



# Annual Review of Constitution-Building: 2018





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## Preface

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Since its launch in 2013 the *Annual Review of Constitution-Building* has become the leading resource for professionals and practitioners within the global constitution-building community.

In many of the countries discussed in this sixth edition of the Annual Review, International IDEA has been working alongside national stakeholders and international partners to support sustainable and inclusive constitution-building processes. This highlights the reciprocal, mutually reinforcing strength of our Institute as both a knowledge producer and an assistance provider: we can know because we do, and we can do because we know.

Drawing upon International IDEA's in-house expertise as well as our network of academics and practitioners in the field of constitution-building, the Annual Review is intended to provide a space to reflect on trends, developments and changes in constitutional design and processes around the world. Since constitutions are at the heart of peacebuilding, state-building, rule of law, human rights, inclusion, accountability and good governance, understanding these trends is highly relevant to the international democracy-support and development community.

In addition to depicting the latest constitution-building trends and developments, I hope this edition will also reinvigorate the debate and contribute to new insights for more inclusive and sustainable constitution-building processes around the world.

Dr Kevin Casas-Zamora  
Secretary-General  
International IDEA

## Introduction

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The Annual Review responds to topical events in the year in question. Thematically, the articles in this issue are all loosely connected to the challenges of coordination and cooperation, broadly conceived, in constitutional politics—especially in terms of the relationship between minorities and majorities, between coalition partners engaged in processes of constitutional reform, between external actors in state-building or stabilization efforts.

Adem Abebe’s article examines the seemingly antagonistic relationship between the power-sharing logic of consociational democracy and the majoritarian logic of constitutional referendums. Drawing on events that took place in Burundi and Comoros in 2018, Abebe argues that a majoritarian constitutional amendment rule can fatally weaken consociational arrangements by potentially allowing one community to unilaterally change the constitutional bargain. On the other hand, they can also provide a kind of ‘nuclear-option’ safeguard against the risk that consociational arrangements will entrench the rule of minorities and fail to adjust to changing circumstances.

Amanda Cats-Baril examines the relationship between coalition partners in constitutional reform processes—a majority made up of minority parties emerging from opposition. Looking at events in the Maldives and Sri Lanka in 2018, Cats-Baril shows the difficulty of maintaining the momentum and fulfilling the promises of a pro-reform coalition throughout constitutional change processes. The difficulty of transitioning from opposition to government, balancing the competing interests and priorities of coalition partners who might not be natural or traditional allies, and managing citizen expectations—all when faced with the sustained challenges of day-to-day governance—can cause the coalition and its commitment to constitutional reform to break down, yielding severe political and real-life consequences.

Dian Shah highlights the relevance of these considerations in her article comparing Malaysia with Sri Lanka. This contrasts the partial success of Sri Lanka—where, despite difficulties, an initial constitutional reform (the 19th amendment) was passed with cross-party support—with the stalling or stagnation of constitutional change in Malaysia, where cross-party consensus has been lacking.

Elliot Bulmer asks what happens when the majority wins so handsomely that the minority is excluded from power. Reflecting on elections that took place in 2018 in Antigua and Barbuda, Barbados and Grenada, Bulmer’s article examines the causes and consequences of such ‘clean sweep’ landslide election results and discusses some potential constitutional design solutions found in the constitutions of other Commonwealth Small Island Developing States.

Erin Houlihan’s article, which discusses ongoing events in 2018 in Libya, South Sudan and Yemen, considers the difficulty of reaching an internal political settlement in situations where external (regional and extra-regional) actors continually destabilize internal politics. In contrast to the prevailing concerns in the empirical constitution-building literature, which focuses on arguing and bargaining between internal political actors within a sovereign state, Houlihan calls attention to the need to consider the wider geopolitical situation.

Roberto Gargarella evaluates two constitutional mechanisms that have recently been used in Latin America to engage with the wider public beyond representative processes: plebiscites, which are a way of eliciting the views of the majority, and ‘free, prior, informed consent’ (FPIC), which is a means of engaging with particular minorities, especially indigenous communities. Conceiving democracy not simply in terms of majority power or minority rights, Gargarella argues that FPIC is likely to be more successful as a way of encouraging democratic dialogue.

No edition of the Annual Review can do justice to the full range of constitution-building or constitutional change processes ongoing around the world, nor cover all the issues of constitutional design or process design that might arise in a given year. Nevertheless, it is hoped that the selection of articles in this issue reveals something of the diversity, relevance and intellectual vibrancy of this field. The provision of technical support, knowledge products, trainings, and other forms of assistance to countries undergoing major constitutional change is vital to good governance—and good development outcomes—in many parts of the world.

# 1. Constitutional referendums and consociational power sharing: strange bedfellows?

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Adem Abebe

## Introduction

Constitutional referendums were held in Burundi and the Union of the Comoros in May and July 2018, respectively—the only referendums in Africa in 2018. The Burundian referendum approved a new constitution, and the Comorian referendum endorsed significant amendments to the 2001 Constitution. In both countries, the referendum was called by the president and the respective drafts were directly submitted for popular vote without legislative approval or even formal consideration. The referendums were conducted within the framework of constitutions that established power-sharing or consociational arrangements. Institutional rules that provide for joint decision-making are formalized along Hutu/Tutsi ethnic lines in Burundi and across Islands in Comoros. The constitutions reflected and were responses to political and armed contestation at the time of their enactment. While the new Burundian constitution largely retains the consociational arrangements, the amendments in Comoros have reformed crucial aspects of the power-sharing arrangement, essentially shifting the system to a largely majoritarian arrangement.

In addition to the general debate on the propriety of constitutional referendums and the conditions for their effective use, the Burundian and Comorian referendums raise specific issues on the value and compatibility of constitutional referendums in countries with power-sharing arrangements. In



particular, in both countries, the constitutions allow constitutional referendums at the sole behest of the president, without legislative approval or even consideration. Considering the hyper majoritarian character of popular referendums, they do not sit comfortably with the power-sharing constitutional frameworks in the two countries.

This article assesses the implications of popular referendums within the specific context of countries with constitutional power-sharing schemes, using Burundi and Comoros as case studies. The next section briefly summarizes the justifications for and criticisms of constitutional referendums, with particular reference to consociational arrangements. The two sections after that provide background on and analysis of the constitutional referendums in Burundi and Comoros. The final section concludes.

This article is not for or against referendums in general or consociational arrangements. It nevertheless notes that constitutional referendums could undercut consociational arrangements, especially when there is not a requirement for qualified legislative approval of reforms, necessitating a level of consensus among elites representing the distinct groups, prior to the referendum. Moreover, while this discussion is set in the context of reforms to consociational constitutions, the examples cited may be relevant to the approval of consociational arrangements in the first place.

## Constitutional referendums

Political equality lies at the heart of democratic theory, political rhetoric and practice (Dahl 2006: 9). Perhaps the most effective way of ensuring political equality is by allowing individuals to exercise direct influence over policy through the act of approval or disapproval, without intermediaries. Nevertheless, beyond the experiences of ancient Athenians in direct democracy, practical realities have led to dominance of representative conceptions of democracy. Increasingly, direct modes of democracy are witnessing something of a revival. In particular, a number of modern constitutions have been adopted through referendums and provide for referendums as potential tools for constitutional reform (Tierney 2012). As instruments that constitute and regulate political institutions and governmental power, constitutions may be considered prime candidates for direct popular consent. In addition to animating the principle of political equality, constitutional referendums may be said to instantiate the constituent power of the people, and therefore enhance the popular legitimacy and ownership of decisions. In particular, popular referendums can help to address concerns regarding the genuine group representativeness of elite bargaining in transitions to power-sharing schemes (McEvoy 2018: 867). Popular engagement in processes of constitutional change has been argued to provide a ‘partial remedy’ to the malaise

of hegemonic interests overpowering representative democracy (Tierney 2012: 21).

Despite their increasing popularity as tools of political equality and participation, constitutional referendums continue to face objections for being ‘crudely majoritarian’ (Bulmer 2017: 26)—more majoritarian even than representative majoritarian democracy, ‘since elected legislatures offer at least some opportunities for minorities to present their case in unhurried discussion and to engage in bargaining and logrolling’ (Lijphart 2012: 221). Tierney observes that minority concerns cause ‘a profound issue and potentially the greatest stumbling block for referendum democracy’ (Tierney 2012: 52). Constitutional referendums have also been criticized as less deliberative and a way of weakening democratic accountability (Setälä 2006). Fishkin notes concerns regarding ‘politically equal but relatively non-deliberative masses’ involved in referendum decisions (*vis-à-vis* ‘politically unequal but relatively more deliberative elites’) (Fishkin 2011: 243). In practice, referendums have been criticized as ‘elite controlled’ and pro-hegemonic, particularly when the right of initiating referendums exclusively belongs to the ruling political class, thereby suffering from the deficits often attributed to representative forms of decision-making (Tierney 2012: 23; Lijphart 1984: 204).

The majoritarian feature of referendums raises unique challenges in countries with power-sharing or consociational arrangements that are based on a recognition of multiple ‘peoples’, rather than a single ‘people’ in a country. Divided societies, where consociational arrangements are more common, ‘raise particularly acute problems for referendum democracy’ (Tierney 2012: 242). Rigidity is a core characteristic of constitutions establishing power-sharing schemes (Lijphart 1984: 211–20). Consociational constitutional arrangements are designed in a manner that encourages or even requires (for example, through ‘corporatist’ minority vetoes or ‘liberal’, formally difference-blind supermajority rules) cross-sectional deliberation and approval of prominent policy decisions. The direct resort to the people to decide constitutional issues would therefore empower the majority and potentially undermine consociational schemes. To this extent, constitutional referendums may be seen as zero-sum outcomes that risk inflaming intercommunal relations (Lee and Mac Ginty 2012). Writing in the context of transitions to power-sharing schemes, McEvoy notes that ‘[i]n a process of institutional design predicated on inclusive decision-making along group lines, the application of the referendum appears to contradict the essence of power-sharing’ (McEvoy 2018: 865). Referendums in general, and constitutional referendums in particular, may therefore be considered strange bedfellows with consociational arrangements.

Criticisms against referendums primarily present them in contradistinction to representative forms of democratic decision-making. Nevertheless, when referendums are used in addition to—rather than as alternatives for—legislative

approval, they may serve antimajoritarian functions as they offer dissatisfied minorities a second opportunity to oppose and launch campaigns against proposed policies or changes (Lijphart 2012: 221; Gallagher 1996). Moreover, when the referendum is an optional tool available for minority groups, it may counterintuitively serve as a ‘strong consensus inducing mechanism and the very opposite of a blunt majoritarian instrument’ (Lijphart 2012: 222), as it forces dominant parties to seek compromises to avoid the risk of a referendum defeat, or at least the political, financial and logistical headache of organizing a referendum. To this extent, the possibility of referendum may incentivize better deliberation and reflection, or at least bargaining. The fact that constitutional referendums in most countries are prescribed in addition to approval by ordinary or qualified legislative majorities means that the process makes constitutions more rigid, and therefore counter-majoritarian.

In the context of divided societies, ‘consociational referendums’, which require concurrent approval by multiple peoples rather than just a national majority, have been proposed as a means to mitigate the potentially perverse impact of referendums on cementing existing hegemonic relations (Tierney 2012: 278–82). Referendums have also been found to be useful but only when the various groups agree to a referendum, implying a level of confidence in pre-referendum bargaining processes (Qvortrup 2014: 159). Consociational referendums may take the form of separate popular approval requirements at the national level and in some or all regional entities. Concurrent majorities may also involve a qualified majority, in the form of a supermajority threshold necessitating sufficient support from the minority and majority groups, therefore ensuring a level of support across groups (without necessarily dividing the people into groups, in the liberal tradition) (McEvoy 2018: 868). In this regard, the Venice Commission has observed that such qualified rules ‘do not, in principle, run counter to equal suffrage’, and may therefore be deployed with a view to protect the core interests of national minorities (Venice Commission 2007: 8).

Constitutional referendums may also be appropriate if used as a way to achieve ‘cross-community ratification’ of reform packages agreed at the elite level (Tierney 2012: 280). In this sense, constitutional referendums are most effective when used to ratify ‘elite compacts’, reflected in the form of supermajority legislative approval requirements (Bulmer 2017: 26). This is compatible with the Venice Commission’s warning ‘against holding constitutional referenda without a *prior qualified* majority vote in Parliament’ (Venice Commission 2016: para. 25). Deployed in this way, constitutional referendums may encourage cross-sectional negotiation, deliberation and bargaining in divided societies. The combination of legislative supermajority and referendums balances the normative demands of popular sovereignty and the practical necessity and desirability of elite bargaining (Bulmer 2017: 33).

Overall, the contestation regarding constitutional referendums largely focuses on the detailed rules on the who, when and how of such processes, and their combination with legislative procedures. As such, there can only be well or badly designed referendum rules, rather than a categorization of referendums as good or bad as such. Constitutional designers must therefore pay critical attention to the rules regulating constitutional referendums. In this regard, the spectrum of choices, regardless of who initiates constitutional reforms, ranges from: (a) qualified legislative supermajority with no referendum; to (b) majoritarian referendum with majority legislative approval; to (c) majoritarian referendum with qualified legislative approval (supermajority or concurrent majority); to (d) qualified referendum with qualified legislative approval. In the context of divided societies with power-sharing schemes, the scholarly consensus seems to float between (c) and (d). In cases where qualified majorities (legislative or referendum) are selected at first order, secondary choices must be made to determine the percentage of the supermajority, considering the unique communal share in each case, and, in the case of concurrent referendum majorities, the number of regions that must approve or disapprove the proposed reform, and by what margin. In the 2005 Iraq constitutional referendum, a national majority was required, subject to the provision that not more than three governorates rejected the draft by at least a two-thirds majority (McEvoy 2018: 872).

The next sections discuss the constitutional referendums in Burundi and Comoros based on the above insights. This article is distinct from most of the existing literature discussed above in that it focuses on referendums within power-sharing or inclusive schemes. Where it exists, the literature focuses on approval of *transitions* to power-sharing schemes through referendums. While the distinction may not be technically relevant, the potential absence of the ‘constitutional moment’, bargaining and urgency that characterize new constitution-making processes may call for distinct design choices for reform processes.

## Burundi

The Constitution of Burundi was adopted in 2005 formally ending efforts to redeem the country after a devastating civil war, which started in 1993 following the killing of the first democratically elected Hutu president. Traditionally, the Tutsi minority groups, which constitute about 15 per cent of the population, had dominated the highest echelons of power. Peace talks started in earnest in 1998 and led to the adoption of the 2000 Arusha Peace and Reconciliation Agreement (Republic of Burundi, et al., 2000). The agreement provided for an inclusive power-sharing scheme in virtually all state institutions, including the cabinet, legislature and the Constitutional Court, and this has been described as the most consociational constitution in Africa (Lemarchand 2007). Nevertheless, the then main Hutu rebel group and now current ruling party, the National Council for

the Defense of Democracy–Forces for the Defense of Democracy (CNDD–FDD), did not sign the Arusha Agreement, although it subsequently signed a peace agreement and transformed itself into a political party. In addition, the 2005 Constitution specifically recognized and incorporated the Agreement. Under the Constitution, no single ethnic group could control more than 60 per cent—50 per cent in relation to the Senate, defence and security forces—of positions in various state entities. Political parties that obtain 20 per cent of the votes were entitled to proportional representation in the cabinet.

In line with the consociational features, laws required the approval of two-thirds majority in the National Assembly and the Senate, allowing the Tutsi minority an effective veto. Constitutional amendments may be initiated by the president, in consultation with cabinet, by majorities in the National Assembly or Senate. Approval of amendments needs a four-fifths majority in the National Assembly and a two-thirds majority in the Senate. Nevertheless, the Constitution also allows the president to directly submit a constitutional amendment bill to the people. Considering the fact that the Hutus constitute close to 85 per cent of the population of Burundi, the introduction of a referendum as a means of constitutional reform stands in tension with the consociational power-sharing scheme. In particular, since there are no detailed rules on referendums, by default a simple national majority of voters can decide the fate of the consociational framework. There are no rules designed to ensure a level of cross-sectional support for any proposed constitutional reforms. While this may have been an oversight (Vandeginste 2018), it could also have been designed as a way of providing a last-resort mechanism to resolve any deadlock that the power-sharing scheme may entail.

The Constitution provided that presidents must be directly elected and may only serve two terms. As a transitional process, parliament elected the first president. Following an overwhelming victory for the CNDD–FDD in the 2005 legislative elections, its leader Pierre Nkurunziza was selected President. Subsequent elections were organized in 2010, starting with local elections, in which the ruling party won 64 per cent of the votes. Opposition groups alleged significant electoral rigging and called for a recount. When their demands were not met, they boycotted the presidential and legislative elections (Nibitegeka 2016). This allowed Nkurunziza to win 92 per cent of the votes in the presidential election, and his party to win 81 per cent and 94 per cent of the seats in the National Assembly and the Senate respectively.

The dominance of the ruling party allowed Nkurunziza to seek in 2014 a constitutional amendment through parliament to allow him to run for a third term. Nevertheless, the proposed amendment failed by a single vote in the National Assembly (Nibitegeka 2016). President Nkurunziza then sought the interpretation of the Constitutional Court to allow him to run for a second term, on the grounds that his first term, in which parliament selected him as President,

did not count for the purposes of the term limits. The court, allegedly under government pressure (Nibitegeka 2016), allowed the President to run again in the 2015 presidential elections.

The political decision to allow Nkurunziza to run for a third term caused civil strife and divisions within the ruling class, elements of which orchestrated an attempted coup (Vandeginste 2018). President Nkurunziza managed to overcome the coup and elections were organized in July 2015 amid opposition boycott and protests. The President was re-elected, and his party won more than 70 per cent of the seats in the National Assembly. Despite the opposition boycott, candidate names remained on the ballot papers, enabling them to win a number of seats (Nibitegeka 2016).

After his election for a third term, President Nkurunziza established a National Commission for Inter-Burundi Dialogue to procure ideas for reforms. The process was launched in October 2015 and completed in May 2017. The need for constitutional reform, including in relation to presidential term limits, was emphasized. Following the finalization of the report by the Commission, the President established a Technical Commission to draft proposed amendments. The Technical Commission completed its work in November 2017 and proposed an entirely new constitution. The report of the commission, as well as the proposed constitutional amendments, was never presented before parliament. Instead, the President announced a constitutional referendum in December 2017 in line with a constitutional provision allowing him to submit constitutional bills for popular vote. The Constitution (Republic of Burundi 2018) was approved with more than 70 per cent support in a referendum in May 2018.

The reforms largely retained the power-sharing scheme (Vandeginste 2018). In fact, the ethnic and gender quota was extended to the entire judiciary. Nevertheless, the two-thirds majority requirement for the enactment of laws in the National Assembly has been removed, thereby potentially undermining the 40 per cent Tutsi representation in parliament. Opposition parties will no longer be entitled to cabinet seats, regardless of their share of the popular vote. The equal ethnic representation for the security services will no longer apply to the powerful intelligence services. Other reforms include the introduction of the position of prime minister. There will also be one, instead of two, vice presidents, who may not be from the same ethnic group as the president. There are no similar requirements in relation to the more powerful prime minister. While the Constitution prohibits more than two consecutive terms, each term will be seven years and it is unclear whether terms served under the previous constitution count. Nevertheless, Nkurunziza has indicated that he will not run in the 2020 elections, a statement welcomed by the African Union (2019).

The amendments were submitted to referendum without the approval or consideration of parliament. President Nkurunziza may have been concerned with the level of legislative support to secure the needed majority, as happened in

2014. Instead, a modicum of participation was conducted through the National Commission for Inter-Burundi Dialogue, although it was seen as an echo chamber for those supporting reforms (Nibitegeka 2016). Notably, the referendum procedure theoretically allows the president to propose the replacement of the current arrangement with a purely majoritarian democratic system. While there is no disaggregated information on the level of cross-ethnic support for the new constitution, technically, the 70 per cent of voters who supported the reform could all be from the Hutu majority. Nevertheless, the Constitution requires the leadership of all parties to reflect the national character of the state. Accordingly, the ruling party has membership across the communal lines. While the 2018 reforms largely retained core features of the power-sharing scheme, there is no guarantee that this will continue to be the case. Moreover, aspects of the consociation arrangement have been weaned, as is the case in relation to the law making procedure. The new constitution retains the provisions empowering the president to submit constitutional amendment bills to popular vote (articles 203 and 285). The uncomfortable combination of a consociational scheme and referendum continues.

## Comoros

The Constitution of the Union of the Comoros—composed of the island archipelago of Anjouan (Ndzuwani), Grande Comore (Ngazidja), Mohéli (Mwali) and Mayotte (claimed by Comoros, de facto administered by France)—was adopted in 2001 on the heels of attempted secession by Anjouan and Mohéli (Union of the Comoros 2001/2009). It was partly intended to stem the spectre of recurrent coups d'état, which notoriously earned it the label 'coup-coup islands' (IRIN News 2009). With negotiations undertaken under the leadership of the African Union (then the Organization of African Unity), which led to the Famboni Agreement of February 2001, a power-sharing scheme was constitutionalized, along with the allocation of significant powers to the islands. The arrangement was particularly designed to curbe the dominance of the biggest and most populated island, Grande Comore, and to placate secessionist tendencies among the other two islands.

A crucial feature of the 2001 Constitution was the introduction of a rotational presidency whereby the presidency rotated every five years between the islands. Primaries were to be held in the relevant island and the three top candidates then run for election nationwide. No two primaries could be held on the same island successively, effectively imposing bans on incumbent re-election. Vice presidents had to run on a joint ticket with the president and must come from the other islands. The president appointed ministers with the assistance of vice presidents, and the cabinet had to reflect the just and equitable representation of the islands. The approval of organic laws required the approval of two-thirds of members of



parliament. The 2001 Constitution also allowed parliamentarians from each island to request the reopening of debate on laws. The executive heads of each island appointed one member of the Constitutional Court, with the president, vice presidents and the parliamentary speaker filling the other seats on the court.

The Constitution as it stands provides for two alternative amendment processes initiated by the government or a member of parliament—through a two-thirds approval in the national legislature and approval by two-thirds of the island councils, or through a referendum. The possibility of a constitutional referendum, without the need for legislative approval or even consideration and deliberation, sits uneasily with the inclusive and consociational features of the Constitution. Crucially, other than the reference to referendums, the Constitution provides little guidance concerning approval and other requirements. Notably, there is no requirement for double majorities at the national level and for some or all of the islands, or for a qualified majority across the Union. Nor is there a turnout requirement. It is not clear whether this was an oversight or a deliberate compromise design choice to mitigate the possible deadlock that the consociational arrangement may entail.

Two rounds of major constitutional amendments have been enacted since 2001, in both cases through constitutional referendums. The amendments have undercut the combination of decentralized and power-sharing constitutional schemes. The first referendum in May 2009 effectively weakened the autonomy of the islands and empowered the president. The amendments were partly in response to a secession attempt by Anjouan, which was aborted with the assistance of forces deployed under the auspices of the African Union. The amendments moved most powers to the central government and shifted residual powers from the islands to the centre and nominally demoted the ‘presidents’ of the islands to ‘governors’. These changes were approved despite the presence of a provision in the 2001 Constitution prohibiting amendments jeopardizing the autonomy of the islands (article 42). The president was granted the power to dissolve parliament in consultation with the speaker. A specific provision empowering the president to declare emergencies was also inserted. The then vice presidents, as well as the island governors, objected to the proposed reforms, without success. Minor amendments in 2013, enacted through parliament and the island councils, extended the term of the union parliament from four to five years with a view to aligning it with the terms of other elections, including presidential and island council elections (The Economist Intelligence Unit 2014).

The amendments approved in July 2018, led by President Azali Assoumani from the biggest Grande Comore island, who was also the first president under the 2001 Constitution, effectively abolished the power-sharing arrangement in the centre (Parmentier 2018). Notably, the rotational presidency has now been abolished. Henceforth, incumbents can run for consecutive re-election. The current incumbent has already indicated that he will run for re-election and the



presidential election has been brought forward to 2019, from 2021. Moreover, the vice presidency positions and the Constitutional Court were removed. Other changes include the declaration of Sunni Islam as a religion of the state.

The amendments were submitted to referendum without legislative approval or even consideration. Considering the slight overrepresentation of the smaller islands, President Assoumani would have been unable to secure the needed two-thirds majority in parliament. Instead, the President established a parallel forum (Assises Nationales) which endorsed the proposed reforms (Habari Za Komori 2018). Opposition parties, civil society organizations and authorities in the smaller islands all opposed the referendum. The Constitutional Court was suspended, before it had the chance to rule on the validity of the proposed reforms, under an emergency declared based on the 2009 amendments. Prominent opponents to the reforms were also placed under house arrest. It is therefore questionable how free and fair the referendum was. According to official announcements, 92.74 per cent of the people approved the reforms on a turnout of 63.9 per cent, with broad support across the islands (77.83 per cent of voters in Mohéli; 91.92 per cent in Grande Comore; and 94.42 per cent in Anjouan supported the reforms). As in Burundi, the provision empowering the president to submit proposals for constitutional referendums directly to the people, without the consideration and approval of parliament, remains.

## Conclusion

Existing scholarship sends cautious messages on the propriety of referendums in divided societies at the time of adoption of constitutional power-sharing schemes. When found necessary, referendums should follow rather than substitute inter-group elite bargaining, in the form of supermajority or concurrent majority legislative approval procedures. Bulmer (2017) has argued in favour of a similar role for referendums as tools to allow the people to pass judgement on elite compacts in all cases, regardless of the level of politically salient social cleavages. In addition, in the context of divided societies, there has been debate on the referendum rules, specifically on the desirability and ways of ensuring a level of cross-community support at the referendum.

Comoros and Burundi have some of the most consociational constitutional arrangements in Africa. At the same time, they have the most flexible procedures to enact constitutional reforms. The president can directly present proposed constitutional reforms to the people, without any need even for legislative consideration, in contexts where one of the islands in Comoros and communities in Burundi have a clear popular majority. The applicable referendum rules impose no turnout or qualified majority requirements. Accordingly, changes to the consociational framework can be endorsed at the behest of a single group. Indeed, endorsement at the behest of a single group has allowed for a turn

towards a majoritarian democracy in Comoros without cross-island support, particularly at the elite level, and a slight weakening of the consociational arrangement in Burundi. Arguably, the principal deterrence against the further weakening of the power-sharing scheme in Burundi lies in the inter-ethnic composition of the ruling party and possibly a return to violence. It is not clear how long this deterrence will continue. Despite the impact of the referendum procedure on the consociational arrangement, the issue was largely absent in the reform debates in the two countries and the new/revised constitutions retain the process.

The constitutional choice in relation to referendums in Burundi and Comoros may be seen as a significant oversight incompatible with consociational arrangements. Nevertheless, it may also have been a deliberate design choice to serve as a safety valve to correct any potential deadlocks that power-sharing schemes may entail. The insertion of such a purely majoritarian process could affirm the primacy of the principle of political equality and address concerns over the ‘tyranny of the minority’ (McEvoy 2018: 869). Nevertheless, the absence even of a possibility of legislative consideration and approval opens vistas for potentially opportunistic and self-serving changes, which could trigger periods of instability in the context of divided societies.

It is important to note that McEvoy’s observations have been made in contexts of free and competitive democracies. In the case of Burundi and Comoros, however, the 2018 referendums were conducted in less than ideal circumstances. Manipulations of the position of voters, through skewed public campaigns, and even outright distortions of the outcomes were reported. The outcomes of the constitutional referendums may not reflect genuine popular choices. In such cases, the need for legislative consideration and approval of executive policy proposals may be particularly significant.

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## 2. Coalitions for constitutional change: Sri Lanka's constitutional crisis and the Maldives' 2018 elections

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Amanda Cats-Baril

### Introduction

In Sri Lanka in 2015 and the Maldives in 2018, coalitions of opposition parties promising constitutional change won landslide victories. The electoral success of these coalitions is notable insofar as it represents broad popular support for democracy and the curbing of authoritarian rule. Both elections were perceived as referendums on democracy, showing that the people of Sri Lanka and the Maldives wanted to deepen democracy in their nations through constitutional reform. Popular support on this level for constitutional change is an opportunity, but one which brings with it many challenges. Perhaps most centrally, coalitions for change often develop around a negative, usually anti-status quo, position. Over time, however, to lead effectively, coalitions need to coalesce around positive positions, proposing feasible alternatives to the status quo and prioritizing from a wider list of desired reforms. At the same time, they have to ensure that these alternatives to the status quo are realistic—taking account of *real politik*—and popularly understood and supported.

The story of Sri Lanka's 2015 coalition government and the eventual constitutional crisis of 2018 highlights this challenge. The United National Party (UNP)-led coalition in Sri Lanka, with Ranil Wickremesinghe as Prime Minister and Maithripala Sirisena as President, came together in opposition to the perceived corrupt and authoritarian Rajapaksa government. However, once in

government, the Prime Minister and President, each from different parties in the coalition, were unable to unite effectively behind a shared reform agenda. This not only led to ineffective and stalemated governance, but also had a severe impact on the momentum for democracy and constitutional change in Sri Lanka as a whole. A failure to implement change disappointed the constituencies that supported the coalition in 2015, and made space for unrest and discontent—space that Mahinda Rajapaksa and the ethnonationalist movement that he represents positioned themselves to fill (Staniland 2019).

While the Wickremesinghe–Sirisena coalition in Sri Lanka was, by early 2019, facing the aftermath of a constitutional crisis, the Maldives had its own surprising election results in 2018, heralding a time of great expectations for democracy and constitutional reform, which inspired former President Mohamed Nasheed to declare that ‘democracy is a historical inevitability’ (Nasheed 2018). But the history of the Maldives itself, not to mention its neighbours including Sri Lanka, cast doubt on this notion of historical inevitability. Democracy is fought for and defended in South Asia against many challenges, and these challenges will not cease to arise. In order for the Maldives to succeed in strengthening its democracy, the reform coalition led by President Ibrahim Solih will have to strategize and prioritize from among the promised reforms and ensure continued civic engagement, so that the coalition’s support base is aware of progress on the promised agenda.

The reform coalition’s electoral success in the Maldives in September 2018 shares a number of parallels with the success of the Wickremesinghe–Sirisena government in Sri Lanka in 2015. For one, both coalitions united in the face of challenges to their country’s democracies. As discussed below, in advance of the 2018 elections, the Maldives Government under President Abdulla Yameen called for a state of emergency that, in turn, allowed for grave violations of the rule of law and civil liberties (Human Rights Watch 2018). Rajapaksa’s administration has similarly been accused of mass human rights violations and abuses of power (see, for example, Human Rights Watch 2015). The electorates in both the Maldives’ 2018 and Sri Lanka’s 2015 elections voted for a return to democratic practices and rule of law, and in so doing, essentially voted against the status quo. In both instances, the coalitions themselves were newly formed in advance of elections, uniting opposition forces that were not traditional allies. The results of both elections were unexpected, but were received with great elation in each country. Many of the issues that the coalitions focused on are also shared. In both countries, there were concerns about foreign investment, and particularly the geopolitics of balancing China’s rising influence in the region, a need for deeper decentralization, including through constitutional change, and a desire to curb executive power due to experiences with authoritarianism—and these featured on the change agenda. Given these parallels, a closer look at the fate of Sri Lanka’s

2015 coalition for change is relevant to assessing the prospects and challenges that lie ahead for the new government in the Maldives.

## Presidential elections in the Maldives (September 2018)

On 23 September 2018, the Maldives went to the polls for presidential elections and, to many observers' surprise, Ibrahim Mohamed Solih was declared the winner, with the reform coalition garnering 58 per cent of the votes. The coalition was made up of four parties collectively promising re-establishment of rule of law and democracy after the authoritarian rule of incumbent Abdulla Yameen and the Progressive Party of the Maldives (PPM). Solih himself represents the Maldivian Democratic Party (MDP), headed by former President Nasheed who was ousted from power after winning the presidential election in 2008. The other parties in the coalition include: Maumoon Reform Movement (MRM), Jumhooree (Republican) Party and Adhaalath (Justice) Party. The leaders of all four opposition parties were imprisoned under Yameen's increasingly authoritarian regime, which was characterized by a systematic silencing of the opposition (Zulfa 2018).

### Pre-elections

In addition to many other preceding actions that raised concerns about the health of democracy in the Maldives, Yameen used the executive power to declare a state of emergency between 5 February and 22 March 2018. The state of emergency suspended constitutional protections, banned public gatherings and assemblies, granted security forces expedited and enhanced powers, and was used to further crack down on opposition forces and their supporters (Human Rights Watch 2018). Abuses during the state of emergency prompted the United Nations High Commissioner on Human Rights, Zeid Ra'ad Al Hussein, to observe:

President Yameen has, to put it bluntly, usurped the authority of the State's rule-of-law institutions and its ability to work independently from the executive . . . what is happening now is tantamount to an all-out assault on democracy. I am seriously concerned that the measures taken appear to go beyond those permissible during a state of emergency, restricting the basic tenets of democracy and undermining respect for fundamental rights in the country. (UN OHCHR 2018)

The state of emergency was Yameen's response to a Supreme Court decision that overturned the criminal convictions of members of the opposition. After declaring the state of emergency, Yameen arrested two of the five Supreme Court justices, leaving three justices who reinstated the opposition leaders' convictions.



On the basis of these convictions, in May 2018, the Elections Commission of the Maldives (ECM) nullified the candidacy of opposition presidential nominees, essentially leaving Yameen as the only eligible candidate for president (Human Rights Watch 2018). Yameen took further steps to rig the 2018 elections in his favour, including attempting to stack the ECM with members of his own party (Zulfa 2018) and using anti-defamation and terrorism laws to persecute the opposition (Human Rights Watch 2018).

## Elections

By June 2018, however, four opposition parties united behind Ibrahim Mohamed Solih, a member of MDP who did not have any criminal convictions, forming a reform coalition that went on to win the elections on 23 September. In response to the victory, Solih stated: 'This is a moment of happiness, this is a moment of hope, this is a moment of history. We will establish a just and peaceful society in the Maldives.' Despite attempts by Yameen and his supporters to undermine the credibility of the election results, the Maldives Supreme Court rejected a petition to nullify results, holding that there was no legal or constitutional basis to question the legality of the election (*Maldives Independent* 2018) and the ECM similarly claimed that the 2018 presidential elections were the most free and fair in the Maldives' history. Ultimately, Yameen accepted defeat and Solih was sworn in as President on 17 November 2018.

## Post-elections

When he said, 'this is a moment of history', Solih was not alone in asserting the significance of the elections, which were largely seen (like those in Sri Lanka in 2015) to be a vote in favour of democracy and against authoritarianism. As Solih's campaign manager, Mariya Ahmed Didi, noted, the elections showed 'a huge popular groundswell in favor of change . . . President Yameen was not given a mandate to trample all over Maldivian democracy and our Constitution, but that is what he has done these past five years' (Abi-Habib and Moosa 2018). The groundswell is at once an opportunity and a challenge, representing as it does high expectations for change from the public. It provides a broad mandate but also suggests a need to keep the public engaged and aware of the reform agenda and any progress made thereon.

The Maldives' reform coalition's campaign promises included a potential shift to a parliamentary system to curb authoritarian power, limitations on foreign ownership of lands, and further decentralization through constitutional reform and better implementation of the current constitution (Zulfa 2018). Achieving this agenda will be no easy task, and with a coalition that does not have a track record in working together, it will be difficult to build consensus around the prioritization of substantive reform issues and on the design of the processes for reform. So far, the new governing coalition has succeeded in ushering through

important legislative change—for example, the repeal of a 2015 law that enabled foreign ownership of reclaimed land in the Maldives (Reuters 2019)—but major issues for constitutional reform remain on the agenda.

Although popular support for the new coalition and the change promised was high, it begs the question of ‘how will coalitions survive when the constitution is silent on power-sharing?’ (Zulfa 2018). This is a particularly acute question given historic challenges and the political culture around power-sharing and fragile coalition arrangements, which have historically destabilized politics in the Maldives. With the 2018 electoral ousting of authoritarian rule, the reform coalition needs a constructive strategy to promote and strengthen democracy in the Maldives. The coalition came to power by promising a move away from the status quo; in order to comply with this promise, the MDP will be wise to avoid power-sharing pitfalls that have plagued the Maldives in the past. If the MDP can demonstrate consensus-based decision-making, and a new way of doing politics in the Maldives, it would provide a great opportunity for democratic gains in the country; but if it disappoints on expectations, then a change-resistant backlash might gain force as was seen in Sri Lanka.

Specifically, one challenge will be to make sure that the MDP—which has a sufficiently large parliamentary majority to unilaterally change the Constitution (Republic of the Maldives 2008), and whose leader Nasheed enjoys great popularity—is not perceived as using these advantages to push aside promises made to other members of the reform coalition. Choices and behaviours will indicate how seriously the MDP values its coalition partners and honours the spirit of the coalition-building; for example, by seeking widespread consensus and engaging in dialogue around major constitutional changes, even if this is not strictly required for these changes to be made. Setting the pace and priorities for change will be key to sustaining the coalition’s popular support. But the MDP will have to honour its commitments to coalition partners in order to avoid criticisms of unilateral exercises of power, in violation of the coalition’s own promise to move away from authoritarian rule. Otherwise, the MDP will be exposed to criticisms of hypocrisy, which could damage the integrity of the whole coalition, and its agenda.

## Constitutional crisis in Sri Lanka (October 2018)

Sri Lanka’s election of 2015 is another example of a momentous victory by a coalition of parties loosely united by a constitutional reform agenda. However, the country’s constitutional crisis in 2018 highlighted the dangers of instability inherent in such vulnerable political coalitions. Analysis of the 2018 crisis suggests that it has brought to an end the ‘constitutional moment’ of openness to change that began in 2015, with little achieved and waning public support for the

Wickremesinghe–Sirisena coalition and for constitutional reform more generally (Welikala 2018).

### Pre-elections

Having emerged from civil war with the Liberation Tigers of Tamil Eelam (Tamil Tigers) in 2009 under the presidency of Mahinda Rajapaksa, hopes were high in Sri Lanka to move towards a period of democratic consolidation and peace. Rajapaksa's second term, however, saw a rise in authoritarian governance evidenced by increased restrictions on civil society space and human rights, and efforts to centralize and consolidate power in the presidency (Human Rights Watch 2015). The Rajapaksa administration was also accused of corruption and human rights violations, which tarnished the popularity of the President and his party, Sri Lanka Freedom Party (SLFP) (see, for example, Reuters 2015). This can be seen as a parallel with the period of Yameen's rule in the Maldives and the threat to democratic freedoms and civil liberty that his regime came to represent.

In advance of the 2015 presidential elections, a former SLFP member, Maithripala Sirisena, broke with the party and joined the UNP-led coalition to run against Rajapaksa. The civic movement against authoritarianism and corruption united behind the UNP-led coalition, which represented 'the broadest coalition of political parties and civil society groups ever arrayed against a Sri Lankan government at an election'; and furthermore, 'inspired the country to unite around a civic ideal rather than divide along ethnic identities' (Welikala 2018: 80).

### Elections

In a crucial election, Sirisena won the presidency and then appointed UNP party leader Ranil Wickremesinghe as Prime Minister. Later, in the 2015 parliamentary elections, Wickremesinghe was elected on the basis of a promise of wholesale constitutional reform—a new constitution—which consolidated the change agenda promised by Sirisena in the presidential elections and made the public mandate for constitutional change clear (Welikala 2018).

### Post-elections

The Wickremesinghe–Sirisena coalition promised ambitious reforms to constrain, if not abolish, the executive presidency through constitutional amendment or replacement, to deepen decentralization and pursue transitional justice for victims of the civil war. While 'the mandate of the winning coalition was unambiguously in favour of constitutional and governance reform . . . 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' (Welikala 2018: 81). As the coalition worked towards consensus on the details of the reforms and processes for constitutional change, its fragility became increasingly apparent. Vagueness was maintained

almost as a political strategy, representing as it did ‘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 program’ (Welikala 2018: 82). Furthermore, the continual missing of deadlines resulted in ‘an impression of disorganization and crisis’, which did not encourage public trust in the coalition (Welikala 2018: 87). This, in itself, may be an important lesson for the Maldives, where to date constitutional reform promises and the processes and timelines by which these might be achieved remain vague.

The Wickremesinghe–Sirisena coalition government at least initiated movement on its change agenda, including passing the 19th Amendment to the Constitution (Democratic Socialist Republic of Sri Lanka 1978/2015), which limited the powers of the presidency, notably powers that had been expanded under Rajapaksa. Despite this limited progress, the coalition was unable to maintain momentum and cohesion, so reforms stalled and the coalition’s weakness was exposed by local elections in February 2018 when Rajapaksa’s newly branded Sri Lanka Podujana Peramuna (People’s Front) won (Staniland 2019).

Sri Lanka’s crisis suggests the difficulty of forming and sustaining coalitions for constitutional change. In political science, there is a distinction between ‘minimal winning coalitions’ and ‘minimal winning connected coalitions’. A minimal winning coalition is one that is no bigger than necessary to have a majority in government, whereas building a minimal winning connected coalition considers more than numbers, and focuses also on ensuring that there is a sufficient shared ideology among the members of a coalition for the coalition to agree to and pursue policy change (Lijphart 2012). The formation of either of these types of coalitions becomes more difficult in the context of constitutional change. For one, constitutional change usually requires a higher threshold of approval than legislative change, so even in forming a minimal winning coalition, it is likely that in sheer numbers, this coalition would have to be more all-encompassing to succeed in delivering constitutional change.

In Sri Lanka, the Wickremesinghe–Sirisena coalition entered into power with a ‘commanding position’ that included ‘two successive election wins, and both control of the presidency and a two-thirds legislative majority’—in this way, the Wickremesinghe–Sirisena coalition was a minimal winning coalition that had the numbers required to see through constitutional change. The coalition’s political capital, however, waned over time and members of the coalition ‘retreat[ed] into the more dysfunctional but familiar mode of politics’ without being able to unite behind a more substantive vision for the constitutional change promised in elections (Welikala 2018: 84)—as such, the Wickremesinghe–Sirisena coalition failed to achieve minimally connected status. Without providing a clear vision, or

demonstrating progress on a change agenda, a coalition is vulnerable to losing political support and constitutional change—or the moment for this change—can pass, being overtaken by other factors and issues such as economic growth and inflation. Uniting the coalition behind a vision is therefore essential to transitioning a moment of electoral success for the opposition, into a moment of constitutional change for the nation.

### Constitutional crisis 2018

Pressure on the Wickremesinghe–Sirisena coalition to deliver on its agenda mounted until finally, on 26 October 2018, President Sirisena shocked the nation and launched a constitutional crisis by dismissing Prime Minister Wickremesinghe and moving to appoint former President Mahinda Rajapaksa as the new Prime Minister. This move shocked Sri Lanka and the world; the Sri Lankan Parliament responded, refusing to provide a vote of confidence to Rajapaksa. Sirisena then moved to dissolve parliament, demonstrating a blatant misunderstanding of the Sri Lankan Constitution. Immediately after the announcement, Sri Lankan civil society organized and brought a challenge to the Supreme Court by the Centre for Policy Alternatives. On 13 December, the Supreme Court came to a decision in the case, ruling that Sirisena's actions constituted an unconstitutional reach of executive power. Ultimately, citizens, the court and parliament stood up for constitutional democracy. Wickremesinghe, who refused to vacate the Prime Minister's residence throughout the crisis, was reinstated in December 2018. Over more than six weeks, the drama continued to play out with Sirisena, having failed to form a majority of support for his action in parliament, calling for elections for a new government in 2019 (Moramudali 2019).

### Parallels, distinctions and learnings

Recognizing the distinct histories and politics of Sri Lanka and the Maldives, there are still parallels to be drawn, and therefore considerations and learnings that emerge, from a comparison between Sri Lanka's 2015 and the Maldives' 2018 winning coalitions for change. Notably, a key distinction between the Maldives and the Sri Lankan experiences is that, in the Maldives, the MDP holds a constitution-making majority and therefore is no longer dependent on the other members of the coalition to pass constitutional reforms. In Sri Lanka, the coalition held a constitution-making majority, but no party held the same on its own. In the Maldives, then, the challenge is likely to be more about resisting the temptation of unilateral (and self-interested) constitutional change, rather than the challenges of holding together a minimally winning coalition that faced Sri Lanka. Constitutional issues are often more fundamental and sensitive than regular policy issues—and since any change enacted is more difficult to reverse, it

is more challenging to build a shared ideology and consensus on constitutional reforms; on the other hand, given a constitution's significance to a country's identity and institutions, it is arguably most critical to pursue consensus in the context of constitution-building, for the sake of legitimacy, among other reasons. Building consensus is central to the health and spirit of coalitions—as was demonstrated in Sri Lanka, and as will likely prove important to bear in mind in the Maldives.

In Sri Lanka, the Wickremesinghe–Sirisena coalition built and maintained its 'consensus' on constitution-building by maintaining a vague vision for constitutional change, with regard to both the scope and content of the reform and the process by which it would be achieved. The coalition promised wholesale change in general terms instead of committing to specific reforms. This allowed the coalition to stay united around lowest common denominators of consensus (i.e. the need to curb executive power) but posed multiple challenges for the coalition in the long run.

The first challenge was around maintaining consensus in moving from a vague to a more specific programme for constitutional change. Despite the difficulties of engaging the public in a more detailed programme for constitutional change, such a programme, arguably, 'would have moored the coalition more securely against the inevitable pressures of inter-party competition' (Welikala 2018: 90). Instead, with its lack of vision, the unlikely coalition between UNP and SLFP began to unravel as more detailed discussions of constitutional change emerged.

The second challenge relating to having only a vague platform for constitutional change was that of citizen engagement and the management of expectations around such change. A coalition pursuing mega-constitutional change must be able to garner public support (especially if it is trying to emerge from being in opposition) but cannot promise so much as to destroy its public legitimacy in the long run if it fails to deliver. The lack of communication and information from the Government of Sri Lanka on the constitutional reform process led to a decline in public interest in the reform process, and also allowed for distortions and manipulations of public understanding of constitutional change that played on the conservative, traditional fears of the Buddhist elite in Sri Lanka. One of the main critiques of the Wickremesinghe–Sirisena coalition was the lack of communication with the public, despite public expectations for greater transparency and accountability than under Rajapaksa's administration (Welikala 2018). This exposed the coalition to criticisms of hypocrisy; a criticism that the Maldives' MDP might also face if it does not act with restraint in managing coalition politics alongside its unilateral constitution-making majority.

On the issue of consensus-building, where it was central to the possibility of constitutional change in Sri Lanka, it is a question of commitment in the Maldives. The MDP could easily pursue constitutional change on its own, should it choose to do so, but the question is whether—in the spirit of its winning

coalition—it would be better served to exercise constraint and demonstrate a commitment to consensus-based, and non-authoritarian, politics. Avoiding critiques of hypocrisy and maintaining public support is critical for any government, but perhaps most critical for governments that have emerged from opposition on a groundswell of popularity, promising major change; their legitimacy is more firmly rooted in the public mandate and trust than in, for example, historic leadership.

Promising large-scale constitutional reform also raises the issue of 'mega-constitutional politics'—when a country tries to mobilize the public behind wholesale, or 'big bang', constitutional change (Russell 1993). Often, the effort to achieve such constitutional change 'absorbs, and exhausts, the political energies of the country's leaders and its citizens' (Russell 1995). While wholesale constitutional change, in terms of promulgation of a new constitution, is not necessarily on the agenda in the Maldives, critical constitutional amendments, including potentially to the form of government, are. Sri Lanka's example shows how the promise of constitutional change, in these contexts, can come at the cost of other changes, such that deadlocks on constitutional issues can lead to deadlocks in overall political negotiations, slowly eroding trust and relationships between constitutive members of a coalition. Equally, over time day-to-day politics can trickle upwards and have negative impacts on consensus-building around constitutional issues, making constitutional change more elusive as 'opposition to reform could congeal into obstruction' (Welikala 2018: 85). In Sri Lanka, the resurgence and takeover of everyday politics undermined a moment of hope for meaningful change, raising the key question: '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?' (Welikala 2018: 90). This is a relevant question for the Maldives too, as it seeks to avoid a return to politics as usual, where 'the emergence and inevitability of coalitions/power-sharing agreements continue to undermine political stability' (Zulfa 2018).

A final issue for consideration is the extent to which the rise and fall of coalitions for opposition and change might depend on internationalized, geopolitical dynamics. For example, in both the Maldives and Sri Lanka, the opposition coalitions spoke to the need to address rising Chinese influence in the countries. President Yameen, like President Rajapaksa in Sri Lanka, was very friendly towards China, and critics of Chinese influence in the Maldives warned about the risks of 'debt-trap diplomacy'. That said, both the Maldives and Sri Lanka have become dependent on Chinese funding and support as they seek to distance themselves from India's historic influence. As noted in *The New York Times* before the 2018 Maldives presidential elections, 'If President Yameen loses, China will be able to work with the next leader, as it has shown in the case of Sri



Lanka after the 2015 election . . . [demonstrating that] China's appeal as a source of money for development transcends domestic politics' (Abi-Habib and Moosa 2018). Sri Lanka's history demonstrates that, even if it is a popular position to stand up against perceived threats to national sovereignty, a coalition coming into power might have an easier time criticizing a regime for working with China than achieving meaningful distance from Chinese influence, especially if inter-generational loan deals have already been brokered. Although the reform government in the Maldives is perceived to be closer to India than China (*The Economist* 2018), campaign promises that are intertwined with larger geopolitical dynamics will be harder to realize in practice, as Sri Lanka learned with the loss of the Hambantota Port (Abi Habib 2018).

## Conclusion

While Sri Lanka and the Maldives have distinct politics, histories and socio-economic realities, the constitutional crisis Sri Lanka suffered in 2018 holds certain lessons that might be relevant to the success of the Maldives' reform coalition. This crisis demonstrates the risks that accompany the hopes surrounding coalitions for constitutional change. Coalitions that are built on a platform of restoring democracy, changing constitutional orders and fighting authoritarian tendencies are often united in their opposition to the status quo and riding on a wave of popular support for large-scale change that is often hard to deliver in practice. Both Sri Lanka's Wickremesinghe–Sirisena coalition and the Maldives' reform coalition, had to consider: (a) how to build and maintain the spirit of the coalition and consensus politics once the coalitions are in power; and (b) how to prioritize, strategize and deliver major constitutional change. The constitutional crisis in Sri Lanka reflects a failure to meet both of these challenges—the coalition itself, united in opposition to Rajapaksa and authoritarianism in Sri Lanka, did not find meaningful consensus, with many describing the relationship between the President and Prime Minister, and their respective parties, as dysfunctional. This diminished the coalition's ability to push through concrete constitutional reforms as promised. Being unable to deliver on these promises, in turn, hurt the coalition's popular support, which was central to its success in 2015, leaving the current government vulnerable in advance of the 2020 elections. Furthermore, many cite the dysfunctional relationship between the President and Prime Minister as a contributing factor in the government's failure to prevent the Easter 2019 attacks in Sri Lanka. This fact, sadly but necessarily, highlights both the real-world consequences of politics and the reason why, for reasons beyond political theory, an understanding of how to sustain coalitions for change is worthwhile.



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### 3. Constitution-building and political change: recent lessons from Malaysia and Sri Lanka

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Dian A. H. Shah

#### Introduction

In the past five years, several countries in Asia have undergone significant political transitions. These transitions were ‘significant’ not only because they marked a change of regime, but also because they were accompanied by hopes (and promises) for democracy and a stronger constitutional government. For instance, the Nepal political transition that began in 2006 concluded with federal and provincial elections held between May and December 2017. Throughout the process, which spanned more than a decade, the Nepalese worked towards securing a greater degree of political inclusivity, various social, cultural and linguistic rights, as well as restructuring the country into a secular, federal state. Similarly in 2015, Myanmar underwent its first free and fair elections in more than two decades, and the landslide victory by the National League for Democracy (NLD) generated expectations of democratic reforms. Yet, democratization and constitution-building efforts have not been forthcoming, as the NLD battled—and continues to battle—powerful anti-democratic forces and changing political priorities (Crouch forthcoming; Kyaw 2018).

These experiences remind us that there are risks and challenges in constitution-building during or following political change. This article, however, takes a slightly different tack. Instead of focusing on the difficulties of securing constitutional change to facilitate democratization, I will assess instances where

political change has been accompanied by challenges to the constitutional order. Although these challenges threaten to undermine constitutionalism and constitutional democracy, the ways in which constitutional institutions have responded deserves attention. As I shall demonstrate by comparing the Sri Lankan and Malaysian experience, those institutions may well respond in ways that contribute to constitution-building, even without the formal process of constitutional change.

What binds the Sri Lankan and Malaysian case studies is this: both countries underwent a momentous political change (in 2015 and 2018, respectively), which came about against all odds. In the lead up to the elections, these countries were riddled with issues of corruption, abuse of power and a decline in the rule of law. Given the sheer dominance of the then-incumbents—the Rajapaksa regime in Sri Lanka and the Barisan Nasional (BN) coalition in Malaysia—under which both countries slid towards authoritarianism, there seemed to be little hope that political change was imminent. Yet, in January 2015 and May 2018, Sri Lanka and Malaysia welcomed a new government, with promises and expectations for wide-ranging legal and political reforms to remedy the endemic decay in governance and the rule of law.

### **First steps: attempts at constitution-building following political change**

One of the first steps at constitution-building following the 2015 political change in Sri Lanka was to reform the executive presidency—the institution that was at the core of the problems that the country had endured under the Rajapaksa presidency. In 2010, President Rajapaksa engineered a constitutional amendment to augment the powers of the president, chiefly by removing the two-term limit on the office and by restoring the president’s unfettered powers of appointment to key public institutions (18th Amendment to the 1978 Constitution of Sri Lanka; see Democratic Socialist Republic of Sri Lanka 1978/2015). The 18th Amendment also dismantled the Constitutional Council, which since 2001 had provided checks and balances on the executive’s powers of appointment to the Supreme Court, the Court of Appeal, and various independent institutions including the Election Commission, the National Police Commission, Public Service Commission and an Administrative Appeals Tribunal.

In view of all this, the 19th Amendment to the Constitution sought to trim the powers of the powerful executive presidency. Among other provisions, the 19th Amendment reduced the presidential term from six to five years; restored the two-term limit on the presidential office; and provided that the president can no longer dissolve parliament before four and a half years of its term and that he or she is required to appoint a prime minister who can command the confidence of the majority of the members of parliament (Shah 2019b).

The 1978 Constitution had originally stated that the prime minister may be removed from office ‘by writing under the hand of the President’, without specifying when or under which conditions removal would be appropriate. The 19th Amendment inserted instead a provision explicitly detailing the situations in which the prime minister and cabinet would cease to hold office (article 48(2)).

Although Sri Lanka has not succeeded in its more ambitious, wide-scale constitutional reform project (Welikala 2019), the incremental reforms embodied in the 19th Amendment have had a substantial effect. Aside from improving the balance of power between the executive and legislative branches, the 19th Amendment also instituted mechanisms to curtail potential abuses of power by the president. In particular, the president’s official acts are now subject to the Supreme Court’s fundamental rights jurisdiction. Previously, the president possessed blanket immunity: no proceedings could be instituted against the president so long as he or she remained in office. Crucially, the Constitutional Council was reintroduced (article 41B) with significant powers, which include the authority to make recommendations on the appointment of members of the National Police Commission, Election Commission, Human Rights Commission, Public Service Commission and Judicial Service Commission. If the president does not act pursuant to its recommendations, appointments to these bodies would nevertheless be effective by operation of law after 14 days. The Constitutional Council is also constitutionally mandated to approve the president’s nominees to the higher courts and other key public offices, such as the Attorney-General and the Inspector-General of Police.

Equally important was the cross-party political consensus and fluidity of cross-party alliances that led to the 19th Amendment’s passage in parliament. The then-minority government comprised the United National Party (UNP), several Sri Lanka Freedom Party (SLFP) members who supported the new President Sirisena, and some Muslim and Tamil parties. There were SLFP members loyal to former President Rajapaksa, and, to be sure, there were divisions even within the governing coalition about reforms on the presidential office. Yet in the end, cross-party compromises facilitated the passage of the amendment, with an overwhelming 215 votes (out of a total of 225) in favour.

It is also worth noting that, within 16 months of the passing of the 19th Amendment, parliament passed the Right to Information Act in a bid to enhance government transparency and improve the ‘opaque processes of public decision-making’ (Gomez 2019a: 837, 840).

The developments in Sri Lanka stand in stark contrast to Malaysia, where concrete reforms to facilitate constitution-building have been slow, if not lacking, in the first 18 months under the new Pakatan Harapan (Pact of Hope, or PH) government. It is true that, unlike Sri Lanka, wide-ranging constitutional reform was not explicitly on the PH government’s agenda. While recognizing the importance of institutional reforms, the government pledged instead to work

within the framework of the existing Constitution and established—within a week of its electoral victory—the Institutional Reforms Committee. The committee had a 100-day mandate and it was tasked to examine and recommend key areas for reform. By the end of June 2018, the committee had proposed seven immediate recommendations to the government. However, their specific content was not publicly disclosed, and there is no indication that the government has taken any action pursuant to those recommendations.

As the months passed, the government’s inability to act upon its mandate for reform continued. Proposals to introduce a two-term limit on the prime ministerial office and to establish parliamentary select committees to scrutinize key appointments to independent commissions remain up in the air. In addition, one of PH’s key electoral pledges was to improve the federal–state balance of power, particularly with regard to the East Malaysian states of Sabah and Sarawak. Therefore, the promise to ‘restore’ Sabah and Sarawak’s status as equal partners in the Federation of Malaysia featured prominently in the government’s 100-day plan. This would entail restoring the spirit of the 1963 Malaysia Agreement (see: UK and Federation of Malaya 1963), an international treaty that established the Federation of Malaysia, which spells out a list of autonomous powers and rights enjoyed exclusively by these two states in matters such as religion, language, immigration and fiscal management.<sup>1</sup> In the broader scheme of things, this pledge was not only about implementing the scheme of federalism enshrined in the Federal Constitution (Federation of Malaysia 1957) and the Malaysia Agreement, but it was also about remedying the abuses of power under the previous BN government, which was facilitated by its political dominance at federal and state levels (Tay 2019).

The government began to take steps to fulfil its pledge, although more than 100 days had passed since it came into power. In April 2019, it tabled an amendment to article 1(2) of the Federal Constitution, so that the wording of the provision reflected the position of Sabah and Sarawak as equal partners with the Federation of Malaysia and not merely as constituent states in the federation as a whole. The amendment fell through, as the governing coalition fell short of 10 votes to garner the requisite two-thirds majority. There were 59 members of parliament, comprising opposition politicians as well as some representatives from Sarawak and Sabah, who abstained from voting (Vanar 2019). There is, of course, a great degree of dissatisfaction from various quarters within Sabah and Sarawak, who criticize the lack of concrete, substantive changes with regard to the federal government obligations vis-à-vis both states. In other words, despite the assurances that the spirit of the Malaysia Agreement underpinned the proposed amendment, critics deemed the amendment merely symbolic and therefore inadequate to ensure that the rights and interests of the two states would be honoured (Parliament of Malaysia 2019: 55–70, 84).

The failure of the amendment is, perhaps, one of the biggest blows to the government's reform agenda. On the one hand, it is a story of a strategy that backfired: in the haste of demonstrating that it *could* fulfil one of its key electoral pledges, the governing coalition—which occupies 128 out of the 222 seats in parliament—underestimated the concerns of (and at the same time overestimated the support from) Sabah- and Sarawak-based coalitions who were previously part of the ruling BN government.<sup>2</sup> On the other hand, this—to some extent—also reminds us about the rigidity of party alliances in Malaysia's parliamentary politics, especially with regard to politically charged issues. The contrast with the cross-party alliance that supported the 19th Amendment in Sri Lanka is evident. Another example of the lack of political cooperation in Malaysia can be seen in the failure to repeal the draconian Anti-Fake News Act, which was passed under the BN government several weeks before the May 2018 elections (Shah 2019b). The PH government managed to attain a simple majority in the lower house of parliament to repeal the law, but it was later defeated in the upper house, which still comprises members from the BN coalition.

## Challenges to constitutional commitments

Many countries undergoing political transitions may face teething problems that could have an impact on constitution-building efforts. Political alliances may prove to be unstable, and deep-rooted institutional practices, as well as the constitutional and political culture, may not have evolved alongside the structural reforms or the democratic agenda. Under these conditions, challenges to the constitutional commitments may emerge, testing the durability of those commitments and the existing constitutional institutions.

The October 2018 constitutional crisis in Sri Lanka is a case in point, but even before that, President Sirisena had sought to challenge the 19th Amendment's five-year term limit on the presidential office. Sirisena's perspective was that his term in office ought to be governed by the six-year term from before the 19th Amendment, in line with his electoral mandate. To Sirisena's credit, he petitioned the Supreme Court for an opinion on the applicability of this limit to his presidency. His arguments, however, did not appeal to the Supreme Court, as it unanimously held that the current president was subject to the limits spelled out in the 19th Amendment. This decision is crucial because another year in office would have allowed President Sirisena to continue beyond the life of the current parliament, which is due to end in August 2020. The Constitution also permits the president to dissolve parliament after four and a half years—a power he could have exercised after February 2020 (Bastians 2018).

In hindsight, Sirisena's actions in this case bore signs of a president who seemed hesitant in being bound by the 'rules of the game' applicable to his office, especially when his political interests and security were at stake. This, in fact,



materialized when, on 26 October 2018, President Sirisena announced that his party had withdrawn from the governing coalition, and this meant that the cabinet stood dissolved and he could appoint a new prime minister. He immediately appointed (former President) Mahinda Rajapaksa as Prime Minister and unceremoniously removed Ranil Wickremesinghe. As Wickremesinghe declared that he would continue to carry out his duties as Prime Minister, the country was left with two competing suitors to the prime ministerial office. Given the terms of the Constitution, Rajapaksa still needed the confidence of a parliamentary majority to assume the premiership. This prompted Sirisena to prorogue parliament for two weeks to enable Rajapaksa to muster the requisite parliamentary support. At that point, it seemed inevitable that Rajapaksa would emerge as the Prime Minister, given the culture of political horse-trading, practice of floor-crossings (especially with the lure of various political and economic benefits), and the tendency of government institutions to heed presidential orders (Welikala 2019). Yet, when it transpired that Rajapaksa was struggling to find the parliamentary majority to support him, Sirisena dissolved the parliament and set an early parliamentary election for January 2019.

Political parties, civil society and the Supreme Court responded swiftly. Within days of the dissolution order, fundamental rights petitions were filed before the Supreme Court. The Supreme Court issued an interim stay on the dissolution, arguing that the president could not dissolve parliament until the lapse of four and half years (*R. Sampanthan v Attorney General*, SC FR Application No. 351/2018, 13 December 2018). In doing so, the court reiterated the principle of constitutional supremacy: although it could not strike down unconstitutional legislative action, the court could invalidate unconstitutional executive action. More crucially, the court also upheld the right to equality and equal protection of the law in article 12(1) as a guarantee against the arbitrary and *mala fide* exercise of power (Gomez 2019b). A day after the Supreme Court decision, parliament reconvened and passed a vote of no confidence against Rajapaksa. To buttress the responses of the Supreme Court and parliament in the constitutional crisis, the Court of Appeal—in a subsequent case in December 2018—issued an interim order restraining Rajapaksa and his cabinet from functioning until a final determination was made on the merits of the case (CA (Writ) Application No. 363/2018, 3 December 2018). Rajapaksa then appealed to the Supreme Court, but was unsuccessful as the Supreme Court declined to vacate the interim order (Gomez 2019b). As a result of these decisions, Rajapaksa eventually backed down: he resigned and Wickremesinghe was then re-appointed as Prime Minister. The significance of these events, therefore, lay not just in the judiciary's response to the threat against constitutional democracy in Sri Lanka, but also in the fact that the decisions were ultimately respected by the relevant political actors.

The examples in Sri Lanka bring to light the ways in which political competition and power struggles—both within governing coalitions and between

different branches of government—could hamper efforts at constitution-building. Indeed, similar dynamics have played out in Malaysia, and it took only days after the PH's victory in May for the first of several potential constitutional crises to unfold. In these events, the role of the monarchy in governance came under the spotlight, and the persisting undercurrents of feudalism in the Malaysian constitutional, social and political culture cannot be overlooked. In fact, in an era where the role of monarchies in public life is increasingly restricted and scrutinized, Malaysia's monarchy has arguably become ever more prominent, especially as Malaysians looked to alternative voices and wisdom in dealing with corruption scandals, political instability and ethno-religious tensions.

However, another crucial aspect to bear in mind is Prime Minister Mahathir Mohamad's complicated history with the monarchy. This stemmed from a series of constitutional amendments during Mahathir's tenure as the fourth Prime Minister (1981–2003), which restricted the monarch's legislative prerogatives with regard to parliamentary bills and removed the monarch's immunity from suit when acting in a personal capacity (Harding 2018a: 78–82). The latter was triggered by a series of alleged criminal acts involving the then Sultan of Johor, Sultan Iskandar Shah (Harding 2018a: 80). Although the amendment marked an important step in strengthening the rule of law, it did not sit well with some members of the royal family who saw this as a direct challenge to their long-held privileges (Shah 2019a).

Therefore, when Mahathir was due to be sworn in as the Prime Minister on 10 May, the stage almost seemed set for an impending crisis. Although PH had agreed that Mahathir would become the Prime Minister, the Yang di-Pertuan Agong (the constitutional Head of State), Sultan Muhammad V of Kelantan, had instead spoken with the leader of the most dominant party within PH—Wan Azizah Wan Ibrahim—and offered her the prime ministerial position. This was despite PH's clear stand in the electoral campaign—that Mahathir would be the prime ministerial candidate. Wan Azizah declined the offer, and amid growing public speculation that the Yang di-Pertuan Agong opposed Mahathir's premiership, the National Palace issued a statement denying allegations that Sultan Muhammad V was deliberately delaying the appointment (*The Star* 2018a). Yet, this did not quell further speculation of a stalemate between the royal household and the incoming executive, as the public began to recall Sultan Muhammad V's decision in February 2018 to revoke a royal award bestowed upon Mahathir. This was compounded by the news that His Majesty had stepped in to interview party leaders from PH and the leaders had submitted a letter in support of Mahathir as Prime Minister.

The public spectacle aside, this series of events was rooted in the uncertainty over the operation and implementation of article 43(2) of the Federal Constitution of Malaysia (Federation of Malaysia 1957/2010), which states that 'the Yang di-Pertuan Agong shall first appoint as Perdana Menteri (Prime

Minister) to preside over the Cabinet a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House'. The question turned on how the Yang di-Pertuan Agong exercises that 'judgment'. One view is that Sultan Muhammad V's decision to act only after the official election results were released was proper pursuant to the requirements of this provision (Harding 2018b). However, his move to speak to PH's component party leaders and offer the position to Wan Azizah was problematic. Indeed, internal sources suggested another narrative (one that seemed consistent with the rumour on the hesitancy to appoint Mahathir): a constitutional crisis was averted by the swift action of the Deputy Yang di-Pertuan Agong, Sultan Nazrin Shah of Perak, who urged on Mahathir's appointment in line with the constitutional conventions underpinning article 43(2). A day later, Sultan Nazrin proved, again, his capacity as the model constitutional monarch who stays above politics, functions as a check on government, and acts as a neutral guardian of the constitution. There was a hung State Assembly in his native state of Perak following the elections as PH won 29 seats—just one seat short of the minimum needed to claim outright control of the Assembly. In spite of that, Sultan Nazrin—following established Westminster conventions—gave PH the first opportunity to form the government, although the BN coalition (which won 27 seats) hinted at an alliance with the Islamic party, Parti Islam Se-Malaysia (PAS) (which secured 3 seats) (*The Star* 2018b).

## Conclusion

The Malaysian and Sri Lankan case studies have illustrated that changes in political dynamics and priorities could trigger challenges against the constitutional commitment and order. In a far more open political environment, it would seem inevitable that governments and constitutional institutions would face competing views, challenges against their decision-making and the presence of anti-democratic forces that are also intent on seizing (or retaining) political power. In addition, government actors may themselves defy the boundaries of the constitution that governs their exercises of power when political survival and interests are at stake.

Consider again, as a final example, the relationship between the cabinet and the monarchy in Malaysia. This was tested for the second time in December 2018 when the government decided to accede to the Rome Statute of the International Criminal Court (ICC). Having deposited the instrument for accession in March 2019, the government subsequently announced its withdrawal, citing concerns of a 'deep state' seeking to undermine the legitimacy of the government and engineer a coup with the support of opposition politicians and the royalty (*The Straits Times* 2019).

In the lead up to the withdrawal, opposition parties had been stoking racial and religious sentiments among the Malays and the royalty, through a systematic propaganda campaign claiming that the ICC threatened the sovereignty of the Malay rulers, as the Yang di-Pertuan Agong would be liable to prosecution in his role as the Supreme Commander of the Armed Forces. By some creative extension, it was also alleged that this would, in turn, undermine the position of Islam in the country.

Although this represented a deeply flawed understanding of the ICC (particularly its principle of complementarity) and the operation of international treaties in dualist countries like Malaysia, it gained significant traction on the ground. It was also enough to generate concerns among the Malay Rulers, who then convened a meeting of the Council of Rulers (Majlis Raja-Raja), where selected academics were summoned to present their views on the matter. Eventually, a concoction of political pressure from right-wing Malay nationalists and the monarchy led to the government's U-turn on the ICC. As these kinds of challenges to the constitutional order emerge, and as constitutional institutions calculate subsequent responses to such challenges, the trajectory of constitution-building and democratization will evolve alongside changing social and political dynamics.

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### Endnotes

1. For instance, under the 1963 Malaysia Agreement, English (as opposed to the Malay language) would remain the official language for Sabah and Sarawak; the two states would retain control over immigration (therefore allowing them to control entry by Malaysians from other states); and although Islam is constitutionally enshrined as the ‘religion of the Federation’, this would not apply to Sabah and Sarawak.
2. The Warisan party (9 seats) and the United Progressive Kinabalu Organisation (UPKO party) (1 seat) are not officially part of the PH coalition, but they have pledged to support the government. The Gabungan Parti Sarawak (Sarawak Parties Coalition, or GPS) and Gabungan Bersatu Sabah (Sabah United Coalition, or GBS) hold 18 seats and 3 seats in parliament respectively, and they comprise lawmakers who were previously under the Barisan Nasional coalition.

## 4. Her Majesty's precarious opposition: 'clean sweep' elections and constitutional balance in Commonwealth Caribbean states

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Elliot Bulmer

### Introduction

The 'Westminster Model' of parliamentary democracy, derived and adapted from the British archetype, continues to be widely used around the world—from some of the world's leading democracies, such as Australia, Canada, India and New Zealand, to small island states across the Caribbean and the South Pacific. At best, it can provide a versatile, adaptive and resilient form of democracy.

However, the majoritarian 'first-past-the-post' (FPTP) electoral system normally associated with this form of government is known to produce erratic election results, over-rewarding winners and punishing losers (Reynolds, Reilly and Ellis 2005). 'Clean sweeps', in which the largest party wins all the seats and the opposition is eliminated from parliament, have occurred occasionally across the Commonwealth: in Trinidad and Tobago (1971), Jamaica (1983) and Saint Vincent and the Grenadines (1989). 'Partial sweep' landslide elections have reduced the opposition to a token presence in Mauritius (1982) and Samoa (2016).

Two Commonwealth Caribbean elections in 2018 produced 'clean sweep' results. In Grenada, the New National Party (NNP) won all 15 seats in the country's House of Representatives, while in Barbados, the Barbados Labour Party (BLP) won all 30 seats in the House of Assembly. Additionally, in Antigua



and Barbuda, the Labour Party (ABLP) won 15 of the 17 seats in the House of Representatives. This partial sweep reduced the United Progressive Party (UPP) and the Barbuda People's Movement (BPM) to just one seat each—a thin toehold of opposition presence.

Such lopsided election results highlight a particular vulnerability of the 'Westminster Model with FPTP' combination. The Westminster Model is predicated upon an effective and institutionalized parliamentary opposition, which is hard-wired into the system and on which it depends for its democratic integrity, its mechanisms of accountability, and its system of checks and balances (de Smith 1964). The FPTP electoral system cannot, however, guarantee the presence of such an opposition. It is possible for an election to entirely eliminate the opposition from parliament and thereby cause a temporary—but potentially very dangerous—deformation of the constitutional order. Given the prevalence of this combination, especially in the small island developing states (SIDS) that are particularly exposed to clean sweep elections, the international democracy support and constitution-building community should carefully consider this problem. It is important to understand why clean sweep elections occur and why they matter, and to examine ways in which clean sweep elections might, through innovative constitutional design, be mitigated. This article is intended as a contribution to that effort.

The first section of the article examines why clean sweep elections happen. The second section examines, in a broad overview, the powers, responsibilities and role of the opposition, and particularly of the leader of the opposition, in Westminster Model constitutions. It explains why, therefore, the existence of a viable opposition is of such importance. The third section explores some ways in which the problem could be mitigated, whether through electoral system design or other constitutional innovations. Finally, it is argued that some such guarantee of adequate opposition is essential if the Westminster Model is to provide resilient democracy even when applied in small island states.

## Causes of clean sweep elections

Clean sweep elections can be divided into three types. First, there are those that arise from the absence of free and fair democratic competition. Such elections were routine in totalitarian states of the Soviet type, where there was only one legally recognized official party. A clean sweep or landslide can also easily be procured in authoritarian regimes where freedom of assembly, association and expression are narrowly constrained, where opposition leaders are bought off or harassed, or where elections are rigged and manipulated by those in power.

Second, clean sweep elections can occur in democracies where the main opposition party decides to boycott elections in an act of protest. Such boycotts led to Jamaica's clean sweep election in 1983 and the landslide result (but short of

a clean sweep) in Bangladesh's 2014 election. Such boycotts are certainly symptoms of democratic dysfunction, but because it is unusual for a major party to boycott elections for more than one electoral cycle they do not usually spell the end of democracy.

This article is concerned, however, only with a third type of clean sweep elections: those that arise in relatively free and fair electoral contests, where the opposition party is willing and able to compete but is beaten across the board in genuinely competitive (albeit disproportional) elections. The 2018 elections in Antigua and Barbuda, Barbados, and Grenada were of this type. The political circumstances—the personalities, the campaigns, the issues—and why each winning party did so well are beyond the scope of this article, but it is worth looking at the numbers, as shown in Table 1.

**Table 1: Votes and seats in 2018 elections**

Country	Winning party		Largest opposition party		Third or minor parties (and independent candidates)	
	% votes	No. of seats	% votes	No. of seats	% votes	No. of seats
Antigua and Barbuda	59.39%	15	37.19%	1	3.42%	1
Barbados	72.83%	30	22.1%	0	4.6%	0
Grenada	58.91%	15	40.53%	0	0.55%	0

*Source:* Caribbean Elections, n.d., <<http://www.caribbeanelections.com>>.

In each case, the opposition parties, including third and minor parties, won between one-quarter (in Barbados) and two-fifths (in Grenada, and Antigua and Barbuda) of the votes. Despite this, they won either no seats (in Barbados and Grenada) or just two seats (in Antigua and Barbuda). These votes were not translated into a viable parliamentary opposition in any of these cases.

This is an obvious consequence of the FPTP electoral system. However, it is not so much the electoral system itself, but its use in unsuitable circumstances, that is to blame. FPTP is used in many other countries, such as Canada, India and the United Kingdom, but never threatens to produce a clean sweep result in any of those countries. These are large and diverse countries, with big parliaments (numbered in the hundreds of members) and extensive regional variation in voting behaviour. There are always some areas of the country—even after a landslide election—where the opposition can continue to win seats and thereby secure some parliamentary representation. In fact, these countries all have multiparty politics; in addition to the major official opposition party, dozens or scores of seats are regularly won by minor parties and regional parties.

Rather, the problem of clean sweep elections occurs when the FPTP electoral system is used in small countries, with small parliaments, and little regional variation in voting behaviour. The geographically differentiated socio-economic and cultural interests that impel competitive party politics elsewhere do not arise, to the same extent, in a small island state. In such conditions, a clean sweep election ceases to be merely an abstract mathematical possibility and becomes a real cause for concern.

Moreover, the margins of victory are tight in these small states. In a large parliament, the opposition, even if reduced to a remnant in percentage terms, may nevertheless hold enough seats to be able to provide a full 'shadow cabinet'. In a small parliament—where the entire House can be counted in the low double figures—the opposition can win a respectable percentage of seats, yet still be reduced to a small handful of members who struggle to stay abreast of their necessarily wide-ranging portfolios.

## Consequences of clean sweep elections

The 'export' variants of the Westminster Model differed from the British archetype in being based upon a written constitution, which was superior to ordinary law, could be changed only by a special amendment process and included a justiciable bill of rights (O'Brien 2014). In other respects, however, these constitutions were designed to replicate, as closely as practicable in each country's context, the main features of the British system of government as it was practised in the middle decades of the 20th century. This majoritarian form of parliamentary democracy, characterized by FPTP elections and two-party politics (Lijphart 1999) was familiar to, and strongly endorsed by, both nationalist leaders and their British constitutional advisors (de Smith 1961), who often shared a similar elite education and professional loyalties that cut across differences of race and religion (Jennings 2014).

The system possesses an elegant simplicity. In principle, it combines effectiveness with responsibility. In practice, it has proven to be a durable, resilient and exportable—if crudely majoritarian—system of democracy. After a general election, the party winning a majority of the seats in (the lower house of) parliament forms the government, with its leader serving as prime minister. The government claims a mandate to implement its election manifesto. The minority party becomes the official opposition, responsible for ensuring accountability—debating the government's legislative proposals, scrutinizing the government's actions, and perhaps seeking to amend policy at the margins through constructive amendments. At the next election the government has to defend its record, while the opposition tries to present itself as a viable alternative.

The relationship between government and opposition in a Westminster Model democracy might best be explained through a cricketing metaphor. Only those

who are ‘in’—the government—can make runs (enact legislation and make policy), but those who are ‘out’—the opposition—must have fair procedural chances to put the batsman under pressure (scrutinize the government and hold it to account), to limit the government’s ability to hit easy sixes (force the government to justify its decisions and sometimes make policy concessions) and ultimately to take wickets (remove the government by a vote of no confidence).

Constitutional rules, institutional design and parliamentary standing orders must all be delicately arranged to ensure that this balance is maintained—allowing the government to govern, so that it can advance its policies and deliver on its manifesto commitments, for which it is accountable to the people, while also enabling the opposition to oppose in ways that effectively scrutinize, and sometimes restrain, the government. The leader of the opposition has a vital duty in maintaining that balance. He or she plays a pivotal role in parliamentary scrutiny of the executive—leading the questioning during ‘Prime Minister’s Question Time’, choosing an opposition member to chair the Public Accounts Committee, and setting the agenda for certain ‘Opposition Day’ debates.

The office of leader of the opposition only gradually achieved formal recognition. It is not found in the texts of early Westminster Model constitutions; in Australia, Canada, India and Ireland, the office is recognized only as a matter of practice, and relationships between the prime minister and the leader of the opposition are governed by customary rules of fair play. Most of the Westminster Model constitutions adopted since the 1960s, however, do formally recognize the office of leader of the opposition and attempt to place the leader of the opposition’s role and relationship to the prime minister on a secure constitutional footing (de Smith 1964).

In Jamaica, as a typical example, the prime minister must consult the leader of the opposition before appointing the Chief Justice, the President of the Court of Appeal, three nominated members of the Judicial and Legal Service Commission, the Public Service Commission and the Police Service Commission. In Dominica, half the members of the Electoral Commission are appointed on the (binding) advice of the leader of the opposition. In Antigua and Barbuda, the leader of the opposition nominates a member of the Constituencies Boundaries Commission. In Fiji, the leader of the opposition is a member of the Constitutional Offices Commission. Most visibly, in the Caribbean states, the leader of the opposition typically has the right to nominate a minority of the members of the Senate (ranging from 10 per cent of senators in Barbados to 38 per cent of senators in Jamaica).

Given the Westminster Model’s fusion of executive and legislative powers in the leadership of the majority party, institutionalized opposition is a necessary counterweight. It provides the checks and balances that would otherwise be missing from a majoritarian system, preventing prime ministerial leadership from tipping over into autocracy. As Walter Bagehot (1873: 53), put it, the

Westminster Model makes 'criticism of administration as much a part of the polity as administration itself'.

Indeed, the recognition of institutionalized opposition may be the secret of the Westminster Model's relative success and durability. The relationship between the government and opposition, although rightly characterized by the 'thrust-and-parry' of partisan politics, also demands an underlying degree of cooperation, mutual respect, forbearance and toleration—if the system as a whole is to function correctly (Levitsky and Ziblatt 2018). The government and opposition might not agree, but they must each recognize that the other is a legitimate participant in the democratic process, with its own rights and duties, responsibilities and privileges. Contesting parties may attempt to defeat their opponents in elections, but they must not deny their right to exist, nor may they arrest, harass or make civil war upon them. Such mutual recognition is essential, of course, in all democratic systems, but the Westminster Model, to a greater extent than other systems, attempts to institutionalize it.

The absence of a viable opposition from parliament is therefore a serious handicap. It throws the whole political system into confusion. Even where the institutions of government are prescribed by an entrenched written constitution, the absence of an opposition is likely to bend or break many of the informal customs and conventions on which the Westminster Model relies. Ministers stare from the Treasury benches across the aisle, ready to meet criticism, to justify their actions, to receive the robust feedback which tells them whether they are doing too much or too little, only to be met with silence or—worse—uncritical cheers from their own backbenchers. Debates are charades of mutual agreement without contradiction. Over time, this has obvious implications for good governance. Policy mistakes, without an opposition to expose them, are not righted. Loopholes in legislation, without an opposition to poke at them, are not closed. The government, without a visibly present opposition to daily remind it of its dependence on the continued confidence of the people, may—unless possessed of virtues beyond normal human character—become arrogant and complacent. A strong civil society and an independent media outside of parliament are also necessary (and indeed the influence of the opposition is strengthened when it can reach out to these extra-parliamentary actors (Russell and Gover 2017)), but they are no substitute for the presence of opposition members in parliament.

## **Solutions to clean sweep elections: mitigation and prevention**

This section discusses several possible solutions to the problem of clean sweep elections which have been tried in Commonwealth states. Some of these solutions seek merely to mitigate clean sweep elections when they occur, finding 'work-

arounds' to overcome the lack of opposition. Others seek to prevent clean sweep elections through changes to the constitution or electoral law.

### (a) Defection

One possible response to the absence of a parliamentary opposition is for a member, or a handful of members, of the majority party to resign the party whip, 'cross the floor' and present themselves as the opposition. This was the course of action taken by Bishop Joseph Atherley in Barbados after the 2018 election (*The Barbados Advocate* 2018). This expedient, of course, cannot be relied upon. It depends too much on the personalities involved and their own political calculations.

Moreover, although defection solves the problem of a vacancy in the office of leader of opposition, it does so in a wholly unsatisfactory way. A leader of the opposition has the legitimate right to lead criticism of the government and to be consulted on important appointments only because he or she represents a considerable section of public opinion. A member who defects from the party under whose banner they were elected cannot claim that legitimacy—and indeed, the decision to do so could be regarded as a betrayal of their electors.

### (b) Informal parliamentary work-arounds

In Jamaica in 1983–1988, the governing party decided to use mechanisms provided by existing parliamentary rules to fill gaps in the opposition's scrutiny and oversight roles (Phillips 2002: 252–55). In the House of Representatives, a provision of standing orders enabling persons 'having an interest in a matter under debate to make a presentation to Parliament by appearing at the Bar of the House' (Phillips 2002: 253) was used to involve the public and civil society in providing critical and constructive feedback to the government's proposals. The public were also invited to participate during the committee stage of legislation. In the Senate, the eight seats which would usually have been allocated to the opposition were instead given to eminent non-partisan members. According to Phillips, this was 'a most commendable effort to show [...] that the Government was ready to hear the other side, to entertain criticism and not to exercise the rule of tyrants' (2002: 255).

Nevertheless, these measures were taken as an act of goodwill and generosity by the prime minister. The Constitution facilitated them, but did not require them. If one of the functions of a constitution is to protect the people, and the political system, even when those in office are less magnanimous, this cannot be recommended as an adequate *constitutional* solution to the problem of clean sweep elections.

### (c) Increasing the number of elected MPs

As noted above, clean sweep elections are mostly a product of the small size of legislatures. One theoretically possible solution would be to simply increase the number of elected MPs and thereby reduce the risk of a clean sweep election. However, this approach is unlikely to be effective in small countries. To increase the number of members to the size needed to make clean sweep elections unlikely would be impractical. The cost alone would be prohibitive.

### (d) Guaranteed appointment of opposition leader

Another option would be to enable the appointment of a leader of the opposition even in those circumstances where the opposition wins no seats. This was proposed in Grenada (with the Constitution of Grenada (Ensuring the Appointment of Leader of the Opposition) (Amendment) Bill 2016; see Grenada 2016). In the event of one party winning a clean sweep, the bill would have required the Governor-General to appoint the leader of the runner-up party at the most recent elections as leader of the opposition. As leader of the opposition, that person would become a voting member of the House of Representatives (increasing the number of members by one).

A weakness of this scheme is that a leader of the opposition appointed in this way would be the sole opposition member in the elected House (although they would have the right to nominate several opposition senators). In terms of parliamentary debates, scrutiny, questioning and committee work, there is a limit to what one person, unsupported by parliamentary colleagues in the House, can achieve.

### (e) Non-constituency MPs

An alternative approach, avoiding the problem of the lone leader of the opposition, is to guarantee the opposition a minimum threshold of representation. A threshold set at, say, one-fifth of the normal number of elected members (three in Grenada, and Antigua and Barbuda, and six in Barbados) would give the opposition enough critical mass, even in a small parliament, to be effective. This threshold might be met in one of two ways. First, it could be met by the opposition winning, through the normal electoral process, at least that minimum threshold of seats. Second, if the opposition fails to meet that threshold in the normal way, the shortfall can be made up by the election of the required number of non-constituency MPs. These would be selected from those opposition candidates in the general election who, of all unsuccessful candidates, won the most votes—that is, the 'best losers'. These top-up members increase the total size of the House, sitting alongside the constituency-elected members.<sup>1</sup>

The non-constituency MP scheme was pioneered by Singapore in 1984, after the ruling People's Action Party won four clean-sweep elections in succession.



Various motives for the scheme were expressed at the time, such as developing younger politicians through more rigorous parliamentary debates (Tan 1999), but its main effect has been ‘to ensure that the views of the opposition can be expressed in Parliament’ (Legislative Council Secretariat 2016). As a way of guaranteeing opposition presence, it has been effective, with the opposition parties now guaranteed at least 9 of the 101 seats.

However, the non-constituency MP scheme in Singapore is not without criticism (How 1988). First, opposition parties have warned of a disincentive effect: if the opposition is guaranteed some seats, will that not make voting for them superfluous? That criticism may be valid in Singapore, where the dominance of one party has been sustained over time, and where there has never been a democratic change of government through general elections. It is less valid in the Caribbean, where elections are genuinely competitive and where governments can, and often do, lose elections. There is still every reason, in the Caribbean, for the supporters of an opposition party to vote for that party in the realistic prospect of ousting the government and replacing them.

The second criticism is that members elected under this scheme may be second-class MPs, who are perceived as less legitimate because they entered parliament by the ‘back door’. In Singapore, non-constituency MPs were excluded from voting on constitutional amendments, supply bills and votes of no confidence, confirming their secondary status, although these restrictions have now been lifted. Yet such questions about legitimacy fundamentally misunderstand the change to the representative process wrought by this reform; opposition members elected under this scheme are, expressly, not there to represent a constituency, but to represent a substantial bloc of minority opinion that would otherwise be excluded from parliament.

#### (f) Proportional representation

Adopting proportional representation (PR) would at a stroke solve the problem of clean sweep elections. PR is not as antithetical to the Westminster Model as it might at first appear: some Australian states, Fiji, Ireland, Malta and New Zealand use PR, as do Northern Ireland, Scotland and Wales. Although Malta, which has retained a two-party system despite using a single transferable vote, is an outlier (Bulmer 2014), in most contexts one would expect a PR electoral system to transform the character of politics, replacing essentially two-party majoritarian competition with genuinely multiparty politics and coalition government (Lijphart 1999). Such a major change would have to be considered with a view to its effects on the political system as a whole. Notably, the political realignment involved, while benefiting third and minor parties, might hurt the largest opposition party as much as it hurts the government, depriving it of the chance to win power on its own.



## Conclusion

Vulnerability to clean sweep elections is a particular failure of 'boilerplate' constitutionalism—constitutions made to an external, standardized design, without much thought given to the needs of the particular context. An electoral system that can produce tolerable (if disproportional) results in large and diverse countries, when applied to a small and homogeneous state, may fail in a way that upsets the operation of the political system as a whole and undermines its most important checks and balances. This is not merely a theoretical problem. As the three Caribbean elections of 2018 demonstrated, clean sweep elections can, and do, happen with surprising regularity.

The good news is that the problem is not insurmountable. Proportional representation would fix it at the root. If that is a step too far, in countries where the dynamics of majoritarian rule and two-party competition are deeply ingrained, then softer, less radical, options exist. Of these, two methods stand out as being particularly worthy of consideration—either the Singaporean technique of using non-constituency MPs to top up the opposition's share of seats, or else the guaranteed appointment of a leader of the opposition, as proposed in Grenada in 2016. These reforms would be targeted adaptations of the existing system, preserving its majoritarian effects while mitigating a particular problem arising from its application to small, homogeneous societies. That is not, of course, to underestimate the practical political difficulty, in the Commonwealth Caribbean region, of achieving even the most minor and technical constitutional reforms, especially where entrenched or 'specially entrenched' provisions are concerned (Bishop 2010).

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## Endnotes

1. Based on the latest Grenadian election results (from <http://www.caribbeanelections.com>), this means that Adrian Thomas (St David, 2,895 votes), Philip Roberts (St George South, 2,678 votes) and Nazim Burke (St George North East, 2,494 votes)—all members of the National Democratic Congress, the main opposition party—would have been elected, swelling the House to 18 members.

## 5. Conflict, constitutions and the international community: third-party interests as impediments to political settlement formation and effective constitution-building

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Erin Houlihan

### Introduction

The roots of intrastate conflict commonly rest in competition over access to power, access to resources and issues of group identity and autonomy. To transition from conflict to peace, it is often necessary to transform the constitutional order to address the demands of warring parties rejecting the status quo and to reflect mutual commitments to a (re)defined constitutional order.

A negotiated political settlement<sup>1</sup> is foundational to structuring both the process and terms of constitutional transformation. Such settlements reflect a tipping point in which warring parties perceive the costs of continuing the conflict to be higher than the potential gains, when balanced against a negotiated redistribution of power, recognition of identity, and/or increased autonomy institutionalized through a domestic constitution-building process.

In theory, such constitution-building arises from initial elite bargains which are broadened through the inclusion of diverse groups that come together to (re)define their state and its values (Ladley 2011; Bell and Zulueta-Fülscher 2016). This process can help generate public ownership of the new order, enhance the legitimacy of transitional processes and outcomes, and contribute to

a more sustainable peace through structures supporting non-recurrence. In the absence of a political settlement, constitutional drafts can be circulated and debated, but the process will never reach an equilibrium of agreement around which a new governance dispensation can form.

In an ideal situation, peace agreement(s) include or are followed by transitional political arrangements and a final constitution—all of which rest upon a consensus-based political settlement (Bell and Zulueta-Fülscher 2016). In practice, the capacity of domestic parties to negotiate a political settlement is largely dependent on the status of conflict and political dynamics on the ground, which external states and parties often influence.

In essence, internal conflicts often provide a low-cost opportunity for external actors to pursue their own interests and conflict agendas. The political constituencies of external states bear few direct costs for their governments' participation in disputes beyond their borders. This low barrier to entry, however, can be manifestly detrimental to the conflict-affected state, not only through the exacerbation of violence and instability, but also by disincentivizing domestic warring parties to reach a settlement; even for a debilitated party, external states can provide diplomatic, military and economic backing to tip the balance of power in their favour. Therefore, the involvement of external states can hinder the political settlement process and, by extension, the constitutional transformation.

In 2018, Libya, South Sudan and Yemen shared a continued failure to reach political settlement, despite repeatedly negotiated ceasefires and peace agreements and ongoing constitution-building processes extending over several years. In each state, early peace processes backed by the international community generated transitional arrangements, along with substantive and procedural plans for constitutional reform. Yet in all cases, the failure to forge an effective underlying political settlement has seen the collapse of agreements, a resurgence and escalation of violence, and stalled constitution-building.

One common factor in these collapses is the ongoing influence of strategic interests and self-dealing behaviours by engaged third-party states. Third-party self-dealing may be understood as imposing upstream constraints on domestic parties by shaping the nature of and commitment to political settlement deliberations, as well as downstream constraints by continually altering the relative relations among domestic elites and between elites and their constituencies (Elster 1995). The unilateral pursuits of external actors have altered dynamics both on the ground and at the regional level, rendering it nearly impossible for parties to the conflict to meaningfully commit to negotiated settlements and legitimate constitutional reform. Such behaviours are motivated, at least in part, by competition over access to economic resources and markets (including arms sales), territorial disputes and concerns about global terrorism and migration.

Libya, South Sudan and Yemen exemplify the complicated role of the international community in intrastate conflicts and related constitution-building efforts. International mediators, negotiators and advisors, acting through multilateral organizations or as third-party states, are a core feature of conflict prevention and mitigation. Yet international actors also bring a variety of narrow geopolitical interests and agendas; these conflicting positions mean that external actors often engage in brokering peace and shepherding constitutional reform on the one hand, and in supplying weapons and legitimizing parties to the conflict on the other.

In the process, external states exercise considerable influence over the dynamics of internal conflicts (von Einsiedel 2014) and the legitimacy, efficacy and inclusiveness of interlinked political settlement and constitution-building processes. The strategic interests of external states are key variables in the calculations of national stakeholders as they determine whether to sit at the peace table, commit to negotiated agreements and institutionalize change through constitutional reform—or continue to battle for territory, resources and military superiority in a vacuum.

This article examines how third-party strategic interests related to Red Sea rivalries, Nile River management, migration and counterterrorism have had an impact on the experiences of Libya, South Sudan and Yemen up to and throughout 2018. While the influence of external actors on political settlement dynamics is but one common element in these otherwise intricately complex internal conflicts, third parties have systematically altered the bargaining power and resources of national actors, as well as relations among regional neighbours. In so doing, they have had an impact on both the capacity and will of domestic parties to lay down arms and forge the political settlements crucial for constitutional reform and sustainable peace. While it is not possible to address in detail the trajectory and impact of particular third-party behaviours on the relative positions of specific warring groups, this article attempts to highlight the sheer scale and interconnectedness of strategic external interests as they play out within these intrastate disputes.

## Background to the conflicts and transitions

### Libya

In Libya, NATO played a prominent role in overthrowing Qadhafi in 2011. While fighting was still ongoing, diverse opposition groups working as a loose collective towards the common goal of regime change formed the National Transitional Council (NTC). The NTC rapidly adopted the Constitutional Declaration in August 2011. This set a path for political and constitutional transformation beginning with an elected General National Congress (GNC) that would appoint a committee to draft the permanent constitution.

Prior to the 2012 GNC elections, however, concerns over the proportional make-up of the congress and the composition and politicization of the drafting body prompted the NTC to amend the Constitutional Declaration in favour of a directly elected Constitutional Drafting Assembly (CDA). Libyans believed that, while the GNC should reflect the population proportionally, the CDA should provide equal representation of Libya's regions to more effectively negotiate positions on federalism, administrative decentralization and enhanced minority rights that broadly fell along regional lines (Gluck 2015). The 2014 CDA elections resulted in an apolitical body comprised primarily of politically independent academics and lawyers; the CDA therefore lacked the competency and constituency base to effect the necessary political negotiations (Gluck 2015).<sup>2</sup> Before the CDA's work could begin, the GNC mandate expired. The Islamist-dominated congress was forced to give way to a newly elected, internationally recognized House of Representatives (HOR) in which Islamist parties were a minority. Post-election violence erupted. The HOR fled to Tobruk while the GNC, with support from the now-defunct Islamist-aligned Libya Dawn forces, declared itself the rightful legislature. This manoeuvring gave rise to parallel state authorities backed by rival militias (Gluck 2015). Against this backdrop, the warlord Khalifa Haftar, who had returned to Libya after 20 years in exile in the United States, launched an anti-Islamist militia operation to purge Benghazi of the Libyan Muslim Brotherhood and Islamist ties. Support was provided by Egypt, France, the United Arab Emirates (UAE) and other foreign powers with strategic interests in combating Islamist ascendancy. This has enabled Haftar to entrench and expand footholds across eastern Libya from which he can threaten Tripoli.

In 2015, representatives of the GNC, HOR and others hand-picked by UN mediators signed a peace agreement in Skhirat, Morocco (Libyan Political Agreement 2015). It established a Presidency Council (PC) to be endorsed by the HOR to preside over a Government of National Accord (GNA) in Tripoli. The agreement rapidly failed amid continuing 'state capture'<sup>3</sup> under the auspices of competing legislatures, a growing economic crisis, continuing insecurity and the precipitous rise of Haftar's national influence and international connections. The HOR has never formally endorsed the PC, therefore highlighting the lack of underlying commitment to the Skhirat agreement. In July 2017, the CDA finalized a draft constitution in the absence of a broader political settlement and presented it to the HOR (Al-Ali 2017). The procedural and political legitimacy of the draft, however, and the feasibility of a future referendum, remained in doubt throughout 2018. Prior to voting, armed protestors had stormed the CDA's session in Bayda and forced revisions, reportedly to remove stipulations that would have prevented Haftar from running for president; at the same time, political support for the draft's content remains an open question (Miller 2017). Throughout the process, Algeria, Egypt, France, Italy, Qatar, Russia, Sudan,

Tunisia, Turkey, the UAE, the UK, the USA and others have directly or indirectly engaged in both peacebuilding efforts and the conflict itself through the pursuit of independent strategic objectives. Intergovernmental organizations such as the European Union, the African Union and NATO have also been deeply involved (Lacher 2018). Libya's 'Second Civil War' remains ongoing.

## South Sudan

After gaining independence in 2011 after 22 years of brutal civil war, South Sudan remains mired in conflict. In 2013, long-standing tensions between President Salva Kiir and then Vice President Riek Machar erupted when Kiir dismissed the cabinet and alleged that there was an attempted coup by forces loyal to Machar. A civil war over political power fought along ethnic lines ensued. The governing Sudan People's Liberation Movement and its army (SPLM/A) split, as forces loyal to Machar formed the SPLM-in-opposition and its army (SPLM-iO/A). The Intergovernmental Authority on Development (IGAD), a regional body consisting of Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda—plus backing from the troika countries (Norway, UK and USA), the African Union, EU and others, forming 'IGAD-PLUS'—headed a mediation process. This resulted in an unsuccessful 2014 ceasefire and the 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS; see IGAD 2015). ARCSS, as an attempt at political settlement, stipulated that parties to the conflict would share power and resources under the Transitional Government of National Unity with Machar reinstated as Vice President and various political factions engaged according to their relative weight of political, economic, social and ideological power (Biel and Ojok 2018). The government's commitment to ARCSS, however, was half-hearted from the start. Ceasefire agreements were ignored and intercommunal violence continued as weapons supplies, military assistance and diplomatic backing were provided to warring parties, particularly via Uganda (and Egypt) to Kiir, and via Sudan to Machar, reflecting a long proxy war between the regional rivals (Knopf 2017). Weapons flowed from China, the EU, Israel and the USA via regional neighbours despite an arms embargo (van Eyssen and Gitta 2018).

In July 2016, fighting between SPLA and opposition forces renewed in Juba; a military operation with assistance from Uganda enabled Kiir's forces to overpower those of Machar, who fled the country. In September 2018, the warring parties signed a 'revitalized' peace agreement (R-ARCSS) with an accelerated timeline for the integration of armed forces, an extended timeline for political, economic and security reforms, and parameters for a permanent constitution (IGAD 2018). The agreement, however, is more armistice than cohesive political settlement; even fundamental elements of the R-ARCSS—such as internal boundaries, power sharing and security—remained contested at the point of signing (International Crisis Group 2019) and timelines are likely not feasible. In the background,



military and diplomatic assistance by external powers (including IGAD members) vying for regional influence have contributed to entrenching both Kiir and Machar's relative leverage and enable them to eschew peace agreements (Knopf 2018). These regional tensions have been broadened by conflicts between and among Gulf states seeking alliances along the Red Sea coast; Egypt, Qatar, Saudi Arabia and the UAE, joined by Turkey, have played off regional rivalries in Africa, increasing suspicious feeling between Egypt, Eritrea, Ethiopia and Sudan, with South Sudan in the middle (United Nations Security Council 2018). In this context, IGAD's members have been reluctant to support sanctions or other accountability measures for repeated violations of the peace agreements (International Crisis Group 2015).

## Yemen

In 2011, thousands of Yemenis protested for the removal of President Ali Abdullah Saleh and for political and economic reform (Darwich 2018a; Finn 2011). The movement forged temporary alliances among historically and ideologically opposed factions, including the northern Houthi movement, the southern secessionists and disaffected youth groups, among others (Transfeld 2018). External intervention by the Gulf Cooperation Council (GCC), spearheaded by Saudi Arabia, facilitated agreements for the deposition of Saleh in exchange for his immunity and power-sharing arrangements among opposing political parties. The agreement and UN-backed implementation mechanism envisioned a two-year transition with measures for transitional justice, security reform and a National Dialogue Conference (NDC) intended to shape a new constitution (Lackner 2016; GCC 2011). The NDC's mandate was broad, ranging from delineating the constitution-building process itself, to addressing causes of tension in Sa'ada and the south, to establishing democratic systems and institutional reform. Results of the NDC were to be addressed by the Constitution Drafting Commission (CDC), which would submit a draft to a 'National Body', followed by a referendum (Lackner 2016; Transfeld 2018). The GCC Agreement and its Implementation Mechanism were regarded at the time as the 'UN's showpiece for successful conflict mediation' (Transfeld 2018).

From the start, however, Houthis and the Southern Movement were excluded from GCC negotiations and the formation of the government of national unity; former Vice President Abdrabbuh Mansur Hadi was elected to the presidency uncontested. Moreover, there had been no serious discussions about the role and status of armed non-state actors, including the Houthis and al-Qaeda in the Arabian Peninsula (AQAP). Armed actors were not required to disarm as a precondition for participation in the NDC (Transfeld 2018). The dialogue, which ran from March 2013 to January 2014, resulted in 1,800 recommendations but failed to reach agreement on crucial issues such as the number of regions for a federal state, membership of the CDC, the southern

secession question and security reform (Lackner 2016; Gluck 2015; International Crisis Group 2016; Al-Muslimi 2015). The process was dominated by moderate and old regime elites and backed by international interlocutors; the Southern Movement split over the group's NDC engagement, whereas the Houthis attended while simultaneously consolidating their control over Sa'ada. In 2014, the CDC was given one year to complete its draft, including public consultation and forging a political settlement on unresolved decisions. Shortly thereafter, the Houthis overthrew the transitional government and full-scale civil war ensued (International Crisis Group 2014).

In 2015, in a presumptive effort to re-establish the transitional government in Sana'a, Saudi Arabia forged a military coalition composed of Bahrain, Egypt, Jordan, Morocco, Qatar, Sudan and the UAE. This group, called by Darwich 'the largest coalition of autocrats the Middle East has ever seen' (2018a), launched attacks with political and military support from France, Germany, the UK and the USA.<sup>4</sup> Despite several efforts to restart negotiations in 2015, 2016 and 2018, little progress has been made. Warring parties, secure in their territorial gains and opportunities for further entrenchment, remain far from reaching the political settlement so optimistically anticipated in 2011.

## **Third-party strategic interests and their influence on domestic positioning**

### **Gulf regional rivalries and Red Sea investment**

Rivalries in the Gulf region have festered for generations (Marlowe 1964). Recently, tensions between the 'Arab Quarter' (comprising Bahrain, Egypt, Saudi Arabia and the UAE) and Qatar (often aligned with Turkey), plus lateral rivalries with Iran, have contributed to the 'world's worst humanitarian crisis' in the heart of the Arabian Peninsula (UN News 2019). While the UN-backed GCC Agreement (GCC 2011) remains the dominant framework for peace in Yemen, in retrospect the Saudi Arabia-led process seems intended, by design, to install a transitional government favourable to GCC member states. The status and stability of Yemen has long been foundational to Saudi Arabia's foreign policy given the country's strategic location on the Bab al-Mandab strait. More broadly, Yemen is seen as a staging ground for both the Kingdom and UAE's pursuit of geopolitical power, opposition to the Muslim Brotherhood and rivalry with Iran (Lackner 2016; Gluck 2015; International Crisis Group 2016).

Moreover, while the Yemen conflict is commonly perceived as a proxy war between Saudi Arabia (and the UAE) and Iran with shades of religious sectarianism, this has been largely overblown. Experts suggest that Iranian support to the Houthis has not been decisive and that Iranian engagement may be deliberately exaggerated to legitimize continuing Saudi military intervention (Darwich 2018b; Transfeld 2017, 2018; Kendall 2017).

For the UAE, engagement has been instrumental in advancing Abu Dhabi's strategic objectives to combat al-Qaeda, counter Iranian influence on the peninsula and limit Houthi expansion, and to influence Saudi domestic policy (Partrick 2017). While Saudi Arabia has concentrated on dislodging Houthis in the north, the UAE has focused on the south where the Southern Movement is a local partner. This alliance provides leverage for the Southern Movement's secessionist aims and entrenches north-south power structures, therefore undercutting the potential for political settlement (Transfeld 2018).

### The Nile River Basin

Competition over Nile River management is a long-standing issue among riparian African countries.<sup>5</sup> Debates stem not only from historical frictions and politics, but also from increasing demands for fresh water related to growing populations, industry and agricultural development, and climate change (Paisley 2017). Notably, six of the eight IGAD member states overseeing the South Sudan peace process are located in the Nile Basin.<sup>6</sup>

Under the 2010 Cooperative Framework Agreement (CFA),<sup>7</sup> Ethiopia constructed the Grand Ethiopian Renaissance Dam (GERD)—Africa's largest. The project faced significant diplomatic resistance from Egypt and Sudan under a short-lived alliance between the two states. Cairo and Khartoum, however, rapidly fell out due in part to conflicts over the contested Hala'ib Triangle region, the reported mobilization of Egyptian and Eritrean troops to Sudanese border areas, and Khartoum's relations with the Muslim Brotherhood (Adam 2018; *Egypt Today* 2018). President Omar Bashir of Sudan, amid growing internal protests, shifted support to Ethiopia under promises for flood protection and increased water access for Sudan's downstream farmers.<sup>8</sup> Egypt responded by allegedly providing military support in 2017 to the Government of South Sudan via Uganda, with the aim of undercutting the influence of Sudan and Ethiopia in Juba.<sup>9</sup>

In the process, South Sudan's President Kiir has gained bargaining power and benefits, to an extent, from indecision about the country's position vis-à-vis Nile River alliances among IGAD members. South Sudan has had the option to sign the CFA since the country's independence, but Kiir has delayed while regional quarrels and IGAD dynamics play out. These dynamics are influenced not only by Nile River competition, but also by economic interdependencies related to South Sudanese oil<sup>10</sup> and by respective member alignments with rival Gulf states and their allies, which have been rapidly expanding their military and economic footprints in the Horn of Africa.<sup>11</sup> Eritrea, South Sudan and Uganda (along with non-member Egypt) are increasingly seen as collaborating against Ethiopia and Sudan (United Nations Security Council 2018) in a configuration that arguably benefits Kiir's position relative to his rivals.

Given this context, IGAD's members have been reluctant to support sanctions or other accountability measures for repeated violations of South Sudan's peace agreements (International Crisis Group 2015). The latest peace deal, the R-ARCSS, is seen by some as a de facto agreement between Presidents Bashir of Sudan and Museveni of Uganda, who are the guarantors and arguably most influential external protagonists in the conflict, rather than a meaningful political settlement between Kiir and Machar (Mamdani 2018).

## Containing migration

Since Qadhafi's overthrow, curbing the flow of migrants through Libya to Europe has become a major domestic priority for the EU and its member governments. Migrant travel peaked in 2015 with more than one million people traversing the Mediterranean. Recognizing that Libya's leaders lack the capacity, resources and means to curtail the tide, some European governments have forged bilateral arrangements with local militias. Italy, for example, along with the EU in Brussels, has provided extensive material and technical support to the Libyan Coast Guard to intercept boats and detain migrants in Libyan detention centres, which are often operated by militias and smugglers. In choosing national partisan actors and militias who can support such containment regardless of their official status, political legitimacy or adherence to international humanitarian norms,<sup>12</sup> third-party states gift power and resources to actors who can then leverage their relative positions to avoid political compromise and obstruct the settlement process.

Further, migration concerns have grafted rivalries between France and Italy onto Libya's peace process through the establishment of competing forums for political negotiations. In July 2017, President Macron formally received the war lord Khalifa Haftar and Libyan Prime Minister Fayez al-Sarraj in Paris. Outcomes of the meeting were confusing at best, but the unilateral French intervention positioned Haftar as a legitimate interlocutor for European leadership despite the fact that Haftar does not hold a formal political position (Lacher 2018). Rome quickly followed by hosting Haftar on several occasions, with praise from the US president; the two countries subsequently held back-to-back international conferences on Libya in 2018. While the UN gave its blessing to the 2018 French event which resulted in Haftar, al-Sarraj and the head of the HOR confirming a ceasefire that rapidly broke down, the event undercut the UN's mediation role and extracted no concessions from the parties to the conflict (Fasanotti and Fishman 2018).

## Counterterrorism and the Muslim Brotherhood

A primary concern underlying third-party intervention in internal conflicts is the maintenance of regional and global security. The rise of international terrorism and growing transnational links between terrorist groups have led to a series of unlikely tactical alliances between foreign powers and local actors. This, in turn, has distorted internal conflict dynamics through the provision of weapons, logistical support, intelligence and airpower to various domestic parties to the conflicts.

In Libya, fears over the political and military capacities of factions aligned with the Islamic State in Iraq and Syria (ISIS) and militias associated with the Muslim Brotherhood and al-Qaeda have prompted Egypt, France, the UAE, the UK and the USA, among others, to support Haftar's so-called Libyan National Army (LNA) to combat Islamists. Egypt and the UAE backed Haftar's Operation Dignity with airstrikes, logistical support, training and arms provisions. This facilitated Haftar's control of the east and enabled his advance on southern Libya and his evasion of the Skhirat agreement. Egyptian and UAE assistance is rooted not only in economic interests related to arms sales, but also in the countries' strategic opposition to the Muslim Brotherhood and political Islam. Haftar's declared intention to eradicate the Muslim Brotherhood in Libya and his credible accusations that Qatar as well as Sudan and Turkey have supported Libyan Islamists fit squarely within the Cairo–Abu Dhabi alignment (Lacher 2018). Egypt, arguably the most influential player in Libya, has given public assurances that it supports the UN-led political process while launching attacks on Haftar's opponents that have strengthened his position relative to other factions.

Counterterrorism pursuits similarly garnered British, French and US support for Haftar in Benghazi (as well as for Misratan militias fighting ISIS), which has undermined the capacity of the West to check regional actors from obstructing the settlement process (Lacher 2018). Western states' support for Misratan forces in Sirte, for example, provides a ballast against Haftar's LNA and is officially provided at the request of the GNA; in practice, Misratan militias are divided over the GNA. Some see the internationally recognized government as a cover for Western support to political rivals cloaked in counterterrorism objectives (Lacher 2018). Broadening these proxy divisions, Russia has supplied a parallel Libyan currency along with food and petrol in the east, ensuring that Haftar's militarized administrations remain liquid and able to provide employment and staples (Megerisi 2019).

Counterterrorism concerns have likewise altered dynamics of the conflict in Yemen, where the UAE and USA prioritize rooting out AQAP. This has led to opportunistic coordination with various internal and external parties to the conflict, many of which are accused of committing gross violations of human

rights (Al-Faqih 2018; Transfeld 2018). In South Sudan, the risk from transnational terrorism is rated as ‘medium’ by the USA, due largely to the country’s porous borders; however, observers believe the country is used as a transit route—including to Yemen and remaining ISIS strongholds—as well as a safe haven (Strachan 2019). This may prompt additional international engagement in the future.

In the background are the cross-cutting alliances and enmities among Gulf states and their respective support for militias on both sides of the Islamist divide.

## Conclusion

Many of today’s intrastate conflicts take place in an increasingly internationalized and internecine ecosystem. Despite professed commitments to peacebuilding and support for political settlement formation and constitutional reform, third-party states continue to funnel machines of war and sophisticated logistical and intelligence support to warring parties. This, in turn, exacerbates the conflicts, heightens civilian casualties, and undermines opportunities for effective political settlement negotiations necessary to address the root causes of violence through credible constitutional reform.

The experiences of Libya, South Sudan, Yemen and similarly situated states reveal the complexities of global relations and the significance of third-party interests in attempts to resolve deep-rooted domestic disputes. Prospects for peace, sustainable political settlements and new constitutional orders at the state level are dependent not only on the resolution of internal disputes in terms of power sharing, identity politics and autonomy, but also on the strategic priorities of actors ostensibly external to the conflicts themselves. While such dynamics are nothing new, it is unlikely that effective settlements and transformative constitutional orders can be agreed in these states unless peacebuilding processes can more effectively account for and mitigate these influences.

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## Endnotes

1. The term ‘political settlement’ has different interpretations, but a useful definition is ‘the forging of a common understanding usually between political elites that their best interests or beliefs are served through acquiescence to a framework for administering political power’ (di John and Putzel 2009: 4). According to Bell and Zulueta-Fülscher, ‘while a political settlement may be closely aligned with a country’s peace settlement terms or constitution, it comprises the underlying political understandings on which those documents are based’ (2016: 18).
2. The election law for the CDA was generally understood as banning political party participation, though this was not explicit. Candidates generally did not run on party lists but as individuals based on their professional backgrounds. As a result, the CDA became primarily composed of self-described politically independent lawyers and academics, though a key function of the body was to support political negotiation and dialogue (Gluck 2015).
3. The concept of state capture as a distinct form of corruption was developed by the World Bank around 2000. It is understood as occurring when the ruling elite or private groups (such as militias or businesspeople) manipulate the state’s decision-making processes (rules of the game) for their own gain (Hellman et al. 1999).
4. While providing extensive arms sales to Saudi Arabia—worth over USD21 billion from the USA alone—these Western powers never seriously questioned the legitimacy of the military intervention (International Crisis Group 2016).
5. Nile Basin states include Burundi, Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Rwanda, South Sudan, Sudan, Tanzania and Uganda. Under the 1929 Nile Waters Agreement, the UK granted Egypt a monopoly despite 97 per cent of the water originating from outside the country. In 1956, Egypt agreed to ‘cede’ some management to Sudan for hydro energy and irrigation but has since opposed claims by others.
6. IGAD is composed of Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda. Only Djibouti and Somalia are outside the Nile Basin.
7. In 2010, Burundi, Ethiopia, Kenya, Rwanda, Tanzania and Uganda signed the Cooperative Framework Agreement. Eritrea and DRC did not sign; Egypt and Sudan boycotted (Telar Kuc 2018).
8. The rapprochement included a security agreement to protect the dam, which in turn impacted power dynamics between Ethiopia and its historic rival, Eritrea (Kuol 2018; Hackleton 2018).

9. South Sudan occupies 45 per cent of the Nile Basin, making it of clear strategic interest to Egypt (Kuol 2018).
10. Ninety-eight per cent of South Sudan's revenue depends on oil. Exports must process through Sudan to reach markets, with Khartoum getting around half the total revenue through tariffs. The situation has prompted South Sudan to negotiate a new pipeline route either through Kenya to the Indian Ocean, through Ethiopia to Djibouti or through Eritrea to the Red Sea. The economic implications for the transiting state are significant and provide Kiir with leverage over key IGAD members during ARCSS negotiations. On the other side, Sudan's oil interests are best served by continuing instability that would prevent South Sudan from realizing a deal (Kuol 2018).
11. Gulf rivalries have been exported to the Horn of Africa, altering geopolitical dynamics both within and between African states vying for investment and alliances, and contributing to the militarization of the region. Since 2015, Qatar, Turkey and the UAE have raced to set up commercial ports and military outposts in Eritrea, Somalia and Sudan (Vertin 2019; International Crisis Group 2018). For African states, association with various Gulf factions has mixed consequences: Somalia has faced backlash in response to its attempted neutrality in the Gulf dispute in ways that could threaten internal stability (Vertin 2019; Al Jazeera 2018; Sheikh 2018); in Sudan, President Bashir has opportunistically shifted Gulf alliances in the face of growing domestic protests, laying groundwork for potential disputes with neighbours favouring other Gulf factions; for Eritrea and Ethiopia, engagement with Saudi Arabia has facilitated a rapprochement for the first time in a decade (Reuters 2018; Lons 2018).
12. Reports indicate that migrants held in Libya often face atrocious conditions, including violence and exploitation. Moreover, agreements have enabled European states such as Italy to eschew any responsibility for migrant safety at sea; the risk of death at sea rose from 1 in 42 in 2017 to 1 in 18 in 2018 (Human Rights Watch 2019).

# 6. Participatory mechanisms and democratic dialogue in Latin America

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Roberto Gargarella

## Introduction

In November 2018, the Colombian Constitutional Court issued a crucial decision, SU-011, concerning the right of indigenous communities to ‘prior consultation’ (Colombian Constitutional Court 2018). In its decision, the court maintained that prior consultation constituted a fundamental and inalienable right, directed at ensuring that all public measures that affected the interests of aboriginal groups were adopted through dialogic procedures, and guided by the principles of good faith, political participation, and respect for ethnic and cultural diversity (Ambito Juridico 2018). Having in mind this important jurisprudential development, this article reflects upon the use of two participatory mechanisms in Latin American democracies, in recent years: (a) plebiscites (referendums), as instruments of mass, majoritarian decision-making, and (b) free, prior and informed consent (FPIC), as an instrument of cooperative decision-making with intensely affected minorities.

Examining these mechanisms from the ideal perspective of a ‘dialogic democracy’, this article argues that FPIC processes have the potential to be dialogically superior to plebiscites, especially when plebiscites are held in politically fraught contexts without adequate safeguards to stop them being misused. However, FPIC remains a relatively novel type of political process, which is not yet properly embedded in constitutional and legal practice.

The article is divided into three sections. The first establishes the principle of dialogic democracy, understood as a deliberative conception of democracy based

on social inclusion and public debate. The second section focuses on the use of plebiscite in Latin America, and the third section discusses FPIC, as established by the International Labour Organization (ILO) in its Indigenous and Tribal Peoples Convention (ILO 1989).

## Constitutional dialogue

In my approach to constitutional dialogue, I shall have in mind the ideal of a *deliberative conception of democracy*. Although there are different versions of what a deliberative democracy is, in this work I will define deliberative democracy in line with the basic features that I mentioned in previous paragraphs. Therefore, I will here assume that deliberative democracy is directly linked to the (Habermasian) ideal of an ongoing discussion about issues of public interest (or public morality) among all those potentially affected (Habermas 1998; Elster 1986; Nino 1996; Williams 2000). According to this definition, a proper deliberative democracy, that is to say one capable of creating impartial decisions concerning public matters, is characterized by the presence of two fundamental features—social inclusion and public debate. Essentially, public decisions tend to lose impartiality or become unduly biased when certain individuals or groups of people become unjustifiably excluded from the debate (because of poverty or social marginalization), and also when those decisions are not preceded by a robust, wide-open process of collective discussion (because specific financial interests have influence over politics or public life in general). It is in that context, for those reasons, and with those limits, that I value dialogic justice. In other words, I shall not value constitutional dialogue here per se, without regard to the content, reasons behind it, the scope or the actors that are involved in the conversation.

Many consider collective dialogue a valuable practice; no one is privileged over others (as a consequence of knowledge, intelligence, social status, racial origin, etc.). More precisely, we assume that each person is the ‘best judge’ of her or his own interests; that we are all fallible and that a conversation with others may illuminate us regarding viewpoints we have not recognized or properly balanced; and also that a conversation with others may help us recognize errors we had not seen in our own positions, and even help us to empathize with the views and interests of others.

Within the framework of a deliberative democracy, I advocate for a dialogic approach to constitutionalism where the different branches of government and the people at large engage in a conversation with the aim of interpreting what the actual implications are of fundamental constitutional values. In the next sections I examine the use of plebiscites and FPIC in Latin America in recent years.



## Plebiscites

Advocates of dialogic constitutionalism may consider plebiscites a potent tool for improving our collective conversation on issues of fundamental public interest. However, the problems experienced in the actual practice of plebiscites are also significant and call for a more sceptical approach.

The use of plebiscites seems to be, in principle, an attractive option from the perspective of dialogic democracy. First, they promise to trigger political discussions: when national or local authorities allow a certain topic to be decided collectively through a popular consultation, that topic becomes the object of an intense collective debate. Second, and more significantly, plebiscites strengthen the participatory or inclusive dimension of democracy. In the context of exclusive and ill-functioning representative systems (which tend to be prevalent in Latin America), the use of this tool seems extremely important: the problems affecting Latin American political institutions are so damaging that, in principle, such participatory alternatives cannot but be celebrated. Plebiscites may be a crucial instrument in minimizing the elitist character of our decision-making process.

Unfortunately, the risks involved with plebiscites are also numerous, particularly if we examine them from the standpoint of a dialogic democracy. First, from the perspective of ‘inclusion’, it is problematic to use plebiscites in political systems characterized by a high concentration of power and weak accountability mechanisms. In those contexts, plebiscites may be used to strengthen the legitimacy of the person or group in power. In addition, the risk of having participatory events that have been manipulated seems enormous: powerful presidents have large resources and multiple methods at their disposal, with which they can enable their preferred choice to triumph (even if this has not always been the case). This is why so many authoritarian leaders who explicitly repudiated democracy—from Augusto Pinochet to Alberto Fujimori—have organized plebiscites during their presidencies.

Second, from the perspective of ‘deliberation’, plebiscites seem particularly problematic, given that their emphasis on ‘participation’ tends to contrast with a lack of attention paid to the other fundamental objective of deliberative democracy, namely ‘discussion’: issues related to information, transparency and open discussion have frequently been improperly respected. In fact, plebiscites have commonly been used not as opportunities for collective reflection, mutual enlightenment, the ‘laundering’ of preferences, and the transformation of initial beliefs—but rather, as instruments for legitimizing certain pre-defined political choices or decisions.

If we examine some of the most noted, recent experiments with plebiscites, we can recognize the presence of all these problems together. Think, for example, about the popular consultation about Brexit in the United Kingdom, or the

consultation about the peace process in Colombia. Both cases offer good illustrations of what we have been saying: neither of those events were preceded by serious processes of collective information and discussion. Both cases could be the United Kingdom, President Juan Manuel Santos in Colombia).

In addition, popular consultations tend to unduly trivialize and simplify complex issues: people are usually asked to respond with a ‘yes’ or ‘no’ answer to extremely intricate and multifaceted issues, such as questions around abortion or a peace process. In Colombia’s popular consultation about the *Acuerdos de Paz*, the people were required to say ‘yes’ or ‘no’ to a peace agreement consisting of 297 pages, which included many clauses that were complex and difficult to understand or accept, to put it mildly. A similar example is the President of Bolivia calling for a popular ratification of the 1994 Constitution, after the draft was completed (which should also be seen as a problem). What does it mean to submit a constitution to a process of popular ratification? It is, of course, excellent to allow people to have a greater role in constitution-making. But is this a reasonable way to do so? The Bolivian Constitution comprised 411 articles and hundreds of sub-clauses. What could one infer from the people’s ratification or rejection of the entire document? It would be reasonable to expect a committed citizen to be able to say: ‘I like this article and that article, but I find this article and these other articles unacceptable, and that one only partially right, and I also find that the Constitution lacks this and that...’ In a ratification process such as the one in Bolivia, none of those nuanced claims had a place: it was all or nothing. In prevailing conditions, perhaps advocates of deliberative democracy should be more critical of the growing use of popular consultations.

A final, additional concern refers to the use of controlling mechanisms that ensure a free, fair and meaningful vote. In order to support dialogic democracy, those controlling mechanisms should be directed at ensuring the inclusive and deliberative character of plebiscites. They should: prevent arbitrary exclusions (for example, the government unduly prohibiting a certain group from participating in a consultation process regarding a topic that directly affects that group); avoid official manoeuvres directed at undermining the voice of certain groups; and guarantee that issues of transparency, information and debate are adequately protected.

Experience of these controlling mechanisms, particularly of a judicial kind, is at an early stage and the results are somewhat ambiguous. One worrying example comes from Bolivia, where President Evo Morales recently lost a referendum that he himself had promoted, in order to gain popular authorization to run for office for a fourth term. Remarkably, on 20 November 2017—after a demand set by Morales’ Movement for Socialism (MAS) party—the Plurinational Constitutional Tribunal (2017) unanimously decided that limits barring elected authorities from seeking indefinite re-election conflicted with the American Convention on Human Rights (Blair 2017; *The Economist* 2017; Reuters 2017). In the words of

Macario Lahor Cortez, head of the Plurinational Constitutional Tribunal, ‘All people that were limited by the law and the constitution are hereby able to run for office, because it is up to the Bolivian people to decide.’ According to researcher Sergio Verdugo (2017), the court’s decision represented a good illustration of what Professor David Landau calls ‘abusive constitutionalism’, referring to actions intended to undermine constitutional democracy using formal constitutional means. From a dialogic perspective, this decision was obviously unacceptable: it challenged, with no reason, a responsible (and courageous) majoritarian claim expressed in the referendum.

Similarly, the Colombian Constitutional Court had numerous opportunities to supervise the development of the country’s Peace Agreement and the plebiscite process—which concluded with the people’s rejection of the Peace Treaty. Following the failed consultation process, an intense process of negotiation took place between the Colombian Government and the political opponents of the Agreement from the plebiscite, in order to review the agreement and try conclusively to achieve a great national pact. The Colombian Congress issued many decisions trying to give life and stability to the new version of the agreement, including a ‘fast-track’ mechanism directed at accelerating its implementation. The Colombian Constitutional Court expressed concerns about the credibility of the procedures that it established. Given what had already happened in the plebiscite, additional efforts were required to increase the democratic character and legitimacy of official initiatives to revitalise and implement an agreement that the citizenry had rejected. The government needed to carefully craft the social consensus, to gain the social support it had failed to obtain through a plebiscite. This is why it is reasonable to conclude that the court’s strict scrutiny of the ‘fast-track’ law was justifiable.

Conversely, a subsequent decision adopted by the same court—Decision C-630/17—seemed less justifiable. On that occasion, the court upheld a Congress-approved legislation (Constitutional Amendment 2, 2017), which established that the Peace Agreement between the government and the Revolutionary Armed Forces of Colombia (FARC) could not be amended for the next 12 years (this meant that the following three governments would be unable to modify approved parts of the accord). The short-term purpose of the political initiative was obvious: it was intended to shield the agreement from potential changes by the upcoming government, a coalition led by right-wing candidate Iván Duque. According to the amendment that was upheld by the court, ‘institutions and authorities of the state have the obligation to comply with what is established in the final accord in good faith . . . until the end of three complete presidential periods following the signing’. For the court, that article incorporated a ‘principle of stability and security that is deferential to the purposes of the Agreement’. In my view, the same principles that justified the court’s decision in the ‘fast-track’ law required a different approach on this occasion. This is because

the context is a historic Peace Agreement, of extraordinary complexity and importance, which received a negative response by the majority of the Colombian citizenry in a recent plebiscite. If—in spite of that popular decision—the incumbent government still wanted to adopt, develop and implement the agreement, then it was obliged to carefully build a new consensus, rather than shield the agreement from politics.

## Free, previous and informed consent

Let us now focus our attention on the other form of public participation, namely free, previous and informed consent (FPIC). The right to decision-making by ‘free, prior and informed consent’ is one of the more interesting and egalitarian, although limited, legal reforms introduced in Latin American constitutionalism in recent years. This right could be studied within the already examined plebiscitarian tradition, but given its specific nature, I have chosen to separate it out here. In fact—and contrary to what seems to be the rule concerning plebiscites—the right to FPIC does not depend on the will of the executive, or on extremely costly social initiatives (which usually require the collection of thousands of signatures etc.). The right to FPIC depends on circumstances that are pre-established by law, which defines in advance what the conditions are that make a public consultation necessary. In that respect, while most plebiscites tend to be organized by those in power, whenever they want, and usually with the purpose of broadening the basis of their support, the right to prior consultation tends to affect those in power and put into question some of their more cherished (economic) initiatives. In addition, the right to FPIC is reserved to specific groups—groups that are or can be potentially affected by certain public initiatives—rather than to the entire population.

From a dialogic perspective, these kinds of initiatives seem particularly interesting. To begin with, they come to address directly some of the most dramatic failures of prevailing institutional systems. For example, they ensure the ‘presence’ of certain demands and claims—certain viewpoints or voices—that would otherwise remain invisible or inaudible. The right to FPIC is egalitarian, too, in its attempt to ensure that certain groups gain control over decisions that affect them directly.

In Latin America, the main legal support for the right to FPIC comes from the International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples (ILO 1989), and also from the United Nations Declaration on the Rights of Indigenous Peoples (UN 2007). The first treaty, in particular, gained special importance when the majority of Latin American countries supported and signed it. Article 6.1 of ILO Convention 169 maintains that governments shall ‘consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to

legislative or administrative measures which may affect them directly'. In addition, article 6.2 states that governments shall 'establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them'.

This new 'right' achieved a special significance in recent years, particularly in a context characterized by: (a) the growing importance of the demands coming from indigenous groups; and (b) an economic context increasingly dominated by predatory economic initiatives, which came to affect those groups particularly. This situation generated serious tensions that frequently resulted in violent confrontations.<sup>1</sup> In that context, the right to prior consultation appeared to be an interesting way to channel those disputes and incorporate the affected groups into the decision-making process, in ways that are respectful of basic conversational principles.

The problem, however, was that local authorities frequently denied the right to FPIC of its potential force. In fact, in many countries legislatures ignored or undermined the requirements of ILO Convention 169. According to a report by legal researcher Carlos Baquero Díaz on the legislative situation of FPIC in South America, 'the [only] four countries that have decided to regulate the right have done so in ways that violate the right by: (i) creating FPIC legislation without consulting indigenous peoples and other ethnic minorities, and/or (ii) developing legislation with fewer protections [than] what the ILO Convention 169 provides' (Baquero Díaz 2014).

Moreover, on some occasions, national authorities considered their obligations satisfied, after simply informing indigenous communities about the economic initiatives they were about to adopt. In other cases, they continued with the implementation of their development plans despite the fact that those plans were rejected in the consultation processes (Rodríguez-Garavito and Arenas 2005). In Mexico, the Yaqui tribe got its prior consultation rights re-confirmed by the court, with almost no practical effect (Sieder 2016: 420). In Ecuador, a crucial mining law was approved with no prior consultation. These legal difficulties were added to many other practical problems, which came to deprive the right to prior consultation of its force or meaning—including, typically, insufficient funds, lack of information and lack of transparency.

In the context of these political difficulties, judicial authorities did not always come to the rescue of FPIC, even in countries such as Ecuador or Bolivia, which enacted constitutions favourable to both indigenous rights and the protection of natural resources.<sup>2</sup> In Bolivia, for example, the Constitutional Court advanced a restrictive reading of FPIC in decisions (SS. CC. 2.003/2010-R and 0300/2012) that limited the situations in which the prior consultation was required, and also affirmed—against the explicit letter of the ILO Convention—that the

consultation could proceed after (and not necessarily before) the enactment of the law (Böhrt Irahola 2015). Similarly, in Ecuador, political and judicial authorities seemed to join forces so as to legalize the exploitation of natural resources, without attention to the limits imposed by the Constitution, the ‘*sumac kawsay*’ or the ILO Convention. Finally, these problems are present, in different degrees, in most of the region’s countries: from Peru to Brazil or Argentina, and even—in a narrower way—in Colombia, where the Constitutional Court had numerous opportunities to refine its view on the subject, but where new refinements are still in order.

In contrast with what happened in most local tribunals, the intervention of the Inter-American Court of Human Rights in these matters—as occurred a number of times—was mostly positive. For instance, in the Case of the Saramaka People *v.* Suriname, the Inter-American Court established that consultation processes constituted a ‘general principle of International Law’ (Inter-American Court of Human Rights 2008: 45). Also in the Saramaka case, the court maintained that ‘regarding large-scale development or investment projects that would have a major impact within (indigenous or tribal territory), the State has a duty, not only to consult with (the indigenous group), but also to obtain their free, prior, and informed consent, according to their customs and traditions’ (paragraph 134). The Saramaka decision was particularly important in the face of governments that, on a regular basis, sought to undermine the value and meaning of the right to prior consultation. Unfortunately, this important decision was also incomplete. In fact, Saramaka *v.* Suriname suggested that consultations were legally binding on ‘large-scale development or investment projects’, but seemingly not in cases involving smaller-scale projects, which could have similar consequences.

The Inter-American Court had the chance to refine its view on the matter further, in the Case of the Kichwa Indigenous People of Sarayaku *v.* Ecuador (Inter-American Court of Human Rights 2012). In that judgment, the court established the following principles:

- (1) states must actively consult and must inform; (2) consultations must be carried out in accordance with the customs and traditions of the communities affected; (3) consultations must be carried out in good faith, through culturally adequate procedures with the expressed purpose of reaching an agreement; (4) consultation should be effected in the first stages of a development or investment plan, and not simply when the need arises to obtain the community’s consent; (5) the state must ensure that the members of a people or community are aware of the possible benefits and risks of the proposed development.

Even though the principles defined by the court did not cover all the important issues relating to the topic, they did contribute to the specification of the basic requirements of the right, which was then defined as the right to free, prior and informed consent (FPIC).<sup>3</sup> From a dialogic perspective, all these clarifications are extremely useful, because they help to reduce the margins of discretion open to political actors who might want, in situations of conflict, to try to restrict or diminish the scope of this right.

## Conclusion

Plebiscites and FPIC represent two very different means of engaging people directly in public decision-making. In comparative terms, plebiscites are now an established part of the constitutional architecture, used in many countries around the world. However, the scope of plebiscites to reinvigorate democracy may well be limited—especially in political circumstances characterized by concentrated powers, lack of electoral integrity, politically dependent media and so forth—by incumbents seeking to use plebiscites instrumentally to reinforce their own shaky mandates. This casts serious doubts on the wisdom of using plebiscites; advocates of deliberative democracy should take due note of those difficulties, rather than candidly celebrate any call made in the name of direct democracy.

FPIC, in contrast, is a relatively novel approach to public participation, which is only beginning to be recognized in domestic constitutional and legal orders. In terms of the scope, content and limits of FPIC, the situation improved after the intervention of the Inter-American Court of Human Rights. We do now have some important clarifications, advanced by the main interpretative institution in the region. However, the lived experience of FPIC has been discouraging for indigenous communities, with numerous unresolved questions and problems still to be addressed. In the end, it seems clear that, given the existing distance between ‘law in the books’ and ‘law in action’, advocates of deliberative democracy will have a long way to go, until they become able to transform the promise represented by FPIC into an effective and emancipatory dialogic practice.

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## Endnotes

1. We may remember, for instance, the protests that were triggered in Ecuador, after President Rafael Correa approved, in 2011, a mining law that favoured the interests of transnational groups; or the massive protests that emerged in Bolivia, at the same time, after the government decided to construct a transnational road through the protected Indigenous Territory and National Park of Isiboro Secure (TIPNIS). More tragically, there was also the massacre of 'Bagua', in Peru 2009, which occurred as a consequence of the indigenous protests against oil exploitation in the Amazon.
2. Those constitutions, it must be noted, even made explicit reference to the '*sumac kawsay*' or principle of the 'good living'—a concept revived from the ancestral Quechua knowledge, which came to incorporate in the constitution a different interpretation of the 'cosmos', related to communal, rather than capitalistic, values.
3. In spite of some important advances that it made on the subject, the Inter-American Court left ample areas of uncertainty, particularly related to small-scale development projects. In principle, it is not at all clear in what regard the required consultations have a binding character in these cases, which are numerous and extremely important.

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## About International IDEA

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

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### Where do we work?

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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



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