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Constitutions: Frameworks for Pluralism?

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I. INTRODUCTION

Currently, diversity, difference and identity politics dominate discussion about constitution-making and constitutional design. The constitution-maker's "toolbox" is full of institutions and procedures intended to provide a basis for building a peaceful society in which diversity is respected rather than the basis of competition, exclusion or oppression. There is, of course, no magic formula that allows us to get a country's constitution "right" in any particular context. The way a constitution will work is difficult to predict: it is influenced by history, the economy and changing interaction between different social and political groups. Even the best intended constitutional choices may work differently from what is expected, and circumstances change challenging the ability of a constitution, which is expected to be stable, to guide society. Moreover, constitutions are not made or implemented in a state of political, social and cultural neutrality. Reaching a balanced constitutional agreement is especially difficult after conflict. Post-conflict constitutions are frequently part of a peace settlement (a set of compromises or bargains made to satisfy the interests and fears of opposed groups). These constitutions may freeze identities. Indeed, this is what the parties may demand at the time of constitution-making. Bosnia-Herzegovina (BiH) and Lebanon are notorious examples. In BiH, the deal was not only built entirely on a one-dimensional concept of identity but also conclusively excluded various groups. In Lebanon, a settlement that allocated shares in political decision-making has become outdated, but the country's politics are too unstable for changes to be made. In short, when thinking about the potential of constitutional design and implementation as instruments of pluralism, a good dose of pragmatism is needed. However, as the case studies in this series amply demonstrate, constitutions that pay attention to inclusion and diversity may also contribute to developing pluralism.

This paper is part of a new publication series from the **Global Centre for Pluralism** called **Accounting for Change in Diverse Societies**. Focused on six world regions, each "change case" examines a specific moment in time when a country altered its approach to diversity, either expanding or eroding the foundations of inclusive citizenship. The aim of the series – which also features thematic overviews by leading global scholars – is to build global understanding of the sources of inclusion and exclusion in diverse societies and the pathways to pluralism.

Constitutions determine the main institutions of government and, consequently, how state power is to be exercised and how different sectors of society are included in public life. In the past, constitutions were preoccupied with institutions and paid little attention to other aspects of nation-building as is evident in many of the "independence" constitutions like those of Ghana and Nigeria, but with India as a singular exception. Certainly, basic civil and political rights (focused on individuals) were included in most post-Second World War independence constitutions, and, in Africa, plural legal systems were usually maintained, with customary legal systems given some status. In addition, federal arrangements, such as in Nigeria and Kenya, were intended to ease potential friction among groups. However, most of these constitutions included little that was concerned with actively building respect for diversity. As was the case in Ghana, at independence, many countries emphasized underplaying diversity rather than recognizing it. This has changed. More recent constitutions are often as much concerned with values and principles as with institutions, and attention is usually paid to accommodating, managing and sometimes celebrating diversity, both in relation to values and principles, and institutional design.

Constitution-making and the implementation of constitutions provide many opportunities for inclusive or "pro-pluralism" choices but, as with law more generally, these are seldom clear-cut choices and may prove Janus-faced—many constitutional choices that recognize diversity can be used both to promote inclusiveness and to institutionalize difference.

II. PLURALISM AND CONSTITUTIONAL DESIGN

Constitutions respond to diversity in a wide range of ways. They may ignore diversity (Australia 1901, Thailand 2014),[1] or expressly or implicitly demand some form of assimilation, such as through the choice of the language of government. At the other extreme, a state may be built on an expressed, rigid and constrained understanding of group identity (BiH). But, it is the wide range of options between these two extremes that allow constitutions to contribute to building pluralism in multi-ethnic and multi-faith societies. The "hardware" set up by constitutions—electoral processes, legislatures, executives, courts, subnational governments, military and other security services structures, and so on—can provide the framework for a society based on pluralism. Constitutions may also influence the "software" of plural societies. Constitutions can protect equality, paying special attention to minority groups; they frequently determine the languages used by public bodies; they may guarantee education and protect a right to establish religious schools; they may articulate respect for diversity as a value that must inform the implementation of the constitution and all public life; and in so doing, they may contribute to the emergence of a pluralist national identity.

The case studies demonstrate how both the software and the hardware set up in a constitution contribute to its role in promoting pluralism. Of course, the distinction between hardware and software in a constitution is not precise. For instance, a constitutional commitment to equality and respect for diversity has characteristics of both hardware

(it imposes requirements on how institutions and individuals must behave) and software (it demands a mindset that respects diversity). In addition, in practice, many elements of a constitution work both together and in tension with one another as citizens and groups interact, and as economic, social and political currents change. Drawing on the case studies, in this paper, I look at two of the most significant aspects of constitutions for pluralism: the "big" elements relating to the system of government and the structure of the state; and the overtly value-driven elements relating to identity, equality and nation-building.

The System of Government and Multi-level Government

When considering how to provide a constitutional framework for a pluralist state, constitution-makers first turn to the system of government (a form of presidential or parliamentary government, or something else altogether) and the structure of the state (should the constitution distribute responsibility for government among different levels of government?). Current discussion about these choices in ethnically divided societies (and by extension, societies divided by religion) is framed by a debate between scholars Arend Lijphart and Donald L. Horowitz. Lijphart argues that majority rule in divided plural societies results in majority dictatorship.[2] This means that no system that depends on a majority form of government (as is customary in parliamentary and presidential systems) is appropriate. Instead, what he refers to as "consociational democracy," which strives to share, divide and distribute power, to draw many groups into decision-making and to emphasize consensus, is the way to go. Horowitz is unpersuaded, particularly because he sees no incentives for groups to cooperate in decision- making in the way that Lijphart envisages. Rather, Horowitz rejects the idea of "ethnic guarantees" and proposes hardware (mainly through the design of the electoral system) that provides incentives for groups to build alliances with each other.[3] For instance, he considers an "alternative vote" electoral system likely to encourage candidates to reach out to a broader portion of the electorate thus avoiding candidates and parties with narrow sectoral interests. Similarly, a successful presidential candidate may be required not only to receive a majority of the national vote but also to have support across the territory.

In practice, neither of these approaches has been adopted in what either Horowitz or Lijphart might regard as a pure form.[4] A requirement of consensual decision-making along the lines proposed by Lijphart is most often found in post-conflict situations (e.g., Northern Ireland, Burundi and, until 2013, Kenya). On the other hand, "multi-level government," supported by both Lijphart and Horowitz, that allows regions within a country to exercise considerable autonomy, is often adopted.

The Indian and Nigerian case studies offer examples of how multi-level government can contribute to peace and stability in a society that is ethnically and/or racially divided. It gives linguistic or tribal groups some autonomy in their regions while also drawing them into the centre. Yet, in India and Nigeria, multi-level government is a double-edged sword. The Indian case study documents the country's deliberate embrace of pluralism at independence—extraordinary for its time. Over half a century,

federalism has enabled the accommodation of linguistic and regional diversity. But there have been costs. In particular, minorities within individual states have not always been adequately protected. Moreover, with constitutional measures focused on linguistic and regional diversity, the large Muslim minority has suffered from exclusionary practices.

As in India, the Nigerian federal system has enabled diversity to be managed through inter-ethnic compromise. Most importantly, the creation of 36 states has limited the political, economic and social power of the largest ethnic groups and given a voice to minority groups. But, as the case study explains, the fragmentation of the country (expanding from three states at independence to 36 today) has deepened ethno-regionalism. The most egregious example of this is the use of the concept of indigenes to exclude so-called settlers (i.e., people whose parents or grandparents did not belong to a community "indigenous" to the state) from jobs and benefits in states in which they live. It may be that the Nigerian Constitution did not intend this. However, a combination of constitutional language susceptible to an interpretation that permits discrimination against "settlers" and the Constitution's assertion of the "federal character" of the Nigeria with courts that are not prepared to buck the trend of tribal identity politics has resulted in states having a licence to discriminate. Similarly, a classic benefit of federalism is that it allows regions to tailor policies to their own needs. But, in northern Nigeria this has led to the recognition of Sharia law in a way that has excluded women and non-Muslims. The federal charter of rights should prevent this, but central government institutions do not have the de facto political authority to enforce it.

Identity, Equality and Nation-building

Constitutions offer an opportunity to articulate a national identity and may include some of the mechanisms to promote it. When the goal is to respect diversity, a commitment to equality and express provisions that permit or require affirmative action are usually the most important.

But, as the case studies demonstrate, just as with choices about systems of government and regional autonomy, these mechanisms have upsides and downsides, creating opportunities to address long-standing exclusionary practices, but introducing their own pathologies of entitlement and group definition.

India is rightly famous for entrenching an intention to expunge the caste system from Indian society in its constitution. To do this, recognition of group membership was essential; however, over time, its costs have become more apparent. Without constitutional recognition, many groups would have been unable to secure rights and would have remained invisible in public life. Yet, it has also become politically impossible to use affirmative action in a manner that benefits the most needy. Instead, elites within groups entitled to special treatment benefit to the exclusion of others in the group. Moreover, rather than gradually moving away from quotas and other affirmative action measures, India finds itself propelled into extending them to an increasing number of groups. At the same time, despite a constitutional promise that the largest minority in India—the Muslim population—would be fully included in public and commercial life, it remains underrepresented.

Similarly, Bolivia and Malaysia provide examples of the importance of a constitutional commitment to an inclusive concept of citizenship with affirmative action as a mechanism to make it more than rhetorical. In both countries, the institutionalized acknowledgement of previously marginalized majorities through constitutional recognition contributes to inclusion and provides opportunities to challenge old practices. But, even taking into account the significant social, political and economic differences between them, both cases reflect how difficult it is to ensure that a constitutional commitment to affirmative action does not lead to a society that uses group identity as a form of entitlement. Notably, the constitutional attempt to restrict affirmative action in Malaysia to situations in which it is "necessary" has been ineffective.

In this context, Colombia offers a contrasting picture. The case study concludes that diversity has become part of Colombian identity in day-to-day life. Among other things, this is a result of the national ratification of an inclusive "social contract" and the Colombian Constitutional Court's attention to the Constitution's pluralist value system in its decisions. Both of these build on the constitutional choice of pluralism. But, the fact that in Colombia, unlike Malaysia and Bolivia, those marginalized were minority groups and not majorities must also be noted as a factor making change from an exclusionary society to an inclusive society a great deal easier.

III. CONCLUSION

In summary, as the case studies show, constitutions matter in building societies that value diversity. They can provide a foundation on which nations flourish in their ability to include everyone. The institutions that they set up can promote pluralism. Still, and again as the case studies show, constitutional arrangements can make pluralism less easy. Indeed, they often both ease and intensify tensions. Constitutional arrangements are only a small part of building an inclusive society. In addition, the effect of constitutional institutions and their framework of values is not static. As scholar Mirjan Damaška observes, "The music of the law changes, so to speak, when the musical instruments and the players are no longer the same."[5] Along with the other drivers of pluralism, maintaining a constitutional framework that promotes respect for diversity is an ongoing task.

NOTES

1 But freedom of religion is usually respected.

2 See for example Arend Lijphart (2012), *Patterns of Democracy: Government Forms & Performance in Thirty-six Countries,* Second Edition (New Haven: Yale University Press).

3 See for example Donald L. Horowitz (2001), *Ethnic Groups in Conflict* second edition (Berkeley: University of California Press).

4 It should be noted that Horowitz is acutely aware of the need for constitutions to respond to context, and he does not propose a set menu of constitutional solutions for diverse societies.

5 Mirjan Damaška (1997), "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments," *American Journal of Comparative Law* 45 (4): 839–40.

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