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## Between Routine and Crisis – Notes on Constitutional Geography

(very rough draft, not to be quoted)

### 1. Constitutions and Space: the Routine

#### 1.1 Constitutional Restraint

Space does not seem to be a favorite topic of constitutions. As a rule, they leave the drawing of borders to politics and the policing of the demarcated space and borders to the laws. Drawing borders is a matter of sovereignty constitutions have to presuppose. Policing borders is a matter of administrative monitoring and violence constitutions prefer to leave to the laws empowering and monitoring the police, border police, military forces, customs etc.

One might think constitutions are too noble and elevated in the legal hierarchy as “higher law” to deal with the messy stuff on the ground. Or that they can deal with time, not with space and probability.

Are constitutions “space-blind” – very much like they were (self-deconstructingly) said to be “color-blind”<sup>1</sup> – because space is too close to reality? This is what the following constitutional clauses suggest:

#### 1.2 Transforming Space into Territory

And yet, the answer is – no. Because constitutions, even those that contain very sparse spatial references, **transform space** and **landscapes** into **abstract, bordered territory**:

“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the **Territory** ... belonging to the United States.” (US 1789)

“Parliament shall authorise by law the ratification of such international treaties as .... entail change of **borders** ...” (Italy 1947/2012) **Fig. no. 1 and 2**

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<sup>1</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Leslie G. Carr, *Color-Blind Racism*, Thousand Oaks: Sage Publications, 1997



(Fig. no. 1 & 2)

### 1.3 Constituting Territory: Structure

There are situations, though, in which constitutions **structure** the bordered territory somewhat to **demarcate** and **identify** a (new) state. Typically, constitutions open their eyes a bit more and are shifted a notch up from abstract mapping to delimiting **internal** regions or spheres of interest, as the following quotes show that can be read as constitutional descriptions/accounts of

- federal systems
- occupied territories or territories under colonial rule
- postcolonial situations.

Fig. no. 3-5



Bhutan

“The **territory** of Bhutan shall **comprise** twenty Dzongkhags with each Dzongkhag **consisting** of Gewogs and Thromdes...” (Bhutan 2008)

“The **States** shall **mean** such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called a State.” (Australia 1901 / 1985)

“The area of Papua New Guinea consists of the area that, immediately before Independence Day, constituted what was then known as Papua New Guinea, together with all internal waters and the territorial sea and underlying lands, and, ...includes such neighbouring waters and such lands underlying any such waters ... “  
(PNG 1975)

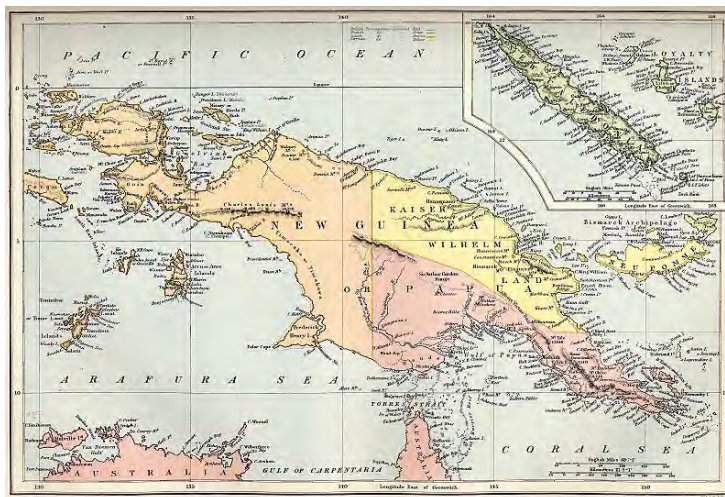


Fig. no. 3 – 5 Papua New Guinea

#### 1.4 The Routine of Constitutional Geography and Unitary Theory

The routine of constitutional geography, in particular the restraint regarding thematisation, spatial transformation and demarcation, can be related to (and maybe explained by) the **unitary conception** within which constitutions operate. Elements of the unitary scheme are:

- Constitutional orders are said to (have to) be taken and introduced into application/interpretation as a “Rechtseinheit”.
- The notion and ideology of “Widerspruchsfreiheit” (consistency) confirms the unitary theory.
- Constitutions demarcate a unified zone of **jurisdiction**.

Therefore, constitutional geography was not only *conventionally* based on and limited by a three-pronged concept of the state as a unified “unit”<sup>2</sup>: bordered territory, population and effective government. Or in slightly different, updated terms the concept focused on:

- **possession & borders**

“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the **Territory or other Property** belonging to the United States...” (US 1789)]

[“The **territory** of the Republic of China, defined by its existing national **boundaries**, shall not be altered unless initiated upon the proposal of ...” (ROC 1947)

“**Admission** into the Russian Federation and creation of a new constituent entity shall take place in accordance with the procedure established by federal constitutional law.” (Russia 1993)

“The President shall take necessary measures for re-delineation of the territorial **boundary** of the Union...” (Myanmar 2008)

- **population & belonging**

[“When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State.” (Pakistan 1973)]

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<sup>2</sup> Georg Jellinek, *Allgemeine Staatslehre* (= *Recht des modernen Staates*, Bd. 1), Berlin: 1900.

[“Cubans may not be deprived of their **citizenship** except for legally established causes.” (1976)]

“The 1919 revolution that had rid Egypt and the Egyptians of the British guardianship, and had established the principle of **citizenship** and equality between the people of the same country.” (Egypt 2014)

- **authority & jurisdiction [sovereignty & administration]**

“Any treaty which provides for a change in Thai **territories** or external territories over which Thailand has **sovereign right or jurisdiction** ..... must be approved by the National Assembly.” (Thailand 2017)

“All laws in force in the **territory** of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.” (India 1949, Part III, 13)

“The **jurisdiction** of Jerusalem includes, as pertaining to this basic law, among others, all of the area that is described in the appendix of the proclamation expanding the borders of municipal Jerusalem beginning the 20th of Sivan 5727 (June 28, 1967)...<sup>2</sup> (Israel 1958/2013).

Thus, constitutions **segment** the **globe by zoning in friends (nationals) and zoning out aliens**, notably by:

- **allocating rights** (to nationals)
- regulating **membership (citizenship)**
- laying down principles that govern **alien/immigration law**

## 2. Crisis of the Unitary Project

**Thesis: The constitutional modality of dealing with space changes and constitutions lose their spatial restraint/nonchalance, when the unitary project gets into crisis – and decomposes.**

Main **situations of crisis** that will be discussed here:

- **“essentially contested borders”**
- **(internal) social-ethnic-linguistic fragmentation** in deeply divided societies
- **(national) partition**

## 2.1 “Essentially contested borders”

The list of countries with contested borders and disputed territories is remarkably long.<sup>3</sup> Contestation starts where the course of borders is unclear or at least not generally accepted by neighboring countries. There are different strategies constitutions may endorse to cope with territorial contestation:

### (1) Authoritative Definition.

Constitutions may render a detailed territorial **definition** or refer to a fairly specific **description** of borders and territories. Here specificity and elaboration (of territory and borders, as for instance India 1949) indicate that there is a problem as is illustrated by the following constitutions.

“The insular space of the Republic includes the Archipelago of Los Monjes, Las Aves, Los Roques, La Orchila, La Tortuga, La Blanquilla, Los Hermanos, islands of Margarita, Cubagua and Coche, Los Frailes, La Sola Island, Los Testigos Archipelago, Patos Island and Aves Island, as well as the islands, islets, keys and banks located or coming in the future to emerge from the territorial sea, that covering the continental shelf or that lying within the limits of the exclusive economic zone.

As to the water spaces consisting of the contiguous maritime zone, the continental sheaf and the exclusive economic zone, the Republic exercises exclusive rights of sovereignty and jurisdiction on such terms, to such extent and subject to such conditions as may be determined by public international law and national law.” (Venezuela 1999/2009)

“The territorial integrity of the Kingdom of Cambodia shall never be violated within its borders as defined in the 1/100,000 scale map made between the years 1933-1953, and internationally recognized between the years 1963-1969.” (Cambodia 1993/2008)

Contestation does not stop there but more often dates back to accession or secession, war or occupation, and in general the recent re-designing of the territory in question.

“The territory of the Republic of South Sudan comprises: **1. a.** all lands and air space that constituted the three former Southern Provinces of Bahr el Ghazal, Equatoria and Upper Nile in their boundaries as they stood on

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<sup>3</sup> CIA, *The World Fact Book* - [https://en.wikipedia.org/wiki/List\\_of\\_territorial\\_disputes/](https://en.wikipedia.org/wiki/List_of_territorial_disputes/)> (Zugriff: 11.11.2018); Brian Taylor Sumner, "Territorial Disputes at the International Court of Justice", 53 *Duke Law Journal* (2004), 1779 ff. The Florida State University lists in its boundary studies almost 200 border conflicts - <https://web.archive.org/web/20080924211639/http://www.law.fsu.edu/library/collection/LimitsinSeas/numericalibs-template.html/>> (Zugriff: 12.11.2018).



January 1, 1956; and **2. b.** the Abyei Area, the territory of the nine Ngok Dinka chiefdoms transferred from Bahr el Ghazal Province to Kordofan Province in 1905 as defined by the Abyei Arbitration Tribunal Award of July 2009 in the event that the resolution of the final status of the Abyei Area results in the Area becoming part of the Republic of South Sudan.” (South Sudan 2011/13)

## (2) Negating contestation:

Constitutions may also simply negate the fact of contestation, as for instance the Constitution of Venezuela:

“The geographical space of Venezuela is an area of peace.” (Venezuela 1999/2009)

or stake off an obviously overbroad territorial claim, such as Ireland’s Constitution (1937/1999) covering “the whole island of Ireland and the territorial seas”, the South Korean Constitution (see below), or the doctrine supporting the One-China-Policy<sup>4</sup>:

“Taiwan is part of the sacred territory of the People's Republic of China.” (China 1982, 3rd paragraph).

“There is only one China in the world. Both the mainland and Taiwan belong to one China.” (Anti-Secession Law of 2005)

Fig. no. 6 – 8



<sup>4</sup> Edward L. Dreyer, „The Myth of ‘One China’“, in Peter C.Y. Chow, ed., *The ‘One China’ Dilemma*, New York: Palgrave: Macmillan, 2008, 19 ff.

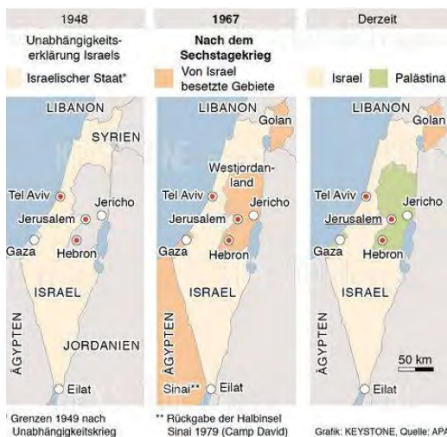


Fig. no. 6 – 8

## 2.2 Internal Fragmentation

The unitary concept breaks down internally, where the counterfactual imaginary of a unified, homogenous society collapses in the face of deep, societal fractures. With society comes conflict. As long as societies neither reside in paradise nor populate other demesnes of harmony, constitutions, unless preferring the quiet of irrelevance, have to deal with the normal modality of people living together in dissent and friction, controversy and, as a result, disunity. Disunity, to be recognized as a noteworthy problem of constitutional design and practice, has to rise above the intensity level of the social and constitutional everyday, though. Analyzing ‘deeply



divided societies’<sup>5</sup> therefore means that more than run-of-the-mill fragmentation, segmentation, or division has to be managed.

In the surprising number of societies belonging to this category of diversity and disunity, social groups disagree intensely about fundamental issues, like belief, identity or common language, and the permissible methods to resolve their differences. When these issues are defined in ethnic, religious, linguistic, cultural, social or racial terms, they are almost always related to and embedded in collective identities. Some cases in point are: Afghanistan with its complex tribal structure; Iraq divided between Muslims following two distinct and disputatious traditions of Islam – Shia and Sunni – and the Kurds; Bosnia and Herzegovina deeply estranged and separated along ethnic and religious lines.

The basic problem of fragmented societies tends to be the **absolute character** of the **conflicting claims**. Identity conflicts and other struggles for recognition tend to thwart compromise and peaceable settlement. They produce minorities along ethnic, linguistic, religious, social lines.

Fig. 9 – 12



Fig. 9 Belgium

<sup>5</sup> For a fragmentary overview see Arend Lijphart *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (1968; Lustick 'Stability in Deeply Divided Societies'; Adrian Guelke *Politics in Deeply Divided Societies* (Polity Press, 2012); Allison McCulloch 'Consociational Settlements in Deeply Divided Societies: The Liberal-corporate Distinction' 21 *Democratization* (2014), 3501; Hanna Lerner *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011); Yash Ghai ed. *Autonomy and Ethnicity. Negotiating Competing Claims in Multi-ethnic States* (Cambridge: Cambridge University Press, 2000); Ted Robert Gurr ed. *Peoples versus States: Minorities at Risk in the New Century* (Washington DC: Endowment of the United States Institute of Peace, (2000).



Fig. 10 Nigeria

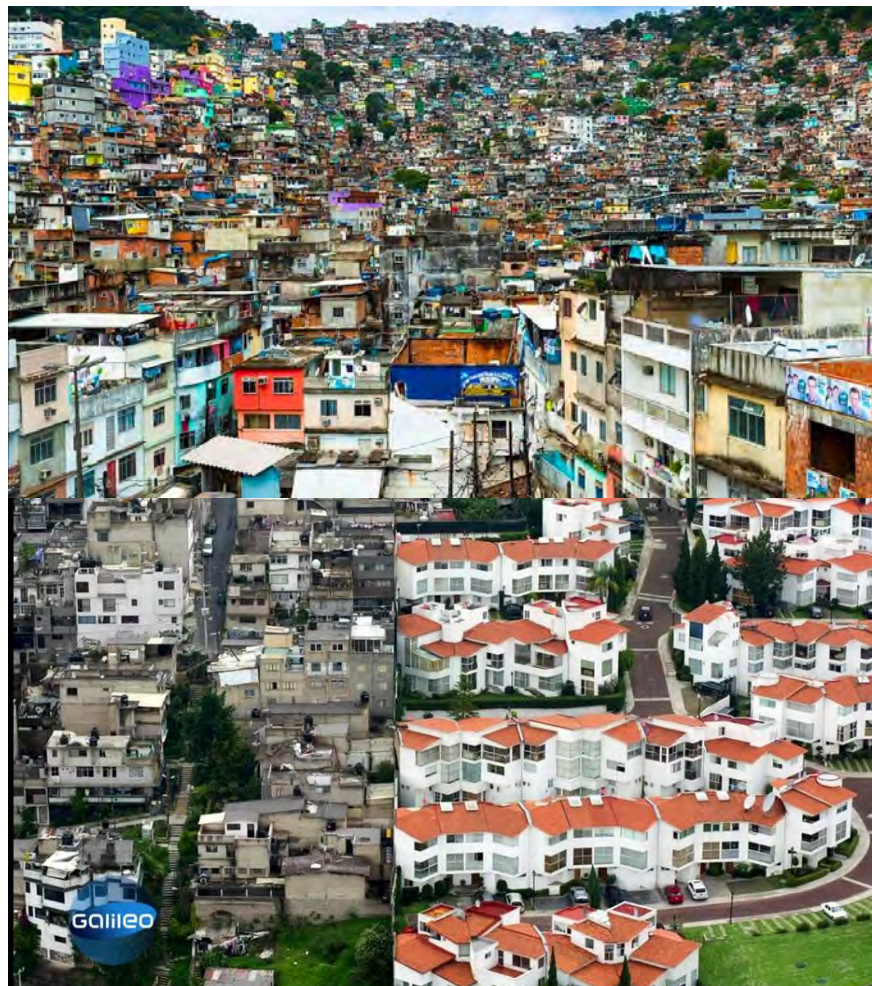


Fig. 11-12 the poverty/wealth divide

If territorial partition, like in Bosnia and Herzegovina, is no realistic option, there are three basic strategies<sup>6</sup> or models to accommodate fragmentation plus a limitless number of hybrids.

### (1) Denial

The internal fragmentation can be denied and/or camouflaged by holding on to a unitary vocabulary and project, like state or nation. In general, constitutions are designed to bring about unity.<sup>7</sup> Within the perspective of liberal constitutionalism, people argue that unity can basically be achieved by the equal distribution of personal freedoms and property rights, if need be supported by formal equality, which are then extended to the concept and rules of citizenship. A constitutional regime of such brand supplies an adequate, if socially abstract and 'reality-blind,' level of coordination for competitive, capitalist market societies. In consequence, it negates class and other differences that have to be brought back in by egalitarian or transformative versions of constitutionalism.<sup>8</sup> *Haiti* began in 1805 and *Liberia's Constitution* of 1986 follows its predecessor from 1847 to address the causes that produce social division, and prevent unity, in particular 'ethnic, regional or other differences' as well as 'sectionalism and tribalism' (Art. 5).

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<sup>6</sup> See Sujit Choudry ed. *Constitutional Design for Divided Societies* (Oxford: Oxford University Press, 2008); Cass Sunstein *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001); Jon Elster 'Forces and Mechanisms in the Constitution-Making Process' 45 *Duke Law Journal* (1995) 369; Douglas Greenberg et al. eds *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993); Jon Elster, Claus Offe and Ulrich K. Preuß *Institutional Design in Post-Communist Societies: Re-Building the Ship at Sea. Theories of Institutional Design* (Cambridge: Cambridge University Press, 1998); Yash Ghai 'A Journey Around Constitutions: Reflections on Contemporary Constitutions' 122 *African Law Journal* (2005) 804.

<sup>7</sup> The 1991 *Constitution of the Republic of Yemen* briefly glimpses at its history of secession declaring that 'no part of [the state] may be ceded.' The 1978 *Constitution of Spain* conjures the 'indissoluble unity of the Spanish Nation' plus the 'common and indivisible homeland of all Spaniards'. — 'The Republic of Sri Lanka is a Unitary State' (1978 Constitution of Sri Lanka). — 'Dedicated to a genuine national healing process and the building of trust and confidence in our society through dialogue; Determined to lay the foundation for a united, peaceful and prosperous society' (2011 *Interim Constitution of South Sudan*). The 1991 Constitution of Zambia projects a unitary state and Christian nation and also integrates the customary institution of Chief into this scheme (Art. 127 ff.).

<sup>8</sup> "If the English, French, and American bourgeois revolutions all served to create the structural conditions for the protection of individual liberties of choice and property, the particularity of the Haitian Revolution was to redress the imbalance they had introduced between equality and liberty in favor of the latter." Nick Nesbitt, *Universal Emancipation: The Haitian Revolution and Radical Enlightenment* (Charlottesville: University of Virginia Press, 2008)

## **(2) Emphatic pluralism**

Emphatic pluralism usually implies that constitution-makers resort to models that grant groups, peoples (minorities) self-rule and cultural autonomy. This model is championed by regimes that recognize their multi-ethnic, multi-religious or multi-cultural structure and origins. Few constitutions embrace social fragmentation by renouncing an *a priori* unitary concept of identity. All the more striking are the ones that do and acknowledge the fragmentary condition of society and then attempt to put together the social, ethnic, linguistic, and other fragments instead of superimposing a fake collective identity – nation, people or, more abstractly, a unitary state.

With fascinating political and constitutional panache, Bolivia<sup>9</sup> undertakes to square the circle by shuttling, in its 2009 *Constitution*, between the conventional constitutional We (the members of the constitutional convention) and the plurality of its social parts, thus establishing a link between cooperation and autonomy.

## **(3) Selective Accommodation of Diversity**

Where neither denial nor recognition of differences seem to work or are considered politically unmanageable, societies and their constitution may opt for a middle way: a design that selectively accommodates difference. Constitutions may follow the path of partial partition combined with institutional segregation, like Switzerland, Belgium and Tanzania, or selective recognition of fragmentation, like India, Sri Lanka and Indonesia.

In contrast to the strategies of denial of and coping with social division discussed above, constitutions designed to *limit cooperation* and *scale down unitary concepts of nation* perform the shift from ‘one nation – one state’ or the likes to ‘one divided nation in a nominal nation’. Their politics of *coordination* on the state level is geared toward recognizing fragmentation and granting territorial and political autonomy on the regional level. They establish diverse forms self-rule to negotiate competing

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<sup>9</sup> See Ted Robert Gurr & Pamela L. Burke ‘Sketch: The Indigenous Peoples of Bolivia: Mobilization and Empowerment in the 1990s’ in Gurr, *Peoples versus States*, 178.

claims of ethnic, linguistic, religious and other minorities.<sup>10</sup> To distinguish autonomy and self-rule from 'reserves' (First Nations in the USA), dependent territories (colonies), and sovereign states, such projects of territorial and political autonomy are characterized as implying the transfer of exclusive legislative powers, concerning matters of special concern to ethnic, linguistic, indigenous groups or minorities (culture, language, religion) that have a territorial dimension, without creating formally independent territories (state, nation).

The Belgian regime of a federal state and communities appears (more than Switzerland) like a paradigm for a linguistically and regionally structured, corporatist arrangement with overlapping competences and not always very clear authorizations of the various institutions. Still – or maybe because of the complexity and vagueness – the Belgian *Constitution* helped reduce the polarization of the 1960s and enhanced some cooperation among the linguistic regions and communities to the extent that the constant struggles along the divide and the resulting chaos were transposed into periodical crises hedged by a federalist regime, labeled 'unique,' 'bipolar,' or 'asymmetric,' that is based on an institutional arrangement of regional cultural autonomy.<sup>11</sup>

### 2.3 National Partition

Unless constitution-making is deferred until partition will have been forgotten, somehow overcome or the country unified, as for instance in Israel<sup>12</sup> or Germany, and when constitutional abeyance<sup>13</sup> and myopia do not seem to be possible options,

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<sup>10</sup> The literature concerning projects and problems of territorial and political autonomy of minorities is vast. I cite only a few studies I found particularly illuminating: Marc Weller & Stefan Wolff eds *Autonomy, Self-Governance and Conflict Resolution* (London/New York: Routledge, 2005); Yash Ghai ed. *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000); Hurst Hannum *Autonomy, Sovereignty and Self-Determination* (Philadelphia: University of Pennsylvania Press, 1993); Thomas Benedikter *The Modern World's Autonomy Systems: Concepts and Experiences of Regional Territorial Autonomy* (Bolzano: Athesia, 2007).

<sup>11</sup> U.S. Institute of Peace, "Belgium, from Model to Case Study or Conflict Resolution" (2010) - <https://www.usip.org/sites/default/files/resources/PB79> - accessed 24 February 2017.

<sup>12</sup> Israel passed several *Basic Laws* that, together with the jurisprudence of the Supreme Court, qualify as 'constitutional law', even if a formal, unified document was never produced due to deep conflicts over the purpose and identity of the Israeli state. See Orit Rozin 'Forming a Collective Identity: The Debate over the Proposed Constitution, 1948–1950' 26 *Journal of Israeli History* (2007) 251.

<sup>13</sup> Michael Foley *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Abingdon UK: Routledge, 1989); David Thomas *Whistling Past the Graveyard: Constitutional Abeyances, Quebec and the Future of Canada* (Oxford: Oxford University Press, 1997).



constitutions of split nations have to somehow address the *de facto* division – territorial, political and otherwise. As regards the variety of coping strategies, it can be shown that some partitioned countries seize not just one constitutional option to grapple with the split but more, as if to make sure that the overall result conveys legitimacy.

Few partitioned nations follow the precarious path, designed for Bosnia, Croatia, and Serbia. To end the war, the General Framework Agreement for Peace – the Dayton Accords for Bosnia and Herzegovina<sup>14</sup> – was reached on November 21, 1995. To preserve Bosnia as a single state it had to be made up of two parts.



<sup>14</sup> 'Symposium: The Dayton Agreements – A Breakthrough for Peace and Justice?' 7 *European Journal of International Law* (1996) No. 2.

### **(1) Denial:**

For all intents and purposes, the German Democratic Republic's first constitution of 1949 appeared to negate the partition. Basically drafted by the Socialist Unity Party under Soviet monitoring, the constitution was arguably designed for a united Germany. It was written before the Soviet Union had decided to establish a separate socialist republic in the zone under its occupation. Not mentioning partition may have been intended to preserve the ambivalence of both serving as a basis for building a socialist society and a democratic all-German republic. To proclaim the GDR to be an 'indivisible democratic Republic' (Art. 1), based on 'one German citizenship' and to let the Republic decide 'in all matters that are essential for the existence and development of the German people in its entirety' may be read in retrospect as very guarded allusions to partition.



The text of the 1947 *Constitution of the Republic of China* (ROC) comes close to denying partition.<sup>15</sup> The usual suspects that might betray the country's territorial division are silent: The provisions concerning the territory are almost taciturn, except for a dark hint at 'frontier regions', hidden in Art. 168, and the abstract mention of 'alteration of the national territory' in Art. 1 of the Additional Articles. Only the Additional Articles of the Constitution of 1991 give away the dirty secret: 'Rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law' (Art. 11).

## **(2) Counterfactual Narratives of Union**

In contrast to denial or semi-denial, constitutions of partitioned nations are often earmarked by straightforwardly counterfactual narratives of non-partition or soon-to-be-realized union that tap into the source of constitutions magical power<sup>16</sup> and myth. Quite commonly constitution-makers resort to such magic and invoke the will of an imaginary pre-constitutional nation (like the Cádiz Constitution in Spain 1812 and today's Hungarian Constitution 2011) that has been post-factually united, undaunted by the geographical split, or to a metaphysical people unaffected by the territorial and political separation, or just an uninterrupted tradition or indivisible territory:

"It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions ... It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation"(Art. 2 and 3 *Constitution of Ireland*, 1937).

Mainland China and Taiwan, as was mentioned before, have always asserted the One-China-Principle, each side defining 'the One' from its own perspective, of

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<sup>15</sup> For an in-depth analysis of the historical and political context of constitution-making in the ROC: Jiunn-rong Yeh *The Constitution of Taiwan* (Oxford: Bloomsbury Publishing, 2016).

<sup>16</sup> Günter Frankenberg, *Comparative Constitutional Studies – Between Magic and Deceit*, Cheltenham UK: E. Elgar, 2018.

course.<sup>17</sup> Since their negotiations in 1992 when they reached ‘the Consensus,’ both sides of the Taiwan Strait have agreed that there is only one China, while disagreeing, however, as to the meaning of that formula.

The preamble of the *German Basic Law* looked forward, in very abstract terms, to a future free German state. It expressed ‘the people’s resolve to preserve its national and political unity’ and, while that was not available, meanwhile ‘act [...] also on behalf of those Germans to whom participation is denied.’ West Germany based its unitary vision – and myth – on the (Western) state as a ‘consubstantial minus’ (*wesensgleiches Minus*)<sup>18</sup> of the (Weimar) German state and constructed the narrative of an undivided Germany on the basis of, first, the dualism of an indivisible pre-constitutional ‘German People’<sup>19</sup> and a temporarily divided nation (the people) as well as, second, a concept of membership encompassing all (ethnic) Germans:

“Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person” (Art. 116 German Basic Law).

During its constitutional development South Korea appears to have pursued a comparable path on its way to contrive a counterfactual narrative of union.<sup>20</sup> In 1948 the constitutional elites also invoked an ethnic South Korean citizenship to bridge the void when, at that time, neither a Korean state nor a nationality law existed. Very much like the ethnic German, the ethnic Korean resides in a pre-statist and extra-constitutional fantasy world.

In a further move to establish democratic continuity and legitimacy, while recognizing rupture, ‘We the people of Korea’ ‘proud of a resplendent history and traditions dating from

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<sup>17</sup> Su Chi *The Historical Record of the Consensus of ‘One China, Different Interpretations’* (Taipei: National Policy Foundation, 2002); Yang Ying-Feng *Der Alleinvertretungsanspruch der geteilten Länder: Deutschland, Korea und China im politischen Vergleich* (Frankfurt: P. Lang, 1997); Alan M. Wachman *Why Taiwan? Geostrategic Rationales for China’s Territorial Integrity* (Stanford: Stanford University Press, 2007).

<sup>18</sup> Federal Constitutional Court – BVerfGE 36 (1973) 1/19 decision on the Basic Treaty (*Grundlagenvertrag*) concerning the foundations of the relations between the FRG and the GDR was signed on 21 December 1972 in East Berlin. It was ratified the next year in West Germany, despite opposition from hardline right-wingers.

<sup>19</sup> Referred to in the preamble and in Art. 146 *German Basic Law*. As a matter of consequence, partition is conveyed by the original version of Art. 23 (regulating accession) as a more or less administrative obstacle.

<sup>20</sup> Illuminating the concept of *pouvoir constituant* and sovereignty: Chaihark Hahm & Sung Ho Kim *Making We the People. Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge: Cambridge University Press, 2015); see also Hahm & Kim ‘To Make “We the people”: Constitution Founding in Postwar Japan and South Korea’ 8 *International Journal of Constitutional Law* (2010) 800.

time immemorial', then upheld 'the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919' in the Preamble of the 1948 *Constitution of the ROK*. The democratic pedigree was later extended to 'the democratic ideals of the uprising on 19 April 1960.' Whereas the South Korean elites did not deny the *de facto* separation, they played national unity down to being merely in need of 'consolidat[ion]'.

Constituting *against* partition, whether *de facto* or even *de jure*, invariably depends on narratives, some of them myths, that construct an imaginary continuity or/and overarching aspect, which lends itself to span the political chasm: Cyprus, gently modifying a transfer from France's 1793 *Constitution*, declared 'the *territory of the Republic ... one and indivisible*,' an attempt to exclude 'the integral or partial union of Cyprus with any other State or the separatist independence.'<sup>21</sup> Germany and South Korea trusted that a concept of ethnic citizenship and people would help transgress the separation. The two Chinas, each in its own fashion, propagated the 'One-China Doctrine', which allowed each of them, at least until recently, to fancy itself as the *one*. *North Korea's Constitution* (2009) celebrates Comrade Kim Il Sung as author of 'the immortal Juche idea' and organizer and leader of 'the anti-Japanese revolutionary struggle', thus 'creat[ing] the glorious revolutionary traditions and achiev[ing] the historic cause of national restoration.' For the time being, the 'independent socialist State' represents 'the interests of all the Korean people' (Preamble). Likewise, the 1968 *Constitution of the GDR* puts the people to task of 'showing the whole German nation the road to a future of peace and socialism'. The amended *GDR Constitution* of 1974 rather than invoking the 'whole German nation,' turned to its Soviet ally and sanctioned the policy of political-ideological dissociation from the West to create a separate GDR national identity.

### 3. Conclusion

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<sup>21</sup> Art. 185 *Constitution of Cyprus* 1960 – emphasis added.