

Historically, the rise of a commercial bourgeoisie or merchant class tends to be associated with the pursuit of limits on the exercise of government power and subsequent political reform. A middle class dependent on commercial and professional activity is likely to resist domination by landed elites or other non-accountable political rulers who are likely to interfere with or expropriate its investments.⁹ Moreover, as incomes and levels of education rise with the emergence and growth of a market economy, citizens are likely to attach an increasing intrinsic value to democratic institutions (that is, democracy is a normal economic good). According to Francis Fukuyama, these psychological imperatives reflect a desire for universal and equal recognition.¹⁰ Finally, the emergence of mass global communication systems and much greater international mobility of goods, capital, services and people have led to the dissemination of external ideas and values into countries and cultures that were once closed.¹¹

These factors may explain why economic liberalization tends to lead to political liberalization, but what effect does the adoption of democratic institutions have on subsequent economic development? Here, as we discuss below, both the academic theorizing and the empirical evidence are much more ambiguous.

B. Defining Democracy

In order to examine the relationship between democracy and economic development, it is necessary to begin by clarifying what is meant by 'democracy'. Democracy is often understood as a political regime that protects the freedom of individuals and expresses the will of the majority through free and fair elections, protection of minority rights and respect for basic human rights.¹² However, notwithstanding this general concep-

⁹ Bhagwati, *supra* note 7; Francis Fukuyama, 'Capitalism and democracy: the missing link', in Diamond and Plattner, *supra* note 7 at 94; Kyung-won Kim, 'Marx, Schumpeter and the East Asian experience', in Diamond and Plattner, *supra* note 7 at 11; and Daron Acemoglu and James A. Robinson, *Economic Origins of Dictatorship and Democracy* (New York, NY: Cambridge University Press, 2006) at 22–30.

¹⁰ Fukuyama, *ibid.* See also John F. Hellier, 'Empirical linkages between democracy and economic growth' (1994) 24 *British Journal of Political Science* 225 and 'Why voting is good for you' *The Economist* 332:7878 (27 August 1994) 15.

¹¹ Bhagwati, *supra* note 7, and Kyung-won Kim, *supra* note 9 at 11.

¹² Economist Intelligence Unit, 'The Economist Intelligence Unit's Index of Democracy 2008' *The Economist* (29 October 2008), available at <http://www.eiu.com/PDF/Democracy%20Index%202008.pdf>; and Michael Coppedge, 'Defining and measuring democracy', IPSA/APSA Committee on Concepts and Methods Electronic Working Paper Series (April 2005), available at <http://www.nd.edu/~mcoppedge/crd/ch2.pdf>.

tion of democracy, there is no consensus on precisely how to define or measure democracy. Scholars approach democracy in at least three different ways: by giving it a thick or thin meaning; by adopting a prescriptive or descriptive approach; and by conceptualizing it as a dichotomy or a spectrum.

There are 'thin' or 'thick' definitions of democracy.¹³ Thin definitions focus on the basic features that characterize democracy, while thick definitions graft a wide range of substantive and procedural elements onto the concept. An example of a thin concept is Joseph Schumpeter's definition of democracy, which is a system 'for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.¹⁴ On the other hand, Larry Diamond's definition of democracy is a thick concept; Diamond suggests that a system is only a democracy if it exhibits the following attributes:

- Substantial individual freedom of belief, opinion, discussion, speech, publication, broadcast, assembly, demonstration, petition, and even the Internet;
- Freedom of ethnic, religious, racial, and other minority groups (as well as historically excluded majorities) to practice their religion and culture and to participate equally in political and social life;
- The right of all adult citizens to vote and to run for office (if they meet certain minimum age and competency requirements);
- Genuine openness and competition in the electoral arena, enabling any group that adheres to constitutional principles to form a party and contest for office;
- Legal equality of all citizens under a rule of law, in which the laws are 'clear, publicly known, universal, stable, and non-retroactive';
- An independent judiciary to apply the law neutrally and consistently and to protect individual and group rights;
- Due process of law and freedom of individuals from torture, terror, and unjustified detention, exile, or interference in their personal lives – by the state or non-state actors;
- Institutional checks on the power of elected officials, by an independent legislature, court system, and other autonomous agencies;
- Real pluralism in sources of information and forms of organizations independent of the state, and thus, a vibrant 'civil society'; and

graphics.eiu.com/PDF/Democracy%20Index%202008.pdf; and Michael Coppedge, 'Defining and measuring democracy', IPSA/APSA Committee on Concepts and Methods Electronic Working Paper Series (April 2005), available at <http://www.nd.edu/~mcoppedge/crd/ch2.pdf>.

¹³ Coppedge, *ibid.*, and Diamond, *supra* note 2 at 21.

¹⁴ Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper, 1947, 2nd edn) at 269.

- Control over the military and state security apparatus by civilians who are ultimately accountable to the people through elections.¹⁵

Second, according to Robert A. Dahl, a leading scholar in this field, democracy is both a prescriptive and descriptive tool.¹⁶ Democracy can be a prescriptive concept that sets out what countries should aspire to become. Democracy can also be a descriptive concept that measures the degree to which a country has democratized. In this regard, the status of a country's democracy is now viewed as falling along a continuum. This reflects the third approach to understanding democracy – that is, conceptualizing democracy as either a dichotomy or a spectrum.

While earlier scholars categorized countries as either democratic or non-democratic, scholars have more recently abandoned this dichotomy and replaced it with the idea that there are varying degrees of democracy.¹⁷ For example, Collier has studied the effect of partial democracy on countries' economic policy reforms. He shows that elections are not a sufficient proxy for democracy since using elections as a proxy results in classifying countries as full democracies even though they have only nominally fulfilled election requirements.¹⁸ Reflecting this shift in perspective, both Freedom House and *The Economist* magazine assess the degree to which countries are democratic.¹⁹ In short, people can generally conceptualize what democracy is supposed to represent, but rarely agree on how best to define it in detail.²⁰

¹⁵ Diamond, *supra* note 2 at 22.

¹⁶ Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 2000) at 26.

¹⁷ David L. Epstein, Robert Bates, Jack Goldstone, Ida Kristensen and Sharyn O'Halloran, 'Democratic transitions' (2006) 50:3 *American Journal of Political Science* 551–69 at 552; Edward Mansfield and Jack Snyder, 'Democratization and war' (1995) 74 *Foreign Affairs* 79; John Bacher, 'Oil and dictatorship: most oil-rich countries are dictatorships that do little for their societies or for nature' (1998) 14:3 *Peace Magazine* 8; Jack Goldstone, Ted Robert Gurr, Barbara Huff, Marc Levy, Monty Marshall, Robert Bates, David Epstein, Colin Kahl, Pamela Surko, John Ulfelder Jr and Alan Unger, *State Failure Task Force: Phase III Findings* (McLean, VA: SAIC, 2000); and Fareed Zakaria, *The Future of Freedom* (New York: W.W. Norton, 2003).

¹⁸ Paul Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places* (New York: HarperCollins, 2009) at 45.

¹⁹ See Michael Trebilcock and Poorvi Chitalkar, 'From nominal to substantive democracy: the role and design of election management bodies' (2009) 2 *L. and Dev. Rev.* 179.

²⁰ W.B. Gallie has characterized democracy as an example of an 'essentially

C. The Case for Democracy

Adopting what Frischak²¹ refers to as the modernization theory of the 1950s and 1960s where 'all good things go together,' proponents of democracy make four contentions. First, democracy provides greater protection of property rights than non-democratic or authoritarian regimes.²² Second, democracy exhibits an enhanced capacity for mediating intergroup and distributional conflicts. Third, democracy generates better information and more reliable feedback on the effects of present or proposed policies²³ when dissent or criticism is an avenue of recourse available to ordinary citizens and is not dependent on extraordinary, self-sacrificial heroes.²⁴ Finally, democratic regimes are more likely than totalitarian or authoritarian regimes to act in the general interest, or at least to reduce predatory tendencies that will often be exhibited by autocratic rulers.²⁵

Some theorists focus on the connection between democracy and orthodox measures of development, such as economic growth, levels of education and infant mortality rates.²⁶ However, others claim that there is a positive relationship between democracy and broader definitions of human development that include improved quality of life and enhanced social welfare and individual freedoms. For example, Sen has famously argued that it is not a coincidence that there has never been a famine in a

contested concept'. See Walter B. Gallie, 'Essentially contested concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167.

²¹ Leila L. Frischak, 'Governance Capacity and Economic Reform in Developing Countries', World Bank Technical Paper No. 254 (Washington, DC: The World Bank, 1994).

²² *The Economist*, *supra* note 10; David Gillies, 'Democracy and economic development' (2005) 6:2 *IRPP Policy Matters* 21.

²³ Maravall, *supra* note 7; Amartya Sen, 'Freedom and needs: an argument for the primacy of political rights' (1994) 10 *The New Republic* 31; Doh Chull Shin, 'On the third wave of democratization' (1994) 47 *World Politics* 135; John Gerring, Philip Bond, William T. Barndt and Carola Moreno, 'Democracy and economic growth: a historical perspective' (2005) 57 *World Politics* 330.

²⁴ Bhagwati, *supra* note 7.

²⁵ Mancur Olson, 'Dictatorship, democracy and development' (1993) 87 *American Political Science Review* 567 and Sen, *supra* note 23.

²⁶ See, e.g., Surjit Bhalla, 'Freedom and economic growth: a virtuous cycle?', in Axel Hadenius (ed.), *Democracy's Victory and Crisis* (Cambridge: Cambridge University Press, 1997); Gillies, *supra* note 22 at 22–24. On the relationship between democracy and human capital, see Matthew A. Baum and David A. Lake, 'The political economy of growth: democracy and human capital' (2003) *American Journal of Political Science* 47. On the relationship between democracy and infant mortality, see Peter Boone, 'Politics and the effectiveness of foreign aid' (1996) 40 *European Economic Review* 289.

functioning multiparty political system.²⁷ He argues that in a democratic country, like India, political activism and the condemnation of governments, in cases of open starvation, have been effective in preventing famine.²⁸ Similarly, beginning with Immanuel Kant, a number of political scientists and philosophers have claimed that democracies are highly unlikely to go to war with one another.²⁹

Many of these thinkers claim that democracies generate relatively strong incentives for political leaders to promote broader goals of development.³⁰ For example, in *Power and Prosperity*,³¹ Olson identifies three basic political regimes: roving bandits, stationary bandits and democracies, assuming that in all cases political leaders are motivated by self-interest. Roving bandits (recent examples of which include rebel groups plundering natural resources in Sierra Leone, the Sudan, Angola and the Congo) have extremely high time discount rates because of their insecurity of tenure. As a result, they prey on the local population to the maximum amount possible by confiscating all of their wealth.³² Stationary bandits, by contrast, fully control a particular territory and, depending on their security of tenure and associated time discount rates, may have an incentive to adopt less confiscatory short-term measures. The strategy of confiscating less than maximal amounts of wealth creates incentives for the citizenry to be productive in future time periods and thus may increase the total returns to a despot with a relatively low time discount rate.³³ Democratic leaders, however, have stronger incentives to promote broad conceptions of the social interest and concomitant laws and legal institutions than either roving or stationary bandits. According to Olson,

²⁷ Amartya Sen, *Resources, Values and Development* (Cambridge, MA: Harvard University Press, 1984); Amartya Sen and Jean Dreze, *Hunger and Public Action* (New York: Oxford University Press, 1989) and Amartya Sen, *Development as Freedom* (New York: Random House, 1999).

²⁸ Sen, *Development as Freedom*, *ibid.*: at 155–7.

²⁹ See Immanuel Kant, 'Perpetual peace' in Peter Gay (ed.), *The Enlightenment: A Comprehensive Anthology* (New York: Routledge, 1974) and Michael Doyle, 'Kant, liberal legacies and foreign affairs, Part I' (1983) 12 *Philosophy and Public Affairs* 323.

³⁰ For overviews of the empirical debate, see Przeworski and Limongi, *supra* note 8; Adam Przeworski, Michael Alvarez, José Antonio Cheibub and Fernando Limongi, *Democracy and Development: Political Institutions and Well-Being in the World 1950–1990* (New York, NY: Cambridge University Press, 2000); and Bhagwati, *supra* note 7.

³¹ Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (New York: Basic Books, 2000).

³² *Ibid.*, at 6–7.

³³ *Ibid.*, at 7–12.

these stronger incentives flow from the fact that, unlike autocratic rulers, democratically elected rulers can often realistically anticipate returning to power at a future date, even after being defeated in an election. This prospect may induce them to place a relatively high value on enhancing the future welfare of their citizens.³⁴

Several other arguments in favour of democracy do not centre on claims about incentive effects. For instance, Rodrik has argued that participatory political institutions are the most reliable 'meta-institutions' from a developmental perspective because they are best suited to elicit and aggregate the local knowledge required to develop other norms and institutions. Following thinkers such as John Stuart Mill, Rodrik has also argued that the deliberative processes typically associated with democracy tend to make people more public-spirited and willing to compromise. He argues that democracies exhibit superior qualities to autocracies in managing social conflict and in fashioning social compromises to deal with adjustment to macroeconomic shocks.³⁵

For his part, Sen argues that democracy has a value in and of itself. As noted in Chapter 1, Sen's conception of development as freedom is not primarily instrumental. While democracy can be a means to better development outcomes, it also has intrinsic value.³⁶ Sen also argues in his recent book, *The Idea of Justice*,³⁷ that the relationship between public reason and justice demands some form of participatory governance, or 'government by discussion', since government decisions must be publicly justified. He rejects the idea that democracy has a uniquely Western heritage and points to many historical examples of 'government by discussion' in widely different societies.³⁸

³⁴ Cf. Avinash Dixit, Gene M. Grossman and Faruk Gul, 'The dynamics of political compromise' (2000) 108 *Journal of Political Economy* 531 (the prospect of an indefinite sequence of reasonably frequent changes in power may also give democratically elected leaders an incentive to cooperate with political opponents in the hope of receiving reciprocal treatment when they are out of power). Other scholars have observed, and Olson acknowledges, that democracies are vulnerable to interest group pressures, voter ignorance and misinformation, and majoritarian forms of oppression of minorities, and that some democratic regimes are likely to be weak, unstable or corrupt. See Olson, *supra* note 25. See also Carothers, *supra* note 5.

³⁵ Dani Rodrik, *One Economics Many Recipes: Globalization, Institutions and Economic Growth* (Princeton, NJ: Princeton University Press, 2008), particularly Chapter 5. Gerring et al. also discuss a similar idea of 'institutionalization of power': see Gerring et al., *supra* note 23 at 333–4.

³⁶ Sen, *Development as Freedom*, *supra* note 27 at 148.

³⁷ Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), particularly Chapters 15 and 16.

³⁸ Consistent with his argument that democracy is not a uniquely Western con-

D. The Case against Democracy

Democracy is not always viewed as being conducive to promoting development. Several arguments are commonly made against democracy and in favour of more authoritarian regimes, at least in the early stages of a country's development. These arguments find their contemporary origins in writings by prominent US political scientists.³⁹ There are at least four major arguments against democracy.⁴⁰

First, democracy is likely to unleash pressures for immediate consumption, which occurs at the cost of savings and investment, and hence of economic growth.⁴¹ Second, authoritarian regimes often insulate the state from particularistic, special-interest group pressures, and are able to take a more comprehensive, single-minded and decisive approach to pro-development policies that may entail short-run pain in order to secure long-term gain.⁴² Third, democracy may threaten the security of private property rights in cases where median voters (given a typically skewed income distribution) and special interests strongly favour redistributive policies.⁴³ Finally, democracies may exacerbate ethnic and other intergroup conflicts if parties organize themselves along ethnic, religious or regional lines and electoral competition yields dominant parties or political bodies that practise 'winner-takes-all' politics (as we discuss more fully in the third part of this chapter).⁴⁴

On this view, citizens of countries in the early stages of economic

ception, Sen argues that these examples of 'government by discussion' are democratic notwithstanding the fact that they may not have taken the organizational form of modern Western competitive multiparty political regimes.

³⁹ Seymour Martin Lipset, 'Some social requisites of democracy: economic development and political legitimacy' (1959) 53 *American Political Science Review* 69; Samuel Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968).

⁴⁰ These arguments are well reviewed in Chapter 1 of Morton Halperin, Joseph Siegle and Michael Weinstein, *The Democracy Advantage: How Democracies Promote Prosperity and Peace* (New York: Routledge, 2010, rev. edn).

⁴¹ Bhagwati, *supra* note 7 and Przeworski et al., *supra* note 30 at 143.

⁴² Ronald Gilson and Curtis Milhaupt, 'Economically benevolent dictators: lessons for developing countries' (2011) 59 *American Journal of Comparative Law* 227–88.

⁴³ Adam Przeworski, 'The neo-liberal fallacy', in Diamond and Plattner, *supra* note 7, 39; Dan Usher, *The Economic Prerequisite to Democracy* (New York: Columbia University Press, 1986).

⁴⁴ See section III *infra*.

development face 'a cruel choice' between democracy and development.⁴⁵ Proponents of the view 'economic development first; democracy later' often point to the post-war economic successes of East Asian autocracies, including most recently China, as evidence that democracy need not precede development.

E. The Empirical Evidence

The empirical evidence concerning the relationship between democracy and development is as contentious as the theorizing. Przeworski and Limongi summarize 18 studies containing 21 observations about the relationship between democracy and growth.⁴⁶ Eight observations favoured democracy, eight favoured authoritarianism, and five found no difference. Helliwell, in a multiple regression analysis of data pertaining to a sample of about one hundred countries from 1960 to 1985, concludes that the effects of introducing democracy on *subsequent* economic growth appear to be minimal.⁴⁷ A subsequent statistical study of 137 countries between 1950 and 1990 published by Przeworski et al. in 2000 finds that the net effect of democracy or autocracy on economic growth is zero.⁴⁸ However, a more recent study by Halperin, Siegle and Weinstein of a large sample of countries for the period between 1960 and 2001 finds that democracies (at least full liberal democracies) generally outperform autocracies in terms of economic growth by a significant margin, as well as exhibit less economic volatility and far fewer 'economic disasters'.⁴⁹ Their study also finds that democracies perform better on other social indicators such as literacy rates, life expectancy rates and infant mortality rates.⁵⁰

Lindert suggests that the debate over the relationship between democracy and growth remains unresolved because of weaknesses in the studies of this relationship. He argues that many of the studies of the relationship between democracy and economic development (or growth)

⁴⁵ Bhagwati, *supra* note 7; Maravell, *supra* note 7; and Stephan Haggard and Robert R. Kaufmann, *The Political Economy of Democratic Transitions* (Princeton, NJ: Princeton University Press, 1995) at 184–6.

⁴⁶ Przeworski and Limongi, *supra* note 8.

⁴⁷ Helliwell, *supra* note 10.

⁴⁸ Przeworski et al., *supra* note 30 at 142–79; Krieckhaus argues that whether democracy may lead to economic growth depends on the country's regional context: see Jonathan Krieckhaus, 'Democracy and economic growth: how regional context influences regime effects' (2006) 36 *British Journal of Political Science* 217.

⁴⁹ Halperin et al., *supra* note 40, Chapter 2.
⁵⁰ *Ibid.*, Chapter 2.

rely on a simplistic dichotomy between democratic and non-democratic regimes, and fail to discriminate between democracies that are genuine, full-franchise democracies and those that are not (what he calls 'elite-rule'). Lindert contends that cross-country studies also often ignore the fact that many democracies became effective full-franchise democracies only relatively recently.⁵¹ He argues that the evidence tentatively suggests that genuine full-franchise democracies typically are more strongly committed to providing effective levels of support for basic universal education; he further argues that in the contemporary global economy where human capital is often the most important factor of production, genuine full-franchise democracies are likely to be a significant determinant of a country's future growth trajectory as a result of increased investment in public primary education.⁵²

Proponents of democracy also argue that the economic success of East Asian autocracies has little to do with the basic political regime but rather is related to factors such as (1) the adoption of outward-oriented growth policies,⁵³ and (2) the insulation of the bureaucracy from day-to-day political pressures.⁵⁴ They also note that a number of economies in Asia such as Burma, Cambodia and Laos have performed poorly under authoritarian regimes.⁵⁵ Furthermore, the tendency in the region is toward the evolution of authoritarian-pluralist regimes with increasingly democratic features (for example, Japan, Taiwan, South Korea and Singapore).⁵⁶

Although economic liberalization has often preceded political liberalization, the upheavals in Eastern and Central Europe over the past two decades followed the opposite sequence. In these cases, authoritarian regimes were replaced by democratic regimes, some of which then embarked on a process of economic liberalization. These attempts at more or less simultaneous political and economic liberalization are largely without precedent. They have sparked intense debates over whether a comprehensive package of economic reform should be implemented in the

⁵¹ Peter Lindert, 'Voice and growth: was Churchill right?' (2003) 63 *Journal of Economic History* 315.

⁵² *Ibid.* See Boone, *supra* note 26.

⁵³ See Bhagwati, *supra* note 7 and Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton, NJ: Princeton University Press, 1992).

⁵⁴ Pei, *supra* note 1; Robert Wade, *ibid.*; World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (New York: Oxford University Press for the World Bank, 1993).

⁵⁵ Pei, *ibid.*

⁵⁶ Kim, *supra* note 11.

short period of extraordinary politics that follows a change of regime,⁵⁷ or whether the absence of open and sustained public debate over the economic reform package undermines the political legitimacy of the economic reforms.⁵⁸

It is similarly argued that comprehensive constitutional reform, including the adoption of a full panoply of liberal political rights, should be undertaken during this 'window of opportunity' – a 'big bang' approach to both economic and political reform.⁵⁹ It may, however, be premature to reach a judgment on whether this simultaneous process of political and economic reform will prove successful.⁶⁰ To date, the evidence is mixed. Countries such as the Czech Republic, Poland and Hungary – which enjoyed a substantial measure of political and economic liberalization earlier in their histories – and some of the Baltic states appear to have managed both processes reasonably well. By contrast, in other Central and Eastern European countries, the prospects for both economic and political reform seem to be much less encouraging.⁶¹

Based on this mixed body of evidence, some commentators conclude that democracy may not be conducive to the emergence of capitalism and its early growth, but that it is the regime most likely to develop and be sustainable once societies reach a certain level of economic development.⁶² Other commentators contest the proposition that authoritarian governments have been better than democratic governments, at least in recent years, at pursuing major economic reforms.⁶³ As *The Economist*

⁵⁷ Anders Aslund, 'The case for radical reform' (1994) 5:4 *Journal of Democracy* 63; Leszek Balcerowicz, 'Understanding post-Communist transitions' (1994) 5:4 *Journal of Democracy* 75.

⁵⁸ Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (New York: Cambridge University Press, 1991).

⁵⁹ Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992).

⁶⁰ As Barbara Geddes remarks, 'political scientists spend much of their time explaining events that have not finished happening': Barbara Geddes, 'Challenging the conventional wisdom' (1994) 5:4 *Journal of Democracy* 104 at 117.

⁶¹ Joel S. Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton, NJ: Princeton University Press, 1988); Joan M. Nelson, *Economic Crisis and Policy Choice: The Politics of Adjustment in the Third World* (Princeton, NJ: Princeton University Press, 1990); and Przeworski, *supra* note 58.

⁶² Berger, *supra* note 7. For a review of the literature, see Halperin et al., *supra* note 40 at Chapter 1.

⁶³ Geddes, *supra* note 23; and Halperin et al., *supra* note 40 at Chapter 3.

points out, if authoritarian governments eventually make countries rich, especially in the early stages of economic development, Africa would be or should soon become an economic colossus.⁶⁴ Instead, some of the more pessimistic prognoses for the future of Africa depict a mafia-like world of social and political disintegration characterized by war, tribute, predation and criminalization of economic activity, as local warlords struggle to extort Africa's most useful resources for sale to the highest international bidders while creating tens of thousands of refugees in the process.⁶⁵

Other commentators argue that authoritarian regimes may be better suited to managing the economic reforms that must occur as a country moves from communism to capitalism. Leszek Balcerowicz argues, for example, that three main categories of initiatives will often have to be contemplated when implementing economic reform in post-Communist countries: first, macroeconomic stabilization; second, microeconomic liberalization; and third, fundamental institutional restructuring.⁶⁶ Macroeconomic stabilization entails radical changes in monetary and fiscal policy that are designed to counteract hyperinflationary trends and related distortions affecting consumption, savings and investment behaviour. Microeconomic liberalization is designed to remove various state-imposed restrictions on economic activity that create policy-induced price distortions by driving a wedge between prices and real resource costs, thereby undermining the price system as a signalling and incentive mechanism. These types of policy are captured by the axiom 'getting prices right'. Fundamental institutional restructuring is aimed at privatizing state enterprises, reforming the tax system and creating new financial and regulatory institutions.⁶⁷ In the face of a major economic crisis, democracies may have no choice but to address the first two classes of issues, even though this may cause serious pain for the population at large. However, democracies may encounter much more difficulty in embarking upon fundamental institutional reform, where loss of jobs, income, status and other perquisites and rents may be much more narrowly concentrated.⁶⁸ Hence, on this view, authoritarian governments may have an advantage over democratic regimes in forcing fundamental institutional restructuring.

⁶⁴ *The Economist*, *supra* note 10.

⁶⁵ Thomas Callaghy, 'Africa: back to the future?' (1994) 5:4 *Journal of Democracy* 133.

⁶⁶ Balcerowicz, *supra* note 57.

⁶⁷ *Ibid.*

⁶⁸ Joan M. Nelson, 'Linkages between politics and economics' (1994) 5:4 *Journal of Democracy* 49.

Focusing on the poorest billion people in the world living in 60 of the poorest countries in the world, Collier finds that democracy is actually damaging to the reform process if it means little more than elections.⁶⁹ At very low levels of per capita income, moving from despotism to a nominally democratic regime may actually increase political violence and do nothing to enhance accountability or legitimacy. In the absence of effective checks and balances, despots will engage in various forms of intimidation, repression and bribery of voters, fraud and other electoral irregularities, and then claim the facade of democracy to further entrench themselves in power.

F. Challenges to Reforming Political Institutions

Despite the euphoria in many development circles over the recent wave of democratization, Carothers offers a sobering assessment.⁷⁰ According to Carothers, of the nearly one hundred countries considered as being in transition to democracy, only a relatively small number – probably fewer than twenty – are clearly on their way to becoming successful, well-functioning democracies. According to Diamond, the 1999 Pakistani coup initiated the reversal of the wave of democratization from its peak, and there has been democratic recession ever since.⁷¹ Diamond argues that this reversal was symptomatic of 'deep-seated problems of governance with which many other new and fragile democracies were also struggling'.⁷² The troubled attempts to install democratic political regimes in Iraq and Afghanistan are some of the more prominent contemporary examples of the challenging task of democratic reform.⁷³ In a 2010 report, Freedom House found that liberty, human rights and the number of free democracies in the world had been declining for four consecutive years.⁷⁴

Carothers argues that five questionable assumptions define the conventional transition paradigm. First, any country moving away from dictatorial rule can be considered to be a country in transition toward democracy. Second, democratization tends to unfold in a set pattern of stages: the opening, the breakthrough and the consolidation. Third, elections are

⁶⁹ Collier, *supra* note 18 at 45.

⁷⁰ Carothers, *supra* note 5 at 5. See also Thomas Carothers, *Aiding Democracy Abroad* (Carnegie Endowment for International Peace, 1999).

⁷¹ Diamond, *supra* note 2 at Chapter 4.

⁷² *Ibid.*, at 60.

⁷³ See Trebilcock and Chitalkar, *supra* note 19.

⁷⁴ Freedom House, *supra* note 3.

of determinative importance. Fourth, the underlying conditions in transitional countries – their economic level, political history, institutional legacies, ethnic makeup, socio-cultural traditions or other ‘structural’ features – will not be major factors in either the onset or the outcome of the transition process. Fifth, democratic transitions making up the recent wave of democratization are being built on coherent, functioning states.

Carothers considers all of these assumptions to be problematic. In contrast, he argues that many countries in transition from authoritarianism to democracy reflect two persistent syndromes: ‘feckless pluralism’ and ‘dominant power politics’. ‘Feckless pluralism’ refers to situations in which small, deeply entrenched political elites periodically alternate power and enrich themselves at the expense of the general population. ‘Dominant power politics’ refers to situations where one party, despite periodic elections, dominates government over long periods of time and often governs with little heed for the general interests of the population.

Some scholars caution that the deliberation, cooperation and compromise ideally associated with democracy cannot readily be imposed through top-down measures. Instead, reform must occur from the bottom up, through thick prior networks of associational activity – civil society or ‘social capital’ – that have already cultivated these norms, which can then be scaled up to regional or national democratic governments.⁷⁵ However, other scholars point out that many forms of social capital are parochial, exclusionary, discriminatory, or repressive, such as the social capital that resides within the Ku Klux Klan and the Mafia. These scholars argue that desirable forms of social capital cultivate a wider radius of trust and that these forms of social capital evolve organically and are not readily constructible by deliberate public policies.⁷⁶

In designing reforms of political institutions, it is important to be sensitive to the specific characteristics of each country. Generalizations about the relationship between democracy and development or binary distinctions between democracy and autocracy⁷⁷ offer very little useful guid-

⁷⁵ See, e.g., Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1994); Peter B. Evans, ‘Government action, social capital and development: reviewing the evidence on synergy’ (1996) 24 *World Development* 1119; and Peter B. Evans, *Embedded Autonomy* (Princeton, NJ: Princeton University Press, 1996).

⁷⁶ Francis Fukuyama, ‘Social capital, civil society, and development’ (2001) 22 *Third World Quarterly* 7.

⁷⁷ Authoritarianism comes in almost as many shades as democracy, ranging from pro-development soft authoritarianism to grossly tyrannical or repressive kleptocracies.

ance or policy-relevant information on the design of particular political regimes.

Even democratic political regimes in the developed world vary vastly in their formal institutional features: some are presidential, others parliamentary; some are unicameral, some bicameral; some are unitary states, others federal states; some have tight political party structures, while others have much looser structures; some employ majority or first-past-the-post voting, while others have adopted some form of proportional representation; some tightly regulate election campaign expenditures, others subsidize these expenditures from public resources, while still others do little of either; some have adopted an entrenched bill of rights and constitutional judicial review as constraints on legislative and executive action while others have not, and so on.⁷⁸ The political arrangements that are feasible in a country will, to an important extent, be a function of each country’s history, culture and institutional legacies.⁷⁹ As with the rule of law and other institutional reforms, path dependence may significantly constrain the reform options that are feasible for a country’s political regime, at least in terms of the organizational form if not the underlying rationale.

III. POLITICAL REGIMES AND ETHNIC CONFLICT⁸⁰

Ethnic conflict occurs when there is intense rivalry, disputes or clashes of interests between groups that are organized along racial, religious, linguistic or communal lines.⁸¹ It includes (but is not limited to) political

⁷⁸ Francis Fukuyama, ‘Development and the limits of institutional design’, Global Development Network, St Petersburg, Russia, 20 January 2006.

⁷⁹ Oona Hathaway, ‘The case for promoting democracy through export control’ (2010) 33 *Harvard Journal of Law and Public Policy* 17.

⁸⁰ Our analysis is largely based on the literature review developed by Theresa Miedema, ‘Understanding ethno-nations and ethnic conflict’, unpublished manuscript (on file with the authors), and the first chapter of her doctoral dissertation, *Social Capital and Violent Conflict in Ethnically-Polarized Developing Countries*, unpublished manuscript (on file with the authors). We are also deeply grateful to her for providing comments on an earlier draft of this session. All remaining errors are our sole responsibility.

⁸¹ For an overview of the concept of ‘ethnicity’, see Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley and Los Angeles, California: University of California Press, 2000, 2nd edn). See also Pranab Bardhan, *Scarcity, Conflicts, and Cooperation: Essays in the Political and Institutional Economics of Development* (Cambridge, MA: MIT Press, 2005) at 169.

competition between ethnically-based political actors, various forms of discrimination, and violence between ethnic groups. These conflicts represent the majority of ongoing armed conflicts around the world; in 2009, the Center for Systemic Peace reported that of 30 ongoing conflicts, 19 were ethnic in nature.⁸² These 19 ethnic conflicts were largely concentrated in developing countries, and 16 took place in low- and low-middle income countries.⁸³ Ethnic conflict not only subverts peace and stability, resulting in enormous human suffering and losses, but also destroys vital infrastructure and imposes significant economic costs. As a consequence, ethnic conflict threatens human security and well-being, undermines economic growth, and detrimentally affects many other development indicators.⁸⁴ As Collier puts it, ethnic conflict is 'development in reverse'.⁸⁵ Thus, the question of whether and how these conflicts can be avoided or mitigated is extremely important from a development perspective.

Determining whether and how ethnic conflict can be resolved or managed, and assessing the potential role of institutions in responding to such conflict requires an understanding of the root causes of ethnic conflict. This is no easy task, however. Beyond a general agreement that ethnic conflict has devastating consequences, virtually every aspect of ethnic conflict is contested in the academic literature. Scholars from fields as diverse as anthropology, history, economics, law, political science, psychology and sociology have weighed in on matters ranging from the nature of eth-

⁸² Center for Systemic Peace, 'Major episodes of political violence 1946–2008', May 2009, available at <http://www.systemicpeace.org/warlist.htm>.

⁸³ *Ibid.*

⁸⁴ See, e.g., Frances Stewart, Cindy Huang and Michael Wang, 'Internal wars in developing countries: an empirical overview of economic and social consequences', in Frances Stewart and Valpy Fitzgerald (eds) *War and Underdevelopment*, Vol. 1 (Oxford, UK: Oxford University Press, 2001) at 67; Duncan Pederson, 'Political violence, ethnic conflict, and contemporary wars: broad implications for health and social well-being' (2002) 55 *Social Science and Medicine* 175; Sanjeev Gupta et al, 'Fiscal consequences of armed conflict and terrorism in low- and middle-income countries' (2004) 20 *European Journal of Political Economy* 403 at 410; Dani Rodrik, 'Where did all the growth go: external shocks, social conflicts, and growth collapses' (1999) *Journal of Economic Growth* 385; Paul Collier, 'On the economic consequences of civil war' (1999) 51 *Oxford Economic Papers* 168 at 175; Paul Collier et al., *Breaking the Conflict Trap: Civil War and Development* (Washington, DC: The World Bank and Oxford University Press, 2003) at 17; and T. Addison, A.R. Chowdhury and S.M. Murshed, 'By how much does conflict reduce financial development?' WIDER Discussion Paper No. 2002/38 (Helsinki: World Institute for Development Economics Research, United Nations University, 2002).

⁸⁵ Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford: Oxford University Press, 2007) at 27.

nicity and ethnic affiliation, to ethnic mobilization, to the sources of ethnic conflict, to the role of institutions and other social structures in triggering or mitigating ethnic conflict. There is little consensus in the literature on definitions, methodologies, causalities or conclusions. Drawing on the work of Horowitz,⁸⁶ Bardhan observes that

existing theories of ethnic conflict are often characterized by two sharply distinguished views of ethnicity – the 'hard view', which sees ethnicity as a *primordial* condition that evokes intense passions and takes ethnic groups as exogenously defined, and the 'soft' view, which takes a more strategic *constructivist* approach where ethnicity is subject to interests and calculations and group boundaries are somewhat malleable.⁸⁷

It is beyond the scope of this chapter to review the extensive literature on ethnic conflict in any detail. Instead, the following discussion will focus on the intersection of ethnic conflict and institutions. Based on the constructivist view that ethnicity is subject to *interests and calculations*, but also acknowledging the emotive power of ethnic affiliation, we will discuss how political systems interact with ethnicity in potentially dangerous ways; we will also analyse some institutional strategies to reduce the risk of ethnic fractionalization erupting into violent ethnic conflict. We will begin by discussing some of the distal causes of ethnic conflict – namely the factors that motivate ethnic affiliation and mobilization and the circumstances under which ethnic affiliation becomes a source of tension. We will then consider some of the immediate causes of violent ethnic conflict. While the specific causes of ethnic conflict vary from case to case,⁸⁸ there are patterns and trends that can provide some insight into common causes. In this regard, we will examine the factors that trigger and sustain conflict as ethnic rivalries spill over into violence. Finally, we will consider possible solutions.

A. Ethnic Affiliations

For those who take the strategic constructivist approach to ethnicity with its emphasis on interests and calculations, the salience of ethnic affiliation is a function of its instrumentality. Ethnicity emerges in response to societal needs and/or the interests of certain groups, often as a mechanism

⁸⁶ See Horowitz, *supra* note 81.

⁸⁷ Bardhan, *supra* note 81 at 169–70.

⁸⁸ Stefan Wolff, *Ethnic Conflict: a Global Perspective* (New York: Oxford University Press, 2006).

to solve collective action problems.⁸⁹ Collier, for example, suggests that in rural societies where people live at subsistence levels, strong ethnic affiliations act as a form of insurance; in the case of a catastrophe or personal difficulties, the ethnic group provides for the needs of its members.⁹⁰ Collier argues that [o]ver time, loyalty to the group becomes reinforced by all the normal power of morality: it is morally good to meet your obligations.⁹¹ Ethnic affiliations thus generate a strong and lasting expectation of loyalty, which in turn reduces the problem of free-riding; one cannot enjoy the benefits of being a member of an ethnic group during difficult times but then abandon the group as one's personal fortunes improve.⁹²

Ethnic affiliation also facilitates economic activity among its members. Shared membership in an ethnic group can act as a proxy for reliability and can serve as the basis for the development of trust between people.⁹³ Moreover, the authority structures and norms within an ethnic group, including social sanctions for cheating and defaulting on contractual commitments, deter opportunistic behaviour and thus facilitate more complex commercial transactions and contractual arrangements.⁹⁴ Ethnic ties also

⁸⁹ Collier, *supra* note 18 at 52–3.

⁹⁰ *Ibid.*, at 53.

⁹¹ *Ibid.*, at 53.

⁹² For examples of how members of an ethnic group work together to provide social insurance-type benefits to members in need, see Thomas Heberer, 'Ethnic entrepreneurs as agents of social change – the impact of ethnic entrepreneurship on social change and ethnicity, a case study among the Yi in Liangshan Autonomous Prefecture in China', in Armin Bohner and Matthias Hoher (eds), *The Role of Minorities in the Development Process* (Frankfurt am Main: Peter Lang, 2004) at 63; Jean-Paul Azam, 'The redistributive state and conflicts in Africa' (2001) 38 *Journal of Peace Research* 429; Sylvie Lambert, 'La migration comme instrument de diversification des risques dans la famille ivoirienne' ['Migration as a risk diversification device in the Ivorian family'] (1994) 94 *Revue d'économie du développement* 3; Paul Collier and Deepak Lal, *Labour and Poverty in Kenya, 1900–1980* (Oxford: Oxford University Press, 1986); and Ryszard Kapuscinski, *The Shadow of the Sun*, Klara Glowczewska (trans.) (Toronto: Vintage Canada, 2002) at 36.

⁹³ See Janet Tai Landa, *Trust, Ethnicity, and Identity: Beyond the New Institutional Economics of Ethnic Trading Networks, Contract Law, and Gift-Exchange* (Ann Arbor: University of Michigan Press, 1994) at 108–13; D. Gambatta, *Trust: Making and Breaking Cooperative Relations* (New York: Basil Blackwell, 1988); Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: The Free Press Paperbacks, 1995); and B. Cornell and I. Welch, 'Culture, information and screening discrimination' (1996) 104 *Journal of Political Economy* 542.

⁹⁴ For examples of such norms, see Easterly's discussion of the practices of the Hausa in Ibadan, Nigeria and the overseas Chinese in Southeast Asia: William

facilitate the circulation of information about prices, market conditions and reliability of buyers and sellers.⁹⁵

Borjas refers to the bonds between members of the same ethnic group, and the embedded norms, traditions, knowledge, and support that are inherent within those bonds, as being a form of capital.⁹⁶ However, while ethnic affiliation is a useful mechanism for organizing collective action, many of the goods and utilities provided by the ethnic group can in principle be delivered by a functioning state.⁹⁷ The problem is that many developing countries do not have well-functioning states, which heightens the importance of ethnic groups in developing countries. Azam observes that the capital existing in the bonds of ethnic affiliation ('ethnic capital') 'ensures to most African people the provision of many services that a modern state has taken over in rich countries, including security, social insurance, education, norms of behaviour, contract enforcement, justice and so on'.⁹⁸ There are therefore strong incentives to organize most facets of life along ethnic lines in countries with weak state structures. For example, a dysfunctional judiciary that offers little certainty about the ability to enforce contracts may create incentives to engage only in commercial transactions that can be monitored within an ethnic group.

Even where governmental institutions are functional, institutional structures may create incentives for political affiliation along ethnic lines. That ethnicity is used as a tool for political mobilization is not surprising given the doctrine of ethno-nationalism, which holds that the bounds of the political unit should be coextensive with that of the ethnic group.⁹⁹

Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York, NY: Penguin, 2006) at 82–3.

⁹⁵ Marcel Fatichamps and Bart Minten, 'Returns to social network capital among traders' (2002) 54 *Oxford Economic Papers* 173. See also Marcel Fatichamps, 'The role of business networks in market development in sub-Saharan Africa', in Masahiko Aoki and Yujiro Hayami (eds), *Communities and Markets in Economic Development* (Oxford: Oxford University Press, 2001), available at Oxford Scholarship Online: <http://dx.doi.org/10.1093/0199241015.001.0001>.

⁹⁶ Borjas referred to this capital as 'ethnic capital'. See George J. Borjas, 'Ethnic capital and intergenerational mobility' (1992) 107 *Quarterly Journal of Economics* 123.

⁹⁷ Collier, *supra* note 18 at 56.

⁹⁸ Jean-Paul Azam, 'The redistributive state and conflicts in Africa' (2001) 38 *Journal of Peace Research* 429 at 430.

⁹⁹ Ernest Gellner provides one of the most coherent definitions of nationalism: Ethno-nationalism is 'a theory of political legitimacy, which requires that ethnic boundaries should not cut across political ones, and, in particular, that ethnic boundaries within a given state . . . should not separate the power-holders from the rest': see Ernest Gellner, *Nations and Nationalism* (Ithaca, NY:

The doctrine of ethno-nationalism infused ethnicity with the legitimate exercise of political power, thereby setting the foundation for political mobilization along ethnic lines and grounding ethnic groups' claims to the rights of autonomy and sovereignty. Proponents of modernization theory argue that ethno-nationalism developed as a result of key socio-political and economic changes that occurred as feudal and agrarian societies grew into liberal, industrialized and urban states.¹⁰⁰ These changes increased the importance of ethnic identity to individuals while, at the same time, creating many new opportunities for social, economic and political power. Ethnicity thus emerged as an effective vehicle for pursuing these opportunities.

Scholars who espouse resource competition theory¹⁰¹ make similar arguments to those of the modernization theorists, although the former focus primarily on the competition for resources rather than the forces that fused ethnicity with the pursuit of social, political and economic power. Resource competition theory scholars argue that the need to compete for jobs, power, privilege and political influence provides individuals with strong incentives to organize along group lines in order to minimize transaction costs and to increase the benefits accruing to them. Barth pioneered the application of resource competition theory to ethnic groups. He argued that ethnicity should be viewed as 'a system of boundaries between groups whose power and relevance are determined primarily

Cornell University Press, 1983) at 1. For other constructivist accounts of the emergence of ethno-nationalism see Eric Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge, UK: Cambridge University Press, 1990, 2nd edn) and Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, UK: Verso, 1991, revised edn) at 5.

¹⁰⁰ For examples of scholars who espouse modernization theory, see Karl W. Deutsch, 'Social mobilization and political development' (1961) 55 *American Political Science Review* 493 at 493; Karl W. Deutsch, *Nationalism and Social Communication: An Inquiry into the Foundations of Nationality* (Cambridge, MA: MIT Press, 1967, 2nd edn) at 188; Gellner, *ibid.*; Eric Hobsbawm, *ibid.*; and Benedict Anderson, *ibid.* Each scholar has a unique view on how the forces of modernization contributed to social mobilization on the basis of ethnicity and on how modernization triggers ethnic conflict.

¹⁰¹ For the pioneering work on resource competition theory and ethnic conflict, see Fredrik Barth, *Ethnic Groups and Boundaries* (Boston: Little, Brown, 1969). For more examples of the application of resource competition theory, see Joanne Nagel, 'Resource competition theories' (1995) 38:3 *American Behavioral Scientist* 442, and John Mukum Mbaku, 'Ethnicity, constitutionalism, and governance in Africa', in John Mukum Mbaku, Pita Ogaba Agbese and Mwangi S. Kimenyi (eds), *Ethnicity and Governance in the Third World* (Aldershot: Ashgate, 2001).

by the nature and scope of contact and competition for scarce resources among ethnic cleavages'.¹⁰²

Scholars point to two types of socio-economic factors that make ethnicity the preferred vehicle for pursuing social, political, and economic opportunities – namely, historical and emergent factors. Historical factors include the cultural division of labour¹⁰³ and a split labour market,¹⁰⁴ while emergent factors include labour migration and immigration.¹⁰⁵ The coincidence of ethnic divisions with economic divisions brings ethnicity to the fore as an efficient means of collective organization in the pursuit of jobs and other opportunities. Political opportunities also serve as a basis for ethnic mobilization. The factors that act as an incentive to mobilize along the lines of ethnic affiliation include:

- (1) common language and culture, and the existence of ethnic organizational structures that can allow contenders for political office to minimize transaction costs;
- (2) possession of large deposits of exploitable environmental resources (e.g., petroleum, natural gas, diamonds and other minerals, etc.) by an ethno-regional group; and
- (3) historical domination of some groups by others.¹⁰⁶

As this discussion illustrates, a variety of scholars have pointed to a connection between ethnic affiliation and the competition for scarce resources. Assuming these scholars are at least partially right, then under certain circumstances *interests and calculations* can influence and determine ethnic affiliations, as well as increase the importance of these affiliations. As we will discuss below, the use of ethnicity to pursue scarce resources is a source of tension in many states; moreover, certain institutional structures are better than others at managing ethnic tension and rivalry in this context.

¹⁰² Mbaku, *ibid.* at 60, referring to the work of Barth in *Ethnic Groups and Boundaries*, *ibid.* See also Nagel, *ibid.* at 442–3.

¹⁰³ For a detailed discussion of how the cultural division of labour impacts ethnic mobilization and ethnic conflict, see M. Hechter, 'Group formation and the cultural division of labour' (1978) 84 *American Journal of Sociology* 293 and M. Hechter and M. Levi, 'The comparative analysis of ethno-regional movements' (1979) 2 *Ethnic and Racial Studies* 260. See also Mbaku, *supra* note 101 at 63–4.

¹⁰⁴ See, e.g., E. Bonacich, 'A theory of ethnic antagonism: the split labor market' (1972) 37 *American Sociological Review* 547 and E. Bonacich, 'The past, present, and future of split labor market theory' (1979) 1 *Research in Race and Ethnic Relations* 17. See also Mbaku, *supra* note 101 at 64–65.

¹⁰⁵ Mbaku, *supra* note 101 at 63–5.
¹⁰⁶ *Ibid.* at 65.

B. Ethnic Tension and Rivalry

The literature on ethnic conflict points to three broad inter-related factors that influence the intensity of ethnic rivalry and tension in the polity: (1) contact and the fact of ethnic difference; (2) the degree of diversity; and (3) the institutional structures in which competition for scarce resources occurs.¹⁰⁷ Drawing on the work of Deutsch, Forbes analyses how ethnic difference contributes to conflict when ethnic groups come into contact with each other.¹⁰⁸ When groups that were formerly isolated from each other come into contact as a result of processes such as modernization, urbanization, centralized education and economic specialization, they must find a means of effectively communicating and coordinating their actions. In the context of development, particularly in the post-colonial period, major decisions also have to be made about how ethnic groups will order their coexistence within the polity. Coexistence and coordinated action ultimately require some degree of homogenization of the ethnic

¹⁰⁷ These factors represent the views of scholars who take a highly constructivist view of ethnicity that emphasizes interests and calculations. Other scholars who cannot properly be described as primordialists emphasize softer variables, including socio-psychological processes. Examples include categorization theory and social identity theory. For a discussion of psychological factors related to ethnic conflict (including, for example, 'belongingness want' – the need to belong to a group), see C. Hayes, *The Historical Evolution of Modern Nationalism* (New York: Russell and Russell, 1968); Dusan Kecmanovic, *The Mass Psychology of Ethnonationalism* (New York, NY: Plenum Press, 1996); David K. Reich, Richard S. Crutchfield and Egerton L. Ballachey, *Individual in Society: A Textbook of Social Psychology* (New York: McGraw-Hill, 1962); and Donald M. Taylor and Fathali M. Moghaddam, *Theories of Intergroup Relations: International Social Psychological Perspectives* (Westport, CT: Praeger, 1994, 2nd edn). For a discussion of categorization theory, see Joshua Searle-White, *The Psychology of Nationalism* (New York, NY: Palgrave, 2001). For a discussion of social identity theory, see Henri Tajfel and John C. Turner, 'An integrative theory of intergroup conflict', in W.G. Austin and S. Worchel (eds), *The Social Psychology of Intergroup Relations* (Monterey, CA: Brooks/Cole, 1979); Henri Tajfel and John C. Turner, 'The social identity theory of intergroup behavior', in S. Worchel and G. Austin (eds), *Psychology of Intergroup Relations* (Chicago: Nelson-Hall, 1986); John C. Turner, 'Some current issues in research on social identity and self-categorization theories', in Naomi Ellemers, Russell Spears and Bertjan Doosje (eds), *Social Identity* (Oxford: Blackwell, 1999); and Henri Tajfel, 'Social categorization, social identity, and social comparison', in Henri Tajfel (ed.), *Differentiation between Social Groups* (London: Academic Press, 1978) at 63.

¹⁰⁸ See H.D. Forbes, *Ethnic Conflict: Commerce, Culture, and the Contact Hypothesis* (New Haven: Yale University Press, 1997). See also Deutsch, 'Social mobilization', *supra* note 100, and Deutsch, 'Nationalism', *supra* note 100.

groups' different norms, institutions, social structures, language and cultural practices. The groups that are unable to impose their language, social structures and institutions on the others must bear the transaction costs associated with learning a new language and set of institutional practices. Moreover, conceding/assimilating groups are less likely to be able to dominate social, political and economic institutions and structures of the shared polity and, consequently, have restricted access to the scarce resources available through these institutions. The process of homogenization thus engenders conflict because each group has strong incentives to resist making concessions in the determination of the common language, norms and institutions.

The degree of ethnic fragmentation in a polity also influences the intensity of ethnic rivalry and tension, likely because of the incentive structures that exist at different levels of diversity. Collier's empirical research shows that ethnically diverse societies with democratic regimes actually face fewer risks of civil conflict; by contrast, societies characterized by dominance (that is, where the largest ethnic group makes up 45 to 90 per cent of the total population) face higher risks of conflict.¹⁰⁹ Other authors confirm the observation that ethnic diversity per se does not increase the risk of conflict.¹¹⁰

In a truly diverse society, where there is a high degree of ethnic fragmentation, no ethnic group is large enough to secure a monopoly on power. Cross-ethnic alliances are necessary in order to secure access to political power and influence. In this context, ethnic elites have strong incentives to adopt moderate, non-ethnic positions and strategies. By contrast, in polarized polities, elections tend to divide the polity along ethnic lines, having a negative impact on electoral competition.¹¹¹ Collier suggests that electoral

¹⁰⁹ Paul Collier and Anke Hoeffler, 'Greed and grievances in civil war', World Bank Policy Research Working Paper 2355, CSAE WPS/2002-01 (Washington, DC: World Bank, 2001). For a succinct formulation of Collier's arguments on economic factors, see Paul Collier, 'Economic causes of civil conflict and their implications for policy', in Chester A. Crocker, Fen Osler Hampson and Pamela All (eds), *Leashing the Dogs of War: Conflict Management in a Divided World* (Washington, DC: United States Institute of Peace, 2007).

¹¹⁰ José G. Montalvo and Marta Reynal-Querol, 'Ethnic polarization, potential conflict, and civil wars' (2005) 95 *American Economic Review* 796. But see Ravi Bhavnani and Dan Miodownik, 'Ethnic polarization, ethnic salience, and civil war' (2009) 53 *Journal of Conflict Resolution* 30 (claiming that ethnic salience is a relevant factor, especially when there are low levels of polarization).

¹¹¹ Wonbin Cho, 'Ethnic fractionalization, electoral institutions, and Africans' political attitudes', Afrobarometer Working Paper No. 66 (January 2007), available at <http://next.pls.msu.edu/index.php>.

competition in polarized societies can take political agendas to extremes since a candidate will draw larger support the more he or she promises to favour one group over another. Elites attempt to solidify support from their respective ethnic groups by 'rallying the faithful' through the use of ethno-centric rhetoric. In this regard, elites from the same ethnic group often attempt to 'outbid' each other for the support of their group by adopting increasingly radical platforms in order to demonstrate that they are the best protector of the group's interests.¹¹² Once elected, the ethnic elites in power must safeguard their own group's interests by providing access to influence and the scarce resources of the state while excluding elites from other ethnic groups from the political process. Elites must avoid the perception that they have made concessions to other ethnic groups or adopted moderate or conciliatory policies. This turns competition for political power into a zero-sum competition for resources and public goods.¹¹³ Moreover, this competition is framed in terms of ethnic identity.¹¹⁴ In sum, elites in fragmented societies have incentives to be bridge-builders between ethnic groups while elites in polarized societies have incentives to adopt ethno-centric and divisive platforms that increase the risk of conflict between ethnic groups.

The negative impact that higher degrees of ethnic polarization have on the political system may be influenced by the political structures that govern ethnically diverse societies. Rational choice theorists and public choice theorists argue that inter-ethnic violence arises or intensifies in response to a particular set of incentive structures.¹¹⁵ On this view, some socio-economic and political structures are more likely to give rise to tension than others because of the incentive structures they create. Institutions that establish or perpetuate the domination of one group over another, or provide a group with a monopoly over wealth and/or power within a certain polity, tend to generate more conflict than institutions that

¹¹² See, e.g., Neil Devotta, 'From ethnic outbidding to ethnic conflict: the institutional bases for Sri Lanka's separatist war' (2005) 11 *Nations and Nationalism* 141.

¹¹³ Collier, *supra* note 85 at 44-6.

¹¹⁴ Kenya is a recent example of how this dynamic may lead to conflict. But this is not a recent problem. See Human Rights Watch, *Divide and Rule: State-sponsored Ethnic Violence in Kenya* (New York: Human Rights Watch, 1993).

¹¹⁵ See, e.g., Michael Hechter and Satoshi Kanazawa, 'Sociological rational choice theory' (1997) 23 *Annual Review of Sociology* 191; Michael Hechter, 'Rational choice theory and the study of ethnic and race relations', in John Rex and David Mason (eds), *Theories of Ethnic and Race Relations* (Cambridge: Cambridge University Press, 1988); and Bhanu Mehta, 'Ethnicity, nationalism and violence in South Asia' (1998) 71 *Pacific Affairs* 377.

force ethnic groups to share power.¹¹⁶ For instance, incentives to organize electoral competition along ethnic lines are higher in democratic regimes that permit ethnically-based party systems and have electoral rules such as winner-takes-all.¹¹⁷ The risk of heightened ethnic tension that is associated with ethnic polarization and dominance can be managed by institutional arrangements (for example, electoral rules, constitutional provisions and property rights) that provide fair, predictable and efficient rules to govern the competition for scarce political and economic resources.¹¹⁸

In addition to political institutions, some socio-economic structures contribute to inter-ethnic rivalry. Socio-economic structures that either establish the dominance of one ethnic group over another (ethno-classes) or establish a monopoly of one ethnic group over limited resources to the detriment of others (middlemen minorities) can contribute to an increase in ethnic tension.¹¹⁹

In his book *Identity and Violence*, Sen suggests that inter-ethnic tensions only exist because people often place excessive emphasis on one-dimensional notions of identity, be it ethnicity or nationality.¹²⁰ The objective reality, however, is that each person's identity is multifaceted rather than one-dimensional and, so long as the various dimensions of a person's identity are not in conflict, they can coexist with each other.¹²¹ Moreover, each person has the capacity and the freedom to determine which group loyalties and affiliations to prioritize.¹²² On this view, the reduction of a person's identity to the single dimension of ethnicity or nationality should be avoided as it has the potential to generate conflict.

Sen's assessment seems to underestimate the importance of ethnicity in developing and developed countries alike, where ethnic groups often provide important goods and services and ethnic affiliation is still very

¹¹⁶ Donald Horowitz, 'Structure and strategy in ethnic conflict: a few steps toward synthesis', in Boris Pleskovic and Joseph E. Stiglitz (eds), *Annual World Bank Conference on Development Economics 1998* (Washington, DC: World Bank, 1999) 345.

¹¹⁷ Bardhan, *supra* note 81 at 183-4.

¹¹⁸ Mbaku, *supra* note 101 at 83.

¹¹⁹ Bardhan, *supra* note 81 at 171-6. See also Reed Coughlan and S.W.R. de A. Samarasinghe, 'Introduction - economic dimensions of ethnic conflict: theory and evidence', in Reed Coughlan and S.W.R. de A. Samarasinghe (eds), *Economic Dimensions of Ethnic Conflict* (London: Pinter Publishers, 1991).

¹²⁰ Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York: W.W. Norton, 2006).

¹²¹ *Ibid* at 4-5; see also Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W.W. Norton, 2006).

¹²² *Ibid*.

relevant to people's daily lives.¹²³ Sen does not present concrete proposals on how to mitigate the effects of these affiliations.¹²⁴ Other authors appear to advocate the deliberate choice of policies that can help to downplay ethnicity by superimposing a constructed national identity or assimilating ethnic groups into a shared, civic identity.¹²⁵ Collier cites Tanzania and Indonesia as successful examples in this regard: by using, creating or imposing a national language, Tanzanian President Julius Nyerere and Indonesian President Sukarno managed to mitigate ethnic divisions. In Tanzania, language policy was coupled with the creation of symbols of national identity, political reforms and education policies to reshape cultural identity. For example, Nyerere eschewed a multiparty system by creating village committees and prohibiting campaigns based on ethnic platforms.¹²⁶ Collier argues that, as both ethnic and national identities are constructed, these policies could be successfully replicated in other countries. Other authors, however, are more cautious about the prospects of transferability.¹²⁷ Moreover, Kymlicka argues that such policies may be sources of conflict in and of themselves since the process of forming a national or civic identity requires at least one group to assimilate to

¹²³ The perception of the United States, for instance, as a 'melting pot' where there is a large degree of cultural assimilation has been rejected by sociologists. See, e.g., Gordon Milton, *Assimilation in American Life* (New York: Oxford University Press, 1964) and Nathan Glazer and Daniel Moynihan, *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians and Irish of New York City* (Cambridge, MA: MIT Press, 1970). See also Joel Perlmann, *Ethnic Differences: Schooling and Social Structure Among the Irish, Italians, Jews, and Blacks in an American City, 1880-1935* (New York: Cambridge University Press, 1988) and Stephen Steinberg, *The Ethnic Myth: Race, Ethnicity, and Class in America* (Boston, MA: Beacon Press, 1989).

¹²⁴ To be sure, Sen presents proposals for institutional reforms both at the national and international levels, so as to address exclusion from the global economy and to reduce levels of inequality between poor and rich countries. These are not, however, related to notions of identity. Instead, they deal with the concern that grievances generated by exclusion and inequality might contribute to a rise in conflict.

¹²⁵ See Forbes, *supra* note 108 and Jon Orman, *Language Policy and Nation-Building in Post-Apartheid South Africa* (Springer Netherlands, 2009), particularly the chapter entitled 'Language policy, language planning and national identity: theoretical perspectives'. For a cautionary survey of experiences in Asian countries and some policy recommendations, see Michael E. Brown and Sumit Ganguly (eds), *Fighting Words: Language Policy and Ethnic Relations in Asia* (Cambridge, MA: MIT Press, 2003).

¹²⁶ Collier, *supra* note 18 at 67.

¹²⁷ See Will Kymlicka and Alan Patten (eds), *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003).

the characteristics of whatever is deemed to be the 'national' or 'civic' identity.¹²⁸

C. Factors that Trigger and Sustain Conflict

Why does violent conflict erupt between communities that have coexisted relatively peacefully for significant periods of time despite historical animosities? While institutional arrangements may increase tension and aggravate rivalries in ethnically diverse societies, they will not necessarily trigger conflict.¹²⁹ In many cases, there are factors that suddenly emerge, creating a shock to the social structure and triggering violent conflict. Many of these factors are not the sole cause of conflict, but when combined with political, social and economic structures that have generated tensions and rivalry for years, they may be the tipping point that triggers violence. In sum, these factors help to explain what triggers and sustains violent conflicts.

In countries where ethnic divisions coincide with class divisions, adverse consequences of international economic policies can exacerbate pre-existing ethnic tensions. These economic policies may reinforce the existing dominance of a certain group and may generate resentment and precipitate a violent reaction from excluded groups.¹³⁰ According to Amy Chua, neoliberal policies for development that seek to promote free

¹²⁸ See Will Kymlicka, 'Misunderstanding nationalism', in Ronald Beiner (ed.), *Theorizing Nationalism* (Albany: State University of New York Press, 1999).

¹²⁹ According to Collier and Hoeffler, 'greed' seems to be a better predictor of conflict than 'grievance'. That is, economic motivations and opportunities (finding deposits of natural resources, for instance) seem to be more relevant than historical structures of dominance in predicting violence. Examples of such cases are Nigeria (oil) and Sierra Leone (diamonds). See Rachel Stohl, 'UN imposes diamond ban on Sierra Leone', Center for Defense Information, *Main Issues* (13 July 2000), available at <http://www.cdi.org/program/issue/document.cfm?DocumntID=651&IssueID=93&StartRow=1&ListRows=10&appendURL=&Orderby=DateLastUpdated&ProgramID=23&IssueID=93>, and R. T. Suberu, *Federalism and Ethnic Conflict in Nigeria* (Washington, DC: United States Institute of Peace, 2001). Regarding opportunities, conflict seems more likely to happen in places where rebels can be easily financed, which are likely to be places in which the structure of the state is weak (especially its military and police forces) and/or where there are high levels of unemployment (reducing the opportunity cost for rebels). See James D. Fearon and David D. Laitin, 'Ethnicity, insurgency, and civil war' (2003) 97 *American Political Science Review* 75. See also Paul Collier and Nicholas Sambanis (eds), *Understanding Civil War: Africa - Evidence and Analysis, Vol. 1* (Washington, DC: World Bank, 2005) at 248.

¹³⁰ Bardhan, *supra* note 81.

markets and democracy may increase these tensions significantly in cases where there is an economically dominant ethnic minority. She analyses a number of such cases to show how pre-existing tensions, combined with liberal democratic reform that empowers an impoverished majority, often became explosive.¹³¹

Chua's arguments are challenged by Milica Bookman (among others), who argues that the institutional protection of civil and political rights serves as an 'ethnostabilizer'.¹³² According to Bookman, despite economic and social hierarchies, in liberal democracies groups are equally protected by the rule of law. Civil and political liberties, including the right to be free from discrimination, provide protection to groups when competition escalates and the pressure for discriminatory policies rises. Bookman, however, does not explicitly address the cases highlighted by Chua – namely, countries that simultaneously implement liberal democratic and market reforms. The ability of institutions to protect ethnic groups may be weaker in new democracies. Moreover, in contrast to Chua's work, Bookman provides very little empirical evidence to support her arguments. In fact, James Fearon and David Laitin show that political democracies and states that observe civil liberties are not less civil war-prone than dictatorships.¹³³

Scholars who draw on rational choice theory argue that violence may be used strategically as a modality of political action. Breakdowns in existing institutional arrangements create uncertainty and undermine the security of ethnic groups; in these circumstances, ethnic groups may resort to violence as a pre-emptive measure to safeguard their vital interests.¹³⁴ Here, 'violence can be analyzed in terms of cost-benefit analysis, theories of bargaining, game theory and rational choice'.¹³⁵ Institutions that place some ethnic groups at a competitive disadvantage in the pursuit of political and economic resources are also likely to trigger violence.¹³⁶ Proponents

¹³¹ Amy Chua, 'Markets, democracy, and ethnicity: toward a new paradigm for law and development' (1998) 108 *Yale Law Journal* 1; Amy Chua, 'The paradox of free market democracy: rethinking development policy' (2000) 41 *Harvard International Law Journal* 287; Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (Toronto: Doubleday, 2003).

¹³² Milica Z. Bookman, *Ethnic Groups in Motion: Economic Competition and Migration in Multi-Ethnic States* (Portland, OR: Frank Cass, 2002) at 91.

¹³³ Fearon and Laitin, *supra* note 129.

¹³⁴ See Mbaku's review of rational choice theory in Mbaku, *supra* note 101 at 69–70.

¹³⁵ Mehta, *supra* note 115 at 377.

¹³⁶ Mbaku, *supra* note 101 at 75.

of public choice theory (a sub-set of rational choice theory) argue that institutional structures that do not create fair, stable and efficient rules to govern competition by ethnic groups for political and economic power generate incentives to resort to violence.¹³⁷

Economic decline can also intensify inter-ethnic competition. During periods of economic decline and stagnation, groups tend to be more aggressive as they compete for a shrinking pool of resources.¹³⁸ Moreover, as with international economic policies, the consequences of economic decline can be unevenly distributed, impacting on some groups more than others. Uneven distributive effects may occur if certain sectors of the economy are more affected than others, or if a specific geographic area where one group is concentrated is especially affected by the downturn. In either case, groups that have borne the brunt of economic decline will press for policies to mitigate these effects and to redistribute resources. The risks of conflict can become especially high if the ethnic group benefiting from existing arrangements strongly resists redistributive policies. Institutional arrangements thus play an important role in mediating the competing interests of ethnic groups during periods of economic upheaval.

D. Possible Institutional Solutions

Thus far, we have examined the factors that motivate people to affiliate along ethnic lines, the circumstances that can increase tension and rivalry among existing ethnic groups, and the proximate causes that can actually trigger conflict in peaceful societies. In the discussion of all these issues, we suggested that institutions may play an important role in managing the dynamics of inter-ethnic relations. We turn now to a fuller discussion of how institutional arrangements may reduce the risk of conflict. This discussion is divided into two sections. First, we consider what types of institution may facilitate the transition from a period of violence to peace and stability within the polity; these institutions help societies to address the legacy of violence and past atrocities. Second, we examine the types of institution that can help a country to manage the coexistence of ethnic groups going forward, with a particular focus on the design of political institutions.

¹³⁷ *Ibid.*, at 77–79.

¹³⁸ Bookman, *supra* note 132 at 31.

1. Institutions to deal with the past

As countries emerge from periods of violence, they must address the legacy of past atrocities, human rights violations, and violence that ethnic groups have committed against each other. The scholarship broadly refers to the process of moving from the former regime (typically associated with the commission of atrocities and systematic violence) to the new, typically democratic governance structure in terms of transitional justice.¹³⁹ The imperatives of 'transitional justice' are varied and include holding leaders of the former regime accountable for their actions; providing justice to the victims, including the possibility of reparations; creating a historical record of past events; promoting reconciliation; and dismantling the previous despotic regime and setting the foundation for democracy.¹⁴⁰ The three most common types of transitional justice institutional structures are (1) truth commissions, (2) trials (domestic and international), and (3) lustration or vetting. Each of these structures is discussed below.

Truth commissions (TCs) have become a common institutional response to past periods of violence and atrocity.¹⁴¹ The use of TCs originated

¹³⁹ For discussion of what 'transitional justice' means and what it requires, see, e.g., Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); Neil Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vols I–III (Washington, DC: United States Institute of Peace, 1995); and Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997). See also Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge, UK: Polity, 2002) and the collection of essays in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge, UK: Cambridge University Press, 2006).

¹⁴⁰ There is no clear consensus about whether all of these imperatives should be included under the umbrella of 'transitional justice' or which imperatives should be given priority. See Bronwyn Anne Leebaw, 'The irreconcilable goals of transitional justice' (2008) 30 *Human Rights Quarterly* 95. Other scholars argue that the focus on transitional justice detracts from the underlying causes of conflict, such as deeply rooted inequalities. See, e.g., Zinaida Miller, 'Effects of invisibility: in search of the "economic" in transitional justice' (2008) 2 *International Journal of Transitional Justice* 266.

¹⁴¹ For an excellent discussion of the history of truth commissions and their role in transitional periods, see Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (London: Routledge, 2000); Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (London: Routledge, 2002); Jon Elster, *Transitional Justice in Historical Perspective* (Cambridge, UK: Cambridge University Press, 2004); and Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy* (New York: Columbia

in Latin America and Africa, but they have now come to be implemented around the world, including in countries as diverse as Argentina, Chile, Germany, East Timor, Canada, South Africa, Ethiopia, Morocco, Solomon Islands, South Korea, Serbia and Montenegro,¹⁴² and Nepal. TCs are bodies that have been established to investigate a past history of human rights violations in a particular country.¹⁴³ In general, the government (usually the executive branch) officially sanctions the work of the TC, which is an important factor in establishing the legitimacy of the TC.¹⁴⁴ Although each TC is unique in its structure, mandate and form, Hayner identifies four primary elements common to all TCs:

First, a truth commission is focused on the past. Second, it does not focus on just one event, but on the record of abuses over a period of time (often highlighting a few cases to demonstrate and describe patterns or large numbers of abuses). Third, a commission is a temporary body, generally concluding with the submission of a report. And finally, a truth commission is somehow officially sanctioned by the government (or by the opposition, where relevant) to investigate the past.¹⁴⁵

Broadly speaking, the objectives of TCs are 'to confront, record, and acknowledge the truth about a past period of widespread rights abuses, with the hope of contributing to reconciliation, healing, and reform'.¹⁴⁶ Hayner notes that most TCs are created at a point of political transition within a country and often serve to underline a break with the past regime's patterns of human rights violations and to obtain or sustain

University Press, 2006). See also Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (London: Frank Cass, 2004).

¹⁴² Note that this truth commission never issued a report.

¹⁴³ Priscilla B. Hayner, 'Fifteen truth commissions – 1974–1994: a comparative study' (1994) 16 *Human Rights Quarterly* 597 at 600. Note that the human rights violations investigated by the TC often include violations committed by the military, but may also include violations committed by armed opposition groups (at 600).

¹⁴⁴ *Ibid.* Note that in some cases TCs have been initiated by the international community, acting through the United Nations, and by non-governmental institutions (e.g., opposition parties). See Hayner, *ibid.* at 604 and Michael P. Scharf, 'The case for a permanent international truth commission' (1997) 7 *Duke J. Comp. and Int'l L.* 375 at 377–8.

¹⁴⁵ Priscilla B. Hayner, 'Commissioning the truth: further research questions' (1996) 17 *Third World Quarterly* 19 at 20.

¹⁴⁶ Priscilla B. Hayner, 'International guidelines for the creation and operation of truth commissions: a preliminary proposal' (1996) 59 *Law and Contemporary Problems* 173 at 175. See also Scharf, *supra* note 144 at 379–80.

political legitimacy for a new regime. In some cases, TCs are also expected to lay the foundation for other processes in the transitional justice period, such as criminal prosecution, institutional reform and the payment of reparations to victims.¹⁴⁷ These goals are controversial, however, both in terms of their appropriateness for TCs and the ability of TCs to achieve such goals.¹⁴⁸ In particular, there is debate about whether and to what extent TCs can play a role in holding specific members of the past regime accountable for their acts, for example, by 'naming names'.¹⁴⁹

Despite the proliferation of TCs, there is a paucity of scholarship that critically evaluates their successes and failures. Brahm puts the matter succinctly: 'the truth commission literature suffers from definitional ambiguity, the imprecise measurement of what are often abstract concepts, and a reliance on anecdotal evidence and perceptions to judge the impact of truth commissions'.¹⁵⁰ More pragmatically, Hayner notes that although TCs do provide a historical record of past atrocities, there is disagreement about whether TCs promote reconciliation or deepen resentment.¹⁵¹

Criminal prosecutions have risen to prominence since the Nuremberg and Tokyo trials at the end of World War II.¹⁵² In general, the focus

¹⁴⁷ Christopher K. Connolly, 'Living on the past: the role of truth commissions in post-conflict societies and the case study of Northern Ireland' (2006) 36 *Cornell International Law Journal* 401 at 404. See also Hayner, *supra* note 146 at 175.

¹⁴⁸ See, e.g., Henry J. Steiner (ed.), *Truth Commissions: A Comparative Assessment* (WPF Report No. 16) (Cambridge: World Peace Foundation, 1997). See also David Mendelhoff, 'Truth-seeking, truth-telling and post-conflict peacebuilding: curb the enthusiasm?' (2004) 6 *International Studies Review* 355 and Stephan Landsman, 'Alternative responses to serious human rights abuses: of prosecutions and truth commissions' (1996) 59-4 *Law and Contemporary Problems* 81.

¹⁴⁹ See Hayner 'Commissioning the truth', *supra* note 145 at 24, 26, and Hayner, *supra* note 143 at 647-50. See also Jo M. Pasqualucci, 'The whole truth and nothing but the truth: truth commissions, impunity, and the inter-American human rights system' (1994) 12 *Boston University International Law Journal* 321 at 335.

¹⁵⁰ Eric Brahm, 'Uncovering the truth: examining truth commission success and impact' (2007) 8 *International Studies Perspectives* 16 at 17, citing Mendelhoff, *supra* note 148. See also Hayner, *Confronting State Terror*, *supra* note 141 at 252.

¹⁵¹ Hayner, 'Commissioning the truth', *supra* note 145 at 22-3. See also Hayner, *supra* note 150, and Jonathan Allen, 'Balancing justice and social unity: political theory and the idea of a truth and reconciliation commission' (2001) 49 *University of Toronto Law Journal* 315. For a case study on whether a TC has contributed to reconciliation, see Gibson's study of the South African Truth and Reconciliation Commission: James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York: Russell Sage Foundation, 2004).

¹⁵² Prior to World War II, the concept of an international war crimes tribunal was virtually non-existent, as was the concept that one could be prosecuted for

of criminal prosecutions is on gross violations of human rights (such as torture, extralegal killing and forced disappearances) and war crimes (such as genocide). Prosecutions may occur in international forums, through domestic courts or both.¹⁵³ At the international level, prosecutions generally occur in the International Criminal Court (ICC) or in international war crimes tribunals such as those established to hear cases from the former Yugoslavia and Rwanda. Domestically, prosecutions are based on alleged violations of a country's laws (usually criminal laws), which can be problematic if a country has not yet enacted legislation prohibiting war crimes and gross violations of human rights. Rwanda, for example, had not at the time of the 1994 genocide enacted domestic legislation codifying criminal acts related to genocide and crimes against humanity.¹⁵⁴ In some cases, special hybrid war crimes courts are created; these hybrid courts are a blend of international and domestic institutions and are generally staffed by both domestic and international personnel. The Serbian War Crimes Court (WCC) in the District Court of Belgrade is an example of a hybrid war crimes court.¹⁵⁵

Some countries have prosecuted alleged perpetrators of atrocities through a mix of conventional courts and traditional forms of administering justice. The most notable case is that of Rwanda, where, in addition to an international war crimes tribunal, the government instituted a community-based form of justice proceedings based on *gacaca*, a traditional

'crimes against humanity'. The Nuremberg and Tokyo trials played a key role in establishing the norms surrounding the prosecution of such crimes. The fairness of these trials was compromised by the retroactive application of the law to the accused. See Minow, *supra* note 139 at 30-5.

¹⁵³ For a comparative analysis of the relative strengths of international and domestic prosecutions, see Donald L. Hafner and Elizabeth B.L. King, 'Beyond traditional notions of transitional justice: how trials, truth commissions, and other tools for accountability can and should work together' (2007) 30 *Boston College International and Comparative Law Review* 91.

¹⁵⁴ Rwanda was a signatory to the Geneva Convention at the time of the genocide, however.

¹⁵⁵ The WCC was established in 2003 as a domestic court and has exclusive jurisdiction to hear cases involving war crimes, genocide and crimes against humanity: see Law Amending the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, Official Gazette of the Republic of Serbia, No. 135/2004, 21 December 2004, article 3 (amending art. 2 of Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, Official Gazette of the Republic of Serbia, No. 67/2003, 1 July 2003). Prior to the enactment of the Serbian War Crimes Law, prosecutions for war crimes occurred in Serbia's criminal courts.

approach to meting out justice and settling disputes.¹⁵⁶ While some laud the adoption of this traditional institution as a means of dealing with low-ranking *genocidaires*, others question how appropriate *gacaca* was for the task of holding these *genocidaires* to account while still others have raised concerns about deficits in due process.¹⁵⁷

The availability of international forums for prosecuting gross violations of human rights and war crimes is generally regarded as a positive step in the efforts to promote accountability and to deter future atrocities.¹⁵⁸ These forums are also more likely to have the resources necessary to carry out prosecutions, including experienced, unbiased staff who have no political connections to the conflict in question.¹⁵⁹ International tribunals and the ICC thus play a particularly important role in cases where the domestic legal infrastructure is in disarray and when the legal community has been decimated.¹⁶⁰ Nevertheless, reliance on the ICC and international tribunals raises concerns about holding accountability proceedings in venues far removed from the country in which the alleged

¹⁵⁶ For a description of the *gacaca* process, see Phil Clark, 'Hybridity, holism, and "traditional" justice: the case of the Gacaca Courts in post-genocide Rwanda' (2007) 39 *George Washington International Law Review* 765, Mark A. Drumbl, 'Sclerosis: retributive justice and the Rwandan genocide' (2000) 2 *Punishment and Society* 288 at 292; and Alice Karekezi, Alphonse Nshimiyimana and Beth Mutamba, 'Localizing justice: gacaca courts in post-genocide Rwanda', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004).

¹⁵⁷ African Rights, *Gacaca Justice: A Shared Responsibility* (London: African Rights, 2003) and Penal Reform International, 'Monitoring and Research Report on the Gacaca: information-gathering during the national phase' (London: Penal Reform International, 2006).

¹⁵⁸ See Neil J. Kritz, 'Coming to terms with atrocities: a review of accountability mechanisms for mass violations of human rights' (1996) 59 *Law and Contemporary Problems* 127 at 129.

¹⁵⁹ *Ibid.* It is not always the case that an international tribunal will have access to better resources and experienced legal staff: see Alison des Forges and Timothy Longman, 'Legal responses to genocide in Rwanda' in Stover and Weinstein, *supra* note 156 at 53.

¹⁶⁰ Kritz, *supra* note 158. The Rwandan judicial system, for example, was overwhelmed in the aftermath of the genocide. The physical infrastructure of the judicial system was in disarray: see des Forges and Longman, *ibid.* Moreover, the Rwandan legal community was decimated by the genocide: see Barbara Oomen, 'Justice mechanisms and the question of legitimacy: the example of Rwanda's multi-layered justice mechanisms', in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace, and Development* (Berlin: Springer-Verlag, 2009) at 192.

crimes occurred; there is a value in ensuring that the local population is in close proximity to these proceedings. Moreover, where prosecutions occur at both an international and a domestic level, questions have been raised about the appropriate relationship between the different proceedings and the fairness of prosecuting some perpetrators internationally and others domestically.¹⁶¹

Many scholars view prosecutions as an essential part of the transitional justice period. Orentlicher, for example, argues that the rule of law requires the prosecution of especially atrocious crimes.¹⁶² She further argues that there is a duty under international human rights law to investigate and (subject to legitimate constraints) to prosecute those responsible for torture, extralegal killings and forced disappearances.¹⁶³ Even scholars who take a more limited view of the role of prosecutions suggest that prosecutions can advance an extensive array of important objectives:

Seeking justice through the institutions of the law is the best means of deterring responsibility for acts of genocide, war crimes, and other politically motivated violations of human rights. Criminal prosecutions of crimes of this magnitude not only punish the individual who committed them, demonstrating that impunity does not exist, but also help to restore dignity to their victims. They can provide a cathartic experience not only for individual victims, but also for society as a whole. By holding individuals responsible for their misdeeds, criminal trials may also deter the commission of abuses in the future. Moreover, if conducted in strict accordance with legal due process, criminal prosecutions of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means.¹⁶⁴

The ability of prosecutions to achieve these goals remains contested.¹⁶⁵

¹⁶¹ See Melynda J. Price, 'Balancing lives: individual accountability and the death penalty as punishment for genocide (Lessons from Rwanda)' (2007) 21 *Emory International Law Review* 563.

¹⁶² See Diane F. Orentlicher, 'Settling accounts: the duty to prosecute human violations of a prior regime' (1991) 100 *Yale Law Journal* 2537. See also Diane F. Orentlicher, "'Settling accounts" revisited: reconciling global norms with local agency' (2007) 1 *International Journal of Transitional Justice* 10. See also Minow, *supra* note 139 at 25–6.

¹⁶³ Orentlicher, 'Settling accounts', *ibid.*; see also Orentlicher, 'Reconciling', *ibid.*

¹⁶⁴ Timothy Phillips and Mary Albon, 'When prosecution is not possible: alternative means of seeking accountability for war crimes', in Belinda Cooper (ed.), *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999) at 244. Remarkably, this assessment of what prosecutions may be able to achieve is put forward by critics of criminal prosecutions as a transitional justice measure.

¹⁶⁵ For an evaluation of the relative strengths and weaknesses of trials, see

Indeed, there is concern that in some cases prosecutions may represent a 'victor's justice'.¹⁶⁶ Moreover, as with the case of TCs, there appears to be a lack of scholarly rigour in the critical study of prosecutions.¹⁶⁷ More empirical analysis is necessary to determine what impact prosecutions actually have on peace-building and efforts to promote the rule of law and to better understand the factors that contribute to the ultimate success or failure of prosecutions.¹⁶⁸

Lustration refers to the process of banning former state officials from holding public office as a result of the role they played in the former regime. In essence it is a form of vetting that is designed to exclude those who collaborated with the former regime from acquiring key posts in the new governance structure. Lustration has been used most prominently in Eastern and Central Europe, where it played a central role in the transitional processes of former communist countries.¹⁶⁹

Landsman, *supra* note 148; Mark J. Osiel, 'Why prosecute? Critics of punishment for mass atrocity' (2000) 22 *Human Rights Quarterly* 118; and Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and social repair: rethinking the contribution of justice to reconciliation' (2002) 24 *Human Rights Quarterly* 573. See also Carlos S. Nino, 'The duty to punish past abuses of human rights put into context: the case of Argentina' (1991) 100 *Yale Law Journal* 2619.

¹⁶⁶ See Matt Rettig, 'Gacaca: truth, justice, and reconciliation in post-genocide Rwanda?' (2008) 51 *African Studies Review* 25 at 40, 45; Amnesty International, 'Rwanda: gacaca: a question of justice', AFR 47/007/2002 (London: Amnesty International, 2002), available at <http://www.amnesty.org/en/library/asset/AFR47/007/2002/en/c0b61832-d769-11dd-b024-21932cd2170d/af470072002en.html>; Mark A. Drumbl, 'Law and atrocity: settling accounts in Rwanda' (2005) 31 *Ohio Northern University Law Review* 41 at 63-5; Oomen, *supra* note 160 at 194; and Allison Corey and Sandra Joireman, 'Retributive justice: the gacaca courts in Rwanda' (2004) 103 *African Affairs* 73 at 86.

¹⁶⁷ See Laurel E. Fletcher and Harvey M. Weinstein with Jamie Rowen, 'Context, timing, and the dynamics of transitional justice: a historical perspective' (2009) 31 *Human Rights Quarterly* 163.

¹⁶⁸ Up to this point, while there have been case studies of prosecutions, these case studies have largely focused on the choices made by particular regimes, the trade-offs that were made, and the implementation (or non-implementation) of these choices. There has been no detailed study of the actual effects of prosecutions on long-term stability and growth. See Chandra Lekha Sriram, 'Truth commissions and the quest for justice: stability and accountability after internal strife' (2000) 7-4 *International Peacekeeping* 91 at 93.

¹⁶⁹ For case studies and discussions of lustration processes in former communist countries, see: Maria Loš, 'Lustration and truth claims: unfinished revolutions in Central Europe' (1995) 20 *Law and Social Inquiry* 117; Jiri Priban, 'Oppressors and their victims: the Czech lustration system and the rule of law', in Alexander Mayer-Rieckh and Pablo De Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council,

There is a broad range of approaches to lustration. David sets out a classification system that identifies two principal categories of lustration systems: exclusive systems and inclusive systems.¹⁷⁰ In *exclusive* lustration systems, once a person's association with the past regime is established, that individual is automatically barred from holding lustrated positions in the new political order, although the former official may hold posts that are not subject to lustration laws.¹⁷¹ Exclusive systems ensure that certain key posts in the new state institutions are 'disconnected from past practices through personnel changes'.¹⁷² Czechoslovakia, Bulgaria and Albania have adopted exclusive lustration systems.¹⁷³

Critics of exclusive lustration systems argue that the automatic barring of officials is too arbitrary and may violate the right to be treated fairly, and that the systems therefore raise rule of law concerns. Critics also suggest that exclusive systems may violate international human rights law by, for example, breaching the right to be free from discrimination and freedom of expression.¹⁷⁴ Moreover, exclusive lustration systems appear to punish everyone who had affiliations with the former regime on a collective basis. Not surprisingly, the political opposition in every country that adopted exclusive lustration laws requested a constitutional review of the lustration legislation.¹⁷⁵ The Czech lustration law was narrowed, though upheld in its substance, following constitutional review; the Bulgarian court endorsed one lustration law, while the Albanian court struck down that country's lustration legislation.¹⁷⁶

In an *inclusive* system, officials from the former regime may retain public office on the condition that they reveal their past involvement with that regime. Officials have the option of resigning if they do not wish

2007); Elizabeth Barrett, Péter Hack and Ágnes Munkácsi, 'Lustration as political competition: vetting in Hungary', in Mayer-Rieckh and De Greiff, *ibid.*; and Roman David, 'Lustration law in action: the motives and evaluation of lustration policy in the Czech Republic and Poland (1989-2001)' (2003) 28 *Law and Social Inquiry* 387.

¹⁷⁰ Roman David, 'From Prague to Bagdad: lustration systems and their political effects' (2006) 41 *Government and Opposition* 347.

¹⁷¹ *Ibid.*, at 353-4. David, *supra* note 169.

¹⁷² David, *supra* note 170 at 354.

¹⁷³ *Ibid.*, at 355.

¹⁷⁴ *Ibid.*, at 356.

¹⁷⁵ *Ibid.*, at 356. Following a constitutional review, the Czech law was narrowed, although upheld in its substance. The Bulgarian court endorsed a lustration law. In Albania, the court struck down the country's lustration legislation.

¹⁷⁶ *Ibid.*, citations omitted.

The rules that govern the political system are important institutional factors that influence a country's political dynamics through the incentives they generate. These rules include, for example, the design of democratic regimes and power-sharing mechanisms, such as federalism and concurrent majorities.¹⁸⁵ Depending on their design, democratic governance structures may be more suitable political regimes for ethnically diverse societies than authoritarian regimes.¹⁸⁶ Although diversity makes democratic politics more challenging, according to some authors ethnic diversity 'is likely to make dictatorship lethal'.¹⁸⁷ However, not all democratic regimes will be effective in mitigating conflict: institutional design of democratic regimes is crucial to their success in managing inter-ethnic tension and preventing violent conflict. Electoral systems, for instance, may help mitigate tensions or may polarize societies even further, depending on their design.¹⁸⁸ The Westminster 'first-past-the-post' (or 'winner takes all') system tends to heighten tension while proportional representation is generally regarded as having a moderating effect on ethnic tension.¹⁸⁹

¹⁸⁵ For discussions of these and other political institutions and their role in managing ethnic conflict, see Eric Nordlinger, *Conflict Regulation in Divided Societies*, Occasional Paper No. 29 (Cambridge, MA: Harvard University Center for International Affairs, 1972); John McGarry and Brendan O'Leary (eds), *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts* (New York: Routledge, 1993); John McGarry and Brendan O'Leary, 'The political regulation of national and ethnic conflict' (1994) 47 *Parliamentary Affairs* 94; Ian Lustick, 'Stability in deeply divided societies: consociationalism versus control' (1979) 31 *World Politics* 325; Arend Lijphart, *Electoral Systems and Party Systems* (New York: Oxford University Press, 1994); Timothy D. Sisk, *Power Sharing and International Mediation in Ethnic Conflicts* (Washington, DC: United States Institute of Peace, 1996); Frank S. Cohen, 'Proportional versus majoritarian ethnic conflict management in democracies' (1997) 30:5 *Comparative Political Studies* 607; Horowitz, *supra* note 81; Daniel L. Byman, *Keeping the Peace: Lasting Solutions to Ethnic Conflicts* (Baltimore: John Hopkins University Press, 2002); Wolff, *supra* note 88; and Ulrich Schneeknecker and Stefan Wolff (eds), *Managing and Settling Ethnic Conflicts: Perspectives on Successes and Failure in Europe, Africa and Asia* (New York, NY: Palgrave Macmillan, 2004).
¹⁸⁶ Paul Collier, 'The political economy of ethnicity', paper prepared for the Annual World Bank Conference on Development Economics, Washington, DC, 20-21 April 1998. See also R. J. Rummel, 'Democracy, power, genocide and mass murder' 39 *Journal of Conflict Resolution* 3.
¹⁸⁷ Collier, *supra* note 18 at 63-6.
¹⁸⁸ McGarry and O'Leary, 'The political regulation of national and ethnic conflict', *supra* note 185 at 106.
¹⁸⁹ Bardhan, *supra* note 81 at 183. See also Horowitz, *supra* note 81 at 628-51 and Benjamin Reilly, 'Electoral systems for divided societies' (2002) 13:2 *Journal of Democracy* 156.

to disclose the details of their involvement with the former regime.¹⁷⁷ Inclusive systems aim to end the secret practices of the past regime, and operate on the assumption that the public can exercise control over an official once information about that official's past is revealed.¹⁷⁸ Hungary, Poland, Romania and Serbia adopted inclusive systems.¹⁷⁹

David also identifies a third, hybrid category of lustration system: the mixed system. In mixed systems, 'vetting commissions' typically make lustration decisions on a case-by-case basis. An official's collaboration with the former regime is not determinative. Instead, a number of factors are considered, including the individual's past record, the requirements of a particular post, and, from a pragmatic perspective, the nature of the labour market.¹⁸⁰ Germany adopted a mixed lustration system as a term of the Unification Treaty.¹⁸¹

De Greiff suggests that lustration serves to end a culture of impunity and that it acts as a punitive, deterrent and preventative measure.¹⁸² He further argues that vetting can, in some cases, facilitate application of other transitional justice mechanisms, such as TCs and trials and that it can also facilitate broader institutional reform.¹⁸³ By contrast, other scholars have argued that lustration may not be an effective tool for transitional justice given its potential for exacerbating factionalism.¹⁸⁴ However, there has not yet been any rigorous analysis of the impact that lustration has had on the ability of countries to manage the transition to a democratic regime.

2. Institutions to manage the coexistence of ethnic groups in the polity

Having considered how institutions may contribute to helping a country address its past, we now turn to consider how institutional arrangements may serve to reduce the risk of violent conflict in the polity in the future. This discussion focuses largely on the design of political institution.

¹⁷⁷ *Ibid.*, at 353 and 357.
¹⁷⁸ *Ibid.*, at 357.
¹⁷⁹ *Ibid.*, at 357-8.
¹⁸⁰ *Ibid.*, at 362. See also Serge Rumin, 'Gathering and managing information in vetting processes', in Mayer-Rieckh and De Greiff, *supra* note 169, 402 at 405-6.
¹⁸¹ David, 'Lustration systems', *supra* note 170.
¹⁸² Pablo de Greiff, 'Vetting and transitional justice', in Mayer-Rieckh and De Greiff, *supra* note 169, 522.
¹⁸³ *Ibid.* But see Arthur L. Stinchcombe, 'Lustration as a problem of the social basis on constitutionalism' (1995) 20 *Law and Social Inquiry* 245 on the issue of lustration and institutional reform.
¹⁸⁴ See Roman Boed, 'An evaluation of the legality and efficacy of lustration as a tool of transitional justice' (1998-1999) 37 *Columbia Journal of Transnational Law* 357.

Regarding the design of democratic systems, some authors support the idea that constraints on political elites, such as those imposed by systems of checks and balances, are one of the most important features of a democratic system in avoiding rent-seeking behaviour, especially when large amounts of natural resources are found.¹⁹⁰ The challenge, then, is to create effective mechanisms for the separation of powers. One of the major obstacles to this endeavour is institutional interconnections: creating an effective system of checks and balances and separation of powers will largely depend on:

- (i) electoral rules that guarantee proportional representation or otherwise ensure a fair distribution of seats in the legislature among the different ethnic groups;
- (ii) a party system that is representative of the diverse composition of the nation, such as one that features a power-sharing executive; and
- (iii) the rules of standing for judicial review, which should grant ethnic minorities access to the constitutional or highest appellate court to challenge unconstitutional measures.

In other words, institutional interdependencies will determine whether separation of powers mechanisms will in fact reduce the risk of conflict and mitigate any possible negative effects of ethnic diversity.¹⁹¹ Each of these features also has independent value as a means of creating incentives for cooperation and for increasing the security of ethnic groups in the polity.

An interesting development in the study of the design of democratic systems to manage conflicts is consociational democracy.¹⁹² The concept of consociational democracy was pioneered by Lijphart, who argued that while it may be difficult to achieve and maintain a stable democratic government in a plural society, it is not impossible if the appropriate institutional conditions exist. Lijphart proposed that elite cooperation

¹⁹⁰ Daron Acemoglu, Simon Johnson and James Robinson, 'An African success story: Botswana', in Dani Rodrik (ed.), *In Search of Prosperity: Analytical Narratives on Economic Growth* (Princeton, NJ: Princeton University Press, 2003). See also Collier, *supra* note 85 at 186 (discussing the importance of a robust system of accountability).

¹⁹¹ For an analysis of the empirical evidence on exporting US-style separation of power systems to fragile democracies, see Hathaway, *supra* note 79.

¹⁹² Arend Lijphart, 'Consociational democracy', (1969) 21 *World Politics* 207 at 216 and Arend Lijphart, *Democracy in Plural Societies* (New Haven: Yale University Press, 1977).

could counteract the centrifugal tendencies inherent in a plural society.¹⁹³ He identifies four essential features of a consociational democracy, each of which plays a role in promoting cooperative attitudes and behaviour among the elite:

- (i) a grand coalition government which incorporates all of the political parties representing the main segments within the society;
- (ii) a policy of proportionality with respect to political representation, employment, and expenditures in the public sector;
- (iii) norms of self-governance and community autonomy over matters which are of the greatest concern to groups; and
- (iv) constitutional vetoes for minorities.¹⁹⁴

Lijphart originally presented consociational democracy as an empirical model, drawing on the experiences of a few deeply divided European democracies.¹⁹⁵ However, his arguments have acquired a more normative tone over time,¹⁹⁶ and consociational engineering (which incorporates the features described above in the design of political institutions) is regarded by many today as a way to achieve stable democracy in highly factionalized societies.¹⁹⁷

Federalism is a prominent example of a power-sharing mechanism that has been adopted in a wide range of fragmented societies. The strength of federalism as a means of mitigating conflict, however, is highly contested in the academic literature. Federalism seems to have potential as an institutional arrangement for governance structures in countries that feature geographically concentrated ethnic communities within a country. A number of authors have claimed that decentralization and federalism is a potential antidote to identity-based tensions in these cases,¹⁹⁸ because

¹⁹³ Lijphart, *Democracy in Plural Societies*, *ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ Arend Lijphart, 'Typologies of democratic systems' (1968) 1 *Comparative Political Studies* 3.

¹⁹⁶ By the time *Democracy in Divided Societies* was published in 1977, Lijphart was describing consociational democracy as both a normative and an empirical model. See *Democracy in Plural Societies*, *supra* note 192 at 1–2.

¹⁹⁷ Ralph Premdas, 'Ethno-racial divisions and governance: the problem of institutional reform and adaptation', Research Project on Racism and Public Policy, United Nations Research Institute for Social Development (2001).

¹⁹⁸ Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley, CA: University of California Press, 1991); John McGarry, 'Federal political systems and the accommodation of national minorities', in Ann L. Griffiths (ed.), *Handbook of Federal Countries*, 2002 (Montreal:

they devolve power to sub-national governments, granting higher levels of political, economic and social autonomy to ethnic groups concentrated in certain geographic areas. But this claim has been disputed, given that decentralization and federalism also have the potential to reinforce ethnic identities and to increase ethnic tensions.¹⁹⁹ Devolving power to certain regions may ultimately lead to demands for more power, culminating in claims for secession.²⁰⁰ Proponents of federalism respond to this argument by pointing out that ethnic communities are already escalating their claims for autonomy. Federalism responds to these claims by devolving a degree of power to these communities, thereby moderating demands for full secession.

Federalism can also apply to non-geographically specific matters: decision-making power over certain issues (for example, culture and social services) can be devolved to ethnic groups regardless of where the members of the group live. This unique federalist system was implemented in Belgium in the 1970s.²⁰¹ The Belgian federal system features two different forms of constituent unit – the Communities and Regions – in addition to the federal (central) government. There are three Communities: Flemish, French and German; membership of the Communities is tied to language and is determined on an individual basis. There are also three Regions: Flanders, Wallonia and Brussels. Membership of one's Region is territory-based and is determined by residence. Communities have jurisdiction over matters such as language, culture, education and various social services. Regions have jurisdiction over matters such as regional

McGill-Queen's University Press, 2002); A. Lijphart, R. Rogowski and R.K. Weaver, 'Separation of power and cleavage management', in R. Ken Weaver and Bert A. Rockman (eds), *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington, DC: Brookings Institution Press, 1993) 302–44; N. Bermeo, 'The import of institutions' (2002) 13:2 *Journal of Democracy* 96; C. Hartzell and M. Hoodie, 'Institutionalizing peace: power sharing and post-civil war conflict management' (2003) 47 *American Journal of Political Science* 318; and Horowitz, *supra* note 81.

¹⁹⁹ E. M. Penn, 'Citizenship versus ethnicity: the role of institutions in shaping identity choice' (2008) 70 *Journal of Politics* 956 and Will Kymlicka, 'Is federalism a viable alternative to secessionism?', in Percy B. Lehning (ed.), *Theories of Secession* (New York: Routledge Press, 1998).

²⁰⁰ Nordlinger, *supra* note 185 at 32.

²⁰¹ Formerly a unitary state, Belgium officially concluded the reforms in 1992, but the federalist system is still evolving. For an overview of the process, see John Fitzmaurice, *The Politics of Belgium: A Unique Federalism* (Boulder, CO: Westview, 1996). See also Maureen Covell, 'Federalization and federalism: Belgium and Canada', in Herman Bakvis and William Chandler (eds), *Federalism and the Role of the State*, (Toronto: University of Toronto Press, 1987).

economic development, urban planning, and public works. The federal government of Belgium has jurisdiction over financial and monetary policy, justice, social security, defence and international relations.²⁰²

Another power-sharing mechanism is concurrent majorities, also called 'mutual vetoes'. This mechanism grants veto powers on certain issues to minority groups that constitute a significant portion of the population. As a consequence, even if one ethnic group dominates one branch of government (or more than one), other ethnic groups have a means of exerting influence over the development and implementation of policies and of securing their interests. Practically speaking, the mutual veto creates incentives for moderation and accommodation since decisions that are not acceptable to other major ethnic groups risk being vetoed.²⁰³ The list of protected items can range from a predefined set of basic issues (for example, basic individual rights specified in the constitution) to broader economic and political reforms. There are also different forms of veto – for example, a delaying veto, a direct veto and an indirect veto.²⁰⁴ In all these cases, mutual vetoes reduce the risk of subjugation and dominance.²⁰⁵

In sum, institutions can play an important role in managing ethnic tension and rivalry. The constitution-making process by which these institutions are selected and designed in post-conflict low-trust societies is also important in ensuring inclusiveness, transparency and ultimately legitimacy for the institutional outcomes of this process. As stated at the outset of this chapter, ethnic conflicts are complex phenomena, and it is unlikely that institutional design alone can avoid the problem; often institutional reforms that were expected to reduce the risk of conflict have not proved effective. However, this should not preclude a potentially fruitful debate about which institutions in particular contexts may mitigate ethnic conflict and its potentially devastating consequences for a country's development prospects.

IV. CONCLUSION

In discussing the importance of political institutions and challenges of institutional reforms, this chapter has also underscored the important

²⁰² Andre Lecours, 'Belgium', in Griffiths, *supra* note 198 at 58.

²⁰³ Nordlinger, *supra* note 185 at 24–5.

²⁰⁴ Ulrich Schneekener, 'Models of ethnic conflict regulation: the politics of recognition', in Schneekener and Wolff, *supra* note 185 at 28–9.

²⁰⁵ Bardhan, *supra* note 81 at 191. See also John C. Calhoun, *A Disquisition of Government* (New York, Liberal Arts Press, 1953) at 28.

role that lawyers, along with others, can play in the exercise of designing political institutions that can promote development and reduce the risk of ethnic conflict. Many solutions discussed here relate to details of political and legal systems that may influence whether a particular legal or political regime will promote economic and social development and/or mitigate conflict and some of the other negative consequences of ethnic diversity. There are also many interconnections between political, legal and other institutions to be considered in constructing effective systems of checks and balances. These all raise complex legal issues, *inter alia*, and their design requires both legal and other forms of expertise as well as an appreciation of local context.

5. Public administration, corruption and development

I. INTRODUCTION

The emergence of an institutional perspective on development over the past decade or so has entailed not only a sharper focus on the nature and quality of a country's political and legal institutions, but also on the organization of its bureaucracy or civil service. According to Salvatore Schiavo-Campo, formerly of the Public Sector Management Team at the World Bank, 'the slide of today's "failed states" can be traced back to, in part, the degradation of their public administrations'.¹

The frailties and failures of public administration in many developing countries have long been documented or remarked upon in the development literature. According to these accounts of bad government in developing countries, to quote Judith Tendler:

Public officials and their workers pursue their own private interests rather than those of the public good. Governments over-extend themselves in hiring and spending. Clientelism runs rampant, with workers being hired and fired on the basis of kinship and political loyalty rather than merit. Workers are poorly trained and receive little on-the-job training. Badly conceived programs and policies create myriad opportunities for bribery, influence peddling, and other forms of malfeasance. All this adds up to the disappointing inability of many governments to deliver good public services and to cope with persistent problems of corruption, poverty, and macro-economic mismanagement.²

This view of government is exemplified in Hernando de Soto's widely cited book, *The Other Path*,³ in which he documents the delays, costs, bureaucratic complexities and corruption entailed in registering title to residential land or obtaining approvals to open a small business in Peru. De Soto

¹ Salvatore Schiavo-Campo, 'Reforming the civil service' (1996) 33:3 *Finance and Development* 10-13.

² Judith Tendler, *Good Government in the Tropics* (Baltimore: Johns Hopkins University Press, 1997) at 1.

³ Hernando de Soto, *The Other Path* (New York: HarperCollins, 1989).

However, as Tendler and others have pointed out, this view of the quality of public administrations in developing countries and prescriptions and antidotes for their deficiencies ignores the fact that, even on a limited view of the appropriate functions of government, a well-functioning public administration is indispensable to the effective performance of these tasks. Moreover, the focus on the deficiencies of public administration in many developing countries ignores many examples of good performance within and among developing countries from which valuable and perhaps transferable reform lessons may be learned.

II. MEASURING BUREAUCRATIC PERFORMANCE

Beginning in the mid-1990s, systematic quantitative efforts have been undertaken to measure bureaucratic quality. For example, Knack and Keefer⁹ use ratings by the International Country Risk Guide of Corruption and Government and Bureaucratic Quality in one of their indices of institutional quality, and use a rating by Business and Environmental Risk Intelligence of bureaucratic delays in the other. Mauro¹⁰ uses ratings by Business International of 'bureaucracy and red tape' and 'corruption' in his index of bureaucratic efficiency. Others, in addition to measuring bureaucratic performance, have tried to measure the impact of bureaucratic performance on economic growth. Indeed, Knack and Keefer find positive and significant effects of both of their institutional quality indices on growth and on per capita gross domestic product (GDP). Mauro finds the same for his index of bureaucratic efficiency.¹¹ By focusing on outcomes, these early quantitative studies are limited by their lack of specificity regarding the particular characteristics of a public administration that predisposed it to either good or bad performance, at least in terms of impacts on economic measures of development. There are also various case studies of the high-performing East Asian economies, which

Performance (Baltimore: Johns Hopkins University Press, 1987); N. Manning, 'The legacy of the New Public Management in developing countries' (2001) 67:2 *International Review of Administrative Sciences* 297-312.

⁹ S. Knack and P. Keefer, 'Institutions and economic performance: cross-country tests using alternative institutional measures' (1995) 7 *Economics and Politics* 207.

¹⁰ P. Mauro, 'Corruption, country risk and growth' (1995) 110 *Quarterly Journal of Economics* 681.

¹¹ *Ibid.* See also James Rauch and Peter Evans, 'Bureaucratic structure and bureaucratic performance in less developed countries' (2000) 75 *Journal of Public Economics* 49.

suggests that the existence of large informal economies in many developing countries is partly explained by the immense difficulties of doing business legally in these countries. These impediments to doing business in many countries have been more systematically documented in the World Bank's 'Doing Business Reports', which aim to investigate 'the scope and manner of regulations that enhance business activity and those that constrain it'.⁴ The project is based on the theory that governments regulate the entry of new firms into the economy, and this can be a limiting factor on economic development.⁵ The reports include detailed information about business law conditions in 175 countries, ranking countries on how easy it is to start and close a formal business, hire and fire workers, and enforce a contract. They also examine the ability of local business to access credit. In 2005, the report added the ease of registration of property and the level of investor protection, and then, in 2006, paying taxes, cross-border trading and obtaining licences.⁶ The reports are highly influential, claiming to induce reforms that increase the ease of doing business in developing countries worldwide. Djankov, the former leader of the Doing Business project, claims that this research has 'led to an acceleration in reform: in 2003-2008, 193 reforms took place in 116 countries', as well as inspiring a wealth of academic literature which relies on the data compiled by the project.⁷

According to Tendler, a negative view of the performance of public administrations in many developing countries has tended to lead to advice, from donor institutions and others, directed at limiting the 'damage' that the public sector can do in developing countries. The advice falls into three categories: (1) reducing the size of government by getting rid of 'excess' workers, contracting out for services, privatizing and decentralizing; (2) terminating many of the policies and programs that provide opportunities for bureaucrats to exert undue influence on the policy process and for citizens to bribe them; and (3) subjecting public agencies and their managers and workers to market-like pressures and incentives to perform.⁸

⁴ World Bank, *Doing Business in 2004: Understanding Regulation* (Washington, DC: World Bank, 2004) at viii.

⁵ Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The regulation of entry' (2002) 117 *Quarterly Journal of Economics* 1.

⁶ However, these reports have been criticized for misrepresenting and oversimplifying information by empirically quantifying legal issues that are inherently complex and difficult to measure: see Kevin Davis and Michael B. Kruse, 'Taking the measure of law: the case of the Doing Business Project' (2007) 32:4 *Law & Social Inquiry* 1095-119.

⁷ Simeon Djankov, 'The regulation of entry: a survey' (2009) CEPR Discussion Paper 7080.

⁸ Tendler, *supra*, note 2. A. Israel, *Institutional Development: Incentives to*

emphasize the positive role played by certain dimensions of East Asian bureaucracies in the region's spectacular industrialization.¹² These studies, however, tend to suffer from the limitations of most case studies – that is, their inability to be generalized.

In two more recent companion papers, Peter Evans and James Rauch examine the characteristics of core state economic agencies and the growth records of a sample of 35 developing countries for the period from 1970 to 1990, based on the assessments of country experts of key institutional characteristics.¹³ They draw on the theorizing of Max Weber,¹⁴ where Weber argued that public administrative organizations characterized by meritocratic recruitment and predictable long-term career paths will be more effective at facilitating capitalist growth. In their studies, Evans and Rauch focus on meritocratic recruitment, internal promotion and career stability, and competitive salaries, and find that the institutionalization of meritocratic recruitment (public service exams or higher educational credentials) is crucial for ensuring high levels of bureaucratic performance, while internal promotion and career stability – which may facilitate institutional coherence, long-term policy goals and counter temptations to short-term gain (including corruption) – seem to be of secondary importance. Whether or not competitive salaries have any effect on bureaucratic performance remains unclear. The authors find that these Weberian characteristics, particularly meritocratic recruitment, significantly enhance a country's prospects for economic growth, even when initial levels of GDP per capita and human capital are controlled for. There are notable regional variations in the relationship between bureaucratic performance and economic growth, with sub-Saharan Africa ranking lowest, then Latin America, and the East Asian high-performing economies ranking substantially higher (thus confirming, from a comparative perspective, the earlier findings of the East Asian case studies).

As noted in Chapter 1, the World Bank's Governance studies now regularly measure the impact of countries' governance performance (includ-

¹² See, e.g., Alice Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (New York: Oxford University Press, 1989); Robert Wade, *Governing the Market: Economic Theory and the Role of Government in Taiwan's Industrialization* (Princeton, NJ: Princeton University Press, 1990); Jose Campos and Hilton Root, *The Key to the Asian Miracle: Making Shared Growth Credible* (Washington, DC: Brookings Institution, 1996); World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (New York: Oxford University Press, 1993).

¹³ See Peter Evans and James Rauch, 'Bureaucracy and growth: a cross-national analysis of the effects of "Weberian" state structures on economic growth' (1999) 64 *American Sociological Review*, 748; Rauch and Evans, *supra* note 11.

¹⁴ Max Weber, *Economy and Society* (1904–1911).

ing 'government effectiveness', 'regulatory quality' and 'corruption') on various development outcomes, and find similar impacts to Evans and Rauch. Similarly, as noted above, the World Bank's more recent 'Doing Business' reports¹⁵ catalogue and compare time, costs and complexities in performing many routine bureaucratic and legal activities in many countries (developed and developing). However, both groups of studies (like some earlier studies) evaluate bureaucratic outputs, rather than bureaucratic inputs or particular characteristics of a public administration.

III. ALTERNATIVE REFORM STRATEGIES

A. The New Public Management

In the late 1980s traditional Weberian bureaucratic organization theory was challenged by the New Public Management (NPM), a bureaucratic reform philosophy that derived from neoliberal ideas critical of the role of the state. NPM is a move away from traditional public sector management principles. The traditional public sector organizational theories – such as the Whitehall Model, which originated in Great Britain – emphasized hierarchy in the public service, anonymity of public servants, and input and output centred program management. NPM, on the other hand, promotes modernization through adapting private sector management techniques and market principles to the public sector.¹⁶ This means that public servants are expected to provide customer-centric services with less emphasis on hierarchy and more emphasis on measurable outcomes, expanded use of user fees, and remuneration more closely related to outcomes, with services contracted out, wherever feasible, through competitive tendering, to private for-profit or non-profit sectors ('steering' rather than 'rowing').¹⁷ Accordingly, NPM considers the two main duties of the civil service – policy-making and service delivery – as distinct tasks.¹⁸

Richard Batley's five-year review of the effects of NPM on the economics

¹⁵ World Bank, *Doing Business 2009* (Washington, DC: World Bank, 2008), available online at <http://www.doingbusiness.org/>.

¹⁶ Wolfgang Drechsler, 'The rise and demise of the New Public Management', (2005) 33 *Post-Autistic Economics Review*, available at <http://www.paecon.net/PAERview/issue33/Drechsler33.htm>; Michael Trebilcock, *The Prospects for Reinventing Government* (Toronto: C.D. Howe Institute, 1994).

¹⁷ Trebilcock, *ibid.*

¹⁸ Manning, *supra* note 8 at 299.

of developing countries finds that the results have been ambiguous.¹⁹ Often performance outcomes are difficult to define and measure, and contracting-out through often flawed and sometimes corrupt processes to an often thin and uncompetitive private sector is not always more efficient. Nick Manning observes that NPM was 'no more able than old public administration to provide governments with the incentives and the capacity to address poverty and provide better services'.²⁰ Wolfgang Drechsler further argues that there has been 'no empirical evidence that NPM reforms have led to any productivity increase or welfare maximization'.²¹

Manning highlights the importance of 'motive' and 'capability' for the successful implementation of NPM principles.²² By motive, he means public expectations that motivate governments to take action. This assumes that the government is genuinely interested in or has sufficient incentives to care about public opinion and accountability. Democratic political regimes and 'mechanisms that incorporate civil society and local governments within the policy-making processes' create such interest in public opinion.²³ By capability, Manning means 'core public management elements', such as 'administrative systems governing policy-making and budgeting, basic service provision, and economic regulation [which] might be inefficient, but are essentially present'.²⁴ Manning labels these existing mechanisms 'Old Public Disciplines'.²⁵

Abu Elias Sarker also suggests that state capability is a principal precondition for NPM's successful implementation.²⁶ In particular, Sarker, who studied NPM implementation in Singapore and Bangladesh, adds economic capability, political commitment, effective governance, rule of law and the absence of clientelism and corruption as important preconditions to viable implementation of NPM in developing countries.²⁷ Since bureaucratic organizations do not exist in isolation from their surroundings, NPM does not seem to be a viable solution for states that do not have 'Old Public Disciplines'.

¹⁹ Robert Batley, 'The role of government in adjusting economies' (1999), in Manning, *supra* note 8.

²⁰ Manning, *supra* note 8 at 303.

²¹ Drechsler, *supra* note 16.

²² Manning, *supra* note 8 at 303.

²³ *Ibid.*, at 304.

²⁴ *Ibid.*

²⁵ *Ibid.*, at 302.

²⁶ Abu Elias Sarker, 'New public management in developing countries: an analysis of success and failure with particular reference to Singapore and Bangladesh' (2006) 19:2 *International Journal of Public Service* 180-203.

²⁷ *Ibid.*, at 189-94.

Finally, although NPM was a major reform strategy in the 1990s, both Manning and Drechsler suggest that NPM is a 'somewhat dated label'.²⁸ Since the late 1990s there has been scepticism about 'generalized applicability' of NPM. NPM was viewed as an imposition of 'Western organizational and institutional structures on the developing world [that has] been counterproductive', particularly to the aid-dependent countries that are 'susceptible to the pressures of the international donor agencies in formulating and reformulating [their] reform agenda'.²⁹

B. The 'Old' Public Management

According to Schiavo-Campo,³⁰ efforts at civil service reform in developing countries have yielded a variety of practical lessons, including the following.

1. A two-tier arrangement may make it possible to recruit, at a higher salary scale, new staff who meet more demanding standards of qualification.
2. Even at low salaries, young, better trained people can be induced to take up government employment for short periods if they are given challenging responsibilities and training.
3. In practice, centralized personnel management systems are generally more cost-effective than decentralized systems.
4. Individual salary negotiations between new staff and ministries should be avoided, because they result in distortions and inequities and compromise prospects for sustainable reform.
5. The temptation to 'fence off' reform projects in order to insulate them from an inefficient system should be avoided; creating enclaves does not work, and civil service reform should be directed at the overall system.
6. For external assistance to be effective there must be genuine ownership of reform by the government as a whole if systemic reforms are attempted, or by a major government player if reforms are limited to a specific sector or function, and government must formulate – with appropriate participation by the public as well as government employees themselves – a clear, long-term vision of public sector reform in concrete detail.

²⁸ Drechsler, *supra* note 16; Manning, *supra* note 8 at 297.

²⁹ Sarker, *supra* note 26 at 195.

³⁰ Schiavo-Campo, *supra* note 1.

Schiavo-Campo also notes that downsizing or retrenchment for fiscal reasons can often have unintended consequences if such programs encourage the best people to leave (e.g., through voluntary severance and early retirement programs) and that short-term fiscal savings from compressing wages may also lead to the departure of better or more senior employees and increased difficulty in recruiting qualified outsiders. Finally, he argues that without improvements in accountability, downsizing and more adequate compensation may result in a small and well-paid, but no less inefficient or corrupt, civil service. Hence, external accountability is essential for the civil service to become more responsive to the public (for example, through user surveys, wearing of nametags, whistle-blower laws, and public opinion polls).

C. Civil Servants as Communitarians

Tendler, in her widely cited book, *Good Government in the Tropics*,³¹ explores, through detailed case studies, four programs in the state of Ceará, in Brazil's poor northeast region:

- programs in preventive health;
- public procurement from informal sector producers;
- a large emergency employment-creating public works program; and
- agricultural extension services to small farmers.

She draws several lessons from her studies of 'good government'.

First, government workers in all these cases demonstrated unusual dedication to their jobs and reported feeling more appreciated and recognized, not necessarily by superiors but by their clients and the communities in which they worked. Second, the state government contributed in an unusual and sometimes inadvertent way to the new sense of recognition by creating a strong sense of 'calling' and mission around these particular programs and their workers through public information campaigns, prizes for good performance, public screening methods for new recruits, orientation programs, and sheer boasting through the media about its successes. Third, workers carried out a larger variety of tasks than usual and often voluntarily, in part in response to their perception of what their clients needed and out of a vision of the public good. Workers were able to provide this more customized service because they had greater autonomy and discretion than usual. Fourth, the greater discretion and responsibility

inherent in the self-enlarged jobs and their fuzzier job definitions would seem to make supervision more difficult than it already is in large public bureaucracies; however, workers wanted to perform better in order to live up to the new trust placed in them by their clients and citizens in general. The trust was a result of the more customized arrangements of their work and the public messages of respect from the state. The communities where these public servants worked watched over them more closely and the state's publicity campaigns and similar messages had armed citizens with new information about their rights to better government and how public services were supposed to work. All these features suggest that instead of approaching public servants as rational self-interested agents, as many public management proposals seem to do, reformers should think of these servants as members of a community.

From a broader institutional perspective, Tendler also draws an interesting lesson: while enthusiasm about decentralization in the development community to date portrays local government and civil society as locked in a healthy two-way dynamic of pressures for accountability that results in improved government, Tendler's case studies revealed instead a three-way dynamic that included an activist central government (in this case, the state government) as well as local governments and civil society. While Ceará was fortunate to have two reformist governors during the early years of these programs, Tendler is inclined to discount the centrality of good leadership in effective programs of this kind, in part because of the serendipity and scarcity of charismatic leadership. She notes that these programs survived the terms of initial political leaders and that, while inspired leadership is obviously an asset, it is not a necessary condition for the development and implementation of public service delivery programs staffed by dedicated and motivated public servants.

D. Institutional Bypasses

As discussed in Chapter 1, path dependence is a crucial factor that policymakers should consider in developing institutional reform strategies. Such strategies may often depart from Schiavo-Campo's recommendations, especially his argument that one should never 'fence off' bureaucratic reform projects, but rather focus on across-the-board bureaucratic reforms, and are often more consistent with the thrust of Tendler's analysis. In recent papers, Mariana Mota Prado³² argues that many

31 Tendler, *supra* note 2.

32 Mariana Mota Prado and Ana Carolina Chasin, 'How innovative was the Poupatempo experience in Brazil? Institutional bypass as a new form of institutional