

**“To engineer or not to engineer, that is the question.”  
When does Constitutional engineering in divided societies occur?**

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**WORK IN PROGRESS, comments welcome**

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This paper explains why some countries have adopted consociationalism after civil wars, but others have not. This analysis begins with a theoretical outline of pro and contra arguments when it comes to constitutional reform in divided, post-conflict societies. The constitutional provisions in five countries that adopted a major constitutional amendment pursuant to an important peace agreement or ceasefire in the period 2001-2010: Burundi, Comoros, DR Congo, Nepal and Sudan are shortly presented as a next step. All cases show a strong propensity to incorporate most if not all elements of consociationalism and all five Constitutions aim at modifying key state institutions with the final objective to mitigate conflict.

However, most divided countries experiencing constitutional change (or their elites) have not opted for such a “radical” approach. In places like Angola, Chad, Djibouti, Niger, Sri Lanka, and Uganda – all listed in the Minorities at Risk dataset and having experienced widespread violence over the last ten years – governments opted instead for a reinforcement of executive power. Other relevant countries have had peace agreements without major constitutional reforms (like Côte d’Ivoire and Mali). Not only did their governments miss an opportunity for institutionalised conflict management, they arguably even augmented the conflict potential by not engaging in constitutional reform. Why is that so?

The main hypothesis tested is that places where the United Nations or other norm-diffusing external actors played a major role in ending an intra-state war constitutional change was more “radical” or complete than in cases in which such an actor was absent or less prominent. It appears that strong outside mediators or guarantee-powers have followed a blueprint approach to constitutional engineering in post-conflict societies. The reverse side reads: no outside mediation – no peace agreement – no influence in constitution-making – no constitutional engineering to overcome dividing lines in society.

### **Some conceptual reflections**

Constitutional amendments can have diverging motivations and go in different directions, including in post-conflict situations in divided societies (as already pointed out). In the recent past, peace agreements have often been based on or included power-sharing arrangements, not least in Africa. Those power-sharing arrangements have been partly codified in a permanent or interim constitution (for example, in Bosnia, Burundi, Nepal, and Sudan).

Arguably, the central peace-relevant issues in “divided societies” are matters of power-sharing between and representation plus protection of identity groups, as well as the moderation of those groups’ demands. The literature is split on the question of how those issues can be best dealt with. “Consociational democracy” is one - relatively coherent - concept to go about those problems. This concept, associated closely with Dutch political scientist Arend Lijphart, is the usual reference point in the academic discussion. Lijphart (1977: 25 et seq.) emphasizes the following key elements:

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

Although this model is very influential in practice, it has often been criticized in academia. While Lijphart proposes the participation of ethnic minorities or other identity groups on the basis of their identity, the adherents of the “integrative” school of thought believe that precisely this is not conducive to achieving the intended aim (for example, Horowitz 1985; Reilly 2001), as consociational methods, they believe, initially provide more incentives for the radicalisation of group demands than for their moderation. Thus the division of society is deepened and not mitigated. Adherents of consociational democracy in turn argue that the acknowledgment and recognition of contrariness can, in the long term, defuse tensions. As a consequence, there are opposing approaches, ranging from “integration” to “recognition of diversity”, as to how conflicts in divided societies can be best dealt with by institutions of a given state.

The aim of this paper is not to draw once more a line between those schools, but between cases of full and targeted constitutional reform and a group of control cases where constitutional reform was not targeted at conflict mitigation/prevention. There is of course in practice a large grey zone consisting of cases with a selective adoption of conflict-reducing institutions in the constitution (see below), but for matters of clarity I will deal in this paragraph with the mechanics of the presence or absence of a comprehensive constitutional reform intended to reduce conflict between the main opposed sections of a divided society by introducing or modifying core institutions. The suitable term for this is constitutional engineering (Sartori 1994).

#### 1. The case for constitutional engineering in divided societies

Basically two main arguments can be advanced in favour of constitutional engineering in divided societies: the assumed positive long-term and the assumed positive short-term effects of constitutional change “in the right direction”.

- The assumed positive long-term effect of constitutional engineering: Regulating key problems impeding the creation of societal order by incorporating them into constitutions and establishing fundamental rules for their regulation seems an obvious thing to do. This should specifically apply to issues that have proven to have a strong potential for causing conflicts, in particular for the coexistence of identity groups with divergent interests. One of the factors frequently leading to violent domestic conflicts in ethnically divided societies is the perception that access to public goods (education, health, infrastructure, security, etc.) is not balanced, and that civil rights and liberties do not seem to equally apply to everyone. Constitutions can grant fundamental rules for such matters (Brancati 2009).
- The assumed positive short-term effect of constitutional engineering is more process-oriented. The peace-enhancing effect results from the cost-intensity of an engagement in profound constitutional reform with consociational ingredients. Why is this so (at least theoretically)? The “security dilemma” that rebels face during peace negotiations has to be taken into account here: under which conditions can rebels surrender their arms without placing themselves at risk of immediately being violently subdued by the state? Only when the state changes its nature and distributes oversight competences and power-positions (including in the security sector) differently than in the past (Mehler 2011a). A corresponding constitutional amendment is clearly a *costly signal* which goes beyond a “cheap” pact among the elites or a peace agreement (Jarstad/Nilsson

2008) or it could also be framed as a strong indicator for “credible commitment”(Walter 2002).

It is therefore of obvious importance whether elements of consociational democracy *or* integrative elements are codified in the constitution: former conflict parties can only expect recognition of their concerns and of their interest in mere survival if such regulations are included in the constitution (however, only the continuous application of the constitution will create reliability).

## 2. The case against constitutional engineering in divided societies

Again, an assumed long-term and also a short-term effect may be distinguished

- The assumed negative long-term effect of constitutional engineering resides in the implicit or explicit acknowledgement that conflict cannot be entirely overcome, but just regulated. E.g. the acknowledged necessity of ethnic, confessional or regional quota or veto rights on the one hand, but also a strong constitutional emphasis on national integration both keep the souvenir of past wars alive.
- The assumed negative short-term effect of constitutional engineering resides mainly in the production of losers of the reform process who could in turn jeopardise peace. A second short-term negative effect can follow from insufficient implementation, i.e. the distance between constitutional promise and reality, creating again frustration and pretexts for further violence.

Faced with these variable arguments in favour or against constitutional reform in divided societies it is of interest to look at the empirical side: what is happening on the ground? And is that at all related to the aforementioned considerations on expected effects?

### **Recent “extreme” cases of constitutional engineering**

In a recent paper (Mehler 2011a) I have argued that astonishingly few countries have experienced both a major peace agreement and far-reaching constitutional amendments intended to deal with the underlying splits within society. Accordingly, in 2005-2010 only seven deeply divided countries in Africa, Asia, the MENA region and Latin America had both a peace agreement and a major constitutional reform: Burundi, Chad, DRC, Iraq, Nepal, Niger and Sudan.<sup>1</sup>

The rather short time-span (2005-2010) proved somewhat problematic – not only because of the limited number of cases resulting (and as a consequence a high risk to draw flawed conclusions), but also for theoretical reasons: a) arbitrariness of the time span selected and b) the possibility of an in-built error – overlooking relationships between peace processes and constitution-making processes by basing oneself not only on event datasets, but on events that could be more distanced from each other but still related. One could in fact easily argue that

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<sup>1</sup> I had opted for not including Europe, the Pacific, North America and the independent states of the former Soviet Union in my research due to my limited research capacities. The same exclusions have been maintained for this paper. Three cases may be lost by this deliberate decision: Macedonia which had a brief violent ethnic conflict, a peace agreement and subsequently a change in Constitution in 2001 taking into account the interests of national minorities, the Solomon Islands with a peace agreement in 2001 (no new Constitution) and Bougainville/Papua New Guinea with equally a comprehensive peace agreement in 2001 and a new Constitution in 2004.

both constitutional reform processes *and* peace processes can be much more protracted than just a five or six years' period. For the - still limited - purpose of the present paper I could not sort out all problems in a radical way. I have now opted for a ten years period 2001-2010. The selection of this time period may be justified by the new – rather interventionist - context of the post-9/11 international environment. In a first step data are needed for four types of information: a) salient identity-based divisions within society, b) related violent conflict, c) war terminated in a peaceful manner and d) relevance of major constitutional amendments.

Divided societies and related conflict: I started to base my research on the Minorities at Risk (MAR) project at the University of Maryland for the identification of divided societies and minorities therein<sup>2</sup>, but controlling the outcome by checking the Ethnic Power Relations (EPR) database at Harvard.<sup>3</sup> The MAR database is certainly not entirely satisfactory as many divided societies with recent violent conflicts along their - mostly ethnic - dividing lines are not included, e.g. in Africa alone Central African Republic, Congo-Brazzaville, Côte d'Ivoire and Liberia. The more complex dividing lines of Nepal including ethnic minorities, but also castes, did not bring this country on the radar of MAR. The EPR database by contrast is much more inclusive, but this may also be problematic as one could easily over-interpret the ethnic nature of violent conflicts only because they take place in ethnically divided societies. On the other hand, EPR data stops with 2005 (while MAR does not specify timeframes). Dividing lines within a society do not change very quickly, but they are certainly fluid in the medium term. A word of caution is therefore appropriate here. The Ethnic Armed Conflict (EAC) database, equally at Harvard, is even of greater relevance for this study because of its explicit clear association with violent conflict. It identifies 110 ethnic conflicts between 1946 and 2005. The same cautionary remarks apply here.<sup>4</sup> I decided to operationalize “divided societies” by selecting the countries of the four world regions that are listed in either the MAR or the EAC database (or in both).

War termination: I first opted to take the War termination database run by UCDP to identify peace agreements in intra-state conflict (plus the second best option offered in the database: “ceasefire with conflict resolution”) for the years 2001 to 2009. The resulting list proved incomplete and I controlled for EAC countries with an end year 2001-2005 (last year covered). I still had to complement the resulting list with my own data on meaningful peace accords and ceasefires for the years 2001-2010 (see Mehler 2009 for peace accords in Africa from 1999-2007).

The biggest data problem arises for the last variable: constitutions/amendments taking up the management of dividing lines. The most complete dataset on constitutional change is offered by the Comparative Constitutions Project<sup>5</sup>, but the current version of the database runs only until end 2006. For the identification of further new constitutions and important constitutional

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<sup>2</sup> The MAR programme has identified 283 groups with at least 500,000 members (a very arbitrary choice as the size of the polity is not taken into account). Not all groups are evident and well-defined (e.g. „Westerners“ in Cameroon, but no „Northerners“ in Côte d'Ivoire). 29 groups are in the MENA countries, 75 in Africa, 57 in Asia, 33 in Latin America. Neither Nepal nor Côte d'Ivoire are in the database, both can be considered as important gaps. Other cases could be discussed: Yemen, Comoros etc.

<sup>3</sup> Lars-Erik Cederman; Brian Min; Andreas Wimmer, 2009-05-01, "Ethnic Power Relations dataset", <http://hdl.handle.net/1902.1/11796> UNF:5:k4xxXC2ASI204QZ4jqvUrQ== V1.

<sup>4</sup> Lars-Erik Cederman; Brian Min; Andreas Wimmer, "Ethnic Armed Conflict dataset", <http://hdl.handle.net/1902.1/11797> V1. The EAC database codes armed conflicts as ethnic if they are conflicts over ethnonational selfdetermination, the ethnic balance of power in government, ethnoregional autonomy, ethnic and racial discrimination, and language and other cultural rights.

<sup>5</sup> <http://www.comparativeconstitutionsproject.org/data.htm>.

amendments I had to rely on works by colleagues at GIGA<sup>6</sup> and some original research by myself.<sup>7</sup> The definition used for an important constitutional amendment is drawn from Jennifer Widner's definition of a regime-changing amendment (2008: 1521): "A regime-changing amendment includes provisions that affect participation and contestation, such as shifts from authoritarian rule to multiparty systems or vice versa; civil and political liberties; property rights; regional or ethnic autonomy; and significant efforts to reallocate power among the branches of government." I have checked with my own means whether this qualification applies to at least one Constitutional amendment per country falling in the time period 2001-2010.

What are the findings?

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<sup>6</sup> Unpublished databases on constitutional change at GIGA for the period 2005-2010 exist on Latin America and Africa. I want to thank my colleagues who read the relevant country sections of this paper and corrected eventual errors (plus giving more general comments): Matthias Basedau, Sandra Destradi, Sebastian Elischer, Rolf Hofmeier, Claudia Simons, Alexander Stroh, Denis Tull, Andreas Ufen and also Maïke Jakusch for some research on background.

<sup>7</sup> The 2001 Constitutional referendum in Guinea was not recorded by the comparative constitutions project. It removed term limits for presidential reelections.

**Table 1: Important constitutional change/important peace agreements in „divided societies“ (2001-2010 )**

	Africa	Asia	Latin America	MENA region
New constitution / Important Constitutional Amendment	Angola Botswana Burkina Faso Burundi Cameroon Central African Republic Chad Comoros Congo-Brazzaville DR Congo Djibouti Guinea Kenya Madagascar Mauritania Mauritius Mozambique Niger Rwanda Senegal Sierra Leone South Africa Sudan Swaziland Togo Uganda Zimbabwe = 28	Bhutan China , East Timor Indonesia Maldives Myanmar Nepal Pakistan Singapore Sri Lanka Taiwan Thailand Vietnam =15	Bolivia, Brazil, Chile, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Peru, Uruguay Venezuela =15	Afghanistan Algeria Bahrain Egypt Iraq Israel Lebanon Qatar Syria =9
Important Peace Agreement / Ceasefire with conflict resolution	Angola Burundi CAR Chad Comoros Congo-Brazzaville Côte d'Ivoire DRC Djibouti Liberia, Mali Niger Senegal Sudan Uganda = 16 <sup>8</sup>	Indonesia Myanmar Nepal Sri Lanka =4		<sup>9</sup>
Both	Angola, <b>Burundi</b> , CAR, Chad, <b>Comoros</b> , Congo Brazzaville, <b>DR Congo</b> , Djibouti, <b>Sudan</b> , Senegal, Uganda =11	Indonesia, <b>Nepal</b> , Sri Lanka =3	-	

First of all, the extension to a longer time-frame has produced many more cases where both constitutions and peace agreements were crafted in the same time period (14), with sometimes more than one event in each category (peace agreement/ceasefire – new

<sup>8</sup> I had to modify the UCDP coding quite strongly as peace agreements or ceasefires in intra-state wars in Burundi 2002, 2003, 2009, CAR 2008, 2009, Chad 2002, 2005, 2006, 2007, Comoros 2001, DRC 2003, Mali 2009 and Niger 2009 were not included in the database. Uganda may be a limit case: I have coded the 2006 ceasefire between government and LRA rebels as important enough to be included, this may be debatable. I have followed the advice of my colleague Sandra Destradi to term a whole number of ceasefire agreements in India's local conflict during the observation period as not important.

<sup>9</sup> In my earlier paper (Mehler 2011) I had included Iraq because a ceasefire agreement with the Al-Mahdi army was enacted in 2007/2008, but this looks in retrospect of marginal importance (ended in March 2008 by a government army offensive). The other interesting case in the MENA region is Lebanon, but the decisive constitutional move towards “confessionalism” is much older and was not touched by later peace and war processes.

constitution/amendment). However, on closer inspection, only a minority of all listed important constitutional changes recorded went into directions aiming at targeting directly identity-based cleavages.<sup>10</sup>

**Table 2: Aims of important constitutional change in countries with relevant peace agreements (2001-2010)**

Major constitutional reform aim	Countries/years with both peace agreements and constitutional reform	Main content
Fostering executive powers	Angola 2010 Chad 2005 Comoros 2009 Congo Brazzaville 2002 Djibouti 2010 Niger 2009 Sri Lanka 2010	Removing term limitations Removing term limitations Extending presidential prerogatives Extending presidential prerogatives Removing term limitations Removing term limitations Removing term limitations
Fostering peace process	<b>Comoros 2001</b> <b>Burundi 2005</b> <b>DR Congo</b> <b>Nepal 2005</b> <b>Sudan 2005</b>	Entire institutional overhaul Entire institutional overhaul Entire institutional overhaul Entire institutional overhaul Federalism, enabling secession
Other	CAR 2004 Indonesia (1999-2002) Niger 2010 Senegal 2001 Sri Lanka Uganda 2005	Reintroduction after suspension Various/strengthening democracy Reintroduction after suspension Strengthening democracy Introduction several commissions Introduction multiparty system

In fact, both the former President of **Niger** in 2009 and the still reigning President of **Chad** in 2005 initiated constitutional referenda to strengthen their position and get rid of a two-term mandate limitation. When a new Constitution was set in place after the coup ousting Niger's President Tandja in 2010, it again was not a response to real tensions in the North even after the substantial ceasefire agreement in October 2009 between several Tuareg rebel factions and the government.<sup>11</sup> So both constitutional moves had no relation at all with the rebellions in both countries.

Same goes for the crafting of a new Constitution in **Senegal** in 2001 that did not respond to on-going negotiations with the split separatist movement in Casamance province.<sup>12</sup>

<sup>10</sup> I have excluded the case of Côte d'Ivoire despite its special interest: The temporary suspension of the Constitution's Art. 35 regulating eligibility of presidential candidates in Côte d'Ivoire was a direct outcome of negotiations resulting in the Pretoria agreements in 2005. This enabled the previously excluded candidate Alassane Ouattara to stand in the (postponed) 2010 elections and can be considered a major element of the peace process. However, in this case one has to argue that the Constitution itself was not amended. The rare absence of noticeable effects of massive international pressure on constitutional reform (see below) still needs better explanation. The extraordinary resistance of Laurent Gbagbo to international pressure may have contributed to his military removal and the installation of Ouattara in 2011 – which has not translated into major constitutional reforms by now!

<sup>11</sup> The text was very similar to the old Constitution in place before 2009.

<sup>12</sup> Introducing inter alia a two-term limit. This was differently interpreted during weeks of turmoil before the Senegalese presidential election on 26 February 2012 when President Wade stood for a third time as candidate (he was elected a first time shortly before the introduction of the 2001 Constitution).

The new Constitution in **CAR** (2004), adopted by referendum, was not much different from the text suspended by victorious rebel leader and President Bozizé in 2003: The presidential term was reduced from six to five years and the Prime Minister could be held responsible by the National Assembly – not a single provision dealt with structural problems between the capital Bangui and the neglected provinces that could be related to all episodes of violence since 1996. Later peace agreements in 2008/2009 with Bozizé's armed opposition had no implications for the Constitutional reform process (and vice versa).

The 2010 Constitution for **Angola** also translated into a strengthening of the President's position (abolishing the post of Prime Minister) and excluded independent candidates from the presidential race.<sup>13</sup> The text was approved in Parliament in late January (the major opposition party UNITA boycotted the vote) only two weeks after a highly mediated attack by FLEC rebels against the convoy of Togo's football team preparing for an African Cup of Nations match. The new Constitution did not address any of the grievances behind this on-going rebellion in the province of Cabinda or of the large and neglected hinterland that was the basis of the UNITA rebellion that had ceased in 2002 with a peace accord (but more importantly with the death of rebel leader Jonas Savimbi).

In **Congo-Brazzaville**, a new Constitution was introduced after a referendum held in January 2003. It granted the president new powers and extended his term in office to seven years. The introduction of a new bicameral assembly was not interpreted as an answer to the obvious tensions between ethnic groups and regions that were played out in the previous episodes of civil war and ongoing turmoil in the Pool region. In fact, only a few months after the referendum, the armed Nsilulu movement (that had signed a ceasefire in 2002; and already before in 1999) was launching new attacks.

While the amendments of **Uganda's** Constitution in 2005 was a major hallmark in the country's history (return to multiparty politics), it was not sensitive to the on-going LRA rebellion in the north (and beyond national borders). Somewhat unexpected peace negotiations with the rebels in 2006 were clearly not related to the constitutional reform process. President Museveni also managed to remove a two-term limit with the new Constitution, which led to a heated public debate.

**Djibouti** is a badly documented case. The 2001 peace agreement between the government and the FRUD rebellion was not officially publicised. It however contained a decentralisation law as an annex, providing for administrative and political devolution. It is difficult to judge about the value of those provisions. A moderate wing of the FRUD rebellion entered the coalition supporting President Guelleh as a junior partner<sup>14</sup>. It half-heartedly advocated the holding of a referendum on the 2010 Constitutional amendment removing the two-term limit of the President, but failed to get heard - the amendment was adopted in Parliament without one dissenting voice. Peace process and constitutional reform process look therefore entirely disconnected.

**Sri Lanka's** constitution was amended twice in the relevant time-span (2001 and 2010). The 3 October 2001 changes made provisions for the Constitutional Council and a number of Independent Commissions, arguably limiting presidential power. However, this can only be vaguely related to the peace process having its high time in 2001/2002 (and was rather seen as

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<sup>13</sup> Angola has now a parliamentary system of government with the President elected by Parliament. In the (undemocratic) Angolan context this means that the President can be reelected without limitations by a MPLA majority that can be taken for granted.

<sup>14</sup> While some elements of a hardline faction continued to stage sporadic attacks.

strengthening democracy). The 1 September 2010 amendment has removed the limitation on a re-election of the executive President. It came after the crushing military defeat of the “Tamil Tigers” in 2009. One may argue that the second constitutional change therefore follows this peculiar war termination process: outright victory by one conflict party.

The Constitution of **Indonesia** was amended in several waves from 1999 onwards, mostly to install a truly democratic regime. In that same year a process of decentralization has begun, made possible by the new constitution. From 2001 onwards, the new decentralization laws were implemented. Moreover, the provinces of Papua and Aceh were granted special autonomy rights. However, the conclusion of the crucial Memorandum of Understanding in 2005 ending the GAM revolt in Aceh can be seen only in loose connection with the constitutional process: two laws in 2004 had specified the role of lower administrative units somewhat, but it is common knowledge that the 2004 Tsunami was the crucial event that prepared for peace in the province.

I have not included the prominent cases of externally mediated elite pacts that ended post-electoral violence in Kenya, Madagascar and Zimbabwe. Those are not considered civil wars and do not end up in the relevant datasets. Let me just note that for the constitutional reform processes in all three countries those crises and their resolution had crucial importance.

This leaves us with only five cases where the peace and the constitution-making process were indeed closely related (Burundi, Comoros, DRC, Nepal, Sudan) over the selected time period. It is of interest that all cases have not simply witnessed important Constitutional amendments but that interim or permanent Constitutions saw the daylight.

### Burundi

Burundi is often presented as the most complex and complete case of power-sharing in Africa. Colonial past and the choice of an influential mediator are frequently invoked to explain this status: In fact, both Belgium and South Africa have important experiences with consociational democracy. A third convincing argument advanced by Vandeginste (2009) is the trial and error approach in finding lasting solutions to a recurrent and extremely violent conflict pattern with about 300,000 dead between 1993 and 2005 (and maybe 500,000 since independence in 1962). Not all details of the current power-sharing provisions can be described here. The final regulation is not transitional. Assuming that the cleavages in society and in particular the everyday Hutu-Tutsi divide are a given, the main provisions are fixed within the country's permanent Constitution. This should have major effects on actor behaviour.<sup>15</sup> A Constitutional Referendum was in fact held in 2005 and the resulting Constitution is regulating access to power positions. The two vice-presidents are from distinct ethnic background (and party affiliation), they represent the dominant ethnic group within their party (Art. 124). Parliament would consist of 60% Hutu and 40% Tutsi (Art. 164). Laws have to be voted by a two-thirds majority (i.e. necessitating Tutsi consent = veto)(Art. 175), same goes for senate decisions (Art. 186). In Senate a Hutu and a Tutsi would represent each of the 17 provinces (Art. 180). All parties obtaining more than 5% of the votes would hold ministerial positions in government (if they wish to) which would have a fixed 60:40 Hutu / Tutsi composition (Art. 129 = minority overrepresentation). Similar provisions were fixed for all other public positions (Art. 143). Legislative elections are by proportional representation on

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<sup>15</sup> I am not analysing Post-Constitution actor behaviour in this paper. Expectations to usher in an era of both democracy and peace were certainly not met in the Burundian case as first election results have motivated main opposition parties to abandon the multi-level electoral process; a limited upsurge in violence has been recorded since mid-2010. But the Hutu-Tutsi juxtaposition has lost most of its relevance, being replaced by the polarisation between one multi-ethnic dominant party and all other players.

provincial level, party lists can consist to 67% maximum of one ethnic group (Art. 168). An article of the Constitution that can be altered by the senate provisionally fixes ethnic quota for the security forces 50:50 (Art. 257). Burundi's power-sharing agreement contains some provisions on administrative devolution as it reinforces the provincial level by the introduction of governors originating from the provinces they administer, but the patterns of settlement and the small size of the country does not permit to fully play out the familiar idea of guaranteeing group autonomy by creating largely autonomous provinces or federal states (see also Sullivan 2005:80; and Stroh 2010 on Rwanda).

### Comoros

The Comoros have experienced repeated political turmoil since independence in 1975 with a total of 22 attempted or successful coups d'Etat. In 1997 the two smaller islands Anjouan (Ndzuwani) and Mohéli (Mwali) declared independence and asked for "reattachment" to France. Political life and public goods delivery were in fact concentrated in Grand Comore (N'Gazidja). The central government did not accept the declarations of independence. Different factions within the separatist camp fought each other in 1998 on the island of Anjouan resulting in about 1,000 deaths. The OAU, alarmed by the spectrum of a return to colonial rule for one of its members, started immediately with peace negotiations. A compromise accepted by the separatists of Mohéli was found in 1999, but the refusal by those of Anjouan resulted in days of violent riots in the capital Moroni. The OAU prepared for military intervention on Anjouan, and separatists now gave in. As a direct result of new peace talks culminating in the Fomboni General Agreement the 2001 constitution was drafted and approved by referendum. The overwhelming support (95% of the votes) in secessionist Anjouan was interpreted as the end of years of turmoil. The text provided for strong political and territorial power-sharing devices and symbolically changed the name of the country in Union of the Comoros. Large political (Art. 7) and financial autonomy (Art. 11) were granted to the islands. The Union President originating – by rotation - from one island is surrounded by three Vice-Presidents representing the islands. The Constitution contains a theoretical veto right for the vice-presidents in Art. 15, but the areas in which this is possible would have to be defined by law. The Union Parliament is composed of 18 MPs directly elected (single member constituencies, absolute majority) and 15 MPs (5 per island) indirectly elected by the three island assemblies (Art. 20). The Constitutional Court is composed of members nominated by the Union President, the Vice-Presidents, the President of the Union Assembly and the Island Presidents (one each) (Art. 32.). The entire text is short (40 articles) and contains many loopholes. New tensions arose when the president of Anjouan/Ndzuwani, Mohamed Bacar refused to leave office in 2007 and succeeded to forcefully expel Union security forces less well trained than his own troops. A joint Comorian–AU military (though bloodless) intervention finally ended Bacar's career by force in 2008 (he escaped to the fourth island in the archipelago, the French overseas department Mayotte/Maoré). The 2001 Constitution was strongly criticized for the costs involved: the running of four parliaments and executives with associated elections were deemed too expensive and a luxury for the poor country. A constitutional referendum in 2009 brought amendments that concentrated power again in the Union government led by President Ahmed Abdallah Sambi: island presidents were to become simple governors, former island ministers commissioners and former island members of parliament simple councilors. The president's prerogatives (inter alia the right to dissolve the Parliament) were extended. This meant that some of the previous constitutional changes enacted as part of a power-sharing deal were partly removed. However, some core elements of autonomy remain: each island elects an executive and an assembly. And the Union presidency rotates: Mohéli/Mwali in fact supplied the third president under the Fomboni agreement in 2011, thus completing the cycle of the three islands – all now have had one of its inhabitants as President. It looks as if the 2001 Constitution despite its imperfection

has lowered the tensions between the islands, while tensions between newly established political camps with adherents on each island have rather augmented.

## DRC

DRC has experienced both foreign invasions and a large-scale civil war before the peace process started in earnest in 1999. The main epicenter of those was the Eastern part of the country bordering Uganda, Rwanda and Burundi. Citizenship issues, state weakness, a competition over precious resources and the security concerns of Congo's eastern neighbors are generally given as conflict causes. The transitional government agreed upon in 2002 and established in 2003 functioned on a somewhat, but not all inclusive executive power-sharing formula associating four vice-Presidents from three armed and one unarmed opposition movements with President Joseph Kabila. Cabinet positions included representatives of further armed movements and civil society. DRC's Constitution was first adopted by Parliament and then by a popular referendum at the end of 2005 (and promulgated in February 2006). The introduction to the text clearly establishes the link between the peace process (and more particularly the "dialogue intercongolais") and the Constitution. As a symbol of the power-sharing spirit the constitution included a semi-presidential system with a president and a prime minister, but the President retained a strong position having the power to appoint the Prime Minister, to dissolve the parliament and to rule by decree (Art. 69-89). Importantly, no regulations to continue a grand coalition government (for the period following the transition phase) were maintained. More importantly, devices for group autonomy are contained within the text: "The draft constitution stopped short of creating a federal system, but foresaw substantial autonomy for the country's envisioned 26 provinces" (Tull 2006).<sup>16</sup> Members of the Senate are elected indirectly by the regional assemblies; senators represent their provinces of origin, but have a "national mandate" (Art. 104). A bit vague are the constitutional dispositions with regard to ethno-regional representation in national and provincial governments (Art. 90, 198). Regulations of crucial citizenship questions are somewhat ambiguous within the Constitution (Art.10). The ensuing citizenship law, which was hotly debated and a core concern for the Rwandophone communities in the East (i.e. the hottest zone of conflict), contained similar provision, i.e. providing citizenship to all those ethnic groups who lived in the country at the time of independence in 1960. A new constitutional court and two other higher Courts were established within the Constitution (Art. 149). The electoral law, equally adopted in 2005, specified the rules of proportional representation in parliamentary elections. One may argue that those central laws form a package with the Constitution.<sup>17</sup> Some regulations for the notoriously malfunctioning security sector (police, army) are contained within the Constitution. Political parties do not have to fulfil any criteria of ethnic or other representation.<sup>18</sup>

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<sup>16</sup> In the introduction to the constitution the following formulation can be found : « le constituant a structuré administrativement l'Etat congolais en 25 provinces plus la ville de Kinshasa dotées de la personnalité juridique et exerçant des compétences de proximité énumérées dans la présente Constitution. En sus de ces compétences, les provinces en exercent d'autres concurremment avec le pouvoir central et se partagent les recettes nationales avec ce dernier respectivement à raison de 40 et de 60 %. » See also Articles 2, 3, 204. Government on the national and provincial level should be representative (Art. 90, 198). Equitable representation of all provinces is also foreseen for both police and army commanders (Art. 186, 189).

<sup>17</sup> This is one reason I opted to point both to proportional representation in table 3 and electoral reform in table 4 (both below). The other reason is the aforementioned constitutional regulation for the election of Senators.

<sup>18</sup> In January 2011 (slightly outside the observation period), the National Assembly revised the Constitution in important ways: *Inter alia*, presidential elections were reduced to one round of voting, the president was given the ability to dissolve provincial assemblies and to remove governors.

## Nepal

Nepal offers a complex conflict picture with main divisions being ethnic (some minorities versus dominant Nepalese), social (among castes) and political (Maoists versus other parties versus the monarchy) The Nepalese peace process and the process of constitution-writing were both complicated and protracted. Both are not fully terminated. The formal peace agreement between Maoist rebels and civilian parties in November 2006 was only thinkable in parallel with the elaboration of an interim Constitution (2007) which would a) stop describing Nepal as a hinduist monarchy, and b) grant more participatory rights, not least to ethnic minorities. Most important elements are: consensus government out of all „seven parties“ under the aegis of a prime minister selected by political consensus (Art. 38-40), participation of educationally, socially or economically backward groups “in state structures on the basis of principles of proportional inclusion” (Art. 21), political parties have to ensure the proportional representation of women, Dalits (untouchables, lowest caste, ca. 13% of the population, AM), oppressed communities/indigenous groups, backward regions, Madhesis and other groups) in the party lists for the elections to the Constituent Assembly (Art. 63, 4). The newly created Supreme Court has the extraordinary power to issue necessary and appropriate orders to enforce minority rights or settle disputes (Art. 107). Provisions have to be made to establish local self-government bodies (Art. 139). The interim Constitution goes a step further: “To bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating the centralized and unitary form of the state, the state shall be made inclusive and restructured into a progressive, democratic federal system” (without specification of how this should be handled; Art. 138). Political parties cannot be registered if their purposes or their symbols would be likely to disturb the religious or communal harmony or might divide the country; parties have to accept the membership of discriminated groups (Art. 143). The new Nepal Army should be “inclusive” by its character (Art. 144).

The elaboration of a permanent republican Constitution was left to a Constituent Assembly whose mandate has been prolonged from Mai 2010 several times (currently until May 2012).

## Sudan

Sudan has experienced decades of war between Southern separatists and the national government in Khartoum. Territorial questions, sometimes with religious overtones, were at the heart of the conflict before competition over resources (mainly oil) became a further important conflict factor. Sudan’s „comprehensive peace agreement“ (CPA)(2005) was the culmination of a long peace process. Individual protocols negotiated between the government and the SPLA/SPLM were compiled in the CPA and the interim constitution was part of that move as well. The Interim Constitution contained practically all elements of consociational democracy: a far-reaching autonomy for Southern Sudan with a high degree of decentralisation (Art. 25/26), recognition of cultural autonomy of minorities (Art. 47), consensus needed between president and the two vice-presidents (Art. 51, 2), the first vice-president coming from Southern Sudan (Art. 62, 1) Grand Coalition at the national level (Art. 80) and even „wealth sharing“ (Art. 185), including the critical revenues from oil sales (Art. 190-192). Exempt from reform is the security sector: The two armies remain separate (Art. 144), but joint units are formed (Art. 145). The President of Southern Sudan was entitled to appoint the President and Justices of Southern Sudan Supreme Court, Judges of Courts of Appeal and other courts within one week after the proclamation of the interim Constitution (Art. 132) – nothing that should fundamentally touch on division within the society.

Sudan’s Interim Constitution regulated the transitional phase until the independence referendum in January 2011 and actually thereafter independence of Southern Sudan. Its

validity has run out in July 2011. At least one could say that it has helped to end a full-fledged war between the Central government and the Southern rebellion while it did little to avoid confrontations within both South and North.<sup>19</sup>

It is indeed difficult to compare the peace-enhancing or conflict-mitigating effects of the reported constitutional elements in those five cases without having deeper insights in their application. What could be done without going into such details is to compare the ingredients a) in relation to the main building blocks of constitutional reform according to Lijphart and b) more bluntly with the main areas of institutional reform put forward in our (Basedau/Kurtenbach/Mehler) application on the “institutions for sustainable peace” network project.

**Table 3: Elements of consociational democracy in recent new Constitutions in divided societies (2001-2010)**

	Grand coalition	Mutual veto	Proportionality	Group autonomy
Burundi	Yes	Yes	Yes <sup>20</sup>	n.a.
Comoros	Yes	No	Yes <sup>21</sup>	Yes
DRC	No	No	Yes <sup>22</sup>	Yes
Nepal	Yes	Yes	Yes	Yes
Sudan	Yes	Yes	Yes	Yes

This overview shows that in two out of the five cases (Nepal, Sudan) the entire set of institutional prerequisites claimed to be essential by Lijphart were addressed within recent Constitutional reform – and not in the two others. However, one has to note the interim nature of the Nepalese Constitution with many provisions not yet implemented (including the federal system). This presentation is of course far too simplified to get an impression as to the emphasis given to the four individual elements. Nepal and Sudan look more complete than Burundi - but this is linked to the small size and settlement patters of Burundi not lending it to a territorial solution of the group autonomy idea. DRC’s Constitution is tacit on an eventual need for a grand coalition. One may want to note that veto rights are rarely established explicitly (and maybe they are more suitable for interim Constitutions than permanent ones).

A different way of looking at those major experiences in constitutional engineering is to get an overview about main areas of reform 1) (territorial) state structure (federalism versus unitary state, and other forms of administrative devolution), 2) electoral system, 3) party regulation, 4) government system, 5) judiciary (legal pluralism versus uniformity) and 6) security sector. Such a view is ideologically more open: There is in fact a large range of options with regard to potential reforms in each aspect. The spectrum has more or less systematically an “integration” and a “co-existence” pole (or centripetal/centrifugal

<sup>19</sup> South Sudan authorities have accused the Northern government of interference after the referendum and the situation is not entirely free from violence.

<sup>20</sup> Actually: overrepresentation of Tutsi to guarantee minority rights. Sullivan (2005) has argued that the post-1993 power-sharing formula contained a de facto minority veto for the Tutsi minority with the composition of the heavily Tutsi-dominated security forces.

<sup>21</sup> No proportional representation during elections, but composition of Union Parliament and executive with a strong representation principle for the three islands.

<sup>22</sup> See footnote 18 above.

tendencies). 1) Territorial state structure (unitary vs. federal/decentralized states); 2) Electoral systems (plurality systems vs. proportional systems/special designs); 3) Party regulation (e.g. ethnic party bans vs. no restrictions); 4) System of government (majoritarian vs. more power-sharing institutions); 5) The ability of a state’s security sector (military and police) to provide for a minimum of public security is equally essential. Options include the construction of new or reformed (e.g. integrated) forces or the reconstruction of a pre-war monopoly on the use of violence 6) Last but not least, a functioning judiciary and the rule of law are preconditions for civil conflict resolution. Institutional choices in divided societies are either the acceptance of legal pluralism (customary law) or unitary jurisdiction. Remarkably, the effects of almost all these institutions are theoretically ambivalent (Basedau 2011). But a conscious, targeted constitutional change in one or the other direction is already an effort of “constitutional engineering” – no matter of its effects.

**Table 4: Reform of “Institutions for sustainable peace” in recent new Constitutions in divided societies (2005-2010)**

	Territorial state structure	Electoral system	Party regulation	Government system	Judiciary	Security sector
Burundi	Yes	Yes	Yes	Yes	Yes	Yes
Comoros	Yes	Yes	No	Yes	Yes	No <sup>23</sup>
DRC	Yes	Yes	No	Yes	Yes	Yes
Nepal	Yes	Yes	Yes	Yes	Yes	Yes
Sudan	Yes	Yes	No	Yes	No	Yes

This overview – again a rough one – associates Burundi and Nepal as cases with the most complete set of changes as part of the constitutional reform process. The 2001 Constitution for the Comoros in this view is the least radical one, it does not contain regulations for political parties and the security sector; overall the document is not well elaborated. Again, this table is not meant to suggest anything on the appropriateness of the choices and is not detailing the content of reform, but could be indicative of what is addressed and how complete the institutional engineering via Constitutions is. But one of the most interesting questions is how we can explain that those radical reforms were initiated at all when in other cases this was consciously avoided.

**Constitutional engineering under external pressure?**

One hypothesis – and the one tested here - is that “radical” or “inclusive” constitutional reform is linked to the massive involvement of outside actors in the peace process... and subsequently in the constitution-making process. We might want to differentiate between different forms of intervention and take deliberately a larger time frame (i.e. 1995-2010) to take into account some long-term effects. Mediation is usually seen as important in reducing information barriers between combatants, leveraging conflict costs and promising help in implementing an agreement - having therefore positive effects on peace. Mediation may also be helpful in redefining the original conflict issue. Sanctions change the opportunity costs of conflict parties to engage in peace processes; and peacekeepers are usually portrayed as third-

<sup>23</sup> The necessity to have a decent security sector reform after an incomplete demobilisation attempt in 2007/8, the assassination of a top military leader in 2010 and a further failed coup attempt in 2011 is evident.

party guarantors of the peace process. Both later elements may be called coercive instruments. Those elements are not all the time employed at the same time which necessitates their distinction, though they may be closely related. What is less well researched is the role those elements may play in constitutional reform processes that can be a specific part of long-term peace arrangement.

The practical problem encountered for such an exercise is the absence of comprehensive lists of third-party involvement in peace processes over the entire time period. Information contained in tables 5 and 6 are therefore based on individual research, in the case of African countries via the *Africa Yearbook* and its German predecessor *Afrika Jahrbuch*.<sup>24</sup>

**Table 5: International involvement in the peace process 1995-2010 countries with a close link between peace processes and constitutional development**

Country	Mediation	Peacekeeping missions / military intervention	Sanctions
Burundi	Yes: OAU/AU, UN, Sant' Egidio	Yes: South Africa, OAU/AU, UN	Yes: OAU trade embargo
Comoros	Yes: OAU/AU, OIF, UN	YES: AU (in Anjouan)	Yes: OAU/AU targeted sanctions (against Anjouan's separatist leaders)
DRC	Yes: OAU/AU, SADC, UN	Yes: UN, EU	YES: USA, EU, UN arms embargo, travel restrictions for militia leaders, assets freeze
Nepal	Yes: India	No <sup>25</sup>	Yes: India arms embargo (against the king, staging a coup in 2005)
Sudan	Yes: IGAD, UN, AU	Yes: UN, AU	Yes: UN, EU, US, other individual countries (first against Janjaweed militia, then government)

*Sources: various, compilation by the author*

This is a picture of intense international involvement in all cases of strong links between peace processes and targeted constitutional reform. The efficiency of sanctions is frequently debated. In both cases of Burundi and Comoros the imposed sanctions were at the same time controversial and apparently efficient (in the short run). Burundi's two-times coup-maker Pierre Buyoya had to face economic sanctions imposed by the OAU in 1996 (and frequently criticized by UN organs and Western governments, see Francis/Kwasi Tiekou 2011). Arguably, this pushed his government to agree to negotiations starting in Abuja. Sanctions against the

<sup>24</sup> Bellamy/Williams 2005 is helpful for peacekeeping operations outside the UN framework (until 2005), UN peacekeeping is well documented in relevant UN webpages. Brzoska 2005 is equally helpful for sanction regimes in Africa until this date; and Basedau et al. 2010 for sanctions (against authoritarian regimes) in place in 2010 (by US, UN, EU).

<sup>25</sup> The UNMIN mission to supervise the DDR process consisted of a small unit of retired and unarmed military personnel.

separatists on Anjouan island are believed to have been equally beneficial for the negotiations in Fomboni 2000/2001.

Peacekeeping had certainly a somewhat stabilising effect in the four cases that had one, again: at least in the short term. Most famous for a positive evaluation of peacekeeping effects are Doyle/Sambanis (2007).<sup>26</sup> However, even large missions like MONUC in the DR Congo gained a dubious reputation on the ground – raising doubts on long-term effects - and one wonders what the direct impact of the presence of peacekeepers means for Constitution-making. The link is supposed to be indirect: Peacekeeping missions could be guarantors that both the peace and the constitutional reform process would not be spoiled by reform-hostile groups. But why should peacekeepers be particularly motivated to influence a constitutional reform process and its implementation? The military involvement of AU troops in the Comoros deserve some special attention. As Massey and Baker (2009) argue it is of interest to analyse why particularly Tanzania, Sudan and Senegal were ready to deploy troops (along with Libya) in 2007. All three states had a secessionist problem in parts of their territory (Tanzania: Zanzibar, Sudan: South, Darfur, Blue Nile, Senegal: Casamance). However, Senegal never gave in to admit some form of autonomy to the Casamance region. This means that Tanzania and Sudan may have had not only an interest to contain secessionist movements elsewhere for domestic reasons<sup>27</sup>, but had also some political formula for conflict resolution to offer (and Senegal had only the first motivation).

Mediation efforts can take rather different forms and can be more or less intense and/or intrusive. One may argue that in the cases of Burundi, Comoros and DRC mediation efforts were both: intense and intrusive, in Sudan they were intense, but could probably not force anything without a change of calculations by the government in Khartoum. In Nepal mediation was apparently very discrete with the UN playing some role (but more after than before the 2006 peace deal) and India providing space for talks.

Other forms of outside involvement can of course also be effective, including political dialogue or conditional development aid. The EU is on record in DRC for having exercised (with success) pressure to submit a draft Constitution with less executive powers for the President of the Republic to National Assembly for approval (Tull 2006).

What we have seen in the five cases of massive constitutional reform is equally a massive international involvement in the peace process, not least by UN organisations. Now let us move to a control group of cases of divided societies experiencing recently war and a peace process, but constitutional amendments that had a different logic, i.e. Angola, CAR, Chad, Congo Brazzaville, Djibouti, Indonesia, Senegal, Sri Lanka and Uganda.

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<sup>26</sup> Failures of UN operations are rather briefly analysed (in comparison to the fully documented successes) in Doyle and Sambanis (2007). The factors of failure identified in Cyprus and Rwanda are given as the wrong design of the mission and management errors. The authors do not consider analysing local perceptions of mission success.

<sup>27</sup> Whether this speculation can be substantiated remains doubtful at least for the case of Tanzania. President Kikwete may have had a stronger motivation by acting as AU President (information by Rolf Hofmeier).

**Table 6: International involvement in the peace process 1995-2010 – countries without a close link between peace processes and constitutional development**

Country	Mediation	Peacekeeping missions	Sanctions
Angola	No	Yes: UN	Yes: EU, UN (against UNITA)
CAR	Yes: France, Presidents of Mali, Gabon	Yes: EU, UN, CEMAC, CEEAC	Yes: AU suspension
Chad	Yes: Libya	Yes: EU, UN	No
Congo Brazzaville	No	No	No
Djibouti	No	No	No
Indonesia	No	No	No
Senegal	No	No	No
Sri Lanka	Yes: Norway (2001) <sup>28</sup>	No <sup>29</sup>	Yes: Canada, EU (against LTTE), US
Uganda	No	No	YES: USA (against LRA)

*Sources: various, compilation by the author*

With the exception of Central African Republic (CAR) and to a lesser degree Angola and Sri Lanka one might draw the conclusion that a weak international involvement in the peace process translates into a weak disposition to constitutional engineering. Sanctions against rebel organisations only (like in Angola and Uganda) are not likely to have any effects on constitutional reform.

The case of CAR may be seen as an outlier and needs explanation. Indeed, one might suspect little resistance by the government of one of the weakest states on earth against outside interference. The full set of sanctions, deployed peacekeepers and outside involvement in peace negotiations applies: But the intensity was mostly low: Sanctions: The AU had suspended the membership of CAR with the unlawful and military change of government in 2003, but readmitted the country when a slightly reformed Constitution was put in place. AU's President Alpha Oumar Konaré had advised coup-leader Bozizé not to stand for elections in 2005. The head of state thereafter accused Konaré openly of interference - and when Bozizé was finally elected there was no particular reaction by the AU. Peacekeepers: The number of peacekeeping missions deployed (already starting in 1997) is impressive, but the number of troops was less so: mostly below a 1,000 troops altogether. Same goes for efficiency: The CEMAC peacekeepers were not able to protect the Patassé regime in 2002/2003 and ultimately did not stop Bozizé's final assault on Bangui. And the later EUFOR Chad/CAR and MINURCAT missions clearly focussed much more on Chad than CAR (about 80% of the troops were deployed to the neighbouring country). Mediation: A first political dialogue with about 350 members was held in September 2003 in the presence of two African presidents (Omar Bongo/Denis Sassou Nguesso), but Bozizé did not feel forced to translate the detailed recommendations for close to all areas of public life into a new policy, let alone constitutional change. A second "inclusive" political dialogue process was strongly suggested by the mediator Omar Bongo (Gabon). From 8-20 December 2008 it culminated in an important gathering of about 200 elite members in Bangui under the chairmanship of former Burundian president Pierre Buyoya. In its aftermath, Bozizé simply formed a somewhat extended government, but did not start palpable institutional reforms (Mehler 2011b). The credibility of the aforementioned mediators may also be doubted: Bongo and Sassou Nguesso

<sup>28</sup> But mediation failed in the later stages of the war preceding military victory by the government.

<sup>29</sup> The earlier Indian Peacekeeping mission 1987-1990 was a spectacular failure and suffered many casualties.

rule(d) in an authoritarian way, Buyoya is a two-time coup leader who himself only grudgingly accepted to engage in a peace process that ultimately saw his departure from power. The CAR example suggests that not outside intervention per se, but only a massive and credible intervention can be decisive.

The synoptic comparison between divided societies that experienced profound constitutional amendments and others that did not shows that strong international involvement in the peace process has – as a rule - occurred frequently and effectively in the former cases and only rarely or with limited effects in the later. This could be just a correlation, a coincidence, but there are strong indicators that this is of a causal nature. In fact, in some cases we could trace the efforts of international mediators to “suggest” particular institutional solutions, while it is not always easy to open the black box of negotiation processes. It looks more difficult to establish a link between threats (i.e. losing the crucial support of peacekeepers to maintain peace or enforcement options by the same peacekeepers against an incumbent regime) and sanctions on the one hand and a readiness to subscribe to *specific* institutional solutions. It seems obvious that the external influences impact more strongly on the sitting regimes and less on their opponents (though sanctions against rebels were taken in Angola, Uganda and the Comoros). A different discussion may be started by putting those findings in the context of the mediation failure literature that posits that effects of mediation are in the long-term less effective and sometimes harmful as they face time inconsistency problems (Beardsley 2008)

## Conclusion

The findings based on an exploitation of rather raw information on both constitutional reform and peace processes in divided societies suggest the following points:

- a) Even a superficial look reveals that by no means all peace processes that (provisionally) ended ethnic-regional conflicts or other violent conflicts caused by issues of identity entail constitutional amendments. And only in about one quarter of all cases can constitutional change be equated with constitutional engineering targeted to regulate or transform violent conflict.
- b) This observation also applies to cases where a particularly high degree of escalation had been reached. Burundi’s 2005 constitution is a clear and differentiated reflection of how constitutional engineering attempts to achieve a transformation of a protracted and highly violent ethnic conflict - peace agreements and constitution-making were closely interlinked. In contrast, Liberia’s 2003 peace agreement after an equally violent and protracted conflict had no immediate effects on the constitutional process.<sup>30</sup> I.e. “necessity” is not engendering constitutional engineering.
- c) Even more notable is the observation that when constitutional amendments took place in highly divided societies also witnessing peace agreements, they frequently did not target a potential mitigation of conflict causes, but were differently motivated – not least by bolstering the power position of the executive.
- d) But what about discussions on the utility: short-term and long-term risks as well as expected positive outcomes of Constitutional reform? It is beyond the scope of this paper to trace the domestic debates about different reform options. A first impression, mostly inspired by the cases of Sudan and Burundi, is however, that those options are only discussed behind closed doors by a small group of constitutionalists, mediators and key stakeholders. Some of the potential negative effects of constitutional engineering have in fact materialised, including in those two cases: the Hutu-Tutsi divide looks contained in Burundi, but political violence has not disappeared. Sudan’s

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<sup>30</sup> A technically problematic Constitutional referendum was however held in Liberia in 2011, slightly outside our observation period.

interim Constitution proved more or less feasible – as long as it lasted. South Sudan has become independent in 2011 in a more or less peaceful process, but violent conflict now flares in the border zones of the new (and weak) state. Both problematic outcomes in the longer run can be related to the content of prior constitutional engineering (though the reverse conclusion - more peacefulness without constitutional reform – cannot be claimed).

- e) It is still fair to assume that institutional conflict-reduction will be most durable if it is protected by a constitution. But it is less safe to think that a combined and radical reform process enshrined in a new constitution is the best way to establish peace. This is a clear warning that to advocate the maximum of institutional reforms in all potential areas may not be positive for peace.
- f) Radical constitutional engineering looks most of the time inspired, supported or postulated by strong international intervention. Norm-diffusion is the likely motivation for the propagation of a radical approach to institutional change.

Constitutional amendments designed as adjustments to new social compromises still are most likely to be made in the wake of resolved violent escalations and peace agreements. But they do not happen just like that, without the involvement of outside actors and certainly also not without taking into account the interests and power-positions of the main stakeholders. In four of the five cases described in more detail it seems that the strong international involvement enabled a constitutional fixation of a blueprint approach of complex and radical reform. But it also seems that the potential losers of such reforms have either accepted defeat or got offered some compensation (altering their opportunity costs).

What this means in the long-term is difficult to gauge. The time factor is in fact crucial in the entire discussion about mediation effects, not least because the durability of peace agreements is frequently low (Bercovitch/Simpson 2010). Beardsley (2008: 729) found that “mediated crises should on average be less likely to immediately recur because it takes time for a mediator’s influence to wane and for the preferences of the combatants to shift”. The flip side of the coin according to Beardsley is a high risk of conflict recurrence in mediated conflicts because they altered opportunity costs of combatants only in the short run. This was tested for inter-state conflicts, but Beardsley expected this effect to be even stronger in intra-state conflicts. One may argue that it is important to factor in such an analysis the effect not only of waning outside influence, but also of the potentially counter-effect of credible commitments associated with constitutional reform and the long-term effect of constitutional reforms after they have been implemented and tested in practice.

A finer analysis could ponder on the *specific* impact of *specific* external actors on constitutional engineering. A more subtle analysis of e.g. South Africa as an active mediator in numerous African crises, not least in Burundi and Côte d’Ivoire would seem potentially fertile. I have also not properly looked into process factors: reform pace, the inner logic of mediation, dialogue processes etc. which all may explain as well why some peace processes translated into meaningful constitutional reform and not others.

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