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Law, power-sharing and human rights: introduction to a special issue

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The concept of power-sharing is complex and refers to widely divergent realities. In essence, however, all types of power-sharing are, on the one hand, about guaranteeing a stake in the exercise of public authority to certain groups in society and, on the other, offering a minimal degree of joint governance by leaders supposedly representing those groups. As the increasing practice of and scholarly attention on power-sharing over the past two decades has revealed, ‘certain groups’ can be defined in different ways, ranging from armed insurgency movements, ethnic minorities or women to particular regions in the countries concerned by the power-sharing arrangement. Power-sharing comes into being through different processes. Some power-sharing arrangements arise incrementally from within, societies gradually adapting the political and institutional architecture of the polity to changing social realities. Other power-sharing arrangements are resorted to as an emergency rescue strategy, brought to conflict-ridden states in the toolbox of external mediators.

Power-sharing as an instrument of institutional engineering is controversial. Advocates1 of carefully designed power-sharing arrangements highlight that they are necessary and effective to sustain democracy in ethnically or otherwise deeply divided societies and that, therefore, they are an important conflict resolution and prevention mechanism. For a variety of reasons, other scholars2 are much more sceptical of power-sharing as a tool of peace-building and/or state-building. They all stress the inherent risks of reproducing, institutionalising and exacerbating divisions which may (again) turn violent when power-sharing is placed too centrally in the process of state formation or reconstruction after internal armed conflict.

It is not the aim of this Special Issue to assess the effectiveness of power-sharing from a state-building or conflict resolution perspective. Rather, it is our intention to shed light on power-sharing from a legal and a human rights – and in particular a human rights law – perspective. There is no legal definition of power-sharing, which may help explain why relatively little attention has so far been paid to the concept in legal academic scholarship. Indeed, the legality of power-sharing agreements is quite often problematic. Although not all power-sharing agreements necessarily violate the domestic constitutional order3 evidence, in particular from the African continent, has shown that the legality of power-sharing deals between incumbents and armed opponents is often questionable both from a domestic legal point of view as well as from an international legal perspective.4 Power-sharing agreements almost inevitably challenge the prevailing national legal order. Their signature comes at times of societal and institutional earthquakes and, as several contributions in this Special Issue will illustrate, they often lay down new constitutional

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blueprints, in particular when adopted as part of a wider peace agreement. In addition to the question of whether power-sharing agreements are in accordance with the prevailing legal context, it is therefore also interesting to take a closer look at the legal norms they directly or indirectly – as a result of national legislation enacted further subsequent to the political agreement – intend to produce. From an international legal perspective, their status is often blurred, in line with the finding that peace agreements are generally not normally classified as international treaties in particular because of the nature of their signatories.\(^5\)

A particularly interesting question is whether, by entering into power-sharing agreements, incumbent governments violate their obligations under international human rights law, especially when those agreements contain provisions that aim to provide shields of immunity or impunity for belligerents who are responsible for crimes under international law.

The genesis of this Special Issue is a research project carried out at the University of Antwerp by the Research Group on Law and Development (http://www.ua.ac.be/ro). One of the aims of the group’s research programme on law, power-sharing and human rights is to contribute to the global academic and policy-oriented debate about human rights and armed conflict about the role of law in conflict resolution, peace building and development, with a particular focus on sub-Saharan Africa. This theoretical and policy-oriented perspective also inspired the terms of reference of a two-day international expert seminar that was held in Antwerp in May 2012. This Special Issue includes a selection of articles that were presented at this event.

In this introduction, we summarise some general highlights from the seminar discussions as well as some of the recurrent themes addressed in the articles included in this Special Issue. The prevalence and diversity of the human rights provisions and their relevance to contemporary peace agreements is highlighted by Stef Vandeginste and Sahla Aroussi based on a study of a data set comprising 82 power-sharing agreements from 20 sub-Saharan African countries signed between 1989 and 2011.\(^6\)

One important cross-cutting theme is how power-sharing relates to the right to effective participation in the conduct of public affairs. First of all, there is a clear tension between power-sharing agreements and electoral rights. As Christine Bell usefully reminds us, international human rights law generally leaves a margin of appreciation to states to determine the modalities of their electoral systems. Therefore, international human rights law surely permits certain power-sharing arrangements, for instance when electoral systems are designed in such a way as to ensure political participation and representatives of all regions through federal or other self-government systems. Some international human rights provisions may even require or encourage power-sharing; for instance, in order to ensure effective political participation of ethnic minorities or women. As Chandra Sriram develops in more detail, power-sharing deals can constitute foundational moments that may allow traditionally underrepresented groups to secure greater political representation. However, as Rowland Cole illustrates through the case of Kenya and Zimbabwe, power-sharing practice can also be at odds with electoral rights and, more generally, the emerging ‘right to democracy’. Power-sharing as a remedy for post-electoral violence may offer short-term solutions but have a negative long-term impact on free and fair political competition. This begs the question whether de lege ferenda it is desirable for international human rights law to develop in such a way as to more clearly prohibit certain types of power-sharing.

While international law has so far largely abstained from regulating power-sharing in general, one important dimension has been the subject of an impressive growth of international legal norms and enforcement mechanisms in the past two decades. As Aroussi and Vandeginste argue, power-sharing negotiations can be seen as essentially an attempt
to reconcile opposed interests of protagonists in the conflict. Impunity for past human rights violations is one area where interests of former enemies easily meet. International law imposes certain normative boundaries on impunity compromises between and for former belligerents who are responsible for certain types of crimes under international law. It has become common practice for peace agreements—and power-sharing arrangements that frequently constitute a pillar of those agreements—to include provisions on accountability for those most responsible for the most serious human rights violations. Seen from that angle, power-sharing has become a vehicle for transitional justice. However, as Thomas Obel and Laura Davis convincingly demonstrate, power-sharing easily leads to impunity even when it does not include blanket amnesties. Power-sharing agreements in Kenya and the Democratic Republic of Congo (DRC), while providing for national, international or hybrid accountability mechanisms, have gone hand in hand with continued (and very often successful) attempts at delaying and shelving justice for past atrocities. Obel shows how continued control, capture and manipulation by elites (former incumbents as well as former opposition forces) constitute a most effective obstacle to transitional justice. Davis demonstrates that, in the absence of an effective independent national justice system, power-sharing in the security sector and the shared control over military power in a seemingly integrated national army without prior vetting of forces is crucial in pushing back accountability for past abuses. In the meantime, the peace versus justice dilemma has again become part of daily life in the eastern part of DRC, with the emergence of a new rebel movement (M23) in which International Criminal Court (ICC) indictee Bosco Ntaganda plays a prominent role.

Context matters when analysing power-sharing from a human rights perspective. While this Special Issue does not exclusively deal with African cases, its main focus lies with sub-Saharan Africa. Some of the disparity in the human rights appraisal of power-sharing is clearly related to what Christine Bell refers to as geographical contingency. Pacifique Manirakiza rightly recalls that the African regional human rights system is, for obvious historical reasons, more concerned with group rights, compared to the European Convention on Human Rights and its increasingly robust standards in terms of individual equality rights. Manirakiza’s article also shows the importance of institutional and international organisational factors. It is impossible to understand the African Commission on Human and Peoples’ Rights’ at times inconsistent position vis-à-vis power-sharing when studying it in isolation from the more general view and use made of power-sharing by the other African Union’s organs. When adopting a peace and security perspective, the use of certain transitional human rights ‘evils’ (or accountability compromises) may become more easily understandable. At the same time, it is important to acknowledge that the African continent takes the lead in developing legal norms aimed at combating certain types of illegitimate authority. In fact, as both Manirakiza and Cole develop in more detail, it is not a coincidence that it is on the African continent that remarkable efforts are being made to outlaw and even criminalise unconstitutional changes of government. This is in line with the more general new philosophy of the African Union to combine respect for national sovereignty and non-interference in domestic affairs with the principle of non-indifference for how political authority is acceded to, exercised and transferred.

This in turn raises the more fundamental question for which this Special Issue provides food for thought. What role is there for law—and in particular international human rights law as a legal/moral guarantor—to regulate how peace is negotiated, how conflicts are settled and how post-conflict polities are built? It is our hope that this Special Issue will encourage the readers of the International Journal of Human Rights to engage in continued
research on *jus post bellum* and/or *jus pacificatoria* and on law, conflict and development more generally.

**Notes**


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