order to rebuild the moral order that has been broken. They believe that the successor government owes it, first of all, as a moral obligation to the victims of the repressive system. Post-authoritarian justice serves to heal the wounds and to repair the private and public damage that the antecedent regime provoked. By serving as a sort of ritual cleansing process, it also paves the way for a moral and political renaissance. Asked by Adam Michnik, a prominent leader of the Polish opposition to communist rule, what he thought of such cleansing, the German writer Jurgen Fuchs answered:

> *"If we do not solve this problem in a definite way, it will haunt us as Nazism did. We did not denazify ourselves, and this weighed on us for years."*

Strengthens fragile democracies. Many believe that in the first months after a transition, the survival of the successor regime depends on swift and firm action against pro-authoritarian officials and their followers. Such action is seen as a necessary protection against sabotage "from within". Moreover, if the prosecution issue remains untouched other forms of social and political disturbance may be triggered, with perhaps a risk of vigilante justice with summary executions, or unbridled screening of political personnel, journalists and judges may be instigated, as was the case in post-communist Poland.

Legitimacy. What a new or reinstated democracy needs most, however, is legitimacy. Failure to prosecute and lustrate may generate feelings of cynicism and distrust towards the political system. This is precisely what has happened in some Latin American countries.

Long-term democratic consolidation. Some analysts believe that prosecutions also advance long-term democratic consolidation. They argue that amnesty endangers the inculcation of codes of conduct based on the rule of law. They claim that a discriminatory application of the criminal law, privileging certain defendants (such as military leaders), will breed cynicism toward the rule of law.

Deter future human rights abuses. Prosecutions, finally, are seen as the most potent deterrence against future abuses of human rights.

4.9.3 The case against punishment

Some analysts argue that prosecuting those alleged to bear responsibility for the crimes of the past is both risky and ambivalent. There is no guarantee, they say, that its effect will be beneficial for democracy. They argue that partisan justice always lurks behind the scenes and that prosecutions can have highly destabilizing effects on an immature democracy. Raoul Alfonsin, Argentina's first elected president after the collapse of the military regime wrote:

> *"In the final analysis, punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience."*

4.9 Transitional Justice

May violate rule of law and thus weaken new regime's legitimacy. Young democracies place a high value upon the rule of law and human rights, but post-transition justice involves a number of decisions that may trespass on these legal principles. It may force the successor elite to violate rule of law principles today while judging the undemocratic behaviour of yesterday, which can weaken considerably the legitimacy of the new regime.

For example, the principles of the separation of powers and of judicial impartiality are at stake when dealing with the question of who will act as the judges of the authoritarian regime. Political pressure, time constraints and the unavailability of sufficient judicial personnel may lead the post-transition elite to create special tribunals in which lay-judges play a prominent role. This, the opponents of prosecutions argue, makes lapses from important legal norms almost unavoidable. Such special courts can, indeed, become instruments of partisan vengeance since non-professional judges are easier targets for pressure by the executive, the media and public opinion. This is what happened in post-war Belgium and France some 50 years ago.

Justice after transition must take place within a timeframe. This frame consists of answers to two questions: do we accept *ex post facto* criminal legislation? And will the existing statute of limitation be lifted or upheld? The first question deals with the *nullum crimen sine lege, nulla poena sine lege* principle. This principle means that no conduct may be held punishable unless it is precisely described in a penal law, and no penal sanction may be imposed except in pursuance of a law that describes it prior to the commission of the offence. The second question, dealing with the lifting of the existing statute of limitation is particularly acute in post-communist countries. Atrocities against life and property took place mostly in the late 1940s and during the 1950s. In most cases, as in Hungary where a 30-year statute of limitations, exists, criminal proceedings for the most reprehensible human rights abuses are precluded by reason of lapse of time. Those who disapprove of prosecutions assert that post-transition trials ultimately will result in changing the rules of the game after the fact, either by applying retroactive legislation or by recommencing the statute of limitation once it has run out.

Post-transition justice tends to be emergency justice. This is particularly true if it comes in the early phases of the transition. The climate is then seldom well suited for a scrupulous sorting out of all the gradations in responsibility for the abuses of the past.

Survival of democratic process. A new or reinstated democracy is a frail construct. For that reason impunity or, at least, tolerance in the handling of past abuses might be a prerequisite for the survival of the democratic process. There is, first, the risk of a destabilizing backlash. Military leaders who feel threatened by projected prosecution may try to reverse the course of events by a coup or a rebellion. This problem especially haunts the young democracies of Latin America.

Creation of sub-cultures and networks hostile to democracy. A prolonged physical and social expulsion of certain sections of the population, based on criminal court decisions, may obstruct democratic consolidation by driving the supporters of the previous regime into social and political isolation. This in turn could result in the creation of sub-cultures and networks, which in the long run will become hostile to democracy.

Precludes reconciliation. Criminal prosecutions may also preclude the reconciliation required for a democracy to function. The need for closing the ranks is one of the main arguments of advocates of amnesty laws. See Uruguayan President Sanguinetti's justification of an amnesty law pardoning abuses of a previous military regime: "The 12 years of dictatorship have left scars which will need a long time to heal and it is good to begin to do so."

Administrative and managerial personnel. The viability of a young democracy depends too on its efficacy. A far-reaching purge of administrative and managerial personnel can be counterproductive as it endangers the badly needed political and economic development of the country. Prudent considerations of the problematic consequences of dismissals from civil service and high industrial jobs have been heard regularly in post-communist eastern and central Europe.

Dealing with the past is an inescapable task for new democratic regimes. Successor elites may be put off by the many delicate and explosive aspects of such assignment. But there is no way out. Choices must be made. One of Samuel Huntington's guidelines to democratizers reads:

> *"Recognize that on the issue of 'prosecute and punish vs. forgive and forget', each alternative presents grave problems, and that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and, above all, do not forget."*

4.9 Transitional Justice

A major problem is that some of the arguments in the debate on pardon versus punish are quite contradictory. Most political leaders, journalists and academics seem to agree that the crucial challenge is to strike a balance between the demands of justice and political prudence or, in other words, to reconcile ethical imperatives and political constraints. This is no easy enterprise. It entails a difficult and, on occasion, tortuous cost-benefit analysis. All costs and gains, political and moral, of pardoning and punishing must be balanced against each other.

4.9.4 Constraints

In their confrontation with the many questions and dilemmas which dealing with the past poses, political and judicial elites have limited freedom of action. Several factors restrict the number of accessible politico-legal strategies: earlier experiences with post-transitional justice; the international context at the time of the regime change; the presence or absence of organizational resources; and the state of the judiciary.

But the determining factor in how a state is able to deal with its past depends on the balance of power between the forces of the old and the new order during and shortly after the transition. There are three scenarios: (1) a clear victory of the new forces over the old order, as in a violent overthrow or the collapse of the repressive regime (e.g., Ethiopia); (2) reformers inside the forces of the past initiate democracy (e.g., Soviet Union); (3) joint action by a negotiated settlement between governing and opposition groups (e.g., South Africa).

The most important consequence of the mode of transition is the density of political constraints it generates. The widest scope for prosecutions and punishment arises in the case of an overthrow. Almost no political limits exist. Full priority can be given to the thirst for justice and retribution. A totally different situation comes up if the transition is based on reform or compromise. In that case the forces of the previous order have not lost all power and control. They are to a certain degree able to dictate the terms of the transition. The new elite have only limited options. They may be forced to grant the outgoing authorities a safe passage in return for their total or partial abdication. The need to avoid confrontation becomes the rationale for exchanging criminal prosecution and severe lustration for a policy of forgiveness.

4.9.5 Conclusion

Many of the policy suggestions mentioned above are based on the premise that post-authoritarian elites can actually make

choices. However, the first lesson of the study of past examples is that the actions of such elites are a function of the circumstances of the journey to democracy. The second conclusion is that there are no miracle solutions to the question of how to deal with a repressive past. In almost all cases the passage of time has not fully exorcised the ghosts of this past. Too much forgiveness undermines respect for the law, induces the anger of those who suffered, is an impediment to an authentic reconciliation and an invitation to recidivism. That is why most analysts argue that if the balance of forces at the time of the transition makes a negotiated mildness inevitable, a truth-telling operation with full exposure of the crimes of the former regime is the least unsatisfactory solution. Memory, it is said, is the ultimate form of justice. The truth is both retribution and deterrence, and undermines the mental foundation of future human rights abuses.

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Michael Lund

4.10 Reckoning for Past Wrongs: Truth Commissions and War Crimes Tribunals

As discussed in the previous section, when communities have been victimized by the government or by another group during a conflict, underlying feelings of resentment and the desire for revenge cannot be alleviated unless the group is allowed to mourn the tragedy and senses that wrongs have been acknowledged, if not entirely vindicated. In an environment where there is no acknowledgement of or accountability for past violent events, tensions among former disputants persist. Hence, confronting and reckoning with the past is vital to the transition from conflict to democracy. This section addresses two mechanisms to achieve this accounting: truth commissions and war-crime tribunals.

During protracted periods of authoritarian rule and violent conflict, support for democratic mechanisms and the rule of law can atrophy. It is important to rebuild confidence in democratic government and eliminate such practices as political killings and ethnic cleansing in order to facilitate the transition to a civil society. The transformation can also be hindered by lingering feelings of injustice and mistrust on the part of the population against the government and other ethnic groups. In addition, the prospects for sustaining the peace process after a settlement

may be prejudiced if perpetrators of atrocities remain in positions of power or are seen to be continuing to act with impunity in the country or in their own communities.

Truth Commissions

4.10.1 Description

A truth commission is a body established to investigate human rights violations committed by military, government, or other armed forces under the previous regime or during a civil war. Truth commissions are not courts of law. Their primary purpose is to provide an accurate record of who was responsible for extra-judicial killings, such as assassinations and "disappearances", massacres, and grievous human rights abuses in a country's past, so that the truth can be made part of a nation's common history and the process of national reconciliation can be facilitated.

Truth commissions are not courts of law. Their primary purpose is to provide an accurate record of who was responsible for extra-judicial killings in a country's past, so that the truth can be made part of a nation's common history and the process of national reconciliation can be facilitated.

Truth commissions also address the demand for justice by victims and their families by providing a forum for victims to relate their stories as well as an official public record. By acknowledging the truth and assigning responsibility for violations to certain individuals, both the violators and the victims can come to terms with the past. Truth commissions do not focus on a specific event, but look at violations committed over a broad period of time. Truth commissions are usually established immediately after a peace settlement has been reached, since at this point the new regime is generally strong in relation to the military and other segments of society. A commission usually exists temporarily; its mandate usually ceases with the submission of a report of its findings. It is not intended as a prosecutorial body, but its findings may be used in separate judicial proceedings.

The legacy of brutal internal conflict or authoritarianism is often a lingering sense of injustice and mistrust of the government on the part of the citizens and thus a lack of confidence in new democratic mechanisms. A truth commission can enhance the process of national reconciliation by reducing the population's fear and mistrust of the government and demonstrating the new regime's commitment to democratic ideals, thus facilitating change in the public's perception of the government. Accepting responsibility for past violations displays respect for the rights of individuals and rule of law, which enhances the legitimacy of the new regime. Truth commissions can also be especially beneficial in "buying time" during the period of transition from the temporary political arrangements established by a peace process to the establishment of permanent judicial institutions.

4.10 Reckoning for Past Wrongs: Truth Commissions and War Crimes Tribunals

Box 11

EXAMPLES OF TRUTH COMMISSIONS

Truth commissions have become a widely used tool in the transition from conflict or oppression to democracy, especially in Central and South America and Africa.

- **Chile's National Commission for Truth and Reconciliation**. In 1990, at the urging of non-governmental organizations, the president of Chile established a "National Commission for Truth and Reconciliation" to investigate violations committed over the previous 17 years of military rule. This commission worked for nine months, with a staff of over 60 people, and was able to thoroughly investigate each of the 3,400 cases submitted. Most notable in the Chilean example is that, following the commission's suggestion, the government created a mechanism for the implementation of the commission's recommendations.

- **Commission on the Truth for El Salvador**. In the case of El Salvador, the creation of the "Commission on the Truth for El Salvador" was written into the peace settlement ending the 12-year civil war in that country. Given the fragile foundation of the El Salvador settlement and the highly polarized nature of the country, the truth commission did not include any Salvadorans. Instead, the UN appointed three highly respected international figures to the commission. The mandate granted the commission six months to complete its investigation and submit a report, although it was later granted a two-month extension.

- **The South African Truth and Reconciliation Commission.** In South Africa, three commissions have been created. In 1992, Nelson Mandela created a "Commission of Enquiry" to investigate treatment of prisoners at African National Congress (ANC) detention camps. This is a rare example of a political party organization establishing a commission to investigate its own abuses. The findings of this commission were criticized for being biased and Mandela named a new commission consisting of three commissioners, from South Africa, Zimbabwe and the US. In December 1995 the Government set up a two-year "Truth and Reconciliation Commission" composed of 17 members and chaired by Archbishop Desmond Tutu. The commission's task included investigation of crimes committed by both the Government and the opposition during the struggle against apartheid, as well as consideration of amnesty for perpetrators and reparations to victims.

4.10.2 Tasks and activities

Truth commissions have performed the following functions:

– Investigation of past human rights violations committed over a given period of time by the government, military or other armed forces.

– Reporting of the commission's findings to government. Such reports can publicly identify individual perpetrators of human rights violations and recommend action to be taken by the government against these individuals. They can also include recommendations covering military and police reform, judicial reform, and ways of strengthening democratic institutions. In some cases, such as in South Africa, the report can also include recommendations on how to apportion reparations among victims.

– As part of their investigations, commissions can gather information on victims, locate victims' remains for their families, and search for persons who still may be alive.

– Examination of the context under which abuses occurred and analysis of what made such events possible, in order to lessen the likelihood of their recurrence.

– Education of the public on human rights through media reports and publications of the commission's findings.

– Granting of amnesty to those perpetrators who have fully confessed their crimes. This was the case in the South African Truth and Reconciliation Commission, where an amnesty committee, staffed primarily by judges, heard applications for amnesty.

4.10.3 Strengths and limitations

Truth commissions are often the result of a negotiated compromise between parties in conflict. As a result, they can be handicapped from the beginning depending on the political climate in which they take place. For example, they may place more emphasis on truth and pardon and less on justice, thus potentially leading to disappointment in the long term. In evaluating the efficacy of a commission at a later stage, therefore, it is important to remember that at the time the commission was negotiated, parties' options may have been limited and that the mere formation of a truth commission may, in itself, have played a valuable role in the transition process.

Can maintain peace during transition. Truth commissions can play an integral part in the maintenance of the peace process

during the early stages of transition from conflict to a permanent legitimate government by representing one of the first visible manifestations of the transition to the new democratic order. Truth commissions provide an impartial mechanism by which the current regime can display respect for individual rights, which helps to enhance their legitimacy. This in turn can help build confidence in democratic mechanisms.

Truth commissions are limited in implementing recommendations. The mandate of truth commissions usually prevents them from playing an active role in the implementation of their recommendations. If there is no real commitment on the part of the government to reform, many of the commissions' recommendations can go unheeded.

They are not a substitute for criminal justice. Truth commissions are separated from the formal judicial process and, though it can lead to such a process, actual prosecution of individuals responsible for abuses has been rare.

They cannot investigate the current situation. As the purpose of a truth commission is to bring a nation to terms with its past, it cannot investigate the current situation. Therefore, abuses by the new regime are often overlooked. An example of this can be seen in El Salvador, where death squads continued to operate after the peace settlement was in place. If there is no group monitoring the current regime, victims are often hesitant to testify for fear of reprisal. A truth commission does not take the place of a permanent human rights monitoring body.

4.10.4 Organization

Establishment, personnel and structures

The executive branch, parliament or international organizations such as the UN have created truth commissions. Once the commission has been created, the establishing body then appoints individuals to serve as commissioners. The number of commissioners can vary, ranging anywhere from three to 30. The commissioners should comprise well-respected individuals representing a cross-section of society, such as politicians, lawyers, judges, and human rights personnel. In some cases where the country is extremely polarized, as in El Salvador, the commissions may be made up entirely of foreign citizens.

An executive secretary or chairperson, often appointed by the establishing body, heads the commissions. Personnel should include administrative and technical support staff.

Resources needed

The main resources needed for an effective commission include: financing, appropriate information, a venue, modes of transportation, and skilled staff. In most cases, funding for the commissions has come from the government. In some instances, funding has come from international foundations, NGOs, foreign governments, or, as in El Salvador, from the United Nations.

Access to files of human rights cases from the country's courts or from human rights organizations is especially beneficial. Commissions also need the physical infrastructure necessary to conduct their investigations. This includes access to transportation in order to address complaints throughout the country as well as adequate office space, where victims and witnesses can come to give testimony. Among the staff required may be human rights specialists, social workers and forensics experts.

Links to other mechanisms

Truth commissions work quite effectively in conjunction with war crimes tribunals. A tribunal is endowed with the actual judicial and prosecutorial powers lacked by truth commissions. Yet tribunals often cannot be established until later in the peace process, after judicial reforms have taken place. Truth commission investigations can begin immediately and serve to fill in this time gap, thereby allowing time for establishment of a tribunal.

Also, as mentioned above, as truth commissions are not mandated to investigate current human rights abuses, a permanent human rights monitoring body should also be established.

DESIGNING A TRUTH COMMISSION

Truth Commission: *A body established to investigate human rights violations committed by military, government, or other armed forces under the previous regime or during a civil war. Truth commissions are not courts of law. Their primary purpose is to provide an accurate record of who was responsible for extra-judicial killings such as assassinations, "disappearances" and other human rights abuses.*

DESIGN FACTORS

Impartial and transparent. The appointment and composition of the commission must be both impartial and transparent; its members must be capable of acting independently and professionally.

Sufficient authority. The commission must be vested with sufficient authority to collect information and to maximize the impact of its recommendations. The commission established in Chad was authorized by presidential decree to collect documentation, take testimony, and confiscate material as necessary. The commission in South Africa was highly successful in its investigations due to its powers of subpoena, and search and seizure.

Flexible mandate. The commission must be given a flexible mandate to decide what types of abuses to investigate.

Realistic timeframe. The commission should have a mandate of limited duration, but one that provides a realistic timeframe or includes mechanisms for extension.

IMPLEMENTATION FACTORS

Sufficient funding and staff. The most successful commissions have had a large support staff. The "National Commission for Truth and Reconciliation" in Chile had over 60 staff members and was therefore able to investigate each case brought before it. In the Philippines, however, the commission did not have staffing levels to investigate the overwhelming volume of complaints received.

Perceived impartiality of the commissioners. The South African Government selected commissioners by committee rather than governmental appointment.

Confidential investigations. Confidential investigations can overcome witnesses' fear of granting testimony. Investigations may be conducted privately if fairness can be guaranteed and the findings are made public. In El Salvador, information was kept confidential until publication of the commission's report.

CONTEXTUAL REQUIREMENTS

Real commitment on the part of the government to respect individual rights and democratic mechanisms.

Strong civilian government in relation to the military. It is difficult for a truth commission to recommend action against members of the military, if the government cannot enforce it.

Impartial media. The existence of impartial media to broadcast commission's findings.

CHALLENGES AND PITFALLS

Threats to commission personnel and/or potential witnesses. Some commissions have reported an unwillingness by victims to testify for fear of reprisals.

Too short or too long a timeframe for the commission's operation. Most truth commissions have been granted a six- to nine-month mandate, but this short a timeframe may limit a commission attempting to investigate and document thousands of cases. Yet setting no deadline for completion of the commission's work is even more problematic. The truth commission in Uganda has been operating for nine years and has lost the confidence of much of the population.

Politicization. Commissions are often used as a political tool to enhance a regime's popularity without a true commitment to reform. The government's claimed commitment is often belied by its tendency to grant amnesty to the perpetrators of violations.

Limited mandate. A truth commission's mandate should be broad enough to allow for the investigation of all forms of abuse. If the commission's mandate is limited in scope, the full truth is not made public and the feelings of injustice and mistrust among the population remain.

Claims of denial of due process. Although truth commissions do not have prosecutorial powers, their allegations against those who have committed human rights violations are often perceived as a guilty verdict. For this reason, commissions have been criticized for denying due process to those accused. The argument over due process versus exposing the truth has arisen in debates over whether or not to identify perpetrators of abuses or victims in commission reports. To address this issue, many commissions have established processes by which those accused have the opportunity to present evidence in their defence.

War Crimes Tribunals

4.10.5 Description

A war crimes tribunal is a judicial body created to investigate and prosecute individuals accused of violations of human rights or humanitarian law in the wake of violent conflict. Such violations include crimes against humanity and other crimes outlined in the Fourth Hague Convention and the Geneva Conventions. By placing the responsibility for human rights violations on specific individuals, rather than a social or ethnic group, a war crimes tribunal can help to defuse ethnic tensions. Actual prosecution of these individuals fulfils the victims' needs for justice, which is necessary for the process of reconciliation. Finally, setting a precedent of accountability for human rights violations ends the notion of impunity and works to deter future perpetrators.

Box 12

EXAMPLES OF WAR CRIMES TRIBUNALS

A tribunal is generally an international body, although national courts can carry out similar functions. Although war crimes tribunals have not been widely used since the Nuremberg trials of Nazi officials after World War II, two prominent recent cases can serve as examples.

- **International Criminal Tribunal for the Former Yugoslavia (ICTY).** In 1993 the United Nations Security Council Resolution 827 created the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY was mandated to prosecute individuals allegedly responsible for violations of international humanitarian law during armed conflict in the territory of the former Yugoslavia from 1 January 1991 until a date to be determined after the restoration of peace.

- **International Criminal Tribunal for Rwanda (ICTR).** In 1994 the United Nations Security Council adopted Resolution 955, which established the International Criminal Tribunal for Rwanda (ICTR). Similar to the ICTY, the tribunal in Rwanda was tasked with prosecuting individuals responsible for genocide and crimes against humanity committed in Rwanda between 1 January, and 31 December, 1994. The ICTR also has jurisdiction for prosecuting Rwandan citizens who committed such violations in neighbouring states.

The purpose of war crimes tribunals is to restore peace and deter future violations by enforcing the norms they uphold. The key difference between a truth commission (as discussed above) and a war crimes tribunal is that a tribunal has the ability to prosecute those persons accused of human rights violations. A tribunal provides the accused with a fair trial and opportunity to defend oneself.

4.10.6 Tasks and activities

War crimes tribunals undertake the following tasks:

– Investigate, prosecute and sentence persons allegedly responsible for violations of international humanitarian law and human rights abuses.

– Provide victims the opportunity to testify in public or have their testimony recorded.

– Educate the public on humanitarian norms and human rights.

4.10.7 Strengths and limitatitions

A war crimes tribunal holds the potential for taking strong, concrete steps toward building a society based on the rule of law through a process that is seen to be fair and law-based. The criticism of the post-World War Two Nuremberg trials – that they imposed retroactive norms and victors' justice on the accused – no longer applies. In the intervening years, the notion of individual responsibility for war crimes has become internationally accepted. Additionally, as with Rwanda and Yugoslavia, an international tribunal under the UN need not be controlled by "victors" and therefore cannot be accused of seeking revenge. The effectiveness of a war crimes tribunal is hampered, however, by four main factors.

No consensus on penalties. Although individual accountability for war crimes has become an accepted norm in the international arena, there is no corresponding consensus on the penalties to be imposed for those crimes. The international community highlighted this situation in the Rwanda case where the punishment under Rwandan national law for some crimes differs greatly from the penalties endorsed. If different judicial bodies mete out different punishments for the same crimes, it can undermine the sense of justice that the tribunal is meant to instil.

The key difference between a truth commission and a war crimes tribunal is that a tribunal has the ability to prosecute those persons accused of human rights violations.

Lack of an enforcement mechanism. Tribunals have the power to issue arrest warrants for war criminals, but do not have the police authority to apprehend those who have been indicted. In this effort, tribunals are reliant upon the co-operation of the local government and of other relevant international bodies in tracking down and capturing war criminals. Yet, as seen with NATO in Yugoslavia, these bodies may resist performing this portion of their mandate because it may place peace-keepers at risk of retaliation. But lack of enforcement may severely hinder the effectiveness of tribunals, thereby eroding public confidence in their usefulness.

Cannot stop a conflict in progress. Although tribunals may begin their work before hostilities completely cease (as in Yugoslavia), they cannot themselves stop a conflict that is in progress. In fact, it is possible that the naming of particular individuals who still have the ability to carry on the conflict may harden their resistance to ending it and provide further motivation to continue the struggle. This problem can be alleviated to the extent that tribunals are established before a war arises, such as would be the case were there to be, as some have advocated, a permanent international criminal court. This kind of established tribunal could have a deterrent effect on future violations.

Scope of prosecution depends on whether the conflict is internal or international. Under the Geneva Conventions, if a conflict is internal, a perpetrator can only be prosecuted for genocide or crimes against humanity, but not for grave breaches of the Geneva Conventions on humanitarian law or other war crimes. Genocide and crimes against humanity have stricter definitions and are more difficult to prove than war crimes. The war in Yugoslavia was deemed an international conflict, therefore the ICTY has the ability to prosecute war crimes and grave breaches of the Geneva Convention, as well as genocide and crimes against humanity. As the conflict in Rwanda is an internal matter, the ICTR's jurisdiction only covers the latter. Thus, when used to adjudicate internal conflict, the jurisdiction of a tribunal is limited.

4.10.8 Organization

Establishment, personnel, and structures

The United Nations Security Council created the ICTY and the ICTR. In both cases the UN adopted a series of reso-

lutions calling first for the establishment of a commission to investigate violations of humanitarian law and then, upon recommendation of the commission, the establishment of a tribunal to prosecute those guilty of violations. The time-frame and territory covered by each tribunal was established upon their creation.

In the case of Rwanda, the question arose as to whether to create an international or national mechanism for prosecution. An international tribunal was preferred on the basis that it would be less biased, have a wider jurisdiction, and have more resources at its disposal. However, it was argued that a national tribunal would serve to enhance the legitimacy of the new regime and would be more sensitive to the local community's needs. In Ethiopia, a war crimes court conducted proceedings regarding the acts of officials of the Dergue ruling group under the dominance of President Haile Mariam Mengistu. Currently, the ICTR is based in Tanzania, and it is working in conjunction with Rwandan national courts to prosecute war criminals, although the Tribunal has primacy over national courts.

Both tribunals have the same three-section structure. The three arms are the Judges' Chambers, the Offices of the Prosecutor, and the Registry. The judges are divided into two trial courts of three judges each and a five-judge appeals chamber. The judges are responsible for issuing indictments and hearing and deciding cases. The UN General Assembly elects the judges serving on the tribunals. The Office of the Prosecutor has the responsibility for investigating alleged crimes, framing indictments, and prosecuting cases. The chief prosecutor is appointed by the UN Security Council and is assisted by a deputy prosecutor and other staff. The Registry is the administrative division of the tribunal and performs a wide array of functions including recommending protective measures for witnesses, providing counselling for victims, and handling appointment of defence counsel. Although the ICTY and the ICTR are separate entities, they do share some of the same personnel, such as the five appellate judges and the chief prosecutor.

Resources

An international tribunal needs substantial financial, personnel and infrastructure resources.

The ICTY has sought $US 70,000,000 from the United Nations to cover operating costs for 1998. Funding for the tri-

bunals has come primarily from the United Nations, although some funding is received from voluntary contributions. A large staff is necessary for conducting investigations and administering the tribunal. Approximately 400 people staff the ICTY. A tribunal should have access to computer and storage facilities for court records, testimony and evidence.

Another important resource is legal and investigatory expertise. In order to maintain credibility, a tribunal must conduct thorough and fair investigation and trials. To this end, evidence must be carefully gathered, documented, and preserved, and prosecution and defence attorneys must be highly competent. Many non-governmental organizations have contributed volunteers and conducted training programs for tribunal staff.

Links to other mechanisms

As discussed above, the work of war crimes tribunals is closely related to that of truth commissions. Both fulfil investigatory functions to seek the truth and hold individuals accountable for violations of human rights. War crimes tribunals can utilize information gathered by commissions, which have investigated human rights abuses. Also, as seen in the Rwanda case, international tribunals can work in conjunction with national courts by dividing the workload.

4.10.9 Conclusion

Transitional justice remains one of the most widely debated aspects of post-conflict reconciliation and democracy building. The type of transitional mechanisms discussed in this section are attracting increasing attention in many different jurisdictions. Two prominent but still uncertain cases of democratic transition – Bosnia and Indonesia – have both been accompanied by calls for the establishment of local truth and reconciliation commissions, for example. Despite the very different circumstances in which these two countries find themselves – post-war reconstruction under the auspices of the international community in Bosnia, and an uncertain transition from authoritarian rule in Indonesia – the attraction of some mechanism to address wrongs committed in the past remains strong. This illustrates the potential perceived utility of such mechanisms for delivering justice, even under very different circumstances.

The possible establishment of a permanent international criminal court to prosecute war criminals and perpetrators of genocide is another illustration of the emerging international consensus on the issue of transitional justice. Such a court would effectively supplant the temporary mechanisms used since World War Two to prosecute crimes against humanity, such as the Nuremberg and Tokyo war crimes tribunals and the ad hoc United Nations tribunals for Rwanda and the former Yugoslavia. The court may have jurisdiction over the most serious crimes of concern to the international community, such as genocide, crimes against humanity and war crimes. It would not supersede national courts but rather play a complementary role. The court would particularly play a role when national institutions are unable to act – such as where existing institutions have collapsed due to internal conflict, or where a state is unwilling to act to try its own nationals. In sum, it appears that post-conflict societies may well soon have a permanent international forum from which to seek justice.

DESIGNING A WAR CRIMES TRIBUNAL

War Crimes Tribunal: *A judicial body created to investigate and prosecute individuals accused of violations of human rights or humanitarian law in the wake of violent conflict. The purpose of a war crimes tribunal is to restore peace and deter future violations by enforcing the norms it upholds. The key difference between it and a truth commission is that a war crimes tribunal has the ability to prosecute persons accused of human rights violations.*

DESIGN FACTORS

Staff. Ample staff with appropriate expertise.

Placement. Situated in a location where it will have the most public impact on the society affected, as a visible image of justice.

IMPLEMENTATION FACTORS

Credibility. Maintenance of credibility by investigating and prosecuting all sides of a conflict equally and precluding in absentia trials.

Use of accepted rules of procedure and standards of evidence. The ICTY and the ICTR utilize the same set of rules in order to avoid questions of fairness.

Number of defendants. Reduction of the number of defendants to a manageable range by focusing prosecutorial efforts on the central core of individuals who planned and organized the systematic violations of humanitarian law, as opposed to everyone who may have committed abuses.

CONTEXTUAL REQUIREMENTS

- Co-operation from relevant international bodies in the apprehension and enforcement of indictments.
- Support of local government and its participation in the proceedings.

CHALLENGES AND PITFALLS

Lack of evidence. It can be difficult to gather enough evidence to support convictions. In the case of senior officers it can be especially difficult to link the perpetrator with the crime. These difficulties can be enhanced when a tribunal can only prosecute crimes against humanity or genocide. Under these conditions, the tribunal must prove a systematic attempt to destroy an ethnic group.

Compliance. States are often reluctant to co-operate in the apprehension of indicted war criminals. States can actively inhibit apprehension by granting immunity to the alleged criminals. Kenya and Zaire have both harboured individuals indicted by the ICTR.

Timing. Tribunals cannot begin operation immediately, as they first must have a trained staff and infrastructure in place. These delays can lead to frustration and a lack of support on the part of the population. This can hamper a tribunal's effectiveness in achieving its goals of building confidence in democracy and the rule of law.

Security concerns. As with truth commissions, potential witnesses may fear reprisals and therefore may be deterred from testifying.

Lack of resources. Shortage of funding and/or trained personnel can erode the effectiveness of a tribunal.

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GUATEMALA

Gulf of Mexico

°Campeche

°Carmen

MEXICO

Carribean Sea

Belize City °

BELIZE

Golfo de Honduras

° Comitan

GUATEMALA

Puerto Barrios

San Pedro Sula

° Coban

° Huehuetenango

° Zacapa

HONDURAS

° Totonicapan

° Chiquimula

° Coatepeque

Antigua

° Jalapa

° Guatemala

° Retalhuleu

° Escuintla

EL SALVADOR

Santa Ana °

Cojutepeque

San Miguel

San Salvador

Golfo de Fonseca

PACIFIC OCEAN

Michael Lund

GUATEMALA

Overview

The December 1996 signing of a final peace agreement between the Government of Guatemala and the Guatemalan National Revolutionary Unity officially ended a 36-year civil war and was the culmination of a series of 14 previous accords. The Guatemalan peace process was noteworthy in several important respects:

– the accords covered a wide range of democratization, human rights, and socio-economic issues, the resolution of which would radically change Guatemala's governing processes and social relations; but agreement on these issues preceded, rather than followed, a formal cease-fire;

– rather than the settlements leading to elections and creating a new democracy, the peace process was fostered to some extent by electoral and democratic processes that preceded the war by several years (but these processes became more vigorous and significant as they were brought into the peace process);

– the negotiations deliberately solicited and incorporated views expressed by the business community and other elements of civil society; and

– implementation of certain accords was handed over to special national commissions and forums devised and run primarily by Guatemalans, rather than to organs and representatives of the UN and the international community.

But despite the inclusiveness of the peace process and the breadth of the settlement, a significant gap still persists between the main protagonists in the negotiations and the interests of ordinary Guatemalans. Thus, if the various implementation mechanisms prove unable to overcome the influence of entrenched corporate and military interests, many of which are represented in the Congress, they will fail to alter relations between various interests, which is needed to progressively attain the accords' far-reaching goals.

The Conflict

Reacting to a history of diplomatic and military intervention in Central America by the United States and Britain on behalf of foreign commercial interests, a nationalist movement emerged in the 1940s which elected two reformist presidents who were determined to modernize Guatemala economically, expand its social services, and bring about land reform. But this "Guatemala Revolution" was thwarted in 1954 by the US Central Intelligence Agency. An invasion force was launched, providing the pretext for a *coup d'état* in the capital: a more authoritarian government was installed, which repealed agrarian reform policies and clamped down on political opposition.

Until the mid-1980s, Guatemala was ruled by military-dominated governments that were repressive and variously corrupt. They suspended democratic institutions

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and the rule of law, banned political parties and trade unions, and engaged in illegal repression through "disappearances", extra-judicial killings, torture, and other human rights violations. The communist party organized a Marxist-Leninist resistance movement that received support from the Cuban Government and adopted the guerrilla tactics of the day. Its nucleus was former military personnel opposed to Guatemala being used as a base for the April 1961 Bay of Pigs invasion in Cuba. The first phase of the conflict ended, however, when the army essentially defeated these forces by the end of the 1960s.

The second phase began with the emergence of two new resistance organizations in the mid-1970s, operating primarily out of the indigenous areas of the country. The Government continued to ban and persecute all leftist organizations, to perpetrate torture and extra-judicial killings, and to conduct rural scorched-earth campaigns. Thus, the armed conflict constituted a struggle between, on the one hand, a rural-based insurgency and populist urban democratic opposition movement, and on the other hand, a corporate and military-controlled government. With competing Cold War ideologies also at stake, both sides had external suppliers of money and weaponry. The indigenous Indian populations were especially hard-hit by the war. *Campesinos* were recruited to fight as guerrillas or in government-led "civil patrols", and the Government in particular targeted thousands of innocent indigenous Indian communities in rural areas suspected of harbouring guerrillas. Thirty years of war left 100,000 to 150,000 civilians dead or "disappeared", over one million displaced persons and refugees, and over 400 villages completely destroyed. Overall, the Government and paramilitary forces were estimated to have been responsible for 80 per cent of the non-combatant deaths and for 50,000 disappearances, giving Guatemala the reputation as Central America's worst human rights violator.

In 1982, an alliance of guerrilla forces and leftist and populist forces formed the Guatemalan National Revolutionary Unity (URNG). By the mid-1980s, the URNG had garnered wide support in Guatemalan society, including many Catholic priests, as well as foreign sympathy; a degree of military stalemate had set in. For its part, the military saw the need by 1985 to begin to return to democracy. Multi-party democracy was formally restored, and since then elections have been regularly held.

However, participation in the elections remained low, coup attempts remained a threat, and the Government did little to address economic issues or social inequalities. Military-influenced governments continued to take advantage of a weak judicial system and corrupt police force to maintain power. Criminal violence and drug trafficking flourished.

Ultimately, the military and the main business interests supporting it realized they could not achieve economic growth through foreign investment and aid unless peace was restored. In addition, the labour unions and other opposition groups, who had reorganized themselves into the Union and Popular Action Movement

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(UASP) in 1988, began to advocate pragmatic social and economic reforms that could make headway in negotiations. By the early 1990s, the Guatemalan conflict had shifted to a primarily political struggle over issues of representation and public policies. Widening support for meaningful democracy was evident.

The Negotiation Process

As the Cold War drew to a close and several other Central American governments held democratic elections, two regional peace efforts also provided the impetus for specific negotiations. The Contadora group, composed of Colombia, Venezuela, and Panama and led by Mexico, came close to mediating an agreement in 1985. In 1986, Guatemalan President Cerezo convened a summit meeting of the five Central American presidents in Guatemala, where they committed themselves to negotiations to achieve peaceful settlements of the three ongoing wars, to further democratization and development, and notably, to the role of the United Nations rather than the Organization of American States as facilitator and mediator. In Guatemala, a National Commission on Reconciliation was created with Bishop Toruno of Zacapa as chair.

Toruno initiated informal consultations among representatives of different sectors of civil society: the legal political parties, business people, priests and lay church leaders, unions, and academics. The result was agreement on the need for constitutional reform, more popular participation in government, respect for human rights, and improved social welfare.

Toruno then facilitated direct negotiations between the Government and the URNG in 1991. This produced an agreement on democratization principles, international verification, an agenda and procedures for further discussion, and the role of a UN mediator, but made little progress regarding civil rights. Further talks in 1993 produced a framework agreement that then led to four accords on human rights, refugees, a truth commission and indigenous rights.

Five further accords were signed in 1996 regarding socio-economic and agrarian issues, civilian power and the military, a cease-fire, constitutional reform, and re-integration and reconciliation of former combatants. By late 1996, no less than 15 accords, including the final peace agreement in December 1996, had been negotiated over five years between the URNG and three successive governments.

Although these accords were fostered and mediated by regional leaders, domestic leaders, and particularly the UN, the progress of the peace process in Guatemala can be attributed more to the changes occurring in Guatemalan politics than to the tutelage of the UN and the international community. A confluence of pressures came from several directions: a populist-oriented armed insurgency; modernizing rightwing governments; a strengthening of civilian politicians vis-à-vis the military; the rising influence of civil society (initially the economic interests of the emerging Guatemalan business class but increasingly labour and other mass-based groups); and the influence of reformism within the military itself.

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The Settlements

The human rights accord of March 1994 pledged the Government to end impunity for human rights violations and illegal security structures, and foresaw the creation of professional security forces, the protection of human rights workers, and the immediate establishment of MINIGUA, a UN verification body. MINIGUA's tasks were to investigate and publicize human rights violations, ensure follow-up in addressing them, and assist others in promoting protection against human rights violations and in creating a culture of respect for human rights. The resettlement accord of June 1994 called for improving local conditions and services to allow the return of uprooted people, expediting the processing of their return, and for legal changes to encourage return of land to original owners or their compensation. Another June accord created a three-member commission to document past human rights violations since the beginning of the conflict. This truth commission has the power to determine institutional responsibility for violations of human rights, but not to name names or bring cases for prosecution.

The indigenous population, composed of Mayan, Xinca, and Garifuna peoples, was not represented in any peace negotiations. But the need to address their interests was clearly recognized. Thus, the rights of the indigenous population were explicitly addressed in a sweeping agreement in 1995. This accord affirmed the Government's intention to address discrimination against the majority indigenous population, by reforming the municipal code, decentralizing the educational system, promoting media rights for indigenous peoples, and recognizing the need for communal ownership of land. All 22 linguistic groups in Guatemala were accorded official status, and the Government committed itself to support the use of their languages. But the details were left to the implementation process, through the work of the designated commissions.

A definitive cease-fire was agreed between the Government and the URNG in May 1996, along with a socio-economic accord that included agrarian issues. The accord addressed taxes, expenditures on health, housing and education; citizen participation in decision-making; a land bank, and access to land for *campesinos.* But it did not require tax reform and said little about land reform. The peace process culminated in the September 1996 accord, which required reforms in the legislative, judicial and executive branches. The role of the military was redefined, and its size reduced by a third. The existing police force would be transformed into a professional civilian body, the civil defense patrols that had fought guerrillas in the highlands were abolished, and internal security was given to a civilian intelligence agency. Subsequent accords addressed the details of the cease-fire, created an electoral commission, and reincorporated the URNG into the normal legal life of the country.

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Implementation

The accords pointed toward a major restructuring and transformation of Guatemalan society. But the accords did not themselves require structural changes; their specific meaning was left to be settled by new implementation mechanisms that were created or envisioned by the accords. These mechanisms can be divided into international and domestic mechanisms for carrying out various agreements, and the actual changes in the ways of government itself, some of which resulted from the accords and some of which occurred apart from the formal negotiations process.

MINIGUA implemented the human rights provisions of the March 1994 accord by setting up offices throughout the country to take complaints on violations and promote local capacity for human rights. This deterred violations and thus enabled the 1995 elections to proceed peacefully.

National-level institutional innovations involved representatives of domestic interests in the complex issues and responsibilities of effecting a durable peace. These included commissions on the identity and rights of indigenous peoples, judicial reform and modernization, the displaced, civil-military relations, incorporation of the URNG, etc.

One of the most unusual processes was the Assembly of Civil Society (ASC), mandated by the January 1994 accord with Bishop Toruno in the chair. For eight months in 1994, a broad array of social, labour, women's, and religious groups, along with major political parties, met and developed consensus positions on all aspects of the peace process agenda. All sectors except the business community were involved. Their recommendations were then forwarded to the UN moderator of the talks. Subsequent agreements between the Government and the URNG were then to be submitted to the ASC for ratification, thus giving them the character of national commitments. The ASC gave opposition groups an opportunity to work together in developing concrete policy proposals.

Other changes occurred completely apart from any specific accord, but were obviously spurred by it. To show good intentions toward the peace process as well as to obtain international legitimacy, the military abolished forced conscription in mid-1994 and the system of military commissioners in 1995, and it demobilized the civil defense patrols in 1996, even before the peace accord required it.

Prospects

There is little immediate likelihood of a renewed war in Guatemala, because the URNG and Government have come to control their militant flanks. But violence and intimidation continue and re-escalation remains possible. The military continues to play a role in public security, and thus behind the scenes in politics as well, in part because of increased crime, kidnappings, and drug trafficking and because the dismantling of the civil defense patrols has left a security vacuum in the coun-

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tryside where disputes over land are arising. But the military itself has yet to be held to a significant accounting of past human right abuses because of its continued political influence and the weakness of the judiciary system. A Public Prosecutor's Office has been established and the new code on criminal procedure is in effect, but justices still have difficulty rendering decisions independently. The police force, moreover, is insufficiently staffed and continues to have links to some of the militarized groups. The truth commission has only operated since 1997, and its limited powers make it unclear whether it will strike a balance that adequately alleviates the deep grievances felt by the many victims of past offenses.

The least advanced aspect of the accords is the removal of discrimination against indigenous peoples and the transformation of rural society and local decision-making. It is being assumed that more equitable social policies and higher social spending will be possible when efficiency is gained from economic reforms, economic growth stabilizes, and state revenues increase. And yet the Congress continues to be dominated by groups that represent more established and better-off national interests, who seem committed to fighting against implementation of the accords.

The Guatemalan parties have gone to the international community to pay for over half of the $US 2.6 billion needed to implement the accords from 1997 to 2001. But it is the broad-gauged and intersecting processes that have been set in motion in Guatemala that will mainly determine whether, over the long term, the country will leave the traditional patterns of governance clearly behind. Although large business interests predominate, Guatemala's politics overall are fragmented, and the channels for the participation of hitherto excluded groups of citizens are only beginning to have influence.

In spite of its implementation problems, the Guatemalan peace process has demonstrated the value of giving detailed attention to issues of process and consultation, even though it may be argued that there has been insufficient progress on core issues such as social inequalities. Questions of how truly participative the process has been in terms of including affected groups from outside the major parties (such as indigenous communities, trade unions, etc.) have also been raised. The initial credibility and legitimacy of the democratization experiment may not last long without attention to these issues, and meaningful progress on the widespread social changes envisaged in the peace settlement.

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4.11 Building an Electoral Administration

A country emerging from a conflict may need to build or restructure the processes by which it conducts elections. In this section, we identify some of the major issues that need to be considered in developing the form and structure of a country's electoral administration.

4.11.1 *The nature of the electoral process*
4.11.2 *Critical factors in election administration*
4.11.3 *Functions of an electoral administration*
4.11.4 *Location of the electoral body*
4.11.5 *Fears and concerns*
4.11.6 *Conclusion*

| Box 13 | Electoral Administration: International Trends (pp. 315–316) |

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One of the central issues that a country emerging from a protracted conflict must consider is the nature and suitability of its electoral administration system. The previous electoral administration may have been damaged or destroyed or perhaps, as is more often the case, may lack credibility and legitimacy through its association with the previous government. Or it may be simply necessary to alter certain aspects of the existing administration to address particular concerns. These decisions will have significant consequences for a country's democratic development.

But before any legislative provision is made, the principles and procedures of a free and fair electoral process must be made absolutely clear. In addition, the most appropriate institution to manage this process, as well as its level of autonomy and location, must be decided. Depending on these decisions, specific provisions relating to an electoral administration should be enshrined in the appropriate legislation.

This section examines the three essential questions that need to be addressed in structuring an electoral administration system:

4.11 Building an Electoral Administration

– Who or what body should be charged with the responsibility of supervising and organizing an election?

– What form should that body take?

– Where should that body be located?

4.11.1 The nature of the electoral process

There are certain features about the electoral process, both practical and political, which must be kept in mind when considering the type and location of an electoral body:

– Elections are *national* and *local* events. They require a centralized effort that is able to extend into all areas of the country.

– Elections should be *accessible.* Administrators must understand and fulfil this objective.

– Elections are *high-pressure* events. Once an election date is set, election administration involves meeting a series of deadlines; the political penalty for missed deadlines is high, both for election administrators and for the government.

– Elections involve *high stakes.* The credibility of elections is tied to national stability, and the winning and losing of elections is tied to political party power. In many post-conflict situations, elections themselves can precipitate a return to violence.

– Elections are *expensive.* The administration of elections requires the capacity to spend money economically, efficiently and without fraud.

– Elections are *periodic* events. National elections usually take place at widely spaced intervals. At the time of elections, an enormous short-term staff is required, which then needs to be down-scaled between elections.

– Election administration is much more *publicly orientated* than many other government functions.

– Election administration is *specialized.* There is no other government function quite like preparing for elections (except perhaps preparing for war). It requires the mobilization of tens of thousands of people on an extremely precise timetable. It also requires moving a myriad of forms, supplies and equipment to thousands of locations throughout the country. Boundary demarcation, voter registration and many other technical duties of the election authorities, are

Those in charge of election administration must ensure that the organization and conduct of an election is right the first time; failure to fulfil even a simple election task or activity may not only adversely affect the quality of the services delivered, but may jeopardize public perception of the competence and impartiality of the election administrators.

also specialized tasks.

– Election administrators must be able to balance the demands of the *public at large* with the rights of *individuals*, especially the marginalized and the disadvantaged.

– Elections must exhibit an overriding concern for the greater *public good*, as opposed to the good of special interests.

– The electoral process should be *predictable*, ruled by law commonly understood and universally applied.

– Elections must ultimately be a *nation building* exercise, rather than a divisive one.

4.11.2 Critical factors in election administration

The primary objective of an electoral administration body is to deliver free and fair election services to the electorate. In doing this, it must undertake its functions in an impartial and efficient manner. It must ensure that the integrity of each election process is adequately safeguarded from incompetent election officials and fraudulent manipulators. Those in charge of the administration must ensure that the organization and conduct of an election is right the first time; failure to fulfil even a simple election task or activity may not only adversely affect the quality of the services delivered, but may jeopardize public perception of the competence and impartiality of the election administrators.

The most important attributes of any free and fair election, and of the body vested with running an election, include:

– independence and impartiality;
– efficiency;
– professionalism;
– impartial and speedy adjudication of disputes;
– stability; and
– transparency.

Independence and impartiality. The functioning of an electoral body should not be subject to the direction of any other person, authority or political party; it must function without political favour or bias. The body in charge of administering or supervising an election must be able to operate free of interference simply because any allegation of manipulation, perception of bias, or alleged interference, will have a direct impact not only on the credibility of the body in charge, but on the entire process. There are many instances in which the perceived influ-

4.11 Building an Electoral Administration

ence of a political party or parties over the electoral machinery has severely detracted from the validity of the election result. In established democracies which have a long history of relatively free and fair elections there may be, and often are, instances where allegations of abuse or bias are raised against an electoral administration; these allegations are then adjudicated upon, and do not necessarily detract from the credibility of the overall process. However, for developing and emerging democracies, there is a much greater degree of vulnerability to allegations of undue influence and bias, thereby making the entire process more susceptible to credibility judgements, which then inevitably result in a limited acceptance of election results and of the process as a whole.

Efficiency. This is an integral component of the overall credibility of the electoral process. In the face of repeated allegations and instances of incompetence, it is difficult for an electoral body to maintain its credibility. Efficiency is critical to an electoral process in that technical breakdowns and problems can, and do, lead to chaos and a breakdown of law and order. A variety of factors impact on efficiency, such as competency of staff, professionalism, resources, and most importantly, sufficient time to organize the election.

Professionalism. Elections are so important for the functioning of a democracy that a specialized group of experts, steeped in the knowledge of election procedures and the philosophy of free and fair elections, is warranted to conduct and manage the process. The advantages of having permanent, highly trained and committed experts as employees to manage and facilitate the electoral process are obvious; the benefits can be seen in countries with permanent and professional electoral administrations, such as Elections Canada and the Australian Electoral Commission, whose electoral expertise has been drawn upon by a variety of developing countries in Asia, the Pacific, Africa, Latin America and the former Soviet states. Many permanent commissions are able to organize an election on extremely short notice and on instruction from the government of the day; they are, in effect, in a permanent state of readiness.

It should be noted that even in many European countries (e.g., the Scandinavian countries and France) in which elections are organized by government ministries, there is a permanent body within that ministry which is tasked with the full-time management and conduct of elections.

Impartial and speedy adjudication. Provisions should be made for a special mechanism to process and adjudicate electoral complaints, as allegations of abuse and disputes between parties or in relation to the election management body are inevitable. Political parties, and civil society in general, are entitled to have their complaints heard in a speedy and efficient manner and by a judiciary or a body in which they have faith.

In societies in which confidence in the judiciary is low, political participants have insisted that a separate adjudicatory process be set up for electoral issues. The electoral administration's credibility will depend, in large part, on its ability to handle election-related complaints. Given the fears and suspicions that often exist during transitional periods, the electoral body should be given the resources and jurisdictional ambit to meet the expectations of the population in ensuring free and fair elections. In South Africa's first democratic elections in 1994, one of the mechanisms employed by the parties was to establish a division within the Independent Electoral Commission to monitor the entire administration and conduct of the electoral process and to ensure that it was free and fair in all its aspects.

Transparency. The overall credibility of an electoral process is substantially dependent on all relevant groups, from government and civil society, participating in the formation and functioning of the electoral structure and processes. In this respect, the value of constant consultation, communication and co-operation between the electoral administration, the political parties and the institutions of society cannot be over emphasized. In the formulation of the legislative framework of an electoral administration, this aspect should receive particular attention.

4.11.3 The functions of an electoral administration

The functions of an election administration body vary from country to country. In some countries, for example, the electoral body handles the adjudication of electoral disputes while in others they are handled by a completely separate structure. Many countries have separate "demarcation committees" that determine the boundaries of constituencies. The division of responsibilities can also vary. For example, the electoral administration body can have the overall supervisory or monitoring role for elections, while a government ministry or department can undertake the administrative functions. There are at least eight areas around which functional divisions must be established within an electoral commission:

- a *personnel division* to recruit and train officials throughout the country;
- a *financial division* to manage the budget;
- a *legal division* for drafting regulations, developing procedures and evaluating complaints;
- an *investigative division* to review complaints;
- a *logistical and administrative division* responsible for administration of the process, communications, and distribution of election materials;
- a *data processing* or *information technology* division for processing election results and statistics;
- an *information and publicity* division to develop education programmes and to disseminate decisions taken by the commission; and
- a *liaison division* with the task of interacting with government and independent agencies.

4.11.4 The location of an electoral body

Once the functions and features of an electoral body have been considered, it is then necessary to determine where that body should be situated. To put it in its simplest form, there are two competing options: inside the government, or outside the government in an electoral commission. However, there are substantial variations on these two options, based on a variety of facts and circumstances, four of which are discussed below.

Government approach. The first model is that the electoral body is located within a government ministry and is charged with the responsibility of conducting and managing elections and utilizing all the resources of that ministry and the civil service to achieve the task. This system works well in cases where the civil service is respected as being professional and politically neutral. This is used in many western European nations.

Supervisory or judicial approach. A variation on the above is that a government ministry is tasked with the conduct of the electoral process, but is supervised by an independent electoral commission consisting of selected judges (i.e., the case in Pakistan and Romania). The task of the commission is to oversee and monitor the conduct of the electoral process by the relevant government ministry.

Independent approach. The third model is that an independent electoral commission is established that is directly account-

able to a minister, a parliamentary committee or to parliament. Some electoral commissions utilize government resources from provincial administrations and local authorities (e.g., India). In other cases, the commission may establish its own infrastructure at a national, regional and local level (e.g., Australia). In either case, independent electoral commissions need to have a substantial degree of financial and administrative independence from the executive government. But while they may be financially and politically independent, they remain subject to stringent financial controls determined by parliament.

The selection process for appointing electoral commissioners should be transparent and impartial. Ideally, the selection should be based on a consensus of the political parties contesting the elections and be individuals with the relevant experience and expertise and who also have a reputation for independence and integrity. The precise number of commissioners may vary from one, with a number of deputies, to any reasonable number. However, the number of commissioners should not be such as to make the operation of the commission unwieldy and cumbersome.

Multi-party approach. A fourth model is to have all registered political parties designate representatives to the national election commission. This ensures that various interests are represented on the commission and that each party can exercise some form of oversight concerning the operation of the commission. The problem associated with this is that in transitional situations, the number of parties often proliferates, thereby resulting in an unwieldy and ineffective commission. Secondly, the commission may be comprised of individuals who lack the requisite skills and/or experience to ensure effective operation of the commission.

4.11.5 Fears and concerns

In every electoral process, and particularly in countries in transition, there are often genuine fears and concerns relating to both technical or administrative areas of potential abuse or incompetence, and which reflect the critical interests of a particular party or constituency. It is essential, without compromising the integrity of the process, to address the specific interest or concern before it affects the legitimacy of the entire process. Typical fears or concerns can include:

– Concern that electoral officials are from or linked to a community rather than imposed from outside;

4.11 Building an Electoral Administration

Box 13

ELECTORAL ADMINISTRATION: INTERNATIONAL TRENDS

In established democracies, national and local government officials often handle electoral administration; while ordinary courts settle disputes, as they have a tradition of fairness and neutrality and generally enjoy the confidence of the electorate.

In emerging democracies, on the other hand, there is an increasing trend to establish an independent electoral commission. This is seen as an important step in building traditions of independence and impartiality, as well as in building the confidence of the electorate and parties in the electoral process. Most new democracies in recent years have adopted independent electoral commissions. Their positive contribution in difficult or transitional situations can be seen, for example, during the 1991 parliamentary elections in Bangladesh and the 1992 presidential election in Ghana, as well as during the first democratic elections in Namibia, South Africa and Mozambique.

Africa. The trend in Africa, particularly Southern Africa, is towards establishing independent electoral commissions, which have varying degrees of autonomy in terms of their relationship with the government of the day (e.g., South Africa, Namibia, Ghana, Malawi, Mauritius and Mozambique).

Asia. Independent electoral commissions are a long-standing feature of a number of Asian democracies, including India and Sri Lanka. Emerging Asian democracies, such as Thailand and the Philippines, have also followed the route of establishing an independent electoral commission.

Commonwealth countries. Commonwealth countries, such as Australia, Canada and India as well as a number of African Commonwealth states tend to favour the adoption of an independent electoral commission as the vehicle for the administration of their electoral processes.

Eastern Europe. Hungary, Slovenia, Romania, Poland, Czechoslovakia and Bulgaria, all established central commissions for their crucial transitional elections in 1989 and 1990. Russia can also be added to this list.

Latin America. In Latin American countries there is a long history of electoral administration which pre-dates similar reforms in Spain. As a consequence, the influence of the colonizing states on election administration practice, generally, has been limited and has led to the development of a wide variety of approaches. Furthermore, the liberalization of political systems in the last decade has led to substantial changes in the electoral system and major electoral reforms. Specific examples include Nicaragua and Costa Rica where the national electoral authorities have status as a "fourth branch" of government.

In Argentina, Brazil, Chile and Uruguay, legislation defines the electoral authority as an independent institution, but operating within the judiciary. In Panama, the electoral tribunal has complete autonomy to manage its own budget once funds have been allocated for this purpose by the executive and approved by the legislative assembly. The budgets of most of the electoral authorities are prepared to cover ongoing operating costs, often related to the permanent register and for the conduct of periodic elections. The budgetary authority generally requires the approval of the executive. In Mexico, a permanent electoral council, the Federal Election Institute (IFE) was established to organize the national electoral process; a second body, the Federal Electoral Tribunal, adjudicates electoral complaints. In addition, an independent special prosecutor to prosecute electoral crimes (ranging from excess campaign expenditures to intimidation or vote buying) was also created.

Western Europe. Most West European countries locate the electoral administration within a government ministry, usually the Ministry of Interior; a permanent department within the ministry is established to manage elections. In the majority of these countries the organization and the resources of the established political parties allow them to conduct sophisticated and detailed monitoring exercises to ensure an impartial administration of the election process.

The most effective model depends upon the relative maturity of the national political system. In cases where election administration previously was in government hands with a one-party or other authoritarian system with no opposition, voter confidence is only likely to be inspired if opposition party representatives or nominees are co-opted into election administration, or if the commission is seen to be independent from government and political influence. The process of appointment of commissioners is important and should be as inclusive and participatory as possible.

Also, the adoption of a type of electoral administration that meets international principles is not, in itself, sufficient to ensure a free and fair process. Provisions must be made to ensure it is credibly implemented and administered. Achieving this objective requires that election officials are impartial and/or independent and that the electoral contestants and the public perceive them as such. Where impartiality is in doubt, election commissions and review bodies comprising representatives from diverse political interests may provide a remedy by achieving balanced composition. Administration, a system of checks and balances, whereby the electoral commission is subject to review by independent legislative, judicial and monitoring bodies, enhances the credibility of the process.

4.11 Building an Electoral Administration

- That electoral officials and structures should be permanent and not transient entities that change according to varying circumstances;
- Lack of training and discipline of electoral officials in relation to electoral processes;
- Need for a speedy, efficient and impartial adjudication system in relation to electoral complaints;
- Need to keep costs to a minimum and avoid waste and fraud;
- Concern that one party may dominate the process;
- Concern that there may not be complete independence and impartiality;
- Need for co-ordination between the provincial and national elections as well as their relations with the local government elections;
- Concern that the incumbent party may abuse and manipulate government resources to its advantage.

It is important that each of these concerns is considered. In this regard, the value of constant consultation, communication and co-operation between the political parties and the institutions of society needs to be re-emphasized. Only after giving each of these concerns due consideration can a decision regarding the appropriate type and location of an electoral body be reached. If a particular fear or concern cannot be met or allayed in relation to the form, structure and location of the electoral administration, then an appropriate safeguard or checking mechanism should be installed to ensure that parties do not become disaffected and alienated from the process. Safeguards can include:

- Appointing an independent adjudicatory mechanism for complaints;
- Appointing a special "demarcations committee" accountable to parliament;
- Having an independent broadcasting authority for regulating the quality, time and access provisions for broadcast media;
- Having the department of census or a "census committee" for population counts as the basis for demarcating constituencies;
- Having particular aspects such, as finances and budget, made accountable to a parliamentary committee or body;
- The entire electoral administration can be made account-

able to parliament, or to a multy-party committee, if necessary.

4.11.6 Conclusion

The crucial factors to be taken into account in any evaluation of appropriate electoral administration systems include:

– the recent history of a country, particularly in relation to the nature and extent of its recent conflict and the type of interaction between the parties;

– the relative maturity of the national political system;

– the resources of the country (financial and material);

– the potential credibility of the intended electoral body;

– the potential competence of the intended electoral body;

– the exigencies of the electoral process such as speed and flexibility;

– the danger of interference by an individual, organization or government with the electoral process;

– the necessity to ensure an equitable distribution of capability and resources in terms of election administration throughout the country, thereby eliminating the risk and perception of elections being competently run in certain areas and not in others;

– the necessity for the adoption of a long-term view in choosing an electoral administration, bearing in mind the dynamic nature of society and politics.

It is the electoral administration, or body charged with the management and conduct of the election, that sets the tone and direction of the electoral process. This is particularly true in post-conflict situations, where neutrality and fairness in democratic elections is a key to building long-lasting social peace.

It is the responsibility of election administrators to lay a sound foundation for the delivery of free and fair election services. They will be judged by the public on the basis of their efficiency and impartiality. In this regard, an electoral administration's independent or neutral status, ability to identify and appoint competent and impartial staff, and its success in delivering what the country sees as a free and fair election will ultimately be the test of its success.

A final critical factor is the issue of the cost and sustainability of the structures and procedures established. Each and every decision concerning the location and form of an electoral adminis-

4.11 Building an Electoral Administration

tration will have cost implications. Unless the structure decided on is affordable and can be maintained by the country, it will not be sustainable in the long term.

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[1] Thanks to Pat Keefer of the National Democratic Institute (USA) and Keith Klein of the International Foundation for Election Systems (USA), on whose advice to the South African Constituent Assembly in 1995 I have drawn for this section.

4.12 National Machinery for Gender Equality

*Transitions from deep-rooted conflicts offer a unique opportunity to
lay the foundation of a democratic and equal society. Central to any
transition process is the need to examine closely the gendered aspects
of nation building and to institute concrete mechanisms to ensure
that all people – women and men, girls and boys – can enjoy
freedoms and participate equally in society. In this section we
examine how national machinery for gender equality can be
institutionalized by looking at how three countries, Uganda,
Australia and South Africa, have addressed this issue. In the case
study that follows we discuss the implementation of one mechanism
in greater detail, South Africa's Commission for Gender Equality.*

Women have played a major strategic role, both on the battle-
front and in critical support areas, in a number of conflicts over
the last two decades. Moreover, women have been especially
vulnerable in recent warfare. They have made substantial sacri-
fices and borne tremendous burdens in order to advance freedom

4.12 National Machinery for Gender Equality

and democracy. Despite their important contributions, and in spite of the fact that commitments and tributes have been made regarding the attainment of an equal society, often in practice this has not occurred. A post-conflict settlement offers the opportunity to develop and implement structures in government and in society, at an early stage, to ensure that the promises made are kept, and to make sure that the issue of gender equality is not marginalized.

During the past decade, there has been an unprecedented emphasis on ensuring that transition processes include concrete and holistic mechanisms to address gender inequality as part of the nation-building process. In fact, mechanisms to address gender issues have shifted from small and often under-resourced bodies to more comprehensive and powerful machineries. The international debate on gender equality and women's emancipation has moved away from viewing equality as an issue that concerns only women, to an understanding of the implications of unequal power relations on society as a whole. Feminist activists and experts have argued that gender equality issues should not be treated as separate "women's issues", but as structural questions that confront society in general.

The current debate on gender equality examines the unequal division of labour and access to and over resources, and the ways in which women and men are affected by programmes and policies that are supposed to benefit society at large. This analysis encourages an understanding that broad socio-cultural processes and socialization influence the roles that women and men play. In order to address gender-differentiated responsibilities and differentiated access to and over resources and decision-making, a comprehensive and systematic strategy is needed.

Feminist activists and experts have argued that gender equality issues should not be treated as separate "women's issues", but as structural questions that confront society in general.

4.12.1 Constitutional mechanisms

The constitution, as the supreme law of the land, is a starting point for addressing gender equality and in setting precedents for the entire society. Many bills of rights include clauses that explicitly address gender equality. In countries like Namibia, Canada and South Africa, these clauses are seen as crucial for advancing women's rights and equality. South Africa, for example, is hailed internationally for not only institutionalizing equality for women in its constitution, but for providing a strong framework to address other forms of inequality such as discrimination on the grounds of sexual orientation. In many countries, gender-neutral language is used throughout the constitution to en-

sure that women are not excluded. Again South Africa's constitution goes one step further in that it specifically uses gender-sensitive language, spelling out issues and their implications.

Since constitutions are interpreted by courts, it is important that the method of constitutional and judicial review also enhances gender equality. In addition to the role of high courts in judicial review, general systems of legal administration have serious implications for women in terms of access to legal recourse and redress against administrative actions that perpetuate sexual discrimination. In South Africa, for example, the Constitutional Court, although not established for gender equality issues *per se*, is seen as an important institution for ensuring that interpretation of the law and the constitution is in keeping with principles of equality.

Box 14 **GENDER EQUALITY IN THE CONSTITUTION: THREE EXAMPLES**

— **South Africa.** *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

Chapter 2, Bill of Rights

— **Namibia.** *No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

Article 10

— **Canada.** *Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.*

Bill of Rights

4.12.2 Executive and administrative structures

But formal equality, as provided for in a constitution and related laws, does not guarantee substantive equality; provisions in the constitution for substantive equality must support formal equality provisions. The concept of substantive equality involves creating access to legal and constitutional remedies for inequalities that stem from particular disadvantages.

4.12 National Machinery for Gender Equality

During the 1970s and 1980s, debates on these issues emphasized the need for an overarching body that could address the concerns of women. In 1976, the United Nations launched the Decade for Women, recommending that member states ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and implement "national machinery" for the improvement of the status of women. In response to this call, many countries established special women's ministries and programmes to promote the advancement of women. National machinery refers to a variety of structures and legal frameworks inside and outside government to build and promote gender equality in all spheres of life. These can include:

– Ministries for women's affairs/gender and development
– Departments of women's affairs
– Offices on the status of women
– Gender desks in line ministries
– Commissions for gender equality

The definition of "national machinery" is extended in many countries to include institutions that monitor human rights and related issues; in this way gender equality issues are seen also as human rights issues. In Canada, for example, the Human Rights Commission may take up gender issues. Similarly, in South Africa, the Human Rights Commission, the Constitutional Court and the Office of the Public Protector (Ombudsperson) are seen as crucial structures, amongst many others, for gender equality issues. In Namibia, the Office of the Ombudsperson is specifically briefed to include gender equality issues in its scope of investigation.

4.12.3 Ministries for women's affairs

The "traditional" ministry for women's affairs is part of the administrative bureaucracy of the state and receives its own budget. Its functions may include, among others, drafting policy on women's issues; drafting legislation for tabling in parliament; representing the interests of women in the cabinet or to the head of state; and conducting development programmes for women. Most women's ministries do not enjoy status in the cabinet. They fall under the president or prime minister's office, which means they have less autonomy and power to influence policy. In France, however, the women's ministry can veto legislation.

A major criticism of women's ministries is that they can become ghettoized "dumping grounds" for all issues that deal with gender equality and women's issues. They are allocated smaller budgets as a result of the low priority and importance assigned to them. As a result, ministers outside the women's ministry can fail to address gender equality issues in their jurisdiction. Women's ministries are often linked with other portfolios concerning children, disabled people, youth and development, as is the case in Uganda.

4.12.4 Ministry for Gender and Community Development: the case of Uganda

The Ministry for Gender and Community Development in Uganda was established in 1988, at the end of the long and horrific Ugandan civil war. Then called the Ministry for Women in Development, Youth and Culture, the ministry has existed under a variety of names. Its current name reflects the shift in thinking, especially by Ugandan women who wield influence, that a women's ministry cannot do it alone and that real attempts must be made to integrate gender issues in the work of other ministries.

In the early 1990s, the head of the Ministry for Gender and Community Development was appointed vice president of Uganda; a move seen by many as a real boost for the ministry. Currently, the ministry is strengthened by the presence of two ministers of state, one responsible for gender issues and the other for community development issues. The ministers of state are similar to deputy ministers in other countries, with the added advantage that they sit in the cabinet.

Despite many people's reservations with such ministries, Ugandan women feel that this structure, which has served them for nearly 10 years, works well for their situation. They view the ministry as a declaration of their government's commitment to address women's concerns and gender equality issues.

Nevertheless, Ugandan women are also quick to point out the problems that the ministry faces. The most significant problem is lack of funding. From the start, the ministry did not get sufficient funds allocated for its work. Uganda is a poor country and the civil war that ravaged the country has created shortfalls in many areas. The lack of funding created not only a problem for the ministry's operations but also reflected lack of national priority for these issues. Despite being headed by the vice president, the work of the ministry, in fact, is not considered a prior-

ity issue. There are also concerns about the extent to which the ministry is independent and able to challenge government policy.

In addition to the women's ministry, Uganda and other countries such as Australia and South Africa have gender desks in line ministries and other independent bodies (discussed below).

4.12.5 The Office of the Status of Women: the case of Australia and South Africa

A second mechanism, the Office of the Status of Women (OSW), evolved out of the recognition that women's machinery should be located in a central co-ordinating department and not exist as a separate marginal entity. The OSW is located in the highest decision-making offices. The major objectives of the OSW are:

– To shape government policy to ensure that gender equality issues are integrated into the overall policies and programmes of government;

– To help develop a gender policy framework for government and develop mechanisms to monitor and evaluate progress;

– To provide government with all information necessary to implement programmes for gender equality;

– To monitor government progress or lack thereof in implementing government policy, international covenants and charters;

– To develop systems for disaggregation of gender in all government information;

– To co-ordinate gender desks or women's units in line ministries.

In Australia, executive responsibility for the status of women in the federal government is located in the prime minister's office, while policy advice and administration is provided by an Office of the Status of Women, based in the Department of the Prime Minister and Cabinet and managed by a senior civil servant.

The Office on the Status of Women in South Africa, similar to its Australian counterpart, is based in the presidency, currently in the deputy president's office. It is headed by a deputy minister responsible for gender equality and youth development, but its ultimate head is the deputy president. The OSW is represented in the cabinet through submissions and presentations made by the deputy president's office.

Like its Australian counterpart, the OSW's major objective is to influence and shape government policy in order to ensure that gender equality issues are integrated into the overall policies and programmes of government. The South African OSW is also charged with developing a gender policy framework for government and developing mechanisms for monitoring and evaluating progress or lack thereof. Currently, the OSW is developing mechanisms for gender disaggregation of all government information and statistics. This is seen as a crucial mechanism for monitoring progress. Countries like Sweden, which disaggregate their information on the basis of gender, report substantial achievement in terms of making visible the impact of policy, budget, laws and programmes on the lives of women.

Similar to the women's ministry in Uganda, the OSW co-ordinates with line ministries and monitors their performance. The Australian OSW has developed important mechanisms for evaluating government progress and for ensuring effective communication and consultation. Over the years, it has pioneered the "Women's Budget Statement" which is a commentary on the implications and impact of national expenditure on the lives of women and in advancing the status of women. South Africa has its "Women's Budget Initiative", produced by the Committee on the Quality of Life and Status of Women in conjunction with the Finance Portfolio Committee in parliament and other structures like the Commission for Gender Equality.

One of the major strengths of the OSW is its location inside the government machinery rather than as a separate entity. Both the Australian and the South African models are focused on policy co-ordination with government rather than on programme delivery. This model ensures that mechanisms that address gender equality are established in all departments, rather than the OSW becoming the "dumping ground".

4.12.6 Gender desks/focal points in line ministries

In addition to women's ministries, women's departments, gender commissions and other structures, many countries have "gender desks" or "gender focal points" in line ministries. As the debate shifted towards having more comprehensive machinery for women's issues, gender focal points were recognized as an important component of the national machinery. Gender desks or "women's units" as they are called in Australia (or "cells" in India) are small offices in line ministries. They are responsible for monitoring progress on women's issues and on advising on gender policy. The advantage of gender focal points is that they

are integrated into the departments and are part of the departmental machinery. They have access to discussions in line ministries and have the potential to affect policy and budgetary provisions.

The disadvantage of gender focal points is that they do not have direct access to the cabinet, and consequently are not involved in decision-making at the cabinet level. Departments themselves determine their priorities, making it difficult to prioritize gender equality issues. Similarly, it is often left to departments to determine the scope of influence and priority given to gender focal points. Often, the desks do not enjoy support staff. There is also danger of marginalizing gender focal points within line ministries or creating a departmental "dumping ground" for gender equality issues. In Uganda, women have warned emphatically against gender focal points, saying that often the officers appointed are not senior enough to wield any authority in the department.

4.12.7 National machinery in the legislature

The legislature is one of the most crucial institutions in the national machinery. While electing women to parliament is seen as one of the best mechanisms for promoting gender equality, in the past decade the debate has emphasized the need to develop strategies that seek to take women beyond numbers, to ensure that the equality agenda is entrenched in parliament. There are several options for promoting and mainstreaming the gender equality agenda into the legislative process. These include:

– Special committees or women/gender committees;
– Women's caucuses (multi-party);
– The requirement that a certain number of women representatives are present in the legislature before a bill is passed;
– Ensuring that on every parliamentary committee there is one person representing gender issues.

The major objective of these mechanisms is to ensure that any legislation passed takes into account women's experiences and equality issues. In the case of South Africa, for example, the Committee on the Quality of Life and Status of Women plays a major role in monitoring the implementation of CEDAW, the Beijing Platform of Action and the overall equality programmes. This committee, like the Australian OSW, has also initiated a women's budget initiative. Women's caucuses can also become a platform for women across the political spectrum to meet, set an

agenda and lobby on women's issues.

These structures also provide viable mechanisms for women in NGOs and civil society in general to interact and work with women in parliament. However, it is often difficult to get a multi-party women's caucus established, especially in historically divided countries like South Africa. There, a Women's Parliamentary Group has taken a long time to get going but it is successful in keeping issues alive. Many of these structures can also be replicated at provincial and local government levels.

4.12.8 Successes and failures of the national machinery

From the experiences of the countries discussed above, certain features that have proven valuable in enhancing the effectiveness of national machinery for women include:

– effective independent advisory councils;
– power and authority to effect change;
– transparency and inclusivity;
– good links between national machinery and the women's movement as well as links with women at grass-roots level;
– methods in which machinery is established and implemented; in countries where the structures are a result of debates and discussions from the grass roots and constituency levels, rather than top-down structures, they appear to be more successful;
– in some cases, highly visible ministers and parliamentarians and public education mechanisms have helped boost these structures.

Among the common weaknesses include:

– the possibility of marginalization of these structures;
– lack of research and research capacity;
– gender insensitivity in the judiciary; and
– lack of funding.

4.12.9 Conclusion

All options have inherent strengths and weaknesses, and the success or failure of each is often influenced by issues beyond the power of the institutions themselves. Often, the arrival at a workable and effective option involves trial and error. There is no straight path to be walked and there are no formulas. The process involves a little bit of dancing, trying this step and that until a comfortable rhythm is found. It is also important to note that without democratic organs of civil society and women's

4.12 National Machinery for Gender Equality

organizations, national machinery cannot work effectively. There is a need for a dynamic and creative relationship between the "formal" structures of the national machinery and civil society. Whatever machinery is chosen, the over-arching principle remains the same – addressing women's issues is critical to the broader emphasis on inclusion stressed in this handbook.

We can all learn from each other's histories, successes and failures. Countries that are going through transition have the added advantage of creating something new. In creating a national machinery, imagination and political will are of fundamental importance. Without them, even the best mechanisms will fail.

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MECHANISMS FOR ENTRENCHING GENDER EQUALITY

National machinery must be institutionalized to ensure that gender equality issues are acknowledged, respected and implemented. Government, and society in general, must commit to gender equality at an early stage to make sure that these issues do not get marginalized. Below we list some of the mechanisms by which this can be achieved and implemented, and the advantages and disadvantages of each.

	Mechanism/ Objective	Implementation	Advantages	Disadvantages
I. Constitution and Bill of Rights	Constitutions delineate principles and reveal a country's political commitment to issues. Therefore, wherever possible, gender equality should be enshrined in constitution.	During negotiation processes, in societies emerging from conflict, during a constitutional review process, in established democracies; Negotiation process offers a tremendous opportunity to ensure that gender equality is integrated and entrenched in the building of a new nation.	Because of the prominence of the constitution and its legal standing, it is easier to influence society in which the law of the land declares a commitment to gender equality.	No disadvantages, except that constitutional provisions do not guarantee equality. Legislation and other mechanisms to ensure substantive equality must complement constitutional provisions; General agreements and statements of intent made at negotiating tables do not always translate into long-lasting commitment to equality.

	Mechanism/Objective	Implementation	Advantages	Disadvantages
II. National Machinery in Government *Ministry for Women's Affairs*	Act as catalyst in building gender equality; Responsible for implementation of government gender policy; Represent women and gender equality issues in government; Monitor implementation of gender equality programmes by other ministers; Prepare government reports in relation to equality; Draft gender equality policies or frameworks.	Usually headed by minister or deputy minister; Allocated budget by central budgeting office; Senior political staff is usually appointed by the minister; Senior civil servants usually pulled from civil service or recruited from outside.	Access to decision-making processes and offices; Possibilities to influence government policies and programmes; Status in the cabinet (if headed by a minister); Equal status with other ministers, which minimizes possibility of being undermined.	Danger of marginalization in cabinet and in government in general; May become "dumping ground" or "ghetto" for women's issues; Since part of the government, ability to challenge government is limited; Often, if not always, underfunded with little support structure; May become isolated from women's movement; Resentment by other ministers for "interfering" with their departments; Appointment of minister by government can be inhibiting, particularly in relation to political independence.

	Mechanism/Objective	Implementation	Advantages	Disadvantages
II. National Machinery in Government *Office of the Status of Women*	Shape and influence government policy; Help develop gender framework for government; Help develop mechanisms to monitor and evaluate progress; Provide government with all relevant information necessary to implement programmes for gender equality; Co-ordinate gender equality work within government.	Can be provided for in the constitution as part of national machinery or established by act of parliament; Usually headed by a minister or deputy minister; Senior political staff appointed by minister; Senior civil servants recruited from civil service or from outside.	Located within government, often in president's or prime minister's office; Can easily integrate with work of departments as it is not a "separate" ministry; Can provide expertise for gender work in the government.	Usually has limited status in relation to the executive; May have limited influence on government policy; Its strength depends on the support of its political head (e.g., the president/prime minister); As with the ministry, fact that head is appointed by government may be inhibiting.
II. National Machinery in Government *Gender Desks*	Co-ordinate gender policy at departmental level; Part of implementing team at departmental level; Monitor progress or lack thereof.	Usually provided for in the country framework for national machinery (usually in the national strategy document).	Can be easily integrated in the department; Offers opportunity to integrate gender work in departmental programmes; Can be involved in actual implementation of gender equality policies in departments.	No direct access to cabinet; Often no support staff; Can become a departmental "dumping ground"; Officers often have little authority; Cannot work on its own.

	Mechanism/ Objective	Implementation	Advantages	Disadvantages
III. Independent and Statutory Bodies *Commission for Gender Equality*	Review existing and new legislation; Investigate complaints or acts of discrimination on grounds of gender; Conduct public education on issues pertaining to gender equality; Conduct research; Monitor/review policies of public funded bodies in relation to implementation of gender equality; Recommend legislation.	Inddependent, statutory body; Accessible to the public; Open and public appointment process of members.	Platform for public debate of gender policies and education; Has significant power to effect implementation of policies and programmes by government and public institutions (e.g., universities, private companies); Independent statutory body, so not tied to government.	Needs adequate funds; Needs political support.

A MENU OF OPTIONS 5 [P. 333]

	Mechanism/Objective	Implementation	Advantages	Disadvantages
IV. National Machinery in the Legislature *The Committee on the Status and Quality of Life for Women*	Ensure that gender equality considerations are integrated in all legislation tabled before parliament; Monitor implementation of Beijing Platform of Action and CEDAW; To provide platform and point of influence for women's movement and NGOs.	According to parliamentary rules regulating establishment of portfolio and special committees.	Part of legislative process; Offers invaluable entry point for women's movement and other actors; Ability to influence legislation; Often can propose bill in parliament.	Often under-funded.
IV. National Machinery in the Legislature *Women's Caucuses/Groups*	Platforms for women parliamentarians to meet, share experiences and strategize on forwarding gender equality agenda in parliament; Provide space for women across party-political lines to lobby on various issues.	According to parliamentary rules.	Provide opportunities for women to interact; NGOs can lobby effectively through women's caucus.	Often difficult to establish; Some political parties do not like idea of women's caucuses; Process of arriving at working relationship is complex and exhaustive; Often women's causes do not

A MENU OF OPTIONS 5 [P. 334]

Nomboniso Gasa

THE COMMISSION FOR GENDER EQUALITY IN SOUTH AFRICA

The struggle for gender equality in South Africa is a long and complex one. South African women struggled to ensure that during the transition to democracy, their experiences and their needs would be taken into account. During the negotiations for a democratic settlement in South Africa, it was apparent that both the principles of equality and non-sexism as well as the concrete mechanisms to achieve these goals must be enshrined in the constitution. The model that South Africa chose to ensure this is the product of years of vigorous debate, consultation and comparative analysis. While it draws on features from the international experiences of Australia, Canada and Uganda, the result is uniquely South African.

The South African national machinery has five main components:

– The Commission for Gender Equality;

– Structures in the legislature: special committees such as the Committee on the Quality of Life and the Status of Women, and the women's caucus;

– Structures in the administration: the Office on the Status of Women, and gender focal points in line ministries;

– Other bodies: Human Rights Commission, Office of the Public Protector and the Constitutional Court;

– Organs of civil society: e.g., NGOs and the women's movement.

In this section, we focus on the Commission for Gender Equality as one example of how national machinery for women's issues can be organized and implemented.

Objectives

The Commission for Gender Equality (CGE) is one of the six State Institutions Supporting Democracy enshrined in Section 119 of the South African Constitution. The commission's objective is to promote gender equality and work towards equal status between women and men. According to the Gender Equality Act of 1996, the CGE is an independent statutory body that should not be subject to any pressure from government or any other person.

The CGE is not an implementing body. It makes recommendations to parliament and government and monitors the effective implementation of programmes to effect equality. Specifically, it has the following powers and functions:

– To monitor and review policies and practices of all publicly funded bodies including the business sector;

– To review existing and new legislation to ensure that it promotes equality, and, where necessary, to recommend new legislation to parliament;

– To investigate complaints on any gender related issue; if need be it may refer to other structures such as the Human Rights Commission or the Constitutional Court;

The Commission for Gender Equality

– To monitor and report on compliance with international conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women, or the Beijing Platform of Action and other South African documents like the South African Charter for Effective Equality;

– To conduct research or recommend that research be conducted to further the objectives of the commission;

– To investigate matters that are brought to its attention, the CGE may search any premises on which anything connected with investigation is or is suspected to be violating the constitutional provisions for gender equality; may call people or institutions to appear before it in order to pursue any investigations brought to the attention of the CGE and may hold public hearings on any issue relevant to its work.

Membership

– **Composition.** The CGE is composed of 12 members, women and men, who are broadly representative of provincial diversity in South Africa.

– **Appointment of members.** The state president, following an open and democratic nomination process, appoints the commissioners. The process of appointing members to the commission is crucial in ensuring that the body is independent and efficient. It is a public process to which a number of people and organizations contribute: the government publishes a notice in the government gazette and invites nominations; the notice is publicized in major newspapers and radio stations, including local stations; names are submitted to a multi-party ad hoc committee set up for this purpose in parliament; this committee shortlists and interviews candidates; interviews are open to the public; the final names are then put to the president after review by parliament; the president makes the final choice and appoints the commissioners and designates the chairperson. This process, although long and time-consuming, is very important in ensuring that the commission that emerges is one to which South Africans from different backgrounds can relate. It makes it easier for people to know the commissioners, to improve access to the commission, and to curb nepotism.

Structure and personnel

– **Provincial offices.** One of the critical aspects of the legacy of apartheid in South Africa is the uneven development of provinces and the marginalization of the rural provinces. The policy of the democratic government is to try and redress these imbalances. In keeping with these principles, and also understanding the critical need to be accessible to all South Africans, the CGE decided to have provincial offices. The provincial offices are headed by a commissioner and have the necessary administrative and research facilities.

– **Committees.** The CGE has a number of committees concerning matters such as legal issues, policy and research, public education, and so on. The committees are

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headed by a commissioner and comprise experts and activists in the specific area.

– **Staff.** The CGE has an extensive backup staff, including researchers, legal experts and administrators. A Chief Executive Officer (CEO) heads the administrative staff.
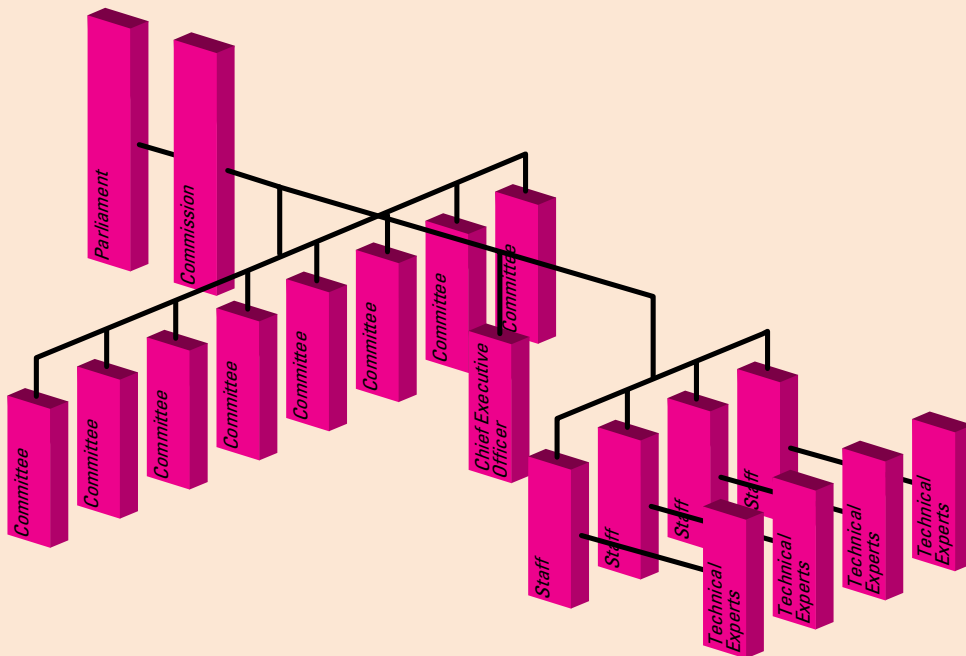
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* Handbook on National Machinery, Courtesy of the CGE

Strengths

– **Provides a forum for discussion, education and implementation.** The CGE can play a critical role in ensuring that constitutional provisions for gender equality are implemented. It provides a forum in which issues pertaining to gender equality are addressed. It is a useful instrument for educating the public about their rights and for raising national consciousness.

– **Power and authority.** The CGE has the power to effect the changes that are required. If its recommendations are ignored, or if key politicians or the private sector fail to address gender inequalities in their institutions, the CGE can

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take these issues to the Constitutional Court.

– **Includes people with different expertise and experience, both experts and activists.** The strength of the CGE lies in the manner in which it approaches its work. It is comprised of people with different expertise and experience and includes a balance between experts and gender equality activists.

– **Commitment to accessibility.** Commissions of this nature are usually seen as aloof and inaccessible. In contrast, the most positive aspect of the CGE is its commitment to accessibility, and the fact that it values the contribution and experiences of its constituency. For example, in its 12-month existence, the CGE has held public hearings on a number of issues, including the impact of poverty on the lives of women. In these public hearings, women from previously marginalized communities define their own understanding of how poverty affects their lives and their access or lack thereof to the constitution's gender equality provisions. The rationale for these hearings is that gender oppression interfaces with other forms of oppression. In order to address inequalities on the basis of gender there is a critical need to understand these "other" oppressions. These public hearings are not just about obtaining information, but about bringing the issues onto the public agenda so the country can engage in discussion and debate.

– **Enabling factors.** The work of the commission is greatly facilitated by a number of factors including the provisions in the South African Constitution and the general political climate which is positive to gender equality.

– **Flexible and open mandate.** The commission's mandate does not limit the areas of investigation, research and litigation; it allows the commission to look at the variety of forms of inequality and its interface with other forms of oppression.

Limitations and resources needed

– **Funding.** Although pains have been taken in the selection process and in its creation to ensure that the CGE is independent, government nevertheless allocates its funding. There is a general agreement that funding for commissions of this nature, in the future, should be allocated in the national budget and not by individual government departments. This would help to ensure that the commissions are able to evaluate government policy and practices objectively and fairly. Funding is a crucial issue, since without funding and resources the extent to which these structures can work effectively is severely limited. It is important that the funding is seen to be without strings attached.

– **Marginalization.** Despite the powers and scope of the CGE and despite its dynamism, there is still a danger of marginalization. This danger can be eradicated depending on the work that the CGE is able to accomplish, since marginalization of gender equality is a result of lack of consciousness and/or political commitment.

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– **Resources needed.** The main resources needed by the CGE are financing, political support, information, access to key files and documents (government or otherwise), and skilled and experienced staff.

– **Political support.** Political support is important because it sends a message of how seriously the government of the day views these structures. This support and respect can help ensure that the commission has access to all key government documents.

Lessons learned

– **Accessibility and confidentiality.** Accessibility of the commission to ordinary people and the confidentiality with which issues are taken up is very important. Some of the people approaching the commission may feel the need to keep their identities secret and information confidential. It is important that this is respected.

– **Links with other mechanisms.** The CGE will be effective if it works in conjunction with other structures of the national machinery and other constitutional bodies such as the Human Rights Commission and the Truth and Reconciliation Commission. There should be an understanding that there is an overlap between its work and the work of these other bodies. This interaction is also important in ensuring that gender equality is not marginalized and that the different constitutional bodies integrate gender considerations into their work.

– **Power and authority to effect change.** Advisory and monitoring roles are important, but they work more effectively when commissions have the power to enforce the policies and constitutional provisions.

– **Adequate funding and skilled staff.** The need for adequate funds and skilled staff cannot be overemphasized. Unfortunately, the first budget for the CGE, allocated by the Department of Justice, was very low and thus made a mockery of the independence and authority of the commission. This was part of the international trend in which governments establish mechanisms for equality and then strangle them with lack of adequate finances. Running costs of structures like these are expensive, but it is important that governments invest in the national machinery as it is a crucial aspect of nation building.

– **Open and public appointment process.** It is also important that the appointment of commissioners be an open and public process. Perceived bias of the commissioners can seriously damage both the image and the work of the commission.

The South African Commission for Gender Equality is a positive landmark in that country's quest for accessible democracy and equality. It is an effective mechanism for promoting gender equality and increasing national awareness.

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However, its success depends on a variety of factors, many of which are beyond the commission's control. Based on this understanding, South Africans opted for a "package" of mechanisms rather than one structure. Within this package the CGE is a crucial component.

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Case Study: South Africa