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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**2462**	**12745**	**15178**
Section 2	**1538**	**7640**	**9159**
Total	**4000**	**20385**	**24337**

Answer-to-Question-_1_

Part A:

First, it is important to note that this challenge is being brought under abstract review. Because the laws have already been enacted it is similar to facial challenges in the US system (See *Casey*) but because it is being challenged by the minority party in parliament it looks like German abstract review (See *German Abortion Decision*). The lack of concrete facts likely won't affect the outcome of the decision as we saw in the abortion cases but it will very likely change who the Court perceives as its audience. The abstract review here will likely facilitate dialogue between the courts and the legislature, allowing the Court, as in the *German Abortion Decision*, to give the legislature clear guidance on what is and is not constitutionally permissible. Such dialogue will keep the legislature for having to work under the shadow of the court and could improve the legitimacy of both bodies.

~Anti-Hate Speech Provision~

The court should uphold the hate speech prohibition.

The protection of speech is considered a prerequisite to democracy and democratic constitutionalist systems because it facilitates competitive elections, a marketplace of ideas (which in turn allows for a competition of ideas, the best ones rising from the fray) and also allows for the individual autonomy that democracy requires of its electorate. Freedom of speech is protected under the Westphalian Constitution but that doesn't mean

that all speech is protected. If Westphalia follows the European tradition of disagreeing with the US about the "presumption against prior restraint" they are less likely to presume that speech should not be restricted. Additionally, while in the US Hate Speech prohibitions are generally stuck down as content-based discrimination (but see *Brandenburg* - where speech is "likely to incite imminent lawless action" it may be prohibited), in Europe Hate speech is treated as a distinct kind of speech that can and, in some cases, must be suppressed (See Bickel). Hate speech may not be considered protected expression but "verbal violence" (see *Keegstra*). If Westphalia has embrace this general view of Hate Speech the provision may be upheld as constitutional.

Yet, even if Westphalia does not ascribe to the European view nor find a national security exception for abridging the freedom of speech, the Court should find the provision, at least in part, to be constitutional under the Canadian Charter-esque provision in its bill of rights. *Keegstra* laid out a similar case to the one before Westphalia (though, that was concrete review and this is abstract). Justice Dickson used Section 1 (the nearly identical provision in the Westphalia bill of rights) to rule that the freedom of speech promised in Section 2 could be abridged. If the same analysis is used here the Court should check first to see if there is a legitimate objective for the law. This seems an easy case: On top of trying to prevent harm to a minority group (one of the special responsibilities of courts in a constitutional democracy) this law could help prevent the "rising violence" from getting worse and protect all Westphalians from both possible abridgments to their freedom of religion and breaches of their equal protection rights (under the Westphalian bill of rights).

If the Court determines that there is a legitimate objective it must determine if it is proportional by determining that the provision is a rational means to attain that objective, it minimally impairs, and is proportional as such. The court could find that it is rationally connected because the violence's origin is linked to the expression of anti-polytheist sentiments. This may be a stretch but given the gravity of the situation it may be appropriate. Minimal impairment is the weak link for upholding the provision. Unlike the Canadian criminal law, this provision outlaws hate speech even in private. Likely the objective of the statute could be achieved with only a public prohibition but the gov't could argue, as was hinted at in *Keegstra*, that a less restrictive means may not be necessary if those means are disproportionately less effective. Finally, because of the low value of this speech and its high cost on a strained society the prohibition on this hate speech is likely proportional as such.

The court should uphold the hate speech prohibition. Even if it isn't the least restrictive means, Westphalia is an tinderbox ready to explode. The only concern is that if the court upholds it despite it not being the least restrictive means, it hurt the perception of the courts legitimacy. If nothing else, the court can strike the "in private" restriction and uphold the rest (as long as this is permitted within the rules of severability).

~Polytheist-Children-Barred-from-Public-Schools Provision~

The court should strike down this provision under the pseudo-section 1.

Barring the Polytheist children from the public schools will raises constitutional issues first because it abridges the positive right in the Westphalian constitution to all

children under 14 to attend schools and could be a violation of their equal protection rights.

It is important to note that a right to education is seen as distinct from other positive rights and it almost always is exempted from the critique of including positive rights in a constitution (see Sunstein, Epstein, etc.). This makes this act by congress, though not in a formal way, more suspect perhaps than the Anti-Proselytizing Provision.

This provision will also be analyzed under the pseudo-section 1 provision of the bill of rights. There seems to be a legitimate purpose for the law. It is trying to protect the health of the other children and slow the possible spread of the Ebola virus. But it seems to fail the proportionality analysis. Barring the children from public schools may be a rational means to prevent the spread of the virus and protect the children but it unlikely to be considered a minimal impairment or proportional as such. The legislature rejected an explicit recommendation for a more narrowly tailored plan from the public health authorities. To ban ALL polytheist children on only the basis that polytheists are more likely to come in contact with Ebola and not some showing that each child has personally come into contact with it not only fails minimal impairment, it also looks like religious discrimination, a violation of the equal protection clause. Even more troublesome is that the government can extend this ban indefinitely with no limit. As above, an argument could be made that following the public health authority's recommendation would be less effective and therefore the least impairing means is not necessary. This will likely fall on deaf ears due to the equal protection concerns. The provision could be considered proportional as such because the threat of Ebola is so great and the less restrictive means

would so costly that it warrants dramatic and cost-efficient action. As mentioned above, education, especially of children, is a particularly special right. The court should strike down this provision under the pseudo-section 1.

~Anti-Proselytizing Provision~

The Court should strike down the Anti-Proselytizing Provision.

This reminds me of the Sri Lanka cases. Distinct from Sri Lanka, Westphalia, while predominantly Christian, does not link Christianity to it national identity, rather its tradition is Polytheism which has been around for "two centuries." This is also different because Sri Lanka was concerned about the proselytizing of one religion whereas this prohibition applies to all religions and is for only a limited time, which would require new legislation to renew.

Analyzing this provision under the pseudo-section 1, the purpose of this anti-proselytizing provision could be two-fold: Prevent the spread of disease and to prevent inter-religious violence that could be sparked by proselytizing. If that is the case there may be a legitimate purpose but we would need to know more. It is unclear whether this is a rational means to achieve this goal. The objective of prevent the spread of Ebola certainly fails. Why single out religious proselytizing? There could be some facts that point to Polytheists as avid proselytizers and due to their risk of contact with Ebola this makes sense. Absent those facts this objective fails here. The objective of peace-keeping is possibly rational, more would need to be know. This objective likely fails on minimal impairment though. As above, it could prohibit proselytizing door-to-door but not, say,

handing out leaflets or other peaceful public displays of religion. Proportional as such: Again, we would need to know more. What is the risk of violence really? This is a pretty big burden on religious freedom and free speech. As the facts stand now, this prohibition is likely not proportional as such. The court should strike this provision down under the pseudo-section 1.

~Emergency Powers~

The constitution explicitly limits the use of emergency powers (the suspension of the bill of rights) in Westphalia to times of war. While it cannot be denied that there is civil unrest, this doesn't seem to qualify as a time of war. The parliament in passing these provisions invoked a "national emergency" to justify them. This is a dangerous road. As we saw in the Weimar Republic, the loose use of the emergency powers can destroy the legitimacy of a constitution and a government. Justice Jackson wisely said in *Youngstown Steel* that the use of emergency powers begets emergencies. The court should not permit any of these provisions on the grounds of emergency power, thus preserving its own and parliament's legitimacy.

Part B:

The Court should follow the AWACS Decision that parliament's consent must be obtained to deploy troops internationally *unless* there is imminent danger. It should then determine that there is no such imminent danger here. Three primary issues arise in EWG's predicament. **First**, if and when legislative approval is required to deploy troops

internationally. **Second**, Must there be legislative approval in this case? **Third**, what does it mean to use the military only for "self-defense"

~If and When Legislative Approval is Required~

Separation of powers is generally (though not universally) a fundamental aspect of a constitutional system. The constitution allocates enumerated or implied powers to a specific branch, usually to the exclusion of the other branch(es). Theoretically this creates within the government itself incentives to protect individual rights and keep government relatively small because aggrandizing any one branch would necessarily diminish the others. In the EWG case it is the Court's responsibility to maintain this balance in such a way that it will preserve the system going forward but also protect and uphold the EWG Constitution.

To accomplish these goals, the EWG Court will want to look primarily to the German AWACS II decision in making its own. As with the EWG, the German constitution gave power to the legislature to declare war and control the military budget. Germany has a "never again" constitution. Much of how it reads its constitution and makes its judicial determinations has to do with the basic understanding that present Germany wants to be different from Nazi Germany. The idea of German troops going into other countries may be too reminiscent of Nazism. The Basic Law itself states and has codified that Germany is a peace loving country. These were important factors in AWACS which held that deployment of troops internationally required parliamentary approval. But the Court determined that there was a kind of emergency exception in the case of imminent danger, so long as the deployment was subject to being called back by

the Bundestag.

While it would be nice to simply apply this model to EWG case, it may not be so easy. As Kommers suggests, the history and culture of these countries will come to bear on these constitutional decisions. EWG's constitution says that the military is to be used only for self-defense but we don't have any information as to its history or past (we only know that Westphalia was a peaceful society). On the other hand, the wording in the German Basic Law may actually be more permissive of sending troops abroad. Troops can be used as PEACE-keeping forces, the kind of use that a peace-loving country might value, indicating that EWG should limit its power to make war even more than Germany. In the interest of respecting the separation of powers and to avoid curtailing the people's (the ones who actually have to fight) ability to have a say (via their representatives) in military decisions, the EWG court should follow Germany's lead and adopt AWACS.

~Is the danger imminent: Applying AWACS~

There is certainly danger. EWG citizens have been attacked in Westphalia and there is fighting near the boarder. I can't lay out at what point something becomes imminent but the court must make this decision with the balance of power between the executive and legislature in mind. As mentioned above, the flagrant use of emergency powers is dangerous and when giving an exception to military deploy on emergency grounds should engender caution in the court. Whatever decision the court makes, i would advice them to keep emergency powers limited and to make the trigger for them (what qualifies as imminent danger) narrow. The loss of lives will be greater if the whole government comes down than if the government is a little slow in responding to a threat.

~What Constitutes Self-Defense~

I won't pretend to lay out what the EWG court should hold as being self-defense under its constitution but the court should give the legislature general guidance on what the court would see has "self-defense." This seems anathema to the US system of concrete review but this is an abstract review and there is relatively no downside. The explanation should be understood to be dicta therefore not binding the court but acting as persuasive authority for what it should do in the future. Additionally, this would benefit the country as well as the relationship between the courts and the legislature. Military action, when needed, must be taken quickly. If the legislature does not know what would or would not be constitutional it may hesitate when it cannot afford to. Dialogue between the court and the legislature is always a good thing. A little heads up will make it clear what rights must be protected and the limit on powers. The only possible downside is that if too much of this goes on the court could be seen as dictating to and constraining the legislature unnecessarily. This could be seen as a serious breach of the separation of powers.

Ultimately, the court should follow the AWACS Decision that parliament's consent must be obtained to deploy troops internationally *unless* there is imminent danger. It should then determine that there is no such imminent danger here. The executive and parliament should determine if they believe this current threat warrants action and is "self-defense" within the constitution. The court, in the interest of dialogue, should give the government some idea of what "self-defense" would mean.

Answer-to-Question-_2_

Okoth-Ogendo would be very pleased with the desire to create an autochthonous constitution. It wouldn't claim that it will fix everything but they will great more buy-in and allow for a fuller expression of the people's aspirations for the country. Additionally, it is a good sign that there is such a consensus across political parties for a new constitution. It will make the whole process run more smoothly.

Part A:

In considering these possible models of constitution-making, I will focus on upstreams constraints and not on what should go into the constitution outside of the specific interests noted.

~Sitting Parliament **Drafts, Popular Vote Ratifies~**

The first half of this model looks similar to the South African model (not ratified by the Constitutional Court). The first question is how the sitting parliament got there. If mode of electing parliament under the old regime was disproportionate there will be concerns about legitimacy if they get to set the terms of the new constitution. Additionally, by having the first crack at the constitution they will likely put a system in place that will preserve their own power. It is important that whoever drafts it is not

necessarily the ones that will be able to use that system of put themselves in power. Such incentives make it difficult to create a truly autochthonous constitution. It is also unclear whether the parliament is the body most equipped for such an important undertaking. As a general rule, representatives are generalists and thus don't have any special training or knowledge in governmental design. Th only thing that could make them especially qualified is the fact that they were chosen by the people but this qualification falls apart if they weren't elected proportionately as mentioned above. The final concern about having the sitting parliament draft the constitution is that there is a potential for gridlock when it goes for ratification by popular vote. Without any way to signal what it is that the populous wants (the downstream constraints) there is going to be a very real possibility of competing interests and no incentive to compromise.

With the exceptions of the concern mentioned above, having the populous ratify the constitution is a great idea. It puts the power in the people, the need for consensus adds legitimacy to the process and it cultivates a spirit of civic-mindedness by making the general populous part of the vote and keeps them invested in the process. The concern would be that the people will be easily swayed by the parliament. As their representative, they are trusted by the people and if the people don't embrace the opportunity and inform themselves, the process could devolve into once step process: Drafting by the sitting parliament.

As to protecting the parliamentary system, it is important to note that this is not a dichotomy. It isn't either a super powerful president or a parliamentary system. France has a mixed system with an independently elected president, a legislature, as well as a

prime minister. That being said, the concern about an independently elected president can be solved by the how power is allocate within the constitution.

~Separate Convention Drafts, Popular Vote Ratifies~

The Separate convention can allow for some expertise in the process (bring in Prof. Jackson, Feldman, Tushnet, Lessig, etc.). It can give an objective-outside look at the issues and facilitate compromise because they don't have a dog in the fight. On the other hand, they may see the process as a theoretical exercise, a chance to try out some of their theories. They don;t have to live with the consequences. It may be just as important to have skin in the game as it is to be objective. Any separate convention can help to avoid the participants to from building the system to help them get into power. You may want elites involved but it might be wise to require that anyone who work on the convention not be permitted to run for office under the new system. Of course, this may exclude talented and civic-minded people from participating which would be a pity.

There is less concern about grid-lock with the popular vote because the committee is not involved in a power struggle with the populous. There are still the same concerns of the drafters "capturing" the populous. When an expert from Harvard speaks, the average person usually listens.

~Other Suggestions~

The South African model of constitution making might be a good one to use here because we are trying to transition from an oppressive previous regime. The intermediate constitution give the drafters a sense of what is required of them and having the court

determine if the new constitution meets the specified requirements lends legitimacy to the process (the average citizen trusts courts). The only problem is that this would still lead to some problem with current elites trying to retain power but this may be avoidable with the intermediate constitution.

An abbreviated version of the Iceland model might be nice. Using a panel of citizens upfront allows for not only elites to be involved in setting the terms of the new constitution but the people as well. But to use Iceland's model, something has to be cut-out. Iceland stands for the proposition (as perhaps does Kenya) that momentum is vital to the constitution-making process. Also, the Iceland model may not work for a country like Colgentina. Iceland is small and homogeneous. I would need to know more about Colgentina.

Part B:

As mentioned in question 1, education will likely, and should, get special priority among these positive rights. Education is seen as necessary to a thriving democracy with civic involvement. Additionally, while the other positive rights seem to focus on the individual, education benefits society as a whole.

As Colgentina has limited resources, following the South African model to provide for these rights. These rights should be contingent on "available resources." In *Grootboom*, the government is required to provide minimum housing but court determines that there was only so much housing the go around and the responsibility of

the government is to take "reasonable legislative and other measures." It is a fine line to walk because if no positive rights are provided that could hurt legitimacy and cause the momentum for the new constitution to wane but if you promise these rights but do not provide them (because the government doesn't have the resources)then again there will be a crisis. What will it mean to have a right if there is no duty bearer. One could make the argument from *Asahi* that what the constitution is creating is a duty in itself but is not providing an individual right, just a blanket duty to get minimum housing/medical care/subsistence to as many people as possible. This seems disingenuous though. The best thing the constitution can do is acknowledge that resources may be scares but and they will be allocated to those who can benefit the most (*Soobramoney*). This could lead to other problems but transparency in the constitution will make the bitter pill a little easier to swallow and allow the parties involved in the drafting/ratification to take the relevant information into account.

Part C:

(*The ultimate irony is that a Colgentinan would distrust my views but readily accept those of a german scholar...*)

It was not Frankenberg's point to say that there can be **no** unbiased comparative study of constitutions or law generally but to illustrate the need for "distance" and "difference." I should be listened to for the same reason that any outsider should be. I bring a unique perspective to the table, one probably not common in Colgentina. In fact Frankenberg would advocate **for** having the different perspective through which one can reflect on any personal biases.

It is true that I do not know the culture of Colgentina every well and the advice I give my not apply perfectly but the beautiful thing about the comparative study of law is that it gives samplings from across many nations, cultures and people. It is likely true that my U.S. training colors my advice and perspective but when so many other cultures and ideas are considered, at some point the biases become weaker and the personal views get lost in the blend of that which is "other." When I moved to South America to learn Spanish, at first I had to translate everything I wanted to say from English to Spanish and then say it. When others spoke everything had to be translated in reverse. But, with time, I began to think in Spanish. I no longer had to translate. When I saw an object I thought of it in Spanish. When I dreamed I dreamed in Spanish. I stopped seeing the words as something foreign but as connected. This is true of studying comparative law, with enough time and some immersion, one no longer sees what is similar from one's own ideas/system and what is different but rather sees the law across cultures and countries as an interrelated web, of which one's own culture and legal system is but one part.

That, in addition to the fact that Kommers is right, that there are some universal truths that bridge all cultures, is why they should consider my advice.