GIGA Focus
German Institute of Global and Area Studies
Leibniz-Institut für Globale und Regionale Studien

Number 2
2011
ISSN 1862-3581

INTERNATIONAL EDITION

Peace through Constitutional Amendment? Opportunities and Tendencies

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On 9 July 2011 the validity of Sudan's interim constitution will end and South Sudan will be independent as determined per referendum. For five years, the constitution has contributed to a significant decrease in violence between the government and South Sudanese rebels (while war has been rampaging in the province of Darfur).

Analysis

The events in South Sudan could be paradigmatic for the fact that opportunities for a policy of peace by means of constitutional amendments are often missed.

- Constitutional amendments offer an extensive range of possibilities for exerting influence on ethnically or otherwise divided societies. However, this potential is rarely put to use.
- The constitutional determination of the form of government, the main rules for decision-making and minority rights should be particularly binding for all former warring parties.
- Constitutional amendments and peace agreements in intra-state conflicts form a complex relationship to one another. Constitutional amendments do not always follow peace agreements. Peace processes and processes of constitutional reform are often long and multipartite.
- Between 2005 and 2010, there were only four countries (Burundi, Iraq, Nepal, Sudan) in Africa, Asia, Latin America and the MENA region with divided societies where a peace agreement *and* a significant constitutional amendment that affected the root causes of the conflict occurred.
- Nevertheless, other cases in which constitutional amendments are either a) used as prevention against conflicts or b) can be seen as lessons learned from long-lasting tensions (Bolivia, Ecuador, Kenya, Zanzibar/Tanzania) exist.

Keywords: constitutions, peace agreements, ethnicity, consociational democracy

Why Constitutional Engineering?

Constitutions are always an expression of their time and require periodic adjustments. The term *constitutional engineering* implies that "sophisticated craftsmanship" is being applied. Incorporating the key problems impeding the creation of societal order into constitutions and establishing fundamental rules for their regulation (whereas the fine adjustments are determined by laws and regulatory statutes) seems the obvious thing to do. This should specifically apply to issues that have proven to have a strong potential for causing conflicts, in particular for the coexistence of identity groups with divergent interests.

One of the factors frequently leading to violent domestic conflicts in ethnically divided societies is the perception that access to public goods (education, health, infrastructure, security, etc.) is not equal, and civil rights and liberties do not seem to equally apply to everyone. Constitutions can provisionally grant fundamental rules for such matters (Brancati 2009). Constitutional amendments made as adjustments to new social compromises are most likely to be made in the wake of resolved violent escalations and peace agreements. In the recent past, peace agreements have particularly often been based on power-sharing arrangements. In some cases – but by no means in all – they have been included in the constitution (for example, in Bosnia, Burundi, Nepal, Northern Ireland and Sudan). The first question that arises is how often constitutional amendments reflect the contents of peace agreements.

The subsequent question is: Which seemingly conflict-relevant content is codified in amended constitutions? Even though the form in which individual civil rights and liberties (and their constitutional guarantee) are incorporated may be conflict-relevant, the central issues in "divided societies" are matters of representation, power-sharing and the protection of identity groups, as well as the moderation of those groups' demands.

The term "consociational democracy" (Arend Lijphart) is the usual reference point in the academic discussion of this topic. Lijphart (1977: 25 et seq.) emphasizes the following key elements:

1) a grand coalition formed by the political leaders of all significant groups of a plural society;
2) a mutual right to veto government decisions;
3) proportionality as the standard for political representation and for the staffing of state offices, as well as for the allocation of public funds; and
4) a high degree of at least *cultural* autonomy for the constituent segments/principle of subsidiarity.

Although this principle is very influential in practice, it has often been criticized in academia. While Lijphart proposes the participation of ethnic minorities or other identity groups on the basis of their identity, the adherents of the "integrative" school of thought believe that precisely this is not conducive to achieving the intended aim (for example, Horowitz 1985; Reilly 2001), as consociational methods, they believe, initially provide more incentives for the advocation of radical group interests than for moderation. Thus the division of society cannot be revoked. Adherents of consociational democracy in turn argue that the acknowledgment and recognition of contrariness can, in the long term, defuse them. There are contrary approaches, ranging from "integration" to "recognition of diversity", as to how conflicts in divided societies can be integrated into the institutions. A general determination as to which "institutional configuration" is conducive to the moderation of group interests cannot be made (Horowitz 2008: 1213). In many cases, the end result does not go beyond a selective adoption of conflict-reducing institutions, even though it is likely that nothing short of a comprehensive, logically coherent constitutional reform will actually yield the desired effects.

Institutional conflict-reduction will probably be most durable if it is protected by a constitution. The suitable term for this is *constitutional engineering* (Sartori 1994). In conflict theory, *constitutional engineering* implies a very high degree of quality. In this context, the "security dilemma" that rebels face is of particular relevance: when can they surrender their arms without placing themselves at risk of immediately being violently subdued by the state? A corresponding constitutional amendment represents a *costly signal* which goes beyond a "cheap" pact among the elites or a peace agreement (Jarstad/Nilsson 2008). It is therefore of obvious importance whether consociational-democratic elements or integrative elements are codified in the constitution: former conflict parties can only expect recognition of their concerns and of their interest in mere survival if such regulations are included in the constitution (however, only the continuous application of the constitution will create reliability).

Even a superficial look reveals that by no means all peace processes that ended ethnic-regional conflicts or other violent conflicts caused by issues

of identity entail constitutional amendments. This observation also applies to cases where a particularly high degree of escalation had been reached. Burundi's 2005 constitution is a clear and differentiated reflection of how *constitutional engineering* attempts to achieve conflict containment. In contrast, Liberia's 2003 peace agreement had no immediate effects on the constitutional process. Is it possible that, as put forward by Waldner (2009), a causal link between *institutional engineering* and peace does not exist? First, we need to create a clearer empirical picture.

Constitutional Amendments in "Divided Societies"

This contribution of *Focus* asks whether and to what extent constitutional amendments made in ethnically or religiously divided societies in Africa, Asia, Latin America and in the Middle East in the period from 2005 to 2010 make reference to key causes of the conflicts. First, I will assign empirical data to the individual continents and examine whether states that reached important peace agreements in intra-state violent conflicts (!)[1] made constitutional amendments that aimed to reduce conflict in the same period. In this context, whether a constitution was accepted before a peace agreement was reached (or vice versa) does not play a role, as both events could be the result of long negotiations.

The peace agreements included in the constitution are a) cases coded as a "peace treaty" or as a "ceasefire with conflict regulation" by the Uppsala Conflict Data Programme (UCDP), b) (African) cases not coded by the UCDP[2] but where we know from our own research that important peace agreements occurred in said period, and c) additions to the UCDP database with cases that occurred worldwide in 2010 – the UCDP database covers the period up to the end of 2009.

- For a), the UCDP lists the following cases: Burundi 2006 and 2008, Indonesia (Aceh 2005), Nepal 2006, Niger 2008, Central African Republic 2008.[3]
- For b), the following additional cases belong to the same basic statistical unit: Côte d'Ivoire 2007, DR Congo 2009, Iraq 2007, Mali 2006, Sudan 2005, Chad 2006/2007.
- For c), important peace agreements were reached in Ethiopia (Ogaden) and Sudan (Darfur) as well as in Yemen.

Second, I will provide exemplary examinations of other, more recent constitutional amendments in "divided societies"[4] that took place in 2005 and show indications that *constitutional engineering* was used as an instrument of conflict management. Preventive and reactive actions seem to be of equal importance.

Africa

Since 2005 important peace agreements have been reached in the following states:[5] Burundi, Côte d'Ivoire, DR Congo, Mali, Niger, Sudan, Chad and the Central African Republic. Surprisingly, Côte d'Ivoire is not listed in the *Minorities at Risk Project*, although it is clearly a state with a "divided society". The bloody political crises in Kenya, Madagascar and Zimbabwe (each occurred in 2008 with important pacts among the elites) are not formally classified as wars by the UCDP. Nevertheless, these three cases display great resemblance with above-mentioned cases insofar as the conflict was resolved by implementing externally brokered power-sharing arrangements. In the case of Kenya, the 2010 constitutional amendment was definitely of fundamental importance.[6]

In the same period, important constitutional amendments[7] were made in the following countries

1 Based on the UCDP's *Conflict Termination Dataset*, 2010–11, 1946–2009 (cf. Kreutz 2010). The UCDP differentiates between extra-state, intra-state and inter-state warfare.

2 In part this is due to the threshold values selected by the UCDP. The list in Mehler 2009 is the basis for the categorization of additional peace agreements in Africa.

3 The coding of the agreement between Israel and Hezbollah for ending the conflict in southern Lebanon as "intra-state" in 2006 may be misleading or false. This article does not deal with North America, Europe and the states that emerged from the former Soviet Union.

4 All states referred to here as "divided societies" are coded in the *Minorities at Risk Project* of the University of Maryland. Two hundred eighty-three groups are listed there; each has to have at least 500,000 members, an arbitrary figure. Not all counted groups make immediate sense (e.g. "Westerners" in Cameroon, Jews in Argentina). The Arab world has 29 groups (Africa 75; Asia 57; Latin America 33). Nepal and Côte d'Ivoire (cf. below) are not listed.

5 Here, conflicts with a sustained ending (at least one year without any significant violent acts between the former warring parties) constitute important peace agreements.

6 The main reason for constitutional amendment in Madagascar in 2010 was to give the (too) young insurgent Andry Rajoelina the right to run for president. In Zimbabwe, constitutional discussions are ongoing. However, they only peripherally pertain to rights of groups in a *divided society*.

7 In agreement with Widner (2008: 1521), constitutional amendments are rated important if they contain new provisions with regard to participation and the contestation of a regime (changes to a multiparty system, civil and political liberties), ownership rights, regional or ethnic autonomy, as well as significant changes concerning the allocation of competencies to the various state branches.

(according to the *Minorities at Risk Project*, not all of them belong to the states being considered here): Angola, Burundi, the DR Congo, Djibouti, Cameroon, Kenya, Comoros, Madagascar, Malawi, Niger, Rwanda, Mozambique, Mauritania, Sudan, Swaziland, Chad, Uganda, the Central African Republic and Zimbabwe. In few of these cases, institutional change was used for the purpose of conflict reduction; rather, the most important motives were the retention, extension or limitation of power.[8] These ambitions can also indirectly be relevant for the conflict, but they do not affect the group interests that this text focuses on. In the following, I will look at the individual examples.

Burundi's extensive peace process generated a constitution that was accepted per referendum in 2005 prior to the signing of separate peace agreements by both rebel movements, the CNDD-FDD and the FNL. The constitution, it is safe to say, was a prerequisite for the surrendering of arms. In the period under examination here, Burundi's constitution represents one of the most strongly differentiated texts for the containment of conflicts with ethnic connotations: a grand coalition with two vice-presidents from different ethnic and party-political backgrounds (each representing the dominant ethnic group in their party; Article 124); a government consisting of 60% Hutu and 40% Tutsi ministers (Article 129); the same applies to the administration and the parliament (Articles 43, 164); laws require a two-thirds majority to pass (Article 175, i.e. with Tutsi votes); 50:50 composition of the security forces (Article 257); senate representation of each province by one Hutu senator and one Tutsi senator (Article 180); a detailed regulation of local government.

Burundi's constitution was largely based on the consociational model. However, the small country lacks one important prerequisite for a consociational democracy: ethnically delineated settlement areas, which would permit federalism or other forms of decentralisation as an expression of group autonomy (cf. Stroh 2010 on Rwanda). The "Burundi model" was under pressure due to the nevertheless monopolizing tendencies in the 2010 election and the subsequent opposition boycott.

This is different in the case of the "comprehensive peace agreement" reached in Sudan in 2005 as a culmination of a long negotiation process between the two conflicting parties: the SPLA/SPLM and the government. The interim constitution contains practically all elements of a consociational democracy: wide-ranging autonomy of South Sudan/high degree of decentralization (Articles 25–26); recognition of cultural autonomy of minorities (Article 47); principle of consensus between the president and vice-president in decision-making processes (Article 51, 2); the first vice-president is from South Sudan (Article 62, 1); agreement of a grand coalition on the national level (Article 80); wealth-sharing (Article 185), including regulations for oil revenues (Articles 190–192).

The agreement was made between both parties at the expense of others and constituted one of the central problems: neither South Sudanese minorities nor groups of other regions were included in the distribution of power. This approach has reached its limits with the foreseeable separation of the country in July 2011.

In *Kenya*, the introduction of the constitutional amendment per referendum occurred in 2010 following long discussions and the successful conclusion of the 2008 post-electoral crisis. Several new dispositions aim to improve the representation of minority rights (establishment of a second chamber pursuant to Articles 96 and 98) and group autonomy. The nine provinces under central administration will be succeeded by 47 *county councils* with an elected executive branch and limited legislative powers (Articles 176–187). The Kadhi courts for civil cases between Muslims (Article 170; based on the Sharia) will strengthen group autonomy. The new regulations for land reform (Articles 60–68), which are to be supervised by an independent commission (Article 67), aiming at the tense situation in the Rift Valley, will probably prove to be conflict-relevant. The pact among the elites for solving the 2008 crisis did not result in the distribution of power being constitutionally institutionalized in the form of a grand coalition.

Usually, constitutional amendments in other ethnically divided African states without acute violent conflicts were not intended to reduce conflicts. The power-sharing arrangement in Zanzibar (Tanzania) is an exception. In Zanzibar, a referendum on the matter of constitutional amendments was conducted in July 2010 and was supported by approximately two-thirds of the

8 Djibouti's (2010) most important constitutional amendments also served to facilitate a further tenure of the president. Nevertheless, a senate was introduced as a second chamber, which supplements decentralization and in turn played an important role in the peace treaty of 2002.

population. The aim of the referendum was to pre-empt violent clashes between the supporters of the two most important parties (Chama Cha Mapinduzi and Civic United Front) during the parliamentary and presidential elections. The amendment provided for the formation of a grand coalition in 2010 after the elections. This was implemented immediately and has resulted in the complete absence of any opposition.

Asia

Many recent conflicts in Asia have ended violently or are ongoing. This applies to Afghanistan, Myanmar (Burma) and Sri Lanka, as well as to conflicts confined to small areas of India. Even though conflicts in the Philippines were ended peacefully, in recent times, this has no longer been the case. Indonesia (Aceh) and Nepal provide interesting examples of how wars were ended with peace agreements.

Between 2005 and 2010, important constitutional amendments were made in the Asian countries of Bangladesh, Bhutan, Myanmar, Nepal, Pakistan, Sri Lanka, Taiwan and Thailand.[9] The new constitution for Thailand (2007) was strongly influenced by the military junta. Nevertheless, at least the rights of local communities have been strengthened (Articles 66–67). Apparently this does not apply to Myanmar, which also received a new constitution under a harder regime (2008; Bünte 2008); the autonomy of ethnic minorities has received only vague guarantees. In a *top-down process*, Bhutan gave itself a new constitution in 2008 containing elements of strong decentralization. However, the Lothshampas minority, which has partially been driven out of the country in the process, is not included, and stricter citizenship laws have been imposed. An important constitutional amendment in Pakistan (2010) has led to an increase of autonomy and a weakening of the president. Even though the constitutions of Malaysia and India undergo frequent amendments, a clear connection to ethnic-regional or religious conflicts has not been established.

Nepal constitutes the clearest example of all cases relevant to this text. The peace process and the associated constitutional process were long and have not yet been completed. The formal November 2006 peace agreement between Maoist rebels and civil parties happened against the background of the creation of an interim constitution which a) did not constitute Nepal as a Hindu monarchy and b) was to contain, among other things, an increase of participatory rights for ethnic minorities. Since then, Nepal has had an interim constitution with the following main elements: consensual government including all "seven parties" under a consensual prime minister (Articles 36–40); proportional participation of disadvantaged groups in state structures (Article 21); proportional representation of women, Dalits (untouchables, lowest caste, approx. 13% of the population), indigenous peoples and inhabitants of underdeveloped areas, Madhesi and other groups on the party lists for the election of the constituent assembly (Article 63, 4); and the creation of local administrative bodies (Article 139). Nepal is to become a federal state. However, no clear specifications have been set forth (Article 138).

The constituent assembly, whose period of incumbency was extended twice, is responsible for the creation of a final republican constitution.

Latin America

In recent decades, Latin America, if the Colombian government's fight (aided by right-wing militias) against left-wing guerrilla groups is exempt, has not seen any severely escalated civil wars.[10] However, continued violent episodes due to real or perceived disadvantages for national minorities can indeed be observed in this region. It seems questionable whether they are still the cause for violence in Colombia, where indigenous peoples constitute only 3% of the total population. Important constitutional amendments during the examined period occurred only in the following states with "divided societies": Bolivia, Chile, the Dominican Republic, Ecuador, Colombia and Venezuela, where once again one of the overriding motives for constitutional amendment was the safeguarding of executive leadership (for example, in Colombia and Venezuela) (Nolte/Horn 2009).

The inclusion of collective rights for ethnic groups (in particular indigenous groups, population groups with an African background) in some constitutions stems from the recognition of

9 The Maldives are not included in the *Minorities at Risk Project*. The new constitution of 2008 creates the prerequisites for a multiparty democracy, but revokes citizenship for non-Muslims. The omission of Nepal from the database is even more striking.

10 Connections between constitutional amendments and peace treaties can be established for Colombia and Guatemala in the early 1990s.

these rights in international human rights and is not a result of peace agreements. This also applies to recent constitutional amendments in Ecuador and Bolivia. They occurred in the wake of broad social protest, not after a country-wide escalation of violence. In both states, the main delineation of conflict runs between the economically and culturally disadvantaged predominantly rural *indigenas* and the urban population, which occupies a higher social position. A fixed amount of seats in parliament (Bolivia) or in congress (Venezuela, Colombia) and the recognition of legal pluralism aim to defuse these conflicts. In Bolivia, quota regulations going beyond this were decreed.

Middle East/North Africa (MENA Region)

Superficially, only few states in the MENA region appear to be ethnically diverse (Afghanistan, Iran and, in particular, Iraq). Nevertheless, significant national minorities live in some states (Syria: Kurds; Algeria/Morocco: Berbers; etc.), and there are several societies with religious conflict lines between Sunnites and Shiites (for example, Bahrain and Yemen – the latter not being included in the *Minorities at Risk* database), between Christian groups (Lebanon), or – as is the case in Egypt – between Copts and Muslims. In addition to ongoing violent conflicts (Israel/Palestine) and completely new violent conflicts in North Africa and the Arab Peninsula, which have not yet been subject to much academic examination, one state has been particularly prominent in the period from 2005–2010: Iraq, where important ceasefires and constitutional amendments have been achieved.

The new Iraqi constitution was accepted in 2005. Contrary to the demands of the Sunnites, the primary result was federalism with few large regions and few integrated mechanisms of inter-ethnical or inter-religious cooperation. However, the introduction of 18 provinces met Sunnite interests. Rights of political say as to the distribution of oil resources and a relatively strongly defined principle of subsidiarity to the benefit of these regions and Kurdistan in particular (Article 111 et seq.) come close to some ideals of the consociational principle – others, however, to a lesser extent. A provision for a second chamber to represent minority rights (Article 62) was made, and the interim provisions determined a presidential council (a Kurd, a Sunnite and a Shiite) for reaching unanimous decisions. In 2009 this led to the conclusion on the part of vice-president al-Hashemi that he could veto the new electoral law (he was shown that he was wrong by the Constitutional Court). Many regulatory provisions are lacking. Particularist parties won the first elections, but in the 2010 elections – after ending violent conflicts with several militias – "centralists" took the lead (Fürtig 2010). This can be interpreted as an indication that the constitution and the electoral laws are, after all, rather flexible. However, the subsequent formation of a government was strongly characterized by an agreement between the ethnic-religious blocks. In March 2008 an offensive of government troops unilaterally ended the preliminary 2007/2008 ceasefire with the Al-Mahdi army. Thus, the constitutional process and peace initiatives do not appear to have been strongly linked, but the introduction of the constitution, which was created with significant U.S. participation, led to a substantial alleviation of tension.

The constitutional amendment in Algeria (2008) was created quickly, and one of its key points was its allowance of a third presidential term for President Bouteflika, a change met with criticism, particularly on the part of Berber politicians. Between 2005 and 2007, Egypt's President Mubarak ordered substantial amendments to the Egyptian constitution and their subsequent approval per referendum. The central amendments were an opening to capitalism, while only few civil liberty reforms were considered in the text. The revolution of January 2011 led to a modification of the constitution, which was accepted in a referendum on 19 March 2011. The majority of Copts (a religious minority) voted against the constitution, as it did not abolish Article 2, pursuant to which Egypt is defined as an Islamic country.

Peculiarities and Open Questions

The application of strict criteria and the examination of a relatively short period (cf. Table 1) show that there is apparently only a weak link between constitutional amendments and peace agreements in "divided societies". However, it should be noted that processes of constitutional amendment as well as peace processes are frequently designed for a longer period and occasionally develop mutual "long-term effects".

Apparently, there is a broad diversity of constitutional reforms ranging from the comprehensive design of new constitutions (some with consociational intentions, see Burundi), interim constitutions

(some with many strong consociational elements, see Nepal, Sudan) and more or less profound reforms of individual paragraphs.

In more recent reforms, the strengthening of decentralizing elements seems to be the most obvious of the measures intended to implement peace policies; doing so also strengthens group autonomy. Grand coalitions also feature prominently in interim constitutions (Iraq, Nepal, Sudan). In contrast, proportionality regulations are rarely codified, and veto rights are formulated as a consensual method to make decisions, which sometimes seems questionable (see Iraq, DR Congo).

It should be noted that many constitutional amendments in "divided societies" are not directly conceptualized to reduce conflict. Constitutional amendments aiming to extend or reduce presidential powers are particularly relevant. Like, for example, in Cameroon, Niger and Venezuela, regulations can exacerbate such conflicts without causing a civil war.

Apparently, processual factors strongly contribute to the failure of implementing customized constitutions to defuse conflicts in "divided societies". In addition to the lack of consideration for alternatives and the weight of historical insights, the interests of the main conflict parties and the fear for their own security mainly prevent optimal *constitutional engineering*. However, it cannot be ruled out that actors learn from experience – amendments can also be made after the adoption of a(n) (interim) constitution!

It was not the purpose of this analysis to examine how, in reality, mechanisms of constitutional law function for the handling of causes of conflict. A closer look, however, may prove rewarding. The clear finding that constitutional amendments, at least recently, have rarely been used to reduce conflict is surprising.

Table 1: Important constitutional amendments/ important peace agreements in "divided societies" (2005–2010)

	Africa	*Asia*	*Latin America*	*Arab World*
Constitutional Amendment	Angola Burundi Djibouti DR Congo Cameroon Kenya Madagascar Mauritania Niger Rwanda Sudan Chad Uganda Zimbabwe	Bangladesh Bhutan Myanmar (Nepal) Pakistan Sri Lanka Taiwan Thailand	Bolivia Chile Dominican Republic Ecuador Colombia Venezuela	Algeria Egypt Iraq
Peace Agreement	Burundi DR Congo Mali Niger Sudan Chad	Indonesia (Nepal)	-	Iraq
Both	Burundi DR Congo Niger Sudan Chad	(Nepal)	-	Iraq

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I would particularly like to express my gratitude to Sandra Destradi, Henner Fürtig, Sabine Kurtenbach, Konrad Lais, Stephan Rosiny, Alexander Stroh and Almut Schilling-Vacaflor for the generous provision of advice.

Related GIGA Research

The research team "War and Peace Processes" of GIGA Research Programme 2 ("Violence and Security") examines organized intra-state and inter-state violent conflicts as well as the factors that lead to or prevent a successful transition to peace processes. In the context of the "Pact for Research and Innovation" Matthias Basedau, Sabine Kurtenbach and Andreas Mehler have applied for funding for an international network that is to conduct comprehensive research on *institutions for sustainable peace*. On this topic, a "pre-conference" supported by the Fritz-Thyssen Foundation took place at the GIGA on 13/14 April 2011 – online: <www.giga-hamburg.de/institutions-for-peace>.

Related GIGA Publications

(Further *Focus* editions on the topic of constitutional amendment are in the making.)

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