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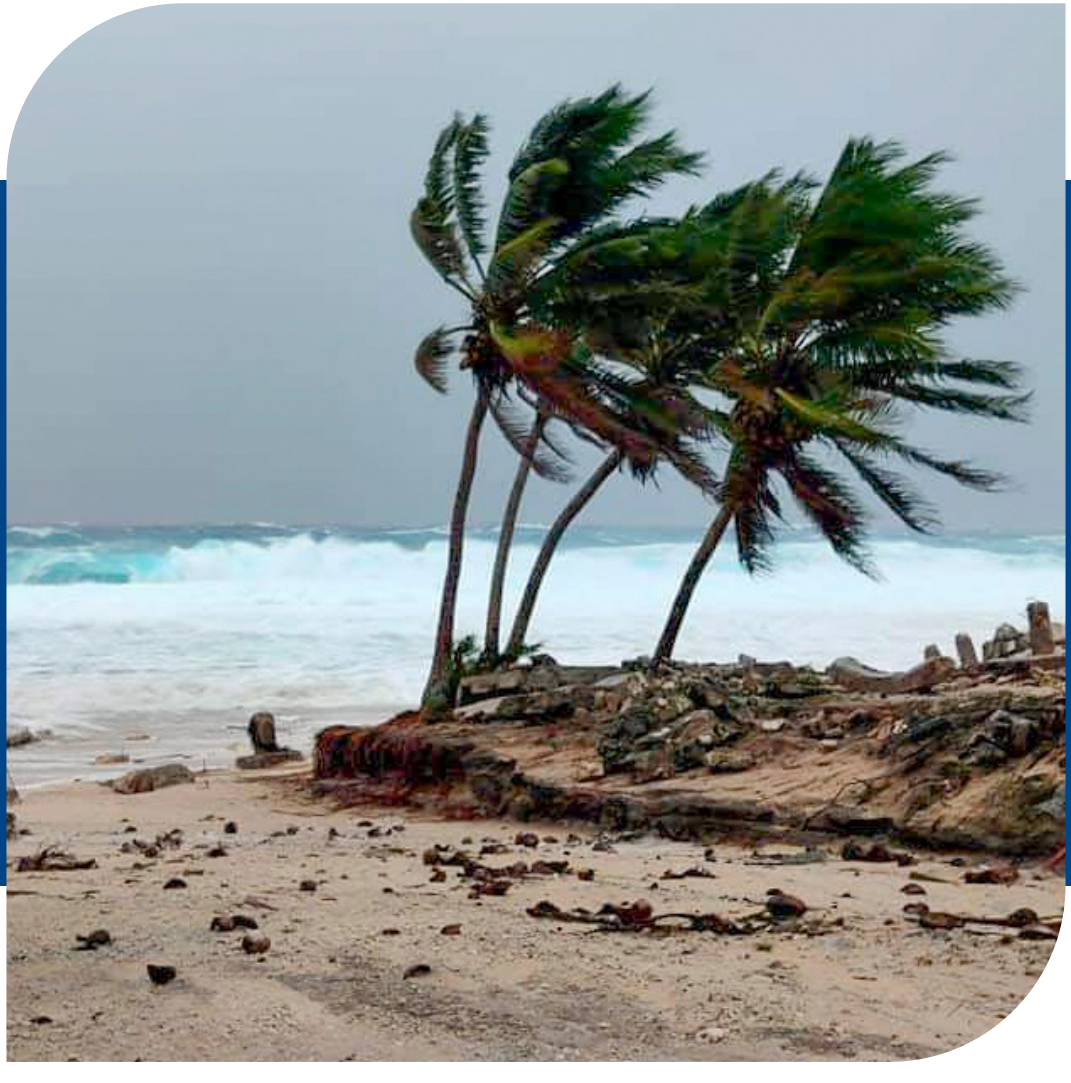
ANNUAL REVIEW OF CONSTITUTION-BUILDING: 2023



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Contents

INTRODUCTION

Sumit Bisarya

Since 2013, International IDEA's *Annual Review of Constitution-Building* has reviewed processes of constitutional change that have taken place over the course of the year, identifying themes which occur across different contexts. Much of the Annual Review is fed by the practical experiences of International IDEA staff who have been accompanying and observing these processes in the field. Another important source is our website ConstitutionNet, which reports on constitution-building processes around the world and provides monthly and daily updates via the 'Voices from the Field' and 'What we are Reading' sections, respectively. While the Annual Review does not aim to be a comprehensive account of all the reform processes that are happening around the world, it does provide an authoritative account of many of them and useful insights into global trends in constitutional process and related issues.

Much of the Annual Review is fed by the practical experiences of International IDEA staff who have been accompanying and observing these processes in the field.

This year, as in all previous years, the Annual Review features countries spanning the entire globe. These include Barbados, Belize and Jamaica in Chapter 1; Chile and Chad in Chapter 2; Mali and Chad again in Chapter 3; and Botswana, Sweden and Wales in Chapter 4. Chapter 5 examines a range of countries affected by issues of climate change and constitutional change, with particular attention given to Tuvalu. Slovakia and Austria are then the focus of Chapter 6.

The chapters of this Annual Review address a variety of subjects relating to both process and constitutional design. These range from the general—for example, constitutional review in the absence of crisis—to the very specific—the constitutional right to use cash.

In most of the instances in which large-scale constitution-building processes attracted a lot of international attention, little to no progress was made in 2023.

Amid this multiplicity of contexts and issues, there is a notable absence—the various countries where recent civil conflict has led to a constitutional review process. In nearly all of these cases, the constitution-building process has stalled, and in many of them, conflict has restarted, if, indeed, it ever really stopped. Thus, in most of the instances in which large-scale constitution-building processes attracted a lot of international attention, little to no progress was made in 2023. Although Somalia may be one exception, there was sadly little to report in terms of constitutional developments in Libya, South Sudan, Sudan, Syria or Yemen. This was despite the establishment of comprehensive constitution-building processes as part of the peacebuilding and state-building processes in the recent and not-so-recent past.

Rather, in those countries where constitution-building has culminated, or looks likely to culminate, in actual change, these processes have entailed either targeted amendments on specific issues or unilateral change pushed through by the incumbent government. With regard to the latter, the plethora of military coups in West Africa has led to a flurry of constitutional transitions, with both Mali and Chad recently promulgating new constitutions and a number of others in the process of doing so.

This year's Annual Review begins, in Chapter 1, in the Commonwealth Caribbean. Elliot Bulmer details the processes which took place in Barbados, Belize and Jamaica—just three among a number of countries in the region that are currently in the midst of constitutional review. Bulmer analyses the establishment, composition, function and mandates of the bodies established in these three countries, identifying both commonalities and key differences in the approaches taken.

In Chapter 2, Kimana Zulueta-Fülscher addresses the issue of supra-constitutional principles—that is, principles established at the outset of a constitution-building process which bind the ultimate making of the constitutional text. Focusing on two extremely different contexts, Chile and Chad, she discusses the origins of the principles, their contents and the mechanisms envisaged for their enforcement.

The next chapter, from Adem Abebe, juxtaposes the two post-coup constitutions of Chad and Mali, both of which were approved by referendum under the auspices of military government. Abebe notes important differences in the two texts: that of Mali is depicted as an 'emergency constitution', while the Chadian text offers a more

decentralized and deconcentrated organization. However, Abebe cautions against inferring too much from the letter of the texts, given the two countries' diverse constitutional cultures and histories.

In Chapter 4, I provide some thoughts on three instances of constitution-making in the absence of crisis—the cases of Botswana, Sweden and Wales. These contexts provide three different approaches to constitutional review, but all appear to have resulted, or seem likely to result, in some concrete changes. They thus offer some insights into the challenges for constitution-making, as well as the conditions for its success, when there is no clear triggering crisis.

The penultimate chapter, from Juliane Müller, provides an overview of constitutional reforms linked to safeguarding the environment and responding to the threat posed by climate change. Cases discussed include the United States (at state level), Aruba, Malta, Ecuador and Ireland. There follows a more detailed dive into Tuvalu, where innovative constitutional changes seek to address the threat of a loss of statehood caused by climate change.

Finally, Sharon Pia Hickey examines one issue emerging from the rapid digitalization of society—the right to use cash. The debates in Austria and Slovakia are illuminating, and Hickey identifies a clear link between the political discourse over the right to cash and the nationalist populist identity debates which, at present, infuse nearly all constitutional debates in Europe.

As always, the country cases examined in the Annual Review encompass a disparate set of contexts and issues. This, together with the recent or ongoing nature of the processes covered, makes it difficult, if not impossible, to draw any form of conclusion. However, the commonalities that do exist across different cases give rise to a number of interesting questions for both academics and practitioners to consider. For example, what factors trigger constitutional review processes in the absence of crisis, and what conditions make reforms in these contexts more likely to go through? As climate change and digitalization continue to change the way we live, what further developments might we expect in terms of constitutional regulation? Can an agreement on binding principles help foster agreement in contested constitution-making processes, and can such principles actually be enforced?

In the coming months, International IDEA plans to publish papers on many of these issues, including environmental constitutionalism,

constitutional rights in a digital age and supra-constitutional principles. As always, we look forward to discussing these and other issues with the ever-growing constitution-building community.

Where to find constitutions

The constitutional texts referred to in this publication, unless otherwise stated, are drawn from the website of the Constitute Project, <https://www.constituteproject.org>.

Chapter 1

CONSTITUTIONAL REFORM IN THE COMMONWEALTH CARIBBEAN

W. Elliot Bulmer

1.1. INTRODUCTION

This chapter examines three constitutional reform processes that were ongoing in the Caribbean in 2023—those of Barbados, Belize and Jamaica. In particular, it explores issues such as the composition of the constitutional review body; the scope of its functions and its role in the overall process; its autonomy vis-à-vis the government; and the nature of its leadership.

The reform processes taking place in Barbados, Belize and Jamaica are but three instances of a wider move towards constitutional reform in the region. In September 2022, the Attorney General of Saint Kitts and Nevis, Garth Wilkin, announced the formation of a Joint Constitutional Review Committee to 're-create and redesign our Constitution to suit the realities of a modern society' (Wilkin 2022). In May 2023, the Saint Lucia Government announced the appointment of a committee to consider the findings of the Constitutional Review Committee that had reported in 2011 (The Voice 2023). However, these processes are less well advanced. One partial exception is the transfer in Saint Lucia of final appellate jurisdiction from the Judicial Committee of the Privy Council to the Caribbean Court of Justice (Clarke 2023). Similarly, in Guyana, the Attorney General announced the formation of a Constitutional Reform Commission in August 2023 (News Source Guyana 2023), but by the end of the year, little progress had been made and the members of the commission had not yet been appointed (News Room Guyana 2024).

The reform processes taking place in Barbados, Belize and Jamaica are but three instances of a wider move towards constitutional reform in the region.

Barbados, Belize and Jamaica are not therefore taken to illustrate the whole universe of current practice on constitutional change in the region. They do, nevertheless, provide three good comparison cases through which to demonstrate some of the choices facing those about to embark on the design of a constitutional reform process.

1.2. **CONTEXT FOR REFORM**

There are obvious similarities between these three cases. All three are 'Westminster model' democracies whose constitutions, adopted at independence from the United Kingdom, establish systems of majoritarian parliamentarism (Lijphart 2011; Bulmer 2020). They are all English-speaking nations which use English common law and whose political elites are closely connected with the Anglo-Atlantic world, in both the UK and North America.

Constitution-building often follows a catastrophic crisis of the previous political order.

Constitution-building often follows a catastrophic crisis of the previous political order (Elster 1995: 370). That might include secession or independence, the end of an internal or external conflict, the collapse of a dictatorship or some other major institutional crisis. None of these situations apply in Barbados, Belize or Jamaica. Rather, these are examples of what might be termed 'constitution-making in the absence of crisis' (see Chapter 4: Constitutional review in the absence of crisis in Botswana, Sweden and Wales). Although levels of economic development vary, Barbados, Belize and Jamaica have established constitutions, stable effective states and many decades of democracy since independence. Constitutional change in these contexts is not a state-building or a peacebuilding process. Rather, it is a continuation of ongoing processes of incremental review and improvement within existing—broadly legitimate—constitutional systems.

The governments of these countries are nevertheless willing, absent pressing need, to invest time, money, effort and political capital into what Peter Russell (2004) described as 'mega-constitutional politics'. They are responding to a public demand for change which has been identified in numerous previous review processes across the region. This demand for change is partly symbolic: it represents the completion of the process of nationalizing constitutions that were at least partially inherited from British rule. This raises the question of transition to a republic. However, there are also more substantive demands arising from specific concerns—that the form of democracy

sustained by the existing constitutions is not as politically inclusive or as accountable as it should be; that politics are too 'top-down' and 'narrow'; and that rights protections are not as fulsome as many desire. In the words of the Saint Lucia Constitutional Reform Commission's 2011 report, 'our Governments, once elected, seem beyond our ability to restrain or to influence' (Saint Lucia Constitutional Reform Commission 2011: 24).

At the launch of the Constitutional Reform Commission in Barbados, the three bases of the reform process were given as (a) 'constitutional modernisation'; (b) 'the lessons of governance gained from experience in governing'; and (c) 'the need to deepen our democratic processes' (Barbadian Prime Minister's Office 2022).

Despite these demands for change, substantial reform has been very limited. In addition to a conservative political and legal culture and high thresholds for term, the absence of crisis in the region has reduced the impetus for reform (Albert 2019). When there is no acute crisis driving a constitutional reform process, the costs of the failure of the process are lessened. There is no immediate risk of the political order collapsing if such a process produces no or little change: it merely perpetuates the existing arrangements, which, although not necessarily ideal, are better than tolerable. Indeed, throughout the Commonwealth Caribbean region, many previous review processes have been conducted, but implementation of their recommendations has been, at best, patchy. Nevertheless, this previous work does mean that the current reviews are not starting from cold. They have a substantial body of previous work on which to draw—work that, for the most part, already has a certain degree of public and elite legitimacy.

Throughout the Commonwealth Caribbean region, many previous review processes have been conducted, but implementation of their recommendations has been, at best, patchy.

1.3. **SINGLE-STAGE VS MULTI-STAGE REVIEW**

An opening question is whether it is better to attempt constitutional reform all at once or in stages. A particular issue in the Commonwealth Caribbean region is whether to treat abolition of the monarchy as a standalone issue, to be resolved separately from wider constitutional change, or whether republicanism and other constitutional forms are necessarily entwined.

Barbados is advancing in two stages. The first stage was to abolish the monarchy and replace the governor-general with an indirectly

elected non-executive president. For this purpose, a Republican Status Transition Advisory Committee was established in May 2021 (Brown 2021). This was not an inclusive cross-party institution, and critics have lamented the lack of public consultation (Barrow-Giles 2021). Nevertheless, its main purpose was to give effect to recommendations for a parliamentary republic which had been proposed by a Constitution Review Commission in 1998 and on which no action had yet been taken. With republican status thereby settled, the second stage, which is now underway, is to consider reforms to the rest of the Constitution. This second stage has a very wide remit. Indeed, at the launch event inaugurating the Barbados Constitutional Reform Commission, the Attorney General said that 'there are no sacred cows; everything is on the table' (Barbadian Prime Minister's Office 2022).

Thus, in Barbados, more substantive changes were separated from a symbolic issue which, due to its high emotional salience, might have absorbed all the energy of the constitutional review process. It is notable that other countries in the region did not do that and consequently paid the price. The failed 2009 reform in Saint Vincent and the Grenadines, for example, bundled republicanism with a range of other reforms which were voted down in toto (Bishop 2011).

In Jamaica, constitutional review is proceeding in three phases. The Minister of Legal and Constitutional Affairs announced in the House of Representatives that the government intends to start with those matters 'on which there is consensus' and which are 'deeply entrenched' (Malahoo Forte 2022). That means, in practice, 'the abolition of the constitutional monarchy, the establishment of the Republic of Jamaica and related matters', for which a referendum would be required (Jamaican Ministry of Legal & Constitutional Affairs 2023). The second phase concerns broader institutional reforms arising from the Constitutional Reform Committee's findings. Here, the focus is on those aspects of the Constitution that do not require a referendum, including possible reforms to the Jamaican Charter of Fundamental Rights and Freedoms. The third phase is a 'full assessment of the nation state's legal and constitutional infrastructure to facilitate the putting together of a new constitution for Jamaica' (Jamaican Ministry of Legal & Constitutional Affairs 2023). The intention of this staged process is to ensure that differences of opinion on one part of the reform package do not hinder the adoption of other parts.

In Belize, in contrast, the People's Constitution Commission is not expected to divide its work in this way. Instead, it is required under its enabling statute to produce one report which will potentially encompass the whole range of constitutional issues.

1.4. **CONSTITUTIONAL REVIEW BODY**

Constitution-building is often a cooperative exercise between 'elites, experts and everyone'.

Constitution-building is often a cooperative exercise between 'elites, experts and everyone' (Bulmer 2015). 'Elites', in this sense, means primarily the political elites—those who hold, or have held, high public office or other influential positions in the policy sphere. In the context of two-party politics in Westminster model democracies, political inclusion normally requires, as a minimum, the presence of leaders from both sides of the aisle—government and opposition. The term 'experts' applies to those who have knowledge or experience of legal or constitutional affairs. 'Everyone' means the wider public, sometimes directly (for instance, through a citizens' assembly or direct public participation in a referendum) and sometimes through the participation of representative civil society institutions in the constitution-building process. Some people might fall into two of these categories by virtue of their office, qualifications or experience. For example, an attorney general is both a member of the political elite and a legal expert.

In Jamaica, the key constitution-making body lacks any statutory basis. It is an executive committee established by the government. The Minister of Legal and Constitutional Affairs announced in the House of Representatives that the role of the committee is to 'assist us [the government] in the process, to provide advice and oversight, as we move on the most comprehensive and impactful constitutional reform work to be undertaken in the life of independent Jamaica' (Malahoo Forte 2023). This is a crucial framing. The Jamaican Constitutional Reform Committee is an advisory body to ministers who will make decisions.

The membership of the Jamaican Constitutional Reform Committee was announced by the Prime Minister, the Most Hon. Andrew Holness, MP, on 22 March 2023 (Patterson 2023). It includes the following members (Jamaica Gleaner 2023):

- two co-chairs—the Minister of Legal and Constitutional Affairs and a former ambassador;

- the Attorney General;
- the President of the Senate;
- two senators—one from the government and one from the opposition;
- an opposition MP;
- an international consultant;
- a national constitutional expert;
- a consultant counsel and additional opposition representative;
- a representative of faith-based communities;
- a civil society representative;
- the chair of the National Committee on Reparations; and
- a youth advisor.

Representatives of faith-based communities, civil society and youth are nominated by the government rather than being chosen by the interests they represent.

In other words, this body leans towards the 'experts and elites' end of the spectrum. The presence of a few opposition parliamentarians is a nod to interparty inclusion, although there is no parity between the government and opposition. Representatives of faith-based communities, civil society and youth are nominated by the government rather than being chosen by the interests they represent.

In Barbados, the main constitution-making body is the Constitutional Reform Commission, which was set up in June 2022 under the Commissions of Inquiry Act 1980. Its term of office, initially lasting 15 months, was extended by 7 months in September 2023 (Brewster 2023) and then further extended in April 2024 (Barbados Today 2024). Commissions of Inquiry have a clear function, which is to consider a particular policy problem and make recommendations to the government. It is then for the government to decide whether, and how, to act in response to those recommendations.

Under the 1980 act, the government has the authority to appoint members of Commissions of Inquiry, and therefore all 11 members of the Constitutional Reform Commission in Barbados are government appointees. Unlike in Jamaica, there are no opposition MPs on the

commission, although there is an independent senator and a former attorney general from the main opposition party. Instead, it leans heavily in favour of legal practitioners and legal scholars, as well as representatives of civil society, including religious communities, students, people with disabilities, the teachers' union and the business sector.

Both the Jamaican committee and the Barbados commission bring in outside talent in the form of foreign academic experts: a Canadian citizen sits on the Jamaican committee, while a citizen of Saint Lucia is secretary to the Barbados commission.

Meanwhile, in November 2022, the Parliament of Belize passed the People's Constitution Commission Act, which established a People's Constitution Commission of 25 members. These are chosen on a 'sectoral' basis to represent various political, social, economic and cultural interests, with a mandate 'to conduct a comprehensive review of the Belize Constitution' (People's Constitution Commission Act 2022, section 6). Unlike in Jamaica and Barbados, the members of the People's Constitution Commission are not government appointees but are instead nominated by the interests they represent.

Although Belize's People's Constitution Commission leans closer to the 'everyone' side of the inclusion spectrum, it is notable that none of these cases has involved the adoption of the sort of directly elected constituent assembly formerly used in, say, Bangladesh (1971–1973) or South Africa (1994–1996). The committees and commissions currently established in the region do not have a popular mandate and do not lay claim to constituent power. This reflects the legitimacy of existing constitutional institutions, which these processes are reviewing and reforming; there is no need to create institutions from scratch.

1.5. **LEADERSHIP**

Constitution-building is a project and, like all projects, it needs to be project-managed. This is not merely a technocratic task. The political sensitivity, and political stakes, of constitution-building require a form of leadership that can navigate through the political fray.

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One option is for political leadership to be provided by a responsible minister who drives the project forwards. This is the case in

Jamaica, for example, where, as noted above, the Minister of Legal and Constitutional Affairs is a co-chair of the Constitutional Reform Committee. The other co-chair of the committee is a retired lieutenant general in the Jamaica Defence Force and ambassador, currently serving in the Office of the Prime Minister. The Attorney General is also a member. So there is a bloc of ministerial leadership to guide, direct and drive the constitutional review process.

Alternatively, ministerial oversight and leadership of the commission may be separated. The Barbados Constitutional Reform Commission is chaired by a former judge, reflecting the nature of Commissions of Inquiry, which, throughout the Commonwealth, often—although not always—have a former judge as chair.

In Belize, under section 4 of the establishing act, the chair of the commission is appointed by the prime minister after consultation with the leader of the opposition. The chair is a former parliamentarian and a sometime President of the Senate—a position that is, perhaps, more political than a former judge but less directly in the line of fire than a serving minister.

The chair of a constitutional review body has to decide how they will approach their role. One way is to exercise direct leadership, proactively driving the agenda towards certain outcomes. The other way is to be a facilitator, coordinator and consensus-builder, seeking to draw on the commission members, and the public, to provide the answers to major constitutional design questions.

The constitutional review body may be directly subordinate to the government. Alternatively, a constitution-making body may be relatively insulated from the government.

1.6. **AUTONOMY**

Discussion of the composition and leadership of the constitutional review body leads naturally on to the question of the relationship between that body and the government. At one end of the spectrum—as in Jamaica—the constitutional review body may be directly subordinate to the government. In such cases, it may advise the government and enable it to canvass a range of views but ultimately serve under the leadership and direction of a responsible minister.

Alternatively, a constitution-making body may be relatively insulated from the government. In Barbados, the constitutional review body's establishment under section 17(1) of the Commissions of Inquiry Act places upon the commissioners a statutory duty to conduct a 'full,

faithful and *impartial* inquiry or investigation into the subject-matter referred to them' (emphasis added). The Prime Minister of Barbados announced that she would not interfere directly in the workings of the commission: 'I have deliberately asked to be at the backend so that I don't influence others. I want to hear what the population is saying' (Joseph 2023). Of course, the extent of this insulation from political control is limited. The commissioners are all appointed by the government and their report goes to the government, which will decide how to act in response to it.

At the other end of the spectrum is Belize, where the People's Constitution Commission Act (section 1.7) provides that '[i]n the performance of its functions, the Commission shall not be subject to the direction or control of any person or authority'. This is a standard formula, providing the highest degree of autonomy to an independent commission or institution. This—combined with the fact that members of the commission are not chosen by the government but are instead nominated by the various groups they represent—means that the government is less able to 'steer' the direction of the commission's work.

These examples illustrate different approaches to the role and nature of a constitutional review body. Those planning a constitutional review process can decide either to maximize government control and direction or to insulate the process from the government and place responsibility in the hands of an autonomous institution. Two considerations might have a bearing on this choice. One is how committed the government is to securing a particular outcome to the constitutional review process. The other is the degree of public trust in the government and the political class in general. If this is low, there may be calls for the process to be led by 'ordinary people' who are 'outside politics', with minimum interference.

1.7. **TERMS OF REFERENCE**

Each of the constitutional review bodies under consideration works to terms of reference (TORs), which are set by the government (in Jamaica and Barbados) or by parliament (in Belize).

Each of the constitutional review bodies under consideration works to terms of reference, which are set by the government or by parliament.

The TORs of Jamaica's Constitutional Reform Committee are tied to the previous work of the Joint Select Committee on Constitutional and Electoral Reform (JSCCER), which reported in 1995. Its

role is to 'assess how the passage of time has impacted' those recommendations and to 'advise what fresh perspectives ought to be considered' because of the changes in the national and international context (Jamaican Ministry of Legal & Constitutional Affairs n.d.). It is specifically tasked with considering 'recommendations of the JSCCER on the establishment of the office of President', 'the nature of such presidency, the qualifications and tenure of the president, and the legislative, executive, or ceremonial powers to be exercised by the President' (Jamaican Ministry of Legal & Constitutional Affairs n.d.). The committee is also responsible for coordinating 'cross-aisle and nationwide consultation and collaboration' and helping to 'educate the electorate on their role in the referendum process' (Jamaican Ministry of Legal & Constitutional Affairs n.d.). The expected outcome was pre-determined by the minister, who announced that it was the government's intention to 'establish Jamaica as a parliamentary republic with a non-executive president' (Loop News 2023).

The TORs of the Barbados Constitutional Reform Commission are set by the warrant, made under the Commissions of Inquiry Act, by which it is appointed. It is to 'examine, consider and enquire into the Constitution of Barbados and all other related laws and matters, for the development and enactment of a new Constitution for Barbados' (Joseph 2023).

In Belize, the commission's TORs are set out in section 6 of the establishing act (People's Constitution Commission Act 2022). They are to (a) 'conduct a comprehensive review of the Belize Constitution' and (b) 'prepare and submit to the Prime Minister, a final report on its findings of the review'. However, this does not give the commission a totally free hand. Subsection (2) of section 6 requires the commission to 'safeguard and promote' a range of objectives and principles, including 'the existence of Belize as a sovereign independent state'; 'Belize's democratic system of governance'; 'the rule of law and fundamental rights'; 'separation of the powers, including independence of the judiciary'; and the principle of a 'secular State in which all faiths are treated equally and encouraged to foster national cohesion and unity'. It is further instructed by the same provision to consider 'international law', 'gender equality' and 'the elimination of economic and social privilege and disparity among citizens, whether by race, ethnicity, colour, creed, disability or sex', as well as various socio-economic rights such as 'basic education', 'basic health', 'the right to work', 'a just system of social security and welfare' and 'the

protection of the environment'. These TORs are not narrow, but they do set a certain direction of travel for the commission's work.

1.8. **OUTPUT OF THE COMMISSION OR COMMITTEE**

Should the constitutional review body draft a new constitution or constitutional amendment bill? Or should it make recommendations only and leave drafting to the government? There are pros and cons to both approaches. However, those in pursuit of actual change might be inclined to prefer the drafting of a bill to the publication of a report, given that the tendency across the region has been for reviews to result in many reports but relatively little change.

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Several aspects of Jamaica's approach—the government-led nature of the process, the presence of the Attorney General as a member of the committee and the fusion of leadership in the hands of the responsible minister—imply that the committee's aim is to produce a bill, or rather a series of bills. This is confirmed by the minutes of the inaugural meeting of the committee (Jamaican Ministry of Legal & Constitutional Affairs 2023).

At the launch of the Barbados Constitutional Reform Commission, the Attorney General and Minister of Legal Affairs, Dale Marshall, announced that he expected the commission (of which he is not a member) to deliver a draft constitution. To this end, Sherman Moore, a retired Justice of Appeal, was appointed as legal draftsman to the commission (Austin 2022). This is also confirmed in the commission's warrant of appointment, which requires the commission to prepare a draft constitution (Joseph 2023).

This matter has not been so clearly settled in Belize, where, in 2023, the People's Constitution Commission appeared to be swithering between drafting a new constitution, drafting amendments to the existing Constitution or simply producing a report with general recommendations. In strict terms, the People's Constitution Commission Act 2022 requires and empowers the commission to produce a report—although there is no reason, of course, why that report might not include, as an appendix, the proposed draft of a revised text.

The expected outcome of the review process is either a set of constitutional amendments or a new constitution.

1.9. **REFERENDUMS**

In each case, the expected outcome of the review process is either a set of constitutional amendments or a new constitution that will be adopted in accordance with the amendment rules set out in the existing constitutions. In Jamaica, a referendum is required to amend the 'specially entrenched' provisions, including the monarchy. A referendum is therefore an inevitability in Jamaica. There are several instances across the region—for example, in Saint Vincent and the Grenadines (2009), Grenada (2016, 2018), and Antigua and Barbuda (2018)—of reforms which had enjoyed parliamentary support being thwarted in referendums, whether because of apathy, lack of public understanding, excessive partisanship or very high amendment thresholds. A vital part of the committee's role is therefore to carry out the public education which will make such a referendum a meaningful exercise, while also keeping the opposition on side.

The Constitution of Barbados can be amended without a referendum, provided that certain parliamentary supermajority requirements are met—a two-thirds majority in both houses, for the most important provisions. However, there is nothing to prevent advisory referendums from being held to consult the people about proposed reforms. There was some criticism over the absence of an advisory referendum in Barbados before it became a republic (Scarsi 2021), although, as Qvortrup (2020) notes, a similarly referendum-free path was previously taken in Trinidad and Tobago without 'protests or dissatisfaction'. The general acceptance of the republic as a now-settled matter, together with the large electoral mandate enjoyed by Mia Motley's government, suggests that a referendum was not strictly necessary.

The Constitution of Belize can likewise be amended by parliamentary supermajorities (by a two-thirds or three-quarters majority in the House of Representatives, depending on the part of the Constitution concerned), with no need for a referendum. However, parliament is authorized by law to hold a referendum on any amendment to the Constitution proposed in the commission's report that 'is of sufficient national importance that it should be submitted to the electors for their view through a referendum' (People's Constitution Commission Act 2022, section 22). Crucially, the decision to hold a referendum therefore rests with parliament, and not with the commission, although, of course, the commission can make suggestions. Furthermore, the referendum need not be on the whole report or all the amendments proposed therein; it would be possible, if desired, to

hold a referendum on the question of a republic while also pursuing other amendments by means of the parliamentary amendment procedure.

A further complication is that Belize has received the 'basic structure' doctrine, which places substantive limits on the amending power in relation to foundational principles such as national sovereignty, separation of powers, the independence of the judiciary and the rule of law (Jamadar 2022). Since the justification for the basic structure depends on the idea of popular sovereignty, a referendum may be felt necessary to express the consent 'that bestows integrity, legitimacy' upon more fundamental changes (Jamadar 2022).

1.10. **CONCLUSION**

Reflecting on the choices made in the design and structuring of these processes may help our collective understanding of non-crisis constitutional change in democracies.

This brief overview of constitutional reform processes in Jamaica, Barbados and Belize shows that even in similar situations, certain important choices have to be made by those who wish to embark on change. Fundamentally, it is a choice between two ways of proceeding. The first way—approximated by Jamaica—is to have a government-led process, in which the constitutional review body is a small body of experts and advisors whose leadership is fused with the government, ultimately under government direction and used to inform and canvass support for government policies in the form of a constitutional amendment bill. This approach seems best calculated to get the reform passed, if the government's will remains steadfast. The second way—approximated by Belize—is an independent process, in which a body representing society and substantially independent from the government sets its own priorities and makes its recommendations in the form of a report which the government may then adopt, or not, as it sees fit. Barbados occupies a middle ground between these two.

Ultimately, however, both of these approaches to constitutional review depend on the goodwill of the government to introduce reform proposals. Whether government control is exercised directly, as in Jamaica, or indirectly, as in Belize, amendment proposals opposed by the government are unlikely to be successful. These processes are therefore quite different from the clean-break, open-agenda constitution-building that could be conducted by, say, an elected constituent assembly. Perhaps the clue is in the name. These are constitutional processes of constitutional review and reform,

taking place in relatively stable democracies and in relatively benign circumstances. Nevertheless, reflecting on the choices made in the design and structuring of these processes may help our collective understanding of non-crisis constitutional change in democracies.

References Chapter 1

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Chapter 2

EX ANTE CONSTITUTIONAL PRINCIPLES: A USEFUL YARDSTICK FOR COMPLEX PROCESSES?

Kimana Zulueta-Fülscher

2.1. **INTRODUCTION**

On 17 December 2023, the world witnessed two constitutional referendums in two very different parts of the globe—Chile and Chad. In Chile, voters rejected the draft that had been proposed by a specially elected Constitutional Council. Meanwhile, in Chad, 86 per cent of voters were claimed to have ratified a text drafted by an appointed committee (Leubnoudji 2023; RFI 2023b). The Chadian draft was then adopted by a non-elected transitional parliament, the National Transition Council (Conseil National de Transition, CNT) (RFI 2023a).

In Chile, widespread social mobilizations and protests in October 2019 resulted in a first attempt at replacing the 1980 military-drafted (though often and democratically amended) Constitution. A referendum held in October 2020 asked Chilean voters whether they wanted a new constitution, written in democracy. The answer was a resounding 'yes'. After the newly drafted constitution failed to be ratified in referendum in September 2022, political party representatives decided to launch a new process. This second process started in January 2023 but lacked the widespread societal support the first process had initially received. Chad, on the other hand, had undergone an unconstitutional change of government in April 2021, after the death of President Idriss Déby in the battlefield. The Transitional Military Council (TMC), led by Mahamat Idriss Déby, son of the late President, dissolved the legislature and replaced it

with a transitional parliament—the National Transition Council—that would be responsible for leading the country back to constitutional rule, including adopting a new constitutional framework. Several opposition parties, civil society organizations and armed groups voiced their discontent and boycotted the process (Bétinbaye, Hoinathy and Elisabeth 2022).

There is, of course, a stark contrast between these countries' constitution-making processes, as well as between their historical, social, economic and political contexts more generally. However, the fact that policymakers in both countries decided to develop ex ante constitutional principles to substantially guide their respective processes provides an opportunity to assess the impact of these principles on the broader legitimacy of both the process and the new constitutional frameworks.

2.2. **DEFINING EX ANTE CONSTITUTIONAL PRINCIPLES**

Ex ante constitutional principles are precepts to guide the process of constitution-making, the content of the future constitution or both.

Ex ante constitutional principles are precepts to guide the process of constitution-making, the content of the future constitution or both. Sometimes different stakeholders agree to them before the start of constitutional negotiations, as part of national dialogues or peace processes, and, as such, they can be more or less inclusive of different sensibilities. At other times, principles may be imposed.

While process-related principles are fairly common, substantive principles are less so. Perhaps the best-known example is that of South Africa's Constitutional Principles, which were agreed in multiparty negotiations and incorporated in the 1993 Interim Constitution. Between 2000 and 2023, substantive principles guided approximately one third of all processes, as detailed in an upcoming Report published by International IDEA (Zulueta-Fülscher and Noël forthcoming 2024).[1] Furthermore, substantive principles can vary significantly in their scope and level of detail. They often include aspects of international norms and standards, as well as other general concepts and values, but they may also reflect the country's

1 These processes include Angola 2010, Bahrain 2002, Bhutan 2008, Burundi 2005, Chad 2018, Chad 2023, Comoros 2018, Fiji 2013, Iraq 2005, Kenya 2010, Kosovo 2008, Madagascar 2010, Mali 2023, Montenegro 2007, Morocco 2011, Myanmar 2008, Nepal 2015, Rwanda 2003, Thailand 2017 and Zimbabwe 2013.

context and thereby include answers to particular concerns (Brandt et al. 2011: 60).

Substantive principles can often constrain the decisions of the constitution-making body on the specific design of the future constitution (Elster 1995: 373; Saunders 2012: 5). This can be problematic in the sense that it is often a group of non-elected individuals (who may or may not be representative of the broader population) that designs constraints on a (sometimes elected and, at least allegedly, more representative) body that will have the explicit mandate to draft a new constitutional framework. At the same time, though, those substantive principles can also set the stage for future constitutional changes. These opposite effects can arguably be observed in both Chile and Chad.

As an assessment of these two cases indicates, substantive principles may be agreed to in very different types of contexts and in countries undergoing very different types of transitions (Zulueta-Fülscher and Noël forthcoming 2024). While Chile underwent its own transition to democracy in the 1980s, the recent attempt to replace its existing Constitution was principally meant to relegitimize its constitutional framework by giving voters an opportunity to determine its content. Chad attempted to restore constitutional order after an unconstitutional change of government, although the authorities at the helm of the unconstitutional change of government were also, for the most part, those leading the process of constitutional replacement.

Furthermore, it is noteworthy that in both countries, the authorities devised institutions that were meant to ensure that such principles would be included in the new constitutional text in some form. In Chile, political party representatives provided for a special committee before the process began. In Chad, it was the participants of a national dialogue (Dialogue National Inclusif et Souverain) who provided for the establishment of a number of institutions that would ensure that their recommendations were implemented. This is something of an anomaly, in that when stakeholders decide to include ex ante substantive principles, they do not typically envisage the establishment of institutions or mechanisms with a mandate to verify the implementation of those principles (albeit loosely in the case of Chad). The following two sections will examine the content of ex ante substantive principles in the constitution-making processes of Chile and Chad. They will also explore whether those substantive

principles were complied with, and the role played by the institutions that had been mandated to verify their implementation.

2.3. **PRINCIPLES IN CONTEXT: THE CASE OF CHILE**

Chile's 2023 constitution-making process followed a previously failed process which had concluded with the rejection of the proposed constitution in a referendum.

Chile's 2023 constitution-making process followed a previously failed process which had concluded with the rejection of the proposed constitution in a referendum held on 4 September 2022.[2] On 12 December 2022, after three intense months of negotiations, most political parties represented in the Chilean Congress signed the Agreement for Chile (Acuerdo por Chile). The agreement provided the roadmap and institutions that were to be involved in the new process, including an Expert Committee, which was to prepare an initial draft, and an elected Constitutional Council, which was to adopt the final draft. The agreement also contained a series of 12 constitutional principles to be incorporated in the new constitutional framework—a significant change from the previous process (García Pino 2023: 1). These principles were seen by some as excessively constraining the future elected constitution-making body (García 2023); others thought they would permit progress in key areas where there was already a certain level of societal as well as political agreement (Ossa, Trujillo and Ortega 2023: 4).

These principles later became part of an amendment (Law 21533, January 2023) to the 1980 Constitution (article 154). They included some general issues, such as (a) that Chile should remain a democratic republic, and that sovereignty should reside in the people of Chile, limited only by internationally recognized human rights and the principle of human dignity; (b) that Chile is a unitary and decentralized state; and (c) that there should be separation of powers and protection of fundamental rights and liberties. It also included principles that came in reaction to the previous process. These included the maintenance of the bicameral legislature; the constitutional entrenchment of a number of autonomous institutions, including the Central Bank, the Attorney General's Office, the Auditor General and Electoral Justice; the entrenchment of civilian-led security, intelligence and armed forces; and the entrenchment of different types of states of exception.

2 For more details on both of these processes and their potential relationship see Zulueta-Fülscher (2023).

The constitution-making body was not to start drafting on a blank page, as had been the case in the previous process, where an elected Constitutional Convention was allowed to start drafting from scratch. Instead, political party representatives—particularly those who had rejected the previous constitutional draft—thought it was important that the basics of a democratic and liberal constitution be maintained. Some principles, however, reflected issues that, if incorporated in the future constitution, could indeed represent a significant transformation of Chile's constitutional framework. These included (a) the recognition of Indigenous Peoples and the protection of their rights and culture; (b) the establishment of a social and democratic state under the rule of law (*estado social y democrático de derecho*); and (c) the commitment to the care and conservation of nature and its biodiversity.

Still, these principles only served as a very general framework that needed to be expanded and deepened during the constitutional negotiations. In other words, it would be up to the elected members of the Constitutional Council to interpret the principles and determine the final context of the constitutional framework (García Pino 2023). However, the ultra-conservative Republican Party (Partido Republicano) ended up winning a plurality of votes and seats in the Constitutional Council. And together with the seats won by the coalition of traditional right-wing parties, they could adopt the text over the objections of left-wing representatives.

At the same time, as part of the Agreement for Chile, the parties also devised a 14-member special commission—the Technical Admissibility Committee (Comité Técnico de Admisibilidad). This body was initially mandated to review all adopted provisions of the draft constitution in order to determine whether these provisions contradicted the ex ante principles in any way. With its incorporation into the 1980 Constitution (Law 21533, January 2023), however, the Committee was only to be called into action in response to complaints from a certain number of members of either the Expert Commission or the elected Constitutional Council (article 146). The Committee would not therefore need to review the entire draft for compliance with the principles. Further, the Committee's composition had an equal number of representatives from ideologically left- and right-leaning parties, and decisions were to be taken by an absolute majority. This meant that decisions could only be taken if there was some level of cross-party agreement. Given the lack of agreement between left- and right-wing representatives in both the Constitutional Council and the Committee, left-wing representatives in the Council

decided not to submit complaints to the Committee, and hence it was never used.

2.4. **PRINCIPLES IN CONTEXT: THE CASE OF CHAD**

In Chad, the April 2021 unconstitutional change of government was followed by the enactment of a Transitional Charter (Charte de Transition de la République du Tchad). The Charter did not include principles or any details as to the constitution-making process other than the fact that the newly appointed 96-member CNT was to examine and adopt the constitutional draft (article 67), which would be ratified via referendum (article 99).

However, the TMC announced separately that an inclusive national dialogue would be held as part of the transition, to help establish a new constitutional framework. The dialogue was part of a roadmap adopted on 29 July 2021 and it was to start at the end of 2021 (RFI 2021a). At the same time, a Committee for the Organization of the Inclusive National Dialogue (Comité d'Organisation du Dialogue National Inclusif, CODNI) was established by decree in July 2021 (Decret 101) and mandated with defining both the agenda and the list of participants for the dialogue (Bétinbayé and Murray 2022). Rebel groups were invited but only agreed to participate if certain conditions were met, which led to the Qatar-sponsored peace negotiations (the pre-dialogue phase) (Pietromarchi 2022). After some delays, the signing of the Doha Peace Agreement took place on 8 August 2022,[3] which meant that the national dialogue, the constitutional referendum and general elections all were postponed. Elections were not held until May 2024.

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The pre-dialogue phase included representatives from the government and 50 opposition and rebel groups. In its preamble, the subsequent agreement provided that the recommendations developed as part of the national dialogue for the refoundation of Chad would be binding. In section 2, on the National Inclusive Dialogue of N'Djamena, the agreement details the organization of 'the Committee for [the] Organization' of the Dialogue, as well as its agenda (articles 2.1 and 2.2). Notably, the agreement appears to pre-commit both the transitional government and rebel armed groups to become co-signatories of any resolutions the dialogue may

3 The Doha Agreement for Peace and Involvement of Political-Military Movements in the Sovereign and Inclusive National Dialogue in Chad, 8 August 2022.

present (article 2.1.15). It also provides for decisions to consolidate peace, national cohesion, institutional stability, good governance and republican values (article 2.1.16). The issues to be discussed as part of the dialogue were (a) the establishment of a legislative and regulatory framework that would allow for free and fair elections; (b) a Truth, Justice and Reconciliation Committee; (c) a General Auditor's Office that would specifically also be in charge of auditing the privatization of national business and profits from hydrocarbons; (d) the form of the state and necessary institutional reforms; and (e) human rights and fundamental liberties (article 2.2.18). More than 40 opposition groups signed the Doha Peace Agreement, but the main rebel group—the Front for Change and Concord in Chad (FACT)—refused to sign. One of the reasons for this refusal was allegedly the absence of an explicit prohibition for members of the junta, including Mahamat Idriss Déby, to run in the post-transition elections (Aljazeera 2022).

On 20 August 2022, the national dialogue finally started. It lasted a total of six weeks. Around 1,400 people took part in it, representing most of the armed groups that had signed the Doha Peace Agreement. At the same time, key stakeholders decided to boycott the dialogue, arguing that it was biased in favour of the military. These stakeholders included FACT and a number of important opposition groups, such as the political party Les Transformateurs and the Wakit Tama civil society network (RFI 2021b; Bétinbaye, Hoinathy and Elisabeth 2022; ICG 2022; Leubnoudji 2023).[4] Throughout the dialogue, other institutions withdrew, including the Catholic Church, the Lawyers' Association and the President of the Human Rights Commission. In the end, most of the leadership of the dialogue's committees and subcommittees had 'a close relationship with the former ruling party' and most of the participants appeared to be 'either members, sympathizers, or had close proximity to the old system and regime, [which] certainly undermined the neutrality and fairness of the dialogue and its resolutions' (Bétinbaye, Hoinathy and Elisabeth 2022).

4 The evolution of Les Transformateurs was quite interesting in that although it had been highly critical of both the transitional authorities and process, it softened its stance after signing an agreement on 31 October 2023 with the government, brokered by the Economic Community of Central African States (ECCAS). Under this agreement, Succès Masra was able to return to the country (after a one-year exile in the United States), and 'committed to work towards a return to constitutional order within the government-defined timetable and in a politically calm environment' (Hoinathy and Bétinbaye 2023), thereby cautiously endorsing the new constitutional framework. On 1 January 2024 Masra was appointed Prime Minister of Chad, and on 3 March he announced his candidacy for the presidential elections of 6 May 2024, which was accepted on 25 March (Africanews 2024).

The national dialogue was divided into five thematic committees which focused on (a) 'peace, social cohesion and national reconciliation'; (b) 'the form of the state, the constitution, institutional reforms and electoral process'; (c) 'fundamental rights and freedoms'; (d) 'sector-specific public policies'; and (e) 'societal questions'. It also included three ad hoc committees which were concerned with (a) 'questions related to the management of the transition'; (b) 'the Doha Agreement'; and (c) 'the transition's technical specifications, calendar and monitoring mechanism'. The recommendations of the thematic committee dealing with the constitution included recommendations made within the first ad hoc committee. Otherwise, however, it was unclear to what extent the recommendations would be translated into the new constitutional text (Bureau du CISE 2023).[5]

Recommendations directly aimed at the constitution-making process suggest using the 1996 Constitution of Chad as a 'basis for reflection'. Beyond this, the Committee recommended that the political system—which had been presidential since the adoption of the 2018 Constitution—should become semi-presidential, with a directly elected president and an appointed prime minister. It also made the following recommendations: the legislature should be bicameral; the Supreme Court should be kept, but the Constitutional Council and the Court of Auditors should be restored; the High Court of Justice, the Economic, Social, Cultural and Environmental Council, the National Commission for Human Rights, and the High Authority for Media and Audiovisual Communication should all be maintained and made truly independent; the Republic's Mediator should be restored and mandated with implementing a national policy to promote peace, social cohesion and coexistence; a new High Council of Traditional Chiefdoms should be established; and all major institutions should be strengthened.

The Committee recommended that the political system—which had been presidential since the adoption of the 2018 Constitution—should become semi-presidential.

Furthermore, there were also more specific recommendations, which had, among other aims: strengthening the independence of the judiciary; dealing with traditional chiefdoms; reinforcing (opposition) political parties; constitutionalizing an independent electoral management body; establishing term limits and a minimum age to be an elected official; and changing the electoral system.

5 Recommendation number 5 of the thematic committee dealing with the constitution reads: 'set up a team of experts to prepare a draft constitution in line with [the Dialogue's] recommendations and resolutions', without specifying which precise recommendations are to be taken into account.

Most notably, the Committee recommended organizing a single referendum with two questions—one on the ratification of the revised constitution and another on the form of the state. It also specified that 'in accordance with the principle of citizens' equality before the law, and in the spirit of national reconciliation and inclusion, all Chadians in general and *the transition leaders in particular* are eligible to vote and stand for election under the conditions laid down by law' (author's emphasis). This last point—which may contravene article 25.4 of the African Charter on Democracy, Elections and Governance—caused several opposition parties to call for a boycott of the referendum (Hairsine 2023).

During the first half of 2023, a 15-member executive-appointed (and government-dominated) Constitutional Committee prepared a preliminary draft constitution, based on the 1996 Constitution, which the transitional government reviewed and subsequently approved on 1 June 2023, as described in a recent International IDEA publication (Noël forthcoming 2024). It was adopted by the transitional legislature on 27 June 2023, ratified in referendum on 17 December 2023 by (allegedly) 86 per cent of voters and promulgated the next day (RFI 2023b).

Most of the recommendations were at least nominally implemented, even though they typically lacked detail.

Most of the recommendations were at least nominally implemented, even though they typically lacked detail, with little specification of the form that the suggested changes should take. The new constitution includes those institutions that, according to the national dialogue, were to be restored or newly established—for example, the Constitutional Council or the Court of Auditors, as well as a bicameral legislature and the restoration of the semi-presidential (premier-presidential) system (Noël forthcoming 2024; see also Chapter 3: Divergent paths: Post-coup constitutions in Chad and Mali). On the other hand, while it appears, for instance, that the independence of the judiciary is strengthened vis-à-vis the 2018 Constitution (Leubnoudji 2023), the independence of the electoral management body is reaffirmed (articles 236, 238–239) but its composition and mandate are to be regulated by an organic law (article 240). This enables an executive-controlled legislature to legislate for the incumbent's benefit (Noël forthcoming 2024; see also Hoinathy 2024). Furthermore, one recommendation was not implemented. This referred to an unresolved debate within the national dialogue regarding whether Chad should remain a unitary state or become a federation, and the recommendation was that there should be a referendum on the issue instead. However, Chadians were never asked which system they preferred, and the Constitutional Committee

reverted back to the unitary but decentralized system that was already provided for in the 1996 Constitution.[6]

As part of the national dialogue, the third ad hoc committee devised a number of mechanisms aimed at monitoring and evaluating the implementation of both the Doha Peace Agreement and the recommendations from the national dialogue.[7] On 28 October 2022, the President of the Transition decreed the establishment of the High Steering Committee (Haut Comité de Pilotage), headed by the Transitional Prime Minister (Présidence de la République du Tchad 2022a). On 7 December 2022, he appointed the 11 members of the Independent Monitoring and Evaluation Body (Cadre Indépendant de Suivi-Evaluation des Résolutions et Recommandations du Dialogue National Inclusif et Souverain), including seven experts and four representatives of the executive (Présidence de la République du Tchad 2022b). Together with the Technical Support Committee, these were the main bodies responsible for guiding, monitoring and evaluating the implementation of the dialogue's recommendations. However, they included the same individuals that participated in the dialogue, and hence some observers questioned their independence (Bertelsmann Stiftung 2024).

The main objective of the Independent Monitoring and Evaluation Body was to evaluate (in the first instance) the implementation of the dialogue's recommendations and, to this end, it presented its first (and only) report on 18 July 2023 (Bureau de CISE 2023; Ezéchiel 2023; Mahamat 2023; Nguemadji 2023). Its assessment was mixed, but it did not offer specific recommendations regarding the constitution-making process (Ezéchiel 2023). It only included general statements about the need to protect the rule of law, eradicate corruption and strengthen the judiciary (Bureau de CISE 2023).

6 Granted that this double referendum could have resulted in inconsistency if voters had ratified the constitutional draft but required the state to become federal. The draft would have had to be amended after being ratified. Beyond this, the specific design of the federal system would have still needed to be agreed on, an issue that has elsewhere prevented the timely completion of constitution-making processes.

7 These included an Independent Monitoring and Evaluation Body, a High Steering Committee, and a Technical Committee, as well as an International Committee for the Evaluation and Monitoring of the Doha Agreement and a Committee for the Consultation and Monitoring of the Doha Peace Agreement Implementation (Nadjasna 2022).

The principles ended up being too vague to drive the somewhat minimal reforms that political party representatives had agreed to in advance of the process.

2.5. **CONCLUDING THOUGHTS**

As mentioned in the introduction to this chapter, the processes of developing ex ante substantive principles in Chile and Chad were ostensibly distinct. In Chile, these principles followed, and partly responded to, a failed process of constitutional replacement and were agreed upon in closed-door negotiations by political party representatives. The principles, as well as the body mandated to verify their implementation, were included in a constitutional amendment that was to regulate the process of constitutional replacement, thereby maintaining legal continuity. These principles were initially seen by some observers as an obstacle to some of the structural reforms that were necessary for Chile to respond to various societal needs and demands that were the source of the 2019 mobilizations (García 2023). Given the ultimate composition of the Constitutional Council, however, the principles ended up being too vague to drive the somewhat minimal reforms that political party representatives had agreed to in advance of the process. The weak mandate of the Technical Admissibility Committee, as well as its (politically balanced) composition and decision-making procedure, further contributed to giving the council (or its right-wing majority) a sense of its own sovereignty. While the principles were at least nominally incorporated into the text, their lack of detail allowed the Council to draft a more conservative constitution than the political middle would arguably have preferred. The draft was rejected in referendum.

In Chad, on the other hand, principles resulted from a national dialogue set up by transitional authorities in the aftermath of an unconstitutional change of government. The dialogue was launched to allow different groups and individuals to have a say over Chad's return to constitutional order. And while the dialogue included representatives from a variety of groups and political sensibilities, a number of key stakeholders decided to either boycott or later withdraw from it. The principles were to be binding on the executive-appointed constitution-making body, but the general sense was that the dialogue's recommendations would stop short of proposing necessary structural changes.

Nevertheless, in an attempt to increase its own legitimacy, the national dialogue provided for the establishment of institutions that would broadly ensure that its recommendations would be implemented. But only one report was published, and while it included a general assessment of the transition and offered some

recommendations, it did not specifically evaluate how principles agreed as part of the dialogue were incorporated in the new constitutional text. However, this is hardly surprising given the context—a transition launched after an unconstitutional change of government and led by a military junta.

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Chapter 3

DIVERGENT PATHS: POST-COUP CONSTITUTIONS IN CHAD AND MALI

Adem Kassie Abebe

While virtually all military regimes announced plans for constitutional reform, only these two have so far been finalized.

3.1. INTRODUCTION

In December 2023, Chadians approved in a referendum a constitution that guided the organization of elections in May 2024. This marked the formal end of the military-led transition and the establishment of an elected government (EFE 2023; *Le Monde* 2024). Chad's constitutional referendum was the second after a string of military coups that had spread from Sudan on the Red Sea coast to Guinea on the Atlantic Ocean, as detailed in two reports published by International IDEA (Zulueta-Fülscher and Noël 2022; Noël 2023). In June 2023, Malians approved a constitution (Sow and Koné 2023), also paving the way for (repeatedly postponed) elections. While virtually all military regimes announced plans for constitutional reform, only these two have so far been finalized.

This chapter discusses post-coup constitutions in Chad and Mali with a view to identifying insights for national, regional, African and international stakeholders engaged in transition processes. It may also inform observers, academics and advisors with an interest in constitution-making processes. Accordingly, the second section provides brief backgrounds on the two countries. The third section then discusses the process through which the two constitutions were prepared, giving particular consideration to whether they represent genuinely negotiated socio-political pacts. It also assesses the content of the new constitutions, with a focus on the system of government, on decentralization and, broadly, on the extent to which

the constitutions seek to prevent transient political majorities from unilaterally defining the rules of the constitutional democratic game. The final section concludes.

The chapter argues that Mali now has an 'emergency' Constitution under a powerful president that will likely intensify winner-takes-all politics—and potentially lead to destabilization. Meanwhile, Chad has established a premier-presidential semi-presidential system, unusual in Francophone Africa, and a relatively decentralized framework, which could enhance inclusion and reduce winner-takes-all politics. Nevertheless, assessment of the formal documents must be tempered with an awareness of Chad's history of personalized power and Mali's relatively robust democracy and tradition of popular mobilization. In Chad, building on the strengths of the formal Constitution can help shape the emergence of a new political dispensation; in Mali, drawing on the country's tradition could help stem worst-case scenarios under the formally imperial presidential regime.

In Chad, building on the strengths of the formal Constitution can help shape the emergence of a new political dispensation; in Mali, drawing on the country's tradition could help stem worst-case scenarios under the formally imperial presidential regime.

3.2. THE RETURN OF THE SOLDIERS

Africa's democratic progress has been uneven but, overall, positive since the waves of constitutional transitions to multiparty elections in the 1990s (Cheeseman 2019, 2021). These transitions formally affirmed continental consensus on multiparty elections as the only legitimate means of accessing power. The period marked the rejection of the idea that Africa's development and nation-building efforts necessitated one-party systems (Nyerere 1997). Nevertheless, de facto one-party states and dictatorships endure (Cheeseman 2019), and the shadows of military coups remain lurking. Indeed, there were only three years between 1990 and 2023 during which no attempted or successful coup took place (based on data in Duzor and Williamson 2023).

Recent years have seen a rise in military coups: there have been nine successful coups since 2019, with four in 2021—the highest number in a single year since 1999. This has rattled the supposed consensus that elections are the only legitimate means of acceding to power, with elected governments struggling to deliver substantial progress in advancing security and socio-economic conditions. The spate of coups has come despite a continental and regional hardline, zero-tolerance policy towards military coups (Zulueta-Fülscher and Noël

2022), and it has afflicted even countries with relatively improving democratic trajectories, including Burkina Faso, Mali and Niger (McCullough and Sandor 2023). After steep advances in the 1990s (Arriola, Rakner and van de Walle 2023), these recent coups threaten to move Africa's stalled democratic trajectory into reverse.

The immediate triggers and contexts of the coups vary.

The immediate triggers and contexts of the coups vary. They relate broadly to a combination of unabating conflict, state ineffectiveness and governance failures in the form of inadequate service delivery and corruption; harsh economic realities exacerbated by conflict and climate change; questionable legitimacy of incumbent governments; and differences over policies towards insurgencies and external actors—notably, in Sahelian states, towards France (Zulueta-Fülscher and Noël 2022; Noël 2023; Opalo 2023).

The 2020 Mali coup came amid dissatisfaction with former president Ibrahim Boubacar Keïta, who was elected after the 2012 coup (Fornof and Cole 2020; Zulueta-Fülscher and Noël 2022; Noël 2023). Despite the signing of the 2015 Algiers Agreement for Peace and Reconciliation, the circumstances that led to the 2012 coup worsened, with the strengthening of jihadist forces with a nationwide anti-democratic agenda. As attempts to stem security challenges failed, contestations over flawed legislative elections triggered massive protests in June 2020, providing an opening for Assimi Goïta to orchestrate a military coup in August 2020 (Zulueta-Fülscher and Noël 2022). Although a civilian-led government was initially established, Goïta orchestrated a second coup in May 2021. In the process, he harassed the organized civilian opposition, while consolidating his dominance by fanning anti-French sentiment (Haidara 2023) and cancelling the Algiers Agreement (AFP 2024).

In Chad, the coup also happened in a context of conflict (Zulueta-Fülscher and Noël 2022). Former President Idriss Déby won re-election in April 2021 but, within days, died on the battlefield during a fight against rebel forces of the Front for Change and Concord in Chad (FACT) (Djilo and Handy 2021). Despite clear constitutional succession rules, a military council led by Mahamat Déby, son of Idriss Déby, took over—ostensibly because the formal successors declined the position and on grounds of necessity due to the insurgency (Enonchong 2021). Under pressure from the African Union, the transitional authorities committed to a short transition period, a national dialogue and, ultimately, elections (Djilo and Handy 2021). Chadian authorities also pursued a peace deal with some armed insurgents, but FACT refused to endorse the deal (Mills 2022).

Meanwhile, the country faced serious popular protests led by Succès Masra, who was forced to flee the country after a violent crackdown on protesters killed hundreds of people. Nevertheless, following undisclosed deals, Masra was appointed Transitional Prime Minister in January 2024 (Aljazeera 2024). Overall, while Mahamat Déby has maintained his power, he is far from the undisputed ruler, with the top military council governing as a collegial body and civilians occupying key positions.

As Chad concluded its post-transition elections in May 2024, in which Mahamat Déby won as expected, and Mali plans to hold (repeatedly postponed) elections, their states and governments are fragile, facing threats of countercoups, while conflict remains pervasive. In this context, it is critical for these countries to establish and implement constitutional and institutional frameworks that reflect the social contract and to establish legitimate governments including, but not limited to, the organization of credible, free and fair elections so that they can begin their trajectory towards democratization and peace. The next section therefore discusses the process through which the new constitutions were adopted and their key contents.

It is critical for these countries to establish and implement constitutional and institutional frameworks that reflect the social contract and to establish legitimate governments.

3.3. THE MAKING AND CONTENT OF POST-COUP CONSTITUTIONS

The two post-coup constitutions have emerged from contrasting contexts. The 2023 Malian Constitution is only the second since the transition to multiparty democracy in 1992. Although there had been several earlier attempts to amend the 1992 Constitution, none succeeded, mainly because of dogged popular resistance to a perceived incumbent desire to enhance presidential powers and undermine term limits. Mali has also seen repeated peaceful turnovers of power through elections, has had a relatively functioning political and judicial system, and has developed a culture of robust popular mobilization.

In contrast, Chad has been engaged in several rounds of constitution-making—most recently in 2018, when a new Constitution was adopted. It has never seen a peaceful alternation of power, and as the country has weak political and judicial systems, it consequently has a limited culture of democratic constitutionalism.

Despite these contrasting histories of constitutional (in)stability, the process of making the two constitutions and the nature of their content may foment a more marked authoritarian drift in Mali than in Chad.

3.3.1. Mali's 'emergency' Constitution

In December 2021, the military regime conducted public consultations (*Assises nationales de la fondation*), which adopted several resolutions, including calls for a new constitution (Doumbia 2023; Noël 2023). In June 2022, Goïta unilaterally constituted a committee of experts, which produced a draft constitution. In January 2023, he set up another expert committee to review the draft. The final draft was submitted to a referendum in July 2023, without being considered by the transitional parliament. The draft was overwhelmingly approved—by 97 per cent, according to official reports—but with a low turnout—officially 38.2 per cent (Sow and Koné 2023). Voting was not held in large parts of the country's north—the stronghold of armed insurgents.

It is difficult to consider the Mali Constitution a result of political deliberation, compromise and consensus among key stakeholders.

Key opposition forces rejected the draft constitution on different grounds (Doumbia 2023). Some questioned the junta's legitimate mandate to draft a constitution (Noël 2023). Others objected to the content of the constitution (Noël 2023; Sow and Koné 2023) on grounds related to presidential powers, secularism, decentralization, the place of the army in the political system and immunity for military leaders. Moreover, the transitional parliament did not consider, let alone approve, the draft, allowing the military to dominate the process and bypass a potential compromise with civilian political forces. In view of this, it is difficult to consider the Constitution a result of political deliberation, compromise and consensus among key stakeholders.

In terms of content, the Constitution is a lean document, characteristic of the minimalism of Francophone African constitutions. The new political system revolves around a dominant president and a centralized state, with decentralization and its forms left to legislation, as detailed in two reports published by International IDEA (Noël 2023, forthcoming 2024). It appears that the Constitution was drafted with an emergency mindset that prioritizes short-term efficiency and individual stewardship over deliberation, checks and balances, and shared wisdom. This, in turn, was likely shaped by a hierarchical military ethos and by the sense of urgency that the fight against insurgents and jihadists engendered. It is arguably an 'emergency' constitution that would nonetheless have to operate

in post-transition 'normal' times. The ostensible involvement of experts in the drafting process did not lead to a meaningful check on the dominance of a military mindset of discipline, centralization and hierarchy. It is clear that expert engagement—even when the experts enjoy relative autonomy, which is not clear in the case of Mali—cannot be a substitute for political deliberation, negotiation, compromise and consensus.

In terms of content, the Constitution is a lean document, characteristic of the minimalism of Francophone African constitutions.

The Constitution replaces Mali's semi-presidential system of government with one that is essentially unique and hyper-presidential, while retaining aspects of the country's semi-presidential heritage that empower the president (Noël 2023, forthcoming 2024). Accordingly, while the offices of the prime minister and Council of Ministers are maintained, they are appointed by and serve at the pleasure of the president, with no parliamentary power to remove them. Moreover, the president retains the power to dissolve parliament (a power that did not exist in the first draft and that, in line with the shift towards a full-fledged presidential system, was subsequently included by the second committee). The Constitution maintains significant executive law- and ordinance-making powers, including through direct resort to a referendum, thus enabling the legislature to be bypassed in a wide range of areas. Furthermore, the Constitution leaves out significant areas—other than those specifically listed as part of the legislature's terrain—in which the president can effectively make laws. The president also enjoys an awesome list of powers to make appointments, including to membership of the newly established Senate. In combination, these formal constitutional powers will make the Malian president one of the most, if not the most, powerful presidents in Africa.

The only possible check on the presidency may come from the Constitutional Court. The court has been reconstituted in the new Constitution to enhance its autonomy, including a process of appointment involving multiple stakeholders and a single non-renewable term for its members (Noël 2023). Nevertheless, considering that the Constitution grants a wide range of presidential powers, even an independent court may lack the normative basis to constrain the president. The system may arguably entail elected absolutism, comparable to O'Donnell's (1994) concept of 'delegative democracy', in a manner that could, in the long term, undermine even the elected character of the political system and the progressive Malian experience with relatively free and fair elections. This risk is particularly likely given that the Constitution does not specifically exclude coup leaders from the end-of-transition elections, as required

under African Union and Economic Community of West African States (ECOWAS) rules, as well as under the Transitional Charter as amended in 2022. It remains unclear whether the requirements for candidacy set out in the Transitional Charter will be applicable in addition to those outlined in the 2023 Constitution.

Crucially, the Constitution largely leaves the issue of decentralization to legislative regulation, even as it establishes a new Senate, which will include representatives of decentralized entities in whatever form they will be constituted. There has been a failure to negotiate in advance with the Tuareg insurgents and establish a robust decentralized framework which would be relatively insulated from majoritarian politics and autonomous from the national government—for example, in the process of selecting provincial leaders. Such measures would have provided crucial guarantees that could contribute to implementing the spirit of the Algiers Agreement and, more broadly, to enhancing the prospect of peacemaking and democracy.

Overall, the changes brought about by the new Constitution will increase the stakes of presidential elections.

Overall, the changes brought about by the new Constitution will increase the stakes of presidential elections—stakes which were already tremendous. It will also engender winner-takes-all politics more than ever, which could prove destabilizing. While some of these issues could be addressed through constitutional amendment, Mali's history underscores the difficulty of amendments, which require, without exception, a supermajority in the legislature and a referendum. (Indeed, the 1992 Constitution was never amended.) The establishment of a new Senate, which will have a role in the amendment process, can make change even more difficult. This difficulty may, in turn, encourage the making of ostensibly new constitutions through referendum to bypass the amendment requirements, as has happened in other Francophone African countries. While the minimalism in the Constitution may allow the filling of constitutional gaps through legislation—including, notably, addressing demands for decentralization—electoral politics and the political need to secure popular support could open up possibilities for hyper-majoritarianism. If so, this could particularly undermine the wishes of minority groups in the north and thus further fuel conflict.

3.3.2. **Chad's constitution of change?**

The process of writing Chad's new Constitution involved a national dialogue in September 2022. This included regional consultations and a final large gathering at the national level, which excluded some armed groups and pro-democracy actors (Leubnoudji 2023;

Noël forthcoming 2024). The outcomes of the dialogue included a recommendation to draft a new constitution, in line with earlier transition plans. Accordingly, the military established a constitution-drafting committee, consisting mainly of experts, which unveiled a draft in June 2023. The draft constitution was approved by the transitional parliament and government, before being put to a referendum in December 2023. According to official results, 85.9 per cent of voters approved the Constitution, with a 62.86 per cent turnout (*Le Monde* 2023).

Some opposition leaders rejected the constitution-making process as well as the draft constitution. They called for delays to enable political consensus on fundamental issues—including the nature and institutional architecture of the decentralized governance system and autonomous institutions, such as the election management body—and to allow for the conditions for a free and fair referendum (Ramadane 2023). Nevertheless, key opposition leaders, notably Masra, returned from exile and called for reconciliation, announcing their willingness to work with the junta ahead of the referendum.

The content of the new Constitution, while providing more detail than its Malian counterpart, firmly continues the tradition in Francophone Africa of constitutional minimalism, with key aspects left to legislative regulation. Politically, the Constitution represents a return to a semi-presidential system, which was abolished in the 2018 Constitution. It is noteworthy in establishing a premier-presidential system, unusual in Francophone Africa, where the prime minister is appointed by the president but can only be removed by parliament. The office of the prime minister enjoys tremendous formal powers, with authority to select members of their cabinet, and the president has no explicit power to oppose the selected cabinet members. The prime minister also shares with the president the power of appointment to key civilian and military institutions, which must be made in the Council of Ministers.

The Chad Constitution is noteworthy in establishing a premier-presidential system, unusual in Francophone Africa, where the prime minister is appointed by the president but can only be removed by parliament.

This shift to a premier-presidential system formally reduces the dominance of the president. This could incentivize the emergence of inclusive governance with representation of varied parties and communities, which, in turn, could nurture and strengthen a new culture of political inclusion and cooperation. Nevertheless, it may also create tension and paralysis, thereby undermining political stability. The operationalization of the system and the enhancement of its positive attributes would require a change in mindset among all key actors; the emergence of cohesive and democratic parties; the

establishment of mechanisms to enable regular interaction, such as a formalized council of political parties; and the capacity development of political parties.

Moreover, the Constitution maintains the decentralized arrangement first established in the 2018 Constitution, which was not implemented but provides for the relative autonomy of substate authorities, as well as for the representation of such entities in the Senate. Importantly, the constitutional framework includes provisions for regional governors which may become more autonomous from the central government than they were under the 2018 Constitution, although the Constitution does not go as far as establishing a full-fledged federal arrangement, as demanded by some political forces. While the details of the arrangement must still be outlined in the law and there are no implementation timelines, the Constitution establishes the basis for a governance system that can offer platforms for regional diversities and outlets for ambitious political leaders.

In combination with the premier-presidential system, the relatively improved decentralized system could help reduce the stakes in a traditionally winner-takes-all politics. It could also give greater voice and prominence to the interests and wishes of Chad's political peripheries in national political conversations. To the extent that the Constitution establishes a formally less personalized and more decentralized political system, it may be seen as a result of compromise. This may be partly explained by the fact that, unlike in Mali, no single individual has consolidated their power; instead, a diversity of interests has reportedly been present, even within the military leadership and Mahamat Déby's family and social base. Moreover, the case of Chad differs from that of Mali in that the draft was considered and approved by the transitional parliament, which has significant civilian presence.

The relative advances in Chad's formal constitutional framework must be tempered with the country's history of dictatorship and personalization of power.

The relative advances in Chad's formal constitutional framework must be tempered with the country's history of dictatorship and personalization of power, its lack of experience of free, fair and credible elections and the overall absence of a culture of respect for rights, rule of law and constitutionalism. Indeed, despite the institutional changes, as in Mali, the Constitution does not exclude coup leaders from the elections. In fact, Déby ran and won the May 2024 elections under questionable circumstances.

Moreover, while the amendment procedure provides significant safeguards against self-serving changes—by requiring a two-thirds

legislative majority and endorsement in a referendum for most changes—the minimalism of the Constitution opens possibilities for undermining constitutionalism through legislation.

3.4. **CONCLUDING REMARKS**

These brief discussions of the process of making post-coup constitutions in Chad and Mali and of the content of these constitutions reveal divergent approaches at critical junctures.

The Malian regime is characterized by Goïta's effort to secure his dominance over domestic forces, both civilian and military, and acrimonious relations with ECOWAS and the African Union. In Chad, Mahamat Déby has had to juggle various forces within the army, as well as among the civilian and armed opposition, while avoiding significant pushback from the African Union and the Economic Community of Central African States. In view of this, Goïta effectively bypassed the civilian opposition—note the absence of involvement of the transitional parliament in the constitution-making process—and ignored the demands of armed rebel groups. In addition, Goïta sought to use the pressure from ECOWAS, pervasive anti-French sentiment and active insurgencies to create a sense of permanent crisis necessitating an 'emergency' constitution. The referendum was also used to circumvent much-needed negotiation, compromise and pacts among key political forces; to ignore continental standards, such as the prohibition against coup leaders running in the post-transition election; and to reject pre-existing peace deals. The consequence is that the final Constitution is both more personalized and centralized.

The process in Chad involved more formal institutional checks, notably in the transitional parliament, a peace deal with parts of the armed opposition and negotiations with parts of the civilian opposition. This may partly explain the establishment of a premier-presidential political system, as well as relatively decentralized governance architecture.

The constitution-making processes and outcomes in Chad and Mali were not inevitable.

These processes and outcomes were not inevitable. If anything, one might have predicted opposite outcomes, given Mali's relative history of alternation of power, nascent constitutionalism and competitive elections and Chad's authoritarian and personalized tradition. Referendums are arguably necessary in post-coup constitution-making processes, considering the lack of direct popular legitimacy

Referendums must not substitute elite-level deliberation, negotiation, compromise and consensus through formal and informal frameworks.

of transition institutions. However, referendums must not substitute elite-level deliberation, negotiation, compromise and consensus through formal and informal frameworks, as was apparently the case in Mali. Rather, referendums must complement high level deliberative processes, as appears to be the case in Chad, at least to some level. National and international stakeholders and supporters of constitution-building processes should have these insights in mind as they define their engagements in post-coup contexts.

The character of the actors and the severity of socio-economic and security problems have proven critical in shaping constitution-making processes and the content of constitutions. Nevertheless, long-term structural factors and historical traditions may influence their implementation and the trajectory towards democratic constitutionalism, including potential reforms. Accordingly, in Mali, it is critical that stakeholders seek to build on the positive long-term traditions in the country's democratic history to stave off potential worst-case consequences of the new constitutional framework. Meanwhile, in Chad, stakeholders must identify, nurture and consolidate any commendable beginnings that have emerged in the transition process to defy the pull of the country's tradition of constitutions without constitutionalism.

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Chapter 4

CONSTITUTIONAL REVIEW IN THE ABSENCE OF CRISIS IN BOTSWANA, SWEDEN AND WALES

Sumit Bisarya

For the most part, the assertion that comprehensive constitutional change requires some sort of 'drama' rings true.

4.1. INTRODUCTION

In a seminal article on constitution-making, Jon Elster stated that 'constitutions almost always are written in the wake of a crisis or exceptional circumstance of some sort' (Elster 1995: 370). Elster cites another scholar, Peter Russell, who claimed that '[n]o liberal democratic state has accommodated comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup' (Russell 1993: 106, as cited in Elster 1995: 370). There may be some exceptions: Elster refers to Sweden's 1974 Constitution, for example, while the modernizing changes to Luxembourg's Constitution provide a more recent example (Wiss 2023). Yet, for the most part, the assertion that comprehensive constitutional change requires some sort of 'drama' (Gargarella 2022: 10) rings true.

That is not to say that there are no attempts to review constitutions in non-crisis contexts; however, few of these come to fruition in terms of actual constitutional change. As Elster again points out, 'public will to make major constitutional change is unlikely to be present unless a crisis is impending' (Elster 1995: 394). And citing Russell again, '[a] country must have a sense that its back is to the wall for its leaders and its people to have the will to accommodate their differences' (Russell 1993: 106, as cited in Elster 1995: 395). In his examination of constitution-making in Latin America, Gabriel Negretto reaffirms

this sentiment, noting that the pressure from a crisis can be critical in forcing a long-term-oriented consensus on constitutional change (Negretto 2013: 54).

Notwithstanding the undeniable logic and empirical evidence supporting these claims, countries continue to spend time and resources on constitutional review in the absence of crisis. This piece examines two such cases from 2023—Sweden and Wales—along with one which concluded at the end of 2022—Botswana. It looks at the triggers for each process, the form the process took, the recommendations which emerged and what happened to those recommendations in each case.

4.2. **TRIGGERS AND MANDATES**

4.2.1. **Botswana**

Botswana has been governed under a single constitution since its independence in 1966 and, throughout that time, has been a leading example of democratic governance, stability and economic development in Africa. While there have, over the decades, been several amendments (22 in total), there has been no 'constitutional moment' requiring wholesale upheaval of the constitutional framework. The 2022 process owes its origins to an electoral promise from President Mokgweetsi Masisi, who declared the need for a constitutional review during the campaign trail. This promise, reiterated in his inauguration speech, was fulfilled with the establishment of a Constitutional Review Commission as a Commission of Inquiry in December 2021.

Botswana has been governed under a single constitution since its independence and, throughout that time, has been a leading example of democratic governance, stability and economic development in Africa.

In none of these statements was there a claim of a triggering event or situation which necessitated constitutional review. Rather, there was a general feeling that the Constitution was from a different time, that the country had changed significantly over the intervening decades and that there was a need to examine whether the Constitution was still fit for purpose in modern Botswana. The Constitutional Review Commission's terms of reference (TORs) echoed this lack of a specific reason for constitutional review. Instead, using broad language, they referred to the importance of assessing 'the adequacy of the Constitution' with regard to identity, values, rights, equality, unity and democracy (CRCB 2022: 3).

The vague nature of the commission's raison d'être was reflected in its mandate, which was similarly broad. The TORs required the commission to 'articulate the concerns of the people of Botswana as regards the amendments that may be required for a review of the Constitution' (CRCB 2022: 3).

The broader trigger for constitutional review was international rather than domestic: in response to the trend of democratic backsliding in Europe.

4.2.2. **Sweden**

Having been established by the government in 2020, the Swedish Committee of Inquiry on the Constitution presented its final report in March 2023. It is fair to say that during the preceding years, Sweden had been stable and there was no major political or social crisis. At the same time, however, a number of issues had emerged to disturb the social and political serenity for which the country is usually known—primarily, increasing gang-related violence in Sweden, social and political polarization over immigration policy, and a brutal ISIS (Islamic State in Iraq and Syria) attack in the heart of Stockholm in 2017. Yet the launch of the constitution review process was only partly in response to these issues—with a specific item in the TORs asking the committee to report on freedom of association and terrorist organizations. The broader trigger for constitutional review was international rather than domestic: in response to the trend of democratic backsliding in Europe, the committee was asked to examine how the Constitution could be strengthened to avoid similar dangers befalling democracy in Sweden (Ruotsi 2023). Thus, rather than reacting to a trigger in Sweden's past, the mandate of the committee was more to 'future-proof' the Swedish Constitution against potential dangers lying ahead. In light of this objective, the scope of the Swedish committee's mandate was tailored to specific elements of the Constitution—namely, freedom of association, the amendment procedure and the independence of the judiciary.

4.2.3. **Wales**

Like Sweden, Wales has been relatively stable, with no specific social or political conflict or crisis in its recent past. However, questions over the constitutional structure of the United Kingdom have acquired greater urgency due to the implications of two referendums—on independence for Scotland in 2014 and on Brexit in 2016—coupled with an 'increasingly assertive strain of unionism' by the Conservative Government in Westminster (Elias and Wood 2022). In addition to addressing questions over the constitutional relationship between Wales and the UK, the Welsh constitution review process sought to respond to problems of democracy within Wales, where 'many feel that the system is not listening to their concerns and … many see democracy as beginning and ending with the ballot box and

know little about the way representative institutions work' (Welsh Parliament 2024: 10).

To respond to this context, the commission had two broad objectives: (a) 'to consider and develop options for fundamental reform of the constitutional structures of the United Kingdom, in which Wales remains an integral part' and (b) 'to consider and develop all progressive principal options to strengthen Welsh democracy and deliver improvements for the people of Wales' (Welsh Parliament 2024: 5).

4.3. CONSTITUTION-MAKING BODIES AND PROCESSES

4.3.1. Botswana

The review of the Constitution was conducted by a Presidential Commission of Inquiry into the Review of the Constitution of Botswana (CRCB), established under the Commission of Inquiry Act, which 'empowers the President to appoint commissioners to inquire into any matter in which an inquiry would be for the public welfare' (CRCB 2022: 1).

The CRCB was composed of 19 commissioners, supported by a secretariat with 5 members, also appointed by the president. The commissioners represented diverse backgrounds including 'tribal chiefs, journalists, natural resource specialists, geologists, lawyers, priests, business administration, education, governance, disability law and policy issues, legislative drafting and population studies', with women making up 42 per cent of the membership (Dinokopila 2022).

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Despite the broad-based membership of the commission, the unilateral appointment process—which occurred without consultation with parliament, civil society or chiefs—led to strong criticism from non-governmental organizations, opposition parties, trade unions and some members of the House of Chiefs (Dinokopila 2022). Nevertheless, the commission set about its work in early 2022.

The CRCB stated that its approach would be based on the Setswana culture of *Therisanyo*, which involves broad participation and consultation. It held meetings in all 57 constituencies, both in the form of traditional open *Kgotla* meetings and through meetings with

special interest groups. In total, this amounted to 290 meetings, with cumulative attendance of 28,524 citizens.

The CRCB complied with its deadline of nine months and submitted a comprehensive report in September 2022.

The constitution review in Sweden was conducted from within parliament by an all-party committee.

4.3.2. **Sweden**

Unlike the processes in Botswana (and in Wales, as discussed below), the constitution review in Sweden was conducted from within parliament (the Riksdag) by an all-party committee—the Committee of Inquiry on Strengthening the Protection of Democracy and the Independence of the Judiciary (hereafter, the Committee of Inquiry). This was chaired by the President of the Supreme Court, Anders Eka, and assisted by staff from the Riksdag Secretariat and external experts. In total, the committee comprised 13 members, of which 6 were women, with 4 supporting staff.

A further contrast with the Botswana and Wales processes was the way the Committee of Inquiry conducted its work—that is, through more expert meetings than public consultations. The committee met a total of 22 times, with several of these meetings attended by both national and international experts as well as representatives from court administration in other Scandinavian countries and a number of relevant Swedish state institutions. In addition, the committee established a reference group consisting of senior judges to input into their work (Committee of Inquiry on the Constitution of Sweden 2023: 106).

The Committee of Inquiry submitted an interim report on freedom of association and terrorist organizations in March 2021, and submitted its final report in March 2023.

4.3.3. **Wales**

In Wales, the body charged with conducting the review was an independent commission—the Independent Commission on the Constitutional Future of Wales (hereafter, the Independent Commission). The Independent Commission was launched by the Labour-led Welsh Government at the end of 2021 and consisted of 11 members, including 7 women. Four members were selected by the main political parties in Wales and the remaining seven were of various backgrounds. The latter group comprised experts drawn from diverse walks of life, including two well-known public figures as co-chairs—Rowan Williams, former Archbishop of Canterbury, and Laura

McAllister, a Professor of Public Policy and Governance who is also a former professional football player.

The Independent Commission conducted a number of expert consultations and evidence sessions, and it encouraged special interest organizations to make written submissions. But the centrepiece of the commission's work was an innovative and extensive public consultation campaign which covered the breadth of Wales. A Community Engagement Fund was also used to support grassroots organizations in holding their own consultations.

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As opposed to the Commission of Inquiry in Botswana, which submitted its report to the government, the Independent Commission made its final report directly available to the public, publishing it in January 2024 (Independent Commission on the Constitutional Future of Wales 2024).

4.4. **SUMMARY OF MAIN RECOMMENDATIONS**

4.4.1. **Botswana**

In Botswana, the CRCB made a vast set of recommendations, numbering 86 in total, and these can be found in summary form in Chapter 4 of its final report. The recommendations covered the breadth of the Constitution, including:

- the renaming of political units to tribally neutral names;
- the addition of socio-economic rights, including health, education and labour rights;
- the addition of 'intersex' as a grounds for non-discrimination;
- revisions to the procedure for appointing the Chief Justice and to the composition of the Judicial Service Commission;
- strengthening of the independence of the Director of Public Prosecutions;
- the introduction of public funding for political parties;
- candidate quotas for women;

- legalization of abortion;
- changes to the process for acquiring citizenship; and
- measures for land reform.

Notably, a number of CRCB recommendations went beyond constitutional amendments and instead concerned law or policy changes.

Notably, a number of CRCB recommendations went beyond constitutional amendments and instead concerned law or policy changes. For example, they included detailed recommendations on education policy and penal code changes.

4.4.2. **Sweden**

The recommendations of the Swedish Parliamentary Committee were divided into two phases. First, an interim report submitted in March 2021 put forward a proposal to amend the provision on freedom of association in the Instrument of Government to allow for limitations regarding groups that engage in, or support, terrorism. Its final report then focused on potential safeguards to prevent democratic backsliding and provided recommendations to change the amendment rule and strengthen the independence of the judiciary.

With regard to changing the amendment rule, the current rule requires an amendment to be proposed by a simple majority in parliament and then approved by a simple majority in the subsequent legislature following elections. The committee proposed instead that both majorities be of the number of members, rather than the number of votes, and that the second approving vote be by a supermajority of two thirds. The existing rule that one third of the members can send the proposal to referendum would remain unchanged, and the committee explicitly ruled out requiring different thresholds for different provisions of the Constitution.

The Committee of Inquiry recommended strengthening the independence of the judiciary, in a variety of ways, including through:

- establishing a board composed of a majority of judges which would oversee the government agency responsible for court administration and have the responsibility of proposing a draft budget for the judiciary;
- strengthening the process for appointing judges through the establishment of a specific body, also composed by a majority of judges, which would be responsible for judicial nominations; and

- amending the Instrument of Government to provide that the judicial retirement age should be specified by statute, and that changes to the status which lower the retirement age cannot affect sitting judges. (This tactic was used in recent episodes of democratic backsliding in several countries—see the International IDEA publication Bisarya and Rogers 2023: 100.)

4.4.3. **Wales**

The recommendations of the Independent Commission can be divided into three categories: (a) the overall relationship of Wales to the UK; (b) recommendations for protecting devolution under the current arrangements; and (c) measures to strengthen democracy within Wales (Elias 2024).

With regard to the place of Wales in the UK, the commission canvassed three options during its consultations—enhanced devolution, a federal arrangement and full independence. The final report does not provide a recommendation in favour of one option over another. Rather, it states that each one is viable and provides an analysis framework with suggested criteria on which such a decision should be based.

With regard to the place of Wales in the UK, the commission canvassed three options during its consultations—enhanced devolution, a federal arrangement and full independence.

On the subject of protecting devolution, the commission provides seven categories of recommendations regarding legislating for and institutionalizing intergovernmental relations. These include legislating for the Sewel Convention—under which the consent of the devolved government is necessary for Westminster to pass legislation on a devolved issue—as well as more budgetary autonomy for Wales and more devolution across broadcasting, energy, justice, policing and rail services.

Lastly, regarding democracy within Wales, the commission had three recommendations—(a) strengthening the capacity for democratic innovation and inclusive community engagement; (b) a project to engage citizens in a process of drafting constitutional principles for Wales; and (c) a review of the Welsh legislature (Senedd) from the perspective of the voter and democratic accountability.

4.5. **RESULTS**

The bill is broad in its scope and takes on board many of the CRCB's most significant proposals but has nevertheless been met by strong opposition from civil society.

4.5.1. **Botswana**

In response to the CRCB report, the government produced a white paper which responded to the commission's proposals. The paper was discussed in parliament in November 2023, and the government then presented a Constitution Amendment Bill in March 2024. The bill is broad in its scope and takes on board many of the CRCB's most significant proposals but has nevertheless been met by strong opposition from civil society.

Among the proposals included in the Amendment Bill are:

- the inclusion of socio-economic rights, including the right to health, education and work, as well as labour rights of collective bargaining and the right to strike;
- prohibition of discrimination against 'intersex' persons and persons with disabilities;
- disqualification of retired presidents who have served for a period of 10 years from elected office;
- increasing the number of members of parliament appointed by the president from 6 to 10; and
- changes to the composition of the Electoral and Judicial Service Commission and with regard to the appointment of the Chief Justice and President of the Court of Appeal.

The bill has been met with some opposition, in particular from church groups who object to the inclusion of non-discrimination against intersex persons and, broadly, from civil society groups who denounce the process as unilateral and non-participatory. However, the government has the numbers in the legislature to ensure the passage of most of the provisions, while a few will also require a referendum.

4.5.2. **Sweden**

As discussed above, the Committee of Inquiry submitted an interim report which focused on the limitation of freedom of association for groups which support or conduct terrorism. The recommendations were accepted, and the Instrument of Government was amended accordingly in January 2023. The rest of the proposals went through

a process of public consultation during the latter half of 2023 before final consideration by the Department of Justice and, ultimately, by parliament. As the amendment procedure requires an intervening election between proposal and ratification, the earliest the proposals could be implemented would be following the 2026 elections.

4.5.3. **Wales**

The uptake of recommendations from the Welsh Independent Commission can be divided into two parts. With regard to recommendations on strengthening democracy within Wales, the Welsh Government has accepted the commission's proposals and committed to their implementation (Elias 2024). However, with regard to the recommendations on the relationship between Wales and Westminster, these fit into a larger debate on devolution, which also includes the report from the Commission on the UK's Future, headed by former Prime Minister Gordon Brown. In a debate on the Independent Commission's report in the Senedd, First Minister Mark Drakeford, of the Labour Party, commended and lent support to the recommendations on strengthening devolution and the powers of the Welsh Parliament. Meanwhile, the Leader of the Opposition, Andrew Davies of the Conservative Party, stressed that the member of the commission nominated by the Conservative Party was not there as a representative of the party, asserting that the current settlement regarding devolution was, in his view, robust (Welsh Parliament 2024). Judging by these early responses, it seems unlikely that the commission's recommendations on devolution will go through, notwithstanding the results of the 2024 general elections as there are also senior leaders in the Labour Party who have already stated their opposition to some of the key proposals of the commission, such as the devolution of police and justice (Elias 2024).

4.6. **FINAL REFLECTIONS**

It is not possible to draw any major conclusions from these three disparate cases. However, one initial reflection is that the prevalence of constitution-making in the absence of crisis in these and many other countries indicates the importance of more study in this area. This would provide a better understanding of why and when such processes occur and how they should be structured to produce positive outcomes.

The prevalence of constitution-making in the absence of crisis in these and many other countries indicates the importance of more study in this area.

It may sometimes be worth engaging in constitutional review processes, accepting whatever short-term uncertainty they may bring, in exchange for proactive prevention of governance frailty or crisis.

Directions for possible study are many, but from these cases, two potential avenues stand out. Firstly, there is often concern that undertaking a review of a constitution can be a polarizing exercise, which can open up societal wounds or, indeed, create new ones. Where such processes are participatory, they risk exacerbating identity cleavages and prejudices in society; where they are not, they will be criticized as being elite-driven and exclusionary. However, in none of the three cases explored here did the process of constitutional review create any level of societal or political instability. On the contrary, it may sometimes be worth engaging in such processes, accepting whatever short-term uncertainty they may bring, in exchange for proactive prevention of governance frailty or crisis.

Secondly, as discussed in the introduction to this chapter, the chances of making the difficult compromises often necessary for constitutional change are greater when there is a crisis to focus minds and engender political will. This is undoubtedly true as a general statement, but the processes in Sweden and Botswana provide us with two wrinkles. Firstly, there may be areas of existing or potential consensus where a constitution review commission can help provide options, flesh out details and/or legitimize political decisions. The recommendation of the Swedish Committee of Inquiry on freedom of association and terrorism seems to be an example of this. Secondly, in contexts where one party has a large enough majority to pass constitutional amendments unilaterally, a constitution review commission can be useful in generating ideas for political review, as well as donating legitimacy through public consultation. However, in democratic contexts, governing parties must be careful not to overplay their hand—if the amendments either are broadly unpopular or touch upon 'red-line' issues for the political opposition, the result will likely be heightened instability.

Relatedly, there is the question of what constitutes success in these kinds of processes. Belize is currently undergoing a process of constitutional review, following a process which culminated in 2000 and was deemed unsuccessful. However, given that over 30 per cent of the recommendations from the 2000 Commission were actually implemented, is that really a failure or, in fact, a successful exercise? It would be useful to study the level of uptake of recommendations and the kinds of recommendations that are more frequently accepted, as this would provide valuable input and guidance for the work of similar commissions.

Lastly, two further points are worth noting on the framing of constitutional review processes in the absence of crisis. First, while there was no major crisis in any of the countries discussed here, each process did link its work to an overarching narrative. In Botswana, this was the fact that the country was still operating under its independence Constitution, which Botswana citizens had little to no say in making. In Sweden, the main report was linked to the spectre of democratic backsliding which was haunting Europe. In the UK, the referendums on Brexit and Scottish independence provided a background of constitutional instability and raised questions about Wales's own relationship to the UK and the world beyond. Perhaps these larger narratives lent a stronger sense of urgency and importance to the work of these commissions, giving it a raison d'être that went beyond merely serving as a routine 'health check' of their countries' constitutional viability.

Further, the review of these three countries is notable in its scope. In Botswana, the review was essentially unbound, while in Wales, the Independent Commission also had a very broad mandate to examine external and internal factors relating to Wales's democracy. In Sweden, by way of contrast, the mandate was more targeted. In cases where unilateral constitutional change is not possible, it does seem wise for political parties to frame the issues for review ahead of time. This may increase the chances that the review body's recommendations will met favourably.

In cases where unilateral constitutional change is not possible, it does seem wise for political parties to frame the issues for review ahead of time.

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Chapter 5

CONSTITUTIONAL INNOVATIONS IN ENVIRONMENTAL AND CLIMATE ACTION: RIGHTS, LITIGATION AND STATEHOOD REDEFINED

Juliane Müller

The year 2023 stood out as a year of climatic extremes and set a new precedent by becoming the warmest year on record.

5.1. INTRODUCTION

Like preceding years, 2023 was not immune to the profound impacts of climate change. Indeed, it stood out as a year of climatic extremes and set a new precedent by becoming the warmest year on record. Not only did 2023 see a significant rise in global average temperatures compared to 2022 but it was also the first year in history to record temperatures more than 1°C above pre-industrial 1850–1900 levels every day (IPCC 2023; WMO 2024). This period was marked by unprecedented heatwaves and droughts alongside extreme storms and heavy rainfall events (IPCC 2023).

Efforts to combat climate change have been multifaceted, encompassing increased investment and the development of innovative technologies, as well as policies, international agreements and legal actions through courts. Constitutions play a vital role in transforming societies into new democratic forms of governance capable of meeting international normative standards on good governance, human rights and the rule of law (Weinrib 2006; Ghaleigh, Setzer and Welikala 2022: 520; Ginsburg 2022). Accordingly, stakeholders are beginning to recognize the promise that constitutions hold to address climate change and guide environmental safeguarding within democratic systems. Surveying various national constitutions reveals great diversity in the way environmental issues are articulated. The range of textual constitutional provisions includes many layers and types of

environmental protection. Within those, most constitutional systems recognize the rights of citizens with regard to the environment, such as the right to a healthy environment. But several countries have now gone further, and examples of those who have also incorporated state or citizen duties relating to climate change include Algeria, Bolivia, Côte d'Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela, Viet Nam and Zambia (Ghaleigh, Setzer and Welikala 2022: 523). Nevertheless, Ecuador remains the only country to explicitly protect the inherent rights of nature in its Constitution. This allows anyone to pursue legal remedies for violations of the rights of non-human entities, emphasizing the environment's value beyond human benefit.

Against this backdrop, the potential role of constitutions in offering a stable foundation for environmental democracy has also been a key point of discussion in 2023 and has fed into an evolving dialogue on integrating environmental stewardship within the highest of a country's laws. This chapter will therefore survey constitutional reforms related to the environment and climate change from 2023 to mid-2024. It begins with a global overview of various debates and constitutional developments regarding the protection of the environment and mitigating climate change. It then provides a more detailed analysis of the constitutional amendment process in Tuvalu, which concluded in October 2023. This process culminated in the adoption of a new definition of statehood as a promise to its citizens, as well as a declaration to the international community to ensure the nation's continued existence, despite the loss of its physical territory due to rising sea levels.

The potential role of constitutions in offering a stable foundation for environmental democracy has also been a key point of discussion in 2023.

5.2. SIMMERING PROGRESS: THE CONSTITUTIONAL APPROACH TO ENVIRONMENT AND CLIMATE CHANGE FROM 2023 TO MID-2024

In 2023 several countries proposed new constitutional provisions related to safeguarding the environment and addressing climate change. Although none has yet progressed through the legislative process, discussions on environmental rights at a constitutional level are increasingly gaining traction.

5.2.1. Chile: Second time is not the charm

In September 2022, **Chilean** voters rejected a new constitution that would have provided groundbreaking protections for the rights

of nature. The 2022 proposal featured a comprehensive section dedicated to environmental concerns, introducing measures on the rights of nature and enhancing safeguards against the activities of extractive industries. (These are discussed in greater detail by Davies and Hickey (2022: 31–39) in International IDEA's *Annual Review of Constitution-Building 2021*.) However, apprehensions about the nationalization of water resources played a significant role in the proposal being rejected in the vote (van der Spek 2024).

The proposal suggested that all water should be considered a national public good for public use, directly challenging Chile's long-standing economic and social model of privatized water rights, which was established during the Pinochet dictatorship. The exploitation of natural resources is a pivotal aspect of Chile's economy, particularly within the mining, energy and farming sectors. However, this exploitation not only incurs high environmental costs and endangers the living spaces of Indigenous communities but also fails to distribute its benefits equitably among all citizens, including Indigenous peoples (Larrain and Schaeffer 2010; Sengupta 2021). Thus, the proposed changes were intended to protect the environment but also to make access to natural resources more equitable, and this raised concerns, particularly from those who benefit from the current policies (Fitch Ratings 2023).

In its second attempt to rewrite the Constitution, the newly elected Constitutional Council significantly reduced such environmental ambitions. The experts who worked on a pre-draft—and who were selected by the political parties represented in Congress—avoided changes that were deemed too radical. In its contributions to the most recent draft, the Environmental Constitutional Committee of the Constitutional Council declined a proposal aimed at protecting the marine environment, biodiversity, glaciers and natural landscapes. Also omitted was an initial proposal that would have made the state accountable for tackling climate change (van der Spek 2024).

The 2023 draft fell short of guaranteeing basic principles of modern environmental rights, such as the right to live in a healthy and balanced environment.

Chapter 16 of the 2023 draft included general statements regarding the environment, sustainability and development. Nevertheless, the 2023 draft fell short of guaranteeing basic principles of modern environmental rights, such as the right to live in a healthy and balanced environment. Environmental advocates found that the draft did not establish sufficient safeguards to balance development and economic growth with environmental concerns, and that it continued to allow the private ownership and exploitation of environmental resources, particularly water (Galaz 2023; van der Spek 2024). Given

these shortcomings, the rejection of the second draft in December 2023 did not disappoint many environmental activists and experts (van der Spek 2024).

5.2.2. Green rights rising: The regional, national and substate initiatives for environmental constitutional amendments

In the **United States**, 2023 has been significantly shaped by movements that advocate for the inclusion of Green Amendments, supported through litigation and courts interpreting these norms. Green Amendments refer to environmental protections embedded within the Bill of Rights section of a US state's constitution. Prior to 2023, such amendments had already been adopted by three states—Pennsylvania (1971), Montana (1972) and New York (2021). According to a database set up by the National Caucus of Environmental Legislators, since the start of 2023, at least nine states have been considering legislation to introduce a Green Amendment into their state's Bill of Rights (NCEL 2023). Among them are Washington (Washington State Legislature n.d.), California (California Legislative Information 2024), Arizona (Arizona State Legislature n.d.), New Mexico (New Mexico Legislature 2024), Hawaii (Hawaii State Legislature n.d.), Kentucky (Kentucky General Assembly n.d.), West Virginia (West Virginia Legislature 2024), Vermont (Vermont General Assembly n.d.) and New Jersey (New Jersey Legislature n.d.). While all of these proposed amendments include the right to a healthy environment, most states also include language that guarantees that the right to a healthy environment is enforced equitably—that is, regardless of race, income or geography (see, for example, Nevada Legislature n.d.). Furthermore, some states are also proposing to include the right to a healthy and/or stable climate and attach historic or cultural values to their Green Amendments (State of Maine Legislature n.d.; Tennessee Legislature n.d.).

When amendments to state constitutions lack political will or encounter other significant political obstacles, substate constitutions can serve as a viable alternative. The merits of substate constitutions can be seen in *Held v. Montana*, a groundbreaking lawsuit in 2023 where 16 young individuals challenged a state law in Montana that prohibited the consideration of greenhouse gas emissions in environmental reviews, invoking their constitutional right to a clean and healthy environment as outlined in article 2, para. 3 of Montana's Constitution. The court ruled both the prohibition and a subsequent amendment seeking to uphold it as unconstitutional, highlighting the significant impact of Montana's greenhouse gas emissions on climate change and the particular vulnerabilities of young people.

When amendments to state constitutions lack political will or encounter other significant political obstacles, substate constitutions can serve as a viable alternative.

This decision sets a precedent for future climate litigation, while Montana plans to appeal (*Held v. Montana* 2023).

Aruba could become the second country to recognize the rights of nature in its Constitution.

Following Ecuador's lead, **Aruba** could become the second country to recognize the rights of nature in its Constitution (Hickey 2024). Prompted by concerns over environmental degradation and the state of the country's ecosystems, Ursell Arends, as the Minister of Nature, integrated the rights of nature into the agenda of his progressive RAIZ political party. By 2021, this concept had also been adopted by the new coalition government between the People's Electoral Movement (Movimiento Electoral di Pueblo) and RAIZ. In 2023, Arends organized a significant Earth Day event with national officials and community groups, as well as international bodies, such as the Global Alliance for the Rights of Nature and the Earth Law Center, and through this event, initiated the legal steps to amend the Constitution of Aruba to include these principles (Surma 2023). The proposed amendment would acknowledge nature's legal rights to protection, conservation and restoration, alongside the human right to a clean, healthy and sustainable environment. Seeking to recognize and enforce both the rights to nature and the human right to a healthy environment underlines the interdependence between human well-being and nature (Surma 2023). After the first dialogue with Aruba's Parliament and the Council of Ministers, the draft law was submitted to the Legislation and Legal Affairs Department in April 2023. However, the amendment must still pass several legislative hurdles, including approval by a two-thirds majority—or at least 14 members—of Aruba's Parliament. Arends expressed confidence that the amendment would secure the necessary two-thirds majority support. Should this process be successful, it would also mark the first change to Aruba's Constitution since its enactment in 1986 (Surma 2023).

In **Malta**, the Nationalist Party (Partit Nazzjonalista), serving as the opposition, presented a bill to the Maltese Parliament on 5 June 2023 to include a right to the environment as a fundamental right (The Malta Independent 2023). Described as 'the strongest legislation in favor of the environment ever proposed in [the] country', the bill seeks to expand the definition of 'environment' to include air, water, land, ecosystems and all their components (ConstitutionNet 2023). This encompasses both natural and physical resources essential for human survival. Furthermore, the legislation aims to broaden this definition to also cover social conditions, aesthetic coherence and cultural attributes, and it thus marks a significant step towards comprehensive environmental protection. The

proposed constitutional amendment requires a two-thirds majority in parliament to pass (The Malta Independent 2023).

The Summit of Heads of State and Government of the Council of Europe, held in Iceland's capital Reykjavik in May 2023, discussed the prospects of recognizing the right to a healthy environment across its 46 member states. During its six-month presidency in the first half of 2023, the Icelandic Presidency made it one of its priorities to strengthen the environmental component of the human rights system. Incorporating a new protocol into the European Convention on Human Rights (ECHR) would provide the right with the highest degree of legal protection. The summit concluded with the adoption of the Reykjavik Declaration, which calls for 'additional efforts to protect the environment, as well as to counter the impact of the triple planetary crisis of pollution, climate change and loss of biodiversity on human rights' (Council of Europe 2023). In an appendix, the declaration details the connections between human rights and the environment, acknowledging that a clean, healthy and sustainable environment is essential for the complete realization of human rights by current and future generations (Council of Europe 2023: Appendix V). Nevertheless, it falls short of delivering a solid commitment to legally recognizing the right to a clean and healthy environment (Council of Europe 2023).

The Reykjavik Declaration falls short of delivering a solid commitment to legally recognizing the right to a clean and healthy environment.

5.2.3. European Court of Human Rights climate litigation: Lack of climate action can violate constitutional rights

Although a legal commitment to a human right to a clean, healthy and sustainable environment is yet to come, on 9 April 2024, the European Court of Human Rights (ECtHR) presented judgments of three climate change litigation cases based on existing provisions of the ECHR. In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, a group of over 1,000 elderly women in Switzerland, called KlimaSeniorinnen (Senior Women for Climate Protection), argued that Switzerland's inadequate action on climate change posed a specific health risk to them, especially given their vulnerability to heatwaves exacerbated by global warming. The plaintiffs based their arguments on articles 2 (right to life) and 8 (right to respect for private and family life) of the ECHR, asserting that Switzerland's insufficient climate change measures had violated their rights to life and health. Furthermore, they raised concerns under articles 6 (right to a fair trial) and 13 (right to an effective remedy), critiquing the Swiss legal system for its failure to seriously address their concerns and for not providing effective remedies for their grievances. In applying these rules to the facts of the case, the ECtHR considered whether the impact of

heatwaves, exacerbated by climate change, on the plaintiffs could be seen as a failure by Switzerland to protect their rights under articles 2 and 8. After assessing Switzerland's climate policies, greenhouse gas emission targets and the specific risks posed to the elderly, the court concluded that there was a significant connection between the state's climate action (or inaction) and the potential harm to the plaintiffs. It highlighted the necessity for states to have concrete, effective climate policies that prevent endangering human health, thereby protecting individuals' rights under the ECHR. The ECtHR ruled in favour of the plaintiffs, finding that Switzerland had indeed failed to fulfil its obligations under the ECHR by not taking adequate measures to combat the adverse effects of climate change (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* 2024).

In another case, *Carême v. France*, Carême, a former mayor of Grande-Synthe, France, brought a complaint against the French Government to the ECtHR. Carême argued that France's failure to adequately combat climate change infringed on the rights protected under articles 2 and 8 of the ECHR, which cover the right to life and the right to respect for private and family life, respectively. The court, however, ruled the case as inadmissible, determining that Carême lacked sufficient personal victim status since he no longer resided in the affected area (*Carême v. France* 2024).

A third case, *Duarte Agostinho and Others v. Portugal and 32 Other*s, was similarly dismissed on procedural grounds. In this case, the ECtHR addressed a complaint from six young Portuguese plaintiffs against 33 states, including their home country, Portugal, alleging that the states' inadequate action on climate change violated their rights to life and to respect for private and family life as stipulated by articles 2 and 8 of the ECHR. The court, however, focused on procedural issues, noting that the plaintiffs had not exhausted all domestic legal remedies available in their countries—a precondition for admissibility to the ECtHR. Consequently, the court declared the case inadmissible without examining the substantive claims about climate action failures (*Duarte Agostinho and Others v. Portugal and 32 Others* 2024).

Verein KlimaSeniorinnen Schweiz and Others v. Switzerland **shows that existing provisions of the ECHR can be invoked to oblige states to take more responsibility in mitigating climate change and that a lack of climate action may violate protected constitutional rights.**

These rulings highlight the ECtHR's strict adherence to procedural requirements, such as the need for claimants to demonstrate that they have been directly and personally impacted by state failures on climate change mitigation or that they have exhausted all national legal remedies before substantive legal claims can be addressed. However, if the procedural requirements are fulfilled, *Verein*

KlimaSeniorinnen Schweiz and Others v. Switzerland shows that existing provisions of the ECHR can be invoked to oblige states to take more responsibility in mitigating climate change and that a lack of climate action may violate protected constitutional rights. This sets a vital and historic precedent in European climate litigation.

5.3. **USING CONSTITUTIONAL AVENUES OF CITIZEN PARTICIPATION FOR CLIMATE ACTION**

In the face of climate change, constitutional avenues of citizen participation are becoming increasingly important.

In the face of climate change, constitutional avenues of citizen participation are becoming increasingly important. Climate policies often require significant changes to how societies function and live. Citizen input and buy-in can be achieved through deliberative processes like citizens' assemblies or public referendums, which can increase the democratic legitimacy and public acceptance of such transformative climate policies (Perlaviciute and Squintani 2020: 341; Wells, Howard and Brand-Correa 2021). Citizen participation can also be effective in overcoming political inertia, particularly as public climate action in representative democracies can be slowed down or hindered by lobbying, short-term electoral cycles and the prioritization of economic growth over environmental concerns (Wells, Howard and Brand-Correa 2021: 5).

Citizens' assemblies on climate change are designed to strengthen democratic processes by directly involving the public in complex decision making, typically through a randomly selected but demographically representative group of citizens. These assemblies deliberate on specific issues, such as climate change, and recommend actions to governments, which can help bridge the gap between public sentiment and legislative action. Furthermore, climate change is not just a scientific issue; it is also a societal one and, as such, it requires policy responses that involve value judgements to balance competing interests. Citizens' assemblies offer a platform for people to engage with scientific evidence and consider ethical trade-offs. By incorporating diverse perspectives, these assemblies can develop balanced, thoughtful and informed policies that reflect the varied values and priorities of the whole community (Perlaviciute and Squintani 2020: 341; Wells, Howard and Brand-Correa 2021).

However, increasing citizen participation does not necessarily foster more public climate action. Instead, citizen participation in environmental decision making can certainly also be a double-

edged sword. For instance, in Switzerland in 2021, a referendum to pass stricter climate and environmental measures was rejected by voters (Davies and Hickey 2022: 28–29). This reflects one of the risks associated with direct democracy: voters may reject essential policies due to short-term interests, lack of information or economic concerns, and this can delay necessary actions to combat climate change.

On the other hand, when governments refuse to accept the results of referendums, it can pose challenges for democracy. For example, in Ecuador in 2023, a referendum on protecting Yasuní National Park from oil exploration was approved by voters, yet the government had initially indicated that it might not honour this decision.

Ecuador is one of the most biodiverse countries in the world and was the first to give nature inalienable rights in its Constitution.

Ecuador is one of the most biodiverse countries in the world and, as mentioned above, was the first to give nature inalienable rights in its Constitution. The decision by the former President Correa to authorize the exploitation of crude oil in the Yasuní National Park sparked a 10-year campaign coordinated by the Yasunidos Collective, a coalition of Indigenous people, environmental activists and feminists. Despite state interference, the campaign succeeded in initiating a public consultation that was approved by the Ecuadorian Constitutional Court and took place in August 2023. The referendum passed with nearly 60 per cent in favour of Yasuní preservation, and yet the government announced its intention to proceed with the drilling. A small gain, however, was that the state oil company declared in November 2023 that it would gradually end, and eventually cease, drilling within the area covered by the referendum by the end of 2024 (Maxwell 2023; Rainforest Rescue 2023).

Citizens' assemblies are assuming a growing role in driving climate action and safeguarding the environment (Convention Citoyenne pour le Climat 2020; Scottish Government 2022; Bürgerrat 2023; University of Southampton 2023). Numerous national, regional and local citizens' assemblies, dedicated to discussing climate change and environmental protection, were held across various countries in 2023, including Denmark (Aarhus Climate Assembly n.d.), Germany (Bürgerrat Klima n.d.), Italy (City of Milan n.d.; IOPD 2023), Maldives (Shareef and Ismail 2023), the Spanish island of Mallorca (GOB Mallorca 2024) and the United Kingdom (KNOCA n.d.; Westminster City Council n.d.). Notably, the world's first permanent citizens' assembly on climate was established in 2023 in Brussels, Belgium (Buis 2023).

In 2023, **Ireland** became the first country in the world to host a citizens' assembly on biodiversity, the Biodiversity Loss Assembly (Quill 2023). This was agreed to by the Irish Government following a declaration by Dáil Éireann (the lower house of the Irish legislature) of a national climate and biodiversity emergency in 2019. The Biodiversity Loss Assembly differed from previous assemblies in several respects. It focused solely on the issue of biodiversity loss, dedicating five weekends to this topic as well as organizing a stakeholder engagement meeting and innovative biodiversity field trips. Unlike past assemblies, it did not require participants to be registered voters in Ireland. Instead, it opened eligibility to all residents of Ireland, inviting them through letters sent to every household. From the positive responses, a representative group of 99 lay participants was chosen through a sampling process (Citizens' Assembly of Ireland n.d.). In April 2023, the citizens approved by a majority vote the assembly's final report, which contained 159 recommendations. These included a proposal to amend the Constitution—a departure from its original government mandate, which did not contain a constitutional reform component. Other key proposals were rights to a clean environment and climate stability; substantive rights such as health and safety; and procedural rights, including access to information and participation in decision making. The assembly also proposed granting nature legal personhood, with rights to exist, flourish and regenerate. This proposal was supported by 74 per cent of participants for substantive rights and 78 per cent for procedural rights, thus enabling nature to be represented in legal and administrative processes (Walsh 2023).

In 2023, Ireland became the first country in the world to host a citizens' assembly on biodiversity.

Recognizing the recommendations from the citizens' assembly, the Irish Government stated that it had incorporated some of the suggestions into its National Biodiversity Action Plan (NBAP), which was unveiled in January 2024 (Irish Department of Housing, Local Government and Heritage 2024; Irish Government n.d.: 5). The proposals contained in the NBAP include exploring ways of giving formal recognition to the rights of nature, including potential constitutional change—a key recommendation of the citizens' assembly (Citizens' Assembly of Ireland 2023: 1; Irish Government n.d.: 65). This plan also mandates the National Parks and Wildlife Service to investigate the legal acknowledgement of the rights of nature, considering the possibility of amending the Constitution to do so (Walsh 2023).

Tuvalu has taken significant steps to newly define statehood, deviating from customary international law.

5.4. TUVALU'S STATEHOOD: PIONEERING NEW CONCEPTS IN CONSTITUTIONAL RESPONSES TO CLIMATE CHANGE

Amid the developments described above, **Tuvalu** has stepped into the spotlight regarding advances in environmental constitutionalism in 2023. The country is composed of nine small islands, which are all low-lying, with no point in Tuvalu higher than 4.5 metres above sea level. The country has highlighted the challenges of statehood in the face of climate change. To ensure its existence beyond its physical territory—which is expected to become increasingly uninhabitable by 2050 due to rising sea levels (SPREP 2023)—Tuvalu has taken significant steps to newly define statehood, deviating from customary international law. Given that this emerging challenge to the concept of statehood also has foundational implications for constitutional practices, this development could affect other countries in the future. In the era of climate change, Tuvalu's recent constitutional amendment stands out as a pioneering example—one that addresses the evolving concept of statehood as it grapples with the existential challenges posed by climate change.

Tuvalu was formerly part of the Gilbert and Ellice Islands Protectorate, which was under British rule from 1892 until Tuvalu became a separate colony in 1916 and then gained full sovereignty in 1978. It is now a constitutional monarchy, with King Charles III as its head of state. Internal political issues prompted the Government of Tuvalu to consider reform of its 1986 Constitution. The constitutional review process scrutinized executive and parliamentary relations, international law commitments and the socio-economic and political landscape of Tuvalu. However, beyond the immediate political concerns, several other critical issues had led to calls for a constitutional revision. These included the Constitution's inadequate handling of religion and religious freedom, its silence on gender equality and its failure to recognize the importance of including marginalized populations, such as persons with disabilities (Mozeem 2018). Furthermore, the previous Constitution did not address environmental concerns (Mozeem 2018).

The Constitutional Review Committee, established in 2020, published its final report on 12 December 2022, simultaneously with the Constitution of Tuvalu Bill 2022. This led to the passing of the Constitution of Tuvalu Act 2023 by Tuvalu's Parliament on 5 September 2023. The act brought forth substantial changes to the

Constitution, which officially came into effect on 1 October 2023 (EDO 2023).

Tuvalu's amendments included a new definition of statehood in response to climate change. Their definition of statehood extends beyond physical aspects to encompass intangible ones like culture and heritage. Furthermore, section 2(1) of the Constitution envisions the country enduring 'in perpetuity', regardless of changes to its physical landmass. This new approach to statehood diverges from the traditional criteria outlined in article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which defines a state by its territory, population, government and capacity for international relations—elements historically considered the backbone of statehood under customary international law.

This definition had been discussed long before the threats of climate change emerged. The possibility of small island nations being completely swallowed by rising sea levels, induced by global warming, has thus also posed a challenge for the international legal doctrine. International law is silent or uncertain regarding what would happen to the statehood of nations like Tuvalu, which are threatened by sea level rises and climate change and are at risk of permanently losing their defined physical territory (EDO 2023). Given those international uncertainties, the Constitutional Review Committee intended to signal to Tuvalu's people and to the international community that its statehood would be preserved, despite the potential loss of its territory (EDO 2023).

International law is silent or uncertain regarding what would happen to the statehood of nations which are threatened by sea level rises and climate change and are at risk of permanently losing their defined physical territory.

Dr Bal Kama, an advisor on the statehood section of Tuvalu's Constitution, highlights two major consequences of Tuvalu's constitutional amendment. Firstly, Tuvalu has set a precedent as the first country to constitutionally entrench the recognition and perpetuity of its statehood in the face of climate change impacts. This move is distinct from the more common approach of relying on diplomatic assurances and international or regional agreements. Secondly, Tuvalu's pioneering approach could inspire other states to undertake similar legal and constitutional reforms. This, according to Dr Kama, has the potential to influence state practices globally, contributing to the development of a new customary international law on statehood. Such a law would recognize and preserve the statehood of nations threatened by the impacts of climate change, marking a significant shift in how global governance addresses climate-induced state vulnerability. This is echoed by various scholars who have already discussed and emphasized the need for

a re-evaluation of the statehood criteria and the potential for non-territorial forms of statehood recognition (McAdam 2012; Farran 2023; Kucharski 2023).

Exploring the concept of digital sovereignty raises the critical question of whether virtual land could serve as a new domain for exercising governmental authority.

During the 2022 UNFCCC Conference of the Parties (COP 27), Simon Kofe, Tuvalu's Minister of Justice, Communication and Foreign Affairs, discussed the innovative concept of transforming Tuvalu into a 'digital nation'. This futuristic vision involves offering public services and safeguarding cultural heritage online, should its inhabitants have to relocate to different countries. Last year, a replica of the country was integrated into the metaverse (virtual worlds in which users represented by avatars interact) to digitally preserve an embodiment of the island (Buk 2023). Kofe suggested that through the metaverse, Tuvalu could continue to operate as a sovereign state, despite its people living elsewhere. Exploring the concept of digital sovereignty raises the critical question of whether virtual land could serve as a new domain for exercising governmental authority—a thought experiment that contemplates a shift from traditional to digital forms of sovereignty in response to unprecedented challenges. Suggestions have also been made to explore the potential of non-fungible tokens (NFTs) to represent real and virtual real estate as a means of preserving Tuvalu's economic resources and sovereignty (Kelly and Foth 2022).

The question of statehood is also significant with regard to the island's exclusive economic zone (EEZ). Selling fishing licences to international fishing boats makes up about 50 per cent of Tuvalu's gross domestic product (GDP), with more than half of the adult population employed in the fishing sector. Consequently, its EEZ is a major contributor to the country's prosperity and to that of its citizens (Farran 2023). With this new provision, the country also wants to highlight that it expects to retain those claims even if its physical territory vanishes (*The Economist* 2023). Indeed, given the similar fate feared by other Pacific Island countries, this issue may become critical for securing fishing and mining rights over a maritime zone that spans an area larger than the entire continent of Africa (*The Economist* 2023). Therefore, section 2(2) of Tuvalu's amended Constitution explicitly defines the country's 'baseline coordinates', stating that they remain unchanged 'notwithstanding any regression of the low water mark or changes in geographical features of coasts or islands, due to sea-level rise or other causes'.

A particular threat facing low-lying islands such as Tuvalu and Kiribati is insufficient fresh water due to shrinking freshwater lenses, and

this has been cited as the most probable trigger for rendering these countries uninhabitable in the longer term (IPCC 2007: 689). This raises the question of whether the absence of a population, rather than territory, might pose a more immediate challenge to Tuvalu's statehood. To address this, the 2023 constitutional amendments commit the state to two main actions: (a) proactively ensuring the security and survival of its people by responding to climate change; and (b) aligning this commitment with section 2(6), which encompasses all relevant regional and international laws related to climate change mitigation and adaptation. It also recognizes the common but differentiated responsibilities of all states, sectors, organizations and individuals, and underscores the need for international cooperation to address climate change and protect those most affected.

To sum up, Tuvalu's constitutional amendments mark a historic milestone in recognizing and addressing the implications of climate change for statehood. By redefining statehood to include intangible elements, and by asserting the nation's perpetuity despite potential territorial loss, Tuvalu not only sets a precedent but also challenges the global community to rethink traditional notions of state sovereignty and territorial integrity. This bold step, coupled with innovative strategies like the digital nation concept, signals a pioneering shift towards ensuring the survival and sovereignty of nations threatened by climate change. As Tuvalu navigates these uncharted waters, its journey offers valuable insights and inspiration for other countries facing similar existential threats, highlighting the critical need for adaptive governance and international solidarity in the era of global environmental change.

5.5. **CONCLUDING REMARKS**

Looking ahead, it seems highly probable that proposals aimed at protecting environmental rights and addressing climate change through constitutional measures will gain momentum. Furthermore, Tuvalu's definition of statehood suggests that constitutions may increasingly serve as tools to explore new frontiers and break with existing assumptions in tackling global challenges like climate change. However, this does not imply that these processes will occur in isolation. Instead, the growing trend of countries discussing environmental constitutional provisions indicates a dynamic interplay of processes and constitutional innovations that mutually influence,

Looking ahead, it seems highly probable that proposals aimed at protecting environmental rights and addressing climate change through constitutional measures will gain momentum.

inspire and guide global responses to climate change. As the climate crisis unfolds, constitutional provisions intended to mitigate its impact will similarly adapt and evolve.

Constitutional provisions designed to protect and safeguard against climate change can only be effectively implemented if courts actively protect and enforce these rights. The Montana lawsuit stands as a pivotal example of how these rights can be realized. The question now is how other courts will follow this precedent. Climate litigation has more than doubled in the past five years, as reported by the United Nations Environment Programme in July 2023, and many of these lawsuits have drawn on human and environmental rights enshrined in international law and national constitutions. The prospects for effectively enforcing these constitutional provisions are therefore looking bright (UNEP 2023).

It is now particularly crucial that we find a delicate balance between environmental protection, mitigating climate change effects, socio-economic rights, fiscal responsibilities and economic development, and the increasing use of deliberative democracy measures, such as citizens' assemblies or direct public consultations, may help navigate these challenges. Such approaches can foster solutions built on consensus. These mechanisms provide politicians with the mandate to implement necessary measures for long-term environmental protection, even if these measures impose short-term economic challenges. By involving the public directly in decision making, these assemblies can build a shared understanding of the sacrifices required, empowering politicians to act decisively and with greater public support.

As we continue to witness the emergence of innovative legal frameworks, it is clear that a new era of constitutional innovation and environmentalism is upon us.

In this pivotal moment, as we stand at the crossroads of environmental sustainability and legal evolution, the collective global efforts in 2023 towards integrating environmental imperatives into the fabric of constitutional law illuminate a path forward. As we continue to witness the emergence of innovative legal frameworks—from Tuvalu's pioneering stance on statehood to the catalytic role of climate litigation like that seen in Montana—it is clear that a new era of constitutional innovation and environmentalism is upon us. This evolving landscape invites broader engagement and deeper reflection on the problems that states might encounter with regard to their current constitutional frameworks and on how constitutions can evolve to meet the exigencies of our time.

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Chapter 6

IDENTITY-DRIVEN DEBATES ON THE RIGHT TO CASH: CONSTITUTIONALIZING *EURO*-SCEPTICISM?

Sharon Pia Hickey

6.1. INTRODUCTION

Rapid digitalization has transformed almost every sphere of our lives, redefining how citizens interact with the state, businesses and each other. The digital transformation extends to our financial lives—how we manage our banking, pay for goods and services, and transfer funds among ourselves. As mobile and digital payment methods have risen, there has been a corresponding decline in the use of cash—that is, banknotes and coins. The Covid-19 pandemic accelerated this trend by pushing consumers towards online shopping and encouraging the adoption of contactless payments as a way to minimize physical contact (Kotkowski and Polasik 2021). Seeming to echo this shift, a 2022 European Central Bank (ECB) study found that only 22 per cent of respondents across the European Union's Eurozone[8] prefer to use cash for in-shop payments. Despite this, in more than half of Eurozone member states, a majority of all retail payments are still made in cash, and peer-to-peer payments across the Eurozone are mainly cash transactions. Furthermore, about 60 per cent of respondents affirmed that the option to pay with cash is still 'very' or 'fairly' important, even in countries where digital modes of payment are more prevalent (ECB 2022; Bautista-González 2023).

As mobile and digital payment methods have risen, there has been a corresponding decline in the use of cash—that is, banknotes and coins.

8 The Eurozone refers to EU member states that have adopted the euro as their sole legal tender. The 20 members of this currency union are Austria, Belgium, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia and Spain. These countries are therefore subject to the monetary policy of the European Central Bank.

The persistent preference for cash in increasingly digital societies raises important questions about the form and function of money within countries, communities and different segments of society.

The persistent preference for and attachment to cash in increasingly digital societies therefore raises important questions about the form and function of money within countries, communities and different segments of society. In 2023, debates regarding the 'right to cash' were elevated to a constitutional level in several European countries. Slovakia amended its Constitution to protect the right to cash transactions—likely a global first—while the Austrian Chancellor committed to a future constitutional amendment. Conversely, Luxembourg and Czechia rejected as superfluous proposals to constitutionally enshrine the right to cash (Fernandes 2023; Forbes Česko 2023). Beyond the Eurozone, Switzerland is preparing to constitutionalize existing legal provisions to protect the supply of cash and guarantee the Swiss franc as the national currency. This move is a counterproposal in response to a popular initiative (subtitled 'Cash is Freedom') that gained the requisite 100,000 signatures needed to trigger a referendum (SwissInfo 2023).

The motivations for these initiatives are multifaceted. There are key concerns over privacy and inclusion, while some have contested the EU's recent proposal for caps on cash transactions as a way of countering terrorism financing and money laundering. Focusing on the case studies of Slovakia and Austria, this chapter also reveals deeper anxieties about the evolving digital infrastructure, surveillance, autonomy and sublimation of distinct national identities under an increasingly integrated EU, which some have characterized as an aspiring Orwellian superstate. This perception is expounded or exploited for political gain by populist parties and fuelled by a movement that fears governments, banks and corporations will hasten the shift from cash (and even abolish it altogether) to facilitate tracking and control of citizens through digital payments (Lasarte 2023). The instrumentalization of this anxiety, alongside other populist narratives, will likely be seen in future national and European Parliament elections, potentially reshaping the political landscape and even the trajectory of EU economic, environmental, security and social policies in the years ahead (Wax 2024).

6.2. EUROPEAN 'IDENTITY', CRISIS AND THE RIGHT TO CASH

Cash is not currently under threat of disappearing. Despite a gradual decline in the transactional use of cash, demand for cash actually surged during the Covid-19 pandemic, showing its non-

transactional role as a 'precautionary measure' and 'store of value' (Giesecke+Devrient 2023). A recent comparative study showed that many EU jurisdictions have enacted legislation protecting the status of cash as legal tender. This includes provisions mandating its acceptance, subject to limitations for technical or safety reasons, and imposing fines for non-compliance (Andrš 2023). For example, Denmark imposes a specific legal obligation for pharmacies to accept cash, a measure under consideration in Ireland as well, where it would be extended to include grocery stores (Spaanderman 2020; Gataveckaite and O'Regan 2024). In 2010, the European Commission released a recommendation that in all retail transactions, acceptance of cash 'should be the rule', with refusal permitted only on 'good faith' grounds (European Commission 2010). In June 2023, it proposed EU-wide legislation with the triple goal of protecting the role of cash, guaranteeing its wide acceptance and ensuring easy accessibility for people and businesses across the Eurozone (European Commission 2023a).

This proposal was massively overshadowed by the simultaneous release of the EU's draft legislative proposal for a 'digital euro', which is part of its wider strategy of digital transformation of the economy, public administration and healthcare systems across the EU (European Commission n.d.a; ECB 2023). The digital euro is a central bank digital currency (CBDC), a form of digital money currently being explored, developed and piloted in many countries around the world, primarily in response to competition from cryptocurrencies (Atlantic Council n.d.).[9] In a promotional video, the European Commission also asserts that the development of the digital euro is a response to the declining use of cash in Europe (European Commission 2023b).

The digital euro is a central bank digital currency, a form of digital money currently being explored, developed and piloted in many countries, primarily in response to competition from cryptocurrencies.

The development of a digital euro, and a multi-use EU Digital Identity Wallet[10] in which to store it, mirrors the historical shift of sequential integration—economic then social—that has marked the EU's evolution (Tekiner 2020). From the inauguration of the European Economic Community in 1957, to the 1992 Maastricht Treaty

9 CBDCs are not cryptocurrencies and have several key differences: they are issued and regulated by a central bank, they are a digital form of fiat money, tied to the state's official currency, and they are not likely to use blockchain technology. This contrasts with highly decentralized and potentially volatile cryptocurrencies like Bitcoin (Sigalos 2021).

10 As of April 2024, the EU is also piloting the EU Digital Identity Wallet. Using a unique and personal digital identity, an EU citizen could potentially use the digital wallet for a range of purposes, including to access government services and social security benefits; open a bank account; register SIM cards; store a mobile driving licence; sign contracts; claim prescriptions; prove academic certifications; travel across borders; and make payments. Using the EU Digital Identity Wallet would not be mandatory (European Commission n.d.b).

that created the euro, and onward to the European single market, the trajectory of EU economic integration appeared to be one of increasing collaboration, cohesion and regulatory standardization. This process was not just to forge an economic and political union: it was accompanied by an objective to cultivate a collective—but dynamic—European identity, resting on common values and principles such as equality, freedom, dignity and solidarity, and adherence to representative democracy and the rule of law (Martinelli 2017).

After the Lisbon Treaty, which entered into force in 2009, the EU seemed to have accomplished 'institutional consolidation' (Schimmelfennig 2018). However, the 2010–2012 'Eurocrisis', followed by the Schengen migration/refugee crisis, severely tested EU unity and fomented a corresponding identity crisis (Merler 2017). Though various political parties have threatened to leave the EU, there was a considerable drop in EU citizen support for leaving the EU post-Brexit (Henley 2023). And with the continued 'constitutionalization' of the EU, a shift has been observed within member states—the replacement of the 'notion of sovereignty with the notion of identity' (Maes 2024). The following sections explore this contention through the case studies of Slovakia, which joined the EU in 2004, and Austria, which became a member state in 1995.

In June 2023, Slovakia became perhaps the first country in the world to constitutionalize a right to cash payment for goods and services.

6.3. SLOVAKIA: IS THE DIGITAL EURO A 'SOCIAL ENGINEER'S DREAM'?

In June 2023, Slovakia became perhaps the first country in the world to constitutionalize a right to cash payment for goods and services. The amendment introduced a new section into article 39 of the 1992 Constitution, which deals with economic, social and cultural rights (Domin 2024). The new section contains three elements—guaranteed issuance of cash; a right to make payments for goods and services in cash; and a right to make cash transactions in banks, including a branch of a foreign bank. The acceptance of cash payments, the amendment says, can be refused for 'appropriate' or 'generally applicable reasons' (Slovakian Parliament 2023). This limitation might in fact weaken the current standard for the right to pay with cash. As mentioned above, the European Commission recommended that euros should only be refused for 'good faith' reasons—for example, if the retailer does not have change or the banknote given is disproportionate to the cost (European Commission 2010)—and the

previous standard set by the Slovakian Central Bank allowed refusal to accept cash only for 'legal reasons' (Zmušková 2023).

The amendment was initiated by the We Are Family Party (Sme Rodina), aligned with the Identity and Democracy group of the European Parliament, which comprises right-wing, populist, nationalist and Eurosceptic national parties (Peñas 2023). The party held 17 of 150 seats in Slovakia's unicameral parliament after the 2020 general elections and governed as part of a four-party coalition. This coalition was mired in political crisis stemming from internal conflict, especially regarding mismanagement of the state's Covid-19 response, and allegations of incompetence. It eventually lost a confidence vote in 2022 (*Le Monde* 2022).

In January 2023, the parliament passed a constitutional amendment allowing early elections if approved by a three-fifths majority of parliament (*Slovak Spectator* 2023). The pro-EU President Zuzana Čaputová agreed with the former coalition parties to delay the early elections until September 2023, instead of holding them in June, to allow time for political restabilization and recovery. However, the (mostly illiberal) opposition used this delay to portray a narrative of mistrust of the people (Steuer and Malová 2023). This was likely not helped by the President's appointment of a technocratic caretaker government, headed by the Governor of the Central Bank, which lost a mandatory vote of confidence on 15 June but stayed in place with limited powers until the September 2023 elections (AP 2023).

It was against this backdrop, and along with disinformation circulating that the EU wanted to ban cash, that the proposed amendment passed in the run-up to the September 2023 elections, with the approval of 111 members of parliament (*Slovak Spectator* 2024a). The explanatory memorandum to the amendment cites gradual and growing restrictions on the right to cash payment and safeguarding the right to privacy as reasons to constitutionally enshrine a right to cash. It also mentions groups that might be disadvantaged by the diminishing use of cash, including low-income citizens, organizations that depend on cash-based fundraising and children who would (allegedly) not gain requisite financial literacy (Slovakian Parliament 2020).

The reasons given for the amendment during the parliamentary debate included defence against 'orders from the outside' and 'total loss of privacy' in contemplating the digital euro. One of the amendment's authors stated that the digital euro 'may be initially sold

as an alternative, but gradually it will become apparent that it can only be exclusive'. Calling the digital euro a 'social engineer's dream', he insisted that it would allow the ECB to monitor every aspect of a person's life (Zmušková 2023). In response to the constitutional amendment, the ECB released an opinion on its own initiative. While diplomatically acknowledging and welcoming that the constitutional law aimed at strengthening the availability of cash in Slovakia, the ECB opined that an amendment of this nature, impacting monetary policy, was outside the competence of any Eurozone member state (ECB 2024: paras. 2.1, 3.1, 3.4.2). It affirmed that the issuance of cash as legal tender is a competence exclusively given to the EU legislature and that the constitutional provision conflicts with article 128 of the Treaty on the Functioning of the European Union, which dictates that issuing euro banknotes is under the exclusive authority of the ECB (para. 3.1).

Further, the ECB stated that the amendment might be seen as improperly establishing legal rules governing the status of legal tender of euro banknotes, an area reserved for EU competence under article 133 of the treaty (paras. 3.2.3, 3.2.4). Finally, the opinion criticized the reproduction of directly applicable EU law provisions within national law, which could create legal ambiguities and interfere with the uniform application and interpretation of EU law across member states (para. 3.3.1). As a remedial measure, the ECB recommended that Slovakia again amend the Constitution, by either deleting the problematic provisions or changing them to refer only to the relevant EU law. The ECB also suggested a clarification of subsection 3 to specify conditions and limitations on the right to perform cash transactions in banks or branches of foreign banks (paras. 3.3.3, 3.4.3).

The long-awaited general elections of September 2023 resulted in a shift in governing parties in Slovakia, with significant implications for its relationship with the EU. The main victory went to former Prime Minister Robert Fico and his left-wing populist party, Direction-Slovak Social Democracy (SMER-SD). SMER-SD gained nearly 23 per cent of the vote, obtaining 42 of the 150 seats in the National Council. Fico's success was welcomed by populist leaders, with Hungarian Prime Minister Viktor Orbán the first to congratulate him. After assembling a coalition of parties formerly in the opposition, Fico embarked on a controversial process to amend the Constitution to abolish the Special Prosecutor's Office charged with investigating corruption and abuse of power, including an investigation into the assassination of a journalist that had led to Fico's resignation in 2018 (Domin 2024).

The proposed reforms led to street protests, as well as prompting criticism from the European Commission, the European Public Prosecutor's Office, Slovakian members of the European Parliament, and Slovakia's President, who did not veto the law but sent it to the Constitutional Court for review (Jochevová 2023; Silenská 2024; European Parliament 2024). While the Constitutional Court did not find a constitutional basis for preventing the abolition of the Special Prosecutor's Office, it suspended proposed changes to the criminal law, a finding hailed by the President as 'good news for democracy and the rule of law in Slovakia' (Dlhopolec 2024). Soon afterwards, Fico called for the Chief Justice to resign, suggesting that the next president should dismiss the judge (*Slovak Spectator* 2024b).

Slovakia's experience shows the tightrope of integration versus scope for expression of national(ist) priorities. While the ECB reiterated its exclusive competence in monetary policy, it could not 'say the quiet part out loud' in regard to the populist point-scoring motivations for the constitutional amendment. In this way, the cash amendment allowed for an identity-based constitutional amendment that indirectly challenged the primacy of EU law and its control over member states.

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6.4. AUSTRIA: IS CASH 'PRINTED FREEDOM'?

In comparison to many of their European neighbours, Austrians are unmistakably attached to cash. According to the government, nearly 70 per cent of all payments under EUR 20 are made with cash in Austria and over half of Austrians use cash to pay for groceries. In a state with just over 9 million people, over EUR 47 billion is withdrawn from ATMs annually (Prakash 2023). Austrians' attachment to cash has been explained as a reflection of a national value of privacy and wariness of its experiences of an overpowerful state from World War II (Euractiv 2019).

In August 2023, Austria's Chancellor, Karl Nehammer of the Austrian People's Party (Österreichische Volkspartei, ÖVP), released a statement that the right to pay in cash should be constitutionally protected. Invoking visions of '[p]ocket money for the child', '[t]he emergency reserve at home' and '[m]oney in the wallet for all eventualities', the Chancellor committed to reforming the Austrian Constitution to enshrine the right to choose one's preferred payment method (Nehammer 2023). The plan had several

components—(a) protecting the right to cash within the Constitution; (b) guaranteeing that transactions could be undertaken with cash payment; (c) obliging the national bank to guarantee adequate cash flow; and (d) requiring reasonable access to physical banks (and presumably ATMs) for citizens (Hülsemann 2023).

The announcement was met with criticism from a perhaps unexpected source—the right-wing populist Freedom Party of Austria (Freiheitliche Partei Österreichs, FPÖ), which was the third-largest party in the National Council, Austria's lower chamber in the bicameral federal parliament. The basis of the criticism, however, was the allegation that the Chancellor had co-opted a long-standing tenet of the FPÖ's platform, with party leader Herbert Kickl asking, 'Aren't you ashamed of stealing ideas this way from the "evil and extreme" FPÖ?' (Murphy 2023). The FPÖ was a coalition partner of ÖVP in 2000 and 2017. In 2000, the creation of this coalition resulted in unprecedented bilateral 'sanctions' by the EU14[11] in response to its then-leader's nationalistic and xenophobic rhetoric, which included diplomatic isolation and removal of support for any Austrian candidates in international organizations (Falkner 2001). The European Commission likewise communicated its intention to monitor the Austrian Government's adherence to EU treaties and 'values' (Falkner 2001).

The FPÖ had indeed raised the issue of cash several times in previous years, as evidenced through parliamentary questions and debates. For example, in 2015, FPÖ legislators questioned the Finance Minister on any plans to 'abolish cash', claiming that strategy papers from the International Monetary Fund, the ECB, the Organisation for Economic Co-operation and Development and the EU demonstrated an intention to create a cashless society. The petition framed restrictions on cash payments in France, Greece, Italy and Spain as part of a transnational and overarching 'war on cash' aimed at controlling citizens and plundering their savings through negative interest rates (Austrian Parliament 2015b; see also Austrian Parliament 2015a, 2016d).

In 2016, the FPÖ petitioned the National Council to pursue enshrining the right to cash in the Constitution. This was in response to EU discussions on combating terrorism-related financing and money laundering by eliminating the 500 euro note and introducing limits

11 The EU14 comprise the EU member states before 2004: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.

on cash payments (Austrian Parliament 2016c). Its motion called for a federal constitutional law that would state that '[i]n order to protect the freedom of the individual, the use of means of payment permitted by law in Austria (banknotes and coins) is not subject to any restrictions' (Austrian Parliament 2016b). During discussions, representatives of the ruling coalition argued a constitutional amendment was unnecessary, especially as the National Council had also passed a resolution on protecting the retention of cash 'as an expression of constitutionally guaranteed private autonomy' (Austrian Parliament 2016a).

The contours of the issue have evolved in the intervening years, and the debate was reignited in 2022, with a popular initiative for a referendum 'for unlimited cash payment' (Austrian Ministry of the Interior 2022). This initiative—which, under article 41(2) of the Austrian Constitution, needed 100,000 signatures for parliamentary debate—attracted 530,938 signatures (over 8 per cent of those entitled to vote), and coincided with a surge in voter intention to vote for FPÖ in the next elections (Politico n.d.). The popular initiative argued that a constitutional right to cash was ever more necessary in a digital world, both to prevent the collection and analysis of personal data and to prevent the marginalization of people who may be uncomfortable with digital technology, such as the elderly and those without access to banking facilities. It also argued for the necessity of ensuring that cash was the superior means of payment over other payment methods on the basis that this was the only way of assuring that personal assets were 'private, free, and anonymously under control'. The petition summed up its sentiment thus: 'Cash is printed freedom!' Nevertheless, the non-binding referendum petition lost steam in parliament, with the ruling ÖVP reportedly shifting blame to its coalition partners, the Greens, for the lack of progress (Remix News 2023).

After the Chancellor's surprise announcement in August 2023, he reported that he had instructed the Finance Minister to develop the proposal for a constitutional amendment. He also said that a meeting would be held in September 2023 that would include officials from the relevant ministries, representatives from the finance industry and the central bank. The FPÖ then submitted a more fleshed-out motion to amend the 1867 Austrian Bill of Rights, integrated into the federal Constitution via article 149. This proposal contained several components that would be inserted into article 5 of the basic law in relation to property rights: it would forbid the restriction of payment with cash, guarantee access to cash (and other approved payment

methods) to all citizens, and oblige acceptance of cash payment for goods and services unless the nature of the transaction required a different method of payment (Austrian Parliament 2023). It was reported that the minister had set up a task force within his office and that discussions had taken place, but there were no reports of the deliberations. In November 2023, FPÖ member Peter Wurm posed a query to the Finance Minister about the government's plans to implement the right to cash, and the party continued to table resolutions related to various aspects of EU monetary policy and integration that they alleged could impact Austrians' savings held in banks.

The FPÖ leads the polls in the run-up to Austria's general elections in September 2024. It also continues to successfully reframe debates on immigration and Russia's invasion of Ukraine to fit its Eurosceptic narrative that any EU measures, driven by Western political elites, are detrimental to Austria's economic well-being and to the preservation of its cultural identity (Heinsch and Hofmann 2023).

While the right to cash may seem a minor issue on the agenda of populist and right-wing parties, it is still a value-laden crusade.

6.5. **CONCLUSION**

While the right to cash may seem a minor issue on the agenda of populist and right-wing parties, it is still a value-laden crusade, and illustrates 'the symbolic and practical nature of constitutions, both as a reflection of national identity and as tools for shaping foreign policy' (Hickey 2023: 29). In this case, it serves as a bulwark against perceived EU interference and overreach.

The digital euro has the potential to be the biggest monetary transformation for Eurozone citizens since the introduction of the euro itself. Money is tangible in a way that many other policy issues are not; it impacts every individual and elicits an emotive and reactive response as people consider their future and that of their families and communities. The EU needs to be sensitive as it forges ahead with the digital euro and other far-reaching digital initiatives like the EU Digital Identity Wallet. It risks alienating citizens and feeding fuel to populist fire if the benefits of the digital euro and digital wallet are not adequately communicated in ways that stress their voluntariness and counter disinformation.

Citizens' initiatives in Austria, Luxembourg, Slovenia and Switzerland have referred to each other without evidence of collaboration,

indicating a pan-European concern about this issue. But during crisis, and in a context where trust is low, it may also be difficult to provide nuance. The digital euro is not purely altruistic: it is being introduced for reasons of efficiency and data collection (to improve public services), and to counter the potential geopolitical dominance of other currencies, cryptocurrencies, and CBDCs like China's Digital Yuan.

While these efforts may be in service of a stronger and more integrated EU, the values that have arisen through debates on the right to cash must be acknowledged and, in some cases, celebrated, entwined as they are with broader concerns about privacy, identity and inclusion. In the words of Professor of Economics Franz Seitz, 'Cash, in itself, is not a public good, but the institution or situation it generates—a more resilient society, a more inclusive society—is' (Giesecke+Devrient 2023).

While efforts may be in service of a stronger and more integrated EU, the values that have arisen through debates on the right to cash must be acknowledged and, in some cases, celebrated.

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The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with 35 Member States founded in 1995, with a mandate to support sustainable democracy worldwide.

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We develop policy-friendly research related to elections, parliaments, constitutions, digitalization, climate change, inclusion and political representation, all under the umbrella of the UN Sustainable Development Goals. We assess the performance of democracies around the world through our unique Global State of Democracy Indices and Democracy Tracker.

We provide capacity development and expert advice to democratic actors including governments, parliaments, election officials and civil society. We develop tools and publish databases, books and primers in several languages on topics ranging from voter turnout to gender quotas.

We bring states and non-state actors together for dialogues and lesson sharing. We stand up and speak out to promote and protect democracy worldwide.

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International IDEA's Annual Review of Constitution-Building 2023 provides a look back on global constitutional shifts, the forces behind them, and their impact on domestic and international affairs.

The review covers diverse topics related to the process and substance of constitutions, from general themes such as non-crisis-driven constitutional review to specifics such as the right to cash transactions. It notes a gap: nations where post-conflict constitutional reviews are underway have seen processes stall and conflicts reignite.

In 2023, many high-profile constitution-building efforts saw little actual advancement. Progress was observed in countries that managed to enact targeted amendments or witnessed changes driven by current governments, with West Africa seeing numerous military-led coups influencing constitutional reforms, leading to new constitutions in Mali and Chad, among others in progress.

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