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SHAPING THE POST-CONFLICT LANDSCAPE? THE ROLE OF CONSTITUTIONS IN NATURAL RESOURCE GOVERNANCE

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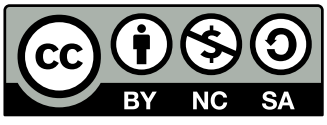

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Abbreviations

CPA	Comprehensive Peace Agreement, Sudan
DRC	Democratic Republic of the Congo
FGF	Future Generation Fund
GDP	Gross domestic product
MPLA	Movimento Popular de Libertação de Angola
PIAC	Public Interest and Accountability Committee, Ghana
PPCC	Public Procurement and Concessions Commission, Liberia
R-ARCSS	Revitalised Agreement for the Resolution of the Conflict in South Sudan
SWF	Sovereign wealth fund

Contents

EXECUTIVE SUMMARY

Natural resources feature prominently in many violent conflicts as a root cause or facilitator of the conflict, or both. Processes to resolve these conflicts must engage with the role that natural resources play in them. This can result in provisions in formal peace agreements or in arrangements that are not formalized. When constitutional reform is included in the peace process, arrangements for governing natural resources may be included in the constitution.

This paper is primarily concerned with the way in which constitutions adopted as countries emerge from violent conflict deal with natural resources. To provide a more complete picture, it also considers provisions in peace agreements. It is the result of a wider conversation aimed at exploring how economic interests drive parties' positions in post-conflict constitutional negotiations. The paper focuses in particular on land and extractives as key sources and facilitators of intra-state conflict, while bearing in mind that every context differs and that different types of natural resources raise different issues and need different legal and political treatment. It suggests some mechanisms and institutions that could assist in the governance of natural resources after conflict.

This paper is primarily concerned with the way in which constitutions adopted as countries emerge from violent conflict deal with natural resources.

Constitutionalizing land issues after conflict

Land-related causes of conflict may be linked to dispossession and to rights concerning the occupation and use of land. The issues are particularly grave when valuable land is scarce and tenure insecure, with processes of formalizing tenure carrying their own challenges and costs. Notably, although most constitutions include a right to property, many do not deal with land in much detail, even where land has been an important driver of conflict. Nepal and South Africa are exceptions, where conflict between the parties at the negotiation

table resulted in an uneasy constitutional balance between securing the right to property and affirming land reform as a way to redress past injustices. Colombia and Kenya also constitutionalized different types of tenure to protect customary tenure. Implementing arrangements on land and tenure can be challenging but including measures to reform arrangements concerning land and tenure in peace agreements or constitutions can provide a starting point in what will inevitably be a long process to resolve land-related problems.

Among the mechanisms that have been constitutionalized and could be considered are:

- Providing *a framework for land restitution*, which helps to prevent programmes of land reform being blocked from the outset.
- Providing for *the formal recognition of communal land tenure* to prevent the abuse of customary tenure regimes.
- *Independent commissions* with a mandate to examine past abuses and document the ongoing dynamics of land access and conflict, designed to include civil society representatives as part of their membership.
- *Special land courts or tribunals* where conflict over land has been significant or where land has been systematically misallocated, which bring expertise to the adjudication of land issues but also signal the state's commitment to resolving land-related disputes.

Constitutionalizing the ownership and management of extractives

Extractives can be both a source and a facilitator of violent conflict, particularly when their revenues are a significant part of a country's gross domestic product (GDP). They can also be significant when they are territorially concentrated, especially when the territory sees little or no benefit from the extraction process or it is politically or militarily mobilized.

In dealing with extractives it is important to distinguish: (a) ownership issues, such as whether they are owned by the state and if so at what level, privately or communally; (b) governance or management issues, including executive and legislative authority over them; and (c) entitlements to resource revenues, and which government entity raises these types of revenue and how they are distributed (see

Section on public financial management). These are all areas of potential contestation.

It is notable that, other than general statements as to the people's or the state's ownership, most post-conflict constitutions (as well as the peace agreements that may have preceded them) do not include many details on these resources even when they were a significant element in the conflict. This might be because existing legislation already covers issues related to ownership and governance but could be because parties are unwilling to formalize new arrangements, or because changing the governance of natural resources, particularly extractives, is controversial or requires a degree of technical knowledge that the parties lack, making agreement difficult. As a consequence, the issues may be deferred to (possible) future legislation.

If natural resource governance is to be constitutionalized a balance needs to be found between what should be constitutionalized, to ensure that the parties' interests are protected, and what should be left to legislation, with its inherent flexibility. Nonetheless, some constitutional mechanisms may provide a basis for constructive and trusted natural resource management over time, including:

- General *principles and guidelines* for transparent and accountable government in the constitution, or more specific ones supporting the sustainable governance of natural resources.

- *Consultative processes* to develop and manage natural resources, while also requiring the relevant authority to take the outputs of those consultations into account. Depending on the context, these consultations could involve local communities (sometimes Indigenous communities, including traditional authorities), civil society representatives, the business community and, throughout, women and youth, and other marginalized groups.

- Independent or politically balanced *commissions* to deal with natural resource governance, particularly for extractive resources, and to increase the level of transparency and accountability in extractive industries. Special attention should be paid to membership, which should be as inclusive and legitimate as possible, and to appointment mechanisms, mandates and sources of funding.

Public financial management

Natural resource revenue—who gets it and how it is used—is a central issue in settling conflicts where natural resources have been a cause or driver. It is generally recognized that while there is considerable potential for significant revenue from natural resources to (re)build a country after conflict, instances where such revenue is translated into prosperity are rare. Instead, vested interests and war economy dynamics often prevail. It is also usually acknowledged that constitutions alone cannot change these dynamics. Nonetheless, they can provide a basis for more accountable and responsive financial governance, and for a more equitable distribution of resources.

Regardless of how the revenues from the extraction of natural resources are raised—through concessions or contract regimes—it is important to have a sound system of public financial management to control how the state collects money and what it does with it—that is, allocation, spending and auditing. There is generally a progression in the level of detail on these matters from peace agreements, which may contain general principles to guide public financial management, to more formal transitional constitutional arrangements, which are more likely to contain some detail, to more permanent constitutions, which are usually relatively detailed. Wherever they are set out, post-conflict settings present major challenges regarding the implementation of such arrangements linked to: (a) a lack of political support from major stakeholders regarding rules-based financial management; (b) geographical or functional fragmentation of the fiscal system, which hampers control over financial movements; (c) public funds that cannot be accounted for, sometimes due to a lack of information about account-holding institutions themselves; (d) a lack of proper cash management and accounting systems; (e) scarcity of information, time or appropriate capacity to audit funds; and (f) insufficient transparency regarding the use and auditing of revenues and spending.

While constitutions are unlikely by themselves to resolve the problems that countries face in implementing sound fiscal arrangements, particularly during or after a conflict, transitional constitutions or transitional provisions in more permanent constitutions can set the ground rules for the gradual establishment of a sound system of financial management, possibly starting with less cumbersome arrangements to allow for necessary changes as the system progresses. With the gradual development of a system in mind, such possibilities could involve:

- Gradual development of *consensual budgeting* by establishing a *transitional development fund*, managed by a multiparty committee, that could provide a model for good financial management involving consensual decision making as far as possible. A timeline could be established for drawing all public budgeting into similar arrangements.

- Provision for *staged multi-party negotiation of the national budget* both early in the budget cycle to agree on priorities and reach an understanding on resource constraints, and before tabling the budget for review and negotiation of the details.

- *Budgeting by economic category*—such as salaries, goods and services, transfers and interest payments, and capital spending—rather than programmatically. This could slowly contribute to increased levels of transparency while avoiding controversial discussions about government priorities.

- Establishing *special oversight bodies* for particular aspects of revenue raising and allocation, with a mandate to ensure general transparency, as well as the competitiveness of tenders and that no individual should stand to benefit unlawfully from public contracts. It is important that the membership of these bodies is independent and includes, for instance, representatives of civil society, and that the oversight bodies have a steady source of income, access to information and a mandate to regularly (and publicly) monitor and evaluate decision making.

Where revenues from non-renewable natural resources represent a significant percentage of total revenues, negotiators might ask whether establishing a sovereign wealth fund (SWF), mostly aimed at contributing to macroeconomic stability and dealing with the so-called resource curse, would be appropriate. If this is agreed, the question arises whether and to what extent such a fund should be constitutionalized. A constitution might provide a broad set of requirements aimed at making the SWF's management transparent and accountable. However, SWFs are rare in peace agreements and post-conflict constitutions. (Sudan's 2004 Agreement on Wealth Sharing during the Pre-Interim and Interim Period and Papua New Guinea's Constitution are exceptions.)

Finally, and particularly where conflicts and the location of extractives are territorially concentrated, and when there are significant regional inequalities, fiscal decentralization combined with a system of fiscal

equalization could help to address local grievances and ensure greater countrywide equity. Post-conflict constitutions do sometimes contain a framework for fiscal decentralization (or fiscal federalism) but implementation is usually poor.

Fiscal equalization is particularly necessary as the central state will invariably raise more revenue than substate entities and the revenue-raising capacity of different units will differ, leading to financial inequalities among substate entities and between substate entities and the central state. Fiscal equalization—revenue sharing and transfers—contributes to resolving these problems by allowing for a redistribution of wealth across a country. Constitutions can set out general or more specific principles to guide fiscal equalization. Usually, fiscal equalization takes all the revenue raised in a country into account and distributes it on the basis of the responsibilities of substate entities according to a formula. In addition to elements such as population size and level of development, these usually also give some weight to the 'derivation principle' through which producing entities benefit from their contribution to the national revenue pool. Fiscal equalization can be controversial nonetheless, particularly where substate entities are resource-rich and see little benefit from making a contribution to national revenue. When the substate entity does not trust that equalization will be fair (or honest), or when it wants a specified share regardless of the needs of the rest of the country, a special entitlement to a percentage of the revenue that entity generates can be agreed, as in the cases, for instance, of Aceh (Indonesia), Bangsamoro (Philippines) and the Democratic Republic of the Congo (DRC).

A related question is who designs the system of fiscal equalization—or how the formula is worked out. Rather than vesting all responsibility in central government, a constitution could mandate intergovernmental arrangements or bodies that include both central and substate representatives or (quasi-)independent financial commissions. However, relying on a commission to provide a basis for equitable revenue distribution can present challenges. It is sometimes difficult to reach agreement on establishing such a commission. At other times a lack of capacity can prevent such commissions from developing well-considered proposals, or their recommendations may be disregarded. A level of commitment by the political authorities and elites to accept proposals that have been developed by such bodies is fundamental to them having the intended impact.

To conclude

There are dilemmas in attempts to turn the page on the economy of a state emerging from conflict in institutionally weak countries. The commitment of key stakeholders is key to implementing new constitutional frameworks, and particularly to upholding principles of transparency, accountability and integrity, but commitment is often shallow and not constant, and the type of change needed to restructure an economy to meet development challenges encounters many vested interests and takes time. Nonetheless, adopting tailored mechanisms and institutions such as those explored in this paper in peace agreements and constitutions could set the stage for future gradual change, and at least offers tools to those who want a chance to walk the path towards it.

This paper constitutes an initial exploration and while more thinking is required on the role that peace agreements and constitutions could have in shifting stakeholders' incentives, the paper will have succeeded if it contributes to this conversation.

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Chapter 1

INTRODUCTION

Conflict parties often have vested interests in natural resources, particularly when they produce (or have the potential to produce) high revenues.

Natural resources have been a dominant factor in many conflicts for decades, if not centuries. Indeed about a quarter of all conflicts between 2014 and 2018 involved natural resources in some way (Schellens and Diemer 2021: 1). Conflict parties often have vested interests in natural resources, particularly when they produce (or have the potential to produce) high revenues. Access to and control over natural resources and their revenues can therefore be either a cause or a driver/facilitator of conflict and instability (Haysom and Kane 2009; Collier and Hoeffler 2011; Anderson 2020; Anderson 2021), and hence natural resources may themselves affect the shape and the duration of the conflict (Schellens and Diemer 2021: 10). In such cases, a durable peace is likely to require a political settlement regarding the governance of natural resources. When constitutional reform is part of a peace deal, that settlement might be expected to find its way into the constitution.

This paper explores how constitutions made either immediately following or during conflict deal with natural resource governance, focusing particularly on land and extractives.[1] It follows a wider conversation aimed at exploring how economic interests drive parties' positions during conflict and in post-conflict constitutional negotiations. The role of natural resources is just one example

1 Different types of natural resources raise different issues and need different treatment and this should be taken into account in reading the paper. Water is particularly relevant here, as issues related to its access and management in particular are likely to become increasingly important. Some newer constitutions (and constitutional drafts) already include specialized bodies or authorities for water managemen. See, for example, the 2008 Constitution of Ecuador (article 412) and Libya's 2016 draft constitution (article 188). Beyond this, independent commissions mandated to either advise or monitor government policies, as well as public consultations on water policies, are increasingly likely to be included in constitutions.

of how these vested interests can ultimately affect the design of constitutional frameworks.[2]

The findings, however, are tentative. Little work has been done on how constitutions frame and influence natural resource governance generally, and even less concerning constitutions emerging out of conflict. By exploring a few cases and sketching different approaches, the paper is intended to trigger further discussion and research. The paper does not assume that a constitution can fix the way natural resources are governed, or even that it is likely to play a significant role in this regard. Nonetheless, it suggests that, while there are clear challenges, constitutional mechanisms could provide a better basis for dealing with natural resources.

Discussions about natural resources often distinguish renewable (or sustainable) resources, such as wind and solar, but also land, water, wildlife and forests, from non-renewable (or extractive) resources, such as hydrocarbons and other minerals. Another way of categorizing natural resources, and a way that might have a distinct impact on how they are dealt with in a constitution, is to distinguish resources vital for livelihood, such as land and water, from those that are commercially important, such as hydrocarbons and minerals (Hickey 2024). Of course, different types of natural resources have distinct roles in specific contexts. While both renewables and non-renewables can be a source of conflict, non-renewables can further contribute to maintaining a system of 'producing, mobilizing and allocating resources to sustain the violence' (Le Billon 2007), potentially to the benefit of conflict parties in an economy that is opaque, exclusionary and exploitative.

Sometimes parties to a conflict may (or may be forced by circumstances to) recognize the need to negotiate a new political settlement. Reasons vary, from reaching a stalemate to one of the parties—often the one that represents the central government—realizing that, if the war continues, their negotiating position could be weakened and peace dividends might vanish. The processes and outcomes of political settlements also vary, including with respect to natural resources: more or less detailed agreements on the governance of natural resources may become part of a peace deal, interim arrangements or a new constitutional framework (Bell and Zulueta-Fülscher 2016), or may not be mentioned at all, or only

2 For further reading on issues related to negotiating, designing and implementing natural resource management schemes in constitutions, and the particular impact of these choices on women and other marginalized groups, see Hickey (2024).

partially, instead becoming part of informal deals or remaining unsettled.

Natural resources that have been at the root of the conflict or that have facilitated its continuation are often not addressed in detail (if at all) either in peace agreements or in constitutions.

It is always difficult for conflict parties to engage in negotiations and agree to a fundamental transformation of processes and institutions. This is particularly the case when those changes mean dismantling a predatory economy from which the parties have profited, and the establishment of resilient and inclusive institutions and processes that constrain their powers. In other words, there is often a tension between building democracy and good governance, which is uncertain and will take time, and protecting existing privileges and interests, including access to natural resources. The result in the cases analysed in this paper is that the natural resources that have been at the root of the conflict or that have facilitated its continuation are often not addressed in detail (if at all) either in peace agreements or in constitutions. When they are addressed, it is often without involving the directly affected communities. The impact of this can be pernicious to sustainable peace and inclusive governance.

Chapter 2 examines situations in which land has been a significant factor in conflict and explores how constitutions can respond. Chapter 3 discusses the extractive industries and focuses on non-renewable resources as a source, driver and facilitator of conflict, and introduces some ways in which constitutions could contribute to better natural resource governance. Chapter 4 shifts to the management of revenue from natural resources and considers more generally how a constitution might provide the foundation for a sound fiscal and monetary system in a country emerging from conflict, as well as specific arrangements for countries likely to have a significant influx of natural resource revenue.

Chapter 2

CONSTITUTIONALIZING LAND ISSUES AFTER CONFLICT

Contests and grievances over property and access to land are part of many conflicts (Schellens and Diemer 2021). These may relate to dispossession, the right to be compensated for loss of land, the right to use or manage land and to generate income from it, or the right to transfer land, among other things (Wehrmann 2008: 21; Trebilcock and Veel 2014: 403, citing Eggertsson 1990: 34–35).

Access or lack of access to land can contribute to violent conflict when land constitutes a major source of wealth but its ownership is concentrated in a small and comparatively wealthy elite that also controls the levers of power. This was famously the case in South Africa throughout apartheid, and also, for instance, in Nepal, where elites resisted land reform that might threaten their wealth and political power. The contest over land in Nepal led to a peasant-supported Maoist insurgency and a civil war that lasted from 1996 to 2006 (Joshi and Mason 2010: 988, 991).[3]

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Conflict over land may also be linked to the scarcity of valuable land, as a result of environmental degradation or scorched-earth policies, for instance, or economic changes that have an impact on the way land is used and divided: 'Scarcity of land due to environmental degradation and population growth often leaves hardly any choice to people than fighting for land which might not be theirs' (Wehrmann 2008: 6). Thus, in eastern DRC, scarcity of land helped to maintain a system of patronage whereby local elites or rebel leaders 'turned land into an asset to be distributed among its members' (Vlassenroot and Huggins 2004: 3).

3 Guatemala is another interesting case. In the 1990s, the land reform envisaged in a peace agreement was opposed by important economic stakeholders (Brett 2022).

Land grabbing usually occurs in contexts where access to land and land management is either unregulated or poorly regulated (sometimes with competing land governance systems throughout the country), or where regulations are not implemented or are biased towards large-scale investors.

In many settings, land tenure is not formally secure, and documents and land registries may have been intentionally destroyed. Sometimes the state is too weak, while at other times it may deliberately decide not to enforce property rights over land, leaving individuals and communities vulnerable to land grabbing. Women and communities that have a history of being discriminated against are often particularly affected in this way (Hickey 2024). Land grabbing has been a key driver of conflict in many countries, not least Colombia, the DRC, Kenya, South Sudan, and Sudan. In these and other countries, tenure insecurity has led to disputes over land, contested claims and encroachment (sometimes by the state), often compounded by a failure by the state to protect well-founded claims (Trebilcock and Veel 2014: 403). In addition, tenure insecurity can lead to the over- or under-exploitation of resources on the land or in its subsoil. Large-scale land grabbing can aim for intensive, short-term profit-maximizing agricultural, mining or logging operations or, on the other hand, lead to land speculation, leaving land unexploited or unproductive. Land grabbing usually occurs in contexts where access to land and land management is either unregulated or poorly regulated (sometimes with competing land governance systems throughout the country), or where regulations are not implemented or are biased towards large-scale investors. Such land exploitation therefore often goes unchecked. In all these situations disputes over land readily lead to conflict.

An inability to demonstrate a legal right to land increases the likelihood that disputes over land will be difficult to resolve. However, formalizing informal property regimes may also have administrative and other costs when dealing with land surveys, adjudicating conflicting claims or maintaining recording (registry) systems. Formalizing land tenure also has the potential to cause social conflict, to further marginalize disenfranchised groups that have perhaps been deliberately excluded from the process and to disrupt informal institutions that may have contributed to a level of stability (Trebilcock and Veel 2014; Huggins 2009). According to Trebilcock and Veel (2014: 450), '[w]hile a strong formal property rights regime can prevent conflict and wasteful competition for resources once such a regime is successfully instituted, the process of creating and formalizing such a regime can itself lead to significant conflict, at least in the short term'. Claims for renewed access to or use of land as part of a broader political settlement process can involve competition or confrontation between those who prefer formal rules to regulate access to and use of land and those who would rather maintain a certain level of informality (Unruh 2003; Trebilcock and

Veel 2014). The higher the land stakes for the negotiating parties, the more difficult negotiations and a transition will be.

2.1. **DEALING WITH LAND: FROM PEACE AGREEMENT TO FINAL CONSTITUTION**

Most constitutions enshrine a general right to property in the bill of rights. Many do not deal with land in much detail, if at all, however, even if it constitutes an important driver of conflict, such as was the case in Angola, Burundi and Timor Leste (Schellens and Diemer 2021). Sometimes, of course, land is dealt with adequately through extant legislation (Anderson 2020: 15). Ordinary legislation can be more detailed than a constitution, is easier to amend and can thus be more sensitive to different needs and emerging ideas and challenges. In some countries, however, such as South Africa, Nepal, Kenya and Colombia, constitutions pay much more attention to land, sometimes constitutionalizing different property regimes and setting up mechanisms to redress past injustices. In all cases, constitutional provisions will need to be supplemented by ordinary laws.

Most constitutions enshrine a general right to property in the bill of rights.

In **South Africa,** the constitutional provision detailing the right to property was the subject of extreme contention among the negotiating parties. For many, protecting a right to property was tantamount to protecting the wealth of white South Africans, gained at the expense of the dispossessed black population. For the African National Congress, undoing the system of property ownership that had underpinned both colonialism and apartheid, and reaffirming a right to land were essential (Coggin 2021: 4). Including a clause protecting property was seen to threaten any land reform project. Nonetheless, the Interim Constitution included a 'positive entitlement' (Coggin 2021: 5) 'to acquire and hold rights in property', and provided protection from expropriation, unless it was for a public purpose and compensated for (section 28). The long provision on compensation stipulated that, if compensation were not agreed, a court must determine 'just and equitable' compensation taking account of a diverse range of matters, including its use and the history of its acquisition. This reflected the tensions and level of disagreement over the issue. In addition, Chapter 8 included provisions related to the restitution of land rights, which was limited to restitutions 'from the state' for dispossessions after 19 June 1913, the date of the notorious Native Land Act, which would have infringed the equality clause had it been in force at the time (section 121). Expropriations

in terms of the Expropriation Act were excluded from this process, which was focused on the forced removals that constructed the racial map of the apartheid state rather than 'regular' expropriations in the public interest. A (temporary) Commission on Restitution of Land Rights was established to, among other things, investigate the claims and settle any disputes (section 122) and a detailed provision on claims emphasized that when restitution involved expropriation from private persons, compensation should be calculated as set out in section 28 (the right to property). As Coggin notes, there is a sense that the Interim Constitution of South Africa was structured 'to *not* disrupt the property status quo too radically' (2021: 6). The detail in the provision certainly reflects the tough negotiations that preceded it.

Further negotiations (and many disagreements among the parties) led to the inclusion in the 1996 Constitution of South Africa of a clause on property that did not reaffirm the positive right to property (and land) but only the negative right that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property' (section 25(1)). While expropriation was allowed only 'for a public purpose or in the public interest' and 'subject to compensation' that is 'just and equitable' (section 25(2) and (3)), section 25(4) specifies that 'public interest includes the nation's commitment to land reform' and section 25(8) states that '[n]o provisions of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination'.[4] Again, factors to be taken into account in determining compensation are spelled out, and the inclusion, for instance, of 'market value' and 'the history of the acquisition…of the property' reflect the disagreements among the negotiators. Overall, the rather convoluted and repetitious language of this provision in a constitution that is otherwise drafted clearly and economically reflects the tense negotiation on the issue of property. Indeed, much of section 25 is backward-looking, limiting the right to property so that abuses of the past can be addressed. However, and again sensitive to South Africa's history of forced removals, section 26 on the right to housing looks ahead and requires a court order for any eviction from a home (section 26(2) and (3)). Almost 25 years later, property rights remain intact and the consensus seems to be that land reform has failed (Cousins and Hall 2013; Hull 2022).

4 In a belt and braces approach, section 25(8) also states, unnecessarily, that the right to property is subject to the general limitation of rights (section 36(1)). The limitation clause itself states that it applies to all rights.

Often such failures are ascribed to a lack of political will but that does not explain the South African experience. It has been a failure of (and disagreement about) policy rather than an absence of attempts to engage in reform. Currently, the debate is dominated by two positions: the mistaken argument that the property clause in the Constitution (section 25) prevents expropriation without compensation, on the one hand, and arguments that it is the elite compromise on the economy reached in the early 1990s but never formalized (Bundy 2014: 40) that has made it impossible to fulfil the commitment to land reform, on the other (McCusker et al. 2016: 181ff). To oversimplify, South Africa demonstrates the obvious connection between land and the broader economy, and the limits of constitutional arrangements. Securing constitutional recognition of the legitimacy of land reform was an achievement, but designing the policy and implementing it has proved to be a formidable task, significantly influenced by broader economic arrangements.

In the case of **Nepal**, the 2006 Comprehensive Peace Agreement committed the Maoists to return the land that they had seized from political opponents during the conflict, but also contained commitments to social transformation, including land reform (Carter Center 2012). The parties agreed to adopt, for instance, 'a scientific land reform program by ending feudal land ownership' (article 3.7) and '[a] policy of providing land and other economic protection to socially and economically backward classes' (article 3.10). The 2007 Interim Constitution provided for a right to property, protection against arbitrary expropriation and compensation for lawfully expropriated property. Notably, and unlike the South African Constitution, for instance, which requires 'just and equitable' compensation and details a number of factors in determining compensation, it left standards of compensation entirely to legislation (section 19). The Interim Constitution also incorporated the agreement on land reform in the Peace Agreement by stipulating the state's responsibility to enact land reform, 'by *gradually* ending feudalistic land ownership' (section 33(f)) (authors' emphasis). The 2015 Constitution reiterates the right to property (section 25), repeating almost verbatim the property provision of the Interim Constitution, but adds a clause reminiscent of South Africa's section 25(8), providing that the prohibition of arbitrary expropriation and right to compensation 'shall not obstruct the state in carrying out land reforms, management and regulation by law in order to increase the production and productivity of land, modernize the agriculture and make it professional' (section 25(4)). In effect, this provision clarifies what might constitute a public interest for purposes of expropriation

and secures the state's ability to develop the 'social function' of land. It also suggests that compensation will not always be required. Nepal in fact did amend its 1964 Land Act in 2018 and again in 2020 to provide for land redistribution to landless *Dalits*, and to recognize the land tenure of 'landless squatters' and 'unmanaged dwellers' (Global Land Tool Network 2023). While it is still perhaps too early to judge—the National Land Policy was adopted only in 2019—the limited implementation thus far and Nepal's history of failure to implement land reform policies raise concerns.

Some constitutions establish a number of different forms of tenure, principally to protect customary tenure.

Some constitutions establish a number of different forms of tenure, principally to protect customary tenure, as in the case of Kenya (see below). This can be particularly important in post-conflict settings where weakened states will often need 'the customs and controls within local communities' to be able to better administer land (Unruh 2003: 11). Unruh (2003: 1–2) further argues that 'the institutional fluidity of armed conflict allows for opportunities to reconfigure certain institutional arrangements to more closely suit the needs of particular groups and situations. … The postconflict period can then find conditions of "legal pluralism" regarding land to be significantly developed, with different sets of normative rules regarding land, property, and territory intricately bound up in the conflict itself.' On some occasions these new rules may find their way into constitutional frameworks.

In the case of **Kenya**, land has always been central to the economy, in terms of both agricultural and pastoralist use, but has also been a tool in political and socio-cultural competition and conflict. Indeed, conflict over land seems to be a permanent feature of Kenyan life. Thus, the post-electoral violence of 2007–2008 involved the large-scale expulsion of people from areas in which they were deemed 'not to belong' for ethnic reasons (New Humanitarian 2011; IDMC n.d.). More generally, land seizures have been a cause of conflict in the recent past (Manji 2020; NDung'u Report 2004). The 2010 Constitution seeks to address these problems, with considerable detail relating to land in the provision on the right to property (article 40) and a lengthy chapter on 'Land and the Environment' (articles 60–72). It provides for the protection of the right to (lawfully acquired) property, including land (article 40), and recognizes three different forms of land tenure: public, community and private (article 61(2)). Expropriation is allowed only for 'a public purpose or in the public interest', carried out in accordance with the Constitution and any relevant law. Anyone with an interest in the property is entitled to compensation for expropriation and to challenge the

process in court (article 40(3)). Like the arrangements in some other anglophone constitutions—Sri Lanka's Constitution (Appendix II on Land and Land Settlement), Ghana's Constitution (section 258) and Uganda's Constitution (section 243)—the Kenyan Constitution establishes a National Land Commission mandated to manage public land, 'to recommend' a national land policy and to advise the government on a programme of title registration, among other things (article 67). Moreover, in addition to establishing a clear framework for land tenure, in what might be described as transformative (or restorative) provisions (Klare 1998), the Constitution requires legislation 'enabling the review of all grants or dispositions of public land to establish their propriety or legality' (article 68(c)(v)). This provision is clearly directed at undoing seizures of public land. Similarly, the mandate of the Land Commission includes investigating 'present [and] historic land abuses' (article 68(2)(e)). According to Manji (2020), however, while the Constitution attempts to confront unequal access to land by asserting the need to address land injustices, the legislation and reform programmes that followed failed to continue in the same vein. Constitutions can provide a framework but a framework might not be enough to produce change.

In **Colombia**, land dispossession and the more general social and economic exclusion of peasants has long been one of the main causes of civil conflict (Sánchez 2021). In one of several attempts to respond to the root causes of conflict, the 1991 Constitution recognizes different forms of property (private and associative and joint forms of property (article 58)), as well as open-access systems such as 'natural parks, communal lands of ethnic groups, reservations lands of indigenous peoples' (article 63). It also provides for the state to 'promote access to property' (article 60) and, in a more transformative manner, requires the state to 'promote the gradual access of agricultural workers to landed property' (article 64).[5] It expressly allows Congress to 'issue regulations concerning the appropriation or adjudication and reclamation of uncultivated land' (article 150.18). Nonetheless, land ownership has remained highly unequal and was, as a consequence, a key source of the long-running conflict between the government and the Fuerzas Armadas Revolucionarias de Colombia (FARC). Access to land, land use and the establishment of special development programmes were prioritized in the peace negotiations that concluded with the signing

5 See also article 60: 'When the State sells its interest in an enterprise, it shall take measures to promote the democratization of the ownership of its shares and shall offer its workers or the collective and workers' organizations special terms to facilitate their acquisition of these shares'.

of the 2016 Peace Agreement (Anderson 2021).[6] In fact, land 'was one of the elements that made the peace process with the FARC possible' (Sánchez 2021: 194). The Peace Agreement established a land fund for landless peasants or peasants with insufficient land, and provided for the formalization of title to small and medium-range (rural) properties, as well as the modernization of the rural land registry. There is also a special development programme for conflict- and poverty-affected territories, with mechanisms for public consultation, among other things (Chapter 1:'Towards a New Colombian Countryside: Comprehensive Rural Reform'). Although these details of the Peace Agreement were not constitutionalized, President Juan Manuel Santos issued a decree in May 2017 (Decreto Ley 902 de 2017) that, among other things, dealt with the regularization of rural property, provided for the establishment of the Land Fund and created a procedure to resolve land access claims (Sánchez 2021: 197). The Constitutional Court approved a slimmed-down version of the decree almost in its entirety in July 2018.[7] The Land Fund was later incorporated into the 2021 National Plan for the Massive Formalization of Rural Property.[8] According to the Comptroller General's Office, the plan has shown improvements in land redistribution, but there have also been delays due to weak institutional enforcement (*El Nuevo Siglo* 2024).

2.2. **SUMMARIZING POTENTIAL CONSTITUTIONAL INNOVATIONS**

The outcomes of these four very different cases reveal the obvious: that provisions of a peace agreement or constitution need to be backed by real commitment, but also that agreement to resolve problems related to land (and property more generally) is merely a beginning. Formidable challenges lay ahead in agreeing on policies and monitoring systems for their implementation. Furthermore, securing the fair distribution of land, and rights to possess and

6 The Peace Agreement was rejected in a referendum held on 2 October 2016. The Agreement was then renegotiated and adopted by Congress in November 2016.

7 República de Colombia, Corte Constitucional, Sentencia C-073/18 [Decision C-073/18], July 2018, <https://www.corteconstitucional.gov.co/relatoria/2018/C-073-18.htm>, accessed 10 April 2024.

8 República de Colombia, Ministerio de Agricultura y Desarrollo Rural, Resolución Número 000382 de 2021, 'Por la cual se adopta el Plan Nacional de Formalización Masiva de la Propiedad Rural, formulado en cumplimiento de los puntos 1.1.1. y 1.1.5. del Acuerdo Final' [By which the National Plan for the Mass Formalization of Rural Property is adopted, formulated in compliance with points 1.1.1. and 1.1.5. of the Final Agreement], <https://www.minagricultura.gov.co/Normatividad/Resoluciones/RESOLUCION 000382 DE 2021.pdf?ID=978>, accessed 10 April 2024.

have access to it, depends not only on comprehensive rights and effective policies, but also on their enforcement by independent state institutions. For instance, in addition to a functioning police service, '[t]he existence of a competent and uncorrupt judiciary is an important institution for the effective functioning of a formal property regime' (Trebilcock and Veel 2014: 464). Nonetheless, carefully considered constitutional provisions concerning property and land provide a foundation, as constitution makers in contexts in which land has been contentious are often aware. In the cases discussed above and various others, provisions on land and property are relatively detailed and direct attention is often paid to addressing long-standing problems. A number of mechanisms have been constitutionalized including:

Securing the fair distribution of land, and rights to possess and have access to it, depends not only on comprehensive rights and effective policies, but also on their enforcement by independent state institutions.

- *A framework for land restitution*: The constitutions of some countries affirm that the state's right to undertake land reform contributes to the public interest (South Africa, section 25(4)) or, more emphatically, require the state to undertake land reform (Nepal, section 51(e)). This approach removes disputes about the constitutionality of land reform itself and leaves individual disputes concerning its implementation and particularly compensation to be resolved by the judiciary.

- *Formal recognition of communal land tenure*: Some jurisdictions provide constitutional recognition or formalization of different forms of land tenure, recognizing not only private and public but also communal and customary forms. Where entire communities, sometimes Indigenous communities, have been deprived of their land, recognition of this form of land tenure may advance redress for past human rights violations, restitution of land and related reparations (Huggins 2009).

- *Independent commissions*: Independent commissions with a mandate to examine past abuses and/or to document ongoing dynamics of land access and conflict are becoming increasingly common, in both transitional and more permanent constitutions. Alternatively, this mandate might be included in the mandate of other commissions, such as Human Rights and Truth Commissions. When a commission concerned with land is included in a constitution it is crucial to think about its mandate and funding, as well as its membership, which should include civil society representatives. Such commissions may be intended to be transitional, focused on resolving historical abuses, and thus perhaps included only in transitional constitutions, such as

South Africa's Commission on Restitution of Land Rights (Interim Constitution, section 122). The mandate of this Commission included to 'investigate the merits of any claims', 'mediate and settle disputes arising from such claims' and 'draw up reports on unsettled claims for submission as evidence to a court of law' (section 122(1)). Where these Commissions are permanently constitutionalized, their mandate may be broader, such as Kenya's National Land Commission (2010 Constitution of Kenya, section 67).

- *Special Land Courts*: Some states have also constitutionalized specialized land courts or tribunals, such as the Kenyan Environment and Land Court (article 162(2)(b)) and Uganda's Land Tribunals (article 243).[9] Uganda's Constitution details the jurisdiction of Land Tribunals, which are intended to resolve disputes related to 'the grant, lease, repossession, transfer or acquisition of land by individuals, the Uganda Land Commission or other authority with responsibility relating to land' and to 'the amount of compensation to be paid for land acquired' (article 243(2)). Specialized land courts are usually established only in those jurisdictions where land conflict has been significant or where state land has been systematically misallocated (Wehrmann 2008: 79). Establishing such specialized courts has advantages. They can help 'free general courts from the burden of land-related cases, decrease the time people have to invest in solving land disputes and improve decision making with arbitrators who are more familiar with land issues' (Wehrmann 2008: 78). Whether they need to be established by the constitution, however, is a separate question. South Africa's Land Claims Court is not mentioned in the 1996 Constitution—it is established as a High Court by an Act of Parliament under the constitutional provision that permits parliament to establish courts within the framework of the Constitution (section 166). Where groups seeking justice for land abuses lack confidence in the government, as in Kenya, and in many conflict-affected settings, a constitutional requirement that a specialized court should be established is more likely.

9 Colombia's Constitution was amended in July 2023, as per Legislative Act 03 of 2023, to establish a new agrarian and rural jurisdiction, as part of Title VIII on the judiciary. This new jurisdiction provided for the creation of tribunals and courts that would focus on 'agrarian and rural' issues as defined by law, with a cassation chamber of the Supreme Court as the court of last instance.

Chapter 3

CONSTITUTIONALIZING THE OWNERSHIP AND MANAGEMENT OF EXTRACTIVES

Several countries where natural resource revenues constitute a significant proportion of GDP, such as Angola, Congo, the DRC, Iraq, Libya, South Sudan and Timor-Leste, have been affected by conflict in the past 25 years.[10] In these countries, natural resources and their revenues—especially when they emanate from extractive resources such as oil, natural gas and minerals—are either a source or a facilitator of conflict (Schellens and Diemer 2021; Anderson 2021). Some have undergone a constitutional transition as part of a broader political settlement process since the turn of the century, in which natural resources also played a role—often invisibly through provisions that do not expressly refer to natural resources, or in absentia. Among these countries are Angola (2010), the DRC (2005) and Iraq (2005). Several other resource-rich countries, such as Libya, South Sudan and Sudan, are still struggling to complete a constitutional transition.[11] Natural resources have also been significant in political settlements in countries where their revenue may constitute a smaller proportion of GDP but where they are territorially concentrated. For example, the relevance of their natural resources is discernible in the political settlements concerning Aceh (Indonesia) and Bougainville (Papua New Guinea).[12]

10 Countries where natural resource revenues represent at least 20 per cent of total GDP are Algeria, Angola, Azerbaijan, Brunei, Burkina Faso, Chad, Congo, the DRC, Equatorial Guinea, Guyana, Iran, Iraq, Kazakhstan, Kuwait, Liberia, Libya, Mongolia, Oman, Papua New Guinea, Qatar, Saudi Arabia, Timor-Leste, Uzbekistan and Zambia. The World Bank does not have data for Eritrea, South Sudan or Venezuela (World Bank 2023). On South Sudan, see IMF (2023).

11 This paper does not focus on countries that have not yet concluded their political settlement process, such as Libya, South Sudan or Sudan, but uses them occasionally to exemplify particular issues included in their peace agreements or other interim arrangements.

12 In Papua New Guinea, for example, the Panguna mine on the island of Bougainville was the largest single source of revenue for the national government after Australian Aid, accounting for 12 per cent of GDP (Togiba and Doherty 2021).

When considering arrangements governing natural resources it is useful to distinguish between the ownership of natural resources, their governance or management and entitlements to resource revenues.

When considering arrangements governing natural resources it is useful to distinguish between the ownership of natural resources, their governance or management, which includes legislative and executive authority over natural resources ('who has the ability to make and administer laws relating to the development and exploitation of natural resources' (Haysom and Kane 2009: 12)), and entitlements to resource revenues (including taxes, royalties, and import and export tariffs). In terms of ownership, natural resources may be privately owned by an individual or a corporation, owned communally, perhaps in a customary arrangement, or owned by the state. However, ownership itself does not necessarily confer a right to determine the terms on which the resource may be exploited (how it is governed).[13] Nor does it indicate who (or what level of government) raises and collects revenues generated by the resources or how those revenues are distributed (Haysom and Kane 2009: 8; Broadway and Shah 2009: 207). In conflicts, all these matters may be contested, and the ownership, governance and management of resources is likely to be dealt with differently in settlements depending on the conflict itself and the nature of the resource.

This chapter explores how constitutions that emerge in conflict-affected settings where extractives have been a source or facilitator of conflict allocate rights of ownership and management (for instance, to regulate and conclude contracts) of natural resources. Revenue generation and distribution are covered in Chapter 4 on fiscal arrangements.

3.1. **DEALING WITH EXTRACTIVES: INSTITUTIONALIZING THE OWNERSHIP AND MANAGEMENT OF NATURAL RESOURCES**

Focusing specifically on countries in which extractives were an element of the conflict, it is striking that often their constitutions—and sometimes also the peace agreements that preceded them—do not contain many details beyond stating that the central state, the government or 'the people' own the respective country's natural

13 The management of the extractive sector is often left to the central government or the central state. This is the case even where the 'ownership' of resources is devolved to substate entities, such as in India and Malaysia (Anderson 2020: 11), or where it is shared between them and the central state, such as in Pakistan (Constitution of Pakistan 1973, reinst. 2002, article 172.3).

resources, including those significant to the extractive sector (see Anderson 2020: 9; Anderson 2021).[14]

Sometimes extant legal regimes already cover issues related to natural resource governance. Where these do not need to be altered, inclusion of matters concerning natural resource governance in constitutional frameworks may be seen as unnecessary. Alternatively, there may not be sufficient time to come to an agreement on issues that are likely to be both highly controversial and highly technical, so parties may defer them to future legislation. At other times, however, negotiating parties may prefer not to formalize the way in which natural resources are governed or be unable to reach agreement on the matter.

Sierra Leone is an interesting case in that after several unsuccessful peace agreements, such as the 1996 Abidjan Peace Agreement and the 1997 Conakry Peace Plan, its diamond-fuelled conflict concluded only after the illegal diamond trade was tackled head-on in the July 1999 Lomé Peace Agreement (Ducasse-Rogier 2004).[15] The Lomé Peace Agreement provided for the establishment of an at least nominally independent Commission for the Management of Strategic Resources, National Reconstruction and Development, mandated to sanction the exploration for, sale and export of, and any other transaction in, gold and diamonds (article VII, 2). While all revenues proceeding from transactions in gold and diamonds were to be public in nature and part of a 'special Treasury account to be spent exclusively on the development of the people of Sierra Leone' (article VII, 6), according to Binningsbø and Dupuy (2009: 96), 'perhaps the most crucial power-sharing mechanism' was the fact that Corporal Foday Sankoh, Leader of the Revolutionary United Front/Sierra Leone (RUF/SL), the rebel group that had waged war for over a decade against the Government of Sierra Leone, was to be appointed Chair of the Commission (Lomé Agreement article VII, 12). This meant that the RUF/SL had de facto control over the diamond trade, which may have been 'the single most important element in convincing the RUF to sign the peace agreement' (Binningsbø and Dupuy 2009), illustrating the point that '[s]ome sources of revenue, most conspicuously oil and minerals, are highly fungible into political budgets', and thus key to the ability of a political actor to 'buy, sell

14 According to Anderson (2021), only a handful of (mostly federal) countries are exceptions to the rule that the central state or the people own natural resources, such as Argentina, Australia, Canada and the United States. Papua New Guinea is a more recent exception.

15 At the height of the conflict, natural resource revenues represented more than 20 per cent of its total GDP (World Bank n.d.).

and trade political power' (De Waal, Spatz and Sarkar 2022: 14, 6). Notably, according to a report by a UN-appointed panel of experts, '[b]etween the time Foday Sankoh returned to Sierra Leone late in 1999 and the resumption of hostilities in May 2000, members of the Commission never actually met, and the Commission did not function', but Sankoh managed to enrich himself (UN Security Council 2000: para. 90). After the resumption of hostilities, Sankoh was detained in 2000 and indicted in 2003 by the Special Court for Sierra Leone for war crimes and other atrocities committed during Sierra Leone's civil war (UN News 2003).

In the case of **Angola**, the 2010 Constitution followed the end of a civil war fought from Angola's independence in 1975 until 2002. The Movimento Popular de Libertação de Angola (MPLA), which had governed the country since independence, eventually won the war. Angola is a country endowed with many non-renewable natural resources and resource revenues had enabled and constituted a driver for parties to continue the fighting. Despite the significance of non-renewables to Angola's economy, however, none of the peace agreements that preceded the 2010 Constitution made any reference to natural resources. The Constitution itself provides only that the state has full ownership over and is responsible for the management of all natural resources, leaving further details to the law (articles 3 and 16).[16] Given its control of the legislature, however, the MPLA had no need to negotiate with opposition parties when it came to regulating natural resource management. More notable perhaps is the fact that in July 2006, after a separate conflict between the Government of Angola (controlled by the MPLA) and separatist forces in Cabinda—the province with the richest oil deposits—the Government signed a Memorandum of Understanding[17] which agreed to adopt a 'Special Statute' (annex 7) for Cabinda.[18] The Special Statute, however, is again silent on natural resource management, only reaffirming the state's ownership of natural resources and of the means of production (annex 7, chapter III, article 15), leaving project implementation to the province (annex 7, chapter IX, article 42.2). In fact, the importance of Cabinda's oil reserves for Angola appeared to ensure that no countrywide party would be willing to relinquish control over the province or its resources (Le Billon 2007: 105). At

16 There were similar provisions in the 1992 Interim Constitution, article 12 and article 89.

17 Official Bureau of the Republic of Angola, Gazette of the Republic, Resolution No. 27-A/06 and Resolution No. 27-B/06, July 2006, <https://www.peaceagreements.org/viewmasterdocument/1336>, accessed 20 May 2024.

18 In 2019, Cabinda's natural resources, mainly oil, represented 60 per cent of total oil production in Angola (AFP 2019). As Le Billon (2007: 105) notes, '[w]ith a population of only 300,000, the revenues from this production would make an independent Cabinda one of the world's wealthiest developing countries per capita'.

the same time, the increasing fragmentation of Cabinda's separatist movement weakened it to the extent that it never became a force for the Angolan government to reckon with (Le Billon 2007; Amundsen 2021).

Similarly, in the **Democratic Republic of the Congo**, no peace agreement leading up to the 2005 Constitution mentions natural resources to any significant extent. It is the 2003 Transitional Constitution that first mentions the state's ownership of the soil and subsoil, and provides that concessions (arrangements for the use of land and the subsoil) must protect the interests of local populations (article 9). The 2005 Constitution for the most part follows the 2003 Transitional Constitution, asserting the state's ownership of natural resources and requiring legislation to regulate natural resource management and concession modalities (article 9) and setting out fundamental principles concerning 'the regime of land, mining, forestry and real property' (article 123.3). The Constitution does decentralize power to the provinces (article 201), following a long history of attempted, but largely unsuccessful, decentralization (Weiss and Nzongola-Ntalaja 2013). However, under this arrangement, the centre retains exclusive responsibility for 'economic legislation including the laws concerning mines, minerals and mineral oils, industry, energy sources and the conservation of natural resources' (article 202.36.f). 'Land and mining rights, territorial management, the regime of waters and forests' (article 203.16) and 'regulation of the regimes [of] energy, agriculture and forests, livestock, [and] foodstuffs of animal or vegetable origin' (article 203.19) are included in a list of concurrent powers of the centre and the provinces. This means that both the directly elected Provincial Assemblies and the centre can legislate on these aspects of natural resources but that provincial edicts (laws) that are incompatible with central laws or regulations are null and void 'to the extent of the incompatibility' (articles 197 and 205). Finally, a list of exclusive provincial powers includes 'the drafting of mining, mineralogy, industrial [and] energy programs of provincial interest and their execution in accordance with the general norms of national planning' (article 204.19). The specific issues that these lists cover and thus exactly how responsibilities are divided are not particularly clear. However, qualifications in the provisions on exclusive provincial powers suggest rather limited provincial legislative space. In any event, Englebert and Kasongo Mungongo (2016: 9) argue that decentralization more generally has lagged behind expectations, and wherever it has been implemented it might actually have contributed to '[reproducing and spreading] the dysfunctions of the Congolese

state rather than curing them'; it has 'fostered greater predation, provincial centralization, unaccountable governance, and self-serving provincial elites' (Englebert and Kasongo Mungongo 2016: 27), partly because the transfer of both competencies and revenues to the provincial level has not been matched by an increase in the levels of both horizontal and vertical accountability.

Iraq is the only country in the group of conflict-affected countries for which natural resource revenues represent a significant part of total GDP that describes itself as a federation.[19] Both the ownership and the management of natural resources—particularly oil and natural gas revenues—were highly contentious during the constitutional negotiations (Al-Ali 2019: 108). Like other contemporaneous constitutions, the 2005 Iraqi Constitution vests ownership of oil and gas in 'all the people of Iraq in all the regions and governorates' (article 111).[20] In a very broadly phrased provision, the Constitution provides that '[t]he federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from current fields' (article 112.1). As Al-Ali (2019: 109) explains, the reference to 'current fields' is meant to distinguish between already exploited and yet-to-be exploited fields, and indirectly referred (or has been interpreted to refer) to the fact that most of Iraq's unexploited fields were (wrongly) thought to be situated in the Kurdistan region, and that their control should pertain to the region and not the federal government.[21] Constitutional implementation has been fraught for many years. An oil and gas law to fill constitutional gaps is yet to be adopted, there have been continuous legal (and political) battles between the federal government and the Kurdistan Regional Government, and an extremely risk-averse court has avoided making decisions until recently (Al-Ali 2023). As is discussed in Chapter 4, Iraq's Constitution also establishes a revenue commission that, among other things, is required to verify the use of federal financial resources. However, it has not been established to date.

The cases of **Indonesia** and **Papua New Guinea** provide examples of peace agreements signed with territorially concentrated groups

19 Nigeria is not included because despite the existence of conflict in many parts of the country, it is not conflict-affected to the same degree, and because despite the significant contribution to tax revenue made by revenue from natural resources, it remains a small percentage of GDP.

20 The importance of the reference to regions and governorates is, however, not considered legally significant.

21 Since then it has been learnt that significant petroleum fields lie outside Kurdistan, and are mostly located in the South and East of Baghdad (US Energy Information Administration 2024).

that include specific provisions on natural resources and grant considerable autonomy to the territories in which the conflict occurred. The 2005 Memorandum of Understanding signed by the Government of Indonesia and the Free Aceh Movement did not lead to constitutional amendments and so the arrangement is governed by the Indonesian Constitution, which stipulates that natural resources are 'under the powers of the State' (article 33). State ownership is moderated by another provision requiring that 'relations between the central government and regional authorities in … the use of natural … resources shall be regulated and administered with justice and equality according to the law' (article 18A.2). Thus, the Memorandum of Understanding was able to provide that Aceh would 'have jurisdiction over living natural resources in the territorial sea surrounding Aceh' (article 1.3.3) and 'retain seventy (70) per cent of the revenues from all current and future hydrocarbon deposits and other natural resources in the territory of Aceh as well as in the territorial sea surrounding Aceh' (article 1.3.4). However, lack of clarity regarding the division of responsibilities between the central and the regional level, lack of capacity at the regional level, lack of accountability mechanisms, and insufficient transparency and information management have led to implementation challenges, which in turn could fuel tensions (Anderson 2020: 12; Venugopal 2014).

In the case of **Bougainville**, although disputes concerning the exceptionally rich Panguna copper mine were the final catalyst for the conflict, the 2001 Bougainville Peace Agreement between the Government of Papua New Guinea and armed groups in Bougainville does not deal directly with mining.[22] Instead, presumably with a mutual understanding that authority over mineral resources would be granted to Bougainville in the amendment to the Papua New Guinea Constitution that was to follow, the Agreement is silent on minerals. This does not mean that the revenue generated by mining was ignored. Relatively detailed provisions on financial arrangements specify that 70 per cent of the revenue from company tax raised from companies 'whose principal place of business or main business activity is in Bougainville' will accrue to Bougainville. The negotiators obviously had revenue from the Panguna mine in mind and, as most companies were (and usually are) registered in the capital, including companies that are primarily active in Bougainville, this gave the arrangement real meaning (2001 Bougainville Peace Agreement, articles 134–148). Amendments to the Papua New Guinea

22 For an excellent discussion of the background to the conflict and the role of the copper mine see Regan 2013.

Constitution in 2002 incorporated these elements of the Agreement into the Constitution and gave Bougainville the right to manage and regulate mining, oil and gas, as well as land, forestry and water (article 290).

3.2. **CONSIDERATIONS FOR INSTITUTIONAL DESIGN**

The almost universal absence or sparseness of constitutional provisions on natural resource ownership and management raises the question of how much detail, if any, should be included. As mentioned above, there may be good reasons for not including much (if any) detail in the constitution. For instance, existing legislation may be adequate or the negotiating parties may not have reached an agreement on the matter, which might require more careful thinking not only about the substance but also about the negotiating process (UN DPA and UNEP 2015). More generally, constitutions are intended to set a framework for governance and cannot provide a detailed regime. Details of management arrangements are best left to legislation, which can also be more easily amended as needs change.

In practice, a balance needs to be struck between providing enough in a constitution to reassure parties that their interests have been taken into account and protected, and leaving enough flexibility for complicated details to be worked out once the main (and usually tense) constitutional negotiations are complete.

In practice, a balance needs to be struck between providing enough in a constitution to reassure parties that their interests have been taken into account and protected—in terms of the authority to manage natural resources and rights to benefit from the revenues derived from them—and leaving enough flexibility for complicated details to be worked out once the main (and usually tense) constitutional negotiations are complete. The management and sharing of revenue from resources is discussed in Chapter 4. Below, we provide some examples of institutions and procedures that might be considered for inclusion in constitutional frameworks, and which can facilitate the development of agreements on natural resource management over time.

- *Principles and guidelines*: Constitutions can establish general principles for transparent and accountable governance as well as, perhaps, more specific guidelines on sustainable natural resource management. The Fiji Constitutional Commission proposed a set of quite specific and direct 'guiding principles' that required, among other things, resource development and use to promote the general well-being of the population; the public to be informed about and involved in decisions related to resource policy and management; permits to be granted on the basis of

competitive tendering; account to be taken of social, economic and environmental consequences; and public and private sector entities to maintain best practice standards in contracting, operations, payments, transparency and accountability (Constitution Commission, Proposal for Constitution of Fiji, 21 December 2012). South Sudan's 2011 Interim Constitution also includes 'Guiding Principles for Petroleum and Gas Development and Management' (article 173). The South Sudan principles are more expansive in some ways, for instance, requiring petroleum and gas management to be guided by the principles of creating lasting benefits for society, safeguarding the interests of future generations and protecting the environment, and including the principle that the capacity of the sector should be developed. The most significant difference between the two sets of principles is the inclusion in the Fiji principles of a requirement to involve the public in decision making. The South Sudan principles refer to transparency and accountability but are silent on the question of affected communities and public participation more broadly.

- *Consultative processes*: Constitutions could require consultation on the development and management of any natural resources and require the relevant authority to take the results of such consultations into account in decision making. Depending on the issue, consultations might be with local communities, customary authorities, civil society representatives or the business community. Beyond this the inclusion of women, youth and marginalized communities could be required. When there is a distinction between Indigenous communities and others, as there is in many parts of Latin America, it might be appropriate to have consultations dedicated to hearing the views of Indigenous communities. Where natural resources are territorially concentrated, and where local grievances could emerge related, for instance, to the environmental impact of extraction, merely dealing with the central authorities or elites opens up possibilities for the emergence or resumption of conflict. In such cases, a requirement for local consultation seems wise. Consultation could be required for all aspects of natural resource management, including all contracts, including exploration and exploitation contracts; licences, royalties and other taxes; employment and labour arrangements; environmental standards; infrastructure and transportation; and import and export permits (Haysom and Kane 2009: 13).

There has been some experimentation, mostly in peace agreements or legislation, with commissions to deal with natural resource governance, particularly of extractive resources. To give them greater authority and security, such commissions could be included in the constitution.

- *Commissions*: There has been some experimentation, mostly in peace agreements or legislation,[23] with commissions to deal with natural resource governance, particularly of extractive resources. To give them greater authority and security, such commissions could be included in the constitution. Then, as with other independent and quasi-independent bodies intended to facilitate greater expertise, accountability and transparency in government, attention needs to be paid to their membership and appointment mechanisms, mandate and funding. In addition to requiring some members to have relevant expertise and experience, representation of substate entities and of civil society, as well as the participation of representatives from affected areas when particular proposals are being discussed are options to strengthen the effectiveness of such bodies.

In the case of **Sudan**, the National Petroleum Commission, established under the 2005 Comprehensive Peace Agreement (CPA) (Chapter III, articles 3.2–3.5), had a very broad mandate. Within a framework of principles set in the Constitution, it was to formulate policies and guidelines on the development and management of the petroleum sector, monitor and assess their implementation, and negotiate and approve oil contracts while also ensuring their consistency with the Commission's principles, policies and guidelines. The Commission comprised members proposed by the conflict parties (the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Army), as well as representatives of oil-producing states as non-permanent members. The membership did not include civil society representatives (partly due to their limited presence during the negotiations), which it has been argued undermined not only the Commission's legitimacy but also the parties' alleged commitment to peace (Norwegian People's Aid 2005). Nonetheless, the Commission was required to consider the views of and potential benefits to affected local communities, and the possibility that those aggrieved might seek relief through arbitration or in a court of law (Interim Constitution of Sudan, 2005, article 191(4)). A more serious problem was that decisions were to be made by consensus (understood as unanimity), which incentivized parties to either block proceedings or make deals to share and pocket most of the revenues. The nature of the CPA negotiations, in which the parties refused to admit any other groups despite the many

23 See for instance the National Petroleum Authority (Autoridade Nacional do Petróleo) of Timor Leste, established by decree in 2008 (decree law No. 20/2008, as amended for the third time by decree law No. 62-2023); or Kosovo's Independent Commission for Mines and Minerals, initially established by a United Nations Mission in Kosovo regulation (2005/02).

conflicts raging in Sudan at the time, and the widely perceived need to reach agreement to end the long conflict could explain the failure to design a more effective and inclusive body. Nonetheless, this is an example of a peace agreement and the constitution that followed it entrenching elements of a conflict economy rather than shifting them.

In general, establishing special bodies such as independent commissions with a limited but significant mandate to increase transparency and accountability in the extractive industries, ensure proper ongoing public consultation on extraction and ensure that state authorities provide reasons for their decisions may contribute to more principled approaches to natural resources. Some countries, such as Sudan, have decided to give these commissions decision-making powers to enter into contracts. Critically, however, for special bodies to be effective, the mode of selecting their members needs to secure a certain level of expertise, as well as broad representation so they are perceived as legitimate and independent from other state institutions; and their mandates and powers need to enable them to constrain government action through, for instance, monitoring and evaluating the executive and providing information to the public, thereby opening government action up to greater scrutiny.

Chapter 4

ESTABLISHING SOUND FISCAL ARRANGEMENTS FOR MANAGING NATURAL RESOURCE REVENUE

Theoretically, the wealth of resource-rich countries gives them an economic advantage that enables them to fund development and tackle poverty. If revenue from natural resources is a significant part of the economy of a country emerging from conflict, a visible peace dividend might be expected as revenue from resources is used to (re) build the country. 'Good' natural resource governance and translation of the wealth generated by natural resources into national prosperity, however, are rare. Instead, it is more likely that a political settlement will fail to reform the economic dynamics of the war economy. Moreover, although revenue from the exploitation of natural resources is no different from other public revenue, in practice, and perhaps particularly post-conflict, substantial income from natural resources can increase the difficulty of establishing a sound fiscal system and create significant macroeconomic challenges, particularly because other sources of public revenue may have collapsed during the war.[24] Beyond this, as the World Bank notes, countries with large natural resource endowments are more 'susceptible to rent seeking and corruption' (Lange et al. 2011: 105).

Constitutions can provide the basis for building more accountable financial government, which, in turn, may provide opportunities over time to check fiscal abuses and use national wealth for the national good.

There is little that constitutional arrangements on their own can do to address these problems. However, constitutions can provide the basis for building more accountable financial government, which, in turn, may provide opportunities over time to check fiscal abuses and use national wealth for the national good (Fritz, Hedger and Fialho Lopes 2011).

24 These challenges are often linked to the intrinsic price volatility of natural resources, particularly extractives, the likely spike in the value of the currency when a new extractive resource is discovered and a resulting inability to diversify the economy (Lange et al. 2011).

This chapter first sketches the general arrangements for public financial management commonly included in constitutions and tentatively explores the ways in which they might be supplemented to better serve countries as they emerge from conflict. It then briefly considers the inclusion of sovereign wealth funds in constitutions. Finally, it outlines constitutional arrangements for distributing revenue, including revenues from natural resources, in a decentralized system through processes that usually fall under the rubric of fiscal federalism.

4.1. **PUBLIC FINANCIAL MANAGEMENT**

Most public revenue from the extraction of natural resources is raised through what are termed 'concession regimes'—that is, from taxes such as corporate tax and royalties based on an agreed percentage of the volume or value of production—or from 'contract regimes', which are arrangements for a particular enterprise which may set a specific tax rate or involve production sharing.[25]

Fiscal arrangements usually (and probably should) apply equally to all revenue, including revenue from natural resources. They include systems to control how the state collects money and what it does with it, usually referred to as public financial management systems. These are a core element of accountable government. Across very different jurisdictions, constitutions establish the basic framework for taxing, appropriating revenue (allocating money through the budget law), spending and auditing expenditure in a relatively uniform way. Thus, constitutions typically establish who has the power to impose taxes, how budgets are passed, including taxing and appropriation laws, and procedures for auditing state expenditure. If these systems are designed in a way that befits the context and are well implemented, they can provide for accountability and limit corruption, and hence build citizens' confidence in the system.

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Peace agreements can set out the principles on which public financial management is to be based and even provide some of the detail. The 2015 Libyan Political Agreement and the 2018 Revitalised Agreement for the Resolution of the Conflict in South Sudan (R-ARCSS) are unusual for the considerable detail on public financial management

25 There is no set list of the taxes that can be raised from natural resources and a range of taxes includes taxes on foreign employees, pipeline fees, payroll taxes and environmental fees (United Nations 2021, 22).

that they contain—provisions that may have been included because of an awareness of the significance of oil revenue flows.[26] The Libyan Agreement has an Annex on financial matters and, as part of detailed provisions concerning fiscal matters, the R-ARCSS has specific provisions on managing petroleum revenue. Transitional arrangements may contain a little more detail than peace agreements but it is usually only more elaborate transitional (or interim) constitutions and, of course, constitutions intended for the long term that deal with the issues more fully. Transitional constitutions and constitutions for the long term typically cover the following.

- *Taxing and spending*: The right to tax is frequently asserted in a constitution and, in multilevel systems, taxation powers over different tax bases may be expressly allocated to different levels of government. Taxes and appropriations usually need to be approved by a legislature, but sometimes the constitution itself authorizes appropriations, for instance, to pay judges, or a law adopted by the legislature might permit certain taxes (such as import duties or other levies) to be authorized or adjusted by laws issued by the executive ('subordinate legislation' in anglophone systems). Accordingly, withdrawals from public funds are usually required to be authorized by law (an appropriation law often included in the budget). A small number of constitutions also stipulate standards for public procurement processes or require legislation to do so (see Ecuador (article 228), Kenya (article 227), Somalia (article 124) and South Africa (section 217)).

- *Deposits into a single treasury account (consolidated fund)*: The constitutions of most Commonwealth countries require revenue raised by the state, such as taxes, loans and income from enterprises, to be paid into a single general fund, sometimes called a consolidated fund.[27] Exceptions to this arrangement must be authorized by law. (Constitutions in other systems generally do not specify where revenue received by the state is to be deposited.) The requirement avoids a multiplication of separate funds that are difficult to control and easily concealed. Thus, it provides a constitutional basis for preventing officials and politicians from accumulating and spending public money outside the budget process. Some exemptions are necessary—publicly

26 As noted in Chapter 3, the 1999 Lomé Agreement on the conflict in Sierra Leone includes detailed provisions on raising and managing revenue from natural resources but does not deal with financial management more broadly.

27 The requirement to pay into a single fund does not mean that all money is banked in one account. The fund may consist of numerous accounts held in different banking institutions.

funded schools may want to run trading accounts for meals or schoolbooks—but, in theory, these should be limited. A 2011 World Bank study on strengthening public financial management in post-conflict countries, which reviews the experiences of eight countries, suggests that closing separate line ministry and agency accounts and introducing a single treasury account improved budget execution by enabling more regular and accurate fiscal reporting (Fritz, Hedger and Fialho Lopes 2011).

- *Accounting for spending*: Government spending should be audited annually. An independent supreme audit institution is now commonly responsible for auditing annual financial statements prepared by the executive and reporting on whether spending was formally in accordance with the budget and with procurement practices.[28] In some relatively rare cases, the audit authority may also report on the results of 'performance' or 'value for money' audits. Constitutions now usually require auditing by an independent audit institution. In countries with a civil law background, these may be part of the judicial system. Constitutions also often specify how members of the audit institution are to be appointed, provide members with security of tenure and give the institution access to government accounts and other information they may require. Establishing an independent institution does not in itself guarantee effective oversight of government but audit institutions are possibly among the most successful of the many different independent institutions found in more recent constitutions. A number of factors contribute to this: audit processes are rules- and regulation-based and thus, unlike other independent oversight institutions, required to exercise little subjective judgment. Most are members of the International Organization of Supreme Audit Institutions, which helps to provide rigorous, internationally accepted standards and thus protects auditors to some extent. They may also be among the oldest government institutions in a country, deeply embedded in government processes and operating on the basis of long experience. Nonetheless, they routinely face problems, particularly because the executive fails to provide them with financial statements in time (or ever), but also because members may be subject to considerable political pressure or may themselves be corrupt.

28 The institution is usually an Auditor General in the Commonwealth, and a court or board of audit in Asia and European countries and their former colonies. In some countries, particularly in Latin American, the Office of the Comptroller is responsible for auditing.

To complete the accounting process, audited accounts should be scrutinized by the legislature, usually by a special committee, ideally with a relatively large contingent of opposition members,[29] and the relevant government ministers and officials should be held to account. Again, usually for political reasons but also because members of a legislature may not have the skills to interrogate complex financial statements, this is a process that is seldom as robust as it should be.

4.1.1. Implementation challenges

Arrangements for taxing, spending and accounting for spending public money are seldom fully implemented.

These arrangements for taxing, spending and accounting for spending public money are seldom fully implemented. Implementing them in post-conflict situations presents several major challenges.

- *Political support*: Implementation depends on the support of the political leadership. The most significant problem is a lack of political buy-in to rules-based financial management because economic elites and their networks have vested interests in maintaining the status quo. This, in turn, enables bureaucrats to appeal to political connections to get their way.

- *A fragmented system*: The fiscal system may be geographically or functionally fragmented, with regions or different state entities, such as the military, raising revenue and spending outside the ambit of overarching and sound public financial management, making control and accounting virtually impossible. Drawing in what may be multiple budgets and funds controlled by sometimes competing security sector actors can be especially difficult and the military might demand secret budgets.

- *Public money that is not accounted for*: Much 'public' money may not make its way into public funds, leading to the persistence of funds that are unaccounted for. Sudan's post-2019 experience demonstrates one of the challenges, where even securing a list of parastatals with control over public accounts proved difficult. These difficulties were compounded by the fact that a number of state-funded General Intelligence Service agencies were registered in the name of powerful individuals rather than as public entities (Baldo 2021), and by the fact that the armed forces

29 It is often argued that these committees (usually called Public Accounts Committees in the Commonwealth) should be chaired by an opposition member. Research published in 2011 using data from 54 committees concluded that the party of the chair is less significant and that a larger contingent of opposition members is most likely to enhance the performance of the committee (Pelizzo 2011).

ran charity organizations that concealed their interest in specific economic sectors (Hoffmann and Lanfranchi 2023: 13). Unless such very basic information is secured, democratic control of and accounting for those (public) funds is impossible.

- *No or inadequate systems*: Proper cash management and accounting systems may not exist and spending may be uncontrolled. This might be because there are few people with the skills to develop government budgets, manage supply chains or control and account for spending. In decentralized systems, the problem of finding adequately skilled officials can be particularly acute, particularly in rural areas as qualified people often migrate to urban centres.

- *No or very delayed auditing*: Auditing may be impossible because financial statements are not prepared within a reasonable time, if at all. If audit statements are prepared, the work of the legislature in scrutinizing them can be meaningless because its members do not have adequate skills or support to perform their function properly, because there are no consequences for officials when money is misappropriated or because a majority of members are unwilling to be seen to criticize the government.

- *Lack of transparency*: Information about taxes and spending, including audit reports, might not be made public and meetings of legislative oversight committees might be closed to the public, making the development of broader accountability mechanisms involving civil society difficult.

4.1.2. **Moving to sound fiscal arrangements**

No-one would argue that a constitution can resolve the problems that countries emerging from conflict confront in implementing sound fiscal arrangements. Setting out a framework for proper management of public finances, however, as a system that 'aims to ensure that public expenditure is well planned, executed, accounted for and scrutinised' (Kristensen et al. 2019), is a start.

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Particularly in post-conflict contexts, transitional constitutions that bridge the period from the end of a conflict to the introduction of democracy under a new or reformed constitutional arrangement or transitional provisions in 'permanent' constitutions can provide more detail on the management of public revenue. They can also put procedures in place that help to establish sound public financial management, gradually implement transparency and build practices

of consensual, rules-based decision making. Detailed provisions could be time-limited and include procedures for their relatively easy revision as the system settles down. The question then arises of what might be included in each context. Some possibilities include:

- *Edging towards consensual budgeting:* It may not be possible to subject all public money to a regular, open budget process, perhaps because the military and other security services will not provide proper information on their sources of revenue. If so, establishing a small, *transitional development fund* for the short term that is managed by a multiparty committee might deliver some tangible benefits and provide a model for good financial management for the future. The deliberations of such a committee could provide an opportunity for competing parties to develop a practice of consensual and rules-based decision making on budgetary matters. This arrangement could be supplemented with a timetable for drawing all public budgeting into an open, multiparty process.

- *Promoting a budget built on political negotiation and agreement*: As the above point notes, drawing conflict parties to engage in budget negotiations is obviously difficult, as particular rather than public interests may be to the fore. The government or, in the case of power sharing, the faction controlling the treasury may be reluctant to implement transparency provisions on budgets and is likely to be reluctant to engage in negotiations while those in opposition/minority groupings will be ready to make accusations of budget manipulation. Transitional arrangements might provide for a staged discussion of the budget by all parties involved in the political transition. This could be both early in the budget cycle to agree on priorities and reach an understanding of resource constraints (perhaps six months before the budget is to be tabled) and a month or two before tabling to review and negotiate the details. Providing repeated opportunities to consider the budget recognizes the importance of the process and of building political consensus as far as possible, and could make it easier for all involved to manage expectations.

- *Gradual movement to transparency*: Transitional arrangements might initially require budgeting by economic category only—for example, stating that: 'All budgets must be presented by economic classification as developed by the International Monetary Fund'.[30]

30 See Jacobs, Hélis and Bouley (2009) for the current IMF classifications.

Such an approach would use categories such as salaries, goods and services, transfers and interest payments or capital spending, and avoid the detail—and thus the likely controversy—involved in programmatic budgeting. (Programmatic budgets, in contrast to economic category budgets, refer to specific activities, such as primary schools, secondary schools, independent schools and early childhood development. They show priorities much more clearly and thus can be more contentious and less easy to agree on in a consensual way.) Use of an economic classification system would also mean that reports on spending require less explanation. All that might be needed is a report on what is spent overall on salaries, for example, without explanations of why more is spent on primary school salaries than secondary school salaries, and so on.

- *Establishing special oversight bodies for natural resource revenue*: The Contracts and Monopolies Commission included in Liberia's 2003 peace agreement had a mandate to ensure 'that all public financial and budgetary commitments entered into by the [government were] transparent, non-monopolistic and in accordance with the laws of Liberia and internationally accepted norms of practice', so that officials did not benefit from public contracts, and tenders were competitive. It was succeeded by the Public Procurement and Concessions Commission (PPCC), which still exists (Krista et al. 2019).[31] When thinking about revenues that come specifically from extractives, particularly when they represent a significant percentage of total GDP, governments sometimes establish an independent commission with monitoring and oversight powers on matters related to natural resource revenue (see Chad and Ghana below). Again (as noted above), attention must be paid to the mode of selection of their membership, which should include civil society representatives, and to their precise mandates and powers.

In 2003, **Chad** established a Petroleum Revenue Oversight and Control Committee (the *Collège*), at the urging of the World Bank, and as provided for in the 1999 Petroleum Revenue Management Law, to oversee revenue collection and allocations, including the 5 per cent earmarked for the oil-producing region of Doba, as well as specific poverty-alleviation targets (World Bank and International

31 Note that, 20 years later, corruption—particularly that linked to natural resources—remains a major problem in Liberia and integrity institutions like the PPCC struggle from underfunding and a lack of independence. Nonetheless, with transparency improving in the natural resources sector, its existence could provide a hook for future anti-corruption initiatives.

Finance Corporation 2006: iv). The nine-member committee included four representatives from civil society,[32] the National Director of the Bank of the Central African States, the General Director of the Treasury, one magistrate of the Supreme Court, one deputy and one senator.[33] In 2004 the *Collège* appeared to function independently, making recommendations to the government on modernizing its public finance management, among other things. It soon became clear, however, that it required better access to information and a greater ability to investigate expenditure; the cooperation of the government in prosecuting wrongdoing; a steady source of income; and the government to refrain from interfering with the selection of its civil society members (Gary and Reisch 2005: 2). In December 2006, the World Bank recognized that '[t]he ability of the *Collège* to remain independent and resist pressure from the government should have been strengthened, and [the Law] should have included an enforcement mechanism to ensure that recommendations of the *Collège* were fully implemented' (World Bank and International Finance Corporation 2006: viii). With '[t]he anti-poverty spending targets never [coming] close to being met', the World Bank cancelled its agreement with the Government of Chad in September 2008 and stopped funding the project (Rice 2008), although the *Collège* continued its work.

In **Ghana**, following the discovery of offshore oil and gas in 2007, parliament adopted the Petroleum Revenue Management Act in 2011. The Act provides, among other things, for the establishment of a Public Interest and Accountability Committee (PIAC) mandated to 'monitor, evaluate, and independently assess government and institutional compliance with [the Act, and to] engage the public on the management and use of petroleum revenue to safeguard public interest' (PIACGhana.org). Even more notably, its membership comprises 13 members nominated by different non-state institutions and sectors, including the academy, think tanks, civil society, trade unions, journalists and lawyers, appointed by the Minister of Finance (Petroleum Revenue Management Act, 2011, section 54(1)). The Committee's decisions are binding if taken by a majority with a

32 Including one representative of local NGOs, one representative of unions, one representative of human rights organizations and one representative of the major religious confessions (Muslim and Christian) on an alternating basis. These representatives are nominated by their peers for a three-year term renewable once (Republic of Chad, Decree Number 240/PR/MED/03, article 7).

33 Republic of Chad, Decree Number 240/PR/MED/03, Relating to the structure, operations and oversight capacity of the Petroleum Revenue Oversight and Control Committee, 1 July 2003.

quorum of nine members (section 54(3)).[34] It publishes two reports a year, which are periodically uploaded to its website. While it appears that the Committee has been able to contribute to transparency and accountability through its reports and recommendations to parliament, some observers highlight its limited power to ensure that oil and gas revenues are used appropriately and argue that a stronger regime of oversight is necessary with greater opportunities for civil society involvement (Sefa-Nyarko, Okafor-Yarwood and Sakyi Boadu 2021: 14).

4.2. MANAGING THE DOMINANCE OF NATURAL RESOURCE REVENUE IN THE ECONOMY: SOVEREIGN WEALTH FUNDS

When revenue from non-renewable natural resources is a significant component of a country's revenue, constitution makers ask whether there is anything the constitution can and should do to manage the likely distorting impact on the economy. The question then arises whether a sovereign wealth fund (SWF) should be constitutionalized and, if so, how much detail should be included in the constitution. Such funds are government-owned investment entities, usually created to address macroeconomic goals (Bahgat 2008; Davis et al. 2001; Arfaa et al. 2014). They take many forms and have a variety of objectives, notably to save for future generations and to maintain macroeconomic stability.

The question of constitutionalizing SWFs is prompted mainly by the familiar and valid concern that the 'resource curse'—the paradox that the wealth from natural resources often fails to lead to prosperity—must be managed. As the World Bank notes, the resource curse has several causes: '(a) currency appreciation that can reduce the competitiveness of nonextractive exports; (b) more difficult macroeconomic management due to volatile commodity prices; (c) inefficient management of the extractive sector; (d) corruption and serious political conflicts over rent capture and management of revenues generated by the extractive sector; and (e) dissipation of rents on current consumption rather than investment' (Lange et al. 2011: 119). The result is that 'the economic performance of less-developed countries is often inversely related to their natural

The question of constitutionalizing SWFs is prompted mainly by the familiar and valid concern that the 'resource curse'—the paradox that the wealth from natural resources often fails to lead to prosperity—must be managed.

34 Republic of Ghana, Petroleum Revenue Management Act, 2011, Act 815, <https://www.bog.gov.gh/wp-content/uploads/2021/07/Petroluem-Revenue-Management-Act815-2011-.pdf>, accessed 20 May 2024.

resource wealth' (Lange et al. 2011: 119). The Bank proceeds to argue that a clear policy for the investment of (non-renewable) resource rents is particularly important because if income from non-renewable resources is consumed rather than invested, sustainable development is unlikely to be achieved (Lange et al. 2011: 16). Of course, as the Bank emphasizes, sound investment on its own cannot resolve these problems—efficient extraction policies and sound taxation systems are necessary too. Moreover, investment of the proceeds from the extraction of natural resources itself requires several decisions, especially in very poor countries:

> [S]hould all rent be invested, or should some of it be used for current consumption to alleviate extreme poverty? Should the rent be managed entirely by a dedicated government investment fund, as in Norway, or should part of the rent be redistributed directly to citizens in order to promote private investment, as is done with oil revenues in the US state of Alaska? If the revenues are managed by government, how should government balance investment in public infrastructure, support for domestic private sector development, and investment for the highest return even if that means investing abroad? (Lange et al. 2011: 115)

The SWFs have become the best-known vehicle for investing the revenue raised by the exploitation of natural resources. The rationale underlying them is that by withholding excess revenue from the economy, they curb inflation and distortions of the exchange rate, and facilitate diversification in a resource-rich economy. They may also be intended as a form of future generations fund. However, many questions remain about their effectiveness, particularly in countries challenged by poor governance (Fotak, Gao and Megginson 2017; Frynas 2017). As the above extract indicates, how much resource revenue should be allocated to an SWF, and how it should be managed (and by whom) are among the complicated questions funds face, as well as how they should be used, whether income should be earmarked for particular programmes and how access to accumulating funds should be restricted. For these and other reasons, establishing an SWF in a peace agreement or constitution requires expert advice and careful consideration, taking account of the anticipated needs of the economy.

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SWFs are rare in peace agreements. The only example of which we are aware is Sudan's Agreement on Wealth Sharing during the Pre-Interim and Interim Period (7 January 2004), which outlines the

creation of a Future Generation Fund (FGF).[35] This provision was carried through to the 2005 Comprehensive Political Agreement (article 5.7) and included in Sudan's Interim Constitution of 2005 (article 192(7)) and South Sudan's 2011 Transitional Constitution. In 2013, the South Sudan Petroleum Revenue Management Act created a Petroleum Revenue Savings Fund 'consisting of two accounts into which the government is to deposit oil revenues': the Oil Revenue Stabilization Account and the FGF (US Department of State 2023). The FGF is again referenced in the 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan (article 4.1.10) and the Revitalised Agreement for the Resolution of the Conflict in the Republic of South Sudan (article 4.8.11). It remains unclear, however, whether those funds have 'received any financing, despite the government sometimes including [it] in budget allocations' (US Department of State 2023).

While, as far as we are aware, only one constitution currently requires a fund specifically called a sovereign wealth fund (Papua New Guinea, article 212), a number of others require stabilization, future generations or development funds for revenue derived from natural resources, which contain SWF investment components. Thus, Colombia's constitution requires five distinct funds to be established for revenues from concession fees, including a Savings and Stabilization Fund, and requires set percentages of the revenue to be deposited in them annually. Mexico constitutionalized an Oil Fund for Stabilization and Development through an amendment in 2013 (Secretaría de la Gobernación 2013), to be set up as a fund of the Central Bank to receive, manage, distribute and, to a limited extent, invest revenue from the exploitation of hydrocarbons. As noted above, South Sudan's 2011 Transitional Constitution requires the government to establish both an Oil Revenue Stabilization Fund and an FGF (article 178) but does not give them a mandate or stipulate what revenue they should receive.

If constitution makers decide that the constitution should require an SWF to be established, how much detail should they include? As one of the primary functions of SWFs is to contribute to macroeconomic stability by, among other things, restricting the ability of politicians to use natural resource revenue for immediate political gain, failing to secure a mandate or to set out a framework of principles for the

If constitution makers decide that the constitution should require an SWF to be established, how much detail should they include?

35 The Fund was to be created 'once national oil production reaches two (2) million barrels per day. This production criterion may, as part of the National Government's normal budget process, be reduced down to one (1) million barrels per day' (Agreement on Wealth Sharing during the Pre-Interim and Interim Period, 7 January 2004).

fund could undercut its usefulness. Thus, although a bland statement merely requiring an SWF, as in the Constitution of Papua New Guinea, provides leverage for those seeking to establish such a fund, leaving every aspect of the fund to the discretion of political decision makers does little to ensure that the fund can meet the goal of improving macroeconomic stability. On the other hand, highly prescriptive constitutional or legislative requirements could also be problematic. For example, it is tempting to assume that constitutionalizing an annual allocation or a percentage of revenue to an SWF, as in the Alaska state constitution, would protect long-term economic outcomes by building a fund for future investment and protecting it from opportunistic political intervention.[36] However, comparative research suggests that alterations to allocations to SWFs may sometimes be necessary. For example, a March 2023 International Monetary Fund report notes that there was scope for reducing expenditures in South Sudan by cutting the contributions to the FGF and Oil Stabilization Fund, to maintain public debt sustainability (International Monetary Fund 2023). Urgent development needs may provide reasons not to lock predetermined sums of money away in what are usually deliberately risky investments by an SWF, and instead to manage macroeconomic challenges in another way. If a decision has been taken to constitutionalize an SWF, however, the constitution might provide a broad set of requirements on its mandate, that it is to operate within a clear legal framework, and that its policy, procedures and assets must be publicly disclosed.[37]

When conflicts have a territorial dimension, or when there are significant regional inequalities, securing a settlement that will sustain peace may involve some level of decentralization.

4.3. WEALTH SHARING IN DECENTRALIZED SYSTEMS

When conflicts have a territorial dimension—that is, when 'one of the parties has a territorial character and demands' (Anderson 2021: 502), or when there are significant regional inequalities—securing a settlement that will sustain peace may involve some level of decentralization, including fiscal decentralization, as in Indonesia, Kenya, Nepal, Papua New Guinea, Sudan and, at least on paper, the DRC. Notably, however, decentralization is less often constitutionalized in post-conflict contexts where revenues from extractives represent a significant percentage of GDP. When it is, it may be only partially implemented. Nonetheless, if appropriate

36 Some US state constitutions, for example, set specific percentage deposits for their respective SWFs (e.g. Alaska, North Dakota, Wyoming).
37 The 'Santiago Principles' provide guidance (International Working Group of Sovereign Wealth Funds 2008).

institutions can be established, fiscal decentralization has the potential to be a strong mechanism to address local grievances and ensure that wealth is shared across a country and not retained at the centre.

This chapter examines fiscal decentralization[38] and focuses on revenue sharing and transfers and, particularly, fiscal equalization because these elements of fiscal federalism involve a consideration of both fiscal decentralization and national interests and fairness. Revenue-sharing arrangements are important whatever the source of revenue but may be particularly contentious when significant natural resource revenues are at stake.

For those concerned with public finance, economic arrangements in decentralized systems fall broadly under the heading of 'fiscal federalism'. In this context, fiscal federalism is not limited to arrangements in countries labelled 'federal' but covers fiscal arrangements in decentralized polities more generally, regardless of how great the autonomy involved and whether decentralization is symmetrical across the country or asymmetrical, with special arrangements for particular regions. Broadly speaking, fiscal federalism is concerned with the authority of different governments in a decentralized system to raise revenue (including tax), borrow and spend; the procedures involved; and the mechanisms for fiscal equalization that seek to ensure that wealth is distributed fairly across the entire country.

Arrangements concerning fiscal federalism may be included in a peace agreement but, perhaps surprisingly, peace agreements rarely contain much detail on such matters, even when territorial claims related to identity and/or natural resources have been central to the conflict (Anderson 2021: 502). The 2005 Indonesia/Aceh settlement and the Agreement on National Issues in the Sudanese 2020 Juba Peace Agreement are recent exceptions. More often, fiscal arrangements are developed later, in a constitution or legislation. The constitutions of Kenya and South Africa are examples of constitutions that enshrine a political settlement involving decentralization and that pay close attention to fiscal matters. The (aborted) draft constitution for Yemen did so too. Such constitutions allocate fiscal powers among different levels of government, provide

38 For an excellent introductory discussion of the issue of fiscal decentralization relevant to countries that describe themselves as federal and other decentralized countries, see Anderson (2010); for a comprehensive discussion see, among others, Broadway and Shah (2009); for an introduction to natural resource revenue sharing see Bauer et al. (2016).

a framework for fiscal equalization and may provide for some specified allocation of revenue from natural resources to producing regions. More often, however, matters of fiscal federalism are left largely or almost entirely to legislation, as in the case of the DRC, Iraq and Nepal.

In seeking settlements through decentralization, territorially based regional groups are likely to focus on autonomy-related matters such as decision-making authority and access to resources; their demands often include ownership of resources and taxation powers.

In seeking settlements through decentralization, territorially based regional groups are likely to focus on autonomy-related matters such as decision-making authority and access to resources; their demands often include ownership of resources and taxation powers. By contrast, central state authorities or elites resist decentralization, often arguing that it will be a precursor to secession. A carefully designed system that both serves the interests of territorially based groups and secures the role of the centre may alleviate concerns on both sides. Fiscal arrangements can be part of this architecture, involving both these aspects of decentralization. Key decisions involve the allocation of powers of taxation, borrowing capacity, revenue sharing and transfers, as well as public financial management. Here, as noted above, our focus is on revenue sharing and transfers, and particularly on fiscal equalization.

The main reason for some system of revenue sharing and/or transfers and fiscal equalization in a decentralized system is that the central government invariably raises more revenue through taxes and borrowing than substate entities,[39] and the revenue-raising capacity of different units is uneven. Revenue sharing and transfers are thus usually necessary if all the entities are to be able to fulfil their responsibilities. In addition, in a process of fiscal equalization, revenue sharing and transfers enable some redistribution of wealth across a country. They may also be used to promote central government programmes across the country.

Constitutions can set out the principles on which fiscal equalization is to be based. These may be general like Germany's requirement of uniform living standards across the country (article 106(3)), Spain's requirement that fiscal arrangements must be 'in conformity' with the principle of 'solidarity among all Spaniards' (article 156) and **Colombia**'s more general commitment to solidarity (articles 1 and 356). The provision in **Nepal**'s Constitution that 'fiscal equalisation grants' are to be distributed to the provincial and local level on the basis of the need of expenditure and revenue capacity is a

39 There are compelling reasons for centralizing many tax-raising powers, but the result is a fiscal gap—a mismatch between the revenue-raising capacity of substate entities and their expenditure needs.

little more specific (section 60(4)). **Iraq**'s constitution contains a similar provision (article 121).[40] Constitutional principles on fiscal equalization can also be considerably more detailed. **Kenya** and **South Africa**'s constitutions, for instance, require equitable sharing of revenue in general but also set out quite detailed criteria that must be considered in determining equitable shares (see Box 4.1 for the South African provision).

Box 4.1. **Criteria for determining equitable shares and allocations of revenue in South Africa**

(2) The Act [to provide for the equitable division of revenue each year] may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—

(a) the national interest;

(b) any provision that must be made in respect of the national debt and other national obligations;

(c) the needs and interests of the national government, determined by objective criteria;

(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;

(e) the fiscal capacity and efficiency of the provinces and municipalities;

(f) developmental and other needs of provinces, local government and municipalities;

(g) economic disparities within and among the provinces;

(h) obligations of the provinces and municipalities in terms of national legislation;

(i) the desirability of stable and predictable allocations of revenue shares; and

(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

Source: Republic of South Africa, The Constitution of South Africa, section 214(2), <https://www.parliament.gov.za/constitutional-amendments>, accessed 20 May 2024.

40 The article reads as follows: 'Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population'.

The amendments to the Papua New Guinea Constitution on the financial arrangements that incorporate elements of the 2001 Bougainville Peace Agreement are also fairly detailed but many of the commitments take effect only once particular levels of self-government have been achieved in Bougainville. In fact, in the 20 years since the conclusion of the Agreement, Bougainville has assumed few of the responsibilities to which it is entitled and these elements of the Agreement remain only partially implemented.[41] In addition, as in many other places, financial allocations from Papua New Guinea to the Autonomous Region of Bougainville are a constant source of political conflict for many intersecting reasons: the central government frequently reneges on its obligations to transfer funds; the central government itself has extremely limited revenue; and the Peace Agreement may have been overly ambitious in its specification of funds to be transferred.

Whether it is entrenched in a constitution or required by legislation, fiscal equalization is frequently controversial because it is distributive.

Whether it is entrenched in a constitution or required by legislation, fiscal equalization is frequently controversial because it is distributive. It is often viewed as a process that takes unfairly from rich (or richer) regions and distributes to ('undeserving') poorer regions. The controversy is particularly acute when resource-rich substate entities are involved and the tension between the principle of equity and the principle of derivation becomes central. As Anderson puts it (2010: 83): 'Equity calls for broad sharing, derivation for a special (or even exclusive) part to go to the producing region'. In response to this problem, equalization criteria frequently include recognition of the need to acknowledge the contribution of more productive areas in the distribution of wealth. Nepal's reference to the 'effort' made by different units is one example; South Africa's and Kenya's references to 'the efficiency of' their substate entities in their lists of criteria for determining equitable revenue shares provide further examples.

Including a recognition of the derivation principle in an imprecise set of principles may not be adequate, however, and resource-rich areas may demand more. Accordingly, in a number of situations where a political settlement has involved a conflict over resources, there is greater specificity about the entitlement of resource-rich regions to part of the revenue that they generate. As noted above, the 2005 agreement between Aceh and **Indonesia** is one example.

41 Following provisions of the Peace Agreement, the Papua New Guinea Constitution and an accompanying organic law provide an elaborate process for Bougainville to 'draw down' powers. With the exception of a small number of areas, which include mining and education, Bougainville has not taken on the responsibilities allocated to it by the Constitution.

That agreement states that Aceh is to receive 70 per cent of revenues from natural resources in Aceh and its territorial waters. Hydrocarbon resources were the main focus.[42] The initial 2012 Bangsamoro Agreement in the **Philippines** was quite general but in 2013 more was added in a detailed agreement on fiscal matters, giving the Bangsamoro a set percentage of revenues from metallic resources (75 per cent) and fossil fuels (50 per cent), among other things.[43] Neither agreement was constitutionalized but an organic law, adopted in 2018, formalized the agreement.[44]

Some constitutions set a percentage of natural resource revenues that is to be retained by (or returned to) the producing region. **Nigeria**'s 1999 Constitution, adopted as the country moved back to democracy, is one example. It sets out that states will receive allocations according to a formula that takes account of 'population, equality of States, internal revenue generation, land mass, terrain [and] population density'. In addition, producing states must receive at least 13 per cent of revenue from any natural resources (Constitution of the Republic of Nigeria, section 162(2)). The formula is adopted through an Act of the National Assembly and, once adopted, cannot be changed for five years, presumably to provide some fiscal certainty for the states. The Revenue Mobilisation Allocation and Fiscal Commission is responsible for making recommendations on changes to the formula (Constitution Schedule III, item 32).[45] The distribution of oil revenue has never been settled amicably in Nigeria, however. The exclusion of the Igbo from access to wealth derived from the oil-producing areas contributed to the civil war of 1967. Now, although oil-producing states receive significantly more revenue than others,[46] there are constant demands that they should receive more and serious conflict continues.

Fixing percentages for the distribution of natural resources revenue to producing regions in constitutions or laws can cause problems.

Fixing percentages for the distribution of natural resources revenue to producing regions in constitutions or laws can cause problems,

42 Article 1.2.4 of the Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement (2005).

43 Article VII, Annex on Revenue Generation and Wealth sharing, to the Framework Agreement on the Bangsamoro, 2013, <https://peacemaker.un.org/sites/peacemaker.un.org/files/PH_130713_AnnexWealthSharing.pdf>, accessed 20 May 2024.

44 Article XII, section 34, Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao (Republic Act 11054, 2018), <https://legacy.senate.gov.ph/republic_acts/ra%2011054.pdf>, accessed 20 May 2024.

45 These arrangements were not wholly new. For instance, the 1960 (Independence) Constitution granted the then three states of Nigeria a right to 50 per cent of the tax revenue from any minerals that they produced in addition to a quarterly specified allocation from a national account (section 134).

46 Producing states receive over 50 per cent of the revenue distributed in the revenue-sharing scheme although, as measured in 2008, they have just 22 per cent of the population (Anderson 2021, 515).

as is demonstrated by the example of Nigeria above, where some regions are disproportionately wealthy, and the DRC, where the process has not been transparent. Russia addresses the danger of disproportionate grants to producing states by capping the sum they can receive (Anderson 2010: 85). A more general note of caution about returning revenues to producing regions should also be added. Research in the Andes region and Ghana highlights a potential 'knock-on effect to the economy'. In Peru, for example, it has been argued that while returning revenues may have reduced poverty, it has also reduced 'resource availability for investment in structural transformation of the economy, even when policymakers have identified this as a critical need' (Bebbington et al. 2018: 213, citing Ghezzi and Gallardo 2013).

4.3.1. Implementing a system of fiscal equalization

As noted above, most subnational governments in decentralized systems experience a 'fiscal gap'—their expenditure responsibilities exceed the revenue they can raise. Allocations from the national government, and sometimes transfers from other subnational governments, are a response to this problem. In countries in which national resources provide a significant percentage of national revenue, natural resource revenue is usually included in the general pool of revenue to be shared, although as already discussed in some cases producing regions are entitled to have their production taken into account in the calculation of their shares. Less often, revenue from natural resources is dealt with completely separately and the 'general' fiscal equalization process does not include that revenue. By requiring two separate processes, this approach makes the goal of equalization less easy to achieve.

Equalization arrangements and the form of transfers used take many forms, depending on a range of factors in the overall system of decentralization and other fiscal matters, such as whether there is tax sharing. Arrangements to implement such equalization are always complicated, which is one reason to include a framework but not the detail in peace agreements and constitutions (Broadway and Shah 2009).

When implementing fiscal equalization arrangements, a decision is needed on who should be responsible for designing the process and criteria for determining shares.

When implementing fiscal equalization arrangements, a decision is needed on who should be responsible for designing the process and criteria for determining shares. Broadway and Shah (2009: 387) note that 'the norm in many countries, is to make the federal [national] government solely responsible on the grounds that it is responsible for the national objectives that are to be delivered through the fiscal

arrangements'. As they point out, however, vesting this responsibility in the central government might not 'allow the full benefits of decentralization to occur'. Indeed, if decentralization is a response to overcentralized government and regional concerns that their needs are not being considered, a mechanism that enables both national and subnational interests to be taken into account is likely to be needed. One option is to rely on intergovernmental arrangements where national and subnational politicians are represented. However, a number of recent constitutions have chosen independent commissions for this role, described as quasi-independent by Broadway and Shah presumably because of the frequent—and sensible—inclusion of political representatives as members.

The goal in establishing fiscal commissions is typically that as (quasi-)independent advisory bodies with influence and expertise, they will be able to develop proposals that command support. Thus, in countries emerging from conflict, the intention is usually that they will provide a less partisan, more technocratic forum in which proposals for fiscal equalization can be developed on the basis of agreed criteria. Notably, however, Broadway and Shah (2009: 391) warn against fully independent fiscal commissions. They advise adopting arrangements in which 'all stakeholders are heard [so] that an appropriate political compact on equalization principles and the standard of equalization is struck. Politics must be internalized in these institutional arrangements. Arm's-length institutions, such as independent grant commissions, are not helpful, as they do not allow for political input and therefore tend to opt for complex and non-transparent solutions.'

Whatever the reasons for establishing a fiscal commission, relying on a commission to provide a basis for equitable revenue distribution can present challenges. First, it may not be established at all. Iraq provides an example: the public commission required by its constitution to 'audit and appropriate federal revenues' (article 106) has not been established. The reasons for this are complex but its non-establishment appears to be both a consequence of the ongoing disputes with the Kurdistan region about revenues and to contribute to those disagreements being prolonged (Baban 2023). Once established, commissions may lack the stable, experienced staff that are needed to derive well-considered proposals. This is a challenge faced by the Nepalese National Natural Resources and Fiscal Commission (Steytler 2021; Saito and Joshi 2023; Republic of Nepal 2017). Finally, the recommendations they make may be disregarded. The recommendations of the South African Financial

The political weight that commission proposals carry is dependent on the political context in which they function.

and Fiscal Commission, which according to the Constitution must be 'considered' (section 214(2)), are routinely acknowledged but not necessarily followed.[47] The political weight that commission proposals carry is dependent on the political context in which they function. In a post-conflict situation, the level of commitment to a decentralized system and a willingness to accept proposals developed somewhat outside the political fray will be particularly important.

47 By contrast, the recommendations of Australia's Commonwealth Grants Commission are usually accepted (Anderson 2010: 81).

Chapter 5

CONCLUSIONS

This paper demonstrates that there is an intrinsic dilemma in attempts to turn the page on a well-entrenched war economy in countries where the institutional framework has been weakened, partly as a result of conflict. Without the commitment of key political and economic stakeholders to new incentives, and to building strong and inclusive institutions with integrity that are accountable, transparent and fair, no formal agreement will have a significant long-term impact. Even with such a commitment, however, implementing a new constitutional framework, and fulfilling its promise of sustainable peace, respect for the rule of law and general economic development, will take time. The short-term incentives of those with vested interests in maintaining an opaque, exclusionary and exploitative—and possibly even predatory—economy may prevail.

Without the commitment of key political and economic stakeholders to new incentives, and to building strong and inclusive institutions with integrity that are accountable, transparent and fair, no formal agreement will have a significant long-term impact.

While natural resources and their revenues are often not only a source but also a facilitator of conflict, constitutions emerging after conflict (as well as some peace agreements) treat natural resources and their revenues in many different ways. Of course, many different factors contribute to how this is done. These include the type of resource, its economic weight and territorial concentration, the history of the conflict, as well as the outcome of the conflict and whether the government is committed to institutional reform and to ensuring that natural wealth contributes to peace and development. Nonetheless, in our examples at least, the pattern is that land and access to land are often addressed head-on, while the response to problems related to extractives, particularly their ownership and management, is often muted, with a small number of exceptions such as Aceh and Bougainville, Sierra Leone, Sudan and South Sudan.

However, there is potential, at least on paper, in some of the more or less innovative arrangements that have been or could be included in peace agreements and constitutional frameworks.

The above also shows, however, that there is potential, at least on paper, in some of the more or less innovative arrangements that have been or could be included in peace agreements and constitutional frameworks. Those designed to protect and promote citizens' and communities' rights to information and transparency, in order to support and build accountable state and non-state institutions, are particularly important. In addition, as discussed above, some constitutions have provided for commissions mandated to document instances where access to land may have been a source of conflict, to examine claims and to mediate or settle disputes, as in South Africa; or with a broader mandate to make policy recommendations or, more specifically, advise on land registration, as in Kenya. Independent advisory or oversight commissions to deal with natural resource governance have also been established under constitutions or, more often, legislation with mandates including formulating policy, negotiating contracts and monitoring implementation, as with Sudan's National Petroleum Commission, or more specifically to oversee revenue collection and allocation, such as with Chad's *Collège* or Ghana's PIAC. When their membership is independent of other governing institutions and includes representatives of different sectors, including civil society organizations, and they behave transparently, these commissions can incentivize, or perhaps at least nudge, state institutions to develop and implement policies to resolve some of the root causes of conflict. At the same time, however, they are one more institution that needs to be staffed, financed and allowed to work even when they challenge the interests of powerful elites.

Something that is not discussed above but may nonetheless be important when dealing with historical disputes concerning natural resources and their revenues is the formalization of processes to deal with past injustices and to manage natural resources appropriately in the future. Such processes could be included in either peace agreements or constitutions. Processes for dealing with historical injustices, including land claims, are quite commonly required by or established in constitutions or law. South Africa's transitional Land Claims Commission is an obvious example. Constitutions could, similarly, set out transitional processes for reviewing the extractives industry, perhaps in stages, or for agreeing on the mandate and management of wealth funds for development or investing in future generations. As we suggest in section 4.1, a staged process to move towards transparent and inclusive public financial management is another possibility.

While there has been some research on why the implementation of peace agreements and constitutions is so difficult, particularly when they touch on vested interests, such as De Waal's (2015) compelling analysis of the political marketplace and systems of patronage, and many country-specific political economy analyses, more thinking is needed on the role that constitutional arrangements and peace agreements, as well as the negotiations leading up to those agreements, could have in shifting or transforming stakeholders' incentives or lack of commitment to transforming the state and state–society relations. This paper offers a partial assessment and some tentative ideas. It will have succeeded if it contributes to the conversation.

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Natural resources feature prominently in many political and economic settlement processes after conflict. When these processes include constitutional reform, it may be expected that mechanisms for natural resource governance would be included in the new constitutional framework, but often this is not the case. This paper explores how governance over land and extractives is dealt with in these post-conflict settlement processes and assesses the (constitutional) mechanisms and institutions that could facilitate accountable implementation.

This paper is the result of a wider conversation aimed at exploring how economic interests drive parties' positions in post-conflict constitutional negotiations and draws on the Tenth Edinburgh Dialogue on Post-Conflict Constitution Building held in December 2023.

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