

Parliamentary and Expert Roundtable on Constitutional Issues

20-22 July 2006, Skopje, former Yugoslav Republic of Macedonia



Parliamentary and Expert Roundtable on Constitutional Issues

20-22 July 2006, Skopje, former Yugoslav Republic of Macedonia

Table of contents

Foreword, pages	4-5
Executive Summary,	6-8
Opening Remarks,	9 -11
Session Reports, pages	12-21
Participants List, page	22
Presentations, pages	23-72

Prishtinë/Priština, 2 September 2006

While negotiations to solve the status of Kosovo are now entering the final stages, the process will not be complete without a thorough political transition. Independently of Kosovo's future status, a key to the political transition is a new constitutional arrangements to replace UN Security Council 1244. A new constitution will also include provisions necessary to hold local and central elections that will fully legitimize the newly established institutions and the representatives of the people of Kosovo.

It is a huge endeavour and it is not too early to start discussing constitutional issues. Kosovo finds itself in a unique situation: some issues, including decentralization and minority protection, are dealt with in the future status talks. As a result, the outcome of the negotiations may impose some legitimate limits on the constitutional exercise.

However, the constitutional process is not limited to issues discussed in Vienna. A constitution will establish governmental institutions, ensure separation of powers, define the roles and responsibilities of the different levels of governance and the rights of its people. Therefore, the process of drafting, reviewing, adopting and implementing the Constitution is crucial.

Most importantly, a successful process will have to be legitimate and to be perceived as such by the people of Kosovo. In order to ensure legitimacy the process must be transparent - according to democratic principles - and inclusive - reaching out to all residents of Kosovo regardless of which group they belong to.

The end of a long period of conflict and suffering in the Balkans can only be achieved through the establishment of sustainable democratic governance where each and every one can recognize their rights and responsibilities in the constitution and fully support its promulgation and implementation. Institutions can not function without the support of all and protection mechanisms can not be effective if not accepted by all, particularly in a society divided along ethnic lines.

These are the principles and goals that motivated us when we organized the Parliamentary and Expert Roundtable on Constitutional Issues in Skopje on 20-22 July 2006. The event brought together international experts from Europe and the US along with experts and politicians from all communities in Kosovo.

The purpose of the present publication is to inform the general public on the importance of a Constitution, to summarize the main issues and the main recommendations related to the drafting of a constitution and to provide some concrete guidance on how to begin the constitutional process.

Ambassador Werner Wnendt
OSCE Head of Mission in Kosovo



EXECUTIVE SUMMARY

The aim of the Parliamentary and Expert Roundtable on Constitutional Issues was to bring local and international experts together with members of the Assembly of Kosovo and other political and party representatives to discuss constitutional issues and to help developing a shared understanding of the role of the Constitution in a democratic society.

The underlying assumption was that, although some issues relevant to a future Constitution are solely discussed in the context of the status talks (in particular minority protection, cultural heritage and decentralisation), a large number of elements, including the constitutional process itself, should already be discussed in order to ensure a smooth political transition. Two common views expressed by participants supported this:

- The political transition to post-status Kosovo would end with the adoption of a legitimate Constitution. The Constitution would be the result of an inclusive process that would bring together all the people of Kosovo to develop a common vision.
- The Constitution will have a lasting effect on the institutions themselves. The ultimate goal of the Constitution – one that will have a European perspective – is to bring stability and prosperity to Kosovo, and by extension to the region.



The main success of the Roundtable was to prove that this common vision on the role of the Constitution was shared by each and every participant. The following account of the roundtable is based on participants' comments and recommendations of the experts.



Institutions, judiciary, elections... and the question of minority rights

The Constitution is to secure internal cohesion, external stability and prosperity, as stated by one expert. Its primary constitutive elements are the separation of powers and the protection of human right.

Separation of powers: parliamentary system and independent judiciary

During discussions on institutions and the judiciary, participants seemed to be especially interested in how to effectively apply the provisions of the Constitution:

- The current situation in institutions was assessed as unsatisfactory, in particular the judiciary, and participants stressed the need to develop functional institutions.
- To date, the four post-conflict elections have been seen as free and fair, thus increasing confidence in the democratic system. However, the need to adopt an open list system was expressed as a way to bring even more legitimacy to the elected representatives.
- A parliamentary system was considered by a majority of the discussants as the most flexible, accountable and sustainable system.
- The lack of a tradition of an independent judiciary in Kosovo was recognised by some participants as problematic.
- To interpret the constitution and guarantee its principles, the creation of a constitutional court was favoured. However, it should not deal with individual complaints (at least for the beginning).

Recommendations:

On elections:

- Many constitutions include only few key electoral provisions and call for an electoral law separated from the constitution. Doing so provides a way to entrench norms to protect against ruling party manipulation since constitutions are difficult to amend.



- Several “universal” principles (right of everyone to vote and stand for election) a set of principles establishing “equality” (equal voting rights; clear balanced distribution of seats, minority and gender equality) should determine constitutional electoral provisions.
- “Fairness” (allowing voters the freedom to form an opinion, be neutral and sanction campaign violations) and “secrecy” must also be ensured.

On an independent judiciary:

- The judiciary must: protect citizens against the state; maintain the balance of power and the principles of legality and rule of law; and maintain public faith in the judiciary (e.g. ensuring there is no risk of politicisation, fair, speedy and low-cost judicial procedures, proper implementation of court decisions).
- Judges with high standards (integrity, dignity of the judiciary) and with in-depth knowledge of European laws are required.



Human Rights and Minority Rights: Protection versus Efficiency

The conference did not intend to discuss minority issues for the reason that those issues will be dealt with during the status process, however, the issue deserves special attention as it was raised during each session.

- Participants repeatedly expressed the feeling that they perceived a sort of “trade off” between efficient institutions (that would enable prosperity) and protection of minority (that would enable stability), stressing the need that the latter should not hinder the former.
- Participants recognised that a society divided along ethnic lines like Kosovo, faces challenges with the protection of minority rights rather than the protection of individual rights as such.
- Some representatives stressed that protection mechanisms should take into account the reality in Kosovo and the specific situation and interests of each community.

For instance, this perception of a “trade off” the minority issue was exemplified when discussing the following issues:



- *On elections and representation:* Participants agreed that minority representation was important but disagreed on how to achieve “fair” representation. A few participants even questioned whether a state could truly be called a democracy if reserved seats were mandated, stressing that Kosovo’s current system of reserved seats was unfair to majority parties.
- *On the judiciary:* Some expressed the view that a definition in the Kosovo Constitution of the nature and diversity of the population of Kosovo, coupled with the statement that the judiciary should reflect that diversity, could be sufficient to guarantee diversity in judicial appointments. As long as the appointment procedure is not politicised, appointment based on merit should automatically lead to a diversity of judicial personnel.

Recommendations:

- *Minority rights:* Any definition should embody individual rights of any member of a group as well as collective rights of a minority group. At the same time, those rights should fulfil an integrative function.





- *Inclusion in the Constitution:* Experts explained that human rights, including minority rights, are the binding expression of the values linking the society to the individual. As this is based in applicable laws justifying an obligation to protect, rights and protection mechanisms belong to the Constitution.
- *Protection mechanisms:* The range of possible human rights protection mechanisms was divided into three categories (internal, outside and supranational mechanisms). Each should be carefully examined to ensure the most efficient and comprehensive protection system.
- *Integration of international law:* Recognising that most human rights instruments are part of the international law, proper mechanisms to ensure their integration into the local legislative architecture should also be included in the Constitution.

- *To create confidence in the system:* Experts explained and repeated during each session that the only way to escape from the dilemma is to create goodwill and to transform the trade off as follow: the more the constitutive groups have confidence in the system, the less they need guarantees and the more efficient would institutions able to be.

Legitimate Constitutional Process: to create political willingness

- *On legitimacy, inclusiveness and transparency:* Experts used any opportunity to stress that the constitutional process itself plays a key role in developing political willingness among all the constitutive groups in a society and to ensure a legitimate constitution. It requires an inclusive process where all groups can participate in a transparent manner.
- *On the role of politicians and experts:* During the constitutional process, the respective role of the politicians and the experts should be clearly defined. Politicians should work on building political consensus. Experts, following political guidance, should look at original solutions through comparative studies, in particular from the region, bearing in mind the specificity of Kosovo.

To ensure legitimacy: need for inclusiveness, local ownership and transparency

- Experts expressed the view that the constitutional process is usually a long one, especially in a society divided along ethnic lines (which is a more permanent phenomenon than for instance division along political ideology).
- The constitutional process should not be rushed for short term interests. Speed could be at the detriment to political consensus and could result in non-functional institutions. Related to this, experts explained the need to be aware of the agenda of the international community.

Constitutional and status process: Drafting phase after status process

- The constitutional process if properly handled will play a positive role in finding solutions to initial tensions and to ensure that the Constitution will be implemented.
- The constitutional process should not interfere with the status process



in order to avoid political interferences and possible deadlock, in particular with issues related to minority rights.

- The status process would provide at least some principles that would have to be taken into account when drafting the Constitution. For this reason, the drafting should take place only when the result of the negotiation is known.
- At the same time, prior to starting the drafting of the Constitution, important preparatory work needs to be done and some participants believed that a drafting body could be mandated by the Assembly after the outcome of the status process is known.



Recommendations:

- Experts explained that during this preparatory phase, all political forces including all groups must come to an agreement on a number of important questions:
 - How to proceed with the drafting?
 - Who should be in charge?
 - What rules of procedure should be followed?
 - How should input from the people of Kosovo be channelled?
 - How should societal input be taken into account?
- T□



OPENING REMARKS

OPENING SPEECH BY AMBASSADOR WERNER WNENDT

20 July 2006

Ladies and Gentlemen,



I would like to welcome all of you to this Parliamentary and Expert Roundtable on Constitutional Issues. A particular warm welcome goes to President Berisha and all the Members of the Assembly, as well as the members of the working group on the Constitution. Your attendance shows how much importance you give to a serious discussion on future constitutional arrangements for Kosovo. I would also like to welcome all the experts, who travelled here from all over Europe and even from as far as the United States to contribute with their expertise and experience to this event.

Tonight is about getting together, and I am looking forward to informal discussions with all of you and I kindly urge you to fully use this opportunity to discuss with the experts. Let me, however, start by briefly underlining the reasons that brought all of us together.

This roundtable is part of the OSCE Support Programme in 2006 to offer you with technical expertise and additional skills. While it is not in our mandate to directly participate in the negotiation process, our aim is to indirectly support all of those in Kosovo involved with the negotiation, including issues related to constitutional matters. As you know, nobody is questioning the fact that with a status settlement there will be the need to adopt new constitutional arrangements, and we felt that now it was a good time, before the summer recess and the beginning of a new negotiation phase, to organize this kind of brainstorming.

The OSCE is not in favour of any particular constitutional model or outcome. We all agree that this a highly sensitive issue. However, by organizing this round table the OSCE seeks to promote inclusiveness and create a sense of ownership by opening a large debate, involving experts as well as Assembly Members. I do believe that, as is the case anywhere else in the world, the Assembly should play a crucial role in such a process. Members of Parliament have the essential role of representing the population and finding the best possible solution for the future of Kosovo.

This roundtable is designed to be a platform for discussing issues like different outlines for constitutions, the inclusion of human rights in the constitutional framework and the overall importance of such a document in a democratic society. Some of the questions raised will deal with the balance between the Legislative, the Executive and the Judiciary. Of course the extent to which certain aspects of a future electoral system are included in a constitution, or not, will be discussed. We will get competent and valuable input from experts, including examples of best practices.

As we all know, designing such a framework is an essential step towards a democratic society; however, it is not enough. In my view this is one of the most important points: general principles are essential but how to concretely implement these provisions is even more important. You can have, as was the case in the Soviet Union, a very good text, something strong on paper, but something that is not implemented, be it for political reasons or because not enough resources are available. My country, Germany, on the other side is a good example of a proper implementation of the Constitution. After WWII, the Constitutional Court was established as a strong institution and it took its task very seriously to promote and implement the Constitution, especially when it comes to human rights protection mechanisms. So, how can we guarantee proper implementation? Which oversight mechanisms need to be in place? Those are fundamental questions we hope this conference will help to clarify.

As you see, it is quite easy to get drawn into this topic, even in the opening speech. However, there are two days in front of us to go into extensive details and to have a fruitful discussion and even, as we also hope, to clarify the need for an agreement between all communities involved on some of the most pressing topics, such as human rights and minority rights, the functioning of the judicial system and the leading role of the Parliament.

Let me wish a pleasant and relaxing evening before meeting you again tomorrow at our first session. I would like to thank you again for your presence and give the floor to President Berisha.

OPENING SPEECH BY PRESIDENT OF THE ASSEMBLY OF KOSOVO, HIS EXCELENCY KOLE BERISHA

20 July 2006

Dear Ambassador Wrendt

Dear participants,



It's my great pleasure to participate in the opening of this parliamentary and expert roundtable devoted to a very important topic. It is also my duty, on behalf of Kosovo's Parliament, to thank the OSCE for organizing this roundtable and providing the participation of international experts. OSCE really deserves the gratitude of the Kosovo Assembly not only for organizing this conference, but because it has done a very good job in Kosovo and in the region, in general.

Kosovo is at the end of the marathon, which aims at determining its future status. That is why, as any other country, it should have its highest legal – political act, the constitution.

Without dwelling into legal explanation on the contents of the highest constitutional act and on fields that it should regulate, I would like to remind you that this roundtable aims at reviewing basic moments and orientations, without which the constitution could not be drafted. Included in this roundtable are the following issues: comparing the constitutional systems functioning in the world, differences between these systems, their functionality, division of powers between the President, Assembly, Government and Judiciary, the government structure and transfer of competences from the central to the local ones, human and minority rights, electoral system, etc. In a nutshell, the discussions will centre around the elements appropriate to Kosovo situation and aspirations, and its citizens towards a democratic and prosperous state with equal opportunities, regardless of ethnic, cultural, language or racial diversity, will be discussed here.

We need to be well provided with necessary knowledge, competences and qualification. I am confident that the expert's professionalism will facilitate the achievements of this roundtable.

Certainly, the roundtable is a right step at the right time and in the right direction. Current processes in Kosovo require efforts to be stepped up for drafting the constitution which, needless to say is *Conditio sine qua non*, would enable Kosovo to have its highest legal – political act ready and hence avoid the constitutional and institutional gap once status is resolved.

I am convinced that this roundtable will come up with a successful offer, which will be of a great value to a future draft constitution for Kosovo.

I say this, taking into account not only the topics of this conference, but the names of the distinguished and respected names of participants, most of whom are personalities with academic knowledge and great experience in organizing institutions. I am also optimistic about the outcome of the roundtable taking into consideration the list of participants from Kosovo, many of whom are our colleagues, who have significant experience not only in the Kosovo constitutional practices after the war, but even earlier in drafting the former Yugoslav Constitution. As you already know 1974 constitution was very advanced.

In the past all of Kosovo's peoples were in favour of protecting it, by taking to the streets of Kosovo, although the Kosovo citizen's cry was ignored at that time by the international community. The fall of the Berlin Wall and other democratic winds that blew in the 90's brought about a movement in Kosovo, which resulted in the adoption of a new constitution, adopted in Kaçanik, under the threat of Serbia's police forces.

However, this is history and I wouldn't like to dwell on it. What I want to express is that I am looking forward to the optimistic and positive outcome of this meeting in Skopje. The reasons for this are obvious: the generous support of international community and the good will and readiness of Kosovo institutions.

Constitutional Framework has become tight or a sort of obstacle to the processes and dynamic of Kosovo developments, but even as such it might be taken into consideration, when drafting the new constitution, in several aspects, in particular the normative part.

Moreover, our colleagues from Kosovo brought a draft with basic principles for which I am positive will serve as a solid basis for drafting the Kosovo Constitution.

OPENING REMARKS

Dear participants,

I am not presenting a special project, or specific ideas on constitution, as I am sure that this will be done by the experts of this roundtable. However, I would like to point out that we want and we need a modern constitution. A constitution that releases positive energy, enables a free market economy, spirit of cooperation with neighbours in the interest of peace and stability in the region. We want a constitution, which guarantees human and minority rights, an advanced model, which guarantees equality for minorities, a constitution that enables the functioning of the legal state, and democracy and is based on the models of the most advanced countries.

To date, we have managed to regulate many things by the law. Now we want to regulate the promises called standards, in the best possible and most powerful way, through a Constitution.

Therefore, I came from Prishtinë/Priština, that is from Kosovo Assembly to Skopje, not to issue ultimatums, or express my reservations or hinder the process, but to express my good will and readiness for utmost support and cooperation in drafting the Kosovo's highest legal document. We don't want improvisations, neither texts that are covered with anger, folklore and reminiscences from the past, but a functional and modern draft. We would like this text to have a long life, simply because it will articulate the aspirations of Kosovo citizens, who will feel and consider it as a document that opens the horizons and not creates limits.

We have made it clear from the get go, and this was not hypocritical but we really meant it, that Kosovo in the future will be a state of equal citizens, that it will be a secular state of the most advanced standards for the human rights and freedoms of all its citizens. These components will be reflected and included, in the most adequate and functional manner, in the constitution and they will be guaranteed through the legitimate instruments of the constitution itself.

So, these would be our expectations from today's meeting in Skopje.

Thank you once again for your efforts and wish you the very best in your endeavours.



REPORTS OF THE RAPORTEURS

Disclaimer

The views expressed herein represent the opinions of the speakers and do not necessarily represent the views of their organization or the OSCE Mission in Kosovo.

Session I: “General introduction to constitutions”

Moderator: Per Oeyvind Semb, OMiK

Introductory remarks:

Ambassador Werner Wnendt, Head of OSCE Mission in Kosovo

Keynote Speaker:

Paul Williams, American University, Washington College of Law & School of International Service

Panel discussions:

Vernon Bogdanor, Oxford University, Brasenose College, Rick Lorenz, Jackson School of International Studies, University of Washington

Emilia Drumeva, Constitutional Court of Bulgaria

Respondent:

Hydajet Hyseni, Chairperson of the Assembly Committee on Legal, Judicial and Constitutional Framework Matters

**Objective**

This session was intended to present the main functions of a constitution in a democratic governmental structure as well as its main characteristics. The role and the specificity of the constitutional process was also discussed.

Introductory remarks

Ambassador Wnendt underlined the rationale behind the organization of the roundtable, namely to enlarge and deepen the ongoing debate on constitutional issues by bringing together local actors and international experts. He stressed the complexity of the task and urged participants to refrain from politicising the debate in order to allow for interaction and a fruitful exchange of ideas.

First Speaker

The keynote speaker stressed the importance of the constitutional process, per se, in particular in a post-conflict context with a divided society such as Kosovo. He drew the parallel with the status process, indicating that, even though some parts of a constitution are likely to be provided by the status settlement, the constitutional process was more far-reaching. It would require local ownership and inclusiveness to ensure legitimacy of the outcome.

The process was likely to be a long one and, in his view, might continue after status settlement because of the extensive consultations needed to build political consensus over a shared vision.



The speaker expanded on the different phases of the process. (1) A preparatory phase of initial consultations aiming at an agreement on a clear set of rules and timeframe. (2) A drafting phase to balance broad political guidance and technical work. This was described as the most difficult phase that had to be carefully managed. (3) A period of public consultation to educate the public on the constitution and ensure broad ownership. A mechanism to channel public input should therefore be developed. (4) A final review should allow comments and suggestions arising from the public consultations to be processed. During this phase, the document could also be reviewed by relevant institutions to ensure consistency with, for instance, international laws and norms. (5) After adoption, a phase of implementation, to foster confidence and ensure its legitimacy, should be foreseen.

According to the speaker, throughout this entire exercise, some rules should be respected:

- limit the appearance of incumbent control which could create distrust and lead to a lack of legitimacy;
- provide multiple opportunities for participation, which could also generate useful ideas and be a model for future democratic behaviour;
- create adequate structures to enable and secure compromises;
- be forward looking; and
- carefully manage the international community's participation, especially in Kosovo where the international community is, at the same time, strongly involved in the status talks.



First panel speaker

The first panel speaker stressed that although the constitution is indeed essential, it is, however, neither the beginning nor the end of the democratic process, because institutions created under the constitutional framework would function only if there was a general agreement. Therefore, emphasis should be on building political agreement. This is especially the case in divided societies such as Kosovo where tensions between granting equal status to different groups and institutional efficiency should be carefully balanced. In other words, the more communities have confidence in the system, the less that guarantees are needed and the more institutions could be efficient. He further suggested that a way to increase confidence when adopting a constitution in such an environment could be the use of multiple referendums, one in each of the constitutive groups.

Second panel speaker

The second panel speaker compared the situation in Kosovo and Georgia. He stressed that while the context was fundamentally different, there were similarities with other post-conflict regions in the world. In that respect, it was also important to compare and draw on experiences from abroad.

Third panel speaker

Based on her participation in the drafting of the Bulgarian constitution and subsequently as a practitioner, and currently in her capacity as a constitutional judge, the speaker stressed the key role of experts in the process. Together with the politicians, experts have to be able to show flexibility and originality in offering solutions that could be acceptable while building political consensus.

Commenting on the minimum content a constitution should encompass, she first referred to basic rights and fundamental freedoms and second to its function as a framework law setting standards and principles. A constitution need not cover everything but it should be able to give answers to any question through the interpretative process.

Referring to the drafting and the adoption of the constitution, she explained that although people are the constituent power in a democracy, for practical reasons a constituent body such as a qualified assembly should be established and the modality for adoption clearly defined. She concluded her intervention on specific provisions to enable the implementation of the constitution without creating a vacuum after entry into force. It could include a package of laws for the first step of the constitution.



Respondent

Responding to the keynote speaker, he stressed that there was a general agreement on the need for international support in the constitutional process as well as a need to learn from the experiences of other regions in the world. At the same time, he underlined the specificity of the situation in Kosovo when finding suitable solutions. He also specified that Kosovo had constitutional experiences in the past and possesses local expertise, which should play a crucial role. The aim would be, in fine, to have a positive impact on regional stability.

Further developing on the general principles, he stated that there was consensus on having a functional, modern and operative European constitution, including human rights principles. It would also include more advanced solutions for the rights of minorities that would reasonably favour minority communities and would be in harmony with the wishes of the majority. In his view, there was also a general agreement on developing a parliamentary system that should aim at more functionality than the current one under the Constitutional Framework.

Finally, he considered that the Assembly, for instance through the establishment of a so-called constitutional conference, should actively participate in the constitutional process.

Discussion

Constitutional process – Role of the Assembly

The discussion focused mainly on the process itself rather than on the content of a constitution. It was acknowledged that the process requested ownership through broad consultations based on democratic principles of transparency and inclusiveness in order to ensure legitimacy. Based on the same rationale, most speakers stressed the leading role the Assembly should take. The discussants also recognised the role the Working Group on Constitution of the Negotiating Team could play at this stage. Participants also stressed that proper implementation of the constitution was certainly even more important than adopting a good text.

Short versus long constitutional process

Numerous comments were made on links between the constitutional process and the status process. On one hand, some believed that a constitution should be ready for status day, one reason being that it would avoid having the international community imposing a document. On the other hand, it was stressed that the mistake would be to rush the process since it would certainly prevent reaching a consensus, in particular with minority communities. Since a constitutional framework in Kosovo exists, there was, in this perspective, no risk of a legal vacuum and therefore no urgency, especially if the goal of the process is to find long-term solutions that would lessen the pervasiveness of ethnic divisions. At the same time, it would enable to avoid overlapping or influencing the status process.



Minority communities concerns

It was also emphasised that the drafting process should allow the participation of experts from all communities to work on shared approaches and that comments raised by minority communities should also be taken into consideration in the drafting, and not solely listened to. In other words, the majority should not try to benefit from the constitutional process but work for all.

Interventions that referred to the content of a constitution mainly stressed the need to balance individual rights and minority (or community) rights as well as between institutional efficiency and the protection of specific groups. Another perceptible tension between the different comments was how visionary the constitution should be and, therefore, whether the emphasis should be on future integration rather than on actual protection.

Rapporteur: Patrice Quesada, OMIK

Session II: “Institutions”

Moderator: Franklin De Vrieze, OMIK

Keynote Speakers:

Vernon Bogdanor, Oxford University, Brasenose College
Amjad Atallah, Strategic Assessments Initiative
Arsim Bajrami, Working Group on Constitution, Kosovo Negotiation Team

Respondent: Gjynaze Sylja, Head of the AAK Parliamentary Group

Objective

This session intended to focus on institutional arrangements needed to ensure a functioning government in Kosovo, including the separation of powers and checks and balances.

First Speaker

The first keynote discussed different models of structuring the executive branch. By asking to whom the government would be responsible, the parliament or another institution, he pointed out that if the government was responsible to the parliament, it would, therefore, be responsible to the “majority.” An alternative could be a “cross-community” government where minority parties are in the government as a matter of right.



SESSION REPORTS

The speaker highlighted a number of roles the head of State can play to reconcile different communities or serve in a symbolic function. In any case, a president should, especially in the case of Kosovo, represent all the people.

The speaker then outlined a broad range of legislative practices for protecting minorities, such as minority vetoes or weighted majority voting. He noted that the fundamental problem was how to protect minorities without introducing inflexibility into the legislative system. One suggestion was to establish a committee system in the parliament to scrutinize the work of the government. Legislation could be scrutinized at a number of stages: the pre-legislative stage, when draft legislation was first presented to the parliament; the legislative stage, when witnesses could be called to inform the parliament; and the post-legislative stage, to determine how effectively legislation was being implemented.

The speaker also stressed potential abuses that can occur when a government can dissolve parliament without limit. On the other hand, he pinpointed that a fixed-term for the parliament might lead to inflexibility and deadlock. Here again a balance must be ensured.

Using a range of models in practice throughout Europe, he noted that checks and balances are integral for any government but no ideal method existed. Institutions themselves were not the key; the key to successful governance is the spirit and willingness to make institutions work. If the willingness to do so was not there, even a perfect constitution will not work. This theme was repeated throughout the roundtable.

Second Speaker

Constitution and status process

The second speaker noted that negotiating independence and the constitution at the same time posed difficulties. Referring to Palestine, he pointed out that in some cases, developing states get neither independence nor a constitution, and cautioned participants that the process of drafting a constitution can be long, sometimes taking years. He pointed out that the perfect arrangement was one where the final status process complements the constitution and vice versa.

How the constitution shapes the state

Noting that the constitution determined the form of government, he stressed its lasting effect on the state and on how it would be perceived. Recent state practice showed that the constitution determined how the international community would see the new state, as a moral leader for the region or simply repeating the mistakes of its neighbours. By extension, it would determine the level of support. Constitutional drafters should therefore set a standard, think inspirationally, and not in a technocratic way.

Key issues the constitution should resolve

First, the structure of the state. This can range from confederal to federal to unitary. Regardless of the model chosen, it would have to ensure the preservation of human rights and the establishment of a functioning economy. Drafters should not feel confined to established models; as new states develop, there would likely be new forms of state structure.



Second, the structure of the executive. A presidential system may serve as a unifying force and ensure separation of powers. There is a degree of accountability to voters but this system could lead to authoritarianism. A parliamentary model includes all groups, and is flexible since coalitions often need to be formed between political parties. Parliamentary systems are more accountable to public control and are more transparent. He pointed out that parliamentary systems are often the most sustainable for new democracies; in fact, all continuously democratic states formed after WWII have a parliamentary system. Finally, he stressed that a mixed system can be inherently unstable.

Third, the structure of the legislature. A constitution must define whether the legislature will be unicameral or bicameral and how under which conditions the parliament can be dissolved..

The speaker concluded by emphasizing the important role of minorities in the constitutional drafting process, including women. He stressed tha□



Third Speaker

The third speaker emphasized that a constitution is a contract between the citizens and the state and that for Kosovo, the new constitution would aim to support the new state and provide maximum rights to all communities at the local and central level. The main goals are, therefore, national cohesion, unity of the people and the functioning of Kosovo's institutions.

The speaker affirmed that although several issues were being negotiated in the framework of the status talks, such as the reform of local government and minority rights, the constitution must be developed under the Assembly, as the highest representative institution in Kosovo. He underlined that some time would be required to include all the people of Kosovo in the drafting process.

Referring to the separation of powers, he pointed out that every constitution limits the government's power in some manner, such as legislative oversight to the powers of the president over specific issues. Focusing on the role of the president, he recommended five instruments of authority: (1) to promulgate laws; (2) to propose laws; (3) the veto power; (4) to appoint the prime minister; and (5) to dissolve the parliament.

Respondent

The respondent pointed out that the constitution in a post status context would have to be sustainable; therefore, the drafters must ensure its consistency with the future status. Support for a parliamentary system was also expressed because of what she qualified as its flexibility, its high level of responsibility and its sustainability. Describing the current system as inefficient, she stressed the need for the new constitution to define Kosovo's sovereign institutions, including new ministries such as a Ministry of External Affairs, Defence and European Integration. The pr□

Discussion

The open discussion concentrated on the protection of minorities through the legislative process as well as on how to make the drafting process more inclusive. The session ended with a discussion on the political realities of drafting a constitution.

On Protecting Minorities

Participants agreed that the protection of minority rights was an important issue to be determined in the constitution. Some stressed the shortcomings of the current system, in particular that the Assembly Committee on the Rights and Interests of Minorities was not functioning effectively and that little information was available about its work. Many did not regard the committee as important, eventually protecting the interests of the governing coalitions rather than of the communities. Therefore a discussant felt that communities themselves must protect their interests and decide on proper legislative mechanisms. He advocated for the creation of a separate chamber for minorities with a variety of legislative protections at both central and local level.

Other participants felt that all communities in Kosovo had to work together to protect minority rights and, while acknowledging the need for protective mechanisms, cautioned to avoid "the mistakes of Bosnia."

Linking the protection of minority rights to the balance of powers, some participants believed that to function, those mechanisms would require the development of a culture of consensus rather than a culture of veto. Good will should predominate the constitutional process, as a way to avoid future deadlocks.

On inclusiveness and representation

Suggestions were made to include state councils, liaison organizations, representatives from professional





organization and of economic and local interests of all communities. All participants shared the belief that the constitutional process had to be inclusive in order for all people in Kosovo to feel invested in the process and the product.

On political realities

Participants referred to the sensitivity of the current political context. They recognised that some provisions or principles would come out of the status process, particularly in the areas of minority rights, reform of local government and cultural heritage. Therefore, some discussants called for the communities in Kosovo to find solutions together to facilitate the conclusion of status talks.

Role of the experts and the politicians

Discussants noted that although experts draft the constitution, it is the politicians who have to create the proper environment. Together, experts and politicians will have to find original solutions that make the future state of Kosovo operational.

Implementation of the constitution

A discussant pointed out that respect for the rule of law was crucial for a constitution to be implemented and, as one discussant noted, whether Kosovo would be a successful state or not depended on how the majority dealt with the minority. A willingness and a sense of responsibilities would be required from both the state and the citizens. But because of the past seven years, a great institutional mistrust still existed. A good constitutional process could help convincing people to develop political will.

Rapporteur: Jennifer Ober, Public International Law & Policy Group

Session III: “The Judiciary”

Moderator: Wolff-Michael Mors, OMIK

Keynote Speakers:

Godwin Muscat Azzopardi, UN International Judge, Supreme Court of Kosovo

Rick Lorenz, Jackson School of International Studies, University of Washington

Nekibe Kelmendi, Working Group on the Constitution, Kosovo Negotiation Team

Respondent: Dragiša Krstović, SLKM Parliamentary Group



Objective

This session intended to focus on the constitutional arrangements necessary to ensure the independence of the judiciary and to look at arrangements for constitutional review.

First Speaker

The first keynote speaker stressed that an independent judiciary was one of the basic constitutional principles. The constitution should provide the structure of government and the limits of governmental action. Quoting from United Nations General Assembly Resolutions on the subject, the speaker outlined elements needed for the establishment of an independent judiciary.

He stressed that it was essential to have a strong judiciary willing and able to protect an individual against the majority; in case of conflict, judges should be enabled to take decisions as they see fit on the basis of the law and the merits of the facts. To that end, judges also need to maintain a high standard of conduct to maintain the integrity and dignity of the judiciary. It would not be enough to provide for an independent judiciary on paper, but it must also be seen as independent.

Recognising that the new constitution should bring a qualitative change to the existing situation in Kosovo, he noted the importance

and relevance of an independent judiciary in the light of a future European Union perspective, where judges would need to be enabled to set aside national laws in favour of European Union law.

Referring to concrete examples from recent Eastern European constitutions, he stressed the protection of the interests of the judiciary towards the rest of the state. He also mentioned the importance of limiting incompatible activities with the post of judge and the necessity to have effective financial disclosure mechanisms to assist in combating corruption. Furthermore, he emphasized the importance of self-management of court administration resources.

Second Speaker

Using a large number of examples from recently adopted constitutions, he illustrated the types of language which may be used to establish an independent judiciary. The speaker highlighted two issues of concern:

1. How to ensure an objective role for courts and/or a constitutional court, in order to avoid the loss of public support. Maintaining public respect for the institution of the judiciary without the judiciary serving public opinion is crucial to maintaining an independent judiciary.
2. How to guarantee a diversity of judicial personnel, and whether or not a specific number of reserved posts per minority group is an appropriate solution.



Third Speaker

She highlighted that the courts were an illustration of the nature of the state, and stressed that an independent judiciary, respected by the executive and the legislative powers of government, was essential to the maintenance of the principles of legality and the rule of law since the judiciary decides on the most essential human values. The speaker recommended to make the basic principles of an independent judiciary accessible to the public so that the public could ultimately seek to maintain those principles.

Commenting on the current functioning and organization of the judiciary in Kosovo, she expressed the view that since 1999, judicial independence has not been respected. The speaker referred to the existence of three court jurisdictions operating virtually or factually in parallel, namely the local Kosovo courts, the international judges and the Serbian courts. She concluded that only with a resolution on the status of Kosovo would it be possible to establish an independent judiciary.

Respondent

The respondent, starting with an overview of the current state of the judiciary in Kosovo, highlighted a series of deficiencies, including: the unclear legal framework of the judiciary; lack of human and material resources; concerns with the appointment authority of the SRSG; lack of public trust in the judiciary; insufficient monetary compensation for judges; and excessive length of judicial procedures. Based on this analysis, he stressed that Kosovo was a specific case and that further provisional solutions would not be beneficial, although he conceded that they may be necessary.

He considered that a constitution for Kosovo should set out, at a minimum, the following elements: responsibilities of the courts; the structure of the judiciary; organization of the courts (including specialised courts); that the judiciary shall be independent and unbiased; functions incompatible with that of judge; and that the judiciary should reflect the diversity of Kosovo. He concluded by noting that respect for the rule of law and human rights in Kosovo would depend on good constitutional solutions to ensure the independence of the judiciary.





Discussion

The discussion concentrated on the value of having a Constitutional Court, the role of such a court, the positive and negative aspects of allowing individual constitutional complaints, the appointment procedures for judges, the position of the prosecutorial office, the execution of judicial decisions, and the risk of political interference in judicial decision-making given the constitutional culture of Kosovo.

On Constitutional Courts¹

Several participants considered that, in the current context of Kosovo and the challenges of its complex applicable law framework, a Constitutional Court could assist in ensuring clarity and legal certainty in the applicable law and the constitutionality of existing and future laws.

Allowing individual claims

A different question presented was the value of allowing individual claims to be brought to a Constitutional Court for judicial review of the constitutionality of public action in individual cases. The predominant opinion of participants was that, whereas such a system has value, the danger of the court becoming overloaded by large numbers of individual claims argued strongly against allowing this. In addition, claimants could seek to abuse the constitutional review as a fourth level of appeal on the merits of their case. One solution to the potential for abuse would be to ensure that while cases were on appeal for judicial review by the constitutional court, the previous decision was not suspended and the operation of the law continues. Experiences in Bulgaria suggested that allowing individual claims should not be considered in the early phase of operations of a Constitutional Court.

On appointment and budget procedures

Several participants expressed concern with the appointment of judges by the legislature and the control of financial resources by the executive. Coupled with the lack of a tradition of an independent judiciary in Kosovo, and negative practices in the past, it was considered essential to protect the judiciary from political influence as much as possible. To this end, some participants preferred appointment and financial control through an independent High Council of Justice or similar body. Nevertheless, it was also considered important to prevent too strong a judicial power from hindering the functioning of the other powers of the state.



On the other hand, several participants expressed the need for a strong relationship between the judiciary, society in general and other public institutions. An independent judiciary should not lose contact with society and should reflect Kosovo society in its composition. Although appointment by Parliament could increase the risk of political interference, this could be prevented by strong checks and balances in the overall system of public institutions. A separation of the budget of the judiciary from the general state budget could also contribute to protecting the independence of judiciary.

Representation

In general, participants favoured that the judiciary should reflect the diversity of the population of Kosovo. Most participants were not in favour of quotas, or reserved posts, for specific sectors of the population. A definition in the Kosovo Constitution of the nature and diversity of the population of Kosovo, coupled with the statement that the judiciary should reflect that diversity, could be sufficient to guarantee diversity in judicial appointments. As long as the appointment procedure is not

¹ Historically, review of the constitutionality of laws can be performed either *a priori*, before the law is adopted or *a posteriori*, once the law is in operation. For the latter, two main models prevail: The Austrian model, establishing a specialized Constitutional Court solely dealing with constitutional matters or the United States' model, where the competence of constitutional review is conferred to the Supreme Court. Both Systems do exist in Europe. Many Central and Eastern European states have recently adopted specialized Constitutional Courts for the purpose of reviewing the constitutionality of laws and public acts because they are believed to be strong and efficient in a time of transition.

politicized, appointment based on merit should automatically lead to a diversity of judicial personnel.

On public faith in the judiciary

A variety of inter-linked issues arose in relation to ensuring public faith in the judiciary particularly for some sectors of the population. The risk of political influence in criminal justice through executive control of the police and the prosecutor's office was a particular concern. The importance of fair, speedy and low-cost judicial procedures to the establishment of public faith was highlighted. Several participants noted that the appointment of higher numbers of judges and providing them with higher salaries would be necessary to improving public confidence. In addition, problems with the enforcement and execution of court judgements need to be resolved. Nevertheless, public faith could not become the determining factor in designing independent judiciary arrangements, because in judicial decision-making one party usually will not be satisfied with the outcome.



Rapporteur: Ronald Hooghiemstra, OMiK

Session IV: "Human Rights"

Moderator: Wolff-Michael Mors, OMiK

Keynote Speakers:

Emilia Drumeva, Constitutional Court of Bulgaria

Ron Hooghiemstra, OMiK

Respondent: Džezair Murati, Head of the 6+ Parliamentary Group

Objective:

This session intended to provide a general overview on to which extent to include human rights in the constitution and on possible protection mechanisms.

First keynote speaker

The keynote speaker explained the rationale behind the need to include human rights in the constitution itself. She referred to its historical definition as being, together with the separation of powers, the second constitutive element of a democratic society.² Furthermore, she explained that in a constitution, 'human rights' become 'fundamental rights' because they are the binding expression of the values linking the society together with the individual.

Since those rights are objective values, they are 'directly applicable laws' justifying an obligation to protect. Protection becomes the essence of those rights whether they are negative rights (to guarantee freedom from infringement such as security, liberty, political rights, judicial rights or remedies, equality rights or non-discrimination) or positive rights (redistribution of the fruits of the individual contribution to the society such as social and economical rights). Therefore, protection mechanisms deriving from positive and negative rights are also different.



² Article 16 of the Declaration on the rights of men and citizens, 1789.



The question opened through this theoretical presentation was which human rights have their place in a constitution. She stressed that the inclusion of rights and the enforcement mechanisms should be defined after research, comparisons, how certain mechanisms are received by the population, as well as study of international law.

On minority rights

When considering those specific human rights referred to as 'minority rights', she stressed that they are also a category of fundamental rights and belong to the constitution. By definition, minority rights embody collective rights of that group as well as individual rights of any member of a group; at the same time she stressed that those rights should fulfil an integrating function. She emphasised, however, that there was no universal model either at the constitutional and institutional level or in the degree of precision in the constitution. Too much detail may narrow its scope and future situations could be overlooked.

Protection mechanisms

Protection mechanisms could include internal mechanisms (i.e. through regulations to produce guarantees that the rights would be followed and violations sanctioned). In case of restrictions (and therefore, except for rights which cannot be restricted), the principle of proportionality should apply and be included in the constitution. Regarding outside mechanisms, she referred to access to remedies including direct or indirect access to a constitutional court or the creation of an ombudsperson institution. Another category are supranational mechanisms, in particular the integration process that is taking place throughout Europe.



Second keynote speaker

The second speaker took another approach to the human rights problematic and its links with the constitution. He stressed that since human rights were primarily contained in international law, the crucial point was the relationship between international and national law and, more precisely how to integrate them into national legislative architecture. Referring to the constitutional framework in Kosovo, he explained that although the standards contained in international treaties on human rights are directly applicable, it did not provide explanations for their relationship to the local legislative framework. This created problems with the practical application of these standards.

Presenting two models, one at each extremity of the range of possibilities, the speaker extracted a list of elements that must be addressed when drafting the constitution to allow coherency as well as an efficient protection of human rights. Important elements include: the status of treaties; their entry into force; the relationship with national law; the remedies for violations; and a feedback mechanism to avoid future violations.

Discussion

The view shared by most of the discussants was that although the constitutional framework in Kosovo ensured, to a certain extent, the protection of human and minority rights, it did not particularly succeed when it came to positive rights such as the right to work. The balance between individual and minority rights as well as between human rights in general and the general interest was again discussed as a fundamental question that the constitution should answer through the entire constitutional process.

However, some representatives expressed concern that protection mechanisms should take into account the reality in Kosovo, particularly with regard to the specific situation and interests of each community. a

more pragmatic approach referring to the level and understanding of integration for each of these communities should be adopted.

It was also admitted that the level of preparedness and education of the population to stand for their rights was a determining factor in ensuring effective protection. Therefore, even a perfect constitution, with its deriving mechanisms, would not be enough to guarantee adequate protection.

Rapporteur: Patrice Quesada, OMiK

Session V: “Elections”

Moderator: Petra Blaess, Stability Pact

Keynote Speaker: Vernon Bogdanor, Oxford University, Brasenose College

Keynote Speaker: William Spencer, Public International Law & Policy Group

Respondent: Nazim Jashari, ORA Parliamentary Group

Objective

This session intended to focus on elections in a constitutional context, including types of electoral systems and provisions for an electoral monitoring body.

First Speaker

The first keynote speaker began by discussing selected methods to ensure fairness in electoral procedures, and in particular through the establishment of an electoral commission. He stressed five important functions: to administer elections; to ensure that constituency boundaries are drawn fairly; to ensure that the media report fairly and that each party has equal media time; to ensure that parties keep proper accounts of contributions and spending; and to provide civic education and voter information.

He expanded on different models for an electoral commission: one composed of impartial, non-party members such as judges and the other with a membership balanced among parties, headed by a non-party member and/or include international members. In either case, the electoral commission must win the confidence of the government by being independent and transparent.

Fair representation

Discussing how to develop an electoral system that gives fair representation, he referred to a variety of electoral system in use in modern European states: the “first past the post” model³, or proportional representation. The system was more practical when many political parties competed and, more importantly, provided a more fair representation to minorities and to individuals with an emphasis on equality among genders. Proportional representation can be with a constituency system or a national system as in Israel. All countries using proportional representation mandate a threshold that a party must achieve in order to gain representation.

He stressed that when choosing an electoral system, it was necessary to decide between allowing to vote for a candidate (open list) or for a party (closed list). The speaker recommended a balanced ticket for multi-member constituencies, where women or minorities could be represented on the ballot without the need for any special procedural rules.

In conclusion, the speaker stressed that no ideal electoral system existed and that states must choose one that suits its own particular needs.



³ Where the par[]



Second Speaker

The second speaker stressed that many constitutions included only a few key electoral provisions and have an electoral law separate from the constitution. This provided a way to entrench norms to protect against ruling party manipulation since constitutions are difficult to amend. The most commonly included provisions are, inter alia: independence of the electoral commission; composition of the commission; terms of office; suffrage rights; voter registration; political party rights; constituency boundaries; rules governing presidential elections; national election system; candidacy rights; qualifications for candidates; election schedules; deadlines; and electoral dispute resolutions.

The speaker raised concerns about including too many electoral provisions in the constitution, but also stressed that it served as valuable safeguard to the democratic process. Several “universal” principles exist which include the right of everyone to vote and stand for election, such as mandating that electoral registers must be up to date as well as establishing clear criteria to submit a candidacy. There are also a set of principles establishing “equality” such as: equal voting rights; balanced distribution of seats; equality of the opposition; and national minority and gender equality. To ensure “fairness” the state must allow voters the freedom to form an opinion. The state must be neutral in finding elections and should impose sanctions on campaign violations. “Secrecy” is maintained by allowing votes to be individual and private. And finally, “direct suffrage” is maintained by allowing at least one chamber of the legislature to be directly elected, some national legislative bodies and some councils.⁴

Respondent

The respondent stressed that Kosovo has an excellent electoral law and a successful record of free and fair elections, with fair representation of parties and candidates and fair media coverage. He also stated that financial obligations have been fulfilled through the electoral code and formal requirements for parties, candidates and procedure have been met.

Discussion

The participants concentrated on the protection of minorities through the election process. They agreed that minority representation was important but disagreed on how to achieve “fair” representation. Several discussants felt that the constitution had to provide for “guarantee” or “reserve seats” and possibly some reserve ministries, as exists now. Others asked if a state could truly be called a democracy if reserved seats had to be mandated, stressing that Kosovo’s current system of reserve seats was unfair to majority parties.

Rapporteur: Jennifer Ober, Public International Law & Policy Group



Session III: “Other Constitutional Issues”

Moderator Peter Vanhoutte, OMiK

Keynote Speakers:

Paul Williams, American University,
Washington College of Law & School of
International Service

Wolff-Michael Mors, OMiK

Respondent: Naim Jerliu, LDKparliamentary
group

Objective

This session intended to discuss any constitutional elements that did not fall under the main categories previously discussed. It included, inter alia, procedures for changing and/or amending the constitution, application of international treaties, as well as procedures of transferring sovereignty to supranational organizations.

⁴ The □

First Speaker

In his presentation, the keynote speaker highlighted a list of elements and sought to relate it to the specific situation of Kosovo. He first stressed that the most widely used procedure for amending a constitution is a special majority vote in parliament, followed or not by a referendum. He emphasised that the legal supremacy of the constitution was a basic principle. Citizenship could be defined either by stating rights and duties or by stating the requirements for citizenship. Other issues of importance, in his view, are the official languages or protected languages, the conditions and duration of the state of emergency. However, he stressed that issues such as symbols, flag, anthem, and capital did not need to figure in the constitution and could be left for subsequent legislative action.

Second speaker

The speaker used comparative analysis of different types of constitutions (mainly the German, Danish and Slovenian constitutions) to highlight the existing range of options. He also stressed the need to refer to those kind of comparative studies to figure out what would suit best to the situation in Kosovo. Referring to the nature of the constitution itself, he explained that it could be either normative or symbolic; that it could have relevant wording or being more of ritual nature; that the constitution could be either demanding or rather be descriptive, it could also be a flexible text (interpretation) or a more rigid one; in the same line, amendments could be done either by changing the language in the constitution or by modifying its interpretation. Basically, what was important to understand is that there is no ideal text but that solutions will have to be in accordance with the context. Therefore, it was important to understand that the constitution is not just a text, but has to be understood in its social and political environment.



Respondent

The respondent referred to the status process to stress that the supremacy of the constitution would be problematic for Kosovo if it was the result of negotiations and not of a popular vote. Therefore he advocated for a constitutional process that would be the result of a legitimate process, and according to him, the Assembly should take the leading role. The Assembly should also ensure the participation of all communities to make the process inclusive and create ownership.

He also referred to the issue of defence forces, stressing that this element should also be a part of the debate, because the constitution will have to provide an answer to that question. He also recognised that this was also part of the status talks.

Discussion

Most of the issues covered during this session were already been mentioned in previous sessions as the focus was mainly on the interaction between the status process and the constitutional process. Participants came to recognise the fact that although both processes were linked, it was better to focus on non-status related issues to avoid having to parallel processes running counter to one another. The remaining question was how far the status settlement would go. Some discussants expressed the view that it was unlikely that the new constitution would give less than the current constitutional framework, especially to the minorities. It was, therefore, important to wait for the outcome of the talks.



Rapporteur: Lodewijk Vanoost, OMIK





Participants of the PERCI roundtable

1. Ambassador Werner Wnendt (Head of OSCE Mission in Kosovo)
2. Kolë Berisha (President of the Assembly of Kosovo)
3. Anna Gorska (OSCE)
4. Paul Williams (Expert)
5. William Spencer (Expert)
6. Amjad Atallah (Expert)
7. Frederick Lorenz (Expert)
8. Jennifer Ober (Expert)
9. Vernon Bodganor (Expert)
10. Emilia Drumeva (Expert)
11. Muscat Azzopardi (Expert)
12. Zlatko Dimitroff (UNOSEK)
13. Petra Blaess (Stability Pact)
14. Ramë Manaj (AoK)
15. Daut Beqiri (AoK)
16. Isa Mustafa (OPoK)
17. Bardhyl Hasanpapaj (MoJ)
18. Gjergj Dedaj (Fol)
19. Zylfi Merxha (Fol)
20. Sabit Rrahmani (Fol)
21. Gjylnaze Syla (AAK)
22. Zylfije Hundozi (AAK)
23. Mazllom Kumnova (AAK)
24. Myrvete Dreshaj (AAK)
25. Bislim Hoti (AAK)
26. Xhevdet Neziraj (AAK)
27. Džezair Murati (6+)
28. Mahir Yağcilar (6+)
29. Altay Soroy (6+)
30. Ergin Koroglu (6+)
31. Bajram Latifi (6+)
32. Ferid Muhić (6+)
33. Randel Nojkić (SLKM)
34. Oliver Ivanović (SLKM)
35. Dragiša Krstović (SLKM)
36. Vesna Jovanović (SLKM)
37. Slađan Ilić (SLKM)
38. Snežana Milić (SLKM)
39. Jakup Krasniqi (PDK)
40. Hydajet Hyseni (PDK)
41. Hajredin Kuqi (PDK)
42. Fatmir Limaj (PDK)
43. Selvije Halimi (PDK)
44. Enver Hoxhaj (PDK) tbc
45. Fehmi Mujota (PDK) tbc
46. Bajram Rexhepi (PDK)
47. Arsim Bajrami (PolStrat)
48. Nekibe Kelmendi (PolStrat)
49. Esat Stavileci (PolStrat)
50. Zejnullah Gruda (PolStrat)
51. Ilir Dugolli (PolStrat)
52. Ismet Salihu (PolStrat)
53. Sabri Hamiti (LDK)
54. Melihate Termkolli (LDK)
55. Malsore Gashi (assistant to Mrs. Termkolli)
56. Sadudin Berisha (LDK)
57. Naim Jerliu (LDK)
58. Lutfi Zharku (LDK)
59. Nazim Jashari (Ora)
60. Fatmire Kollqaku (Ora)
61. Afrim Demiri (Ora)
62. Albert Prenkaj (Ora)
63. Agon Vrenezi (Ora)
64. Chad Rogers (NDI)
65. Ben Crampton (EU)
66. Fredrik Wesslau (UNMIK)
67. Bryan Hopkinson (UNMIK)
68. Oleg Levitin (Head of UNMIK Office in Skopje)



A Global Pro Bono Law Firm

THE CONSTITUTION MAKING PROCESS

Paul R William's
Presentation

July 21, 2006

I would like to thank Kole Berisha and Ambassador Wnendt for inviting me to participate in this workshop, and to thank Franklin De Vrieze, Blerim Vela and Jennifer Ober for their effort in organizing this workshop. I would also like to thank the participants for seeking our assistance as Kosovo prepares its constitution. It is a great honor for me to be able to exchange ideas and perceptions with those who will be drafting the constitution for Kosovo.

The hosts have asked me to begin the workshop with a few remarks concerning contemporary state practice relating to constitution making.

Statement of Purpose

The purpose of my presentation will be to provide a review of the basic elements of the constitution-making processes that have been recently employed in post-conflict states.

In doing so I will draw upon lessons learned from several recent post-conflict constitutional models including South Africa, Albania, Bosnia-Herzegovina, Afghanistan, and Iraq.

I will approach this from a very practical perspective. [notes on participants from PILPG - Bosnia at Dayton, recent redrafts, this past summer in Iraq (Spence); for three years in Palestine (Amjad); just asked to review the new Nagorno-Karabagh constitution; new project in Georgia (Rick Lorenz), and just now returned from Sri Lanka.]

I will begin with a brief analysis of what is being called "new constitutionalism" for the twenty-first century, the notion of participatory constitution-making.

I will then survey the general mechanisms essential to any democratic constitutional process, and focus on the importance of the process of constitution making itself.

I will then review five lessons learned concerning the process of constitution making. I will conclude with a brief note on managing the role of the international community.

Introduction

Over the past twenty years, following a wave of post-conflict constitution-making, an approach of "new constitutionalism" has emerged, that focuses as much on democratic process as it does a democratic outcome.¹

One of the major critiques of traditional drafting approaches is that they are static, immovable, contractual approaches to the process of constitution-making.

While traditional approaches viewed constitutions as an "act of completion," the new constitutionalism is focused on "participatory constitution-making" or "conversational constitutionalism."²

The new approach is characterized by more transparency and by broad-based public participation.

The process is also characterized by increasing international involvement - what is being called a "shared international effort."³

As a result, the legitimacy of the constitutional process and the constitution itself is measured by the degree to which the process is participatory, open, democratic, socially

inclusive, and transparent, and where those drafting the constitution are democratically selected

and accountable.⁴

¹ Vivian Hart, Democratic Constitution-Making, U.S. Institute of Peace, Special Report No. 107, July 2003, available at <http://www.usip.org/pubs/speciareports/sr107.html> (last viewed 3/31/05).

² Id.

³ Margaret A. Burnham, Constitution-Making in South Africa, Boston Review, 1998, available at http://www.nidcbowen.org/p2/rni/reports/constitution_making.htm (last viewed April 3, 2005).

⁴ See Hart, *supra* note 1.

Basic Elements of a Constitutional Process

Let's now turn to the actual process itself. The constitutional process is generally characterized by four phases:

- the preparatory phase;
- the constitutional drafting phase;
- the public consultation phase; and
- the final review and adoption phase.

First Phase: Preparatory phase

- The preparatory phase is characterized by:
- Initial negotiations concerning procedure, an outline of the process, and the establishment of realistic timetables;
- Agreement on a set of basic principals that will guide the constitutional process;
- Initial public education and consultation, national dialogue of the constitutional changes or potential revisions;
- The possible adoption of an interim or transitional constitutional document; (this already exists in Kosovo)
- And, the establishment of a constitutional commission. Second Phase: Constitutional drafting phase
- The establishment of an elected constitutional commission or assembly that will oversee the drafting of the final document;
- Extensive consultation with legal experts and advisors, the international community, a broad array of stakeholders, all political parties concerned, and the public at large;
- The preparation of an initial draft of the constitution, via transparent drafting committees, and regular input from the public, and select international advisors, as well as domestic and international legal advisors.

Third Phase: Public consultations period

- A nation-wide public and civil education, media campaigning, reception of public comments and suggestions;
- The use of traditional and innovative modes of bargaining and public dialogue, before or during the initial drafting of the new constitution; website
- Structured participation by all groups-especially women, minorities, all political and opposition parties, and civil society;

Fourth Phase: Final review and adoption phase

- A period for modifying the draft constitutional text to include public and expert comments and suggestions;
- A review by the constitutional commission, parliament or the courts, as well as the public, for necessary revisions, amendments, or greater public input;
- The broad approval and adoption of the final text via the constitutional commission, elected representatives, or a national referendum process;
- A post-adoption process of public education, national ratification, and conference of legitimacy on the final product.

Five Rules of Constitution Making

(Adopted from a paper prepared by Jennifer Widner for the U.S. Institute of Peace)

Rule 1: Limit the appearance of incumbent/occupier dominance

Incumbent control of the drafting process can de-legitimize the constitution and sow distrust. Also, the appearance of control by an international force, such as the Coalition in Iraq, the OHR in Bosnia, or UNMIK in Kosovo can delegitimize the constitution.

Measures for reducing the appearance of incumbent dominance:

Appoint a roundtable of key players with power to select from a range of possible formats or models. Undertake a transparent evaluation of the processes being evaluated.

Buffer the process from the appearance of incumbent control by delegating partial appointment of a drafting committee to opposition parties.

Find a widely-respected neutral statesman with no local political ambitions to chair proceedings. This of course is easier said than actually accomplished.

Rule 2: Provide multiple opportunities for participation Public participation may generate useful ideas. Creates a model for future democratic behavior

Disseminates information and shapes ability of ordinary citizens to monitor adherence to substantive terms

Helps avert charges of partisanship or external control

Measures for Providing Multiple Opportunities for Participation:

Consult with ordinary citizens before submitting a second text to debate (hearings, surveys, written submissions) (2 million in South Africa - 30,000 in Iraq)

Allow social and economic groups and under-represented parts of the community to appoint representatives to sit alongside elected delegates

Presentations

Rule 3: Choose procedural rules that foster compromise

Many drafting processes collapse as a result of the failure to adequately structure compromises on issues of primary concern.

Measures for selecting procedural rules that foster compromise:

Choose low quorum requirements and supermajority or qualified majority voting rules over high quorums and simple majorities (helps avoid boycotts)

Initiate the operation of working committees within the first few days. Prohibit lengthy opening statements during the plenary session. Close early negotiating sessions to media coverage.

Balance the need for public outreach and public input with the need to prevent the work of the committee from becoming a public platform for political advantage.

Rule 4: Focus on the future

A□

Measures for focusing on the future:

Start with a technical template (text) that outlines possible options and provides draft language - not with a blank piece of paper, and invite discussion on the technical text.

Avoid opening speeches that stress the past - limit the time for opening presentations.

Bar thematic committees that focus on non-constitutional issues. This is a separate process from final status

Do not try and regulate everything through the con but it should reflect broad principles

Use the constitution to define the relationships b/w different communities, and to establish workable mechanisms to accommodate an evolving relationship (yes Macedonia, no Bosnia)

A constitution is not just a law, its more important than a law, it embodies the principles which will guide the state of Kosovo, and it establishes the mechanisms for political compromise and for effective self-government.

Rule 5: Adopt clear rules of procedure in advance

Uncertainty about format and timing breeds mistrust and charges of manipulation.

Measures for reducing uncertainty in the process:

Announce a clear timetable up front, with criteria for allowing extensions (because flexibility will undoubtedly be needed)

Develop procedural rules within closed committee meetings, but with extensive private consultation

Develop capacity for simultaneous interpretation, rapid translation, rapid publication of texts

Managing the International Community

If you don't write it - they will.

Invite specific assistance - task the international community with providing concrete studies and briefings. Do not ask them to draft language.

Develop rules of procedure as to how and when the international community may be invited to provide assistance.

Careful of laboratory type of constitutional constructions:

Careful of their own agenda - must be a Kosovo constitution for all Kosovars.

Conclusion:

Long and complicated process. Many facets that must be woven together. Specific role for the political parties, the public, and the international community. Must have a highly structured process. Maybe even more important than final status - in that Kosovars completely own the process..

Prof. Arsim Bajrami, PhD
Professor of Constitutional Law at the Law Faculty in Pristina

**CONSTITUTIONAL ASPECTS OF SHARING THE POWERS AND
PARLIAMENTARY CONTROL OF THE GOVERNMENT**
(constitutional comparative approach)

Role of the Constitution in democratic societies

- ✦ Constitution as a contract between citizens for promotion and practice of public policies
- ✦ Constitution as a power institutionalization and limitation act
- ✦ Constitution as a construction base for political, economic and social system
- ✦ Constitution and governing system

**Kosovo Constitution in the
context of final status**

- ✦ New Constitution-constitutive act for establishing the new state,
- ✦ Kosovo Constitution –guaranteeing act of the rights of minority communities in Kosovo
- ✦ New Kosovo Constitution- basis for functioning of parliamentary democracy in Kosovo
- ✦ Kosovo Constitution-basis for Euro-Atlantic integrations of Kosovo

Constitution and the negotiation process

- ✦ Constitutional principles for the rights of minorities in Kosovo, their protection, and representation in the institutions at the local and central level;
- ✦ Constitutional principles of the local power reform
- ✦ Kosovo Constitution and Assembly
- ✦ The need to avoid constitutional vacuum after the final status.
- ✦ Citizen's role and Constitution

SHARING THE STATE POWER

- ✦ Draft constitution and legislative power
- ✦ Executive-administrative power
- ✦ Judicial power



**Power sharing principle
and governing form**

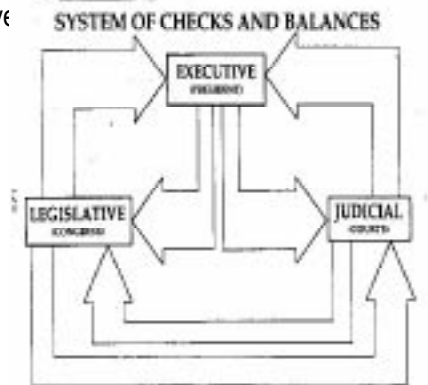
- ✦ Parliamentary system
- ✦ Presidential system
- ✦ Mixed parliamentary-presidential system

Power sharing functions

- ✦ Independence of the powers
- ✦ Mutual limitation of the powers
- ✦ Ensure of the balanced democracy
- ✦ Checks and balances system

Relationship between powers (checks and balance)

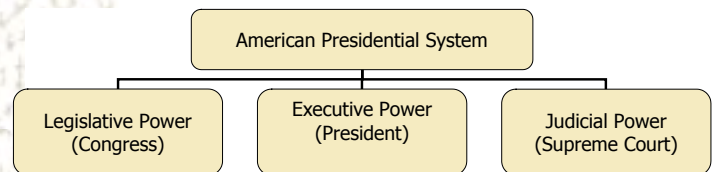
- ✦ Relationship between legislative and executive powers
- ✦ Relationship between legislative and judicial powers
- ✦ Relationship between executive and judicial powers



Ways of power sharing

- ✦ Fluid power sharing-interference between powers
- ✦ Solid power sharing-independence and balance maintenance
- ✦ Mixed power sharing-mutual interference

Power sharing in US



Congress



Structure of the Congress is consisted of:

- ✦ Chamber of Representatives (435 representatives)
- ✦ Senate (100 senators)

President

Bearer of the executive power where governing system is appointed as presidential as well



White House



Inauguration of the President

Supreme Court

Supreme Court is the bearer of judicial power that along with classical judicial functions exercises the following functions:

- ✦ Control and protection of constitutionality and legality
- ✦ Resolves power conflicts between federation and federative states



Supreme Court

Relationship between Congress and President

John Stuart Mill stated "real task of the Representative Assembly is to supervise and control the Government". This is a function that Congress keeps practicing still today with a pronounced independence



Cabinet of Gerald Ford

Budget as a control mechanism

- ✦ Article 1, Chapter 9 of Constitution, determines that 'no money can be spent from the Treasury for something that has not been determined by law'. This provision provides the Congress (as the wallet power) the last word on spending the means
- ✦ The Office of Management and Budget-OMB, established by the Congress in 1921, supervises and prepares the budget for the executive branch



Signing the laws

- ✦ Congress can oppose the President in many ways: cancels every resolution that supports the President, decreases or interrupts funds on war conduction (for example, Bush required from the Congress over 80 billion dollars for the War in Iraq in 2005)



Bush signing a law

Institution of impeachment

- ✦ Draft Constitutional Convention determined that nobody will be above the law and that each president and other senior placemen can be subjects of impeachment
- ✦ Impeachment is the last mechanism and always present against the executive, as a powerful weapon against the tyranny and arbitrariness of that power or as Joseph Story used to state "to protect the states from the major state misusers"



Impeachment procedure

- ❑ Bearer of the charge is Chamber of Representatives, while Senate is constituted as a court that judges and decides by adjudication. Adjudication can be releasing or convicting (the President can be discharged by the two-thirds of the votes). Supreme Court President heads the Senate during the trial

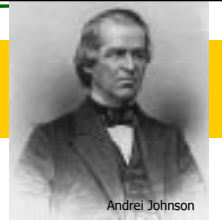


Chamber of Representatives



Senate

- ✦ Impeachment has been rarely applied, only in the President Andrei Johnson case (by releasing adjudication), against President Richard Nixon, 1973 (resigned before the Chamber of Representatives voted), and against Bill Clinton (b releasing adjudication)



Andrei Johnson



Richard Nixon



Bill Clinton

WATERGATE AFFAIR

- ✦ Watergate affair with Nixon, proved not only the strong position of the elected president by the people's votes, but also proved how can a combination of powers exercised by the Congress and Supreme Court, as well as by the public opinion and media can discharge any president



Watergate Complex

LEWINSKY AFFAIR

- ✦ In February 1999, a crisis ended when Senate failed to ensure two-thirds of the votes to discharge the president.
- ✦ Judgment by the Senate was influenced by the support of two against one in favor of American public opinion for not having president Clinton convicted since they highly evaluated his work



Clinton's trial

Bill Clinton case- LEWINSKY AFFAIR

- ✦ In 1998, press and media published the President Clinton affair in the White House with the medical practitioner, Monica Lewinsky. Chamber of Representatives, supporting the assertion that the President's deed leaves the possibility for an action that has to do with "serious crimes and misapplications" as well as for false testimonies and obstruction of justice prohibited by the US Constitution, raised the charge for impeachment.



William Jefferson Clinton

Appointment of Supreme Court judges

- ✦ Appointment of the judges by the president presents a way of important control over the Supreme Court
- ✦ In a study (1980) of 84 candidatures, 76 judges, presidents elected in that way where political philosophy was similar to theirs and this poses an indicator for the way of decision making by the judges



Actual Judges in the Supreme Court

Power Sharing in the Great Britain

- ✎ The Crown
- ✎ The Parliament (Chamber of Communes, 659 members) and Chamber of Lords with 1185 members)
- ✎ Unbalanced bicameralism
- ✎ Homogenous Government in the cabinet form
- ✎ Prime Minister (assigned by the party that has largest representation in the Chamber of Communes)

Constitutional Principles of power sharing in France

- Controlled presidential system
- Bicephalism and endorsement
- Government of the Coalition with double responsibility
- Balanced bicameralism-National Assembly with 491 deputies and Senate with 305 members
- Combined majority and proportional electoral system
- Constitutional Council

Power sharing in Germany

- ✎ Federal Assembly (Bundestag)
- ✎ Federal Council (Bundesrat)
- ✎ President (Bundespräsident)
- ✎ Federative Government (Bundesregierung)
- ✎ Federal Chancellor
- ✎ Federative Constitutional Court (Bundesverfassungsgericht)
- ✎ German Central Bank (Bundesbank)

Power sharing in Italy

- ✎ Governing principles
- ✎ Parliamentary Republic
- ✎ Balanced Bicameralism
- ✎ Multi-party System
- ✎ Government of Coalition
- ✎ Roles of the interests group and pressure group

Power sharing in the future Kosovo Constitution

1. Governing System in Kosovo is based on the principle of power sharing and of the mutual control system of the powers in the function of setting the balance between them;

2. Executive power is exercised by the Government of Kosovo. Government is the main authority for governing the state and for the implementation of the laws and state policies. Government is subjected to parliamentary control;

3. Legislative Power is exercised by the Assembly of Kosovo that will have full legislative and constitutional drafting authority.

4. President of Kosovo is a symbol of people's unity, legitimate country representative in and out of the country and warrantor of the democratic and constitutional functioning of the Kosovo institutions.

5. Judicial power is exercised by the independent courts.

Legislative function of the Parliament

- ◆ Constitutional Approval and Amendment
- ◆ Law approval
- ◆ Approval of general acts
- ◆ Ratification of international agreements
- ◆ Budget approval

Elective function of Parliament

- ◆ **In the parliamentary systems**, parliament elects and supervises the government and the president-Albania, Kosovo, etc.
- ◆ **In the mixed parliamentary-presidential systems**, parliament elects the government, while the president is elected by the people-France
- ◆ **In the presidential systems**, government elects the president

Supervising function of the Parliament

- ◆ **Regular means-**
- ◆ Budget approval and periodical relationships
- ◆ **Extraordinary means-**
- ◆ parliamentary questions,
- ◆ interpellation,
- ◆ surveying committees,
- ◆ Motion of vote of confidence and government discharge

Recommendations for the Kosovo Constitution

Recommendation I.

Relationships between the Kosovo President and Assembly need to be determined in that way so the President would be granted the authority to propose laws, suspension right of the veto, declare of laws and dissemination of the Assembly. In the other side, Assembly would press a constitutional charge against the President for violation of the Constitution and act on betrayal and would initiate the procedure in the Kosovo Constitutional Court, that with a two-thirds vote would discharge the President.

Recommendation II.

Regarding the relationships between the Assembly and Government, Kosovo Constitution should institutionalize the parliamentary control through the constitutional instruments, that may result also with the vote due to lack of confidence by the government, President of Kosovo in order to avoid the parliamentary crisis can disseminate the parliament and declare early parliamentary election.

Recommendation III.

New Kosovo Constitution would guarantee the independence of the judiciary, by protecting it from the political influences from the Assembly and Government. This would be achieved through respecting these constitutional principles; election of judges in long-term mandates; appointment of the judges by the President of the Republic, depolitisation of the judiciary, independent financing, etc.

A key role in providing the independence to all three powers, would belong to the Constitutional Court that would resolve the constitutional conflicts between the three powers and would be the ultimate authority in protecting the Constitution.



PILPG

The Single Most Important Part of State Building – Drawing Up a Constitution

Lessons on Institution Building from the Palestinian Example



PILPG

- Choosing A State Structure
- Structuring the Executive
- Designing the Legislative
- Creating a Judiciary System



PILPG

Choosing a State Structure

- Which system best addresses the needs of the population for self-determination, economic well being, and individual human rights?
- On a continuum – Confederal ----- Federal ----- Unitary
- Unitary systems are highly centralized with little powers to local or regional authorities
- Federal systems have parallel lines of authority
- Confederations link two or more pre-existing units to form a common government for limited constitutionally established purposes.



PILPG

Choosing a State Structure – Draft language

- Unitary - [State], with its territory and nation, is an indivisible entity.
- Federal - [State] is a federal state.
- Confederation - State of [Confederation] is a union of [names of joined states]. [Confederation] shall have its own constitution, law and government institutions. All powers not specifically allocated to the Central Government shall be reserved to the States.



PILPG

Choosing a State Structure – Palestinian Case Study


- Which system best addresses the needs of the population for self-determination, economic well being, and individual human rights?
- From the perspective of Palestinian self-determination, the best option appeared to be the creation of a unitary Palestinian state out of 22% of historic Palestine composed of the West Bank and the Gaza Strip.
- However, both the West Bank and the Gaza Strip's economies are entirely tied into Israel's after almost 40 years of occupation. The severance of those economic ties have already caused tremendous dislocation and, a fully independent Palestine walled off from Israel would have to spend the next two decades trying to create separate economic links with a weaker Jordanian and Egyptian economy respectively from the West Bank and the Gaza Strip.
- From the perspective of individual human rights, Palestinians expelled or otherwise displaced from their homes in Israel as well as the 18% of Israel's citizens who are Palestinians, would not be able to necessarily exercise their rights in the 78% which would be defined as an exclusively Jewish state.



PILPG

Choosing a State Structure – Palestinian Case Study



- The Palestinian Response
- A hybrid in which the state of Palestine would be a unitary state but
- With significant and continued economic interaction with Israel, requiring significant overlapping of economic models, regulations, legislation, and foreign arrangements.
- Refugee rights and the question of the equality of Palestinian citizens of Israel would be left to future negotiations.



PILPG

Choosing a State Structure – Palestinian Case Study

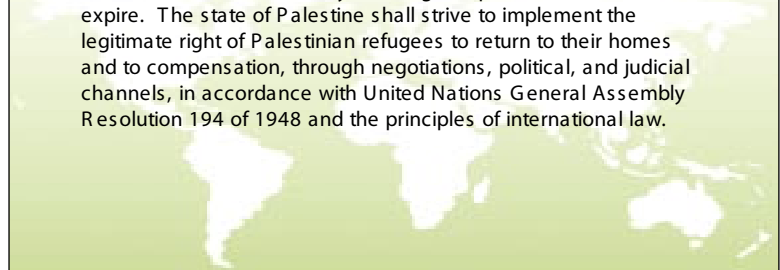

- The Palestinian Response
- Article 1: Palestine is an independent, sovereign state with a republican system. Its territory is an indivisible unite within its borders on the eve of June 4, 1967 and its territorial waters, without prejudice to the rights guaranteed by the international resolutions related to Palestine. All residents of this territory shall be subject to Palestinian law exclusively.

PILPG

Choosing a State Structure – Palestinian Case Study

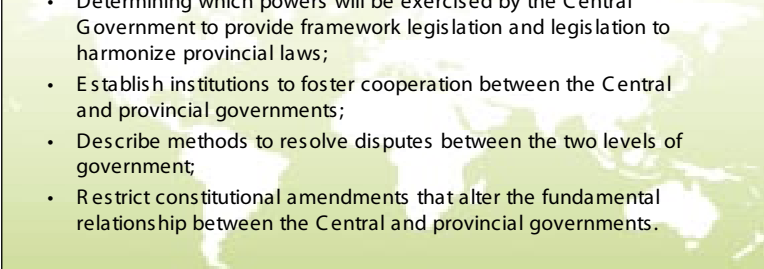

- The Palestinian Response
- Article 13: Palestinians who were expelled or emigrated from Palestine as a result of the 1948 war, and who were denied return thereto shall have the right to return to the Palestinian state and bear its nationality. The right is permanent and cannot expire. The state of Palestine shall strive to implement the legitimate right of Palestinian refugees to return to their homes and to compensation, through negotiations, political, and judicial channels, in accordance with United Nations General Assembly Resolution 194 of 1948 and the principles of international law.

PILPG

Choosing a State Structure – Devolution of Powers

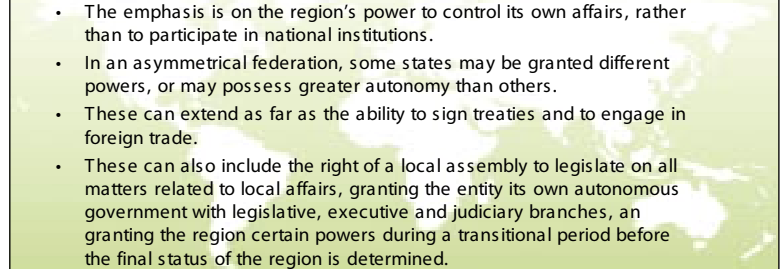
- Along the spectrum of state structures, states may choose to devolve powers in order to meet particular needs including:
- Delineating provincial boundaries;
- Devolving powers asymmetrically;
- Determining which powers will be exercised by the Central Government to provide framework legislation and legislation to harmonize provincial laws;
- Establish institutions to foster cooperation between the Central and provincial governments;
- Describe methods to resolve disputes between the two levels of government;
- Restrict constitutional amendments that alter the fundamental relationship between the Central and provincial governments.

PILPG

Choosing a State Structure – Devolution of Powers

- Asymmetrical Devolution of Powers
- Some states may choose to devolve a disproportionate amount of power to a particular region.
- This may take the form of special autonomy arrangements, in which a region or province is granted a particular status.
- The emphasis is on the region's power to control its own affairs, rather than to participate in national institutions.
- In an asymmetrical federation, some states may be granted different powers, or may possess greater autonomy than others.
- These can extend as far as the ability to sign treaties and to engage in foreign trade.
- These can also include the right of a local assembly to legislate on all matters related to local affairs, granting the entity its own autonomous government with legislative, executive and judiciary branches, an granting the region certain powers during a transitional period before the final status of the region is determined.




PILPG

Choosing a State Structure – Devolution of Powers

- Powers Exercised Exclusively by Central Government
- Generally, the minimal core powers allocated to the central government include:
- Armed services and national security
- Foreign affairs,
- Monetary policy, customs and duties,
- Communication,
- Interregional transportation,
- Debt management,
- Immigration and naturalization,
- Management of the national economy.




PILPG

Choosing a State Structure – Devolution of Powers

- Powers Exercised Exclusively by Provincial Governments
- Generally, typical powers allocated to a provincial government include:
- Education,
- Health,
- Social welfare,
- Police powers,
- Local taxes,
- Regional transportation,
- Sometimes oversight of natural resources extraction, production and management.





PILPG

Choosing a State Structure – Devolution of Powers

- Powers Shared by Central and Provincial Governments
- Health
- Welfare
- Education
- Housing
- Transport and traffic regulations
- Environment management
- Police and prisons administration



PILPG

Choosing a State Structure – Devolution of Powers

- Process for Provincial Governments to Assume Powers over Time
- Criteria may be established in a constitution that must be met before devolution of any particular authority such as
- Requirements relating to the size of the population
- The maturity of the public administration and infrastructure
- The degree of economic development and
- A determination of financial capability.



PILPG

Choosing a State Structure – Devolution of Powers

- Dispute Resolution between Central and Provincial Governments
- Many post-conflict constitutions specify that disputes between the Central Government and provincial governments regarding the constitutionality of the activities, laws, powers, or policies of the other may be brought to a constitutional court for resolution.



PILPG

Devolution of Powers – Palestinian concerns

- States create constitutions that first and foremost reflect their own experiences, including fears and hopes.
- The Arab regional context is one of extraordinarily powerful executive authorities with weak to non-existent provinces, regions, or even legislatures.
- The Palestinian short history of governance with the Palestinian Authority as an administering arm of the Israeli occupation was widely considered to be flawed, corrupted, and without checks and balances.
- So the Palestinian constitution provides for a stronger parliamentary system than is the norm in the Arab world.
- Political authority is only allowed to be exercised through clear legal channels.



PILPG

Devolution of Powers – Palestinian concerns


- Article 158: The law shall regulate the relationship between the government and the local unites on the basis of administrative decentralization. The units of local governance shall enjoy legal personality. Their councils shall be elected. The law shall provide for the method of their establishment, formation, the election of their councils, competencies, and jurisdictions.



PILPG

Devolution of Powers – Palestinian concerns

- Article 109: An Advisory Council shall be created by virtue of this constitution composed of one hundred and fifty members; it shall have an independent personality. Care shall be taken in its formation to portion of the distribution of population of Palestinians inside Palestine and outside of it. The law shall regulate the terms and methods of election of its members or their appointment according to the countries where they live. The president of the state shall be permitted to appoint members in the Advisory Council who do not bear Palestinian citizenship if they have been distinguished fro providing outstanding services to the Palestinian cause, provided that they do not exceed ten members.



PILPG

Devolution of Powers – Palestinian concerns

- Article 110: The Advisory Council shall be concerned:
 - With the study of general strategic issues and providing suggestions regarding them.
 - With providing suggestions in all matters connected with national rights and the integrity of Palestinian soil and the rights of Palestinians abroad.
 - With discussion of constitutional amendments and expressing an opinion in those that have been proposed.
 - With topics the president of the state refers to the Council connected to public policy in Arab and international affairs for the state of Palestine.
 - With draft laws which the president of the state refers to it connected to Palestinians abroad.
 - With what members of the Advisory Council decide to put forward for discussion on its agenda.



PILPG

Executive Branch Structures


- Constitution should
- Define the structure of the executive branch
- The powers and functions of the executive branch
- The role of the cabinet or council of ministers
- The selection of the President/Prime Minister
- The removal of the President/Prime Minister
- The term of office
- Eligibility for office
- And the oath of office



PILPG

Executive Branch Structures – Three Models

- Presidential – Chief political executive of the federal government elected directly by the populace
 - Ensures separation of powers
 - Allows degree of accountability to voters
 - Serves as a unifying force for the state, particularly of those with significant ethnic or linguistic diversity.



PILPG

Executive Branch Structures – Three Models


- Parliamentary System – Prime Minister serves as the chief executive of the parliamentary government and head of the cabinet. Populace elects the legislature, which in turn elects the Prime Minister.
 - Facilitate the inclusion of all groups within the legislature and the executive because cabinets are usually drawn from members of the elected legislature. This is particularly useful in deeply divided polities.
 - Flexible because coalitions can be formed to change the government on the floor of the legislature without a general election and conversely can enable elections to be called at any time increasing accountability.
 - Accountability because of greater public control and transparency over the policy-making process.
 - More sustainable for new democracies – of the states that became independent after WWII, all the continuously democratic countries have parliamentary systems.



PILPG

Executive Branch Structures – Three Models

- Mixed Presidential/Parliamentary System – President is directly elected by voters while the Cabinet is drawn from and subject to the confidence of the legislature.
 - Advantages include potentially greater consensus requiring the two executive wings to agree before making any big decisions.
 - But great potential for deadlock between the two executive branches.



PILPG

Mixed System – the Palestinian Approach

- Palestinians want to balance traditional reliance on strong central leadership with the more democratic requirements of a parliamentary system.
- Article 8: The Palestinian political system shall be a parliamentary representative democracy. It shall be based on political pluralism and the guarantee of the rights and freedoms of all citizens. These include the right to form political parties and engage in political activity without discrimination on the basis of political opinions, sex, or religion. Parties shall abide by the principles of national sovereignty, democracy and peaceful transfer of authority in accordance with the Constitution.
- Article 112: The president of the state is the president of the republic. He shall defend the constitution and the unity of the people, guarantee the continuity of the endurance of the state, national independence, and the orderly functioning of public authorities. He shall exercise his competencies and his responsibilities as defined in accordance with the provisions of the constitution. Except for the competencies constitutionally attributed to the president of the state, the executive and administrative competencies of the government shall be within the competence of the Council of Ministers.



PILPG

Designing the Legislature

- The legislature is the main representative body that reflects the political will of the people at the national level.
 - Granted the power to represent the goals and interests of the people
 - To propose legislation
 - To approve legislation



PILPG

Designing the Legislature

- Constitutional responsibilities of the legislature include
 - Electing the Prime Minister (in a Parliamentary or Hybrid System)
 - Passing laws and other administrative measures
 - Passing constitutional amendments
 - Deciding upon the sources and amounts of revenues for the operations of the institutions and international obligations of the state
 - Approving a budget for the institutions of the state
 - Ratifying treaties signed by the Prime Minister
 - Overseeing government administration
 - Overseeing government regulatory and spending powers



PILPG

Designing the Legislature

- Unicameral
 - More efficient and less expensive
 - However, require more checks and balances to ensure that the majority do not overwhelm the minority's concerns.
- Bicameral
 - Most effective way to combine proportional representation with recognition of other internal concerns of local governments, geographic regions, ethnic groups, and underrepresented constituencies.
 - Allow the nation as a whole and individual territories or regions to be represented simultaneously in the legislative process.



PILPG

Designing the Legislature

- Dissolution of the legislature
 - Under extreme circumstances such as states of emergency
 - Linked to votes of no confidence
 - When the legislature fails to meet its responsibilities set forth by the constitution or law
- Legislative Immunity
 - Provisions for protections and immunities for members
 - Including guarantees of the freedom of legislative speech
 - Immunity from legal liability while in office



PILPG

The Legislature in the Palestinian Context

- Unicameral "Representative Council"
 - Article 65: The Representative Council shall exercise the legislative authority. It shall establish the general policies of the state and the general budget, which shall be prepared by the Council of Ministers. It shall exercise oversight over the actions of the executive branch in the manner specified by the Constitution.
 - Article 66: The Representative Council shall be composed of 150 deputies, representing the Palestinian people. They shall be elected according to the provisions of the constitution and the election law. Nomination for membership in the Chamber of Deputies shall be in accordance with the provisions stated in this constitution and in the election law. Whoever runs for the Representative Council must be Palestinian and it is not permitted after his election to hold the citizenship of another state.



PILPG

The Legislature in the Palestinian Context


- Limits
 - Article 67: Members of the Representative Council are elected for a period of five years. A member may be re-elected more than once. It is not permitted to extend the term of the Representative Council except in case by necessity, and by virtue of a law passed by the Representative Council by a two-thirds majority of its total membership
 - Article 70: The Representative Council shall elect in its first meeting of every annual session a speaker, two deputies for the speaker, and a secretary-general, composing the Presidium of the Representative Council. It is not permitted for a member of the Presidium of the Council to assume a ministry or any other government position. A member of the Representative Council may assume a ministry provided that the total of deputies serving as ministers in the government is no more than half of the total number of ministers.



PILPG

The Legislature in the Palestinian Context

- Dissolution
 - Article 88: If the president of the state or the prime minister, in case of necessity, suggest the dissolution of the Representative Council to the Council of Ministers, then its dissolution may be approved by a majority of two-thirds of its members, and the president shall issue the decision of dissolution. The government shall call voters to conduct an election for a new Representative Council in a period not less than sixty days, in accordance with the procedures specified by the law of elections. If the election is not held during the defined period, the Council returns to exercise its duties until a new Council is elected. It is not permitted for the dissolved Council to withdraw confidence from the government. It is not permitted to dissolve the Representative Council during the first year after it is formed, or in the period of a State of Emergency provided for in the Constitution.



PILPG

The Legislature in the Palestinian Context

- Dissolution
 - Article 89: The Government shall call for the election of the Representative Council within sixty days before the end of its legal term in accordance to procedures governed by law. If the government fails to call for elections within the said period, the speaker of the Representative Council may request that the Constitutional Court order the call for elections. If elections cannot be held at the established time because of war, imminent danger of war, or siege that prevents constitutional bodies from functioning regularly, the Representative Council will continue to perform its duties until elections can be carried out within sixty days of the termination of the obstruction.



PILPG

Creating a Judiciary

- All post-conflict constitutions establish an independent functioning judiciary to uphold the constitution and enforce the laws of the state.
- Provisions about the functioning and structure of the judiciary include:
 - Powers and functions
 - Judicial independence
 - Judicial authority
 - Structure of the judiciary
 - Administration of the judiciary



PILPG

Creating a Judiciary


- An independent judiciary requires
 - The separation of the judiciary from other branches of government
 - Creation of a judicial council to oversee the judiciary and its judges, and to administer it effectively and independently
- Goals of an independent judiciary include
 - Protection of human rights
 - Promotion of political stability
 - Establishment of a healthy economy
 - Ensuring equal justice



PILPG

Creating a Judiciary

- Constitutions usually specify when judicial decisions are binding upon other branches of government
- Explain the jurisdiction of each court and which individuals, institutions, or agencies have standing to bring cases to the various courts
- Provide the roles of its courts
- Specify how the courts work in conjunction with other government bodies and agencies including how the legislature is allowed to create specialized courts.



PILPG

Creating a Judiciary

- Structure of the Judiciary
 - Some constitutions provide for the creation of specialized courts
 - Some leave the creation of courts, other than the Supreme Court and the Constitutional Court, to the legislature
 - This includes the role and responsibility of the courts
 - The existence of national, local, and provincial courts
 - The independence of the courts from other government agencies, organizations, and individuals
 - The binding effect of court decisions
 - An enumeration of some or all of the courts
 - Authority to issue decisions on civil and criminal law and to review administrative decisions.
 - The need for an impartial and independent judiciary



PILPG

Creating a Judiciary

- Constitutional Court
 - Critical to ensure judicial independence and to provide a mechanism for upholding and enforcing the constitution.
 - Has the responsibility to decide upon
 - The constitutionality of legislative and executive acts
 - Failure to implement the constitution
 - Constitutional disputes
 - Constitutional amendments



PILPG

Creating a Judiciary

- Supreme Court
 - Acts as the states' highest appellate court
 - States without a constitutional court also delegate constitutional review to the Supreme Court
 - Decisions are generally final and binding upon agencies, government entities, and individuals



PILPG

Creating a Judiciary in the Palestinian Constitution

- Article 159: The judicial branch shall be independent. It shall have original jurisdiction to perform the judicial function and to decide in all disputes and crimes. The law shall define the institutions of the judicial branch and regulate their structure. It shall define the types of courts, their levels, jurisdictions and procedures. Exceptional courts may not be formed.
- Article 16: A Supreme Council for the Judiciary shall be entrusted with the affairs of the judicial institutions. The law shall define its formation and competencies, ensuring its independence and guaranteeing its equality in the framework of cooperation with the other public authorities. Its opinion shall be solicited in draft laws regulating the affairs of the judiciary. It shall establish its internal regulation.



PILPG

Creating a Judiciary in the Palestinian Constitution

- Article 170: A court of cassation shall be constructed with jurisdiction over appeals in criminal and civil matters. The method of its formation, jurisdiction and operational procedures shall be defined by law.
- Article 171: A high court of justice shall be established with jurisdiction to decide administrative disputes and disciplinary cases as they are defined by its establishing law, which shall regulate the bases of its operating, the terms of the appointment of its judges and employees, and the procedures which are to be followed before it. The construction of lower administrative courts is to be permitted by law.



PILPG

Creating a Judiciary in the Palestinian Constitution

- Article 178: A Constitutional Court shall be established by virtue of the constitution to exercise its jurisdiction independently in order to defend the legality of the work of state institutions. It shall be composed of nine judges appointed by the head of state by nomination from the Council of Ministers and approved by the Representative Council. The Court shall set its internal regulation which will organize the procedures of its work. The judges shall be appointed for one term of nine years that shall not be renewed or extended.

THE CONSTITUTION OF KOSOVO.

1. Role of the constitution.

- a. The limitation of power.
- b. Procedures for amendment.
- c. Provisions which cannot be amended.
- d. Guarantees for human rights. The European Convention on Human Rights. **Need for further human rights connected with protection for minorities in education, employment and religious and cultural development.**

2. THE PRINCIPLE OF POWER-SHARING. In divided societies, the Westminster Model does not work. There is unlikely to be an alternation of power.

BUT – power-sharing is not a panacea.

THE DANGERS OF POWER-SHARING.

- a. The reinforcement of divisions.
- b. The danger of deadlock.
- c. The absence of an opposition, and too little room for democratic choice.

Power-sharing as a TRANSITIONAL form.

THE STRUCTURE OF GOVERNMENT.

3. The legislature.

- a. Method of election. See separate note.
- b. Relationship to executive: The idea of responsible government. Alternatives to responsible government. The examples of Austria and Northern Ireland.
- c. The role of committees.
- d. Protection for minorities. Weighted majorities/ minority vetoes. Alarm bell procedures. The example of Belgium.
- e. The provisions for dissolution of the legislature.

4. The executive.

- a. Role of the President. A 'super-president'? Example of Nelson Mandela. Role of leadership. A dual presidency with requirement for joint action on fundamental matters?
- b. Role of cross-community consent and proportionality in executive appointments. The examples of Austria and Northern Ireland.
- c. The principle of Cabinet responsibility.

5. The judiciary and the public service.

- a. The principles of IMPARTIALITY and PROPORTIONALITY.
- b. Appointment of judges by impartial and non-political process. Commission for Judicial Appointments. Tenure during good behaviour. Politicians should not be able to dismiss them.
- c. Appointment of civil servants and public officials by impartial and non-political process. Civil Service Commission. Commission for Public Appointments..

6. The principle of decentralization. BUT must be combined with the principle that benefits and burdens should depend upon need and not on geography. Cultural and linguistic communities. The examples of Belgium and Estonia. The idea of personal federalism. The ideal of **GROUP AUTONOMY** within a national framework of rights and duties.

7. Links with other countries without compromising the principle of sovereignty. The example of the North/South Council, linking Northern Ireland, which remains a part of the United Kingdom, and Ireland, a separate country. Seek co-operation by agreement while respecting the identities of different nations.

Vernon Bogdanor,
July 2006.



INDEPENDENCE OF THE JUDICIARY

PARLIAMENTARY AND CONSTITUTIONAL ROUNDTABLE ON CONSTITUTIONAL ISSUES



DEFINITION OF CONSTITUTION

- FUNDAMENTAL LAWS: BASIC STRUCTURE OF GOVERNMENT
- DEMOCRATIC CONSTITUTIONALISM
- INDIVIDUAL FREEDOM
- COMMUNITY RIGHTS
- LIMITED GOVERNMENT POWER



INDIVIDUAL RIGHTS VS MAJORITY OPINION

- WHO DECIDES?
- STRONG AND INDEPENDENT JUDICIARY
- HUMAN RIGHTS HAVE PRECEDENCE OVER MAJORITY OBJECTIONS



RULE OF LAW

- STRONG, INDEPENDENT COURTS
- AUTHORITY
- RESOURCES
- PRESTIGE
- TO HOLD GOVERNMENT OFFICIALS ACCOUNTABLE TO LAWS AND REGULATIONS



JUDICIAL INDEPENDENCE

- INDIVIDUAL ASPECTS AND INSTITUTIONAL ASPECTS:
- INDIVIDUAL JUDGES NEED TO BE INDEPENDENT
- JUDGES AS A BODY NEED TO BE FREE FROM ANY INFLUENCE OF OTHER GOVERNMENT BODIES



HOW TO ENSURE INDEPENDENCE

- PRIMARILY BY KEEPING POSITIONS AND SALARIES OF JUDGES BEYOND REACH OF EXTERNAL FORCES.
- HOLDING OFFICE DURING “GOOD BEHAVIOUR”
- HENCE SECURITY IN PAY AND POSITION.

What are the obligations of the judges?

- NO BIAS: PERSONAL OR OTHER
- TOTAL INTEGRITY
- ETHICAL CONDUCT

- HENCE THE CHOICE OF JUDGES IS FUNDAMENTAL.

- LEGALLY PREPARED, FULL INTEGRITY
- FROM CROSS-SECTION OF POPULATION

UN RESOLUTIONS 40/32 AND 40/146 1985

- DISTILLED MULTICULTURAL EXPERIENCE

- GUARANTEED BY THE STATE AND ENSHRINED IN THE CONSTITUTION
- DUTY OF OTHER BODIES TO RESPECT INDEPENDENCE OF JUDICIARY.

ARTICLES 2 & 3

- DECIDE MATTERS IMPARTIALLY WITHOUT RESTRICTIONS, PRESSURES, OR INTERFERENCE
- EXCLUSIVE AUTHORITY TO DECIDE WHAT FALLS WITHIN ITS COMPETENCE

ARTICLE 4

- NO UNWARRANTED INTERFERENCE WITH JUDICIAL PROCESS, NO REVISION OF JUDICIAL DECISIONS.

- RESERVATION FOR JUDICIAL REVIEW AND MITIGATION OR COMMUTATION.

ARTICLES 5, 6 & 7

- PROTECTION OF COURT JURISDICTION
- JUDICIAL INDEPENDENCE REQUIRES JUDGES TO CONDUCT PROCEEDINGS FAIRLY AND WITH RESPECT OF RIGHTS OF PARTIES.
- STATES TO PROVIDE ADEQUATE RESOURCES FOR JUDICIARY TO PERFORM ITS FUNCTIONS.

OTHER ISSUES

- FREEDOM OF EXPRESSION, ASSOCIATION AND ASSEMBLY
- STANDARDS IN JUDICIAL SELECTION, SELECTION NOT IN THE HANDS OF GOVERNMENT AND ADMINISTRATION

CONDITIONS OF SERVICE

- TERM OF OFFICE
- INDEPENDENCE AND SECURITY, REMUNERATION, PENSION, RETIREMENT-AGE
- SHALL BE ADEQUATELY SECURED BY LAW.

REMOVAL FROM OFFICE/ DISCIPLINE

- DEFINITE PROCEDURE TO BE ESTABLISHED BY LAW FOR REMOVAL AND DISCIPLINE.
- COMPLAINT PROCESSED EXPEDITIOUSLY AND FAIRLY

Financial security, promotion, immunity

- NO VARIATION TO REMUNERATION AND BENEFITS DURING TERM OF OFFICE.
- PROMOTION BASED ON OBJECTIVE FACTORS
- PERSONAL IMMUNITY. DECISION ON ARREST TO BE TAKEN BY JUDICIAL BODY.

RESOURCES

- JUDGES ARE TO BE PROTECTED FROM INFLUENCE OF OTHER PARTS OF GOVERNMENT.
- ADEQUATE FUNDING, EMPLOYING AND DISMISSING COURT STAFF, INCENTIVES, ORGANIZING INFORMATION.

THROUGHOUT JUDICIAL TENURE

- TO MAINTAIN PUBLIC CONFIDENCE
- ONCE APPOINTED JUDGES TO ABIDE BY STRICT ETHICAL STANDARDS. EITHER AUTO-REGULATION OR ADHERENCE TO A CODE
- NO PERCEPTION OF POLITICAL VIEWS, CORRUPTION, UNETHICAL TRAITS

BANGALORE PRINCIPLES OF JUDICIAL CONDUCT

- SIX CORE VALUES
- INDEPENDENCE
- IMPARTIALITY
- INTEGRITY,
- PROPRIETY,
- EQUALITY
- COMPETENCE

CONSTITUTIONAL FRAMEWORK

- BEST WAY FORWARD IS NOT CAST IN STONE
- PUT IN PERSPECTIVE AND CONTEXT
- PRESENT PERCEPTION
- EUROPEAN UNION ASPECT.

Proposed inclusions in new constitution

- Independence of the judiciary
- Separation of powers
- Balance of powers
- Specific tasks for each branch and for judges

Representation

- The need for an interlocutor
- Ministry of Justice, judicial council etc.
- An independent branch should represent itself.

Constitutional Courts

- Review of legislation and executive acts.
- Selection of judges of fundamental importance
- Ideally judicial review should be through ordinary courts or by normally appointed judges.

Incompatibility

- Personal or professional affiliations
- Commercial activities
- Usually allowance for academic, artistic work.

Disclosure

- Financial disclosure may help to increase accountability
- Transparency essential



Court Administration

- Judiciary should manage its own resources.
- Budgetary responsibility frequently a problem
- Transparent procedures.

OSCE Round Table Constitutional Issues

The Judiciary

Frederick Michael Lorenz JD, LL.M.
Public International Law and Policy Group

Sample Language: Powers and Functions

- The courts shall ensure equal justice for all. They shall safeguard the rights and legitimate interests of all citizens, individuals, legal entities, and the State.
- The courts shall be responsible for the administration of justice in accordance with the Constitution, as well as statutes and binding international laws and norms.

Sample Language: Structure of the Judiciary

- Judicial power is implemented by way of constitutional provisions or legislation provided for in the constitution.
- Option 1: The courts shall consist of [provide court names].
- Option 2: The Courts of Law shall consist of a Constitutional Court, a Supreme Court, and such District Courts, Municipal Courts and Minor Offence Courts as are established by law.

Sample Language: Supreme Court

- The Supreme Court shall be the highest appellate Court of Law in the State and shall possess appellate jurisdiction over other Courts of Law, including specialized courts.

Constitutional Courts

"Since the court has neither the power of the sword nor of the purse, it depends on public support and for this, particularly in the early years, it must tread carefully, and not expend whatever capital it has on matters best handled by other institutions."

Prof Herman Schwartz, American U Law School

Austria

- The Austrian constitution was the first in the world to enact (in 1920) judicial review under what came to be known as the "Austrian system", where a separate constitutional court reviews legislative acts for their constitutionality. Many European countries adopted the Austrian system of review after World War II.

Latvia Experience

- Award winning program (Cicero 2005) of the new court focused on transparency, open court sessions and a public relations campaign that helped convince citizens that the court was operating to protect their rights and freedoms.

Latvia (continued)

- "The Constitutional Court is needed in the time of political transition, especially in the small country, and should do some things in a different way as compared with the (traditional) German Constitutional Court"

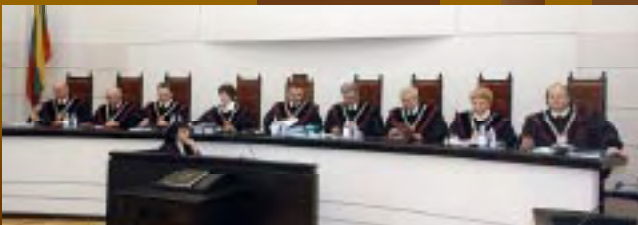
Ms Dzintra PEDEDZE, Advisor to the Chairman of the Republic of Latvia Constitutional Court

Lithuanian Constitution

CHAPTER VIII THE CONSTITUTIONAL COURT

Article 102

The Constitutional Court shall decide whether the laws and other acts of the Seimas (legislature) are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or laws.



Sample Language: Judicial Independence

- The judiciary of [name of state] shall be autonomous and independent.
- Judges shall be autonomous, independent, and bound only by the law.

Judicial Independence

- Three times in America's history, a politically dominant majority has openly challenged the authority and independence of the US Supreme Court as an institution.
- 1805 Impeachment of Justice Chase
- 1868 proposed law to limit Supreme Court jurisdiction
- Franklin Roosevelt's "Court-packing" plan in 1937.

Judicial Independence

- "The degree to which (judicial) independence will be preserved will depend in some measure on the public's respect for the judiciary. Maintaining that respect and a reserve of public goodwill, without becoming subservient to public opinion, remains a challenge to the federal judiciary.

US Chief Justice William H. Rehnquist
March 2004

Recent events in the US

- Congress attempted to strip the US Supreme Court of jurisdiction to proceed with a case, *Hamdan v. Rumsfeld*, when it passed the Detainee Treatment Act in December 2005 providing that "no court, justice, or judge" had jurisdiction to hear certain petitions filed by detainees at Guantánamo Bay.

Judicial Independence

- **Sample Language:**
- **State institutions and administrative bodies shall comply with court decisions; these entities shall neither alter court decisions in any respect nor delay their execution.**

Terms of Office: Options

- Judges of the Supreme Court shall be appointed for a term of [X] years and may be reappointed to office. The terms of judges of other Courts of Law shall be determined by law.
- The Judicial Council shall have responsibility for discipline and removal of judges [as provided by law].
- Judges may only be dismissed, suspended, transferred or retired on the grounds, and subject to the guarantees, provided by law.
- A judge shall be relieved of his duty only if he is convicted of a crime which makes him unworthy of performing his function, [or] if he becomes permanently incapable of performing the function, [or for any other reason prescribed by law].

Selection of Judges: Three Options

Option 1: Cooperative Selection

- The [Supreme/Constitutional/Other] Court is composed of [9] judges. The President shall appoint [3] of the judges, the Assembly shall appoint [3] of the judges and the Judicial Council shall appoint [3] of the judges on the [Supreme/Constitutional/Other] Court.

Option 2: Plurality System

- Judges of all Courts shall be selected by the President and approved by [2/3] members of Parliament [and the Judicial Council].

Option 3: Majority System

- Judges of all Courts shall be selected by [2/3] members of Parliament [and approved by the Judicial Council].

Sample Language: Impartiality

- The Courts of Law shall be autonomous and independent from any organ, authority, office, group of individuals, or individual.
- During their term of office, judges shall not hold any other public office or engage in any other service or profession that is determined by law to be incompatible with the judicial function.

Sample Language: Qualifications and Diversity

- Judges of all Courts of Law shall be independent and impartial. They shall be distinguished jurists of the highest moral character, with adequate qualifications, including higher legal education. The membership of the judiciary shall reflect the diversity of the people.

Kosovo Parliamentary and Expert Roundtable on Constitutional Issues

Inclusion of human rights in the Constitution

Prof. Dr. Emilia Drumeva
Constitutional Court of Bulgaria

20-22 July 2006
Skopje, FYR Macedonia

Human rights belong to constitutionalism.

Inclusion in the Constitution is a *conditio sine qua non*.

The organisation, established in every Constitution for exercising public power as “separated powers” has a special and unique purpose: to guarantee fulfilment of human/individual rights. That is why a Constitution is adopted; here is its designation and justification. The Declaration of the Rights of Man and Citizen, adopted in August, 1789 by the revolutionary French National Assembly provides that a society, which has no separation of powers and no protection of individual rights, has no constitution /art. 16/; with other words separation of powers and protection of human rights go together and represent the indispensable components of a Constitution. The Declaration is an official recognition of the person as a value.

In the Constitution human rights become **fundamental rights**.

Fundamental rights are binding public authorities.

Fundamental rights and constitutional rights are often used as synonyms. Nowadays the notion of “fundamental rights” has enriched its content and application – it has gone beyond the borders of the nation state and is bound to become an acting institute of the European Union law with the Charter of Fundamental Rights of the European Union.

Fundamental rights bind the legislature, the executive and the judicial branch as directly applicable law. As a result, they justify an obligation on the part of public authorities to protect them; all acts of the authorities should respect fundamental rights and not infringe upon the spheres they protect, unless the intrusion is justified by constitutional reasons. If rights of the individual, proclaimed by the Constitution, are violated, then the right holder has pretence for eliminating the infringement, respectively for restitution and compensation. The execution of such pretences is a task for the law-maker.

Fundamental rights represent the appropriate form, in which between individuals and society occurs an exchange of values, vitally important for both parties. Fundamental rights concentrate constitutional value judgements, which advance the protection of individual freedoms. Fundamental rights cover goods, which are indispensable for the normal being of the individual as a person and citizen. They constitute relations, without which the fulfillment of the needs of the person, on one hand, and their concurrence with the public interest, on the other hand, would be unthinkable. However, fundamental rights are only possible, where the state recognizes every individual's capacity as a person.

Nature of fundamental rights:

- subjective rights /in public law sphere/.
- objective values ;

In fact, the recognition of fundamental rights as source of individual subjective rights in public law was achieved after long history of individual rights expressed primarily in the construct of fundamental rights, which gradually came up and “ripened” into subjective rights for every person for the protection of his/her freedom and property. The emergence of social rights in contemporary constitutions affirms the social function of fundamental rights.

The justification of a subjective right includes a norm of the objective legal order /in our case, a constitutional provision regarding fundamental rights/.

Thus, the legal norm could be basis for protection of an individualized citizen interest, so that the citizen, as a right holder, could require from public authorities and “third” persons observance of the protected interest. The capacity of fundamental citizens' rights as source of subjective rights in public law is their foremost nature.

Fundamental rights have also another, equally important meaning in the sphere of “the objective”: they are objective principles of constitutional legal order and, respectively, of the overall legal order.

What does a Constitution protect? – the core of every fundamental right.

Two principles concerning core of fundamental rights :

- freedom ;
- participation/involvement.

Accordingly two main categories:

- defensive/negative rights ;
- participatory/positive rights.

As the two categories rights have a different nature, respectively they enjoy a different protection.

Which human rights to proclaim as fundamental rights in the Constitution? First, the defensive rights which protect the private sphere of individuals against public authorities.

Second, indispensably the participatory/social rights.

Initially, the constitutional movement, inspired by natural rights, fully shared the understanding about freedom as securing the individual against the public authorities. The freedom of religion, of opinion, the protection of property and other freedoms had to secure for everyone a space “free of state” for individual decisions and individual action. Thus, the constitutional function of fundamental rights used to be mainly “defense”, i.e. limitations before the public authority. Even nowadays this function and nature of fundamental rights as defensive rights /Abwehrrechte- dt., droits-resistances-fr./ is very important and has new dimensions – e.g. the inviolability of personal data and its regime.

The other aspect lies in the theory of involvement of citizens in the state’s achievements. This idea is directly related to the notion of the social state and the German legal doctrine. Participation means a right for everybody to take part in the decisions, influencing the rights and interests of the specific individual. In this sense involvement is an element of the democratic state and human rights /Teilhaberechte-dt., droits-exigences-fr./ include election rights, freedom of association and of assembly, etc. In contrast to that, however, the connection between involvement and the social state lies in the realm of involvement in the economic and social achievements of the state and society. In this case the aim is already not to protect the individual sphere from the intrusion of public authority, but to claim a share, a piece of the achievement – of the success of the state. That is why those rights are called participatory rights , positive rights - they involve a claim for a share in the achievement, a part of the common success. They can only be exercised if the state performs certain actions and provides what is needed to create the, primarily, economic conditions for the exercise of those social rights. These rights better accepted as social fundamental rights – right to labour, including right to rest, etc.

The notions of defensive and participatory rights, also present in the case-law of Bulgarian Constitutional Court show the different basis and nature of those two groups of fundamental rights, which reflects on their different means of protection. By the way, this difference gives rise to a widespread understanding, mainly in American legal ideology, that participatory rights are not fundamental in their nature and are not equal to the classic rights/freedoms. The following arguments are given for this: first, financial: such social rights can only be exercised if we have the respective economic capacities; secondly, procedural: many of the social rights cannot be clearly defined and thus are not justifiable in principle, i.e. their exercise is not guaranteed through judicial protection. Where legal theory is influenced by those views, there is a hierarchy in citizens’ fundamental rights: defensive rights are seen as classic as and higher in rank than social rights. This understanding also recommends that social rights be differentiated from fundamental rights and put in constitutional norms, which regulate the state’s main goals or program directives towards the law-maker.

Still, contemporary legal theory mostly supports the view that social rights are equally fundamental. This is supported by the statement that the preference towards one type of rights or the other is a political choice, whose results could be fatal even for the values, protected by the Constitution itself. An indicative example is the freedom of opinion or the right/freedom of expression as a classic individual right: it aims at providing to everyone the opportunity to develop as a person and gather knowledge on his/her social and natural environment; the one-sided emphasis on the defensive nature of this right is not enough for accomplishing this aim – nowadays the distribution of information is a mass industry; a lot of action is taken by the state so that the freedom of opinion could be decently protected, i.e. the right to information is supported by the obligation on the part of the state to provide the necessary information.

This example actually illustrates the efforts of contemporary constitutional practice to get over the inherited controversy between “defensive rights” and “participatory/social rights”. The solution is sought through finding the answer to the question what should the principles and the values of society be: only “individualism, liberalism and equality before the law” or also “solidarity, democracy and equal chances”?

Both categories rights belong to a modern Constitution with the appropriate implementation and enforcement mechanisms.

II. MINORITY RIGHTS.

The term

The term embodies two separate concepts :

- individual rights of each member of a racial, ethnic, religious, language,cultural or sexual minority ;
- collective rights accorded to a minority group.

Minority protection A notion of the international law. First steps in modern times were made in 1815 during the Vienna Congress. After the I. World war minority protection was based on bilateral agreements. After the II world war - on multilateral basis; first it was

introduced in addition to the Universal Declaration of 1948 to cover this specific issue. Later a dynamic development in the framework of the UN followed :

1966 the UN Covenant for civil and political rights ;

Subcommittee for prevention of discrimination and protection of minorities.

Oblig□

An intensive international law regulation developed also within the Council of Europe, especially after the democratic changes in Central and Eastern Europe :

1990 The Copenhagen standards on human dimensions ;

1991 The Geneva experts meeting ;

1991 The Venice Commission Draft for a European convention on protection of minorities ;

1992 The European charter for minority and regional languages ;

1995 The Framework Convention for the protection of national minorities.

So minority protection according to the Framework Convention covers not only language, culture, religion and traditions, but also education, media etc.

National law/constitutional law in the last decades shows a diversity of regulations, some of them very detailed – for ex. Constitution of Slovakia. In the same time modern constitutional law shows also flexibility: some constitutions proclaim fundamental rights, which protect minority groups without those having the statute of a national minority /Bulgaria/.

In conclusion : International law and constitutional law have established positive obligations upon public authorities to protect minority groups if objective criteria are at hand and if subjective will is manifested.

Recommendation

As there is no universal model of minority protection rights of minority groups must be proclaimed in the Constitution in both cases: “with” or “without” the statute of a minority, so that individual rights could be practiced in communion.

Ombudsman for minorities to be provided by the Constitution as a special reinforced protection.

Ensuring the fundamental rights in Constitution no matter what the ethnic origin, religious or language affiliation is, represents a part of the guarantees for a long duration and stability in Kosovo.

III. Implementation and enforcement mechanisms for fundamental rights

- Inside Protection – principle of proportionality;
- Outside protection:
- The road to the court must always be free.
- Control for constitutionality /incl. individual constitutional complaint?/
- Ombudsman/men /a network ?/
- Supranational mechanisms.

/ Fundamental rights and hopefully protecting mechanisms belong to the establishing of a functioning legal system and administration, of a civil society, what means – they belong to the concept of rule of law.

Fundamental rights and rule of law represent a key step towards the European perspective of Kosovo.

Human Rights and Constitutional Law

Ronald Hooghiemstra
OSCE Mission in Kosovo

Human Rights and Constitutional Law

Preliminary point:

Human Rights Law is International Law

Therefore:

To include human rights, the Constitution would also need to incorporate international law

Human Rights and Constitutional Law

International law is contained primarily in treaties.

WHAT IS A TREATY?

An agreement between states

Human Rights and Constitutional Law

HOW DOES A TREATY ENTER INTO FORCE?

1. Signature
2. Ratification
3. Promulgation

Human Rights and Constitutional Law

Human Rights Treaties are made up of three parts:

- | | |
|-----------------------------|---|
| 1. Preamble = | 1. <i>WHY</i> we agreed to regulate something |
| 2. Substantive Provisions = | 2. <i>WHAT</i> we agreed to regulate |
| 3. Operative Provisions = | 3. <i>HOW</i> we agreed to enforce what we regulated |

Human Rights and Constitutional Law

TWO LEVELS OF OBLIGATION:

1. To other states
2. Within the state

Human Rights and Constitutional Law

TWO TYPES OF OBLIGATION:

1. Securing the enjoyment of human rights
2. Enforcing the enjoyment of human rights

Human Rights and Constitutional Law

Example of obligation 1:

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Human Rights and Constitutional Law

Example of obligation 2:

ECHR

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Human Rights and Constitutional Law

In other words a state would need to:

Do things in compliance with human rights

and

Fix things when they go wrong

Human Rights and Constitutional Law

Therefore the Constitution would need to:

- Specify the status of treaties in the national legal order
- Specify how treaties enter into force in the national legal order
- Clarify the relationship between treaty law and the Constitution, and with national law
- Specify the obligation on national authorities to protect human rights *in legislation, decisions and actions*
- Specify how national legal procedures will remedy violations of human rights; *and ideally*
- Specify how national authorities will ensure that violations, once fixed, will not happen again (feedback)

Human Rights and Constitutional Law

Two uncommon examples

1. The Netherlands
2. The United Kingdom

The Netherlands

The Netherlands is a Constitutional Monarchy

It has a written Constitution and there is a specific role for the Crown

The Crown is Sovereign

The role of the Crown in this Monarchy can be understood as broadly equivalent to the role of the President in a Republic

The Netherlands

CATALOGUE OF RIGHTS

The Constitution of the Netherlands begins with a catalogue of fundamental rights and freedoms of all persons in the Netherlands. This catalogue comprises 23 separate provisions which cover the range of rights broadly similar to the Universal Declaration of Human Rights of 1948.

The Netherlands

STATUS OF TREATIES

Article 91

1. The Kingdom is not bound by treaties and treaties are not renounced without prior approval of Parliament.
3. In case a treaty contains provisions which conflict with the Constitution, or which require changes to the Constitution, Parliament can only approve the treaty by two-thirds majority.

The Netherlands

ENTRY INTO FORCE

Article 93

Provisions of treaties and decisions of public international organizations which, according to their substance, can be binding on everyone, are binding once they have been made public.

(Self-executing provisions of treaties and decisions of public international organizations have the force of law.)

The Netherlands

ENTRY INTO FORCE

Article 95

The Law provides rules on how treaties and decisions of public international organizations are made public.

The Netherlands

RELATIONSHIP WITH NATIONAL LAW

Article 94

Legislative provisions in force within the Kingdom shall not apply if their application is incompatible with self-executing provisions of treaties and decisions of public international organizations.

The Netherlands

OBLIGATION TO PROTECT?

Article 73

1. The Council of State shall be consulted on legislative proposals and draft regulations, as well as on proposals for the adoption of treaties by Parliament.

(Review of draft primary and subsidiary legislation for compliance with treaty obligations, the Constitution and other legislation in force)

The Netherlands

REMEDY?

Article 120

The courts do not review the constitutionality of laws and treaties.

However, read in conjunction with Article 94, the courts do review the application of legislative provisions to the case before them for compliance with self-executing provisions of treaties and decisions of public international organizations.

The United Kingdom

The United Kingdom is a Constitutional Monarchy

It has an unwritten Constitution

Parliament is Sovereign

This implies that no law can be of higher legal value than an Act of Parliament

The United Kingdom

STATUS OF TREATIES

Because Parliament is sovereign, a treaty that has been ratified only binds the United Kingdom in its dealings with other states.

No treaty can have consequences for the internal legal order without the treaty being converted into an Act of Parliament

The United Kingdom

INCORPORATION OF A TREATY

Human rights treaties have moral force in the internal legal order but not legal force.

In 1998, Parliament incorporated the ECHR into the internal legal order through the **Human Rights Act 1998**

The United Kingdom

HUMAN RIGHTS ACT 1998

The Human Rights Act repeats all the substantive rights of the ECHR and sets out procedures for these rights to be implemented in the national legal order through legislation, public action and court procedures.

The United Kingdom

RELATIONSHIP WITH NATIONAL LAW

Section 3(1)

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

The United Kingdom

RELATIONSHIP WITH NATIONAL LAW

HOWEVER:

Section 3(2)(b)

This section does not affect the validity, continuing operation or enforcement of any incompatible primary legislation.

The United Kingdom

OBLIGATION TO PROTECT – 1

Section 6

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if, as the result of one or more provisions of primary legislation, the authority could not have acted otherwise.

The United Kingdom

OBLIGATION TO PROTECT – 2

Section 19

- (1)(a) A Minister of the Crown in charge of a Bill in either House of Parliament must make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights.

The United Kingdom

REMEDIES - 1

Section 7

- (1)(a) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by Section 6(1) may bring proceedings against the authority under this Act in the appropriate court or tribunal.

The United Kingdom

REMEDIES – 2

Section 8

In relation to any act [...] of a public authority which the court finds is [...] unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

The United Kingdom

REMEDIES – 3

Section 4

(2) If the court is satisfied that the provision [of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility.

The United Kingdom

FEEDBACK – 1

Section 5

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

The United Kingdom

FEEDBACK – 2

Section 10

[if a provision of legislation has been declared to be incompatible with a Convention right -]

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

Human Rights and Constitutional Law

CHECKLIST

- ✓ Status of treaties
- ✓ Entry into force
- ✓ Relationship with national law
- ✓ Duty to protect human rights
- ✓ Remedies for violations
- ✓ Feedback mechanism to avoid future violations

Elections and the Constitution: Finding Balance and Building Confidence

- Thanks to OSCE, especially Per, Franklin, Blerim, and Jennifer. Apologies to the translators for speaking so fast!
- First, it is important to stress that elections do not make a democracy, which is a web of values, institutions, and practice. However, democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the country, freedom of assembly and freedom of association.
- But how can a constitution safeguard and nurture the democratic process, and build confidence and legitimacy in the electoral process? When looking at electoral processes in a constitutional process, it is important to strike a balance between entrenching principles and rules in a constitution and allowing for the flexibility and responsiveness that laws and regulations can provide. I should also note that Kosovo already has a strong body of electoral law on the books. What should be in a Constitution?
- Two plugs: the Post Conflict Constitutional Drafters Handbook, and the Venice Commission's Code of Good Practice in Electoral Matters. Both are excellent sources. The Drafter's Handbook covers:
 1. The type of electoral system
 2. Methods of Electoral Districting
 3. Mechanisms for minority and women's representation
 4. Procedure for elections of the legislative and executive branches
 5. Voter Enfranchisement, and
 6. the roles of an electoral management body.

Elections in a Constitutional Context

- Electoral processes are complex, standardized activities requiring clear, simple, and relatively comprehensive legal definition to promote consistency, equity, and a common understanding of the electoral framework by all persons involved in an election, says IFES.
- Constitutions address electoral issues in different ways depending on the individual requirements of the country. Electoral provisions can be a specific chapter or articles in the constitution, while others put the matter in the context of elections for the executive and legislative branches.

An Electoral Legal Framework

- A country's electoral legal framework also should specify the requirements for an Electoral Management Body (EMB). How an EMB operates can be defined in many different types of instruments, including international treaties, the constitution, national and regional laws, and regulations.
- International treaties and agreements provide a framework that can be used to define and assess a country's electoral framework: Copenhagen Document, ICCPR, ECHR
- There is a trend towards defining key electoral issues in the constitution, which can provide a workable way of entrenching electoral norms against ruling party manipulations. Electoral arrangements may be defined in national laws and regulations as well.
- A country's electoral law may be a single law or several laws that of course must be kept in harmony with each other. EMB or the executive branch of government may be able to develop regulations that can fill in gaps in the law; usually these are subject to judicial review. For confidence in the electoral process, it is important that all the pieces of the electoral framework – from treaties to regulations – are discussed and freely available to everyone involved in the process.
- *A balance needs to be struck between providing a consistent and predictable legal framework, while allowing the EMB the flexibility to respond to changing political circumstances. Bottom line is that the amount of detail in the constitution or statute laws is a function of the trust and confidence participants have in the system.*

The Constitution

- A growing number of countries are incorporating electoral provisions in their constitutions, frequently focusing on establishing an Electoral Management Body. Some establish an EMB as a constitutional body, such as:

1. Bangladesh
 2. Costa Rica
 3. Fiji
 4. Ghana
 5. India
 6. Indonesia
 7. Iraq, and
 8. Uruguay
- Putting electoral provisions in a constitution means that they cannot be changed as easily as laws, and constitutions have usually very difficult hurdles for amendment. The barrier that constitutional entrenchment imposes on ruling parties can give opposition groups a feeling of greater protection. On the other hand, entrenchment makes it more difficult for the electoral system to adapt to change.
 - Some electoral provisions that are often included in constitutions include the following:
 1. EMB independence
 2. EMB composition
 3. EMB term of office
 4. EMB powers and functions
 5. Suffrage rights or voter registration qualifications
 6. Political party rights
 7. Boundary delimitation authority or parameters
 8. Presidential election systems
 9. National legislative election systems
 10. Candidacy rights or qualifications
 11. Election schedule or date deadlines, and
 12. Electoral dispute mechanisms
 - *Ultimately, what is inside a constitution or part of laws and regulations depends on local considerations and varies widely.* For example,
 1. Austria's Constitution sets out EMB membership, the franchise, the Constitutional Court's role in election disputes, and the election system;
 2. Bangladesh defines the powers, independence, and functions of the EMB, the franchise, candidate qualifications, and deadlines for setting election dates;
 3. Cameroon's Constitution deals with political party rights, candidate qualifications, election date deadlines, and the powers of the Supreme Court and Constitutional Council to resolve election disputes;
 4. Costa Rica established the independence, membership, and functions of the EMB as well as dealing with the franchise, political party rights (including government funding), election systems, and candidate qualification;
 5. The Czech Republic's Constitution defines the franchise, the election system, and election date deadline;
 6. Ghana addresses the franchise, establishes the EMB, the right to form or join a political party, and delimits electoral districts;
 7. India's Constitution establishes an EMB, defines the franchise, the electoral register, bars the courts from interfering in electoral matters, and reserves seats for legally defined "castes" and "tribes" in the House of the People;
 8. Madagascar sets out candidacy rights, the election system for the senate and the presidency, and the Constitutional Court's role in elections and election disputes.
 9. Namibia's constitution spells out qualifications and procedures for presidential elections; and
 10. Peru's Constitution establishes different institutions that collectively do the work of a single EMB and defines relationships between them and other institutions.
 - While putting many electoral provisions in a constitution can be a way to build confidence and legitimacy in the overall process, *there are clear disadvantages to having too much detail.* The electoral framework may be difficult to change or change may take too much time.
 - The extent to which electoral provisions are included in a constitution is significantly affected by the level of trust in the election administration of a country. In many established democracies, where a high level of trust exists in law-making and public administration, constitutions do not make reference to constituting an EMB.
 - Yet around the world it is common to have independent and robust EMBs, which are supported by sophisticated and detailed legal frameworks which incorporate key electoral provisions in the constitution. This practice fosters stakeholder confidence in the electoral process.

Beyond the Constitution: Electoral Laws and Regulations

- Rather than placing establishment of an EMB in a constitution, an EMB can be established by statute. Countries such as the United Kingdom (which has no written constitution), Australia, Burkina Faso and Canada have established their EMB's entirely by a law.
- Such legislation should define the status of the national EMB and/or any other subsidiary EMBs, including responsibilities, powers, and functions. A law should also provide a clear and sufficiently detailed framework to ensure confidence and efficiency, which should include:
 1. EMB member and staff appointments, as well as tenure;
 2. Operational management issues relating to voter registration, political party and candidate registration, political campaigns, voter education, EMB transparency, voting, vote counting, and announcement of results;
 3. Financial and asset management issues; and
 4. Electoral offenses and electoral dispute resolution.
- Other issues which may also be covered include boundary delimitation, and codes of conduct for EMB members and staff, political parties, media, and election observers.
- Again, there is a fine balance between too much detail and too little that must be struck. Too much detail in the legislation can result in an EMB not being able to respond to new challenges or developments. A good example of this could be electronic voting or changing the organization of the EMB.

Electoral Districting

- Constitutions generally specify the electoral system as a single or multi-district system; states must decide how many representatives will be elected from each electoral district. States must consider how to delineate electoral districts – they can be drawn from existing boundaries or new ones can be configured.
- Texas redistricting example

Minority Mechanisms

- Many states include mechanisms in their constitutions to ensure minority representation, such as set asides or specific party minority requirements. Set asides are seats reserved for ethnic and religious minorities. Party requirements stipulate that all political parties must include candidates from different ethnic or confessional groups.
- The Venice Commission's Code of Good Practice of July 2002 notes that special rules that can guarantee minorities reserved seats (or providing exceptions to normal seat allocation – for example, exemption from a quorum requirement) do not run counter to the idea of equal suffrage. The code also notes that neither candidates nor voters should be forced to reveal their membership in a national minority, and states that voter information should be available in the local language of the minority.

Gender Provisions

- States may also choose set asides or specific party requirements for women. The Venice Commission Code of Good Practice also states that legal rules requiring a minimum percentage of persons of each gender *among candidates* should not be considered as contrary to the principles of equal suffrage *if they have a constitutional basis*.

Procedure for Electing the Legislature and Executive

- There can also be provisions about the legislature: the legislature can be a unicameral body, which promotes efficiency and unity. In states with bicameral legislatures, the first chamber usually serves the interests of the entire state, while the second chamber can represent regions, provinces, and other interests or units. Constitutions also can include provisions concerning electing the executive, including eligibility, length of term, nomination and re-election requirements, and the percentage of votes required to win the election.

Right to Vote and the Right to be a Candidate

- Venice Commission Code of Good Practice in Electoral Matters, issued in October 2002 outlines the “underlying principles of Europe’s Electoral Heritage.” This is a useful source on constitutional standards. The Venice Commission outlines five principles: universal, equal, free, secret, and direct suffrage.
- *Universal Suffrage* means in principle that all human beings have the right to vote and the right to stand for election. This right may, and indeed should be subject to certain conditions: Age, Nationality, Resident, and deprivation of the right to vote and to be elected.
- Procedurally, the Venice Commission stresses that this means that electoral registers must be accurate, published, up-to-date, and have dispute resolution mechanisms. The Commission also notes that part of universal suffrage includes clear procedures for the submission of candidacies.
- *Equal Suffrage* entails equal voting rights, voting power (a clear and balanced distribution of seats based on specific criteria, equality of opportunity for parties and candidates alike, national minority representation, and gender equality and parity).
- *Free Suffrage* includes several principles, including the freedom of voters to form an opinion (this means that the state must be neutral in terms of funding parties, media, demonstrations, etc., and that the authorities must enable voters to know who they are voting for, as well as impose sanctions for violations).
- Free Suffrage also means that voters should be able to express their wishes and combat electoral fraud: this means voting procedures should be simple and administration should be transparent.
- *Secret Suffrage*: For the voter, a secret ballot is not only a right but also a duty, and any disclosed ballots should be disqualified. Voting should be individual, and no list of persons actually voting should be published.
- *Direct Suffrage*: The Venice Commission’s Code also notes that the following must be elected by direct suffrage:
 1. At least one chamber of the national parliament;
 2. Sub-national legislative bodies; and
 3. Local Councils.
- So to go back full circle, every constitutional process is local, and whatever happens with Kosovo’s constitution, it should and must reflect the special circumstance of Kosovo. A balance must be struck between laws and the Constitution, and the process must be transparent, so that there is confidence in the system.
- Thank you for listening, and sorry for taking so long!

THE ELECTORAL SYSTEM.

1. The need for fairness in electoral procedures, the drawing of constituency boundaries and the administration of elections. Role of an impartial electoral commission.
2. The electoral system. Proportional representation more appropriate for a divided society. BUT – proportional representation is not the name of a **single** electoral system, but of a whole variety of systems, each of which seeks to attain the ideal of representing in accordance with opinion.

THE FUNDAMENTAL CHOICES TO BE MADE;

- a. A **national** or **constituency** list system. The example of Israel.
- b. The level of the **threshold** below which a party is not represented.
- c. Most important of all – whether the system allows the elector to choose between different candidates of their preferred party – or even across parties – or whether it confines them to voting for a party list, with the order of the candidates being determined by the party.

CLOSED lists. Israel and Germany. The German system.

FLEXIBLE lists. Belgium.

OPEN list. Finland. Combines general election with a primary election.

FREE list. Switzerland and Luxembourg. More suitable perhaps for consensual societies.

Vernon Bogdanor,
July 2006

Other Constitutional Issues

Wolff-Michael Mors
OSCE Mission in Kosovo

Wolff-Michael.Mors@osce.org

Content

- Comparing Constitutions
- Constitutional Development
- Transfer of Sovereignty

Comparing Constitutions



Normative and Symbolic Constitutions
→ degree of impact on the political and social reality

Comparing Constitutions



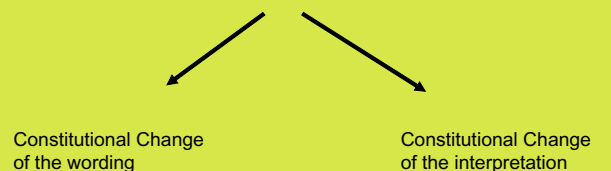
Relevant and Ritual Constitutions
→ degree of effectiveness to regulate political and social behaviour

Comparing Constitutions



Demanding and Descriptive Constitutions
→ relationship to the de facto powers in the society

Constitutional Development



Constitutional Change of the Wording

Flexible/Rigid Constitutions

- No one-document written constitution
- Parliamentary Majority
- Diverse constitutional sources
- Only a few examples
- One-document written constitution
- Protection against too much flexibility
- Theoretically the text should be the sole source
- Most common model

Germany

Article 79 [Amendment of the Constitution]

(1) This Constitution can be amended only by statutes which expressly amend or supplement the text thereof.

[...]

(2) Any such statute requires the consent of two thirds of the members of the House of Representatives [Bundestag] and two thirds of the votes of the Senate [Bundesrat].

(3) Amendments of this Constitution affecting the division of the Federation into States [Länder], the participation on principle of the States [Länder] in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible.

Germany

- Proposal by Government, 5% of MPs or the Senate (Bundesrat)
- Amendments have to be clearly stated
- 2/3 majority in both chambers
- Absolute limit

Denmark

Section 88 [Constitutional Amendments, Electors' Vote]

When the Parliament passes a Bill for the purposes of a new constitutional provision, and the Government wishes to proceed with the matter, writs shall be issued for the election of Members of a new Parliament. If the Bill is passed unamended by the Parliament assembling after the election, the Bill shall within six months after its final passing be submitted to the Electors for approval or rejection by direct voting. Rules for this voting shall be laid down by Statute. If a majority of the persons taking part in the voting, and at least 40 per cent of the Electorate has voted in favour of the Bill as passed by the Parliament, and if the Bill receives the Royal Assent it shall form an integral part of the Constitution.

Denmark

- Any MP can introduce a bill
- Parliament passes the bill
- Parliament gets dissolved
- Parliamentary Election
- New Parliament passes the bill
- Approval by referendum with at least 40% participation

Slovenia

[Part] IX Procedure for Amending the Constitution

Article 168 (Proposal to Initiate the Procedure)

(1) A proposal to initiate the procedure for amending the Constitution may be made by twenty deputies of the National Assembly, the Government or at least thirty thousand voters.
 (2) Such proposal is decided upon by the National Assembly by a two-thirds majority vote of deputies present.

Article 169 (Acts Amending the Constitution)

The National Assembly adopts acts amending the Constitution by a two-thirds majority vote of all deputies.

Article 170 (Confirmation of Constitutional Amendments by Referendum)

(1) The National Assembly must submit a proposed constitutional amendment to voters for adoption in a referendum, if so required by at least thirty deputies.
 (2) A constitutional amendment is adopted in a referendum if a majority of those voting voted in favour of the same, provided that a majority of all voters participated in the referendum.

Article 171 (Promulgation of Constitutional Amendments)

Constitutional amendments enter into force upon their promulgation in the National Assembly.

Slovenia

- Proposal by 20 MPs, the Government or at least 30.000 voters
- 2/3 of MPs present approve the proposal to initiate the process
- Adoption by 2/3 of MPs
- 30 MPs can require a referendum
- Approval by referendum with at least 50% participation

Constitutional Development



Constitutional Change of the wording

Constitutional Change of the interpretation

Constitutional Change of the Interpretation

Denmark

- Supreme authority
- The King shall not be answerable for his actions; his person shall be sacrosanct.
- Appointment/Dismissal of Ministers
- Dissolve parliament/new election

Transfer of Sovereignty

Germany

Article 24 [Collective Security System]

(1) The Federation may by legislation transfer sovereign powers to intergovernmental institutions.
 [...]

[...]

(2) For the maintenance of peace, the Federation may join a system of mutual collective security; in doing so it will consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world.
 [..]

Germany

Article 23 [European Union]

(1) To realize a unified Europe, Germany participates in the development of the European Union which is bound by democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate [Bundesrat], delegate sovereign powers. Article 79 II & III is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized.

Germany

- the European Union which is bound by democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution
- 2/3 majority in both chambers
- absolute limit

Denmark

Section 20 [Delegation of Powers]

(1) Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.

(2) For the passing of a Bill dealing with the above a majority of five-sixths of the Members of the Parliament shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the Electorate for approval or rejection in accordance with the rules for Referenda laid down in Section 42.

Denmark

- Law
- for the promotion of international rules of law and co-operation
- 5/6 majority
- If majority in parliament is not reached, it shall be sent to the electorate for approval
→ Majority but not less than 30% of the electorate

Slovenia

Article 3a [European Union]

(1) Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

(2) Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal is passed in the referendum if a majority of those voting have cast valid votes in favour of the same. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.

(3) Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.

(4) In procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present.

Slovenia

- to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values
- two-thirds majority vote of all MPs
- Parliament may call for a referendum (if yes, then they are bound by it)
- Government action in respective organisation



PUBLIC INTERNATIONAL LAW & POLICY GROUP

Additional Constitutional Provisions

Paul R. Williams

Public International Law & Policy Group

www.publicinternationallaw.org

Provisions

- Constitutional Enactment
- Constitutional Amendment
- State Identity
- Supremacy of the Constitution
- National Identity
- Citizenship
- Official Capital, Flag, Anthem, Symbol, and Holidays
- Official Language
- State of Emergency

Constitutional Enactment

- Providing effective mechanisms to enact and amend a constitution are crucial for ensuring the document's integrity and stability.
- Most post-conflict states condition a new constitution's entry into force on its formal adoption. States most commonly choose to adopt their constitutions in one of two ways: (1) vote of the legislature or (2) popular referendum. A small number of post-conflict constitutions allow for both of these adoption mechanisms. Regardless of the adoption scenario, the constitution may also specify the date on which it comes into force.

Vote of the Legislature

Some post-conflict states enact their constitutions through legislative approval, typically by a vote of two-thirds or three-fourths majority. After the required number of legislators approves the constitution, it may come into force on the day it is declared in the legislature. An advantage of requiring more than a simple majority is that it signifies widespread support and assures that the constitution represents the will of more than just a narrow majority of parties, which will help promote greater stability.

Sample Language: Vote of the Legislature

This constitution is adopted by a [two-thirds/three-fourths] majority vote of the total number of members in the Assembly.

This constitution comes into force on the day it is declared in the Assembly.

Constitutional Amendment

Most post-conflict constitutions establish a fixed procedure for proposing and approving amendments. The procedure is important because changes to a constitution may alter the state's basic principles and potentially affect much or all of the general population. In outlining the process of amending a constitution, there are several key points a post-conflict states consider: the process for proposing amendments; the process for drafting amendment; the process for approving amendments; and deciding whether to impose restrictions on the subject matter and/or the timing of amendments.

Process for Proposing Amendments

Constitutions may specify one or more methods for proposing amendments; the options fall into four general categories.

First, an amendment may be proposed by a vote of a fixed number of members of the state's legislature. For example, this fixed number may be one-fifth, one-third, one-half, or two-thirds of the members. A second option is to allocate the authority to the Executive alone. A third option is to allocate the power to a large group of voting-eligible citizens. The size of this group should be small enough to allow for meaningful deliberation, but large enough to demonstrate the commitment of a significant portion of the populace. A final option is to allow the general public to propose amendments through a popular referendum. A constitution may include any combination of these four options.

Sample Language: Proposing Amendments

Option 1: Vote of the Legislature

Initiative for revision of this constitution may be undertaken by not less than [two-thirds/three-fourths] of the members of the Assembly.

Option 2: Executive Proposal

A proposal for the amendment of any provision of this constitution may be initiated by the [President/Prime Minister].

Option 3: Constituent Assembly

Proposals to amend this constitution may be made by a constituent assembly, composed of [number] of eligible voters.

Option 4: Popular Referendum

Proposals to amend this constitution may be made by the people through a popular referendum.

Process for Drafting Amendments

Some post-conflict constitutions include special provisions and/or requirements for drafting a proposed amendment. Some post-conflict states require the creation of a governmental committee to prepare a draft of the proposed constitutional amendment. There are virtually limitless options for procedures by which post-conflict states may permit amendments to their constitutions. Regardless of the procedure selected, states may wish to consider the need for a high degree of public support to change the constitution. States may also consider the need for adequate time for the public and the legislature to understand and debate the proposed change.

Sample Language: Drafting Amendments Creation of Special Committee

In order to implement proposals regarding the amendment of the constitution, a commission composed of members of the [Government/Assembly/Supreme Court], shall be established by a Presidential decree, and the commission shall prepare a draft of the amendments.

Process for Approving Amendments

The process of approving amendments to the constitution varies greatly among states. Because constitutions set forth the core principles and basic structures of the state, many states choose to require a greater level of social and political agreement to amend the constitution than that required to pass general legislation.

Possible approval scenarios include:

- (1) approval of the proposed amendment by a fixed number of members of the legislature;
- (2) approval of the proposed amendment by a fixed number of members of the legislature plus the endorsement of the executive;
- (3) approval of the proposed amendment by a fixed number of members of the legislature followed by ratification by popular referendum;
- (4) submitting the proposed amendment for approval in a referendum;
- (5) approval by a fixed number of the legislatures of the nation's member states; and
- (6) public debate and referendum.

Sample Language: Approving Amendments

Option 1: National Legislative Approval
Constitutional amendments must be approved by a [two-thirds/three-fifths] majority of the Assembly.

*Option 2: National Legislative Approval
Followed by Executive Approval*
Constitutional amendments must be approved by [two-thirds/three-fifths] majority of the members of the Assembly. Following the approval of the legislature, the executive must endorse the amendment before it comes into force.

*Option 3: National Legislative Approval
Followed by Popular Referendum*
Constitutional amendments must be approved by [two-thirds/three-fifths] majority of the members of the Assembly. Once the amendment has been passed by the Assembly, it shall be submitted to ratification by referendum, which shall be conducted according to the referendum law.

Option 4: Popular Referendum
The amendment shall become ratified after approval by [two-thirds] of eligible voters in a popular referendum.

Option 5: State Legislative Approval
The amendment must be ratified by the legislatures of [two-thirds/three-fourths] of the provinces or by conventions in [two-thirds/three-fourths].

*Option 6: National Legislative Approval
Followed by Public Debate and Referendum*
A proposed amendment, after adoption by the Assembly, shall be submitted to public debate and to a referendum.

Restrictions

Because constitutions often embody fundamental principles and core principles of the state, post-conflict states may wish to restrict its amendment. Specifically, some states do not allow any amendment of the constitution during a state of emergency or war. Others prohibit amendments regarding religion. Other states restrict constitutional amendments that pertain to fundamental rights so that amendment is impossible unless such rights are afforded greater protection. Finally, some states restrict amendments so that they may not alter fundamental aspects of the state.

Sample Language: Restrictions

- *No Amendments during Emergency or War:*
This constitution may not be amended during a [state of emergency].
- *No Amendments Regarding Religion:*
Amendments regarding the adherence to the fundamentals of the state religion are not permitted.
- *No Weakening of Fundamental Rights:*
Amendments regarding the fundamental rights of the people are permitted only in order to make them more effective.
- *No Change to the Nature of the state:*
Any constitutional amendment cannot infringe on the nature of the state or the integrity of the national territory.

State Identity

The constitution may identify the type of government and the boundaries of the state that it governs, and the nature of the borders. Many post-conflict constitutions also include a provision declaring the independence and sovereignty of the state. Such a declaration may include language that notes that state sovereignty is inalienable, indivisible, and non-transferable. Moreover, this provision may also note the source of the sovereignty – commonly that it derives from and is vested in the people.

Sample Language: State Identity

Borders:

The borders of [state] are [geographic description of boundaries]. Borders may only be altered in accordance with international law, by peaceful means and by agreement.

Type of Government:

[State] is a [parliamentary republic].

Sovereignty:

[State] is an independent, sovereign state. Sovereignty is inalienable, indivisible, non-transferable, and is derived from and vested in the people of [state].

Supremacy of the Constitution

Some post-conflict constitutions include a provision providing that it is the supreme law of the land and any laws inconsistent with it have no force. Including such a provision may prevent provincial or municipal governments from enacting laws inconsistent with constitutional principles.

Sample Language: Supremacy of the Constitution

This Constitution is the supreme law of [state]. Any laws inconsistent with this Constitution shall be void.

National Identity

Post-conflict states containing many nationalities or ethnicities often include a provision in their constitution describing national identity. In defining national identity, constitutions may acknowledge the variety of nationalities within the state while simultaneously noting the commonality and unity of the state's citizens.

Sample Language: National Identity

[State] is a country of many nationalities. [State] belongs to all who live in it, united by our diversity, common history, purpose and destiny, and committed to working together to promote the good governance and the welfare of all citizens of [state].

Citizenship

Most post-conflict constitutions address citizenship in one of two ways: either by describing specific citizenship requirements or simply by noting that citizens have both rights and duties of citizenship. If the state elects to detail requirements for citizenship in its constitution, this section may include means by which individuals qualify for citizenship of the state. Typical ways to gain citizenship are being born in the state, having one or both parents as citizens, or being naturalized as a citizen.

Sample Language: Citizenship

Option 1: Rights and Duties of Citizenship

All citizens of [state] are equally entitled to the rights, privileges and benefits of citizenship; and equally subject to the duties and responsibilities of citizenship.

Option 2: Citizenship Requirements

Any person who was born in [state], born to a parent who is a [state] citizen, or who has been naturalized as a citizen of [state], shall be considered a [state] citizen.

Official Capital, Flag, Anthem, Symbol, and Holidays

Some post-conflict constitutions specify the state's capital city, the official flag, symbol, anthem, and holiday(s). However, some post-conflict constitutions provide that specifics of these matters should be determined by law. If such provisions are detailed in the constitution they generally are simple, straight-forward descriptions.

Option 1: Specify Official state Capital, Flag, Anthem, Symbol, and Holiday(s) in Constitution

The capital city of [state] is [capital city].
The national flag is [description of flag].
The [seal/symbol] of [state] is [description of the seal/symbol].
The national anthem of [state] is [title of national anthem].
The national holiday[s] of [state] [is/are] [title and date of national holiday(s)].

Option 2: Leave Specific Determinations of Official state Capital, Flag, Anthem, Symbol, and Holidays to Law

Determination of the capital city, national holidays, the form and dimensions of the national flag and symbols, the content of the text of the national anthem, and their use shall be regulated by law.

Official Language

Some post-conflict constitutions designate one or more languages as the official state language(s). However in states where multiple languages are spoken, constitutional acknowledgement of an official language may lead to friction or conflict because of a perceived marginalization of individuals who speak the non-official language. One option is to mandate one or more official languages. A second option is to proclaim one or more official languages, while recognizing and allowing and/or protecting the use of other languages. This second option may be desirable in states with many indigenous or regional languages.

Option 1: Mandate One or More Official Language(s)

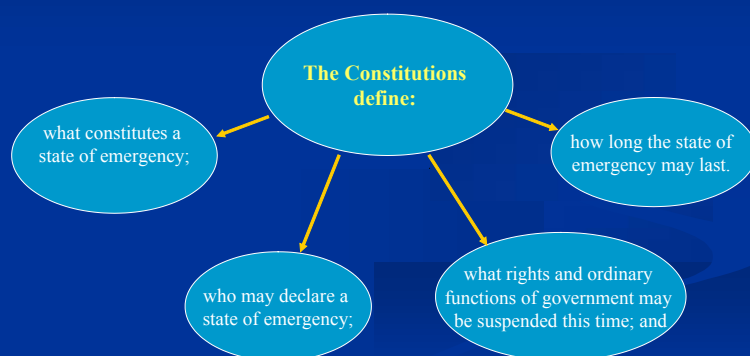
[Language(s)] shall be the official language[s].

Option 2: Mandate Official Language(s), but Protect All Languages

[Language(s)] shall be the official language[s]. The equality of all languages is guaranteed, and citizens have the right to educate their children in their mother tongue.

A State of Emergency

Post-conflict constitutions commonly include provisions relating to states of emergency



Defining a state of Emergency

Some constitutions define what constitutes a state of emergency, such as during state of war, an immediate threat to the independence and unity of the country, or in the event of a severe natural disaster. Others leave defining and declaring states of emergency to the discretion of one or more branches of government.

Sample Language: Defining a state of Emergency

Option 1: Explicit Definition

Declaration of a state of emergency may only be made if [the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency]; and the declaration is necessary to restore peace and order.

Option 2: Allow Government to Define

When it appears that an imminent peril resulting in grave results to public order or in the case of events presenting themselves, by their nature and their gravity, the character of the public calamity or natural disaster, the [President/Prime Minister/majority of members in the Assembly] of [state] may declare a state of emergency.

Authority to Declare a State of Emergency

A constitution may include provisions regarding who has the authority to declare a state of emergency. Some post-conflict countries vest this power solely in the executive branch. Others require broader consensus such as the affirmative vote of two-thirds majority of the Assembly, with a contingency plan in case the legislature is unable to meet.

Sample Language: Authority to Declare

Option 1: Executive May Declare

The [President/Prime Minister] may declare a state of emergency.

Option 2: Legislature May Declare

A state of emergency may be declared by an affirmative vote by [majority/two-thirds] of the members of Assembly. If the Assembly cannot be convened during the state of emergency, the [President] of [state], with the proposal of the [Council of Ministers], has the right to issue acts that have the force of the law, which have to be approved by the Assembly in its first meeting.

Restrictions During a State of Emergency

The constitution may also define the types and scope of restrictions during a state of emergency. One such restriction is to prohibit all amendments. Another option is to limit allowable restrictions to those that do not pertain to fundamental rights such as the right to life, prohibition of torture, cruel or degrading treatment or punishment, or the legal definitions of penal offenses and punishments.

Constitutions may also include a provision that prohibits the dissolution or suspension of any state organs or their powers under the constitution during a state of emergency.

Sample Language: Restrictions

No Constitutional Amendments:

No revision of the Constitution may be undertaken during a state of emergency.

No Constitutional Amendments Regarding Fundamental Rights:

In case of a state of emergency or war, the human rights and freedoms as defined by the Constitution and other laws are subject to limitation only by law.

Such a law may not affect the right to life, the freedom of thought, conscience, and religion, as well as the right not to be subjected to torture or inhuman and cruel treatment.

No Dissolution of Government

The Assembly may not be dissolved during a state of emergency.

Duration of the State of Emergency

Drafters may choose to specify maximum duration of a state of emergency and ways, if any, that such time may be extended.

Sample Language: Duration

[Council of Ministers/President/Prime Minister] may decide for a state of emergency in one part or in the whole state territory, which lasts for as long as the danger continues, but not longer than [30/60/90] days.

The extension of the term of the state of emergency may be done only with the consent of [the Assembly], for each [30] days, for a period of time not longer than [90] days.

