

Annual Review of Constitution-Building: 2020





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Design and layout: International IDEA

Cover photo: ©Paulo Slachevsky, Flickr

Copyeditor: Andrew Davidson

DOI: <https://doi.org/10.31752/idea.2021.102>

ISBN: 978-91-7671-497-3 (PDF)

Created with Booktype: <https://www.booktype.pro>

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Preface

Democracy has faced numerous challenges in 2020, including the coronavirus disease 2019 (Covid-19) pandemic. The ways in which governments responded to the crisis in many cases resulted in the weakening of democratic systems. The impact of the pandemic on the global state of democracy in the medium and long term still needs to be gauged. In the short term, it is evident that people's freedoms and liberties were curtailed to an extent not experienced for generations.

The role of constitutions and laws in facilitating or hindering the pandemic response revealed both good practices and lessons on government efficiency and accountability, and showcased how effective the separation of powers in each polity truly was.

Constitutions and constitution-building processes are at the core of democracy, peacebuilding and conflict transformation, and global efforts to ensure the rule of law, human rights and accountability. Learning and understanding how constitution-building processes interact with peacebuilding efforts is crucial to ensuring sustainable and successful democracy support methods.

In its eighth edition, the International Institute for Democracy and Electoral Assistance's (International IDEA's) 2020 *Annual Review of Constitution-Building* provides the only annual compilation of constitutional events worldwide. It gives a sense of how constitutions and constitutional thinking evolved throughout the year by surveying a diverse set of developments across the globe. Constitutions have continued to be at the centre of transitions to peace and democracy, and this Annual Review takes a deep dive into the political dynamics at play in constitutional reforms in different contexts.

From a comparative perspective—a key attribute of International IDEA's constitution-building work—this Annual Review discusses the use and implications of different types of emergency legal frameworks to respond to the Covid-19 pandemic. This edition also explores the links between constitutional

amendment rules and opportunities to increase executive power the pandemic presented in three countries that have recently experienced democratic backsliding or stagnation—the Central African Republic, Hungary and Sri Lanka. Transitions to peace and democracy are the focus of this year’s review, with analyses of the status of peacebuilding and constitutional reform processes in Libya, Syria and Yemen 10 years after the Arab Uprisings. This Annual Review also marks the anniversary of a series of international commitments and instruments aimed at advancing gender equality, examining progress and challenges in securing women’s effective engagement in peace and constitution-building processes. It also includes a chapter on recent constitutional amendments to incorporate customary law into constitutional frameworks and judicial processes in the Pacific Island countries Samoa and Tonga. Finally, this Annual Review analyses the role of the French Citizens’ Convention for Climate in helping the government to rethink its climate change policies, a global challenge that International IDEA prioritizes given its impact on democracy now and in the future.

The chapters in this eighth edition offer a kaleidoscope of experiences and lessons learned in constitutional reform processes around the world. The authors include in-house experts and close collaborators and partners. Their expertise and networks have helped International IDEA to contribute to peace- and constitution-building processes worldwide by offering advice, technical assistance, training and venues for discussions among experts and decision makers, and have given International IDEA’s Constitution-Building Programme the opportunity to create a world-leading repository of comparative knowledge.

Dr Kevin Casas-Zamora
Secretary-General, International IDEA

Introduction

Kimana Zulueta-Fülscher and Erin C. Houlihan

Since 2013, the International Institute for Democracy and Electoral Assistance's (International IDEA's) *Annual Review of Constitution-Building* has addressed key events and developments in constitutional reform processes worldwide throughout the past year. The year 2020 is quite significant, not only as the start of a new decade, but because the world was plunged into perhaps the worst health crisis in recent memory. The pandemic is ongoing at the time of writing, and its consequences are increasingly being felt across the world, particularly by vulnerable individuals, groups and countries already subject to high levels of poverty, inequality and general fragility. Chapters in this eighth edition deal with issues related to constitutional design and the process of constitutional reform in the context of the coronavirus disease 2019 (Covid-19) pandemic, along with broader trends over time. As ever before, all chapters take a comparative perspective, looking at ways in which circumstantial factors, such as the pandemic, but also broader issues related to identity and the environment, have had an impact on constitutional reform processes in key countries and globally.

In Chapter 1, Joelle Grogan sets the stage for this year's Annual Review by discussing the impact of the pandemic on constitutionalism and constitution-building worldwide, and the consequences of using different emergency legal frameworks for the protection of human rights. The global pandemic offers a unique opportunity to examine emergency legal frameworks, the practical applicability of their procedural and substantive safeguards, and their effect on societies and countries across the world. Grogan presents a typology of emergency legal frameworks and then examines in more detail how legislative and judicial

oversight has functioned. Key takeaways include the fact that (a) establishing a neat categorization of country responses under different types of emergency legal frameworks is, despite conventional wisdom, proving neither feasible nor effective, as emergency response types in practice operate on a continuum; (b) the choice of a particular emergency legal framework as the basis for pandemic response says little about the level or effectiveness of procedural and substantive safeguards applied in practice; and (c) there is a risk that whatever measures are (justifiably) taken at the beginning of the pandemic may extend through time and permanently alter democratic checks and balances and the protection of fundamental rights. Countries with authoritarian or backsliding tendencies have used the pandemic as a pretext to further curtail the rights of individuals and particularly the opposition, but no country has been immune to these or other risks stemming from the extended use of extraordinary executive powers.

In Chapter 2, Adem Abebe and Asanga Welikala explore links between constitutional amendment rules, pre-pandemic trajectories in democracy and constitutionalism, and the impacts of the pandemic on attempted executive aggrandizement in the Central African Republic (CAR), Hungary and Sri Lanka. Leaders in Hungary and Sri Lanka, as relatively consolidated though backsliding democracies, have used opportunities the pandemic presented to entrench executive power. In Hungary, the legislature granted almost unlimited decree powers to the prime minister and would constitutionalize expanded executive authorities under a proposed amendment. In Sri Lanka, the president opted not to recall parliament, which stood dissolved ahead of elections, despite the pandemic emergency. Following delayed elections, he used a newly won majority to enact an amendment establishing a hyper-presidential form of semi-presidentialism. In the CAR, on the other hand, despite significant challenges with fragility and conflict, an independent judiciary was able to avert attempts to pass a constitutional amendment to delay presidential and legislative elections, which some perceived as an attempt to take advantage of incumbency dominance to extend term limits. The authors identify three key factors that may have contributed to the different outcomes in these contexts: the independence of the judiciary and its level of deference towards the executive; whether the country had been on a path of democratization or democratic regression before the pandemic; and the design of constitutional amendment rules.

In Chapter 3, Zaid Al-Ali examines progress made throughout 2020 in three peace- and constitution-building processes in the Middle East and North Africa regions. By exploring recent developments in mediation efforts in Libya, Syria and Yemen, Al-Ali reflects on the unpredictability of peace processes where sudden changes in circumstances on the ground can derail plans and strategies. He notes that negotiators are well advised to maintain flexibility, adaptability, creativity and compassion to shape negotiations in light of changing circumstances. One key factor that may determine the success of negotiations, Al-

Ali posits, is a (perceived) long-term stalemate and the realization by all parties that, on the one hand, nothing is to be gained from the status quo and, on the other hand, nothing may be done to change the situation in one party's favour. Despite less than propitious circumstances on the ground, negotiations often continue, and have continued throughout the pandemic in the three countries in focus. Al-Ali poses two questions for observers to consider with regard to peace processes in these contexts: (a) what types of initiatives could be pursued in peace processes that will most likely fail; and (b) what are the consequences of failed negotiations for advancing sustainable peace?

Erin C. Houlihan, in Chapter 4, explores progress towards gender equality in constitution-building and peace processes in light of 2020 as an anniversary year for the Beijing Declaration and Platform for Action, United Nations Security Council Resolution 1325 and the 2030 Agenda for Sustainable Development. Houlihan first considers the imperative of women's equality in these complementary processes, links between women's meaningful engagement and the likelihood that agreements will be reached and implemented, and outcomes for peace and democracy. She then examines developments over time, noting that, while some progress has been made towards enhancing women's systematic participation, change has been slow and gains have not been shared equally across process types. At the content level, references to women or women's concerns within peace agreements remain rare, while gender-sensitive constitutional design has become more common; gender-responsive implementation, however, remains challenged, and there is evidence of backsliding on a global scale. Houlihan also reflects on the disproportionate impact that the pandemic has had on women and girls, compounding ongoing obstacles to women's equal and effective participation in decision-making in most societies. Despite these challenges, the chapter closes with a look at two positive developments in 2020 and broader implications for the future: the application of a gender parity rule for the composition of the Chilean Constitutional Convention, and the adoption of an amendment extending the gender quota in Zimbabwe.

Anna Dziedzic, in Chapter 5, examines constitutional amendments to enhance the recognition and role of customary law, values and institutions in two Pacific Island countries, Samoa and Tonga. References to custom are present in the constitutional preambles of most Pacific Island countries, but express recognition and protection of particular aspects of custom vary across the region. In 2020, Samoa and Tonga amended their constitutions to strengthen and integrate customary law and practice in their judiciaries. The amendments in Samoa divided the judiciary into two parallel and equal court systems, removing disputes about customary land and titles from the purview of the Court of Appeal and Supreme Court to grant exclusive jurisdiction to the Land and Titles Court, which is composed of lay judges who are expert in Samoan custom. In Tonga, the amendments introduce custom into the Constitution for the first time, and

compel the courts to take custom, broadly defined, into account when forming their rulings. Dziedzic outlines the roots and content of these amendments in the respective states, and considers some of the challenges and potential implications they present vis-à-vis constitutional interpretation and balancing of rights. Critically, Dziedzic examines the fact that defining custom in opposition rather than in relation to individual rights or ‘Western norms’ defies the establishment of a dialogic, and therefore enriching, relationship between these two legal traditions and risks entrenching a binary framework of opposing—potentially contradictory—laws.

In the last chapter, Thibaut Noël analyses the establishment, functioning and outputs of the Citizens, Convention for Climate (CCC), a body convened by the President of France in 2019 and charged with devising proposals for the government to define more effective and widely accepted policies to tackle climate change. In June 2020 the CCC submitted 149 proposals to the government, including two specific proposals for constitutional amendments. The first proposal attempted to position environmental protection above the protection of other individual rights and freedoms, and the president rejected it. Only the second proposal, which would add to the Constitution (article 1) guarantees for the preservation of the environment and biodiversity and the fight against climate change, was submitted to parliament. The Constitution requires both chambers of parliament to adopt an amendment bill before it is ratified in a referendum; the Senate proposed modifications and thereby derailed the process. As Noël indicates, the work of the CCC was perhaps politicized in the context of the upcoming presidential elections in 2022. At the same time, parliament could have taken a more prominent role in establishing and engaging with the CCC. Better integration of the CCC in parliamentary deliberations could have contributed to enhancing parliament’s buy-in to the process and improved the legal clarity, consistency and relevance of the CCC’s recommendations.

1. The impact of Covid-19 on constitutionalism and constitution-building

Joelle Grogan

Introduction

The impact of the Covid-19 pandemic on legal systems worldwide must not be underestimated, but also cannot yet be fully gauged. The Covid-19 health emergency has tested the limits of both constitutional and legislative frameworks on the use of emergency powers and executive decision-making. Most states worldwide have adopted highly restrictive measures both limiting and, in some cases, derogating from fundamental rights protections, which have also had an impact on the ordinary functioning of administrative systems and processes. These measures have been primarily promulgated by executive powers, and the locus of power and authority has been principally in governments, with a weaker and sometimes weakening role given to the other institutions and organs of state, including the courts and legislatures.

This section provides an overview of the impact of the Covid-19 pandemic on constitutionalism and constitution-building globally, highlighting not only the most concerning developments but also some evidence of emerging good practices. It examines state responses through the lens of executive action and use of powers in response to emergencies; the effectiveness of judicial and legislative oversight; the diffusion and division of power across the federal, regional and local levels; and, briefly, the impact of Covid-19 measures on human rights and civil liberties protections.

The executive powers and their use in response to emergencies: models of legal response to the pandemic

Across the world, governments and executive authorities have been the primary decision makers in determining the appropriate action to take in response to the health emergency. This is not unusual, and is to be expected in the context of an emergency where a fast response is essential, and is sometimes at odds with the time necessary for ordinary legislative procedures (Cormacain 2020). The legal basis for the use of executive powers has varied significantly, which has led to confusion about what constitutes an ‘emergency power’ (and therefore what limitations should apply to it). Conventional wisdom and expectations prior to the Covid-19 emergency divided emergency powers and their legal bases into constitutional emergency regimes, ‘legislative models’ and ‘other’ or ambiguous legal bases for power, though many important contextual factors can provide a determinative influence (Houlihan and Underwood 2021).

In response to the Covid-19 pandemic, different models and forms of power have been employed (primarily though not exclusively by executive powers) that have reflected the full panopticon of constitutional and legal frameworks worldwide. The great diversity of models, rules, modes of implementation and practices adopted has made any form of categorization with clear divisions among types of legal basis an exceedingly difficult exercise, as exceptions appear to be more common than paradigmatic examples. Models of emergency power and the observed use of power during the Covid-19 emergency may be understood as existing on a spectrum ranging from constitutional declarations of emergency to extra-legal action, incorporating a wide range of (ostensibly) applicable safeguards and spanning an even wider range of application in practice.

With this caveat with regard to understanding the diversity of legal bases for the use of power during the Covid-19 emergency, this chapter adopts the following broad groupings within this spectrum to serve as a general framework for the navigation and analysis of the forms of power and legal bases of measures taken in response to the pandemic:

1. *Constitutional states of emergency.* The legal basis for extraordinary measures (e.g. the use of decrees, orders, regulations or extraordinary delegated legislative power, which the executive usually exercises) is under a formal declaration of a constitutional state of emergency. Constitutional emergency regimes often, but not always, enable the legal setting aside of some constitutional checks and balances to facilitate the emergency response. They often formally include some procedural safeguards for the declaration and approval of the emergency, and some substantive safeguards (limitations) on the scope of extraordinary measures that the executive may take, including to limit or derogate from rights.

2. *New legislative states of emergency.* The legal basis for the executive's exceptional or extraordinary use of power is based on ordinary legislation passed by the legislature in direct response to the pandemic through ordinary legislative processes, which create new designations of states of emergency though which are not *constitutional* states of emergency. Unlike constitutional emergency regimes, legislated emergency regimes ostensibly operate within the normal bounds of constitutional checks and balances and involve the legislature delegating extraordinary or exceptional powers to the executive. They involve the contemporaneous engagement of the legislative branch in constructing the emergency regime through law-making.

3. *Legislative emergency law frameworks.* The legal basis for executive measures is based on legislative frameworks that countries describe as 'emergency powers'. They allow the use of exceptional or extraordinary power by the executive, and were created ex ante by ordinary (e.g. primary or parliament-made) law. Though sharing significant overlap with the new legislative states of emergency, legislative emergency law frameworks are self-designated emergency powers that are based within ordinary (or parliament-made) law. Like new legislative states of emergency and in distinction to constitutional states of emergency, they are expected to be subject to ordinary democratic checks and balances, including parliamentary scrutiny and judicial review.

4. *Ordinary legislative frameworks*

- Executive measures are based on pre-existing, ordinary legislation not designated as for use during an 'emergency', for example promulgation of orders or regulations based on pre-pandemic, non-emergency health legislation.
- Measures can also be based on primary legislation that the legislature passes in response to the pandemic through ordinary processes but that the country does not designate as conferring extraordinary emergency powers on the executive.

5. *Soft law measures.* Soft law refers to governmental or public authority guidance, or other non-legally binding measures.

6. Extra-legal or extra-legislative action

- This refers to executive measures without legal basis that are nevertheless treated *de facto* as legally binding.
- Although these measures are typically extra-legal or illegal, relevant legislative authorities may retrospectively authorize them.

Constitutional states of emergency

Across the world, most countries declared either constitutional or legislative emergency powers at some point in their response to the pandemic. The legal processes and consequences for the declaration of a constitutional state of emergency vary significantly across states. The design of constitutional states of emergency can be highly prescriptive and limit the circumstances under which an emergency can be declared (e.g. insurgency or war, natural disaster or, though less common, a threat to public health). Provisions may also include a wide range of procedural and substantive safeguards for the extraordinary use of power under such a state of emergency. In contrast, some constitutions provide more open-ended and discretionary provisions that do not distinguish between different types of emergency, and/or may contain weak procedural or substantive safeguards.

Procedural safeguards

Most constitutions require either *ex ante* or *ex post* approval from the legislature of the declaration of a constitutional state of emergency and can also require legislative approval for any extension of a state of emergency, which is an important procedural safeguard. Judiciaries may also play a role in oversight either as expressly provided for within the constitution or through normal judicial review. However, some courts may be expressly excluded from the review of a declaration of a state of emergency, or (as observed in practice) may decline review for lack of competence.

In Malaysia, for example, article 150 § 1 of the Constitution empowers the king to declare a state of emergency if he perceives a threat to security, economic life or public order: such declaration of a constitutional state of emergency is exempt from both judicial review and legislative oversight. Although the country initially relied on ordinary legislation to respond to the pandemic, by early January 2021, and faced with a ‘third wave’ of infections, the king consented to the prime minister’s repeated requests to declare a state of emergency. On 12 January, the Malaysian Parliament was suspended until August 2021 to enable direct emergency rule by the government, effectively suspending ordinary parliamentary functions and oversight (Balasubramaniam 2021).

Substantive safeguards

As a safeguard for the considered protection of constitutional or fundamental human rights, constitutions may contain substantive conditions on which rights may be limited. Some states may allow the consideration of whether or not to derogate from international human rights instruments (e.g. the American Convention on Human Rights [ACHR], the European Convention on Human Rights [ECHR] and/or the International Covenant on Civil and Political Rights [ICCPR]), but are not obligated to do so when a state of emergency is declared.

Article 19 of the Constitution of Portugal, for example, distinguishes between a ‘state of siege’ (for use in the event of armed aggression or insurrection) and a ‘state of emergency’ (for use in situations of calamity); the latter only allows for partial suspension of rights, while certain rights—including the right to life and non-retrospectivity of criminal law—are expressly non-derogable.

New legislative states of emergency

Several countries created new statutory states of emergency in response to the pandemic. Note that, although countries describe these as ‘states of emergency’, they should not be confused with constitutional states of emergency, as they are the product of ordinary legislation—not the constitution.

It is commonly assumed that powers based on ordinary legislation are subject to higher levels of scrutiny, as they ought to be subject to ordinary judicial and legislative oversight (rather than excluded from it, as may be the case under constitutional states of emergency). At odds with that view, in some instances introducing ‘new’ legislative emergency frameworks has resulted in lower levels of scrutiny than would have applied had the countries relied on their own constitutional states of emergency with their (often) built-in safeguards. For example, in France, the Emergency Response to the Covid-19 Epidemic Act (2020-290) introduced a new ‘state of health emergency’, also codified in articles L.3131-14–L.3131-12 of the Public Health Code. In many aspects, this new state mimics a state of emergency in being declared by decree of the Council of Ministers (article L.3131-13) and is subject to parliamentary involvement. However, such parliamentary oversight is more limited than under a constitutional state of emergency. For example, parliament must authorize any extension of the state of health emergency after one month, and, unlike, for example, the State of Emergency Act 1955, it does not lapse after 15 days (Platon 2020). There is also no obligation to send measures that executive or administrative authorities have adopted under the act to parliament, as compared with under a constitutional emergency (Basilien-Gainche 2021).

In Bulgaria, responding to criticism on the alleged misuse of a constitutional state of emergency (which was arguably only applicable in war or insurrection [Vassileva 2021]) in its initial response to the pandemic, the government

introduced amendments to the Law on Health to introduce a new state of ‘extraordinary epidemiological conditions’ in May 2020. The executive unilaterally triggers this new legal framework, and there is no limit within the law on how long it may last. It also allows the restriction of fundamental rights through executive orders, in contravention of the established norm that such restrictions may only be enacted with parliamentary authorization. Despite strong objection in a joint dissenting opinion, highlighting that this new framework was an ersatz state of emergency declared by the executive rather than by parliament (as the Bulgarian constitutional state of emergency requires), in Decision 10/2020 of 23 July 2020 the Constitutional Court held that the amendments to the Law on Health were constitutional.

Legislative emergency law frameworks

Legislative emergency law frameworks provide for self-designated emergency powers, but are statutory delegations of extraordinary power from the legislature to the executive, and, as with the new legislative states of emergency, have been developed in the normal course of law-making. As all such legal bases operate on a spectrum, a notable distinction of these laws is that they do not necessarily provide for the declaration of a state of emergency but do authorize the executive’s exceptional powers. As with statutory states of emergency, they would be expected to be subject to ordinary democratic checks and balances and a range of substantive and procedural checks, including some form of legislative scrutiny and judicial review, though this is not always the case in practice. Several states have used these types of laws as the basis for their emergency response to the pandemic.

In the United Kingdom, the Civil Contingencies Act 2004 (CCA 2004) is the main piece of legislation addressing civil emergencies such as epidemics. It was not, however, utilized during the pandemic, ostensibly because the gradual onset of the pandemic did not constitute a ‘sudden, unanticipated event’. Instead, parliament enacted the Coronavirus Act in 2020, granting the government emergency powers. However, the Public Administration and Constitutional Affairs Committee, in its report scrutinizing the government’s handling of the Covid-19 pandemic, concluded that this choice was politically motivated, highlighting that the CCA 2004 is subject to safeguards of meeting strict standards of necessity and urgency before emergency regulations can be applied, while the Coronavirus Act 2020 does not have the same safeguards as the CCA 2004 (Public Administration and Constitutional Affairs Committee 2020: paragraph 34).

Why have only some states declared a constitutional state of emergency?

There are several reasons why some states have not relied on constitutional emergency powers to respond to the pandemic (for post-conflict states in

transition, see Molloy 2021). For example, in many states, the current health crisis does not constitute grounds for a constitutional state of emergency to be declared (e.g. article 28.3.3 of Ireland's Constitution states that an emergency may only be declared in times of 'war or armed rebellion'). Other constitutions do not include a state of emergency in their provisions (e.g. Japan's Constitution). In some cases, states have eschewed the declaration of a state of emergency for political and/or historical reasons (e.g. Bangladesh, India and Myanmar). However, there is also good reason to support an approach that advocates the use of ordinary powers in response to an emergency, where such an approach of 'normally applicable powers and procedures . . . insists on full compliance with human rights, even if introducing new necessary and proportionate restrictions upon human rights based on a pressing social need created by the pandemic' (Scheinin 2020).

Ordinary legislative frameworks

In theory, ordinary legislative models are subject to ordinary procedural and substantive checks and balances, and involve parliament at least to the extent of the enactment process that introduces legislation. In terms of substantive safeguards, without provision for derogation from rights protections possible under constitutional states of emergency, reliance on ordinary legislation can also ensure the ordinary application of human rights standards. For example, in the UK, the Coronavirus Act 2020 was not excluded from the application of the Human Rights Act 1998, so measures taken under it can be subject to review for compatibility with ECHR rights.

However, in some instances, avoiding the declaration of a constitutional state of emergency can also be a means of avoiding the higher levels of scrutiny that should be applied to the use of emergency powers under the constitution. For example, in Poland, the government's reliance on ordinary legislative provisions as the legal basis for the measures it adopts has been criticized where they place limitations on constitutional rights *without* express provision through parliament (as set out in the Constitution) (Jaraczewski 2021).

A distinction can also be drawn between pre-pandemic and pandemic-era legislation. The Republic of Korea, Singapore and Taiwan provide excellent examples of the reliance on pre-pandemic legislation to respond to the current pandemic. In the Republic of Korea, these legal frameworks were achieved through reforms following the lessons learned from mistakes made during the initial response to the 2015 Middle East respiratory syndrome epidemic. However, pre-pandemic legislation is not immune from criticism that its provisions may be unsuitably wide and afford a degree of discretion to executive action that is not balanced by legislative or judicial scrutiny. For example, in India, reliance of state governments on the Epidemic Diseases Act 1897 has been criticized where its vaguely worded provisions have resulted in very stringent

restrictions on liberties, and excessive (if not arbitrary) enforcement (Bhatia 2020; Raj 2021).

Pandemic-era ordinary legislation can provide a bespoke response to the crisis, and fill gaps in legal powers where they were required but did not previously exist. However, legislation introduced in the haste that an emergency provokes can often have legal deficiencies including vague and open-ended terms providing for the wide delegation of discretionary powers, and a lack of parliamentary oversight, especially in its application. For example, the Swiss Covid-19 Act remains ‘too vague for ordinary legislation’ and, as emergency legislation, it represents a ‘form of empowerment vis-à-vis the government that lacks a constitutional basis’ (Uhlmann and Ammann 2021).

A solution would be to introduce targeted coronavirus legislation that delegates limited powers to the executive to respond to the immediate crisis, but also contains necessary legal safeguards, including sunset provisions, as well as judicial and parliamentary oversight (Ginsburg and Versteeg 2020). Such legislation would act as an effective ‘quarantine’ on powers during the pandemic. However, and as the experiences of the states that reformed following previous epidemics underline, legislating for *future* pandemic emergencies must be done following a crisis, not during it, as the pressures to respond quickly may encourage lower levels of participation, engagement and oversight as well as greater delegation of powers to the executive.

The effectiveness of judicial and legislative scrutiny and oversight of Covid-19 measures

The primacy of executive decision-making during an emergency is unsurprising and can be justified based on the need for urgent action. However, an essential element of all constitutional democracies is the limitation of powers within the law, which is guaranteed through the separation of powers and the exercise of review and scrutiny functions by both the judiciary and parliament (Gross and Ní Aoláin 2006). This is an essential safeguard against the abuse of powers in emergencies, and is necessary to upholding democracy and the rule of law. The function of legislatures—as with the role of the judiciary—is to provide scrutiny and oversight of the practice of governments, particularly where they so severely, and over a long period, curtail the rights and liberties of citizens and residents across the world. While it is not possible to consider in detail the national responses (particularly as represented across the broad spectrum of different models of the use of powers), it is possible to highlight both global trends and emerging good practices worldwide.

Parliamentary scrutiny

The role of parliament varies depending on the model of response the country adopts. With regard to the use of emergency powers (and in this context, we can understand *both* constitutional states of emergency *and* legislative emergency law frameworks), two distinct issues arise in terms of the effectiveness of parliamentary scrutiny. First, in terms of the design of emergency provisions, and as outlined above, the degree of parliamentary involvement can vary significantly across states. For example, parliamentary approval may be required to declare a state of emergency. Parliaments may be required to approve the extension of any state of emergency, and (though to a lesser extent among those examined) provide for either the *ex ante* or *ex post* review of executive measures.

In some states these roles vary. For example, in The Gambia, while the president has the exclusive power to declare a state of emergency under article 34 § 1 of the Constitution, parliament must nevertheless approve this declaration within seven days or it automatically expires (article 34 § 2); parliament is also obligated to ensure that the action the executive takes adheres to democratic principles and the rule of law (Nabaneh 2021). In contrast, in Thailand, the Emergency Decree 2005 does not provide for parliamentary scrutiny, nor is parliament required for its extension beyond three months. Unlike the roles of parliament typically envisaged in constitutional states of emergency, it was notable within the ‘new’ legislative emergency law frameworks introduced in France and Bulgaria that the degree of parliamentary involvement was less than that under a constitutional state of emergency.

The second issue is that even where provisions exist for parliamentary involvement in the approval, oversight or extension of the use of emergency powers, these may not be effectively exercised owing to external or political circumstances. For example, the supermajority that Prime Minister Viktor Orbán’s party holds in the Hungarian Parliament has effectively negated meaningful review of government decrees (Kovács 2021). At the same time, the pressure to respond quickly to the virus has meant that effective parliamentary scrutiny in the form of debate has been negligible in some states. It should be noted that this is a cross-cutting issue, evident in all models of response to the pandemic, including states that have relied on ordinary legislation. For example, in the UK, over the 12-month period following the introduction of the Coronavirus Act 2020, only five hours of debate were given to its extension *and* measures taken under it.

However, even where there is limited time for parliamentary debate, good practices worldwide can still be emulated. These include standing committees (e.g. Finland; Scheinin 2020, 2022), specially constituted committees scrutinizing action (e.g. Denmark; Lautu 2021), and active community engagement and communication (e.g. South Africa; Labuschaigne and Staunton 2020). In

Taiwan, all control orders are subject to parliamentary oversight and must be submitted to parliament ‘as soon as possible’ (Chang and Lin 2021). Open calls for evidence and online publication of materials relating to both decision-making and rationale for government action can provide an important layer of transparency to decision-making during a pandemic, which is an important element for public trust and compliance. It should be acknowledged that, although these are good practices, they can be more easily adopted in some political and legal cultures and contexts than in others. For more robust parliamentary oversight of constitutional states of emergency, it may be necessary to review the efficacy of current constitutional design for potential future reform and amendment.

Access to the courts

Judicial review of action taken in emergencies can provide an essential democratic safeguard on the protection of rights and the rule of law. Examples across the world provide insight into constitutional and higher courts’ robust examination of government action, and (where allowed) into procedures for the declaration and approval of states of emergency. For example, the Constitutional Court has provided arguably more effective scrutiny than parliament in Ecuador, in a successive series of rulings on the constitutionality of presidential executive decrees adopted in response to the pandemic. For example, the Court declared Executive Decree No. 1217 of 21 December 2020 to be unconstitutional, as the pandemic was no longer ‘unforeseeable’ but had become part of a ‘new normality’, which obligated the executive to act with ordinary powers. Similarly, in ruling 3-20-EE/20A of August 2020, the Constitutional Court declared an executive decree related to the collection of tax unconstitutional, as it did not meet the ‘standards of necessity, suitability and strict proportionality’ (Cervantes 2021). In Brazil, the Federal Supreme Court has played a ‘pivotal role to secure the constitutional legitimacy of the measures against Covid-19’ by protecting indigenous rights and access to information, and requiring the public authorities to observe scientific and technical criteria (Meyer and Bustamante 2021). The courts in the Ukraine found 90 per cent of administrative penalties to be groundless (Petrov and Bernatskyi 2021).

There are, however, also concerns. As could be expected, the Covid-19 crisis has brought delays to sometimes already backlogged justice systems. This has been a critical concern not only for the ordinary administration of justice, but even more importantly with respect to judicial review (where provided) of actions taken in an emergency. Concerning developments in some states relate to the absence of jurisdiction over emergency measures. For example, in Thailand, an ouster clause precludes administrative review of regulations made under emergency legislation.

Some courts have declined to review either emergency measures or the procedure for declaration of a state of emergency, for lack of competence. For example, in Czechia, although courts have annulled some restrictive measures that the Ministry of Health introduced, they refused (on a split decision) to review the declaration of a state of emergency for lack of competence (Pl. ÚS 8/20) (Vikarská 2021).

Even where jurisdiction for either the substantive and/or procedural review of emergency measures exists, some courts have been marked in their deference towards the government's decisions during the pandemic. In one interpretation, this can reflect the 'political question' doctrine, which acknowledges that the democratic legitimacy of action comes from both government and parliament, not the courts. Alternatively, it may acknowledge the lack of expertise in science and understanding epidemiological evidence. Nevertheless, the courts can play an essential role in ensuring the publication of evidence and of the rationale underlying decision-making.

Ultimately, without effective review scrutiny, legal safeguards on the use of emergency powers are ineffective and rights guaranteed through constitutional and international human rights instruments are unprotectable. However, and echoing those concerns identified in the context of parliamentary scrutiny, the problems of effective judicial oversight relate not only to the legal questions of jurisdiction, but also to the practice of (often) self-imposed deference and—critically—the level of judicial institutional independence.

Diffusion and division of power: federal, regional and local responses to Covid-19

Constitutions can promote subsidiarity by delegating or devolving responsibility for significant policy areas to local and regional decision-making to bring these decisions closer to citizens. However, an effective devolved system requires functional local government and administrative processes as well as the capacity for coordination, consultation and (at times) conflict resolution between different levels of local, regional and federal government.

The locus of power and division of competences, particularly where health is a devolved competence among regions or other subdivisions of states, has been brought into focus in the pandemic response. This has been particularly acute where there has been divergence in central- and substate-level estimation of the threat of the pandemic. Such decentralization of power is not unique to federal systems; it can be present in unitary systems. In contrast to executive overreach is executive *underreach*, which is 'a national executive branch's wilful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address' (Pozen and Scheppelle 2020). Federal executives led by President Jair Bolsonaro in Brazil (see

e.g. Bustamante and Meyer 2021) and President Donald Trump in the United States (see Graber 2021) downplayed or denied the threat of Covid-19, and underreaction characterized the federal responses, which has resulted in among the highest infection and mortality rates globally. In Pakistan, the Federal Government's opposition to lockdowns was directly at odds with the decisions of the states of Sindh and Punjab to impose them, and partial lockdowns in the states of Balochistan and Khyber Pakhtunkhwa (Syed and Tariq-Ali 2021).

In Sweden, the prevailing model is one of decentralized powers and quasi-autonomous administrative agencies. It provides a positive example of enabling local expertise and responding quickly to the pandemic, but has nevertheless revealed areas that could not be regulated under existing provisions (for example, businesses could not be legally obligated to require employees to work remotely; Cameron and Jonsson-Cornell 2021). Although there are certainly benefits of such networking and diffusion of authority, it should be highlighted that the national strategy of Sweden in adopting comparatively few and lax restrictions under the aim of achieving 'herd immunity' has been widely criticized (Cleason and Hanson 2021). Ultimately, the most successful national strategies in both federal systems and unitary systems are based on regional adaptation driven by pressing local requirements and differentiation based on objective, health-based reasoning. However, this must be part of a coordinated approach at the national level to avoid confusing internal divergences in both strategies and the application of laws.

Impact of Covid-19 measures on human rights and civil liberties

Authoritarian regimes worldwide have capitalized on the pandemic as a pretext to end dissent through the restriction and removal of rights, and the strict enforcement of sometimes disproportionate and unjustified measures.

International human rights instruments (e.g. the ICCPR, ACHR and ECHR) provide for situations of emergency through their guidelines on the limits that should be in place on the use of exceptional power. These include the identification of non-derogable rights (e.g. right to life, and the prohibition of slavery and torture). These instruments also require the use of emergency powers to limit rights to be proportionate, necessary, non-discriminatory in application and time-limited (Emmons 2020). It should be noted, however, that while most states worldwide have acted to limit the exercise of rights (e.g. assembly, movement and worship), most states worldwide have not notified relevant international or regional human rights bodies of their intention to derogate in light of the ongoing pandemic.

While much of the public debate and political discourse on Covid-19 measures has centred on both the necessity and proportionality of measures, concerns have

been raised particularly in the context of the discriminatory application of punitive measures targeting minorities (e.g. the Roma community in Slovakia and Ukraine; and the lesbian, gay, bisexual, transgender and queer (LGBTQ) community in Uganda; United Nations Network on Racial Discrimination and the Protection of Minorities 2020); political opponents (e.g. Hungary and Thailand); and even doctors and medical personnel when criticizing state action in response to the virus (e.g. Belarus and Russia). In some cases, permanent changes to the criminal code have been made, deepening further concern for ‘emergency creep’ or permanent shift and entrenchment of exceptional powers within the ordinary arsenal of executive powers. Indiscriminate bans on public protests (e.g. Bangladesh, Russia and Thailand), and the restriction of free speech through the criminalization of spreading false information or criticizing governmental responses to the health emergency (e.g. Brazil, Hungary, India, Indonesia, the Philippines and Russia) shifted attention away from both the critical accountability of governments and the public health discourse.

In some states, limitations on gatherings restricted access to the courts. In the first phase of the pandemic, courts were temporarily closed (e.g. Bulgaria) and/or access was limited to extremely urgent or critical cases (e.g. Denmark and India). A positive development across the world was the efforts to introduce and support remote hearings and written submissions to continue the functions of the court while restrictive measures were in place. However, this can be a double-edged sword where lack of access to the Internet or of requisite understanding of technology and the absence of the neutral setting of a courtroom can have prejudicial effects on litigants.

Beyond civil and political rights, increasing concern and attention has played into the recognition and protection of socio-economic rights in a global pandemic, including the right to health. Even where such rights are embedded and incorporated in national constitutions (e.g. Egypt and India), without sufficient support for health care systems prior to pandemic these rights provided limited protection, let alone provision.

A reality of the measures adopted is that they have disproportionately impacted some of the most vulnerable communities, including undocumented migrants, minorities and indigenous peoples, people with disabilities, prisoners, older people, and low-income or informal workers (Al Saba and Gougisa 2021). The ordered closures of businesses leading to mass unemployment of part-time and informal workers, coupled with school closures, have had a disproportionate impact on women and have escalated rates of domestic violence worldwide (UN Women 2020). Although a human-rights-based approach (Dagron 2021; Donald and Leach 2020, 2021) as the most effective strategy in combating the virus has been advocated, continuing trends towards democratic deconsolidation indicate that this is far from the realization globally.

Conclusion

When examining the impact of the Covid-19 pandemic on legal systems worldwide, many pre-existing assumptions on how constitutions, laws and power would function during emergencies have proven inadequate. For example, the assumed sharp divisions between procedural and substantive safeguards under constitutional emergency regimes, and ‘ordinary’ or (as the states described them) ‘emergency’ legislative regimes, have collapsed in practice.

No one model of the use of emergency powers has proven immune from potential misuse or abuse. However, the use of emergency powers is not inherently concerning where appropriate procedural and substantive safeguards against the misuse of power not only exist but are applied where necessary or relevant. At least during the first phase of the pandemic, there was no indication that states that relied exclusively on constitutional emergency powers were more likely to be abusive in their practices than states that relied only on ordinary executive powers delegated through ordinary legislation (Grogan 2020). A central concern for some states has been where the continued centrality of executive decision-making over the extended period of the pandemic could lead to a permanent shift in the balance of powers. The prevention of this shift to permanency relies on the adoption (where absent) and inculcation of good practices.

Good practices and international standards provide helpful guidance on how emergency powers may be not only designed, but also engaged in practice. As an essential frame of reference, the conditionality on the exercise of emergency powers should be in ‘terms of necessity, proportionality, exigency in the situation, temporality and a commitment to human rights as a framework for legitimate emergency measures’ (Scheinin 2020). International human rights instruments, including the ICCPR, the ACHR and the ECHR, explicitly provide for derogation and, while recognizing the need for national flexibility, identify certain non-derogable rights. The Siracusa Principles for the restriction of rights under the ICCPR provide further guidance on the requirement of meeting the standards of legality, necessity, proportionality and temporariness.

At the national level, constitutional safeguards in the form of the requirement of parliamentary involvement in the declaration, extension and expiry of states of emergency, as well as active parliamentary oversight and judicial control over the *use* of powers for their compliance with the rule of law and human rights, form the bedrock of good practices and the effective use of safeguards, and these responsibilities should extend to legislated emergency regimes as a matter of good practice.

The year 2020 tested the limits of legal systems globally and exposed both a fragility in democracies and a weakness in the bonds of democratic

constitutionalism where there is not a robust institutional framework and healthy separation of powers to guarantee it. Endemic socio-economic disparities reveal a poverty in the protection of some socio-economic rights and the lack of voice in decision-making for the most vulnerable—though most affected—communities.

With ongoing concern that the risk of more infectious mutations will mean that the virus becomes endemic to the global population, the future is uncertain. However, there is and will be opportunity for states and international bodies to scrutinize and review the actions taken in response to the pandemic, and the impact of pandemic governance on their constitutional and legal architecture, as well as health and crisis response preparedness. Based on this, some preliminary recommendations may be given. First, states must review their emergency law frameworks. A key observation of the practices of states during the Covid-19 pandemic is that different emergency legal frameworks do not necessarily inform the observer as to the level of legislative/judicial scrutiny observed or mandated, or about the timeframe for the declaration and sustenance of a state of emergency, or its proportionality and non-discrimination. International legal frameworks have, throughout the pandemic, continued to provide guidance on essential safeguards, including necessity, proportionality, non-discrimination, human rights compliance and temporariness. However, '[t]he effectiveness of legal safeguards against abuse depends on executive observance of the rules and on the strength of the separation of powers to enforce it' (Grogan 2020).

Second, states must review the capacity, efficacy and appropriateness of actions that all state actors took during the pandemic. Primarily, in terms of the authority for action, broad and open-ended measures should be avoided in favour of time-limited provisions, and they should make the use of exceptional powers conditional on both constitutional and human rights compliance and real-time scrutiny (where practicable, and *ex post* if not), for example by specially constituted parliamentary groups or inquiries into distinct or discrete areas of pandemic management, response, action or impact. Access to justice through independent courts must always be supported: a tragedy of contemporary backsliding from the rule of law is that, although Covid-19 has proven a catalyst for further democratic backsliding, increasing attacks on and undermining of judicial independence in many states were a feature prior to the pandemic, which has had a pernicious effect on the ways the states have been able to address the pandemic.

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2. Aggravating aggrandizement? Comparing the constitutional impact of the pandemic in the Central African Republic, Hungary and Sri Lanka

Adem Abebe and Asanga Welikala

Introduction

The Covid-19 pandemic has affected the ways societies live and are governed. This chapter takes stock of the impact of the pandemic on democratic constitutionalism in Africa, Europe and Asia through the case studies of the Central African Republic (CAR), Hungary and Sri Lanka. The experience of the three countries illustrates how some executives attempted to entrench their power throughout the pandemic, successfully or unsuccessfully, depending on several factors. They represent three continents and cultures, different yet comparable modern state formation histories and different degrees of democratization, as judged according to International IDEA's Global State of Democracy Indices.

The case studies reveal that, as with the public health implications of the coronavirus, where pre-existing conditions are critical predictors of impact on individuals, the state of democratic constitutionalism prior to the outbreak of the disease determined the impact of the disease on the politics of democratization.

While the CAR continues to languish in instability and scores low on democracy indices, there is no absolutely dominant political group, and the political arena has become increasingly open since the adoption of its 2016 Constitution. The adoption marked the end of the post-coup transition, aided by the international community and a particularly assertive Constitutional Court.

The Covid-19 crisis arrived at a time of an early but improving democratization trajectory. In Hungary, the pandemic emerged when the country had already firmly taken the route of an avowedly illiberal constitutional dispensation. In Sri Lanka, the pandemic occurred soon after the election of a populist president riding on waves of disappointment over the messiness and performance failures of coalition politics.

The outcomes in the three countries reflect these varying contexts. In the CAR, the pandemic revealed an unanticipated problem with unamendable constitutional provisions, and presented an opportunity for the Constitutional Court to clarify issues and assert its role. In Hungary, the pandemic response merely represented the latest opportunity for incumbent entrenchment. In Sri Lanka, the pandemic provided a catalyst for already planned constitutional changes that recentralized power in a highly personalist executive presidency by removing intra-executive, parliamentary and fourth-pillar checks on presidential powers. For each case study the next section briefly discusses the political and constitutional context in which the pandemic hit, the issues the pandemic raised, how the governments responded, attempts at checking excesses and some notes on the expected trajectories. The third section provides some preliminary reflections and broader lessons for comparative constitutional change. The fourth section provides conclusions.

Covid-19 and constitutional change in three contexts

The Central African Republic: Covid-19 and unamendable constitutional provisions

The CAR held presidential and legislative elections on 27 December 2020. Despite high levels of insecurity and the state not controlling the entire territory of the CAR, incumbent President Faustin-Archange Touadéra won in the first round with 53 per cent of the votes. The preparations for and holding of elections had a tumultuous background of the Covid-19 pandemic and political twists that exacerbated political and security volatility, putting the country on the verge of collapse.

The increase in the number of Covid-19 cases in March and April 2020 generated concerns that the physical contact and sharing of spaces that election-related activities necessitate conflicted with social distancing and isolation measures that Covid-19 prevention demanded. Notably, members of the ruling coalition pushed for a constitutional amendment to allow the postponement of elections and extension of terms of the incumbent president and legislature on grounds of ‘force majeure’ (Vohito 2020). To appease concerns of potential incumbent abuses, the proposed amendment provided that the Constitutional Court would determine the grounds and period of extension. The ruling coalition

had the numbers to pass the amendment in parliament, and the cabinet then approved it in May 2020.

There were, however, two concerns. First, opposition groups and civil society organizations feared that the government was attempting to take advantage of its dominance and the public health situation to extend its term and entrench itself. This was mainly because the government did not invoke any constitutional emergency to claim exceptional powers to tackle the health and social impacts of the pandemic.

Second, the Constitution prohibits amendments related to, among other matters, the number and duration of the presidential mandate (article 153). Under the Constitution, all amendment bills must be submitted to the Constitutional Court for ‘its opinion’ before they can be submitted to referendum, when required, or otherwise take effect (articles 90 and 95).

In reviewing the proposed amendment, the Court had to consider that elections may under certain circumstances be practically impossible, while remaining faithful to the constitutional text banning constitutional amendments to the term and duration of presidential mandates. One of the main arguments of the proponents of the amendment was that, unless an exception was recognized based on force majeure, such circumstances might force the suspension of the constitutional order, necessitating the establishment of a supra-constitutional ‘transition period’, or a power vacuum.

Following deliberations with political parties, state institutions and civil society, the Court found that there were procedural irregularities that rendered the process of adoption of the amendments unconstitutional. Specifically, the signatures in support of the amendment were collected outside regular parliamentary sessions, which were not held owing to Covid-19 concerns. At the same time, the Court recognized that the matter raised fundamental issues that needed resolution in view of the real possibility that elections might not be practical or even wise under certain circumstances—in this case, the worsening of the Covid-19 pandemic. The Court did not seem to subscribe to an elections-at-any-cost view.

Nevertheless, the Court rejected the possibility of suspending the Constitution or of establishing a transition period. It also ruled that the term of the National Assembly could not be extended through an amendment—although the unamendable provision only refers to the duration and term of presidential mandates—on the ground that the ‘consensual spirit of the 2016 Constitution’ precluded the ‘extension of the legislators’ term by themselves’, without prior extensive consultation with the people (Vohito 2020).

Despite recognizing the constitutional prohibition on amendments to extend presidential terms, the Court recommended the organization of a ‘national consultation’ to be convened by the government to arrive at a ‘consensual solution’ to the practical challenges that Covid-19 posed to the holding of

elections. The Court retained its authority to review the outcomes of the consultations with key representatives from the government, parliament, political parties, state institutions and civil society organizations.

In addition to this one-off solution, the judgment of the Court also appeared to imply that even the unamendable provisions could be amended through a referendum (Vohito 2020), in an apparent recognition of the extra-constitutional constituent power of the people, a prominent concept in francophone African legal thought (Abebe 2020a). It nevertheless recognized that the Covid-19 situation would make a referendum impractical.

In the end, the national consultation was not pursued as the government pushed for elections. The Covid-19 situation did not seriously disrupt the electoral process or otherwise allow the incumbent to abuse the pandemic-related travel and gathering restrictions in place. Instead, the elections were marred by an attempt by former president and rebel leader François Bozizé to topple the government in coordination with other rebel groups following the Court's invalidation of his candidacy for failure to pass a 'good morals' requirement (CAR Constitution, article 36) on grounds of a pending international warrant and UN sanctions against him for alleged assassinations, torture and other crimes (Constitutional Court of the Central African Republic 2020; Al Jazeera 2020).

At the time of writing, the security situation remains extremely tense, with rebels controlling significant parts of the country and threatening to overrun the capital, Bangui, and many citizens fleeing the country. The CAR has been in turmoil since 2013, when Bozizé orchestrated a coup but was quickly forced to flee (International Crisis Group n.d.). He returned to the CAR and announced his candidacy for the presidential elections in July 2020 as the opposition's flagbearer, but was disqualified by the Court.

Hungary: Covid-19 and opportunistic incumbency entrenchment

'Never let a crisis go to waste' seems to be the driving mantra of Hungarian Prime Minister Victor Orbán (Scheppele 2020). The Covid-19 pandemic has provided him with a new opportunity to entrench his self-proclaimed idea of 'illiberal democracy'. In March 2020, within weeks of the announcement of the pandemic, the Hungarian Government placed before parliament legislation that granted the executive decree powers to tackle the pandemic and its consequences, ostensibly on the ground that the uncertainties surrounding the pandemic necessitated such a general delegation.

Under the law, the executive could not only make new laws but also depart from or even suspend existing laws adopted by parliament, effectively creating an 'alternate legal regime' and further threatening the country's already debilitated constitutional democracy (Uitz 2020a). Following the adoption of the law, the government quickly extended the 'state of danger' it had declared for an unlimited period. It also issued hundreds of decrees, including some unrelated to

the pandemic, such as one that ‘stripped opposition-led municipalities of decision-making power and financial resources’ (Walker 2020).

While the parliament could at any time revoke the law, the transfer of power had no time limit. Nevertheless, the ruling Fidesz party controls more than two-thirds of the seats in parliament, and any such revocation was unlikely without the government’s endorsement. Considering this dominance, it is not clear why the government pushed for such a controversial and blanket transfer of legislative power. This transfer of law-making power to the executive meant that the parliamentary opposition would not have the formal opportunity to scrutinize proposed measures before their adoption, as would have been the case for legislation passed by parliament.

In addition to enabling government by decree, the law imposed restrictions on reporting of what it considers spreading ‘false’ or ‘distorted’ facts about the pandemic. This vague crime sought to allow the government to control the narrative and had a chilling effect on the capacity of the media, civil society and other non-state actors to hold the government accountable, particularly in a context in which the government faced no challenge from parliament or the courts (Uitz 2020a; International Press Institute 2020). It threatened to exacerbate the already stifled media environment in the country. Indeed, in the first few months, the Hungarian police launched hundreds of investigations and in some cases reportedly ‘hailed citizens in for questioning’ over critical Facebook posts (Walker 2020). The emergency was also reportedly used to cut public financial support to political parties and the funding of local councils that opposition parties controlled (Hopkins 2020).

Following persistent criticism of the emergency law, in June 2020, parliament rescinded the controversial ‘state of danger’ and the blanket authority to rule by decree (Bayer 2020). Under new rules, the government can still declare and make decrees under a ‘state of medical crisis’, but it cannot change laws on its own or restrict fundamental rights. However, the new law has also been criticized as a continuation of unchecked executive powers as under the Enabling Act (Halmai, Meszaros and Scheppele 2020b). The law has been used, for instance, to cut public financial support to the political opposition. In any case, in November 2020, the government enacted another emergency declaration effectively reinstating the unlimited powers of the government to rule by decree, although this time the emergency was limited to a 90-day period (Halmai, Meszaros and Scheppele 2020a).

Also in November, the Hungarian Government proposed a constitutional amendment that sought to overhaul the emergency regime, very much in line with the above law that undermines limits on the executive (Uitz 2020b). Although it has not yet been adopted, in combination, the proposed constitutional reforms will effectively liberate the government from parliamentary control and oversight in the declaration and implementation of emergency

measures (Halmai, Meszaros and Scheppele 2020a). Moreover, proposed reforms to the electoral law regulating joint lists of parties seek to make it difficult for opposition groups to coalesce to challenge the dominant ruling party (Halmai, Meszaros and Scheppele 2020b). The failure to mount a joint opposition has been central to Fidesz's electoral dominance. The reform seeks to undermine emerging political will among opposition groups to work together in recognition of the dangers to the democratic system that the ruling party presents.

The government has also used the context of the pandemic to push forward reforms that further the illiberal turn. For instance, the proposed constitutional amendment aims to entrench what the government considers 'Christian values' (Halmai, Meszaros and Scheppele 2020c). Notably, the amendment would specifically reinforce the 'heterosexual' definition of marriage, by specifically indicating that the father is 'a man' and the mother is 'a woman', alongside a legal amendment that would restrict adoptions to married couples. Furthermore, the state would be required to ensure that children are educated 'according to their biological sex' and in line with Christian values. Finally, the amendment would narrow the scope of state-held information that citizens have the right to access, while making it hard to trace European Union and Hungarian public funds, creating opportunities for misuse of resources and corruption (Halmai, Meszaros and Scheppele 2020c).

In combination, the constitutional and legal reforms threaten to entrench the country's illiberal turn, and transfer power to the executive to effectively liberate Orbán and his government even from prior control from their own party in parliament, while advantaging the ruling party over the opposition. The reforms also undermine individuals' fundamental rights. There are currently no effective domestic constraints on the government, and it has so far managed to resist pressure from the EU. A change in course would take an electoral defeat, which is exactly what the government is trying to prevent by consistently remaking the electoral environment to guarantee its advantage. Facing a more cooperative opposition in the run up to the 2022 elections, the ruling party may yet seek to tamper with the electoral rules to continue the dominance that it entrenched through a new constitution in 2010 and subsequent amendments. In the last elections, the ruling party won more than two-thirds of the seats in parliament on less than half of the votes, allowing it to amend the Constitution unilaterally.

Sri Lanka: pandemic-propelled democratic erosion

Sri Lanka was, like Hungary, already on a significant path towards democratic erosion (Global State of Democracy 2021 (International IDEA 2021)) is expected to classify Sri Lanka as a backsliding country), which was exacerbated by the Covid-19 pandemic. This process of democratic erosion began well before the pandemic, with the election of Gotabaya Rajapaksa to the presidency in November 2019. His election had provided a clear and decisive popular mandate

for an agenda of ‘technocratic populism’ (Dissanayake 2020). The president’s election campaign had made it abundantly clear this would include constitutional amendments to roll back democratizing reforms by the previous government of 2015–2019 (Welikala 2016). The pandemic provided the perfect opportunity to accelerate the executive takeover of the state, characterized by the president’s refusal to recall a parliament already dissolved ahead of elections when the pandemic hit the country, pervasively involving the military in the public health response, and near-complete control of the public relations narrative. The government was aided by a deferential judiciary, the relatively minor public health challenge posed by the first wave of the Covid-19 pandemic in early 2020, a comparatively well-functioning public health system, a collapse of the political opposition and the electoral popularity of the new government. It was rewarded with a two-thirds majority in the delayed parliamentary elections in August 2020. The government used this majority to enact the 20th Amendment to the Constitution in October 2020. This amendment undid all of the more significant democratizing changes that the 19th amendment of 2015 had established, and reinstated a hyper-presidential system of government.

A pandemic, by nature a type of crisis that foregrounds executives, provides the optimum conditions for the entrenchment of this constitutional regime type (Fonseka, Ganeshathasan and Welikala 2020). The government’s response to the pandemic was centred on the presidency, and extensions of presidential power through task forces and other disaster management bodies. Moreover, these bodies have been conspicuously staffed or headed by serving or retired military personnel rather than civil servants or public health professionals. This approach maximizes executive discretion. Existing constitutional and statutory provisions for emergencies and disaster management have not been engaged. Many executive actions, including curfews, arrests and detentions, either have had no basis in law or are clearly illegal. The closure of courts due to the pandemic meant that access to justice was effectively shut down for a time. However, neither the higher judiciary nor the wider public saw this wide legal grey zone within which the executive was acting as a cause for concern.

Parliament had been dissolved for elections when the pandemic started. The Constitution clearly requires parliament to be recalled in such a situation, both to ensure oversight and to sanction expenditures (Welikala and Fernando 2020a). Moreover, the health and safety challenges posed by the pandemic created difficulties for the Election Commission in varying the dates of the election within the permitted constitutional period. The recall of the dissolved parliament would have addressed this problem (Welikala and Fernando 2020b). However, the president flatly refused to do so. The clear unconstitutionality of his refusal was challenged in the Supreme Court (Welikala 2020). After an extended and unhurried hearing despite the urgency of the situation, the Supreme Court refused leave to proceed to the petitions, without giving reasons. All this meant

that in the first phase of the pandemic, the executive was given a *carte blanche*, with no parliament, and the courts refusing to get involved.

The parliamentary elections were eventually held in August 2020 in conditions of maximum advantage to the ruling party. It could hoard the credit for the pandemic response without institutional scrutiny, and communicate its message without challenge. Compounding the split and consequent collapse of the main opposition party after the 2019 presidential election, pandemic restrictions on freedom of movement meant that opposition campaigning was virtually halted. Although the victory of the ruling party even before the pandemic was never in doubt, the situation created by the pandemic clearly helped it to win the two-thirds majority. Such a legislative majority has never been won by a single party in an election since proportional representation was implemented in 1989.

This two-thirds majority was used to enact the 20th Amendment to the Constitution in October 2020 (Centre for Policy Alternatives 2021). This removed all the ‘premier-presidential’ characteristics introduced by the 19th Amendment in 2015. Accordingly, the presidential discretion to appoint and, especially, dismiss the prime minister without reference to the will of parliament was restored. The requirement that other ministers be appointed and dismissed by the president only on the advice of the prime minister was also removed. The prime minister and cabinet have thereby been resubordinated to the presidency within the executive. The fixed-term parliaments principle has been diluted by the 20th Amendment. Under the 19th Amendment, parliament could not be dissolved by the president until the last six months of its five-year term, unless parliament itself requested a dissolution by a resolution passed by a two-thirds majority. Under the 20th Amendment, the president can dissolve parliament after two and a half years (and various other means of prior dissolution have been reintroduced). This change also re-tilts the balance of power in favour of the presidency against parliament. Finally, the relatively strong ‘fourth pillar’ framework under the 19th Amendment has been neutralized in favour of presidential power. The Constitutional Council has been replaced by the Parliamentary Council. The Constitutional Council, which comprised both members of parliament and civil society representatives, either nominated or approved all key public appointments. The Parliamentary Council, composed solely of MPs, is only empowered to provide non-binding observations on presidential appointments. In these ways, the 20th Amendment has re-empowered the presidency. However, two key changes of the 19th Amendment have survived: the reduction of the terms of presidency and parliament from six to five years, and the two-term limit on the presidency.

The government has also promised a new constitution and appointed a committee of experts to report thereon. There is not yet an official statement of the government’s substantive proposals regarding the content of a new constitution.

Broader comparative lessons

Consideration of the experiences in the three countries shows that, in Hungary and Sri Lanka, a democratic erosion process was already under way in the pre-pandemic period, driven by populist nationalism, which was accelerated by executive aggrandizement due to Covid-19. In Hungary, the regression included planned fundamental constitutional reforms aimed at entrenching the ruling party and its ideology of illiberal democracy, with virtually no significant constraints, including from the courts. In Sri Lanka, pre-pandemic constitutional reforms had introduced better checks on the historically overbearing presidency, but the new president had won the election on the promise of reversing these gains in favour of a more centralized presidency. In both cases, the constitutional amendment procedures did not include sufficient veto points and were easily met by the dominant ruling forces in the form of a two-thirds parliamentary majority and, in the case of Sri Lanka, with a pliant Supreme Court that did not exercise overly rigorous pre-enactment scrutiny of the government's constitutional amendment bill, negating a second veto point in the form of a referendum.

In contrast, in the CAR, formally a hybrid regime and the least democratic among the three countries, the pre-pandemic period was one of progressive democratic improvement, although the country started from a low base and with simmering conflict. In addition, experiences under extremely authoritarian governments of the past had induced the drafters of the 2016 Constitution, which involved an inclusive national conference, to establish key veto points for constitutional reforms, which notably did not exist in Hungary and Sri Lanka. In particular, the CAR Constitution includes several unamendable provisions, including the terms and duration of presidency, and a mandatory requirement that constitutional amendments should be reviewed by the Constitutional Court. The combination of an improving democratic dispensation and rigid constitutional amendment procedure provided a more formidable hurdle against potential backsliding or executive aggrandizement in the pandemic context, despite the president enjoying supermajority support in parliament.

In fact, the pandemic and efforts to postpone the elections in the CAR exposed the challenges of deploying unamendable constitutional provisions to ensure constitutional stability. As noted, the ruling party could not push through measures that on the face of it could have been necessary, because of rigid constitutional constraints enforced by an independent court. Although the purpose of such 'eternity clauses' may be understandable in certain contexts, the nature and intensity of emergencies may be hard to foresee, which may require a level of flexibility to reform constitutional rules under extreme conditions. The complete preclusion of reform not only could be impractical on certain occasions

but may unduly empower and potentially politicize and endanger constitutional courts.

Overall, the case studies affirm the importance of the level of political dominance in defining constitutional trajectories, and the challenges, depending on context, of both too ‘easy’ and too ‘difficult’ amendment procedures. These experiences raise the necessity of re-imagining and refining amendment procedures. One idea is to consider genuine cross-party approval for certain amendments in the form of ‘inclusive majoritarianism’ (Abebe 2020b). This rule would simultaneously preclude even the most dominant groups from tampering with constitutional rules to create lasting electoral or other advantages, in normal or emergency scenarios, while avoiding the pitfalls of unamendable provisions, which could prevent constitutional changes even when they are absolutely necessary.

Conclusion

The case studies reveal what has now been established as truth. As with the virus’s impact on humans, the pandemic had comparable consequences for the democratic shapes of the three countries. In Hungary and Sri Lanka, which had pre-existing conditions of dominant populist parties that have historically manipulated constitutional reform processes, the democratic erosion accelerated and became entrenched. In contrast, the CAR had a ruling group that was far from dominant, with an improving democratic environment, an independent Constitutional Court and political will to respect judicial decisions, although these factors must be seen in the context of a very low threshold of democratic ranking as well as ongoing active conflict and fragility. This meant that Covid-19 did not lead to a fundamental weakening of the existing level of democratic constitutionalism.

Beyond pre-Covid-19 democratic diagnostics, the outcome in the CAR can be attributed to the establishment of multiple veto points against potential regressive constitutional reforms—combining unamendable provisions, a supermajority parliamentary approval threshold and the Constitutional Court’s review of certain amendments. In contrast, in Hungary and Sri Lanka, reform faced a single hurdle—a supermajority approval requirement, which the ruling parties achieved. The variations affirm the importance of constitutional design—in particular, constitutional amendment rules—as part of the set of tools for preventing and confronting democratic backsliding.

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3. Constitution-building and peacebuilding in the Middle East and North Africa region in 2020

Zaid Al-Ali

Introduction

The effort to build a stable and prosperous society does not run through a straight and narrow path, particularly where conflict is involved. Peace negotiations often involve detailed discussions of constitutional arrangements, and while the discussions can be slow and deliberate, they often produce surprising outcomes. Negotiators and their advisers sometimes have clearly identified interests, and sometimes also develop detailed strategies on how to achieve their interests. Nonetheless, however well the initial plans are developed, they are almost never successfully implemented. Circumstances evolve in ways that cannot be predicted, and opposing groups respond to developments in surprising ways, forcing all groups to adapt and improvise, and causing them to falter as they seek to achieve their aims. Violent conflict establishes its own dynamic and its own logic and can prevent, interrupt or change the nature of discussions on governance or constitutions. In most circumstances, the most progressive negotiators and their advisers can do is to bend the path that negotiations take in the direction of equity and prosperity. To succeed is to mobilize creativity, skill and compassion, and it also requires propitious factual circumstances. Much less intellectual enterprise is required to interrupt or prevent progress. Man plans and God laughs, as the (Yiddish) saying goes.

Where there is conflict, developments on the battlefield overshadow constitutional and peace negotiations. Logic dictates that, where one party to a conflict considers that it has a significant chance of defeating its enemy, that same party has little to no incentive to negotiate a compromise with its adversary, particularly on key issues such as system of government, security arrangements and resource allocation mechanisms. Where a party cannot feasibly win the entire conflict, but can still expand its area of control, it will also have little incentive to negotiate in the short term given that its negotiation position is likely to be stronger after a specific military target has been achieved. In addition, given the natural tendency to overreach, military victories often encourage parties to a conflict to seek to achieve more gains, meaning that constitutional negotiations are unlikely to take place following the victories, unless they are followed by a stalemate of some type that lasts for a perceived long period. If no long-term stalemate occurs, discussions on governance systems become close to impossible to achieve.

In many cases, it is in everyone's interest that a negotiated solution is reached, accepted and applied. However, if the above analysis is correct, this can only be achieved if the conflict has reached a stalemate. Nevertheless, in many situations, negotiations continue to take place even though parties to the conflict are still of the view that they can achieve more gains in the battlefield than they can through negotiations. What should negotiators, advisers and peacebuilding institutions do in such circumstances? Should efforts to reach a settlement be abandoned until the military balance of power shifts? In practice, negotiations are rarely formally suspended pursuant to military considerations, and for good reason. The imperative to work towards the end of violent conflict, no matter how low the prospects of success, clearly outweigh the inconvenience of mobilizing resources and efforts, and the disappointment of failure. The difficulty, however, lies in deciding what else can and should be done during peace negotiations that have a very low probability of success, and what impact failed negotiations can have on long-term prospects for peace.

This contribution examines three case studies, Libya, Syria and Yemen. All three countries have experienced violent conflict over the past few years and international mediation efforts had have to interact with the dynamics of those respective conflicts. Very little progress has been made anywhere, but what progress has been made can be attributed to a few factors, some of which are discussed in further detail below.

Libya

Following the outbreak of protests in eastern Libya in early 2011, a civil war broke out that quickly internationalized. Opposition forces and defectors from the regime formed a National Transitional Council, which administered the

country's liberated areas and prepared for the post-conflict transition to a new constitutional regime. One of the National Transitional Council's main actions was to adopt an interim constitution, entitled a 'constitutional declaration', which outlined how the country would be governed until a new permanent constitution was adopted, and included a roadmap for the rest of the transition (Al-Ali 2011). The Interim Constitution (State of Libya 2011) followed the regional trend and established a parliamentary system following years of centralized presidential rule. The Interim Constitution originally provided that a new permanent constitution would be drafted within months. This plan was derailed following multiple political crises and security challenges, and remains incomplete as of today.

Elections were organized in 2012 that led to the establishment of the General National Congress, Libya's first genuinely elected parliamentary body in decades, perhaps ever. This body was ineffectual and widely unpopular, so early elections were organized in 2015 that gave rise to the House of Representatives (HOR). However, the outcome in the end was that the General National Congress refused to recognize the legitimacy of the HOR, and insisted that the Congress remain in place in Tripoli, which it did. The HOR meanwhile set up in Tobruk, a city in eastern Libya. The country was divided into separate spheres of influence; there were geographic divisions between different parts of the country, and state institutions were splintering with alarming speed. Many wondered, with some justification, if the country could ever be put back together. In 2015, the United Nations Support Mission in Libya (UNSMIL) organized a first attempt at resolving these divisions. An agreement was drawn up (the Libyan Political Agreement), but was never formally adopted for lack of sufficient support, causing the initiative to fail, which meant that formally the 2011 Interim Constitution remained in force.

In parallel, a Constitutional Drafting Assembly (CDA) was elected in 2014. The CDA mainly consisted of independents who only loosely represented the country's main political groups and interests. It was originally supposed to draft its constitution in a few short months but, as a result of violence and other factors, the deliberation ended up taking years, and many observers gave up hope that an agreement would ever be reached. However, in 2017, in a major surprise, two-thirds of the CDA successfully voted in favour of the constitution as required under the rules of procedure. The 2017 draft constitution's proposed arrangements were even more of a surprise to most observers. After years of dysfunction in both parliamentary bodies, the CDA moved towards establishing a presidential system that concentrated very significant powers in the hands of the president (Al-Ali 2020). A constitutional referendum was supposed to be organized within 30 days of the vote, but the HOR never adopted the necessary legislation. There was little enthusiasm for the text within and outside Libya, in part because an agreement between the members of the CDA (who, as noted above, were not formally connected to the country's main political groups or

warring parties) did not mean that the text had sufficient support within the country.

In late 2018, UNSMIL was preparing to launch a dialogue process that it hoped would resolve the country's impasse. Very few details were made publicly available on how this process would be organized or even who would attend, but several announcements were made that it would commence during the second quarter of 2019. That initiative was pre-empted in April 2019 by a military offensive launched by Field Marshal Khalifa Haftar, the military commander of the Libyan National Army, who had taken control of the east of the country (see, for example, Oakes 2021). The offensive was launched from Benghazi and its objective was to take over the capital, Tripoli, and by extension the entirety of Libya's national territory. The offensive lasted for almost a year and ended with Haftar's forces retreating to the east of the country. Some observers attributed the failure to several factors, including (a) Turkey's willingness to invest significant resources in supporting the Tripoli-based authorities; and (b) the fact that no other major party was willing to invest equivalent resources in supporting Haftar. The outcome of the failed offensive, and of the fact that the Tripoli-based authorities did not start an offensive of their own, was that space was created for the contemplation of a new phase in the transition and for finally implementing elements of the plan that had been devised in 2018.

In 2020, UNSMIL set in motion the Libya Political Dialogue Forum (LPDF) (UNSMIL 2020a). The forum was not provided for in the Interim Constitution, or in any formal legal document. It was designed as a political mechanism through which the country could agree on a new transition plan, including a ceasefire agreement, a new joint administration and a plan to transition to elections, and hopefully a referendum on the 2017 draft constitution. Different committees were organized within the dialogue forum, including on economic, security and legal issues, each of which sought to resolve key obstacles that were preventing progress. Early progress was reported on several fronts, including on security arrangements. The Security Committee agreed on a ceasefire in October 2020 (UNSMIL 2020b). In addition, the LPDF ultimately elected a new joint administration in February 2021 (UN News 2021). The Tripoli-based administration recognized the outcome and dissolved itself in favour of the new cabinet. Eastern-based authorities formally accepted the outcome, but the overbearing nature of security institutions in the east made it less clear whether or not the new joint administration would have any meaningful authority in the territory that they controlled.

The LPDF was not without its critics or its flaws. One of the main points of attack was its membership, including the process through which it was selected, and the interests represented. The selection process was controlled by UNSMIL and was never made fully public. Ultimately, 75 members were chosen, all of whom were required by UNSMIL 'to recuse themselves from political and

sovereign positions in any new executive arrangement' (UNSMIL 2020c). Partially because the method for selecting the members was never fully disclosed, many observers criticized the final make-up, arguing that the particular balance of forces was skewed in favour of specific outcomes (Zaptia 2020). Another major point of contention was the LPDF's decision-making process. Many observers and some participants accused LPDF members of taking bribes to vote in favour of specific candidates in the effort to select a new joint administration. These accusations appear to have been widely accepted, but the process was not interrupted. The LPDF's work was complicated somewhat by Covid-19. Many of the preparatory meetings were organized online, and, because of Libya's poor Internet infrastructure, the conversations were often interrupted by long periods of silence. The LPDF's main sessions took place physically in Tunisia, and although social distancing was generally followed the sessions were largely unimpeded.

Most importantly perhaps, many critics complained that the LPDF was ignoring or setting aside major substantive differences that were very likely to re-emerge as major points of contention within months (Lacher 2021). The LPDF's Legal Committee had the role of discussing and reaching agreement on the direction in which the political transition would head, and how it would be reached. A decision was reached early on that a referendum on the constitution should take place in October 2021 and that new elections should take place at the end of the same year, but little more was agreed than a target date. Since then, the Legal Committee has not been able to reach agreement on the nature of the elections that should take place, and the electoral framework that should be adopted. Just as importantly, the committee could not agree on whether a referendum on the 2017 draft constitution should go ahead. Some members instead prepared a series of proposed amendments to the 2011 Interim Constitution as a substitute, although at the time of writing they had still not reached consensus on those either (Libyan House of Representatives 2021). The Legal Committee's hesitation over the 2017 draft constitution rekindled discussion about the LPDF's and associated bodies' legitimacy. The CDA, whose mandate most would argue ended in 2017, issued several statements in which it challenged the Legal Committee's ability to block the referendum on the draft 2017 constitution (Assad 2021).

By June 2021, it was still unclear whether or not elections would take place by the end of the year, and it was increasingly improbable that a constitutional referendum would take place. The end of the conflict did not necessarily resolve the fact that the country had still not made up its mind on how it wanted to be governed, particularly given that many of the same actors remained in place, with many of the same ambitions and instincts. Neither the CDA nor the LPDF Legal Committee was properly equipped or sufficiently representative to resolve this matter, and, despite the current lull in hostilities, circumstances were still not

sufficiently propitious to allow for the country's different communities to reach consensus on how they wanted to be governed.

The Syrian Arab Republic

Prior to 2011, Syria's system of government was established under the 1973 Interim Constitution, which established a highly presidential system of government. Under that system, the president had full control over the executive, parliament was dominated by the Baath Party, and the judiciary was headed by the president. A popular uprising started in 2012, which was met with violent repression from the regime, and contributed to a brutal conflict that continues to this day (Heller 1974).

At the end of 2011 the president sought to address domestic concerns in part through an expedited process to review and reform the Constitution. He appointed a 29-member committee for the purpose of drawing up a new constitution for the country. The committee consisted mainly of party loyalists, independents, some legal practitioners and others. It was required to draw up a new text in four months, to be followed by a referendum two weeks later (Associated Foreign Press 2011). On 26 February 2012, voters approved the draft (reportedly with 90.86 per cent in favour); the president issued Decree No. 94/2012 promulgating the Constitution of the Syrian Arab Republic in the Official Gazette. The new text was heavily inspired by the 1973 Constitution, and although it did institutionalize some reforms, such as contested presidential elections and political pluralism, it brought little fundamental change to the underlying Syrian political settlement (see, for example, Atassi 2018). The new Constitution came into force on 27 February 2012.

The Constitution's entry into force had no impact on the conflict's dynamics. Very few if any members of the opposition were convinced of the regime's goodwill, and they pressed forward their offensive against the capital with a view to overthrowing the regime. The regime refused to negotiate even after it had lost control over the majority of the country's sovereign territory and when armed groups had broken through the capital's security perimeter (BBC News 2014).

In December 2015, at a time when the Syrian regime was still very much on the defensive militarily, the United Nations Security Council adopted Resolution 2254 (SCR 2254), which framed the constitutional process as the main forum for peace negotiations in the country. SCR 2254 called for:

'a Syrian-led political process that is facilitated by the United Nations and, within a target of six months, establishes credible, inclusive and non-sectarian governance and sets a schedule and process for drafting a new constitution, and *further expresses its support* for free and fair elections, pursuant to the new constitution, to be held within 18 months and administered under supervision of the United Nations, to the satisfaction of the governance and to the highest

international standards of transparency and accountability, with all Syrians, including members of the diaspora, eligible to participate’.

All members of the Security Council supported the initiative to establish a constitutional committee for this purpose, including Syria’s military and strategic partner the Russian Federation. It is unclear whether any other manner of proceeding could have been more successful, but for Syrian officials in Damascus, any discussion about reforming the Constitution through a negotiated settlement with political opponents was inconsistent with the political worldview that they had been cultivating for decades, and was therefore very unlikely to be accepted, whether under duress or otherwise.

After SCR 2254 was adopted, it took years to negotiate the committee’s composition. The conflict continued throughout that period, and developments on the ground impeded discussions relating to the constitutional process for months at a time. In addition, other international initiatives to end the conflict were often prioritized over the constitutional process, which distracted attention from the constitutional process for a significant amount of time. It was eventually agreed that the committee should consist of 150 members, with 50 representing the Syrian Government, 50 nominated by the opposition and the remaining 50 consisting of ‘independent’ members selected by the UN. There were strong disagreements about how the 50 independent members should be selected, with both sides of the conflict seeking to influence the process (OSES 2019).

The committee’s composition was finally settled in 2019, and by then the conflict’s dynamics had completely changed. The Russian Federation had massively increased its support for the regime’s forces, which allowed it to regain the majority of the country’s territory. Half of the country’s population was displaced (with millions forced out of the country altogether). The regime was positioning itself as having won the military conflict and as having little to gain from a negotiated solution with an opposition that controlled almost no territory and that was essentially defeated on the battlefield. The regime still formally supported the constitution-building process and participated in the constitutional committee’s meetings through its 50 members, but the president and a number of other members stated on many occasions throughout that period that the Constitution was a sovereign matter that was not up for negotiation (Reuters 2019).

There has been significant discussion internationally about whether there is any point in pursuing constitutional negotiations given the Syrian Arab Republic’s situation and given the behaviour of the parties to the conflict. Many commentators have argued that the Syrian regime was extremely unlikely to make any meaningful concessions given its past and current attitude to negotiations and given its strong position militarily. Others responded that the regime’s victory was pyrrhic, that the country’s economy was ruined and that any international reconstruction assistance would be contingent on the regime making concessions

to the opposition on constitutional issues. Still others responded that the Syrian regime had consistently rejected any suggestion that it should make any concessions and that it was very unlikely to do so in the future.

Since commencing its work, the committee has held only a small number of sessions, the most recent of which took place in January 2021. Covid-19 has had a marginal impact, at most, given that the conveners were able to organize the logistics of committee sessions without great difficulty. On the other hand, participants and observers lamented the lack of substantive progress in all the meetings (Hauch 2020). The United Nations Special Envoy for Syria, Geir O. Pedersen, described the lack of progress a ‘disappointment’ (Nebehay 2021). As noted previously, under current circumstances, a sober analysis would suggest that there is very little chance that the peace process can succeed, or that the Syrian regime is prepared to compromise. A separate question is whether anything else could have been achieved instead, but that is a subject for another paper.

Yemen

Yemen’s transition also started in 2011, after a popular uprising led to the adoption of the Gulf Cooperation Council Initiative and the UN-backed Implementation Mechanism (Yemen 2011) (see, for example, Transfeld 2018; Lackner 2016; Gluck 2015). The Implementation Mechanism in particular provided that a comprehensive national dialogue conference should be organized, and that a constitutional draft committee should draft a permanent constitution for the country based on the outcomes of the dialogue conference’s work. The UN established an Office of the Special Envoy (OSE) to support the transition, which remains in place today, although it has since moved its headquarters to Amman, Jordan, as a result of the conflict.

The dialogue conference completed its work in January 2014, much later than originally intended. It produced 1,800 ‘outcomes’, which were taken to be binding decisions that would inform how the future constitutional arrangement would be shaped (OESGY 2014). The conference decided that the state should be formed as a federation, but said almost nothing on how the details of the federal arrangement would be organized in practice. The constitutional drafting committee produced a final draft of a constitution in January 2015 (although there is some controversy about whether or not all the committee’s members agreed to it) (Yemen 2015). Before the text could be finalized and put to a referendum, the conflict had already started and internationalized.

The president of the republic and the government fled into exile in Riyadh. Although the government controlled very little on the ground, it was considered to enjoy constitutional legitimacy by the international community. The capital and most of the country’s northern territories fell under the control of Ansar

Allah (also known as the Houthi movement), which set up a rival administration of its own.

In the early stages of the conflict, the view among many Yemenis and international observers was that an agreement to end hostilities could be reached within months. During that period, the OSE and other organizations focused on how to resume the transition that was interrupted at the end of 2014 and in early 2015. In April 2015, United Nations Security Council Resolution 2216 was adopted mainly on that basis. The resolution called for:

‘the return to the implementation of the Gulf Cooperation Council Initiative and its Implementation Mechanism and the outcomes of the comprehensive National Dialogue conference, including drafting a new constitution, electoral reform, the holding of a referendum on the draft constitution and timely general elections, to avoid further deterioration of the humanitarian and security situation in Yemen’.

Section 5 of the same resolution called on:

‘all Yemeni parties, in particular the Houthis, to abide by the Gulf Cooperation Council Initiative and its Implementation Mechanism, the outcomes of the comprehensive National Dialogue conference, and the relevant Security Council resolutions and to resume and accelerate inclusive United Nations-brokered negotiations, including on issues relating to governance, to continue the political transition in order to reach a consensus solution and *stresses* the importance of full implementation of agreements reached and commitments made towards that goal and *calls on* the parties, in this regard, to agree on the conditions leading to an expeditious cessation of violence’.

At the time when it was adopted, United Nations Security Council Resolution 2216 was interpreted by Yemen’s main political groups as calling for a negotiation between two sides, namely the internationally recognized government and Ansar Allah, excluding other actors, including southern groups, civil society organizations, women’s groups and others.¹ The OSE organized a negotiation session that was hosted by the Kuwaiti authorities in 2016. The two parties were both present in Kuwait but did not interact directly with each other. UN officials met with each party individually over a period of months, moving from delegation to delegation, and sought to construct a consensual agreement that satisfied both parties’ interests. The session lasted for a few months, but did not yield an agreement (Al Jazeera 2016). A draft agreement was developed, but most negotiators stated after the fact that they were never given copies of the draft.

The next major initiative in the peace process took place in late 2018. A military build-up was taking place around the port of Hodeidah, the largest port that was still functioning and through which the bulk of Yemen’s basic necessities were imported. Ansar Allah had been controlling the port for years, and forces loyal to the internationally recognized government were preparing to retake control over the city and port. There was widespread concern inside and outside

the country that a military offensive against Hodeidah could cause major interruptions to the flow of international humanitarian aid to the country and result in a famine. An urgent attempt to negotiate a ceasefire was organized by the OSE in December 2018 in Stockholm. Both parties attended, but did not negotiate face to face. The draft agreement was once again prepared by the OSE. A local ceasefire agreement was reached, which provided that control over the city should be transferred to 'local forces', a term that was never defined and that caused significant dispute during the agreement's implementation stage (OSESYG 2018).

A few weeks after this ceasefire was announced, the OSE encouraged the two parties to create momentum towards the signing of a transitional peace agreement that would allow the peace process to resume. The OSE pushed for a new negotiation session to take place within weeks, but the parties did not accept for a variety of reasons, including what is sometimes referred to as the 'war economy', as well as regional involvement in the conflict (DeLozier 2019). However, over time, as the conflict's dynamics changed, Ansar Allah came to consider that it could still make significant territorial gains and therefore saw little incentive to end the conflict at that time. Direct negotiations were also even less likely after Covid-19 started to spread.

In place of a new negotiation session, the OSE sought to negotiate the outline of a new agreement through shuttle diplomacy. Various ideas and drafts were explored through that process, including the establishment of a national unity government, transitional security arrangements and a process through which the constitutional process could be restarted and completed. At the time of writing, a final agreement has not yet been reached, and there is significant pessimism that a resolution will be possible in the short term (Kossaifi 2021).

Conclusion

This chapter surveyed three recent negotiation processes, in Libya, the Syrian Arab Republic and Yemen. All three countries have lived through violent conflict for years, which international organizations have sought to mediate. Over the past 1–2 years, all three have seen significant activity, but only in Libya has significant progress been made. In that country, a military offensive was launched that led to a stalemate, following which different sides of the conflict were able to negotiate a ceasefire agreement and a roadmap to new elections and to a constitutional referendum. In the other two countries, one side of each conflict still considers either that it has already won or that it can continue to make significant gains on the ground. In both countries, efforts to mediate a solution have not progressed over the last 1–2 years. It remains unclear how all these countries will ultimately evolve. Even in Libya, despite the recent progress, it remains unclear whether the current roadmap will be successfully implemented. For now, the lesson appears to

be that stalemates are ultimate opportunities to press forward with peace negotiations, and that, before circumstances allow negotiations to move forward, mediators, international organizations, local groups and others must do as much as they can to lay the groundwork for a successful negotiation process.

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Endnotes

1. For years, many southern groups boycotted or stood in firm opposition against the internationally recognized government. In August 2019, the Southern Transitional Council, which is a leading southern group, seized control of Aden, a southern city that was one of the few that was under the nominal control of the internationally recognized government. Following the implementation of the Riyadh Agreement in early 2021, a new unity government was established between the internationally recognized government and the Southern Transitional Council, although it remains unclear how sustainable that arrangement will be.

4. The bumpy road to women's equal participation in constitution-building and peace processes: a milestone year marking progress and setbacks

Erin C. Houlihan

Introduction

The year 2020 marked several converging milestones in the development of an international framework to advance gender equality. It was the 25th anniversary of the Beijing Declaration and Platform for Action (BPfA)¹; the 20th anniversary of UN Security Council Resolution (UNSCR) 1325 and the initiation of the Women, Peace and Security (WPS) agenda²; and the 5th anniversary of the 2030 Agenda for Sustainable Development.³ These initiatives, building on the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), stress (among other points) the importance of women's meaningful participation and decision-making in society and governance. They emphasize the value of women's contributions to democracy, democratization and peace, and the necessity of mainstreaming gender in all aspects of peacebuilding and governance, including constitution-building (CEDAW 1997, 2013, 2018; O'Rourke and Swaine 2020; Suteu and Bell 2018).

Yet the road towards making gender equality a global reality is long and rather rocky. Not a single country in the world has achieved *de jure* and *de facto* gender equality to date (United Nations Secretary-General 2020a). Progress has been made, but slowly, and gains have not been equal across states. Concerningly, there are indications of stagnation—even backsliding—on a global scale (UN

Women 2020). There is also a growing recognition that sometimes the promise of gender equality in legal frameworks can be opportunistic or even abusive, particularly when frameworks embrace formal rather than substantive equality⁴ as a means of garnering political support (Dixon and Landau 2021: 71–73).

Furthermore, the impacts of the Covid-19 pandemic, which swept the world in 2020, highlight the intersectional and persistent discrimination facing women in every sphere of life, from healthcare to economics, from physical security to social protection, and in the realm of political participation and representation. The endurance of patriarchal norms remains underpinned—and is reinforced—by structural inequalities and gender-based violence that inhibit both the protection and fulfilment of women’s rights. As of 2019, for example, 47 per cent of the world’s population believe that men make better political leaders than women (OECD 2019).

This chapter examines progress and challenges to date in realizing women’s equal participation in and influence over constitution-building processes and related peace negotiations. It considers trends over time in light of the anniversary year and considers the trajectory for the future. The first section focuses on the urgency of women’s equality and women’s participation from the perspectives of peace, democracy and social justice, considering empirical findings and country examples. The second section looks at trends and developments in women’s roles in peace and constitution-building processes, including progress and challenges. The third section provides a bird’s-eye view of the current situation, including experiences from 2020 and indications for the future. The chapter closes with concluding remarks.

The imperative of women’s equality in constitution-building and peace processes

The catalogue of justifications to urgently ensure women’s active and equitable participation in constitution-building and peace processes is extensive. From a normative perspective, ensuring that women have a seat at the table and access to positions of prestige and influence is both right and fair; inclusive participation is a key democratic value and a good in itself. Beyond this, women’s meaningful participation—meaning their capacity to influence decision-making—is also beneficial for the outcomes of these processes. It is integral to the situation and status of women in society and to the possibility of peace, security, prosperity, health and good governance within and among states (Hudson, Bowen and Nielson 2016).

While intrastate conflicts have largely replaced interstate conflicts since the end of the Cold War, these are becoming increasingly complex and internationalized. The impacts of these conflicts disproportionately affect women and their futures (Dupuy and Rustad 2018; Ní Aoláin et al. 2018). Conflict, and particularly

intrastate conflict, is often rooted in competition over access to power, access to scarce resources, and issues of group identity and autonomy that cannot be effectively resolved within existing political and legal frameworks and conventions. A constitution, as the supreme law of the land, defines the structure of the state and the system of government, the way that political power and resources are accessed (and limited), and how the people and peoples within a polity are recognized and protected. Transitions from conflict to peace are almost always accompanied by constitutional and legislative changes. Depending on the nature of the conflict and type of negotiations, reforms to the constitutional order often seek to reflect the demands of warring parties in rejecting the status quo and to entrench mutual commitments to a new governance dispensation.

These commitments, in the form of a negotiated political settlement, are often forged at the peace table and are foundational to structuring both the process and terms of constitutional transformation (Bell and Zulueta-Fülscher 2016; Paffenholz et al. 2016). This means that having a say in negotiating the political settlement, any interim arrangements and the (new) constitution itself is of paramount importance. Women's participation and capacity to influence negotiations ensures that their strategic interests are addressed and protected, and also that the resulting agreement has more perceived (and perhaps actual) legitimacy. Legitimacy is integral to the effectiveness of implementation, and can provide pressure to bind leadership to their commitments (Hart 2003; Moehler 2008; Paffenholz et al. 2016).

There is also evidence that women's meaningful engagement is linked to better outcomes for democracy, more sustainable peace and stronger overall stability. It contributes to more equitable legal frameworks, more inclusive social and economic reforms and, in conflict-affected societies, more durable political settlements and long-term peace (O'Reilly, Ó Súilleabháin and Paffenholz 2015; Krause, Krause and Bränfors 2018; Lee-Koo and True 2018; Suteu and Bell 2018; Tamaru and O'Reilly 2018). An agreement is more likely to be reached in cases where women both participate *and* have strong influence at the negotiating table (meaning that women are not only descriptively present but also have decision-making power) than when women's influence is weak or women are not present. Furthermore, the level of women's influence is strongly correlated with the likelihood that agreements reached will be implemented, and that institutions and processes set up subsequent to peace agreements—ranging from building a new or amended constitution, to monitoring a disarmament process or ceasefire, to establishing a truth and reconciliation commission—will themselves be inclusive and effective (UN Women 2015).⁵

More broadly, levels of gender inequality are closely associated with levels of oppression and conflict within the state system. More than religiosity, national wealth, ethnolinguistic fractionalization, colonial heritage or a range of other common explanatory variables, lack of gender equality lays the foundations of

authoritarianism and is associated with higher levels of insecurity, interstate conflict and (renewed) civil war (Caprioli 2000, 2005; Fish 2002; Hudson et al. 2009). On the other hand, states with the highest levels of gender equality display lower levels of aggression in both interstate and intrastate conflicts, including among democracies such as Austria, Denmark, Finland, Kenya, Nigeria and Zambia (Caprioli 2003; Hudson et al. 2009).

Therefore, since relations between the sexes predicate other macro-level phenomena within a society, women's inclusion in decision-making—including in the design of peace infrastructure and the (new) constitutional system—and women's substantive equality are requisite for the consolidation of a more inclusive, just and peaceful democratic world. Yet progress towards realizing these objectives over the past 25-plus years has been sluggish and irregular.

Developments in gendering peace and constitution-building processes

Since the 1980s, women's participation in constitution-building has become more systematic and widespread compared to the decades following World War II (Rubio-Marín and Irving 2019). This progress is grounded in part in the development of international commitments and norms under CEDAW, the WPS agenda, the BPfA, and Sustainable Development Goals 5 and 16. These instruments, as well as the ICCPR, establish positive legal obligations on states and provide an important tool for women to assert their right to engage and be heard (Suteu and Bell 2018).⁶

An increase in international engagement in peace processes and constitution-building has also contributed to women's increased inclusion—particularly in processes following post-election violence or civil war. International engagement often brings additional pressure to comply with international norms and legal obligations, access to comparative expertise, and opportunities for alliance-building among international and domestic women's rights advocates.

Yet women's participation in both constitution-building and peace processes still falls far short of parity with men. From 1990 to 2015, 75 countries engaged in constitutional reform or a negotiated transition from authoritarianism to democracy in the wake of conflict or unrest, but only 19 per cent of members of constitution-making bodies were women (Tamaru and O'Reilly 2018). Although there is significant variation across cases, in many contexts, women face multiple challenges to their participation. These range from gender biases and perceptions of 'tokenism' that undermine their political legitimacy, to procedural barriers to building effective coalitions, institutional biases that limit women's capacity to exert leadership and influence, political party agendas with conflicting interests, and gaps in trust among and coordination with external women's groups and their allies (Houlihan 2020; Tamaru and O'Reilly 2018).

Progress at the peace table has been even slower. From a sample of major peace processes between 1992 and 2019, on average, only 6 per cent of signatories, 6 per cent of mediators (2.4 per cent of chief mediators), 3.7 per cent of witnesses and 13 per cent of negotiators were women (Council on Foreign Relations 2020; UN Women 2012, 2020). This is despite the adoption of UNSCR 1325 in 2000, several subsequent WPS resolutions and increasing policy linkages with other elements of the international women's equality framework, such as CEDAW (see Ní Aoláin 2017; O'Rourke and Swaine 2020; Paffenholz 2018; Paffenholz et al. 2016: 18).⁷

Moreover, women are rarely involved in the early stages of peace processes, during humanitarian dialogues and in ceasefire negotiations. Pre-negotiation discussions ('talks about talks') often take place in secrecy and/or are limited to parties to the conflict, who are usually men. This can hinder women's capacity to influence substantive agendas and the nature of their participation in later stages (Houlihan 2020). Nepal and Yemen are examples of how international norms have helped shape decisions about women's inclusion—at least their descriptive representation—in later stages. In both cases, though the peace processes were themselves quite exclusive, subsequent constitution-making bodies were still designed in an inclusive way, primarily through quotas for women and other marginalized groups. A key challenge in both cases, however, was that women had limited access to leadership and decision-making roles within these bodies, and therefore had limited substantive influence on the outcomes. While women were included as a normative obligation, counting women is not the same as making women's voices count (Paffenholz et al. 2016: 24; see also Tamaru and O'Reilly 2018).

In terms of content, the vast majority of peace agreements established since 1990 do not reference women or women's concerns at all. Of 1,860 agreements penned between 1990 and 2019, only around 25 per cent reference women, girls and gender (and many of these relate to the same country or related conflicts), and only 6 per cent address violence against women (Peace Agreements Database (PA-X) n.d.). Still, some positive changes over time are observable: between 1995 and 2019, the proportion of such agreements with provisions on gender equality increased from 14 per cent to 22 per cent (Peace Agreements Database (PA-X) n.d.). In South Sudan, for example, 15 per cent of negotiators during the 2015 peace process were women, growing to 25 per cent during the 2018 process, and resulting agreements include several provisions on women. These commitments extend to the related Transitional Constitution, much of which was negotiated at the peace table. It includes a 35 per cent quota for women in all legislative and government bodies, gender-inclusive language and a number of provisions on women's rights. Though the text retains several clawback clauses and has relatively weak enforcement mechanisms, overall it lays important foundations for

advancing women's substantive equality, including by ensuring women's participation in the permanent constitution-making process to come.⁸

Compared with the content of peace agreements, progress in constitutional design for women's equality has been more promising—at least on paper. As of 2020, 168 of the world's constitutions contain provisions that explicitly guarantee equality and non-discrimination across sex and/or gender (see WORLD Policy Analysis Center n.d.; Constitute Project database n.d.). This represents a significant change since the 1960s, when only 58 per cent of constitutions included such guarantees. Among constitutions adopted between 2000 and 2017, 100 per cent have gender equality provisions.

In addition, around 24 constitutions include stand-alone provisions on women's rights. An example is article 35 of Ethiopia's Constitution, which details women's equal rights in marriage, employment and pay; rights to maternity leave, family planning education and health; the right to full consultation in national development; the right to acquire, administer, control, use and transfer property; and state obligations to eliminate harmful customs and laws and to remedy past discrimination through affirmative action. Yet at least 11 constitutions with specific women's rights provisions contain clawback clauses that allow exceptions to guarantees of equality in matters of personal status (United Nations Secretary-General 2020a: box III.1). This profoundly impacts women's social and economic mobility and their political participation and leadership. On average, women have just three-quarters of the legal rights held by men globally (World Bank 2020). This is a significant increase since the 1970s, when women held less than 50 per cent of legal rights compared to men, and since the adoption of CEDAW in 1979, but remains far from reflecting parity.

Regarding constitutional (and legislated) mechanisms to support women's equality rights, trends indicate an increase in the use of (temporary) special measures in legal frameworks and the establishment and strengthening of gender-responsive institutions, such as gender (equality) commissions. Indeed, almost every country in the world has established some institutional mechanism with a core mandate to coordinate, facilitate and monitor policies related to gender equality and women's empowerment. This is a notable development. However, only 11 countries entrench such bodies as independent commissions in their constitutions.⁹ The vast majority are legislated or regulatory (Resta, Khan and Gifford 2019). Several global and regional assessments have also identified a consistent problem with lack of human and financial resources, which limits efficacy and the ability of these bodies to fulfil their mandates (Resta, Khan and Gifford 2019).

Around 63 per cent of states have amended constitutions, laws and regulations to implement BPfA and CEDAW commitments. This often includes enhancing women's political participation through electoral reforms, (temporary) special measures such as quotas and reserved seats, or other affirmative action (United

Nations Secretary-General 2020a). As of 2020 around 80 countries have introduced legislated gender quotas and around 35 entrench quotas in their constitution or obligate the government to legislate a representation mechanism (Constitute Project database n.d.).¹⁰ On the other hand, around 69 countries have no legal quotas, special measures or incentives for political parties to promote women's political participation.

Combined, data indicate that progress has been made but unevenly. There is a growing tendency to design more inclusive processes, at least during later stages, and to ensure that agreements, constitutions and other laws address women and women's concerns in some way. However, neither women's descriptive inclusion nor commitments to women's formal equality alone are sufficient to realize women's *substantive* equality or their capacity to meaningfully influence decision-making. Progress on this substantive front has been far slower. This slow progress, paired with the rise in complex and protracted humanitarian crises and the escalating climate crisis, means that women today are in a more vulnerable position than at perhaps any time in the last 25 years, and there are signs of bumps in the road ahead (UN Women 2020: 2).

Where we stand and where we seem to be going

The global pandemic that swept the world in 2020 disrupted or complicated the trajectories of virtually every aspect of society, governance and the economy—including the situation of women. Across the board, women and girls have disproportionately borne the brunt of the impact of Covid-19 response measures (see, for example, Wenham 2020; United Nations Secretary-General 2020b). Women face increased job losses and job insecurity, an escalation in violence both in person and online, increased depression, increased household and childcare responsibilities, increased risks of poverty and food insecurity, and a range of other challenges at levels far exceeding those experienced by men.

These setbacks are interacting with persisting structural barriers to compound ongoing obstacles to women's full and effective participation in decision-making. Even before the Covid-19 pandemic, women and girls were already in a more vulnerable position than at any time in the last 25 years owing to the growth of complex and protracted conflicts. More recently, women's rights have also faced a backlash under the ongoing trend of democratic backsliding, which includes regressive, nationalist agendas promoting a return to 'traditional values' that erode women's rights (Roggeband and Krizsán 2020; UN Women 2020). Indeed, 'the current pace of progress is too slow' (CSW 2021: paragraph 34), and by some accounts, 'momentum has been lost' (UN Women 2020: 2).

In the realm of constitution-building, including peace-related negotiations and reforms, there is a plausible risk that these broader trends could coalesce to stall or reverse gains women have made in securing seats at the table and influencing

substantive outcomes. The disproportionate impact of Covid-19 on women serves as a canary in a coal mine; it should warn law- and policymakers, women's rights advocates and students of democracy and peace about the fragility of women's status and the real costs at stake.

Still, despite the rather dire implications of the anniversary year, 2020 also marked a number of positive developments for women in the field of constitutional reform. In Chile, for example, following widespread popular protests in 2019 against inequality and key elements of the 1980 Constitution, parties across the political spectrum agreed to hold a national plebiscite in 2020 on whether and how to undertake constitutional reform. The ballot asked people if they wanted a new constitution to be written and, if so, what kind of constitution-making body they desired.

Ahead of the vote, the well-established women's movement, which involves strong network links between civil society and political coalitions, successfully influenced the two chambers of the National Congress to enact a gender parity rule that would apply to any constitution-making body approved by voters (Arce-Riffo 2020). When people went to the polls in May 2021, women won 84 of the 155 seats available, exceeding 50 per cent. This success required the parity rule to apply in the other direction—seven men replaced elected women, bringing the total number of men to 78, or one more than the body's 77 women members (Latorre and Rivas 2021). This makes Chile the first country in the world with equal numbers of men and women drafting a constitution. This development is not only a milestone in itself; it is a model and a precedent for other inclusive processes. Future agreements to also include gender parity in leadership positions within the Constitutional Convention, and to adopt gender-sensitive rules of procedure, would mark further steps in a positive direction.

Also in 2020, in Zimbabwe, members of the legislature successfully negotiated a constitutional amendment to preserve a provision in the 2013 Constitution that had been designed as a temporary special measure for women's political participation, but was set to expire before the 2023 legislative elections. The amendment, enacted in 2021, extended the life of the reserved seat quota for another 10 years (two election cycles). Article 124 reserves 60 of the 270 seats in the lower house of the bicameral legislature for women; the remaining 210 members are elected in single-member constituencies divided across 10 provinces. The women's bloc is elected through a system of proportional representation based on the votes cast for candidates on party lists in each of the provinces. Article 120 specifies that 60 of the 80 senators are distributed among parties also on a proportional basis, subject to a 'zipper', or 'zebra', party list system in which women and men must be listed in alternating order and women candidates must head the lists. The remaining Senate seats are distributed to chiefs and persons with disabilities, mandating women to hold at least 30 out of 80 (or 37 per cent) of seats. No women's quota applies to local elections.

The adoption of a gender quota in Zimbabwe's Constitution reflects a growing trend in Africa that can, at least in part, be attributed to the development of the international framework on women's rights—including CEDAW, the BPfA and the WPS agenda—and progressive regional instruments. During the 2013 constitution-building process, women's civil society organizations and women's rights activists pushed for the inclusion of a quota system comparable to those in Liberia, Rwanda, South Africa and Uganda. Women's representation in the lower and upper houses in the 2008–2013 legislature was only 16 per cent and 25 per cent, respectively, but this increased to a total of 35 per cent and 48 per cent with the quota system in 2013. While this marked a numerical victory, the quota system has been criticized for actually *decreasing* the number of women directly elected to the legislature compared with previous years and for reinforcing perceptions of 'token' women's seats under the proportional system (Tshuma 2018; International IDEA 2021). In 2013 and again in 2018, the number of women directly elected from party lists or as independents dropped compared with 2008, from 34 to 26. The major parties—including the Zimbabwe African National Union–Patriotic Front and the Movement for Democratic Change Alliance—reportedly prevented or blocked women from directly contesting for office because their seats were guaranteed, and women candidates faced sexist threats and backlash (Butaumocho 2018; Tshuma 2018).

As of 2018, few members of the legislature supported extending the quota, and some called it 'wasteful' (Tshuma 2018). Indeed, the 2018 campaign process revealed extensive misogyny among male politicians, including many who were elected, and in society more broadly (Butaumocho 2018). This makes the joining together of women and men members of parliament in 2020 to extend the quota through constitutional amendment a noteworthy achievement. While debates around the utility of quotas, the qualifications of 'quota women', and the relationship between quotas and stereotypical beliefs about women's leadership continue, the amendment importantly extends an *opportunity*. It provides the opportunity for women and their allies, both in the legislature and in civil society, to promote and achieve law, policy and institutional reforms that can substantively improve women's status and equalize relations between the sexes in Zimbabwe.

The achievements in Chile and Zimbabwe represent concrete forward progress for women's substantive equality, made even more remarkable for having taken place amid a global pandemic and in the context of stalled, or even reversing, momentum. They reflect the continuing commitment of women and their allies, despite great obstacles. They also highlight the normative and instrumental utility of international instruments and commitments in supporting these efforts at the national level.

Conclusion

The road towards realizing women's equal and meaningful participation in constitution-building and related peace processes, and indeed towards achieving women's substantive equality more broadly, has been long and uneven. Evidence of trends over time reveals marked but slow progress; by many accounts, the current situation presents a viable risk that the limited but important gains that have been achieved so far could be reversed.

Nevertheless, in many cases, these hard-won victories have been life-changing for the social and political status of women and girls at the country level. The necessity of women's substantive equality for the advancement of peace, security, prosperity, health and good governance within and among states is arguably more urgent now, in a pandemic- and conflict-affected world, than at any time in the last 25 years.

Looking ahead to the next 25 years, there is a need for renewed attention and commitment to advance women's participation in decision-making and women's equal rights. Moreover, given the problem of democratic backsliding, women's substantive equality issues should be integrated beyond peacebuilding and democratization, to be prioritized across the democracy support agenda.

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Endnotes

1. The Beijing Declaration and Platform for Action was unanimously adopted at the Fourth World Conference on Women in 1995. It made commitments under 12 areas of concern: poverty, education, health, armed conflict, human rights and the environment, among others.
2. Sustainable Development Goal 5 focuses on gender equality and the empowerment of women and girls. It is understood as a means for achieving the other goals, all of which include gender-related targets through the systematic mainstreaming of a gender perspective.
3. The Women, Peace and Security agenda includes 10 security council resolutions: 1325 (2000), 1820 (2008), 1888 (2008), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013), 2242 (2015), 2467 (2019) and 2493 (2019). Combined, this policy framework promotes and protects the rights of women in conflict and post-conflict situations, extending from the international to the national level. The resolutions should be implemented by all member states and relevant actors.
4. Formal equality refers to the equal treatment of women and men before the law and is important in the context of exercising many rights, such as due process. Substantive equality, on the other hand, acknowledges the impacts of past discrimination and the reality of the political, economic and social barriers women face in accessing opportunities, exercising their rights and making autonomous decisions that impact their lives. It recognizes the differences between women and men due to the potential reproductive capacity of (some) women and takes into account lived realities and the differential issues women face linked to their intersecting identities, such as nationality, ethnicity or race, religion and socio-economic status. It acknowledges that equal treatment under formal equality does not necessarily result in similar outcomes for men and women or among women with different intersecting identities and experiences because some groups of people are already in an unequal starting position. Accordingly, although constitutions that embrace the principle of formal equality provide a crucial foundation for exercising women's rights, they do little on their own to change the status quo situation of women.

5. While the data indicate a strong link between women's meaningful participation and the ability to reach and implement agreements, this operates in a dynamic way with levels of elite support or resistance also at play. The position of political, economic and/or military elites is often a decisive factor in the outcomes of both peace processes and complementary constitution-building, including inclusion of women and other groups. Parties to the conflict and other groups are likely to attempt to 'capture' selection criteria and decision-making procedures to enhance their own positions and undermine others (Paffenholz et al. 2016).
6. Article 25 of the ICCPR deals with the right of people to participate in the conduct of public affairs, including choosing or changing their constitution. This provides an important legal foundation for the right to participate in constitution-building. However, 'participation' in this sense has generally been interpreted narrowly to mean in the election of representatives, including to a constitution-making body, and voting in a ratification referendum (UNHRC 1996).
7. One study suggests that, despite common expectations, the number of women who sign peace agreements has *not* increased since the adoption of UNSCR 1325, implying that the WPS agenda has done little to strengthen women's actual access to the peace table. This is based on a review of 130 peace agreements signed between 1990 and 2014, of which women signed only 13 (Krause, Krause and Bränfors 2018). It is notable that UNSCR 1325 was designed around a primarily normative and rights-based approach; it does not call for 'equal' participation of women. This has been seen as a drawback since its adoption (Paffenholz 2018).
8. While South Sudan's 2011 Transitional Constitution (as amended to 2020) establishes important and progressive foundations for women's substantive equality, it also includes gaps, inconsistencies, clawback clauses and weak enforcement mechanisms that impede effective implementation and limit accountability for constitutional obligations to women (see International IDEA 2020).
9. These are Egypt (2014), in article 214; Guyana (1980), in article 212; Kenya (2010), in article 59; Morocco (2011), in article 19; Nepal (2014), in article 252; the Republic of the Congo (2015), in article 232; Rwanda (2003), in articles 185 and 187 (two bodies); South Africa, in article 187; Sudan (2019), in article 39; Zambia, in article 231; and Zimbabwe (2013), in article 232.

10. This includes both constitutions and interim/transitional constitutions in which a particular quota or related representation mechanism is specified, and those requiring the state to establish mechanisms to promote women's representation in the legislature(s) through implementing legislation—both temporary and permanent: Afghanistan (2004), article 83; Algeria (2020), article 59; Bangladesh (1972; reinstated in 1986), article 65; Belgium (1831), article 67 (applying to upper house); Burundi (2018), articles 169 and 185; Chad (2018), article 34; China (1947), articles 64 and 134; the Dominican Republic (2015), article 39; Ecuador (2008), articles 65 and 116; Egypt (2014), articles 11 and 102; Eswatini (2005), articles 94 and 95; Guyana (1980), article 160; Haiti (1987), article 17-1; Iraq (2005), article 49; Kenya (2010), articles 81, 97 and 97; Kosovo (2008), article 71; Nepal (2015), article 84; Nicaragua (1987), article 131; Niger (2010), article 22; Pakistan (1973), articles 51 and 59; Papua New Guinea (1975), article 101; the Philippines (1987), section 5; Rwanda (2003), articles 75 and 80; Samoa (1962), article 44; Saudi Arabia (1992), article 3 (applying to the Shura Council—an advisory body to the king); Serbia (2006), article 100; Somalia (2012), article 3; South Sudan (2011), article 16; Sudan (2019), article 24; Taiwan (1947, Additional Articles of the Constitution of the Republic of China), article 4; Tunisia (2014), articles 34 and 46; Uganda (1995), article 78; the United Republic of Tanzania (1977), article 66; Zambia (1991), article 45; and Zimbabwe (2013), articles 17 and 157.

5. Custom, constitutions and change: constitutional amendments in Samoa and Tonga in 2020

Anna Dziedzic¹

Introduction

In many Pacific Island countries, customary law, values and institutions, rooted in Indigenous tradition and world views, continue—with adaptation and change—to govern societal relations. In both urban and rural areas people live as part of a family, village, clan or tribe, with the obligations and responsibilities that come with these communal relationships. In several countries, land is owned and managed according to custom, and customary institutions provide local-level governance. Both state and non-state laws and institutions therefore contribute meaningfully to the order, security and well-being of the people, to the point that, in some contexts, one cannot be said to be subordinate to the other.

The continuance of custom presents challenges for understanding a written constitution. The idea of a written constitution is intricately tied to modern ideals of statehood. The constitution is understood to be an expression of the sovereign power to make and legitimize law. It is the supreme law with which all other laws—and indeed all forms of social ordering—must comply. In this, written constitutions reflect the modern expectation that the institutions and procedures for government—law-making, administration and adjudication—will provide the ‘predominant, if not exclusive, rules of the game in each society’ (Migdal 1988: 14). In many instances, written constitutions bring such institutions into being.

For these reasons, written constitutions by and large focus on state institutions. Where then do the governance institutions and the values of custom fit? Are they subsumed within the constitutional order such that they derive their authority from the constitution and must be consistent with it? Are customary institutions ‘proximate’ institutions, which are not established or even necessarily recognized by the constitution, but have a significant impact on the constitution and how it works in practice? Or do they exist on a parallel plane, officially operating in certain areas of life as carved out by the constitution and unofficially elsewhere?

At the time of constitution-making and over the decades since, Pacific polities have considered the place of custom in the law and the state. The preambles of most Pacific constitutions invoke the foundational importance of custom, bolstering the legitimacy of both the constitution and the nation by reference to pre-existing and deeply held societal values and institutions. Some aspects of custom, in particular relating to the ownership and management of land, may be expressly protected, while some constitutions recognize custom as a source of law (Cuskelly 2011: 18–21). Issues about the place of custom in the constitution came to the fore in 2020, as two Pacific countries made constitutional amendments that sought to more explicitly reflect custom in their written constitutions. In 2020, the parliaments of Samoa and Tonga passed constitutional amendments to give greater precedence to custom. This chapter outlines these developments and identifies some of the challenges that the recognition of custom presents for constitution-building.

Constitutional amendments in Samoa²

The Constitution of Samoa 1960, made just prior to its independence in 1962, recognized customary law and institutions. It defined law as including ‘any custom or usage which has acquired the force of law’ (section 111). Most land in Samoa is customary land, and customary ownership is given special protection under the Constitution through a doubly entrenched prohibition on the alienation of customary land (section 102). The Constitution also provided that *matai* (chiefly) titles must be held in accordance with Samoan custom and usage (section 100).

In March 2020, Samoa’s parliament introduced constitutional amendments and implementing legislation, which sought to ‘reflect more of the Samoan context inside Samoa’s supreme law . . . to make the Constitution a Samoan Constitution in light of today’s context’ (Parliament of Samoa: paragraph 1.3). The amendments, which were passed on 15 December 2020, sought to elevate the status of custom through two main changes.

First, the amendments divided Samoa’s judiciary into two parallel court systems of equal standing. On the one hand is the Supreme Court and Court of Appeal, which deal with criminal and civil matters. On the other is the Land and

Titles Court, which has a ‘special individual jurisdiction on Samoan customs and usage’ and governs ‘a legal system different and separate from that of the Civil and Criminal Courts’ (Constitutional Amendment Act 2020, new section 104(2)). The Land and Titles Court is composed mainly of lay judges who are expert in Samoan custom and who determine disputes about customary land and titles. Proceedings are inquisitorial, are conducted in Samoan and follow customary protocols. Although it began its life as a creation of the German colonial administration, the Land and Titles Court is now an Indigenous Samoan institution (Aiono-Le Tagaloa 2009).

Prior to the amendments, the Supreme Court had jurisdiction to conduct judicial review of the decisions of the Land and Titles Court on constitutional grounds. The amendments removed this jurisdiction from the Supreme Court. Section 4 of the Constitution, which guarantees a remedy for the breach of fundamental rights, now expressly excludes judicial review arising from proceedings in the Land and Titles Court. Instead, the appellate courts within the Land and Titles Court system have the jurisdiction to finally determine constitutional rights in the proceedings before it. This change was intended to remove the possibility of the Supreme Court overruling the Land and Titles Court on rights grounds. As a result of the amendments there are now two courts empowered to finally determine constitutional rights, giving rise to the risk of conflicting constitutional interpretations, overlapping jurisdiction and forum shopping, especially where an issue raises issues under both custom and criminal or civil law. Examples potentially include legal issues arising from the use of property associated with customary land, the adoption of children, and electoral matters.³

The second means by which the amendments sought to elevate custom was to introduce a ‘judicial guidance’ provision that requires all courts to take account of custom (Constitutional Amendment Act 2020, new section 71). In contrast to the restructuring of the courts, which sought to separate law and custom, this provision seeks to encourage the integration of custom in the jurisprudence of all courts.

The amendments sought to address concerns that the Constitution and the courts too heavily favoured individualistic Western legal values over custom. The law reform report on which the proposed amendments were based found that a very small percentage of Samoa’s Constitution and legislation refer to custom, and claimed that courts tend to rule in favour of individual rights over customary practices (Samoa Law Reform Commission 2020). Paragraph 1.5 of the Explanatory Memorandum (Parliament of Samoa 2020) explained the concern in the following terms:

Why is the Samoan Constitution more protective of the introduced modern principles such as individual rights, as compared to the Samoan custom and usages, the way of life of the Samoan people? In a court room, why are individual rights more powerful than Village Fono decisions? The answer is, because the Constitution says so.

Similarly, in explaining the proposed amendments, Samoa's Prime Minister contrasted *papalagi* (foreign) constitutional values against Samoan cultural values. In his view, the Constitution 'was done by *papalagi* who have no customs and culture like Samoa. . . . We want the court to equally view individual rights, which [are] based on *palagi* beliefs, and communal rights, which are at the fore of our cultural governance' (Lesa 2020).

The amendments seek to give equal prominence to both imported law and Indigenous custom. In doing so, however, they risk entrenching a dichotomy or conflict between them. In his 2015 report on the state of human rights in Samoa, Ombudsman Maiava Iulai Toma states that 'Human rights are not merely foreign ideals as many wish to see them, but they have roots within Samoan culture also. . . . [T]he weaving together of Fa'asamoa and human rights principles will make a stronger and more harmonious society' (Office of the Ombudsman and National Human Rights Institute 2015). Although the judicial guidance provision might promote the 'weaving together' of custom and imported laws, the separation of the two court systems and their jurisdictions sets up a clash rather than marriage between the different components of Samoa's legal order.

Constitutional amendment in Tonga

While Samoans debated their constitutional changes, on 15 October 2020 the Parliament of Tonga unanimously passed the Act of Constitution (Amendment) Act 2020 which introduced custom into its 145-year-old Constitution for the first time. The new provision requires every court and tribunal, where relevant, to consider custom when deciding on any matter. The amendment states that courts are not to be restrained by the technical rules of evidence and may consider information on customs as available. Custom is defined, in a non-exhaustive manner, as comprising 'all reasonable and sufficiently certain customs, traditions, practices, values and usages of Tongans'. The provision also states that 'Tongan Custom shall not be lost by reason of lack of recent usage'. The amendment requires approval from the King before it becomes law.

Parliamentary debates on the constitutional amendment reflect a desire that courts consider Tonga's unwritten traditional culture. It was noted in discussions that, in Tonga's superior courts, foreign judges apply laws derived from British precedents (Fonua 2020a). Parliamentarians provided examples of the kinds of customs that courts might take into account under the amendment, including

customary apologies and forgiveness, and cultural practices such as providing food to voters during an election (Fonua 2020b).

Aspects of Tongan custom, such as traditional apology and forgiveness, have long been practised as part of the legal process. For example, Tongan Magistrates will often require defendants to offer victims and their families a customary apology, not as an alternative to any criminal or civil liability, but to secure the additional social benefit of communal harmony (McKenzie 2017: 101–02). It has been recognized, however, that customary apology and forgiveness is not appropriate or effective in some contexts. For example, section 28(3) of the Family Protection Act 2013 expressly provides that ‘it is not a defence to a domestic violence offence that the respondent has paid compensation or reparation to the complainant or to the complainant’s family’. The Director of Tonga’s Women and Children Crisis Centre, Ofakilevuka Guttenbeil-Likiliki, expressed strong concerns that the constitutional amendment could undermine gains in addressing violence against women, by providing a way for courts to excuse offending based on ‘traditions, practices, values and usages’ (reported in Nepituno 2020).

The Acting Minister for Justice justified the amendments by saying that Tonga was following similar moves to those of other countries in the Pacific. He explained that the amendment did not make a great change to the law, saying that aspects of Tongan custom were already part of the legal process, but were not written into the law (Radio New Zealand 2020).

However, the act of writing custom into the Constitution *is* a significant change. In contrast to the Constitution of Samoa, Tonga’s Constitution has never, until now, made explicit reference to custom, either as a source of law or as a system of values on which the Constitution is based.⁴ The main reason for this is Tonga’s distinctive constitutional history. Tonga was never colonized and its legal system was never formally divided between Indigenous custom and the Western laws that colonizers imported. Tonga’s Constitution, made in 1875 by Tupou I, the first King of Tonga, did not enshrine a distinction between Indigenous custom and imported law, but rather codified elements of both, alongside Christian values. The result is long-standing laws and governance institutions that are an ‘amalgam of traditional and introduced values and accompanying laws’, which cannot be ‘splintered’ into ‘component parts’ but, as a whole, are regarded as Tongan (Powles 2007a: 111, 114, 120–21).

The amendment passed in 2020 potentially alters this conception of Tongan law by introducing the idea of custom as a separate system beyond the laws the courts apply, rather than part of them. Rather than a legal system in which all laws and institutions are Tongan, the amendment risks creating a binary opposition between Indigenous custom and Western or introduced law, which Tonga had, until now, avoided entrenching in its Constitution.

Custom and constitution-building

The 2020 constitutional amendment processes in Samoa and Tonga were characterized by a lack of public consultation. In both states, constitutional amendments require the support of a majority of parliament (two-thirds in Samoa and an ordinary majority in Tonga). In Tonga, constitutional amendments also require the King's assent. With formal requirements for public participation limited to representative democracy, the extent of consultation becomes a political decision.

In Tonga, the bill introducing the amendments into the parliament in September 2020 was not publicly released (Fonua 2020a). There was no public consultation on the proposal, despite some members of parliament pushing for it (Fonua 2020c). In Samoa, there was very limited consultation on the amendments before they were introduced into the parliament. The Law Reform Commission, which was responsible for preparing the initial report, did not conduct consultations in the way it usually does for other law reform inquiries. The legal profession and the judiciary—who would be responsible for implementing the changes—were not consulted on the detail (Retzlaff 2020). Eventually public pressure led a parliamentary committee to conduct public consultations across Samoa, which led to some changes at the third and final reading of the amendment bills.

The political risks of inadequate public consultation were realized in Samoa. The government, owing to its parliamentary majority, was able to pass the amendments, but not before the Deputy Prime Minister quit and joined another political party over the issue. Public concern over the content and process of the constitutional amendments was a key reason for the dramatic tied result in Samoa's 2021 general election, as the incumbent government lost many votes to the new opposition party led by the former Deputy Prime Minister, whose campaign included reversing the amendments (Sanerivi 2021).

The lack of public consultation also gives rise to risks for the implementation and workability of the new constitutional provisions. This is especially so where the implications of the change affect not only the constitution, but the meaning and status of custom in the national legal system. Constitutions may be distant from the lives of ordinary people, but customary law, values and institutions govern much of day-to-day life and provide the foundations of national identity. Indeed, an issue that received a lot of attention during the public consultations was a proposed legislative amendment to restrict the number of *matai sa'o* (paramount chiefs) to five per family. This proposal was criticized as an unwarranted legislative intervention in custom and, as a result of opposition expressed during public consultations, dropped from the package of amendments.

In contrast, the more abstract, institutional proposals to elevate the status of custom were generally, but not unanimously, supported.

Constitutional amendments for the purpose of reflecting custom in a written constitution are inherently complex. It is difficult to understand and capture the complex relations between state and non-state institutions, let alone balance the implications for law and custom in the abstract. Much will be determined through practice, and this places the emphasis on constitutional implementation, for which consultation, particularly with the stakeholders responsible for implementation, is a necessary foundation.

There are good reasons for giving custom greater prominence in the foundations and governance of Pacific states. One is to embed the constitution in Indigenous values and systems of governance and so enhance the sense of local ownership and legitimacy of the constitution. Another is that the inclusion of custom has the potential to positively enhance government by making a constructive addition to the Western institutions of government adopted by many states. For example, customary values such as consensus decision-making, respect and service can be values of good governance in and of themselves.

These reasons might answer the question *why* Pacific states might seek to give greater constitutional prominence to custom, but do not shed much light on *how* this should be done. Constitutionalizing custom gives rise to a set of tensions. Custom predates the constitution and other imported laws. Its continued strength in the Pacific as a source of norms for governance and societal relations lies in its continuity and adaptation over time. It is common to hear Pacific people say that custom is ‘in our hearts’ and ‘in our families’. This does not preclude custom from being in the public institutions of government, but incorporating it through a written constitution brings risks that must be carefully negotiated.

The 2020 constitutional amendments in Samoa and Tonga aim to encourage the judiciary to pay greater attention and give greater weight to custom in their decision-making, through the mechanism of the judicial guidance provision and/or an institutional restructuring of the judiciary. The problem, identified in the critiques of the amendments outlined above, is that when custom is defined only in opposition to ‘individual rights’ or ‘Western law’, such changes risk entrenching a binary opposition, rather than creating an ‘amalgam’ of law and custom.

An alternative approach is to codify custom, but this too presents problems. Custom is unwritten and generally does not take the form of directive rules. Codification of custom can become a political exercise, as legislators selectively enact certain customs into written law, with (at least) two problematic consequences. The first is the standardization of custom across the whole state, disregarding the distinctive customs of particular villages or families. The second is that custom as legislated by parliaments and interpreted by courts is inevitably different from custom in practice, such that what is defined as ‘custom’ by the

state under the law may not actually reflect custom as practised (Tamanaha 2008: 380).

A better solution requires a more nuanced approach to developing custom on its own terms and in relation to other laws. The work of Samoan scholar Tamasailau Suaali'i-Sauni provides a compelling example. She advocates a dialogic, scholarly inquiry into Samoan custom, which traces the cultural and intellectual 'genealogy' of particular customs. She shows how investing in the development and articulation of custom provides the foundations for a legal system that both protects and reflects custom (Suaali'i-Sauni 2017).

Adding an abstract reference to custom in the constitutional text seems unlikely, in and of itself, to achieve the goal of elevating or even reflecting custom in the country's legal system. At best, such amendments may provide a platform and impetus for the work that Pacific scholars undertake to critically examine custom and tradition in their own contexts (for examples, see Efi 2008; Meleisea and Schoeffel 2015; Suaali'i-Sauni 2017; Powles 2007b). It is this work, which can then inform the technicalities of constitutional amendment, that lies at the heart of constitution-building in the legal pluralist states of the Pacific.

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Endnotes

1. Convenor of the Constitution Transformation Network at Melbourne Law School. I thank Jayani Nadarajalingam, Kimana Zulueta-Fülscher and Erin C. Houlihan for their comments on a draft of this chapter.
2. This section builds on my earlier discussion, see Dziedzic (2020).
3. While not the focus of this short chapter, in restructuring the courts, the amendments made several other changes to the judicial system, including to remove constitutional protections against the arbitrary removal of judges. For an overview and critique see Ey (2020).
4. The *Tonga Magistrates Court Bench Book* (Pacific Judicial Education Programme 2004) states that ‘The Constitution and the statutes do not recognize the legitimacy of unwritten customary Tongan law. Most customary law has been transformed into legislation and only rarely does custom play a role, most notable with respect to kinship relations, mitigation of sentence or local land matters’ (para B1.3).

6. Attempting constitutional amendment in France: greening the Constitution or surfing the green wave?

Thibaut Noël

Introduction

In November 2018, the French Government announced an increase in the carbon tax, which is aimed at reducing greenhouse gas emissions. This announcement sparked nationwide demonstrations, led by what became known as the yellow-vest movement. Protesters perceived the higher tax on fossil fuels to disproportionately burden the rural lower and middle working class. The leaderless yellow-vest movement gradually took on a broader agenda of social and fiscal justice, requesting the government not only to raise the minimum wage, to reintroduce the wealth tax abolished in 2018 and to address deteriorating public services in rural areas, but also to involve citizens in policymaking, for example by allowing citizens' initiatives to launch referendums. As a way out of the crisis, President Emmanuel Macron launched two participatory democracy initiatives. From January to March 2019, the government conducted face-to-face and online debates, seeking inputs from the general public and local public authorities on four themes: the ecological transition; taxes and government spending; state structure and public services; and democracy and participation (Le Grand Débat National 2019). To respond to some of the demands that emerged in this first participatory exercise, Macron announced the convening of a Citizens' Convention for Climate (CCC) tasked with 'redrawing all the measures' related to the climate transition, 'defining incentives or compelling measures' and

‘proposing sources for financing’ (Macron 2019). After nine months of deliberations, the CCC submitted 149 proposals to the government in June 2020, including four constitutional amendment proposals aimed at further strengthening constitutional environmental protection (Convention Citoyenne pour le Climat 2020).

Although the CCC constitutes an institutional innovation for France, citizens’ conventions or assemblies are not unheard of from a comparative perspective. In recent years, a growing number of countries have experimented with the use of citizens’ deliberative forums to address certain pressing or contentious societal matters (OECD 2020; Mellier and Wilson 2020). A citizens’ deliberative forum consists of a group of randomly selected citizens, representing societal diversity as far as possible, tasked with learning about, discussing and making recommendations for policymakers on often complex or contentious policy issues. Notably, citizens’ assemblies are increasingly used to draw policy answers to the climate change crisis, for instance in France (2019–2020), Germany (2021), Ireland (2016–2018), Scotland (2020–2021) and the UK in general (2020), with varying mandates and results. Denmark also launched a citizens’ assembly on climate in 2021, and Spain is currently considering doing so (Bürgererrat Demokratie 2021). The premise behind the use of citizens’ assemblies is twofold. On one hand, it may help define policy orientations about pressing or divisive topics that would probably enjoy broad acceptance by demonstrating what an informed public would likely prefer. On the other hand, when citizens’ assemblies are seen by the public as broadly representative of society and when their outputs are seriously considered and debated by decision-making bodies, it may contribute to strengthening democracy, and addressing the declining trust of the public in elected representatives, by complementing representative decision-making with direct participatory tools.

This chapter focuses on the use of the CCC to help define more widely accepted climate change policies in France. The next section provides an overview of the attempt at constitutional amendment, with a specific emphasis on the design and mandate of the CCC and its relationship with representative decision-making bodies. The section after that provides a substantive analysis of the constitutional amendment proposal from the CCC, in light of existing constitutional environmental norms in the country. It also provides, where relevant, brief comparative observations about the design of citizens’ deliberative forums and constitutional provisions related to environmental protection. The chapter closes with some lessons learned from the CCC process and brief considerations of potential next steps.

An amendment from the people to be approved directly by the people?

The Citizens' Convention for Climate

On 25 April 2019, Macron announced his intention to convene the CCC (Macron 2019), after which the prime minister enacted an engagement letter providing details about the process (Philippe 2019). It mandated the Economic, Social and Environmental Council (ESEC)—a consultative body provided for in the Constitution (articles 69–71)—to convene the CCC, tasked with formulating proposals ‘to reduce France’s greenhouse gas emissions by 40 per cent by 2030 compared to 1990 in a spirit of social justice’. This quantitative objective was already set in statutes under the 2016 Paris Agreement. The CCC would then submit its proposals to the executive, and according to the engagement letter the executive would respond to these proposals. President Macron, however, verbally committed himself to submitting these proposals ‘without filter’ to the parliament, the general public through a referendum, or the government for consideration and decision-making (Macron 2019). In other words, while the president committed to submit the CCC proposals for consideration and decision-making, the letter of engagement implicitly enabled the executive to veto some proposals.

Although the CCC was convened in response to demands for greater citizens’ involvement in decision-making, the executive defined the mandate, the overall institutional design of the CCC and its relations with decision-making bodies. The CCC Governance Committee defined the rules of procedure and working method of the CCC. In contrast with Denmark and the UK, for example, where climate assemblies were enacted by acts of parliament, the executive initiated the French CCC with no involvement of the legislature or opposition parties.

As prescribed in the letter of engagement, the ESEC convened and organized the CCC with a budget of EUR 5.4 million (nine times the amount allocated to the Climate Assembly UK). The CCC comprised 150 members selected by sortition. They met for seven 3-day sessions, over nine months, from October 2019 to June 2020. The CCC was structured in five thematic working groups, namely housing, food, transport, consumption, and work and production. Each group was required to learn, discuss and prepare proposals related to its own theme. These proposals were then debated and ultimately voted on in the plenary. Discussions on potential amendments to the Constitution took place in plenary. To be included in the final report, each proposal had to be approved by a simple majority vote in the CCC. The final report itself, which included all approved recommendations, was endorsed by 95 per cent of CCC members.

Various committees and support groups assisted the CCC in carrying out its mission. The letter of engagement provided for the establishment of a

Governance Committee. The Governance Committee included 17 people, that is, 13 specialists—on climate, the economy and participatory democracy—appointed by the ESEC, 2 experts appointed by the Ministry of the Ecological Transition and 2 members of the CCC. It defined the CCC's rules of procedure and overall workplan, and oversaw its implementation. This Governance Committee established and coordinated three support groups: (a) a support group of 13 climate experts responsible for providing technical assistance to the CCC members in measuring the impact of their proposals; (b) a team of fact checkers from four research centres to answer questions from CCC members and verify specific information; and (c) a drafting committee tasked with assisting CCC members in choosing legal instruments (i.e. constitutional amendment, and statutory or regulatory reform) and translating the CCC's proposals into legal texts. Furthermore, CCC members held hearings with around 150 external experts—from academia, think tanks, civil society groups, legal practitioners, companies, state institutions and the civil service—in the plenary and in working groups to get briefings, inputs and different points of view on the policy issues considered by the CCC. A team of 16 moderators from three private agencies specializing in public consultations facilitated the sessions of the CCC. In addition, a board of guarantors—composed of three individuals appointed by the president of the ESEC, the president of the National Assembly and the president of the Senate—was tasked with assessing the independence and the transparency of the CCC process.

The CCC proposals and responses from the executive

The CCC submitted 149 proposals to the government, including four constitutional amendment proposals (Convention Citoyenne pour le Climat 2020).

Two of the proposals for constitutional amendments were formulated as ideas for the government to further explore. The first idea was to consider the constitutional establishment of an independent oversight institution (*le Défenseur de l'environnement*) to monitor the implementation of environmental legal norms by public authorities. Second, the CCC proposed reforming the ESEC into a chamber of citizens' participation, where part of its membership would be selected by sortition (in addition to the current representatives from professional organizations and civil society). Consultations with the ESEC would be mandatory on certain bills, and the ESEC would be able to hold public consultations and convene citizens' conventions on thematic issues and recommend that parliament hold debates on ESEC-developed reports on certain bills. In response, the prime minister commissioned a report on the feasibility and design options for the establishment of an independent oversight institution for the environment, before deciding whether or not to submit a bill to parliament (Castex 2021a).

Regarding the other two constitutional amendment proposals, the CCC requested that they be developed into a constitutional amendment bill and submitted to the public for referendum. First, the CCC proposed to add to the Preamble of the Constitution: ‘the conciliation of rights, freedoms, and principles shall not compromise the preservation of the environment, common heritage of humanity’. The wording of this amendment proposal would assert that the preservation of the environment takes precedence over other constitutional rights and objectives. Such an amendment would create a critical limitation to the exercise of rights. It would also create an interpretative directive to the Constitutional Council and administrative courts that would contradict the 2004 Charter for the Environment, which provides that ‘the preservation of the environment must be sought as other fundamental interests of the Nation’ (Preamble). In the end, Macron refused to include this proposal in the constitutional amendment bill submitted to parliament, arguing that it is a balance—and not a hierarchy—that must be found between these considerations (Macron 2020). His refusal to proceed on this recommendation contradicted his earlier commitment to submit all proposals ‘without filter’ to specific decision-making bodies.

Second, the CCC proposed the following addition to article 1 of the Constitution: ‘[France] guarantees the preservation of biodiversity, of the environment and fights against climate change’. President Macron agreed to turn this proposal into a formal amendment bill that was submitted to the National Assembly on 20 January 2021 (Assemblée Nationale 2021a). The legal implications of this proposal are analysed in Section 2.

Constitutional amendment procedure and the prospect of a referendum

A constitutional amendment procedure can be initiated by the president upon the proposal of the prime minister, or by any member of parliament (article 89 of the Constitution). When the amendment bill originates from the executive, it must first be approved in identical terms by both chambers of parliament separately through a simple majority vote, and then be adopted either by the Congress (i.e. the two chambers of parliament in joint sitting) through a three-fifths majority or in a referendum through a simple majority vote. As the CCC requested in its final report, the executive decided that the amendment bill would be submitted for approval by the people through a referendum, after being approved by the two chambers of parliament separately (Macron 2020).

The fact that the proposal to amend article 1 of the Constitution was developed by the CCC, and would be submitted to referendum for final approval, somewhat constrained the deliberations in parliament. This process places a representative democracy deliberation between two participatory democracy devices. For fear of further deepening the lack of trust of the general public in elected representatives or losing the political support of their constituents,

members of parliament may have found it politically difficult to vote against the original proposal. In the UK (2020), Ireland (2016–2018 and 2020–2021) and Denmark (2021), processes of participatory democracy and representative deliberations were somehow better integrated. Not only were citizens' assemblies in all three countries established by an act of parliament, but parliaments also designed the framing questions to be considered by the respective assemblies. In contrast with the French CCC, proposals were submitted directly to parliament instead of filtering through the executive. In this regard, the proposal made by the CCC to better integrate participatory democracy initiatives with parliamentary deliberation through reforming the ESEC into a chamber of citizens' participation is worth exploring. Such a reform could make participatory democracy part of the parliamentary process.

In the end, the National Assembly approved the constitutional amendment bill on 16 March 2021 in the same form as developed by the CCC (Assemblée Nationale 2021b). However, the Senate, where the right-wing opposition has a majority, adopted it with modifications on 10 May 2021 (Sénat 2021), which made the holding of a referendum before the April 2022 presidential elections (as originally foreseen) unlikely. The modified version adopted by the Senate provides that 'France preserves the environment and biodiversity, and fights against climate change, *under the conditions provided for by the 2004 charter for the environment*' (emphasis added). The amendment bill had to go through the parliamentary shuttle until each chamber approved it in identical phrasing, before being submitted to referendum. However, on 6 July 2021, the prime minister officially announced that the constitutional amendment would not be further processed, arguing that the Senate had blocked it (Castex 2021b).

This scenario was, to a certain extent, predictable. On one hand, the right-wing opposition in the Senate would not have offered the incumbent president the opportunity to hold a referendum on a consensual topic a few months prior to the next presidential election. On the other hand, it would have been politically risky for the right-wing opposition to simply vote against a proposal developed by the CCC dealing with a widely consensual topic, especially a few weeks before the regional elections (held on 20 and 27 June 2021) and less than a year before the next presidential election.

A non-reform? Analysis of the amendment proposal

To what extent does the constitutional corpus protect the environment?

In light of the CCC recommendations, it is notable that the constitutional corpus already provides, in a relatively precise and comprehensive manner, guarantees for environmental protection. Although the 1958 Constitution originally did not mention the environment, it was amended in March 2005 (French Republic 2005) to reflect environmental considerations. Constitutional environmental

protection since then has mostly been based on the Charter for the Environment and its gradual implementation through the case law of the Constitutional Council.

The Charter for the Environment was developed at the request of President Jacques Chirac between 2002 and 2003 by a committee of experts through a participatory process (Février 2005). It was adopted by parliament, through the Congress procedure, in March 2005, in the form of a constitutional amendment bill that adopted the charter and added a reference to it in the preamble of the Constitution. Overall, the charter adopts an anthropocentric approach that aims to put environmental considerations at the same level as (and not above) other constitutional rights, both civil-political and socio-economic. It envisages a new model of society based on sustainable development, in which the state must balance economic development, social progress and environmental preservation. The charter guarantees three rights: the right to a healthy environment (article 1) and the rights to access information on and participate in decision-making affecting the environment (article 7). It also imposes three obligations on public authorities and individuals—to participate in preserving and enhancing the environment (article 2), to avoid environmental damage (article 3) and to repair it (article 4)—and two further obligations on public authorities: to exercise precaution (article 5) and to promote sustainable development by reconciling environmental protection, economic development and social progress (article 6). The charter also has three broad objectives: environmental education (article 8), research and innovation (article 9) and inspiring France's actions at the European and international levels (article 10). Although most of these principles were already provided for in statutes, their insertion into the constitutional framework made them binding on legislators.

The 2005 constitutional amendment also modified the list of policy areas falling under the competency of the legislative power (article 34), by granting parliament the power 'to define the fundamental principles . . . of environmental protection'.

The Charter for the Environment has been effected through constitutional and administrative case law. Notably, the normative scope of the charter has increased gradually over time through the jurisprudence of the Constitutional Council.

A few months after the March 2005 constitutional amendment, the Constitutional Council agreed, in an *ex ante* review, to assess the compliance of two bills with article 6 of the charter, which requires public policies to balance environmental protection with economic development and social progress (Conseil Constitutionnel 2005a, 2005b), thereby implicitly recognizing its constitutional status. In 2008, the Constitutional Council explicitly recognized the constitutional status of 'all the rights and duties defined in the charter' and that 'they are binding on public authorities' (Conseil Constitutionnel 2008). This decision implicitly built on a landmark decision of the Constitutional Council

from 1971 in which it stated that the preamble of the 1958 Constitution, and the texts mentioned therein (i.e. the 1789 declaration of human and civil rights, and the preamble of the 1946 Constitution), have constitutional status and are part of the *bloc de constitutionnalité* (or constitutional corpus), and can thus be used by the council to check the constitutionality of bills (Conseil Constitutionnel 1971). The constitutional corpus can be defined as the various texts and principles that have been granted constitutional status over time.

By recognizing constitutional status to the rights and duties contained in the Charter for the Environment, the 2008 decision expanded the rights in the constitutional corpus, which now includes civil and political rights from the 1789 declaration of human rights; social and economic rights from the preamble of the 1946 Constitution; environmental rights from the 2004 Charter for the Environment; and several objectives and principles that the council has created and defined throughout its case law. By giving constitutional status to the rights in the charter, the 2008 decision also introduced the possibility of using these environmental rights in incidental ex post judicial review. A few months after the Constitutional Council's decision, the State Council, the highest administrative jurisdiction, used the same formula to recognize constitutional status to 'all the rights and duties defined in the charter' (Conseil d'État 2008).

In 2014, the Constitutional Council stated that the preamble of the charter also has constitutional status but cannot be invoked in incidental ex post judicial review, as it does not contain rights (Conseil Constitutionnel 2014). Most importantly, in 2020, the Constitutional Council gave a new dimension to the charter through two landmark decisions. First, the council referred to the preamble of the charter to consecrate 'the protection of the environment, [the] common heritage of humankind' as a constitutional objective (Conseil Constitutionnel 2020a). The pursuit of such a constitutional objective requires the legislature to balance the objective with other constitutionally guaranteed rights and freedoms, and may justify limitations to constitutionally guaranteed rights and freedoms. Second, the Constitutional Council gave direct effect to articles 1 (right to live in a healthy environment) and 2 (duty to contribute to the preservation and improvement of the environment) of the charter by stating that they are binding on the legislature (Conseil Constitutionnel 2020b). Legislators can limit the right to a healthy environment only in a manner proportionate to the objective pursued and only to balance other constitutional requirements or common interests.

Besides the constitutional case law, administrative courts have issued recent landmark decisions with regards to environmental protection by referring to the state's commitments under the 2016 Paris Agreement. Notably, the Council of State ruled on 1 July 2021 that the commitment made by the state under the 2016 Paris Agreement to reduce greenhouse gas emissions by 40 per cent by 2030 compared with 1990 is legally binding, and that it has regularly exceeded the

emission limits set in recent years. The Council of State ruled that the measures enacted by the government were insufficient to meet its trajectory of greenhouse gas reduction, and ordered the government to take, within nine months, ‘all the necessary measures’ to fulfil its obligation to reduce greenhouse gas emissions (Conseil d’Etat 2021).

A symbolic amendment at best, a potential regression at worst

Given the existing guarantees of environmental protection in the constitutional corpus, the substantive contributions of CCC recommendations may prove at best to be symbolic, and at worst a regression from the status quo. As mentioned above, the amendment proposal that the CCC developed, which the government turned into an amendment bill, proposed adding the following provision to article 1 of the Constitution: ‘France guarantees the preservation of the environment and biodiversity and fights against climate change’.

Article 1 of the Constitution defines the fundamental principles that aim to characterize the French Republic. Adding environmental preservation and the fight against climate change to the principles of democracy, equality and secularism would have a significant symbolic impact. It would make environmental preservation a component of the identity and fundamental principles of the republic. Environmental preservation would no longer constitute a policy debate and would have to inform public policies. According to a few constitutional experts, this amendment may therefore encourage decision makers to enact more ambitious ecological transition policies (Guitton-Boussion 2021).

However, other than its symbolic importance, this amendment proposal does not have any added value from a constitutional standpoint (Barbarit 2020; Cassia 2020, 2021; Derosier 2020, 2021; Gonzales 2021; Gossement 2020a, 2020b, 2021; Mauss 2020; Morel 2020; Rousseau 2020, 2021). Indeed, as explained above, the 2004 Charter for the Environment, already referenced in the preamble of the Constitution and granted constitutional status (Conseil Constitutionnel 2008), provides for environmental rights and duties more precisely and comprehensively than the proposed amendment would.

In fact, as Arnaud Gossement and other environmental law experts argue, this amendment proposal may even undermine existing environmental norms, especially the 2004 Charter for the Environment (Gossement 2020a, 2020b, 2021; Bétaille 2021; Lepage 2021). First, the proposed amendment is vague with regard to the duty bearer. While the charter provides that ‘each person’ (i.e. public institutions, companies, associations and individuals) has a duty to participate in preserving and enhancing the environment (article 2), the proposed amendment only refers to ‘France’ and not explicitly to the state. Second, the amendment proposal differentiates the notions of environment, biodiversity and climate, whereas the charter uses the term ‘environment’ in an all-encompassing manner. Drafters of the charter only referred to the environment in a broad sense,

making biodiversity and climate components of the environment (Hédary 2021). By introducing this distinction, the proposed amendment raises the risk that the rights and obligations provided for in the charter—which does not contain the term ‘climate’—may be interpreted as not applicable to climate change. While these three notions are interdependent in practice, their legal distinction risks limiting the fight against climate change to solutions aimed at reducing greenhouse gas emissions that may themselves be harmful to biodiversity, and thus be counterproductive. Importantly, this distinction raises the risk that the competency to enact measures against climate change and preservation of biodiversity switches from the legislature to the executive. The Constitution provides that the rules regulating ‘environmental preservation’ are defined by statutes (article 34) and that policy areas not explicitly granted to the legislature fall under the remit of the regulatory domain (article 37). Third, the proposed amendment only provides for the ‘preservation’ of the environment, whereas the charter refers to ‘preserving’ and ‘improving’ the environment (article 2) and is thus more ambitious.

In other words, the amendment to article 1 of the Constitution proposed by the CCC would introduce inconsistencies and contradictions in the constitutional corpus that might undermine the scope of the rights and duties provided for in the charter. If the CCC proposal were adopted, these inconsistencies would eventually have to be resolved by the Constitutional Council. In this regard, the changes made by the Senate on the proposed amendment aimed precisely to prevent these inconsistencies and the risks of undermining the implementation of the charter. The modified amendment proposal adopted by the Senate reads ‘France preserves the environment and biodiversity, and fights against climate change, *under the conditions provided for by the 2004 charter for the environment*’ (emphasis added).

The proposed amendment could have provided real added value if it had constitutionalized the principle of non-regression. This principle, already provided for in statutes (French Republic 2016), implies that new legal norms should not weaken the existing level of environmental protection but, instead, seek to constantly improve it. It aims to prevent environmental protection backsliding. However, in December 2020, when asked to assess the constitutionality of a bill authorizing the temporary use of previously banned phytopharmaceutical products, the Constitutional Council refused to deduce a constitutional principle of non-regression from the right to live in a balanced environment (article 1 of the charter) and the duty to participate in improving the environment (article 2 of the charter) (Conseil Constitutionnel 2020b). This decision contrasts with those of courts from a few other European countries—namely Belgium (Cour d’arbitrage de Belgique 2006), Hungary (Constitutional Court of Hungary 1994) and Spain (Supreme Court of Spain 2012a, 2012b)—which have recognized such a constitutional principle from the right to a healthy

environment. Including the principle of non-regression in the Constitution would ensure that it is applicable not only to regulations but also to statutes, and would thus prohibit parliament from enacting regressive legislative measures. The CCC missed this opportunity in its amendment proposal.

Rather than an imprecise symbolic constitutional amendment, effective implementation of existing environmental law is needed to better protect the environment. Notably, this requires the state to allocate more financial and human resources to the administration, especially in deconcentrated services tasked with controlling the implementation of environmental legal norms. By way of illustration, there are only 1,250 environmental inspectors in charge of informing and inspecting 500,000 classified industrial and agricultural facilities (AIDA INERIS 2019)—on average 400 facilities per inspector. It also requires more timely and appropriate procedures to investigate and sanction environmental offences. In this regard, the recent statute on environmental justice (French Republic 2020) enacted in December 2020 seems more useful than the proposed constitutional amendment. It establishes specialized environmental courts to adjudicate environmental offences. To be more effective, however, this reform could be accompanied by the creation of specialized public prosecutors for environmental offences (Bétaille 2020).

A political manoeuvre?

The attempt to amend article 1 of the Constitution could be seen as a political manoeuvre. Indeed, any outcome would have probably been favourable to the incumbent president. The decision of the right-wing opposition—through its majority in the Senate—to adopt the amendment bill with substantive modifications, and the subsequent announcement by the prime minister of abandoning the amendment process, provides an opportunity for Macron to run in the next election campaign as ‘the champion of the environment’, who was prevented from greening the Constitution and seeking people’s direct voice by an overly conservative right wing disconnected from environmental concerns.¹ If the amendment proposal had been approved by the two chambers of parliament separately and by the people in a referendum, it would have been a plebiscite for Macron before the presidential elections scheduled in April 2022.

The only risk for Macron would have been if the amendment proposal had been rejected by the people in the referendum. Under the Fifth Republic, referendums have had a plebiscitary dimension, anchored in Gaullist practices. President Charles de Gaulle considered that submitting a proposal to referendum was in a way equivalent to facing a motion of confidence or no-confidence from the people. Accordingly, de Gaulle resigned from the presidency in April 1969 following popular rejection in a referendum (through article 11 of the Constitution) of a proposal to reform the Senate and grant constitutional status to the regions. Although other presidents did not resign after rejection in a

referendum (i.e. Georges Pompidou in 1972 and Jacques Chirac in 2005), a ‘no’ at the referendum just a few months before the presidential elections would have put Macron in an uncomfortable position ahead of the campaign. This risk, however, was minimal, as it seemed unlikely that a majority of voters would have rejected an amendment proposal to include environmental protection and the fight against climate change in the Constitution (a topic enjoying wide consensus, even though only of a symbolic nature) that was developed by the CCC.

Conclusion

The fact that the Constitution requires amendment bills to be approved by both chambers of parliament separately through a simple majority vote before being submitted to referendum is an important mechanism to reduce the risk of a constitutional referendum being used by the executive for political purposes. The decision of the Senate to pass the constitutional amendment bill with modifications in May 2021 (Sénat 2021) provides an illustration; it significantly reduced the chances of holding a referendum on a broadly accepted topic before the next presidential election and actually led the prime minister to announce the end of the constitutional amendment process. However, when the president’s party has a majority in both chambers of parliament this procedure may prove insufficient.

To address this pitfall, one solution, which goes beyond the scope of this chapter, would be to prohibit any constitutional referendum in the year before presidential elections. When proposing an amendment bill less than a year before the presidential elections, it would have to be approved by the two chambers of parliament separately through a simple majority vote, and then by a three-fifths majority in a joint sitting (as provided for in article 89 of the Constitution). Such a ban would pre-empt an incumbent president from seeking a constitutional plebiscite ahead of the presidential election campaign, while still providing an opportunity to amend the constitution.

Content-wise, and as explained above, the ambiguity of the amendment bill raised a number of additional risks. A democratic constitution should ideally provide a set of rules and principles that a vast majority of stakeholders can agree upon, as well as clear procedures for governing institutions and decision-making, limitations on powers and guarantees for the protection of fundamental rights that can be effectively operationalized. In constitutionalizing vague declaratory provisions, such as this amendment bill, there is a risk not only of rendering the constitutional corpus partially inconsistent, but also of unduly increasing the power of the judiciary, specifically the Constitutional Council, which would have a wider purview to interpret these provisions.

The French CCC, and other comparative experiences, shows that citizens’ deliberative forums can be helpful in discussing, and sometimes addressing,

politically contentious issues. Among the 149 recommendations formulated by the CCC, a number of proposed statutory and regulatory provisions are innovative, are more ambitious and appear to be more widely supported by the public than some of the measures previously enacted by decision-making bodies. However, the political stance taken by the CCC in proposing to give precedence to environmental protection over other constitutional rights (proposal to amend the preamble of the Constitution) and the vagueness of the proposal to amend article 1 of the Constitution raise questions about the risk of citizens' deliberative forums formulating potentially regressive or otherwise unworkable proposals.

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Endnotes

1. See, for instance, Pierre-Alexandre Anglade, a member of the National Assembly affiliated with the party La République en Marche, accusing the right-wing majority in the Senate of wanting 'to deprive the country of an essential debate' (Radisson 2021).

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About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

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International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on democratic practices; offers technical assistance and capacity-building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

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Writing at the mid-way point between the instant reactions of the blogosphere and academic analyses that follow several years later, the authors provide accounts of ongoing political transitions, the major constitutional issues they give rise to, and the implications of these processes for democracy, the rule of law and peace.



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ISBN: 978-91-7671-497-3 (PDF)