Annual Review of Constitution-Building Processes: 2017

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Design and layout: International IDEA
Cover image: Tuvalu House, on the atoll of Funafuti, which houses Tuvalu's parliament (Palamene o Tuvalu). © Dmitry Malov/Dreamstime.com
DOI: ‹https://doi.org/10.31752/idea.2018.72›

ISBN: 978-91-7671-224-5

Created with Booktype: ‹https://www.booktype.pro›

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Preface

The strategy of the International Institute for Democracy and Electoral Assistance (International IDEA) for 2018–2022 describes the organization as a 'think and do tank'. As such, the Institute combines global, policy-relevant research and international comparative knowledge production with country-level technical assistance on democratic reform. This complementary nature is key to our added value for our Member States.

In addition to generating knowledge we work on the ground in countries as diverse as Paraguay and Yemen, Myanmar and Ukraine. We use our in-house expertise and knowledge base to add value to our technical assistance activities. Reading through the 2017 edition of the *Annual Review of Constitution-Building Processes*, I am convinced that the mutually reinforcing circle of comparative knowledge production and advice given in country programmes is part of what makes International IDEA unique and able to fulfil its mandate to strengthen and safeguard democratic institutions and processes.

This *Annual Review of Constitution-Building Processes* was made possible thanks to our excellent staff spending a good deal of time on the ground, engaging with national stakeholders who are leading constitutional reform processes. From Tuvalu (Chapter 6) to the Gambia (Chapters 1 and 4), our colleagues are working with partners on the ground and are able to translate those experiences and lessons learned into publications such as this Annual Review.

In line with its mandate, International IDEA zooms in on salient issues and trends arising in the field, convenes thought leaders at the international policy level, and develops resources and sets agendas around these emerging topics. This edition of the Annual Review highlights the links between transitional justice and constitution-building processes (Chapter 3), and the increasing use of citizens' assemblies (Chapter 4), two central themes in 2017. In 2018, in partnership with

the Center for Deliberative Democracy at Stanford University, International IDEA convened a meeting of high-level experts and practitioners working on citizens' assemblies to develop lessons learned and guidance on the use of such mechanisms in constitution-building; the Institute also co-hosted the fifth Edinburgh Dialogue on Post-Conflict Constitution-Building, on the intersection between transitional justice and constitution-building, with the University of Edinburgh.

Chapter 5 analyses the 'anatomy of a failed process' in Sri Lanka and raises the complicated notion of political culture as a factor in the waning momentum for reform. In 2018, International IDEA picked up this issue at the third Melbourne Forum on Constitution-Building in Asia and the Pacific, organized in partnership with the Constitution Transformation Network, which brought experts and practitioners from several jurisdictions across the Asia-Pacific region to exchange experiences and lessons learned about how political culture has helped or hindered constitutional reforms in their own countries.

I hope the reader will enjoy and learn from this *Annual Review of Constitution-Building Processes*, which has been developed and written from the point of view of practitioners immersed in these issues in their daily work.

Yves Leterme
Secretary-General
International IDEA

Introduction

Sumit Bisarya

Each year, the International IDEA *Annual Review of Constitution-Building Processes* provides a series of reflections on some of the central themes and issues that arose across countries attempting constitutional change during the year. As has been the case in previous years, since the first edition covering 2013, the 2017 edition reveals a mix of issues that seem to be of perennial relevance and some that seem to be novel and perhaps indicative of new trends and forms of constitution-building.

In Chapter 1, Adem Abebe covers systems for electing a president. After surveying the recent constitutional changes and debates taking place in Gabon, the Gambia, Malawi and Togo, Abebe illustrates how the discussion focuses exclusively on a choice between plurality and run-off systems, and how the advantages or disadvantages of these systems are often poorly predicted by their proponents. Importantly, Abebe suggests expanding the constitutional imagination to consider other electoral systems that have been introduced in other continents.

Chapter 2 looks at an issue that has made front-page news across the world in recent years—the independence referendum—in particular with regard to the cases of Iraq and Spain. Erin Houlihan explains the constitutional origins of these referendums, and the responses of the parent state to the attempted secession. In doing so, she sheds light on the tension between constitutional arrangements that allow substates to develop secession movements and the powerful constitutional tools at the disposal of the central state, which enable it to take back control.

In Chapter 3, Lea Mano and I tackle the nexus between constitution-building and transitional justice. Both processes look back to look forward: transitional justice processes aim to deal with injustices of the past, to provide a basis for

reconciliation and sustainable peace in the future; while constitutions are drafted to respond to problems in the past by constraining actors in the future. The chapter provides overviews of how these processes are interacting in Colombia and the Gambia, which illustrate a number of different linkages and overlaps between these two aspects of transition.

In Chapter 4, Amanda Cats-Baril looks at the innovative modes of citizen participation in constitution-building processes in Chile, Ireland and Mongolia. In Chile, a participatory process was carefully designed using deliberative settings from local to national levels. Although the reform process ultimately stalled, there is much to be admired, and to learn from, in the public consultations that were carried out. Ireland and Mongolia both used forms of citizens' assemblies to propose constitutional reforms, in which groups of randomly selected citizens were brought together to learn, deliberate and vote on possible reforms. These mechanisms—which first gained attention at provincial level in Canada, and subsequently in Iceland—continue to increase in prominence and are likely to feature in other processes in the future.

Chapter 5 is the only chapter to focus on the case of a single country, that of Sri Lanka. The reason for this focus is twofold. First, the constitution-building process garnered widespread attention for the hope it held out, arising as it did from unexpected origins: in December 2015, a reform coalition unexpectedly defeated strong-arm President Mahinda Rajapaksa in elections, including constitutional reform as part of its platform. Asanga Welikala explains how the once fierce momentum for reform soon dissipated under the various exigencies of day-to-day politics. Therefore, the analysis is of interest to anyone who has followed the various attempts at constitutional reform in Sri Lanka over the years. Second, the Sri Lankan narrative is not unique. Most attempts at writing new constitutions fail, through processes that either gradually grind to a halt or regress into violent conflict. Understanding failing processes can provide lessons as important as those from the more often studied successful processes.

Finally, in Chapter 6, W. Elliot Bulmer covers the issue of religion. Bulmer focuses on how religion has been used to articulate state identity through constitutional reforms. Cognizant of the plethora of literature on the relationship between religion and state in Islamic contexts, Bulmer focuses his analysis on three religions: Judaism in Israel, Christianity in the South Pacific island states of Samoa and Tuvalu, and Buddhism in Sri Lanka.

1. Electing African executive presidents: beyond a false dilemma

Adem K. Abebe

Introduction

As when they were colonial masters during the pre-independence era, post-independence African presidents continue to be the centre of gravity of political power and patrimonial dispersal, both constitutionally and even more so in practice. This historical continuity has prompted prominent African scholars to lament the phenomenon of 'imperial' or 'absolute' presidentialism (Prempeh 2013). It is no wonder, then, that attempts at strengthening democratic transitions almost always involve demands to reform the rules concerning ascendance to and the mandate of the presidency and to constrain the continued dominance of incumbents, including by enforcing or introducing term limits.

A notable reform proposal that featured in several constitutional reform efforts in Africa in 2017 concerned the way in which presidents are elected. All presidents in Africa with strong executive powers (executive presidents) are directly elected by the people, with the notable exceptions of the absolute monarchy in Swaziland and the unelected regime in Eritrea. Although the heads of government in Botswana and South Africa are called 'presidents', they are appointed by, and subject to the no-confidence vote of, parliament; both countries effectively have a parliamentary system of government whereby a single person serves as both head of government and head of state.[1] Following the wave of democratic and constitutional reforms in the 1990s, most African executive

presidents are now elected through the two-round majority run-off electoral system (run-off system) (McClintock 2018: 96). Despite this continental trend, Cameroon, Equatorial Guinea, Malawi, Nigeria, Rwanda, São Tomé and Príncipe, and South Sudan have adopted the first-past-the-post plurality system (plurality system). In addition, Tanzania (2000), the Gambia (2001), Togo (2002), Gabon (2003), Angola (2010) and the Democratic Republic of the Congo (DRC) (2011) have amended their constitutions to replace the run-off system with the plurality system. Kenya (2010), Tunisia (2014) and Zambia (2016) have shifted in the other direction, introducing the run-off system.

In line with the post-1990 global trend, however, there has been growing pressure on countries to move from the plurality system to the run-off system. In 2017, such reforms were on the agenda in Gabon, the Gambia, Malawi and Togo. After briefly outlining the various modalities of electing executive presidents, this chapter provides some background to the reform efforts in these countries, discusses the proposals for reform and concludes with some tentative observations. It notes the importance of understanding the potential implications of such a shift for the broader political framework and the need to draw on comparative lessons to inject a level of creativity to break out of the false dilemma of either plurality or run-off. Relevant stakeholders may also need to think through the possible negative consequences of shifting to a run-off system, such as the proliferation of presidential candidates, a greater likelihood of 'minority' presidents—where the president's party does not have a supportive legislative majority, which increases the possibility of legislative–executive deadlock—and more marked ethnic and regional voting patterns.

Various modalities of electing executive presidents

In the vast majority of countries with executive presidents, the president is directly elected by the people. Direct election is considered crucial to ensuring the legitimacy of the presidential mandate. Most countries elect their executive presidents through the plurality system, whereby the candidate with the highest proportion of votes wins the election (Shugart and Carey 1992: 206). The plurality system is associated with the formation of two broad coalitions (known as Duverger's Law), and is known for its simplicity and practicality. Nevertheless, the system may also lead to a candidate winning an election without a majority of the votes.

Accordingly, since the wave of constitutional reforms in the 1980s and 1990s, presidents in most regions (perhaps with the main exception of executive presidents in East Asian countries) have been elected through run-off elections in which a candidate must win more than 50 per cent of the valid votes cast to secure an election (Reynolds, Reilly and Ellis 2005: paragraph 174; McClintock 2018: 96). In cases where no candidate secures a winning majority, a second

round is held between the top two candidates. As well as ensuring broad-based popular support for the winning candidate, the system encourages political moderation on the part of candidates, with a view to receiving support beyond their base, and it is more permissive of the emergence of new candidates and parties, that is, it lowers the entry barriers that plurality systems may create (McClintock 2018: 106). Nevertheless, it is also associated with the proliferation of candidates, especially when an incumbent is not running (Jones 2018) and in countries with higher levels of social heterogeneity (Golder 2006). In addition, it increases the cost and the logistical and security burden of elections. Furthermore, legislative–executive deadlock is generally more common in countries that use the run-off system (Reynolds, Reilly and Ellis 2005: paragraph 181), especially those with proportional electoral systems for the legislature, and when presidential and legislative elections do not coincide (Golder 2006: 47). As noted above, executive presidents in Africa are elected through either the run-off or the plurality electoral system.[2]

The desire to maintain the perceived advantages of the plurality system in encouraging political groups to coalesce into two broad coalitions, and in reducing instances of second-round elections, has led to innovative proposals when designing rules for presidential elections (Shugart and Taagepera 1994). Accordingly, in determining whether a run-off is required, several Latin American countries have introduced rules reducing the majority needed and taking into consideration the gap between the most popular candidate and the second-placed candidate (McClintock 2018). For example, in Costa Rica, a candidate wins in the first round if he or she wins a plurality with at least 40 per cent of the votes. In Ecuador (since 2002) and Bolivia (since 2009), an absolute majority (50 per cent plus 1) is needed to avoid a run-off, except when the top candidate wins between 40 and 50 per cent of the votes and has at least 10 per cent more votes than the second-placed candidate. In Argentina (since 1995), a candidate must win 45 per cent of the votes to avoid a run-off. In addition, a candidate who wins between 40 and 45 per cent of the votes can avoid a run-off if he or she has a 10 per cent lead over the runner-up. In Nicaragua (since 2000), a candidate must win at least 40 per cent to avoid a run-off, or between 35 and 40 per cent with a lead of at least 5 per cent over the runner-up.

A few countries, notably Sri Lanka, have sought to achieve some of the benefits of both the plurality and run-off systems by adopting the alternative vote system (also called instant run-off) (Reynolds, Reilly and Ellis 2005: paragraphs 182–86). Under this system, instead of selecting one candidate, voters rank some or all candidates. A candidate will win if he or she secures an absolute majority of the first-preference votes. If not, the last candidate in the list is eliminated and her or his votes are distributed to the other candidates based on the ranking. This process is repeated until a winner emerges. To make the process less complicated, in Sri Lanka, voters may rank only up to three candidates. Although this system

has the advantage of determining a winner at the first attempt while ensuring that he or she enjoys broad support, it adds complexity to the voting system and could encourage the proliferation of candidates.

Some countries have opted to adopt processes other than direct election. The United States uses an Electoral College to select the president, while Myanmar, Somalia, Suriname and Switzerland have opted for the legislative appointment of the executive president. The critical difference between parliamentary systems and the systems in these countries is that the president, once elected, is independent of the parliament, which does not have the power to hold the government politically accountable through a no-confidence vote—referred to as assembly-independent regimes (Shugart and Carey 1992: 26). This arrangement combines features of parliamentary systems (the head of the executive originating from parliament) and presidential systems (the president existing separately from the government) (Ganghof, Eppner and Porschke 2018: 213). The legislative majority required to select the president may be high. For example, a two-thirds majority is required to elect the Somali president in the first two rounds. When the two rounds do not produce a winner, the third round is decided by a vote between the two most popular candidates.

Constitutional reform debates on systems of presidential elections in Africa

In constitutional reform processes in 2017, some African countries were debating the electoral system for presidents. In all these cases, the proposed shift was from the plurality system to a run-off system. In Malawi, the reform plans were driven by repeated electoral outcomes in which winning candidates failed to secure an absolute majority. In the last presidential election, in 2014, the winning candidate secured only 36 per cent of the vote. In the Gambia, the reforms were being discussed as part of an overall constitutional reform initiative following the defeat of long-time dictator Yahya Jammeh in the December 2016 presidential election. The reform debates in Gabon and Togo have occurred mainly as a result of pressure from opposition groups in the context of a political and security crisis. The constitutional shift was finalized in Gabon in early 2018. While the reform plans in the Gambia and Togo are ongoing, there appears to be a high level of political support for the moves. In contrast, in Malawi, although the Law Reform Commission has clearly recommended a move, the process has largely stalled and there does not seem to be serious political commitment to following the shift through (Malenga 2017). Other countries where there has been debate about a potential similar shift, but which are not discussed in this chapter, include the DRC and Sierra Leone.

Gabon

Following the political and security crises in the aftermath of the contested outcome of the 2016 presidential elections, Gabon witnessed serious protests, which led to the burning down of the parliamentary building. While the protests were triggered by complaints about the freedom and fairness of the elections, the demands included the reform of the 1992 Constitution. The president is elected directly for a seven-year term (extended from a five-year term in the 1997 constitutional amendments) through the plurality system. Notable amendments include the 2003 reforms—which removed presidential term limits that had been introduced through a constitutional amendment in 1997 and replaced the run-off system with the plurality system under the leadership of Omar Bongo Ondimba, the late father of the current President, Ali Bongo Ondimba—and reforms in 2011 that enhanced the president's powers in matters of defence and security.

Civil society groups and opposition political parties had been calling for constitutional reforms on a range of issues long before the 2016 crisis (Kiwuwa 2018; Mouity and Ondo 2018). Despite government promises, these reforms were not forthcoming. It was only after the violence and the political crisis that followed the 2016 presidential elections, in which the incumbent won a second term, that the reform agenda was set in motion. With a view to addressing the crisis, President Ali Bongo launched a national political dialogue, which took place in April and May 2017. Opposition political groups and civil society organizations participated in the dialogue, although it was boycotted by some radical groups. The outcomes of the dialogue led to proposals for constitutional reform. Opposition groups demanded the reinstatement of presidential term limits and the reintroduction of the run-off system, both of which were endorsed during the dialogue.

In line with the outcomes of the dialogue, the run-off electoral system was reintroduced as part of constitutional amendments approved in January 2018. The changes followed the 2009 and 2016 presidential elections, both conducted under the plurality system, both of which Ali Bongo won with less than an absolute majority (over 41 per cent and 49.8 per cent of the vote, respectively). In the 1993 and 1998 presidential elections, both conducted under the run-off system, Omar Bongo won in the first round, with 51 per cent and 66 per cent, respectively. Omar Bongo also won the 2005 elections, undertaken under the plurality system, with 79 per cent.

In the first two post-1992 presidential elections under the run-off system, two opposition candidates shared most of the votes for opposition candidates (i.e. there was no single dominant opposition contender). This happened again in the 2005 and 2009 elections, which were undertaken under the plurality system. Only once has the opposition rallied under a single flag-bearer, and that was in the 2016 elections, which were conducted under the plurality system. Whether or

not the opposition coalition in the 2016 elections would have materialized under a run-off system is hard to say. In general, countries with run-off systems tend to have more presidential candidates than those with the plurality system (Jones 2018). The shift to a run-off system may therefore have the unintended consequence of increasing opposition fragmentation in the first round, which was historically common. That is, the run-off system may drive an opposition coalition only in the second round, with the first round becoming a means of determining the most viable opposition candidate.

The Gambia

In the December 2016 presidential elections in the Gambia, incumbent President Yahya Jammeh, who was running for a fifth term, lost to Adama Barrow, the flag-bearer of an organized opposition coalition. Despite his initial refusal to step down, Jammeh was forced to accept defeat and to leave the country for Equatorial Guinea. Barrow campaigned on a promise of reviving Gambian democracy, including through a constitutional reform and transitional justice process (Jobarteh 2018; Siegle and Bekoe 2018). Central to the constitutional reform plan is a review of the institution and powers of the presidency. In particular, the debate has focused on the need to establish presidential term limits and reverse the shift from the plurality system to a run-off system. The run-off system was replaced with the plurality system through a constitutional amendment in 2002.

Following up on the campaign promise, in December 2017 the Gambian parliament approved a law establishing a Constitutional Reform Commission, which the president signed in January 2018. Once established, the Commission will have an initial period of 18 months to finalize the reform process (subject to a potential six-month extension). The law specifically requires the reinstatement of term limits, although the details are to be determined in the review process. In contrast, the law does not make specific reference to the reintroduction of the run-off system for presidential elections. Although the memorandum of understanding between opposition parties concluded before the 2016 presidential elections included such a reference, a shift to the run-off system for presidential elections cannot be taken for granted.

Although the removal of term limits allowed Jammeh to stay in power, the shift to the plurality system ultimately contributed to his defeat in 2016. The 2016 presidential elections were the first since the adoption of the constitution in which a candidate won without receiving the absolute majority of the votes; in other words, the lack of significant voter support for the winner has not been a practical problem in the Gambia. Barrow won just over 43 per cent, while Jammeh secured just under 40 per cent. The third candidate, a former Jammeh ally, won just over 17 per cent. The fact that the third candidate won a significant share of the votes meant that the outcome of a run-off election between the top two candidates would have been uncertain.

In the first four presidential elections after 1990, Jammeh won, with just over 55 per cent (1996), 52 per cent (2001), 67 per cent (2006) and 71 per cent (2011). Jammeh secured a particularly high share of the votes in the 2006 and 2011 presidential elections, which were conducted under the plurality system, and a relatively low share in the 1996 and 2001 elections, which were conducted under the run-off system. Moreover, except in the 2011 elections, where the votes for the opposition were largely divided between the second and third most popular candidates, in the first three elections the second candidate won a large share of the votes for the opposition. The run-off system did not encourage the effective fragmentation of the opposition in the first two elections. In contrast, in the last two presidential elections, conducted under the plurality system, the third candidate won a significant share of the votes (i.e. the plurality system did not lead to a two-horse race). The shift to a run-off electoral system may further discourage the formation of pre-election coalitions, and, in combination with the departure of long-time leader Jammeh, may reduce the incentives for opposition presidential candidates to coalesce with or against the incumbent in the first round.

Malawi

Malawi has been debating replacing the plurality system with a run-off system since the first presidential elections under the current constitution, which was provisionally approved in 1994 and formally entered into force in 1995. The most serious process culminated in a formal recommendation by the Law Reform Commission in 2017. The Malawian president is elected for a five-year term and may serve a maximum of two *consecutive* terms. The president (and her or his running mate for vice president) is elected by a 'majority' of the electorate. This provision is seen as establishing the plurality system for the presidency. The Supreme Court of Appeal confirmed this interpretation in 2000.

In the five presidential elections since the adoption of the constitution, the winning candidate won more than 50 per cent of the votes only twice, in 1999 (52 per cent) and 2009 (66 per cent). In the elections in 1994, 2004 and 2014, the winning candidate won with just over 47 per cent, 35 per cent and 36 per cent, respectively. The repeated occurrences of the winning candidate securing significantly less than an absolute majority, and a feeling that presidential candidates often reach out to only those constituencies in their stronghold regions, have led to calls for the reform of the electoral system for the presidency (Nkhata 2017). Accordingly, the Special Law Commission on the Review of Electoral Laws was established. In March 2017, the Commission presented its report, developed following consultations with stakeholders, in which it recommended a raft of electoral reforms, including a shift from the plurality system to a run-off system with a view to increasing acceptance of electoral results. Despite consistent evidence of ethnic and regional voting patterns, there

was no specific proposal requiring the regional distribution of votes (Nkhata 2017).

The government has been reluctant to table the necessary constitutional amendments to give effect to the recommendations of the Commission, ostensibly on the grounds of cost and capacity constraints on organizing two rounds of elections (Jimu 2017). The National Assembly has, similarly, not deliberated on the Commission's report or taken a position on the proposed shift to a run-off system. The reform process has largely stalled and is unlikely to be seriously considered before the next presidential and legislative elections, scheduled for 2019 (Malenga 2017).

The two elections in which the winning candidate secured more than 50 per cent of the votes were the only ones in which the incumbent ran for re-election and won.[3] Both were also characterized by opposition groups coalescing against the incumbent. In the 1994, 2004 and 2014 elections, the incumbent either was barred from running because of term limits or died in office. In these elections, the winning candidate received just over 47 per cent, 35 per cent and 36 per cent, respectively. In elections where there was no incumbent competing, the plurality system did not lead to a two-way competition, and the third most popular candidate won a significant share of the votes. A shift to the run-off system would probably reinforce the historical trend towards fragmented presidential competitions, making second-round elections almost certain.

Togo

Togo has been witnessing a series of organized protests, particularly since August 2017. At the heart of the protests are demands for the reinstatement of the 1992 Constitution (Bado 2017). Constitutional amendments in 2002, which were introduced after the ruling party won a commanding legislative majority thanks to an opposition boycott, removed presidential term limits and replaced the run-off system with the plurality system for presidential elections. The reinstatement of the 1992 Constitution would mean that current President Faure Gnassingbé, who succeeded his late father in 2005, would be excluded from running for re-election.

Calls for constitutional reform were at the centre of the political crisis that followed the 2002 reforms. The crisis reached its height in the aftermath of post-election violence in 2005, which led to opposition groups and the ruling party signing a political agreement in 2006. Although a national unity government was established in line with the agreement, none of the agreed constitutional and institutional reforms was approved. Opposition and civil society pressure led the government to prepare draft constitutional amendments, but the legislature rejected these without consideration in 2014 and 2015 (Bado 2017). Opposition efforts to force the legislature to table the amendments through the courts were also frustrated as the legislature delayed implementing a decision of the

Constitutional Court directing it to discuss constitutional reforms to give effect to the 2006 agreement. It was only after the beginning of mass protests that the government tabled selected proposed reforms giving effect to aspects of the 2006 agreement, and parliament approved these in September 2017.

In addition to the reinstatement and retroactive application of presidential term limits, opposition campaigners seek to reintroduce the run-off system. The government has generally agreed to the demands to reinstate critical aspects of the 1992 Constitution removed in earlier constitutional amendments, but it has rejected proposals to make term limits retroactively applicable. Indeed, the reforms approved in parliament in September 2017 reintroduced the run-off system. Nevertheless, the bill did not achieve the four-fifths parliamentary majority necessary to avoid a constitutional referendum, as opposition members boycotted the legislative process. The reforms must therefore be approved in a referendum before they can come into effect. Although the government has indicated that it intends to organize the referendum, mediation efforts are ongoing to end the political crisis under the auspices of the Economic Community of West African States (ECOWAS). The exact outcomes of the process are, therefore, unknown. Nevertheless, given the consensus on the form of the electoral system, it is likely that the run-off system will be reintroduced.

In all presidential elections since the adoption of the constitution, the incumbent has won with more than 50 per cent of the votes. The second most popular candidate has also won a substantial share of the votes for the opposition, continuing a steady tradition of opposition coalitions forming to challenge the incumbent under both the plurality and the run-off systems. Therefore, the implications for opposition coalition formation of moving to a run-off system remain unclear. Nevertheless, as noted above, in general, countries with run-off systems tend to have more candidates than countries with the plurality system. The shift may therefore encourage opposition fragmentation, undermining the nascent tradition of opposition coalitions. Indeed, in the 1998 elections—which were the first competitive elections under the plurality system, as the 1993 elections were boycotted by the opposition—the third most popular candidate won the highest share (9 per cent) of the votes for opposition candidates.[4] In the last three elections, all undertaken under the plurality system, the third candidate has not won more than 5 per cent.

Conclusions

Rules governing the election of executive presidents have been central to constitutional reform processes in 2017 in African countries that use the plurality electoral system. In all the case studies, the choice appears to be limited to either the plurality system or the run-off system. The relevant stakeholders do not seem to be aware of or otherwise value the potential utility of innovative, middle-way

approaches adopted in several Latin American countries, and the alternative vote system adopted in Sri Lanka, particularly considering that the main concerns about run-off elections appear to relate to the cost, logistical and stability implications. The relevant stakeholders should break out of this false dilemma that has constrained the range of available options.

The shift from a plurality to a run-off system has been demanded by opposition groups, whereas incumbents tend to be comfortable with the status quo.[5] The run-off system ensures that the winner receives an absolute majority of the votes, which could increase the legitimacy of electoral outcomes, particularly considering the extensive individual powers that executive presidents exercise. Nevertheless, proposed changes to the manner of election of presidents should not be seen in isolation. It is crucial that stakeholders also consider the potential implications of adopting the run-off system in terms of the proliferation of candidates. As noted earlier, proliferation of candidates is more likely in countries with the run-off system, and in heterogenous societies (Golder 2006: 35), a common feature of all the countries discussed in this chapter. In this context, the run-off system may disincentivize the formation of pre-election (opposition) coalitions, which are more likely to be based on compatibility of policies and programmes than coalitions of convenience created after the first round (Reynolds, Reilly and Ellis 2005: paragraph 175).

Although the proliferation of candidates may at times, counterintuitively, help incumbents win in the first round, it is likely to increase the chances of second-round elections, with implications for cost, administration and stability. A fragmented opposition in the first round may find it hard to rally its voters behind the opposition candidate in the second round. Moreover, legislative–executive deadlock and political crisis are generally more common in countries with the run-off system, especially when first-round presidential and parliamentary elections are held on the same day *and* when the runner-up in the first-round wins the run-off (McClintock 2018: 104).[6] Caution must be exercised to ensure that the proliferation of candidates does not reinforce the proliferation of political parties, and the fragmentation of parliament and the overall political process.

Understanding these potential challenges is necessary to design safeguards to address them, including through deliberate decisions about the timing of legislative and presidential elections, the electoral system for the legislature, and tools to discourage fringe candidates. The multiplicity of presidential candidates and parties has been a challenge in the four countries discussed in this chapter, even under the plurality system. This has led occasionally to instances of legislative–executive deadlock, especially in Malawi (Lembani 2013: 81–83), which has had more open and competitive elections than the other countries. Indeed, except in 2009, Malawian parliamentary elections have consistently resulted in no single party winning an absolute majority, leading to constant

legislative–executive squabbles and, on occasion, paralysis. Without thoughtful adjustments in related areas, the introduction of the run-off system could undermine political cohesion and effectiveness.

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Endnotes

1. The only other African countries with a parliamentary system of government are Ethiopia, Lesotho and Mauritius. Morocco has a unique system whereby the prime minister exercises executive powers alongside a powerful monarch.
2. Angola has a unique plurality system whereby the presidential and legislative elections are combined. The leader of the party that wins the highest number of votes in the legislative elections automatically becomes the president.
3. In the 2014 elections, a former vice-president, who replaced the president after he died in office, also ran and lost the election. This chapter does not consider her an incumbent, as she was not elected to her position as president.
4. At the same time, the share of the third candidate was quite low in absolute terms, compared with just above 34 per cent for the main opposition candidate and 52 per cent for the incumbent.
5. The notable exception is Sierra Leone, where changes to the electoral system were mooted by the former governing party, even though the Constitutional Review Committee, which recommended several reforms after widespread consultations, did not propose reforms to the presidential electoral rules (Conteh 2017). Interestingly, the ruling party had rejected most of the Committee's reform proposals. The ruling party has since lost the presidential election in March 2018 and it is not clear if the new government will pursue the reforms.
6. For instance, in the 2016 Peruvian presidential elections, the front runner won around 40 per cent of the votes, while the runner-up won around 21 per cent. The front runner's party won 73 of the 130 parliamentary seats in the unicameral legislature, while the runner-up's party won only 18 seats. Nevertheless, in the run-off election, the runner-up won the presidency with 50.1 per cent of the votes. The deadlock that followed led to the forced resignation of the president in December 2017. This may not always be the case, especially in countries that use single-constituency first-past-the-post electoral systems for their legislature. For example, in 2018 in Sierra Leone, where legislative and first-round presidential elections occur on the same day, the party of the runner-up, who ultimately lost the run-off, won a clear majority of the legislative seats. This up-ends the generalizations in the political science literature that predict that the party of the top candidate in the first round is likely to win more seats if legislative elections are undertaken on the same day.

2. Referendums on secession and state responses in 2017: Catalonia and Kurdistan

Erin C. Houlihan

Introduction

In 2017, secession movements were front-page news in many parts of the world, including Africa, Asia, Europe and the Middle East. This chapter describes the two instances, in very different contexts, in which these movements led to attempted independence referendums, in Catalonia and Kurdistan.

The 2017 secession referendums in Catalonia and Kurdistan marked historic shifts in the status of democratic pluralism and the constitutional order in Spain and Iraq. In both cases, state responses threaten to scale back the regions' autonomy at least in the medium term, and potentially to exacerbate already acrimonious relations between central authorities and the pro-secession peoples they govern. Therefore, these events promise to test the capacity of these states to effectively manage diversity, ensure security, and address growing social and economic inequality in a manner that maintains unity and respects rights to internal self-determination. In the longer term, both Spain and Iraq will need to consider a constitutional realignment on the status of federalism and decentralization.

This chapter considers the state-specific intersections between political and ideological divergence on the one hand and the relevant legal and administrative

frameworks on the other that contributed to the initiation of separatism among Catalans and Kurds and the responses employed by the parent states. It also considers the risks and opportunities that these constitutional moments present for the future of Spanish and Iraqi democracy and the potential to resolve the existential and constitutional crises at the heart of these separatist claims.

Both Catalan and Kurdish nationalist ambitions have deep historical and cultural roots. In the 12th century, an independent Catalonia was incorporated into the Kingdom of Aragon and later into the Kingdom of Castilla (Rodriguez 2018). During Francisco Franco's regime from 1939 to 1975, both the 1932 Statute of Autonomy of Catalonia and most regional institutions were suppressed, along with Catalan cultural and linguistic heritage (Rodriguez 2018). The 1978 Spanish Constitution, with its guarantee of self-governance, was a conscious rejection of Franco's nationalism and an embrace of Spain's pluralism. However, in establishing a constitutional monarchy and quasi-federalism through negotiated decentralization, the Constitution left it to the autonomous communities themselves to broker their relative rights directly with the Spanish state (Turp et al. 2017). This enabled the re-emergence of Catalonia's historic autonomy and identity within the constitutional framework, while requiring the central government to strike a balance among Spain's multiple autonomous regions.

Unlike the Catalans, the Kurds have never been sovereign. This group comprises around 30 million people indigenous to the Mesopotamian plains and the mountainous region that spans parts of modern Iraq as well as Armenia, Iran, Syria and Turkey (BBC News 2017f). A provision for a Kurdish state was incorporated into the 1920 Treaty of Sèvres but was removed under the later Treaty of Lausanne (BBC News 2017f). Within Iraq, the Kurds faced decades of persecution that culminated in the Ba'ath regime's 1988 Anfal campaign, characterized by some as genocide (Human Rights Watch 1993; UNPO 2013; Barbarani 2014). In 1992, an internationally backed no-fly zone facilitated the establishment of an autonomous Kurdistan region and an elected government (BBC News 2017e). The 2005 Iraqi Constitution represented a conscious break from the authoritarianism and oppression of the country's Ba'athist past by formally recognizing Kurdish autonomy. It also reflected, however, the extent of unresolved constitutional debates about the structure of federalism, internal boundaries and fiscal redistribution (Morrow 2005; Jawad 2013). Constitutional protections of Kurdish autonomy enabled the consolidation of regional governance and administrative structures, security apparatus, and international diplomatic and economic relations. Yet gaps in the constitutional framework also created retaliatory opportunities for clashes between Erbil and Baghdad: since 2005, Kurdistan has achieved de facto expansion of territorial and extractive resource control, while Baghdad has used the power of the purse to curb Kurdistan's access to its share of the national budget. The strategic and economic

threats to Baghdad posed by Kurdistan's secessionist ambitions have also raised concerns among regional neighbours, particularly Iran and Turkey.

Given these divergent histories, the 2017 Catalan and Kurdish independence efforts exhibited a remarkably parallel series of tactical and strategic miscalculations, bitter constitutional debates and spectacular political backfires. Both referendums featured reinforcing cycles of political breakdown and ideological divergence between centre and region rooted in concepts of identity, self-determination and economic justice. These clashes helped forge populist foundations for independence within the regions as well as reciprocal waves of patriotism within the centre (Abdulla 2011; Haddad 2015; Kingsley and Minder 2017). At the same time, this politicking operated within a set of constitutional and administrative arrangements that may be seen as 'both the consequence and cause of nationalist ambition' (Griffiths 2016: 42); the Iraqi and Spanish constitutions, by design, provided opportunities for the regions to negotiate (or appropriate) greater autonomy over time, including the initial architecture of proto-states (Griffiths 2016). Yet this framework also reinforced the central governments' strategic and constitutional imperatives to aggressively maintain unity: in Spain because of precedent for other regions and economic considerations, and in Iraq because of oil, security and indeterminate power-sharing arrangements. Moreover, the constitutions provided the parent states with a host of fiscal, security and law-making tools that enabled them to politically and economically isolate the rebelling regions, including through the deployment of security forces.

Legal frameworks on secession in Spain and Iraq

The international legal framework on a right to secede from a sovereign state establishes a presumption against secession. Such a right does not flow automatically from the right to self-determination (Tancredi 2014). In practice, legal recognition of a right to secede is generally limited to a matter of last resort in conditions of severe oppression of a people, failure of a government to adequately represent a people's needs and interests, or a decolonialization context (United Nations General Assembly 1960, 1970; Walter, von Ungern-Sternberg and Abushov 2014). There are notable exceptions, such as in the case of Kosovo, whose unilateral secession from Serbia in 2008 was found by the International Court of Justice not to violate either international law or Serbia's constitutional framework.[1] In the case of violent oppression, an international right to remedial secession may supersede such restrictions, including any constitutional limitations on external self-determination. However, the scope of this kind of remedial right is underdeveloped.[2]

Therefore, the principal legal framework guiding any secession effort begins with the state constitution. The vast majority of the world's constitutions are

silent on secession. Around 21 address the possibility of changes in territorial boundaries, often requiring parliamentary ratification or a national referendum; of those states, six expressly recognize a right to secession through a regulated process.[3] In addition, the constitutions of six countries—China, the Comoros, Ecuador, Kuwait, Myanmar and Palau—expressly prohibit secession. More common are implied bars on secession through provisions that assert the 'territorial integrity', 'unity' or 'indivisibility' of the parent state and its peoples.

The constitutions of both Spain and Iraq fall into this last category. Spain's 1978 Constitution declares the indissoluble unity of the Spanish nation and the sovereignty of the Spanish people (articles 1 and 2); it does not provide for referendums of the types that Catalan legislators called for in 2014 and 2017 (Catalonian Laws 10/2014 and 19/2017; González 2015). Iraq's 2005 Constitution similarly establishes the country as 'a single federal, independent and fully sovereign state' (article 1); no process for secession is recognized.

As such, the 2017 referendums in both Catalonia and Kurdistan were most certainly illegal under the relevant constitutional frameworks: in neither case was there a mutually agreed political process with the parent state, such as that between Scotland and the United Kingdom in 2014 (United Kingdom and the Scottish Government 2012), and in both cases the country's high court ordered a halt before the referendum took place and later held the voting illegal. This prohibition was countered by the rebelling regions in both cases through reference to the right to self-determination and constitutional failures on the part of the parent state to adequately respect needs and interests relating to the exercise of autonomy (Kurdistan Regional Government 2017; Puigdemont 2017).

The road to referendum in Catalonia

Spain's constitutional framework and the build-up to the vote

The 1978 Spanish Constitution guarantees the right to self-government of nationalities and regions and enables communities to 'progressively enlarge their powers within the framework' over time (article 148(2)). The scope of autonomy must be carved out bilaterally with the central government and instituted through a Statute of Autonomy (Ragone 2014). This approach has, by design, resulted in uneven status among Spain's 17 autonomous communities and rendered Spain among the most decentralized states in the world according to the Regional Authority Index (Schakel n.d.). This flexibility, however, has also opened opportunities for politicized negotiations and public perceptions of injustice (Sun Daily 2017). While all regions have control over key services, Catalonia and the Basque Country also have their own police forces. The Basque Country and Navarra have independent fiscal systems. Catalonia and 14 others are part of a tax redistribution system (European Committee of the Regions 2012; Specia, Gladstone and Minder 2017).

Spain's Constitutional Court retains review authority over autonomous communities' laws and regulations. The Constitution also reserves to the central government a 'nuclear option' under article 155 that enables the state to suspend regional autonomy and impose direct rule under ill-specified conditions and through ill-specified processes.

In 2010, Spain's Constitutional Court held that key provisions of the 2006 Statute of Autonomy of Catalonia were unconstitutional (Tribunal Constitucional de España 2010). The law had been challenged by the conservative Popular Party (Partido Popular) following its approval by the national parliament and a referendum of Catalan voters. The court held provisions on language, the judiciary, taxes and investment unconstitutional. Perhaps more importantly symbolically, the court also held that references to Catalonian nationality had no interpretive legal effect. The ruling's implications for concepts of identity and nationhood affirmed the Popular Party's ideological interpretation of the Spanish nation and demarcated constitutional limitations on the latitude extended to Catalonia's ambitions. The ruling, combined with the financial crisis and austerity, Catalonia's role as a driver of the Spanish economy, and animosity between the Popular Party and Catalonia's governing coalition of pro-independence parties, provided a populist underpinning to the secessionist movement (Nationalia 2010; Catalan News 2012; Vogel 2012).

Following the ruling, Artur Mas, then President of Catalonia, sought unsuccessfully to renegotiate the region's fiscal relationship with the central government, led by the Popular Party (Mas 2013). Mas called for early regional elections and led Catalonia through a non-binding referendum in November 2014 (Ginsburg and Zulueta-Fülscher 2015). Spain's Constitutional Court barred the 2014 plebiscite and later held the vote illegal because the underlying Catalan law was unconstitutional (Library of Congress 2014; Catalan News 2015). In 2015, prosecutors filed suit against Mas, his deputy and a minister for civil disobedience, abuse of power, usurpation of duties, and embezzlement of public funds linked to the referendum effort. Spain also enacted a law allowing public servants to be suspended for ignoring Constitutional Court rulings (Venice Commission 2016).[4]

In Catalonia's 2015 elections, voters repudiated the position of the central government and the court's assessment of the constitutional order by delivering an absolute majority to pro-independence parties and Mas's new coalition. The win, however, was fraught with disagreements over the preferred secession process (Nardelli 2015); 18 per cent of Catalans supported the anti-secession and debatably centrist Citizens party (Ciudadanos) (Kassam 2015; Amón 2018). Mas's legal and political troubles forced him to cede office to Carles Puigdemont in 2016 (Minder 2017a).[5]

In September 2017, the Catalonian Parliament enacted legislation on a binding referendum. It required that independence be declared within 48 hours of a 'yes'

vote simple majority, drawing ire from the central government (Stothard 2017a). Notably, the constitutional requirement that regions bilaterally negotiate autonomy with the central government made concessions unlikely from the outset—if only to avoid setting a precedent. In addition, decades of conflict with the Basque separatist militant group ETA had left deep scars in the country. These practical calculations intersected with a widening political and ideological gap between Catalonia and the Spanish Government that forestalled a negotiated resolution of the crisis.

Spain's response and the constitutional 'nuclear option'

As in 2014, the Constitutional Court held the 2017 Catalan referendum law unconstitutional; the Spanish public prosecutor began preparing cases against regional leaders for a host of civil and criminal violations, including making deliberately unlawful decisions (about the referendum) as elected officials (Carranco 2017; Noguer 2017; Stothard 2017b). In late September, Spain sent the Civil Guard to Catalonian government offices to confiscate election materials, conduct arrests (Dowsett 2017; Hernández, Carranco and García 2017) and block websites (Cerulus and Torres 2017). Protesting Catalans trapped police in buildings and vandalized vehicles (*El País* 2017). Days later, the central government placed all regional security forces temporarily under centralized command (BBC News 2017b). The Ministry of Finance increased control over Catalonia's finances (Stothard 2017c; Toyer and Cobos 2017).

On the day of the vote, the central government sent thousands of police to Catalonia under its constitutional monopoly on the use of force (CNN 2017; Minder and Barry 2017; Penty and Tadeo 2017). To enforce the earlier Constitutional Court ruling, ballot boxes were seized and police used batons and rubber bullets, resulting in nearly 900 injuries (Dearden 2017). The UN High Commissioner for Human Rights called for an investigation into the proportionality and necessity of the police response (Amnesty International 2017; UNOHCHR 2017). Catalans overwhelmingly supported independence, with 90 per cent favouring a break with Spain; the turnout was around 42 per cent (*El Mundo* 2017).

On 2 October, Puigdemont signed a declaration of independence but deferred making it official. He instead called on the European Union to mediate and declared that Catalonia wanted not a traumatic break but 'a new understanding with the Spanish state' (BBC News 2017c; Boffey and Jones 2017; Jones 2017a; Soares 2017). Prime Minister Rajoy rejected external mediation and considered the government's options under article 155 (Minder 2017b). In the meantime, the authorities arrested two pro-independence Catalan leaders for sedition (Fotheringham 2017; *Los Angeles Times* 2017) and the Spanish Parliament passed legislation making it easier for companies, including banks, to move their headquarters from Catalonia; over 1,600 businesses, including CaixaBank and

Banco Sabadell, left the region (De Barrón, Ordaz and Pellicer 2017; Ruano and González 2017; Stothard 2017d). Puigdemont finally put the independence question before the Catalonian Parliament, which declared independence on 27 October (Wildman 2017).

Prime Minister Rajoy and the Spanish Senate immediately invoked the article 155 'nuclear option' and asserted direct rule. The Catalonian Parliament was dissolved and new elections ordered for 21 December. Puigdemont, his cabinet, and the director general of the autonomous police force were dismissed, and Catalonia's representative offices abroad were closed (Minder and Kingsley 2017). Spain's attorney general asked the national court to bring charges of rebellion, sedition and misuse of public funds against 13 members of the now-deposed Catalonian Government, including Puigdemont, while the Supreme Court examined potential legal action against the former members of the Catalonian Parliament for their independence vote (Catalan News 2017; Jones 2017c). Puigdemont and five former ministers fled Spanish jurisdiction (Jones 2017b).

The aftermath

After invoking article 155 and rescinding autonomy, the Spanish Government has largely left the Catalonian question to the courts. Secessionist leaders face a litany of criminal charges and jail time as prosecutors continue to round up former officials (Birnbaum 2017; Minder 2018; Stothard 2018).

Unfortunately for the central government, Catalonia's December 2017 regional elections returned a slim separatist majority, dashing any hopes of a quick resolution (Burgen 2017; Minder 2017c). Separatist parties again nominated Carles Puigdemont, followed by Jordi Sànchez, to the presidency; the Constitutional Court blocked both (Torres 2018; VOA News 2018). As a result, the formation of a regional government was delayed, leaving Rajoy unable to disentangle the central government from direct rule. Only when a government is formed can the parties begin a process to re-establish autonomous status. In the meantime, Catalan separatists continue to conduct a grassroots campaign of economic disruption in protest (Brito 2018), and the governments of other autonomous communities—namely the centre-right Basque nationalists—are leveraging Rajoy's shrinking popularity and inability to get the Spanish budget approved to extract concessions (Duarte 2018).

Not only did Catalonia's elections reflect the strength of secessionist aims, they also returned the worst ever performance for the Popular Party. For months, Rajoy's party has also lost ground in national polls to the Catalonia-based Citizens party, which took over 25 per cent of the vote in the Catalan regional elections and is currently supported by a plurality of over 28 per cent of voters nationally (Nieto 2018). The rise of the Citizens party indicates a potential political reshuffle in the central government, which may create new opportunities to re-examine the constitutional framework and a pathway for negotiations on the

scope of Catalan autonomy. The existential and constitutional crisis at the heart of Catalonian secessionism is not new to Spain, but the duration and momentum of the challenge demands a constitutional solution. The legal and political fallout facing leaders in both the regional and the central governments may, however, limit the participation of these protagonists in rebuilding the constitutional order.

The road to referendum in Kurdistan

Iraq's constitutional framework and the build-up to the vote

Iraq's 2005 Constitution was a milestone in the recognition and protection of Kurdish self-determination rights. It recognizes an autonomous Kurdistan; enables regional constitutions; decentralizes specified executive, legislative and judicial authorities; protects Kurdish culture and language; provides for the establishment of foreign relations and offices abroad; and grants regional control over internal security and security forces—this latter being a constitutional rarity.

Yet the constitution-building process involved complex negotiations between ethnic and religious groups, political and economic elites, regional power players, and occupier state-building priorities (Al Ali 2005; Jawad 2013). It therefore deferred resolution of contentious issues on which no agreement could be reached and provided ill-defined pathways for later decision-making. One such mechanism was a constitutionally mandated parliamentary committee on amending the constitution (article 142; Global Justice Project: Iraq 2009). Although the committee submitted a final report to parliament two years after its formation in September 2006, little resulted from the effort; the Iraqi leadership could not reach consensus on key issues relating to, among other things, federalism and disputed internal boundaries, the upper house of parliament and the management of extractive resources (United Nations Assistance Mission for Iraq 2007; I-CONnect 2009).

Perhaps the most critical of these open provisions is article 140, which attempts to remedy the impacts of Saddam Hussein's Arabization campaign in Kurdistan and to define the internal boundaries of the Iraqi state. Article 140 requires the Government of Iraq to 'remedy the injustice caused by the previous regime's practices in altering the demographic character of certain regions, including Kirkuk' through direct reference to article 58 of Iraq's interim constitution, the 2004 Transitional Administrative Law.[6] The Constitution requires a 'normalization' process—meaning restoration of property and nationality, resettlement, economic revitalization, and appointment of a neutral arbitrator to recommend on boundaries—followed by a national census and a referendum on the status of Kirkuk and other territories. The constitution does not specify voter eligibility or registration, or the physical boundaries of the disputed areas in question. The deadline for these measures was 31 December 2007. None of these

steps has been implemented (Kurdistan Regional Government 2007; Saeed 2017).

Other open constitutional issues related to power sharing and fiscal redistribution have been partially resolved through informal agreements. The Iraqi presidency has become reserved de facto to the leader of the Patriotic Union of Kurdistan party (PUK) (Ludwig 2014); a Sunni regularly serves as Speaker of Parliament; and the central government has traditionally earmarked a 17 per cent national budget allocation to Kurdistan based on a formula using 2005 population estimates (Rudaw 2014; Zhdannikov 2015; Lasa Aresti 2016).[7]

Notably, and in contrast to Spain's article 155, article 126(4) of Iraq's Constitution expressly prohibits any amendment from weakening or withdrawing regional powers unless it is approved by both the regional legislature and a majority of regional citizens in a general referendum.

Although Kurdistan's secessionist ambitions long pre-date the 2005 constitution-building process, the independence issue has since become part of the national dialogue. In 2005, an unofficial plebiscite found that 98 per cent of regional voters were in favour of independence (Kurdistan Referendum Movement 2005); in 2014, shortly after the fall of Mosul to the so-called Islamic State in Iraq and Syria (ISIS), the then President, Mesoud Barzani, also called for an independence referendum—although, amid internal political disputes, it was never held (BBC News 2014; *The Guardian* 2014). Despite challenging relations with the central government in Baghdad, the Kurds have gradually achieved extensive de facto territorial expansion into disputed internal boundaries through the extension of administrative and security apparatus (Kane 2011; Kurdistan Regional Government 2014). This reach spread rapidly with the onset of the ISIS crisis, which saw Kurdish administrative and security functions expand in parallel with military operations into ISIS-controlled areas, enabling the Kurds to seize full control of Kirkuk (Rasheed 2015; Derzsi-Horváth 2017). The success of Kurdish Peshmerga security forces in combating ISIS made them international heroes and increased Kurdistan's leverage on the global stage (Abdulla 2016; Chulov 2017). In effect, these constitutional and extra-constitutional trade-offs have supported the consolidation of Kurdish autonomy and expanded regional authorities over time—Kurdistan even issues its own visas to foreign travellers. However, Kurdistan has not actually received its share of the federal budget since 2014 (Kurdistan Regional Government 2016; Zhdannikov 2015); disputes over oil dating back to 2012 prompted the region to suspend its supply for export, to which the central government responded by withholding the budget allocation (International Crisis Group 2012; Al-Salhy 2014; Al-Silefanee 2014; Coles 2014).

By 2017, however, Kurdistan's coffers were at an all-time low and the government faced a political and economic crisis: the regional parliament had not convened in two years because of disputes over presidential term limits, civil

employee salaries had not been paid and oil prices were collapsing (Fantappie and Salih 2017; Klain and Hintz 2017). Moreover, constitutional debates on regional autonomy, internal boundaries and oil were no closer to resolution than at any time before the ISIS crisis. At the same time, the Kurdistan Regional Government held extensive territory of both symbolic and economic importance, including Kirkuk; it enjoyed international esteem through decisive military operations against ISIS and hosting thousands of Syrian refugees and Iraqis displaced by conflict; and years of institutional development and diplomatic networking had created the foundations of a state in the making (Abdulla 2016). The central government also faced its own problems: large-scale public protests revealed deep frustration with government performance and corruption, while renewed political power struggles threatened an escalation of violence (Morris and Salim 2016; Al Jazeera 2017; Chmaytelli 2017a). In this context, de facto Kurdish President Barzani declared a secession referendum despite a lack of agreement from other Kurdish parties and against the urging of the United States and other international allies.[8]

Unlike in Catalonia, the impact of a successful independence vote was unclear from the outset in Kurdistan: because the Kurdish Parliament had not met for two years and could not reach a quorum for initial referendum planning, the non-binding vote was agreed through a series of political negotiations and leadership restructuring under parliamentary rules of procedure (Ekurd Daily 2017a; Goran 2017; Rudaw 2017c). The referendum was then variously portrayed in the media as signalling an affirmation of the Kurdish right to self-determination, as an advisory mandate for negotiations with the central government on failures of constitutional implementation and as a political pathway to future independence (BBC News 2017a; Chmaytelli 2017b; Ekurd Daily 2017b; Macdiarmid 2017). The rights to self-determination and remedial secession—the latter probably a stronger claim in the Kurdish than in the Catalan case given decades of persecution by the Iraqi state—formed the core of public discourse and underscored the historical and ideological gaps between the Kurdish nation and its parent state, Iraq (Arango 2017; Ekurd Daily 2017c).

The path towards Kurdish national ambition in the immediate sense was paved through the constitutional and administrative arrangements determined in the post-war period that left unanswered critical questions about power sharing, control of extractive resources, internal boundary delineation and a host of other issues that enabled divergent consolidation strategies. The failure of both Iraq and Kurdistan to effectively negotiate and implement key constitutional provisions, paired with complex international alliances in the fight against ISIS and threats to regional stability, provided Barzani with an opening to aggressively redefine Kurdistan's relationship with the central government. In calling for a referendum, he also prompted the revitalization of stalled Kurdish political machinery in

parliament and created a pathway to legitimizing his status as de facto President (Natali 2017; Rasheed and Jalabi 2017).

In reality, however, international support never came (Haaretz and Reuters 2017; Rudaw 2017a; Scheindlin 2017). Moreover, the central government's constitutional response options, paired with support from wary regional neighbours, gave the federal government the latitude to isolate Kurdistan economically and, potentially, to scale back hard-won autonomy.

Iraq's response

As in Spain, the central state in Iraq used a series of constitutional tools to not only block secessionist aims but also unravel key components of Kurdistan's autonomy following the vote. As a first step, the Supreme Court issued an injunction against referendum planning (Agence France-Press 2017). In an assertion of federal authority, the Iraqi Parliament rejected the referendum, authorized the government to take 'all measures' to prevent the plebiscite (Rudaw 2017b) and dismissed the governor of Kirkuk (Associated Press 2017), although these votes reportedly involved procedural irregularities. Prime Minister Haider al-Abadi sought to moderate flaring tempers by calling for dialogue; this was rejected by the Kurds and many central government officials (Rasheed and Jalabi 2017). Regional neighbours Turkey and Iran threatened retaliations (Majidyar 2017a; Riva 2017). The United States, along with the European Union, Germany, the United Kingdom and others, called for postponement of the vote and, in some cases, publicly denounced the referendum as a threat to both Iraqi democracy and progress against ISIS throughout the region. Against this shaky backdrop, Kurds went to the polls on 25 September (Jalabi and Zhdannikov 2017); over 90 per cent supported separation, with turnout at around 72 per cent (Rudaw 2017d).

Almost immediately, the central state began peeling back Kurdistan's autonomies. The federal aviation authority ordered the closure of Kurdistan's two airports to international travel; third-party states suspended international flights in solidarity (The New Arab 2017). Parliament presented a 13-point resolution authorizing the deployment of the Iraqi army to retake disputed areas, including Kirkuk; the handover of border crossings and airports; and the closure of diplomatic consulates in the region (Bulos 2017).

The Iraqi army, supported by Iranian-backed militias, proceeded to seize virtually all Kurdish-held territory along disputed internal boundaries, including Kirkuk, largely with the willing capitulation of the PUK-backed Peshmerga (Zucchino 2017; Morris and DeYoung 2018). Turkey contemplated a trade ban and Iran closed border crossings (BBC News 2017d; Georgy 2017; Majidyar 2017b).

On the legal front, the Iraqi Supreme Court held the vote and its process unconstitutional and annulled 'all the consequences and results of the

referendum' (BBC News 2017g). As a precondition to any negotiations on the Iraq-imposed blockade and the future of Kurdish autonomy, the government demanded that Kurdistan declare the results invalid.

The aftermath

As Iraq seized Kurdish-held territories outside its delineated governorates, a political crisis within the region developed. De facto President Barzani—who heads the Kurdistan Democratic Party—accused the PUK leadership of cutting a deal with the central government and ceding Kirkuk. Political relations in Kurdistan—already combative—disintegrated amid threats by the central government and growing regional isolation (Iddon 2017); Barzani resigned (Jalabi and Chmaytelli 2017). The diversion of logistical and financial resources to the referendum and the internal political fallout also resulted in the Kurdish elections being delayed by eight months (Reuters 2017). They were rescheduled to take place after the national parliamentary elections in May 2018, which delivered a major shift in the national political landscape.

Regarding budget allocations, the Iraqi Parliament's 2018 budget law reduced the previous 17 per cent to around 13 per cent. While it was ostensibly based on adjusted population estimates, this change effectively dissolved previous informal agreements (Snow 2018). The Kurdish bloc boycotted the vote and the President of Iraq, a PUK member, threatened to sue federal agencies after rejecting the bill under his constitutional authority (Mostafa 2018).

Yet the outlook is not entirely bleak. Reports from Baghdad and Erbil indicate cautious progress towards rapprochement over immediate security and economic issues: the central government has reportedly tacitly rescinded its requirement that Kurdistan declare the referendum results invalid before dialogue can take place (Ali 2017); following President Barzani's resignation, reports emerged that Kurdish Prime Minister Nechirvan Barzani and Iraqi Prime Minister al-Abadi had negotiated a framework for dialogue (Reuters 2018; Shafaaq Foundation for Culture and Media 2018; but see Rudaw 2018). Ahead of the Kurdish New Year in spring 2018, al-Abadi declared a national holiday and approved the transfer of USD 268 million to Kurdistan to pay Peshmerga and civil servant salaries (Coker 2018). A delegation of Iraqi finance heads then visited Erbil to finalize arrangements, which are likely to include payroll audits (Goran 2018). Oil exports from Kirkuk also look likely to resume, through joint agreements (Sulaivany 2018). Notably, conditions on the constitutional status of Kirkuk and territorial demarcation have been absent from early framework discussions.

The probability that the Kurdistan issue can be resolved without constitutional reform is not great. However, opening the 2005 Constitution to public debate is hazardous. Parameters for constitutional amendments—such as the scope of potential reforms and the implications of long-unimplemented provisions—have never been agreed, and constitutional protections for a host of women's, minority

and religious rights are under threat (Institute for International Law and Human Rights 2015; US Department of State 2016; Rudaw 2017e). Moreover, the historic, cultural and economic importance of internal territorial boundaries should not be underestimated. Sensitivities at the heart of the article 140 requirements and the real risk of internal conflict are key reasons why implementation has been avoided for over a decade. Particularly in the aftermath of ISIS war crimes, the context is fragile.

Importantly, the Kurdistan referendum did not result in a significant exchange of hostilities between central and regional authorities (Rudaw 2017f; Ebraheem 2018). For a country that has been mired in conflict for much of the past four decades, the restraint exercised by both the Iraqi state and the Kurdish authorities is laudable. Moreover, the political strategies adopted by both the Kurdish and the Iraqi leaderships have signalled a foundational respect for the constitutional order. Therefore, the ultimate outcome of the 2017 referendum may be the opportunity it presents for the Iraqi people to redefine their country and their constitution after a decade of asymmetric progress.

Conclusion

The 2017 secession referendums in Catalonia and Kurdistan form part of a broader global trend in state deconstruction (Griffiths 2016). However, the differing experiences also reflect the unique intersections between constitutional and administrative arrangements and a country's ideological and political composition. Under the Spanish and Iraqi constitutions, national identities and nationalist ambitions have expansive space to grow; yet these same frameworks also provide strategic and legal incentives—and a host of tools—for parent states to aggressively block secessionist aims. This supports secessionist momentum while also limiting the feasibility of forming a new state under current arrangements.

In both cases, state responses shocked many international observers. In Spain, the level of force deployed raised questions about proportionality; in Iraq, the reassertion of federal control over Kirkuk and other disputed areas signalled a remaking of the Kurdish landscape. Yet in both cases the parent state's reliance on constitutional prerogatives provided legal and international legitimacy to the aggressive reassertion of authority and retraction of regional autonomy—even where tactics skirted the boundaries of legality and convention. Throughout, the international community has been steadfast in support of the parent states, signalling to the dozens of other separatist movements around the world that both international law and international opinion remain presumptively opposed to unilateral secession.

What the referendums may have achieved in both countries, in fact, is a constitutional re-examination the results of which may have far-reaching

consequences. The role of the international community in any forthcoming constitutional reform process remains to be seen, but the implications for regional security and economics give a stake to third-party allies and opponents alike.

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Endnotes

1. The court did not find the principle of territorial integrity to be a bar to secession, suggesting that it applies only to relations between states and would therefore be relevant only if a third-party state were to assist an internal secessionist movement.
2. In its Kosovo advisory opinion, the International Court of Justice chose not to address whether there is a right to 'remedial secession' in a post-colonial setting. In 1998, the Supreme Court of Canada, in addressing the question of Quebec's secession, indicated that there may be a last resort right to 'remedial secession' grounded in self-determination 'when a people is blocked from the meaningful exercise of its right to self-determination internally…'. However, the Court did not rule on the issue because it held that the people of Quebec had not been denied the right to self-determination within Canada.
3. The constitutions of Armenia, Austria, Belgium, Chad, Croatia, Denmark, Djibouti, Estonia, Ethiopia, Georgia, Liechtenstein, Luxembourg, Maldives, Mauritania, Saint Kitts and Nevis, Senegal, Slovakia, Sudan, Ukraine, the United Kingdom and Uzbekistan address changes in territorial boundaries. The UK's constitution is unwritten. The constitutions of Ethiopia, Liechtenstein, Saint Kitts and Nevis, Sudan, the UK and Uzbekistan expressly provide for secession.
4. The Government of Catalonia tried unsuccessfully to challenge this law through the Venice Commission.
5. Mas was found guilty of disobeying the Constitutional Court by holding the 2014 referendum on Catalonian independence and banned from holding public office for two years. He was also ordered, along with 10 other former Catalan officials, to reimburse the state for the cost of the referendum, amounting to EUR 5.1 million.
6. Article 140 of the 2005 Constitution refers directly to obligations under article 58 of the Law of Administration for the State of Iraq for the Transitional Period' (8 March 2004), developed by the Coalition Provisional Authority (the then government). See <https://www.refworld.org/docid/45263d612.html>, accessed 23 November 2018.
7. Since 2005, the Prime Minister has been a Shia, while the Speaker of Parliament has been a Sunni. This division is not constitutionally or statutorily defined but has become a matter of convention.
8. Barzani's hold on the presidency had exceeded both Kurdistan's constitutional term limits and a term extension approved by parliament as of 2015, leaving the legitimacy of the standing government in 2017 in question.

3. Transitional justice and constitution-building processes

Sumit Bisarya and Lea Mano

Introduction

This chapter reviews the recent transition processes in Colombia and the Gambia. The government in Colombia has been engaged in peace negotiations with a rebel armed group to end a decades-old conflict, while the Gambia has recently emerged from a 22-year authoritarian presidency after the victory of an opposition coalition in elections in December 2016. While the country contexts are very different, both cases shed light on the interaction between transitional justice and constitution-building processes.

Constitution-building and transitional justice both look backwards to look forwards. Constitution-building seeks to constrain actors in the future, but the new constitutional framework is designed to address what went wrong in the past. Transitional justice seeks to address the injustices of the past to provide a basis for reconciliation in the future. Both also involve a tension between peace and justice. Constitutional reforms may often require the consent of all major parties, including outgoing regimes and/or armed rebel groups, if they are to garner broad popular acquiescence. This may necessarily involve a pacted transition whereby certain actors are guaranteed positions of power in the new constitutional dispensation regardless of the democratic rationale. Similarly, in transitional justice processes there is often a trade-off between prosecution for past crimes and abuses, and national unity and reconciliation.

Constitution-building and transitional justice are linked substantively in three ways. First, agreements with regard to transitional justice may be included in the constitution to ensure that they have secure legal protection. Second, the two processes may interact. Third, the two sets of overall objectives overlap, in that constitution-building can be viewed as the *institutionalization* of transitional justice.

With regard to the first linkage, in a sense, peace accords and transitional justice mechanisms are intrinsically linked to democratic transitions ultimately epitomized either by the drafting of new constitutions or by constitutional revisions. South Africa, for example, entrenched its peace agreement in the form of an interim constitution setting up transitional justice mechanisms, which eventually led to the implementation of a new constitution in 1996 (Bell 2008). Similarly, the Accra Peace Agreement (2003), which put an end to Liberia's 14-year internal conflict, included a provision establishing the need for an 'extra-constitutional' arrangement designed to facilitate the proper functioning of the entire transitional process (article XXXV).

One of the main reasons for constitutionalizing peace agreements is that doing so entrenches these agreements in the supreme law of the land. In other words, it gives fragile peace agreements, based on negotiations between conflicting parties, a hierarchical status equal to that of a constitution. Therefore, constitutionalizing peace agreements seeks to ensure that parties taking part in conflict resolution will uphold promises made in those agreements. Indeed, the principle of constitutional supremacy supposes that any law given constitutional status will be respected, or at least will be harder to modify.

Constitutionalizing peace agreements also plays a crucial role in transitional justice processes. Transitional justice mechanisms regularly define a new array of laws, often drawn from international law principles, which can clash with a country's existing constitutional framework. Entrenching transitional justice mechanisms and laws in a constitution typically prevents future alterations of peace agreements, which can otherwise be seen as unconstitutional. In a sense, transitional justice mechanisms are characterized by a hybrid of constitutional and pacific laws, essentially creating a new supreme legal framework, which can be referred to as *lex pacificatoria* (Bell 2008: 204).

With regard to the interaction between the two processes, this may be particularly interesting when separate bodies are established concurrently to oversee the constitution-building and transitional justice processes, as is the case in the Gambia. This can establish two parallel forums for negotiation: for example, individuals or groups may consent to compromises on constitutional reform issues if they can receive amnesty in the transitional justice process, or may agree to submit themselves to a truth commission if they receive concessions on constitutional reform issues. In the Gambia, the two processes are seen as inextricably linked, to the extent that the Constitutional Review Commission is

seen as part of the transitional justice programme (Gambia Ministry of Justice 2017).

Finally, with regard to constitutional reform as the institutionalization of transitional justice, the United Nations has defined four main pillars of transitional justice: truth, justice, reparation, and guarantees of non-recurrence along with a duty of prevention (United Nations 2010), and each of these pillars can be seen through the lens of constitution-building. With regard to truth, constitutions often seek to set forth a narrative of the common history of the country, usually through the language in the preamble, which provides an account of the past and the reasons for which the new constitution has been drafted. For example, the constitutions of both Rwanda and Burundi make explicit reference to the genocides of the recent past, while the preamble to the 2014 Constitution of Egypt traces a line that links the founding of the new Constitution with the Arab Uprisings popular revolutions, previous revolutions and the times of Ancient Egypt and Moses. With regard to justice, constitutions may provide for criminal justice to trump claims for amnesty (e.g. the Constitution of Tunisia, article 148) or may, on the contrary, affirm amnesty (Constitution of South Africa, section 22.1). More broadly, new constitutions, through reform of the courts system, may reframe what justice looks like and how it is dispensed.

Reparations, in transitional justice settings, serve to acknowledge the legal obligation of the state, individual or group to repair the consequences of violations (ICTJ 2018). But reparations are 'made significantly more effective when linked to other, complementary initiatives such as . . . institutional reform' (Magarrell 2007: 2). While reparations generally (although not always) provide individual victims with one-off payments, where specific societal groups have been the victims of state-repression, constitutional reform offers an opportunity to change the way in which public resources are allocated and/or the level of autonomy particular communities may have to govern themselves, which can provide for a more permanent form of compensation in the long term.

Finally, ensuring non-recurrence of the injustices of the past will certainly raise issues in relation to reframing constitutional structures and rules to better constrain, and provide more oversight of, those in power, for example through deconcentration of power in the executive, strong democratic oversight of security sector agencies and mechanisms to ensure the dispersal of power to different groups.

While it is too early, in the cases of both Colombia and the Gambia, to discuss how the objectives of transitional justice will overlap with constitutional reforms, both illustrate different aspects of the first two linkages between transitional justice and constitution-building. In Colombia, the debate centres on the constitutionalization of transitional justice arrangements agreed to in the peace

process, while in the Gambia the processes of transitional justice and constitution-building have been launched together, and in parallel.

Constitutional transitional justice in Colombia

Background

For more than 50 years, Colombia has been embroiled in one of the Western hemisphere's longest and bloodiest internal conflicts, between the Revolutionary Armed Forces of Colombia (FARC) and the Colombian Government (ICTJ n.d.). The conflict's onset can be traced to 1948, when a political war between the country's Liberals and Conservatives, known as *La Violencia*, began to unfold (Felter and Renwick 2017). After a decade of violence, the government excluded communist guerrillas from a power-sharing agreement, giving rise to the formation of the FARC and National Liberation Army (ELN) groups in the 1960s (Felter and Renwick 2017). These guerrilla groups, composed of militant communists, peasants and Catholic radicals, took up arms against the government and ravaged the country for the better half of a century. In the 1980s, a second period of internal war saw the formation of anti-guerrilla right-wing parliamentary groups seeking to protect themselves from the ongoing violence (LeGrand, Isschot and Riaño-Alcalá 2017).

Throughout these periods, drug trafficking, land disputes and extremist ideologies helped to escalate the conflict. Guerrilla groups imposed their control over the civilian population and led campaigns of mass violence (ICTJ n.d.). In the 2000s, then President Álvaro Uribe progressively began routing the FARC through a military offensive (Forero and Vyas 2016). However, after half a century of conflict, the toll inflicted on the people of Colombia was dismaying: 220,000 people killed, nearly 7 million people displaced, over 60,000 reported cases of forced disappearances and human rights violations, and 6,500 children and young people forcibly recruited (National Center for Historical Memory n.d.).

In 2012, President Santos began formal peace talks with the FARC, which ultimately led to a final peace agreement signed by both parties on 23 June 2016 (ICTJ n.d.). Pre-emptive negotiations focused on five key issues: illegal crop eradication, transitional justice and reparations, rebel disarmament and implementation of the peace accord, political participation on the part of the FARC, and agrarian reforms (Felter and Renwick 2017). In October 2016, the first agreement was submitted for public approval via plebiscite. Surprisingly, Colombians voted against it by a narrow margin, reflecting public unease about the leniency of the accord towards former FARC members (Felter and Renwick 2017). However, in November 2016, Colombia's Congress approved a revised peace agreement, effectively bypassing referendum approval. Since then, the

implementation of the agreement, and specifically of its transitional justice system framework, has led to several constitutional debates.

Transitional justice

Alongside demilitarization, the establishment of a post-conflict transitional justice (TJ) system constituted the backbone of the Colombian peace agreement. Aligned with the United Nations' four-pillar framework, the Colombian peace agreement established a Comprehensive System for Truth, Justice, Reconciliation, Reparations and Non-Recurrence (CS), which combines judicial and non-judicial mechanisms for the investigation and punishment of serious human rights violations committed during the country's 50-year conflict (Final Agreement 2016: 135). Components of the CS include both a Truth and Reconciliation Commission and a Search Unit for Missing Persons. At the heart of this system, however, is the Special Jurisdiction for Peace (SJP), which has been provided with a 15-year mandate to serve as the country's tribunal for gross violations of human rights and international humanitarian law (Final Agreement 2016: 153).

Although this TJ framework has been heavily criticized for its leniency towards war criminals, many have also applauded its original design, constructed to resolve the 'peace versus justice dilemma': the question of how to achieve justice without jeopardizing peace (Josi 2017). For instance, the agreement allows amnesty for political crimes but defines various sanctions ranging from 20 years in prison to 5 years of restriction on movement for other crimes (Josi 2017). However, abstract provisions regarding victim participation in the justice process and restrictions on criminals' rights and liberties significantly weaken the TJ process as a whole. Similarly, the strict definition of the concept of command responsibility reduces the likelihood of seeing guerrilla members punished for their crimes (Vivanco 2017). In summary, while the agreement understandably seeks a compromise between justice and peace, it contains certain caveats that threaten victims' ability to obtain justice for their suffering.

Constitutionalization of the Colombian transitional justice process

As mentioned in the introduction, countries going through post-conflict negotiations regularly entrench their peace agreements in constitutional texts, either by drafting new constitutions or by reforming the existing constitutional framework. At the core of this manoeuvre is the idea that constitutionalizing peace agreements protects those agreements in the long run by legitimizing pacification through the principle of constitutional supremacy. In Colombia, the FARC had originally requested that the accord be viewed as equal to the 1991 Constitution, which would have promoted government compliance with the agreement and public trust in the peace process.

The first Colombian peace agreement, and the corresponding temporary constitutional amendments of June 2016, initially made the accord a 'special

agreement' for the purposes of article 3 of the Geneva Conventions, automatically incorporating the whole agreement into the Colombian 'constitutional block' (Landau 2016). However, as mentioned above, this first agreement was rejected by plebiscite and modifications were made to the final draft. Instead, the revised peace agreement adopted by Congress in November 2016 provides that 'state institutions and authorities are obliged to comply with the provisions of the Final Agreement in good faith', and does not constitutionalize the agreement in its entirety (Final Agreement 2016: 289).

While the peace agreement was not constitutionalized as a whole, a specific provision of the agreement of 9 November 2016 does give temporary constitutional status to the SJP (Final Agreement 2016: 292). Therefore, this provision effectively constitutionalizes parts of the agreement relating to serious breaches of international humanitarian law or human rights violations (Final Agreement 2016: 292). Unsurprisingly, the corresponding constitutional amendments (Legislative Act 2 of 2017) were challenged before the Colombian Constitutional Court, with a claim being brought that the amendments were in fact substitutions of the Constitution (Ramírez-Cleves 2017). In October 2017, the court made some interpretations of the content of the reform but eventually upheld the Legislative Act through a unanimous ruling (9–0) (Ramírez-Cleves 2017). Three key points were closely examined by the court. First, the court upheld the idea of constitutionalizing the accord's contents related to fundamental and international human rights. Second, the court found that the government had to comply in good faith with the requirements of the agreement. In other words, the court essentially gave the government a broad power of interpretation to enforce the peace agreement, even though it emphasized the fact that principles such as separation of powers, supremacy of the Constitution, and democratic peace must also be respected (Ramírez-Cleves 2017). Finally, the court's decision upheld a key provision of the agreement of 7 November 2016, which states that the final agreement 'remains in effect until the end of three complete presidential terms' (Final Agreement 2016: 289). In essence, this decision protects against future political interference with approved parts of the agreement.

While the court ultimately protected the TJ components of the peace agreement, the fact that judicial review played such a crucial role in the peace process highlights another risk associated with unconstitutionalized peace agreements—the risk that such agreements will ultimately be subject to interpretation. Indeed, in its October 2017 decision, the Constitutional Court reaffirmed the idea that the agreement was solely a parameter of validity under the framework of the Constitution (Ramírez-Cleves 2017). In doing so, the court made sure that any future constitutional amendments designed to implement the agreement would be subject to judicial scrutiny to verify their constitutional validity.

In terms of TJ mechanisms established in Colombia, judicial interpretation is also problematic because the SJP is designed to derive its jurisdictions and laws from international standards. More precisely, the court's decision of October 2017 provides that the agreement's contents corresponding to norms of international law will be parameters for interpretation and reference points for the validity of laws that will be implemented to develop the final agreement. Simply put, this means that key components, and the most contentious aspects, of the agreement, such as criminal liability, amnesty and sentences to imprisonment, will have to be interpreted in terms of international law standards. Once again, the court was required to balance peace with constitutional values.

Generally speaking, the court's decision to protect the final agreement illustrates a well-known dichotomy between constitutional justice and politics to promote peace. Throughout the peace process, Colombia's highest court has had to make tough calls on what can be seen as a choice between the supremacy of the Constitution and the protection of the agreement designed to bring peace to a country that desperately needs it. In June 2016, for instance, Congress passed new 'temporary' constitutional amendments designed to create an expedited congressional procedure for enacting laws and to give the president sweeping powers to implement the agreement (Landau 2016).

In 2017, President-Elect Duque brought a suit challenging the 'fast-track' procedure. Although the court did not strike down the amendments as a whole, it did invalidate a provision meant to force Congress to vote on blocks of laws and reforms related to the agreement, rather than debating and voting on each point individually (Bargent 2017). The practice, known as *votar en bloque*, was meant to speed up legislative procedures in order to achieve peace. However, the court found that preventing legislators from voting on individual clauses would deprive them of their constitutional legislative abilities. Similarly, the court claimed that giving the president sweeping powers would curtail the principle of separation of powers.

In summary, the court's decisions of May and October 2017 exemplify the dilemma between constitutional supremacy and political leeway as a means of achieving peace. In a sense, by constitutionalizing the accord's contents corresponding to fundamental and international human rights, the court effectively created supraconstitutional rules safeguarding TJ. On his ascension to the highest office in the land, President-Elect Duque swore to modify the accord to better deliver 'peace with justice'. At the core of his promise is the idea that guerrilla criminals should be subject to more stringent sentences. Through its October 2017 decision to constitutionalize prosecution for human rights violations, the court's attempt to shield the peace process from political intervention is likely to make Duque's goal hard to achieve.

In conclusion, the court's implication in the conflict resolution process highlights the deeper legal form of peace agreements and of TJ specifically. Any

peace agreement designed to promote stability in a conflict-ridden country has an inherent constitutional aspect. Many peace agreements are also styled as constitutions (Bell 2008: 204). The Colombian final peace agreement, for one, introduces a set of fundamental principles for the future of the country resembling remarkably closely those of the 1991 Constitution. For instance, both article 2 of the Constitution and provision 15 of the Accord's preamble seek to promote core democratic values such as political, social and economic individual rights.

Therefore, Colombia might not have completely constitutionalized its peace agreement, but congressional amendments and corresponding court decisions have given its TJ mechanisms a constitutional status. In doing so, the Constitutional Court has most likely saved the fragile peace process and shielded it from future modifications. But in creating supraconstitutional rules designed to protect the final agreement, the court has given tremendous power to both the legislative and executive branches (Ramírez-Cleves 2017). Today, the legislature can amend the constitution as it sees fit as long as it enables further implementation of the agreement. It has also given itself extensive powers to interpret the constitutionality of amendments designed to implement the peace agreement. Although Colombia is now a democratic country, it remains affected by decades of conflict, and its fragile peace could be endangered by such extreme powers.

Constitutional transitional justice in the Gambia

In 1994, a military coup overthrew the Gambian Government and installed Yahya Jammeh in power, where he was to remain as president for 22 years (Jobarteh 2018). Jammeh's regime became progressively more brutal and eccentric, with police beatings, disappearances and forced relocation used regularly as tools to repress dissent. Jammeh became convinced that he had developed a cure for HIV, and an estimated 9,000 Gambians were forced to abandon conventional medicine to be force-fed Jammeh's homemade recipe (Maclean and Jammeh 2018). Jammeh promulgated a new constitution in 1997 and during the following years used his party's dominance in the legislature to pass a raft of amendments that entrenched power in the presidency.

In December 2016, much to the surprise of many outside the Gambia, Jammeh lost the presidential elections to a coalition of opposition parties headed by Adama Barrow. After a few unsuccessful attempts by Jammeh to cling on to power, regional actors including Senegal and ECOWAS made it clear that he should accept the results of the elections, and he was offered exile in Equatorial Guinea, where he remains. Meanwhile, the broad reform coalition soon set about putting in place a series of measures to deal with the past, and build for the future.

Chief among these were the processes of transitional justice and constitution-building. In December 2017, the government passed a pair of statutes to establish two independent commissions to oversee the processes: the Truth, Reconciliation and Reparations Commission (TRRC) and the Constitutional Review Commission (CRC). While both commissions are just starting their operations, and therefore it is too early to comment on outcomes, it is interesting to examine how the two processes have been linked from the outset.

First, although both commissions are independent, there is a clear message from the parent Ministry of Justice, which authored the statutes and has been instrumental in the appointments processes, that transitional justice and constitution-building are two sides of the same coin. The Ministry has created the position of Advisor to the Attorney General/Minister, whose role it is to oversee the processes and provide support on behalf of the government, and the Ministry's website announced that the Act established the CRC as part of the overall transitional justice process.

Second, the mandates given to the commissions are both explicitly and implicitly linked. The TRRC Act (TRRC 2017) specifies that one of the objectives of the TRRC is to 'prevent a repeat of the violations and abuses suffered by making recommendations for the establishment of appropriate preventive mechanisms including institutional and legal reforms' (article 13(a)(iv)). How these recommendations will square with the CRC's own vision of the right legal and institutional framework for the new Gambia will be important in maintaining an overall coherence to the transition project.

The TRRC may also run into constitutional issues vis-à-vis the existing constitutional framework. According to the TRRC Act, the TRRC is to examine events from January 1994 to January 2017 with a view to, inter alia, addressing impunity (TRRC Act, article 13(a)(iii)). However, the 1997 Constitution explicitly provides immunity to the members of the then-ruling party for any crimes arising from the coup (Schedule 2, section 13), while subsequent laws passed during the Jammeh regime provide immunity for specific acts; for example, the Indemnity Amendment Act 2001 provides immunity for those involved in the brutal repression of demonstrations in April 2000.

Finally, the two processes, running side by side through two independent commissions, may eventually overlap in terms of their politics. In particular, once the CRC begins to debate and discuss revisions to the political framework, and to conduct consultations with political parties, bargaining between those with interests in the transitional justice process and those with interests in the new constitutional framework may arise. This may work to the advantage of both processes, as compromise in one forum may facilitate progress in the other, but close coordination between the two commissions will be required to avoid conflict between the two mandates and institutions.

In summary, the transition in the Gambia will be very interesting to follow, not only because it offers a rare occasion for a democratic, bloodless revolution from a brutal, authoritarian regime, but also to see how the close tying together of the constitutional reform and transitional justice processes plays out.

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4. New modalities of public involvement in constitution-building processes

Amanda Cats-Baril

Introduction

Constitutional change—the making of new or amending of old constitutions—was once a technocratic realm for legal experts and political elites. Today, the trend is increasingly towards more participatory constitution-building, as demonstrated, for example, by the United Sstates Institute of Peace's special report on constitution-making (Gluck and Brandt 2015), with processes that seem to be coming ever closer to the people. Much of the practitioner and academic discussions on constitution-building focus on how to make processes more open, inclusive and participatory (see e.g. Hart 2003). As noted in ConstitutionNet's 2017 year in review, popular participation and input are recognized as the foundation for claims of popular authorship of constitutions, reflected in the much touted 'We, the people . . .' (Adebe 2017). Participation is linked to the perceived legitimacy and sustainability of constitutional change, but the modality through which participation is best ensured is still a matter of debate and evolving practice.

In 2017, the world saw an increased reliance on 'micro-processes' for the development of new constitutions and the consideration of constitutional amendments. These processes can be contrasted with more 'traditional' methods for achieving broad-based participation, for example the Constituent Assembly process in Nepal and Venezuela or the large-scale public consultations conducted

in South Africa and Kenya. The terminology used to refer to these micro-processes is still being developed, but it includes 'citizens' assemblies', 'random assemblies', 'constitutional conventions', 'deliberative polls' and 'citizen juries'.

Several definitions of these processes are in development, but most are either overly broad or too narrow to encompass the myriad forms. Examples include forums, usually organized by policymakers, in which 'citizens representing different viewpoints are gathered together to deliberate on a particular issue' (Kimmo Groenlund et al., quoted in Suteu and Tierney 2018: 284), and this list of identified characteristics: 'relatively large group of ordinary people; lengthy periods of learning and deliberation; and a collective decision with important political consequences for an entire political system' (Patrick Fournier et al., quoted in Suteu and Tierney 2018).

Each of these definitions refers to a slightly different process, but each is a process in which ordinary citizens are gathered together not only to express their viewpoints on a particular issue or set of issues related to constitutional change but also to influence the drafting and text of a constitution. In some of these processes, citizens are randomly selected (as opposed to being self-selected as in a normal town-hall style consultative process); some incorporate political or administrative actors and some are composed strictly of citizens. Some are linked to broader, macro- or national-level processes—for example, citizen assemblies were linked to referendums in Iceland and Ireland—and some are stand-alone processes.

Although these modalities for public engagement are different from one another, and they concern a wide range of differing issues, 'they are all indicative of a trend in current constitutional practice. The recourse to the people has become *the* tool for constitutional legitimation, both internally and in the search for external validation' (Suteu and Tierney 2018: 282). As this recourse to the people becomes increasingly more common and prominent, there is a need to better understand these processes' relative value, as well as to assess key lessons learned regarding good practices in composition, mandates, working procedures and other pragmatic aspects of their operation. What follows stops short of such an analysis but, rather, is intended to provide an overview of how some of these processes unfolded in 2017.

Comparative practice

Chile's cabildos, deliberaciones y encuentros

One example from 2017 of new modalities of public involvement in constitution-building processes can be found in Chile. Chile's 1980 Constitution, promulgated during Pinochet's regime, is linked to the dictatorship in the minds of much of the Chilean population. Therefore, when Michelle Bachelet campaigned for the presidency in 2013, one of her key promises—to promulgate

a new Chilean constitution—enjoyed significant public support. Despite the popularity of her promise, it should be noted that the issue of constitutional change is one of political polarization in Chile: right-wing parties have traditionally rejected the idea on the basis that Chile has already transitioned to democracy, whereas left-wing parties have largely supported it, arguing that there is a need to renew the legitimacy of Chile's constitutional order. There is also an ideological divide over the Constitution, as it sought to entrench a vision of neoliberal economics in the political order.

Once in office, Bachelet initiated 'an unprecedented constitution-making process . . . which spanned from October 2015-January 2017 [and] consisted in a complex itinerary—"a long and winding road"—of self-convened meetings at the local, provincial and national levels' (OECD 2017). The Constitutional Process Open to Citizens (CPOC) was intended to occur in three main stages: (a) *el encuentro* ('meeting'), (b) *la deliberación* ('deliberation') and (c) *la soberania* ('sovereignty'). The entire process was meant to be participatory, but the first stage—*el encuentro*—was designed as the primary mechanism for collecting the voices of the people on constitutional issues (OECD 2017). As opposed to the more common town-hall style format, where members of a large audience voice their opinions to a figure of authority, these meetings were designed to enable citizens to talk to one another and deliberate collectively about potential constitutional change. Citizens were presented with four guiding questions on values and principles; rights, duties and responsibilities; and state institutions, and they could choose to agree, partially agree or disagree with the options proposed. They were also given an opportunity to provide new ideas in an 'open comment' section.

Divided into three levels, the process engaged over 200,000 citizens through a variety of means. Individuals could submit responses to a web-based consultative interface (*consulta individual*). There were also *encuentros* at the local level, which were self-convened meetings bringing together between 10 and 30 people, and *cabildos* at the provincial and regional levels, which were led by facilitators and organized, respectively, by provincial governors and regional administrations. The inputs garnered through the process were eventually collated into a report, *Citizen Bases*, which was then coded by social scientists to produce a final document representative of the most popular constitutional conventions (rights, institutions, principles, etc.). A Citizens' Council was convened to oversee the process and ensure transparency. A parallel but distinct process was set up for consulting indigenous peoples.

The final report on the process was submitted to Bachelet in January 2017, with the report on indigenous consultations following in May 2017. A closed-door process then ensued, in which Bachelet drafted a bill that reflected the participatory inputs for submission to Congress. The bill maintained much of the text of the 1980 Constitution but introduced key changes in areas such as

presidential terms, rights, procedures for constitutional amendment, and judicial remedies. To date, however, Congress has not considered the Bill, and a new President, Sebastián Piñera, has been elected, who does not support a 'big-bang' replacement of the former constitution but, rather, favours incremental, if any, changes to the 1980 Constitution.

There are a variety of explanations for why this process failed to result in constitutional change. Bachelet's approval ratings descended rapidly in the second half of her term, which may have denied her the necessary political capital to force the agenda at the level of Congress. Verdugo and Contesse (2018) cite the failure of the process to involve political parties and elites, as well as the fact that it was championed as a participatory and open process but ultimately became a 'secretive law-making experiment conducted by unknown experts and advisers'. Importantly, this observation speaks to the need to balance normative considerations and preferences in relation to participatory constitution-making processes with pragmatic and political realities. As Verdugo and Contesse (2018) argue, 'engaging political parties in political agreements that result in constitutional replacement is necessary to represent their constituencies, to elevate the deliberative character of the process, and to give guarantees of stability to the competitive feature of the democratic stability'. The need to engage political parties and elites in constitution-making may be particularly pronounced in well-established competitive democracies, which the Iceland experiment discussed below illustrates. The lesson learned from this is critical, particularly in the context of the trend towards ever-increasing participation in constitution-making processes, highlighting the need to balance the demands that this trend places on constitution-making with other considerations and sources of constitutional legitimacy and sustainability.

Mongolia's deliberative polling

Another example of new modalities of public engagement in constitutional change can be found in the use of 'deliberative polling' in Mongolia, a methodology developed by the Center for Deliberative Democracy at Stanford, which was called in to support the design and implementation of the deliberative polling process in Mongolia.

Mongolia's 1992 Constitution was a by-product of the nation's successful and peaceful transition from socialism to constitutional democracy. Under the new constitution, power has been peacefully shared by the two main political parties, the Mongolian People's Party (MPP) and the Democratic Party. In 2016, the MPP won general elections, securing 65 out of the available 76 seats in the State Great Khural (SGKh, the Parliament), giving them the necessary majority to unilaterally pass changes to the constitution (a three-quarters majority). Despite this, the party launched an innovative public engagement process to pursue constitutional reform.

The MPP manifesto called for the amendment of the 1992 Constitution in consideration of public needs, a mandate that was officially added to the Mongolian Government's Action Program for 2016–20 (Mongolian Government 2015: 8). The commitment included a reference to 'asking the people' before change was undertaken—although the exact method that would be used to conduct this asking remained vague. Based on the advocacy and proposition of MP Gombojavyn Zandanshatar, who was serving as a senior advisor to the Center for Deliberative Democracy at Stanford, the SGKh enacted the Law on Deliberative Polling in February of 2017 and passed an amendment to the 2010 Law on Constitutional Amendment Procedures to mandate deliberative polling whenever certain constitutional provisions were up for amendment, including those related to the Parliament and the executive. As James Fishkin and MP Zandanshatar report:

> The basic idea of Deliberative Polling is simple. A Deliberative Poll surveys a random sample of the population, both before and after it has been brought together to deliberate about the issues in depth. The idea is to engage a representative sample with the best practical conditions for the people to really think in depth about the issues. (Fishkin and Zandanshatar 2017)

Following the passage of the 2017 law, a subsequent resolution to conduct deliberative polling was passed in reference to constitutional amendments grouped under six themes:

1. developing checks and balances between the SGKh and the government;
2. clarifying the powers of the President;
3. establishing an independent, professional, competent public service;
4. enhancing the administrative divisions;
5. improving accountability, discipline and justice; and
6. replacing the unicameral parliament with a bicameral parliament.

The questions and themes were developed by two working groups, with representation from both major political parties in Mongolia. The resolution also established a Deliberative Council to administer the polls; the Council was composed of eight representatives of civil society, the private sector and research institutions.

The polls were administered by selecting a random, representative sample of citizens. Sampling was overseen by Mongolia's National Statistical Office, which 'randomly selected households from randomly selected geographical areas (or

strata) and then randomly selected an adult in each of those households to be interviewed. In effect, each adult citizen in the country had an equal random chance of being selected' (Fishkin and Zandanshatar 2017). This process is scientifically sound, especially with high response rates, as were witnessed in Mongolia. In the first poll, conducted in April 2017, a total of 1,515 citizens were polled on suggested amendments (of 1,568 selected through random sampling). Then, in accordance with the Law on Deliberative Polling, half of the respondents (785) from the first poll were invited to the Government Palace in Ulaanbaatar; 669 members convened and participated in deliberations on 29 and 30 April. The subset was to be representative in terms of gender, geography, employment, age and marriage status, among other criteria. Each citizen was provided with a written explanation of the six constitutional amendment themes. They were also privy to oral responses from experts on questions that the citizens themselves had developed; these responses were televised live. Following these deliberations, the citizens were once again polled on the original questions to measure whether their opinions had shifted in response to the deliberations (Stanford University 2017b).

In terms of the spirit of deliberation, defined in a Rawlsian sense as 'inducing "public reason"—in terms of the open exchange of reasons in public fora and the preparedness of participants to *listen, reflect, and if they feel it correct to do so, change their views*' (Suteu and Tierney 2018: 283), the Mongolian process is extremely fascinating. Notably, the process did record major shifts in public opinion. For example, two of the proposals that originally enjoyed a lot of support lost a significant amount of that support during the process. The proposal for creating a parliament with two chambers went from 61 per cent in favour to 30 per cent, and the proposal for an indirectly elected president went from 61.5 per cent in favour to 41 per cent after deliberation (Stanford University 2017c). By contrast, support for the proposal to increase the powers of the Prime Minister to appoint/dismiss members of the cabinet increased after deliberation, from 57 per cent to 73 per cent (Fishkin and Zandanshatar 2017).

The highest-ranked proposals after deliberation (evaluated on a scale from 0 to 10, with 10 indicating the strongest support) were considered by the Deliberative Council. The vast majority of these concerned issues of transparency and accountability. The results were collated by the Deliberative Council and submitted to parliament in the form of recommendations on constitutional amendments on 3 May 2017. Two days later, the chairperson of the SGKh convened a 26-member working group (based on party representation) to be in charge of drafting the constitutional amendments. This group had the latitude to accept, reject or modify the recommendations of the Deliberative Council. The working group submitted its proposed amendments to the chairperson of the SGKh on 25 May 2017, and by 2 June the SGKh had adopted a resolution to organize public discussions on the draft, allowing the public to provide further

inputs between 3 June and 10 September. It was not clear how seriously the working group was required to consider the public inputs provided during this period; some criticized this part of the process for a lack of transparency. The working group was given a deadline of 1 October to collate all inputs and submit the final proposed amendments to the SGKh. Although a referendum was not required for the adoption of the proposed amendments, one was considered.

The questionnaire and draft amendments covered a range of issues, beyond those related to the branches of government, and included questions about administrative divisions of territory (Stanford University 2017a). Some of these issues were controversial, including the entrenchment of several constitutional institutions such as the State Control Organization and the Public Service Council. For example, the amendments addressed issues around the powers and dismissal of the Prime Minister; limited the number of MPs who could also serve as cabinet ministers; fixed membership of the Judicial General Council; and opened the electoral system design for reconsideration through legislative development. People rejected moving to a non-directly elected presidential system and moving to a bicameral parliament (Stanford University 2017a). The proposed amendments do accurately reflect the outcomes of the deliberative polling process. The future of the amendment process, however, remains unclear. In July 2017, the MPP candidate lost the presidential elections and the Prime Minister was then unseated after a no-confidence vote.

Ireland's Citizens' Assembly

A third and, once again, distinct model of public involvement in constitution-building that occurred in 2017 is the Irish Citizens' Assembly, modelled on antecedents in British Columbia, the Netherlands and Ontario, all examples that aimed to increase participation and deliberation partly for the sake of public legitimacy but mostly in relation to non-constitutional electoral reform. Iceland also experimented with a similar approach to constitutional change in 2013. The idea of citizens' assemblies, although implemented differently in different contexts, demonstrates how these new processes emphasize the 'centrality of the citizen tasked with deciding important constitutional reforms in a deliberative setting' (Suteu and Tierney 2018: 285).

Ireland's 2016–17 process has to be understood with reference to its 2012 experience with citizens' assemblies. In 2012, the Government of Ireland, in accordance with the Programme for Government (2011), established a Constitutional Convention composed of 100 members, of whom 33 were politicians and 67 were randomly selected citizens, to consider eight constitutional issues. This mechanism was unique in bringing together citizens and politicians. The formation of the Convention followed the citizen- and academia-led We the Citizens initiative in 2011. We the Citizens is a 'democratic participatory project to ignite citizen involvement in democracy in Ireland'; the

project began with a pilot that found that people felt they had limited ability to influence politics. Based on this finding, We the Citizens set out to test whether people would feel more influential and connected to politics if there were a more participatory form of democracy. To test this, We the Citizens convened a group of randomly chosen citizens to attend a Citizens' Assembly in June 2011. The model proved successful in increasing people's interest and engagement in politics and was used as the template for the Irish Constitutional Conventions to come. Representatives of We the Citizens served on the academic and legal support group for the Conventions' design and implementation (We the Citizens 2015).

The emergence of these citizen-driven reform processes can be linked to the widely held public perception that the government and parliament were overly centralized and unaccountable, political failures that were also perceived to have contributed to the 2008 economic crisis in Ireland (Marlborough 2016). Based on the success of the We the Citizens initiative, the Government of Ireland took an interest in citizens' assemblies and finally included the idea in the Fine Gael and Labour government plan, which proposed the creation of the Constitutional Convention, which was to have a mandate for constitutional review. Although there are critiques of the process, and scepticism about the future of many of the proposals that resulted from it, the experience was generally seen as positive, benefiting citizens and politicians alike and leading to two recommendations being put to referendums in May 2015, including the referendum that legalized same-sex marriage.

In June 2016, based on its past experience, the Irish Government called for a Citizens' Assembly by way of resolutions that passed through the Dáil and Seanad (lower and upper houses of Parliament) as part of its 'Programme for a Partnership Government'. The resolution tasked the Citizens' Assembly with deliberating on five items: fixed-term parliaments; the conduct of referendums; challenges related to an ageing population; leadership in climate change; and the most widely covered and contentious, the eighth amendment of the Constitution, which constitutes a prohibition on abortion. The eighth amendment was the first item for consideration.

The 2016 Assembly was composed of 99 randomly selected citizens, selected by a polling company to be broadly representative of the electorate as a whole (from geographical and socio-economic standpoints) and differed from the 2012 Constitutional Convention in that it did not include elected politicians. Rather, the Citizens' Assembly process was overseen by the Honourable Mary Laffoy, a Supreme Court judge, who was appointed in July 2016. The Assembly members conducted five meetings to consider the amendment, beginning in November 2016 and extending through to April 2017. The meetings followed a general format, with introductory remarks by the chairperson; expert presentations, when experts including doctors and professors would present on different aspects of a topic; presentations from civil society and advocacy groups; consideration of the

submissions from members of the public; question and answer sessions; and then round-table discussions and deliberations. The deliberative aspects of the process were critical. Facilitators and note-takers would sit with the members at each table to record the discussions. There were generally two formats for the deliberations, with the facilitator playing a slightly different role in each: (a) round-table discussions after an expert presentation, in which the facilitator helped identify questions to be posed to the experts based on member insights; and (b) round-table discussions in which the facilitator would circulate 'conversation starters' from the Secretariat to guide discussions. Following the discussions and deliberations, all matters before the Assembly were voted on and then recommendations based on majority views were made to the Houses of the Oireachtas (Citizens' Assembly 2018a). Members of the public were also invited to submit inputs on the topic between October and December 2016; the submissions can be viewed online (Citizens' Assembly 2018b).

Following the meetings, on the first ballot, 87 per cent of the members of the Assembly voted that the eighth amendment should not be retained in its full form; on the second ballot, 56 per cent of the Assembly voted for amendment or replacement of the text of the eighth amendment. Finally, in the third ballot, 57 per cent of the Assembly members agreed that the eighth amendment should be replaced with a provision authorizing the Oireachtas (Parliament) to legislate on abortion rights, including setting certain conditions under which abortion would be allowed. The Assembly put forward specific recommendations on what should be included in the legislation, with 64 per cent of the members recommending that abortion without any restrictions should be lawful. The Assembly also put forward a number of 'ancillary recommendations' that went beyond the legal changes to the constitution and included policy recommendations such as the improvement of sexual health education in schools (Citizens' Assembly 2018c). The chairperson of the Assembly presented the final report and recommendations to the Houses of the Oireachtas on 29 June 2017; the full text of the report was made publicly available on the same day (Citizens' Assembly 2017a).

As per the resolution of 2016, the Oireachtas established a joint committee of both houses to consider the final report and recommendations of the Citizens' Assembly. The committee met between September and December 2017, and also published a report on its deliberations (Citizens' Assembly 2017b). Finally, a referendum on the amendment was scheduled in accordance with the thirty-sixth amendment of the Constitution Bill (March 2018); the Bill held that article 40.3.3 (the eighth amendment) would be repealed and replaced by the text 'Provision may be made by law for the regulation of termination of pregnancy'. The referendum was held on 25 May 2018 and passed by a majority of 66.4 per cent.

Constituting another example of the innovative ways in which the public is increasingly involved in constitutional change, the Irish Citizens' Assembly is still

convened to consider the other four issues on its agenda. While many applaud this example of public participation, some critics see it as indicative of 'political cowardice', or a means by which politically contentious issues can be removed from the political agenda and government consideration, therefore avoiding potential electoral backlash arising from a controversial decision (Marlborough 2016).

Risks and other considerations

The processes discussed in this chapter reflect an emerging trend towards innovative approaches to engaging citizens in constitutional reform. This trend is in line with a general increase in participation in constitution reform, for example in terms of inclusiveness, but suggests a new focus, not only on participation but on *deliberation* and on the central role of citizens and civilians in constitutional change processes. Although participation and deliberation could be viewed as overlapping and mutually reinforcing objectives, actually they are distinct and may give rise to competing demands on processes that need to be better understood. As Suteu and Tierney note:

> While there is significant overlap between [the principles required of participatory and deliberative processes], important differences exist. Questions about the balance between the respective roles of elite and popular actors, the size and working methods of the constitution-making body, the role attributed to experts and various other actors in the process, and the rules of decision-making will each result in different answers when looked at through a participatory or a deliberative lens. (Suteu and Tierney 2018: 282)

While participation tends to focus on *who* and *how many* are involved in decision-making, deliberation seeks to examine *how* decisions are made and to improve conditions related to, for example, access to information.

If referendums and micro-processes are considered to exist on a spectrum of processes aimed at garnering legitimacy through public input into constitution-building, it is evident that each poses different challenges related to representation and inclusiveness. While referendums can be considered the clearest means of direct democracy, they often do not provide opportunities for meaningful deliberation on critical issues. On the other hand, micro-processes focused on deliberation will face challenges in ensuring truly broad-based representation of an entire national population. Therefore, there is generally a need to think through how micro-processes are linked to broader national processes so that deliberation is not achieved at the cost of broader public engagement. The processes examined in this chapter largely tried to create linkages through either

public outreach and consultations or a referendum that would sanctify the outcomes of the deliberative process. Participation and deliberation should not be thought of as competing objectives but, rather, as animating principles that can foster linkages between and innovations in macro- and micro-processes for constitutional change.

Other issues for consideration with regard to the promotion of the new modalities of public engagement include a need to ensure that the pendulum does not swing too far towards the centrality of citizens at the risk of losing political buy-in and support for constitutional change. Constitutional change requires legitimatization through both public and elite involvement. The cases of Chile and Ireland suggest that there is a need to balance public input with an active role for political parties and the political elite in a given context.

Finally, the classic democratic dilemma of crises of representation must influence our assessment of new modalities of public input—that is, the question of if small bodies can be made representative, if the 'judgments of a mini-populus would represent the judgment of the demos' (Dahl 1989: 340); if not, then we must 'fear that in setting up micro-deliberative forums we are merely replacing one representation model with another, possibly less accountable one' (Suteu and Tierney 2018: 287).

Conclusion

The continued experiments in public involvement in constitutional change raise great questions and possibilities with regard to innovative ways of promoting the engagement of citizens in these once-elitist processes. The rising popularity of these initiatives, however, highlights the need to examine them critically and assess certain risks and design options that could be better understood, for example how the outcomes of these processes are approved, the linkages between micro-processes and referenda as discussed above, the selection method for citizen groups, and the applicability of these processes in less stable and larger democratic contexts.

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5. An anatomy of failure: the 2014–18 Sri Lankan constitutional reform exercise in context

Asanga Welikala

It is now clear, even though there has been no formal acknowledgement of the fact, that the Sri Lankan constitutional reform moment has ended. In both its rise and especially its fall, the latest attempt at democratic reform followed the trajectory of past attempts with depressing predictability. It began as a civic movement against corruption and authoritarianism in 2014, gained political momentum as the broadest coalition of political parties and civil society groups ever arrayed against a Sri Lankan government at an election, inspired the country to unite around a civic ideal rather than divide along ethnic identities and achieved a stunning success in peacefully ousting a well-entrenched populist regime in January 2015. In the first flush of victory, the new government succeeded in enacting some reforms of the executive branch, which are not inconsiderable. However, in the main, it has failed to fulfil the full extent of its reform promise, and Sri Lanka has returned to the form and culture of politics that have prevented it from achieving its full political, social and economic potential since independence. What follows is an attempt to account for the failure of this process by analysing the course of events between mid-2014 and early 2018, placing them within a broader political and institutional context.

Creating the constitutional moment: the regime-change strategy

The Rajapaksa regime was rejected by the electorate in the January 2015 presidential election, on the grounds of corruption and authoritarianism, and Maithripala Sirisena was elected as the new President (Welikala 2015a). The mandate of the winning coalition was unambiguously in favour of constitutional and governance reform, although it was nothing if not ambiguous in both the substantive detail of the proposed reforms and the process by which they were to be achieved. The regime change strategy the coalition used was known as the 'Single Issue Common Candidate Road Map', first mooted by the academic and commentator Kumar David, although critical elements of David's plan that were meant to ensure the accountability of political actors to the roadmap were not followed (David 2014). This idea was underpinned by two arguments. The first was that the regime could be defeated only by the opposition unifying to include the main opposition and all ethnic minority and minor parties as well as civil society, so as to construct a state-wide democratic majority at a presidential election around a single challenger supported by all except the regime. Second, the common candidate should concentrate all strands of social discontent with the regime into a focus on systemic change, and, specifically, on the executive presidential system as the fountainhead of the ills of corruption and authoritarianism. Unless this institution was abolished, and the political system as a whole liberated of its corrupting influence, the consequential benefits of democratic government, such as economic development and social prosperity, could not be achieved.

In short, the strategy called for transforming an ordinary presidential election (albeit a high-stakes one given the implications for regime survival) into, effectively, a constitutional referendum on the presidential state. It was given a strong impetus with the formation of a broad civil society coalition around the National Movement for Social Justice led by a senior and charismatic monk, the Venerable Maduluwawe Sobitha. When Sirisena won on the back of this strategy, the mandate of the reform government was underpinned by a potent normative charge, sharply signified by the way in which its campaign slogan, *yaha paalanaya* ('good governance' in Sinhalese), quickly became a moniker for the new government used by supporters and critics alike. Nevertheless, both the conceptual and policy content of *yaha paalanaya* and the extent of the reform of the executive presidency planned remained vague (Welikala 2015b). That those elected to give effect to this broad aspiration made no effort to flesh out its substance pointed not only to the lack of interest in, or inability to engage with, normative ideas but also to an aspect of political culture in which the imprecision of policies and promises is seen as something of a strength, giving maximum

room for manoeuvre and representing different things to different constituencies, therefore avoiding accountability for the implementation of a defined programme.

The first phase: the nineteenth amendment to the Constitution

Sirisena's manifesto offered a 100-day programme of various measures that would have been difficult to achieve within such a short time frame. Even though the presidency had changed hands in January 2015, the parliament elected in 2010 continued with a majority of Rajapaksa loyalists within the new president's own Sri Lanka Freedom Party (SLFP). When President Sirisena appointed the leader of the opposition, Ranil Wickremesinghe, as the new Prime Minister, it was as the head of a minority government made up mainly of the latter's United National Party (UNP) along with some SLFP members and minority Muslim and Indian Tamil parties. Although the main Tamil grouping, the Tamil National Alliance (TNA), and the left-wing Janatha Vimukthi Peramuna (JVP) were supportive of reform and had backed the common candidacy of Sirisena, they remained outside government. This configuration of the legislature might have impeded reform, but the momentum of the presidential election and the unusual expectancy of reform that it created were sufficient to ensure the two-thirds majority needed for the first constitutional amendment proposed by the new government to be enacted, with certain concessions, in April 2015 (Welikala 2016a).

The nineteenth amendment, mainly concerned with limiting presidential powers and re-establishing a de-politicization framework enfeebled by Rajapaksa's eighteenth amendment in 2010, was initially meant to fully abolish presidentialism by establishing the requirement that the President must always act on the advice of the Prime Minister (although limited exceptions to this, situations in which the President would be able to act on her or his own volition, were envisaged) (Jayakody 2016). However, this met with opposition not only from the Rajapaksa loyalists but also from parties and individuals within the new governing coalition (Senaratne 2016). In an early sign of things to come, it appeared that Sirisena had made ambiguous and inconsistent promises in negotiating support for his candidacy, and this was exemplified in his manifesto, the English version of which promised to 'abolish' the executive presidency, whereas the Sinhalese version amorphously proposed merely to 'change' it. The watered-down version of the nineteenth amendment, however, was still a substantial change that transformed the 1978 Constitution into a premier-presidential design of executive power (Galyan 2016; Welikala 2018).

The consolidation of the mandate

In August 2015, the United National Front for Good Governance (UNFGG), led by Prime Minister Wickremesinghe, won a majority in the parliamentary elections. His manifesto promised a new constitution that would, subject to the consensus of all, devolve power to the maximum extent possible within the unitary state; strengthen the bill of rights; introduce a mixed electoral system; introduce a new constitutional court; introduce an appointed advisory council representing social, economic and civil society sectors with the power to recommend reconsideration of bills by parliament; protect the supremacy of parliament by requiring the President to act on the advice of the Prime Minister and Cabinet, responsible and answerable to parliament (with an exception for powers exercised by Sirisena); and undertake various other measures designed to increase transparency and accountability and improve governance. This second mandate of 2015 therefore consolidated and added some detail to the reform agenda and better defined the contours of a new constitution. Pro-reform parties outside government also did well in this election, including, crucially, in Tamil areas where there was a strong nationalist challenge to the accommodationist stance of the TNA (Hoole 2018). It is important to emphasize the significance of the parliamentary election, as in Sri Lankan debates the mandate for reform is often questioned on the basis of the presidential election and Sirisena's equivocations, whereas the country in fact voted in favour of reform twice in seven months in 2015.

The voces populi in favour of reform therefore cannot have been clearer, but it is necessary to briefly reflect on the nature of the democratic majority because of its implications for interpreting the substantive parameters of the popular mandate, the design of the process for delivering it, and indeed the role of political leadership and culture in ultimately frustrating it.

The nature of the democratic majority

In the presidential election, Sirisena won 51.28 per cent (6,217,162 votes) of the state-wide popular vote to Rajapaksa's 47.58 per cent (5,768,090 votes). Sirisena won 12 out of the 22 electoral districts but the only majority Sinhalese Buddhist district he won was his home district of Polonnaruwa. The others were ethnically and religiously mixed and mostly urban (Badulla, Colombo, Gampaha, Kandy and Puttalam), or Tamil and Muslim majority (Ampara, Batticaloa, Jaffna, Trincomalee and Vanni). Rajapaksa won the Sinhalese Buddhist heartland in the southern and central districts of Anuradhapura, Galle, Hambantota, Kalutara, Kegalle, Kurunegala, Matara, Monaragala and Ratnapura.

In the parliamentary election, Wickremesinghe's UNFGG won 11 of the 22 electoral districts and 45.66 per cent of the state-wide vote, including Kegalle and Matale, which had voted for Rajapaksa in the presidential election. The United People's Freedom Front (UPFA), led by the SLFP, whose leader was notionally Sirisena but in reality Rajapaksa, won eight districts and 42.38 per cent of the vote. The Tamil-majority Jaffna and Vanni districts in the Northern Province and Batticaloa in the Eastern Province were won by the TNA with 4.62 per cent of the national vote. The pro-reform JVP won 4.87 per cent. If the UNFGG, TNA and JVP percentages are aggregated, then 55.15 per cent of the electorate voted in favour of reform in the parliamentary election, which enlarged and consolidated Sirisena's presidential mandate and gave Wickremesinghe a comfortable governing majority. Not all of the UPFA MPs were also Rajapaksa loyalists, and when this group was added to the UNFGG, TNA and JVP seats, the government enjoyed a majority well above the two-thirds required for constitutional amendments.

With an electorate with ethnic divisions momentarily stifled and enthusiastically united by its central message of *yaha paalanaya*, two successive election wins, and both control of the presidency and a two-thirds legislative majority, this was a commanding position for a reforming government to be in at the start of the process. The frittering away of this substantial political capital by its beneficiaries and their retreat into the more dysfunctional but familiar mode of politics, rather than any special aptitude or strategic skill on the part of reform opponents, explains how yet again the reform of the Sri Lankan state was stymied from within.

Although Rajapaksa did not resort to any illegal means to stay in power, and indeed his loyalists voted for the nineteenth amendment, his supporters never fully accepted the reformist mood of the country and, therefore, the legitimacy of the new government's mandates for reform. Entirely consistently with their style of governing and the ideology of Sinhalese Buddhist ethnocracy, they pointed out that Rajapaksa had in fact won overwhelmingly in Sinhalese areas of the country, and that Sirisena would not have won the election without the overwhelming support of the minorities (Welikala 2015b). The powerful implication was that Sirisena, in thrall to the ethnic minorities and the deracinated and pro-western UNP, could not be trusted to look after the Sinhalese Buddhist interest and the group's primacy in the Sri Lankan state. Parochial, jaundiced and irresponsible as this argument might be, the only surprise would have been had Rajapaksa not resorted to it. And since it is also based on an analysis of the 2015 results that is not by any means unsustainable, it was a clear demarcation of where the battle lines would be drawn in the ideological and electoral mobilization of opposition to reform.

This is the challenge which required of Sirisena, Wickremesinghe and their government a bold articulation of the substantive vision of the plural but united

society that was to underpin the new constitution. While it was also necessary for the government to protect its vulnerable flank by appealing to the majority Sinhalese Buddhists with meaningful reassurances, setting out such a vision was essential to sustaining momentum in the process before opposition to reform could congeal into obstruction. Although it entailed departure from the accustomed forms of political mobilization, and participation in a politics of ideas rather than of patronage, conceptualizing the plural ethnic and religious foundations of the government's electoral majority into a coherent constitutional vision did not require any especially imaginative thinking. It is, after all, the most conventional means of post-colonial nation-building by which ethnically plural societies are woven into modern, civic, democratic polities (Smith 1998; Weinrib 2006). The reform majorities of 2015 captured the public desire not only for a change in leadership style and personnel but also for constitutional change that could permanently counteract institutional and cultural incentives for authoritarianism, corruption, clientelism and ethnoreligious inequality that had become the dominant motifs of Sri Lanka's political culture since independence (Uyangoda 2015). Sirisena and Wickremesinghe were very careful to exclude any hint of radical change, especially on the question of power sharing with the Tamils, and the TNA for its part not only adopted a reconciliatory stance but fought off a strong Tamil nationalist challenge in committing to the reform process. In other words, these were the near-ideal conditions for the articulation of a very centrist vision of a Sri Lankan nation state founded on a civic sense of shared belonging based on equal rights and dignity while protecting societal diversity—albeit a vision that never took root in post-colonial Sri Lanka (Welikala 2015c).

There were very basic and intermittent attempts in manifestos and speeches in the early days of optimism (see, for example, Wickremesinghe 2015; Sirisena 2016), but the government's inability or unwillingness to effectively and consistently set out such a vision from the beginning was one of its earliest missteps in sustaining the process of building a new constitution. This mistake was later compounded when, with the high idealism of the 2015 constitutional moment fading from public memory, extraneous factors such as economic underperformance and failure to ensure successful corruption prosecutions began to affect the government's popularity.

The design of the constitutional reform process

In December 2015, the Sri Lankan Government set up the Public Representatives Committee on Constitutional Reform (PRC). Made up of political party nominees and independent academics and lawyers, the PRC held sittings in every district and took oral and written submissions from the public. In total, 3,655 submissions were made to the committee from all sections of society and from

every ethnic and religious community. The PRC published its report in May 2016, which contained an analysis of the submissions as well as its recommendations on the whole gamut of constitutional issues ranging from the preamble, symbols, and the nature of the state, through fundamental rights and the structure of government, to devolution and power sharing. The majority view of the committee reflected a fairly liberal consensus about the direction of constitutional reform. At the same time, however, the areas in which the PRC was unable to make unanimous recommendations were historically some of the most contentious in Sri Lankan constitutional reform debates, such as the constitutional recognition of a foremost place for Buddhism and whether or not to retain the express self-classification as a unitary state in the constitution (Schonthal and Welikala 2016; Welikala 2016b; Anketell 2017).

In March 2016, by a unanimous resolution, parliament established the Constitutional Assembly (CA) to consider constitutional reforms (Constitutional Assembly 2016a). The CA, which has not been formally terminated, comprises all the Members of Parliament (MPs) but sits as a separate body. The rationale for this mechanism was to ensure both inclusivity, with all MPs of all parties having a role, and flexibility, in avoiding the rigidity of parliamentary procedure and standing orders. The CA was led by a steering committee, which was chaired by the Prime Minister and included all parliamentary party leaders and other senior MPs. The CA was also divided into subcommittees, chaired by senior MPs, to report on fundamental rights, the judiciary, public finance, the public service, law and order, and centre–periphery relations. These reports were submitted to the steering committee in July 2016 (Constitutional Assembly 2016b). The areas of electoral reform, devolution and the central executive were to be dealt with directly by the steering committee.

In terms of the original resolution, the steering committee was to then consolidate its own and the subcommittees' reports (which would also take into account the PRC report), and present that single report, together with a draft constitution bill, to the CA. The CA would debate the bill and was empowered to approve amendments before passing it with a simple majority. The provisions of the existing constitution would then come into operation: the bill would have to be passed by a two-thirds majority in parliament, and, if it was passed, the President would submit the bill to a referendum, requiring public approval by a simple majority (Constitution of Sri Lanka 1978: articles 82 and 83).

This was, therefore, a reasonably well-designed process, which correctly preserved the formalities of legal continuity, by adhering to the amendment procedure laid down in the 1978 Constitution, but added (with parliamentary approval) a framework of greater participation by the public and parliamentary parties, through the innovations of the PRC and the CA. Even if discrete criticisms might be made, the first steps of the process, such as the PRC's work and the reports of the subcommittees, were also implemented reasonably well and

in a timely manner in 2015–16. Thereafter, however, the focus on constitutional reform was lost, although the deliberations within the steering committee continued apace. Delays and opacity were exacerbated by a complete absence of information and communication from the government, let alone any sustained campaign to maintain public support for the process. To the extent that anything was said on constitutional reform, it was in well-calculated and sometimes orchestrated interventions by Rajapaksa and his allies, including reactionary members of the Buddhist hierarchy, who capitalized on the lack of information and the government's disengagement to resurrect old canards about plots to introduce federalism through the backdoor or destroy Buddhist primacy by stealth. By the time the steering committee's much-delayed interim report was published in September 2017, not only had public interest in reform waned and moved on to other matters, such as the economy, but its incoherence and lack of explanatory detail had caused further distortions and misconceptions to thrive (Welikala 2017).

The unravelling of the coalition consensus

It was, however, not owing to a disagreement over constitutional reform proposals that the relationship between the President and the Prime Minister began to unravel in late 2017, but as a result of one of the oldest weaknesses in the Sri Lankan structure of party politics, which it had been the purpose of the *yaha paalanaya* coalition to overcome: the inability to transcend the intense pressure of party competition in co-managing a constitutional project in the national interest (Philips 2018; Senaratne 2018).

Local government elections had been repeatedly postponed until the law disallowed this any further, and the elections were eventually scheduled for February 2018. The postponements were largely to give Sirisena time to resolve the schism within his party either by achieving a rapprochement with the Rajapaksa loyalists or by expelling them. Neither of these outcomes had been achieved by the time the local elections were forced on the government, which were the first elections since 2015, which it had now to face without much in the way of tangible delivery on the economy, corruption prosecutions or constitutional reform. For Rajapaksa, this was both the first and the best opportunity to make the election a referendum on the Government's performance and popularity. Sirisena, rather than closing ranks with his coalition parties to defend the record of the coalition government (such as it was), and attempting to recreate the winning formula of 2015 in the face of this threat, instead chose to campaign alone for the SLFP, therefore isolating the UNP, dividing the reformist constituency and giving Rajapaksa an open field. Given the coalition's poor performance and dismal communication, dividing the UNP and SLFP at this moment was the worst possible strategy, yet the President was

adamant. He was emboldened by a treasury bond scandal that had tainted the Prime Minister, and he chose to aggressively attack his coalition partner on this issue during the campaign. The result was what seemed like a humiliation for the UNP and SLFP and a major victory for Rajapaksa's new Sri Lanka Podujana Peramuna (SLPP).

Although it goes without saying that the electorate punished a divided government, the notion of a Rajapaksa landslide was also a chimera. Between them, the SLFP and the UNP obtained 5,093,915 votes, or 46.01 per cent of the national vote, while the SLPP obtained only 4,941,952 votes, or 44.65 per cent (Gunasekara 2018). This was certainly a stiff rebuke for the government, but with Rajapaksa not exceeding the combined share of the vote of the coalition parties, and indeed garnering a smaller share of the vote than he had done in the 2015 presidential election, it could at least be argued that the pro-reform majority in the country still held despite the government's dilatory delivery. However, in the period after the election, Rajapaksa exploited the government's divisions and total inability to communicate to construct the aura of a victorious comeback. He has successfully communicated the perception that the government is fatally wounded and that its defeat in the 2019–20 national elections is now inevitable. Moreover, rather than learning the obvious lessons, the SLFP and the UNP have seen their self-interest in separating rather than reuniting on the basis of the 2015 consensus. The SLFP has splintered further and the President's political authority, never strong, has evaporated. His moral authority, his stronger suit, has also vanished after he publicly reneged on his central promise of abolishing the executive presidency and standing for only one term (*Colombo Telegraph* 2015). The Prime Minister is also facing pressure from within for internal party reform, even greater pressure to deliver on the economy, and the prospect of the next elections. The casualty of this unfortunate confluence of factors is the constitutional reform process.

Accounting for reform failure: political culture and leadership

It is easy to identify the many shortcomings of the process that led to this rather inglorious end to the high hopes of 2015. The process, as noted, was relatively thoughtfully designed at the beginning. However, although the PRC represented more of an effort at public participation than had been made during previous exercises in post-independence constitution-making in 1972 and 1978, it is doubtful whether it had any meaningful impact as an exercise in engaging the public in a national endeavour to reconstitute the polity. Even allowing for necessary confidentiality, the public was unaware of the steering committee's deliberations or even that such a process was taking place. The initial assessment, that the process of constitutional negotiation and drafting should be completed with reasonable speed, and that the referendum should be conducted no later

than 2017 to benefit from the public sentiment of 2015, was thoughtlessly abandoned as the steering committee's deliberations became mired in the detail. Fluid deadlines denoted not a healthy process but an ill-disciplined one, which, moreover, created an impression of disorganization and crisis. When the steering committee's interim report did eventually emerge, its uninspiring style and substantive incoherence did nothing to revitalize the process, let alone reignite public interest in constitutional reform. From the start, the government lacked anything remotely like the strategic campaign of political communication that it needed to support a transformative process. The official process was simply absent in the increasingly important arena of social media (Hattotuwa, forthcoming).

The close connection between reformist civil society groups and political parties that had characterized the democratic movement against the Rajapaksa regime in the run-up to the 2015 presidential election was not replicated as effectively after the election. The autonomy of politics from civil society reasserted itself quickly once the latter's electoral utility was exhausted, partly out of defensiveness in the face of opposition charges of excessive association with liberal viewpoints, and partly because key actors, including the President, belong to a political tradition that is inherently distrustful of and even hostile to civil society agendas for reform. Critical counter-reform forces such as the Buddhist clerical hierarchy were never engaged with a view to constructively channelling their enormous potential as social capital in favour of reform. With the death of the Venerable Maduluwawe Sobitha in November 2015, the reform movement lost its icon and the only individual who seemed to have the cachet and eminence to keep straying politicians in line.

Politicians in the governing coalition fundamentally misunderstood the character of their mandate, which was a responsibility to systemically change government and the culture of politics, and not simply to change the personnel. Very few even at ministerial level seemed to know anything about, let alone understand or be invested in, the government's commitment to constitutional reform. A coherent, substantive consensus about the coalition's policy programme defined by the normative expectations of *yaha paalanaya* never developed. Not only did this make the coalition government seem even more fractious and pointless than it actually was, but it contrasted badly with the ideological clarity of the ethno-nationalist opposition, and in this way lent unnecessary respectability to this atavistic form of reactionary anti-reformism as the sole political alternative to the shambolic reality of reformist governance. Such an elite consensus was also crucial in maintaining the political relationship between the President and Prime Minister in both day-to-day governing and co-managing a constitutional transition, even more so after the nineteenth amendment had institutionalized a duumvirate in the executive branch (Welikala, forthcoming). Aside from the personal attributes of leadership and competence, and the role of the advisors to the two leaders, all of which can be heavily criticized from the

perspective of the requirements of a constitutional transition, an early investment in developing a more detailed substantive consensus about their programme in government would have moored the coalition more securely against the inevitable pressures of inter-party competition. However, such an approach seemed to be of little interest to either Sirisena or Wickremesinghe, both senior politicians steeped in the traditional political culture, who saw the advantages of riding the popular anti-Rajapaksa mood in 2014 but were less committed to carrying out its more normative implications of a cultural change in politics once ensconced in government.

Seen against this litany of shortcomings, it is not too difficult to see how the process proved incapable of delivering on the reform mandate. But there is a deeper conundrum about the politics of constitutional reform that arises from this latest example of failure, which echoes previous attempts in 1994 and 2001. In what is often described as an ethnically deeply divided society, it is remarkable that the electorate unites cyclically and fairly frequently across sectional divides to demand reforms to constitutional democracy (Choudhry 2012). This cautions against too easily adopting deterministic or essentialist categories in understanding the nature of the Sri Lankan polity. Liberalism may not provide the dominant source of normative values in Sri Lankan society, and the threshold for acceptance of authoritarian leadership combined with majoritarian nationalism may be high, but the long tradition of unbroken procedural democracy has deeply entrenched certain essential expectations of accountability in the collective psyche that, as Rajapaksa found out, any regime ignores at its peril. However, in 1994, 2001 and now 2015, such reform mandates were squandered by those elected to implement them in trajectories of mismanagement that are strikingly similar. While issues of institutional capacity and individual competence no doubt have a role in interpreting and implementing civic mandates, the deeper structural question can be put like this: what is it about the culture of politics that disincentivizes political leaders with a mandate for reform against constitutional democracy, and, within only a short period of regime-changing elections, incentivizes them towards the old culture of clientelism, personalization and ethnic populism? What, or what combination of factors, explains the autonomy of politics from civil society between elections that severs the accountability relationship between the rulers and the ruled?

The answers to these questions require more research and reflection than is possible here. However, the key to breaking the cycle of reform failure in Sri Lanka seems to be found not so much in the institutional solutions that have been the preoccupation of reformists in the past (although, of course, institutional reform is also indispensable), but in a more nuanced apprehension of the internal dynamics of political culture as it operates at both elite and mass levels (Kavanagh 1972; Diamond 1994). This in turn calls for a sophisticated understanding of the relationship between the universal notions of constitutional democracy to which

the electorate clearly shows a commitment and the subjective values, norms, practices and expectations constituting political culture through which they are mediated in the interaction between politicians and voters. Without properly and precisely understanding the terms of this relationship and the political culture that envelops it—and it is wise to remember that politicians know their voters far better than any constitutional theorist—prescriptive reformism is unlikely to break its path dependency of failure.

Too often, perplexed and disappointed reformists are tempted to decry the triumph of tradition over modernity in post-colonial societies such as Sri Lanka (Pye 1985; see also Welikala 2015d). However, as Almond and Verba's classic work argued, even in Western liberal democracies civic culture is 'neither traditional nor modern but a partaking of both' (Almond and Verba 1963: 7–8). We can, perhaps, take encouragement from that as we prepare for Sri Lanka's next constitutional moment.

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6. Constitutional recognition of religious identity

W. Elliot Bulmer

Introduction

The regulation of religion, and of the relationships between religion and the state, has long been among the central functions of a constitution. The Magna Carta stated that 'the English church shall be free, and shall have her rights entire, and her liberties inviolate' (Blick 2015). In the modern era, there has been a shift in emphasis away from protecting the corporate rights of the church and towards protecting religious belief and practice as an individual and private right. The French Declaration of the Rights of Man and of the Citizen of 1789 provided (article X) that 'No one may be disturbed for his opinions, even religious ones, provided that their manifestation does not trouble the public order established by the law'.

Today, freedom of religion has become accepted into the *acquis* of international human rights law, enshrined as it is in a number of international instruments, including the United Nations' Universal Declaration on Human Rights (article 18), the International Covenant on Civil and Political Rights (articles 18 and 27), the European Convention on Human Rights (article 9) and the Commonwealth Charter (article 4). Moreover, freedom of religion is, at least textually, recognized by 97 per cent of the world's written constitutions (2006 data); even if the limits to that freedom, in practice, are variable, the principle appears to be near-universal (Law and Versteeg 2012: 775).

Yet religion continues to be a thorny issue in constitution-building around the world. Recurring challenges include protecting the collective rights of religious

minorities, defining the place of religious laws and norms in society, recognizing the religious identity of the state and the nation, reconciling religious values and liberal-democratic principles, and deciding how the constitution is to address such issues as bioethics, sexuality, marriage and reproduction. In such matters, there is much constitutional diversity, with a range of options from French-style *laïcité* to 'constitutional theocracy' (Hirschl 2010; Durham 2013): 34 per cent of constitutions proclaim the separation of church and state, while 22 per cent of constitutions make provision for an official state religion (Law and Versteeg 2012: 775).

Negotiating these issues during constitutional change can be treacherous. Specific provisions may be unacceptable to religious leaders, who, if dissatisfied, may mobilize their supporters against the whole constitutional project. For example, while the churches in Kenya had generally encouraged constitutional reform in its early stages, some mobilized against the final draft of the 2010 Constitution because of concerns over whether the Constitution would allow abortion (Osur 2011).

Much attention has been focused on the questions of religion–state relations in Muslim-majority countries (Brown 2002; Ahmed and Ginsburg 2014). This chapter, focusing on constitutional developments in 2017, chooses examples from three other world religions: Christianity in the South Pacific, Buddhism in Sri Lanka and Judaism in Israel. The following sections very briefly examine each case, giving a short overview of the constitutional changes completed or proposed in 2017. The chapter concludes by offering some comparative observations on religion–state relations in constitutions.

Constitutional recognition of Christianity in the South Pacific

The Constitutions of Samoa and Tuvalu are both, with varying degrees of adaptation and adjustment, based on the 'Westminster export model' (de Smith 1964). This is a liberal-democratic model of constitutionalism, combining majoritarian parliamentary democracy with judicially enforceable fundamental rights, including the right to freedom of religion (de Smith 1964; Parkinson 2008). The Constitutions of Samoa and Tuvalu operate in overwhelmingly Christian societies. According to a 2011 estimate, 82.3 per cent of the Samoan population are Christian, with around one-third of the population being Congregationalist and nearly one-fifth Roman Catholic (Central Intelligence Agency 2018a). Tuvalu is even more religiously homogenous. The majority of the population belong to the Congregational Christian Church of Tuvalu (EKT), which is established by law as the State Church (State Church (Declaration) Act 2008), although the only legal privilege granted to the EKT by this law is that of 'performing special services on major national events'. Some estimates put EKT membership as high as 98.4 per cent (Central Intelligence Agency 2018b),

although there is anecdotal evidence to suggest that the near-monopoly of the EKT has weakened in recent years, with a small but steady trickle of people leaving to join other religious groups.

Samoa and Tuvalu each continue to face the challenge of reconciling their desire to express their distinctly Christian national identities and their public commitment to Christian values with a liberal-democratic commitment to religious freedom and equality before the law. In common with many other Pacific Island countries, they have attempted to do this by combining religiously laden preambles with substantive provisions that broadly reflect international human rights law (Kama 2017). The preamble to the Constitution of Samoa includes several religious invocations: the Constitution is proclaimed 'In the Holy Name of God, the Almighty, the Ever Loving'; sovereignty is declared to belong to 'the Omni-present God alone'; the authority of the people is to be exercised only 'within the limits prescribed by His commandments'; and the state proclaims itself to be based on 'Christian principles and Samoan custom and tradition' (preamble to the Constitution of Samoa).

The preamble to the Constitution of Tuvalu, as amended in 1986, likewise makes several religious proclamations. It states that 'the people of Tuvalu, acknowledging God as the Almighty and Everlasting Lord and giver of all good things, humbly place themselves under His good providence and seek His blessing upon themselves and their lives'. The state claims to be based on 'Christian principles, the Rule of Law, and Tuvaluan custom and tradition'. The rights of the Tuvaluan people to a 'fully, free and happy life, and to moral, spiritual, personal and material welfare' are recognized as having been 'given to them by God'. Moreover, the principles expressed in the preamble are made justiciable, and specific reference is made to the limitation of rights on the basis of these principles.

In 2017, both Samoa and Tuvalu attempted to strengthen these provisions. The Constitution Amendment Act (No. 2), passed by the Parliament of Samoa, added the following words to the Constitution: 'Samoa is a Christian nation founded on God the Father, the Son and the Holy Spirit.' These words were not confined to the preamble (which remains unchanged) but were incorporated into the main body of the constitutional text, implying a function more than purely symbolic or declaratory. Indeed, they were added to the first article of the Constitution, which concerns the 'Name and Description' of the state, suggesting that they are of a foundational, state-defining nature that may colour one's understanding of the Constitution as a whole. It is noteworthy that while the *invocatio dei* in the preamble could previously have been interpreted in ways that accommodated other monotheistic faiths, the new wording means that references to God in the preamble are now difficult to understand other than in an exclusively Trinitarian Christian sense.

Tuvalu's major constitutional revision exercise, ongoing throughout 2017, initially centred on improving the mechanics of parliamentary government, and strengthening the ability of opposition and backbench MPs, the judiciary and independent commissions to hold the government in check. Yet the Constitutional Review Committee and its Secretariat quickly became focused on issues of values, identity, traditions, customs and culture, and especially on the ways in which the constitution could help preserve the traditional Christian and communitarian way of life. In part, this was driven by the *Falekaupule* (traditional meetings of the chiefs and elders on each island), who expressed their concern, during the first phase of public consultations, that increasing religious pluralism and other social changes were weakening the solidarity of Tuvaluan society and undermining the network of communal obligations on which the peace and harmony of island life depend.

Although the Constitution of Tuvalu guarantees freedom of religion in broad terms (section 23), it also contains a restrictive limitations clause (section 15), which enables a court, in determining whether a law limiting rights is 'reasonably justifiable in a democratic society', to take into account, among other things, 'traditional standards, values and practices' (section 15.5a). Following a decision of the Court of Appeal in 2009 (*Teonea* v *Pule o Kaupule of Nanumaga*), which concerned the right of a Fijian missionary from a non-EKT Christian denomination to seek converts on the Tuvaluan island of Nanumaga, against the wishes of the local *Falekaupule*. Parliament passed the Religious Organizations Restriction Act 2010. This Act—the constitutionality of which has yet to be tested—prohibits new religious organizations and associations from forming without the permission of the *Falekaupule*. Under section 4(3) of the Act, the *Falekaupule* may withhold such permission if it is satisfied that the beliefs or practices of the religious association 'directly threaten the values and culture of the island community'. Section 5 of the Act created the offence of 'permitting unauthorized religious assembly', in essence limiting religious freedom to personal belief and private practice within one's own home. With the constitutional review ongoing, it remains to be seen whether the Constitutional Review Committee will press for further constitutional restrictions on religious freedom, or, as in Samoa, satisfy itself with expressive pronouncements of religious identity.

Constitutional position of Buddhism in Sri Lanka

The first Constitution of independent Sri Lanka (then Ceylon) was silent on the state's religious identity. It simply prohibited restrictions on religious freedom and prevented discrimination or privileges on the grounds of religion (Constitution of Ceylon 1948: sect. 29). This was in accordance with the preferences of Sir Ivor Jennings, constitutional advisor to the Government of Ceylon, who believed that differences between the Sinhalese Buddhist majority

and the Tamil Hindu minority could be resolved through a simple, robust democracy, based on regular elections and the rule of law, and not through extensive human rights provisions, special provision for communities, or communal veto-powers (Jennings 1949: 110; Welikala 2016). In the event, this institutional design was insufficient to 'build a modern Sri Lankan nation-state that transcends traditional ethnic identities' (Welikala 2015: 325).

The republican Constitution of 1972 declared that 'The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster Buddhism' (section 6). The same provision went on to say that all religions should be assured the rights granted by section 18 of the Constitution, which protected 'the right to freedom of thought conscience and religion', including 'the freedom to have or to adopt a religion or belief of his [sic] choice, and the freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'. Substantially the same text remains in the Constitution today (article 9), although 'Buddhism', which implies 'doctrines and beliefs', was replaced in 1978 by the term 'Buddha Sasana', which 'also encompasses relics, temples, texts, persons, customs, material objects and even spaces' (Schonthal and Welikala 2016: 17).

Sri Lanka's ongoing constitutional reform process is driven primarily by the need to finally settle a long-running, and in the past very violent, dispute between the Sinhalese majority and the Tamil minority. Much of the reform process has centred on issues of federalism versus unitarism and, to a lesser extent, on whether to retain a relatively powerful presidency or to go back to the pre-1978 system of parliamentary democracy (Dibbert 2017). Yet the status of Buddhism has remained a point of contention, which is closely tied to the wider Sinhala–Tamil question. Various proposals for reforming or replacing article 9 have been put forward, including one which, while still giving Buddhism 'foremost place' and asserting the duty of the state to 'protect and foster the Buddha Sasana', would also include a requirement for the state to treat 'all religions and beliefs with honour and dignity, and without discrimination' (Constitutional Assembly, Steering Committee 2017: 3). Such revisions have been firmly rejected by the Joint Opposition, the largest opposition group in the Sri Lankan Parliament, which on 7 October 2016 included among a list of 'uncompromising constitutional principles' that 'No alteration shall be made to the article 9 on Buddhism' (Constitutional Assembly, Steering Committee 2017: Annex 1E).

At the time of writing, no agreement appears to have been reached. Agreement is difficult because the status of Buddhism is related to national identity and intersects, albeit imperfectly, with other concerns, such as the status of the Sinhalese language and the preservation of the 'unitary' character of the state. The existing provisions of article 9 are expected to remain unchanged for the

foreseeable future, although it remains to be seen whether that is a sustainable outcome.

Constitutional position of Judaism in Israel

Religion–state relations in Israel have been fraught with constitutional difficulty since the state was founded (Navot 2014; Lerner 2011, 2017). The Declaration of Independence, adopted on 14 May 1948, proclaimed Israel to be a 'Jewish State' which would be 'open for Jewish immigration and for the ingathering of the exiles'. Democracy was not explicitly mentioned, but the Declaration did refer to the creation of 'elected, regular authorities', to principles of 'freedom, justice and peace', to 'complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex' and to 'freedom of religion, conscience, language, education and culture'. Together, these formed the core of a liberal-democratic political order.

However, the tensions arising between the Jewish and democratic identities of the state, particularly regarding how to prioritize them when one conflicts with the other, have never been resolved in a way that achieves consensus across the country's splintered and polarized political spectrum. The First Knesset's inability to overcome disagreements on the role and status of religion contributed to the decision to postpone the development of codified constitution and instead enact a series of Basic Laws that would construct the Constitution piecemeal (Lerner 2011, 2017). It was not until 1992 that the *Basic Law: Human Dignity and Liberty*, which gave authoritative recognition to the nature of the State of Israel as a 'Jewish and democratic state', was enacted (Navot 2014).

In 2017, a new Basic Law was proposed, originating as a private members' bill presented by Avi Dichter MK (Likud). This would give constitutional status to Israel's claim to be the 'National Home of the Jewish People' and declare that 'the right to exercise national self-determination in the State of Israel is unique to the Jewish people'. The substance of the bill is remarkably similar to a chapter of a draft constitution prepared by the Institute for Zionist Strategies (Institute for Zionist Strategies 2006) and submitted to the Knesset when the idea of replacing the Basic Laws with a codified Constitution was last on the political agenda. It recognizes the Law of Return, the Ingathering of the Exiles, and the Jewish diaspora. It states that the right of national self-determination in Israel belongs only to the Jewish people. Moreover, it would require all legislation to be interpreted in the light of the nation's Jewish identity, meaning that, in any conflict of norms, this would prevail over the state's democratic character (Harkov 2017).

Other provisions of the bill (Wootliff 2017) concern aspects of state identity, found in many constitutions, which are not strictly religious in nature, but which in the Israeli context emphasize the exclusively Jewish character of the state:

designation of the capital (Jerusalem), the anthem (Hatikva), the flag (including the Star of David), the official language (Hebrew, with Arabic having only a subordinate 'special status'), the calendar (Hebrew calendar) and days of rest (the Jewish Sabbath and 'the festivals of Israel'). At the time of writing, the bill had been reported favourably by a Knesset committee and, having received the backing of the Israeli Cabinet, was expected to become law.

Discussion and reflections

From the survey of these three cases, a few general observations and reflections may be made which are of interest to the global constitution-building community.

Rights and recognition

Although the constitutionalization of religion may have implications for rights, as in Tuvalu, it is not primarily a rights issue. In each of the constitutions under consideration, religious freedoms are, with more or less scope and vigour, guaranteed, and the constitutional recognition of a dominant religion is not intended, primarily, to restrict the rights of minorities. It is relevant less to the role of the constitution as a legal charter that protects enforceable rights, and more to the constitution's status as a social, political and cultural covenant, which expresses cultural norms and values and performs community-defining and nation-building functions (Bulmer 2015). This does not make these provisions any less important. Some may downplay the importance of article 9 in Sri Lanka, for example, arguing in the words of Jathika Hela Urumaya (a Sinhalese Buddhist nationalist party) that it is a mere 'constitutional decoration' with minimal legal force (Steering Committee of the Constitutional Assembly 2017: Annex 1D). Even if that were so, it would not change the fact that some people care passionately about these 'decorative' provisions, either because they symbolize one's identity or because they symbolize one's alienation from a constitutional identity that has been defined in an exclusive way.

Universality versus particularism

There is a contrast between the relative universality of religious rights provisions, which tend to reflect international norms, and the particularism of religious identity provisions, which reflect specific bargains between national actors. In Samoa, Tuvalu and Sri Lanka (but not in Israel) rights provisions closely reflect the wording of the European Convention on Human Rights or the International Convention on Civil and Political Rights, whereas the provisions on religious identity are unique to each country, reflecting its own history, culture, demographics and political dynamics.

Religion and ethnic identity

There can be a close connection between religion and ethnic identity. Religion can be an 'in-group/out-group marker' (White 2018). This is most clearly pronounced in Israel, where much of the issue at stake concerns the dual nature of 'Jewishness' as a religious and as an ethnocultural national identity. It is also evident in Sri Lanka (where Sinhalese and Buddhist identities often overlap) and in Samoa and Tuvalu (where 'traditional culture' and 'Christian principles' are often elided, both in constitutional texts and in official rhetoric). Disputes about the constitutional recognition of religious identity can, therefore, be proxies for disputes about the boundaries of the political community (White 2018): who is in, who is out, to whom does the state belong? Is it a state of all its citizens, or is it the state of a particular ethnoreligious community, in which other communities are tolerated, and may enjoy some rights, but are never fully equal partners?

Intra-religious disagreement

Disagreements over the constitutionalization of religious identity often take place within the majority, dominant religion, as well as between that religion and other religions. In Tuvalu, the 'threat' to the State Church comes not from other religions, but from other Christian churches. In Sri Lanka, 'many of the deepest disagreements regarding the Buddhism chapter [were] among Buddhists themselves'; the phrase 'foremost place' was a carefully negotiated compromise between Buddhists with different views on 'how much influence the government should have over the affairs of Buddhist monks' (Schonthal and Welikala 2016: 13). In Israel, the proposed Basic Law has exposed tensions not just between Jews and non-Jews, but also between religious and secular Jews—with the Israel Democracy Institute, for instance, concerned that the proposed Basic Law would emphasize the Jewish, while neglecting the democratic, aspects of the state's identity (Plesner, Kremnitzer and Stern 2017). In Samoa, not all Christians have supported the constitutional recognition of Christianity; some have portrayed it as a hypocritically pious, and therefore unchristian, attempt to distract attention from 'widespread unchecked corruption in the government, thievery at all levels of our society, and immoral behaviour' (Huaman 2017).

Intractability

Religion–state problems can be intractable, especially in deeply divided societies. In Israel, religious disagreements that were unresolved at the time of the state's founding remain unresolved and politically live issues today (Navot 2014). In Sri Lanka, disputes surrounding the Sinhalese Buddhist character of the state, and the role of minorities (primarily, but not exclusively, Hindu-Tamils) within it, were not adequately resolved at independence, nor in the constitutions that followed. The same arguments used in the 1970s are still reappearing today (Schonthal and

Welikala 2016). Perhaps this is unsurprising; identity issues—since they concern the heart and soul, not the head and wallet—are often difficult to settle by compromise (Lerner 2011). Likewise, the search for an autochthonous reconciliation of traditional Christian values with liberal-democratic constitutionalism has been an ongoing concern in the South Pacific since independence.

Finally, religion has not gone away. Secularization theory—the claim that religion would die out in the face of modernity—no longer has the support it once enjoyed (Woodhead 2012). New attempts to achieve the constitutional recognition of religion could be interpreted as a response to social change and demographic pressures. Even majority religions may feel that they are fighting a desperate rearguard action, if they fear that their previously unchallenged dominance is now under threat. The constitutional reassertion of religious identity can be interpreted, at least in part, as a sign of a 'neo-traditionalist' reactionary movement, with religious *belonging* (not necessarily *belief*) being deployed in electoral rhetoric of conservative populists against the social changes that have flowed from globalization, immigration and liberalization (White 2018). For the foreseeable future, therefore, those involved in supporting democratic constitutional change processes will continue to have to grapple with the issues raised in this chapter.

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ISBN: 978-91-7671-224-5 (PDF)