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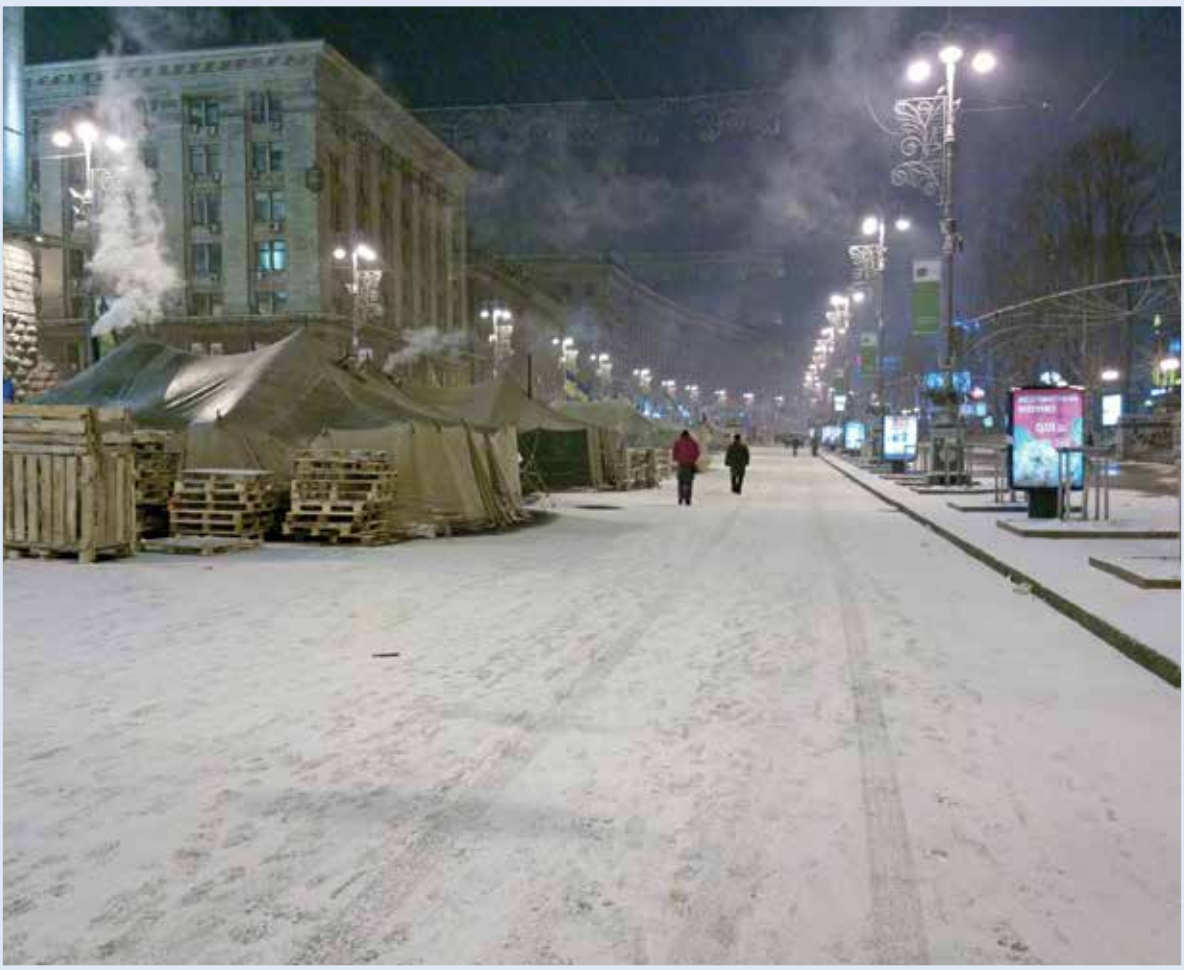
Annual Review of Constitution-Building Processes: 2014



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Preface

This, the second Annual Review of Constitution-Building Processes published by International IDEA, describes the key issues underlying constitutional transitions in 2014 and, as a consequence, some of the most important challenges facing global stability during the year as well. Constitution-building and constitutionalism have been at the heart of global issues from the independence referendum in Scotland to the annexation of Crimea, from the international response to the rise of ISIS to the breakdown of the transitions in Libya and Yemen, and from the pro-democracy protests in Hong Kong to the popular overthrow of the government in Burkina Faso. As such, this publication reads very much like an annual review of the most important news events of the year.

In 2014 International IDEA was an active supporter of democratic constitutional transitions in countries across the globe, from Chile to Yemen and from Tunisia to Ukraine. In addition, the organization regularly convenes the expert and practitioner community to exchange knowledge and experience, which contribute to our generation of comparative knowledge resources. Drawing on this intensive involvement in the field of constitution-building, our constitution-building team has selected a number of key themes for this publication whose importance transcend country-specific processes and reflect critical challenges at the heart of constitution-building. In consequence, these are of fundamental importance to the rule of law, good governance and conflict resolution.

Reading the seven chapters, there is one issue that resonates throughout: constitutions in territorially divided societies. The steady and seemingly irreversible progress made over the past 350 years towards an unquestioned acceptance of the nation state as the unit of political organization, and the national constitution as its organizing framework—which, among other things, defines an integrated political community—can no longer be taken as read. From my own political experience, I am intimately familiar with the challenges of maintaining national unity in pluri-national societies divided

along geographic lines, and the two chapters at the heart of this review are testament to the global resonance of this issue in 2014. Chapter 4, from Tom Ginsburg and Kimana Zulueta-Fülscher, covers secession processes, looking in detail at the cases of Catalonia, Scotland and Crimea. In Chapter 5, Roberto Toniatti provides a comprehensive overview of claims for increased regional autonomy in countries as varied as Hong Kong, Iraq and Tanzania. The contribution from the United States Institute of Peace on two heavily problematic processes also draws attention to the problem of constitution-building in territorially divided countries, focusing on Libya and Yemen.

IDEA, together with the Forum of Federations and the Center for Constitutional Transitions, has been exploring this issue throughout 2015, with the objective of delivering guidance for policymakers and advisers faced with difficult choices in contexts of territorial cleavages and constitutional transition. A paper on this topic was published in July 2015, we held a conference with the European Union Committee of the Regions in September 2015, and the resulting policy manual will be published in early 2016.

More broadly, with surging mass migration, a resurgence in group identity based around religion or other ethnic markers, increasing calls for territorial autonomy around the world and ongoing challenges to the legitimacy of representative democracy even in so-called established democracies, the relationships among individuals and societal groups, and between individuals and groups and the state are in flux; and this will inevitably lead to an increased frequency of constitutional reforms. In 2015 we can already count 19 countries attempting significant constitutional changes.

International IDEA's Constitution-Building Processes Programme, together with its partners around the world, continues to operate at the cutting edge of these and other issues, and I look forward to the thoughts next year's Annual Review will provide on the tumultuous events of 2015.

Yves Leterme
Secretary-General
International IDEA

Abbreviations

ARP	Assembly of the Representatives of the People
CA	Constituent Assembly
CDA	Constitutional Drafting Assembly
CDC	Constitutional Drafting Commission
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CiU	Convergence and Union (Convergència i Unió)
CRC	Constitutional Review Commission
CSO	Civil society organization
DRC	Democratic Republic of the Congo
ECLAC	Economic Commission for Latin America and the Caribbean
ERC	Catalonian Republican Left (Esquerra Republicana de Catalunya)
EU	European Union
FGM	Female genital mutilation
GCC	Gulf Cooperation Council
GDP	Gross domestic product
GNC	General National Congress
HoR	House of Representatives
ICJ	International Court of Justice
ISIS	Islamic State in Iraq and Syria
JSDF	Japan Self-Defense Forces
LDP	Liberal Democratic Party
MDC	Movement for Democratic Change
MMR	Maternal mortality rates
MP	Member of Parliament

NCA	National Constituent Assembly
NDC	National Dialogue Conference
NTC	National Transitional Council
POUM	Prospect of upward mobility (hypothesis)
SAR	Special Administrative Region
SER	Special Economic Region
SNP	Scottish National Party
UNDP	United Nations Development Programme
USIP	United States Institute of Peace
ZANU–PF	Zimbabwe African National Union–Patriotic Front

Introduction

Introduction

Sumit Bisarya

The response to International IDEA's first global review of constitution-building, published in 2014, has been remarkable, with positive feedback from government officials, international organizations and academics, as well as national civil society and political representatives engaged in constitution-building efforts.

Our objective was to provide an account of the major constitution-building processes taking place around the world—with an estimated 20 such processes ongoing in any one year—and some analysis of the major recurring issues in various contexts. Developing this publication into an annual series affords further opportunities. In addition to continuing to provide a narrative of the major constitutional transitions under way and the critical questions they tackle, an Annual Review allows readers to track the issues raised in previous years to see how they develop over time; and to monitor trends in issues that recur in different processes over time.

As International IDEA works at the heart of constitution-building globally, much of the identification of these issues and processes is carried out by staff within the Institute's Constitution-Building Processes Programme, based on the processes in which we or our partners are involved, and informed by the regular contributions submitted to our online information portal for constitution-building, <www.ConstitutionNet.org>.

Chapter 1 in this volume, by International IDEA's Melanie Allen, examines gender equity and agency in the constitutions of Egypt, Tanzania, Tunisia and Zimbabwe. Allen examines the role of women in the constitution-making process in Tanzania, and how successive drafts have dealt with issues such as citizenship, discrimination, child marriage and the supremacy of constitutional rights with respect to customary practices. The sections on Egypt, Tunisia and Zimbabwe enable Allen to take up where she left off in last year's review, assessing the progress—or lack of progress—with implementing these constitutions from a gender perspective. While wisely

reserving judgment, as it is still early in each country's constitutional journey, Allen rightly notes that the most critical indicator of success in a constitution from a gender perspective is not its explicit provisions on gender, but the presence of a robust overarching framework for democratic governance. This is a critical issue that advocates of a gender perspective—and human rights advocates more generally—should take on board.

Chapter 2, by Jason Gluck of the United States Institute of Peace (USIP), is based on the author's experience at USIP and as focal point for constitutions at the United Nations Department for Political Affairs. Gluck offers insights into why and how the constitution-making processes in Libya and Yemen diverged from their respective broader peace processes, to the overall detriment of the chances for a successful transition. As the constituent parts of peace processes and political processes are the same, and many of the demands arising from a peace process can only be accommodated through decisions on the allocation of political power at the centre of constitutional compromises, a disconnect between the drafting of the constitution and peace negotiations caused both processes to slide rapidly towards conflict.

In Chapter 3, International IDEA's Elliot Bulmer pairs two unlikely bedfellows: Chile and Hungary, both of which went through critical moments on their constitutional journeys in 2014. In Chile, the administration of President Michele Bachelet continued to plan for a constitutional review process to remove the last vestiges of the Pinochet-era Constitution. In Hungary, the first general elections under the new constitution delivered another two-thirds majority for the ruling Fidesz coalition. Comparing the 1980 Chile Constitution and the 2011 Hungary Fundamental Law, Bulmer finds a number of similarities that place both in the category of 'ideological exclusionary' constitutions. Both seek to provide constitutional protections not just for a regime, but also for a political ideology; and they use similar means, including manipulation of the electoral system, a requirement for supermajorities for many types of legislation and the preservation of institutional enclaves, or partial regimes, free from democratic oversight.

Chapters 4 and 5 deal with constitutional change in the context of territorial divisions within countries. In Chapter 4, Professor Tom Ginsburg and International IDEA's Kimana Zulueta-Fülscher recount three major secession-related cases: calls for secession in Catalonia, the independence referendum in Scotland and the annexation of Crimea from Ukraine. The authors urge constitutional designers to accept the fact that issues linked to the threat of secession will probably never go away, and that the constitutional design should therefore be clear in this regard. Specifically, they recommend provisions that can compel democratic deliberation, which clearly reflect the

will of the affected territory, and which do not hold the affected territory hostage to a veto by a minority of the rest of the population.

In Chapter 5 Professor Roberto Toniatti delivers a wide-ranging account of federalism and regionalism. Analysing developments in seven countries—Belgium, Bosnia and Herzegovina, Canada, China, Iraq, Tanzania and Yemen—Toniatti highlights two constitutional forms of the 'territorial mobility of power': federalism and regionalism. His two main reflections are worthy of serious consideration by constitutional designers. First, any federal/regional arrangement is in constant dialogue between the centre and the regions, and is thus in need of ongoing maintenance and adjustment in response to evolving power dynamics. Second, the political agreement on which such forms are based must not only concern the allocation of power and autonomy to the periphery, but pay equal attention to institutions at the centre and a pluralistic national vision shared by both centre and regions.

International IDEA's Yuhniwo Ngenge covers the ever-topical issue of presidential term limits in Chapter 6, contrasting the remarkably untroubled proposal by Ecuadorian President Rafael Correa for a constitutional amendment to allow him to run for re-election when his term expires in 2017, and his likely success, with the mass uprising in Burkina Faso in 2014 that forced President Blaise Campaoré from power when he attempted a similar amendment, as well as the protests in the Democratic Republic of the Congo which faced down President Joseph Kabila's attempts to extend his time in power. Ngenge highlights socio-economic performance, in particular in terms of reducing extreme poverty, as the key driver in reducing or increasing the political costs of altering constitutional limits on the number of terms a president can serve. With this in mind, Ngenge suggests Rwanda as another case in which presidential term limits are unlikely to hold in the near future.

In Chapter 7 Professor Yasuo Hasebe analyses the issue of war powers in Japan and the United Kingdom. In Japan, article 9 of the country's 'pacifist' constitution has come under repeated attack. Most recently, Prime Minister Shinzō Abe has used various mechanisms to change, circumvent or reinterpret the article's prohibition on the maintenance of 'land, sea and air forces as well as other war potential'. In 2014, in contrast, the British Government proposed but then lost a parliamentary vote on the use of armed forces in Syria. Prime Minister David Cameron's decision to respect the will of parliament makes it likely that parliamentary approval for the deployment of armed forces abroad—first proposed by Prime Minister Tony Blair before the 2003 invasion of Iraq—is fast becoming a constitutional convention.

Finally, the team at I-CONnect, the online blog of the *International Journal of Comparative Constitutional Law*, has recommended ten scholarly articles on the subject of constitution-building processes from its 2014 archive, which we present as an appendix to this Annual Review. The list is impressive for its quality and variety, covering analyses of constitution-building processes in the context of the events of the Arab Spring, the internationalization of national constitutions, the role of citizen assemblies in making constitutions, the Islamic content of constitutions and a host of other issues. The blog itself is a wonderful resource for staying up to date with scholarly thought in our field.

Each of the chapters in this Annual Review is worthy of its own publication, and a number of other issues were left off the table due to time and space constraints. Nevertheless, this publication provides a broad and accurate picture of the state of constitution-building in 2014, underlining its relevance to the wider political contexts in the countries and regions discussed. As a whole, the publication serves to underscore the number and variety of constitutional transitions currently taking place around the world; the significance of constitutions; the importance of constitution-building processes as both conflict-mediation and conflict-prevention tools; the sometimes divisive norm- and identity-creation functions of constitutions; and the challenges these factors pose for women, minorities and territorially concentrated populations that do not subscribe to the national projects and visions created and reinforced by constitutions.

The Hague
December 2015

1. Women and constitution-building in 2014

1. Women and constitution-building in 2014

Melanie Allen

Introduction

In 2014 Tanzania debated a new constitution, demands for which have been heard at least since multiparty democracy was introduced in the early 1990s. At the same time, Egypt, Tunisia and Zimbabwe were engaged in consolidating the new political values and governance structures set out in their recently promulgated constitutions (Allen 2014). Although their dispensations were new, the building blocks for creating these systems—institutions, political parties and key political figures—were in many cases the same, as were the ingrained attitudes and practices that challenge the achievement of gender equality.

The debate about Tanzania's proposed constitution

*Tanzania's constitutional reform process**

The Constitution of the United Republic of Tanzania dates from 1977, when it replaced the interim constitution installed in 1965 following the 1964 union of Tanganyika and Zanzibar.[1] In 2012 President Jakaya Kikwete appointed a Constitutional Review Commission (CRC) tasked with conducting a participatory constitutional review process (Branson 2015). Of the 30 members of the CRC (not including the chair, vice-chair, secretary and deputy), 11 were women.

* This analysis is based on an unofficial translation of the proposed constitution undertaken by International IDEA (2014b), which can be accessed at <http://www.constitutionnet.org/vl/item/proposed-constitution-tanzania-sept-2014>. Unless otherwise stated, all references in the text to the proposed constitution are based on this translation.

The CRC led the first two stages of the four-stage constitutional review process (see also chapter 5 in this volume). The first stage involved the organization of public consultations at the local level, including opportunities for civil society organizations (CSOs) and political parties, which resulted in a first draft (Polepole 2015). In the second stage the CRC publicized the first draft and organized a series of constitutional review forums to enable citizens to share their views, including two specifically for people with disabilities. Independent organizations also organized forums to solicit views on how to improve the draft constitution (Polepole 2015). Based on these inputs, the CRC prepared a second draft.

In the third stage, in February 2014 a Constituent Assembly (CA) was established and mandated to review the second draft in order to produce a proposed constitution. The CA was composed of the members of the national parliament, the members of the subnational parliament of Zanzibar and 201 presidential appointees, who had been nominated by CSOs and associations (Polepole 2015). Of the 201 appointed members, 100 are women (Maoulidi 2014a). Following contentious and divisive deliberations on the CRC's second draft, the CA voted on and passed the proposed constitution in October 2014, which was planned to be submitted to a referendum in 2015 (Clyde and Co. 2014). Preparing for and holding the referendum constitutes the fourth stage in the constitutional review process.

The Network of Women and the Constitution (Mtandao Wa Wanawake na Katiba), an influential coalition of more than 50 women's groups, worked together to identify a platform of 12 key issues focused on political and socio-economic rights for women and the need for an independent commission to oversee the implementation of these rights, and to advocate for their inclusion in the constitution (Meena 2014).[2] Most of the platform's demands have been reflected in the proposed constitution.

Women's political participation and representation

Tanzania has made continuing progress in the representation of women in its national parliament through the adoption of increasingly ambitious quotas. A quota system with special seats for women was introduced in 1985 (Swai et al. 2013: 2). Following the introduction of the multiparty system in 1992, the Tanzanian Government mandated a quota of 15 per cent of the seats for women in parliament. As the majority of members of the national parliament are elected in first-past-the-post elections to single-member districts (Smith 2015: 34), the quota was reached by introducing special seats for women (Quotaproject.org n.d.). These seats were allocated among the political parties

by proportional representation, based on the number of directly elected constituency seats each party won (Quotaproject.org n.d.).

In the 1995 elections just 8 women were elected to constituencies, while 37 women occupied women's seats, giving women 16.7 per cent of the seats in parliament (Electoral Institute for Sustainable Democracy in Africa 2010). This increased to 21.5 per cent in the 2000 elections, when 12 women won constituency seats and 48 women occupied women's seats (EISDA 2010). Before the 2005 elections, the Constitution was amended to increase the quota for women to 30 per cent and to change the mechanism for allocating women's seats, basing it on the percentage of votes received by each party with a 5 per cent threshold. These changes led to an increase in the number of women in parliament, with 75 special seats for women in addition to 17 constituency victories, and in the proportion of women to about 30 per cent. The 2010 elections saw a further increase to almost 37 per cent (EISDA 2010).

Despite this positive trend, which places Tanzania 23rd in the global ranking of women's representation in parliament (Inter-Parliamentary Union n.d.), the system for achieving these gains has been criticized for harming women's chances of being elected to constituency seats, reducing the effectiveness of female parliamentarians who occupy the special seats, leaving intact male-dominated political party structures, and being a tool of the ruling party for the consolidation of its power (Meena 2004). Women who occupy special seats are selected by their political parties and do not represent geographic constituencies as directly elected parliamentarians do. Political parties control the screening mechanisms for selecting women for these seats, and the mechanisms themselves generally lack transparency (Meena 2004). Therefore, the system encourages a high degree of political party loyalty among the women selected for special seats, who are not directly accountable to voters.

This has led to a perception among some that special-seat members of parliament are 'second-class parliamentarians' who enjoy less legitimacy than their colleagues (Yoon 2011: 92), which in turn affects their ability to influence the agenda in parliament and to be effective legislators.[3] It has been argued that the presence of special seats diminishes political parties' interest in nominating women as candidates for constituency seats (Meena 2004), partly because seats elected using a first-past-the-post system are generally more difficult for women to win.[4] Professor Ruth Meena, a feminist scholar and activist, has noted that 'reserved seats have taken the pressure off political parties to nominate women to stand in constituency seats. . . . Special seats have eroded the competitive "power" of women in regard to what is constructed as the "normal" way of entering parliament and other representative organs of the state' (Meena 2004: 85). Since parties can rely on special seats to achieve

women's representation, there has been a lack of serious effort to transform the internal power dynamics of political parties in order for women to achieve greater representation within the party leadership, greater influence within political parties more generally and increased support for female candidates (Meena 2004).

Given these criticisms, women's participation in politics has become a key issue. Some gender equality advocates have supported the introduction of proportional representation, which allows for forms of quota other than reserved seats (Chatham House 2012). The CRC's second draft eliminated special seats for women and instead provided for two-member constituencies of one woman and one man, thereby guaranteeing parity in parliament. Following revisions in the CA, however, two-member constituencies were replaced with a provision that states that the basis of representation in parliament shall be equal representation of elected male and female parliamentarians.[5] While the proposed constitution calls for parity between women and men, it leaves the mechanism for achieving equal representation to enacting legislation, which may result in the same type of quota as is currently in force. The draft is silent on women's representation in public bodies—although, with regard to the public services, article 204(2) mandates that appointments 'in institutions or ministries of the Union shall be made in accordance with representation of the two parties of the Union, gender equality and people with disabilities'.

Rights elaborated in the proposed constitution

A new feature of the proposed constitution is the introduction of specific sections concerning the rights of specific groups, under Chapter 5 on human rights and the responsibilities of citizens and national authorities (Part 1). Specific provisions relate to the rights of children (article 50), youth (article 51), people with disabilities (article 52), minority groups (article 53), women (article 54) and the elderly (article 55). These rights are detailed in Box 1.1.

Article 54, on the rights of women, responds to several of the challenges to substantive gender equality in Tanzania. In addition to protection from discrimination, women will have the right to protection from harassment, abuse, violence, sexual violence and harmful traditional practices. Coupled with article 9—which asserts the supremacy of the constitution and that culture and tradition are 'obligated to follow and comply with' the constitution—the proposed constitution takes a clear stand against cultural practices that are harmful to women, including female genital mutilation (FGM). Despite the fact that FGM is outlawed for girls under the age of 18, approximately 15 per cent of girls and women aged 15–49 are currently subjected to the practice, with prevalence reaching 70 per cent in some regions (UN CEDAW 2014: 17).[6]

Box 1.1. Rights elaborated in the proposed Tanzanian constitution

Article 50
(1) Every child has the right to: (a) have a name, citizenship and registration; (b) express his [or her] views, be heard and be protected against impunity, cruelty, abuse, child labour and dehumanization; (c) an environment that encourages play and learning; (d) be held in an appropriate environment, in the case of offenders; (e) nutrition, health care, housing and an environment that contributes to physical, mental and moral growth; (f) participate in activities related to his [or her] age; and (g) to get care and protection from his [or her] parents, guardians or an authority of the land, without any discrimination. (2) It will be the duty of every parent, guardian, community and national authority to ensure that children are taught values and ethics appropriate to their age. (3) For the purposes of this article 'child' means a person under the age of 18 years.

Article 51
(1) Every youth has the right to participate fully in the development activities of the United Republic and society in general, and to that end, the Government of the United Republic and society shall ensure youth favourable circumstances to become good citizens who can participate fully in political, economic, social and cultural affairs. (2) For the purposes of sub section (1), parliament shall enact legislation governing, among other things, the establishment, composition, functions and operation of the National Youth Council.

Article 52
A person with disabilities has the right to: (a) be respected, recognized and treated in a way which does not reduce his [or her] dignity including discrimination, bullying, violence and harmful traditional practices; (b) get training in the use of special equipment to participate in social activities; (c) have infrastructure and an environment which allow her/him to go wherever s/he pleases, use transport facilities and get information; (d) use sign languages or written language with the aid of special equipment or other methods that are appropriate; (e) find employment and work; and (f) access to health services, safe motherhood, rehabilitation and integration.

Article 53
(1) The authorities of the land, in line with the country's resources and capabilities, shall make provisions of law that enable minority groups in society to: (a) participate in the leadership of the country; (b) have special opportunities in education for economic and employment development; and (c) be given land where they traditionally live and source or produce food. (2) The government and authorities of the land shall take deliberate steps to promote and sustain economic activities and put in place infrastructure for the delivery of housing, educational, water and medical services to current and future generations of the minority groups in society. (3) For the purposes of this article, 'Minority Group' means a category of people whose livelihoods depend on natural vegetation and the environment around them for food, shelter and other necessities of life.

Article 54
Every woman has the right to: (a) be respected, valued and their dignity recognized; (b) protection against discrimination, harassment, abuse, violence, sexual violence and harmful traditional practices; (c) participate in elections and all stages of decision-making without discrimination; (d) get employment opportunity and be paid the same salary as a man; (e) protection for her employment while she is pregnant and after delivery; (f) get quality medical services including safe reproductive health; and (g) own property.

Article 55
The authorities of the land shall put in place procedures for the elderly to: (a) participate in social development affairs; (b) further their lives according to their abilities including working; (c) have access to medical services; (d) protection from exploitation and violence including torture and murder; (e) provide infrastructure and a better environment which will enable travel using public transport facilities at low cost; and (f) be cared for and receive assistance from their families, society and the authorities of the land.

Source: International IDEA, 'The Proposed Constitution of Tanzania (Sept 2014)' [unofficial translation], ConstitutionNet, December 2014b, <http://www.constitutionnet.org/vl/item/proposed-constitution-tanzania-sept-2014>

A woman's right to own property is also recognized, and is further elaborated in Chapter 3 on land, natural resources and the environment, reinforcing 1999 legislation that provides for women's rights to acquire, own and use land, as well as rights to land in the case of divorce or the death of a spouse, and mandates that customary or traditional means for allocating land that do not respect the rights of women are void (Lowe Morna 2014: 164).[7] Approximately 70 per cent of women in Tanzania are 'engaged in agricultural

occupations' (UN CEDAW 2014: 30), which makes secure land-tenure rights for women critical to poverty reduction, especially among rural women.

Article 54 also protects women's rights to participate in elections and decision-making processes, as well as women's labour and employment rights, including during pregnancy. Tanzania has the highest labour force participation rate for women in southern Africa (90 per cent), and the constitutional recognition of these labour and employment rights strengthens existing legislation. Women's right to medical care and safe reproductive health is recognized. Article 52 on the rights of people with disabilities also establishes the right of access to health services and safe motherhood—an important recognition of the intersectional challenges many women face.[8] Tanzania has made positive progress in this regard, reducing maternal mortality rates (MMR) by 55 per cent between 1990 and 2013, but the 2013 MMR was still 410 (World Health Organization, 2014: 43). This relatively high figure is related to poverty, early marriage and lack of access to health care.

Article 50(3) defines a child as a person under the age of 18. Tanzania has one of the highest rates of child marriage in the world, and girls from poor families and from rural areas are disproportionately affected (United Nations Population Fund 2013). The Marriage Act (1971) currently sets the minimum age for marriage at 18 for boys and 15 for girls, with the possibility of marriage at 14 with the approval of a judge, although girls sometimes enter into customary marriages earlier (UN Population Fund 2013). While setting a minimum age for marriage in the constitution would have been a stronger position, some gender equality advocates hope this provision will open the door to raising the statutory age for marriage for girls to 18 (Ngowi 2014).

Chapter 5 of the proposed constitution also includes two important provisions regarding the judicial enforcement of the rights contained within it. Article 62(1)(a) obliges the judiciary or any other decision-making body interpreting the rights in this Chapter to observe international law; and provides broad legal standing to file suits in the High Court for violations of these rights, allowing organizations and persons acting on behalf of another to file a suit in addition to the affected individuals.

Equality and non-discrimination

The proposed constitution includes several provisions that affirm the importance of equality and non-discrimination, which strengthens the constitution as a framework for advancing gender equality aims. The preamble refers to sex discrimination, and article 6 identifies gender equality as a principle of good government. Article 33 prohibits discrimination on

the basis of sex, and prohibits laws that are discriminatory on their face or in their effect. This supports efforts to achieve de facto equality and to reform legislation that has a harmful impact on women and girls. Article 33(5) defines discrimination as including discrimination on the basis of sex, and article 33(6) specifies that special measures intended to address specific societal problems will not be considered discriminatory. This provision allows the state to pursue laws, policies and programmes that aim to accelerate the achievement of substantive equality.

Article 12 contains a state commitment to preventing and eliminating injustice, discrimination, intimidation, violence and oppression among citizens on the basis of several characteristics including sex. Unfortunately, additional provisions that contribute to gender equality—including access to legal aid, and access to health care and care for reproductive health—appear in Chapter 2 (article 14). According to article 20, this Chapter is not justiciable, although article 19 requires the Tanzanian Government to make annual reports to parliament on its progress with the implementation of the national objectives outlined in the constitution.[9]

Other relevant provisions

Under current law, while women and men have equal rights to pass their citizenship on to their children, only men can confer citizenship to foreign spouses (Tanzania Citizenship Act 1995). In contrast, article 68 of the proposed constitution, on naturalized citizenship, is formulated in gender-neutral language, allowing women to confer citizenship on their spouses, and grants citizenship to children if either parent is a citizen.[10] Article 204 mandates that the appointment of managers and officials in the public services shall be on the basis of gender equality and the representation of people with disabilities.

Finally, Chapter 15 of the proposed constitution introduces a new institution, the Commission for Human Rights and Good Governance, to protect human rights and gender equality. The Commission is mandated to promote, protect and monitor the implementation of gender equality; and to conduct inquiries and research, and institute proceedings in court, while also advising the government on matters related to human rights and good governance.

Conclusions on the proposed constitution of Tanzania

Compared to the current Tanzanian Constitution, the proposed constitution strengthens women's existing rights and introduces new rights. However, while it has been endorsed by several prominent women and gender-equality

advocacy organizations, others view the provisions related to women as 'empty rhetoric' (Maoulidi 2014b). Furthermore, the constitution-building process, and in particular the role of the CA in introducing significant changes to the CRC's second draft, has received severe criticism (Burchard 2015; Polepole 2015; Nkya 2014; Maoulidi 2014b). Critics regard the process as having been hijacked by the ruling party, Chama Cha Mapinduzi. Among their concerns, they have expressed disappointment that the structure of the union between Tanganyika and Zanzibar reflects the status quo and that the powers of the President remain broad (Burchard 2015; Polepole 2015). Although opposition parties and civil society have been clamouring for constitutional reform since the return to multiparty democracy in 1992, dissatisfaction with the process—and with the proposed constitution—has led led opposition parties to call for a boycott of the constitutional referendum. It is now far from certain that 2015 will be the year that Tanzania finally promulgates a new constitution.

Consolidating constitutional reform in Egypt, Tunisia and Zimbabwe

Egypt

Egypt's 2014 Constitution contains significant advances on the recognition and protection of women's rights compared to its 1971 and 2012 constitutions, but there has been little progress on implementation. Egypt's post-constitutional approval context resembles that of Zimbabwe, with old institutional powers still at the helm, a struggling economy and high levels of unemployment, the continued use of authoritarian tactics against opponents and dissenters, a lack of political will among the leadership to implement the Constitution, and a disregard for key constitutional provisions relating to gender.

The presidential elections in May 2014 saw a voter turnout of only 47.45 per cent. The former head of Egypt's armed forces, Abdel Fattah el-Sisi, won almost 97 per cent of the votes (IFES n.d.) in elections that were characterized as reasonably free but not fair (Kirkpatrick 2014). There was no sitting parliament in 2014. Instead, the executive issued legislation by presidential decree. The People's Assembly (lower house) had been dissolved following a ruling by the Supreme Constitutional Court in June 2012. In July 2013, following the removal of President Mohamed Morsi, interim President Adly Mansour dissolved the upper house, the Shura Council (Deutsche Welle 2013). The 2014 Constitution replaced both institutions with a unicameral legislature, the House of Representatives (HoR) (Part V, Chapter 1, articles 101–38).

The Egyptian Constitution contains only a vague and weak clause concerning women's representation in parliament: 'The State shall ensure the achievement of equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution. The State shall take the necessary measures to ensure the appropriate representation of women in the houses of representatives, as specified by the law' (article 11). The electoral law issued by interim President Mansour in June 2014 allocates 420 individual candidate seats, 120 seats elected by a closed party-list system and 27 seats for presidential appointees (Morsy 2015). Although women's groups and the National Council for Women called for women to make up at least 30 per cent of parliament, only 56 of the 120 party-list seats were reserved for women (Nazra for Feminist Studies 2014c).[11] Women would therefore make up a minimum of around 10 per cent of parliament, while 74 per cent of seats would be filled through individual candidacies, which are generally more difficult for women to win than party list seats.

Women's political representation in decision-making bodies has thus far also been disappointing. In his first presidential decree, issued in June 2014, President Sisi created a Supreme Committee for Legislative Reform, acting with parliamentary powers, with a mandate to draft legislation and review proposed legislation. The Committee does not include any women. Despite the recognition of the right of women to be appointed to public bodies without discrimination in article 11 of the Constitution, calls to include women were rejected by cabinet members, who argued that there is 'no obligation to allow women to join the committee, even if they are law experts' (Samir 2014), and that the National Council of Women already has the right to review articles concerning women.

Women fared only marginally better in the cabinet appointed in June, with four women appointed out of 31 ministerial positions. This decision was criticized by the National Council of Women, which noted that the cabinet appointments did not align with President Sisi's emphasis on the importance of women in decision-making positions in his inauguration speech (Ahram online 2014b). In August 2014 women's groups again protested when the Minister of Local Administration announced that no women would be appointed as governors until 'they are trained and equipped with the necessary qualifications for local administration' (Nazra for Feminist Studies 2014b).

The dearth of women appointed to decision-making positions illustrates the indifference of Egypt's leadership to its constitutional commitments. Without meaningful participation by women in governance, the state cannot effectively address the numerous social, economic and cultural barriers to women's substantive equality. One of the most pressing is gender-based violence, and

violence against women in public spaces has reportedly increased since the 2011 revolution (Dean 2014). A 2013 survey by UN Women found that 99.3 per cent of female respondents 'had been subjected to one form or another of harassment' (Deeb 2013). Violence against women in the private and public spheres seeks to control women, whether in the home or as citizens agitating for change. Article 11 explicitly commits the state to protect women from violence. In one of his last acts as interim President, Mansour issued a decree criminalizing sexual harassment in June 2014. While government action to combat sexual harassment is critical and welcome, there is a 'body of law', particularly in the penal code, that 'uphold[s] disparity and discrimination between men and women' and 'provides legal cover for systematic infringements of the human rights of victimized women' (Nazra for Feminist Studies 2014a). Therefore, comprehensive legislative reform is required before the state can begin to fulfil its obligations under article 11.

The law on non-governmental organizations proposed by the Ministry of Social Solidarity in June 2014 is a significant threat to independent women's organizations. The proposed bill, which goes even further than the existing 2002 law on associations and foundations, would exercise virtually complete state control over the approval and functioning of CSOs, and would create a stranglehold on civic mobilization in violation of article 75 of the Constitution (Arab Forum for Alternatives 2015). Despite the civil rights protections created by the Constitution, the Egyptian Government does not tolerate dissent, whether from religious conservatives or secular liberals. The Muslim Brotherhood was declared a terrorist organization in 2013 and its political arm, the Freedom and Justice Party, was dissolved by court order in August of that year. In April 2013 a court banned the April 6 Movement, which had been a key player in the 25 January Revolution that ousted Mubarak. Military trials of civilians have increased, and human rights defenders and journalists have been targeted for prosecution and even travel bans (Ajroudi 2014; Ahram Online 2014a; Egypt Initiative for Personal Rights 2014; McRobie 2015; Nazra for Feminist Studies 2015). This increasingly restrictive environment affects the ability of gender-equality advocates to mobilize effectively, in both their public-policy advocacy efforts and their own research and service-delivery activities.

Tunisia

Tunisia's Jasmine Revolution, which began in December 2010, sparked a series of uprisings in the Middle East and North Africa which are often referred to collectively as the Arab Spring. Tunisia's adoption of its new Constitution in January 2014 also garnered global attention and ushered the Jasmine Revolution into a new phase (see also chapter 5 in this volume).

In drafting the Constitution, the National Constituent Assembly (NCA) reinforced Tunisia's place as a regional leader on women's rights by affirming equality between women and men and the principle of non-discrimination (article 21). The Constitution commits the state to protect women's rights and to eradicate violence against women (article 46), and advances women's political participation (articles 34 and 46). Furthermore, in April 2014 Tunisia became the first country in the region to lift its specific reservations to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which it had ratified in 1985.[12]

With the first parliamentary and presidential elections set to take place in October and November 2014, respectively, the energies of the political class were focused on drafting a new electoral law and the subsequent political campaign. Elections to the NCA in 2011 had taken place under a quota system that mandated parity between male and female candidates through the alternation of women and men on closed party lists (Carter Center 2011: 20). However, the law did not specify women's placement at the head of the candidate lists, and as a result men headed most lists and women gained just 27 per cent of the seats in the NCA—well below parity. Gender-equality advocates sought to improve on these results, and implement the constitutional provisions guaranteeing women's representation on elected bodies (article 34) and parity in elected assemblies (article 46). They campaigned to include both vertical parity (the alternation of women and men on candidate lists) and horizontal parity (the placement of a woman at the head of at least half of all of a party's candidate lists) in the new electoral law.

Vertical parity was not questioned, and an initial draft of the law included both vertical parity and a one-third horizontal quota. The latter was rejected by the NCA, however, and the quota system remained the same for the 2014 parliamentary elections (Cherif 2014: 4; Mekki 2014). As a result, only 148 candidate lists out of 1319 were headed by a woman, although the number of women elected to the new parliament, the Assembly of the Representatives of the People (ARP), increased to 67 (of a total of 217 seats, or 31 per cent). Only 11 of the women elected to the ARP have previous parliamentary experience, perhaps reflecting women's reluctance to run for the ARP as well as the negative experiences of women elected to the NRC during their time there. These include the weak technical support provided to members of parliament (MPs) by their parties and the NCA; the lack of psychological and financial support from parties for female MPs from distant districts who had to relocate to the capital without their families, in some cases leading to financial and familial hardship; and 'harassment, assault, insult, and denigration . . . either directly or through social media'. The issue

of harassment is particularly frustrating, as there is a legislative gap in Tunisia which means that in many cases women who sought to file claims against their harassers were unable to pursue their complaints (International IDEA 2015).

Beji Caid Essebsi, the leader of the secular Call of Tunisia (Nidaa Tounes) political party, won Tunisia's first free presidential election following a second round of voting. In a field of 27 presidential contenders, Kalthoum Kennou was the only woman. A judge since 1989, Kennou was known for her willingness to take on the regime of President Zine El Abidine Ben Ali. She has continued to defend and promote the independence of the judiciary, and ran as an independent candidate. While Kennou garnered only about 18,000 votes, her candidacy reinforced article 74, which recognizes the right of women to stand for election to the presidency, and was symbolic of a new era of Tunisian politics (Ghribi, 2014).

Call of Tunisia also won a plurality of 86 seats in the ARP. Essebsi, who served in the administrations of presidents Habib Bourguiba and Ben Ali, had become Prime Minister in 2011 following Ben Ali's ousting. For many voters, Essebsi's election represented a defence of the civic values that form the basis of the modern Tunisian state. To his opponents, however, he is indelibly associated with Tunisia's authoritarian past. While his party is secular and espouses support for women's rights, Essebsi revealed a lack of respect for women in politics when he made a dismissive remark about Mehrzia Laabidi, the deputy speaker of the NCA, during a television appearance in October 2014 (Said 2014; Ghribi 2014). In February 2015 Essebsi invited Habib Essid, the leader of Call of Tunisia in the ARP, to form a coalition government. The Essid cabinet contains only 3 women among 24 ministers (Mersch 2015) and 5 women among 14 secretaries of state, meaning that just 21 per cent of cabinet members are women. Both the number of women appointed as ministers and the lack of younger appointees have been criticized (Mersch 2015).

Other legislative priorities in relation to gender-responsive implementation include a Human Rights Commission, one of the five independent constitutional bodies established by the Constitution, and tackling violence against women. A bill was drafted to operationalize the Human Rights Commission in November 2014 (Klibi 2015). In accordance with the provisions of the Constitution that oblige the state to eradicate violence against women (article 46), and protect human dignity and physical integrity (article 23), and as part of a 2011 national strategy, a comprehensive bill on violence against women was drafted in 2014. The State Secretariat for Women, Children and Families had planned to submit this to the Council of

Ministers in November, but instead decided to shelve the draft (Klibi 2015). Even if the ARP does not pursue comprehensive legislation, at a minimum it will be necessary to review the criminal code, the personal status code and the labour code in order to meet the constitutional commitments regarding violence against women (Klibi 2015). For example, the current penal code does not criminalize forced marriage or sexual violence within marriage (Euro-Mediterranean Human Rights Network 2014).

Since the formation of the coalition government in February 2015, the newly elected parliament has turned its attention to addressing the most pressing issues facing the nation, including security and the economy, as well as constitutional implementation. In order to more effectively advocate and legislate for gender-sensitive laws and pass the necessary legislation in a timely manner, women in the NCA have urged women in the ARP to form a women's caucus (International IDEA 2014a). During the NCA, there was a movement to form a women's caucus to lobby for issues of special relevance to women in the constitution, but the rules and procedures of the NCA prevented the official establishment of the caucus. However, an informal women's caucus made several achievements, including critical inputs into the wording and adoption of article 46 and the creation of a non-partisan spirit of cooperation among most of the women who were members of the NCA.

So far, the ARP has established a special commission dealing with women, family, children, youth and elderly affairs, which has female and male members (Tunisie Numerique 2015). At the end of March 2015 the Chair of the Committee on Rights and Freedoms announced that she intended to present a bill to the ARP on the formation of a women's caucus (Brahim 2015). Legislation to establish the Constitutional Court, which according to article 148(5) must be established within one year of the first legislative elections, is also one of the priorities of the new parliament.

Zimbabwe

Zimbabwe's Constitution, which was approved by 94 per cent of voters in a referendum in March 2013, significantly advances the constitutional protection of women's rights and gender equality in the country. It uses gender-inclusive language, contains extensive equality and non-discrimination clauses, recognizes a range of critical social and economic rights, and provides for women's participation and representation in government. The Constitution complements its substantive approach to gender equality with a robust framework for the recognition and protection of human rights.

However, since the Constitution entered into force, progress with its implementation has not advanced as quickly as many had hoped. Speaking

at a conference on constitutional implementation in March 2015, the Chair of the parliamentary committee on Justice, Legal and Parliamentary Affairs, Jessie Majome, described the current lack of progress as a 'constitutional crisis' (Crisis in Zimbabwe Coalition 2015), amid indications by the Minister of Finance that the Constitution requires amendment due to the expense of implementation. In addition, the ruling party, the Zimbabwe African National Union–Patriotic Front (ZANU–PF), has shown disregard for critical constitutional provisions, including key gender-related provisions. A challenging economic climate and infighting within the country's two main political blocs—ZANU–PF and the largest opposition party, the Movement for Democratic Change–Tsvangirai (MDC–T)—has compounded the challenges facing efficient constitutional implementation.

In addition to women's representation in parliament, the Constitution contains clear commitments to women's representation in government (article 17).[13] However, following his re-election in 2013, Zimbabwean President Robert Mugabe appointed only 3 women to the 26 cabinet positions available (Ndebele 2013). In addition, he appointed only 3 female ministers of state (out of 13) and 5 women as deputy ministers (out of 24) (Ndebele 2013). At only 11.5 per cent, the gender balance of the new cabinet fell far short of Zimbabwe's constitutional and international commitments to gender parity, which include the Southern African Development Community Protocol on Gender and Development and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. President Mugabe brushed aside his critics, however, arguing that 'there were just not enough women' (Ndebele 2013). In February 2014 Mugabe again showed his disregard for the Constitution's gender-equality guarantees when he appointed only two women (out of 12 positions) to the Judicial Services Commission (Mushonga 2014; Muzulu 2014).

An inter-ministerial committee chaired by the Deputy Minister at the Ministry of Justice, Legal and Parliamentary Affairs is in charge of the process of aligning existing legislation with the Constitution.[14] It is thought that approximately 400 bills will require realignment. One of the few draft bills related to gender presented in 2014 operationalized the Gender Commission, one of the independent commissions established by Chapter 12 of the Constitution (Veritas 2014a). Gender equality advocates were highly critical of the draft bill. The Gender Commission, like the four other commissions established by Chapter 12—the Electoral Commission, the Human Rights Commission, the Media Commission and the National Peace and Reconciliation Commission—is intended to be an independent body, accountable only to parliament. However, critics of the proposed bill say that

it embeds the 'functions and operations' of the Gender Commission in the Ministry of Women's Affairs, Gender and Community Development, which gives it insufficient independence to carry out its mandate effectively (Women's Coalition of Zimbabwe n.d.; Veritas 2014a).[15] Following widespread criticism, the Ministry of Women's Affairs, Gender and Community Development agreed to revisit the draft bill.

Gender equality advocates expressed disappointment with the development process of this draft bill (Sifelani-Ngoma 2015) but civil society monitored the process closely to ensure that its views were heard. This included proposing draft legislation to relevant ministries.[16] Overall progress continues to be slow. President Mugabe emphasized the importance of aligning legislation to the Constitution while opening the Second Session of the Eighth Parliament on 28 October 2014, but none of the 14 bills presented by the Zimbabwean Government were related to achieving this end (Veritas 2014b).

Therefore, Zimbabwe is in the peculiar and incoherent position of having a Constitution in place with robust human rights guarantees while still operating under an oppressive legal regime from the previous era (Associated Press 2014). The Zimbabwean Government, dominated by ZANU–PF, continues to use the law to attack journalists, independent media and human rights defenders (Human Rights Watch 2014; New Zimbabwe 2015). Nonetheless, advocates are using the courts to seek to force the government to adhere to the Constitution. In November 2014 a case was filed in the Constitutional Court challenging the existing laws on marriage and customary marriage as unconstitutional to the extent that they allow the marriage of girls under the age of 18 (Loveness Mudzuru and Ruvimbo Tsopodzi vs Minister of Justice et al. 2014). The Constitution does not set a minimum age for marriage, but several provisions read together—including the right to establish a family for those aged 18 and above (article 78), the rights of children 'to be protected from economic and sexual exploitation . . . or any form of abuse' (article 81), and the provisions which prohibit discrimination on the basis of gender, and guarantee men and women equal treatment under the law (article 56)—support an interpretation that marriage for girls under the age of 18 is unconstitutional (Veritas 2015).

Conclusions

In 2015 Tanzanians will decide whether the proposed constitution fulfils their aspirations for reform, while Tunisians, Egyptians and Zimbabweans will continue to make strides, and perhaps face setbacks, on their implementation journeys. While it is too soon to judge the success of these constitution-

building efforts, progress with the implementation of commitments to women's rights and equality is an indicator of democratic consolidation.

Of course, the advancement of women's equality is not just linked to the existence of a constitution. As feminist scholar Valentine Moghadam notes, 'Whether or not a women-friendly democracy takes hold depends on a number of factors: the institutional and normative legacy of the past, the role, visibility, and influence of women's rights organizations before and during the transition, and the nature of the new government and its capacity for a rights-based economic and political system' (Moghadam 2014: 141).

While the issues discussed in this chapter are some of those most directly related to women's equality, the overall governance structure—judicial independence, the balance of power among the branches of government and civilian oversight of the military—is also critically important and will largely determine each country's progress towards greater gender equality.[17]

Notes

1 The 1977 Constitution has undergone 14 amendments, including the introduction of multiparty democracy. A constitutional reform committee formed by President Benjamin Mkapa in 1998 also recommended constitutional amendments.

2 The 12 key issues identified by the Mtandao Wa Wanawake na Katiba coalition are: (1) women's rights to be spelled out in the constitution; (2) the prohibition of all laws, regulations and practices which discriminate against women; (3) women's right to dignity to be protected by the constitution; (4) the international instruments and standards to be respected and translated into law; (5) the constitution to guarantee equal rights for women in decision-making organs; (6) spelling out the age of the child (to protect girl children against early marriage); (7) women's rights to access, control and benefit from national resources should be spelled out in the constitution; (8) women's rights to maternal health services to be spelled out; (9) women's rights to access and benefit from basic services to be spelled out; (10) the rights of women with disabilities to be spelled out; (11) a commission to monitor and oversee implementation of these rights to be provided for as one of the accountability instruments for gender equality; and (12) a family court to be provided for in the constitution.

3 Female parliamentarians have, however, been crucial to the passage of important legislation such as the revision of an education law to boost the enrolment of women in university, a landmark sexual offences bill, land reform legislation (Meena 2004: 83) and gender-sensitive budgeting (Yoon 2011: 89).

4 This concern was also raised in Zimbabwe following the inclusion of reserved seats for women for the first two parliamentary cycles after the 2013 Constitution entered into force.

5 Article 124(4) of the proposed constitution states: 'Without prejudice to the provisions of this article, the basis of representation in sub article (2) (a) shall be equal representation of female and male parliamentarians'.

6 The Sexual Offenses Special Provisions Act (1998) prohibits FGM for girls under the age of 18 and provides sentencing guidelines but does not provide for a minimum sentence (28 Too Many 2013: 55).

7 Article 54(g) of the proposed constitution states: 'Every woman has the right to: (g) own property'. Article 22(2)(d) states: (2) All land will be owned, used and managed as prescribed by a law enacted by parliament to consider the following: … (d) every woman shall have the right to acquire, own, use, develop and manage land on the same conditions as for a man.' Article 45(1) states: 'Every person is entitled to own property, and has a right to the protection of his property held in accordance with the laws of the land'.

8 Article 52(f) of the proposed constitution states: 'Every woman has the right to: . . . (f) get quality medical services including safe reproductive health'.

9 Article 19 of the proposed constitution states: '(1) National objectives outlined in this Constitution shall be the guide to the Government of the United Republic and for the citizens in the use or interpretation of the provisions of this Constitution or any other law or in the implementation of policy decisions for the purpose of building a better, independent and proactive community. (2) The Government of the United Republic shall submit to Parliament once a year, information about the steps taken in the implementation of National Objectives'.

10 Article 68(2) of the proposed constitution states: 'A person who is married to a citizen of the United Republic and who: (a) remains in the marriage for a period of seven consecutive years; and (b) has met the requirements outlined in the law in accordance with sub article (1), can apply for citizenship of the United Republic by registration to be citizens'. Article 67(2) states: 'Subject to the provisions of this Constitution, a person who was born outside Tanzania shall be a citizen of the United Republic by birth from the date he is born if his parents or either of his parents is a citizen of the United Republic'.

11 There are also quotas for Copts, people with disabilities, youth, workers and farmers, and Egyptians abroad. On the June 2014 electoral law see Morsy (2015).

12 Tunisia adopted a decree lifting its reservations to articles 9, 15, 16 and 29 of CEDAW in 2011, but the withdrawal notification was not sent to or received by the UN until 2014: 'On 17 April 2014, the Government of the Republic of Tunisia notified the Secretary-General of its decision to withdraw the declaration with regard to article 15(4) of the Convention and the reservations to articles 9(2), 16 (c), (d), (f), (g), (h) and 29(1) of the Convention made upon ratification' (UN

Treaty Collection 2015). These reservations dealt with issues related to women's status within the family, citizenship laws and property rights (Arfaoui 2014). However, according to the withdrawal notification, Tunisia's general reservation is still in place: 'The Tunisian Government declares that it shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Chapter I of the Tunisian Constitution'.

13 Article 17:1(b) of the 2013 Constitution of Zimbabwe states: 'the State must take all measures, including legislative measures, needed to ensure that: (i) both genders are equally represented in all institutions and agencies of government at every level; and (ii) women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament'.

14 The legal officers of all ministries, departments and independent commissions are members (Nemukuyu 2014). Each ministry is responsible for reviewing legislation related to its mandate and submitting proposed bills to the inter-ministerial committee. Bills cleared by the inter-ministerial committee are then sent to parliament, where Jessie Majome, the former Deputy Minister of Women's Affairs, Gender and Community Development, chairs the Justice, Legal and Parliamentary Affairs Committee.

15 The draft bill did not clarify the roles of the Gender Commission and the Human Rights Commission, the objectives of which as articulated in the constitution overlap. In addition, it was inconsistent with the constitution, for example by setting out a process for the appointment of commissioners and by stating that their terms will be set by the Minister of Women's Affairs, Gender and Community Development, when both issues are already specified in the Constitution (Veritas 2014a).

16 Gender equality advocate, email correspondence with author, March 2015.

17 In 2015 International IDEA's Constitution-Building Processes Programme will publish a tool to support users conducting comprehensive gender audits of constitutions and draft constitutions.

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2. Constitution-building in a political vacuum: Libya and Yemen in 2014

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Jason Gluck

Introduction

The primary focus of constitution-making—particularly in countries making a transition from autocracy or recovering from violent conflict—has, in recent years, frequently and correctly turned to building a new national compact. Today we rarely observe constitution making undertaken as a single party exercise, as sometimes occurred when imperial powers handed down constitutions to former colonies, or strongmen tightly orchestrated the outcome. Particularly in post-conflict, transitional or divided societies, constitution-making is increasingly seen as a multi-stakeholder enterprise that requires groups to come together to agree—ideally by consensus—on how to define or redefine the nation and how to live together peacefully, including how they will share land, resources and power, as well as how they will respect religious, cultural, linguistic and other differences.

Experience shows that, in order to achieve a sustainable social compact, constitution-making must be first and foremost a political enterprise, grounded in negotiation, compromise and agreement between key stakeholders representing the main political and societal constituencies. For this, the constitution-making process must be designed in such a way as to ensure that key stakeholders or societal constituencies are 'at the table', or part of the constitution-making body, whether on the basis of geography, ethnicity, religion, language or political ideology. Most often, inclusion is achieved through political party representation in this body based on elected seats in a legislature or constituent assembly (as in Bolivia in 2009 or Tunisia in 2015). In other cases, representatives are chosen based on geographic representation (e.g. Bosnia and Herzegovina in 1995 or Afghanistan in 2003) or tribal or ethnic affiliation (e.g. Somalia in 2012). A mix of approaches can also be used. For example, in 2005 Iraq constituted its Constitutional Drafting Committee based on political parties' representation in parliament, but later added Sunni representatives to accommodate that important community.

There is no one right way to determine who should participate in the negotiation and drafting of a constitution. A myriad of different institutional and procedural options can be utilized. However, in each case a country must determine (a) which groups need to be represented in the constitution-making body, and in what proportions; (b) how to select representatives of those groups; and (c) how to structure the discussion so that meaningful reflection, debate, negotiation and compromise can take place. Careful attention to these questions is critical to ensure that what arises is indeed a national compact that speaks to the needs and aspirations of diverse—and sometimes antagonistic—communities and interests.

In addition to political stakeholders, there remains a vital role for constitutional experts and technicians, individuals who can be called on for advice on the formulation of constitutional provisions and the drafting of constitutional text. Technicians, however, cannot substitute for politicians—they cannot negotiate an elite bargain. The best designed constitution-making processes are those which marry these two critical roles, finding the appropriate balance between the leaders who need to 'strike the deal' and the technicians needed to translate it into a working constitutional text.

In 2014, intentionally or not, constitution-making processes were designed in such a way that they were disconnected from evolving and deteriorating national politics. This chapter analyses two processes that moved on substantially in 2014. In Libya, the Constitutional Drafting Assembly (CDA), an elected body, worked separate from competing political forces as security and governance in the country rapidly worsened. In Yemen, the Constitutional Drafting Commission (CDC), an appointed technical drafting body, was mandated to constitutionalize political agreements reached in the 2013 National Dialogue, but the agreements they were handed were incomplete in some respects and disputed in others.

Libya and Yemen offer examples of constitution-making that fail to include (in the case of Libya) or effectively execute (in the case of Yemen) processes and mechanisms to enable critical and timely political negotiation and bargaining among key stakeholders. While these constitution-making processes alone may not have caused the deterioration in political stability and security that was experienced in 2014—and is continuing in both countries—neither provided a critically needed forum to discuss and potentially resolve existential national challenges.

These cases raise questions and may provide lessons on the design of constitution-making processes in post-conflict and transitional states. Where constitution-making is a step towards putting divided societies on a path

towards peace and democratic consolidation through the forging of a new national compact, processes that divorce constitution making from national politics or inadequately connect constitution-drafting to political bargaining run the risk of developing texts that fail to achieve these objectives, potentially resulting in a total breakdown of the process.

Libya: No politicians allowed

Libya's constitution-making process was originally designed to be led by an elected legislature. The Constitutional Declaration adopted by the National Transitional Council (NTC) in August 2011 called for a future elected legislature, the General National Congress (GNC), to appoint a committee—it was unclear whether it would be comprised of members of the GNC, outsiders or a combination of both—that would draft the constitution within 60 days and submit it to the legislature for approval before being submitted to a national referendum for adoption (Constitutional Declaration, article 30). It was envisaged that the GNC, and perhaps the GNC-appointed committee as well, would serve as the forum for political negotiation, compromise and agreement, and would ensure that the draft enjoyed widespread support from Libya's various political constituencies before being submitted to the public for approval.

Even before the GNC's election in July 2012, however, Libyan minds changed. Concerns over the proportional make-up of the GNC relative to the population of Libya's three regions—Cyrenaica in the east, Tripolitania in the north-west and Fezzan in the south-west—led the NTC to amend the Constitutional Declaration days before the elections for the body that would eventually become the CDA.[1] By mid-2012, the expectation was that the CDA would produce a constitutional text within 120 days that would go directly to national referendum for adoption—bypassing the elected GNC completely.

The decision to elect a separate constitution-making body reflected Libyans' belief that, while the legislature should, at least to a great extent, reflect the country's population proportionally, the constitution-making body should not. At the time, the major political fault lines were seen as splitting along regional lines, with support in Cyrenaica for federalism, support in Tripolitania for more central control while allowing for administrative decentralization, and concern in Fezzan over minority rights. It was believed that a constitution-making body of equally represented regions—similar in composition to the body that negotiated and drafted Libya's 1951 Constitution—would create a forum conducive to negotiation and compromise between these factions,

which would result in a constitution that could serve as a new national compact. This reasoning was buttressed by the electoral law written for the CDA, which called for the CDA to be a 60-person body—20 from each region, with each region apportioning its seats in single member districts based on the population of cities and areas in each region. There were also seats set aside for minorities (two each for the three key minority groups) and six seats for women. Decision-making required a two-thirds plus one majority, ensuring that compromises would have to be made among the three regions in order to reach the necessary threshold. Nonetheless, minority groups objected to the fact that their concerns could be overridden using this formula and two groups ended up boycotting the CDA election.[2]

Once the allocation of seats based on regions was set, what remained was to determine which individuals would represent the regions and sit in those seats. In electing their representatives to the CDA, Libyans were heavily influenced by their disillusionment with politicians and mistrust of political parties.[3] In addition, '[w]hile the election law did not explicitly ban political parties from participating in the Constitutional Drafting Assembly elections, it was interpreted by party leaders and the general public alike as having done so' (Carter Center 2014: 5). Candidates ran on an individual basis rather than on party lists, and there was only minimal campaigning on issues in the run-up to the election. Candidates ran almost entirely on their professional résumés. Finally, GNC members were barred from running for the CDA, which disqualified many individuals with claims to a political constituency. As a result of these decisions, the CDA became an institution of lawyers and academics. Almost all were self-described political independents with no previous record in political office or other basis to assert a political constituency. Few were elected with a mandate for a particular constitutional outcome.[4]

Thus, two features of the design of the CDA defined its make-up, and by extension its capacity to deliver a consensual draft constitution. First, it was constituted to support political negotiation and dialogue as defined by Libya's three regions. Second, it was elected based on individual candidates running on largely professional rather than political credentials. That said, some of the minority groups did not follow the second paradigm and instead elected candidates who would represent their communal interests.

Almost as soon as the CDA began work, however, Libya's political landscape was turned upside down. The regional dynamic, if it had ever truly reflected political constituencies, was no longer the prevailing political narrative. Instead, it was replaced by an ever-changing assortment of political and security alliances between militias, tribes and local leaders. Lacking members

with a strong political constituency, it became increasingly unlikely that the CDA alone could deliver a constitution that could hold the country together.

The CDA met for the first time on 21 April 2014. The deadline for completing its work was 19 August. However, even before this deadline was reached, the GNC had dissolved itself and called for the election of a new legislature—the House of Representatives (HoR).[5] Libyans hoped the new election would break the gridlock experienced by the GNC, which had failed to achieve much during its two years of operation. The election resulted in a new legislature with a vastly different political make-up from the GNC. In particular, the Justice and Construction Party (the Libyan offshoot of the Muslim Brotherhood) and allies of Misrata (a city in Tripolitania located 190 kilometres east of Tripoli) were significantly less well represented compared to the number of seats they had won in the GNC. Instead of a fresh start, Tripoli broke into post-election violence and came under the control of militias loyal to Misrata (*The Guardian* 2014; Agencia EFE 2014). The newly elected HoR fled to the eastern city of Tobruk, while the old GNC declared itself Libya's rightful legislature after the Supreme Court, in a controversial judgement, determined the HoR to be unconstitutional (Imed Lamloum 2014). Rival militias, variously aligned with the two legislatures, engaged in targeted assassinations, street fighting and aerial bombardments as the nation slipped into civil war (Daragahi, Politi and Barker 2015).

At the heart of Libya's instability is competition between multiple forces that have been variously described as based on ideology ('Islamists' versus 'nationalists/liberals'), tribal affiliation ('Mistratis' versus 'Zintanis'), institutional affiliation (the GNC versus the HoR), relationship to the February 2012 revolution ('revolutionaries' versus 'counter-revolutionaries') and a loose conglomeration of militia alliances ('Operation Dawn' versus 'Operation Dignity'). While these designations are overly simplistic and fluid, the chapeaus under which these loose configurations fall are the two competing legislatures.

It was clear by mid-2014 that the assumptions of political interest and constituency on which the CDA was designed no longer held. The various ideological, tribal, revolutionary and militant parties vying for power were making claims and demands of a constitutional nature: about the type and nature of government, federalism, natural resource management, security arrangements, revenue sharing, and the role and status of religion, among other things. The CDA, however, was incapable of—and some would argue not interested in—providing a forum for negotiating and resolving political differences. The stated view of the President of the CDA was that it had to stay 'above the current political struggles' and 'remain non-partisan, and

keep itself and its activities separate from the current political bodies' (United Nations 2015: 2–4). As a result, throughout this period, the CDA 'had very little engagement with parliamentarians' from either the GNC or the HoR.

Throughout the violence in 2014, the CDA continued its work in obscurity. Its 19 August deadline was missed but largely ignored by politicians amid increasing violence, competing legislatures and governments vying for legitimacy, and threats of secession (Al-Warfalli 2014). The CDA published the initial draft reports produced by its thematic committees on its website on 24 December 2014 (CDA 2014). The drafts addressed many important constitutional matters but failed to resolve the most contentious issues at the heart of Libya's current crises, including the structure of the state, decentralization versus federalism, and the nature and status of the security apparatus. Failure to reach agreement on these issues was not surprising. If the CDA had decided these issues without buy-in from or the support of the main parties to the conflict, it could have rendered itself irrelevant or illegitimate, and hindered the prospects for peace.

At the time of writing, the CDA continues to work on refining its early drafts. However, constitution-making in Libya cannot continue in the political vacuum in which the CDA has operated. First, even were the CDA to finalize a draft, a referendum to adopt it would be logistically and politically impossible in the current security climate. Second, even if a CDA-produced draft were approved by a majority of Libyans in a referendum, it would have little likelihood of being implemented in the status quo environment of two competing governments, increasing violent extremism and virtual civil war. Furthermore, a scenario where a CDA-produced constitution was approved without the input of and buy-in from the parties to the conflict could further inflame tensions, polarize groups and contribute to Libya's declining stability.

If a constitutional draft capable of supporting a peaceful and democratic Libya is to be successfully produced, it must have the buy-in and support of political interests outside the CDA. The international community, led by the United Nations, has been trying to bring together representatives of the GNC and HoR (and others) to mediate an agreement that would include a cessation of hostilities, a government of national unity and a roadmap for elections and constitutional reform. At the time of writing, these efforts have failed to produce a final agreement. Violence continues unabated, politics is at a standstill and there are warnings of a 'full-scale civil war', with Libya 'turning into a Somalia by the Mediterranean' (Whiting 2015).

In July 2015 the HoR, together with key Libyan political parties and civil society organizations—although, notably, not the GNC—initialed an

agreement that created a Government of National Accord, provided for security arrangements and other confidence-building measures, and created space for political actors to inform the CDA's draft constitution (*Oman Observer* 2015). Under the agreement, interim authorities would govern Libya during an extended transition until a new constitution is adopted. The draft agreement gives the CDA until 24 March 2016 to produce a new draft of the constitution.[6] As part of this agreement, the CDA 'will take the opinion of the House of Representatives and the State Council on the draft constitution upon the completion of the final draft and before it is sent for referendum' (article 53). Furthermore, should the CDA fail to produce a draft by the new deadline, 'a committee consisting of five representatives from each of the House of Representatives and the State Council with the participation of the Presidency Council of the Council of Ministers, shall be formed at a date that does not exceed two weeks of that date to deliberate regarding this matter' (article 54).

Should this agreement, or one similar, be adopted by the principals to Libya's conflict, Libya would finally have a constitution-making process that integrates the views and interests of the prevailing political constituencies in the constitutional negotiations—increasing the chance that any draft would have the buy-in and support of major stakeholders. In so doing, Libya might finally be able to produce a constitution capable of stabilizing the country, putting it back on the path towards peaceful democratic transition, and serving as a new national compact.

Yemen: An incomplete blueprint

Yemen's transition to constitutional democracy held great promise during its almost year-long National Dialogue Conference (NDC), which concluded on 25 January 2014. The UN Constitutional newsletter characterized the NDC as a 'historic milestone in Yemen's transition from authoritarianism to democracy':

> . . . the 565 NDC delegates, spanning Yemen's social, geographic and political spectrum (of which 30% were women and 20% youth) adopted the comprehensive Outcome Document by acclamation, following six months of preparations for the NDC and another 10 months of negotiations in nine working groups and two special committees. The Outcome Document contained over 1800 consensual outcomes on issues ranging from human rights, good governance and transitional justice to the question of the South and a new federal state structure. (United Nations 2014a: 18)

The outcomes of the NDC were handed over to a Constitutional Drafting Commission (CDC), appointed by President Abd Rabbuh Mansur Hadi, on 9 March 2014. The CDC was a technical body of 17 members comprised of judges, lawyers and other professionals that reflected Yemen's geographic, ethnic and political diversity and included four women. It was charged with producing a first draft of the constitution, which would then be submitted for public comment and to a 'National Body', composed of 88 representatives from the same groups that participated in the National Dialogue, tasked with assessing whether the draft was consistent with the NDC outcomes. Once finalized, the draft would be submitted to a national referendum.

On the face of it, the Yemen constitutional drafting process appeared well designed to synchronize political and technical inputs. The NDC would provide a forum for political negotiations on a range of constitutional framework questions and principles, which the CDC could turn into a coherent constitutional text. The National Body would confirm that the CDC's work was consistent with the NDC's political agreements, after which the population could ratify the text in a referendum. The Transitional Roadmap signed under the Gulf Cooperation Council (GCC) Initiative in November 2011 envisaged that this process would end in early 2015.

Despite the good intentions behind this harmonized approach, the Yemeni constitution-making process never enjoyed the elite political support required for it to achieve its objectives. The 'blueprint' for constitutional drafting, in the form of the NDC Outcomes Document provided to the CDC, was inadequate. The NDC, for all the good it achieved in terms of reaching important agreements and keeping Yemen's democratic transition on track, failed to achieve political consensus on some of the most contentious and existential questions over the future Yemen state, including Yemen's precise federal character, and the number of regions and their boundaries. There were a number of reasons for this. The timeline to complete the NDC (six months, later extended for another three months) was unrealistically short, given the complexity of the issues and the distance between the various stakeholder positions. The large number of people participating in the NDC made the forum more inclusive and popular but may have sacrificed efficiency in elite bargaining: 'Smaller groups of the right political actors—those who actually had traction within their parties or constituencies to be able to negotiate and enforce political compromises—were needed to work through many of the issues' (Gaston 2014: 10). The NDC's ability to reach agreement was also hindered by the refusal of the leadership of the southern Yemeni separatist group al-Hiraak to participate. In addition to being too short, the NDC may also have occurred too soon:

> The common critique leading up to the NDC was that holding it before at least some of the key deal-breakers and political framework issues were negotiated, or at least softened, was premature. Although it had already been delayed for more than a year, some argued that the NDC should have been delayed even further because not enough progress on the main political issue—the future status of the South—had been made in the pre-dialogue phase [i.e., the GCC-brokered mediation]. (Gaston 2014: 9)

The NDC was divided into nine working groups but many groups addressed the same themes and produced contradictory language on key matters, including some of the provisions on revenue sharing and natural resources. This left the CDC in the difficult position of trying to fill in the gaps on highly sensitive and polarizing issues. The NDC sought to overcome this obstacle through the creation of a Consensus Committee—a smaller group of NDC participants, selected by the President—which was meant to resolve and finalize agreements that the NDC working groups could not reach. However, the Consensus Committee also failed to secure consensus on many of the most divisive issues.

The upshot was that certain matters were 'resolved' without buy-in from key stakeholders. The decision that Yemen would be comprised of six federal regions provides a compelling example. The issues of federalism and regional boundaries were especially difficult for the NDC. Neither the working groups nor the Consensus Committee were able to reach a deal, so a special committee of 16 representatives, known as the 8+8 or North/South Committee, was formed to resolve these issues. The 8+8 Committee succeeded in reaching a deal on certain issues related to the federal nature of the Yemeni state but failed with regard to 'how financial, administrative, and political competencies would be devolved' (Gaston 2014: 4). In particular, the Committee could not agree on whether Yemen should be divided into two, four or six regions. With the NDC already months past its original deadline, a decision was made to end the NDC proceedings and refer the issue of the number of regions to a separate body. Two weeks after the conclusion of the NDC, President Hadi formed a 22-member Regions Committee to make a recommendation on the number of regions. The Regions Committee had just one week to make its recommendation. In a meeting chaired by President Hadi, the Committee determined that Yemen would be a six-region federation, with two regions in the south and four in the north (Office of the Yemeni President 2014).

The decision that Yemen would be a nation of six regions demonstrates how the NDC outcomes—on the basis of which the CDC was to conduct its work—did not always reflect broad political agreement. On some of the

most divisive and contentious issues the outcomes may have been more a reflection of the President's attempts to force a compromise than a genuine elite bargain. In addition, the configuration of the key bodies discussing these issues reflected a north/south political paradigm—a historically critical divide in Yemen. As in Libya, however, just as the CDC was beginning its work, the political landscape in Yemen changed dramatically, and in ways that would further undermine the basis on which the CDC was conducting its work.

In August 2014 Houthi rebels, a Zaidi Shia group that had been in conflict with the regime of President Ali Abdullah Saleh for many years, mounted an offensive and took near-total control of the capital, Sana'a, and other cities. In addition, Houthi advances triggered a response from al-Qaeda in the Arabian Peninsula (Reuters 2014), and empowered southern separatists to increase their calls for independence (Yahoo News 2014). These developments greatly altered the political and power dynamics in Yemen, calling into question whether existing transitional structures such as the NDC, President Hadi's transitional government and the National Body still accurately reflected the relative weight of Yemen's political constituencies and were capable of negotiating and supporting Yemen's transition to democracy.

Despite the gains made through the National Dialogue, these challenges created an environment in which the constitution was being written based on an inadequate political agreement. Additional political bargaining was crucial before a durable and stable constitution could be written. However, the CDC was neither designed nor mandated to carry out the type of negotiations that were needed. Throughout late 2014, talks took place between the Yemeni Government, Houthi rebels, southern leaders and other key stakeholders under the guise of UN-mediated dialogue, but insufficient progress was made to integrate agreements into the CDC's work.

On 21 September 2014 Yemen's political parties (excluding the southern separatists) signed the Peace and National Partnership Agreement—a ceasefire agreement with the Houthi that reaffirmed the NDC outcomes and included provisions on the formation of an inclusive, technocratic—that is, non-elected—government. The hope was that this agreement would revive the parties' support for President Hadi's transitional government and the roadmap to the constitutional referendum and national elections. However, the agreement was soon ignored by the Houthi, who increased their military presence in Sana'a and advanced further to areas south and west of the capital (United Nations 2014b: 12). The CDC continued its work throughout 2014, albeit at a much slower pace than originally contemplated and in a rapidly deteriorating security environment. With Sana'a under siege and after a number of political assassinations, the CDC moved to Abu Dhabi

in November and December 2014 in an effort to finalize an initial draft constitution. While this distanced the CDC even further from politics at home, a first draft was produced by the end of the year.

On 14 January 2015, after the CDC draft was leaked to the Yemeni press, President Hadi's Chief of Staff was abducted by Houthi rebels as he was delivering the document to the President. The rebels, apparently 'incensed by what they thought was a plot to rush a freshly drafted constitution through to a referendum', seized the Presidential Palace (Salisbury 2015a; Gaston 2015). The International Crisis Group noted that the draft constitution contained 'controversial language concerning the divisive unsettled issue of the country's future federal arrangement' (International Crisis Group 2015). The Houthi were particularly concerned that the configuration of the six-region federal state would leave the traditional Houthi stronghold of Saadah landlocked (Salisbury 2015a). The next day, the Houthi also secured President Hadi's private residence before effectively placing the entire Yemeni Government under house arrest (Salisbury 2015a).

By 22 January 2015, following the abduction of the president's Chief of Staff, an agreement seemed to have been reached between the government and the Houthi that explicitly provided for 'amendments, addition or deletion' to the draft constitution and a requirement that the draft be 'agreed upon by all factions' (Al-Moshki 2015). A day after this apparent deal had been reached, however, the Houthi continued to refuse to withdraw from the capital. The President, still under house arrest, resigned. The Houthi responded by putting in place a Supreme Revolutionary Committee and a Constitutional Decree (dated 6 February) to govern for a two-year transitional period, which would include a review of the CDC's draft constitution before a referendum. After several weeks under house arrest, the President escaped and fled to the southern city of Aden, withdrew his resignation, condemned the Houthi takeover as a coup and declared all subsequent actions illegal and invalid.

As in Libya, the current security and political climate in Yemen is no longer conducive to constitution-making. This raises questions about whether the existing constitution-making process can bring the parties together, or whether it should be replaced by a new and separate process. The first option appears particularly unlikely. The CDC, as noted above, was neither mandated nor designed to negotiate a way out of the political and constitutional deadlock in which Yemen currently finds itself. The second option, currently being pursued, is international mediation to bring the parties together to find a way out of the situation. This will necessarily include agreements on constitutional issues, most likely the structure of the state, the number and boundaries of regions and the status of the south. These agreements could be fed to the

CDC or incorporated directly into the CDC's draft, either by the National Body or through some other mechanism, effectively putting Yemen back on the transitional roadmap it has been on since the 2011 GCC Initiative. President Hadi effectively made this offer to the Houthi in January 2015. Unfortunately, for the time being Yemen seems stuck in a third scenario—its constitution-making process and, by extension, its transition to democracy halted by civil war.

Conclusions

Libya and Yemen both designed constitution-making processes intended to capture the will of the people and translate it into a constitutional text that could serve as a new national compact. In Libya, the CDA has proved incapable of acting as a forum for resolving critical differences, many of which are constitutional in nature, between key constituencies. In Yemen, the roadmap from the NDC to the CDC went off course because critical political agreements that were ostensibly reached by the NDC never enjoyed the buy-in and support of key constituencies, most notably the Houthi and al-Hiraak. As the transition progressed from national dialogue to constitution-drafting, these groups feared that the National Body would not be able to amend certain existential issues, which would therefore become permanently constitutionalized, and reacted accordingly.

On a side note, there is another perspective on Yemen's transition that views Yemen's process as closer to those employed in many Anglophone African countries, such as Ghana, Liberia and Sierra Leone, in which a technical commission is tasked with producing a draft that is then submitted to another body (usually a legislature) for political negotiation and agreement. Under this theory the NDC was never intended to reach final political agreements, merely to derive basic national principles that the CDC would incorporate into the constitutional text. The National Body would then serve as the forum for political negotiation and agreement. This interpretation of Yemen's transition, however, ignores the fact that many Yemenis viewed the NDC outcomes as final settlements. President Hadi certainly treated them as such in decreeing that the CDC and the National Body would consider the matter of the six regions resolved.

One further question concerns whether the CDC in Yemen and the CDA in Libya contributed to the predicaments in which these countries currently find themselves. In Yemen, the constitutional draft seems to have been the event that touched off the Houthi coup, but the Houthi had already occupied Sana'a and parts of Yemen and their intentions cannot be fully

known. Furthermore, the regional and other interests that have contributed to Yemen's destabilization cannot be ignored, including the arrest of former President Saleh, who supported the Houthi during their advance to Sana'a, as well as Iran and Saudi Arabia, which support the Houthi and President Hadi, respectively (Salisbury 2015a). It might be fairer to say that the groundwork for a constitution had not been laid firmly enough, and that the CDC was put in the impossible position of having to resolve huge political problems left open by the NDC that it was simply ill-equipped to handle.

Similarly, Libya's civil war was not caused by the CDA. Increasingly powerful militia, a fight for jurisdiction between the GNC and the HoR, and geopolitical interests all contributed to the rapidly deteriorating security situation and the political deadlock. However, the design of the CDA, as well as the decision to remove the elected legislature from the constitution-making process, foreclosed one channel for political negotiation that might have allowed the contesting parties to work through competing visions of the nature of the Libyan state.

Despite these limitations and challenges, Yemen's CDC and Libya's CDA both managed to produce draft constitutions. That the drafts could not resolve some of the more intractable political divisions does not diminish the fact that both bodies produced documents that attempted to address many important issues related to fundamental rights, governance and the rule of law. That work will endure and can be called on when the political climate is ripe for a comprehensive agreement.

Libya and Yemen find themselves in similar situations—destabilized by competing powers vying for legitimacy, and threatened by continual violence and civil war. No meaningful constitution-making can occur in such a situation. What both countries need now is a peace process, not a constitution-making process. Perhaps the most appropriate course is for formal constitution-making to be suspended until conditions are more conducive, and there is the will on the part of stakeholders to engage in genuine dialogue and negotiation with the aim of achieving a political agreement.

Nonetheless, while current conditions in Libya and Yemen may not be conducive to constitution-making, it is still worth thinking about whether and how these processes might be used to feed into the critically needed elite political negotiations; and, looking forward, what these cases can teach future countries in transition to ensure that constitution-making does not take place in a political vacuum, but instead provides a platform for the political negotiation and agreement critical to creating a new national compact.

Notes

1 This amendment was later deemed unconstitutional on procedural grounds by the Libyan Supreme Court, a defect corrected by the GNC with a further amendment to the Constitutional Declaration in March 2013.

2 The 20/20/20 formula over-represented Cyrenaica and Fezzan in the CDA. The results of a census taken in 2006 are contested but, of the votes cast for the GNC in the 2006 elections, 26 per cent were from Cyrenaica, 9 per cent from Fezzan and 65 per cent from Tripolitania (Kane 2012).

3 The regime of President Muammar Gaddafi had deliberately and systematically vilified political parties as a way of weakening opposition and maintaining control. Disillusionment with politicians grew and the NTC's (and soon after the GNC's) approval ratings plummeted with the perception that they were ineffective at guiding Libya through its post-Gaddafi transition.

4 The CDA was elected in three stages between December 2013 and January 2104. A combination of insecurity, voter apathy and boycotts by minority groups resulted in under 500,000 votes being cast, less than half of those registered and barely one-sixth of the national electorate; 4 of the 60 seats were left unfilled.

5 The GNC, elected in July 2012, had been given an 18-month mandate to govern Libya during its transition to a permanent constitution. When the 18 months expired with the CDA only beginning its work the GNC organized new elections for a replacement legislature, the HoR.

6 For an unofficial English translation of the draft see the website of the United Nations Support Mission in Libya, <http://unsmil.unmissions.org/Portals/unsmil/Documents/Libyan_Political_Agreement_2_July_15.pdf >.

7 The Gulf Cooperation Council (GCC) Initiative was a mediation effort in which, in part, former Yemeni President Ali Abdullah Saleh and the main opposition parties agreed that President Saleh would step down in return for an amnesty, and a national unity transitional government led by an elected president would oversee a national dialogue, constitutional reform and general elections within a 28-month timeframe.

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3. Exclusionary constitutionalism: developments in Chile and Hungary

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Introduction

All constitutions are ideological documents in so far as they reflect, either explicitly or implicitly, the beliefs, values and aspirations held by their authors. This can most obviously be seen in the constitutions of the former Soviet republics and those of Islamic states, which are infused with ideological provisions and attempt to root public life in a particular political or religious vision to which all citizens, laws and policies are subordinate. However, even liberal constitutions, which supposedly assert neutrality between competing notions of 'the good life', make implicit claims about the superiority of representative institutions, religious and social pluralism, autonomous civil society, and market economics based on private property over other possible ways of organizing public life.

The global expansion of constitutionalism through successive waves of democratization has been accompanied by an increased emphasis on the political and ideological role of constitutions. Ghai (2005) notes that contemporary constitutions, especially in newly independent and post-colonial states, have to carry a 'heavier load' in terms of their nation-building, society-transforming and goal-setting functions than classical constitutions of the 18th, 19th and early-20th centuries had to bear. There is a growing realization that constitutions are often nation-building and not merely state-regulating instruments. In addition to protecting rights and establishing institutions, a constitution is expected to recount the 'autobiography of the nation' (Sachs et al. 2009) and thereby to define the identities, values and principles on which the state and society are based. Contemporary constitutions often have a 'transformational' intent; they typically seek not to preserve the status quo, but to radically alter it in democratic, left-leaning or progressive directions. For progressives, constitutions are instruments by which marginalization can be overcome and through which inequalities can be challenged (Bilchitz 2007; Ghai 2005; Sen 2011).

When a new constitution represents a genuine and widely supported public commitment to a new legal–political dispensation, it can be an effective instrument of social change. Tensions between democracy and constitutionalism may arise, however, if an ideologically prescriptive constitution is produced in a closed, imposed, one-sided process, or if the resulting constitution does not represent a broad public consensus. In these cases, where the degree of ideological prescription exceeds the breadth and depth of public support, the constitution may serve only to project the ideology and the policy choices of the party that established it, and to preserve these from subsequent electoral challenge. Citizens in a democracy should be able not only to replace the incumbent government with different leaders, but also to 'challenge and reverse policies that do not enjoy public support' (Mueller 2011). If the constitution hinders this through reliance on extensive 'pre-commitments' that narrow the range of political decision-making, it may be perceived as an anti-democratic device (Bellamy 2007; Hirschl 2007; Tomkins 2005).

This chapter examines the role of ideological entrenchment in two such 'democracy-excluding' constitutions: the Chilean Constitution of 1980 and the Hungarian Fundamental Law of 2011. Although unusual subjects for comparative analysis, on account of their very different circumstances and institutional forms, these two constitutions are both 'imposed constitutions'. Neither constitution was the product of a participatory, politically inclusive constitution-building process. Although the Chilean Constitution was the product of a military dictatorship and the Hungarian Fundamental Law arose in the context of a newly consolidated democracy in which one bloc held a constitution-amending supermajority in parliament, both were adopted by those in power, without any opportunity for compromise or contestation, in an attempt to impose the ideological doctrines of the dominant group on the rest of society, and to commit the state to follow those doctrines by constitutional means, regardless of electoral outcomes.

These two constitutions also possess other striking similarities that are of interest to constitutional theorists, comparative legal scholars and practitioners. First, the ideology they impose happens to be conservative—they are rare examples of regressive, rather than progressive, constitutional prescription. Second, both constitutions use a combination of techniques, including result-distorting electoral rules, counter-majoritarian legislative processes and insulated enclaves of power beyond democratic control, in order to protect the dominant ideology from electoral challenge.

Despite their similarities, these constitutions were at different stages of development in 2014. In Chile the incumbent centre-left administration

spent much of 2014 preparing the way for constitutional reforms in order to remove the residual constraints that, it believes, frustrate the pursuit of progressive policies. In contrast, Hungary held its first general elections since the new Constitution took effect, and the conservative Fidesz-led coalition, which had prepared the new Constitution, was returned to office with a two-thirds majority that—although later eroded—was initially sufficient to make further unilateral constitutional changes if desired.

Prescribing ideology

Neoliberalism in Chile

Chile's 1980 Constitution was a product of the 1973 military coup that brought General Augusto Pinochet to power. Jaime Guzman, one of the leading intellectual forces behind the Constitution, noted that 'military coups in the twentieth century appeared as a direct reaction to the threat perceived by the upper classes from democracy, concerning property rights' (Gargarella 2013: 233–34). The constitutional drafting commission at first included several moderates and conservative democrats, who supported the coup as a short-term 'corrective intervention' seeking to 'prevent future violations of the rule of law' and, in particular, to reinforce property rights which many felt to have been eroded by the administration of President Salvador Allende (Couso et al. 2013: 35).

By the late 1970s, however, many of these moderates had withdrawn from the process, alarmed by the human rights abuses, leaving the way open for the influence of the more doctrinaire 'Chicago boys'—neoliberal economists from the University of Chicago who 'held an almost religious adherence to the monetarist policies of Milton Friedman and other Chicago professors' (Couso 2012: 403). These economists sought to entrench an 'economic public order' (Couso 2012: 408) that went far beyond a simple reinforcement of property rights, to include a detailed set of prescriptive provisions intended to limit the role of the state in the economy, privilege the role of private capital and restrain populist economic policies (Couso et al. 2013: 36).

The resulting Constitution was to be Chile's first 'full constitution'—that is, a social and economic constitution as opposed to a merely 'political' constitution—which tried to regulate society and the economy, as well as the state, in accordance with its ideological vision (Couso et al. 2013: 36–37). It was 'explicitly designed by the military regime to ensure that the fundamental features of its 'conservative revolution' would be protected from the inevitable return to democracy' (Couso 2012: 396). In place of democracy, government

would proceed on the basis of 'technical rationality' (Couso 2012: 397), which was in fact the economic rationality of markets as understood by neoliberal ideology.

The Constitution adheres to a liberal-conservative understanding of the subsidiarity principle, according to which 'the State can only perform those functions which the private sector is not willing to perform' (Couso et al. 2013: 205). This assumes the primacy of private enterprise in the production and distribution of goods and services, and in the delivery of public services, and permits state action in the economy only as an exception. With certain specific exceptions, the Constitution prohibits 'discrimination' in economic affairs (article 19: 22), a provision that is intended to prevent the state from influencing the direction of economic activity through subsidies or other such interventions (Couso et al. 2013: 230). The right to acquire property (as opposed to the right not to be deprived of property once acquired) is also given explicit protection (Couso et al. 2013: 231). Similarly, market provision is emphasized in the sphere of the public services. The Constitution places no limits on the right of private entrepreneurs and investors to profit from the provision of education (Couso et al. 2013: 192), and the right to 'free' and 'equal' access to healthcare is non-justiciable, while the right to choose private provision is justiciable (Couso et al. 2013: 205).

Thus, in the social and economic sphere, the Constitution was intended to achieve two things: (a) 'to end the political debate on economic matters, taking this discussion out of the realm of politics into the realm of constitutional law' (Couso et al. 2013: 38); and (b) to ensure the longevity of the [Pinochet] regime's economic policies, in order to entrench the principles of 'a-politicism, technocratic efficiency, anti-communism and laissez-faire economics' (Couso et al. 2013: 38). In so far as Chile's recent centre-left presidents have found the Constitution an obstacle to progressive reform, especially in the fields of public education and health care, the constitution has functioned as its authors intended.

National conservatism in Hungary

The Hungarian Fundamental Law is enacted in the name of 'We the Hungarians', not 'We the citizens of Hungary', which implies an ethnic rather than civic understanding of nationality (Venice Commission 2011: 40). It begins with a 'National Avowal', a statement of identity and purpose that functions as a preamble and 'contains numerous national, historical and cultural references, such as to King Saint Stephen, the Christian tradition and the Hungarian culture and language' (Venice Commission 2011: 32). The preamble therefore establishes the state on a conservative, historicist

and nationalist ideology, based on appeals to a 'historical' rather than a 'republican' constitutionalism (Apor and Solyom 2012). According to Jakab, 'If the primary function of the preamble is to express the togetherness of the political community, then it has to be formulated in a way that allows for an emotional identification for as many citizens as possible' (2012: 66). A narrow, ideological formulation such as this, which 'excludes a good proportion of the (liberal or leftist) population from emotionally identifying with the text . . . cannot fulfil its role as a common ground for politics' (Jakab 2012: 68).

The substantive provisions in the text also embrace a national-conservative ideology. Article D pledges the state to 'bear responsibility for the fate of Hungarians living beyond its borders'. This 'touches upon a very delicate problem of the sovereignty of states' (Venice Commission 2011: 41) and indicates an irredentist attitude to the Treaty of Trianon (1921). Similarly, article H 'regulates the protection of Hungarian language as the official language of the country [but] does not include a constitutional guarantee for the protection of the languages of national minorities' (Venice Commission 2011: 45). This exclusive attitude is also evident in the Constitution's treatment of religion. Parts of the Constitution 'read like an ode to Christianity', placing 'an apparent emphasis on the importance of one strain of Christianity which was instrumental to preserving Hungarian nationhood' (Uitz 2012: 201–202). The Constitution also effectively forbids same-sex marriage (article L).

In addition to this conservative stance on social questions and matters of identity, the new Constitution also shapes economic policies in a neoliberal direction. Article M states that the economy 'shall be based upon work which creates value, and upon freedom of enterprise'; it protects 'conditions of fair economic competition' and 'the rights of consumers'. Article XII protects the right to 'engage in entrepreneurial activities'. These formulations are balanced by a constitutional commitment to the rights of workers (article XVII) and to education (article XI), health (article XX), social security (article XIX) and housing (article XXII), but the overall effect of the Constitution—especially given the need for supermajority laws and the role of the Budget Council—is to entrench a right-wing economic agenda in the country.

Maintaining the power of special interests

Disproportional electoral systems

Both Chile and Hungary have used result-distorting electoral systems to maintain the power of particular parties or interests. In Chile, a 'binomial' electoral system has been used since the transition to democracy. In principle,

this is a form of D'Hondt proportional representation, but elections take place in two-member districts, which in practice wholly undermines its proportionality. The plurality winner in each district wins one seat but cannot win a second seat unless it polls twice as many votes as its rival. The usual outcome is for one seat in each district generally to go to each of the two main blocs: the centre-right bloc, which includes some allies and political descendants of the former military regime; and the centre-left bloc. This typically results in a legislature in which both blocs are almost equally represented, and large swings from one bloc to the other are almost impossible. This arrangement works, in practice, to the advantage of the centre-right parties, whose representation is artificially increased. By winning approximately one-third of the votes, they are guaranteed around half of the seats.

At the time of Chile's transition to democracy, this electoral system helped to reassure the centre-right and right wing that their economic interests would not be harmed by social democratic legislation enacted by a popular majority in the legislature. Policy changes diverging from the path set out by the Pinochet regime would have to proceed incrementally and in negotiated steps. In so far as this has moderated political conflict within the Chilean elite, and given the right wing confidence in a civilian and non-dictatorial system of government, it has been a successful experiment. However, there are also disadvantages to disempowering the popular majority, such as a lack of electoral accountability, an erosion of legitimacy and the inability to make effective decisions.

The current Chilean President, Michelle Bachelet, has argued that the binomial system 'condemns Chilean politics and society as a consequence to a permanent deadlock. A basic principle of democracy, which is that the majority dictates what should happen, is denied by this system' (quoted in Gligorevic 2015). Reform of the electoral system, which does not require a constitutional amendment but does require supermajority approval, was one of President Bachelet's key achievements in 2014. The bill received final approval from the Senate in January 2015. At the next election, 'the binomial system will be replaced by a proportional D'Hondt method' (Marty 2015).

In Hungary, the maintenance of power is achieved through a mixed-member system in which parliament consists of both constituency representatives and members selected from national party lists. Unlike in a mixed-member proportional system, however, the lists do not have a fully compensatory effect (which would result in the overall share of the seats awarded to each party being in proportion to its share of the party list vote). Instead, the list

seats are awarded according to a complex formula in which the votes cast for constituency candidates are counted towards the distribution of votes.

The effect of these rules is to strengthen the position of the largest party, leading to an outcome that can at best be described as 'reinforced proportionality'. Moreover, the constituency boundaries are drawn to the advantage of the ruling Fidesz party, in such a way that 'no other party on the horizon besides Fidesz is likely to win elections' (Krugman 2011). In the 2014 parliamentary election, the Fidesz-led coalition won 44.5 per cent of the vote, and this was sufficient to obtain a two-thirds majority of the seats—a majority that enables the coalition to amend the Constitution at will and to pass 'cardinal laws'. This two-thirds majority was narrowly lost following a by-election in February 2015, but the Government has been able to sustain its power by means of furtive and ad hoc arrangements with the far-right Jobbik party (Krugman 2015).

Although both the Chilean and Hungarian electoral systems are disproportional, and both serve the electoral interests of the parties of the right, they act in different ways. The Hungarian system over-rewards plurality winners, while the Chilean system over-rewards the plurality runner-up. Thus, the Hungarian system raises the stakes of the electoral contest in a 'winner takes all' way, whereas the Chilean system lowers the stakes. This reflects the nature of the constitutional projects: Chile's Constitution was an attempt by an incumbent loser (the military regime which had lost a 1988 referendum on a return to democracy) to minimize its losses through a system of balanced power-sharing, while Hungary's Constitution was an attempt by an incumbent winner (the Fidesz party and its allies which had won the elections in 2010) to consolidate power.

Supermajority laws

Advocates of consensual democracies argue that reliance on broader inclusion and on higher thresholds of agreement produces 'kinder, gentler' outcomes (Lijphart 1999). However, when supermajority decision-making rules are used to entrench policy decisions, insulate these decisions from future democratic challenge and thwart the will of the majority, an exclusive form of constitutionalism may result. Such super-majoritarian provisions feature in the Chilean and Hungarian constitutions.

Chile recognizes three kinds of supermajority laws, which have different standards of rigidity and reflect different degrees of importance. First, at the highest level of rigidity, are the 'Laws Interpreting the Constitution'. These 'explain or amplify the Constitution' and, since they can in effect shape the

Constitution itself, they must be approved by a three-fifths (60 per cent) majority of the total membership of each chamber of Congress (article 66).

Second, there are 'Organic Constitutional Laws', which must be adopted by a four-sevenths (57 per cent) majority of the total membership of each chamber. Their main purpose is 'organizing public services and bodies established in the constitution'. There are around 25 organic laws, which cover crucial aspects of the state such as the organization of the armed forces, the judiciary, the education system and the civil service (Couso 2012).

Third, there are 'Special Quorum Laws', which require approval by an absolute majority (50 per cent plus one) of the total membership of both Chambers, as opposed to a simple majority of those present and voting which is required for the approval of ordinary laws. These are used to regulate aspects of criminal law and fundamental rights, such as the laws defining terrorism (article 9), imposing the death penalty (article 19, section 1) or regulating the boundaries of freedom of expression (article 19, section 12), and aspects of social and economic policy, including the right to social security (Gomez 2005; Couso et al. 2013: 70–71). When combined with the binomial electoral system the effect of these super-majority requirements is to give the right an effective veto over social and economic policies proposed by democratic majorities of the left, thereby undermining political responsibility.

In Hungary, the 2011 Constitution makes extensive provision for 'Cardinal Laws' (article T-4). These are laws that must be passed by a two-thirds majority of the votes cast in parliament (Krugman 2015) Supermajority laws are not an innovation—the 1989 Constitution had made provision for them, but they were mostly concerned with the protection of fundamental rights (Krugman 2015), and their intent was to protect minorities against majoritarian abuses of power by requiring a broader consensus for the passage of fundamental legislation (Venice Commission 2011: 23). However, the new Constitution changes the subject matter of laws requiring a two-thirds majority 'from fundamental rights to economic policy, which makes governing difficult for any political party (or coalition) not having a two-thirds majority in the Parliament'. (Jakab 2012: 69). This is problematic from a democratic perspective, rendering elections meaningless as a way of changing policy: 'The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-thirds majority have of cementing its political preferences' (Venice Commission 2011: 24).

Insulated enclaves

The constitutions of Chile and Hungary establish 'enclaves' of power that are insulated from democratic accountability. Insulation can be a necessary part of a democratic constitutional system, protecting neutral 'fourth branch' institutions such as electoral management bodies from political manipulation (Pettit 2001: 169). However, when these institutions are not impartial, but fortresses of the ruling establishment that are impregnable to opposing parties, they can pose a threat to democracy.

In Chile, several fortresses of power were created to protect the interests of the outgoing regime, such as the presence of non-elected Senators and the autonomy of the military (Couso et al. 2013: 90). Most of these provisions were removed by constitutional amendment in 2005 (Couso 2012: 414) but the Central Bank and the Constitutional Tribunal, both of which were also introduced in order to maintain Pinochet's legacy on economic policy, remain in place. It is notable that the members of these institutions are irremovable, and cannot be impeached or censured. The Constitutional Tribunal plays a pivotal role in enforcing the complex constitutional restrictions on the exercise of public power over the market and over the provision of public services, while the autonomous central bank denies the government control over monetary policies and exchange rates (Couso 2012: 413). Through these institutions, the economic policies of the right are quite subtly but effectively reinforced, while those of the left are frustrated.

In Hungary, the composition and functioning of independent commissions demonstrate the desire of the incumbents to augment and protect their power. First, these institutions, in so far as they provide a check on the government, are weakened. Access to the Constitutional Court has been limited through the abolition of *action popularis*, which allowed anyone to petition the Court to review the constitutionality of laws (Bankuti et al. 2012: 250); 'the human rights, data protection and minority affairs ombudsmen have been collapsed into one lesser post' (Krugman 2011); and judicial independence is threatened by an arbitrary reduction in the retirement age of judges (Bankuti et al. 2012: 262).

Second, these institutions have been captured by the ruling party, which has used its two-thirds majority to install loyalists in key positions (Krugman 2011). Most notoriously, Fidesz captured the Electoral Commission by ending the mandates of its incumbent members and using its majority to elect a new set of Electoral Commission members (Bankuti et al. 2012: 256).

Third, the new Constitution established, or enabled the establishment of, new constraints, such as the Budget Council (article 44) and the Media

Council. The Budget Council has the authority to approve budgets in order to impose fiscal restraint, such that state debt may not exceed 50 per cent of gross domestic product (article 36). The Budget Council has three members: a president appointed for six years by the Hungarian President; the President of the State Audit Office, who is elected by parliament by a two-thirds majority for a term of 12 years; and the President of the National Bank, who is appointed by the President for six years. The Media Council, members of which are elected by parliament, by a two-thirds majority vote, for nine-year terms, regulates private as well as public media (Bankuti et al. 2012: 257). These institutions are filled with Fidesz members, and will allow Fidesz to maintain a power of veto over key aspects of policy even if it is rejected at the ballot box.

Conclusions

In 2014, the exclusionary constitutions of Chile and Hungary were moving in different directions. In Chile, an important milestone in the dismantling of 'exclusionary democracy' was achieved through electoral reform, and further progress towards a new constitutional settlement is ongoing. In Hungary, conversely, after the 2014 parliamentary elections, the movement was away from competitive democracy and towards the consolidation of a new, and less than fully democratic, regime.

It is difficult to see 'exclusive constitutionalism' as a trend or even as an innovation. After all, 'conservative' constitutions that seek to maintain the power of ruling elites and impose a restrictive moral or ideological order on society go back at least 200 years (Gargarella 2013). However, the congruence of the exclusionary features, despite otherwise considerable differences in the form of government, is remarkable. The techniques for preserving power through a combination of electoral, procedural and structural rules are strikingly similar. The Chilean and Hungarian experiences remind us of the risks of an overly prescriptive constitution in the absence of a suitably inclusive process. When the constitution strays beyond providing a basic framework of rights and institutions in which democratic politics can take place, and begins to prescribe identities and policy choices, care must be taken to ensure that these represent a broad and stable social consensus, and not simply the ideology of those currently in power. Otherwise, the constitution, rather than supporting democracy, may 'prevent the people from effectively governing themselves' (Couso 2012: 414) and even 'jeopardise the legitimacy of the constitutional establishment for quite a while' (Jakab 2012: 66–67).

'Ideologically exclusive constitutionalism' may also be a useful taxonomic category for the purposes of comparative analysis, into which other constitutions might be placed. The Constitution of the People's Republic of Bangladesh, for example, since the adoption of the 15th Amendment in 2011 not only contains extensive rhetorical and ideological content, but also places such content beyond the reach of subsequent amendment. The distinguishing feature of such a constitution is not the degree of ideological content in itself, but its one-sided nature. An exclusive constitution takes issues that are controversial and divisive, settles them according to the ideology of incumbents, and seeks to entrench that imposed settlement beyond the reach of subsequent democratic contestation. By separating office-holding from policymaking, such constitutions allow incumbents to cede office to their opponents through elections, while protecting their most important policy goals from electoral challenge. Although this is unlikely to be a stable or enduring arrangement, it may be an attractive intermediate position for authoritarians who wish to withdraw from power while binding the hands of their successors, and for semi-authoritarians who wish to maintain the legitimacy of democratic elections while limiting the scope of what electoral politics can achieve.

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4. Secessionist movements in 2014

4. Secessionist movements in 2014

Tom Ginsburg and Kimana Zulueta-Fülscher

Introduction

One of the oldest questions in constitutional design concerns the circumstances under which a sub-unit can break away from an existing state to form its own country. The founding fathers of the United States justified their break away from the United Kingdom on the grounds of tyranny. The US Constitution, however, said nothing about secession, eventually requiring a civil war to resolve the issue. The lack of an agreed international law regulating secession leaves every state to deal with the issue in its own way. In 2014 secession emerged as a major constitutional challenge in Catalonia, Scotland and Ukraine. In other parts of the world, including Africa, the Middle East and South East Asia, secessionist claims still linger and sometimes fuel insurgencies. Such claims seem likely to reassert themselves in the coming years.

The number of states in the world has expanded from 51 United Nations member states in 1945 to 193 today. This increase largely occurred through decolonization and the break-up of larger states. There are multiple forces behind these processes, including the resurgence of identity and the belief that statehood is politically empowering. The fact that many states are embedded in transnational trade regimes means that the economic cost of going it alone is less significant, and so smaller domestic markets might become economically viable if they can successfully secure access to broader external markets. Furthermore, international norms against violating the territorial integrity of other states have possibly made smaller states less fearful of invasion. Thus, countries such as Montenegro or Timor Leste that have a population of under 2 million are viable in ways they would not have been at other times.

Proponents of secession invoke international law and the norm of self-determination, asserting the rights of 'peoples' to decide their own political future. Opponents point to the ambiguity of what precisely constitutes a

people capable of making such decisions, and note the increasing tendency of many states to recognize their demographic pluralism. They also argue the functional benefits of larger states. International law is generally somewhat ambiguous on the subject. While the International Court of Justice (ICJ) found nothing illegal about Kosovo's 2008 unilateral declaration of independence from Serbia (ICJ 2010), it is generally agreed that the right to self-determination does not provide for a robust right to break away from an existing state. Territorial integrity is an international norm of arguably equal significance as self-determination, and the only cases in which secession has been suggested as having a legal basis are those in which a territorial minority is threatened with severe human rights abuses.

The majority of constitutions are silent on secession but some explicitly prohibit it.[1] Other constitutions are more vague, referring to the 'territorial integrity' and 'indivisibility' of the state, or regulating changes to territorial boundaries by requiring them to be ratified by parliament or approved by a referendum of the whole population. Article 1 of Thailand's 2007 Constitution, for instance, describes the country as an indivisible kingdom, whose territorial integrity the state has a duty to protect. In contrast, Mauritania's Constitution requires a referendum on any changes to its territory (article 78) without mentioning secession explicitly.

Only a small number of constitutions have explicitly allowed for secession by subnational units. For example, Ginsburg, Melton and Versteeg (n.d.) identify 16 historical constitutions from ten different countries that allowed for such secessions. The right to secession was also part of the ideology of the Soviet Union, which operated under the fiction that it consisted of multiple independent republics with the right to break away. In some cases, a right to secession may be granted to a particular sub-unit, sometimes as part of an effort to keep it in the fold. The 2005 Constitution of Sudan, produced as part of a peace settlement, allowed for the secession of South Sudan, which eventually occurred after a referendum in 2011. In other cases, granting a right to secession can provide a commitment to treat the sub-unit with special care. The Constitution of St. Kitts and Nevis, for example, allows Nevis to secede after a referendum passed by a two-thirds supermajority of the island's voters. A 1998 referendum on the question failed to meet this threshold.

The key political variable regarding secession is whether or not it is mutually agreed, although some constitutions are more enabling of such agreement than others. Furthermore, when both the seceding state and the rump state agree on the terms of the break-up, the situation resembles a more-or-less amicable divorce—not pleasant, but bearable and perhaps the best result under the circumstances. However, when the secession is the product of

a violent rebellion or external interference, it can cause much more harm than good. There were proposals for both kinds of break-up in 2014, in Catalonia and Scotland, but the only one that was actually effectuated was the annexation of Crimea, a sub-unit of Ukraine, by Russia.

Catalonia

In 2012 the head of the Convergence and Union (Convergència i Unió, CiU) electoral alliance, Artur Mas, who is also the current President of the regional Catalonian Government, initiated a process for Catalonia's independence from Spain, which was to culminate in a referendum on self-determination on 9 November 2014. This vote became a 'non-binding consultation' on independence after the Spanish Constitutional Court ruled out holding a formal referendum. The Spanish Constitution makes the indivisibility of the Spanish state explicit in its preamble, and renders any reform dependent on a super majority in both the Congress of Deputies and the Senate, as well as on a nationwide referendum. Furthermore, the state must grant authority for any public consultation by referendum. Participation in this non-binding consultation was therefore predictably low—around one-third of those eligible to vote—and the 'yes' camp in favour of independence won 81 per cent of the vote.

The regional Catalonian Government is still pressing for a referendum on independence, but the most recent opinion poll, published by the Catalonian Centre d'Estudis d'Opinió in December 2014, indicated that the appetite for secession has apparently decreased since its peak in October 2014 (*El País* 2014). On the question of the preferred political framework for Catalonia, 36.2 per cent opted for an independent state (down from 45.3 per cent in October 2014) and 28.9 per cent supported a federalist option (up from 22.2 per cent), while support for the status quo of maintaining Spain's Autonomous Communities had declined slightly from 23.4 per cent in October to 21.8 per cent in the December survey (El País 2014). Those who wanted Catalonia to revert to mere regional status within Spain had risen to 5.4 per cent in December from just 1.8 per cent in October. The Spanish Prime Minister and leader of the conservative Popular Party (Partido Popular), Mariano Rajoy, opposes both an independence referendum and a constitutional reform process that would formalize the federalist option. The current leadership of the socialist opposition under Pedro Sánchez, however, supports constitutional reform that would transform Spain into a federal state.

The current pressure for independence has three main sources. First, in 2010 the Constitutional Court made a decision to declare unconstitutional parts

of the legal provisions agreed in the 2006 reform of the 1979 Catalonian Statute of Autonomy. The Statute is the legal document that, under the Spanish Constitution, regulates the autonomy of Catalonia, and articulates the relationship between the national and the regional government. The 1979 statute was negotiated after Spain's transition to democracy, while the most recent statute was originally ratified in 1932 during Spain's Second Republic. The 2006 reform—negotiated by the Catalan socialist-led coalition government, approved by the Spanish Parliament and ratified by Catalan voters in a referendum—was intended to significantly advance Catalonian self-government (El País 2006). However, the Partido Popular, which was in opposition at the time, won an appeal in the Constitutional Court, and the decision by the Court provoked a backlash in Catalonia.

Second, the Partido Popular won an absolute majority in the 2011 Spanish general elections and Mas was unsuccessful in his efforts to negotiate a new fiscal pact with the Spanish Government. This pact would have allowed Catalonia to collect its own taxes, as the Basque region already does. Third, in early 2012 Mas won a second regional election. Increasing pressure from the Catalan population, as well as a temporary alliance with the Catalonian Republican Left (Esquerra Republicana de Catalunya, ERC), a minority pro-independence party, led Mas to make a concerted push for independence.

Catalonia and Spain have a long, conjoined history. Catalonia was first incorporated into the Kingdom of Aragon in 1137, when the Count of Barcelona married the daughter of the King of Aragon and eventually himself became King of Aragon. In 1469 the King of Aragon, Fernando II, married the Queen of Castilla, Isabel the Catholic, bringing about a dynastic union, effective since 1516, between the kingdoms of Aragon and Castilla, which became the Kingdom of Spain. Both kingdoms maintained their own laws and institutions until the end of the Spanish War of Succession (1701–14), when Philippe V, the first Bourbon King, abolished many of the institutions and civil liberties enjoyed in most of the former Kingdom of Aragon, including Catalonia. Catalan civil law, however, was upheld.

During the regime of General Francisco Franco (1939–75), both the 1932 Statute of Autonomy and the institutions derived from it were suppressed, as were most demonstrations of Catalan cultural heritage, including its language, especially in the public domain. After Franco's death, Spain went through a democratic transition that led to a new Constitution, which was approved by referendum in 1978. The 1978 Constitution set the stage for a constitutional monarchy and a type of quasi-federalism under which the Autonomous Communities themselves were required to negotiate the degree of their autonomy from the Spanish state.

Catalonia was one of the first Autonomous Communities to negotiate its Statute of Autonomy, in 1979, after which CiU's Jordi Pujol was elected President of the regional Catalonian Government—a position he held until 2003, winning six consecutive elections. From 2003 to 2010 Catalonia was governed by a coalition that included the Socialist's Party of Catalonia (Partit dels Socialistes de Catalunya), the ERC and a minority leftist coalition, the Initiative for Catalonia Greens–United Left Alternative (Iniciativa per Catalunya Verds–Esquerra Unida i Alternativa). In 2006 this coalition negotiated a reform of the Statute of Autonomy. Artus Mas won the 2010 elections in Catalonia.

The case for secession gained momentum in the period between Spain's transition to democracy and the November 2014 public consultation. Since then, a tense calm has prevailed, intensified perhaps by the rigid Constitution and the lack of agreement between the Catalonian and Spanish governments—with the former still pushing for a referendum and the latter unwilling to grant one. However, the status quo is unlikely to hold for long and secessionist sentiment is unlikely to fade away for lack of success. The moment for an open constitutional debate may have arrived.

*Scotland**

On 24 September 2014 approximately 3.6 million Scottish voters cast their vote to decide whether Scotland would become independent from the United Kingdom. The independence campaign, which culminated in the Scottish referendum vote, had been a three-year undertaking by the Scottish National Party (SNP). The SNP officially launched the referendum in October 2011 after gaining a majority in the Scottish Parliament the previous May. The issue was of such significance that 85 per cent of Scotland's eligible voters participated in the 2014 vote. With only 45 per cent of the popular vote in favour of independence, Scotland remained part of the United Kingdom (Elections Scotland 2014). The long-standing issue of Scottish independence seems to have been put to rest, at least for a while.

Like Catalonia and Spain, Scotland and England have a long, conjoined history. After 1603, each jurisdiction had its own parliament under a joint monarch. In 1707, after a conflict in which Scotland attempted to disband the union, the two countries signed the Treaty of Union, under which Scotland retained access to British markets in exchange for being ruled by an English monarch. Under the Treaty of Union, the two countries formed a

* Emily Bieniek provided research assistance for this section.

single government with its parliament at Westminster—and so things stood for nearly 300 years.

However, the economic and political atmosphere of the 1980s in the UK put great pressure on the Union. Many Scots disagreed with the economic policies of the British Prime Minister, Margaret Thatcher, and believed that Scotland was disproportionately contributing to the national budget because of the revenues from North Sea oil. With an independent economic base and a reduced need for the protection of England, pressure for devolution increased. The Scottish Parliament was re-established in 1999 under the Scotland Act (1998), and was given responsibility for 'devolved matters' such as education, housing and various aspects of the economy. The Westminster Parliament retained authority over 'reserved matters' such as social security, economic regulation, taxation and national defence. Under this arrangement, which most observers characterize as constitutional in character, Scotland does not have the right to unilaterally pass laws related to the Union, or to secede.

In May 2011 the independence-oriented SNP, under the leadership of Alex Salmond, won a majority in the Scottish Parliament. This led the two governments to conclude the Edinburgh Agreement of October 2012, which set out the terms under which an independence referendum could be held. The legal status of this agreement was contested. Some argued that it constituted a pre-commitment by the Westminster Parliament to recognize the result of any referendum, while others characterized it as a mere political agreement. The legality of the agreement was never tested, however, due to the defeat of the September 2014 referendum.

On 25 November 2013 Salmond, now Scotland's First Minister, published a 667-page white paper that detailed the goals and process of secession from the UK (Scottish Government 2013). The Scottish bid for independence, it argued, was based on democratic ideals. Scotland should be able to control the revenue generated by its natural resources. Scotland would not use the same currency as the UK, and would seek to become the 194th member of the United Nations and the 29th member of the European Union (EU). Independence would give Scotland greater control of its economy and allow Scottish voters the opportunity to participate in public policy decisions.

The case against an independent Scotland was largely based on economics and security. Experts warned against fracturing the UK's integrated market and worried that consumers would not be protected during the break-up of the integrated banking system. Some analysts believed that Scotland was overestimating the revenue it could generate from oil once it gained

independence. Furthermore, membership of the EU would not be automatic, posing some significant economic risk. Indeed, the Spanish Government, concerned about the spillover effect on its own restive regions, vowed to oppose a Scottish application to join the EU.

The terms of the referendum allowed only Scottish residents to vote, be they British citizens or citizens of other Commonwealth countries or EU member states. This meant that Scots living outside Scotland were not allowed to participate. The voting age was reduced from 18 to 16 for the referendum. Although some argued that the entire nation should be able to vote on a matter that affected the whole of the UK, this position was rejected by the British Government.

As the campaign proceeded and opinion appeared closely divided, British Prime Minister David Cameron made increasingly generous promises on Scottish autonomy within the UK. He also made clear that a vote for independence was non-reversible. This provided a kind of 'carrot and stick' framework to shape the deliberations. Salmond resigned after the defeat of the referendum (Carrell et al. 2014), and the British Government established a commission under Lord Smith of Kelvin to make proposals about further devolution. The Smith Commission proceeded with astonishing speed, and its report, issued in late November 2014, outlined an extensive transfer of tax and welfare powers to Scotland. Some commentators speculated that this would increase pressure for further concessions among other component parts of the UK (see e.g. Tierney 2014). Perhaps indirectly, it may have motivated efforts to produce a consolidated constitution for the UK, as the lack of a single text may have contributed to differing interpretations of the legal character of some of the key documents.

The Scottish case illustrates the resolution of a high-stakes question of secession within an established democratic order. Both parties agreed to the framework for holding the referendum and both parties committed to accept the results. At the same time, the process shows that the threat of secession, once credible, can lead to significant constitutional reordering, even in one of the most stable democracies in the world.

Ukraine and Crimea

In contrast to the secession movements in Catalonia and Scotland, which in 2014 at least were not successful in achieving their aims, the secession of Crimea from Ukraine—which remains contested—offers an example of a break-up achieved through both violent rebellion and external interference. The annexation occurred in the aftermath of the mass protests that overthrew

the government of Ukrainian President Viktor Yanukovych following his decision to withdraw from talks on accession to the EU in favour of closer relations with Russia.

Crimea was conquered by the Russian Empire in 1783 and remained part of Russian territory even after the Crimean War, which ended in 1856. Crimea was briefly independent after the October Revolution in 1917, but was captured by the White Army during the Russian Civil War. In 1921 Crimea became part of the Russian Republic within the Soviet Union. In 1954 Nikita Khrushchev, the leader of the Soviet Union, transferred Crimea into what was then the Ukrainian Soviet Republic.

After the collapse of the Soviet Union in 1991, Crimea remained part of an independent Ukraine but maintained its own constitution (as an autonomous republic within Ukraine) and legislature. The 1996 Ukrainian Constitution contains two provisions relevant to secession. The first is general and states that '[i]ssues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum' (article 73). The second explicitly declares Crimea 'an inseparable part of Ukraine', thereby seemingly prohibiting its secession (article 134).

In late 2013, as a result of economic pressure from Russia, Yanukovich refused to sign an Association Agreement with the EU. This led to massive protests in Kyiv's Independence Square (Maidan Nezalezhnosti) against the Ukrainian Government's alliance with Russia. By early 2014, after a government crackdown, the protests had become increasingly violent. Abandoned by many of his own supporters, Yanukovich was removed from office on 22 February 2014 and fled to Russia shortly after.

Following the fall of Yaukovich's administration, troops later identified as belonging to the Russian military (including members of Russia's Black Sea Fleet, which was stationed in the Crimean port of Sevastopol) stormed the Crimean Parliament and other government buildings in Simferopol, the Crimean capital. Ukrainian military units stationed in Crimea surrendered swiftly. The President of Crimea's Parliament, Vladimir Konstantinov, addressed the Crimean people later that day, stating that due to the fact that Ukraine was 'slipping into chaos, anarchy and economic disaster', the legislature would engage in 'the application of the principles of direct democracy' through a referendum asking citizens whether they favoured a union with Russia.

The referendum was held just two weeks later, on 16 March 2014. Opponents of the referendum boycotted the polls. While official figures indicate that

95 per cent of voters supported independence, the turnout was low (BBC News 2014a). On 17 March 2014 the Crimean Parliament declared Crimea's independence from Ukraine and Russia duly annexed the territory the next day. However, the purported secession seems to be unconstitutional. Most international analysts believe the secession was also illegal under international law (Stepanowa 2014), and a non-binding resolution at the UN General Assembly declared the referendum invalid by a vote of 100 to 11, with 58 abstentions (Felton and Gumuchian 2014).

On 7 April 2014 separatists in Donetsk, a region in eastern Ukraine, declared a Donetsk People's Republic. The Luhansk People's Republic followed suit on 27 April 2014. The separatists held a referendum in early May which, according to the organizers, achieved an overwhelming majority in both regions in favour of independence (BBC News 2014b). In June 2014 the entity received recognition from another breakaway Russian-backed state that lacks international recognition, the Republic of South Ossetia. Separatists continue to demonstrate across Ukraine, particularly in the eastern part of the country, with support from Russian troops. The conflict has led to sanctions being imposed by the EU and the United States, and there is an ongoing military conflict, although external powers have sought to de-escalate the crisis.

The ongoing crisis in Ukraine is an illustration of a violent and contested secession conducted not by mutual agreement, but by a combination of a sub-unit's unilateral declaration of independence and interference by an external power. The result has been a major rupture in Russia's relations with the West, which seems set to continue given the tacit Russian support for the breakaway Donetsk republic. As has been the case in other breakaway republics of Russian speakers in Abkhazia, South Ossetia and Transdniestria, the likely outcome is a small territory viable only because of Russian force, with little international recognition. The Ukrainian Constitution is perhaps the biggest casualty of all.

Other cases

Latent secession issues exist in many parts of the world. In South East Asia, particularly in Myanmar and the Philippines, secessionist movements have moved towards accommodation with their states, but this is not certain to last. In Myanmar, long-running secessionist claims were set aside after a series of peace agreements was negotiated between the Myanmar Government and most of the ethnic militias. However, while most of the country remained relatively peaceful, sporadic violence continued until the end of 2014. The integration of ethnic minorities is likely to be a major issue in Myanmar's ongoing transition.

On 27 March 2014 the Philippine Government signed an agreement with the Moro Islamic Liberation Front, one of the main secessionist movements in the south of the country. This agreement set the stage for special autonomy in the Bangsamoro region and for the delineation of a Basic Law to govern the territory. This Basic Law, a sort of regional constitution or statute of autonomy, was personally submitted to Congress by President Benigno Aquino in September 2014. It was expected to be approved in January 2015, but has since been delayed. If the Basic Law is approved without major changes and the agreement fully implemented, it will go some way towards mitigating a conflict that has been ongoing for more than four decades. At the same time, however, other secessionist groups remain committed to creating a separate entity.

Conclusions

This review suggests that issues of secession are likely to remain on the global constitution-making agenda for the immediate future. The fundamental issues of identity that give such force to secessionist movements are not going away any time soon. It therefore makes sense to think about what lessons can be learned from recent practice.

A first point is that, ideally, any secession should be mutually agreed among the parties concerned. States with established constitutional provisions on secession usually have procedural criteria that must be fulfilled to express this agreement, sometimes involving national referendums or supermajority votes in the legislature. If secession occurs as the product of a unilateral decision or an outside intervention, conflict is likely to be exacerbated, possibly over issues of boundaries, state property, financial arrangements and the ownership of resources.

A related point is that countries with the potential for breakaway movements should try to draft constitutional provisions to anticipate the possibility of secession. This does not mean that secession clauses should necessarily be included in constitutions. There are many other ways of dealing with enduring territorial cleavages—politically salient differences between territorially concentrated populations—including greater devolution, guaranteed representation at the national level and electoral arrangements (see Anderson and Choudhry 2015). These are usually preferable to explicitly allowing the break-up of states. Secession provisions more often operate as triggers for a break-up than pre-commitment devices that guarantee the protection of a territorially concentrated minority.

If provisions on secession are to be included in a constitution, they should ideally be drafted in a clear form and follow certain design principles. They should first encourage dialogue and negotiation before secession to ensure that there is a genuine deliberative process. They should also make certain that the decision to secede is clearly in line with the wishes of the relevant population. This might be achieved by requiring approval by a supermajority of voters in the region, as in the St. Kitts and Nevis Constitution, or a certain level of turnout in the referendum. However, constitutions should not allow a minority of the rest of the country to block a clearly expressed desire to secede. For example, requiring a supermajority of the entire population will probably mean that secession can never be achieved. Such an arrangement—providing for secession but making it impossible to achieve—might be very dangerous, and deepen the cleavages it is supposed to resolve.

Finally, it is worth noting that issues of secession touch directly on international relations. Other states will have to decide whether to recognize the breakaway state, and calculations in this regard will have a direct effect on incentives to secede. An explicit secession clause could invite meddling by foreign powers, but the situation in Ukraine illustrates that constitutional rules purporting to guarantee territorial integrity are no panacea in the face of powerful pressures for a break-up, regardless of whether those originate from inside or outside the country.

Notes

1 See e.g. article 59 of the 1960 Constitution of Gabon or division 4.1.2 of the 1967 Constitution of Spain (Comparative Constitutions Project n.d.).

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5. Federalism and regionalism

5. Federalism and regionalism

Roberto Toniatti

The territorial mobility of power in its many forms

Throughout history, there has been a constant flow of, and mobility in, territorial power. This might be linked to war and military conquest, or by means of the various connections between and among social groups, ruling elites and royal dynasties; as a consequence of the discovery of new lands or of expanded opportunities for economic exploitation; or as a sacred mission of religious or ideological proselytization. It might be just as much due to the outcomes of rebellions and struggles for independence, or the severance by a people of former ties with another people, or collective social and political emancipation and sovereign self-determination. Over time, power has constantly changed its spatial scope and material reach over land, resources and populations.

The original European Westphalian state, and its worldwide expansion since the mid-17th century as the organizational model for ensuring some degree of political stability and as a theoretical justification for the state's monopoly on the legitimate use of force, has helped to give to the territorial mobility of power a new and more stable governmental setting within the framework of a unitary nation state. The advent of liberal constitutionalism at the end of the 18th century further evolved into democratic constitutionalism during the 19th and mostly in the 20th century. This enhanced the shift from power to governmental functions and has led to new patterns of institutional interaction over land, resources and populations. The protection and promotion of rights have developed into inherent components of governmental tasks in response to claims for freedom and for basic social needs, such as health care, education, shelter and security. Further contemporary developments in the international and supranational organization of governmental functions confirm the intrinsically mobile attitude of power in space, just as in time; and either its capacity to adapt to a plurality of varying external conditions or

else its creativity in constantly shaping the institutional settings that appear to best accommodate its needs and purposes.

Federalism and regionalism are two key concepts in this dynamic, evolving and pluralistic historical context: the former (from the Latin *foedus*) being more specific and, although itself implemented in a variety of forms, generally consistent with some typical features centred on the idea of a historical or ideal compact; the latter, by contrast, being fairly general and generic, to the extent that regionalism can be referred to as an arrangement of the subnational division of powers, partially sharing the same inspiration as federalism although to a lesser degree and within a stronger unitary state that unilaterally experiences some degree of decentralization or devolution of power. A regional state is thus the 'junior partner' of the federal state. Despite their differences, both federalism and regionalism may be regarded as modern and rationalized institutional tools for managing the spatial mobility of power, of rights and needs, and of governmental functions. They are consequently an essential component of constitutionalism and of constitution-building, through the constituent function; and also of constitutional maintenance, mainly through constitutional revision and reform, or the power to amend (Halberstam 2012).

Limited government is one of the original basic features of modern constitutionalism. Although based on different conceptual premises, historical processes and legal foundations, Western states including France, the United Kingdom and the United States—followed by further developments on the European continent that shared the same ideological inspiration—all established forms of constitutional government that made sovereignty compatible with being subject to inherent limits provided by individuals' fundamental rights and by an institutional network of checks and balances. Article XVI of the French Declaration of the Rights of Man and the Citizen (1789) declares that 'a society that does not have the separation of powers and the protection of rights does not have a constitution'.[1]

Limited government is generally shaped by conferring distinct sovereign functions on more than one institution, according to the principle of the 'horizontal separation' of legislative, executive and judicial powers. It can also be achieved using another technique: federalism, which was originally experienced by those smaller polities that at some stage in their history found it convenient to associate themselves, in order to cope with a set of shared governmental concerns, within a larger and more stable union rather than within a military alliance, a customs union or a confederation. In such a process, it should be noted that there is a shift from the field of international

law to that of constitutional law, or in the other direction when a federal union collapses or secession takes place.

The constitutional rationale for federalism is expressed by establishing a general (or central) government and conferring on it a limited functional scope, while at the same time preserving pre-existing governmental units that retain a good share of their former functions, thereby retaining some areas of diversity and distinctiveness for different sectors of the population in their respective territories under their own governmental institutions. The states that become members of this federal union have the historic opportunity to design the federal institutions in such a way that keeps their operation under some degree of control. The member state–federal government connection is therefore quite crucial and is manifested by the member states' participation in the setting up of the federal institutions and in the direct or indirect exercise of the main federal functions, such as amending the federal constitution, policymaking, legislation and treaty-making.

A combination of shared government (or shared rule) and self-government (or self-rule) is thus likely to be a typical and distinctive feature of federalism (Saunders 2013: 41). Such 'vertical' division of power—originally practiced in the past on a rather small scale, most notably in Switzerland—was greatly enhanced by the establishment in 1789 of the USA under a Constitution that is acknowledged to have provided a model that has been imitated in Africa, Asia, Europe and Latin America with varying degrees of success.

Federalism necessarily results from a properly balanced co-existence of the distinct governmental authorities within their respective functional and territorial areas of competence. Such balancing is ensured mainly by political factors such as flexibility and adaptation to different requirements in time and space. From this point of view, federalism should be regarded more as a process than an institutional structure. It is also necessary, as they are ultimately regulated by law, for conflicts between central governments and local authorities to be resolved by law. This is the rationale for the original constitutive compact, and the adjudicatory role of a supreme or constitutional court established as an umpire for this purpose.

The rationale behind federalism—seeking the advantages of the larger unitary government while preserving smaller polities' respective heritage and identity along with a substantial share of self-government—is somehow imitated by those larger unitary states that decentralize powers to a number of smaller governmental units. In such cases, which are normally the origins of regionalism, instead of a centripetal dynamic, which would be typical of a federal compact, there is a centrifugal process that is mainly regulated by

the central government. That said, the latter may be true of newly established federal states such as Belgium where, since 1993, an original institutional setting has been established, including regions in charge of economic policy as well as communities dealing with matters identified according to the distinct Flemish, French and German linguistic groups. In all such cases, the driving political force comes from the territorial units, although legally it is up to the central government to regulate the speed, scope and depth of the decentralizing process.

In the 20th century a number of centralized states started to reform their domestic organization, introducing various degrees of decentralization and devolution of public powers to what has been regarded as a distinct form of state—the regional state. This, as mentioned above, is a sort of 'junior model' with fewer powers but essentially the same rationale as the vertical division of powers. Such was the experience of Spain (1931, 1978), Italy (1948), France (1982) and the UK (1998). None of these cases, however, involve substantial forms of participation by the regions in the design of central institutions or the exercise of the powers of national authorities.

Regionalism can serve, in particular, to promote the conditions for economic development, as in the case of the Special Administrative Regions (SARs) in China, or allow some self-government by cultural, linguistic or religious minorities, as in Aceh in Indonesia, Åland in Finland, the Basque Country and Catalonia in Spain, and Trentino–South Tirol and Valle d'Aosta/Vallée d'Aoste in Italy. However, the same can also apply in federal states such as Canada with regard to Québec; South Africa, mostly in relation to KwaZulu-Natal and Cape West; or Bosnia and Herzegovina, under a constitution that formed part of an international peace agreement.

In other words, despite their differences, both federalism and regionalism may be instrumental in providing a—sometimes only provisional or contingent—solution to specific problems and to managing—albeit temporarily—a way out of conflicts between uniformity and diversity, and between centralization and communities' governance of their own identities.

Developments in federalism and regionalism in 2014

Federalism and regionalism, for reasons of political expedience and the expectations they can raise in a variety of situations (as indicated in the previous section), are often resorted to during the constitution-building process. This occurred during 2014, where 'contingent federalism' or regionalism appeared to prevail in the adoption of new constitutions, while existing federal and

regional states instead experienced a degree of constitutional maintenance. This section outlines developments in federalism and regionalism in 2014 in Belgium, Bosnia and Herzegovina, Canada, China, Iraq, Tanzania and Yemen.

Belgium

Belgium is an interesting case in the field of constitutional maintenance. Federalism in Belgium went through a new constitutional reform process in 2014, the 'Sixth State Reform', following a political agreement known as the 'butterfly agreement' (l'accord du papillon) reached by the political parties after the formation of a new cabinet with a parliamentary majority (Belgium Chamber of Representatives 2011). The main guidelines of the agreement are found in a document that outlines the constitutional-amendment process, which does not affect the fundamental and unique features of Belgium as 'a federal State composed of Communities and Regions' (article 1). These are a combination of a territorial principle, expressed by the Flemish, Walloon and Brussels regions with competencies in fields such as economic development, public works and agriculture; and a personal principle reflected in the three Flemish-, French- and German-speaking Communities, in charge of language, culture, education and personal assistance.

The constitutional revision is consistent with the character of the basic features of the polity. It is supported by both separation of the two subnational groups, and institutional and procedural mechanisms that to varying and changing degrees hold the country together. The changes were introduced by a plurality of sources, such as formal constitutional amendments, special legislation and ordinary legislation. The reform has strengthened the 'constitutive autonomy' of the federated Communities and Regions, with regard to their respective taxation powers and overall public finances, as well as the status of Brussels as the bilingual federal capital. It has also expanded their policymaking roles in crucial areas such as public health, family support, employment and, to some extent, the judicial system, and affected electoral legislation.

One major structural change was introduced in the composition of the Senate, which has been transformed into a chamber for the representation of the federated entities through a system of indirect political representation.[2] Despite what appears to be a very strong connection with the federated Communities and Regions, however, only experience will confirm whether the new Belgian Senate will be able to function in a way that is comparable with the chambers of representation of member states in other federal polities.

Bosnia and Herzegovina

The 1994 Constitution of the Federation of Bosnia and Herzegovina provides an example of contingent—or truly forced—federalism whose weakness has retroactively affected the process of constitution-building. The 2014 general elections, by reproducing substantially the same balance of power among ethnic political parties, confirmed once again the extent to which the political system fails to create the proper premises for any prospect of shared government with at least some element of common perspective as a unitary polity functioning beyond the ethno-nationalist based self-government of each of the federated entities. The respective constituencies, and even more so the political parties, do not seem likely to abandon their respective platforms, centred on the interests of their own community, or to be willing to contribute to establishing limited but credible common governmental ground. Putting and holding together three pieces of a puzzle is not sufficient when the puzzle does not have a frame that keeps them united—the glue provided by the principle of loyalty (Basta Fleiner and Gaudreault-DesBiens 2013: 151).

Canada

In the area of constitutional maintenance of older and well established federal states, mention should be made of a decision by the Supreme Court of Canada on the extent to which the role of the constitutive governmental units is decisive in controlling the process of constitutional revision, with reference to the restructuring of an existing Senate as a second chamber somehow representative of regional interests (Supreme Court of Canada 2014a). According to the Court, in response to five questions posed to it by the Federal Executive, the federal government cannot unilaterally limit the term served by senators as 'fixed terms provide a weaker security of tenure' and, furthermore, such fixed terms 'imply a finite time in office and necessarily offer a lesser degree of protection from the potential consequences of freely speaking one's mind on the legislative proposals of the House of Commons'. Nor can the federal government unilaterally create a consultative election process for choosing whom to appoint to the Senate, as 'the implementation of consultative elections would amend the Constitution of Canada by fundamentally altering its architecture' and such reform 'would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought' (Supreme Court of Canada 2014a: 708).

Another negative answer was given by the Court to the power of the federal government to establish a framework to enable provinces to create their own consultative election process, 'introducing a process of consultative elections for the nomination of senators would change our Constitution's architecture,

by endowing senators with a popular mandate which is inconsistent with the Senate's role as a complementary legislative chamber of sober second thought. This would constitute an amendment to the Constitution of Canada in relation to the method of selecting senators' (Supreme Court of Canada 2014a: 708).

On the question of whether the Canadian Government can unilaterally repeal the constitutional requirement that a senator must own 4000 Canadian dollars' worth of property in the province he or she is appointed to represent, the Supreme Court responded that 'the net worth requirement . . . can be repealed by Parliament under the unilateral federal amending procedure. However, a full repeal of the real property requirement . . . requires the consent of Quebec's legislative assembly'. Finally, to the question of whether the abolition of the Senate would require 'the consent of seven provinces representing 50 per cent of the population or unanimous consent', the Court gave an opinion that once again emphasized the role of the provinces in controlling the process of amending the federal constitution: 'as for Senate abolition, it requires the unanimous consent of the Senate, the House of Commons and the legislative assemblies of all Canadian provinces'.

To the Supreme Court of Canada we also owe another significant decision that gives a detailed explanation of the origins, scope and purpose of the principle of a 'reflective judiciary'—that is, one that reflects the various segments of a plural society in the composition of the highest judicial institutions—the rationale of which holds well beyond the Canadian case (Supreme Court of Canada 2014b). The case dealt with protecting the province of Quebec and with enhancing the Supreme Court's own character of being reflective of the cultural diversity within the federal structure, and inclusive of French-speaking Quebec and its civil law system. In the decision, the Court gave a strict interpretation of the legislative requirement that the three members of the Supreme Court appointed from Quebec must be members of the Bar of that province.

The decision was in response to a request by the Governor in Council, whose appointment to the Supreme Court had been challenged before the Federal Court. Section 6 of the Supreme Court Act states that one-third of the members of the Supreme Court (three out of nine) are to be appointed 'from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province'. The issue at stake was the interpretation of the 10-year Québec Bar membership specified by the statute, and whether membership must be current at the time of the appointment. In its decision, the Court declared that the guarantee that the 'Québec seats' are part of its own composition, although written in a

statutory provision, is part of the entrenched federal Constitution of Canada, which parliamentary legislation cannot properly reform without recourse to the constitutional amending procedure that requires the participation of the provinces.

China: Hong Kong and Macau

A radically different picture, featuring varying degrees of functional regionalism under strong unitary political control, is provided by the case of the Special Economic Regions (SERs) in China, whose free market-oriented economic policies and rules of management make them more attractive to business and foreign investment.

The doctrine of 'one country, two systems'—a constitutional justification for allowing Hong Kong and Macau to retain their respective distinctiveness once returned to China—could be part of the same conception of spatial mobility of power and might at some stage be applicable to Taiwan as well, with all of them treated as SARs. Nonetheless, the strict functional rationale of the doctrine—although wider than the SERs—has turned out to be inconsistent with a political dimension.

This was made obvious in Hong Kong in 2014 during the so-called umbrella revolution, a movement that expressed its disagreement with restrictions on the choice of candidates for the 2016 elections to the Legislative Council and the 2017 election of the Chief Executive, to the Standing Committee of the National People's Congress and ultimately to the Communist Party of China. The quality of and widespread participation in the protests as well as the reaction by both the Hong Kong and the Chinese authorities suggest that the events of 2014 will have significant consequences for future developments, testing the effectiveness and credibility of China's path to regionalism (Ghai 2000: 77; Po Jen Yap 2014).

Iraq

In Iraq, no final agreement was reached in 2014 on a national consensus on the contours of a new federal constitution, mainly built on ethnic grounds, or on the corresponding borders of the proposed federated states. Iraq's 2005 Constitution established 'a single federal, independent and fully sovereign state' (article 1), and 'a country of multiple nationalities, religions and sects' (article 3) with a future 'free from sectarianism, racism, locality complex, discrimination and exclusion' (Preamble). Iraqi federalism is multi-levelled: while the federal system 'is made up of a decentralized capital, regions, and governorates, as well as local administrations' (article 116), thus far

it shows only the potential for federalism, inasmuch as the 'Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region'. For other regions, however, the Constitution goes no further than indicating the procedure to be followed for their establishment: 'one or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum' (article 119). Governorates, composed of districts, sub-districts and villages, 'that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law' (article 122).

Whether potential or actual, the Constitution gives Iraq's regions a significant 'member state role'. For example, each region has the right to 'adopt a constitution of its own' (article 120) and 'to exercise executive, legislative, and judicial powers in accordance with this Constitution'. Kurdistan, having experienced some degree of self-government in the 1970s and a degree of military protection as a no-fly zone after the Gulf War (1990–91), continues to be the only region with effective self-government. The military events that took place in the area in 2014, the major role played in the war by Kurdish armed forces (the Peshmerga) and the acknowledgement of this role by the international community may—despite opposing factors linked to the security scenario—suggest that Kurdistan is now a step closer to de facto secession, thereby providing more evidence of the inherent weakness of the 'contingent' federal arrangement that was hastily and superficially put in place in 2005 in order to pretend to have found a permanent solution to the post-war crisis in Iraq.

Tanzania

The total revision of the Constitution of the United Republic of Tanzania continued in 2014.[3] After two successive drafts were prepared by a Constitutional Review Commission (CRC) in 2013, a Constituent Assembly (CA), consisting of all Members of Parliament plus 201 additional representatives of different societal sectors selected by the President, issued its own draft in October 2014. This did not reproduce the main innovations recommended by the CRC, however, and achieving the two-thirds majority in parliament which is required to implement it will face challenges from opposition parties backed by some sectors of civil society. The procedure is worthy of note because of its reliance, at various stages, on wider participation by the people in local ward-level discussion groups or forums (*barazas*), albeit led by the political party whose current incarnation is Chama Cha Mapinduzi, and which has enjoyed a dominant position since independence

from the UK in 1964. The new constitution must be voted on in a national referendum, which was originally due to take place at the end of April 2015, was subsequently delayed but is still expected to take place in 2015.[4]

The proposed constitution fails to establish a three-tier federal government, as recommended by the CRC and consistent with mainstream federal theory and practice. It confirms the present federal architecture, which is made up of a single Union Government in charge of both Union matters and matters related to Tanganyika (renamed the Mainland of Tanzania), and a revolutionary government of Zanzibar in charge of matters that concern Zanzibar alone (article 71.1). Consequently, there will be two presidents: one for the Union as a whole and Tanganyika, and the other for Zanzibar. Furthermore, there will be three vice-presidents: the first Vice-President; the second Vice-President, who will be the President of Zanzibar; and the third Vice-President, who will be the Prime Minister.

The definition of Union matters reproduces the division of governmental powers. What is quite interesting is the introduction of a new Commission for Union Affairs (articles 122 and 123), responsible, in particular, for ensuring coordination and cooperation in fulfilling the provisions of the Constitution, and on policies, laws, plans and strategies between the Union Government and the revolutionary government of Zanzibar. It is an innovative instrument for reaching an agreement other than judicial adjudication and, as such, it appears to be more in line with the African culture of dialogue and conciliation.

Yemen

Events in Yemen in 2014 (see also Chapter 2 in this volume) provide sad evidence of the shortcomings of contingent federalism (Gaston 2014). The National Dialogue Conference (NDC), a 565-member multiparty representative body established in 2013 with the task of shaping the institutional outcome of Yemen's political transition, failed to reach an agreement on the future constitutional setting for the country as a federal system. Instead, a president-appointed committee adopted a model based on six regions, four in the north and two in the south, and the possibility of adopting a new name—the United Regions of Federal Yemen. The cities of Aden and Sana'a have their own autonomous status and legislative powers.

The work of the Constitution Drafting Committee set up by the NDC was badly affected by the military confrontation initiated by the Houthi—a group that practices a branch of Shia Islam known as Zaidism. The Houthi did not take part in the NDC, are radically opposed to a federal solution and

gradually increased their armed control over the whole territory of Yemen in 2014, including the capital. Further military confrontations early in 2015 served to underline the fact that that any superficial adoption of a federal pattern in the absence of common cultural ground—even within Islam—and a genuine political will to share government (after a fairly long two-state history) will prove too weak and unreliable as a form of effective government.

Conclusions

The main developments in federalism and regionalism in 2014 suggest the need for two sets of final reflections. First, the extent to which any constitutional setting founded on a balancing of interests and powers is in frequent (if not constant) need of maintenance, further indicating that politics and policymaking by themselves are not sufficiently reliable, and a more stable solution founded on the law as well as, ultimately, on judicial adjudication is often regarded as the best guarantee and therefore often sought. Second, that the rationale for both federalism and regionalism—combining uniformity and diversity, shared rule and self-rule, common ground and features of distinctiveness—in particular when the scenario to be dealt with within the legal, federal or regional architecture is one characterized by national, cultural, religious, or linguistic pluralism, requires that the political actors are inspired by a genuine willingness to share a common government and not only to enjoy self-government. In other words, the law in the books is not sufficient, although—as the practice of maintenance suggests—politics alone cannot manage the challenges of the governance of pluralism (Watts 2013).

In a general assessment of the performance of both federalism and regionalism, reference ought to be made to substantive functional areas. Matters of security, both domestic and international, under the same threats of for instance terrorism, foreign affairs, and economic and financial policies are not only the formally exclusive domain of central governments but produce more and more invasive consequences within the reserved area of policymaking by the subnational units of government. The economic and financial crisis that has shaken European citizens and institutions since 2008 has placed a number of strains on Spanish regionalism, the most disruptive of which in 2014 was the drive for secession and independence in Catalonia (see Chapter 4 in this volume). In Italy, the state's re-centralization of governmental powers was formalized into a draft text for the revision of the Constitution in 2014, which annuls the further decentralization produced by a previous constitutional revision in 2001. The new text would also establish the primacy of national legislation in those few areas that the Constitution reserves to regional competencies.

The field of human rights is an arena for confrontation between states and the federal constitution, as shown in the USA, although, at least since the Civil War, the drive for uniformity has tended to prevail over the quest for diversity, mainly on the grounds provided by the principle of equality and non-discrimination. In 2014 the issue of equality in marriage and family life and most notably in same-sex marriage reached the US Supreme Court. In June 2015 the Court eventually decided that the right to marry is guaranteed to same-sex couples by the 14th Amendment of the Constitution.

Such substantive references help to confirm that federalism, although a more and better structured system than regionalism with regard to its nature as a compound polity, nonetheless demonstrates a prevailing drive towards unitary attitudes. A reaction to such a unitarian drive may be one of the reasons for the development—as opposed to the historical origins—of a new pattern of organization for the spatial mobility of power—the supranational entity aiming for various forms of functional integration among its member states that are less than federal but more than international, as in the EU, Mercosur and the Andean Community of Nations in Latin America, or the Organisation for the Harmonization of Business Law in Africa, again with different degrees of implementation and effectiveness, different attitudes and different perspectives to offer on constitution-building. The EU, having gone furthest in this direction, now faces at least a temporary setback.

Regionalism, therefore, although more vague and less participatory, once the unitary and fundamentally centralized structure of government is clearly stated, may appear to have more flexibility and fewer constraints than federalism, all the more so if strictly functional, as may be the case with cross-border regions established for the management of well-determined problems—although they may also serve the purpose of facilitating contacts between a national minority and its kin-state.

Another area of concern for federalism and a legal phenomenon to be noted is the 'no backward transition' clause to be found in the constitutional texts of some countries that have experienced a radical transition out of a federal polity. The normative effect of such provisions is meant to introduce a constraint into the political process on undertaking a constitutional renewal, either through a prohibition or by introducing a burdensome procedural requirement. A clause of this sort is not widely used but can be found in the constitutions of Croatia, formerly a Republic of Yugoslavia, and Singapore, formerly a member of the Federation of Malaysia. Article 141 of the Croatian Constitution prohibits Croatia from initiating 'any procedure for the association of the Republic of Croatia in alliances with other states if such association leads, or might lead, to a renewal of a South Slav state

community or to any Balkan state form of any kind'. Article 6 of Part III of the Singaporean Constitution prohibits the participation of Singapore in any federal form, 'whether by way of merger or incorporation with any other sovereign state or with any Federation, Confederation, country or territory or in any other manner whatsoever', although participation in beneficial cooperative international schemes is allowed; and subjects any amendment to the provision to a national referendum, 'by not less than two-thirds of the total number of votes cast by the electors registered'.

This kind of clause, indicative of the negative experiences and memories that federalism may leave, is referred to in a decision by the Constitutional Court of Lithuania of December 2014. The legal source is provided by the Constitutional Law on the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions where there is a commitment 'to develop mutually advantageous relations with each state which was formerly a component of the USSR [Soviet Union], but to never join in any form any new political, military, economic or other unions or commonwealths of states formed on the basis of the former USSR'. It further states that 'the activities seeking to draw the State of Lithuania into the unions or commonwealths of states specified in the First Article of this Constitutional Act shall be regarded as hostile to the independence of Lithuania'.

This clause has been defined by the Constitutional Court as 'the negative aspect of the geopolitical orientation of the State of Lithuania' and is protected by the most heavily entrenched procedural requirements for the amendment of the constitution. The clause, rare but meaningful, sheds realistic light on the advantages and shortcomings of federalism and regionalism, and ought to be recalled by local actors and the international community when constitution-building is attempted superficially as a sort of short-cut out of complex situations where, in a conflict arena, the problems of a pluralism of interests of all kinds—material and non-material alike—do not appear to be otherwise manageable.

Notes

1 For a distinctive view, which decouples constitutionalism and limited government, see Thio (2012).

2 The details are a good example of asymmetric federalism and are also a good indicator of the intricacies of Belgian federalism. According to the new article 67 of the Constitution, 29 senators out of a total membership of 60 are appointed by the Flemish Parliament from among its members or from among the members of the Dutch linguistic group of the Parliament of the Brussels-Capital Region;

10 senators are appointed from among its members by the Parliament of the French Community; 8 senators are appointed from among its members by the Parliament of the Walloon Region; 2 senators are appointed from among its members by the French linguistic group of the Parliament of the Brussels-Capital Region; one senator is appointed from among its members by the Parliament of the German-speaking Community; a further six senators are appointed by the group of Flemish- and Dutch-speaking senators, while four more are appointed by the Walloon- and French-speaking senators.

3 On the gender aspects of the Tanzanian constitutional reform process see Chapter 1 in this volume.

4 On the Tanzanian constitutional reform process see Kituo Cha Katiba (2013). For an unofficial translation of the text of the proposed draft constitution of Tanzania see <http://www.constitutionnet.org/vl/item/proposed-constitution-tanzania-sept-2014>.

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6. To go or not to go: debates on constitutional term limits

6. To go or not to go: debates on constitutional term limits

Yuhniwo Ngenge

Introduction

'This is a message to all those leaders . . . seeking to retain power for life that the status quo is no longer acceptable'. With this admonition, protesters chased Blaise Campaoré—Burkina Faso's President for 27 years—from office in October 2014, following his attempts to amend the provision on term limits in article 37 of the Burkinabe Constitution (Ngenge 2014). This development generated renewed interest in the issue of constitutional limits on the number of presidential terms as, beyond Burkina Faso, leaders from Burundi and the Democratic Republic of the Congo (DRC) to Congo-Brazzaville and Rwanda were seeking ways to engineer similar changes. Outside Africa, most notably in Ecuador and Nicaragua, the abolition of term limits was also central to the constitutional reform agenda in 2014. While incumbents and their political allies more or less got their way in Ecuador and Nicaragua, elsewhere protesters forced them to back down (DRC) or leave office prematurely (Burkina Faso). What accounts for these different results?

Term limits then and now

Term limits in this chapter refers exclusively to the limitations placed on executive re-election at the national level, although it is not rare in some polities to restrict the tenure of legislators or other elected officials at the subnational level. Ginsburg et al. define term limits as 'pre-commitments through which the polity restricts its ability to retain a popular executive down the road' (2011: 1807). Term limits come in various forms, but most contemporary constitutions place the cap at a maximum of two terms, which may run consecutively or non-consecutively (Ginsburg et al. 2011: 1833–40; International IDEA 2011: 23). While such pre-commitments have assumed particular importance in modern constitutional polities, they are by no means a product of contemporary practice. Doron and Harris (2001:

5) and Ginsburg et al. (2011) provide extensive accounts of civilizations with analogous examples in classical and even biblical times.

Then, as now, despotic and undemocratic leadership was the key concern with perpetual rule, although others have challenged the democratic thesis. Stein (1943) argues, for instance, that pre-commitments are artificial and illiberal constraints on democratic choice (cited in Ginsburg et al. 2011: 1823), while Armstrong (2011) contends that term limit clauses represent a lack of faith in the populace to make informed decisions. Politicians seeking to extend their tenure are often quick to exploit this paradox (Butty 2009). Armstrong, however, nuances his arguments by suggesting that term limits, while restricting democratic choice, ultimately promote democratic competition and are more likely to prevent authoritarianism than hinder democracy (Armstrong 2011). This position accords with Ginsburg et al (2011: 1866) who, after a thorough survey of the different arguments, conclude that term limits generally play a key role in democratic governance.

Under what conditions are transgressions of term limits likely to succeed or fail? A number of interrelated factors often operate together. These include, for instance, the degree of concentration of executive power, the degree of neutrality or involvement of the security forces, the role of the international community or the impact of events in the regional neighbourhood. However, socio-economic realities—what Armstrong (2011: 30) calls contextual pressure—may be the biggest factor, as people are more likely to resist the status quo if they feel they or their social group are less advantaged than other social groups or people around them, perceive their living conditions to be bad, or have few prospects of upward mobility.[1]

Circumventing term limits: what makes the difference?

This section focuses on three 2014 term-limit controversies—in Burkina Faso, DRC and Ecuador—and seeks to explain why the attempt to circumvent term limits failed or succeeded in each case. As noted above, President Campaoré's attempts to evade the term-limit restriction met with strong public resistance. In the DRC, President Joseph Kabila ultimately renounced his ambitions for a third term (International Crisis Group 2015; Associated Press 2015; NOFI 2015), against a backdrop of persistent public and increasingly violent opposition, as well as loss of parliamentary support. In Ecuador, however, incumbent President Rafael Correa's Proud and Sovereign Fatherland Alliance (Patria Altiva y Soberana, Alianza PAIS) won a major victory in the Constitutional Court, allowing it to continue its efforts to remove the ban on re-election through parliament, rather than in a referendum as opponents

demanded. As Allianz PAIS has the required majority in parliament, it is unlikely to lose any vote on the issue. To what extent do economics, more than any other factor, explain the different outcomes in these three cases?

Burkina Faso

President Campaoré faced tremendous international and domestic pressure to respect the constitutional order as the crisis in Burkina Faso became increasingly volatile. On the domestic front, he faced internal party rebellion (Global Voices 2014), which he somehow managed to overcome. Pressure from international partners came notably from the United States (US Department of State 2013), former United Nations Secretary-General Kofi Annan and French President François Hollande (Jeune Afrique 2014). The fact that Campaoré ignored most of this pressure was a clear indication of his intention to push through the measure and continue to govern (*Global Times* 2014). However, the resilience of an apparently frustrated Burkinabe citizenry violently opposed to his leadership made it difficult even to guarantee the continuing loyalty of the security forces, which made it impossible for him to continue to govern. Having established the important role of public resistance in his ousting, the next logical question is: what was driving this public anger? It is difficult to answer this question without analysing Campaoré's Burkina Faso through a service delivery lens if not for the entire period of his rule, at least in the years running up to the proposed constitutional amendment.

In 2014 Burkina Faso was ranked 181st out of 186 countries on the United Nations Development Programme (UNDP) Human Development Index (UN 2014). More than 44 per cent of its 16 million inhabitants were still living on less than 1.25 US dollars per day, despite the improved levels of economic growth—an average of 6.4 per cent in the ten years to 2014.[2] Unemployment in its two main cities, Ouagadougou and Bobo Diolassu, stood at 20 per cent (World Bank 2013), although official unemployment data vary, for reasons beyond the scope of this analysis, and could be much higher (Wittek 2015).

Reliable and consistent data on levels of income and wealth inequality are similarly scarce but, according to a 2013 report by the International Crisis Group (2013), the disparity had become so great that distrust of and dissatisfaction with Campaoré had increased even in the traditionally loyal army. In 2011 this boiled over and, as soldiers mutinied over unpaid allowances, angry students and members of the wider public joined protests against perennial wealth inequality, rising food prices and the general lack of development (Associated Press 2011). This followed earlier protests (in 2000, 2006 and 2008) against unpopular political and economic development

choices. Calls for his departure (Nossiter 2011) illustrate the President's increasing unpopularity among the majority who could no longer manage the frustrations of living on the margins of society. If anything, it was this sense of socio-economic deprivation plaguing Burkinabe society that caused tensions to boil over again in 2014.

The Democratic Republic of the Congo

The factors at play in Burkina Faso also seemed to be operating in the DRC. President Kabila, who was serving his final term, remained defiant in the face of internal fragmentation and rebellion within his ruling coalition (Radio Okapi 2014), as well as warnings from partners such as the USA (Associated Press 2014) whose 'injunctions' he said 'Congo would not bow to' (Reuters 2014). Only the steadfastness of protesting citizens, even in the face of government repression, appears to have eventually pushed parliament to withdraw its support for the President by repealing previously adopted reforms to the electoral law that would indirectly have prolonged his rule. This immediately forced him to reconsider his ambitions for a third term.

In the face of a violent crackdown by government forces: what kept the protesters on the streets? Again, as in Burkina Faso, it is difficult to explain this without looking at the socio-economic conditions in which many Congolese citizens were living. Despite impressive and consistent economic growth in recent years, as measured by gross domestic product (GDP)—7.2 per cent in 2012, 8.5 per cent in 2013 and 8.9 per cent in 2014, according to the World Bank—and a positive forecast for the same in 2015 (World Bank 2014; Agbenonwossi 2015), poverty remained extremely widespread. The DRC was ranked 185th out of 186 countries in the UNDP's 2014 Human Development Index (UNDP 2014). Despite the economic growth, inequality remained high with no sign of any positive change. For instance, in the years for which data was available (2006, 2007 and 2013), the country's Gini coefficient remained constant (UNDP 2013). Unemployment among young people (who make up 58 per cent of the population) ranged between 80 and 90 per cent by some measures (allAfrica 2015).

In 2014, Transparency International ranked the DRC among the lowest 20 countries in terms of perceptions of corruption. This, combined with President Kabila's poor human rights record, earned him one of the lowest approval ratings (24 per cent) in a recent poll comparing the popularity of African leaders in their respective countries (Gallup 2013). Taken together, these factors made it impossible for Kabila to seek a third term without significant costs; and strengthened the tenacity of the people even in the face of armed repression. As Jean-Paul Beya, a determined protester, confidently

told journalists during mass protests in the city: 'we think the people are getting there little by little and we will replicate Burkina' (Ross 2015).

Ecuador

Events in Ecuador turned out differently. It is important to note that while President Correa may not be a political tyrant, he is not exactly a liberal democrat either. According to Freedom House, Ecuador's freedom scores—like those of the DRC and Burkina Faso—have remained static in the past ten years, never reaching 'free' status (Freedom House n.d.). Many also accuse Correa of patronage politics, stacking the judiciary and an increasingly authoritarian disposition (De la Torre 2014). Yet, while some voices, especially within the political opposition, remain vocal against plans by Alianza PAIS to repeal the re-election ban, Ecuador's ordinarily vibrant civil society has remained largely impassive. The reason seems to lie in the improved economic situation in the country. This is not just economic progress measured by GDP growth, which both Burkina Faso and the DRC achieved, but progress reflected positively across more far-reaching indicators such as downward trends in poverty, income and wealth inequality, and unemployment.

Ecuador's economy as measured by these indicators has achieved a better and more consistent performance under Alianza PAIS and Correa than under any other administration in recent times. The percentage of people living below the poverty line has fallen from 45 per cent to 25–27 per cent since Correa took office (Weisbrot 2013). Income inequality as measured by the Gini coefficient is also down—from 0.54 in 2006 to 0.46 in 2013 (Agencia Pública de Noticias del Ecuador y Suramérica 2015). Data from the UN Economic Commission for Latin America and the Caribbean (ECLAC), and other sources, puts unemployment in 2014 at 5.2 per cent, down from 7.3 per cent in 2007 (Trading Economics n.d.; Cox 2014). Together with other measures—such as increasing government revenues from improved management of the country's resources, which have been invested effectively in new infrastructure and social spending—this has reduced deprivation and enabled the fulfilment of the constitutional promises of free education, and access to health care and housing. The result for Correa has been consistently high approval ratings of between 60 and 85 per cent (Miroff 2014).

Correa's parliamentary majority, together with a sympathetic judiciary, should help reduce the costs of repealing the re-election ban. Yet, the economic argument appears more likely to explain the current status of Ecuador's term limits debate. More than anything else, economic progress has boosted Correa's popularity, with many people linking their changed fortunes directly to the President's leadership (De la Torre 2014: 459). In turn, this is insulating

both Correa and the regime from the costs of evading term limits. It has kept the masses—who seem to see the matter only as a pointless distraction by Correa's less successful detractors—off the streets and made any potential costs from externalities negligible. Carlo Ruiz Giraldo, a former adviser to the Constituent Assembly, agrees: 'But for a tiny minority who are beginning to look beyond just the economics, ordinary Ecuadorians—the majority of whom have endured socio-economic injustices in the past—are too content with the extant degree of progress to fully appreciate the significance of the debate. . . . The average Ecuadorian right now would rather maintain the status quo' (Giraldo 2015).

Juxtaposing Ecuador with Burkina Faso and the DRC lends some credit to this assessment. Campaoré and Kabila—whose parties, like Correa's, dominated political space in their respective countries—did not exactly run open societies either. Both exerted extensive influence over the polity due in part to an institutionalized system of crony politics. In theory, this should have reduced any costs associated with breach. However, while in Ecuador improved governance had resulted in social and economic transformation for many and increased Correa's popular appeal in the process, the reverse was true for Burkina Faso and the DRC. In the latter cases, economic deprivation and the bleak prospects of escaping it under the same leadership probably made it more difficult to keep citizens off the streets for much longer, even in the face of state repression. Beyond 2014, a quick survey of other contexts reinforces this argument on the predominant role of economics in determining outcomes in term-limit controversies.

Term-limit controversies in other contexts

Kazakhstan

In Kazakhstan, one of many Central Asian countries caught in the term limits imbroglio in recent decades, President Nursultan Nzarbayez, who has ruled since Kazakhstan's independence from the Soviet Union in 1991, successfully presided over the abolition of term limits through a parliamentary vote in 2007 without any public opposition. While the former-Soviet culture of repression and authoritarianism, which Kazakhs are accustomed to, might seem the most obvious explanation for this outcome, the impact of improved socio-economic conditions in the years running up to 2007 should not be ignored.

Despite variations between urban and rural areas, poverty levels declined hugely, from 47 per cent in 2001 to 4 per cent in 2012 (International Monetary

Fund 2014: 3), and the unemployment rate fell to 5.2 per cent in 2013—less than half its level in the early 2000s (International Monetary Fund 2014: 5). Between 2001 and 2009, Kazakhstan's Gini indicators also improved markedly from 'noticeable inequality' to 'moderate inequality' (Nedera 2012: 19). Considering the stagnation that characterized Kazakhstan's transition from a planned economy to a market economy in the 1990s, this progress is likely to have led not only to increased optimism but possibly also to greater confidence in the political status quo. This would tie in with Hirscham and Rothschild's prospect of upward mobility (POUM) hypothesis, which argues that people are less inclined to resist the status quo if they expect their well-being to improve (Hirscham and Rothschild 1973).

Nicaragua

In December 2013 Nicaragua's President, Daniel Ortega, who returned to office in 2007 with just 37 per cent of the vote but was re-elected in 2011 by 63 per cent of voters, scrapped the Nicaraguan Constitution's term-limits provision altogether with little public or political opposition. Ortega, who is no more of a liberal democrat than Ecuador's Correa, lost presidential elections in 1990, 1996 and 2001 after more than a decade in power in the period 1979–90. So what changed between 2007 and 2011? Economic progress seems to be the most convincing explanation.

Returning to power on an economic and social platform aimed at not only boosting economic growth, but also reducing poverty and income inequality, Ortega—in part through targeted subsidies to the poor which increased his popularity among poorer citizens—reduced the proportion of people living below the poverty line in nine years from 17 per cent to 5 per cent (Tortilla con Sal 2014). Income inequality has also decreased under Ortega, with an average year-on-year fall in the Gini index of 2.6 per cent between 2000 and 2011 (Lustig et al. 2013: 2). Over the years, these measures have allowed Ortega to rebuild political capital and trust with a broad section of Nicaraguans, especially the poor, as evidenced by his positive approval ratings of between 59 and 65 per cent in 2014 surveys (Rogers 2014). Unemployment remains a challenge, but this does not seem to have affected his ratings. His successes in other areas have arguably raised people's hopes. This would also correspond with Hirscham and Rothschild's POUM hypothesis.

Rwanda

Rwandan President Paul Kagame is similar in many ways to Ecuador's Rafael Correa and, to some extent, Nicaragua's Ortega. He has presided over Rwanda's remarkable economic revival, from the depths of genocide in 1994

to one of the world's ten fastest-growing economies in 2014 (Weiner 2014). Kagame is currently serving his final term, which ends in 2017. However, despite dissent from some quarters, parliament has already initiated a constitutional amendment process on the term limits provision. If passed, it would open the door to him running for a third term. This came after over 3.5 million Rwandans signed a petition in support of a third term for the President, the majority citing Kagame's largely positive economic record (Menelik-Mfuni 2013).

Conclusions

What do these cases tell us about the constraining power of term limits? Evidently, while incumbents may often have unrestricted access to state machinery, in particular the army, which they can deploy to undermine term limits at will, whether they are successful depends ultimately on the citizenry. In other words, the constraining mechanism of term limits is likely to be effective when citizens are committed to defending and protecting it from encroachment and less so if citizens remain passive. However, in less industrialized contexts, where democracy is increasingly valued in not only political, but also socio-economic terms, the ways in which citizens react to political threats to constitutional term limits also depend on the socio-economic incentives or disincentives that are there for them in the first place. Hence, incumbents with poor records on delivering public goods provide incentives for citizens to rally against them. In this scenario, term limits become very strong constraints. In contrast, where incumbents have a strong record of delivering public goods, there are fewer incentives for citizens to seek to prevent their continued stewardship of the state apparatus, even, it seems, at the expense of building and sustaining democracy. In this scenario, term limits constitute weak constraints or barriers that popular incumbents can easily overcome.

To end on the same cautionary note in which the central argument was framed, it is important to recognize that the cases reviewed here are far too few to allow for any definitive conclusions or broad generalizations. One reason is that there will always be outliers. Burundi, whose current socio-economic and political realities mirror Burkina Faso and the DRC, might be one such outlier. At the time of writing, a controversial ruling by the country's constitutional court has validated incumbent President Pierre Nkurunziza's bid for a third term, which many even within the government consider illegal. As high-ranking officials desert the government and street protests continue over the issue, even after a botched coup attempt in April 2015, the outcome

of the controversy seems far from settled.

Any generalization about presidential term limits would require an empirical analysis of a broader range of cases than is possible here, due to the scope of the review, which was predominantly limited to 2014 cases, and the lack of consistent and reliable data. Nonetheless, the cases analysed above reveal interesting parallels for further research into the hypothesis.

Notes

1 For a broad review of the literature that analyses these different hypotheses see Mueller (2011).

2 These calculations are based on annual figures over the 10-year period sourced from African Economic Outlook, <http://www.africaneconomicoutlook.org/en/statistics/>.

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7. Debates on the use of war powers in 2014

7. Debates on the use of war powers in 2014

Yasuo Hasebe

Introduction

When constitutionalist states prepare to go to war against unfriendly political regimes or terrorist organizations, one of the most serious challenges they face is how to wage or prepare war without damaging their own constitutionalist principles, on which wars often put great strain. Each state develops its own devices to achieve this objective. The challenges governments face have become increasingly global in nature, but their constitutional effects are usually local. This chapter examines the debates in 2014 on the use of so-called war powers in Japan and the United Kingdom. In Japan, the government has struggled to remove the restrictions imposed by its pacifist Constitution. In the UK, successive governments have created a constitutional convention that limits their discretion over the use of the war powers accorded as a royal prerogative.

Japan: Article 9 of the Constitution*

Article 9 of the Constitution of Japan stipulates that 'land, sea, and air forces, as well as other war potential, will never be maintained'. Many people, however, regard the Japan Self-Defense Forces (JSDF) as nothing short of military forces. The official explanation for this apparent contradiction is that it would be manifestly unreasonable for the Constitution to prohibit a government from maintaining and using minimum force to protect the lives and property of its people. In other words, the Constitution merely demands that the forces to be maintained and used should be strictly minimal (Hasebe 2012: 477–78).

* An earlier version of this section was published in a post on the blog of the International Association of Constitutional Law (Hasebe 2015).

A Japanese Government statement submitted to the National Diet on 14 October 1972 held that 'the current constitution, which is based on the pacifist principle, cannot be understood to tolerate unlimited exercise of the right of self-defence. The constitution recognizes the use of the right only in cases it is essential to protect Japanese people's rights to life, liberty, and pursuit of happiness, as these rights are jeopardised by foreign military attacks'.[1] Since the right to collective self-defence is invoked when a foreign state is under military attack and requests support from Japan, such use of force would be beyond the limits of the Constitution. In concrete terms, the government may only use force if: (a) Japan itself is under ongoing or imminent armed attack from abroad; (b) the use of force is necessary to terminate the attack; and (c) the extent of the use of force is proportionate to achieve this end. These three conditions should be co-existent.

In accordance with this line of reasoning, successive Japanese administrations have stated that, of the rights of self-defence recognized by article 51 of the United Nations Charter, the Japanese Constitution recognizes only the right of individual self-defence. In other words, use of the right of collective self-defence would be unconstitutional. Various Japanese Government spokespersons, including successive chiefs of the Cabinet Legislation Bureau which is responsible for providing legal advice to the government (Hasebe 2007: 298–99), have stated that amendment of article 9 would be essential in order for the government to be able to exercise the right of collective self-defence.

Prime Minister Shinzō Abe, who was elected in December 2012 when his Liberal Democratic Party (LDP) came to power, has long been critical of this official view. In January 2004 his parliamentary question addressed to the then chief of the Cabinet Legislation Bureau, Osamu Akiyama, suggested that there might be some circumstances in which the right of collective self-defence could be exercised even under the interpretation indicated in the above-mentioned statement of 14 October 1972. Osamu Akiyama denied the suggestion that such a possibility existed.

On becoming Prime Minister in 2012, Abe again asked for advice on this issue from the then chief of the Cabinet Legislation Bureau, Tsuneyuki Yamamoto, who duly repeated the view that use of the right of collective self-defence would be unconstitutional. In August 2013, after being asked to retire, Yamamoto was appointed an associate justice of the Supreme Court. In an unprecedented move, the next chief, Ichiro Komatsu, was not promoted from within the bureau, but recruited from the Japanese Foreign Ministry, which had been critical of the authoritative interpretation given by the bureau. Komatsu retired in May 2014 due to serious ill-health, but by that

time had made substantial preparations for a change in the interpretation that successive administrations had maintained could not be altered.

On 1 July 2014 the Japanese cabinet made a statement that, subject to limitations, the use of the right of collective self-defence could now be considered constitutional. According to the new interpretation, the use of force would be permissible when Japan is under ongoing or imminent armed attack from abroad (as outlined above), or when the Japanese people's rights to life, liberty and the pursuit of happiness are jeopardized because of military attacks against foreign countries which are in close relationship with Japan. The second and third conditions governing the use of force outlined above remain basically unchanged.

Apparently, the new condition was extracted from the Japanese Government statement of 14 October 1972, which was intended to set out the reasoning why the exercise of collective self-defence was not permitted under the Constitution. Although the 2014 statement refers in quite abstract and ambiguous terms to changes in international circumstances and the military situation in which Japan now finds itself, the exact grounds for this new interpretation are not clearly articulated. It is true that tensions between China and Japan have recently been heightened over the Diaoyu/Senkaku islands, but this is obviously a matter of individual rather than collective self-defence.

Reactions to the new interpretation of article 9

This change in government view has caused great concern. First, denial of the right of collective self-defence under the Constitution was a conclusion arrived at through the elaborate deliberations of various government departments over many years. It has been steadfastly confirmed and repeated. To borrow the expression of Sir Edward Coke, 'by many succession of ages, it hath been fined and refined by an infinite number of grave and learned men' (Coke 2013). If the product of many minds of requisite art can be changed in accordance with the policy preferences of a transitory Prime Minister, the role of a constitution in limiting political power almost evaporates. Any interpretation of any constitutional clause would now be up for grabs.

That is not to say that a government's views on a constitution can never change. Indeed, the Japanese Government has changed its position on the Constitution, albeit only on rare occasions. For example, in August 1985 the government stated that, under some strict conditions, cabinet ministers may officially visit the controversial Yasukuni shrine, despite the 'establishment clause' in the Constitution (article 20) prohibiting the state from taking part

in religious activities. Although the families of soldiers killed in action during World War II had demanded that ministers should pay official visits to the shrine, the government had expressed doubts about the constitutionality of such visits. The statement of 1985 was intended to make the legal situation clear and provide precise conditions under which ministers could officially visit the shrine constitutionally.[2] Whether actions previously held to be unconstitutional can become permitted under limited circumstances, however, poses quite a different question.

Second, this change in interpretation has seriously undermined the authority of the Cabinet Legislation Bureau in the eyes of many people. Several former chiefs of the bureau even openly criticized the turnaround. The bureau is highly regarded because it has given legal advice to various administrations from a standpoint that is detached from party politics. However, on this issue, the current bureau chief, Yusuke Yokobatake, who succeeded Komatsu from within the bureau, is suspected of having succumbed to Abe's pressure. If the bureau has come round to saying that some government actions are constitutional because the Prime Minister wants them to be, there will be scant respect for its opinions in future.

Third, it is difficult to understand the exact meaning of the newly issued conditions on the legitimate use of force. On the face of it, the cabinet states that use of force is permitted when Japanese people's rights to life, liberty and the pursuit of happiness are jeopardised by military attacks against foreign countries. If taken literally, it is hard to conceive of concrete examples of such a situation. While some politicians, including Abe, claim that under the new interpretation, the JSDF could be dispatched to the Hormuz Strait if it were blockaded since such a blockade would result in a sharp rise in oil prices and make people's daily lives more difficult, other politicians in the governing coalition, particularly those in the Komei Party, have asserted that it is unimaginable that troubles caused by higher oil prices could satisfy the new condition. On the question of whether possible destabilization of the alliance between Japan and the United States caused by foreign military attacks against US forces would satisfy the condition, the opinions of Foreign Minister Humio Kishida and Yokobatake patently differ. The normal role of interpretation should be to provide definitive meaning to an ambiguous text. The meaning of article 9, however, has become much less clear as a result of this change.

Fourth, it is not at all clear how such an expansion of the possible use of military force might contribute to peace and security in East Asia. Abe's foreign policy is said to be based on 'proactive pacifism', an obscure idea that is not easy to understand. While the Japanese Government asserts that the change in

interpretation increases the deterrent effect of Japan's alliance with the USA, this could also bring about military expansion on the part of neighbouring countries, making all parties more vulnerable to miscalculations. The risk that Japan might be implicated in the quarrels of other countries would also increase.

The Abe administration's move on article 9 has not been popular; it has certainly been divisive. According to an opinion poll conducted by the public broadcaster, NHK, at the end of July 2014, around 54 per cent of respondents were against the change. However, after a snap Diet election in December 2014, in which the main agenda was the government's economic policies (so-called Abenomics), the LDP won 290 of the 485 seats as underprepared opposition parties lost out. With the aid of the Komei Party, the LDP now controls more than two-thirds of the seats, which means it can force through bills rejected by the upper house. The government is expected to propose a bill related to the change in interpretation of article 9 in 2015. Many in the liberal camp in wider society are worried that the result of this policy direction will be the nationalistic regime that Abe has long desired.

Military intervention against the Islamic State in Iraq and Syria

The advances made by the self-proclaimed Islamic State in Iraq and Syria (ISIS) have led to military interventions by various countries. In August 2014 the USA began bombing ISIS targets in Iraq after US President Barak Obama argued for military action against the group. It is reported that there had been more than 240 US airstrikes against ISIS in Iraq and Syria by the end of September (Sisk 2014). This section discusses the constitutional aspects of the British Government's interventions in the same conflict.

While, as a question of law, war powers in the UK are vested solely in the executive, in recent years governments have tended to seek the approval of the House of Commons before deploying armed forces abroad (Hasebe 2012: 466–68). Before embarking on military intervention in Iraq in 2003, Prime Minister Tony Blair asked parliament to approve the use of all necessary means, including military force, 'to ensure the disarmament of Iraq's weapons of mass destruction'. While opinions differ on whether this established a constitutional convention that parliamentary approval must be obtained before the use of military force, it has been observed that 'there are unlikely to be any circumstances in which a government could go to war without the [at least implicit] support of Parliament' (British Parliament 2006: para. 98).

In March 2011, just after the commencement of the UK's military intervention in Libya to enforce UN Security Council Resolution 1973, the House of Commons overwhelmingly supported the British Government's action by 557 votes to 13. In August 2013, however, the House of Commons rejected possible British military action in Syria to deter the use of chemical weapons by Syrian President Bashar al-Assad. After the defeat of the proposal, by 285 votes to 275, Prime Minister David Cameron said that he would respect the will of parliament. The tentative evidence that the orders to gas civilians near Damascus on 21 August came from the al-Assad regime were not convincing enough for many members of parliament (MPs), with some analysts (e.g. Hersh 2013) suggesting that rebel forces were responsible for the chemical weapons attack. It seems likely that the convention requiring parliamentary approval for the use of force abroad has consolidated its status as a constitutional convention under Cameron's administration (Bradley, Ewing and Knight 2015: 257).

On 26 September 2014, a recalled House of Commons voted overwhelmingly (524 to 43) to approve the UK's participation in airstrikes against ISIS targets in Iraq. The Royal Air Force carried out its first airstrike on 30 September (British Ministry of Defence 2014). Given the request for British intervention from the Iraqi Government, airstrikes in Iraq do not pose any serious legal problem under international law. A vote in favour of airstrikes against Syria by the United Nations Security Council would almost certainly be vetoed by Russia. The hotly debated question is whether military action can be extended to Syria on the basis of the right of collective self-defence.

Whether the right of collective self-defence can be used as a legal basis for military action in Syria under international law is not clear. Although ISIS attacks are launched from Syrian territory, and their advances cannot be stopped without striking their military bases there, ISIS members are not acting under the command of the Syrian Government. One possible rationale may be that, since the areas in which ISIS military bases are situated are not effectively controlled by the government, and the government itself is unwilling or unable to prevent the use of its territory for ISIS attacks, airstrikes against ISIS targets there would not constitute the use of force against a sovereign state, but against a separate terrorist organization. It is reported that the US Ambassador to the UN defended US airstrikes on Syria in a similar way in a letter to the UN Secretary-General, Ban Ki-moon (Nichols 2014). Opinions may differ, however, about the cogency of this reasoning.

Conclusions

The requirement for parliamentary approval for the use of military force abroad has consolidated its status as a constitutional convention in the UK. The extent to which this parliamentary control will prove effective, however, remains unclear. In Japan, whether and how the range of actions by the JSDF expands will be determined by the specific changes made to the relevant statutes by parliament in 2015. The change in government view by itself does not expand the range of their actions.

Notes

1 Author's translation. The statement was officially titled 'Relationship between the Right of Collective Self-Defense and the Constitution', and was submitted by the Japanese Government to the Committee on Audit of the House of Councillors (the upper house of the National Diet). See also Japanese Ministry of Defense (n.d.) for a Japanese Government reference to this statement.

2 An official visit was conducted only once by Prime Minister Yasuhiro Nakasone in 1985, which provoked strong reactions from neighbouring countries. Since then, no minister has made an official visit but ministers have visited as private persons.

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Appendix. The I-CONnect year in review

Appendix. The I-CONnect year in review: scholarship on constitution-building in 2014

Richard Albert, Tom Ginsburg and David Landau (I-CONnect Co-Editors)

I-CONnect (<http://www.iconnectblog.com>) is the scholarly blog of the *International Journal of Constitutional Law*. I-CONnect publishes a combination of deep scholarly analysis, short critical reflections, timely reports on recent developments, audio and video interviews with scholars, and calls for papers for programmes in comparative public law.

In January 2014 I-CONnect inaugurated a curated list of news, high court judgements, blog posts and new scholarship. Over the course of the year, thousands of new developments in comparative public law were highlighted, including over 250 new scholarly books and articles.

This Appendix highlights ten noteworthy scholarly contributions on constitution-building processes either published or made available as drafts in 2014.

1. Dawood I. Ahmed and Tom Ginsburg, 'Constitutional Islamization and human rights: the surprising origin and spread of Islamic supremacy in constitutions', *Virginia Journal of International Law*, 54/615 (2014), <http://ssrn.com/abstract=2438983>

   Many constitutions in the Muslim world entrench clauses that make Islamic law supreme or declare void laws that are repugnant to Islam. There is little scholarship on the origins of these clauses, how they migrate around the Muslim world, whether they are anti-democratic, and why constitutional designers entrench them to begin with. Dawood and Ginsburg draw on an original dataset based on the coding of all national constitutions since 1789 to explore these important questions. Contrary to conventional claims that the constitutional entrenchment of Islam is antithetical to human rights, they conclude that 'constitutional Islamization' is almost always accompanied by an expansion, not a reduction, in the rights guaranteed by the constitution.

2. Dawood I. Ahmed and Moamen Gouda, 'Measuring constitutional Islamization: the Islamic Constitutions Index', 12 November 2014, <http://ssrn.com/abstract=2523337>

   Many codified constitutions incorporate Islam. Some recognize the Islamic character of the state, others make void all laws that are contrary to Islam and still others entrench Islam against formal amendment. This paper further develops the Islamic Constitutions Index, which was created by Ahmed and Gouda, the first index to measure and rank constitutions according to what the authors define as 'Islamicity'. They conclude that the Muslim world's model of 'Islamic constitutional democracy' is different in substantial respects from Western constitutional democracy.

3. Richard Albert, 'The structure of constitutional amendment rules' *Wake Forest Law Review*, 49/913 (2014), <http://ssrn.com/abstract=2461507>

   Constitutional designers lack sufficient academic resources to guide them in designing rules on constitutional amendment. Albert fills this void by explaining and illustrating that such rules are conceptually structured in three tiers: foundations, frameworks and specifications. He shows how constitutional designers may use amendment rules to manage federalism, express values, enhance or diminish the judicial role, and pursue democratic outcomes related to governance, constitutional endurance and amendment difficulty.

4. José Antonio Cheibub, Zachary Elkins and Tom Ginsburg, 'Beyond presidentialism and parliamentarism', *British Journal of Political Science*, 44/515 (2014), <http://ssrn.com/abstract=2365604>

   One of the most basic questions in constitutional design has long been how to structure executive–legislature relations. Three conventional options are commonly identified: presidentialism, parliamentarism and semi-presidentialism. Cheibub, Elkins and Ginsburg examine the formal constitutional provisions of these three design options in order to assess the internal cohesion of these classic categories. They conclude that the distinctions between them are not systemic but rather contextual.

5. Adam Chilton and Mila Versteeg, 'Do constitutional rights make a difference?', University of Chicago Coase-Sandor Institute for Law and Economics Research Paper no. 694/Virginia Public Law and Legal Theory Research Paper no. 2014-43, 7 August 2014, <http://ssrn.com/abstract=2477530>

Whether the formal entrenchment of rights leads to their actual exercise and enjoyment or whether they are what James Madison referred to as mere 'parchment barriers' is a question that remains largely unanswered empirically. In this empirical study, Chilton and Versteeg conclude that individual rights are unlikely to make a difference but organizational rights are associated with increased protection because they create incentives to protect the underlying right.

6. Ester Cross and Jason Sorens, 'Arab Spring constitution-making: polarization and state building', 3 November 2014, <http://ssrn.com/abstract=2518648>

   The Arab Spring spawned new constitutions, most notably in Egypt, Libya and Tunisia. Despite their similar origins, these three constitutions differ substantially in how they structure political institutions to protect individual rights. Cross and Sorens argue that the constitutional drafters were influenced by the degree of political polarization in their respective societies. Where there was a high degree of polarization, the authors placed more emphasis on building state capacity rather than protecting individual rights. The authors conclude with observations on the implications of their findings for constitution-making elsewhere.

7. Rosalind Dixon, 'Partial constitutional codes', University of New South Wales Law Research Paper no. 2014-37, 18 August 2014, <http://ssrn.com/abstract=2482377>

   Faced with variations in the length and degree of specificity of written constitutions, constitutional designers have many options with regard to the substance of what they entrench and the style in which they do so. Dixon contrasts two models of constitution drafting—the highly codified approach and the framework model—and explores their costs and benefits for the judicial function, constitutional interpretation and constitutional design more generally.

8. Cheryl Saunders, 'The impact of internationalisation on national constitutions', in A. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014), <http://ssrn.com/abstract=2369675>

   The past 30 years has seen increasing convergence among national constitutional systems, as a result of transnational forces which Saunders refers to as 'internationalization'. With reference to constitutions in Asian states, Saunders identifies these forces and evaluates how internationalization affects national constitutions, recognizing

that although convergence is occurring, so too is fragmentation. Internationalization, Saunders concludes, waxes and wanes, and the challenge facing comparative constitutional scholars is to be attentive to the realities of both convergence and difference.

9. Silvia Suteu, 'A new form of direct democracy: constitutional conventions in the digital era', University of Edinburgh School of Law, Research Paper Series no. 2014/39, 17 October 2014, <http://ssrn.com/abstract=2511285>

   Constitutional democracies have experimented with participatory constitution-making in recent years. Iceland, Ireland and the Netherlands, as well as British Columbia and Ontario authorized partially citizen-led procedures for constitutional change, in relation to electoral reform in some cases and more sweeping constitutional reform in others. Suteu evaluates the quality of the processes and outcomes of participatory constitution-making in the 21st century.

10. Rivka Weill, 'The New Commonwealth Model of Constitutionalism notwithstanding: on judicial review and constitution-making', *American Journal of Comparative Law*, 62/127 (2014), <http://ssrn.com/abstract=2402625>

    This provocative paper challenges the conventional view that weak-form or strong-form constitutional review in a given jurisdiction can be properly deduced from the wording of the provisions of the constitution, namely legislative override or incompatibility clauses. Weill argues that the nature of judicial review is dictated primarily by the constitution-making rules, and concludes that the procedures used to adopt and amend a constitution are better referents for the nature of constitutionalism.

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