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INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE

Annual Review of Constitution-Building Processes: 2015

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International IDEA resources on constitution-building processes

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Preface

The third International IDEA *Annual Review of Constitution-Building Processes* continues this important series, which provides a yearly overview of constitutional transitions around the world. In doing so, the *Annual Review* is the only 'go-to' source of information regarding the major events, trends, challenges and successes in the establishment, or strengthening, of constitutional democracy globally. The range of contributors across the editions combines some of the leading minds in the field, including a number of younger authors whose work marks them as a new generation of constitution-building experts, as well as authors from our own team at International IDEA, which is also responsible for the conceptualization and editing of each edition.

In addition to being a resource for those interested in constitutional and political transitions—as constitutions are at the heart of peacebuilding, state-building, the rule of law, human rights and good governance—the *Annual Review* provides insight into a range of issues of critical importance for countries in transition, as well as for the international community seeking to assist them.

To take just a few examples from the chapters that follow: current efforts to strengthen good governance and the rule of law in Ukraine encompass a range of tasks, from retraining the police force to broad anti-corruption measures, but the foundation for much of this has been political commitment to reforming the fundamental framework of the justice sector through constitutional reform. In Sri Lanka, there are a host of reconciliation measures underway to bridge the ethnic divide between the Sinhala and Tamil populations, but the true test of whether this reconciliation will succeed in bringing about sustainable peace will be the acceptance on both sides of the new Constitution. In Zambia, there is recognition that making the government legitimate and representative in the eyes of the people cannot be achieved by simply voting one group out and another one in, but will

require more fundamental changes to the structure and mechanisms of politics through constitutional reform.

International actors working in democracy support or rule of law assistance spend a great deal of time—and money—on activities such as training for parliamentarians, election monitoring, or capacity building for judges and lawyers. While this work is important and necessary in the often long road towards stability and prosperity based on respect for human rights, rule of law and democracy, it can be akin to rearranging the proverbial deckchairs on the *Titanic* if the underlying constitutional settlement is not capable of empowering government with adequate powers and legitimacy through public support, while at the same time limiting government through both legal and political constraints. Furthermore, at International IDEA we firmly believe that, in the vast majority of cases, if a constitution is to be more than just words on a page and truly achieve its goal to become a living document that constrains abuses of power, the process through which it is drafted will be just as important as its content. In many of the accounts that follow, it is clear that the process carries great responsibility for the enduring success or immediate failure of attempted constitutional reforms.

Finally, readers will note that while previous editions were organized thematically, this iteration is organized geographically, with each chapter focusing on a specific region. Reading through these chapters makes it clearer than ever that context matters greatly in constitutional processes, and in political processes more generally. While on the surface many problems—including a lack of popular legitimacy for governments, the challenge of channelling ethnic conflict through politics instead of violence, or the balance between security and liberty in an age of increasing threat from global terrorism—may seem similar, the varying history, political landscape and culture, and micro-demographics among countries means that the root causes of these problems are often very different. In designing solutions to these problems, it is therefore imperative to understand these root causes at their most fundamental level in order to tailor the treatment to the disease.

Without doubt, this series will continue to grow, and I look forward to subsequent editions in 2017 and beyond.

Yves Leterme
Secretary-General
International IDEA

Introduction and overview

Introduction and overview

Sumit Bisarya

Each year, International IDEA's *Annual Review of Constitution-Building Processes* provides a retrospective of constitutional transitions around the world, the issues that drive them, and their implications for national and international politics. Falling between the instant reactions of the online blogosphere and the academic analyses that follow several years later, these reviews provide an account of ongoing political transitions, the major constitutional issues they give rise to, and the impacts of these processes on democracy, the rule of law and peace.

Unlike previous editions, which were organized into thematic chapters, this third edition is organized geographically. Before providing a brief overview of the six chapters, it is worth acknowledging that the global survey is not comprehensive in its coverage. Latin America and the Middle East and North Africa were omitted due to space constraints. Yet given the high-profile constitutional reform processes taking place in Chile and Libya, these countries deserve a brief mention here.

In Chile, President Michelle Bachelet formally launched the process of drafting a new constitution in September 2015. While it is still in its early stages, some comment on the design of the process is warranted. In her electoral campaign, the president announced she would launch a constitutional process that would be 'democratic, participatory and institutional'; therefore it is instructive to use these terms to analyse the process so far.

The democratic elements of the process are twofold and revolve around the decision to have the current Congress negotiate a draft produced by the president in response to the citizen inputs from the participation stage, but to postpone the adoption of the constitution until the next Congress. First, this approach allows citizens to have their say in the next elections: if they feel the draft reflects their inputs, they can reward the government; if not, they can vote for an opposition party. Second, the process takes into account the fact that the current Congress was elected under the binomial

electoral system that has now been reformed, partly because it was deemed undemocratic. Designing a process around intervening national elections is a choice worthy of note, in particular in how it provides democratic upstream and downstream constraints on the constitution-making process. It will be a very interesting process to follow.

The process is divided into several phases, which can be further classified as citizen input, political negotiation and final adoption. The participatory part of the process was launched in late 2015 and is scheduled to last beyond mid-2016, consisting of a broad civic education campaign followed by citizen dialogues organized at the local, provincial and national levels.

The process is institutional in nature: it does not take any decisions out of the hands of the bodies mandated to control constitutional change without their explicit agreement. Thus, this Congress will first need to pass a constitutional amendment by the required majority to change the amendment procedure to cater for the current process. Second, the next Congress will decide between four possible modes of adoption—an elected Constituent Assembly, a Bicameral Commission, a Constitutional Convention combining elected politicians and citizens, and a referendum—to allow citizens to decide between the three other options. In this way, constitutional continuity is maintained.

In Libya, the Constitutional Drafting Assembly (CDA) continued its work on the new draft constitution in 2015, albeit in a sporadic fashion. In last year's *Annual Review*, Jason Gluck provided a concise description of the constitutional review process up to July 2015 (Gluck 2015). A central theme of his analysis was the CDA's disconnect from the actual politics of Libya, caused by both the method through which it was elected and the deliberate actions of its leadership, which steered the CDA to 'remain non-partisan, and keep itself and its activities separate from the current political bodies (and) very little engagement with parliamentarians' (UN 2015). Gluck ended his analysis with a brief note of hope in the form of a Libyan Political Agreement (LPA), which was initialled in July 2015.

Progress of sorts has been achieved since then, but a resolution of the root causes of instability remains elusive. The LPA was finally signed, including by representatives of both rival parliaments—the House of Representatives and the General National Congress—in December 2015. Subsequently, the CDA produced a draft constitution in April 2016. However, the fear remains that the constitutional process, and the text it has produced, are lacking in both ownership by the political groups and in any connection with the political process it purports to govern.

Despite an article in the LPA that mandated the CDA to consult both the House of Representatives and the State Council (to be created under the LPA), this was not done; thus an opportunity to link the political, peace and constitutional processes was not taken. Given the current security situation, it is difficult to put the draft constitution to a public referendum, and thus one hope is that this will give the political groups time to discuss and debate—and thereby start to take ownership of—the new constitution.

This year's *Annual Review* features chapters organized by region or subregion. There has been a growing similarity in constitutional forms around the world over the past three decades, in particular in the embrace of bills of rights in general, and in the particular rights included in constitutional texts (Law and Versteeg 2012). However, the regional context can often provide important layers of understanding about why constitutional designers may make certain choices, and the influences that affect both processes of constitutional change and the practical operation of constitutional texts.

The contributors to this year's *Annual Review* were asked to identify regional commonalities that not only tie together the processes of constitutional reform taking place in neighbouring countries, but also represent relevant contextual aspects that help explain the forces and mechanisms driving constitutional change in each region.

In Chapter One, Ken Opalo explains, among other things, how President Nkurunziza of Burundi may have felt emboldened to push for a third term despite domestic and international opposition because of regional politics—in particular the practice and intentions of the presidents of Uganda and Rwanda, respectively, and the importance of Burundian troops to the African Union peacekeeping mission in Somalia.

In Chapter Two, Anna Dziedzic and Cheryl Saunders focus on constitution-building in the Pacific, and clearly highlight three characteristics of the polities concerned that must be considered when trying to understand the constitutional processes therein—geography, demography and partial statehood.

Similarly, in Chapter Three, I highlight the impossibility of understanding constitution-building in South Asia without first understanding plurinationalism and group identities as valid organizing principles of political communities, which run contrary to (but are no less valid than) Western liberal democratic notions of the homogenous nation state.

In Chapter Four, Melissa Crouch and Tom Ginsburg bring a regional, comparative perspective to their accounts of constitutional change in Myanmar

and Thailand. They discuss 'hybrid constitutionalism' (Chen 2014) as systems in which authoritarian and liberal elements co-exist, and compare the role of the military in both cases.

In Chapter Five on Eurasia, William Partlett frames the debates over constitutional reform in Ukraine and Armenia as responses to a common Soviet legacy of top-down centralization of political power and supervision.

In Chapter Six, Katalin Dobias contrasts the role of constitutional identity in the responses of Hungary and France to the twin crises of terror attacks and refugee management that dominated the European news in 2015.

Of course, even within the regions and subregions analysed in this book, there are numerous differences between neighbouring countries. Dziedzic and Saunders, for example, highlight how similar polities in subregions of the Pacific have evolved different constitutional systems due to different colonial powers; and Katalin Dobias contrasts the instrumentalization of constitutional identity in Hungary with France's long-standing guiding principle of the indivisibility of the republic. This year's Annual Review serves as a reminder to always treat claims that national constitutional orders are heading to a mutual point of convergence with some scepticism. Working constitutions cannot exist in isolation from the influences of a country's past history and current society, and as regional neighbours often share histories and geopolitical, cultural and environmental vulnerabilities and influences, studying these processes at the regional level can enhance understanding of constitutions, including how they are made and how they operate.

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1. Constitutional protections of electoral democracy in Africa: a review of key challenges and prospects

1. Constitutional protections of electoral democracy in Africa: a review of key challenges and prospects

Ken O. Opalo

Introduction

In 2015 several African countries continued to face challenges in the quest to consolidate their respective constitutional democracies. In Burundi, President Pierre Nkurunziza successfully defied constitutional term limits (Kitonga 2015). In Kenya, the opposition Coalition for Reforms and Democracy (CORD) attempted to address perceived imbalances in the management of the country's elections through a popular constitutional amendment (Simiyu 2016). Meanwhile, in Zambia, the ruling Patriotic Front party ushered in a new Constitution designed to incentivize national coalition-building through majoritarian presidential elections.

These three examples are instances of key recent developments that have affected several African electoral democracies over the last two decades: (a) how to limit the allure of personalistic life presidencies; (b) how to deal with the challenge of competitive politics in an environment where ethnicity continues to be a key organizing principle of politics; and (c) how to enhance the process of democratic consolidation by institutionalizing the principle of popular sovereignty.

Exploring these questions is important for three main reasons. First, despite positive trends in democratic consolidation in sub-Saharan Africa (Posner and Young 2007), significant autocratic pockets remain in the region (Diamond 2015). This phenomenon continues to pose a serious challenge to continued democratic consolidation via negative neighbourhood effects. The entrenchment of democratic norms such as term limits, civilian control over the military, and free and fair elections, among others, is an ongoing effort, the success of which partly depends on having sufficient regional democratic density (Pevehouse 2002).

Second, while the institutionalization of politics is gaining traction in the region (Opalo 2012; Posner and Young 2007), emerging challenges suggest that this process cannot be taken for granted. Changes in the structure of global geopolitics, the increasing securitization of interstate relations and domestic politics, and declining economic fortunes mean that proponents of institutionalized democratic politics do not always have willing allies on the global stage (Colaresi 2014).

Third, after more than two decades of democratic experimentation, some African countries are now in a position to redesign their constitutional electoral democracies with the experiences of the past two decades in mind. Such constitutional changes hold considerable promise since they are home-grown, rather than adaptations of models from elsewhere. Constitutional orders tend to be more stable—and therefore self-enforcing—when they reflect the existing balance of power in society (Greif and Laitin 2004; North and Weingast 1989). For example, in order to incentivize cross-ethnic alliances at the national level and boost the legitimacy of elected leaders, the vast majority of African countries with presidential systems have adopted majoritarian rules for presidential elections. Some countries have also taken the step of entrenching the principle of popular sovereignty in their constitutions.

This chapter examines how these dynamics affected constitutional events in Burundi, Kenya and Zambia in 2015. In Burundi, President Pierre Nkurunziza successfully managed to stay in power despite significant domestic and international opposition to his decision to violate term limits. He was able to achieve this partially because two of his counterparts in the region—Paul Kagame of Rwanda and Yoweri Museveni of Uganda—had also successfully violated term limits or were planning to do so. In addition, Burundi is a significant contributor of troops to the African Union (AU) peacekeeping mission in Somalia, which gave it significant leverage with respect to the wider international community. The lack of regional and broader international support meant that the spirited domestic opposition to Nkurunziza, which included a brief coup, came to naught. As a result, the norm of term limits faces a serious challenge not only in East Africa, but also in the wider Central African region.

Since constitutional amendments are inevitable in the process of democratic consolidation—especially as it applies to electoral laws—Kenya offers important lessons on such processes. The Kenyan Constitution provides for popular initiatives to amend it via extra-parliamentary means. But while this provision preserves the popular basis of constitutional electoral democracy, it also risks being hijacked by well-organized political interests and groups in a manner that may threaten constitutional stability and overall institutional

development. The Kenyan case provides a cautionary tale of the risks posed by popular amendment initiatives. If left unchecked, populist politicians can exploit popular amendment provisions—with significant negative consequences for state institutions, fiscal stability and general democratic stability.

The Zambian case offers an interesting example of an attempt to stabilize and legitimize presidential tenures through a majoritarian constitutional requirement. Over the last five elections Zambia's first-past-the-post (FPTP) system has ensured that its presidents won with the support of very small proportions of the electorate (Opalo 2012; Cheeseman and Hinfelaar 2008). In 2001 Levy Mwanawasa garnered 29.2 per cent of the vote, or a mere 19.8 per cent of registered voters. Similarly, in 2008 Rupiah Banda won 40.6 per cent of the vote on a turnout of 34.5 per cent (his supporters thus comprising 18.4 per cent of registered voters). In 2011 Michael Sata was elected with 42.8 per cent of the vote, which comprised a mere 23.1 per cent of registered voters in Zambia. Most recently, Edgar Lungu was elected president in early 2015 with 48.3 per cent of the vote, but with a paltry turnout of 32.4 per cent (his supporters representing just 15.6 per cent of registered voters).[1] Realizing the need to boost the legitimacy of the winners of presidential elections, Zambia sought to incentivize presidents to seek their mandate from a broader segment of the electorate through a constitutional change that introduced a majoritarian requirement.

Curbing autocracy: democratic constitutionalism and term limits in Africa

This section addresses the importance of constitutional protections of term limits with a focus on the case of Burundi in 2015. President Pierre Nkurunziza's successful extension of his rule in 2015 illustrates the wider threat to presidential term limits in sub-Saharan Africa. Indeed, presidents who attempt to extend their stay in office are usually successful. Since 1990, 80 per cent of presidents who have attempted to circumvent constitutional limits to their tenure have succeeded.[2]

Regular change of leadership is a critical component of democratic government (Weingast 1997; Maltz 2007). At the same time, competitive democratic elections marked by a non-trivial element of uncertainty over the outcome are crucial both for keeping elected officials responsive to voters' needs (Dropp and Peskowitz 2012) and ensuring continued support for democracy as a normatively preferable form of government (Przeworski 2005; Fearon 2011). Systems without presidential term limits go against these defining features of responsive constitutional democratic government for two main reasons.

First, by virtue of their being in office, incumbent presidents typically have enormous advantages relative to their challengers. On account of their extensive executive prerogatives, they control the implementation of budgets and laws, and can manipulate them to meet their specific electoral objectives. The phenomenon of political budget cycles, in which incumbents increase government spending close to elections, is well documented in Africa (Block 2002). A context of limited horizontal accountability—due to weak legislatures—accentuates these advantages, making incumbent presidents virtually unbeatable. This is the case in many sub-Saharan African states (Opalo 2014; Barkan 2009), and is the main reason why constitutional provisions for term limits are so vital for the continued consolidation of competitive electoral democracy in the region.

For example, since 1990 a total of 294 elections in which the chief executive position was contested have been held in Africa. Leadership turnover occurred in less than one-quarter of these contests. The vast majority of these cases were elections in which presidents were either term limited or otherwise unable to run and therefore did not contest elections. Incumbent African presidents seldom lose when they contest elections. Over the same period, sitting African presidents lost elections in only eight instances—Kenneth Kaunda of Zambia (1991), Aristides Pereira of Cape Verde (1991), Mathiu Kerekou of Benin (1991), Nicephore Soglo of Benin (1996), Rupiah Banda of Zambia (2011), Abdoulaye Wade of Senegal (2012), Joyce Band of Malawi (2014) and Goodluck Jonathan of Nigeria (2015).

This suggests that term limits not only enable leadership transitions, but also increase the odds of opposition parties winning elections. Thus, if implemented, term limits hold the promise of deepening constitutional electoral democracy in Africa. Democratic theory suggests that the consolidation of electoral democracy is more likely to occur if opposition parties and politicians believe they have a chance of winning elections (Przeworski 2005).

Second, the lack of term limits increases the odds that power will be concentrated in the hands of one individual (or a small, tightly knit circle). Yet the essence of democracy is the dispersal and limitation of power via constitutional checks and balances. The longer an individual serves as president, the more likely interest groups are to cease investing in institutions and instead focus on the individual holding power. In the long run, this leads to institutional decay (Maltz 2007). Term limits therefore serve the important role of ensuring that power never rests in the hands of a few individuals for too long, thereby incentivizing investment in institutions. Indeed, three-quarters of Africans (on average) support constitutional term limits for executive office holders (Dulani 2015).

The case of Burundi illustrates the challenges of introducing constitutional term limits in sub-Saharan Africa, including weak judicial systems, insufficient international support for democratic principles, and incumbents' proclivity to use political violence as a tool of control. On paper, President Nkurunziza's victory against the Constitution seemed improbable. Burundi's post-conflict Constitution (2005) provided a robust array of checks against such an eventuality.[3] Due to the ethnic character of previous conflicts in Burundi (Lemarchand 1996), the Constitution explicitly sought to limit the power of any single individual or ethnic group. Article 164 required the National Assembly to have a 60–40 split between the Hutu majority (85 per cent) and the Tutsi minority (14 per cent), and the Senate to be shared 50–50. Article 300 significantly raised the hurdle for constitutional amendments—supermajorities of 80 per cent in the National Assembly and two-thirds in the Senate. Article 257 required a 50–50 Hutu–Tutsi split in the military.

Nkurunziza was able to run roughshod over these institutional checks, but not without a fight. First, he failed to pass a constitutional amendment in the National Assembly that would have allowed him to run for a third term. Second, he was unable to obtain a favourable ruling on whether he could run for a successive third term from the Constitutional Court—even though it was composed of his own appointees. The court later reversed its decision under intense pressure, but by this time the public already knew the nature of its initial ruling (Nduwimana 2015). Third, the military's post-conflict reforms helped motivate the armed forces to step in and launch a coup to forcefully remove Nkurunziza from power. That Nkurunziza survived all these institutional and extra-constitutional checks on his power is a testament to the difficult challenges faced by constitutional democracies in Africa.

What might the drafters of Burundi's Constitution have done differently? Two important lessons are apparent. First, the drafters ought to have avoided any ambiguity over the question of what constitutes a full term in office; Nkurunziza exploited this uncertainty in court. Article 96 of the Constitution set the term limits (to five years, renewable once) and specified that the president must be elected via universal suffrage. However, because the country was just emerging from conflict, Nkurunziza was elected by the legislature under article 302, which was explicit about the special circumstances of the election. But these circumstances did not mean that his first five years in office did not constitute a valid five-year term. Articles 96 and 302 must therefore be read together.

Article 302 explicitly refers to the first five-year period after the special election as 'the first post-transition period' and expressly bans the president from dissolving the first post-transition parliament. That being said, the

ambiguity inherent in the wording of articles 96 and 302 allowed Nkurunziza to create the illusion of uncertainty and therefore mount a constitutional challenge against term limits. Nkurunziza's 'soft' violation of term limits had precedents in Burkina Faso (Blaise Compaore), Namibia (Sam Nujoma) and Senegal (Abdoulaye Wade), where sitting presidents also exploited constitutional ambiguities to run for third terms. Therefore, in anticipation of such challenges to constitutional term limits, the language and intent of specific clauses in constitutions should be simple and clear.

The second lesson in the Burundi case is that the wider international community ought to have done more to support democratic principles. Once the coup was underway, the international community—including the East African Community (EAC)—had an opportunity to step in on the side of democratic constitutionalism. However, a lack of regional consensus on the right response, as well as Burundi's important role in sending peacekeepers to Somalia, provided Nkurunziza with international cover for his domestic constitutional transgressions. The EAC, in particular, was in a singularly weak position with respect to Nkurunziza since two of its member presidents—Paul Kagame of Rwanda and Yoweri Museveni of Uganda—were themselves long-serving autocrats hostile to presidential term limits. In addition, Burundi's troop contribution to peacekeeping in Somalia gave it leverage with both the AU and the United Nations Security Council (Ambrosetti, Birantamije and Wilen 2015). The lesson here is that African constitutional democracies face higher risks in regions lacking democratic density, and in cases where other international priorities trump the need to protect constitutional electoral democracies.

Engineering legitimacy: the case for majoritarian systems in Africa

Legitimacy is a central component of representative democratic government. While citizens may have varied preferences regarding candidates vying for public office, the legitimacy of electoral democracies rests on the assumption that the processes of determining the winners of elections are legitimate (Saffon and Urbinati 2013). In turn, the legitimacy of electoral processes rests on their ability to approximate the true intent of a majority of voters. For this reason, robust political participation—in the form of a high voter registration and turnout—is a normatively preferable condition (Gallego 2014).

Similarly, the legitimacy (and effectiveness while in office) of election winners is closely correlated with the size of the base of their support (Morrow et al. 2008). Leaders who derive support from a relatively broad base enjoy greater legitimacy. They are also more likely to effect programmatic (as

opposed to targeted or clientelist) policies, thereby granting the government even greater legitimacy. Nowhere is the question of how to engineer greater legitimacy and public confidence in the electoral process more salient than in young democracies in which ethnicity is the main principle of organizing politics (Posner 2003). In such situations, a normative preference for broad-based multi-ethnic parties and coalitions can be implemented through constitutional provisions for majoritarian elections.

This is the case in much of Africa. About two-thirds of African countries have majoritarian (two-round system) requirements for presidential elections.[4] Since in many African countries no single ethnic group comprises over half the population, such requirements guarantee the building of cross-ethnic alliances around elections. Some countries also have minimum geographic thresholds at the subnational level, which further incentivizes political candidates to seek a broad base of support across ethnic groups concentrated in different parts of the country. Only 15 per cent of African countries currently have pure FPTP rules for presidential elections.

The case of Zambia illustrates why many African countries have sought to force presidential candidates to seek a broad base of support. The country has 72 different ethnic groups, divided into four main language and cultural groups (Posner 2003). Since 2001 the country's electoral map has ensured that successful candidates have typically won with very small shares of the electorate. Between 2001 and 2015, winning presidential candidates garnered an average of only 40.8 per cent of the votes cast, with an average turnout of just 54 per cent of registered voters over the same period. Clearly, Zambia needed to increase voter participation and boost the legitimacy of winning presidential candidates by providing constitutional incentives for a more broad-based political campaign strategy.

The results of this effort are enshrined in the Constitution of Zambia (Amendment) Act No. 2 of 2016.[5] Under the new electoral rules, the winning presidential candidate must garner at least 50 per cent plus one of the valid votes cast (article 47 (1)).[6] This provision will ensure that Zambian presidents devise electoral campaign strategies that seek to energize a broader base of voters. It will also force candidates to seek cross-ethnic and cross-language group alliances. The biggest language group—the Bemba—comprises just over 40 per cent of the country's population.

In line with constitutions in other majoritarian two-round electoral systems, Zambia's new Constitution also strengthens the office of the vice president by making election to the office concurrent with that of the president. This provision allows for credible commitment in alliance building, and ensures

that, once in office, the president cannot fire the vice president. Previously, the vice president of Zambia served largely at the pleasure of the president, and Zambian cabinets were characterized by ministerial musical chairs of frequent reshuffles (Von Soest 2007). The new Constitution also obviates the need to have by-elections in the event that a president leaves office before the end of his or her term: article 106 stipulates that the sitting vice president serves out the reminder of the presidential term. This measure is particularly relevant, because Zambia has recently had two presidential by-elections, after sitting presidents died in office, in 2008 and 2015, respectively.

The Constitution also gives the Zambian vice president legislative powers akin to those of a prime minister (albeit a very weak one): the office holder is the official leader of government business in parliament (article 74), serving as the main link between the executive office of the president and the National Assembly (article 86 (2)). This will ensure that the alliances between presidents and their vice presidents are backed by credible constitutional guarantees of shared authority in the making of government policy. This role also gives the vice president broad discretionary powers over the ruling party's legislative agenda. Furthermore, because the president cannot fire the vice president, this measure disperses power within the executive branch in a manner that is likely to strengthen the cabinet, thereby providing checks on presidential power.

Therefore, Zambia's new electoral rules incentivize credible cross-ethnic alliance building in presidential elections, and make such coalitions more credible. Having two names on the ticket will also increase the legitimacy of the president and encourage higher voter turnout, which will be further reinforced by the majoritarian two-round constitutional requirement.

Popular democracy or populism? Referenda in African democracies

Another development in constitutional democracies in Africa in 2015 was the attempt to exercise the sovereign power of the people. While strong institutions are central for the consolidation of electoral democracies, such institutions also need to be adaptable and responsive to the will of the public (Huntington 1965). In other words, institutions must be able to adapt to changes in public opinion and general popular will. One mechanism of ensuring this happens is through regular elections—in which the public populates state institutions with their preferred candidates, who promise to implement their preferred policies. However, in some instances representative state institutions may become too far removed from the popular will of the public, or elected officials may collude to deny the general public the chance to change the manner in which they are governed. For this reason, some

constitutions provide for popular amendments that originate from unelected citizens not serving in public office. Such provisions are meant to ensure that elected officials and institutions reflect the popular will of the public (Habermas 1994), and may include varying degrees of direct democracy (Lupia and Matsusaka 2004). One such example is the provision for popular constitutional amendment in article 257 of the Kenyan Constitution, which provides for extra-institutional (popular) origination of referendum questions by unelected citizens.[7] Proposed amendments by popular initiative must be backed by at least one million signatures from registered voters and at least half of the 47 counties. This provision was designed to give civil society organizations (CSOs) and regular citizens a chance to provide checks and balances with respect to elected officials who already possess institutional means of changing the Constitution (via article 256).

However, Kenya's experience has shown how elected officials can use such a provision as a political football. Instead of giving a voice to extra-institutional interests—including regular citizens and CSOs—the provision for popular amendment was hijacked by CORD. Despite having significant representation in the legislature (with 38 per cent of seats), CORD leaders opted to pursue an extra-institutional channel to amend the Constitution. While perfectly in line with the Constitution, this action by a sizeable parliamentary opposition party raises two important questions.

First, does the use of extra-institutional amendment channels by parliamentary parties rob such measures of their legitimacy? This is an important question, because the original intent of the provision was to empower extra-institutional interests, thereby providing a check on elected officials. This was in line with the Constitution's overall emphasis on the popular origins of sovereignty in Kenya (article 1). However, by leaving this mechanism open to political parties with existing representation in the legislature, the framers of the Constitution exposed it to strategic manipulation in the practice of everyday politics. Having lost political contests in the legislature, political parties may be incentivized to explore a populist 'popular' path to constitutional amendment.

Second, does the option of initiating populist amendments disincentivize parliamentary parties from investing in legislative institutional strength? The Kenyan experience shows that parliamentary parties can exploit popular amendment provisions. Their existence therefore bodes ill for the institutionalization of legislatures. Research shows that the institutionalization of legislatures is conditional on their being the main forum of intra-elite contestation (Opalo 2014). For this to occur, the outcomes of legislative contests must be binding. When they are not, this discredits the institution's

rules and outcomes, leading to the erosion of both public trust and the political power of legislatures as the pivotal representative institutions of the state. With these observations in mind, the availability of outside options (for parliamentary parties) in the form of (relatively) low-cost popular referenda may hinder the process of democratic consolidation.

The Kenyan case is a telling example. In a country of 22 million eligible voters, the constitutional threshold for initiating a popular referendum is just one million registered voters. While this may have been considered a high threshold for CSOs, it is a low bar for organized political parties.[8] Furthermore, making this option available to political parties exposes the Constitution to frequent populist amendments. While the bulk of the CORD Alliance's proposed amendments related to Kenya's electoral rules, in order to make the changes attractive to the wider public the alliance added populist riders with non-trivial fiscal implications. For example, CORD promised to devolve more funds to the country's 47 county governments without considering their absorptive capacity and the potential governance challenges that would arise. Kenya's county governments so far have had a chequered record of fiscal discipline and transparent management of fiscal resources (Mbaka 2016).

Conclusion

These three cases illustrate that the battle for democratic consolidation in Africa has entered a new phase, with its own challenges and implications. On the positive side, many African states have amended their constitutions to suit their 21st-century domestic political realities. In the majority of cases, term limits have been introduced and respected by sitting presidents. The majority of African countries have majoritarian two-round system electoral rules for presidential elections, thereby incentivizing cross-ethnic political alliances at the national level. Finally, a few countries have tried to experiment with the idea of a popular basis of sovereignty that institutionalizes the power of the people, and not just their elected representatives. All these examples provide opportunities for continued constitutional experimentation informed by lived experiences in the quest to consolidate electoral democracy in Africa.

However, significant challenges remain. The most important of these is the fact that the international community's commitment to democratic promotion has waned. Security and geopolitical concerns have instead occupied centre stage, making it ever harder (from a normative standpoint) for progressive political forces in African countries to have international allies. In addition, the lack of a critical mass of democratic countries in the various subregions

of Africa has deprived many of the continent's nascent democracies of the demonstration effects they badly need. An important challenge for the next phase of democratic development and consolidation in Africa will be how to entrench popular sovereignty in a context of weak institutions. Huntington's (1965) warning still applies: expanding the political space to include direct popular participation without sufficient institutionalization will threaten the very idea of democratic stability in Africa. For constitutional democracy to endure in the region, the process of popular inclusion must be predicated on an elite commitment to strengthening democratic institutions such as legislatures. This means protecting democratic institutions from the threat of populism masquerading as direct popular democracy.

For a long time, the biggest challenge to competitive democratic elections in Africa has been the dearth of credible alliances among elites. Once in power, African presidents have often focused on weakening institutions of credible commitment to fellow elites, including parties and parliaments (Opalo 2014); and opposition leaders have lacked the necessary mechanisms to credibly commit to one another and form alliances to challenge incumbent presidents (Arriola 2012). Changes that allow for credible commitment and the formation of alliances among elites, especially those that cut across ethnic lines, will therefore improve the prospects of democratic consolidation in the region. This is the context in which efforts to reinforce constitutional term limits, introduce majoritarian two-round constitutional requirements for presidential elections and constitutionalize the popular origins of sovereignty in Africa should be viewed. The importance of elite consensus on 'the rules of the game' cannot be overstated in discussions of the consolidation of constitutional electoral democracies in Africa.

Notes

1 Figures calculated from the African Elections Database, available at <http://africanelections.tripod.com/>.
2 Data for this calculation based on Hyde and Marinov (2012).
3 For the full text of Burundi's 2005 Constitution see the Constitute Project website, <https://www.constituteproject.org/constitution/Burundi_2005?lang=en>.
4 Calculations based on data from International IDEA's Electoral System Design Database, <http://www.idea.int/esd/search.cfm>.
5 For the full text of the Constitution of Zambia (Amendment) Act No. 2 of 2016 see <http://www.parliament.gov.zm/sites/default/files/documents/amendment_act/Constitution%20of%20Zambia%20%20(Amendment),%202016-Act%20No.%202_0.pdf>.
6 However, there is no minimum threshold of votes at the subnational level (i.e. in Zambia's 10 provinces), as is the case in other countries in Africa. Kenya, for example, requires winning presidential candidates to also garner at least 25% of the votes cast in at least 24 of the country's 47 counties. See Constitution of the Republic of Kenya, article 138 (4).
7 For the full text of the Kenyan Constitution see <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>.
8 Interestingly, the CORD Alliance failed to meet the one-million-signature threshold on a technicality.

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2. Constitution-building in the Pacific in 2015

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Anna Dziedzic and Cheryl Saunders

Overview of the Pacific region

The Pacific region—classified by the United Nations as Oceania—has unique characteristics from the perspective of constitution-building. If Australia and New Zealand are excluded, the region comprises 12 UN member states, all of which are small island developing states and four of which are listed among the least developed states in the world (UN Statistics Division 2013).

The Pacific also comprises other polities that lack full international status and thus are dependent on other states to varying degrees. These include territorially defined areas with a degree of self-governance that are fully incorporated into other states (e.g. Bougainville and West Papua); territories that are not incorporated but nevertheless are considered part of another state, including American Samoa and Guam; distinct self-governing states in a form of 'free association' with other states that affects the exercise of their external sovereignty, such as the Cook Islands in its relationship to New Zealand; and former colonies (now territories) that remain linked to the former colonial power via arrangements that differ from case to case (e.g. French Polynesia and New Caledonia).

These characteristics are significant in the context of constitution-building for several reasons. First, at least some of the constitution-building that takes place in the region does so in relation to polities that lack full statehood, which affects both the process and the substance of constitution-building. Second, irrespective of international status, all constitutions in the Pacific are made for polities with small populations. The largest is Papua New Guinea (PNG), with a population of 7.7 million people, but a vast majority of the island states have populations less than 300,000; most are much smaller still (Pacific Regional Statistics 2013). This factor has implications for both constitutional design and process.

Other characteristics of the region and the communities within it are also relevant to constitution-building. The first concerns demographics. Most polities in the region have a large majority (or at least a substantial minority) of peoples who, to some degree, have a traditional lifestyle and consider customary law to be important. As elsewhere in the world, some are affected by deep societal cleavages that have implications for constitution-building. Some of these are attributable to ethnic divisions, for example in Bougainville and Solomon Islands. Other societal cleavages, however, are rooted in divisions between indigenous peoples and others who have arrived more recently through colonialism, migration or both. Albeit in different ways, Fiji and New Caledonia are in this category. As both examples show, divisions of this kind require careful management.

A second relevant characteristic concerns geography. All Pacific polities are islands, and many comprise multiple islands. All Pacific communities are under stress from climate change, experienced both through rising sea levels that are inundating low-lying islands and violent geophysical events, including cyclones, earthquakes, tsunamis and droughts (UN University 2014: 10). Both factors complicate the business of government, contribute to people's insecurity and may begin to be reflected in the constitutions that are created.

The three sub-regions of the Pacific—Melanesia, Micronesia and Polynesia—reflect ethnic and cultural similarities in areas in which ties between polities may be closer. Colonialism has affected this dynamic to some degree, leaving behind different languages, legal systems and networks; the most salient are attributable to France, the United Kingdom and the United States. Irrespective of ties or divisions, a considerable degree of coordination takes place between Pacific states in relation to shared needs and challenges, including, for example, aviation and higher education. Formal regional integration, however, remains fragmented and weak; the Pacific Islands Forum is the most significant regional body (Australian Department of Foreign Affairs and Trade n.d.).[1]

This chapter examines the principal examples of constitution-building activity in the Pacific in 2015, in relation to seven polities: Bougainville, Fiji, the Marshall Islands, New Caledonia, Solomon Islands, Tonga and Tuvalu. It divides constitution-building into three phases as a framework for analysis. The first phase comprises the vast array of steps that may take place before drafting a new constitution begins, sometimes stretching back for a considerable period of time, to trace the impetus for constitution-building. The second phase comprises the high-profile activities of negotiating, designing and drafting a new constitution—or making major changes to an existing constitution—and bringing it into effect. The third phase

involves implementing the new constitutional regime, which is critical in the immediate aftermath of promulgation but may also be a drawn-out affair. The chapter identifies relevant case studies, describes developments in each in 2015 and concludes with reflections on the insights they suggest for global experience with constitution-building.

Pre-constitution making

In any constitution-building exercise, a variety of important steps will be taken and decisions made before the processes of constitutional negotiation and design can begin. Exactly what these steps and decisions comprise depends on the context for constitution-building, although they will always involve decisions on process and may involve pre-commitments on substance as well. In 2015, three polities in the Pacific—Bougainville, New Caledonia and Tuvalu—engaged in precursor activities to constitution-making. Two of these, Bougainville and New Caledonia, prepared in 2015 for referenda on their future status: independence was one of several possible options. These polities are part of a group of 'states-in-waiting' in the region (Andrews 2016). The third case study in this category is Tuvalu, which has been an independent state since 1978. In 2015 it sought to design a constitutional review process to give effect to an election campaign commitment.

Bougainville

Bougainville is an autonomous region of PNG that experienced 10 years of conflict, sparked in 1988 by tensions between local and national interests in a copper mine. The conflict renewed movements, active since the 1960s, for a separate identity and/or independence for Bougainville.

The conflict formally ended with the negotiation of a ceasefire in 1998 and a peace agreement in 2001 that consisted of three pillars.[2] The first provided for an Autonomous Bougainville Government, with its own constitution and government institutions, to exercise powers devolved to it by the national PNG Government. The second pillar guaranteed a referendum on the question of Bougainville's future status. The third pillar provided for disarmament. Key provisions of the peace agreement were included in a new chapter of PNG's Constitution.[3] Significant progress towards the referendum was made in 2015. Under the terms of the 2001 peace agreement, the five-year window for holding the referendum opened in June 2015—the same month in which John Momis, an experienced pro-independence leader, was re-elected president of the autonomous region. His government is responsible for steering Bougainville towards the referendum.

Two key procedural decisions must be made in the lead-up to the referendum. Both require negotiation between the governments of Bougainville and PNG. The first relates to the timing of the referendum. The peace agreement stipulates that the referendum shall be held on a date agreed between the Bougainville Government and the PNG Government. Before setting the date, the governments must also agree that weapons have been disposed of in accordance with the peace agreement, and that the government of Bougainville meets internationally accepted standards of good governance. President Momis has proposed 2019 as the year for the vote, although this is yet to be agreed to by the PNG Government.

The second issue concerns the question to be put to voters in the referendum. The peace agreement provides that the Bougainville and PNG governments must agree on the question, and that it must include a choice of full independence for Bougainville. Because the peace agreement states that the outcome of the referendum is subject to ratification by the national PNG Parliament as the 'final decision-making authority', early engagement with the PNG Government is also important to ensure that all parties will accept the outcome. It is not yet clear how the negotiations between the two governments will play out; they may be further complicated by the outcome of national PNG elections in 2017. The implications for constitution-building, however, are clear. The requirements for consultation and post-referendum ratification by the national PNG Parliament are likely to influence both the timing of the referendum and the options that are put to the people. The obvious alternative to independence is that Bougainville continues as an autonomous region of PNG, but other options may serve as middle points between independence and autonomy. The need to manage the expectations of the government and the people of Bougainville—and to minimize the risk of renewed conflict—weighs heavily.

The substantive constitution-building that has occurred alongside these formal negotiations is also important, in part because 'good governance' is a specified precondition for holding the referendum. The creation of an autonomous government and the deferral of the referendum have given both governments and the people time to see how self-government might work in practice, enabling a more informed choice about independence. In 2015 the view seemed to be that the Bougainville Government had made a better case for independence than the PNG Government had made for autonomy within PNG (Woodbury 2015). The Bougainville Government has established key government institutions and held three democratic elections, while criticising delays by the national PNG Government in devolving functions and providing the promised funding to Bougainville.

New Caledonia

A referendum is also pending in New Caledonia, a French territorial community with a special transitional status pending a final decision on independence. Its population is divided between the indigenous Kanak people (who comprise around 40 per cent of the population), descendants of those who arrived in connection with French colonization, and more recent arrivals from France and the Pacific region. Conflict between groups seeking independence and other groups favouring continued dependence on France was mediated through the 1988 Matignon Agreements, which placed independence on hold for a decade, at the end of which was a vote on whether to vote on self-determination.[4] The Noumea Accord of 1998 agreed that a referendum on New Caledonia's political status should take place between 2013 and 2018.[5] In the meantime, substantial powers were transferred from France to New Caledonia, which acquired special status under the French Constitution (Title XIII). French legislation established new national and provincial institutions pursuant to the Accord to govern New Caledonia in the interim.

At least three important questions were on the table in 2015 in preparation for the referendum. The first relates to the options to be put to the voters in the referendum—the possibilities range from full sovereignty to various forms of association with France to continuation of the status quo (Courial and Melin-Soucramanien 2013). A French commission visited New Caledonia in 2015 to explore the implications of these options (Fisher 2016).

A second controversial issue concerns who may vote in the referendum. The Noumea Accord acknowledged the impact of colonization on the indigenous Kanak peoples and sought to redress it by restricting the right to vote in the referendum to people born in New Caledonia and long-term residents. Some groups have advocated universal voting rights instead. Concerns about the inclusion of ineligible voters on the roll were raised before a UN committee in 2015 (UN Decolonization Committee 2015). An exceptional meeting of New Caledonian and French authorities agreed upon a process to vet the roll and deal with disputes, but controversy lingers.

Finally, the date of the referendum has yet to be set. Under the Noumea Accord, the New Caledonian Congress can set a date with the agreement of a three-fifths majority. Currently, the Congress is divided between parties who support independence (which together hold 25 seats) and three separate conservative parties that oppose independence (which together hold 29 seats) (McClellan 2014). If Congress does not agree on a date by 2017, France will conduct the referendum before the end of 2018. Decision-making about the

timing and conduct of the referendum is likely to be further complicated by the French national elections in 2017. While the 2018 deadline is intended to keep the process on track, it is also placing considerable pressure on the parties to make decisions on critical issues.

Tuvalu

In 2015 the independent state of Tuvalu also found itself in the preliminary stages of constitution-building. In 2012–13, Tuvalu experienced a period of political instability as a consequence of shifting majorities within Parliament. A constitutional crisis ensued, in which the then-prime minister refused to summon Parliament in order to avoid a no-confidence vote, the governor-general sought to dismiss the prime minister and the prime minister advised the Queen to remove the governor-general. A vote in Parliament ultimately led to the appointment of the then-opposition leader, Enele Sopoaga, as prime minister.

In 2015, Sopoaga was re-elected prime minister after campaigning on the promise that his government would undertake a review of the Constitution with a view to stabilizing government (Radio New Zealand 2015a). The Constitution of Tuvalu can be amended with a two-thirds vote of all members of Parliament.[6] Less formal procedures of canvassing public opinion may also be used. The Tuvalu Government is now considering options for the constitutional review process. The UN Development Programme (UNDP) and other international agencies and experts are reported to be providing advice and support for the constitution-making process.

Reflections

The experiences of Bougainville, New Caledonia and Tuvalu demonstrate some of the ways in which critical aspects of constitution-building arise in the period prior to commencing formal constitution-making. Bougainville and New Caledonia are examples of negotiated, incremental and regulated processes for constitutional change following conflict. They share a further—less common—feature: both are presently incorporated into another sovereign state in circumstances that make independence a potential outcome. In both cases, interim constitutional arrangements provide for a government framework in which sovereignty is shared, and address the timing of future decisions about constitutional status and the process by which these will be made. The relatively long transition time required by this approach has given each polity the capacity to experiment with institutional forms and to gain experience in the processes of self-government. It seems likely that at least some of these constitutional arrangements will remain in place irrespective

of the outcome of the referendums. In both cases 2015 was a significant year, as the clock ticked down to the scheduled referendums and the pressure to make decisions about referendum processes increased. Critical decisions such as who may vote, who determines the question, and what options are on the ballot may affect the legitimacy of the outcome and any constitution-making that ensues. A common challenge is accommodating the need for careful and continuing negotiations between and within national and subnational governments with an eye to future sustainability and peace.

All three cases demonstrate how and why the decisions made during the pre-constitution-making period are critically important. They reinforce the need for decision-making at this stage to be as inclusive and transparent as circumstances allow, in the interest of public ownership of the outcomes, the accountability of political representatives and effective constitution-making processes.

Constitution-making

In 2015, two states in the region were engaged in formal constitution-making processes—the Marshall Islands and Solomon Islands.

The Marshall Islands

The current Constitution of the Marshall Islands dates from 1979 and imposes a duty on the *Nitijela* (Parliament) to report every ten years on whether the constitution should be amended or a referendum held on whether to call a convention to report on constitutional change (article XII, section 6).[7] A special committee of the *Nitijela* prepared such a report in 2013. After some delay, in 2015 the *Nitijela* passed legislation to call a Constitutional Convention to consider the proposed amendments.[8] Elections to the 45-member convention are likely to be held in 2016, with the convention itself to follow within a month. The legislation set out the procedures, duties and powers of the convention and provided for an appropriation to fund its work.

The proposals of the special committee are annexed to the legislation. Foremost among them is a proposal to move away from the current parliamentary system, in which the president is both head of state and head of government and is elected by (and answerable to) the *Nitijela*, to a presidential system in which the people directly elect the president. This change would also entail replacing current provisions for removing the president and cabinet via no-confidence votes with procedures for impeachment modelled on arrangements for removing judges. Other proposed changes include reserving

parliamentary seats for women, expressly prohibiting sexual discrimination in the Bill of Rights, requiring that appropriation bills be balanced, and establishing an ombudsman's office.

The work of the Constitutional Convention is constrained by constitutional and legislative provisions. The Constitution prohibits the convention from considering or adopting amendments that are unrelated to or inconsistent with the proposals presented to it by Parliament. The convention itself does not have the authority to alter the Constitution. Its role is to consider whether to adopt proposals for change and to prepare the proposed amendments for submission to referendum.

The convention and other government institutions also play an important role in ensuring that the people understand the implications of the proposed changes. The proposal to adopt a presidential system is largely driven by the desire to avoid the instability caused by frequent no-confidence votes, but the convention will need to consider the full range of strengths and weaknesses of different systems of government in the particular context of Marshall Islands before recommending significant change.

Solomon Islands

Solomon Islands has a population of around 400,000 people. It comprises an archipelago in which more than 70 languages are spoken. Its current Constitution dates from 1978 and is scheduled to the Solomon Islands Independence Order of the same year.[9] The Constitution provides for a unitary system of government with a degree of decentralization through a system of provinces, to be established by Parliament. Legislation to establish the provinces came into effect in 1981 and has been modified over time. Since 1995, the country has been divided into nine provinces, plus Honiara as the capital city.

Solomon Islands has been engaged in a drawn-out process of constitution-making since 2000. The initial catalyst was the civil conflict that broke out in 1998, initially between militant groups on the islands of Guadalcanal and Malaita but also involving the capital. Peace agreements in 1999 (the Honiara Peace Accord) and 2000 (the Townsville Peace Agreement) laid the foundations on which peace might be built, including constitutional change, but failed to restore order.[10] On the invitation of the Solomon Islands Government, an international assistance force, the Regional Assistance Mission to Solomon Islands (RAMSI), entered the country in 2003 with a view to supporting law and order.[11] Armed conflict subsided, a degree of normality was restored and constitution-making has been underway ever since. An analysis undertaken

by the UNDP in 2005 identified the principal contentious issues as land ownership, bringing governance arrangements closer to the people, the need to reinforce the authority of traditional leaders and insensitive development driven by international actors (expat *wantokism*) (McGovern and Choulai 2005).

The proposed constitutional changes are substantial. Local autonomy was one of the central planks of the Townsville Peace Agreement (Part 4), requiring change from a unitary to a federal system. The implications of federalism in Solomon Islands are unclear, which has been a complicating factor in constitutional negotiations. There have also been concerns about the financial and administrative costs of implementing a federal system. From the outset there has been no comprehensive framework or timetable for constitution-making in Solomon Islands. As a result, processes to broaden the range of interests represented, obtain technical advice and facilitate public participation have evolved over time. Since 2004 a series of drafts has been prepared and reviewed by international experts, government taskforces, Parliament and public consultations (Le Roy 2008).

In 2007 a Constitutional Congress and an Eminent Persons Advisory Council were established to finalize the draft. In 2014–15 the Constitution Reform Unit within the Office of the Prime Minister organized public awareness consultations across the provinces and with Solomon Islanders living overseas.[12] A final draft of the new constitution is expected to be approved by the Congress and the Advisory Council in 2016 and submitted to the prime minister for adoption by a supermajority of Parliament in accordance with section 61 of the current Constitution.

Reflections

These two examples of constitution-making in the Pacific region are very different, reflecting the widely different contexts of the Marshall Islands and Solomon Islands. It is nevertheless possible to draw some connections between the two cases that have wider relevance to constitution-making in the Pacific and elsewhere.

In the Marshall Islands, constitution-making has been initiated through a process of constitutionally mandated periodic appraisals of the Constitution, while in Solomon Islands it is one of a range of steps taken in the course of post-conflict nation- and state-building. In both cases, however, the proposed changes address fundamental structures: those of government (the Marshall Islands) and of the state (Solomon Islands). The significance of the changes being considered has implications for the process, including the need to

ensure that constitution makers and the people understand the reasons for the change and the implications such change may have across the constitutional system.

In this sense, a notable difference between the two cases is the degree to which the constitution-making process is regularized. The Marshall Islands Constitution sets out in detail the procedures for proposing, considering and implementing constitutional change, and both government elites and the people are familiar with the process. In Solomon Islands, where the Constitution may be amended by Parliament, procedural devices designed to ensure wider public participation (such as constitutional conventions and referendums) are less familiar, but—as the process to date demonstrates—crucial when considering such extensive constitutional change.

Implementation

In 2015, another two Pacific states, Fiji and Tonga, were engaged in the implementation of relatively new constitutions. As their experience shows, implementation requires more than putting in place institutions and laws prescribed in the constitution, although these are important too. It also requires attention to the interpretation of new provisions, which may ultimately fall to courts but in practice also involves political actors and the public at large as the meaning of the constitution becomes clear. Further, implementation extends to the development of a culture to support the effective operation of a new constitution by, for example, adjusting political practice and accepting the independence of courts and other accountability institutions. While the nature and magnitude of the challenges of implementation vary by context, this phase is likely to last for a period of years after a new constitution is adopted.

Fiji

The Constitution of Fiji came into effect in 2013 after a highly contentious process (Dorney 2013).[13] At the time, Fiji was under military rule following a coup in 2006, which ultimately led to the abrogation of the 1997 Constitution in 2009 (ConstitutionNet n.d.). The government initiated a constitution-making process in 2012, comprising a Constitutional Commission to prepare an initial draft and a Constituent Assembly to deliberate it and bring it into law. The commission conducted public consultations and drafted a constitution, which the government rejected, and the idea of a Constituent Assembly was also ultimately abandoned. Instead, the government prepared its own draft and promulgated it by decree after a period of public feedback. Consistent

with the government's stated intention from the outset, the 2013 Constitution provided for a single voters' roll and equal Fijian citizenship, eliminating the racial divide that had characterized earlier Fijian constitutions. It was open to criticism in other areas, however: it retained office holders' immunity for events that occurred in the wake of the coup; provided for broad limitations on constitutional rights; gave the military an ongoing role in ensuring the 'well-being' of Fijians; included institutional arrangements that offered the potential for considerable executive control; and introduced procedures that made the Constitution almost impossible to amend.

In such circumstances, the implementation phase becomes even more important, and bears a considerable burden in shoring up a constitution's legitimacy, which is otherwise rather weak. In 2015, a number of important events occurred in Fiji related to constitutional implementation. Elections had already taken place in 2014, enabling a Fijian Parliament to sit for the first time since 2006. The Constitution calls for many other institutions and laws, several of which were in place by the end of 2015. Some of these, such as the Human Rights Commission, were already formally in existence and the task of implementation involved staffing and funding (rather than establishing) them. Others, such as the Constitutional Offices Commission (section 132), needed to be created anew. Formal compliance with constitutional provisions of this kind is considered technical implementation. Much has been done to fulfil constitutional requirements in this way, although important matters remain outstanding. Notably, the Accountability and Transparency Commission has not yet been established, as required by section 121, and access to information legislation has not yet been passed to give effect to the right in section 25.

Much more difficult in the Fijian context has been the cultural change necessary to move from military rule to constitutional democracy has been much more difficult, particularly since Voreqe Bainimarama, the leader of the outgoing military government, was returned as prime minister following the elections. The challenge is rendered more complex still by continuing divisions within Fiji over the 2006 coup, the military rule that followed and the legitimacy of the 2013 Constitution.

There are signs that the failure to make this transition is inhibiting both Parliament's capacity to hold the government to account and the emergence of an electoral democracy in which power changes hands from time to time through free and fair elections. In one example, clashes between the government and the parliamentary Public Accounts Committee in 2015 led to amendments to rule 109(2)(d) of the rules of Parliament to enable a government member to chair the committee (rather than requiring an

opposition member to do so) and the restriction of its mandate to the scrutiny of expenditure 'in accordance with the written law' (Gounder 2016).[14]

Equally, a delayed transition to a culture of constitutional democracy can impede the effectiveness of independent constitutional public bodies, either through the appointments made to them in a government-controlled process or through a general caution in carrying out their responsibilities, derived from the period of military rule. Concerns of this kind surfaced in 2015 when the opposition nominee to the Constitutional Appointments Commission resigned, claiming that the commission was politicized and criticizing government actions in appointing an acting commissioner of police (Sauvakacolo 2015).

It is still early days for constitutional implementation in Fiji. The emerging problems offer insights into the kinds of difficulties that are likely to accompany constitution-building after a period of authoritarian rule in any state. In Fiji, three additional factors further complicate the transition. First, the equal citizenship that the new Constitution provides is itself controversial in some parts of the country. Second, a generation of young Fijians has spent its adolescence under military rule and has no inherited understanding of how constitutional democracy should work. Third, much of the legal system remains based on military decrees, which are shielded from judicial review by the terms of the Constitution (section 173).

Tonga

The Kingdom of Tonga has a population of just over 100,000 people. It comprises 169 islands, 36 of which are populated. Its Constitution dates from 1875, making it the oldest written constitution in the region.[15] This Constitution was made by King George Tupou I with the approval of an Assembly of Chiefs, with the aim to demonstrate and maintain Tonga's sovereignty and independence in the face of Western colonialism (Latukefu 1975). It created a centralized monarchy in which the king held and exercised executive power, and legislative power was shared between the king and the Legislative Assembly. This Constitution continued in force when Tonga was a British Protectorate (from 1900) and after independence in 1970.

Significant changes were made to the Constitution in 2010 following a period of unrest caused in part by concerns about government accountability (The Commonwealth n.d.). The amendments drew on a 2009 report by the Constitutional and Electoral Commission, which was established by the Privy Council in 2008 (Tongan Constitutional and Electoral Commission 2009). One effect of these amendments was to change the composition of the

Legislative Assembly to comprise nine noble representatives and 17 elected representatives of the people. Previously it had been made up of the Privy Council as appointed by the monarch, nine noble representatives elected by 30 holders of titles, and nine representatives of the people. In addition, the changes shifted executive power from the monarch to a cabinet, consisting of a prime minister elected by the Legislative Assembly and ministers nominated by the prime minister.[16] Under a further amendment in 2011 the structure and composition of the judiciary was also changed to reflect the diminution of the monarch's power.[17]

The changes did not represent a complete shift of authority away from the monarch, who retains significant power, for example in relation to appointing judges, summoning and dismissing the assembly, and treaty-making. In the context of Tonga the changes are very significant, which presents a range of implementation challenges. Some have been the predictable challenges that accompany any transition of this kind. The new Constitution has required an Electoral Commission to be established, electoral boundaries to be drawn and elections held.[18] The Legislative Assembly also necessarily needed to assume a new, more significant role. The Electoral Commission is now in place and two rounds of elections have been held, in 2010 and 2014. In 2010 a party that won 12 of the 17 popularly elected seats failed to form a government because it did not have the support of a majority in the Assembly. In 2012 there was a period of instability following the death of King George Tupou V, who had led the reforms and shifts in political allegiance within the Legislative Assembly, which led ultimately to a no-confidence motion in the government that took four months to resolve (Fonua 2012). In 2014, while the election results were still inconclusive, the leader of the party with the largest number of popular seats was appointed prime minister (Metuamate 2015). From this perspective, the transition to the new constitutional regime seems to have gone relatively smoothly.

Other dimensions have proved more difficult, however. For example, a review of the new Constitution in 2012 under the auspices of the Commonwealth Secretariat was highly critical of the new structures for the courts on the grounds that they divided responsibility for the judiciary between three bodies, including a newly created Office of Lord Chancellor, and 'established alien institutions with no legal, cultural or historical ties' with Tonga (Latu 2014). There is often a question during the implementation phase of a new constitution about whether changes should be made to remedy any defects that have emerged, or whether the constitution should be allowed to be fully implemented before such decisions are made. In this case the argument for change was strengthened by claims that the changes to the judiciary had

not been included in the original recommendations of the Constitutional and Electoral Commission (Moala 2014). Constitutional amendments were reported to have been passed by the Legislative Assembly in August 2014, but to have been delayed by the king until 2015 due to the advice of some of his legal advisers (Fonua 2014). As of early 2016, assent has not yet been given. These events are significant not only because they have failed to address concerns about the structure and operation of the judiciary, but also because they demonstrate that only a limited transfer of monarchical authority has occurred.

Another illustration of continuing ambiguity regarding the scope of monarchical authority concerns treaty-making. In 2015, the government's decision to ratify the Convention on the Elimination of Discrimination against Women ran into difficulties when the Privy Council asked the government to reconsider its decision on the grounds that only the king had the authority to ratify treaties (Radio New Zealand 2015b). While this is literally correct under sections 39 and 51(7) of the Constitution, most constitutional monarchies give this type of power to the elected government. The proposed ratification created other divisions within Tongan society, causing the government to retreat from its proposal to ratify and raising the possibility of a referendum on the question instead, if and when legislation to authorize a referendum is passed (Radio New Zealand 2015c).

Reflections

As with the other cases examined in this chapter, Fiji and Tonga are experiencing very different constitution-building processes, both generally and during the implementation phase. Nevertheless, they have enough in common for insights to be drawn that are relevant for the Pacific region and elsewhere.

In both cases, the degree of constitutional change was substantial. Therefore policymakers and legislators are inevitably required to take a wide range of actions in the immediate aftermath of promulgating a new constitution to bring it into practical effect. While such technical aspects of compliance with new constitutional provisions represent only a small part of constitutional implementation, they are nevertheless essential to provide the base on which other, subtler, aspects of implementation can build.

Ambiguities and imperfections may well emerge in the course of implementing far-reaching constitutional changes; it is desirable for them to be resolved in ways that support the constitutional transition. Some decisions involve a choice between seeking formal change and allowing institutions to become

more securely established to determine whether a problem persists. In Fiji, the problem concerned Parliament's standing orders rather than the Constitution itself. Changes were made—perhaps too hastily, given how recently representative processes have been re-established in Fiji. In Tonga, difficulties in designing the court system were deemed to require constitutional change, although this has not yet been forthcoming.

Both Fiji and Tonga also demonstrate the challenges of cultural adaptation to new constitutional arrangements in the course of a transition to democracy. In both cases, the transition was ambitious—from military rule (in Fiji) and strong monarchy (in Tonga) to democracy. Effective constitutional implementation in such circumstances requires compliance with the spirit as well as the letter of the new constitutional framework. This may take some time to achieve, but it is important to recognize the need and ensure that progress continues to be made. To further complicate the situation, in both Fiji and Tonga there is evidence that the transitions were intended to be only partial, leaving considerable authority with the military and with the monarch and their advisers, respectively. These realities inhibit the development of a constitutional culture on which the effectiveness of the constitution depends by increasing uncertainty about the meaning and effect of the new constitutional regime.

Conclusion

There is considerable and diverse constitution-building activity in the Pacific region, which addresses the broad spectrum of constitutional change, including pre-constitution-making issues, the substance and process of formal constitutional change, and the implementation of new constitutional arrangements. Shared challenges for constitution-building stem from the small size and degree of isolation of polities in the region, the varying external interests of former colonial powers and new geopolitical forces, and the degree to which polities are formally and informally dependent on other states. However, the contexts in which constitution-building occurs in the Pacific also speak to global experiences, including post-conflict state-building, transition to democracy and fragmentation of the state in circumstances of societal cleavage. As such, the region's experiences can provide valuable insights for a global study of constitution-building.

Notes

1 The Pacific Islands Forum comprises 16 members—Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu—as well as a number of associate members and observers. See <http://www.forumsec.org>.

2 The terms of the peace agreement are outlined in United Nations Security Council, 'Letter dated 22 October 2001 from the Secretary-General addressed to the President of the Security Council', S/2001/988, 23 October 2001, <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2001/988>, accessed 14 July 2016.

3 Constitution of the Independent State of Papua New Guinea, Part XIV, <http://www.parliament.gov.pg/images/misc/PNG-CONSTITUTION.pdf>.

4 The texts of the Matignon Agreements are available (in French) at <http://www.axl.cefan.ulaval.ca/pacifique/ncal-Matignon_1988.htm>.

5 The text of the Noumea Accord is available at <http://www.austlii.edu.au/au/journals/AILR/2002/17.html>.

6 Tuvalu Constitution of 1986, <http://www.paclii.org/tv/legis/consol_act_2008/cot277/>.

7 Constitution of the Republic of the Marshall Islands, <http://www.rmiembassyus.org/Constitution.htm>.

8 Marshall Islands Constitutional Convention Act 2015, <http://www.paclii.org/mh/legis/num_act/cca2015320/>.

9 Solomon Islands Independence Order, <http://www.paclii.org/sb/legis/consol_act/c1978167/>.

10 For the texts of the 1999 Honiara Peace Accord and the 2000 Townsville Peace Agreement see the UN's Peacemaker Database, <http://peacemaker.un.org/>.

11 RAMSI is still in place, although since 2013 it has acted as a policing operation. See <http://www.ramsi.org/about-ramsi/>.

12 This and other aspects of the process can be followed on the official website of the Constitutional Reform Program, <http://www.sicr.gov.sb/>.

13 Constitution of the Republic of Fiji, <http://www.paclii.org/fj/Fiji-Constitution-English-2013.pdf>.

14 See Standing Order 117, 109(2)(d), <http://www.parliament.gov.fj/getattachment/Parliament-Business/Rules-of-the-House/Revised-Standing-Orders-pdf-version-with-track-change.pdf.aspx>.

15 Constitution of Tonga, <http://www.paclii.org/to/legis/consol_act/cot238/>.

16 Act of Constitution of Tonga (Amendment) Act 2010; Constitution of Tonga (Amendment) (No. 2) Act 2010; and Constitution of Tonga (Amendment) (No. 3) Act 2010, <http://www.paclii.org/to/legis/num_act/toc-2010.html>.

17 Constitution of Tonga (Amendment) Act 2011, <http://www.paclii.org/to/legis/num_act/cota2011339/>.

18 Electoral Commission Act 2010, <http://www.paclii.org/to/legis/num_act/eca2010222/>.

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3. Forces and mechanisms in plurinational constitution-building in South Asia

3. Forces and mechanisms in plurinational constitution-building in South Asia

Sumit Bisarya

In 2015, constitution-building in South Asia was dominated by the promulgation of the Constitution of Nepal, after two constituent assemblies and seven long years, and the launch of a new constitution-building process in Sri Lanka. Notable constitution-building events certainly took place in neighbouring countries, such as the 21st amendment to the Constitution of Pakistan—which enabled the establishment of military courts to legally try civilians accused of terror-related offences without due process constitutional guarantees (Siddiqi 2015)—and the Indian Supreme Court striking down a constitutional amendment seeking to significantly reform the judicial appointments system (Khosla 2015). However, this chapter focuses on the processes in Nepal and Sri Lanka, not only because they were of paramount importance in their respective nations, but also because they both deal with a similar issue—the task of finding constitutional arrangements to accommodate conflicting groups that perceive themselves as different nations living in the same state.

Nepal and Sri Lanka are relatively small countries in terms of geography, with populations ranging between 20 and 30 million people. While both are characterized by strong ethnic group identities, the nature of the cleavages in each country—that is, geographically concentrated populations with politically salient differences—differs considerably. In Nepal the 2011 national census identified 126 castes or ethnic groups, and 123 languages were reported as inhabitants' mother tongues. From a constitutional design perspective, Nepal is very much a country of minorities. The largest caste or ethnic group, the Chhetri, represents only 16 per cent of the population, and the most widely spoken language, Nepali, is reported as the mother tongue for only 44.6 per cent of the population (National Planning Commission of Nepal 2011). In contrast, Sri Lanka's diverse society is complex in its cross-cutting and numerous identities, yet there is a strong majority of Sinhalese (74.9 per cent of the population), and Tamils are the largest minority group, at 11.1 per cent (Sri Lankan Department of Census and Statistics 2012).

While the demographics and constitutional processes in these countries are starkly different, the processes are similar in the sense that demands for constitutional designs that provide for territorial autonomy are couched not in the language of minority cultural groups ceding concessions from a majority, but rather as a challenge to the 'perception of the state as a unitary national site within which only one process of nation-building can take place' (Tierney 2008: 441–42). Central to the difficulties of reaching a constitutional settlement in both cases has been the response by those in power to demands for territorial devolution.

In both Nepal and Sri Lanka, dominant groups have preferred a constitution-building process that views the inclusion of minority groups as a gracious concession or accommodation, despite the fact that such an approach cannot meet minority groups' expectations for devolution. Rather, the success of the constitutional settlements depends on a constitution-building process that is envisaged as a joint endeavour in which different nations approach a state-building project as equal partners. Furthermore, given that constitution-building negotiations in both countries take place between elected representatives, the difficulties in arriving at an agreement that adequately recognizes the plurinational identity of the state, and the demands accompanying such recognition, are rooted in the different incentives and constraints placed on these negotiators as they seek to respond to the demands of their constituents.

In recent years, extensive effort and time have been invested in the development of the historical, legal and sociological aspects of plurinational constitution-building in both Nepal and Sri Lanka (see e.g. Lawoti 2015; Welikala 2015e). While much of this work is important in its innovative redefinition of the debate around plurinationalism and governance, and its reconceptualization of constitution-building outside the context of the liberal Western homogenous nation state, it often approaches the argument from a normative perspective—as if, once both sides can be convinced of the true nature and essence of plurinational state-building, a federal deal will somehow arise.[1]

This chapter focuses on federal politics in the two countries' constitution-building processes during 2015, based on the understanding that moving towards federalism is predicated on 'a political will designed to force a particular kind of constitutional bargain based upon elite negotiations and compromises' (Burgess 2012: 12) and an examination of the democratic forces that shape—or hinder—such a bargain. It briefly describes the political forces and mechanisms involved in constitution-making, and discusses how they have affected the chances of finding a stable solution to questions of

plurinational constitution-building in Nepal and Sri Lanka. It concludes by discussing the difficulties of consensual constitution-building in plurinational societies.

Forces and mechanisms in constitution-making

Much of the literature on federal theory focuses on sociologically rooted concepts of autonomy, community, identity and recognition. However, an examination of the processes taking place in Nepal and Sri Lanka offer a stark reminder that the creation of a federal constitution requires that the political will and circumstances are conducive to efforts to 'negotiate, bargain and compromise about the process of state and nation-building' (Burgess 2012).

The politics of these two constitution-making processes have tightly constrained the parameters of how the new constitutions respond to demands from the territorially concentrated populations in each country. The following section recounts the two cases through the lens of the upstream and downstream constraints on the constitution-making body. Elster (1995) uses the terms 'upstream constraints' and 'downstream constraints' to illustrate that no constitution-making body is ever completely sovereign and free in its capacity to make decisions.

In order for such a body to be established, it first needs to be convened, and its members need to be selected. The ways in which these processes are conducted—and, in particular, by whom—help define the universe of possible outcomes that the constitution-making body is likely to produce, and are referred to as upstream constraints. Further, if individual members (or groups of members) of the constitution-making body have a specific mandate, this may constrain the possible actions of the body as a whole. Downstream constraints refer to the mode of ratification, and the fact that the constitution-making body must pursue options that will be acceptable to those with the power of ratification.

These forces and mechanisms are complicated by the plurinational nature of the state-restructuring debates in both Nepal and Sri Lanka. Any analysis of their constitution-building processes must be undertaken through this dual lens of existential group identity claims and parallel nation-building processes, which are then channelled through political mechanisms. These mechanisms constrain the possible outcomes of the constitution-building process in specific ways, sometimes exerting pressure in opposite directions.

The promulgation of Nepal's Constitution

Background

On 20 September 2015, Nepal's second Constituent Assembly (CA-II) passed the country's seventh constitution.[2] As this was the conclusion of a lengthy peace process that began in 2006 after a decade of conflict (International IDEA 2015), one might expect some degree of national celebration. Instead, the promulgation was met with protests, blockades and violence, taking the country to the brink of economic collapse.

There were a number of issues on the reform agenda of the constitution-building process, the most contentious of which was the dispersal of power away from the traditional elites. Nepal has been governed by the so-called Caste Hill Hindu Elite (CHHE)—consisting of the hill Bahun, Chhetri, Thakuri and Sanyasi groups—for its entire history, despite the fact that, at the time of the recent conflict, these groups comprised only 31 per cent of the country's population (Lawoti 2015). The majority of the population is represented by a complex mix of overlapping nationalities and identities—including Dalit, indigenous, Madhesi and Muslim groups—which have been historically disempowered and marginalized by the promotion of a dominant 'national Nepali' identity that denied the presence and importance of differing identities and nationalities within the Nepali state.

From an early stage in the constitution-building process, demands to share power and recognize diversity centred on federalizing Nepal. The requirement that the country become a 'progressive, democratic federation [emphasis added]' was inserted into the 2007 Interim Constitution at the insistence of the Madhesi parties (Lawoti 2015). The transition from a unitary to a federal state involved a number of other contentious issues, including the powers allocated to each level of government and the number and boundaries of the proposed substates.

Following a massive and devastating earthquake on 25 April 2015, which claimed over 8,000 lives and made hundreds of thousands homeless, the parties in the government coalition—dominated by the two largest political parties, the Nepal Congress (NC) and the Communist Party of Nepal–Unified Marxist Leninist (CPN–UML), and also including the smaller Madhesi Janadhikar Forum–Democracy (MJF–D)—pursued a fast-track process to finalize the Constitution. This greatly limited any opportunities for consultation, negotiation or general public participation. The process was based on a 16-point agreement between the parties, which included an eight-state federation but deferred the decision regarding federal boundaries to a

post-promulgation process (Shakya 2015). When the Supreme Court ruled that the Constitution had to define the federal map, the parties released a map of six states, which was later increased to seven following significant protests in the western part of the country. As the delineation made it unlikely that any state could be controlled by a Madhesi majority—a key demand of most Madhesi parties and movements—protests continued to intensify throughout the second half of the year.

Forces and mechanisms

To a significant extent, the upstream constraints exerted on CA-II in passing the new Constitution in 2015 were rooted in the experience of the first Constituent Assembly (CA-I, 2008–12). For example, there were two separate convening processes: the convening of the constitution-building process as a whole, and the convening of CA-II.

The convener of the constitution-building process as a whole was, arguably, the Comprehensive Peace Agreement (CPA) signed on 21 November 2006—which ended the decade-long violent Maoist-led insurgency—rather than any specific individual, group or institution.[3] As such, it is important to understand the constitution-building and peace processes as belonging to the same overall political settlement. A broad range of groups signed up as parties to the CPA: on one side, there was the seven-party alliance in government (including the NC and CPN-UML), while on the other was the Maoist leadership, which incorporated the Madhesi and Dalit groups' demands for inclusion. The constitution-building process was therefore constrained by the peace process in the sense that it needed to reflect a consensus on the restructuring of the state along more inclusive lines or risk a return to conflict. Given that CA-II was established due to the failure of CA-I to produce a constitution, there was significant pressure on CA-II to deliver a draft without significant further delay.

With regards to upstream constraints, due to the selection of CA-II, the composition of its membership was determined by the 2013 elections, which saw a significant swing back to the larger political parties—with 601 seats in Parliament, the NC won a 196-seat plurality, while the CPN–UML followed closely behind with 175 seats. This meant that two parties dominated by a CHHE leadership could form a coalition government (albeit in an uneasy coalition), and that they would only require a few smaller parties to join them to form a constitution-making majority of 401. With regards to downstream constraints, CA-II had the power to adopt the Constitution by a two-thirds majority without recourse to a referendum. However, regular strikes, protests and popular agitation outside the assembly from Madhesi, Maoist and other

groups served as a reminder that any constitution would need to respond to their long-articulated demands.

Thus, while the events that gave rise to the constitution-making process as a whole, as well as the regular street protests, clearly predicated peace and acceptance of the constitution as part of a consensus-driven process and an inclusive new political order, the convening and selection of CA-II constrained it in the opposite direction, pushing the NC and CPN–UML to drive the process, and to do so without significant delay. Substantively, these constraints affected a number of issues—from women's rights to the system of government—but perhaps the most contentious was the number and boundaries of substates. The difference in negotiating positions can be roughly summarized as follows.

On the one hand, disadvantaged ethnic groups, particularly Madhesi groups, argued for a larger number of states, which would be defined along ethnic lines and would include one state in the Terai plain region, which spans the southern part of the country (and where Madhesis would form a majority). On the other hand, the CHHE groups sought to limit the number of states, use economic or geographic factors for their delineation, and divide the Terai vertically rather than horizontally. The combined upstream constraints caused by the selection of CA-II (which resulted in a CHHE majority), and the need to produce a constitution without delay, provided upstream constraints tending towards the latter position. At the same time, the need to produce a constitution that would meet the expectations of the mobilized masses outside CA-II, as well as the international community, produced informal downstream constraints in the opposite direction.

Denouement

Regardless of the demand for CA-II to produce a constitution quickly, contention over the number and boundaries of states—as well as the electoral system, the system of government and the question of whether to include a specialized constitutional court—continued unresolved into 2015. However, the immense physical destruction caused by the April 2015 earthquake also had a significant effect in terms of tipping the balance between the competing constraints discussed above.

Generally speaking, a national crisis is likely to lead to more cooperative bargaining (Negretto 2013), but in the case of Nepal the earthquake had the opposite effect, for two reasons. First, it meant that donors—already fatigued with delays in the political transition process—had to reallocate funds to humanitarian aid. This loosened the external donor-driven constraint for

consensus over the constitutional order in favour of a resolution to the long-delayed constitution-making process, thus driving the government to complete the constitution to earn support from donors reluctant to trust them with significant funds for disaster relief. Second, the government's immediate reaction to the earthquake was heavily criticized as being woefully ineffectual and inadequate (ICG 2016a). Thus, under fire from all sides, the government sought to deliver on the constitution in order to regain public support, and to avoid taking further blame for delays that it saw as being caused by intransigence among the Madhesi parties, despite the democratic mandate given to the government in the 2013 elections.

In June, the four largest parties—the NC, the CPN–UML, the Unified Communist Party of Nepal–Maoist (UCPN–M) and the MJF–D—announced a 16-point agreement that would pave the way for the final constitutional text.[4] Included in this pact was an agreement on a federal set-up of eight states, the boundaries of which would be decided *after* the promulgation of the Constitution, by a two-thirds majority of Parliament and following recommendations from a federal commission. Following a Supreme Court ruling that any new constitution must define the state boundaries, the parties to the 16-point agreement released a map of six states (with no explanation of why this was reduced from eight) that divided the Terai region across all six states in such a way that the Madhesi population would not have a majority in any state.

Almost immediately, protests erupted in the Terai, resulting in the deaths of both protestors and policemen, a national economic crisis caused by a blockade of imports from bordering India, and the boycotting of CA-II by all Madhesi parties—including the MJF–D, which was party to the 16-point agreement (ICG 2016a). Rather than seek to mollify the protestors, the four-party government coalition added fuel to the fire by creating a seventh state in the far west of the country to respond to the demands of people living in the hill regions, while continuing to ignore the demands of those in the Terai. This sparked violent confrontations between the police and Tharu groups residing in the western plains around Tikapur, which resulted in the deaths of seven police officers and the infant child of one officer, and caused the deployment of the army for the first time since the end of the Maoist uprising (ICG 2016a).

The NC and the CPN–UML refused to modify their positions and pushed ahead with the passage of the Constitution on 20 September. They could point to the fact that a democratically elected constituent assembly had voted for their draft by an overwhelming majority of 89 per cent. Despite this, Madhesi groups and the broader population in the Terai continued to voice

their dissent through protests and the import blockade. This dissonance between the political landscape and the societal expression of group identity has led to an impasse, but given the instability inherent in Nepali politics, and the current unlikely coalition between the CPN–UML and the UCPN–M, further developments are certainly likely. The only question is in which direction these developments will take Nepal.

The constitution-building process in Sri Lanka

Background

In late 2014, Sri Lankan President Mahinda Rajapaksa announced that early presidential elections would be held in January 2015, and that he would run for a third term, a situation made possible by the 2010 repeal of term limits in the controversial 18th amendment to the country's 1978 Constitution.[5] If the call for early elections was meant to destabilize the opposition and pave the way for a straightforward extension of Rajapaksa's rule, it did not turn out as planned.

In November 2014 the United National Party (UNP) announced it would support Maithripala Sirisena as the opposition's candidate to challenge Rajapaksa. Sirisena was formerly the general secretary of Rajapaksa's Sri Lanka Freedom Party (SLFP) and the health minister in Rajapaksa's government, and his defection to the opposition was followed by several other high-profile SLFP members. Sirisena won the January 2015 elections after a campaign in which he promised to reform the Constitution, including the abolition of the executive presidency—an institution of the 1978 Constitution that had not been present in Sri Lanka's previous parliamentary constitutional history (Welikala 2015a). On taking office, Sirisena appointed Ranil Wickremesinghe, then-leader of the UNP, as prime minister of a minority government.

The fragile Sirisena–Wickremesinghe coalition passed a constitutional amendment in April 2015 that stripped away some of the hyper-presidential excesses grafted onto the Constitution by the 18th amendment under Rajapaksa. The April 2015 amendment reinstated term limits and removed the president's discretionary power to dissolve Parliament. Sirisena managed to cobble together enough SLFP votes to reach a two-thirds majority—which, given the historical enmity between Sri Lanka's two major opposing parties, was no small achievement. However, in order to progress with further constitutional reforms, it was felt the government needed to turn to the electorate for a fresh mandate; parliamentary elections were held in August 2015 (Welikala 2015b).

The unitary state

Tamil nationalist aspirations for increased autonomy extend back to at least the 19th century, if not earlier, but they were significantly amplified as a consistent political demand with the passage of the Sinhala Only Act of 1956, which proclaimed Sinhalese as the country's only official language.[6] Since that time, a Sinhala nationalist political majority has, with only sporadic attempts at finding a political solution, consistently ignored claims for increased autonomy from the Tamil minority, including in constitution-building processes in 1972 and 1978. In 1972, the Constitution proclaimed Sri Lanka to be a 'unitary state', thus explicitly denying any claims to plurinationalism and divided spheres of sovereignty. This clause was reproduced in the 1978 Constitution and was also included in a list of entrenched articles whose amendment would require a referendum (Edrisinha 2015).

As Tamil demands continued to fall on deaf ears, they became substantively stronger—shifting from greater power sharing at the centre to devolution, federalism and finally secession—and more militant, until the civil war that ended in 2009 with the defeat of the Liberation Tigers of Tamil Eelam by government forces. Since that time, the subject of a political solution to deal with the continuing disenchantment of much of the Tamil population with their current constitutional lot has not been broached.

The current constitution-making process: forces and mechanisms

In the elections of August 2015, Sirisena's electoral campaign platform made it clear that Sri Lanka was electing a Parliament to oversee further constitutional reforms, and that these would continue the move away from an executive presidency started by the 19th amendment and engage in the long-standing 'national problem' (i.e. the question of territorial devolution of power). Given this, political parties included in their campaign platforms their positions on constitutional reform. Under the heading 'Ensuring Freedom for All', the UNP-led coalition, the United National Front for Good Governance (UNFGG), pledged to pursue a new constitution including measures for 'maximum devolution within a unitary state' (Welikala 2015c). The reaffirmation of the unitary state sent a clear signal to reassure Sinhala–Buddhist nationalists that their vision of Sri Lanka as a Sinhala nation state would not be changed. At the same time, the Tamil National Alliance (TNA), which won more seats in the elections than any other Tamil party, pledged to pursue 'a federal power-sharing arrangement based on the recognition of the Tamil people's right to self-determination', at least partly in order to subdue criticism from smaller, but more vocally nationalist, Tamil parties (ICG 2016b: 2).

Elected on the basis of these campaign promises, the new 'constitutional assembly' is therefore subject to clashing upstream constraints in terms of conflicting mandates that are made all the more difficult to reconcile given the potential spoiler role of the extreme wings on both sides. Yet the fact that the Constitution must be passed by referendum acts as a looming downstream constraint on the actions of all negotiating parties.

The UNFGG won a plurality in the elections, gaining 106 of a total of 225 seats. The United People's Freedom Alliance (UPFA), a coalition led by Sirisena and the SLFP, followed with 95 seats. Soon after the elections the SLFP and UNP signed a coalition agreement to form a national government for a period of two years, with Wickremesinghe continuing as prime minister. As part of the agreement, they agreed to work together on issues of constitutional reform—while conspicuously avoiding any specifics on the 'unitary versus federal' issue—and stated that Parliament would negotiate and draft the new text by transforming itself into a constitutional assembly (Welikala 2015d). With the two largest parties joining forces in government, the TNA—the third-largest party in Parliament—was recognized as the official parliamentary opposition. This has allowed for important and regular channels of dialogue, for example between the TNA leader, R. Sampanthan, and Prime Minister Wickremesinghe, and through the TNA's automatic ex officio inclusion in the Steering Committee of the Constitutional Assembly.

While the Constitutional Assembly is now considering issues ranging across the entire breadth of the constitutional agenda, including the executive presidency, the electoral system, the Bill of Rights and judicial review, this chapter focuses on the general issue of the devolution of power. Negotiating a path for consensus among all parties on this issue within the upstream and downstream constraints described briefly above will require parties to find the smallest of overlaps between multiple Venn diagram circles.

On the Tamil side, Sampanthan and the TNA must walk a precarious political tightrope: the devolution deal must offer enough to the Tamil population to be seen as a success, but he cannot afford to be too vocal in his demands, which Sinhala nationalists could use to validate their position that any dialogue regarding devolution is a recipe for instability. Indeed, the TNA has continued to assuage government concerns by emphasizing the party's rejection of talk of separatism, stressing instead a common goal of a 'united and undivided' Sri Lanka (ICG 2016b: 22).

On the government side, the first struggle is within the SLFP. First, former President Rajapaksa seeks to maximize the temptation for defections from Sirisena by labelling cross-aisle collaboration with the party's historic rivals—

the UNP—and open negotiations with Tamil leaders as signs of weakness, in contrast to his own strong form of leadership. Second, the UNP–SLFP coalition must find sufficient space for consensus with the TNA, while not conceding so much ground that Sinhala nationalist rhetoric will drown the proposal at referendum. Even deleting the term 'unitary state' from article 6 of the Constitution, regardless of any substantive changes in the constitutional allocation of public power, may be sufficient for Rajapaksa and his allies to mobilize enough voters to ensure the referendum fails.

Another constraining circle in this Venn diagram of constitutional preferences is provided by Muslims in the Eastern province, who make up some 40 per cent of the population. Their support of the constitutional solution will be critical, and must assuage their concerns that any devolution of power to Tamils in the Northern and Eastern provinces could harm the status of Muslims or dilute their political influence. This factor is particularly relevant when negotiating any potential merger of the Northern and Eastern provinces, which has been a long-standing demand of Tamil nationalists, who see the whole region as the Tamil homeland (ICG 2016b: 2) and recognize the increased political power that such a merger would provide.Such a merger would greatly dilute the political voice of the Muslim population and would therefore be likely to swing a significant number of Muslim votes against the proposed constitution.

Finally, the potential downstream constraint of the provincial councils must also be considered. Under the current Constitution, provincial councils must be consulted on any legislation that affects their powers. While the Constitutional Assembly will be able to overrule any objections by passing the bill with a two-thirds supermajority, the political cost of overruling provincial councils and seeing their grievances aired in public will certainly affect votes at the eventual referendum. As Welikala notes, the role of the provincial councils is further complicated by the political landscape: some councils are under the control of SLFP majorities (which may not be in tune with President Sirisena's leadership), while others, most problematically the Northern Provincial Council, fall 'under the sway' of a Tamil nationalist leader who may use this opportunity to pick a fight with the TNA by rejecting its proposed constitutional settlement (Welikala 2015d).

Threading the political needle to find a deal among these competing interests and constraints should, however, be made easier by the broad scope of possible issues on the reform agenda. Accompanying a package of devolutionary reform with the abolition—or at least a very significant disempowerment—of the executive presidency, along with increased representation at the centre through the establishment of a second chamber and reformed electoral laws,

may be enough to allow Tamil leaders to convince their constituents that this deal is too good to turn down, and unlikely to be made available again in the near future. However, whether such a proposal will be possible from the government side will—as discussed above—require a great deal of intricate political manoeuvring in order to bring on board the SLFP and negate the influence of Sinhala nationalist propaganda during the referendum process.

Cognizant of the fragility of the SLFP–UNP coalition, as well as SLFP party discipline under Sirisena and the TNA's position in seeking compromise, and understanding that the alignment of the current political constellation with three party leaders keen on finding a consensus deal is unlikely to recur in the near future, the government has set an ambitious timeline for the constitution-building process. This timeline will, no doubt, be subject to delays, but the hope is that it will concentrate energies on finding a deal before one or more of the components of the political alliance falls apart.

Conclusion

Events in Nepal and Sri Lanka reiterate the complicated politics of constitution-building in plurinational contexts. Designing a process through which societal interests can be channelled into political negotiation becomes increasingly difficult when segments of society do not feel that their voice can be accurately represented by the mere weight of population, but rather see themselves as equal partners in the constitution-building process. Further, traditional protections of individual rights as a means to guard against the tyranny of the majority are not sufficient in the plurinational context, when issues of recognition and the very identity of the state are at stake. As a result of this incongruity between the composition of a constitution-making body based on a representation of the population at large (as a collection of individuals) and the self-identification of segments of that population as 'a people', the constitution that *can* be created by the constitution-making body is often not the constitution that *should* be made, in terms of providing a stable, long-term constitutional settlement.

Notes

1 Unless specified otherwise, in this chapter 'federal' refers to a general concept of shared rule and self-rule that can take many different institutional forms, including special autonomy, federalism, devolution or decentralization.
2 Constitution of Nepal 2015 (official English translation by the Ministry of Law, Justice and Parliamentary Affairs of Nepal), <http://www.constitutionnet.org/files/nepal_constituton_2015_final_english_version_23_sep_2015.pdf>.
3 The full text of the 2006 CPA is available on the United Nations' Peacemaker website, <http://peacemaker.un.org/nepal-comprehensiveagreement2006>.
4 For an unofficial translation of the 16-point agreement, see <http://www.satp.org/satporgtp/countries/nepal/document/papers/16-point_Agreement.htm>.
5 Constitution of the Democratic Socialist Republic of Sri Lanka (as amended up to 15 May 2015), <https://www.parliament.lk/files/pdf/constitution.pdf>.
6 Official Language Act (No. 33 of 1956), <http://www.commonlii.org/lk/legis/num_act/ola33o1956180/>.

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4. Between endurance and change in Southeast Asia: the military and constitutional reform in Myanmar and Thailand

4. Between endurance and change in Southeast Asia: the military and constitutional reform in Myanmar and Thailand

Melissa Crouch and Tom Ginsburg

Introduction

Up until the 2000s, patterns of constitution-making in Southeast Asia were influenced by colonialism, communism, revolution and evolution (Tan 2002). Most countries in Southeast Asia originally adopted a constitution after independence from colonial rule from the 1940s to 1960s. Some more recent constitution-making experiences involve the introduction of a new constitutional text.

For example, new constitutions were introduced in Laos (in 1991), Cambodia (1993), Timor Leste (2002), Myanmar (2008) and Vietnam (2013), while Thailand introduced an Interim Constitution in 2014, and a permanent Constitution in 2016. Another frequent trend in constitutional change in Southeast Asia has been a resort to formal constitutional amendment as a mechanism for major constitutional change; the most recent formal amendments were made to constitutions in Indonesia (1999–2002), Brunei (2014), Cambodia (2014), Myanmar (2015) and Singapore (2015).

More broadly, contemporary constitutionalism in Southeast Asia can be characterized as 'genuine', 'communist-socialist' or 'hybrid' (Chen 2014). These classifications adapt and expand on earlier work by Loewenstein (1957) and Sartori (1962) in the context of Asia. The only country in Southeast Asia that Chen classifies as exhibiting genuine constitutionalism is Indonesia (alongside a number of countries in Asia, broadly speaking, including India, South Korea, Hong Kong and Taiwan).

Chen classifies Vietnam (and China) as adhering to communist-socialist constitutionalism. Cambodia, Malaysia, the Philippines, Singapore and Thailand (to which Brunei, Myanmar and Timor Leste could be added) are categorized as hybrid constitutional systems—that is, those in which authoritarian and liberal ideas coexist. Therefore, the study of constitutionalism in Southeast Asia has great potential to expand understandings of hybrid constitutionalism.

This chapter focuses on two major sites of constitutional change in 2015—Myanmar and Thailand, two majority-Buddhist countries in the region. The two countries have somewhat different histories: Myanmar experienced many decades of military-led socialist rule and then direct military rule without a constitution, until the 2008 Constitution ushered in a new quasi-military regime. Thailand's constitutional history has been chequered, to say the least, but has featured regular elections and periods of democratic rule.

The military in both countries sought to maintain and consolidate its role in the constitutional order in 2015. In Myanmar, proposed amendments did not address the reserved powers of the military under the 2008 Constitution. Similarly, in Thailand the military regime seemed intent on consolidating its role as national guarantor, overseeing the latest constitution-making process.

While these are primarily national debates, constitutional developments in the two countries have at times intersected. For example, in mid-2014 the Myanmar Government warned the National League for Democracy (NLD) that its rallies in support of constitutional change must not provoke social unrest, or else this may necessitate a declaration of emergency and military takeover similar to what occurred in Thailand. Government officials in Myanmar used these references to developments in Thailand to engender a sense of instability and fear that a state of emergency might be declared, and allow the military to take control. This incident is a reminder that constitution-making rarely happens in geographic isolation.

The two examples of constitutional change discussed in this chapter in some respects represent opposite extremes in constitutional law. Myanmar is a case of constitutional endurance due to the extreme rigidity of its Constitution, while Thailand's experience illustrates constant change of the constitutional order. The background of each of the respective debates in 2015 is outlined, followed by a discussion of the procedure and processes for change and an analysis of the core constitutional reform issues at stake.

Amending the 2008 Constitution in Myanmar: built to endure

Constitutional developments in Myanmar in 2015 were the result of a process of formal amendment that commenced in 2013 under President Thein Sein (March 2011–March 2016). In order to understand the importance of these developments, the country's formal procedure for constitutional amendment is described, followed by a characterization of the process in the lead-up to 2015, including its ultimate failure to provide genuine forums for

participation. The outcome of the proposals for amendment indicate the deep divisions within Parliament over the question of constitutional reform, as well as Parliament's broader disregard for the courts.

The procedure for formal amendment

The 2008 Constitution was the result of a protracted and heavily restricted drafting process that stretched from 1993 to 2007 (Crouch 2014; Williams 2014).[1] The formal amendment process under the 2008 Constitution is detailed and specific. A proposal to amend the Constitution must be submitted in the form of a bill solely for the purpose of constitutional amendment (section 433). The proposed bill must be supported by at least 20 per cent of all members of the Union Parliament (664 members, including 166 from the military) (section 434). This means that the process of initiating a bill can begin with non-military members of Parliament (MPs), yet ultimate approval requires some level of support from the military.

The Constitution sets out two different levels of amendment, depending on the provision concerned. Both tiers require more than 75 per cent approval in the Union Parliament. Tier 1 is the higher threshold: it requires more than 75 per cent approval in Parliament plus a nationwide referendum with the votes of more than half of those who are eligible to vote (section 436(a)). This approval process applies to most of the provisions on the powers of the government and the military: Chapter I on Basic Principles, Chapter II on State Structures; the qualifications for president and vice president; the formation of all houses of parliament at the national and state/region levels, which ensures protection of the unelected military seats in Parliament; the formation of the Union Government, the National Security Council (the most powerful and nebulous body), and the president's powers over the states/regions and self-administered zones; the hierarchy of the court system; emergency powers; and the amendment provision itself.

Tier 2, in contrast, requires more than 75 per cent of approval of MPs in the Union Parliament (section 436(b)) but no national referendum, which ensures that the military MPs have the final say on these provisions. Section 436(b) covers all sections of the 2008 Constitution other than those specifically mentioned in section 436(a) discussed above. This includes the appointment and impeachment of MPs, the process of passing legislation, the process of forming parliamentary committees, the rights of citizens and remedies for protecting these rights, and elections. The clear inference of this two-tier structure of constitutional amendment is that the power of the military should not be subject to change, while individual rights are subject to change by Parliament and the military.

Background to the 2015 constitutional amendment proposals

The bills for constitutional amendment that were deliberated by Parliament in mid-2015 were the culmination of the momentum for reform since 2011 and the calls for a formal process of constitutional change that commenced in 2013. The 2008 Constitution came into force in 2011 (see Box 4.1 for a timeline of events). It was not until mid-2012 that the NLD, one of the main proponents of democratic change, agreed to participate in the by-election and won every seat that it contested (43 seats). Calls for constitutional amendment from the NLD and the 88 Generation led to an official process of formal amendment, which was ultimately marred by a lack of genuine participation.

The process commenced in February 2013, when President Thein Sein announced that a Constitutional Review Committee would be established. By July 2013 the Union Parliament had approved the committee (Notification 41/2013). According to its terms of reference, the committee was responsible for proposing constitutional amendments to promote peace, national unity and democratic reforms in Myanmar. This decision was welcomed with enthusiasm, although there was little debate about whether the existing Parliament was the most appropriate body to be undertaking the review process. The committee consisted of 109 existing MPs. Most were from the Union Solidarity and Development Party (USDP), the military or ethnic-based political parties, and were elected in the 2010 elections, which were not considered to be free and fair. The participation of these members raised legitimacy concerns about the process. The committee also included seven NLD members elected in the 2012 by-election, which was considered to be free and fair, although Nobel Peace Prize Laureate Daw Aung San Suu Kyi was not a member of the committee.

By October 2013, a shift to allow some form of public participation appeared to take place, as the committee issued an official call for submissions (Order No 1/2013). This provided room for public engagement and generated public debate and constitutional campaigns across the country as political parties, social organizations, ethnic groups, and religious groups held discussions and finalized submissions to the committee. The committee received a large number of submissions from a wide range of groups and individuals. Yet how (or whether) the committee assessed and reviewed these submissions remains unclear.

In January 2014 the committee submitted its report to Parliament. The report, however, was far from what was expected. The committee had the mandate to make recommendations to Parliament, yet it avoided this responsibility in its report. This was the first major sign that the amendment process was

Box 4.1. Timeline of constitutional events in Myanmar, 2008–16

May 2008	Junta announces Constitution has been approved at a national referendum
March 2011	The new Parliament commences under the 2008 Constitution
February 2013	President Thein Sein announces a constitutional amendment process
July 2013	Parliament approves Constitutional Review Joint Committee
January 2014	First report of the Committee made public
February 2014	Second Implementation Committee constituted
June 2015	Two bills proposed in Parliament for constitutional change. All proposals failed to receive support, with the exception of changes to Schedules 2 and 5.
2016	New NLD government takes office

not going to be as genuine or inclusive as had been hoped. The report set out the number of submissions that sought to amend different provisions of the Constitution, but it failed to explain in detail what the proposals for amendment were. The report did not offer any of its own suggestions or recommendations for reform. It collated data on the number of provisions that were suggested to be amended and those that should stay the same. It did not reach any conclusions on which provisions should be amended, although it was emphatic on which should not be amended.

The report and information on submissions received was published in various forms, such as in press releases in the government-run *New Light of Myanmar* newspaper (see Box 4.2). The press release is silent on what suggestions or recommendations were made, and only lists the total number of submissions received in relation to each chapter of the 2008 Constitution.

The most controversial aspect of the report was its reference to three key aspects of the Constitution that should not be amended, based on what it claims to have been a petition signed by 106,102 people, presumably from the USDP. These three aspects are the role of the military in politics, the presidential requirements of sections 59f and 436 on the amendment process. Under section 59f, a person whose partner or children hold foreign citizenship is prohibited from taking office as president, and so this is perceived to bar Daw Aung San Suu Kyi from this role because her children are British nationals.

These proposals were met with widespread criticism and were perceived as a direct attempt to preserve military control. The fact that the petition was signed by unidentified people was seen as an underhanded tactic, and pro-democracy groups argued that it was unfair that they had not been told that petitions could be submitted to the committee.

In the second formal stage, in February 2014, Parliament established an Implementation Committee that was chaired by USDP member U Nanda Kyaw Swa, deputy speaker of the Pyithu Hluttaw, or lower house (Order No 20/2014). The committee consisted of 31 MPs, including seven from the military—far short of the requirement that at least 20 per cent of MPs are required in order to propose an amendment. As a show of diversity and inclusion, an additional nine honorary members—representing the Chin, Wa, Karen, Kachin, Palaung, Inn and Danu ethnic groups—were permitted to attend the meetings but were not allowed to vote on any decisions.

The Implementation Committee was responsible for reviewing the report submitted by the first Committee, which lacked legitimacy. By this stage the process had clearly lost all legitimacy in the eyes of the public. The second report issued by the Implementation Committee did not generate as much interest or recognition, and many civil society actors were disillusioned by the process.

Proposals for constitutional change

Despite this loss of legitimacy, two bills for constitutional amendment were proposed in Parliament in June 2015. The first bill, dated 11 June 2015 and published in *Myanma Alin*, concerned amendments under section 436a, or Tier 1, which require a nationwide referendum. This first proposal contained six issues that were voted on by MPs (Office of the President of Myanmar 2015). The only amendment that was approved was to change the wording of section 59(d) on presidential requirements. Under this provision, a person nominated as a presidential candidate must be familiar with military affairs. The proposal was to change the word *sit-ye* ('military') to *kagwe-ye* ('defence'), and this was approved by a vote of 88 per cent of MPs, but the referendum required to enact the amendment was never held. The other five proposals only received 58 to 61 per cent support, which failed to meet the 75 per cent threshold. The most significant of these failed proposals was the suggestion to amend section 436(a) to reduce the approval threshold to 70 per cent.

The second bill fell under Tier 2, and thus did not require a referendum. The bill was again submitted to Parliament by a member of the USDP, U Thein Zaw. It contained three main elements. First, the proposed amendments would

Box 4.2. Joint-Committee for Reviewing the Constitution of Republic of the Union of Myanmar Press Release (4/2013)

1. The Joint-committee for Reviewing the Constitution of Republic of the Union of Myanmar issued Press Release (2/2013) and invited legislative, executive and judicial pillars to send reviews and suggestions on the Constitution not later than 31 December 2013.

2. According to the press release, the joint-committee received 28,247 letters of suggestion till 4.30 pm on 31 December 2013.

3. The following are letters of suggestion on respective chapters received from departments, associations, political parties and persons up to 31 December 2013.

(a) 140,624 suggested points for Chapter (1)
(b) 100 suggested points for Chapter (2)
(c) 3,369 suggested points for Chapter (3)
(d) 24,398 suggested points for Chapter (4)
(e) 10,783 suggested points for Chapter (5)
(f) 469 suggested points for Chapter (6)
(g) 7,242 suggested points for Chapter (7)
(h) 2,077 suggested points for Chapter (8)
(i) 213 suggested points for Chapter (9)
(j) 43 suggested points for Chapter (10)
(k) 338 suggested points for Chapter (11)
(l) 105,233 suggested points for Chapter (12)
(m) 29 suggested points for Chapter (13)
(n) 59 suggested points for Chapter (14)
(o) 26 suggested points for Chapter (15)
(p) 81 suggested points for Table (1)
(q) 78 suggested points for Table (2)
(r) 11 suggested points for Table (3)
(s) Five suggested points for Table (4)
(t) 26 suggested points for Table (5)
(u) 27,906 special suggested points/letters for amending the Constitution

4. A total of 323,110 suggested points have been received.

Source: Joint-committee for Reviewing the Constitution of Republic of the Union of Myanmar, Press Release (4/2013), ‹http://www.myanmargeneva.org/pressrelease/constitutional%20review%20committee.pdf›, as published in *The New Light of Myanmar*, 1 January 2014, p. 8.

have *reduced* judicial independence, despite rhetoric to the contrary (Crouch forthcoming). The appointment process for judges of the Supreme Court was to be amended so that Parliament would have the power to select the chief justice and two vice justices, with nominations by the president and the speakers of both houses of parliament. In addition, the tenure of all judges of the Supreme Court and State/Regional High Courts was to be reduced to a five-year term, to coincide with the term of the government. The bill also proposed enhancing Parliament's role in appointing the chief member of the Constitutional Tribunal (although Parliament had already amended the Constitutional Tribunal Law to this effect). It also sought to downgrade the Tribunal's decisions to declaratory (non-binding) status unless an application was submitted by the Supreme Court, in which case the decisions were still binding.

Second, the proposals were designed to reduce presidential power and increase parliamentary power, due to concerns since 2011 that the president's office had disproportionately more power than Parliament. There had been clashes on several occasions when Parliament disagreed with decisions or actions taken by the president, and vice versa, related to the president's authority to appoint key officials. It also concerned the stand-off between the Constitutional Tribunal, Parliament and the president's office in 2012, which led to the resignation of the entire bench of the tribunal. The constitutional amendment proposal sought to address Parliament's concerns by granting both houses of parliament the power, along with the president, to appoint judges, including the chief member of the Constitutional Tribunal.

Third, the proposal sought to decentralize power within the existing legal framework. It suggested changing from a system in which the president appoints the chief minister of each state or region to one in which chief ministers are appointed by the approval of a majority of the relevant state or regional lower house.

A large number of other proposals were also included in the two bills. However, the only proposal that was successful related to the division of legislative power and taxation power (Law No. 45/2015). The proposal added a longer list of powers to schedules 2 and 5 of the 2008 Constitution, which would allow the 14 states and regions to collect income tax, customs duties and stamp duty, and levies on services (tourism, hotels, private schools and private hospitals) and resources including oil, gas, mining and gems. This issue arose because states and regions have considerable autonomy in legislation and taxation matters.

Since 2011, this has raised many questions as the new state and regional parliaments began to assert their power and test the boundaries of their

authority. The proposal was also in response to a case heard in the Constitutional Tribunal on the issue of state legislative and taxation powers, in which the tribunal declined to interpret the legislative and taxation powers of the states and regions; it suggested this is a matter to be negotiated with the central government (Crouch forthcoming).

In short, the constitutional amendments suggest that only the Union Parliament has the ability to expand the list of matters under state control. The tribunal has little power to interpret schedules 2 and 5. Going forward, this could lead to a difficult situation in which, rather than allowing the tribunal to fulfil its mandate to interpret the Constitution, any new issue that arises that is not directly mentioned in the schedules may require a formal constitutional amendment. In short, the schedule lists narrowly circumscribe the scope of legislative power.

In late 2015, the constitutional amendment process became second-rate news as election fever took hold. With the majority of seats won by the NLD, the new government that took office in 2016 will undoubtedly continue to push for further constitutional change. While the NLD will be able to pass any laws that it chooses, it cannot pass a proposal for constitutional amendment without the agreement of at least some members of the military.

Drafting a new constitution in Thailand: built for change

Oscillating between military and civilian rule

Thailand's political history is cyclical, as it has oscillated between military and civilian governments since the establishment of the constitutional monarchy in 1932. Each of these changes in power has been accompanied by the adoption of a new constitution, so, depending on how one counts, the current draft will be Thailand's twenty-first if adopted. The most recent iteration in the cycle was touched off by the May 2014 military coup that deposed Prime Minister Yingluck Shinawatra and her Puea Thai Party government (see Box 4.3 for a timeline of events).

Since then the military junta, under the name of the National Council for Peace and Order (NCPO), has followed the script of earlier coup makers by promulgating an Interim Constitution and promising a return to constitutional democracy. The centrepiece of this interim period has been the drafting of a new constitution, which continues the pattern of looking for a post-political basis of legitimacy for the country (Ginsburg 2009). This constitution-making process is taking place in an environment in which public discourse evidences a deep distrust of elected officials and political parties.

Box 4.1. Timeline of constitutional events in Thailand, 2014–16

May 2014	Military coup, martial law
July 2014	Interim Constitution promulgated
April 2015	Draft constitution released, but heavily criticized
August 2015	Final draft released
September 2015	Draft rejected; new drafting commission formed
March 2016	New draft constitution released
August 2016	Constitution adopted by referendum

On 22 July 2014, the Interim Constitution was promulgated by King Bhumibol, an indication of the role of the monarchy in Thai politics. The Interim Constitution lays out the drafting process of a permanent constitution in articles 32–35. It requires the formation of an appointed Constitutional Drafting Committee of 36 members (who cannot be politicians or political party members), 20 of whom are designated by the National Reform Council (the secretariat of the House of Representatives), and five each nominated by the National Legislative Assembly, the Council of Ministers and the NCPO. The NCPO has the authority to nominate the chairperson of the Constitutional Drafting Committee.

The Constitutional Drafting Committee, headed by the noted legal scholar Borwornsak Kuwanon, completed the first draft of a new constitution on 17 April 2015 (Tonsakulrungruang 2015).[2] Prime Minister and junta leader Prayuth Chan-ocha expressed optimism about the document, arguing that it would 'effectively resolve' the country's protracted political crisis (Parameswaran 2015). The Constitutional Drafting Committee hoped that the bill would guard against 'parliamentary dictatorship' (Niyomyat 2015). However, many analysts found the first draft highly fraught in several respects.

Controversy over the 2015 draft constitution

One of the most controversial clauses was a set of options to select the prime minister that seemed to allow the possibility of an unelected individual taking the post. Some saw this as a ploy by General Prayuth Chan-ocha, the current Prime Minister, to retain power (BBC News 2015). At a minimum, as constitutional law scholar Khemthong Tonsakulrungruang noted (2015), this would institutionalize the apolitical 'middleman' that has historically come in to resolve political deadlock in Thailand, whether it be the monarch, the Privy Council or, more recently, the military.

Another feature of the draft was immunity for the military generals involved in the May 2014 coup. It also featured a Senate that was only partly elected: of the 200 Senate seats, 77 were directly elected at the provincial level. The rest would be non-elected members, the usual hallmark of a Thai constitution produced by a military government. All of these characteristics placed it squarely within the country's constitutional tradition.

The draft also contained innovations, especially a heavy moralistic ethos and a new institution, the National Virtue Assembly (translated in the draft as 'National Moral Assembly', see article 74). The moralism reflects broader regime practice: General Prayuth has promulgated 12 core 'Thai values' that are now taught in schools. Constitutional rhetoric seeks to ensure that 'good people' are in control of government. According to Tonsakulrungruang (2015), a 'good person' in this context means 'one who is ethical and free from political influence'. McCargo (2016) noted that the rhetoric reflects 'a quest for a system in which benevolent and morally upstanding elites are able to exercise very substantive control and jurisdiction over what's going on in the society'.

Once finalized in late August 2015, the draft was sent to the National Reform Council (NRC) for adoption. The NRC rejected the draft constitution on 6 September, by a vote of 135 to 105, which surprised observers. While it is not clear why the council rejected the draft, some observers noted that elements of the military changed their views on it and lobbied for its rejection (McCargo 2015). Whether it did so out of concern for democratic criticism or because the document was insufficiently authoritarian is unclear, but there is some clue in subsequent developments.

As stipulated in the Interim Constitution, the NRC was disbanded after rejecting the draft and a new 21-member Constitution Drafting Committee (CDC) was convened. Meechai Ruchupan replaced Bowornsak as the head of the new committee, and a National Reform Steering Assembly was appointed to take over the role of the now-defunct NRC. While the Interim Constitution called for the creation of the NRC, Prime Minister Prayuth Chan-ocha simply appointed the new Steering Assembly in the absence of any provision calling for a new NRC. Media coverage referred to its goal of avoiding the 'mistakes' of the NRC, which presumably included genuine deliberation on the draft, along with its ultimate rejection. This suggests that the current process may be more effectively managed by the military.

Beyond 2015

The new CDC issued another draft constitution in late January 2016; a final version was released in March, to be put to a public referendum in early

August (Lefevre and Thepgumpanat 2016). Public discussion was highly constrained by government repression of 'criticism' of the draft, but on 7 August the referendum approved the Constitution with 61 per cent of voters in favour. Turnout was relatively low, at 55 per cent. The new Constitution is less democratic than the prior draft in several ways: it moves to an entirely unelected Senate, and allows the junta and its institutions to remain in place until the appointment of a new cabinet, giving it de facto approval over the formation of the first elected government. In addition, there is a long list of reforms that will constrain the government going forward. It also grants the Constitutional Court wider powers (Mérieau 2016). One notable difference is that the National Virtue Assembly is absent from the new draft. Nevertheless, there is still the possibility of an unelected prime minister.

Finally, reflecting a global trend towards the interaction of religion and constitutional form, Buddhist-majority countries such as Thailand have seen a rise in demands for state protection of the dominant faith (Schonthal 2016a; 2016b; Schonthal and Ginsburg 2016). In 2016, a movement of monks agitated to make Buddhism the state religion. This would be an expansion of the traditional formula of Thailand's constitutions, which have required the king to be a Buddhist, and obligated the state to 'patronise and protect Buddhism' while preserving freedom of worship in general. The precise formula of (and justification for) Buddhism's special treatment changes with each document. The 2007 Constitution described Buddhism as 'the religion observed by most Thais for a long period of time' to justify state patronage. Arguably, the tone of the language privileging Buddhism has been firmer under periods of military rule than civilian rule, and the movement towards a state religion is a consolidation of the maximalist position.

The 2016 Constitution goes a step further than past constitutions: while still acknowledging religious freedom, it also obligates the state to protect Buddhism and take steps to prevent its desecration (Tonsakulrungruang 2016). How these two principles of religious freedom and patronage will be reconciled in practice may be up to judicial interpretation.

Conclusion

Myanmar and Thailand represent opposite ends of the spectrum of constitutional endurance. The 2008 Constitution of Myanmar is clearly intended to endure, and yet its longevity is premised on the idea that the military is central to governance and the political order. In Thailand, by contrast, constitutional oscillation is the norm, but the military also seems to be seeking to institutionalize its guardian role. In this regard, in both

countries the military and its interests are central to the issue of constitutional reform. However, the military is not monolithic in either country, and in Thailand the rejection of the first draft of the permanent constitution shows there is disagreement even *within* the military regime about the proper way to move forward.

In both countries the military has asserted its role as a key actor in the process of constitutional reform. In Myanmar, the approval of military MPs is required for any constitutional amendment to be passed, while in Thailand the military regime is leading the constitution-making process. This military influence affirms previous observations that the experience of constitution-making across Asia has been marked by an absence of popular participation in constitutional change (Blount and Ginsburg 2014). While some efforts were made to receive suggestions about amending Myanmar's 2008 Constitution, there was little transparency in the process, and no evidence to suggest that these recommendations were considered in the process of drafting proposals for reform. In Thailand, constitution-making takes place in the absence of any substantial public consultation at the front end of the process. While the prospect of a public referendum at the back end of the process provides some constraint, elites seem squarely in control, and indeed are currently attempting to manipulate public discourse in advance of the referendum.

The relationship between Buddhism and the constitution-making process in Thailand is likely to remain an issue in the future. While Myanmar's constitutional amendment process has not yet raised the issue of recognizing Buddhism as the state religion, in 2015 monks influenced the legislative agenda by advocating the passage of four laws that they claimed would protect Buddhism (Crouch 2016). In this way, power holders in both Thailand and Myanmar must negotiate how religion is reflected in law and in the constitution, a challenge found in many countries around the world today (Schonthal and Ginsburg 2016).

Constitutional reform will remain on the agenda for both countries in the immediate future. The new NLD-majority government in Myanmar is likely to continue to make efforts towards constitutional change. In Thailand, while a draft constitution was approved at a referendum on 7 August 2016, it is unclear whether this will result in a return to democracy. The constitutional reform processes in both countries suggest that the military is set to maintain a role in constitutional law and politics in the future.

Notes

1 For the full text of Myanmar's 2008 Constitution see <http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf>.

2 An unofficial translation of this version of the draft constitution is available on ConstitutionNet, <http://www.constitutionnet.org/files/thai_constitution_17_april_2015.pdf>.

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5. Reforming centralism and supervision in Armenia and Ukraine

5. Reforming centralism and supervision in Armenia and Ukraine

William Partlett

In 2015, both Armenia and Ukraine initiated major structural changes to their constitutions. In Armenia, reforms were adopted in December 2015 that converted its presidentially dominated system to a parliamentary system. In Ukraine, the most important constitutional reforms—which have not been formally adopted at the time of writing—focused on decentralizing the country's constitutional system (Ash 2016).

The Council of Europe's Venice Commission—officially known as the European Commission for Democracy through Law—has described both sets of constitutional reforms as moving Armenia and Ukraine closer to Western standards of constitutionalism. This chapter seeks to understand the constitutional histories of these two countries to determine how well these changes—both pending and actual—signify a break with the past and a step towards Western constitutionalism. It argues that, despite some halting first steps, these reforms do not yet demonstrate a decisive move towards Western constitutionalism. This conclusion yields some important broader conclusions about formal constitutional change.

Eurasian constitutionalism: centralism and supervision for development

Fully understanding constitutional reform in Armenia and Ukraine requires a deeper look at their constitutional context. Both countries are part of a distinct region referred to here as 'Eurasia'. This region comprises 15 countries that were formerly part of the Russian Empire and the Soviet Union. Their combined population exceeds 300 million people. Prior to the 1990s, formal written constitutions in Eurasia were heavily influenced by the West and therefore featured many of the formal institutions of Western constitutional design. Yet Eurasian discourse envisions constitutions as top-down documents for centralizing and enabling state power in order to achieve specific developmental goals, while Western approaches envision constitutions as

popular documents dividing and limiting government to protect individual rights and avoid tyranny. Eurasian constitutional designers have justified this rejection of Western-style limited constitutional government on the basis that enabling a strong and centralized state is the only way to overcome persistent poverty and territorial insecurity. This discourse has two important consequences for Eurasian constitutional design.

First, formal Eurasian constitution-making has generally been a top-down process that organizes Western institutions in a way that centralizes political power in one sovereign body or individual (Wortman 2011). During Tsarist times, courts and legislative bodies were always subordinated to the tsar; article 1 of Russia's Fundamental Law held that the power of the Tsar was 'unrestrained' (Oda 1999: 385). During Soviet times, the constitution created a constitutional system of legislative supremacy in order to facilitate the rapid and efficient implementation of communist party policy (Partlett 2012).

Second, Eurasian constitutionalism has consistently rejected independent judicial power and has instead given institutions such as prosecutors or legislatures pseudo-judicial powers of supervision (nadzor). This tradition of supervision comes from the sovereign's need to control implementation by the vast governmental apparatus (Raeff 1983: 203). In fact, since Peter the Great, excessive centralism has led to localism and state weakness; supervisory powers have emerged as a method of overcoming this weakness and ensuring top-down, vertical state power.

After the fall of the Soviet Union, Estonia, Latvia and Lithuania adopted new constitutions that overcame these legacies. For the other 12 countries emerging from the Soviet Union, however, these legacies of constitutional centralism and supervision have persisted. For them, the post-communist period was one of economic collapse and state fragmentation. Hyperinflation and unemployment led to a massive economic depression (Reddaway and Glinski 2001). These countries also frequently faced violent separatist movements that posed serious threats to their own territorial integrity.

Amid this turmoil, constitutional designers rejected Western concepts of checks and balances and judicial independence as inadequate to the urgent tasks of rebuilding the economy and securing the territorial integrity of the state. Formal constitutional design across the region was once again aimed at centralizing and concentrating—rather than dividing—state power in order to overcome these challenges (Partlett 2012). New post-communist constitutions therefore afforded vast formal power to presidents—placing them above the system of separated executive, legislative and judicial power, and giving them the authority to coordinate the three branches of government.

This form of centralized presidential power drew on the tradition of viewing a single sovereign as necessary to ensure the unity and territorial integrity of the state. For instance, one of the creators of the 1993 Russian Constitution, Sergei Shakhrai, later commented that it was a myth that the Constitution was drawn from any Western constitutional models, except for perhaps the idea that the Russian president was conceived as the 'Russian equivalent of the British Queen' (Leonova 2012).

At the same time, in order to deal with state collapse, constitutional designers also gave non-judicial institutions supervisory powers to both interfere with and wield judicial power, which has seriously undermined the independence and finality of judicial decisions. For instance, prosecutors across the region retained the power not just to prosecute crime but also to supervise legality. Furthermore, a central core of court leadership (forming what is called the presidium) possesses supervisory power to reopen cases that have been affirmed on appeal. The European Court of Human Rights has held that this judicial supervision undermines the right to a fair trial (Pomeranz 2009). Abuse of prosecutorial supervision was clearly on show when prosecutors were able to use their supervisory review powers to reopen a final decision moving a renowned oligarch's criminal trial to Moscow (Pomeranz 2009).

Armenia and Ukraine—which suffered from both separatism and economic collapse—typified this path. They both adopted constitutions in the mid-1990s with powerful presidents who stood above the three branches of government.[1] These countries were never semi-presidential in the Western sense; instead, they had constitutional systems that were organized under centralized and concentrated presidential power. Second, both countries have a wide array of powerful supervisory institutions that fuse executive, legislative and judicial power: both gave prosecutors the power to supervise investigation and legality (Constitution of the Republic of Armenia 1995, article 103; Constitution of Ukraine 1996, article 121).[1]

Whither Eurasian constitutionalism?

In 2015, both Armenia and Ukraine initiated significant constitutional reform. The Venice Commission commented that Armenia's changes were moving it towards a 'rationalised parliamentary regime' (Venice Commission 2015a: 12). An early report on Ukraine's reforms was similarly positive (Venice Commission 2015b). These positive assessments were echoed at the Venice Commission's 2015 plenary session. The commission's report on Armenia stated that the creation of a parliamentary system in Armenia 'corresponded to the international standards of democracy' (*Armenian Weekly* 2015). Its

report on Ukraine stated that constitutional decentralization was compatible with the European Charter of Local Self-Government and 'deserve[s] support' (Venice Commission 2015c: 7).

This review will examine these claims in light of both countries' Eurasian constitutional legacy. After their failure to converge with Western models in the early post-communist period, do these changes now reflect a significant shift towards the key values underlying Western constitutionalism, including the rule of law and checks and balances? Or do they continue the tradition of adopting the forms and institutions of Western constitutionalism but for different purposes? The answer to this question has important implications for understanding the ongoing development of Eurasian constitutionalism.

Armenia

Armenia completed its two-year process of constitutional reform with the approval of major constitutional changes in a December 2015 referendum. Armenia's reforms were not initiated by a popular revolution or mass perceptions of political corruption. Instead, constitutional change in Armenia was primarily a top-down attempt to change the super-presidential system to a parliamentary system.

Process

Armenia's process solicited very little domestic popular participation. Instead, it followed the Eurasian tradition of a top-down process of presidentially led constitution-making. In September 2013, Armenian President Serzh Sargsyan appointed a nine-person Constitutional Commission without consulting with Parliament or any other body. The commission was headed by the president of the Constitutional Court and largely included pro-Sargsyan loyalists (Galyan 2015). The only participative aspect of the process was the engagement of the commission with a key international body: the Venice Commission. In fact, a key member of the Constitutional Commission, the president of the Constitutional Court, Gagik Harutyunyan, is also a member of the Venice Commission. These ties led to significant collaboration throughout the process, from the announcement of the reforms until the final proposed changes.

The process of constitutional drafting had a strong impact on the outcome. The lack of popular involvement in the reforms has fuelled criticism that the reforms did not seek to introduce a Western-style system of limited parliamentary government, but rather to change the rules of the game to allow the president and his party to remain in power. This perception

motivated significant protests before the December 2015 referendum. In fact, the only real public participation in Armenian constitutional change arrayed itself in opposition to the reforms (Radio Free Europe 2015).Furthermore, Armenia's experience provides an example of the possibilities and perils of international involvement in constitution-making. On the one hand, the Venice Commission was successful in helping to shape the direction of the reforms. Many of the requested changes were made, reinforcing the conclusion that international bodies are increasingly playing an important role in constitution-making. On the other hand, however, this involvement did not allay the opposition's concerns that the reforms were designed to help the president and his party retain power. This provides further evidence that international participation might have the unintended effect of enabling top-down and non-participatory constitution-making.

Substance

The reforms fundamentally converted Armenia from a presidential to a parliamentary system of government. Initially, the commission did not clearly state this direction. In the first significant announcement about the reform in May 2014, the presidentially appointed Commission on Constitutional Reforms announced a series of vaguely worded goals related to reforming the constitution to establish 'effective mechanisms of real appreciation of human rights and freedoms' and 'a working system of checks and balances' (Roudik 2014). As details of the reforms emerged, however, their true direction became clear. A concept paper released in 2014 criticized Armenia's current system for giving the president 'unbalanced' powers and therefore helping to contribute to the excessive 'personification' of state power (Venice Commission 2014a: 15).

The reforms create a parliamentary republic in which the president is reduced to a ceremonial role in comparison with the prime minister (Venice Commission 2015d). In particular, the new constitution shifts key power—particularly over the direction of policy and the military—from the president to the prime minister. The prime minister now leads the Security Council (article 152), controls the armed forces (article 154) and determines 'general guidelines of policy' (article 152). In addition, the president can only issue a decree if it is 'co-signed' by the prime minister (article 138). The Constitution concentrates power in Parliament and goes to great lengths to formally codify electoral rules to ensure that one party has a 'stable parliamentary majority' (article 89(3)). Perhaps most notably, the new rules mandate a run-off election between the two leading parties if a stable parliamentary majority is not reached. These rules draw heavily from the Italian system, which seeks

to ensure large and stable majorities for the top vote-getting party (Venice Commission 2015a: 14).

On the one hand, these reforms potentially roll back the legacies of Eurasian constitutionalism. In particular, the introduction of a parliamentary system might help encourage the growth of parties—a key component of checks and balances in Western-style democracy. The Venice Commission has largely viewed the changes as filling this role, describing the reforms as 'a further important step forward in the transition of Armenia towards democracy' (*EurActive* 2015).

On the other hand, this new system, particularly with its constitutional mandate for a stable parliamentary majority, undermines a key check on a sovereign leader's power: term limits. Term limits have proven to be the most important limitation on super-presidential power across Eurasia. In Russia, President Vladimir Putin stepped down from the presidency in order to respect a constitutional term limit; although he returned to power four years later, this represents the first time that a healthy and powerful leader in the region has voluntarily given up (at least formal) power. Elsewhere, presidents have been forced to absorb the reputational costs of amending constitutions to remove or extend term limits. For instance, Kazakhstan faced fierce criticism by international bodies for changing its Constitution to allow Nazarbaev to be president for life (Freedom House 2008).

The adoption of a parliamentary system, by contrast, removes term limits while still allowing Armenia to appear to be moving towards Western-style constitutionalism. In fact, many commentators have argued that these changes are designed to allow President Sargsyan to avoid stepping down from power in April 2018 when his second term ends. Pointing to the elitist and presidentially dictated process, they argue that this reform was only about adopting the formal outlines of European standards, and that it never represented a commitment to true checks and balances. One commentator has argued that this system could be 'harmful' to democracy because it would lead to 'the entrenchment of a single party and individual' (Galyan 2015).

These criticisms echo prior experience in constitutional practice elsewhere in Eurasia. Moldova's move from super-presidentialism to parliamentarism in 2000 has created a stronger sovereign leader than in the former super-presidential system (Roper 2008: 124). Indeed, leaders in parliamentary systems who have a comfortable majority face very few checks and balances, particularly when courts are weak. In March 2016, the Constitutional Court struck down the parliamentary system and returned Moldova to a popularly elected presidential system in response to popular protests (Calus 2016).

President Sargsyan has used the language of Eurasian constitutionalism to encourage Armenians to vote for the reforms. In particular, he described how a parliamentary system will increase the effectiveness of the state and fulfil developmental goals, stating that '[t]he changes will make cooperation between different branches of government more effective' and also that they will 'facilitate economic development' (*EurActive* 2015).

Thus, although these reforms formally adopt a parliamentary system, they do not signal a clear break with the regional tradition to use constitutions to consolidate state power. Codifying electoral rules that ensure majority-party rule has the potential to further centralize power in one individual—and do very little to break away from the past. Finally, Armenia's reforms do nothing to change its tradition of supervision. Despite the wholesale changes to presidential power, article 175 of the Constitution still gives the prosecutor broad powers to 'supervise' legality by overseeing 'the enforcement of sentences and other coercive measures' as well as allowing broad power to appeal cases, even those to which he or she is not a party.

Ukraine

Ukraine has a long history of excessive centralism. During the Tsarist and Soviet periods, it was ruled by a system that concentrated significant power in the imperial centre (i.e. St. Petersburg and Moscow, respectively). Since 1991, power has been centralized in Kiev. The central government exercised its power through a centrally appointed and vertically integrated system of executive 'state administration' under the control of the president, which relied on centrally allocated resources. This executive power vertical made the regions dependent on the central government for resources and policy priorities; political accountability flowed from the central administrative apparatus rather than from the local electorate.

Several important political events occurred in Ukraine in 2015. After the revolution in Maidan Square in 2014 that led to the removal of President Viktor Yanukovich from power, a number of ambitious political reform projects were undertaken against the background of violent conflict in eastern Ukraine (Ginsburg and Zulueta-Fülscher 2015). Formal constitutional changes to the relationship between central and regional institutions were at the forefront of this political change. These reforms were adopted by the Ukrainian legislature in a first reading, but have not yet been adopted by the required amount in later readings (Carnegie Endowment for International Peace 2016). Demands for decentralization came from two opposite sources. First, the Maidan protestors saw constitutional decentralization as a way to end the cronyism and corruption in Ukrainian politics that stemmed

from excessive centralism (USAID 2014: 3). Underlying many of these demands was a sense that constitutional change was a form of post-colonial rejection of former Russian domination. The second source of demands for decentralization was the new Russia-backed leadership in eastern Ukraine, which wanted to preserve its linguistic and cultural ties with Russia. These demands were codified in point 11 of the 2015 Minsk Agreement, which called for 'constitutional reform' where the 'key element' is 'decentralization'.

Process

Two key elements have characterized the process of constitutional change. First, despite the popular demands for constitutional decentralization, the Ukrainian Government has followed the Eurasian tradition of limiting public involvement in the constitutional drafting and ratification process. The draft provisions were formulated by a Constitutional Commission appointed by the Ukrainian president, Petro Poroshenko. The commission included prominent legal experts and politicians, but no representatives of the rebel-controlled east. Furthermore, the process did not include any referendum on the changes; instead, the reforms required passage in a series of readings by escalating majorities in the legislature. Second, the process was also characterized by strong international influence—wielded primarily through the Venice Commission, which worked closely with the Ukrainian Commission and successfully achieved a number of changes to the text after a series of reports on the deficiencies of the draft amendments.

This process had important impacts on the reforms. First, the failure to include any participation from eastern Ukraine greatly reduced the chances that the reforms would satisfy that region's demands for decentralization. Moreover, the lack of popular input also likely contributed to major demonstrations outside the Ukrainian legislature after it passed the constitutional reforms in its first reading. Perceiving (incorrectly) that the reforms went too far in accommodating the demands of the eastern Ukrainians, demonstrators led a protest that ultimately led to three deaths. Moreover, this lack of public involvement—and the ongoing suspicion that it created—is also likely a factor in continuing problems with legislative ratification of the reforms.

Furthermore, the Venice Commission's active involvement is an important example of a growing trend in the process of constitution-making: influential intervention by non-domestic actors. The Ukrainian example shows how influential this kind of intervention can be: the Constitutional Commission complied with nearly all of the requests for changes made by the Venice Commission. Yet the legislature's failure to ultimately pass the reforms suggests this cooperation cannot replace broad-based buy-in from the populace.

Substance of the reforms

The text of the proposed reforms made significant changes to the relationship between the centre and the periphery in Ukraine. Perhaps the most far-reaching proposed change is that elected representatives at the *hromada* (community), *rayon* (district) and *oblast* (regional) levels of government now control executive power in the regions (articles 140–41). At the lowest (i.e. *hromada*) level of government, Ukrainians will separately elect their executives and legislators. At the district and regional levels, Ukrainians will elect legislators who will then choose their executive. Given their ability to control executive bodies of power, local governments can now carry out their preferred policies. As the Venice Commission stated in its report, this 'shift toward local self-governance deserves to be commended' (Venice Commission 2015b: 4).

These formal constitutional changes, however, are not enough to erase the legacy of centralism. First, additional changes are needed at the statutory level. The reforms afford localities control over land and taxation, but also specify that 'the state' will ensure the 'adequacy of financial resources' and the 'scope of powers of local self-government'. Kiev therefore needs to pass additional laws to ensure that this central control will not keep the regions fiscally dependent on the centre.

Second, important questions remain around the Ukrainian Government's—and particularly the president's—continued supervisory powers over local government. The reforms give the president (head of state) and Council of Ministers (head of the executive branch) the power to interfere in the internal actions of regional governments. In particular, they allow the president to temporarily suspend the heads of local regions and local councils (and to appoint a replacement) if they violate the constitution or threaten Ukraine's territorial integrity, national security or state sovereignty (articles 106 and 144).

Moreover, the constitutional reforms also create 'prefects' that represent the president in the localities (article 118). These prefects are classic supervisory institutions in the Eurasian tradition: they are a renamed version of *predstavniky*—regional representatives that helped presidents build top-down presidential power in the 1990s. They are appointed and dismissed by the president, and have the authority to repeal provisions passed by local government (article 144). Prefects are also broadly charged with coordinating the actions of local government and 'supervising' legality. The combination of judicial and executive powers given to these new institutions has therefore been the most controversial aspect of the reforms, as the prefects represent a

mechanism of continued central control as well as a continued lack of respect for the independence of judicial power (Mendus 2015).

President Poroshenko has repeatedly justified this continuing central control as a response to the crisis in Eastern Ukraine. In particular, he has repeatedly clarified that the amendments do not create a federal state, and describes the continued powers of presidential supervision as an important 'vaccination' against separatism. In this way, he has drawn on a long tradition of constitutional centralism and supervision as a way of preserving the territorial integrity of the state.

These statements demonstrate the continuing power of Eurasian approaches to constitutions amid crisis. With Ukraine facing new challenges to its territorial integrity from Russia and Russian-leaning eastern Ukrainians, constitutional designers have drawn on the centralist legacies of Eurasian constitutionalism—presidential supervision. These legacies in turn undermine the ability to achieve real reform that can satisfy either the eastern Ukrainians or the Maidan supporters. The Venice Commission realized this, but was only able to convince the Constitutional Commission to make a last-minute change that subjects the unilateral review power of the president and prefects to the Constitutional Court (article 144). Given the weakness of the Constitutional Court, however, the extent to which this judicial supervision will control these legacies is uncertain at best. Thus, although the proposed reforms will help Ukraine take some tentative first steps towards building a less centralized system, they do not signal a significant break from its Eurasian past, as the Maidan protestors hoped they would.

The Eurasian legacy has also persisted in the failure to change the broad powers of 'supervision' given to the public prosecutor in sections 3 and 4 of article 121 of the Ukrainian Constitution. Legislative attempts to reform the prosecutor's office have also failed, which many argue is a key factor in slowing Ukraine's reformist path (Coynash 2016).

Conclusion

Placing these reforms in their historical context suggests that they have not been as transformative as previously thought. Instead, they have preserved important components of Eurasian constitutionalism such as a top-down process of constitution-making as well as design features such as centralism and supervision. This analysis yields three important lessons.

First, it demonstrates the resilience of historical forms of constitutional design. Ukraine is the clearest example of this. Its constitution-making was driven

primarily by a popular uprising in favour of breaking free of the Eurasian legacy. But in trying to break away, Ukraine has drawn on the same types of approach—particularly excessive presidential centralism and supervision—that it inherited from its Russia-dominated past. It thus demonstrates a key post-colonial irony: in seeking to escape Russian colonial rule, Ukrainian drafters were inevitably shaped by it. In its constitutional design, Ukraine is perpetuating centralism and supervision, and therefore failing to make the necessary structural changes to signify a significant break with the past.

Second, it demonstrates the limits of a best-practices approach to formal constitutional design. Armenia is perhaps the best example. Although a switch from a super-presidential to a parliamentary system seems to be a move towards Western constitutionalism, this is not necessarily the case. In the absence of strong party competition and judicial review, parliamentary government can be less democratic and pluralistic than presidential systems. In particular, a formal parliamentary system of constitutional government can reduce key checks and balances. This finding suggests that formal constitutional rules are only part of the picture, and must be assessed within the broader context of how they interact with the domestic political culture.

Third, and relatedly, these limits on formal design also provide two important lessons for international organizations such as the Venice Commission. First, they should avoid assuming that a certain constitutional design or a best practice—in this case, parliamentary government—is always preferable. Second, international organizations should be aware of the potential effect their participation can have on the *process* of constitutional reform. In both Armenia and Ukraine, the commission's role contributed to the top-down nature of constitution-making: its participation gave the processes in both countries a veil of democratic legitimacy even though they did not engage with key domestic groups. Nor did the commission encourage greater public participation.

Going forward, members of international organizations should play a more active role in encouraging not just substantive changes, but also a more transparent and participatory process. While focusing on the constitution-making process would have been unlikely to solve all the problems in Armenian and Ukrainian constitution-making, it could have helped to combat traditional Eurasian views that formal constitutional rules are simply an elite game in the pursuit of monopolizing power. More generally, this kind of advice could help to limit the chances that international organizations are used to legitimize constitution-making processes that are otherwise top-down and unilateral affairs.

Notes

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6. The role of constitutional identity in the responses to the terror attacks in France and the refugee-management crisis in Hungary

6. The role of constitutional identity in the responses to the terror attacks in France and the refugee-management crisis in Hungary

Katalin Dobias

Introduction

In 2015 European news was dominated by the refugee-management crisis, terror attacks and fears that radicalized Muslim Europeans may conduct further attacks in their home countries, or travel to join the Islamic State in Iraq and Syria (ISIS) in the Middle East. These crises revealed the cracks in the cohesion of the European Union and its 'established' democracies, as countries grappled with issues of national and European values, political community and nationhood often revolving around the question of identity, as embodied in their constitutions.

In particular, France and Hungary, which have become symbols of the European response to 'terrorism from within' and the refugee-management crisis, respectively, demonstrate that whether it is the 200-year-old 'Indivisibilité de la République' principle of the French Constitution or the reference to the role of Christianity in preserving nationhood in the 2011 Hungarian Fundamental Law, constitutional identity matters.

After a short overview of the year's constitutional amendment proposals regarding the state of exception in France and Hungary, this chapter seeks to explain two notions of constitutional identity through the fundamental values and principles these countries drew on in a time of crisis. Without delving into the complexities of French and Hungarian constitutional identity, it discusses how these identity-defining values continue to guide and legitimize changes in laws, policies and even constitutions.

The chapter stresses that, despite the persistent myth of homogenous nation states, in the face of attacks on the democratic core of European states, it is essential that constitutional identities reflect the heterogeneous realities of contemporary Europe. For a constitution to serve its unifying function and prevent further fragmentation, it must (re)define its political community in an inclusive way.

States of emergency in 2015

France: state of emergency—with a citizenship twist

The attacks on the headquarters of the magazine *Charlie Hebdo* in Paris on 7 January 2015 prompted proposals for a new state of emergency regime suitable to address the challenges of modern terrorism. As the current 1958 Constitution provides for emergency powers only in cases of traditional warfare (article 36) or when the functioning of the state is interrupted (article 16), President Hollande proclaimed a state of emergency, under the State of Emergency Act 1955, amounting to sweeping executive powers.[1] Parliament then expanded the scope of permissible rights limitations to include a broad range of powers, from ordering house arrests or police searches without judicial authorization to preventing public gatherings and blocking websites that glorify terrorism (HRW 2015).

The obvious limitations imposed on constitutionally enshrined fundamental rights, and the danger that multiple extensions would result in a permanent state of emergency (*The Economist* 2016), underlined the necessity of the president's amendment proposal (French National Assembly 2015b) that sought constitutional legitimation of the restrictions—even if their proportionality or timing was questioned (Fassassi 2016). The bill quickly passed the lower house with support from across the political spectrum in the immediate aftermath of the attacks, yet it has since become divisive.

The controversy, which also brought about the resignation of Justice Minister Taubira, was not the constitutionalization of the state of emergency per se, but rather its twin measure of revoking the citizenship of dual-national French citizens convicted of terror offences. As a signatory of the 1961 Convention on the Reduction of Statelessness, France should not strip mono-nationals of their citizenship, as they would then become stateless—meaning that this clause would have only applied to dual nationals. In effect, this would have constitutionalized two categories of French citizens—implying that half of the French immigrant population, over three million dual citizens mainly from North Africa (*Le Monde* 2015), was inherently more suspect. Despite widespread support for the state of emergency clause, the failure to broker consensus for the denationalization proposal led president Hollande to abandon the entire constitutional amendment project (Nossiter 2016).

Hollande originally sought to justify the initiative with the weight of the offence, and France's interest in rapidly deporting the offenders, adding that '[o]ur Constitution . . . is a contract which unites all the citizens of the same country. And if the Constitution is a collective agreement, an

essential agreement for living together, then the Constitution should include responses for combating those who want to undermine it' (*France Diplomatie* 2015). The president seemed to suggest that either the state, as one party to the contract, should have the right to unilaterally terminate it, or that through the commission of terror offences the individual essentially broke the social contract, which justifies the state in then formalizing the severance of the relationship. This interpretation seems to presume that state power is constitutive rather than declarative in nature by assuming that the state has the power to revoke an individual's legal personality, and thus her or his recognition as the bearer of rights.

Except for the human rights guarantees under international law, deprivation of citizenship amounts to the denial of 'the right to have rights' (Arendt 1948: 296) within French jurisdiction without regard for the individual's ability to exercise her or his rights in their other (and now likely only) country of nationality. The proposed citizenship amendment thus appears to be simply punitive in nature, using denationalization as the ultimate punishment for misconduct. Such banishment (Macklin 2015: 3) is an ancient practice that precedes criminal justice systems (or constitutional guarantees), which fails to recognize that 'citizenship is not a license that expires on misbehavior' (US Supreme Court 1958: paragraph 80).

Hungary: state of emergency due to threats of terror, or the 'state of diversity' panic

While Hungary has not been targeted by jihadist extremism, the politics of its Christian-Conservative government blurring together terrorism and mass migration has built an image of Muslims as threats to Hungarians in one form or another. According to Prime Minister Viktor Orbán, 'the fact is that all the terrorists are basically migrants. The question is when they migrated to the European Union' (*Politico* 2015). Following the ruling coalition's anti-migrant campaign, the government conducted a 'National Consultation'—a survey tellingly titled 'Immigration and Terrorism'—through which it claimed the support of over one million citizens for its nationalist rhetoric, further polarizing the politically and socially divided country.

Throughout the year, the governing coalition sought to secure executive emergency powers and was quick to put forward a constitutional amendment proposal (Amendment No. 6, 2015) to introduce a new form of state of emergency in case of acts or threats of terror, even though the constitution already specifies five different grounds for exercising 'special legal orders' (articles 48–53) in times of a 'state of exception'.[2] After five years of maintaining a constitution-amending supermajority in Parliament, during which the

Fidesz coalition easily passed five controversial amendments in a row, this was the first time Fidesz had to convene five-party negotiations to broker a consensus. While initial government drafts contained extensive executive powers to order curfews, conduct surveillance or ban public gatherings, the government's aim to propose a sixth state of exception type, in a democracy with comparatively little history of emergencies, was to enable it to deploy the army domestically (Office of the Hungarian Prime Minister 2016a).

The Constitution currently permits deploying the army at home contingent either on two-thirds parliamentary majority support or, under the existing state of exception, on the decision of the president or the National Defence Council (Fundamental Law 2011, article 49(1)). Therefore, what distinguished this state of exception proposal from the other five grounds was not its material scope, but rather its reallocation of power to the government—begging the question of why a state of exception due to a terror threat would require higher levels concentration of executive power than, for instance, a foreign attack.

Hungary has not experienced known acts or serious threats of terror, and the government in fact used the army in its response to the refugee-management crisis. While the government sought constitutional legitimation for the deployment of the army against (likely home-grown, that is, Hungarian) terrorists, it has without much fanfare introduced a 'state of crisis due to mass migration' by simply decreeing a comprehensive statutory amendment package.[3] It was then quick to expand the powers of the National Defence Forces and deploy the army to build a 175-kilometre-long fence, currently guarded by 6,000 to 10,000 armed soldiers, to forcibly close the border to irregular migrants (Office of the Hungarian Prime Minister 2016b)—without considering it to be a matter of constitutional relevance.[4]

While doing so, the government prevented the possibility of invoking the right to asylum for many by excluding jurisdiction through limiting access to its territory—despite Hungary's international and EU obligations to at least *process* asylum claims. Thus, the threat Hungary arms itself against does not seem to be an actual threat of terror, but rather a perceived diversity threat to its (newly announced) constitutional identity—which is now defined in ethno-religious terms.

Constitutional identity in the making? Evolving versus constructed identity

Does constitutional identity matter?

Understanding a constitution as 'the foundation for both legal and social relations within the polity' (Jacobsohn 2006: 364) explains the expectation that constitutions should reach beyond the normative sphere and embody the social cohesion of the nation, understood as an inherently limited and sovereign imagined political community (Anderson 2006: 48). This community is imagined, as no national can know each fellow national, yet 'in the minds of each lives the image of their communion' (Seton-Watson 1977: 5). This imagined community creates a kinship-like link that forms a community, which is sovereign and limited by the invisible boundaries of other nations. Importantly, the community 'is always conceived as a deep, horizontal comradeship. Ultimately, it is this fraternity that made possible . . . for so many millions of people, not so much to kill, as willingly to die for such limited imaginings' (Anderson 2006: 50).

The constitutional order should not only reflect the identity of the political community, but also create conditions that facilitate its social embeddedness and eventually its ownership (Harris 1993: 177) through interpretation and implementation in politics, courts, legislatures and all walks of life (Jacobsohn 2011). This procedural understanding of constitutional identity allows for its continuous rediscovery through dialogue that maintains its legitimacy. To that end, this 'constitutional discourse' plays a central unifying role, weaving the political community together by consciously bridging the gap between the key differences of 'self' and 'other' in the spirit of constitutionalism to develop an accommodative narrative of a shared identity. At the same time, constitutionalism requires a 'fundamental commitment to the norms and procedures of the constitution [that] has more to do with behaviour, practice, and internalization of norms than the constitutional text' (Ghai 2010: 3).

Thus when the constitution fails to capture the common values and identities of the political community, such internalization and voluntary practice become unlikely, either rendering the constitution hollow or—even more alarmingly—imposing a constitutional identity alien to its subject and (ab)using the seemingly democratic institutional framework to enforce it. In this way the constitution risks becoming a tool for subordinating people to the state instead of bringing the state under the sovereignty of the people. Such an effect also fuels existing divisions that remain unaddressed—defeating the unifying purpose of the constitutional project.

France: Indivisibilité de la République—the deal maker

The constitutional negotiations in France during 2015 demonstrated how the essence of French constitutional identity transcends even urgent national security considerations. French parliamentarians appeared to be willing to give up the exercise of some of their fundamental rights for the enhanced security promised by the state of emergency measures, but were reluctant to accept any measures deemed contrary to 'the founding principles of the French Republic' (Bisserbe and Meichtry 2016). This mentality demonstrates the continued influence of the republican pact—which requires 'France [to] be an indivisible, secular, democratic and social Republic' (Constitution 1958: article 1)—as a 'basic regime-defining characteristic that provides general definitional content to [French] constitutional identity' (Jacobsohn 2006: 362). The constitutional recognition of a two-tiered nationality regime that contradicts the indivisibility principle could thus be perceived as an attack on one of the central tenets of French identity.

As Ombudsman Jacques Toubon stressed, 'citizenship is as indivisible as the Republic' (French National Assembly 2015a); if the constitutional amendment were passed, 'we would go from an indivisible to a divisible Republic and from an indivisible citizenship to a divisible one . . .affecting the very fundamental principle of the Republic' (*France Inter* 2015). This fear has united policymakers across political lines; with members of Parliament (even from Hollande's Socialist parliamentary majority) actively upholding the fundamental principles: 'A Republic which forgets its origins would soon disown them . . . our great republican principles are not and will never be indelible and irreversible. So do not change the Constitution under the influence of emotion! ... Do not give up what makes the strength of our Republic: the unity and indivisibility of our republican society' (Commission on Constitutional Laws 2016).

In a divisive time of home-grown terrorism, France chose to reach back to the indivisibility principle that has guided French public life since its incorporation in its first written constitution in 1719 (article 1).[5] Even though this principle is largely understood as pertaining to territorial integrity (Daly 2015), its social dimension triggered opposition to the classification that would have divided the French citizenry. The constitutional and social embeddedness of the indivisibility principle has made it a bedrock of French constitutional identity. The principle, which rejects any form of non-political (including religious) identity as a basis for distinction under the Constitution, has endured for 200 years because it has gradually evolved through dynamic interaction with constitutionally relevant developments throughout French history. This continued legitimacy, which suggests that the principle reflects—

rather than imposes—identity, explains why it prevailed over a reactive (but understandable) state of emergency amendment. The indivisibility principle continues to be at the heart of the French demos, where abstract constituent power is vested in the people, who are imagined as a political community formed through equal citizenship as a result of the social contract. This notion stands in stark contrast to the ethno-religious understanding of the Hungarian ethnos introduced by the Fundamental Law in 2011.

Hungary: Christian nation or imposed identity?

The Hungarian president, Pál Schmitt, symbolically signed the 2011 Fundamental Law on Easter Monday; with that, 'a value-neutral interim constitution was replaced by a clearly value-laden Fundamental Law' (*24Hu* 2016). The government sought legitimacy for the Fundamental Law by pointing out that Hungary was the only country that had not drafted a new constitution following its transition to constitutional democracy after 1989—even though the Constitution Act XX of 1949 had been substantially revised, and this 'patchwork constitution' (Elster 1991: 447) had governed democratic Hungary for over two decades.

Although the Fidesz coalition's constitution-making majority in Parliament represented a slim majority of only 52 per cent of the electorate (National Election Commission of Hungary 2010), the new constitutional initiative essentially declared a constitutional identity by attempting to codify what it means to be Hungarian. The Fundamental Law introduced the National Avowal of Faith, a solemn preamble embodying an unprecedented shift in the characteristics of Hungarian constitutionalism. The building blocks of liberty, equality and democracy of the 1949 constitution, as revised in 1989, were replaced by the values of family, nation and loyalty couched in religious tones that marked the end of secular constitutionalism in the country.

These religious proclamations of the new Constitution—which define Hungary as 'a part of Christian Europe', 'recognize the role of Christianity in preserving nationhood', and take pride in how Hungarian 'people ha[ve] over the centuries defended Europe in a series of struggles'—give context to Prime Minister Orbán's wariness of migration: 'those arriving have been raised in another religion, and represent a radically different culture. Most of them are not Christians, but Muslims. This is an important question, because Europe and European identity is rooted in Christianity' (Office of the Prime Minister of Hungary 2015). Translating the seemingly vague principles and historical references of the National Avowal into policies has more than one precedent. For instance, immediately after its promulgation, the 2012 Church Law codified the classification and differential treatment of various

religious denominations in the country—in effect, favouring Christianity—and at first revoked official recognition of a range of other religions, including Islam.[6]

While the majority of the Hungarian population is (self-declared, albeit non-practicing) Christian, in the wake of the democratic transition the Constitutional Court declared state neutrality to be a constitutional principle of the new Hungarian democracy in one of its first landmark decisions (Constitutional Court of Hungary 1993). Since then, the Fundamental Law has redrawn the boundaries of the 1949 Constitution's prohibition on entanglement (article 60(3)).[7] Even though it requires state and religious communities to operate separately, it allows their cooperation for the public good, but only if the religious community is recognized (by the National Assembly) as an established church (Fundamental Law 2011, article VII).

The notion of state neutrality entered the Hungarian constitutional tradition from the German *Grundgesetz* as well as the jurisprudence of the Federal Constitutional Court, which appears to have a consistent position based on a rather pluralist understanding that 'the state constituted by the Basic Law is to be home to all citizens, irrespective of religion and worldview' (Haupt 2011: 164). From a legal perspective, the Fundamental Law's 'Christian nation' concept thus goes against 60 years of state neutrality and non-entanglement tradition and does not necessarily follow from the country's history either. While Saint Istvan established Hungary as a Christian Kingdom in 1000 and the monarchy lasted, with a brief interruption, for 10 centuries (until 1946), the recognition of Christianity has varied from a strong state-forming role under Saint István or László to tolerated religion under 150 years of Ottoman occupation. Such changing dynamics were reflected in the 'historical constitution' encompassing unwritten constitutional principles and statutes of constitutional relevance.

While Christianization was common in Europe from the Late Antiquity to the Middle Ages, of the 28 EU countries, only the Latvian Constitution mentions Christian values, while the Polish Constitution recognizes the country's Christian heritage. The Hungarian Constitution's explicit identification with Christianity is peculiar in both the regional and supranational context: the EU consistently refrained from endorsing religious identity of any kind in the (failed) 2004 EU constitution. Article 8 of the Treaty on the European Union establishing EU citizenship only listed the set of rights guaranteed by virtue of union citizenship, without attempting to define or forge a shared identity, pledging to respect the distinctive identity of each member state. The EU has consistently reiterated that '[t]he Union is founded on values [that] are common to the Member States in a society in which pluralism, non-

discrimination, tolerance, justice, solidarity . . . prevail' (Consolidated TFEU-TEU 2007: article 2).[8] The current EU presidency was even more specific, stating that these 'fundamental values and the rule of law are not only Treaty principles but also essential parts of European identity' (Netherlands EU Presidency 2016).

In contrast with these fundamental European values and this year's unifying constitutional discourse in France, the Hungarian case demonstrates how the proliferation of the political elite's sustained exclusionary discourse—and its manifestation in a new constitution and corresponding laws and practices—has called the legitimacy of the constitution into question (Bulmer 2015). Since the promulgation of the 'alliance among Hungarians of the past, present and future . . . [that] is a living framework which expresses the nation's will and the form in which we want to live', emigration rates have climbed dramatically: over 500,000 Hungarians have left the country in the past five years (*Hungary Today* 2015).

Inclusion processes: resilient democracies in testing times?

Beyond the religious 'Christianity' and political 'indivisibility' elements discussed above, a variety of other substantive components seem to reappear in different constitutional identity formulations. Such normative content through which constitutions may seek to express constitutional identity remains polity-specific, and can be reflected in corresponding diversity management models. It is not the substantive building blocks of identity per se, but their inclusive (rather than exclusive) nature that creates a constitution that can unify a polity and make it more resilient to fragmentation. While social cohesion is achieved through integration that, by its nature, takes place in the societal rather than the normative realm, constitutions continue to set the framework for not only law and policymaking but also for acceptable behaviour in society.

In order for the constitution to provide an enabling structure for diversity management, it needs to (re)define the community in an inclusive manner that requires self-reflection and conscious social, political and, at times, constitutional engineering. Since it is imperative to enhance the resilience of European states against physical and ideological attacks on their democratic core, the integrative function of constitutions becomes essential. The ability of constitutions—and of European constitutionalism—to address questions of diversity will be paramount in determining whether they can channel societal conflict through political processes. A failure to recognize the inevitable diversification of the polity risks contributing to growing

nationalist extremism and ignoring the millions living in shadow societies on the edge of European democracies with little to no political participation.

The notion (or myth) of homogenous nation states does not apply to 21st-century Europe. Diversity goes beyond the hundreds of thousands of newly arrived asylum seekers, who only added to the estimated 54 million foreign-born persons in the EU (Eurostat 2016).[9] National identity concepts that ignore or exclude these residents are the seedbed of fragmentation. Understanding the majority identity as singular will inevitably risk being exclusionary; rather, the first step is to see it as a 'predominant identity' that is potentially distinct from, but is in constant interaction with, a variety of competing ethnic, religious, cultural or other identities within the polity (Rosenfeld 1994: 4).

Identifying the elements of the predominant identity in inclusive terms is a precondition for designing a political (rather than ethnic) community that reflects the country's heterogeneous makeup. Such inclusiveness requires that the substantive building blocks of constitutional identity do not set conditions that cannot be fulfilled (or be expected to be fulfilled) without reference to origin, race, religion and so on. Similarly, the procedural rediscovery of identity through continuous interpretation and implementation of constitutional values and principles in all walks of life also needs to be open to public participation.

While diversity management has long been considered a pressing question for constitutional design, responses have mainly been placed within a context of either cross-cutting or segmental cleavages in divided societies (Choudry 2010), reflecting a group (rights-) based formula of state-building. Such approaches may be valid in the context of divided societies that have been formed by different ethnic, religious or cultural communities thrown together due to national borders that have been moved or imposed for various reasons, from colonialism to state succession. Yet group rights-based diversity management models might not respond directly to needs stemming from the 'super-diversity' of contemporary Europe, which is instead a product of migration and is characterized by various 'new, small and scattered, multiple-origin, transnationally connected, socio-economically differentiated and legally stratified' immigrant generations (Vertovec 2007: 1024). These complexities and their interplay distinguish the European case from classic divided societies, as the relative homogeneity of subgroups can no longer be assumed. Thus, in the context of super-diversity, individual rights-based considerations may be more dominant in developing diversity management frameworks.

Unity within diversity—France's inclusive constitutional 'self'

The preliminary challenge of any attempt to manage diversity is to address the issue of 'who we are'. This is a simple question with a complex answer that in France has long been considered to be part of a political rather than ethnic or religious public identity, set through the constitutional entrenchment of the indivisibility principle. The principle became judicially enforceable with the 1958 Constitution, which established the Constitutional Council. The council's growing jurisprudence has affirmed that any division of the 'French people' is unconstitutional, when, for example, annulling the legislative act referring to 'the people of Corsica, [as] a component of the French people', and in so doing noting that 'many constitutional texts from two centuries refer only to the legal concept of "French people", which has constitutional value' (Constitutional Council of France 2002). Nevertheless, the equality framework within which the indivisibility principle operates continues to be imperfect with the complete rejection of (sub)group identities in the French demos—and, correspondingly, minority rights as such. The infamous veil ban controversy is just one example of France's republican integrationist approach to diversity management (Choudry 2010: 46) that creates the legal and constitutional framework for including religious and other minorities.

Accordingly, earlier this year the Senate rejected another Constitutional Amendment Bill (Nationalia 2015) that would have allowed France to ratify the European Charter for Regional and Minority Languages, arguing that the constitutional recognition of languages other than French would go against the unity/indivisibility of the nation. Nor does the constitutional text recognize the people of territorial communities, such as the French Polynesians, as distinct from French people (Constitution 1958: Title XII). The French principle of laïcité (secularism) follows the same logic when, rather than protecting an individual's right to manifest her or his religion, it stresses the (perceived) interest of the community through a broad interpretation of the prohibition 'to profess religious beliefs for the purpose of non-compliance with the common rules governing the relations between public communities and private individuals' (Constitutional Council of France 2004).

Despite a 'muscular' constitutional tradition supporting state neutrality in France, simply assuming the value neutrality of the state might overlook the majority's tendency to interpret foundational principles, such as equality or indivisibility, through the lens of the majority's identity (Phillips 2007). As a result, the dominant identity might clandestinely govern everyday life through setting standards that are invisible to members of the majority, yet restrictive for members with minority backgrounds—amounting to discriminatory effects on the exercise of individual rights. The theoretical and

practical downsides of the French understanding of the demos—from the veil controversy to the refusal to recognize minority rights—has repeatedly called its unifying function into question. Yet, its constitutional identity formulation in political (as opposed to ethnic or religious) terms continues to provide the backbone of an inclusive constitutional discourse that at least leaves the legal and ideological door open for unity within diversity in the French Republic.

Unity as uniformity—Hungary's exclusive national 'self'

Hungary's response to the refugee-management crisis is a sharp reminder of how an exclusionary answer to the 'who are we' question in the constitution creates a framework that invites legal, political and societal responses that exacerbate the identity crisis. Through the ethnicization of its subject, the Fundamental Law reinforced a constitutional identity that incentivizes the exclusion of ethnically or religiously different people, while on a policy level it disincentivizes diversity management of any kind and instead aims to minimize differences within the polity—leaving the door open for exclusionary or assimilationist policies.

Prime Minister Orbán has been clear: 'we do not want a large number of Muslim people in our country. We do not like the consequences . . . we see in other countries' (Mackey 2015). Thus the focus has not been on reconciling sameness and difference within the community of all people in the Hungarian jurisdiction, but on introducing a binary framework in which 'we the people' has become 'we the Christian ethnically Hungarian citizens, who live in faithful procreating marriages'—as envisaged by the values the coalition constitutionalized.[10] Therefore, it is unsurprising that 'equality' is not even mentioned as one of the values proclaimed in the lengthy National Avowal (Tóth 2012: 186).

Rather than just political rhetoric, 2015 has brought about the latest manifestation of Fidesz' nation-building project that neatly fits with the prime minister's infamous vision for Hungary announced shortly after Fidesz secured its third term in office in 2014: 'the new state that we are constructing in Hungary is an illiberal state, a non-liberal state. . . . [it] includes a different, special, national approach' (Office of the Prime Minister of Hungary 2014). By the end of 2015, the then-scandalous proclamation was seen as a prediction of the emergence of illiberal democracies at the heart of Europe (Kaufmann 2016). Michel Rosenfeld's framework for understanding the process of creating constitutional identity, described in more detail below, helps deconstruct the steps of Fidesz' nation-building attempt to move beyond a one-dimensional perception of the Orbánian rhetoric as

simply authoritarian. In light of Rosenfeld's constitutional identity-building stages, the recurrent political rhetoric appears to have constituted steps to re-engineer the Hungarian nation—under the direction and framework of the 2011 Fundamental Law.

According to Rosenfeld, constitutional discourse essentially (re)creates identity by selecting, organizing and discarding its key elements at various stages: negation, metaphor and metonymy (Rosenfeld 2010: 45). In Hungary, constitutional discourse following the rise of Fidesz labelled the 1949 Constitution a communist one, despite its complete overhaul in 1989 and the ensuing two decades of democratic constitutionalism (negation stage). To fill the void created by the denial of the past identity, Fidesz offered an alternative positive identity—by attempting to form a community through stressed similarities (metaphor stage).

Such identities are typically rooted in the traditional identities dismissed at the negation stage, but purified in the subsequent constitutional discourse to increase the constitution's legitimacy. Given that the Fundamental Law and its amendments were passed in a non-inclusive manner, the constitution-building process failed to facilitate a framework of constitutional governance that encourages public participation. Substantively, this unifying stage should have also aimed to strike a balance between grounded traditional identities and aspirational identities striving to realize constitutionalism (Rosenfeld 2010: 47). To this end, access to membership of the political community is paramount. As the Fundamental Law set such standards in ethno-religious terms, the new imagined community has become that of Christian Hungarians—which makes being Muslim, for instance, a tension difficult to reconcile.

The last stage of Rosenfeld's identity creation, metonymy, is meant to provide a touch of local flavour with an emphasis on context in order to tailor the constitutional identity to the actual self by considering the nuances of the de facto community governed by the constitution. Here, Fidesz missed yet another chance to recognize the striking gap between the community it has and the community it constitutionalized, by selecting and amplifying instances that reinforce differences, and dismissing those that could bridge them. As a chief paediatrician volunteering to treat asylum seekers stranded at the capital's railway stations put it: 'The help of all the civilians is touching, and stands in stark contrast with the astonishing hate campaign that is going on against them [migrants] on state level' (Nyilas and Szabó 2015).

The Fundamental Law's aim was to re-imagine an ethno-religious (rather than political) community by constitutionalizing an exclusionary national

rather than inclusive political identity. Despite the democratic legitimacy of the (then) supermajority coalition, the lack of broad participation or representation of political and societal groups, coupled with its exclusionary substantive provisions have rendered the Fundamental Law the constitution of only 'some'.

Conclusion

After both World War I and World War II, Central and Eastern European countries had to come to terms with the fact that redefining their borders changed the people who were de facto governed by their constitutions—and that addressing such diversity was a precondition of peace. Now Europe must accept that its population has changed again, this time due to the movement of people. Ignoring this diversity or demonizing differences, which are part of the human experience, is a futile and dangerous enterprise. To successfully negotiate sameness and differences within a political community governed by the constitution, the precondition is to 'accept the tension as an enduring component of the constitutional predicament' (Jacobsohn 2012: 782).

In order to create more resilient democracies, EU countries need to develop and maintain enabling constitutional (and corresponding legal and policy) frameworks within which the tensions between various conflicting and overlapping identities can be resolved through peaceful political processes. The substantive elements of constitutional identity and the constitution-building process must be inclusive in order to develop a constitutional identity that reflects that of the polity and thus makes, rather than breaks, constitutional deals. This is essential for the constitution to become a living instrument that simultaneously regulates and represents its political community in order to maintain social cohesion. The omission or exclusion of marginalized communities inevitably risks eroding—and eventually severing—the bond between the constitution and 'we the people'. In order to address the identity vacuum that has left Europe vulnerable to radicalization and fragmentation, and to tackle the root causes of the ongoing crises, it is essential to re-imagine its constitutional communities according to inclusive identity-forming factors.

Notes

1 The full text of the 1958 Constitution is available at <https://www.constituteproject.org/constitution/France_2008?lang=en>, accessed 22 June 2016. The text of Hollande's state of emergency proclamation can be found at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>, accessed 20 June 2016.

2 The full text of Hungary's Fundamental Law 2011 is available on ConstitutionNet, <https://www.constituteproject.org/constitution/Hungary_2013?lang=en>, accessed 22 June 2016.

3 Article 13 of the Government Bill on the Amendment of Certain Laws Regarding and in Connection with Migration, August 2015, <http://www.parlament.hu/irom40/09634/09634.pdf>, codified in Act XXXIX of 2016 <http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600039.TV&txtreferer=00000003.TXT>, accessed 22 June 2016.

4 National Defence, Hungarian National Defence Forces and measures to be introduced in a time of Special Legal Orders (Act 2011), article 36 (1)h, <http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100113.TV#lbj54id53b3>, accessed 22 June 2016.

5 The full text of France's 1719 Constitution is available at <https://web.archive.org/web/20111217062556/http://sourcebook.fsc.edu/history/constitutionof1791.html>, accessed 22 June 2016.

6 Act CCVI of 2011 on the Right to Freedom of Conscience and Religion, and the Legal Status of Churches, Religious Denominations and Religious Communities (Church Law) deprived hundreds of religious denominations of their former church status and corresponding entitlements including the entitlement to collect income tax donations. The act also granted power to parliament to decide on the 'established church' status of a given religious community: a condition the Constitutional Court found unconstitutional in its decision annulling the act. Instead of remedying the unconstitutionality, the governing majority amended the Constitution to entrench this parliamentary entitlement. The Venice Commission expressed concerns about the amendment; and in 2014 the European Court of Human Rights also found Hungary in violation of both the freedom of thought, conscience and religion and the right to an effective remedy, given that there was no possibility to appeal against Parliament's decision. While the Hungarian state has yet to remedy the rights' violation with regards various other religious communities and in terms of legislative (and constitutional) changes to bring domestic law in line with the European Convention on Human Rights, a 2012 amendment to the Church Law added the Hungarian Islamic Council to the Annex enumerating the 'established churches' recognized in Hungary. The list originally (December

2011) included only 14 churches, none of which were Muslim.

7 The full text of Hungary's 1949 Constitution is available at <http://lapa.princeton.edu/hosteddocs/hungary/1989-90%20constitution_english.pdf>, accessed 22 June 2016.

8 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN>, accessed 23 June 2016.

9 Understood broadly, 'foreign-born' comprises people born abroad (according to present-day borders), including those born in another EU member state or in non-EU countries, and who were the residents of an EU country in 2015.

10 Besides the references to Christianity and nationhood in the National Avowal of Faith, such value choices are also reflected throughout the binding chapters of the Fundamental Law of Hungary (2011d); for instance, Article L stipulates that '1. Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children. 2. Hungary shall encourage the commitment to have children . . . '.

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