



Summary

This issue of **Constitutional *INSIGHTS*** examines the choice between making a new constitution and amending an existing constitution to achieve substantial constitutional change. This choice arises in the early stages of constitution building. It is likely to affect the constitution-building process and it may have significance for the perceived legitimacy of the changes. The choice between a new or amended constitution may, in context, also affect the success of the constitution-building exercise.

About this series

The Melbourne Forum on Constitution-Building in Asia and the Pacific

is a platform co-organized by the Constitution Transformation Network and International IDEA.

It brings together scholars and practitioners of constitution building from across the region, to share their perspectives on critical issues, as a contribution to global understanding of the field.

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Constitutional beginnings: Making and amending constitutions

Introduction

This issue of *Constitutional INSIGHTS* examines the choice between making a new constitution and amending an existing constitution to achieve substantial constitutional change. This choice arises in the early stages of constitution building, is likely to affect the constitution-building process and may have significance for the perceived legitimacy of the changes. The choice between a new or amended constitution may also affect the success of the constitution-building exercise.

Despite its importance, the benefits and risks of making a new constitution or amending an existing constitution are not always explicitly considered, even when both options are, in principle, open. The decision is generally determined by those leading the constitution-making process at the outset with little public discussion.

This issue of *Constitutional INSIGHTS* addresses three questions:

1. What is the difference between making a new constitution and amending an existing constitution?
2. What factors influence the choice between making a new constitution and constitutional amendment?
3. What is the significance of the choice between making and amending a constitution for constitution-building processes?

1. What is the difference between making a new constitution and amending an existing constitution?

When considering substantive changes to a written constitution, constitution-makers must decide whether to make an entirely new constitution or amend the existing constitution. The distinction between making a new constitution and amending an existing constitution is not always clear cut. Much depends on the criteria used to make the distinction.

1.1. The procedural difference between making and amending a constitution

Making a new constitution

Making a new constitution involves drafting and ratifying a new written constitution in its entirety, completely replacing the existing constitution (where one exists). Depending on the circumstances, a new constitution may (a) entail a clear break with the past constitution and be made according to new processes that are accepted as legitimate for making a new constitution; or (b) retain legal continuity with the previous constitution by following the procedures that it lays down for amendment or, in some cases, for replacement of the constitution as a whole.

The case of Sri Lanka illustrates the differences between the two approaches to making a constitution. In 1972, following a mandate given by the people at the 1970 general election, a Constituent Assembly comprising all members of the Sri Lankan House of Representatives drafted and adopted a new constitution in accordance with its own procedures, rather than following those set out in the 1946 Constitution that it replaced. In contrast, in 1978, a new Constitution was enacted by a super-majority of the Sri Lankan Parliament, following the procedure for constitutional replacement set out in the 1972 Constitution.

Amending an existing constitution

Substantial constitutional reform may also be achieved through existing constitutional amendment processes. These vary between constitutions but almost always involve procedures that are more difficult than making or changing ordinary legislation. By definition, legal continuity is preserved. There is thus a fine line between constitutional amendment and replacement of the entire constitution in a way that retains legal continuity, as described in the previous section. To complicate matters further, in some states, of which the Republic of Korea (South Korea) is an example, significant amendment of an existing constitution may be equated to the introduction of a new constitution.

In the interests of clarity, the idea of amendment in this issue of Constitutional *INSIGHTS* is used to cover any change to particular provisions or parts of an existing constitution without replacing the constitution entirely. The idea of making a new constitution will be used to cover all cases where a new constitution is drawn up to replace an existing one, whether legal continuity is preserved or not. In dealing with making a new constitution, we will distinguish between cases where legal continuity is preserved and when it is not, if it is relevant to do so.

1.2. The substantive difference between a ‘new’ and an ‘amended’ constitution

It might be assumed that significant changes to the substance of the constitution will generally be given effect through an entirely new constitution and that less significant changes will be made by amendment. This assumption has some strengths. It will usually be undesirable to undertake the huge task of making a new constitution

A combination of factors influences the choice between making a new constitution or amending an existing constitution, including the status of the existing constitution, politics and control of the agenda, and constitutional tradition

in order to achieve a specific change. On the other hand, if major structural change is required to, for example, move from a unitary to a federal system, a new constitution will often be needed, to ensure that all parts of the constitution work together as a whole.

In practice, however, this rule of thumb for identifying the difference between new or amended constitutions requires qualification.

For example, depending on the circumstances, constitutional changes that take the form of amendments sometimes are so sweeping that they amount in substance to a new constitution. Indonesia offers an example, where democratization occurred through a series of constitutional reforms from 1999 to 2002, significantly restructuring the existing constitutional system. Changes were made to over 80 per cent of the original Constitution, all through a series of amendments.

By contrast, even where a new constitution is made, the text will often retain elements of earlier constitutions. For example, although the new 1987 Constitution of the Philippines marked a complete legal break from the constitution under which former authoritarian regime operated, it incorporated many of elements of the previous constitution, including the presidential system. Similarly, while Thailand has had many new constitutions over its history, provisions relating to the monarchy, the parliamentary form of government, the form of the state and the process for constitutional amendment have remained largely the same.

2. What factors influence the choice between making or amending a constitution?

A combination of factors influences the choice between making a new constitution or amending an existing constitution. The significance of each factor varies depending on the context in which constitution-building occurs.

2.1. The status of the existing constitution

The status of an existing constitution will affect the degree to which constitutional amendment, as opposed to a new constitution, is desirable or even possible.

Where there is *no existing constitution*, it will be necessary to make a new one. This is most often the case for newly independent states, which make a new constitution to formalize the institutions and structures of self-government and to mark their statehood and independence. Timor-Leste is an example, where a new constitution was promulgated in 2002 after the new state gained independence from Indonesia. Another situation where a new constitution may be considered necessary for this reason is where there has been an earlier constitution, but it has been inoperative for some time, after having been abrogated or replaced for some reason. Fiji is an example, where a new constitution was made in 2013, after the earlier constitution was abrogated in 2009. As the case of Fiji shows, in such a situation, there may be divisions in the community over whether to make a new constitution or to return to the earlier one.

Where *the existing constitution is highly respected and has a deep symbolic force*, effective substantial constitutional change by way of amendment may be more attractive. For example, there is a deep attachment to the 1875 Constitution of Tonga, arising from history, the freedoms and rights it enshrined, its endurance, and respect for the monarchy. Significant constitutional changes were made in 2010 to shift key powers away from the monarch and place them in the hands of elected representative branches of government, as well as to reconfigure the composition of the legislature, but these took the form of amendments to the original Constitution.

Where *the existing constitution is discredited*, a new constitution might be made to symbolically mark a new beginning. The legitimacy of the existing constitution might be tainted as a result of its origins in an authoritarian, colonial, or oppressive regime. For example, in the Philippines after the fall of the authoritarian Marcos regime, the new government issued a unilateral proclamation establishing a provisional constitution, laying the way for the new final Constitution of 1987. Similarly, in Nepal, the comprehensive peace agreement that brought an end to the conflict called for a complete restructuring of the state under a new constitution.

2.2. Political considerations

Political considerations may affect the decision whether about how best to affect constitutional change.

The political dynamics may be such that one approach is *more feasible* than another. For example, if constitutional amendment requires a supermajority in the legislature that is unlikely to be achievable, an attempt to make a new constitution, without legal continuity, may seem preferable. Equally, if a new constitution is deemed to require a process that is likely to be difficult to pursue successfully (for example, a state-wide referendum), decision-makers may attempt to secure changes through constitutional amendment.

In some circumstances, constitutional amendment may represent a *compromise position* between those seeking major change and those opposed to any significant change. Constitutional amendment may appeal to the reformers as a way of ensuring some development and to their opponents as a way of confining the scope of change. The Republic of China (Taiwan) offers an admittedly unusual example, where the desire of some internal political forces to retain the existing constitution, at least in outward form is reinforced by external pressures from the People's Republic of China and the United States.

Constitutional amendment might be preferred by political leaders as a way of *retaining control of the agenda* in any event. A decision to make a new constitution potentially opens all parts of the constitution up to debate and change in a way that cannot be controlled. By contrast, constitutional amendment identifies the constitutional issues that are on the table and is more likely to confine the scope of change.

Indonesia offers an example of these factors in operation. The constitutional changes to support democratization in Indonesia took the form of a series of four constitutional amendments over the period from 1999 to 2002. During this period, there was much discussion

over whether these changes should be by way of amendment of the existing constitution, or in a new constitution.

The preference for amendment at the early stages reflected a desire to maintain the integrity of the 1945 independence Constitution, and in particular the *Pancasila* principles set out in the preamble. This desire was also reflected in the idea, expressed in early debates, that amendments be included in the Constitution by way of an addendum rather than incorporated into the text of the constitution (although this practice was not followed for amendments made later in the reform process). Another reason to prefer amendments over making an entirely new constitution was to maintain the national symbolism of the 1945 Constitution and to avoid opening up contentious issues relating to religion and the state.

2.3. Constitutional tradition

Many countries have underlying constitutional traditions that influence how substantive constitutional change is and should be made.

Legal continuity might be more important in some constitutional traditions than others. Where this is the case, there is likely to be a preference for achieving substantial change through constitutional amendment or through a new constitution that is made in accordance with relevant procedures laid down by the earlier one. All else being equal, as a generalization to which there are exceptions on either side, states in a constitutional tradition influenced by the common law tend to assume the need for continuity. This may at least partly explain the history of achieving change through constitutional amendment in, for example, India, Papua New Guinea and Singapore.

By contrast, other constitutional traditions may accept or even require approval of major change by the *constituent power* in ways that do not retain legal continuity with the earlier constitution. The Philippines again offers an example, in very distinctive circumstances. The country's 1987 Constitution was made in the context of a People's Revolution that ousted a dictatorial president and installed a new, democratic regime.

This constitution-making process was initiated by a promulgation from the revolutionary government under President Aquino, which abolished the existing constitution and called for a new constitution to be made by a Constitutional Commission. This complete break with legal continuity reflected the authority of the people's movement and its calls for democratic change. It suggests that, in these circumstances at least, an extra-constitutional response was acceptable and appropriate.

3. What is the significance of the choice between making or amending a constitution for constitution-building processes?

The significance of the choice between making a new constitution and amending an existing one will depend to some extent on context. This section sets out three sets of issues that are likely to be relevant in all cases.

Legitimacy refers to the qualities of a constitution that explain and justify why people and governments consider the constitution to be authoritative and binding and why they obey it

3.1. Legal requirements and flexibility in choice of process

A decision to amend an existing constitution will always require compliance with the procedures for amendment that the constitution prescribes. These vary between constitutions. Common procedures, separately or in combination, involve supermajorities in the legislature, constitutional or constituent assemblies and referendums.

Some constitutions prescribe different amending procedures, depending on the nature of the amendments proposed. For example, while the Constitution of India generally can be amended by a two-thirds majority in each house of the parliament, amendments that affect specific provisions relating to the federal structure must also be ratified by the legislatures of more than half of the constituent states. Several other countries in the region take a similar tiered approach to amendment, in order to more deeply entrench specific provisions or fundamental constitutional values (see e.g. the constitutions of Papua New Guinea, Singapore, Sri Lanka and Vanuatu). Some even include eternity clauses, which prohibit amendments to certain constitutional provisions or ideals (see e.g. the constitutions of Timor-Leste, protecting rights, democracy and specified political values; Indonesia, protecting the unitary and republican form of the state; and Malaysia, protecting succession rules).

Where the legal requirements for constitutional change are deemed to present too high a bar, it may sometimes be possible to achieve change through a two-stage process that retains legal continuity. This involves amending the constitutional provisions that prescribe the procedures for change, as a first step, before proceeding with more substantive amendments.

A decision to make a new constitution, on the other hand, is likely to give decision-makers greater flexibility to determine the processes to be followed. A new constitution may be made in accordance with the requirements set out in the existing constitution for constitutional amendment or replacement. However, in situations where there is no existing constitution, or where legal continuity is not required, those directing the constitutional process will have some freedom to determine the procedures by which the new constitution is made. It will be important to choose procedures that will ensure that the new constitution is accepted as legitimate. These are likely to involve a constituent assembly of some kind and/or a referendum, to demonstrate that the constitution has the support of the constituent people.

3.2. Other processes, including public participation

It is now well-established that public participation and other processes to ensure inclusion and ownership are expected when a new constitution is made. This is less well-established for constitutional change by way of amendment of an existing constitution, where it is often assumed that legitimacy can be secured simply by ensuring legal continuity. In these circumstances, little consideration may be given to popular participation even when, as in Indonesia, the changes are sweeping. Nevertheless, there is nothing to prevent popular participation and other procedures to make the process more inclusive

being used in association with constitutional amendment. Whether popular participation should be used will depend on the advantages that it is likely to bring in each case.

When a new constitution is made, public participation offers a mechanism for building legitimacy. It seeks to ensure that the views of all significant social and interest groups within a society are considered. In conflict-affected or divided countries, this may enable aggrieved communities to share their experiences and ideas. It may also bring in potential spoilers. Depending on the context, this might require engagement with insurgent or combatant groups (e.g. the current constitutional processes in Myanmar), representatives of minorities and indigenous peoples within the state (e.g. Nepal), or with diaspora outside the state. Public participation also provides an avenue for those leading the constitution-making process to explain and justify their proposals to the wider population. This may be critical where proposals are to be put to the people at referendum for approval. The advantages of public participation often also apply where changes are made through constitutional amendment.

Mechanisms for public participation may include elected or appointed citizens assemblies to discuss and advise on proposed changes, direct consultation processes such as meetings and written submissions, and wider public consultations such as crowdsourcing or deliberative polling (which was trialled recently in Mongolia). Randomly selected citizens from across the country were brought together to discuss a range of constitutional issues at a public forum. Each participant then completed a survey or poll to find out their views on each issue. It was proposed that their collated responses would be used by the Parliament to help inform their constitutional amendment process.

Sometimes, public-participation processes might be mandated by formally changing the rules for amendment of the Constitution. For example, Thailand's 1997 Constitution was made following public uprising against the military dominated government. Article 211 of the existing 1991 Constitution originally set out a process by which the House of Representatives could amend the constitution. In response to calls for a new, democratic constitution, the government amended this provision in 1996 to provide for the creation of an indirectly elected Constitution Drafting Assembly, to debate and approve a new constitution, before it was formally adopted by the parliament. It is not always necessary to amend the constitution to provide for such procedures. Depending on the context they may instead be set out in legislation, included in a peace agreement, or conducted under the auspices of those charged with constitutional review.

3.3. The role of the courts

Courts can be significant actors in processes of constitutional change, in ways that also differ between making a new constitution and amending an existing one.

Constitutional change by amendment is more vulnerable to judicial review, because it must comply with provisions for amendment in the existing constitution. As part of its role in interpreting and upholding the constitution, courts generally have authority to examine whether

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The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

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About the Constitution Transformation Network

The Constitution Transformation Network within Melbourne Law School brings together researchers and practitioners to explore the phenomenon of constitutional transformation.

<http://law.unimelb.edu.au/constitutional-transformations>

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Colophon

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Design and layout: International IDEA

an amendment complies with the procedural requirements. Courts in some countries, including India, Papua New Guinea and Taiwan, have gone further and considered whether the substance of a constitutional amendment is consistent with the existing constitution, applying what sometimes is called the basic structure doctrine. In some contexts, judicial oversight of this kind might provide an important check on constitutional amendment, inhibiting abuse by powerful actors. In other contexts, however, judicial review can put a brake on constitutional reforms; can act conservatively to entrench the status quo; and can disturb constructive political compromises.

These issues are less likely to arise in *making a new constitution*, at least in cases where legal continuity is not required. On the other hand, judicial review sometimes can play a role in these circumstances as well. One notable example arose in Nepal, when the Supreme Court refused to allow the first Constituent Assembly to further extend its tenure to make a constitution. The first Constituent Assembly had been deliberating for more than four years and had already extended its own deadline. As a result of the Supreme Court's decision, a second Constituent Assembly was elected, which did produce a new Constitution.

References and further reading

Böckenförde, M., *Constitutional Amendment Procedures*, International IDEA Constitution-Building Primer No. 10, September 2014, <https://www.idea.int/publications/catalogue/constitutional-amendment-procedures>, accessed 5 October 2018

Chang, W.-C., Thio, L., Tan, K. YL and Yeh, J.-R., 'Constitutional Change and Amendments', in *Constitutionalism in Asia: Cases and Materials* (Oxford: Hart Publishing, 2014)

Constitution Transformation Network and International IDEA, Second Melbourne Forum on Constitution Building in Asia and the Pacific, Manila, The Philippines, 3–4 October 2017, Interim Report, <https://law.unimelb.edu.au/constitutional-transformations/MF/melbourne-forum-2017/interim-report>, accessed 5 October 2018