



Annual Review of --- Constitution-Building --- Processes: 2015

Introduction and overview

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

Of course, even within the regions and subregions analysed in this book, there are numerous differences between neighbouring countries. Dziedzic and Saunders, for example, highlight how similar polities in subregions of the Pacific have evolved different constitutional systems due to different colonial powers; and Katalin Dobias contrasts the instrumentalization of constitutional identity in Hungary with France’s long-standing guiding principle of the indivisibility of the republic.

This year’s *Annual Review* serves as a reminder to always treat claims that national constitutional orders are heading to a mutual point of convergence with some scepticism. Working constitutions cannot exist in isolation from the influences of a country’s past history and current society, and as regional neighbours often share histories and geopolitical, cultural and environmental vulnerabilities and influences, studying these processes at the regional level can enhance understanding of constitutions, including how they are made and how they operate.



References

- Chen, A., 'The achievement of constitutionalism in Asia: moving beyond constitutions without constitutionalism', in A. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century* (New York and Cambridge: Cambridge University Press, 2014)
- Gluck, J., 'Constitution-building in a political vacuum: Libya and Yemen in 2014', in International IDEA, *Annual Review of Constitution Building Processes: 2014* (Stockholm: International IDEA, 2015)
- Law, D. and Versteeg, M., 'The declining influence of the United States constitution', *New York University Law Review*, 87/3 (2012), pp. 762–858
- United Nations, 'UN Constitutional Newsletter', 4 (May 2015), <http://peacemaker.un.org/sites/peacemaker.un.org/files/TheUNConstitutional_Issue4_May2015_0.pdf>, accessed 31 July 2016

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