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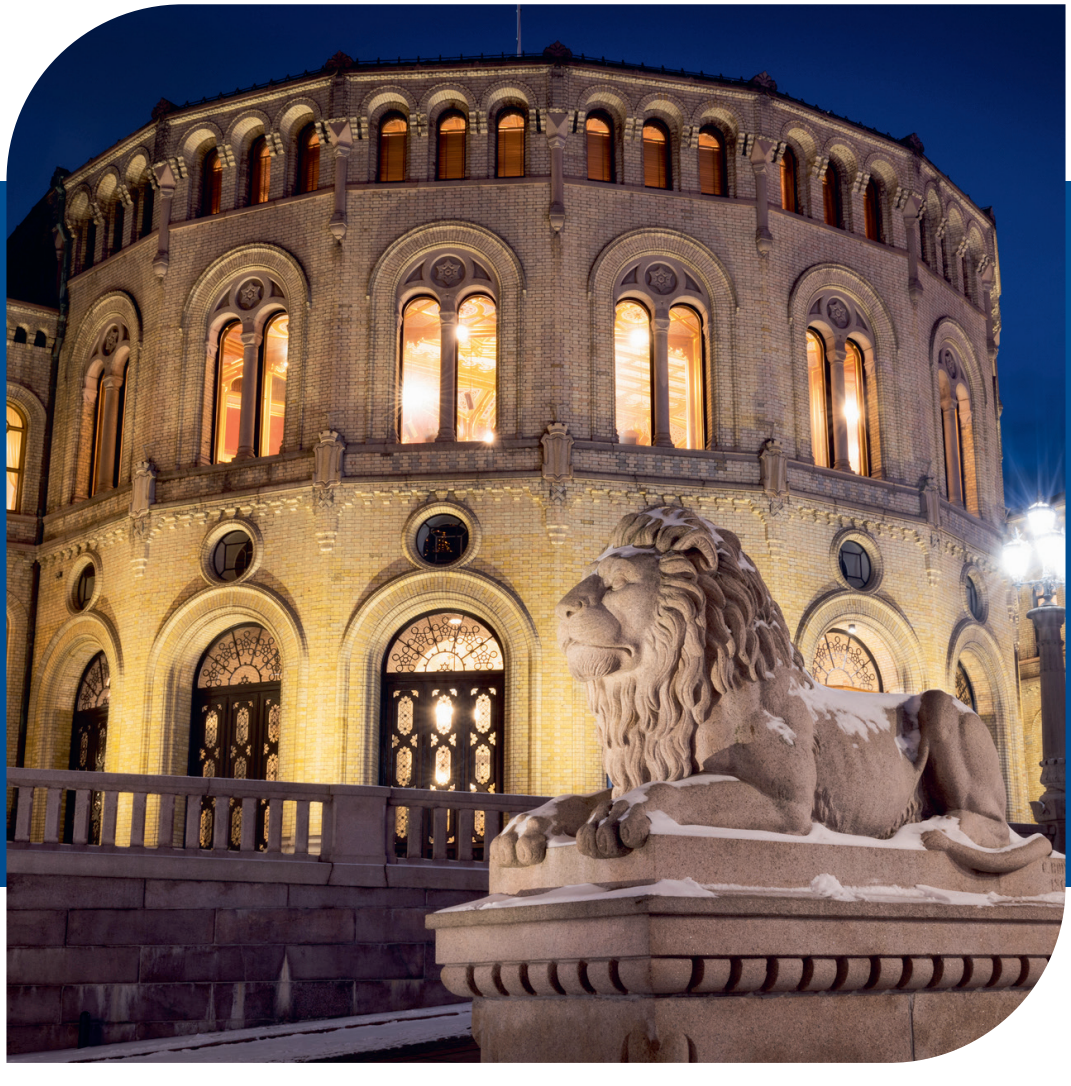
ANNUAL REVIEW OF CONSTITUTION-BUILDING: 2024



ANNUAL REVIEW OF CONSTITUTION BUILDING: 2024

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Cover illustration: The Norwegian parliament building. © Peter Mydske/Stortinget
Design and layout: International IDEA
Copyeditor: Curtis Budden

DOI: <https://doi.org/10.31752/idea.2025.61>

ISBN: 978-91-8137-003-4 (PDF)

Abbreviations

CHAPTER 1

AfD	Alternative for Germany
CDU/CSU	Christian Democratic Union of Germany and the Christian Social Union in Bavaria
FCC	Federal Constitutional Court, Germany
SPD	Social Democratic Party of Germany

CHAPTER 2

CRC	Constitutional Reform Commission, Barbados
CRCC	Constitutional Review Consultative Commission, Ghana

CHAPTER 3

JLP	Jamaica Labour Party
PNP	People's National Party, Jamaica
SODELPA	Social Democratic Liberal Party, Fiji

CHAPTER 4

CRC	Constitution Review Commission, The Gambia
PiS	Law and Justice party, Poland
SPO	Special Prosecutor's Office, Slovakia

CHAPTER 5

LGBTQIA+	Lesbian, gay, bisexual, transgender, queer, intersex and asexual
NGO	Non-governmental organization

CHAPTER 6

AFTA	Articles of Federal Transitional Arrangements, Myanmar
CRPH	Committee Representing Pyidaungsu Hluttaw
FDC	Federal Democracy Charter, Myanmar
NLD	National League for Democracy, Myanmar
NUCC	National Unity Consultative Council, Myanmar
NUG	National Unity Government, Myanmar
SAC	State Administration Council, Myanmar
TCWG	Transitional Constitution Working Group, Myanmar

CHAPTER 7

MPSR	Patriotic Movement for Safeguard and Restoration, Burkina Faso
R-ARCSS	Revitalised Agreement on the Resolution of the Conflict in South Sudan
R-JMEC	Revitalised Joint Monitoring and Evaluation Commission, South Sudan

Contents

INTRODUCTION

The *Annual Review of Constitution-Building*, published by the International Institute for Democracy and Electoral Assistance (International IDEA), describes several constitutional reform processes taking place around the world, identifying prominent themes which recur across different contexts. The review was first published in 2013, at a time when democratic constitutional change was high on the agenda of countries throughout the world, including most prominently many countries in the Arab world, as well as others across the wider Europe region at various stages of accession to the European Union.

Another event that occurred in 2013 was the promulgation of Hungary's current Constitution, an event which in some ways could be said to have been a landmark in the current global recession of democracy and the rule of law.

Since 2013 the number of reform processes that could be described as being part of a positive democratic transition has dwindled to close to zero, having been replaced by what Landau (2013) calls 'abusive constitutionalism', whereby political leaders change the legal and constitutional framework to entrench themselves in power, erode checks and balances, and weaken fundamental freedoms. In places where democratic constitutional reform might be possible, political parties are unable to find consensus, and processes commonly stall or fail outright.

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This year's review includes chapters covering Barbados, Belarus, Bulgaria, Burkina Faso, Fiji, The Gambia, Georgia, Germany, Ghana, Guyana, Jamaica, Myanmar, Norway, Poland, Slovakia, South Sudan and Sweden.

The constitutional debates and reforms taking place in many of these countries reflect overall negative trends with regard to democracy and the rule of law worldwide. In Chapter 4, for example, Adem Abebe focuses on reforms to prosecution services, noting how common partisan abuse of these services has been in various countries, the ease with which political actors can capture the prosecution to pursue their political adversaries and ways in which some jurisdictions have sought to protect the prosecution function from political manipulation.

But constitutional reforms are easier to propose than to implement: in Chapter 3, Elliot Bulmer describes the ongoing reform processes in Fiji, Guyana and Jamaica, including the major challenge of finding sufficient political consensus to meet the necessary thresholds to adopt constitutional amendments in parliament. At a time when the politics surrounding every matter of day-to-day governance is polarized, reaching bipartisan agreement on high-stakes changes to constitutions is almost impossible in many contexts.

Where constitutional change is contested, a confrontation between gender equality and gender identity issues, on the one hand, and conservative visions of traditional values and religion, on the other, is often one of the most polarizing issues. In many situations, politicians have exploited the societal polarization around these issues to further their own political goals, often eroding the democratic bedrock in the process. In Chapter 5, Sharon Hickey describes the very different constitutional debates that took place around these issues in 2024 in France, Georgia and Ireland, with varying outcomes in terms of gender equity and alignment with EU norms.

Even in countries which are nominally in the midst of a political transition, it is difficult to see progress. In Chapter 7, William Underwood describes the transitional constitutional arrangements in place in Burkina Faso and South Sudan, and in particular the initial timelines set for transition, and how these have been extended with no real certainty as to when either country will re-establish a democratic constitutional order.

However, there were also some tentative signs of hope with regard to democratic constitutionalism in 2024. Continuing with the issue of gender, Satang Nabaneh in Chapter 2 notes positive developments in the recommendations for gender equity and agency by the respective constitutional reform commissions of Barbados and Ghana. At the

same time, she notes—similar to Hickey—how political dynamics can dilute or block progressive gender reforms, as was the case in The Gambia.

Continuing with a positive theme, in Chapter 6 Kimana Zulueta-Fülscher describes how democratically elected leaders who have been forced from power through a military coup d'etat (Myanmar) or electoral manipulation (Belarus) have engaged in constitution making as a means of building a coalition around a shared vision for the future of their country. Remarkably under the circumstances, actors in both countries have utilized comparative expertise and consulted with different political groups and the general public to develop iterative drafts of a potential constitution for a time when a political opening appears for a democratic transition.

Lastly, in Chapter 1, Alexandra Oancea and Sumit Bisarya describe the constitutional reforms which took place in Germany and Norway, as well as the ongoing process in Sweden. In each of these cases, reforms are being driven by a proactive effort to safeguard constitutional democracy in an effort to shore up vulnerabilities exposed by backsliding elsewhere. If there is one lesson to be learned from the difficulties involved in resisting and reversing democratic backsliding, it is that prevention is better than cure. With this idea in mind, the kind of anticipatory assessment of potential vulnerabilities described in this chapter is something that all stable democracies would do well to consider. It is also noteworthy that, as opposed to the difficulty in finding multiparty consensus in the Westminster systems described in Chapter 3, Germany, Norway and Sweden enjoyed broad political consensus around reform packages among both government and opposition parties.

The global landscape of constitutional reform undoubtedly remains gloomy, with the trend continuing towards a weakening of democratic norms across different contexts. As some of the chapters in this year's review show, however, there are silver linings among the gathering clouds. Efforts to capitalize on these silver linings—whether by democratic actors exiled from power or advocates of gender justice or democratic resilience—continue to need support, and International IDEA is committed to responding to requests for knowledge, assistance and advice wherever possible.

The global landscape of constitutional reform undoubtedly remains gloomy, with the trend continuing towards a weakening of democratic norms across different contexts.

Box 0.1. **Where to find the constitutions**

The constitutional texts referred to in this publication, unless otherwise stated, are drawn from the website of the Constitute Project, <https://www.constituteproject.org>.

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Chapter 1

CONSTITUTIONAL RESILIENCE: FIXING THE ROOF WHILE THE SUN IS SHINING

Alexandra Oancea and Sumit Bisarya

1.1. INTRODUCTION

Constitutional reform is often a reactive exercise. Given the supermajorities or popular support required to change most constitutions, the necessary political investment or social mobilization is unlikely to take place unless there is a particular event which triggers demands for change. While constitutional reviews have been taking place in the absence of a crisis in an increasing number of contexts in recent years (Bisarya 2024), these processes are generally backward-looking, reviewing the constitution in question with regard to how it has performed in the past.

However, the experience of democratic backsliding has demonstrated that when democratic erosion begins, it is hard to reverse. Once anti-democratic actors hold the reins of power, they have shown great creativity and determination in changing the legal and constitutional framework, including by clamping down on the opposition and changing the electoral system, which makes it very difficult to remove those actors at subsequent elections. Even in cases where such governments have been voted out of power (e.g. in Poland), the changes they have made to core democratic institutions are difficult, if not impossible, to reverse while adhering to legal norms (Bianchi, Cheeseman and Cyr 2025).

Once anti-democratic actors hold the reins of power, they have shown great creativity and determination in changing the legal and constitutional framework.

International IDEA's 2023 report *Designing Resistance: Democratic Institutions and the Threat of Backsliding* (Bisarya and Rogers 2023)

illustrated how backsliding in different countries features numerous parallels in terms of the forms of attack on the legal safeguards for democracy. Some common examples with regard to the judiciary include the following: (a) lowering the judicial retirement age in order to remove swathes of judges from the bench and appoint loyalists in their stead (e.g. El Salvador and Hungary); (b) changing judicial appointment procedures (e.g. Israel and Poland); and (c) manipulating court administration and the ways in which cases are assigned (e.g. Hungary and Poland). Those seeking to weaken democracy are clearly learning from each other and are replicating methods that seem to be successful.

In considering how to respond to these attacks on democracy from within, the 2023 report provides a number of recommendations on how to make democratic institutions more resilient. While acknowledging that constitutional design can never be perfect and that no institution can ever be backsliding-proof, the report offers concrete suggestions to create more effective 'speed bumps' against those seeking to weaken democratic safeguards. Included among these suggestions is the recommendation that countries look to 'fix the roof while the sun is shining' and engage in proactive reforms to the constitutional framework to prevent potential backsliding (Bisarya and Rogers 2023: 17).

2024 saw a few countries in Europe engage in such proactive constitutional reforms to protect their respective judiciaries from the risk of backsliding in the future, based on developments which have happened elsewhere. In Germany and Norway, for example, these processes resulted in the adoption of constitutional amendments in 2024, while in Sweden a proposal for a constitutional amendment is currently before parliament.

In each of these cases, the constitutional amendment processes have been triggered by a wave of democratic backsliding taking place across Europe and beyond.

In each of these cases, the constitutional amendment processes have been triggered by a wave of democratic backsliding taking place across Europe and beyond; in some cases, this justification was made explicit. For example, in explaining the reason for introducing amendments in Norway, Peter Frølich, a member of parliament, referred to a 'disturbing tendency' around Europe whereby the independence of the courts was being undermined, and he posited that 'stronger constitutional protection for courts and judges can be a means of preventing such development' (Kingdom of Norway Parliament 2020: 1).

This chapter examines each of these three cases—Germany, Norway and Sweden—providing an account of the triggers and mandate of the reform, an overview of the amendment process and some details on the actual content of the amendments.

1.2. **GERMANY**

1.2.1. **Trigger and mandate**

Germany's 1949 Constitution originally contained few details regarding the organization and status of the Federal Constitutional Court (FCC). The court was instead solely regulated by the 1993 Federal Constitutional Court Act, a federal law which can be amended by a simple majority in the Bundestag, the lower house of Germany's federal parliament, without approval from the Bundesrat, the upper house.

Until recently, this vulnerability did not raise significant concerns, and the FCC retained robust judicial independence based mostly around a shared democratic political culture which values the rule of law (Böckenförde 2024; Duden 2024). In early 2024, however, Germany's then-governing coalition joined forces with the largest opposition party to initiate a constitutional reform of the FCC.

In the absence of a critical event or crisis of judicial independence, two developments prompted the parties to proactively amend the Constitution and introduce additional safeguards for Germany's highest court (Böckenförde 2024; Hamenstädt 2025). First, the far-right political party Alternative for Germany (AfD) was gaining considerable support in electoral polls ahead of the February 2025 parliamentary election, which led to fears that it could gain enough seats in the Bundestag to block or influence judicial appointments.[1] Second, the democratic backsliding observed in Hungary and Poland highlighted how political interference could undermine judicial independence.

These events led to a consensus among political majorities that additional institutional safeguards to strengthen the status of

1 Following the February 2025 election, the AfD became the largest opposition party in the Bundestag, holding 152 seats and gaining significant influence in parliamentary committees. While the Christian Democratic Union of Germany and the Christian Social Union in Bavaria (CDU/CSU) secured 28.5 per cent of the vote, the AfD followed with 20.8 per cent. The Social Democratic Party of Germany (SPD) came in third with 16.4 per cent.

the FCC had to be constitutionally entrenched to protect it from becoming a political target (Bayerische Staatsregierung 2024).

1.2.2. **Amendment process**

The procedure for amending the German Constitution requires a two-thirds majority in both houses of the national legislature. To reach this threshold, the ruling coalition (consisting of the Social Democratic Party of Germany (SPD), the Greens and the Free Democratic Party) joined forces with the largest conservative opposition group, the Christian Democratic Union of Germany and the Christian Social Union in Bavaria (CDU/CSU).

The parliamentary groups announced a joint proposal to amend the Constitution and the Federal Constitution Court Act in July 2024—a few months ahead of the February 2025 election—with the intention to conclude the legislative process during their parliamentary term, which is set to end in the autumn of 2025.

A formal bill was introduced in the Bundestag in September 2024 (Federal Republic of Germany Bundestag 2024a). In November 2024, a public hearing was held where legal experts, bar associations, civil society organizations and academic institutions were invited to provide feedback on the bill. While the proposed reforms and additional institutional safeguards were broadly supported, some experts cautioned against potential loopholes and stressed the importance of not overcomplicating legislative processes (Federal Republic of Germany Bundestag 2024b).

The reform largely elevates existing provisions of the Federation Constitutional Court Act to constitutional status, thereby making them more difficult to amend and strengthening the FCC against political interference.

In December 2024 the bill was passed in the Bundestag, surpassing the necessary two-thirds majority (600 votes in favour and 69 against). The following day, the bill was approved as is by the Bundesrat (Federal Republic of Germany Bundesrat 2024). While the AfD and the recently formed left populist party Sahra Wagenknecht Alliance opposed the reform, their objections did not gain enough support to block the amendments (Federal Republic of Germany Bundestag 2024b). The federal president signed the amendments into law in January 2025.

1.2.3. **Amendment content**

The reform largely elevates existing provisions of the Federation Constitutional Court Act to constitutional status, thereby making them more difficult to amend and strengthening the FCC against political interference.

The Constitution now defines the composition and key rules governing the FCC. It establishes that the FCC consists of 2 senates, each with 8 judges, and clarifies that judges serve a single, non-renewable term of 12 years, with mandatory retirement at the age of 68. The amendments also prohibit the reappointment of judges.

In addition, the FCC's autonomy in establishing its internal procedural rules, including the order in which its cases are processed, is now constitutionally protected. The court's status and the effect of its decisions are also clarified: the Constitution stipulates that the FCC is autonomous and independent of all other constitutional bodies, and that its decisions are binding on the constitutional bodies of the federal government and of the federal states and on all courts and public authorities.

An amendment that has led to much debate (see, for example, Duden 2024; Eichberger 2024; Talg and Wittreck 2024; Hamenstädt 2025) relates to the appointment of judges to the FCC. The amended Constitution maintains the existing principle according to which half of the FCC judges are to be elected by the Bundestag, while the other half are to be elected by the Bundesrat. However, while the Federal Constitutional Court Act requires a two-thirds majority in the respective chamber to elect the judges, a new opening clause has been introduced to prevent political deadlock and delays in appointments. According to this new rule, if either body fails to achieve a two-thirds majority within three months, the other legislative body may elect the judge in question, with the appointment being attributed to the originally competent body.

1.3. **NORWAY**

1.3.1. **Trigger and mandate**

While Norway's 1814 Constitution did not originally contain detailed provisions on safeguarding judicial independence, it is fair to say that the principle itself had long been respected and upheld in practice (World Justice Project n.d.).

In 2024, however, the Norwegian Parliament adopted constitutional amendments to further reinforce the safeguards protecting judicial independence. This reform was not prompted by any specific crisis or threat to the judiciary but rather reflected a proactive approach—strengthening an already independent judiciary to guard against future political interference.

In 2024, the Norwegian Parliament adopted constitutional amendments to further reinforce the safeguards protecting judicial independence.

While the constitutional amendments were introduced in 2020, the reform process started earlier, in 2017, when the government appointed a Courts Commission to investigate the organization and independence of the country's courts. According to the two reports issued by the Commission, the Norwegian courts had been functioning effectively, earning high levels of public trust. Judges were seen as independent and neutral, and cases were handled both quickly and to a high standard. However, the reports highlighted that a significant amount of time had passed since the previous reform, during which the courts' framework conditions had evolved. Furthermore, the reports pointed out that 'internationally, there has been growing attention to the importance of the courts', with developments in several European countries underscoring the need for countermeasures against interference in judicial activities (Kingdom of Norway Ministry of Justice 2019: 16, 2020: 22).

Using the same rhetoric, Peter Frølich, the member of parliament who proposed the amendment, explained that, 'In some European countries, a disturbing tendency is for elected bodies to undermine the independence of the courts, particularly when legislative reforms attack the working conditions of judges. … Stronger constitutional protection for courts and judges can be a means of preventing such development' (Kingdom of Norway Parliament 2020: 1).

As a result, the impetus for constitutional reform in Norway appears to have stemmed not only from a desire to modernize the judiciary but also from a wish to implement additional protections, inspired by experiences from other European countries.

1.3.2. **Amendment process**

The Courts Commission, which was comprised of 16 experts (including 7 women) from the judiciary, legal practice, academia, economics, public administration and politics, visited various courts and institutions across Norway and engaged with representatives from the judiciary, academia, public administration and the legal profession (Kingdom of Norway Ministry of Justice 2020: 25–26). The Commission submitted an interim report on the structure of the courts in October 2019 (Kingdom of Norway Ministry of Justice 2019) and a final report in September 2020 that considered the role and functions of the courts, their independence and the performance of their tasks (Kingdom of Norway Ministry of Justice 2020).

The reports make a series of recommendations aimed at ensuring comprehensive protection of the country's courts. Following these

recommendations, Frølich, a member of parliament from the Conservative Party—the ruling party from 2013 to 2021—proposed a constitutional amendment one year before the 2021 parliamentary election (Kingdom of Norway Parliament 2020).

The bill was then submitted to the Standing Committee on Scrutiny and Constitutional Affairs for consideration. In March 2024, the Committee held an open hearing with representatives from the Courts Commission, the Supreme Court of Norway, the Court Administration, the Judges' Association, the Norwegian Bar Association, the Norwegian Institution for Human Rights and the Norwegian Association of Lawyers (Kingdom of Norway Parliament 2024a). Participants were unanimous in asserting that the independence of the judiciary should be safeguarded in the Constitution, and that such protection had to be established during stable times to ensure resilience in times of crisis. The Committee emphasized that, while Norway did not experience challenges related to the independence of the judiciary, '[i]nternational developments … show that even in democratic states, political majorities that want to exert influence can quickly establish control over the judiciary in a way that seriously threatens the independence of the judiciary' (Kingdom of Norway Parliament 2024b).

Amending the Constitution requires a two-thirds supermajority of all members of parliament. This requirement was easily met in May 2024 when the parliament unanimously approved the constitutional amendments, with 168 votes in favour out of the 169 seats (one representative was absent), and the amendments entered into force immediately.[2]

1.3.3. **Amendment content**

The constitutional amendments introduce the following changes:

- the establishment of a mandatory retirement age of 70 for Supreme Court judges, along with a cap limiting the number of Supreme Court judges to 21 (in addition to the existing minimum of 4);

- the formal constitutional recognition of the court structure, explicitly including district courts, courts of appeal and the Supreme Court (previously, only the Supreme Court and the Court of Impeachment were mentioned in the Constitution);

2 A description of the legislative process is accessible here.

- the incorporation of the existing practice whereby judges must be nominated by an independent council—the Judicial Appointments Board—prior to appointment by the King; and
- a provision making the state responsible for ensuring the independent administration of the judiciary.

1.4. SWEDEN

1.4.1. Trigger and mandate

In Sweden, the constitutional reform of the judiciary was part of a broader constitutional review process. In 2020, in response to the trend of democratic backsliding in Europe, the Swedish Government established an all-party parliamentary committee—the Committee of Inquiry on the Constitution—to examine how the Swedish Constitution could be strengthened to avoid similar dangers in the country, focusing on specific elements of the Constitution, namely freedom of association, the amendment procedure and the independence of the judiciary (Kingdom of Sweden Ministry of Justice 2020; Ruotsi 2023; Bisarya 2024: 56).

The government noted that, although the independence of the courts and judges in Sweden functioned well, recent developments in parts of Europe had raised concerns about threats to judicial independence.

In establishing the Committee, the government noted that, although the independence of the courts and judges in Sweden functioned well, recent developments in parts of Europe had raised concerns about threats to judicial independence. These concerns highlighted the need to examine and potentially strengthen the long-term independence of the Swedish courts and judges, with a particular focus on the number of judges and their retirement age, the ability of the Supreme Court and the Supreme Administrative Court to convene in special compositions, and the structure and governance of court administration (Kingdom of Sweden Ministry of Justice 2020: 6).

As was the case in Germany and Norway, rather than reacting to a trigger, the Committee was tasked with proactively strengthening the independence of the courts and judges in Sweden in light of recent developments in Europe.

1.4.2. Amendment process

The Committee of Inquiry was chaired by the president of the Supreme Court and assisted by staff from the Riksdag (Sweden's unicameral parliament) Secretariat and external experts. In total, the Committee comprised 13 members, 6 of whom were women,

with 4 support staff. The Committee met 22 times, with several of the meetings attended by both national and international experts as well as representatives from the court administration in other Scandinavian countries and a number of relevant Swedish state institutions. In addition, the Committee established a reference group consisting of senior judges to provide input (Kingdom of Sweden Committee of Inquiry of the Constitution 2023: 105–06; Bisarya 2024: 56).

In addition to a first interim report, submitted in 2021, proposing an amendment to the constitutional provision on freedom of association (Kingdom of Sweden Committee of Inquiry of the Constitution 2021), the Committee presented its final report, titled 'Enhanced Protection for Democracy and the Independence of the Courts', in 2023 (Kingdom of Sweden Committee of Inquiry of the Constitution 2023). The final report focuses on potential safeguards to prevent democratic backsliding, recommending changes to the constitutional amendment rule and proposals to strengthen the independence of the judiciary. It is notable that the Committee was able to present this reform proposal with support from all parties in the Riksdag, with no dissenting opinions attached to the final report (Ruotsi 2023, 2025).

The proposals underwent a process of public consultations during the latter half of 2023 and were scrutinized by national authorities, universities, courts, human rights organizations and other stakeholders (Kingdom of Sweden Government 2023). The proposals were subsequently considered by the Department of Justice.

In April 2025, following the Committee's recommendations, the government submitted a bill to the Riksdag that included two parts: (a) a first part focusing on constitutional amendment rules; and (b) a second part focusing on strengthening the independence of the judiciary (Kingdom of Sweden Parliament 2025). At the time of writing, the reform proposals have been referred to the Committee on the Constitution—a standing committee of the Riksdag tasked with reviewing constitutional issues, including legislation affecting the structure and functioning of the state—which will adopt a decision on the proposals and submit a report to the Riksdag. As the amendment procedure requires an intervening election between proposal and ratification, the two decisions by the Riksdag are expected to take place before and after the general election planned for September 2026—requiring a simple majority before the election and a two-thirds majority thereafter. The amendments are proposed to enter into force on 1 April 2027.

1.4.3. **Amendment content**

Taking into account the Committee's recommendations, the bill submitted by the government makes the following proposals:

- introducing a specific constitutional provision affirming the independence of the courts;
- providing that the mandatory retirement age for ordinary judges be determined by statute, and stipulating that statutory changes lowering the retirement age cannot affect judges currently in office;
- establishing that the Supreme Court and the Supreme Administrative Court will each consist of no fewer than 12 and no more than 20 ordinary judges, with appointments to these courts initiated at the request of the respective court;
- granting the authority responsible for the central administration of the courts—currently the National Courts Administration—greater independence, to be led by a board composed mainly of current or former ordinary judges, with no executive or legislative representatives (the board would appoint the director, and its members could be dismissed only by the Riksdag through a qualified majority);
- granting the Supreme Court the ability to convene in special judicial formations for significant cases;
- enshrining key elements of the appointment process for ordinary judges in the Constitution, including the requirement that appointments by the government must be based on proposals from a special body composed primarily of current or former ordinary judges;
- limiting oversight of judicial activities to authorities under the Riksdag, namely the parliamentary ombudsman and the National Audit Office (meaning that the chancellor of justice, a government authority, will no longer have supervisory authority over the judiciary); and
- guaranteeing ordinary judges the right to judicial review in cases of dismissal, suspension or disciplinary sanctions, with such proceedings to be adjudicated either by a court composed exclusively of ordinary judges or, if conducted by another body, by a majority of members who are or have been ordinary judges.

1.5. CONCLUSION

The cases of Germany, Norway and Sweden highlight a clear phenomenon of preventive constitutional reform, whereby the authorities learn from what has gone wrong elsewhere in order to strengthen vulnerabilities in their respective domestic constitutional framework before an opportunistic political majority can take advantage of any weak links.

The cases of Germany, Norway and Sweden highlight a clear phenomenon of preventive constitutional reform, whereby the authorities learn from what has gone wrong elsewhere.

The lines between the amendments adopted or proposed and the patterns of democratic backsliding are clear. For example, all three countries have either fixed a retirement age in their respective constitution or prevented the retroactive application of changes to the retirement age which would affect sitting judges. This approach prevents the kind of attack on the judiciary seen in Hungary, where a change in the retirement age resulted in the immediate removal of 270 judges, or in El Salvador, where one third of all sitting judges were thus removed (Bisarya and Rogers 2023: 100–01). Clearly defining judges' term lengths and ensuring their non-renewability, as is the case in Germany, also protects courts from selective non-removal practices—tactics that exploit vague provisions to extend the terms of favoured judges, as observed in El Salvador and Poland (Bisarya and Rogers 2023: 107–08).

Similarly, specifying the number of sitting judges—as adopted in Germany and Norway and proposed in Sweden—and the number of court chambers (as adopted in Germany) helps prevent situations where courts are expanded by increasing the number of seats or creating additional chambers, allowing the administration to hand-pick a large number of judges and gain control over the respective court's decision-making majority. A notable example of this occurred in Türkiye, where the Constitutional Court was expanded from 11 to 17 members, giving the administration the opportunity to appoint a full third of the court at once (Bisarya and Rogers 2023: 102).

Another example is the constitutionalization of the appointment body for judges proposed in Sweden and adopted in Norway. In both Hungary and Poland, the body responsible for nominating to the legislature candidates for appointment was captured by the political majority through changes to the legal framework governing the body. The Swedish and Norwegian proposals and amendments seek to prevent this kind of capture by ensuring that judges constitute the majority in this critical institution. Further, the amendment to the 2012 Basic Law in Germany which provides autonomy for the FCC

over its case docket would seem to be a direct response to the situation in Poland, where the political majority amended the law on the Constitutional Tribunal to force it to take cases in the order in which they were received. This amendment meant the Tribunal had to decide older cases before it could address some of the critical cases arising through various laws passed by the ruling Law and Justice party that were affecting the core of Poland's constitutional democracy.

Reviewing the constitutional framework for vulnerabilities based on patterns of democratic backsliding elsewhere is an exercise which should be strongly considered by all.

The lessons from these countries are evident. Democracy can no longer be taken for granted. Where there is a clear pro-democracy constitution-making majority, reviewing the constitutional framework for vulnerabilities based on patterns of democratic backsliding elsewhere is an exercise which should be strongly considered by all, including established democracies. Further, even where no constitution-making majority exists, it may be prudent for governments to engage in such reviews to produce recommendations ready for consideration at some time in the future, when sufficient numbers are in place.

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Chapter 2

GENDER AND CONSTITUTIONALISM: BARBADOS AND GHANA

Satang Nabaneh

This chapter analyses the ongoing constitutional reform processes in Barbados and Ghana, focusing specifically on the evolving relationship between gender and constitutionalism. In 2024, both nations engaged in significant constitutional reviews. Examining the final reports of Barbados's Constitutional Reform Commission (CRC) and Ghana's Constitutional Review Consultative Commission (CRCC), this analysis highlights the proposed reforms designed to dismantle discriminatory citizenship provisions, recommend a 30 per cent gender quota in legislative bodies and enhance women's representation in key national institutions. The recent passage of Ghana's Affirmative Action Gender Act (2024) further underscores the momentum towards gender equality. The chapter argues that these reforms, while promising, represent a critical juncture in the ongoing struggle to embed gender equality within the foundational legal frameworks of these nations, reflecting a broader trend towards inclusive constitutionalism.

2.1. INTRODUCTION

Achieving gender equality and the Sustainable Development Goals by 2030 is critically dependent on women's equal participation and leadership. Approximately 29 countries worldwide are led by women serving as heads of state or government (Council on Foreign Relations 2025), and the landscape for female leadership in Africa is evolving as well. December 2024 marked significant progress, with the election of Netumbo Nandi-Ndaitwah as Namibia's first female

president, as well as the election of Naana Jane Opoku-Agyemang as Vice-President of Ghana, adding to the growing number of African women who have attained the highest offices in their respective countries. Meanwhile, in the Caribbean, Mia Mottley, Prime Minister of Barbados, continues to be a prominent female leader in the region.

UN Women (2024: 1) notes that, as of 2024, 23.3 per cent of cabinet positions globally were held by women. According to the second Women's Political Participation Africa Barometer 2024, women constitute just a quarter of the 13,057 parliamentarians in Africa—26 per cent in lower houses and 21 per cent in upper houses (International IDEA 2024: 5). In the anglophone Caribbean, women hold on average 22 per cent of ministerial and cabinet positions (UN Women 2018). Generally, women occupy no more than 30 per cent of elected roles across the region, with the notable exceptions of Guyana and Trinidad and Tobago. The higher representation of women in Guyana can be attributed to a legislated quota requiring at least one-third of political party nominees to be women (UN Women 2018: 5).

While progress has been noted, global data consistently reveals that women are under-represented in political life, a trend mirrored across both African and Caribbean nations.

While progress has been noted, global data consistently reveals that women are under-represented in political life, a trend mirrored across both African and Caribbean nations. In Africa, for instance, women's representation in parliaments saw only a slight increase from 25 per cent in 2021 to 26 per cent in 2024, indicating that gender parity in legislative bodies may not be achieved until 2100 at the current rate. Despite the high level of female representation in some countries, such as Rwanda (over 60 per cent in parliament, attributable to a quota), significant disparities persist across the continent, with many nations still far from achieving gender parity in their political leadership.

This chapter examines the ongoing constitutional reform processes in Barbados and Ghana, with a specific focus on the evolving relationship between gender and constitutionalism within these contexts. The year 2024 saw several milestones in the advancement of gender equality, as both nations undertook significant reviews of their foundational legal frameworks. This analysis centres on an examination of the final reports issued by Barbados's CRC and Ghana's CRCC. Through this examination, the chapter highlights the specific reforms proposed to address gender parity within legislative bodies and enhance the representation of women across key national institutions. The recent passage of Ghana's Affirmative Action

Gender Act further underscores the growing momentum towards the advancement of gender equality within the region.

Reforms in both Barbados and Ghana are unfolding within a historical context marked by deeply entrenched gender inequalities. These inequalities are rooted in pre-existing legal and social structures, including discriminatory customary laws and colonial legacies that have historically limited women's rights and participation in public life. However, the push for these reforms has been shaped to a significant extent by the persistent advocacy of women's rights movements and other civil society organizations, both domestically and internationally. Their activism has been instrumental in placing gender equality on the political agenda and influencing the constitutional review processes. The global evolution of international human rights norms and conventions on gender equality, such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women, has also played a crucial role, providing a framework and impetus for the constitutional reforms in both countries.

Reforms in both Barbados and Ghana are unfolding within a historical context marked by deeply entrenched gender inequalities.

The second section of this chapter focuses on the specific constitutional reforms and processes in Barbados, while the third section details those in Ghana. The fourth section considers the broader trends and implications of these reforms on gender and constitutionalism. The chapter closes with concluding reflections.

2.2. **BARBADOS**

Barbados embarked on a constitutional reform process following its transition to a republic in 2022. Recognizing the need to adapt its foundational legal framework to this new status, the president of Barbados, acting under the authority of the 1980 Commissions of Inquiry Act, established the CRC to serve an advisory body, charged with formulating recommendations for the comprehensive reform of the Barbadian Constitution (Bulmer 2024).

The reform process was initiated based on three guiding principles: (a) the imperative of constitutional modernization to reflect the nation's contemporary context; (b) the valuable insights gleaned from practical experience in governance; and (c) the fundamental necessity of deepening Barbados's democratic processes. Initially appointed for a 15-month term, the Commission has seen its mandate extended on two occasions, first by 7 months in September

2023 and subsequently in April 2024, for 2 months set for 30 June 2024, underscoring the intricate and protracted nature of constitutional review (*Barbados Today* 2024). In late 2024, Barbados released the report draft bill for a republican constitution (Yearwood 2025).

Under the Commissions of Inquiry Act, the government appointed the 11 members of the CRC. The specific scope of the CRC's work is defined by its terms of reference, which mandate the Commission to thoroughly examine, consider and inquire into the existing Constitution of Barbados, alongside all related laws and matters, with the ultimate goal of developing and enacting a new constitution for the nation (Joseph 2023). The existing constitutional framework permits amendments without a referendum, provided that specific parliamentary supermajority requirements are met, notably a two-thirds majority in both houses for the most significant provisions.

A significant area of focus within the constitutional reform process is the issue of securing equal gender representation, particularly within the Senate (CRC 2024). The text traces the historical trajectory of women's political enfranchisement in Barbados, noting that the right to vote was initially granted to women in 1944 (albeit with income qualifications), followed by the right to sit in parliament in 1948 (CRC 2024: 124). Despite these milestones, the representation of women in both the House of Assembly and the Senate remains significantly below gender parity. Currently, the House of Assembly has its highest proportion of female members ever, at only 26.7 per cent (8 out of 30), while the Senate has a record number of 7 female senators, constituting just a third of that chamber (IPU 2025).

While acknowledging arguments for organic progression towards equal representation in the Senate, the majority contends that the slow pace of change over the past seven decades necessitates decisive action to ensure fair representation for all Barbadians.

Drawing upon the 2021 Population and Housing Census, which indicates that 51.68 per cent of the total population is female, the majority of the CRC argued that there is no justifiable rationale for the persistent disparity between the representation of men and women in parliament (Republic of Barbados 2024: 123). They assert that the 'People's Parliament ought to better reflect the People themselves' (Republic of Barbados 2024: 123). Consequently, the majority of the Commission recommended that the new constitution should mandate equal representation in the Senate. While acknowledging arguments for organic progression towards such representation, the majority contends that the slow pace of change over the past seven decades necessitates decisive action to ensure fair representation for all Barbadians, irrespective of sex, aligning with the Commission's commitment to non-discrimination.

The proposed solution is a gender-neutral quota, requiring a minimum of 10 senators of each sex in the 21-member Senate. Specifically, the Commission recommends that the prime minister be constitutionally obligated to advise the appointment of six men and six women as government senators; and the leader of the opposition, to advise the appointment of two men and two women as opposition senators. For the five independent senators, the recommendation is that there should be no fewer than two male and two female appointees, with the final selection remaining at the president's discretion. While acknowledging the potential merit of special provisions for other demographic groups, such as youth and persons with disabilities, the Commission's current recommendations are limited to gender representation in the Senate.

The Commission recommended maintaining the Senate's total of 21 appointed members. However, a significant compositional shift was proposed—an increase in opposition senators from two to four (Republic of Barbados 2024: 123). While this change offers the opposition a greater voice, it reduces the number of presidentially appointed independent senators from seven to five, potentially weakening civil society's representation (Yearwood 2025). The allocation of 12 government senators, appointed by the prime minister, would remain unaffected.

In contrast to the majority view, the deputy chair of the Commission offers a dissenting opinion, arguing that the constitutional reform process should also address the significant gender disparity in the House of Assembly (Republic of Barbados 2024: 309). This dissenting perspective proposes a more robust intervention, suggesting that the Constitution should empower parliament to enact legislation that mandates gender quotas for all political parties participating in general elections in Barbados. The proposed enforcement mechanisms include financial penalties, such as fines and the abatement of parliamentary subventions, for non-compliant parties. The dissenting opinion calls for the Electoral and Boundaries Commission to be tasked with actively working towards achieving and maintaining gender equity in both the House of Assembly and the Senate through the regulation of political parties in this specific regard. While the proposals have been commendable, the absence of similar mandatory measures for the House of Assembly in the final adopted report, despite the dissenting opinion of the deputy chair, suggests an inconsistency in the approach to gender parity within the legislative branch.

Reports also indicate that the Barbadian public views the CRC's proposals with scepticism, with citizens expressing concerns that they are 'antiquated' and lack 'innovative thinking' (Moore 2025). What is particularly striking about these public concerns is the apparent absence of a focus on gender equality in their criticisms, even as they voice other reservations about the proposed changes.

2.3. **GHANA**

In April 2023, the then–Ghanaian Minister for Parliamentary Affairs, Osei Kyei-Mensah-Bonsu, established the CRCC under the Ministry of Parliamentary Affairs. The Committee was tasked with carrying out a comprehensive examination of Ghana's 1992 Constitution.

The CRCC's work involved a thorough review of the 2011 report from the previous Constitution Review Commission alongside an analysis of numerous submissions and proposals gathered from various constitutional review platforms and academic institutions across the country. Their ultimate goal was to present the minister with either preliminary ideas or firm recommendations for amending the Constitution.

To fulfil its mandate, the CRCC meticulously reviewed the 1992 Constitution clause by clause, comparing it with the 2011 report of the Constitution Review Commission and all other stakeholder submissions. Their recommendations were consistently guided by the 1992 Constitution's core values, including liberty, equality, justice, accountability and human rights, with the aim of strengthening Ghana's democratic foundations (CRCC 2024: xviii).

The CRCC formally submitted its report to President Nana Akufo-Addo in December 2024. Crucially, the report also addressed the persistent issue of gender imbalance in public life, with several key recommendations aimed specifically at enhancing gender equality within the nation's political and governance structures.

The CRCC's proposals mark a potential shift in the constitutional framework, specifically concerning gender representation (CRCC 2024). While article 35(6)(b) of the 1992 Constitution directs the state to ensure 'reasonable' gender balance in recruitment and appointments to public offices, the proposed amendments aim to establish more concrete and measurable standards, reflecting a

growing recognition that the aspirational language of the original Constitution has not translated into equitable representation in practice.

Chapter 5 of Ghana's 1992 Constitution explicitly safeguards fundamental human rights and freedoms for all citizens, irrespective of origin, skin colour or gender. This commitment is particularly evident in article 17(2), which specifically addresses equality and the prevention of discrimination on the grounds of gender. Furthermore, article 27 outlines provisions for women's rights, calling for distinctive care for mothers during reasonable periods before and after childbirth, including paid leave and special care for children, to enable women to realize their full potential. Article 27(3) also explicitly states that 'women shall be guaranteed equal rights to training and promotion without any impediments from any person'. Complementing these provisions, article 35(6)(b), read in conjunction with article 36(6), places a positive obligation on the state to take appropriate measures to achieve regional and gender balance in recruitment and appointment to public office.

Building on this foundational framework, and notably prior to the formal submission of the CRCC report, Ghana's Parliament passed the Affirmative Action Act on 30 July 2024, which was subsequently assented to by the President on 11 September 2024. This comprehensive law applies to all business entities, institutions and bodies in both the public and private sectors, requiring equal representation in appointments and decision-making positions. The Ministry of Gender, Children and Social Protection, through its Department of Gender, is charged with the implementation of the law. To ensure compliance, an Affirmative Action Monitoring Committee has been established, responsible for supervising implementation, collecting compliance reports and proposing enforcement actions for non-compliance.

This proactive legislative step reflects a broader ambition to rectify the persistent under-representation of women in public life, as evidenced by the fact that women have occupied only 14.5 per cent of seats in the National Assembly since the 2020 elections (Global Centre for Pluralism 2023). The CRCC's proposed amendment to article 27 on gender rights, which would guarantee equality between women and men and equal opportunities across all spheres, aligns seamlessly with the newly enacted Affirmative Action Act's ambitious target. This convergence signifies a move beyond the current Constitution's rather vague directive of 'reasonable

The CRCC's proposed amendment to article 27 on gender rights, which would guarantee equality between women and men and equal opportunities across all spheres, aligns seamlessly with the newly enacted Affirmative Action Act's ambitious target.

balance' and reflects a stronger commitment to gender parity. The CRCC's emphasis on a minimum 30 per cent threshold in public appointments aligns with a commitment made by the Government of Ghana in 2012, which had accepted a proposal from the Constitutional Review Commission to require all state institutions to achieve at least 30 per cent women's representation (Government of Ghana 2012). It also draws parallels with international benchmarks, such as those advocated by the Inter-Parliamentary Union, and regional norms like the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

In addition to this broad institutional target, the CRCC has also proposed specific measures for key national bodies. Notably, there are targeted recommendations for the National Media Commission and the Armed Forces Council (CRCC 2024: 30, 32). The proposal stipulates that there should be a minimum of one woman among presidential and parliamentary appointees to these bodies. This measure aims to ensure female representation in institutions that wield significant influence in shaping public discourse and national security, respectively. While this targeted approach could lead to more immediate progress in these specific areas, the limitation to a minimum of one woman may be seen as setting a rather low bar for representation and falling short of striving for more equitable or proportional representation. This approach might address the symbolic need for a female presence but may not necessarily lead to a significant shift in decision-making power or perspectives within these institutions.

While the majority leader's remarks claiming that the country needs 'a constitutional order that will ensure gender equity and, in many respects, equality to promote real development' directly connect gender equity with national development (CRCC 2024: 96), the depth of societal commitment to these principles and the potential for resistance based on traditional gender roles cannot be overlooked. Constitutional and legal changes alone are insufficient to dismantle deeply entrenched patriarchal norms. Therefore, the effectiveness of these reforms will depend heavily on complementary efforts in education and public awareness as well as active challenges to gender stereotypes.

2.4. THE SHIFTING LANDSCAPE OF GENDER AND CONSTITUTIONALISM

The evolving nexus between gender and constitutionalism highlights a significant paradigm shift in the understanding and practice of foundational lawmaking.

The evolving nexus between gender and constitutionalism highlights a significant paradigm shift in the understanding and practice of foundational lawmaking. Historically, while constitution-building processes have marginalized or excluded women, there is growing recognition of the imperative for their active and equitable engagement. Women's involvement is particularly crucial given that the combined experiences of being Black and a woman have disproportionately disadvantaged women and girls of African descent, who even today frequently remain among the most marginalized and discriminated against women globally, consistently ranking at the lowest levels across various social development indicators (Nabaneh forthcoming 2025).

Despite this imperative for greater inclusion, obstacles persist. For instance, the trajectory of constitutional reform in The Gambia took a concerning turn in 2024. The 2020 Gambian draft constitution, produced as a result of extensive public consultation but rejected in Parliament, was hailed for its bold vision, aiming to introduce significant progressive reforms such as gender quotas (Nabaneh 2022a, 2022b, 2024). In stark contrast, the recently gazetted 2024 draft constitution demonstrably rolls back these gains, particularly concerning genuine gender representation.

A primary point of contention is the deletion of clause 216(8) from the 2020 draft. This clause had mandated essential gender diversity in the leadership of independent institutions, requiring the chairperson and vice-chairperson to be of different genders and ensuring succession by a different gender. The official justification, as indicated in the Government Explanatory Note—that such provisions are better handled through more flexible policies or secondary legislation, and that rigid gender requirements might inadvertently prioritize gender over qualifications—rings hollow to many (Islamic Republic of The Gambia Ministry of Information 2024: 42). This deletion, in practice, removes a direct constitutional guarantee for gender balance in key public bodies, thereby undermining concrete efforts towards achieving equitable representation and, instead, potentially preserving existing male-dominated power structures.

Furthermore, the 2024 draft fundamentally weakens female representation and attempts at affirmative action through gender quotas in parliament. The 2020 draft had envisioned 14 seats

reserved for women in the National Assembly, directly elected by the populace, ensuring a strong, independent mandate (Nabaneh 2022c). The 2024 draft, however, drastically reduces this number to a mere seven seats and, critically, alters their mode of election to an indirect proportional representation system. This shift means that women's seats are now allocated to political parties based on the votes they receive in general elections rather than through direct mandates. The consequence is clear: this change risks diminishing the independent voice of women representatives and their accountability to constituents, making them more beholden to party dictates than to the direct will of the electorate.

The experience in The Gambia demonstrates how these crucial recommendations can be significantly diluted, if not outright undermined, once they enter the often-compromised arena of political negotiation and legislative action.

It is important to note that, while expert bodies in Barbados and Ghana have put forth robust recommendations aimed at strengthening women's political participation, the experience in The Gambia demonstrates how these crucial recommendations can be significantly diluted, if not outright undermined, once they enter the often-compromised arena of political negotiation and legislative action. Ultimately, this experience highlights a recurring tension between expert-driven ideal reforms and the practicalities of political will, underscoring the constant need for vigilance to safeguard the intent of such recommendations.

From a normative standpoint, the imperative to ensure women's substantive representation and access to positions of influence within constitution-making bodies is rooted in principles of justice and fairness. The exclusion of half the citizenry from shaping the fundamental legal framework of their society constitutes an inherent inequity. Furthermore, inclusive participation is a core tenet of democratic legitimacy, rendering constitutions formulated without the meaningful input of women as inherently deficient in their representational capacity. Indeed, the very act of participation holds intrinsic value, fostering civic engagement and a sense of ownership over societal structures; the denial of this right to women undermines the democratic ethos.

Beyond these fundamental principles, women's meaningful participation—understood as their capacity to exert influence on decision-making processes—yields demonstrable benefits for the outcomes of constitution-building. Their substantive involvement is integral to the advancement of women's societal status and the realization of peace, security, prosperity, health and good governance at both the domestic and international levels (Hudson, Bowen and Nielson 2016).

The imperative of ensuring women's active and equitable participation in constitution-building transcends mere adherence to normative principles; it constitutes a pragmatic necessity for the creation of just, democratic and prosperous societies.

2.5. **CONCLUDING REFLECTIONS**

The advancement of gender equality through constitutional reforms within one Commonwealth nation in Africa or the Caribbean carries profound implications for the broader region, potentially serving as a catalyst for similar progress in neighbouring countries. Successful implementation and the demonstrable positive outcomes of such reforms can establish compelling legal precedents and frameworks that other nations can adapt to their unique contexts. Regional bodies within the Commonwealth possess a significant role in facilitating the dissemination of best practices and fostering knowledge exchange among member states.

Looking towards the future, the trajectory of gender and constitutionalism in the two regions will likely be shaped by several critical factors and necessary actions. While constitutional reforms represent a foundational step, their ultimate impact depends on sustained political will to enact and enforce the requisite enabling legislation and policies. Necessary measures include the allocation of adequate resources, the strengthening of relevant institutions and the establishment of mechanisms to hold governments accountable for their commitments to gender equality. Future endeavours may necessitate a broadening of the scope of reforms to address more nuanced dimensions of gender inequality, moving beyond the premise of formal equality to achieve substantive equality. Such reforms could entail tackling deeply entrenched patriarchal norms, addressing gender stereotypes prevalent in education and media, and actively promoting women's economic empowerment. The sustained effort to augment women's representation and meaningful participation at all levels of decision making remains paramount. This effort may involve electoral reforms, the strategic use of quotas where contextually appropriate, and targeted initiatives to support women candidates and leaders.

The extent to which these constitutional reforms account for the intersectionality of gender with other salient identities such as race, class and ethnicity constitutes a critical determinant of their potential to achieve genuine gender equality.

In addition to these considerations, the success and impact of constitutional reforms are inextricably linked to the specific cultural and social contexts of each nation. Reforms must be sensitive to local traditions and values while firmly upholding universal human rights principles. The active engagement of women's rights organizations and other civil society groups is also paramount in advocating comprehensive reforms, diligently monitoring their implementation and holding governments accountable. Their sustained involvement is crucial for ensuring that reforms translate into tangible and meaningful change.

Finally, international and regional organizations can provide invaluable technical assistance, financial support and platforms for knowledge sharing to bolster national endeavours in advancing gender equality through constitutionalism. By comprehensively considering these broader implications and proactively addressing the guiding questions, African and Caribbean nations can strive towards constitutional frameworks that genuinely advance gender equality and foster more just and equitable societies for all their citizens.

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Chapter 3

ADVERSARIAL POLITICS AND CONSTITUTIONAL CHANGE: FIJI, GUYANA AND JAMAICA

W. Elliot Bulmer

3.1. INTRODUCTION

This chapter examines the interaction between constitutional amendment rules and the dynamics of the political opposition in Westminster model democracies. It begins with a discussion of the sometimes-contradictory roles of the opposition—between, on the one hand, working with the goverment to moderate policy in favour of their own preferences or constituencies ('policy wins') and, on the other hand, working against the goverment, highlighting the goverment's failures, in order to win the next election ('electoral wins'). It then explores how these opposition dynamics map onto constitutional amendment rules, first in principle and then through case studies of three constitutional reform processes that were ongoing in 2024—in Fiji, Guyana and Jamaica. In each of these cases, constitutional reformers have had to overcome supermajoritarian thresholds in contexts where a competitive, rather than cooperative, relationship between goverment and opposition is ingrained in political practice, making it instinctively unnatural for politicians to work across party lines.

Supermajority constitutional amendment rules in countries normally characterized by adversarial and competitive politics, may be majority-constraining mechanisms, but they are not necessarily consensus-promoting mechanisms.

The chapter observes that supermajority constitutional amendment rules in countries normally characterized by adversarial and competitive politics, may be majority-constraining mechanisms, but they are not necessarily consensus-promoting mechanisms. Rather than encouraging cross-party collaboration, on a higher plane of constitutional politics, these rules might render constitutional change

effectively impossible unless one party has an overwhelming majority that is sufficient to overcome supermajoritarian thresholds alone.[3]

3.2. **OPPOSITION DYNAMICS AND CONSTITUTIONAL AMENDMENT RULES**

Westminster model democracies have usually been characterized by a majoritarian form of politics (Lijphart 1999). The normal operation of these democracies is to deliver 'responsible party government', with a winning party having a clear mandate to carry out their programme, for which they can be held responsible at the next election (Jennings 1954; Rhodes, Wanna and Weller 2009; Rosenbluth and Shapiro 2018). Even if minority governments and coalitions are not unknown, this system typically eschews the politics of negotiation. The power to govern is won or lost at general elections, rather than shared.

Taken to extremes, this type of winner-takes-all democracy has even been described as a form of 'elective dictatorship' (Hogg 1976). Nevertheless, the Westminster model does not exclude the opposition from public life. On the contrary, the Westminster model 'made a criticism of administration as much a part of the polity as administration itself' (Bagehot 1872). As early as 1844, the British statesman Benjamin Disraeli was able to announce that 'No government can be long secure without a formidable opposition' (Kumar 2014: 3).

The opposition leads parliamentary scrutiny of legislation and holds the government to account. It also acts as an alternative government-in-waiting, potentially just one general election away from power. The opposition, additionally, often has a right to be involved in making certain appointments, especially to independent, neutral institutions such as the judiciary and independent commissions (de Smith 1964: 101–04).[4] In recognition of these roles, the leader of the opposition is typically granted certain privileges, such as an official salary, office

3 The situation is different in Germany, Norway and Sweden—political systems with a long tradition of coalition government—where proactive, collaborative constitutional change has been possible. (See Chapter 1.)

4 In Jamaica, as a typical example, the Constitution requires the leader of the opposition to be consulted on the appointment of the director of public prosecution, the chief justice, the president of the Court of Appeal, certain members of the Judicial Service Commission, the members of the Public Service Commission and the members of the Police Service Commission. In addition, under statute, two members of the Electoral Commission are directly nominated by the leader of the opposition.

space, priority speaking rights in parliament and a place in the order of precedence at official events (Bulmer 2021).

The relationship between government and opposition in many Westminster model democracies is often adversarial and competitive—a classic zero-sum game in which any gain by one side is experienced as a loss by the other. This approach is epitomized by the following saying attributed to Lord Randolph Churchill (1849–1895): 'The duty of the opposition is to oppose' (Safire 1981). The primary aim of the opposition, according to this view, is to maximize votes and so to become the government. Alternatively, the opposition may seek to maximize its policy preferences (Müller and Strøm 2010), seeking to influence government policy and legislation. Such efforts are not always in vain. Bills and policies may be amended or mitigated in response to opposition criticism, especially if the opposition is able to work with groups outside of parliament—in the media and in civil society—to extract concessions from the government (Russell and Gover 2017).

Oppositions may adopt an adversarial approach on ordinary policy issues but work constructively with the government on certain issues of transcendent national interest, such as constitutional reform.

These two approaches are not mutually exclusive. Oppositions may adopt an adversarial approach on ordinary policy issues but work constructively with the government on certain issues of transcendent national interest, such as constitutional reform. In practice, short-term partisan and electoral calculations often dominate in constitutional decision making (Negretto 2013). The question, then, is whether constitutional amendment rules might encourage constructive and cooperative opposition dynamics on constitutional issues, even in otherwise adversarial political cultures.

Most Westminster model constitutions are rigid: they distinguish between ordinary and constitutional laws and set a higher threshold for amendment of the latter (see Bryce 1905). In most cases, supermajority support in parliament is required (Böckenförde 2017; Albert 2019). These purposefully counter-majoritarian amendment thresholds are designed to protect the foundations of the democratic system from the potential abuse of power by the governing majority (Albert 2019) or to entrench the constitutional guarantees extended to specific ethnic or religious minorities, which would otherwise be vulnerable to erosion by majorities (de Smith 1964).

Constrained by their mutual veto, both government and opposition are encouraged, when it comes to constitutional politics, to shift out of an adversarial mode of interaction and into a more collaborative mode. Failure to work across the aisle produces a deadlock, in which

the status quo prevails. An exception arises if the government has a constitutional majority— that is, numerical support in parliament sufficient to amend the constitution without needing the opposition's agreement, as in Barbados in 2021 (Bulmer 2023: 57).

Put another way, supermajority amendment rules can either encourage consensus or block change except where the government has a constitutional majority. In the former case, amendment rules should have a moderating effect. In the latter, these rules might have a paradoxically polarizing effect, since constitutional change will be achieved only when a governing party is in a position of overwhelming numerical and political dominance.

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The three countries considered in this chapter are characterized by deeply adversarial, competitive modes of government–opposition relations which have continued into the sphere of constitutional politics. Agreement between government and opposition has not (yet) been forthcoming in current constitutional change processes.

3.3. **FIJI**

The 2013 Constitution of Fiji has extremely rigid amendment rules. Every constitutional amendment requires a three-quarters majority in the unicameral parliament, followed by a three-quarters majority of the total electorate in a referendum (Constitution of Fiji, section 160). This high threshold is an attempt to lock in a constitution which, although democratic in substance, was unilaterally imposed by the outgoing military government, and which 'has been widely criticised for its lack of public consultation and inclusivity' (Kant and Chung 2024). More favourably, the threshold can also be seen as a mutual guarantee, in a society divided between its Indigenous Fijian (iTaukei) and Indo-Fijian communities, that neither side of Fiji's ethnic polity would be able to impose changes through its own voting strength alone.

Formal rigidity, however, is not the same as resilience: since independence in 1970, Fiji has had four constitutions, three of which have been overturned after military coups. The risk of a breakdown in interethnic relations, and of a return to the cycle of military coups, cannot be ignored and forms an unavoidable background to discussions of constitutional amendments.

From the restoration of democracy until the general election of 2022, Fiji was governed by FijiFirst, a catch-all, big-tent party flanked by two main opposition parties—the Social Democratic Liberal Party (SODELPA) and the National Federation Party. SODELPA later spilt, forming the People's Alliance. The People's Alliance, the National Federation Party and SODELPA formed a coalition government after the 2022 election, headed by Sitiveni Rabuka, leader of the People's Alliance.[5]

Rabuka, when previously in opposition, had argued for far-reaching constitutional reforms, including restoration of the Upper House, a return to geographical and ethnic constituencies in place of national party lists and the rre-establishment of the Great Council of Chiefs, which had previously been a seat of power for iTaukei leaders (RNZ 2018). A process to review the 2013 Constitution and consider amendments was included in the 2022 Coalition Agreement (Kumar 2022). The Great Council of Chiefs was re-established in 2023, albeit on a statutory rather than constitutional foundation (Pacific News Service 2023). Further progress during 2024 was, however, limited to preliminary discussions (RNZ 2024). The positions of the main actors, in terms of their desired eventual outcomes, were not clear (Qalobau 2024).

What was clear, however, was the difficulty of achieving any substantive change under the existing constitutional amendment rules. In order to reform the rest of the Constitution, it would first be necessary to amend the amendment rule in order to lower the threshold. A bill to this effect—the Constitution (Amendment) Bill 2025[6]—has recently been introduced into parliament. This bill would reduce the parliamentary threshold for amendment from three-quarters to two-thirds of members of parliament and would entirely remove the requirement for a referendum on amendments. If successful, this change would then open the way to other amendments.[7]

5 The People's Alliance is a breakaway from SODELPA led by Rabuka, former head of SODELPA. SODELPA remains as the rump of the original party.

6 The text of the bill is available here.

7 There are parallels with Guyana's experience. Much of Guyana's independence Constitution could be amended only by a two-thirds majority in parliament followed by majority support in a referendum (Constitution of Guyana, article 73). In 1978 the People's National Congress (PNC) Government, which had a two-thirds majority in parliament, succeeded—amid allegations of voting fraud—in amending article 73 to remove the referendum requirement. This change then enabled the PNC to establish a Constituent Assembly and to replace—effectively by unilateral action—the existing constitution with a new constitution (see Ramkarran 2004: 590–91).

The governing three-party coalition currently musters 29 seats in the 55-member parliament, far from the 41 needed for a constitutional majority. The prime minister has called for a collaborative, cross-party approach, asking parties to 'put democracy above politics' and to 'embrace dialogue over division' (Ravuwai 2025). Such appeals are aided by the weakness of the opposition. FijiFirst has been deregistered by the Political Parties Registrar for non-compliance with the 2013 Political Parties Act (Lewis and Anthony 2024). This move leaves the former FijiFirst group in parliament split into a Group of 9 who are willing to support constitutional reform, and a Group of 16 who oppose it (Kant and Chung 2024).

At the time of writing, the government's bill to change the constitutional amendment rules received the support of 40 out of 55 votes (RNZ Pacific 2025)—a two-thirds majority but not the three-quarters majority required. The opposition (Group of 16) leader, Inia Seruiratu, was criticized for failing 'to rise above the politics and seek common ground', while the opposition insists that constitutional change must proceed transparently (Rovoi 2025).

Even if the bill did succeed in parliament, getting the backing of a three-quarters majority of the registered electors in a referendum makes constitutional change practically impossible. Once again, the constitutional amendment rule, as it stands, is blocking constitutional change rather than leading to change based upon compromise. This impasse has encouraged the government to seek other solutions, including an attempt to have the Supreme Court declare the 2013 Constitution *null ab initio*—invalid from the outset—owing to the manner in which it was adopted, although that seems an unlikely and divisive outcome (Chand 2025).

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3.4. **GUYANA**

Guyana's Constitution of 1980 deviates quite substantially from the Westminster model, establishing an executive presidency and a system of proportional representation (Ramkarran 2004).[8] However,

8 The Guyanese arrangement is neither strictly presidential nor parliamentary. It combines features of both systems but in a different way from semi-presidential systems. The president is directly elected, although the presidential and parliamentary elections are combined onto one ballot, and voters cannot split their ticket. On the other hand, parliament can remove the president by means of a vote of no confidence, which then triggers new presidential and parliamentary elections. For this I have coined the term 'presidentmentary' system. This kind of system also exists in Botswana and has previously existed in Kenya and several other anglophone African countries.

Westminster-style adversarial politics, with a competitive rather than collaborative relationship between the government and the opposition, endures. Competition for power is exacerbated by the ethnic divide in Guyanese politics, with the division between the two main parties (or party families) reflecting the division between the Afro- and Indo-Guyanese communities (Hinds 2010: 338). The People's Progressive Party/Civic, currently in government, mostly draws its support from Indo-Guyanese voters, while the People's National Congress Reform (part of A Partnership for National Unity, in opposition) mostly draws support from the Afro-Guyanese community. In a country where 'corruption remains a significant barrier to good governance and equitable development' (Kaieteur News 2025), the state 'is used by ethnic groups as a means through which both economic and political power can be attained and exercised' (Edwards 2017: 88).

This zero-sum ethnic politics makes cooperation between government and opposition on constitutional issues difficult.

Although this zero-sum ethnic politics makes cooperation between government and opposition on constitutional issues difficult, cooperation has happened in the past. In the aftermath of civil unrest following the 1997 election, the Herdmanston Accord was brokered between the parties in 1998, which ultimately led to a series of constitutional amendments enjoying cross-party support that were passed in 2000–2001 (Ramkarran 2004). Despite this achievement, subsequent attempts at reform, in 2016–2018, did not reach such consensus. Owing to 'the entrenched culture of dominance', both major parties 'have been reluctant to share power with each other' and 'never really sought to prioritize constitutional reform … to facilitate that outcome' (Ramkarran 2018). Supermajority constitutional amendment rules have therefore been insufficient—without the spur of crisis and conflict that concentrates the mind, by raising the political costs of non-cooperation—to break down adversarial patterns of political conduct.

A persistent blockage has occurred in the process of appointing the most senior judges, which requires the agreement of the president and the leader of the opposition (Constitution of Guyana, article 127). This rule has proven insufficient to overcome ingrained habits of adversarial politics. No chief justice or chancellor has been appointed as a substantive office holder since that rule came into effect (Chabrol 2025).

This impasse between the government and the opposition on judicial appointments is part of a wider struggle for control of the various independent commissions that act as gatekeepers and guardrails to

power. The Constitution establishes many such bodies, with various forms of composition, but there is in practice a government majority on the key ones—the Judicial Service Commission, the Public Service Commission and the Police Service Commission (Constitution of Guyana, articles 198, 200, 210). At stake is control of both the carrot (the state's ability to reward supporters with jobs, contracts and public spending) and the stick (the state's ability to selectively, with partiality, apply laws and regulations).

The current reform process began with the enactment, in 2022, of the Constitutional Reform Commission Act, which provided for the appointment of a Constitutional Reform Commission (News Room 2022). The members of this 20-member body, which includes representatives of the government, the opposition, minor parties, and a range of civil society and communal representatives, were appointed, however, only in April 2024. Progress during 2024 and into early 2025 was slow. It remains to be seen whether agreement on judicial appointments and other constitutional issues can be reached between the government and the opposition, which would require trust and cooperation between the two sides and a mutual willingness to put their reliance on ethic political patronage aside. The need for a two-thirds majority in the National Assembly means, however, that if agreement is not forthcoming, it is likely that reform will be blocked.

3.5. **JAMAICA**

Jamaica has stable, competitive, adversarial two-party politics, with the conservative Jamaica Labour Party (JLP) and the progressive People's National Party (PNP) totally dominating political life (Bertelsmann Stiftung 2024).[9] This intense two-party rivalry has produced a deep, persistent split down the middle of political and social life. In the 1970s this rivalry spilled over into politically influenced gang violence in an 'urban paramilitary conflict that killed, injured, and displaced thousands of people' (Day 2021).

The Jamaican Constitution has a complicated amendment formula, with three levels of entrenchment. Some parts of the Constitution can be amended by an absolute majority vote in both Houses of

9 The high-water mark of third-party success was reached in 1997, when the National Democratic Movement won 4.8 per cent of the vote. In the following election, in 2002, support for the party's plunged to less than 0.4 per cent of the national vote.

Parliament; some parts (the so-called entrenched provisions, which make up the bulk of the Constitution's important sections), by a two-thirds majority vote in both Houses; and some parts (the so-called specially entrenched provisions, which include the monarchy), by a two-thirds majority vote in both Houses followed by a simple majority vote in a national referendum. However, the effect of supermajority rules depend upon the political situation, especially upon the strength of opposition representation (de Smith 1964: 111–17). When first-past-the-post elections are combined with a small legislature and a low geographic variation in voting behaviour, such rules may not be a sufficient safeguard (Bulmer 2020).

At the time of writing, before the 2025 general election, Jamaica's JLP Government has a two-thirds majority in the House of Representatives. Getting a constitutional bill through the Senate, however, is more of a challenge. Senate seats are divided between the government and the opposition according to a fixed formula of 13 to 8 (Constitution of Jamaica, section 35). The opposition therefore has a veto over amendments in the Senate as long as no opposition senators break ranks. That said, Jamaica's constitutional amendment rule also enables the Senate's veto to be overturned by a referendum: if not approved by the Senate, the entrenched provisions can still be amended by a three-fifths majority in a referendum; and specially entrenched provisions, by a two-thirds majority in a referendum. The government can, therefore, take a calculated risk to ignore the opposition and appeal directly to the people if they are confident that they can win a referendum—although experience in the region suggests that winning a referendum is difficult with cross-party support, and practically impossible without it (Bulmer 2024b).

In 2024, Jamaica was in the midst of a constitutional reform process, led by the Minister of Legal and Constitutional Affairs (Bulmer 2024a). Transition to a republic is popular among JLP and PNP supporters alike, but by the end of 2024 political lines were hardening. The PNP opposition, while supportive of the proposed transition to a republic, held that a republic would be incomplete without also transferring the appellate jurisdiction of the Judicial Committee of the Privy Council to the Caribbean Court of Justice. They would not support the government's Constitutional Amendment (Republic) Bill in parliament unless it included this change of apex court in the first phase of reform. The government has so far refused to make such a concession, insisting that such a decision would require further consultation and deliberation, and should therefore be left to phase two of the process (Witter 2025).

The dispute, which depends more on timing than substance, is overshadowed by the prospect of a 2025 general election. The PNP have a tactical decision to make—either to support those parts of the reform on which there is agreement, which would give the electoral dividend of becoming a republic to the JLP, or to withhold support, hoping to extract concessions on the issue of the apex court. If concessions are granted, this would mean that the electoral reward would have to be shared and would not uniquely benefit either party.

In this game of constitutional brinkmanship, it appears that adversarial, short-term, partisan calculations of electoral advantage predominate over consensual, long-term decision making in the public interest. Despite the pleas of the minister, and previous undertakings by the leader of the opposition (PBC Jamaica 2025), constitution making in Jamaica has so far, in this round of constitutional reform, failed to rise above ordinary politics.

3.6. **CONCLUSION**

It is not possible to extrapolate from so few cases, especially from ongoing processes whose outcome is uncertain at the time of writing. It is possible, however, to note that supermajority constitutional amendment rules do not necessarily act as inducements to consensus.

Supermajority constitutional amendment rules do not necessarily act as inducements to consensus.

Negretto (2013) argues that the design choices of political actors during constitutional negotiations may be shaped by their expectations of winning or losing forthcoming elections. These cases may point further towards constitutional realism: short-term electoral outcomes influence not only parties' preferred constitutional design choices but also their willingness to engage at all in the cross-party compromises of constitution negotiation.

Finally, this is a reminder that political culture is sticky. When a political system is built upon winner-takes-all, adversarial, competitive dynamics, it is hard to rise above that to bring about constitutional change in the national interest, especially in an election year, when the competitive scrabble for power easily overshadows any collaborative impulse.

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Chapter 4

THE CONSTITUTIONAL PLACE OF THE PROSECUTION SERVICE, DEMOCRATIC BACKSLIDING AND RESILIENCE

Adem Kassie Abebe

4.1. **INTRODUCTION**

An all-too-familiar occurrence after an alternation in power, including one that takes place through democratic elections, is the commencement of prosecution proceedings against former government officials. In 2024–2025 senior former officials in Ghana (Mensah 2025), Mauritius (Mohabuth 2025), Poland (Reuters 2024; Carothers and Carrier 2025) and Senegal (Ba 2025) faced investigations and prosecutions after the opposition won presidential or legislative elections. In the United States, then-President Joe Biden, days before he left office, issued unprecedented pre-emptive pardons ostensibly over fears of the capricious prosecution of government officials and his family members by his successor, President Donald Trump (Liptak and Saenz 2025). The pardons occurred amid a series of proceedings against Trump, led by a special prosecutor during Biden's presidency, that faced accusations of politicization.

The use or abuse of prosecutorial powers to harass government critics is a recurring feature in authoritarian and semi-authoritarian regimes, as is the failure to prosecute those in power for suspected crimes. Comparative studies on democratic backsliding around the world have identified the prosecution service as one of the key institutions that backsliding governments seek to capture, neutralize or instrumentalize (Bisarya and Rogers 2023).

Whatever the merits of the aforementioned investigations and prosecutions, and while broader developments show the value of democratic alternation in power to promote responsiveness and accountability, these proceedings raise critical questions around why the targeted officials were not prosecuted while they were in power but are prosecuted only after leaving power.

These questions are directly related to both the reality and the perception of the prosecution service's neutrality and professionalism, which are shaped in part by the procedures for appointing the head of the service and the mechanisms for holding that office to account. Accordingly, understanding the workings of the prosecution service is crucial, particularly since the prosecution often holds significant discretionary authority which 'is exercised "backstage" and out of public view and oversight' (Stenning, Colvin and Douglas 2019: 1).

This chapter discusses constitutional reform debates around the autonomy of the prosecution service in various countries in 2024. It first presents in broad strokes developments and changes that took place during the year. It then identifies key issues and highlights broader insights and considerations relevant to democratic regression, resilience and recovery, and constitutional and legal reform endeavours concerning the prosecution service.

Disputes around the politicization of the prosecution service, including in relatively competitive democracies, may give rise to demands for constitutional and legal reforms affecting the service, especially in places where backsliding regimes have institutionalized changes or where democratic forces seek to shore up vulnerabilities in case of an electoral victory on the part of political groups that are ambivalent about the value of democratic pluralism (see Chapter 1: Constitutional resilience: Fixing the roof while the sun is shining). If and when these reform debates occur, comparative experiences can provide useful insights into how to enhance frameworks aimed at ensuring both the neutrality and effective accountability of the prosecution service.

The prosecution service can feature, sometimes prominently, in debates during transitions of power and constitutional reform.

4.2. THE PROSECUTION IN FOCUS

The prosecution service is one of the key institutions that was subjected to constitutional or institutional restructuring in 2024. In some countries, particularly those under populist, illiberal or otherwise undemocratic political forces, this restructuring sought to bring or keep the prosecution service under political control. In view of the potential instrumentalization of the service to undermine political pluralism and civic space, the role and function of the prosecution service lies at the heart of the rule of law and democratic framework. It is therefore no wonder that the prosecution and its actions or omissions feature, sometimes prominently, in debates during transitions of power and constitutional reform. This chapter briefly summarizes these reform endeavours to provide the basis for a subsequent discussion of key comparative questions and considerations in the design of the prosecution service and the balancing of its autonomy, impartiality and accountability.

In late 2024, the Hungarian Parliament adopted constitutional amendments regarding the process and requirements for the appointment of the prosecutor general, who leads the prosecution service and exercises significant powers over the decisions and careers of other prosecutors (Farkas 2025). Prior to the amendments, the president appointed the prosecutor general from among existing prosecutors following approval by a two-thirds majority in parliament. The amendments removed the requirement that candidates must be serving prosecutors, effectively expanding the pool of candidates and therefore the discretion of political actors. While this change is not unusual from a comparative perspective, it has been seen in the specific context of Hungary's backsliding democracy as enabling the politicization of the appointment process (Farkas 2025). Even if the prosecutor general is ultimately appointed from among existing prosecutors, the change in selection procedure could incentivize such prosecutors to be pro-government in order to secure nominations.

The amendments were made ahead of elections planned for 2026, where the ruling party is expected to face a strong opposition, potentially denying it the majority needed to amend the constitution. Many therefore see the change to the selection procedure as a prelude to more amendments that the ruling party is seeking to entrench before potentially losing its amending majority (Farkas 2025; Bisarya and Rogers [2023] refer to this tactic as 'harpooning'), including reforms that could grant sweeping powers to the government to disband civil society organizations (Inotai 2025).

Indeed, the amendments were adopted through an accelerated procedure, with no input from the public or even the key actors affected by the changes.

In Bulgaria, constitutional amendment debates in 2024 focused on provisions governing the prosecution, in particular the extensive powers of the prosecutor general—without corresponding effective accountability mechanisms—and the composition of the Supreme Judicial Council (Thavard and Slavov 2024).

Under the 1991 Constitution, the prosecutor general has broad powers to 'oversee legality and provide methodological guidance to all other prosecutors' (article 126[2]). In July 2024, the Constitutional Court invalidated a 2023 constitutional amendment that had sought to diminish the powers of the prosecutor general and reduce the office's seven-year term to five years, but the amendment was criticized for enhancing political influence in the appointment of the prosecutor general (ConstitutionNet 2024; Vassileva 2024).

The above-mentioned constitutional amendment debates were complicated by the formal expiry of the tenure of some members of the Supreme Judicial Council, which nominates the prosecutor general. A political deadlock made it impossible to achieve the two-thirds majority that the National Assembly needs to appoint some members of the Council. In this context, the Constitutional Court ruled that the term of the existing members of the Council would continue until replacements are appointed (Vassileva 2024).

In January 2025, parliament adopted a law (not a constitutional amendment) stipulating that Council members who are in office even after their terms expire—based on the principle that their positions should remain filled until their replacements are appointed—cannot participate in nominating the prosecutor general (The Sofia Globe 2025). In addition, the law limits the term of acting prosecutors general to a maximum of six months. The law was adopted days before the Council was due to nominate a prosecutor general, forcing the Council to cancel the process.

In The Gambia, the cabinet published a draft constitution (WADEMOS 2024) after modifying a 2020 draft that the independent Constitution Review Commission (CRC) had prepared after extensive popular and stakeholder consultations. The CRC draft failed to obtain the needed majority in parliament in 2020 (Constitute Project n.d.). One of the key changes in the cabinet draft relates to the deletion of a proposed

change in the CRC draft (article 131) to establish an institutionally separate and self-standing director of public prosecutions who would have autonomy in relation to the attorney general (CRC draft, article 131). The cabinet draft deleted this change and maintained the provision in the 1997 Constitution which subjects the decisions of the director of public prosecutions to the oversight and approval of the attorney general, even in specific cases (1996 Constitution, article 85[1]).

In Poland, one of the key areas that has given rise to reform debates following the 2023 electoral defeat of the government, led by the Law and Justice (PiS) party, was the prosecution service (Mycielski, Kozlovska and Kramek 2025). Given the powers of the Polish president, who is affiliated with PiS, to veto legislation and the fact that the coalition government that came to power in 2023 did not have a constitutional amendment majority in parliament, most of the changes adopted in 2024 were implemented by the Ministry of Justice through sublegislative measures.

In addition, the government is pursuing legislative changes that seek to separate the positions of minister of justice and the prosecutor general; under laws adopted by PiS, the same individual serves in both positions simultaneously. A proposed draft law from 2024 seeks to officially separate the two positions and ensure the autonomy of the prosecutor general (Kremens 2024). The draft proposes an open and relatively competitive appointment process for the prosecutor general and the establishment of a separate National Council of Prosecutors; it also seeks to ensure both the internal and external autonomy of the prosecution service, as well as its accountability. The draft law is under review following comments from the Venice Commission (Kremens 2024), but given the election of the PiS candidate as president in the 2025 election, any reform drive is likely to face the same veto threat as before.

In Slovakia, the Special Prosecutor's Office (SPO) was abolished in 2024 through a legislative amendment (Domin 2024; Klimek and Sramel 2025). The SPO is part of the Office of the Prosecutor General but has autonomous powers and personnel, mainly focused on corruption, abuse of power by public officials and organized crime.

The 1992 Constitution refers to the prosecutor general and leaves the organization of the office to legislative regulation, without specifically mentioning the possibility of establishing special prosecution bodies (articles 150 and 151).

The abolition of the SPO triggered protests partly because the Office was pursuing criminal cases against some key government officials of the party which won the 2023 parliamentary election. Regardless of the merits of maintaining the Office, the absence of constitutional guidance on whether, when and how special prosecution bodies may be established created perceptions of politicized decisions in a public function that is crucial to the rule of law and democracy. Moreover, as in Hungary, the Slovak Government pursued an accelerated legislative procedure to abolish the SPO, heightening criticism of partisan manipulation of state institutions.

In the USA, the special prosecutor leading proceedings against Trump was appointed by the attorney general. Accordingly, the proceedings were halted after Trump was re-elected in November 2024. The establishment and regulation of special prosecutors or special counsels in the USA is largely based on executive discretion rather than constitutional or even legislative regulation. In fact, the appointment of special counsels has been challenged as unconstitutional (Holzer 2024; Lederman 2024).

4.3. THE PROSECUTION IN THE CONSTITUTION: ISSUES AND CONSIDERATIONS

The prosecution service is often a target for democratic backsliders.

The aforementioned examples of debates and reforms to the legal and constitutional provisions governing the prosecution service affirm that its status is often a target for democratic backsliders. It is also critical for stakeholders seeking to resist backsliding measures, reverse regressive changes and strengthen the resilience of the service. The experiences described demonstrate that the prosecution service can be a double-edged sword, endangering or serving as a bulwark for the rule of law, political pluralism and civic space. A systematic understanding of the issues affecting the status, autonomy and accountability of the prosecution service is therefore critical. This section identifies some key issues and considerations based on comparative experience.

In view of the recurrent challenges, strengthening and stabilizing the operation, autonomy and effective accountability of the prosecution service may require a more robust constitutional regulation of the institution than is often the case. Poland's experience demonstrates the challenges and opportunities of a relatively minimalist constitution that largely leaves issues around the prosecution service

(and the judiciary) to legislative regulation. This approach enabled the PiS government to change key aspects of the framework through legislation, without the need to resort to a constitutional amendment. The current government is seeking to reverse some of these changes and strengthen the prosecutorial framework through organizational and legislative measures. Finding a long-term solution to challenges and reducing uncertainty and enhancing relative stability may require broad political consensus to entrench key aspects at the constitutional level. In Slovakia, the decision to abolish the SPO was pursued unilaterally through the regular legislative process. Similarly, special prosecutors in the USA do not have a clear constitutional basis, leading to charges of politicization when they are established.

Constitutional rules on the key issues related to the prosecution service can diminish perceptions of politicization and help prevent unilateral and capricious changes.

Constitutional rules on the key issues related to the prosecution service can diminish perceptions of politicization and help prevent unilateral and capricious changes. Constitutional rules also require transient majorities to seek support from across the political aisle to pursue changes. Nevertheless, as the developments in Hungary show, dominant political groups can constitutionally entrench capricious reforms that will be difficult for future democratic forces to reverse. Accordingly, constitutional regulation offers relative stability and protection but is certainly not a panacea.

In thinking about constitutional regulation, it is particularly important to consider ways to outline the broader objectives and to guarantee the functional autonomy of the prosecution service, as well as the independence, tenure and accountability of the highest prosecutor. Constitutions also increasingly seek to guarantee the institutional autonomy of the prosecution service, often by separating it from the ministry responsible for justice and law enforcement, which is often headed by a political appointee serving as the principal legal advisor to the government.

The institutional autonomy and independence of the prosecution service needs to be counterbalanced with clear and effective accountability mechanisms. The absence of such mechanisms can create authority without responsibility, which can undermine the rule of law and democracy. Indeed, the Bulgarian Office of the Prosecutor General has been criticized for the extensive powers it enjoys without corresponding accountability mechanisms, which the European Court of Human Rights, Venice Commission and other European institutions have identified as a problem that needs to be addressed (Thavard and Slavov 2024). Recurrent constitutional and legal reform efforts have therefore sought to tame the prosecutor

general. In the face of this challenge, the difficulty of garnering consensus on constitutional reform to address the issue and strict judicial interpretations have engendered other problems, including controversies in the appointment of members of the judicial council responsible for nominating the prosecutor general, leading to repeated appointments of acting prosecutors general and, in early 2025, the adoption of controversial legal reforms aimed at dealing with the problem.

Bulgaria's experience also underscores the importance of deadlock-breaking mechanisms in the appointment of key officials, especially where the process requires a qualified legislative majority (Venice Commission 2018, 2021), and in clearly outlining the consequences of failure to appoint replacements in due time to reduce constitutional and legal blind spots.

The autonomy of the prosecution system and popular perceptions of its independence and role in impartially enforcing the law may also require the constitutional regulation of whether, when and how special prosecution mechanisms may be established. In cases where there are no rules on these issues, incumbent governments may establish special mechanisms, including for potentially capricious purposes. The existence of constitutional regulation of a prosecution service does not necessarily exclude the establishment of special mechanisms. Indeed, Slovakia's SPO was established despite the presence of a constitutionally established Office of the Prosecutor General. In cases where constitutionally established autonomous prosecution institutions are in place, the establishment of special mechanisms may allow opportunities for transferring power from the autonomous body to politically compliant bodies. Even where special mechanisms have been established to advance the rule of law in view of specific expertise, potential conflicts of interest or the complexity of certain crimes, the lack of constitutional anchoring can lead to their abrupt abolition, as occurred in Slovakia.

The autonomy of the prosecution system may also require the constitutional regulation of whether, when and how special prosecution mechanisms may be established.

Another key aspect of the prosecution service relates to prosecution councils, which play roles largely similar to those of judicial service commissions but in relation to prosecutors. In some jurisdictions, the appointment and disciplining of prosecutors is dealt with through a judicial service commission, which may include a special chamber for prosecutors (e.g. France). Some countries have moved towards the establishment of dedicated prosecution councils separate from the judicial service commission. In both Bulgaria and Poland, for instance, the attempt to enhance the autonomy, accountability and

effectiveness of the prosecution service has included proposals to establish separate prosecution councils. In countries that choose to establish such bodies, it is important to seek to avoid the twin perils that face all independent fourth-branch institutions (Bulmer 2019)—namely, the potential politicization of the council, undermining autonomy, and the possibility of corporativism, tainting accountability. Both politicization and corporativism are antithetical to the core function of the prosecution service—to enhance the rule of law and democratic accountability and responsiveness.

Beyond the constitutional status, substance and institutional aspects of the autonomy of the prosecution service, developments from 2024 also reveal a familiar challenge regarding the reform process. In particular, constitutional amendments in Hungary and the abolition of the SPO in Slovakia were pursued through accelerated processes that have consequences for the democratic quality of the reforms, regardless of the compatibility of the substance of the reforms with the democratic spirit. Accordingly, constitution makers should be cautious in the regulation of both constitutional amendment and legislative processes. In this regard, clear requirements for the publication of proposed amendments for a specified period before proposals are debated in parliament can enable public and political deliberations, potentially allowing organized resistance against proposed reforms to undermine political pluralism and civil space (Bisarya and Rogers 2025).

Such time requirements are common, particularly in relation to constitutional amendments, and exceptions to trigger accelerated procedures should be carefully crafted and should ideally not apply to reforms that affect institutions critical to the rule of law, fundamental rights and political pluralism—which constitute a minimum constitutional and democratic core (Dixon and Landau 2016; Bisarya and Rogers 2023). Alternative or additional safeguards against procedural abuses may include the possibility of allowing a determined number of members of parliament to delay the adoption of legislative or constitutional amendment initiatives, and possibly even the empowerment of a predetermined number of members of parliament to refer proposals to a referendum (Böckenförde 2017: 7).

The authority to alter the fundamental rules should arguably not be left to the unilateral whims of the political majority, however significant that majority is.

The authority to alter the fundamental rules should arguably not be left to the unilateral whims of the political majority, however significant that majority is. Changes to such rules should require broad consensus and at least a direct popular vote, in addition to qualified majority support in representative

parliaments (see Chapter 3: Adversarial politics and constitutional change: Fiji, Guyana and Jamaica, where Bulmer argues that supermajority requirements may simply constrain the majority, encourage deadlock and favour the status quo, rather than incentivizing cooperation, compromise and consensus).

4.4. **CONCLUSION**

Experiences from across the world in 2024, including constitutional and legislative reform debates, demonstrate that the prosecution service is critical to the functioning, stability and legitimacy—and therefore the effectiveness—of the rule of law and the democratic framework. Accordingly, assessments of and efforts to improve the resilience of a constitutional and democratic framework should pay particular attention to the constitutional status of the prosecution service and efforts to reform it. Beyond reform advocates, domestic and international trackers of democratic progress and regression may also do well to include specific indices focusing on the prosecution service as a proxy for the overall health and trajectory of the democratic framework. In this regard, the extent to which the prosecution is anchored at the constitutional level can make a difference.

Assessments of and efforts to improve the resilience of a constitutional and democratic framework should pay particular attention to the constitutional status of the prosecution service and efforts to reform it.

Nevertheless, constitutional regulation is no magic wand. Ultimately, the fate of democracy in general and the ability of the prosecution service in particular to deliver on the promise of enforcing the law and protecting (or at least not undermining) democracy depends on broad popular commitment to the ideals and promises of the rule of law and political pluralism. Beyond the legal and constitutional mechanisms, this commitment must be reinforced by a strong civil society to monitor and challenge governments and inform the public about the damage being done to their democracy, and a political opposition able to 'pursue smart tactics like forging coalitions and broadening their appeal beyond traditional supporters' (Carothers and Carrier 2025).

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Chapter 5

CONSTITUTING FAMILY, GENDER AND THE NATION: EUROPEAN UNION 'VALUES' AND INTEGRATION IN 2024

Sharon Pia Hickey

Box 5.1. **Quotes**

'Yes to natural families, no to the LGBT lobby ... yes to the culture of life, no to the abyss of death'—Giorgia Meloni, Prime Minister of Italy

'Brussels' efforts to have us allow LGBTQ activists into schools and nursery schools are in vain, we are not willing to do that'—Gergely Gulyás, Head of the Prime Minister's Office of Hungary

'Even if the anti-LGBT law hinders us with EU integration, we will disregard these "European values"'—Mamuka Mdinaradze, Executive Secretary of Georgian Dream

'We not only celebrate European values, we commit once again to transforming them into reality here at home ... [The] European Moldova we are building must, first of all, be a country where families live in safety, prosperity and with confidence in tomorrow'—Maia Sandu, President of Moldova

'Sexist, stereotypical language has no place in our Constitution and is representative of a time when women were treated like second-class citizens'—National Women's Council of Ireland

5.1. **INTRODUCTION**

Throughout 2024, constitutional debates surrounding concepts of family and gender became touchstones in broader struggles over national identity and European 'values'. This chapter traces how the gender and sexuality culture war is unfolding across the landscape

of the European Union—in France (a founding EU member that positions itself as a vanguard of European values), in Ireland (a pro-European but traditionally more socially conservative country) and in Georgia and Moldova (two aspirants on starkly divergent paths). The following questions run throughout the chapter: how is increasing European integration shaping constitutional identity, and conversely, how do national constitutional choices around family and gender feed back into the competing narrative of what Europe is and what it stands for? The answers have very real consequences for women, girls and sexual minorities—and the future of sustainable democracy in Europe.

5.2. **EU VALUES, ILLIBERALISM AND GENDERED POPULISM**

The surge in rhetoric in opposition to gender equality, abortion and the LGBTQIA+ community across Europe is closely linked with the rise of illiberal politics and right-wing populism (Dietze and Roth 2020; Oxfam 2024). By restricting abortion and vilifying minority sexualities, right-wing populists connect women's civic worth with reproduction and invoke the traditional family as simultaneously the locus, building block and guardian of the nation's identity. In this narrative, the breakdown in national identity is caused by the erosion of traditional norms by external forces—tantamount to a loss of sovereignty (Rubio-Marín 2020; Palazzo 2024). Russia has amplified these narratives, portraying itself as the defender of 'traditional Christian values'—at home and abroad—against a decadent, corrupt and immoral West (Caballero 2023), and has propagated over 17,000 anti-EU or anti-LGBTQIA+ messages since 2015 in an effort to weaken democratic cohesion in countries of geostrategic importance (EUvsDisinfo 2023; Nikoleishvili 2024). European populists have also been inspired by Russia's legal suppression toolkit—pairing regressive sexuality and gender reforms with stringent 'foreign agent' laws and funding regulations that delegitimize and overburden non-governmental organizations (NGOs), activists and independent media—providing a pretext for curtailing freedoms of assembly, expression and the press, and for stifling broader political dissent (Strand and Svensson 2021; European Union External Action 2023; Bondarenko, Shubin and Storyev 2024).

The surge in rhetoric in opposition to gender equality, abortion and the LGBTQIA+ community across Europe is closely linked with the rise of illiberal politics and right-wing populism.

Historically, the EU has deferred to its member states on the substance of more sensitive matters—such as marriage, reproductive

The EU has been drawn into an overt culture war, forced to define the boundary between the permissible pluralism of member states and impermissible breaches of its common values.

rights, adoption and gender recognition. Faced with this new geopolitical reality, however, the EU has been drawn into an overt culture war, forced to define the boundary between the permissible pluralism of member states and impermissible breaches of its common values under article 2 of the Treaty on European Union—human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including minority rights (Lane Scheppele, Kochenov and Grabowska-Moroz 2020; Lamprinoudis 2025).

In 2021 the European Commission opened infringement proceedings against Hungary's so-called Child Protection Act, which bars any portrayal of LGBTQIA+ topics in schools or the media, and a parallel case against Poland for creating 'LGBT-Ideology-Free Zones' (e.g. Kartarodzin.pl n.d.; Knight 2025). The European Parliament has twice triggered article 7(1) proceedings for serious breaches of EU values (against Poland in 2017 and Hungary in 2018: Council of the European Union 2025) and has issued a stream of non-binding resolutions condemning homophobia, promoting sexual and reproductive health rights, and in 2024 urging the inclusion of abortion rights in the Charter of Fundamental Rights. Meanwhile, the European Court of Human Rights has found violations in cases of state failure to provide protections for legal gender recognition, same-sex couples and reproductive autonomy[10]—all flashpoints in today's culture war. Taken together, these bodies' actions send a clear message—safeguarding and expanding LGBTQIA+ rights and women's reproductive autonomy are integral to safeguarding the EU's core values.

Against this backdrop, the four snapshots that follow in this chapter—describing the situation in France, Ireland, Georgia and Moldova—show the same EU narrative refracted through very different domestic prisms, illuminating how constitutional politics on family and gender simultaneously respond to and reshape the meaning of Europe itself.

5.3. FRANCE: *SOLIDARITÉ* FOR GLOBAL SORORITY

Reacting to the rollback of reproductive rights in Europe and the United States, President Emmanuel Macron in 2024 moved to

10 *Goodwin v The United Kingdom* App no 17488/90 (ECtHR, 27 March 1996); *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015); *Bayev and Others v Russia* App nos 67667/09, 44092/12 and 56717/12 (ECtHR, 20 June 2017); *Fedotova and Others v Russia* App nos 40792/10, 30538/14 and 43439/14 (ECtHR, 17 January 2023); *M.L. v Poland* App no 40119/21 (ECtHR, 14 December 2023).

pre-empt any challenge to abortion in France by constitutionalizing the right to terminate a pregnancy (Goury-Laffont 2024). France has long been a self-styled champion of European values and liberal democracy, but that image is increasingly under strain from the persistent popularity of right-wing political parties at home. The 2024 amendment was therefore an opportunity for the government to signal its side in Europe's ongoing culture wars, solidify waning left-wing support in the months before an election, and put conservatives—and in particular Marine Le Pen's party—in a position of voting with the president or publicly revealing potentially unpopular and misogynist viewpoints (Solletty 2025).

On International Women's Day, 8 March 2024, President Macron signed into law a constitutional amendment adding a single new sentence to article 34 of the 1958 Constitution: 'The law determines the conditions under which a woman's guaranteed freedom to have recourse to a voluntary interruption of pregnancy is exercised.' The wording was a compromise on the version introduced by opposition deputies in October 2022: after months of debate over the words 'right', 'freedom' and 'guarantee', and the placement of the text in the Constitution, the more conservative Senate adopted a lighter version in February 2023. With debates ongoing, Macron's government took control of the process in December 2023 (Bottini, Bouaziz and Hennette-Vauchez 2024).

By initiating the executive-led process under article 89 of the Constitution, Macron avoided the requirement for a referendum: instead, on 4 March 2024, the parliament, convened to great visual effect as a Congress at Versailles, approved the amendment with 780 votes in favour, 72 against and 50 abstentions (Imbach and Romain 2024). Thirty-one National Rally deputies and several Republicans voted against or abstained, exposing internal divisions even as party leaders officially backed the measure. A poll taken just before the vote found that 86 per cent of French respondents favoured constitutional entrenchment of abortion, giving the government a rare unifying issue, cost-free to implement, on which it could campaign across partisan lines. The symbolism of the amendment was not lost on its proponents, with the lawmaker Mathilde Panot stating that the amendment was 'a promise for all women who fight all over the world for the right to have autonomy over their bodies—in Argentina, in the United States, in Andorra, in Italy, in Hungary, in Poland ... . This vote today tells them: Your struggle is ours; this victory is yours' (Center for Reproductive Rights 2024).

A poll taken just before the vote found that 86 per cent of French respondents favoured constitutional entrenchment of abortion.

A series of referendums have both reflected and contributed to Ireland's liberal trajectory and its break from the Catholic Church.

5.4. IRELAND: POLITICAL MISSTEPS—STALLED FAMILY AND GENDER REFORMS

Ireland's 1937 Constitution wove religiously infused values and norms into law, including banning divorce, casting women's place as 'in the home', and—through a 1983 amendment prompted by fears of a *Roe v Wade*–style ruling—effectively banning abortion. Integration with the EU catalysed social liberalization, including pay equality between men and women and the decriminalization of homosexuality in 1993 (Bell 2023). Since then, a series of referendums have both reflected and contributed to Ireland's liberal trajectory and its break from the Catholic Church, including legalizing divorce (1995), marriage equality (2015) and abortion (2018), the latter two driven by people's movements.

Yet on 8 March 2024, the same day France enshrined abortion rights, Irish voters rejected two proposals to amend constitutional provisions related to marriage and family, despite widespread recognition that the provisions did not reflect modern Irish life. The first proposal aimed to expand the constitutional definition of family (article 41) to include families based not only on marriage but also on 'other durable relationships'. The second amendment targeted controversial constitutional provisions portraying women's life 'in the home' as necessary to achieving 'the common good'. In its place, a gender-neutral article would have recognized unpaid care by family members, directing the state to 'strive to support' such care (Electoral Commission of Ireland 2024).

Both amendments were soundly rejected nationwide, with negligible variation across urban–rural, gender or socio-economic groups (Ipsos 2024). This rejection was surprising given the almost-unanimous political and social support for amending these articles, which travelled a 12-year route from a 2012 Constitutional Convention, subsequently handed over to a 2013 Task Force, on to a 2018 Justice Committee, reconsidered during the 2021 Citizens' Assembly on Gender Equality and finalized in a cross-party joint parliamentary committee. There were various political, social and legal factors that contributed to the defeat. Firstly, voters were asked to endorse weaker texts than the stronger, clearer language recommended by the 2021 Citizens' Assembly on Gender Equality and the cross-party joint parliamentary committee (Bacik 2023). The language of the 'care' amendment diluted the duty of the state from an obligation to take 'reasonable measures' to merely 'strive to support' unpaid care, which disappointed many caregivers, disability-

rights activists and feminists who saw the burden reverting from the state to families and still—de facto—to women. In relation to the 'family' amendment, the phrase 'other durable relationships' was undefined, prompting warnings from legal practitioners and academics that the courts would decide what counted as 'family', with potential future consequences for inheritance, tax and citizenship. These concerns were confirmed by a memorandum from the attorney general leaked just before the referendum (Moore 2024).

Further, critics faulted the government for poor timing and communication: last-minute wording changes, a rushed parliamentary process and scheduling the vote on International Women's Day led to accusations of political arrogance (Pogatchnik 2024). The government expressed disappointment with the result, saying they 'got it wrong' (Bray 2024), a response that underscored how proposing values-based but ultimately symbolic constitutional reforms can fall flat in a country eager for real, substantive, progressive reforms, ironically leaving Ireland with constitutional provisions at odds with EU norms on gender equality. This fragility of constitutional promises for meaningful social progress is mirrored in Georgia, where a once-robust constitutional pledge to pursue EU integration has been undermined by sovereignty-first politics.

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5.5. GEORGIA: A BATTLEGROUND FOR EU INTEGRATION

Georgia provides a compelling case study in Europe's culture wars: public support for EU membership nears 90 per cent, but the ever-present shadow of Russia complicates its EU aspirations and provides a pretext for stalling increased integration (IRI 2023). When Georgian Dream came to power in late 2012 and secured the presidency in 2013, it quietly continued its predecessor government's negotiations on an EU–Georgia Association Agreement, even as it sowed the seeds of an illiberal turn via tacit tolerance of homophobic violence, politicized prosecutions of political opponents and increasing anti-NGO rhetoric (Amnesty International 2013; OC Media 2018). Despite these warning signs, Georgia cemented a pro-Western trajectory into its Constitution in 2017–2018, stating that 'The constitutional bodies shall take all measures within the scope of their competences to ensure the full integration of Georgia into the European Union and the North Atlantic Treaty Organization' (Constitution of Georgia, article 78). By 2020–2021,

however, Georgian Dream's backsliding on rule-of-law reforms and its introduction of a Russian-style 'foreign agents' bill exposed a growing dissonance between rhetoric and reality, and a visibly deteriorating relationship between Georgia and the EU.

Russia's attack on Ukraine in February 2022 abruptly reshuffled and crystallized regional priorities.

Russia's attack on Ukraine in February 2022 abruptly reshuffled and crystallized regional priorities: Ukraine and Moldova applied for EU membership, with Georgia soon after lodging its own application, not least to avoid falling visibly behind its Association Trio peers. Georgian Dream, however, quickly invoked the spectre of war to stall deeper EU integration. Party leaders invoked the threat of a shadowy 'global war party' and 'deep state', insisting that adopting EU sanctions or security policies would provoke Russia and lead to direct conflict. The party reinforced this fear-based narrative with anti-LGBTQIA+ messaging and appeals to 'traditional values' as defences against foreign interference. The resulting sovereignty-first rhetoric ultimately found constitutional shape in 2024 and led to Georgia removing EU accession talks from its agenda until 2028 (European Digital Media Observatory 2024; Parulava 2024).

Two weeks after International Women's Day had seen France enshrine abortion rights and Ireland reject two gender-related amendments, Georgian Dream unveiled its own constitutional initiative—a draft constitutional law defining marriage as a union between one genetically male and one genetically female adult, forbidding adoption by same-sex couples, banning gender-affirming medical care and prohibiting any 'propaganda' aiming to 'popularize', among other things, non-heterosexual relationships or families and medical sex transition (Venice Commission 2024).

Georgian Dream, without the three-quarters majority needed to pass the amendments (article 77 of the 1995 Constitution) instead repackaged the constitutional initiative into a legislative bundle that could be passed with a simple majority. This umbrella Law on Family Values and the Protection of Minors mirrors the constitutional draft in substance but is more granular, adding a prohibition on recognizing foreign same-sex marriages and sex/gender change documents, introducing enforcement mechanisms and adding symbolic flourishes (e.g. designating 17 May as the Day of Family Sanctity and Respect for Parents) (Parliament of Georgia 2024a). The law passed unanimously on 17 September 2024 amid an opposition boycott and protests by civil society and NGOs (Civil Georgia 2024b).

During this time, Georgian Dream also resuscitated the previously shelved foreign agents law, obliging every NGO, charity and or media organization receiving more than 20 per cent of its annual income from abroad to register with the Ministry of Justice as 'organisations pursuing the interests of a foreign power' and to be subject to reporting requirements (Parliament of Georgia 2024b). Amid massive anti-government protests, the pro-EU (and largely ceremonial) president vetoed the bill, stating that it was 'Russian in essence and spirit ... contradicting our constitution and all European standards' (Al Jazeera 2024; Bayer 2024). Parliament overrode the presidential veto as permitted under the Constitution (articles 46 and 77), and the bill was signed into law on 3 June 2024.

The international reaction was immediate: the EU froze financial aid and declared Georgia's EU accession process 'de facto halted' (Botter 2024; Megrelidze and Cook 2024). Statements from United Nations officials and world leaders affirmed that the laws pose 'threats to freedoms of expression and association and [risk] impeding the work of civil society and media' (UN Georgia 2024), mark 'a dark time for Georgia's democracy and European aspirations' (U.S. Helsinki Commission 2024) and constitute 'a step in the wrong direction, taking Georgia further away from its Euro-Atlantic integration' (Colomina 2024 collated by Civil Georgia 2024a).

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Fusing the notion of family values and the foreign agents law appears to serve three strategic interests: (a) chilling criticism by NGOs and media ahead of tight 2024 elections; (b) deepening polarization that the ruling party can exploit to consolidate power; and (c) signalling the government's readiness to turn towards Russia should the EU continue to 'impose' its values on Georgia.

The timing was no accident. Georgia's October 2024 parliamentary election—described by the observation mission deployed by the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights as 'marked by reports of intimidation and pressure on voters' and rejected as illegitimate by the European Parliament (OSCE/ODIHR et al. 2024b; Kitachayev 2025)—took place under these new constraints, with Georgian Dream securing nearly 54 per cent of the vote and 89 of 150 seats in the legislature.

The formula has proven effective in a country where support for EU membership is near universal, with low acceptance of same-sex relations (EqualDex n.d.). By recasting EU conditionality for

democratic reforms as alien coercion, the government cornered the opposition—reject the bills and be accused of hoisting 'the LGBT flag over the national flag' or pass them and risk losing European support (Kobakhidze 2024; Kucera 2024). By casting the debate in this way, Georgian Dream exploited voters' desire for the EU's economic benefits while tapping into its broad distrust of the EU's presumed social agenda.

5.6. MOLDOVA: CONSTITUTIONALIZING AN IRREVERSIBLE EU PATH

Across the Black Sea, Moldova charted a different course: after the EU's decision to start accession talks in late 2023, pro-EU President Maia Sandu called for a constitutional referendum to cement EU integration 'so that whoever is in government, the voice of the people for this direction of development should be mandatory for the political class' (SwissInfo 2024). In March 2024, the Moldovan Parliament adopted a resolution stating that 'only the accession of the Republic of Moldova to the European Union will ensure the future of the country as a sovereign, neutral, integral and democratic state', a rejoinder to Russian propagation of war (Republic of Moldova Parliament 2024).

The referendum was held on 20 October 2024 and added several new provisions to Moldova's Constitution. The Preamble now affirms the European identity of Moldova's people and the irreversibility of the country's European path, also confirming integration into the EU as a strategic goal. Additionally, a new article permits parliament to adopt organic laws to accede to the EU founding treaties and, upon accession, establishes the precedence of EU treaties and laws over national laws (Constitution of Moldova, article 140). The referendum was set for the same day as the first round of the presidential election—effectively tying its outcome to President Sandu's bid for a second term and her pro-EU platform. To make this possible, legislators amended the Electoral Code in January 2024 to permit holding the referendum and presidential vote simultaneously (Secrieru 2024).

While the text of the amendment resembles Georgia's, and thus may appear values-light, the EU accession process it embeds is decidedly values-heavy.

While the text of the amendment resembles Georgia's, and thus may appear values-light, the EU accession process it embeds is decidedly values-heavy. By December 2023 Moldova had already satisfied most of the headline rule-of-law, democracy and equality

benchmarks set by the European Commission for opening accession negotiations. Steps to meet these benchmarks included expanding its anti-discrimination law to explicitly include sexual orientation and gender identity, aligning its Criminal Code with EU standards on hate speech and crimes against sexual minorities, and ratifying the Istanbul Convention on preventing and addressing violence against women. The 2023 European Commission country report welcomed these steps as concrete progress on implementing the EU's non-discrimination and equality acquis (European Commission 2023), and the European Parliament likewise noted such measures as achievements towards Moldova's EU membership bid (European Parliament 2025).

Opposition to constitutionally padlocking EU integration was expressed on two fronts—substance and procedure. On substance, critics wanted to wait until accession talks yielded concrete membership terms; a ruling-party member of parliament dismissed this criticism as a mere delaying tactic that masked anti-EU sentiment (Tanas 2024b). On the far end of such opposition, a cluster of smaller parties travelled to Moscow and formed a euro-sceptic, pro-Russia Victory bloc with the explicit intent of increasing Russian cooperation and resisting 'values alien to us' associated with EU integration (Socor 2024). Other opposition figures accused the government of instrumentalizing the referendum to boost the president's and the ruling party's electoral chances, while maintaining that they did not oppose EU accession in principle (Secrieru 2024; Tanas 2024a). On process, opposition figures pointed to procedural irregularities by the ruling party which utilized fast-track legislative procedures that bypassed committee opinions and skipped the usual requirements for public consultation (Promo-LEX 2024; UNIMEDIA 2024). International observers echoed the latter concerns, with particular criticism of amendments to the Electoral Code adopted in an election year without cross-party support (OSCE/ODIHR et al. 2024a).

It had seemed that the president might have overplayed her hand when, in October 2024, the referendum passed by a miniscule margin of less than 1 per cent, tipped by diaspora voting (Solovyov 2024). In separatist Transnistria (where Russia maintains a military presence) and the autonomous region of Gagauzia, voting results against EU integration were more highly pronounced, but some EU border regions also returned majority votes against (Nationalia 2024). In the presidential run-off, the Party of Socialists' candidate capitalized on

rural and Russian-speaking discontent to obtain 45.7 per cent of the vote, but a diaspora landslide for Sandu secured her second term.

With a turnout of almost half of the electorate, the results in both votes were much closer than originally envisaged. The president alleged 'unprecedented' interference by Russia and its proxies, with international observers condemning the impacts on Moldova's democratic processes from cyberattacks, disinformation campaigns and vote buying (European Commission 2024; Smith 2024). Anti-EU messaging exploited fears that the EU would force Moldova to legalize same-sex marriage, strip parental rights and teach children about LGBTQIA+ content in schools, seeking to shift public sentiment by claiming that EU integration would erode family values (Olari, Calmis and Gigitashvili 2024).

Georgia and Moldova are in some ways mirror images in the same culture war.

Georgia and Moldova are in some ways mirror images in the same culture war. Georgia's Government has utilized 'traditional values' to stall European integration, while Moldova has invoked European values to accelerate it. With no legal obligation to hold a referendum at this stage, doing so was a gamble that very nearly failed.

The Moldovan Government must tackle genuine public concerns about EU integration while countering disinformation that frames equality and human rights reforms as foreign impositions (Corman 2024). Moldova's new constitutional lock is no guarantee, since Georgia likewise constitutionalized its EU trajectory only to pivot years later. Moldova's amendment could still be hollowed out by a future government, but the political cost of backtracking is now higher. Any reversal would require another referendum and would jeopardize the EUR 1.9 billion (approximately USD 2.2 billion) Reform and Growth Facility for Moldova that the European Commission unveiled in February 2025, which is legally conditioned on continued progress on rule-of-law and anti-corruption reforms. Ultimately, the real battle, it seems, is about narrative control: whoever gets to define the state's moral compass will shape its geopolitical destiny.

5.7. **CONCLUSION**

Constitutional reforms and debates throughout 2024 reveal an EU committed to democratic and inclusive ideals, even as it pragmatically seeks to blunt Russian influence in countries aspiring to become EU member states by fast-tracking accession talks and financially investing in democratic reforms and infrastructure.

Meanwhile, current member states are simultaneously co-creating—and contesting—the constitutional expression of EU values—some on the side of embedding gender and sexuality rights, others steadfastly repudiating this course as an affront to what they consider traditional values.

Even though the EU has begun to utilize its coercive force in an explicit defence of gender and sexual equality, the results remain uncertain. Hungary, for example, doubled down on its rejection of EU values by passing a raft of illiberal constitutional and legislative amendments in early 2025 (Uitz 2025). In 2024 Bulgaria amended its laws to ban any 'propaganda, popularization or instigation' of non-heteronormative sexual orientation or gender identity in schools, while Slovakia's Government, led by Prime Minister Robert Fico, has since tabled constitutional amendments that would strictly limit gender to male or female at birth, restrict adoption to married heterosexual couples and explicitly retain its 'sovereignty' to decide 'fundamental cultural-ethical questions' as part of its national identity (Amnesty International 2025). The EU's economic leverage and infringement proceedings may be its sharpest tool to defend gender equality and non-discrimination, but over-use might antagonize the anti-EU sentiment it seeks to curb.

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Beyond rights-based contestations, the continued political weaponization of gender more broadly demands sustained scepticism and interrogation. For example, both left- and right-wing populist groups in many Western democracies have already mobilized gendered narratives about protecting women from the alleged illiberal influences of migrant communities, profiling migrant men as security threats and challenging women's choice to wear religious headscarves (Yilmaz and Shakil 2023). Undoubtedly, therefore, constitutional texts will continue to be both a battleground and barometer of the EU's cohesion and the resilience—and, indeed, universality—of its values.

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Chapter 6

CONSTITUTION MAKING IN EXILE

Kimana Zulueta-Fülscher

In autocratic regimes, opposition figures are often forced into exile from power following stolen elections. Recent examples include opposition figures from Belarus, Iran, Mali, Myanmar, Nicaragua, Russia and Venezuela. These figures support and often fight for a return to democracy in their countries of origin. Sometimes they coordinate, creating bodies and institutions aimed at both consolidating the opposition and preparing for a future transition.

Individuals and groups, both within and outside of a country, who oppose authorities exercising power under an undemocratic or illiberal constitution—or those disregarding the constitutional and legal framework—may sometimes initiate constitution-making processes. These processes can help to keep opposition members and civil society engaged, particularly in discussing the type of new social contract needed after the removal of an autocratic regime.

This phenomenon is, however, uncommon. Historically, de facto authorities were frequently foreign powers that occupied countries and their institutions. Notably, during both World Wars I and II, governments of occupied countries often went into exile and organized resistance from abroad (Tiroch 2011). These exiled governments, though, generally did not engage in constitution-making activities.

Spain's 1812 Constitution presents a notable exception to this trend.[11] It was drafted and adopted by an opposition parliament elected in 1810, operating out of the southern city of Cádiz, during the French occupation of the Iberian Peninsula. The Constitution was enforced only in a small part of Spanish territory for a short period of time, as King Ferdinand VII suspended it when he was reinstated in 1813 (Colley 2021: 185). However, the document was the result of a structured process of constitution making which, thanks to its progressive design and ambition, had an impact well beyond Spanish territory (Colley 2021: 189).

Another interesting example is that of Tibet. Upon the Dalai Lama's exile, a parliament-in-exile was established in 1960, and the first Constitution of Tibet was promulgated in 1963, which was succeeded in 1991 by a Charter of Tibetans-in-Exile, negotiated by a 369-member Special People's Congress and drafted by an appointed Constitutional Review Committee. The Charter was meant to further entrench the democratic features of Tibetan institutions (in exile) (Tibetan Parliament in Exile 2023). In 1992 the Dalai Lama also published 'Guidelines for Future Tibet's Polity and Basic Features of Its Constitution', which provided for transitional governance mechanisms (for the period when China had withdrawn from Tibet) and a roadmap for the drafting of a more permanent Constitution of Tibet.

This chapter explores two ongoing processes of constitution-building led by democratically elected authorities that were prevented from taking office in their respective countries—Belarus and Myanmar. In both countries, autocratic figures usurped power and declared themselves the legitimate leaders of their respective country's executive branch. Consequently, numerous opposition figures in Belarus have ultimately left the country due to concerns for their safety. In Myanmar, on the other hand, internal conflict has allowed some authorities and opposition figures to remain in the country, while others had to find refuge elsewhere. Technological advances, however, have allowed regime-critical figures in both countries to build representative institutions and engage citizens (inside and outside the country) in online negotiations aimed at building new constitutional and legal frameworks and envisioning a democratic future.

This chapter explores two ongoing processes of constitution-building led by democratically elected authorities that were prevented from taking office in their respective countries—Belarus and Myanmar.

11 The 1812 Constitution was Spain's first constitution and the one that marked the end of the Old Regime and absolutist monarchy, and the start of a new social and political (liberal) order.

Although polls suggested that Tsikhanouskaya had secured a significant majority, official results reported that she had received only 10 per cent of the vote.

6.1. BELARUS: CONSTITUTION MAKING (AND LEGISLATIVE DRAFTING) IN EXILE

The August 2020 presidential election in Belarus featured a contest between Alexander Lukashenko's long-established, Russia-aligned regime, and a pro-European opposition led by Sviatlana Tsikhanouskaya. Although polls suggested that Tsikhanouskaya had secured a significant majority, official results reported that she had received only 10 per cent of the vote (Cacciati 2024). This outcome was consistent with historical trends. Since Lukashenko assumed office in 1994, three years after Belarus declared independence from the Soviet Union, elections have been routinely manipulated (Bedford 2017; 2024). The 1994 elections remain the only ones considered free and fair by both opposition parties and the international community.

The 2020 presidential election marked the first time the opposition had a fair chance of winning. Massive peaceful protests followed the announcement of the results, but they were met with a violent crackdown and an escalation in state repression (Myers 2025: 6, 7), resulting in some 500,000 Belarusians leaving the country (out of a population of about 9 million). Many found refuge in neighbouring Lithuania and Poland, including Tsikhanouskaya, who relocated to Vilnius. Before she left the country, however, and just days after the election, she created a 70-member Coordination Council, whose main objective was to ensure a peaceful resolution to the crisis and a democratic transfer of power (Wesolowsky 2020)—to no avail.

Still, the Coordination Council continued operating even after most of the opposition had gone into exile. It became an alternative assembly to the Lukashenko-subordinated Belarusian Parliament (Bienvenu 2024), and in time changed both its structure—to become more inclusive of various democratic groups and civil society organizations—and its mandate, now aimed at developing and approving strategic plans and policies for Belarus's transition (New Belarus Conference 2024: articles 1.2 and 3.1). In May 2024, the Council held its first online election.[12]

Separately, before the 2020 election, some opposition leaders, including Anatoly Liabedzka, engaged in discussions around

12 In this election, approximately 280 candidates ran on 11 electoral lists for 80 seats. However, the low voter turnout, with only 6,723 votes cast, was noted as a factor potentially affecting the Coordination Council's perceived legitimacy as a representative body (Kłysiński 2024).

proposals to amend the 1994 Constitution of Belarus. It appeared then that Lukashenko would open space to negotiate constitutional reforms, and leaders like Liabedzka sought to be prepared for such an eventuality. During the electoral campaign, however, it became clear that the opposition would not be invited to participate in any future constitutional reform process.[13] Thus, the opposition determined that, to respond better to citizens' aspirations, Belarus required a new, and not merely an amended, constitutional framework, and one that responded to Belarusians' quest to be part of a 'peaceful and prosperous Europe' (Council of the European Union 2024). The constitutional draft eventually became a tool for the opposition to rally Belarusians (and arguably also European member states and institutions) around discussions on a future democratic and European Belarus.

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By late 2020, an initial draft of the new constitution for a post-Lukashenko Belarus had been completed. This draft eventually provided the legal foundation for the development of several draft laws in 2024 and 2025 that elaborated on constitutional provisions concerning executive power, local autonomy, the establishment of a human rights commission and the National Council of Justice.[14]

These laws—as well as the draft Constitution—were drafted by working groups within the newly created Public Constitutional Commission.[15] Conceived by Liabedzka ahead of the 2020 presidential election, the Commission includes 36 individuals, mainly former members of the last democratically elected parliament, who now represent civil society organizations and expert groups. At its inception, the plenary of the Commission set strategic goals and outlined the general roadmap for the constitution-drafting process. Once the draft constitution was finalized, in July 2022, the Commission focused on drafting key pieces of implementing legislation.

The draft constitution of 2020 was based on the Constitution of Belarus as amended in 1996 (originally adopted in 1994). Basing the

13 In fact, wide-ranging amendments to the Constitution were ratified before February 2022 in a sham referendum organized by the Lukashenko regime. The main aim of these reforms was arguably to consolidate Lukashenko's control over the state, ensure his immunity from prosecution and allow him to remain in office until 2035 (Anonymous 2022).

14 Earlier laws addressed political parties and the Constitutional Court. Recently, there has been discussion about the potential establishment of an ombudsperson as well as a lustration process, which were not included in the 2020 Constitutional draft.

15 The working groups are made up of 5 to 20 members each and include at least one international expert from the broader region.

2020 draft on the 1996 version of the Constitution was controversial, as the 1996 amendments were deemed illegitimate by some democratic actors because they removed key democratic safeguards and enabled Lukashenko's consolidation of power (Vasilevich 2021). Debates were rife on whether to restore the 1994 Constitution or create a new one—and one that would represent a clearer departure from the extant Belarusian Constitution. Members of the Commission decided to go ahead with the latter.

Amid these debates, Tsikhanouskaya appointed Liabedzka as her representative on constitutional reforms and parliamentary cooperation in 2021. By then Tsikhanouskaya had already relocated and had registered her own office in Lithuania. On 9 August 2022 she established the United Transitional Cabinet as an 'interim government' at the request of a number of Belarusian opposition representatives. Arguably, the constitutional debates that took place both before and after the 2020 elections helped give direction to an opposition that was relatively fragmented in 2021 already (Leukavets 2024).

It is important to note that the development of the first draft of the constitution involved only a limited number of participants. Broader participation started only after the first draft was completed. The members of the Commission—who for the most part still resided in Minsk—visited different parts of the country and engaged the public in meetings aimed at discussing the draft as well as a broader vision for a future democratic Belarus. Face-to-face discussions with citizens and local and international experts continued until May 2021, after which they moved mostly online.

Once the public outreach campaign had moved online, the Constitutional Commission created additional working groups and enabled them to receive and react to feedback and suggestions received from the public. The working groups responded individually to about 2,000 submissions and established a three-member commission that collected and responded to complaints regarding feedback offered by the Constitutional Commission.

The public awareness campaigns,[16] and in particular the resulting public feedback on the constitutional draft, had a significant impact not only on the text itself but also on the legitimacy of the broader

16 The public awareness campaigns on YouTube, and mostly led by Honest People and other civic groups, received millions of views and many interactions online.

process. Lending legitimacy to the draft was arguably the main objective of opening the process to the public.

At the same time, the draft constitution is intended as a document for discussion once Belarus begins its transition to democracy as well as a tool for engagement of the population at large; the draft itself remains an open document. It also serves as the basis for the development of draft legislation. However, the status of draft laws is still in discussion, as some see them as finished products to be adopted by the Coordination Council, while others see them as blueprints for discussion once the transition starts.

The drafting processes, encompassing the draft constitution as well as draft laws, not only offer a platform to deliberate on an envisioned democratic future for Belarus, but they also serve as a mechanism for involving Belarusian citizens within and beyond the nation's borders. Additionally, the opposition uses these processes to reaffirm its commitment to achieving democracy in Belarus. Since May 2024 it also appears that face-to-face discussions have started to take place in several parts of the country on specific issues related, for instance, to how local governance would be organized should the opposition take power. Although there is no space yet for open and public opposition activities, there appears to be increasing interest among citizens in exploring future avenues for change.

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6.2. MYANMAR: CONSTITUTION MAKING UNDER PARTIAL DISPLACEMENT

Over the past year, Myanmar's pro-democracy actors have intensified their efforts to develop a democratic transitional constitutional framework. This framework aims to assist in transitioning to a fully democratic and federal system that addresses the needs and demands of all ethnic groups in the country. Since Myanmar's independence in 1948, minority ethnic groups have sought to create a federal state granting them significant autonomy from the central state (mostly controlled by the majority Bamar population). Persistent tensions between the military, which has traditionally viewed federalism as a potential threat to national unity, and ethnic groups have been echoed by prolonged periods of military rule and violent conflict.

Since the 2008 Constitution entered into force, Myanmar began a very complex and fragile transition to peace and democracy. In November 2020, two months after the presidential election in Belarus, Myanmar held its third general election. The National League for Democracy (NLD), headed by Aung San Suu Kyi, Nobel Peace Prize winner and de facto head of state and government in Myanmar since 2015, won by a landslide, securing almost 80 per cent of elected seats in the Union Parliament (Noel 2022). Soon after the election, however, the Myanmar military and the Union Solidarity and Development Party—a political party closely aligned with the military—claimed that the election had been fraudulent. They filed claims with the Union Election Commission regarding alleged electoral irregularities, which were rejected, and then they filed claims against the Commission with the Supreme Court (Noel 2022).

On 1 February 2021, the day the new parliament was scheduled to convene its first session, the military took power in a coup d'état and instituted what became the military-led State Administration Council (SAC) as the new (illegitimate) executive body. High-level government officials, including President and State Counsellor Aung San Suu Kyi, were imprisoned. Parliament was suspended.

The coup also fostered a shared understanding across ethnic, religious and generational divides that unity was essential in combating military autocracy.

Significant demonstrations and the initiation of a civil disobedience movement ensued following the illegal seizure of power. The coup also fostered a shared understanding across ethnic, religious and generational divides that unity was essential in combating military autocracy and striving towards the establishment of a new federal democracy in Myanmar.

Shortly after the coup, on 5 February 2021, 289 elected NLD members of parliament announced the establishment of the Committee Representing Pyidaungsu Hluttaw (Union Parliament) (CRPH). The CRPH claimed to represent the will of the people expressed in the 2020 election. On 31 March 2021 members of the CRPH released Myanmar's Federal Democracy Charter (FDC), which included a new interim constitutional arrangement and was meant to supersede the 2008 Constitution (which is now defunct) (Zulueta-Fülscher 2021).[17]

The FDC constitutes a significant step in building a coalition of pro-democracy actors across ethnic and other divides that is aimed at establishing institutions and processes that could lead to a new federal and democratic Myanmar. It should be noted, however, that

17 The FDC was revised slightly and adopted by the newly created People's Assembly in its first meeting in January 2022.

disagreements on the specific federal design that would be able to address the needs and demands of different (ethnic) groups have for long hampered these negotiations. To respond to those needs and demands, the FDC establishes a number of highly inclusive bodies and institutions meant to govern during the interim period. These bodies include the People's Assembly,[18] the National Unity Consultative Council[19] (NUCC) and the Interim National Unity Government[20] (NUG). They include (and sometimes work alongside) a number of political parties, ethnic armed organizations, civil society organizations and individual citizens who oppose the SAC.

The FDC also provides the framework for the making of a transitional constitution for Myanmar. As part of the process of preparing a transitional constitution, the NUCC is mandated to form a working group—the Transitional Constitution Working Group (TCWG)—to prepare a first draft (FDC, Part II, Chapter 9). The TCWG was established in early 2022. However, disagreements within the NUCC over the TCWG's composition and modalities delayed any progress until early 2024. Partly in reaction to this delay, the NUG Ministry of Federal Union Affairs took the initiative and prepared a first draft of a transitional constitution (NUG 2023, 128–29). The draft was completed and submitted to the NUCC on 8 September 2023 (Republic of the Union of Myanmar Ministry of Federal Union Affairs 2024) and subsequently presented to (though not adopted by) the People's Assembly in April 2024.

As a result of the disagreements mentioned earlier, two additional constitutional drafts were produced in 2023 and 2024. One was developed by the NLD in 2023 and reviewed following several internal consultations, with the latest draft released in March 2025. This NLD draft is not public, but it has been informally shared with members of the NUCC for their consideration. Separately, in February 2024, a

18 The People's Assembly is a consultative body mandated to ratify 'basic principles, policies, strategies and transitional arrangements concerning political, social, economic, security issues and elimination of dictatorship' (FDC, Part II, Chapter II), made up of official representatives of various revolutionary forces, including elected members of parliament (including the CRPH), political parties, unions, women's groups, civil society organizations, the civil disobedience movement, strike groups, ethnic resistance organizations, and representatives of interim state or federal units and ethnic-based organizations and councils.

19 The NUCC is a platform made up of representatives of the same groups represented in the People's Assembly and mandated principally to lead the review of the FDC, to provide 'guidance, oversight and coordination for the implementation of strategies stipulated by the FDC', and to lead the drafting of the Transitional Constitution (FDC, Part II, Chapter III).

20 The NUG was initially established by the CRPH, in coordination with and with the agreement of the NUCC, as the interim government of Myanmar, and is accountable to both the NUCC and the People's Assembly.

coalition of 12 ethnic political parties (not affiliated with the NUCC)—the People's Representatives Committee for Federalism—released a constitutional framework called the Constitution of the Federal Democratic Union. This document was not formally submitted to the NUCC, but it was publicly released to facilitate discussion with other stakeholders (Saw Reh 2024).

Discussions of the draft developed by the NUG were resumed only in February 2025, when the so-called 9+ Group,[21] for the most part members of the NUCC, announced that they would start drafting the Articles of Federal Transitional Arrangements (AFTA) (Myanmar News 2025; Myanmar Peace Monitor 2025).

The AFTA constitutes an attempt at a new political settlement between stakeholders that are currently fighting the military junta.

The AFTA constitutes an attempt at a new political settlement between stakeholders that are currently fighting the military junta. Once the draft is complete, which is expected by September 2025 (Myanmar News 2025), the plan is to have a public consultation process, which will also include stakeholders that have not yet engaged in the process. This process may also allow for the two alternative drafts developed respectively by the NLD and the People's Representatives Committee for Federalism to be formally considered. It is anticipated that a national conference, involving all relevant stakeholders, will adopt the unified constitutional text resulting from the consultation process as the new Transitional Constitution for the Federal Union of Myanmar.

The adoption could mark the start of the transitional period. During the transitional period, the unwritten plan is for a constitutional convention to deliberate, draft and promulgate a federal democratic constitution. The establishment of a constitutional convention and the broader constitution-making process will need to be provided for by the transitional constitution.

In parallel to the very complex (and relatively convoluted) higher lawmaking process, the interim NUG and the CRPH continue to build structures and processes in order to strengthen governance in the

21 The 9+ Group includes the NUG and different members of the NUCC (ethnic resistance organizations, political parties, elected members of parliament, Spring Revolution forces, and organizations based on ethnic or federal units), including the General Strike Collaboration Committee, the Interim Chin National Consultative Council, the Karenni National Progressive Party, the Karen National Union, the Karenni State Consultative Council, the Member of Parliament Union (Burma), the Mon State Federal Council, the Myanmar Teachers' Federation, the Pa-O National Federal Council, the Ta'Ang Political Consultative Committee, the Technological Teachers' Federation, the Women's Advocacy Coalition Myanmar and the Women's League of Burma, as well as one party outside of NUCC structures—the Democratic Party for a New Society, which was also involved in the drafting of the 2024 Constitution of Federal Democratic Union.

country's liberated areas—in particular the seven central regions (or federal units) mostly inhabited by the majority Bamar population.[22]

The CRPH has so far drafted several amendments to existing laws, as well as new laws and guidelines,[23] and the NUG has followed suit by developing several policy frameworks—for instance, on local governance. The level of implementation of these legal and policy frameworks varies greatly, depending on the level of territorial control of the NUG.

Since ethnic states are for the most part controlled and governed by ethnic armed organizations, most of which operate independently from the NUG, one unanswered question is the extent to which the parties will find common ground to start rebuilding Myanmar as one country. The AFTA process could make a significant contribution in this regard.

6.3. **CONCLUSION**

The differences between Belarus and Myanmar are more than obvious. Belarus held its last free and fair elections in 1994 and has been led by an autocratic regime for more than a quarter of a century. Over time, most people linked to the political opposition have had to leave the country for their safety. Myanmar, on the other hand, started a transition to peace and democracy in 2010 and held more or less free and fair elections in 2015 and in 2020, despite constitutional constraints on civilian rule (Crouch 2019).

In both cases, the results of the 2020 elections were not accepted—in the case of Belarus, by the incumbent regime, and in the case of Myanmar, by the commander in chief of the armed forces. The elected leadership and their supporters were either arrested and imprisoned or persecuted—in turn deciding to either hide or go into exile. In both cases, those who opposed the state's illegal capture organized inside and outside their respective country and engaged in processes aimed at negotiating a new social contract.

22 The rest of the seven ethnic states are mostly governed by a myriad of ethnic armed groups. Some of these groups support the NUG while others do not, but most of them are currently fighting the SAC in their respective territories.

23 The CRPH has adopted amendments, for instance, to the Taxation Law (2021), the Public Debt Management Law (2021), the Gambling Law (2021) and the Counsellor of the State Law (2021, 2022). It has also adopted new laws related to the People's Police Force (2022) and Union taxation (2023).

Engaging in constitution-building (and legislative drafting) without full (or any) control of a country's territory can be seen as a spurious exercise, in particular when the transition to (peace and) democracy remains at arm's length. The implementation of any legal or political framework will depend on citizens' ability to build institutions and develop mechanisms that will in turn allow (and ensure) the enforcement of laws within the territory of a country. When the state itself has been captured, and as a result political forces mostly reside outside of the country, their ability to enforce legal frameworks will likely be impaired. Hence, groups living inside and outside of these countries often criticize the relevance and legitimacy of these opposition governments (or democratic movements) for their lack of effectiveness (Nyan Lin 2024; Pucek and Deen 2025).

While the start of the transition is uncertain, writing a constitution that is forward-looking and acknowledges the people's needs and demands may have an impact beyond the frontiers of the country it is primarily written for.

But even under these circumstances, as we have seen, constitution making (and legislative drafting) can also offer opportunities. First, it may give time to the democratic movement to consolidate while facilitating discussions on the country's future and negotiations on the political and legal framework that will help attain it. Second, these discussions and negotiations, if inclusive of different sensibilities and open to constructive feedback, may serve as a tool to rally people around a democratic and liberal project for the country. Third, it also gives key parties time to think about effective ways to engage the public in these negotiations, both within and outside the country, by way of conducting civic education and public consultation campaigns. Fourth, while the start of the transition is uncertain, writing a constitution that is forward-looking and acknowledges the people's needs and demands may have an impact beyond the frontiers of the country it is primarily written for.

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Chapter 7

EXTENSIONS TO TRANSITIONAL GOVERNMENTS: THE USES AND LIMITS OF THEIR REGULATION

William Underwood

7.1. **INTRODUCTION**

In 2024, the authorities of several countries, including Burkina Faso, Guinea, Mali and South Sudan, postponed elections planned for the same year, resulting in the extension of unelected transitional governments. While in Burkina Faso, Guinea and Mali, military regimes had been installed following a series of coups d'état across West Africa from 2020, in South Sudan a transitional power-sharing government had been established following a 2018 civil war peace agreement between the government and armed opposition groups.

In Burkina Faso, the military regime announced in May that elections scheduled for July would be postponed and the transition period extended for a further five years due to the prevailing insecurity and its impact on the government's capacity to organize elections. In South Sudan, the transitional government announced in September that elections planned for December would be delayed and the transition period extended for a further two years due to the lack of progress in implementing the peace agreement and other measures necessary to carry out elections. For South Sudan, this was the second time that the transition period had been extended since the 2018 peace agreement, and there are fears in respect of both countries that the 'transition' may be enduring.

In Burkina Faso and South Sudan, the origins of the transitional governments—a coup d'état and peace agreement, respectively—as

well as the broader historical and political contexts are quite different. Nevertheless, for each country an assessment and comparison of the circumstances leading to the extension, its regulation, and the consequences of both the extension and its regulation are instructive in understanding how the regulation of transitional governments and their extension may impact governmental legitimacy and a return to ordinary democratic rule.

7.2. **TRANSITIONAL GOVERNMENTS: THEIR PURPOSE AND REGULATION**

Transitional governments are governments established following a political crisis—such as a coup d'état, civil war, electoral dispute or popular revolution—for a limited time and for a specific purpose (Bell and Forster 2020; De Groof and Wiebusch 2020). They are often unelected and established outside the existing constitutional order: some are established following an amendment to the constitution or the adoption of a new constitutional framework, some are established following the suspension of the constitution, while others may lack a constitutional basis altogether (Bell and Forster 2020). They are ordinarily charged with carrying out basic government functions and with implementing tasks necessary for a transition from the state of crisis to peaceful and stable democratic rule.

In light of their often unelected and constitutionally exceptional nature, the instruments that establish transitional governments usually explicitly delimit their authority. They generally set out the aims of the transition or a specific subject-matter mandate for the transitional government. They usually also specify a mechanism by which the transitional government will eventually hand over power to a democratically elected government. Such a mechanism will often include fresh elections and the resumption, amendment or replacement of the existing constitution. Many instruments also set out a specific time period for the transition. The length of this period will depend upon the nature of the transition and the tasks required of the transitional government; most often it is between one and three years.

The instruments that establish transitional governments vary as to how they address the possibility of extending the transition period, such as in the event the transitional government is unable to complete its mandated tasks within the specified time period. Some

explicitly provide that the transition period may be extended. In so doing, they may also specify that a certain body must approve the extension or be consulted, or they may set a limit on the number of times the transition may be extended. Other instruments are silent on the possibility of extension though may set out a process to amend the instrument and thereby extend the transition.

Ultimately, repeated extensions may erode public trust and undermine governmental legitimacy.

Extending a transitional government not only delays the re-establishment of elected and constitutional rule but may also signal that the government is not credibly committed to realizing the transition—that it is unable or unwilling to complete its mandated tasks and hand over power. Such a perception is particularly likely where the transition period is repeatedly extended with little progress towards its goals. Ultimately, repeated extensions may erode public trust and undermine governmental legitimacy. The regulation of transitional governments and their extension should therefore support and incentivize the government to realize the goals of the transition, including by promoting clear and realistic expectations and extensions only where considered and necessary.

7.3. THE EXTENSION OF TRANSITIONAL GOVERNMENT FOLLOWING A COUP D'ÉTAT: BURKINA FASO

In Burkina Faso, the establishment of a transitional government followed a prolonged security crisis leading to two successive coups d'état in January and September 2022. Since 2015 Burkina Faso has faced a wave of violence by militant Islamist groups, leading to the deaths of several thousand and the displacement of over 2 million Burkinabé (Africa Center for Strategic Studies 2024). The inability of President Roch Marc Christian Kaboré to respond effectively to the crisis, coupled with accusations of widespread corruption within his government, contributed to growing dissatisfaction both with the security services and among the general populace (Koné and Moderan 2022).

In response to the security situation, violent protests broke out on 22 January 2022 in Burkina Faso's two main cities—Ouagadougou and Bobo-Dioulasso. Soldiers mutinied the following day, and on 24 January 2022 the commander of the military's third region, Paul-Henri Sandaogo Damiba, forced Kaboré's resignation and announced the suspension of the constitution and the establishment of a

transitional military government, dubbed the Patriotic Movement for Safeguard and Restoration (MPSR) (International Crisis Group 2022). On 1 March 2022, a national conference convened by the MPSR adopted a transitional charter providing a regulatory framework for the transitional government and a three-year transition period. The charter purported to restore the constitution, subject to the terms of the charter.

Damiba's rule was short-lived. Some eight months later, on 30 September 2022, Captain Ibrahim Traoré, who had joined Damiba's forces in ousting Kaboré, announced that he had deposed Damiba and would himself lead the transitional government (Africa Center for Strategic Studies 2024). On 14 October, a second national conference convened by the MPSR adopted a new transitional charter providing for a 21-month transition period. The charter set out several aims for the transition, including restoring and strengthening security, promoting good governance, fighting corruption, working towards national reconciliation and facilitating elections. Although the charter was silent on the possibility of extension, it provided for its amendment by a two-thirds majority vote of the members of the Transitional Legislative Assembly.

Under the charter, elections were due to be held by July 2024; however, in September 2023 Traoré announced that, in light of the continued lack of security, elections were 'not a priority' (Traoré 2023). In extending the transition by another five years, the government chose not to follow the amendment procedure set out in the charter but instead convened yet another national conference—boycotted by most political parties—which in May 2024 adopted a new charter extending the transition (*Le Monde* 2024; Sghir 2024).

While the reaction to the 2022 coups d'état was mixed and indeed welcomed in some quarters, the 2024 five-year extension of the transition period has prompted questions about the military government's commitment to handing over power. The latest version of the transitional charter removes a provision prohibiting the sitting president from running for office in elections for the post-transition government, contributing to growing scepticism. More generally, as the holding of elections has been linked to improving overall security, and given that insecurity has only increased since the 2022 coups, it remains unclear when and how Burkina Faso will exit its transition (Africa Center for Strategic Studies 2024). While for now Traoré continues to enjoy significant support, public trust may begin to erode

Public trust may begin to erode should the transition continue to endure with little progress towards improving security and the other stated aims of the transition.

should the transition continue to endure with little progress towards improving security and the other stated aims of the transition.

In Burkina Faso, as in the context of most coups d'état, the regulation of the transitional government was decided largely by the transitional government itself (Al Jazeera 2022; Engels 2022). While the initial three-year period for the transition was criticized by regional actors for being unduly long, it nevertheless raised expectations that elections would be held within that time, compelling the government to justify an extension. However, in the absence of a more detailed roadmap for completing the transition, the broadly defined aims of the transition have afforded the government significant scope to argue that it needs more time. The application of the amendment procedure set out in the transitional charter could have contributed to a somewhat broader discussion on the merits of an extension; however, the government ultimately chose to not to follow it.

In sum, in Burkina Faso the decision of the military government to further extend the transition has not only delayed a return to elected rule but has begun to raise questions about the credibility of the government's commitment to hand over power. Further delays, particularly where coupled with a lack of progress in achieving the aims of the transition, may begin to erode public trust in the government. The explicit three-year time frame contributed to pressure to hold elections and compelled the government to justify an extension. However, the broadly defined aims of the transition and the absence of a detailed roadmap for achieving those aims have afforded the government considerable leeway to significantly extend its rule.

7.4. THE EXTENSION OF TRANSITIONAL GOVERNMENT FOLLOWING A CIVIL WAR: SOUTH SUDAN

While the transitional government in Burkina Faso was unilaterally established by a military regime, the transitional government in South Sudan was established by the parties to a peace process. In December 2013, a long-running leadership dispute evolved into civil war when fighting broke out between forces loyal to President Salva Kiir Mayardit and those supportive of ousted former Vice-President Riek Machar Teny. From early 2014 the Intergovernmental Authority on Development, an East African regional organization, facilitated

negotiations between the government and Machar's faction, leading to the signature of a comprehensive peace agreement in August 2015. While that agreement ultimately failed, negotiations resumed in 2017, and an updated—'revitalised'—version of the 2015 agreement was signed in September 2018.

The Revitalised Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) provided for a three-year transition period in which a Revitalised Transitional Government of National Unity would be led by Kiir as President and Machar as First Vice-President. Four vice-presidents, a Council of Ministers and Transitional National Legislature would be selected by the parties to the agreement. To provide a constitutional basis for the government, the agreement would be incorporated into the constitution by means of an amendment, with the peace agreement to prevail in the event of an inconsistency. After an initial delay resulting from a disagreement between the parties, the Revitalised Transitional Government of National Unity was inaugurated in February 2020.

Under the terms of R-ARCSS, elections were to be held by December 2022. In August 2022, however, the parties to the agreement announced their intention to extend the transition by two years, citing a lack of progress in implementing the agreement and other measures necessary for elections. While in 2022–2023 some progress was made in enacting relevant legislation, as of 2024 several tasks, including the drafting and adoption of a new 'permanent' constitution and the carrying out of a new population census (framed as prerequisites for elections under the peace agreement), were outstanding. Accordingly, in September 2024 the parties agreed again to extend the transition, this time until February 2027.

While the decision to yet again extend the transition has been met by mixed reactions, an opinion poll of South Sudanese in early 2024 showed that 70 per cent of those surveyed wanted elections to take place in 2024, and there are signs that public trust in the government is eroding (Deng et al. 2024). Even given the most recent extension, it remains unclear whether the Revitalised Transitional Government of National Unity will be able to achieve its remaining goals before elections are due. The process of making a permanent constitution alone is likely to take significant time, and there is limited political will to implement the agreement (Deng 2024). If elections do go ahead as scheduled in December 2026, it will be the first time that the independent state of South Sudan—established in 2011—has ever held elections.

An opinion poll of South Sudanese in early 2024 showed that 70 per cent of those surveyed wanted elections to take place in 2024, and there are signs that public trust in the government is eroding.

In contrast to the regulation of the military government in Burkina Faso, the regulation of the Revitalised Transitional Government of National Unity in South Sudan was decided in negotiations between the government and opposition groups under international facilitation.

R-ARCSS enumerates a specific mandate for the transitional government that includes carrying out the functions of government, restoring 'permanent and sustainable peace, security and stability' and implementing the peace agreement, including the permanent constitution-making process and population census. Notably, and unlike the Burkina Faso charter, the agreement includes a detailed implementation matrix that outlines specific activities and time frames. In practice, however, targets have not been met due to a lack of political will, an ambitious peace agreement and disincentives created by a system in which a large number of people may lose office if and when elections are held.

As with the Burkina Faso transitional charter, R-ARCSS is silent on the possibility of extension, although it provides for its own amendment. This process is, at least on paper, onerous. The agreement provides that it may be amended by the parties, with the consent of at least two-thirds of the members of the Council of Ministers and of the Revitalised Joint Monitoring and Evaluation Commission (R-JMEC), an implementation mechanism comprising both domestic and international actors. The amendment must further be incorporated into the constitution by means of an amendment, which requires the approval of two-thirds of the members of the Transitional National Legislature.

The consent requirements have generated discussions in multiple forums on the need for an extension, contributing to pressure on the transitional government to hold elections. Beyond this, however, they have done little to incentivize the Revitalised Transitional Government of National Unity to complete its outstanding tasks. In the R-JMEC vote on the extension, the Troika group of states (Norway, the United Kingdom and the United States) abstained, while the United Nations voted in favour, describing the extension as 'inevitable but regrettable' (Fabricius 2024). While international actors are reluctant to consent to further extensions, there is little else they can do in the absence of viable alternatives.

In sum, the decision of the parties to the peace process to further extend the transition period has not only delayed the establishment of an elected government in South Sudan but has raised questions about the credibility of the government's commitment to implement the peace agreement and hold elections. While reactions to the extension have been mixed, there are signs that public trust is eroding. Unlike in Burkina Faso, the Revitalised Transitional Government of National Unity had a clearly defined mandate and detailed plan for achieving its aims. However, the lack of political will, an ambitious peace agreement and unrealistic time frame have conspired to hinder progress towards completing the transition. Requirements to obtain the consent and approval of the transitional legislature and peace agreement implementation body have contributed to pressure to hold elections but have done little to stimulate the necessary action.

7.5. **CONCLUSION**

While the experiences of Burkina Faso and South Sudan are quite different, they nevertheless both demonstrate how extensions to transition periods not only delay a return to democracy but may erode public trust in the government by signalling that the government is not credibly committed to realizing the transition. While in both countries extensions have yet to significantly affect governmental legitimacy, further delays may begin to do so. The experiences of both countries suggest the importance of ensuring that the mandates of transitional governments are both limited and feasible, and their time frames realistic, so as to promote reasonable expectations and achievable aims and to limit the need for extensions.

The experiences of both countries suggest the importance of ensuring that the mandates of transitional governments are both limited and feasible, and their time frames realistic.

The experiences of both Burkina Faso and South Sudan also highlight the uses and limits of regulation in contributing to realizing their respective transitions. In both countries, a specific time frame and set of aims for the respective transition or government mandate led to expectations that elections would be held and compelled governments to justify an extension. In Burkina Faso, however, the broad scope of the aims of the transition allowed the government significant leeway to prolong its rule considerably. By contrast, in South Sudan there was a clear plan of action and ostensibly onerous consent requirement; however, neither did much to incentivize the transitional government to complete the tasks necessary for the transition.

The example of Burkina Faso suggests the value of clear and specific aims for transition, while the example of South Sudan suggests the importance of those aims being realistic in both their scope and timing. Perhaps above all, however, the experiences of both countries demonstrate the limits to the regulation of transitional governments and their extension in the face of insufficient political will to complete the transition.

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About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with 35 Member States founded in 1995, with a mandate to support sustainable democracy worldwide.

WHAT WE DO

We develop policy-friendly research related to elections, parliaments, constitutions, digitalization, climate change, inclusion and political representation, all under the umbrella of the UN Sustainable Development Goals. We assess the performance of democracies around the world through our unique Global State of Democracy Indices and Democracy Tracker.

We provide capacity development and expert advice to democratic actors including governments, parliaments, election officials and civil society. We develop tools and publish databases, books and primers in several languages on topics ranging from voter turnout to gender quotas.

We bring states and non-state actors together for dialogues and lesson sharing. We stand up and speak out to promote and protect democracy worldwide.

WHERE WE WORK

Our headquarters is in Stockholm, and we have regional and country offices in Africa and West Asia, Asia and the Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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The International IDEA *Annual Review of Constitution-Building* examines global constitutional reform efforts around the world. The 2024 review covers cases from Africa, Asia, the Caribbean and Europe, highlighting both the challenges and opportunities facing democratic constitutionalism today. Topics include proactive constitutional resilience in Germany, Norway and Sweden; gender and constitutionalism in Barbados and Ghana; adversarial politics in Fiji, Guyana and Jamaica; reforms affecting the independence of the prosecution service; constitutional debates over family, gender and EU integration; constitution making in exile in Belarus and Myanmar; and the extension of transitional governments in Burkina Faso and South Sudan. While the global picture remains troubling, the report identifies signs of hope in inclusive reform processes, proactive strengthening of vulnerabilities in democratic safeguards, and the efforts of exiled democratic actors to shape future transitions.

ISBN: 978-91-8137-003-4 (PDF)