



Annual Review of Constitution-Building Processes: 2016





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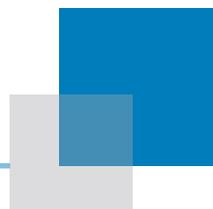
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Contents



Acknowledgements.....	2
Preface.....	3
<i>Yves Leterme</i>	
Introduction	5
<i>Sumit Bisarya</i>	
1. Democratic decay in 2016	7
<i>Tom Gerald Daly</i>	
2. Elite compacts and popular sovereignty: the constitutional referendum in comparative context	24
<i>W. Elliot Bulmer</i>	
3. Federalism’s image problem: why constitution-makers should work with decentralization	38
<i>Markus Böckenförde and Michael Meyer-Resende</i>	
4. Senate reforms in constitution-making processes in 2016.....	51
<i>Adem Kassie Abebe</i>	
5. Constitution-building processes in Armenia and Georgia.....	64
<i>Sumit Bisarya and Ellen Hubbard</i>	
6. Deconstructing West Africa’s fourth wave of constitutional change.....	76
<i>Yuhniwo Ngenge</i>	
About the authors	96
About International IDEA.....	98
About ConstitutionNet.....	99
More International IDEA resources on constitution-building processes	100

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Preface



The fourth edition of the *Annual Review of Constitution-Building Processes* comes at an important time for International IDEA and for the global democracy community. With regard to the global democracy landscape, there is increasing concern that what once seemed an unstoppable march towards democracy across the globe is grinding to a halt in some places and moving into reverse gear in others.

Naturally, at International IDEA we are addressing this issue head-on. We are about to embark on a new five-year Strategy anchored in the 2030 Agenda for Sustainable Development, in order to advance democracy that delivers. Furthermore, our new mission statement now explicitly includes the ‘safeguarding of democratic political institutions’, in recognition of the fact that democracy is always under threat. This year also sees the launch of a significant new biennial initiative, *The Global State of Democracy*, the inaugural edition of which features a unique ‘index of indices’, which we believe should become the gold standard for measuring democracy, accompanied by an in-depth report analysing the key global challenges to democracy.

As always, this Annual Review manages to reflect the broader democracy landscape through the critical lens of constitution-building processes. The first two chapters in particular, on democratic decay and on referendums, should be required reading for anyone interested in understanding the constitutional consequences and constraints of major events in 2016 such as the Brexit vote in the United Kingdom, democratic deconsolidation in Europe and the battle for political supremacy in Venezuela. In addition, the chapter on federalism and decentralization picks up an issue of critical importance in nearly all peace processes around the world—from Yemen to Myanmar, and Ukraine to Mali.

The second half of the Annual Review exhibits another value of this publication, and of International IDEA's Constitution-Building Processes Programme more generally, in bringing to our attention certain trends affecting constitutional democracies that may have gone under the radar of many observers. One chapter focuses on an uncommon phenomenon taking place in the South Caucasus region—a move away from directly elected presidents—while a second concentrates on the hive of activity that is constitutional reform in West Africa. Finally, a chapter on senates identifies a widespread change in the way countries are thinking about the utility of the second chambers of legislatures.

Under our new institutional Strategy, we will continue to prioritize constitution-building processes as one of our impact areas. This Annual Review highlights International IDEA's continuing role as a central reference point in the field of constitution-building, which represents a unique asset in the range of skills and competencies the organization brings to its support of democracy processes worldwide.

*Yves Leterme
Secretary-General
International IDEA*

Introduction



Sumit Bisarya

Each year, compiling the International IDEA *Annual Review of Constitution-Building Processes* provides a reminder of the breadth and dynamism of the modern field of constitution-building, and its centrality around the globe to the issues of democracy, conflict, stability and development. This fourth edition, focusing on events in 2016, provides accounts from 16 countries and covers some of the most regularly debated issues around constitutional design, as well emerging issues of particular interest at the current time, such as democratic backsliding. These countries and themes represent only a small slice of the constitution-building activity taking place. Our website, ConstitutionNet.org, published original analyses from 40 different countries in 2016.

One pattern worth commenting on, which is also touched on in the Secretary-General's Preface, is the increasing presence of consolidated democracies in the Annual Review over the past four years. For example, this edition covers developments in Italy, the United Kingdom and Poland, indicating that the political order in consolidated democracies is often not as settled as we might have thought. They face a number of challenges which vary according to the country, but perhaps a common theme is a crisis of representation and a sense that somehow politics is 'broken'. This general theme is explored further in *The Global State of Democracy: Exploring Democracy's Resilience* (International IDEA 2017), which focuses on the resilience of democracy in the face of numerous threats.

Another recurring theme across four editions of the Annual Review is the theme of Chapter 3, constitutional design and territorial cleavages. The nation-state model continues to fall short of demands for increased autonomy and recognition from territorially concentrated groups, and the way in which constitutions reallocate the spatial arrangement of public power is often critical to

resolving conflict and building sustainable peace. International IDEA, together with the Forum of Federations, the Center for Constitutional Transitions and the Manual Giménez Abad Foundation, will publish a Policy Paper on this subject in 2018.

Backsliding forms the theme of Chapter 1, written by Tom Gerald Daly, which explores democratically regressive developments in Poland and Venezuela. How pervasive this phenomenon is becoming was driven home in the difficulty we had in narrowing the selection of cases to only two, and we look forward to the forthcoming book Daly is writing on the topic.

In Chapter 2, W. Elliot Bulmer analyses the referendums that took place in Italy, the United Kingdom and Zambia in 2016, and develops an interesting idea about the contrast between using referendums to ratify elite pacts as opposed to settling elite disputes.

For Chapter 3 we are delighted to have a contribution from two regular programmatic partners of International IDEA: Markus Böckenförde at the Center for Global Cooperation Research and Michael Meyer-Resende at Democracy Reporting International. Speaking from extensive practical experience around the world, Böckenförde and Meyer-Resende caution against a default to federalism as a constitutional design solution for territorially based conflicts.

Chapters 4 and 5 discuss two issues that have been central to debates on comparative constitutional design for many years—bicameralism and executive–legislative relations, respectively. In Chapter 4, Adem Kassie Abebe describes the debates on establishing or reforming senates in Côte d’Ivoire, Italy and Thailand in 2016, while in Chapter 5 Ellen Hubbard and I cover the processes still being debated in Georgia but completed in Armenia, central to which is a move away from a semi-presidential to a parliamentary system of government—a very rare phenomenon worth following in the coming years.

Finally, in Chapter 6 Yuhniwo Ngenge describes the range of constitutional reforms taking place in West Africa, where no less than nine countries initiated major reforms to their constitutions in 2016.

The six chapters are dense with country-level detail on the numerous processes described and elucidate some of the key themes that frame constitutional debates around the globe. We are already looking forward to describing the events of 2017 next year, in what will be the fifth edition of the *Annual Review of Constitution-Building Processes*.

References

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1. Democratic decay in 2016



Tom Gerald Daly

Introduction: democratic decay as a global phenomenon

In 2015 Larry Diamond wrote of a ‘democratic recession’ that has swept the world since 2006, reversing hard-won gains in state after state and bringing a decades-long global expansion of democracy to a halt (Daly 2017b). For Diamond, this democratic recession comprised four elements: (a) a deepening of authoritarianism in non-democratic states; (b) an acceleration in the breakdown of democratic regimes; (c) a decline in the stability or quality of democracy in younger democracies; and (d) a decline in the vigour of long-established democracies, in both their internal democratic performance and their faith, and willingness to engage, in democracy promotion abroad (Diamond 2015). His analysis chimed with others, who marked a similar year-on-year decline in democracy worldwide in the past decade (Freedom House 2017). ‘Democratic decay’ can be viewed as a subset of this phenomenon that broadly relates to the latter two categories described above: a decline in the quality of democracy in both younger and long-established democracies that falls short of a democratic breakdown.

Examples were not hard to find in 2016. The year began with European Commission ‘rule of law’ investigations into Polish laws that appeared to undermine the Constitutional Tribunal and media (European Commission 2016a). February brought a disturbing crackdown on dissent in India under Prime Minister Modi (*New York Times* 2016). By 10 May Rodrigo Duterte was announced as the new President of the Philippines, winning on campaign pledges to kill criminals en masse. In October South Africa was removed from the top

band of best performers in the Mo Ibrahim Foundation's report on a decade of African democracy (Mo Ibrahim Foundation 2016). December witnessed the far-right Sweden Democrats achieve record support of 20 per cent in some opinion polls (The Local 2015). Finally, the election of Donald Trump as President of the United States on 8 November, following a campaign notable for its multiple attacks on foundational tenets of US democracy, such as free speech and freedom of religion, focused many more minds on the global issue of democratic decay.

Defining and understanding democratic decay

This negative trend is being studied, discussed and addressed under various rubrics, such as 'democratic backsliding', 'democratic deconsolidation', the 'democratic disconnect', 'democratic crisis', 'constitutional crisis', the 'rise of populism', 'the rule of law', 'militant democracy', 'abusive constitutionalism' and 'constitutional justice', by a wide array of policymakers, international organizations and scholars—the latter from the fields of law, political science, political philosophy and sociology. Here the term 'democratic decay' is used as an umbrella term that might loosely be defined as the *incremental degradation of the structures and substance of liberal constitutional democracy*. By homing in on each aspect of the definition, the severity of the challenge facing democracies worldwide—and the difficulty of fully understanding this phenomenon—come into sharper focus.

First, in a range of states worldwide, the degradation of democracy is an incremental, step-by-step process across multiple dimensions. This reflects a fundamental distinction in the scholarship on 'democratic breakdown' between the 'quick death' of a coup d'état, invasion or other crisis, and the 'slow death' of successive authoritarian advances and a weakening of existing democratic structures (O'Donnell 1992). It is the incremental nature of decay that makes it so insidious. Bit by bit, not only the structures of democratic governance, but also the substance or animating spirit of a democratic political community are eroded, chipped away and sapped of their vitality (Daly 2017a). It is often impossible to identify the precise point at which a functioning democracy shifts to become a non-democracy. Unlike a coup d'état or even self-coup, for instance, there is usually no 'flash point' heralding the end of democratic rule, or to galvanize remedial action against decay. The term 'degradation' here is intended to capture dynamic, linked and often iterative processes of both a 'structural' deterioration in, and a cheapening and devaluation of, democratic governance.

With regard to the structures of democracy, in state after state the foundational pillars of democratic governance and the key mechanisms for holding political powers to account—civil liberties, a free media, a genuinely independent judiciary, democratic political opposition and civil society organizations—have been attacked and undermined. In 2016 many governments engaged in

systematic assaults on these structures, not least the Polish laws undermining the media and Constitutional Court or attempts to curb the right to protest in Venezuela (Agencia EFE 2016). However, there are also more diffuse causes. The democracy-reinforcing role of the media as the fourth estate has been significantly compromised not only by the advent of ‘fake news’, largely circulated through social media (Allcott and Gentzkow 2017), but also by the crisis of economic viability facing the print media in particular. The nuts-and-bolts functioning of electoral processes has also taken a hit through concerns surrounding Russian hacking of electoral systems during the US presidential election, and the threat of interference in European elections.

The degradation of the structures of liberal constitutional democracy is intimately linked to the degradation of the ‘substance’ of democracy. Any number of indicators based on sociological analysis have highlighted deeply disturbing trends. Roberto Foa and Yascha Mounck, for instance, employ four separate measures: (a) public support for democracy as a system of governance, including individuals’ support for the entire system; (b) support for the key institutions of liberal democracy (e.g. civil rights); (c) willingness to pursue political causes through the extant political system; and (d) openness to undemocratic government systems such as military rule (Foa and Mounck 2016). In this regard it is alarming that a September 2016 opinion poll revealed that 29 per cent of Americans would support a military coup (Taranto 2016), while a poll in Brazil the same month suggested that support for democratic governance had fallen to just 32 per cent of the population (Riethof 2016). Support for the idea that mainstream political parties are capable of delivering public goods such as prosperity and security has fallen in states across the world, and there has been a marked shift to insurgent far-right, nativist, xenophobic and extremist parties (Daly 2017b). Democracy, long the ‘only game in town’ in whole swathes of the world, especially since the collapse of the Soviet Union in 1989, is now being challenged once again.

Of course, one of the biggest sticking points in defining ‘democratic decay’ is the meaning of ‘democracy’ itself. It is the ‘quintessentially contested’ (O’Donnell 2017) concept of our age and one that perennially evades any broad consensus on its conceptual coordinates. It is not possible to capture that debate here. It is perhaps sufficient to emphasize that the term ‘liberal constitutional democracy’ is used to capture the complexity of our prevailing understandings of ‘true’ democratic governance, and also to draw out the different flanks on which it is suffering decay and attack.

A preliminary point is that it would appear sensible to apply the term ‘decay’ solely to democratic orders that have attained a sufficient level of maturity. At the launch of its flagship report on freedom worldwide in 2016, for instance, Freedom House (2017) noted ‘setbacks in political rights, civil liberties, or both, in a number of countries rated “Free” by the report, including Brazil, the Czech

Republic, Denmark, France, Hungary, Poland, Serbia, South Africa, South Korea, Spain, Tunisia, and the United States'. Some states on this list, such as Serbia and Tunisia, have not reached a sufficient level of democratic maturity and cannot be said to be suffering from democratic decay, but rather problematic democratization trajectories. Others, such as Brazil, the Czech Republic, Hungary, Poland, South Korea and Spain, are seen as 'consolidated' democracies that arose during the so-called third wave of democratization of the 1970s to the 1990s. The third category includes more venerable democracies, such as Denmark, France and the the USA.

However, none of these categories is definitive. 'Consolidation' is itself a highly contested concept and some prominent democracies, such as the Philippines and South Africa, are commonly viewed as not having reached this bar (Daly 2017b). It is also worth emphasizing that the current republic in France dates from 1958 and the USA is now commonly viewed as having become a liberal democracy only with the passing of civil rights reforms in the 1960s (Stepan 2015). 'Democratic decay', then, can be taken as covering consolidated and long-established democracies, but deciding which states fit into these categories is not always straightforward and there is not as wide a gulf between long-established democracies and younger democracies as is often claimed.

Second, 'liberal democracy' is an insufficient label in that it tends to elide the outsized role that constitutional law and constitutionalism have increasingly played in our prevailing understandings of 'true' democracy, as evidenced in recent decades by the triumph of 'thicker' conceptions of democracy and the 'constitutionalization' of democracy, as bills of rights have grown progressively longer and constitutions have become more prescriptive regarding the functioning of democratic institutions (Issacharoff 2011).

That said, any monolithic or universal understanding of what liberal constitutional democracy means has come under increasing attack on different fronts. One is the emergence in Andean states of a conception of 'post-liberal' constitutional democracy, which proclaims a new social compact and an experimental 'new constitutionalism' tailored to local needs, but which has in some states, such as Venezuela, merely proved to be a cover for the concentration of power in the executive. On another flank, liberal democracy is openly derided by governments in states such as Hungary and Poland which refer, respectively, to 'illiberal democracy' and 'conservative democracy' but still lay claim to being constitutional democracies.

Third, these specific developments at their core tend to speak to the wider reassertion of a conception of democracy that places much greater emphasis on majority rule, with a more dyadic relationship between the government and the electoral majority, sidelining other locations of governance power and evincing a particular distaste for counter-majoritarian mechanisms such as rights and courts at both the national and international levels. Importantly, these are not presented

as alternatives to democracy itself, and do not operate as traditional dictatorships. In many states degradation of the democratic system has been explained away as simply legitimate constitutional change, taking power back from ‘elites’, including the legal system as a form of elite power, or the achievement of a *more democratic* system of governance.

Policymakers and scholars alike are increasingly reacting to this trend. As Freedom House observes: ‘A constant refrain among democracy advocates is that “democracy is more than just elections”’ (Freedom House 2017). We see public law scholars beginning to use the term ‘majoritarian autocracy’ rather than ‘illiberal democracy’ or ‘majoritarian democracy’ for regimes, such as that in Poland, that enjoy the support of an electoral majority but are jettisoning core tenets of liberalism and constitutionalism, such as concerns for minority rights, judicial independence and limitations on executive power (Pech and Scheppele 2017a, 2017b). This resonates with terms such as ‘electoral authoritarianism’, ‘competitive authoritarianism’ and ‘semi-democracy’ used by scholars of politics and governance (Levitsky and Way 2002). Others have elaborated new conceptual frameworks such as the ‘Mafia State’ to describe specific undemocratic governance systems’ such as in Hungary, based on a quasi-family structure maintained through legal, official and secret-service coercion and incentives (Magyar 2016).

Thus, notwithstanding the lack of consensus on what ‘democracy’ means, taking a negative approach to definition can assist in achieving some clarity. A governance system that evinces little concern for fundamental rights (especially minority rights), collects inordinate power at one location or views political power as unconstrained by constitutional law quite simply cannot be a liberal constitutional democracy, no matter how much electoral support it commands.

This chapter briefly examines democratic decay in two states in 2016. The aim is simply to provide a sense of the different causes, patterns and contexts of such decay in two different contexts. Poland and Venezuela have been selected as case studies not just in the interests of geographical balance, but more importantly because they provide examples of significant and advanced democratic decay, respectively. (These, it must be said, are fuzzy areas on a spectrum rather than hard categories.) Comments regarding Western democracies and the global outlook for 2017 are made in the conclusion.

Poland: significant democratic decay

Poland was once a poster child for democracy in the post-Communist sphere. The state’s prominent democratic transition under the Solidarity Movement, and its adoption of all the trappings of a European *Rechtstaat*—complete with a liberal democratic constitution, a constitutional court and a central preoccupation with human rights—secured the state a special place in the narrative asserting the

triumph of Western-style liberal constitutional democracy after 1989. By the time of its entry into the European Union in 2004 it was widely viewed as a securely consolidated democratic system, having met the EU's 'Copenhagen criteria' (1993: section 7A), which demanded not only that aspirant members prove the 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities', but also 'the existence of a functioning market economy'. Its economy grew apace in the post-Communist era.

It is perhaps this highly positive narrative that blinded outside observers to the challenges facing the sustainability of Polish democracy after 1989. These briefly came into stark relief after accession to the EU, long after Solidarity had become a spent political force, when the new ultra-conservative, Catholic and nationalist Prawo i Sprawiedliwość (Law and Justice, PiS) party formed the government after the 2005 elections in coalition with two other ultra-conservative parties. PiS attacks on the judiciary, media, independent Central Bank and rights of sexual minorities meant that by 2007 the scholar Ivan Krastev was calling Poland 'the capital of Central European illiberalism today' (Krastev 2007). However, the PiS-led coalition only lasted until 2007 and fears concerning illiberalism receded somewhat.

After an eight-year interlude of government by the liberal Platforma Obywatelska (Civic Platform, PO) in coalition with smaller parties, the PiS returned to government in October 2015 with the first outright majority since the fall of Communism, handing it an opportunity to remake the political system according to its worldview. Having seemingly discarded previous plans to adopt an entirely new constitution (Steinbeis 2016), the PiS quickly launched an assault on liberal democratic structures through a raft of legislation aimed at de facto constitutional change, leaving the Constitutional Tribunal 'ineffective and toothless' (Konciewicz 2016a). Among these were measures to: (a) annul judicial nominations made by the previous parliament, curtail access to the Constitutional Tribunal and introduce rules on quorums and voting majorities that prevented the Tribunal's effective functioning; (b) increase government control over the media by transferring control over the appointment of governance boards for the public broadcaster from an independent body to the government; and (c) permit more extensive police surveillance. These strongly echo the path of legislative and constitutional reform taken by the illiberal Fidesz party in Hungary since 2010.

The initial draft laws alarmed close observers of Poland, but it was not until the end of 2015 that they started to attract more intense external scrutiny. After weeks of fruitless back-and-forth communications between the European Commission and the Polish Government, in January 2016 Poland enjoyed the dubious honour of being the first state to undergo the Commission's new 'rule of law' monitoring process, which inserts a phase of structured dialogue before possible activation of the sanctioning procedure in article 7 of the Treaty on



European Union to address ‘a clear risk of a serious breach’ or a ‘serious and persistent breach’ of the fundamental EU values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (European Commission 2016a).

Spatial constraints preclude discussion of all the developments in 2016. This account focuses on the Law on the Constitutional Tribunal, which has been a particular bone of contention. In a judgment of 9 March 2016, following previous issue-specific judgments in December 2015, the Constitutional Tribunal held the Law to be unconstitutional in its entirety. In an Opinion issued two days later, echoing European Commission concerns regarding the rule of law in an Opinion of 1 June (see Pech 2016), the European Commission for Democracy through Law (Venice Commission) stated:

Crippling the Tribunal’s effectiveness will undermine all three basic principles of the Council of Europe: democracy—because of an absence of a central part of checks and balances; human rights—because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law—because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective. Making a constitutional court ineffective is inadmissible
(Venice Commission 2016: 24).

As 2016 progressed, alongside additional external interventions—including a report by the Helsinki Foundation for Human Rights—and domestic interventions, such as a resolution from the Supreme Court of Poland affirming the continuing validity of Constitutional Tribunal judgments, a steady stream of leading Polish scholars, both within and outside Poland voiced increasingly acute concerns regarding the trajectory of Polish democracy. This appears to have had little effect. The government steadfastly refused to acknowledge or adequately address the problematic aspects of its plans identified by the Constitutional Tribunal, various EU organs and Council of Europe organs in particular, including the Venice Commission and the Commissioner for Human Rights. Perhaps of most concern, the government refused to publish the Constitutional Tribunal’s 9 March judgment in the *Official Gazette*, thereby preventing it from having legal effect. The new Law on the Constitutional Tribunal was passed by the *Sejm* (parliament) on 22 July 2016. Five days later the European Commission issued a formal Recommendation reiterating its warning of a ‘systemic threat to the rule of law in Poland’ (European Commission 2016b).

Speaking shortly before the passage of the new Law in July 2016, the leading Polish scholar Wojciech Sadurski warned of ‘an assault on the very foundations of democracy’ (Steinbeis 2016). As the Tribunal crisis deepened during 2016, a

flurry of legislation was passed, often through accelerated legislative procedures, affecting the civil service and ombudsman, among other institutions. By December the PiS was viewed as having ‘captured’ the Constitutional Tribunal through a range of additional laws, including installation of three ‘unconstitutionally appointed’ judges as active members of the Tribunal (Koncewicz 2016b). In an article published at the very end of 2016 another leading scholar, Tomasz Koncewicz, argued that the specific attack on the Tribunal forms part of a wider and more sophisticated plan ‘aimed at debilitating possible pockets of resistance and independence, curbing democracy, the rule of law and the division of powers’. He concluded: ‘It is now beyond dispute that there is a gradual constitutional coup d’état in Poland whereby the Constitution is being modified through legislative sleight of hand’ (Koncewicz 2016c).

Thus, throughout 2016 an increasingly firm consensus developed that Poland is suffering significant democratic decay, actively orchestrated by the sitting government. However, despite intensifying concerns—and mirroring its approach to democratic decay in Hungary—the European Commission’s continued failure to robustly confront Poland for violating the EU’s fundamental values has drawn the ire of many commentators. As Laurent Pech and Kim Lane Scheppele observed in January 2017: ‘Any aspiring demagogue with an authoritarian streak will conclude from the EU’s latest failure to do anything meaningful against the Polish authorities that you can brutally undermine the rule of law in the EU and expect no response until you have already consolidated all power in very few hands’ (Pech and Scheppele 2017a).

Of course, it is unclear what precise impact, if any, a more robust approach by the EU institutions would have had. Identifying alternative solutions is also no easy task. The rise of populism in Poland is blamed by some on an elite-led democratic project that placed excessive emphasis on liberal constitutionalism but broke the core democratic promise of giving the Polish people a real say in governance after 1989: they could vote, but the policies remained the same (Krastev 2007). Beyond potential institutional responses, such as the possibility that the ordinary courts might act as grassroots defenders of the Constitution (Koncewicz 2016c), ‘people power’ remains the key for some. Popular protests have achieved limited pushback against the PiS government’s agenda, but leading Polish scholars such as Koncewicz stress that Polish democracy cannot be saved without a ‘wider awakening’ of the general public (Koncewicz 2017).

Venezuela: advanced democratic decay

Marina Ottaway observes that, in the ideological battleground of the Cold War, Venezuela was counted by the USA as a dependable and stable democratic system. Under civilian control since 1958, it was—unlike many of its neighbours—free of radical and leftist political parties or armed leftist forces (Ottaway

2003). Consensual politics and economic progress—and a gross domestic product the same size as Israel and Ireland in the 1980s (Foa and Mounck 2017)—gave the impression of a democratic system close to finding its place among the top tier of democracies worldwide.

However, Venezuela has now become a byword for decline. The sequence of events is clear in hindsight: a stark 40 per cent drop in per capita income during the 1980s, exacerbated by neoliberal reforms; a failed coup d'état by Colonel Hugo Chávez in 1992; his ascent to the presidency in 1998 promising greater prosperity and an outsider's ability to fix a broken political system; adoption of a new Constitution in 1999; distortion of the constitutional regime through governance that bypassed democratic institutions and included extraconstitutional action; and another military coup attempt in 2002 as both elite and popular disaffection with Chávez set in.

As in Poland, the decline was incremental, but it took place over a longer time period and has had more severe results. The 1999 Constitution was presented as entrenching a new type of 'post-liberal' democratic constitutional order. It placed less emphasis on the core tenets of liberalism, such as judicial independence, and greater emphasis on social rights, direct democracy and experimentation with a new separation of powers model (Uprimny 2011). In practice, Chávez successively expanded the powers of the presidency and hard-wired the deficiencies of Venezuela's 'petro-State'. Corruption, rent-seeking and obstacles to building strong democratic institutions all increased (Aach 2008). The new Supreme Court, established in 2000, quickly gained a reputation for being a tool of the Chávez regime (Sanchez-Urribarri forthcoming). The steady drumbeat of democratic decline sounded since the 1990s quickened after the death of Chávez in 2013 into a triple-pronged democratic, economic and humanitarian crisis.

The crisis steadily worsened in 2016. Elections in December 2015 handed decisive control of the legislature (National Assembly) to the opposition for the first time in 16 years, and a formal handover took place on 5 January 2016. Although President Maduro claimed to have accepted the results, stating that 'the constitution and democracy have triumphed' (BBC News 2015), 2016 was marked by a tug-of-war between the different powers in the state. Maduro twice declared a state of emergency, in January and May, while the opposition from March onwards pursued two initiatives to oust Maduro: a referendum to recall him from office and force a fresh presidential election earlier than the elections set for late 2018; and a constitutional reform to reduce his term from six to four years.

At various junctures, the 'captured' Supreme Court came to the embattled president's aid (Meza 2016). However, its dismissal of the original opposition initiatives did not prevent the opposition from making official progress with its recall referendum campaign, which is a lengthy, multi-step process. It easily gathered the required signatures to pass the first stages of the process and almost

half the signatures (1.85 million of 4 million) required to trigger a referendum. In September 2016 the Supreme Court declared all the National Assembly decisions made since 28 July to be unconstitutional on the grounds that three opposition members of parliament suspended by the Court for alleged electoral fraud had been readmitted to the Assembly. On 20 October the National Electoral Council suspended the recall signature drive on the basis of allegations of voter fraud in previous rounds of signature collection. The Council also declared that the governorship elections scheduled for December 2016 would be postponed until 'mid-2017' (Cawthorne 2016).

In a somewhat similar manner to Poland, the deepening crisis of Venezuelan democracy has sparked international intervention, and the Organization of American States (OAS) has taken the lead. On 30 May 2016 the OAS Secretary General submitted a report to OAS member states on the Venezuelan crisis, referring to an 'alteration of the constitutional order' and the 'democratic order'—terms in the OAS Inter-American Democratic Charter ordinarily applied to outright coups (de Zela Martínez 2013). Although an emergency session of the OAS Permanent Council was convened on 23 June, no decision on further action was taken amid serious disagreement and a hope that dialogue and diplomacy might yet yield results. This pattern of inertia continued throughout 2016 and into 2017 (OAS 2017), despite the spiralling crisis and clear intransigence of President Maduro (Pan Am Post 2016).

Concerns regarding the trajectory and future of Venezuela's democratic order became increasingly acute in 2017. Two judgments issued by the Supreme Court in April 2017—seeking to transfer the National Assembly's powers to the Court and strip parliamentarians of their immunity, respectively—prompted talk of an 'internal coup', but both were reversed within 48 hours in the face of intense pressure from both domestic and international actors, including an unexpectedly strong intervention by the Attorney General (Couso 2017). Weeks later, President Maduro called for a new Constituent Assembly to rewrite the Constitution. In response, the leader of the opposition, Henrique Capriles, denounced the move as 'constitutional fraud' and the inauguration of a 'dictatorship', and called for citizens to engage in civil disobedience to defend their rights (Europapress Internacional 2017).

At the time of writing, massive popular protests against the government are continuing, calling for Maduro's resignation and fresh elections, but faced at every turn with physical repression from state forces. Democratic decay in Venezuela, it seems, has reached its endgame and threatens to culminate in full democratic breakdown. The OAS Secretary General believes that this point has already been reached, stating in May 2017: 'Citizens have been left entirely at the mercy of an authoritarian regime that denies them their most basic rights' (OAS 2017).

For those tending towards complacency, Venezuela presents a stark lesson. Decay, once set in motion, can have extreme consequences. In Venezuela, it is summed up not just by the barricades strewn across Caracas, or the imprisonment of opposition figures, but also by the soaring murder rate, rolling blackouts, and citizens crossing the border to sell their hair, or hunting dogs, cats, and pigeons for food, or risking their lives to reach countries once viewed as tourist destinations (Reuters 2016). This in a state that was once one of the wealthiest and most stable in Latin America.

Conclusion: an uncertain trajectory since 2016

It is important to acknowledge that the outlook is not relentlessly negative. In Germany, a May 2017 poll showed the far-right Alternative for Germany (AfD) party had lost one-third of its support in the four months since its 15 per cent high in the January 2017 polls (ARD 2017), while successive defeats for the Freedom Party in the Dutch general elections and Marine Le Pen in the French presidential elections, of March and May 2017 respectively, have provided a counter-current to what had previously seemed an inexorable global tide of populism and illiberalism. In Romania and South Korea, ‘people power’ in the form of mass protest has shown a commitment to democratic values in the face of corrupt and illiberal governments. In the USA a broadly based resistance has emerged to counter the excesses of the Trump administration, comprising government officials, senators from both sides of the aisle, non-governmental organizations and individual citizens. The December 2016 elections in the Gambia and the ousting of the authoritarian President Yahya Jammeh the following month show that democracy is not in reverse gear everywhere, and reminds us that, as both an ideal and a practical objective, it holds immense power to inspire. Freedom from tyranny is not merely an outmoded imperial Western notion.

If 2016 can only be remembered as the year in which the global spread of democratic decay came into sharp focus, 2017 appears to be a crucial year when this decay will deepen and continue to spread, come to a halt or possibly go into reverse.

When more deep-rooted trends are taken into account, however, the outlook is not encouraging. The wider systemic challenges facing liberal constitutional democracy worldwide are stark, and the rot has long been developing. Foa and Mounk’s observation (2016) that trust in democratic institutions such as parliaments and courts has suffered a precipitous decline across the established democracies of North America and Western Europe in the past three decades is mirrored by declining faith in younger democracies (Riethof 2016). Youth in many countries show ambivalent attitudes to democracy. Current remedial measures—whether US bills to address Russian hacking of Europe’s elections,

limited Facebook measures to address ‘fake news’, global protests against the Hungarian government’s attacks on the Central European University, and isolated state-specific interventions by national and international institutions—are mere sticking plasters for a cancer that has been growing at the heart of democracies worldwide for some time, and which has aggressively metastasized in the aftermath of the global financial crisis of 2008, but which cannot be blamed on economics alone.

In a 2014 article on the end of the era of democratic transitions, Marc Plattner warned: ‘Perhaps the most fatal blow to the cause of democracy would be the breakdown of democracy in a country where it has been strong and stable’ (Plattner 2014). Just as concerning is the prospect of the slow, incremental, decay of the world’s lynchpin democracies. The trajectory of US democracy under the Trump administration in the coming year will therefore be pivotal, as will the ability of France’s new centrist President, Emmanuel Macron, and his political movement, to reinvigorate faith in liberal constitutional democracy in France. Serious concerns voiced about the health and trajectory of democratic governance in other lynchpin democracies such as India (see Stepan 2015: 128) and South Africa (see Borhat et al. 2017), to name just two, mean that developments in these states throughout 2017 will also be crucial.

Fatalism, panic or, worse, complacency cannot be the only options. The first task for policymakers and scholars alike right now is to continue to seek a better understanding of the phenomenon of democratic decay, and how policy and law can be wielded to best effect to counter it.

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2. Elite compacts and popular sovereignty: the constitutional referendum in comparative context



W. Elliot Bulmer

Introduction

In 2016 nearly 20 referendums on constitutional amendments or on matters of major constitutional significance were held worldwide. Referendums on new constitutions or substantial constitutional amendments took place in Azerbaijan, Bahamas, Bolivia, Grenada, Italy, Ivory Coast, Kyrgyzstan, the Australian state of Queensland, Senegal, Tajikistan, Thailand and Zambia. Referendums on institutional matters that could be regarded as constitutional or quasi-constitutional in nature were held in Bulgaria (electoral system), Colombia (FARC peace agreement), the Canadian province of Prince Edward Island (electoral system), San Marino (electoral system) and the United Kingdom (membership of the European Union). In addition, although no referendum was eventually held, a citizens' initiative for a referendum on constitutional amendments in Kenya was instigated.

In itself, this swathe of constitutional referendums was nothing unusual. A similar number of referendums on such issues are typically held worldwide annually. At the time of writing, more than 75 per cent of the world's national constitutions make some explicit provision for holding referendums, and many of these provide for compulsory or voluntary referendums on some or all

constitutional changes.¹ However, 2016 saw some high-profile ‘backlash’ referendums, which have been variously interpreted as expressions of apathy, as protest votes or as votes of public ‘no-confidence’ in the government—venting popular anger against political, financial and cultural elites that are perceived to be out of touch with the general public.

If people are frustrated by the unresponsiveness of representative institutions, then more frequent referendums, which allow the people to vote for or against a particular proposition or to choose between proposed alternatives, could be a corrective. This is especially true in situations where the people themselves can trigger referendums. Even if the elites determine the issues that are to be decided, however, the act of letting the people decide has a certain democratic clarity, bypassing the compromises and insider dealing often associated with representative processes. Yet that very lack of compromise—the absolutism of the popular decision—means that referendums can also have a crudely majoritarian effect that is polarizing and dangerous for democracy. In the context of resurgent reactionary populism, these backlash referendums have reopened perennial debates about the dangers of referendums, especially as a means of making major decisions of constitutional significance.

This chapter is a modest contribution to that debate. It does not attempt to rehearse all the well-known arguments for or against referendums (see e.g. Beramendi et al. 2008; Bulmer 2017). Rather, it takes the more nuanced view that the referendum, like an election, is a tool that can be used well or badly, from a democratic perspective, depending on the context and the specific rules under which it is held. There are many questions of detail that must be answered before it is possible to conclude that a specific referendum is likely to be beneficial or harmful to democracy, from the way the question is set to the financing of referendum campaigns. There is no space to go into all of these. The discussion that follows is solely concerned with referendums that offer a free and genuine choice, held under conditions that guarantee the integrity of the voting process and that allow opposing voices to be fairly heard. Facade or fraudulent referendums, held in conditions where the result is preordained or unfairly influenced by the authorities, are obviously undemocratic and so excluded from this analysis.

The chapter focuses on a little-examined aspect of constitutional referendums, namely their relationship to the other main means of constitutional entrenchment: the legislative supermajority (see also Böckenförde 2017). The referendum embodies the principle of popular sovereignty—the right of the people, as possessors of the constituent power, to make, remake and unmake constitutional law. In contrast, elite compacts are typically expressed in legislative supermajority rules. Although the extent to which a given majority requirement will necessitate cross-party agreements depends on the electoral system and the party system, it is possible to assume, all else being equal, that a three-quarters or

two-thirds majority requires a broader elite-level consensus than, say, a three-fifths or an absolute majority (Lijphart 1999; Böckenförde 2017).

While not negating the dangers of referendums, this chapter argues that the risks of crudely majoritarian, polarized decision-making arise mainly when referendums are used by narrow ruling majorities to appeal directly to the people—either to reinforce the majority’s will or to settle issues on which elites are deeply divided—without first reaching an elite consensus. When referendums are applied as a means of ratifying an elite compact that has already been expressed through legislative supermajorities, the risks are reduced. Used in this way, the referendum can give popular legitimacy to elite compacts while safeguarding the public interest against elite capture. Such a referendum is a ‘downstream constraint’ (Elster 1995) on the decision-making process, ensuring that whatever bargains the elites reach can be ‘contested’ (Pettit 1997) and cannot be imposed except ‘on the people’s terms’ (Pettit 2012). Embedded in well-designed rules, the referendum can even encourage elite compacts. If designed as a final deadlock-breaking mechanism, held in reserve and deployed only when elites fail to reach a sufficient consensus, the referendum is likely to extract a significant political cost, and elites may have an incentive to compromise in order to reach agreements that spare them from the unpredictability and risks of a referendum.

This chapter develops this argument from a theoretical perspective, examining the roles of elite compacts and popular sovereignty in constitution-building. It discusses several of the constitutional referendums held in 2016 to illustrate this argument. There is no attempt to provide a systematic analysis of all cases. Instead, it has the more modest aim of simply presenting and reflecting on preliminary findings from a limited set of case studies: Italy, the United Kingdom and Zambia. The conclusion discusses the implications of this argument for the design of constitutional amendment mechanisms and for the structuring of constitution-building processes.

Elite pacts and popular sovereignty

Theorists and practitioners of constitution-building continue to debate the relative importance of elite pacts and public participation in the adoption and amendment of constitutions (Wheatley and Mendez 2013; Saati 2015; Ghai and Galli 2006; Ginsburg, Elkins and Blount 2009). From a democratic perspective, especially in the radical tradition descending from Rousseau, the constitution is seen primarily as an expression of the supreme constituent power of the people (Rousseau [1762] 2003; Hutchins 1988; Gargarella 2010). It follows that the constitution must be the product not of the will of the representatives, but of the people themselves acting in their sovereign capacity by means of a referendum. In the words of Thomas Paine, the ‘Constitution is not an act of government, but an act of the people in establishing a government’ (Paine 1791). The idea of popular

sovereignty, with constituent power expressed in a referendum, retains a powerful attraction, especially but not exclusively in the Francophone and Latin American ‘sub-universes’ of constitution-building.

However, the now dominant view—driven less by democratic purism, and informed by institutional realism and rational choice theory—is that constitutions are a ‘particular kind of elite pact’ based on ‘arrangements and compromises between elites’ (Wheatley and Mendez 2013: 13). Constitutions are not made by ‘the people’, but by political and institutional actors capable of making relatively autonomous decisions, who can shape the constitution according to their reason, interest and passion (Elster 1995) and with a view to their future chances of holding power (Negretto 2013). Successful constitutions, according to this view, are those that reflect well-negotiated agreements among elites (Elkins, Ginsburg and Melton 2009).

Moreover, the referendum as a means of expressing sovereign decisions is awkward and unwieldy in many contemporary constitution-building contexts. An unlimited constituent power is difficult to reconcile with universal claims to human rights and obligations under international law (Thornhill 2014; Law and Versteeg 2012; Dowdle and Wilkinson 2017). Deeply divided societies may demand constitutional models that protect minorities and share power (see: Choudhry 2006; Lerner 2011), and here the crudely majoritarian nature of referendums may be dangerous. Referendums embodying the will of a unified people are especially troublesome when applied to plurinational societies, in which constituent authority derives not from ‘the people’ but from ‘the peoples’ (Tierney 2012). Elite compacts, which allow for compromise and negotiation between societal groups, are seen as a safer option. The contrast between Egypt and Tunisia after the events of the Arab Uprisings is illustrative; in Egypt, referendums enabled alternation between extremes and no consensual constitutional reform was agreed, while in Tunisia, where a referendum was avoided and political elites from religious and secular parties had to compromise, a moderate constitution was agreed (Bisarya and Bulmer 2017).

Referendums and legislative supermajorities can be combined in various ways. Referendums may be required for every constitutional change, no matter how minor or uncontroversial, either in conjunction with a parliamentary supermajority (e.g. Denmark, Japan) or not (e.g. Ireland, Australia). A referendum might be required only if the substance of the proposed amendment is of particular importance, or if it touches on especially entrenched provisions of a constitution (e.g. Botswana, Jamaica, Lithuania). Similarly, referendums may be required for major amendments, or a complete replacement of the constitution, while minor amendments can be passed by a parliamentary supermajority (e.g. Austria, Spain). In France, a referendum is optional. The Constitution may be amended—at the initiative of the president—either by a three-fifths majority in both chambers united in a joint session or by a referendum. Elsewhere (e.g.

Poland, Tunisia), the president may call a confirmatory referendum only after—and not, as in France, instead of—approval by a legislative supermajority. In some countries, the legislative minority can also trigger referendums: in Sweden a referendum on constitutional change must be held if demanded by one-third of parliamentarians, while in Luxembourg a referendum is held if one-quarter of parliamentarians or 25,000 citizens request it. In Latvia, the Constitution can be amended by a popular initiative vote, even without the approval of parliament.

Yet, for all this variety, there are just three basic approaches to the relationship between elite consensus and popular sovereignty. First, referendums can be used to ratify or reject elite consensus. In this case, the referendum, whether required or optional, passes public judgment on elite compacts expressed in a previous legislative supermajority. Second, referendums can be deployed as a (high-cost) deadlock-breaking mechanism if elite consensus is not forthcoming. In this case, the threat of a popular veto is used to encourage elite consensus. Third, the referendum can be a majoritarian device that enables the incumbent majority to avoid elite consensus, appealing directly to the people over the heads of opposition parties. The following section illustrates the effects of each of these approaches.

Referendums and legislative supermajorities in practice

Encouraging elite consensus: Italy

The Constitution of Italy was designed at the end of World War II with the aim of dispersing power to prevent the rise of another Mussolini (Cimino 2015). It adopted symmetrical bicameralism: two legislative houses with almost identical powers, both elected by proportional representation (Adams and Barile 1972). During the First Republic (1946–92), this resulted in chronic governmental instability (Adams and Barile 1972; Spotts and Weiser 1986). While stability has improved during the Second Republic, Italy retains a slow and inefficient legislative process, which has made it difficult for successive governments to tackle the country's economic and social problems.

Shortly after coming to power in February 2014 Prime Minister Matteo Renzi of the Democratic Party embarked on a programme of constitutional and institutional reform. Under proposals initially passed by narrow majorities in both houses in 2014, the Senate was to be indirectly elected from among regional councils, to be given a subordinate role in legislation and to lose its ability to dismiss governments. Regional powers were to be curtailed, and the Economic and Labour Council abolished (Cimino 2015). In addition, Renzi proposed a change to the electoral law, advocating a 'reinforced majority system' which would give the party winning 40 per cent of the vote an automatic majority in parliament (Clementi 2016). Taken together, these measures aimed to strengthen

the central executive and reduce the need for consensus in policymaking (Mardell 2016).

The constitutional amendment rule in Italy is quite complex, but in comparative terms not especially rigid. An amendment must be voted on twice by both chambers, with an interval of not less than three months between the first and second vote. In the second vote, an absolute majority is required in each chamber. This means that a government with an absolute majority in both chambers could, in principle, amend the Constitution at will. However, this is subject to a further constraint: unless an amendment is passed by a two-thirds majority in each chamber on the second vote, a referendum must be held if so requested by one-fifth of the members of either house, 500,000 voters or five regional councils. In other words, the effective threshold for amendments is either a two-thirds majority in both chambers or an absolute majority in both chambers plus a majority in a referendum.

The proposals failed to receive the endorsement of a two-thirds majority in parliament, making a referendum—once it was requested by one-fifth of the members of parliament—inevitable. The amendment was supported by the parties of the mainstream (the Democratic Party, New Centre-Right, Popular Liberal Alliance and Civic Choice), while populist parties, including the ‘Five Star Movement’, Forza Italia and the regionalist Northern League, opposed the change (Clark 2016).

The date of the vote was set for 4 December 2016. Renzi fought a personalized campaign, staking his office on the result. This shifted the debate away from the substance of the reform and provided an opportunity for those discontented with the general direction of the government under Renzi’s leadership to register a protest by voting against the amendment. In the event, however, the No side won handsomely, with 59 per cent of the votes. Despite international speculation that a ‘No’ vote might be interpreted as another instance of reactionary populism, these fears proved ill-founded. Instead, the referendum prevented a constitutional decision, without sufficient consensus, being forced on the country by a governing majority. The parliamentary opposition, concerned that the reform would over-concentrate power in the hands of the prime minister, activated the referendum and mobilized the people as an external ‘veto player’. Far from being an instrument of populist reaction, Italy’s experience in 2016 shows how the referendum, as part of a mechanism that allows the parliamentary minority to appeal to the people against the decisions of the parliamentary majority, can be a brake on rash, partisan, imposed change.

Avoiding elite consensus: the United Kingdom

On 23 June 2016 the United Kingdom held a referendum on its membership of the EU. This resulted in a UK-wide majority (and a majority in two of the UK’s four constituent nations) for its exit from the EU (‘Brexit’). The referendum was

once alien to the British parliamentary tradition; that has certainly changed. Prior to 2016, referendums had been held on the UK's place in Europe (1976), Scottish and Welsh devolution (1979 and 1997), electoral reform (2011) and Scottish independence (2014). There is now an emerging tradition of using referendums for major constitutional change. The Constitution Committee of the House of Lords (2009–10) even suggested that there are six issues, including leaving the EU, which are of such profound constitutional significance that a referendum would now be expected (Tierney 2012: 101). However, the UK is unique among European democracies, and rare in global terms, in not having a written constitution. There is no clear differentiation, either in status or legislative process, between laws that are constitutional in nature and other laws—except for the judicial recognition of a vaguely defined class of ‘constitutional statutes’ that are protected in common law from implied repeal (see *Thoburn vs Sunderland City Council* 2003). This means there are no higher-order legal rules, binding on parliament, regulating when a referendum is required.

The decision to call a referendum on EU membership was driven not, therefore, by any binding constitutional requirement, but by political circumstances. The government wished to pacify Eurosceptic members of parliament on the Conservative backbenches and to avoid losing votes to the anti-EU UK Independence Party (UKIP), which had won a plurality of the vote in the most recent elections to the European Parliament. David Cameron, the then Conservative Party Prime Minister, having negotiated a few opt-outs for the UK to reassure his base, was convinced that a referendum would result in a victory for remaining in the EU that would take Euroscepticism off the political agenda.

It was not to be. On a turnout of 72 per cent, nearly 52 per cent voted in favour of leaving. Initial analysis of the result exposed deep and long-ignored divisions within British society—between north and south, between highly educated and less educated voters, between old and young, between cities and small towns, between the middle class and the working class, and, in short, between the ‘winners’ and ‘losers’ of the past 40 years of cosmopolitan neoliberalism. Some on the left saw the Brexit vote as a natural if desperate response to ‘a structural crisis of capitalism’, in which voters were rejecting ‘the lethal combination of austerity, free trade, predatory debt, and precarious, ill-paid work that characterize financialized capitalism today’ (Fraser 2017). For many inside the middle-class, educated, prosperous, urban, liberal, cosmopolitan bubble, the decision to leave the EU seemed to erupt from a shockingly different Britain, which they neither knew nor understood—a backward-looking, closed, narrow, racist and xenophobic Britain motivated by the post-liberal politics of reactionary populism. Either way, the result could be interpreted as the revenge of the common folk, who were venting their anger against an out of touch political, financial and cultural elite.

The government, having hoped for a decision to remain, was wrong-footed. David Cameron resigned and a rushed leadership election in the Conservative Party placed Theresa May in power. Conservative politicians who had campaigned to remain found themselves having to support a government promoting not only Brexit, but a ‘hard Brexit’ outside the EU Single Market and Customs Union—despite the economic consequences and the effect that this would have on the parts of the UK (Northern Ireland and Scotland) that voted to remain. The outcome is the worst economic, constitutional and political crisis since the formation of the UK, from which ordinary people, especially in deprived areas, are likely to suffer the most.

Viewed from the perspective of Brexit, referendums, especially on such important and perhaps irreversible issues, seem like a terribly bad idea. The campaign was brief and superficial, with misinformation employed on both sides. Despite the referendum being only advisory, and although more than 48 per cent of votes cast (and 62 per cent in Scotland) were to remain, the majoritarian logic of referendums was forcefully applied. Those who opposed Brexit, including those who simply sought to establish by recourse to the Supreme Court a requirement for parliamentary approval of the decision to notify the EU of the UK’s intent to leave under article 50 of the Lisbon Treaty, were demonized in the popular press as ‘traitors’ and ‘saboteurs’.

Yet this is not necessarily an indictment of referendums as such: more a warning regarding the use of referendums in situations where there is no elite consensus. The British political elite—especially the Conservative Party—was divided on the EU, and the government used the referendum in a cynical and instrumental way to overcome both external pressure from UKIP and dissent in its own ranks. There was no need for the consent of the parliamentary opposition. In consequence, the vote was framed only in vague terms. Neither the full implications of leaving the EU, nor a clearly proposed alternative, was elaborated. Had there been a requirement for, say, a two-thirds majority in both chambers in favour of Brexit before holding a referendum, then the nature of that decision and the full range of ‘hard’ and ‘soft’ Brexit options could at least have been explored before putting one of them, which at the end of the process would have had broad parliamentary support, to a referendum. That way, the people would have had a clearer choice and the government would have been better prepared for the consequences of that choice.

Ratifying or rejecting elite consensus: Zambia

Since the restoration of multiparty democracy in Zambia in 1991, there have been several attempts to achieve a lasting constitutional settlement, but all so far have proved elusive (Kabimba 2016). The incumbent President Edgar Lungu, elected in 2015, made completion of the constitutional reform process integral to his programme. The amendment rules outlined in Zambia’s Constitution involve

two levels of entrenchment. Most provisions can be amended by a two-thirds majority in parliament, but certain provisions—including the bill of rights and the amendment procedure itself—require approval in a referendum before being voted on by parliament (article 79; see also Munalula 2016).

Constitutional reforms were therefore proposed in two stages. First, those which did not require a referendum, including the adoption of an absolute majority (second ballot runoff) system in place of the former plurality system for electing the president, were passed by parliament. Second, those which did require a referendum—including the addition of a number of social, economic and cultural rights and changes to the amendment formula—were put to the people on 11 August 2016.

The people rejected the amendment on a technicality: although 71 per cent of the votes cast were in favour of the change, the turnout was only 44 per cent. This meant that the threshold—50 per cent of the total *eligible* electorate, a rather high requirement in a country with less than perfect electoral registration—was not reached. As Lumina (2016) noted, ‘referendums tend to be successful in circumstances where there is bi-partisan support for proposed changes’, but Zambia’s process was ‘characterised by profound political divisions, with the result that the referendum was overshadowed by party politics’ and understood ‘as a project of the ruling Patriotic Front (PF) rather than a national project’ (Lumina 2016).

Here again we see the referendum not as a polarizing tool of majoritarianism, but as a stabilizing and moderating device by which the voters can punish—in this case passively, by abstention—elites that have failed to reach a consensus. Perception and process were just as important as substance: the opposition objected to the lack of consultation and to the way in which the government appeared to be pushing its own agenda, without seeking broadly acceptable consensual outcomes—in particular in relation to issues such as regional devolution (Lumina 2016). The effectiveness of the referendum as a moderating, consensus-promoting device may be limited, however, by the fact that Zambia requires the referendum to be held before—and not, as in other countries, after—the parliamentary vote. If the vote were held not on the government’s proposed bill, but on a bill that has already been through parliament and perhaps modified to reflect the preferences of the opposition in order to achieve super-majoritarian support, then perhaps there would be a greater incentive for elite consensus. That would encourage opposition parties to mobilize for rather than against the changes—which might, in turn, help to reassure voters.

Conclusion

The three cases outlined in this chapter exemplify different combinations of elite compact and popular sovereignty. In the UK, the referendum sought to bypass elite compact: the government favoured remaining in the EU, but in an attempt to outflank UKIP while settling a dispute within its own party it allowed the decision to be made by the people. The people were not asked to confirm or reject a clear policy agreed among elites, but to choose between options advocated by rival factions of the elite. The result was a decision that caught the government by surprise, and which it was ill-prepared to implement. Italy and Zambia, however, show how the referendum can be more wisely employed in ways that encourage more harmonious relationships between the elite compact and popular sovereignty. In both cases, the referendum enabled the people to veto proposals by the ruling majority that did not enjoy broad, cross-party support at the parliamentary level. Regardless of the pros or cons of the particular reform proposals, the requirement for a referendum under these circumstances helped to ensure the continued universality of the constitution itself. That is to say that good constitutions reflect both a consensus among the political elites that have to 'work' with them and the consent of the people who have to live with them.

While it is not possible to make scientific generalizations from such a small number of cases, they do illustrate the value of referendums as a means of either encouraging an elite compact, or confirming or rejecting it. The guiding rule is that the referendum should not be called at the whim of the majority (as was the case in the UK) but, rather, should be required by the constitution itself (as in Zambia) or initiated by the minority as the price of not having reached agreement with them at the parliamentary level (as in Italy).

This has implications for constitution-building, particularly the design of constitutional adoption processes and constitutional amendment provisions. Rules enabling a bare majority to appeal directly to the people, using the referendum as a narrowly majoritarian expression of popular constituent power, are, in general, perhaps best avoided. Nonetheless, constitution builders should not shy away from the referendum, nor conclude that the people are incapable of making sovereign constitutional decisions. It is simply that the nature of a constitution as an overarching framework for law and politics requires more than majority rule. A requirement to seek elite consensus should precede the referendum, enabling the people to express their judgment on that consensus, or to veto changes that lack consensus. The function of the referendum—especially but not exclusively in deeply divided societies where minorities demand a particular voice—is not, therefore, to enable the majority to impose their will, but to ensure that representatives form elite compacts that are broadly acceptable to the majority.

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Endnotes

1. For a list of referendums held around the world each year see the Database and Search Engine for Direct Democracy, <<http://www.sudd.ch/index.php>>. For full texts of the world's constitutions see the Constitute Project, <<https://www.constituteproject.org>>.

3. Federalism's image problem: why constitution-makers should work with decentralization



Markus Böckenförde and Michael Meyer-Resende

Introduction

In early 2016, as the war in Syria moved into its sixth year, the United Nations sought to revive the peace talks taking place in Geneva and—according to media reports—major powers in the UN Security Council were mulling the possibility of turning Syria into a federal state, hoping to build a political structure that would address some of the main demands of the warring parties (Charbonneau 2016). This was always likely to happen. In almost every civil war or post-conflict constitution-making process, at some stage some actor—an armed group, an opposition party or international experts—will suggest that ‘federalization’ is the solution. And why not? Given the competing claims of religious and political militia and groups, many of them linked to territory, it might seem useful to offer them the degree of control over certain territorial units that federalism typically offers.

Nonetheless, there are good reasons for avoiding federalization as a default response to such conflicts, as was shown once again in 2016 in places such as Libya, Mozambique, Sri Lanka, Syria and Ukraine. As discussed in this chapter, federalism is a counterproductive term when used to negotiate and frame a conflict over the allocation of power and territory. Federalism often comes up because almost all violent conflicts involve disputes about the allocation of power in the whole or some of the territories of a state. In contrast to federalism,

decentralization provides a better analytical framework and basis for constitution-making in conflict-affected settings. A review of constitutional negotiations in such contexts in 2016 shows that they all revolved around questions of decentralization.

Decentralization in constitution-making in 2016

Decentralization is an open term. It denotes that some power or resources will be passed from the central government to lower levels of government or administration. Decentralization offers a matrix of options that can be combined in various ways to accommodate competing interests. The key elements of decentralization are usually enshrined in the constitution and therefore protected. In 2016 questions of decentralization were crucial in a number of constitution-making processes.

In **Libya** the Constitution Drafting Assembly (CDA) completed its work in 2016, amid controversy over whether the plenary that adopted a draft constitution possessed the necessary quorum. In a country with historically different regions (East, West and South), the extreme centralization of power under President Muammar Gaddafi was bound to create strong centrifugal pressures the moment he loosened his brutal grip on the country. Libya's constitution-making was indeed bedevilled by the question of decentralization versus federalism right from the beginning, when the CDA was elected in 2014 (Ibrahim 2014; Gluck 2015). As is shown in more detail below, when discussing federalism, the draft constitution of 2016 left many crucial questions of decentralization open.

In **Mozambique** decentralization continues to be a bone of contention between the government, controlled by the Frente de Libertação de Moçambique (FRELIMO), and the opposition Resistência Nacional Moçambicana (RENAMO). After the 2014 parliamentary elections, in which RENAMO gained many seats but no majority, it alleged electoral fraud and low-level violence resumed. RENAMO demands more provincial and local autonomy in the six northern and central provinces where it won majorities in the 2014 elections (Repell, Rosen and de Carvalho 2016: 14).

Mozambique does have elected provincial councils but they are consultative and the provincial governors appointed by the central government play the most important role (Bueno, Plagemann and Strasheim 2015). Despite pressure from foreign donors, Mozambique's government has been lukewarm about decentralizing the country, in the face of strong opposition from some provinces. For FRELIMO, decentralization always risks passing some degree of power to RENAMO, which was its civil war adversary for 15 years before 1992. While peace talks continued in 2016, the parties did not manage to agree on a package of decentralization reforms that would also include constitutional revisions.

After unexpectedly winning presidential elections in **Sri Lanka** in January 2015, Maithripala Sirisena brought together a broad coalition to initiate reforms aimed at decentralizing governance in Sri Lanka to provide better representation for minorities, especially Tamils. In 2009 the Sri Lankan army had defeated the Liberation Tigers of Tamil Elam (LTTE), which had de facto controlled many of the Tamil majority areas for two decades. The reintegration of these areas and their status were therefore a major challenge for Sri Lanka and in the public discourse this was addressed under the label of devolution. In April 2016 Sri Lanka's parliament officially declared itself a Constitutional Assembly, in addition to serving as a parliament, in order to negotiate constitutional reform (DRI 2016). At the time of writing the process is still incomplete.

The vertical reorganization of the **Syrian** state after a possible peace agreement was discussed early in 2016. Later that year Russian experts prepared a draft constitution for Syria (Partlett 2017) that did not foresee a federal model for Syria and largely shirked the question of territorial organization, indicating only in article 15 that Syria's 'constituent parts', their status and borders, should be determined by law. The draft does, however, make explicit mention of Kurdish 'cultural autonomy' and states that local administration should be based on the principle of decentralization.

Leaving the shape of decentralization in Syria wide open could potentially allow a system that provides a high degree of regional and local autonomy. In particular, the establishment of an upper house (article 40) might give the impression that the regions would gain a significant role. However, it has been noted (Partlett 2017) that the proposed second chamber follows the Russian or Belarussian model and would play a mainly advisory role for the president. Furthermore, other aspects of the draft, such as a strong president and a focus on national unity and statehood, suggest that it aims for a strong, centralized state based on the Russian model (Partlett 2017).

In **Ukraine** an attempt to amend the Constitution to make space for more decentralization failed in 2015. At the heart of the reforms was the creation of a basic tier of *bromadas* (communes) that would have the same powers and rights across the country, superseding a panoply of different basic units. These communes would have had a high degree of autonomy to deal with their own affairs, overcoming a legacy of strong centralization under which all local decisions required approval from the central government. The reform proposal was positively assessed by the European Commission for Democracy through Law (Venice Commission 2015) and garnered the necessary majority at its first reading in parliament on 30 August 2015.

However, on the same day, at a demonstration at the parliament building, somebody threw a hand grenade, killing four guardsmen (Walker 2015). This criminal act highlighted the massive resistance that had built up against a special provision of the bill. At the insistence of Germany, which was eager that the

reform should reflect Ukraine's commitments made in the Minsk process, a transitional provision had been included to indicate that special self-governance arrangements could be made for parts of the Donetsk and Luhansk districts, which are under control of Russian-backed armed groups (Schuller 2015). This provision was seen by many as the beginning of a territorial dismemberment and the bill was never tabled for a second reading. In 2016 the government strengthened local government by measures that did not require constitutional change, such as amalgamating small units, but comprehensive decentralization has been shelved for the time being.

What is decentralization?

Reforming the state structure as part of a constitution-building process is often not limited to a horizontal balancing of powers between different branches of government at the national level (systems of government, judicial review and so on), but also includes a vertical dimension through decentralization by allocating powers between different levels of government or administration.

As detailed in the International IDEA Handbook, *A Practical Guide to Constitution-Building*, 'Decentralization comes in many forms, offering numerous options for meeting different contexts and their challenges' (Böckenförde 2011: 5). When mapping forms of decentralization, two components are relevant: (a) the territorial configuration of decentralization, setting the formal structure of the country; and (b) its 'depth', determining which substantive powers should be allocated to the subnational levels.

Elements specifying the formal structure include the number of subnational levels of government or administration (from local to national), their symmetric or asymmetric availability throughout the country (does any subunit have special powers, tasks or resources?), and the number of units at each level (also implying the question of criteria to draw the territorial boundaries of subunits). Some of these figures may be determined by previous arrangements and historical contexts and are either difficult to renegotiate or may be excluded from negotiation altogether. The substantive component of decentralization fills the formal structure with functional authorities. The degree of decentralization runs along a continuum with strongly centralized states at one end and heavily decentralized states at the other.

To measure the extent of decentralization more accurately, three core elements should be assessed:

1. *Administrative decentralization*. This refers to 'the amount of autonomy non-central governmental entities possess relative to the central

government' in terms of de-concentration, delegation and devolution (Böckenförde 2011: 18–19).

2. *Political decentralization*. This includes two subelements: (a) transferring power to the elected political leadership at the subnational levels; and (b) providing them with sufficient autonomy from the centre to enable them to be held accountable by the voters in their own right. Regarding the latter, there is an overlap between administrative and political decentralization.
3. *Fiscal decentralization*. This means the extent to which central government passes fiscal responsibility and resources to subnational units.

While distinguishing between these elements facilitates measurement in the first place, effective decentralization requires coordination between all three. Decentralization of authority will remain shallow if, for example, fiscal decentralization does not support and follow administrative and political decentralization.

In addition to determining the depth of decentralization along the three elements by examining the substantive power and authority distributed to lower levels of government, there is a complementary, legal perspective. This assesses the legal commitment to decentralization and the legal relations between the different levels of government. One indicator is the extent to which the framework for decentralization is articulated in detail in the supreme law of the land, the constitution. If most of the relevant parts are left to the national legislature for enactment at a later stage, the wait may be too long for a shift from the national to the regional or local level to be implemented; or even if such a transfer took place initially, the national legislature might take grants of autonomy back at a later stage.

Another incremental indicator is the status of the different levels of government in relation to adjustments to the decentralization package. Who is involved in the constitutional amendment procedure that addresses pertinent provisions? Do lower levels of government need to be involved and give consent or does the ultimate authority remain in the hands of national actors? Answers to these questions will help determine whether a state has a federal structure.

These answers also make clear that the mere fact of a federal relationship between levels of government does not say much about the actual depth of decentralization. Evidently, a certain degree of administrative, political and fiscal decentralization must be met as minimum criteria to allow the concepts of shared rule or self-rule to operate, but beyond that the amount of power constitutionally assigned to the subunits can vary greatly and federal countries can be categorized as strongly decentralized (e.g. Switzerland or the United States) or weakly decentralized (e.g. South Africa).



What's wrong with federalism?

In contrast to decentralization, from a legal perspective federalism is a fairly specific term. As detailed in a recent report by Democracy Reporting International:

Although there are different opinions about how to define federalism exactly, there is wide agreement that federalism means that there is at least a second tier of political units (states, Länder, provinces, cantons, etc.) with genuine legitimacy that is not derived from the central power and with constitutionally guaranteed prerogatives. At the core, a federal arrangement is based on an agreement between two (or more) levels – an agreement that cannot be unilaterally changed by either side (Karmel 2017: 3).

The fact that the Latin origins of the word federal, *foedus*, is the word for 'pact' highlights the contractual element of a federal arrangement. In some federal countries (e.g. Canada) the idea of an agreement is reflected in the representation of subunits sitting in the second chamber of the national legislature which must be involved in the constitutional amendment process. In others, including the USA, the consent of subnational legislatures is needed.

Disputes between levels of government are usually controlled by the courts. In the German case the Constitution (or Basic Law) provides several avenues for the states or the federal government to bring cases to the Constitutional Court, if either alleges that the constitutional allocation of roles between the federal and state level has not been respected. In a few constitutions the federal concept—a pact between two sides—is rendered immutable and cannot be abolished by constitutional amendment (see e.g. article 60 IV of Brazil's Constitution, or article 79 III of the German Basic Law).

Historically, federalism was predominately a means for bringing independent states together. Examples include the North American states that formed the USA; the cantons that over centuries consolidated into the Swiss confederation; and the German states that during the 19th century built the basis for a German state, but which only formally became a federal state in 1949. In these three cases, federalism was an effect of centripetal forces—a concept which still applies today (e.g. in the case of the United Arab Emirates). The more recent federal states have been less of a 'coming together' and more of a 'staying together' type (Stepan 1999), in an attempt to control or accommodate centrifugal forces. Examples include Belgium, Ethiopia, India and Spain. Even today countries such as Belgium and Spain suffer from serious tensions between their subunits: in Spain these include secessionist pressures.

Federalism has an image problem. In public perceptions it is often associated with secessionist pressures. Those who consider themselves the majority ethnic, religious or linguistic group, who often see themselves as the real ‘owners’ of a state, fear that a federal set-up might be the first step towards secession of part of the territory. They often resent the idea of a negotiation between equals that is inherent in a deal between the central level and the subunits. The term federalism usually raises controversy. For example, one guide for peace mediators notes: ‘The mediator should expect that the use of the word federalism will inevitably provoke both positive and negative emotions’ (Swiss Peace 2009). This point was proved once more in 2016.

In Syria, the spokesperson for the opposition immediately dismissed the idea of federalism when it became part of the debate (Charbonneau 2016). In Sri Lanka the Tamil National Alliance demanded a federal solution echoed in September 2016 by the former Prime Minister, Chandrika Kumaratunga (*Daily Mirror* 2016) but roundly rejected by the other major parties. One international expert noted that, in Sri Lanka: ‘Like in many other countries, federalism is either seen as a panacea for all sorts of conflicts and state failures or as a threat to the territorial integrity of the country and a first step to secession’ (Belser, E., Maggetti-Waser and Steytler 2016: 3). The Tamil National Alliance has made clear in the meantime that it is more interested in the substance of any solution than how it is labelled (*The Hindu* 2016).

In Libya, the idea of federalism burdened the constitution-making process from the outset, with a number of forces from the east and south of the country branding themselves as federalists even though their own constitutional proposals did not amount to a federal set-up. Indeed, the electoral arrangements for the CDA already reflected thinking on a balanced representation of subnational units. Each of the three historic regions of Libya elected 20 members of the CDA, despite significant disparities in the number of voters between them. Analysts understood the risk of the polarizing federal/anti-federal dynamic early on, with one noting: ‘Anti-federalists and pro-federalists are both struggling to appreciate the complexity of the issue at hand. . . . The debate is becoming more polarized, especially with both parties involved refusing to listen to each other’s views’ (Eljarh 2012).

According to data made available to the authors through Democracy Reporting International’s support to the CDA, some 15 per cent of the members of the CDA boycotted the process when they found early proposals to be either too federalist or too unitary, depending on their standpoint, making the search for consensus difficult and achieving the necessary two-thirds majority for approving a draft unlikely. The procedural result was that the two-thirds majority for adoption may not have been achieved. It is unclear whether it was eventually achieved as some members expressed their approval in writing after the vote.

The price of the 'federal' debate in Libya is a draft constitution that remains vague on crucial aspects of decentralization. A Senate with some legislative power is foreseen with equal representation from each region—one-third of senators to be elected from each of the three regions—but the regions will have no further role or legal personality, no government and no elected council. In not representing any subnational government and instead being directly elected, the Senate looks quite similar to the lower house in terms of representation, except that it over-represents two regions. The draft constitution does not provide much detail on the role of other levels of decentralization, such as the regions, although article 155 leaves open the option of creating other 'administrative units'.

Myanmar is a special case in that under the terms of the Nationwide Ceasefire Agreement signed on 15 October 2015 the military and the armed groups of ethnic minorities agreed to 'establish a union based on the principles of democracy and federalism' (Chapter 1, article 1.a). In this case, the term federalism has not been divisive, but it seems that it is employed as a political notion signifying strong local autonomy, rather than a legal notion with precise content. The secession concerns that come with federalism are reflected in the same article of the ceasefire agreement, which is also included in article 6 of Myanmar's Constitution, which indicates that the parties must uphold 'the principles of non-disintegration of the union, non-disintegration of national solidarity and perpetuation of national sovereignty'.

Furthermore, it is likely that the idea of federalism will become more controversial as negotiations progress. Position papers presented by military representatives at the first Union Peace Conference in January 2016 (unofficial English translations of which have been seen by the authors) suggest that the military, one of the key players in the country's transition, has already indicated that it sees the Burmese regions of the country as the centre of the reformed state. While this could be understood as a demand for an asymmetric federal state, in which one area has more powers than others, it can also be interpreted as a limited commitment to local autonomy.

In Ukraine, federalism has played a role in the public discussion to the extent that the Russian government has repeatedly called for Ukraine to become a federal state, suggesting that its regions should have far broader autonomy on economic and cultural matters. During the crisis in 2014, Russia implied that this was a natural solution to a heterogeneous country under strain (BBC News 2014). Ukrainian political parties have roundly rejected this idea. Their biggest concern is territorial dissolution at Russia's instigation, as happened in Crimea and in hybrid forms in eastern Ukraine. Thus, the Russian demand for federalism is considered a provocation more than a policy proposal. Understandably in this case, the connection between federalism and dissolution is high in public perceptions.

In short, 2016 was another year that proved that ‘federalism’ is a questionable notion to employ in peacemaking and constitution-making processes. It is more likely to fuel the fire than offer common ground for constructive negotiations. Alfred Stepan has suggested that federal systems should be seen as a *solution* rather than a *threat* to holding together multinational, multi-ethnic or multilingual states (Stepan 1999). He fears that discarding federalism out of concern over secession robs policymakers of a potent model for accommodating difference, thereby potentially increasing centrifugal pressures. He has a point and it may be worthwhile to try to improve federalism’s image problem.

However, as long as federalism is a polarizing proposition, peacemakers should avoid the term to prevent complicating their tasks. If the parties to a conflict demand federalism, mediators should try to engage them in a discussion on the concrete shape of relations between the different levels and move them away from operating within a label. The idea is not to discard federalism as a solution, but rather to avoid the label and the idea that the negotiation is about adopting one specific model.

The political implications of using or not using the term federalism can be seen in Kenya’s 2010 decentralization process, which was carried out under the headline of ‘devolution’ and approved by the people in a constitutional referendum. Legally, Kenya’s devolved system of government has all the hallmarks of a federal state. The referendum might not have been successful if the legal identity of the decentralization scheme had been portrayed to voters as federal. Thus, it is not the federal structure as such, but the assumptions and fears associated with federalism through political campaigns that can divide a country along these lines.

Especially if federalism is understood as a specific form of decentralization with defined legal contours, rather than a general call for subnational autonomy, it becomes even more apparent that it should be avoided when structuring peace- and constitution-making processes. Instead, such processes should be approached openly by exploring the key concerns and demands of all sides and establishing common ground over time. Working on a specific concept will separate the sides from the start into a ‘pro’ and a ‘con’ group.

As can be seen from the case of Libya, artificial divisions may emerge where no side actually promotes genuine federalism but ‘federalists’ believe they are doing so. Federalism then simply becomes a rallying cry, a label for something desirable rather than a defined legal–political notion.

Importantly, a federal state is not necessarily more decentralized than a non-federal state. Local governments in a unitary state may be given more autonomy than they enjoy in another federal state. Malaysia and Russia, both federal states, are more centralized than unitary states such as the Netherlands or the United Kingdom, a point that should be impressed on parties to a conflict who believe that federalism gives them the best chance of autonomy. Similarly, it is not

obvious that the risk of secession would be higher in federal states than in states with other forms of decentralization. For example, the independence referendum in Scotland took place in a non-federal state. Indeed, some argue that federalism makes secession less likely, because subunits with constitutionally guaranteed rights may worry less about their autonomy.

Conclusion

The level and shape of the decentralization of a state tend to be among the most salient and controversial issues in constitution-making. This is not surprising. As is the case for electoral rules, decentralization affects access to, and the extent of, political power for political parties. These issues are also of great social and historical importance for many people, as they signify their attachment to a territory. Decentralization is a major point of contention, especially in constitution-making processes that follow war, conflict or civil strife. Topical examples from 2016 are Libya, Mozambique, Myanmar, Sri Lanka, Syria and Ukraine.

The idea of 'federalism' often comes up in constitutional reform processes. Either international players suggest it or some of the relevant parties demand it. However, developments in 2016 showed once more that federalism is not a concept that peacemakers should use. There are three reasons to avoid the federalism term in peace- and constitution-making. First, federalism denotes one specific conception of decentralization and therefore immediately limits negotiations. Second, it imports a binary choice into negotiations. Either the parties to the agreement consider the result to be a federal structure or they do not. The choice then leads to perceived winners and losers in the negotiation. The whole idea of federalism can create unnecessary divisions from the beginning, when one party to a conflict defines itself as 'federalist', as happened in Libya. Ironically, the demands of Libya's federalists did not amount to a federal state solution. Third, for those groups that are most concerned about secession (usually the majority groups in a conflict) federalism has a bad name. They see the significant strengthening of territorial divisions as a prelude to secession. While this is arguable, perceptions matter. If a notion triggers instant massive resistance, alternative formulations should be considered.

Instead of federalism, constitutional negotiations should be framed by the term decentralization. In contrast to federalism, decentralization is an open term—there can be a lot or a little of it. Decentralization offers a rich menu of options that can be adjusted to the needs and demands of a specific context. The menu includes formal elements, such as the number of levels and the number of units at lower levels, as well as the opportunity to create asymmetric set-ups that take account of any group or territory that may have special interests or features. The menu also includes substantial features, such as the extent and shape of

decentralization in administrative, political or fiscal terms. Whether the outcome of the negotiations—the specific mix chosen from the menu—is considered to qualify as a federal state remains an academic question of no practical relevance.

In conclusion, in a March 2005 speech John Garang, the former President of South Sudan, suggested that, in avoiding the use of any specific word to describe the form of governance created under the terms of the Comprehensive Peace Agreement (CPA), its drafters might have been guided a desire not to name their ‘child’ before it was born. He went on to state: ‘Now that the child has been born, you can decide what to call the form of governance that we have agreed to in the CPA, whether it is a federation, confederation or true federalism or some other “ism”’ (quoted in Deng et al. 2008: 114).

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4. Senate reforms in constitution-making processes in 2016



Adem Kassie Abebe

Introduction

Over 40 per cent of the countries in the world have bicameral legislatures, comprised of a lower house and a second chamber, or senate (Bulmer 2017).¹ The proportion of bicameral systems worldwide was highest at the beginning of the 20th century, has decreased since but has begun to increase again in recent times as states establish new senates in post-authoritarian and post-conflict settings (Drexhage 2015: 5). While bicameralism is common in federal countries, the majority of countries with bicameral legislatures are in fact unitary.² Bicameral legislatures exist in all regions of the world and in all systems of government—presidential, parliamentary, as well as mixed systems. Constituent unit legislatures in some federations, particularly in Australia and the United States, can also be bicameral, although the majority of constituent units have unicameral parliaments. A number of constituent units in many federations, such as Brazil, Germany and Nigeria, have abolished their second chambers.

Senates have a long history, initially representing landowners and subsequently territorial, social and professional groups, and their composition and function vary much more than those of lower houses, which show remarkable similarity in their composition and functions. Senates remain controversial and are frequently the subject of constitutional reform. In unitary states, their very existence is often

contested, as countries establish new chambers or abolish existing ones, reform their composition and powers, or introduce different systems of representation.

In 2009 Romanian voters voted overwhelmingly to abolish the senate in a referendum, but the decision has not been implemented. Newly elected President Macky Sall of Senegal led a campaign to abolish the senate in 2012, partly with a view to saving resources to pay for the damage caused by floods. In 2013 a slight majority of the Irish electorate voted in a referendum to retain the senate. In Canada, Prime Minister Justin Trudeau formulated a revised process of appointment for members of the senate, who under the Constitution are appointed by the governor general on the advice of the prime minister. With the stated goal of strengthening its original purpose of serving as an independent, deliberative chamber, Trudeau established a non-partisan Independent Advisory Board for Senate Appointments. The Board provides a merit-based, non-binding list of recommended candidates identified through a public application process for consideration by the prime minister.³ Nonetheless, although several appointments have been made based on the reformed process, these changes have yet to be concretized through constitutional or legislative reform. Constitutional drafters in Mali have proposed to establish a new senate, while Mauritians voted in August 2017 to abolish the senate. Burkina Faso is likely to abolish its senate, which was constitutionally established in 2012, as it was never operationalized due to resistance from opposition groups which saw it as a means to strengthen the fortunes of President Blaise Compaoré, who was removed from power in a popular uprising in 2014, thereby precipitating the ongoing constitutional reform process.

This chapter discusses efforts in 2016 to establish or reform senates in three countries: Côte d'Ivoire, Italy and Thailand. The reforms in all three countries required a constitutional referendum. While the Italian reform package was rejected, in Côte d'Ivoire and Thailand the proposed reforms were approved as part of a new constitution. The chapter briefly examines the overall constitutional and senate reforms in the three countries.

A new senate for Côte d'Ivoire

Following a short reform process dominated by Ivorian President Alassane Ouattara, more than 93 per cent of voters approved a new Constitution in October 2016. (See Chapter 6 in this Annual Review for details of the process leading to these reforms.) Although turnout was only around 42 per cent, the absence of a turnout threshold for the approval of referendum outcomes meant that the outcome was valid. One of the innovations of the 2016 Constitution is the establishment of a new senate with significant powers. The origins of the senate are slightly unclear. When Ouattara announced his intention to amend the 2000 Constitution during his 2015 presidential re-election campaign, the focus

was on the nationality-by-birth requirement for aspiring presidents and their parents. Establishing a senate had been considered and rejected at the end of the 1990s by former President Henry Bedie, who was then a rival of but is currently in partnership with Ouatarra.⁴ The ruling party—the Rally of Houphouëtists for Democracy and Peace, named after popular founding Ivorian President Felix Houphouët-Boigny—is a coalition of several parties. Given the power of the president to appoint a significant proportion of the senators, the senate may prove a useful platform for accommodating important elements of the coalition (Branson 2016). President Ouatarra has also indicated that the appointment powers will allow him to select from significant voices outside the governing coalition, or that are unrepresented in the lower house. However, there is no constitutional requirement for him to do so or any procedure to this effect.

The constitution drafting process began in May 2016 with the unilateral presidential appointment of a panel of experts (Lobe 2016a). While there was some consultation with opposition groups, civil society organizations, and religious and traditional leaders, there was little large-scale public consultation or debate. The president dominated the process, and before its referral to a referendum, parliament approved the draft constitution by a two-thirds majority after only a few days of deliberation (Lobe 2016b).

Composition of the Ivorian senate

The new senate is designed to ensure the representation of territorial collectivities and Ivoirians living abroad (article 87). In addition, the senate will include representative experts from various fields. Members of the lower house are directly elected to single-member constituencies or some multiple-member constituencies of up to six seats by the first-past-the-post electoral system, which essentially links each representative with a specific constituency. The added value of the senate in ensuring the representation of territorial collectivities will depend on the extent to which its membership varies from the membership of the lower house. In particular, the senate could enable the slight overrepresentation of less densely populated collectivities, while also ensuring the inclusion of other traditionally underrepresented groups such as women and youth, giving them a greater voice than in the lower house (Branson 2016).

The president appoints 40 of the 120 members of the senate (article 87). The Constitution does not address the manner of the selection of senators, but the president is required to appoint individuals from diverse professional fields. An electoral college of local and regional council members will appoint the remaining 80 members. While granting powers of senate appointment to the head of state is not uncommon (e.g. India, Italy), the proportion of appointments left for the president of Côte d'Ivoire is large, allowing the president to exercise greater influence over the legislative process. In addition, the Constitution does not provide for an independent entity to draw up a list of recommendations for

appointment, as occurs in Canada following the reforms introduced by Trudeau in 2016, or for various professional, social and economic groups to select their representatives themselves, as occurs in Slovenia. Given that the new Constitution removes the requirement for a mandatory referendum to approve constitutional amendments affecting presidential powers, a friendly senate might support a president wishing to extend their own term, which is now possible as the new Constitution has removed the age limit on presidential candidates (Branson 2016).

Powers of the Ivorian Senate

The senate enjoys broad legislative, oversight and appointment powers. Parliament must approve all constitutional amendments in a joint sitting. The senate must also approve all laws, including money and budget bills. The latter must first be introduced in the lower house (articles 109 and 110). Laws relating to the regions and districts of Côte d'Ivoire must first be introduced in the senate. While the lower house can override the senate (except in relation to constitutional amendments), it can only do so with a two-thirds majority in relation to organic laws (an ordinary majority is required in other cases), and in all cases only after failure to agree on a text following the establishment of a joint committee (article 110). Where a joint committee fails to agree on an agreed text, or where both houses fail to approve the text agreed in the committee, the lower house can pass a determinative vote at the request of the president (article 110).⁵

The senate also has oversight authority to seek information from, and address questions to, the council of ministers and the president (article 116). The chairperson of the senate appoints one member of the constitutional council, which is in charge of reviewing draft laws and legislation, and approving election outcomes (article 126). Crucially, neither the senate nor the lower house formally participates in the appointment or dismissal of the prime minister, or the formation or dissolution of the government, for which the president is solely responsible (article 70).

The failed Italian reform effort to weaken the senate

Italy's constitutional framework and the bicameral system in particular must be seen in the light of the political experience that immediately preceded the drafting of the 1948 Constitution. To prevent a repeat of the autocratic regime of Benito Mussolini, the drafters of the Italian Constitution opted for a weak executive and a 'perfect' bicameral system, in which each house enjoyed direct popular legitimacy (Calingaert 2008: 106; Cimino 2015). While the electoral system has changed over the years (Regalia 2015; Damiani 2017), since 2006 members of both houses have been elected at the same time through proportional representation, but the bonus to the largest party is calculated at the national level

for the lower house and at the regional level for the senate. The two houses also exercise identical powers, a system unusual even for parliamentary *federal* countries. In particular, the government must enjoy the confidence of both houses, and each house is individually empowered to withdraw its support.

The frequent changes of government and associated political instability—more than 60 governments in 70 years—have been partly attributed to this bicameral system (Calingaert 2008; Clementi 2016).⁶ Only once has a government completed its five-year term (Silvio Berlusconi's government of 2001–06). Nonetheless, all efforts to reform the bicameral system in the past three decades had failed even before their formal consideration in parliament as constitutional amendments, until Matteo Renzi, a young and reform-minded politician, became Prime Minister in 2014.

Within months of assuming power, Renzi proposed a constitutional amendment to downsize the senate and, more crucially, reduce its powers and the powers of the Italian regions. With little public consultation or parliamentary debate, which created a sense of an 'imposed' constitution (Cimino 2015), Renzi proceeded with the constitutional amendment initially in the senate itself and subsequently in the lower house. The proposal was approved twice, by an absolute majority in the senate and the lower house, as required under the constitution. However, the reforms could not obtain the two-thirds majority required to avoid a referendum. The possibility of amending the Constitution in a referendum allowed the Renzi government to push the reforms through with an ordinary parliamentary majority and without the need to seek compromise on the proposals with other political factions, and despite some opposition from within his party. The lack of compromise, and the resistance from some mainstream and new political actors, led to fierce opposition, mainly on the grounds that the senate reforms, combined with changes to the electoral system for the lower house (known as *Italicum*) could lead to a concentration of power in the executive and the prime minister (Azzariti et al. 2015).⁷

Misjudging his popularity, Renzi directly linked the outcome of the referendum to his political future, as discussed in Chapter 2 of this Annual Review. The proposals were at the centre of politics and public debate for several weeks prior to the referendum, as all sides aggressively promoted their positions. In the end, voters overwhelmingly rejected the reforms in December 2016 and Renzi subsequently resigned. While concerns regarding the concentration of power provided the substantive basis for organized opposition to the reforms, the outcome of the referendum was attributable to a mishmash of factors, not least the perceived failure of the government to address the troubled economic situation (*The Economist* 2016), overall dissatisfaction with political institutions and the high rate of unemployment—especially among young people, more than 70 per cent of whom voted against the reforms (Poggioli 2016).

Proposed composition of the Italian senate

The proposed senate would have had 100 members, reduced from the current 315. Regional councils and autonomous provinces would have appointed 95 of the 100 senators, while the President of the Republic would have retained the constitutional discretion to make up to five additional appointments from among persons who have contributed to the nation through their outstanding achievements. Using the senate as a platform for regional representation had been considered in 1948, but the regionalization process proceeded slowly and the idea was abandoned (Drexhage 2015: 17).

Proposed powers of the Italian senate

If the context at the time of the drafting of the 1948 Constitution necessitated the establishment of several veto players, experience under it, and fading memories of life under Mussolini, triggered efforts to devise a more streamlined and stable government. Under the reforms, the lower house would have had sole responsibility for the formation and dismissal of the government. The absolute veto powers of the senate would also have been reduced to constitutional amendments and some matters affecting the regions. In most other cases, the lower house would have been given the power to override the senate, including in relation to the budget. The reforms retained the power of parliament to appoint five members of the 15-member Constitutional Court. However, under the reforms, rather than approval of all five appointments in a joint sitting of the two houses, the lower house would have separately appointed three members and the senate the other two. Overall, the reforms would have significantly reduced the formal powers of the senate.

An apolitical and counter-majoritarian senate in Thailand

If the goal of the failed Italian reforms was to reduce government paralysis and cement the supremacy of the lower house, the reforms in Thailand had the opposite purpose (Wheeler 2016; Bremmer 2016; Crouch and Ginsburg 2016). In Thailand, the overall goal was to strengthen rather than weaken veto points. The move was a reflection of a legacy of mistrust of political parties, especially among the military, and more particularly in response to a series of electoral victories (including a landslide in the 2011 elections) by a new party with a large rural electoral base: the Pheu Thai Party (PTP).

In 2014, in response to months of anti-government protests and pro-government counter protests, Prime Minister and PTP leader Yingluck Shinawatra dissolved the lower house and called for elections. The Constitutional Court invalidated the elections, however, because they were not held on the same day across the country, and subsequently removed Yingluck and a number of

other ministers for unrelated reasons. A transitional caretaker government was then established but the military orchestrated a coup against it. Subsequently, the military also dissolved the senate and suspended the 2007 Constitution, other than the parts dealing with royal powers.

Soon after, the military government established a commission to draft a constitution. An initial draft was rejected by the army-appointed National Reform Council, which was serving as an interim legislature. A subsequent draft by a newly established commission was directly submitted to a referendum, without referral to the National Reform Council. The dominance of the military and the constraints imposed on political parties meant that there was very little public debate on the content of the constitution during the drafting process. Public debate before the referendum was equally insignificant as the military systematically promoted the new draft, focusing on its populist elements, and largely banned campaigns—particularly by those who rejected the draft (Meisburger and McQuay 2016). The new draft was approved by over 60 per cent of voters in a constitutional referendum in August 2016.

One of the most controversial aspects of the draft approved in the referendum was the establishment of a senate with significant powers, including, for a transitional five-year period, in relation to the appointment of the prime minister. Indeed, one of the referendum questions was whether the senate should join the lower house in selecting the prime minister during the transitional period. The senate reforms were accompanied by institutional limits on any future elected government. In particular, the reforms strengthen the powers of the Thai Constitutional Court, including its powers to impeach an elected government, remove elected representatives and review bills and laws for constitutionality.

Composition of the Thai senate

Unlike the senate in the 2007 Constitution, which was partly elected on a regional basis and partly appointed, the new senate will be a fully appointed 200-member body. Senators must be selected by and from among persons with the ‘knowledge, expertise, experience, profession, characteristics or common interests or working or having worked in varied areas of society’, at the local, regional and national levels (articles 107, 108). Accordingly, the composition of the senate should broadly reflect the professional and regional diversity of the nation. The Constitution explicitly regulates the composition of the lower house (article 83), which is elected based on a mixed system that combines single-member constituencies (350 members) and proportional representation (150 members). In relation to the senate, however, the new Constitution leaves largely unregulated the exact number of groups and the number of representatives from each group, as well as the process of appointment. An organic law (article 107) is expected to be adopted by the military-appointed Constitution Drafting Committee (article 267).⁸

Members of the senate are expected to be apolitical. Second terms and alignment with political parties are prohibited, and government officials are barred from standing (articles 108, 113). The Constitution also imposes a five-year time limit before which former ministers, local administrators and members of the lower house and local assemblies, as well as former members of political parties, cannot be appointed to the senate. Moreover, former senators cannot subsequently hold ministerial or other political positions for a period of two years, except for membership of local assemblies or as local administrators (article 112).

Crucially, in the initial period of five years, the senate will be composed of 250 members fully appointed by the military (National Council for Peace and Order), including six of the most senior military and security officials. This will allow the military government to strengthen its political influence and prevent any temptation to legally abolish or disempower the various veto players formalized in the new Constitution.

Powers of the Thai senate

Overall, the senate will have significant legislative, oversight and appointment powers. All bills are introduced in the lower house but must be considered by the senate (articles 133–36). In some cases, such as constitutional amendments, the declaration of war and the adoption of organic laws, the senate sits jointly with the lower house (article 156). In cases where the two houses sit separately, the lower house can override the senate but only after a joint committee has been established to find a compromise draft and 180 days has elapsed (articles 137, 138). This period is reduced to 10 days in relation to money bills, and the lower house can override the senate immediately on budget laws. In the first five years, however, certain laws concerning corruption and the administration of justice that are rejected by the senate can only be overridden in a joint sitting with a two-thirds majority (article 271).

The senate also has the power of interpellation—that is, to seek explanations and statements of fact from the council of ministers (article 150). Most importantly, members of the major independent entities, such as the Constitutional Court, the Election Commission, the Anti-Corruption Commission and the Auditor General, are appointed by the King on the advice of the senate, with no formal or direct role for the lower house (articles 204, 222, 228, 232, 238, 241, 246).

Crucially, in the initial five-year period, the prime minister must be appointed in a joint sitting with the support of an absolute majority (article 159 and 272). Exceptionally, with the approval of a two-thirds majority in a joint session, an unelected person may be appointed prime minister (articles 159 and 272). After the transitional period, confidence powers will lie exclusively with the lower house. The involvement of the senate in the formation of a government is unusual (Drexhage 2015). The notable exceptions are Italy, where a new

government must receive and continue to enjoy the confidence of both chambers, and Switzerland, where the federal council is appointed in a joint sitting but neither chamber can dismiss the government before the end of its term. In Japan, each chamber nominates the prime minister and where there is a failure to agree on a common candidate, the views of the lower house prevail; the senate does not have the power to remove the prime minister.

Conclusion

While their origin and consequence vary, often depending on the extent of their veto powers (symmetry), the manner of selection of their members (electoral legitimacy), the similarity of their composition with the lower house (congruence) and the extent of overrepresentation of minorities (based on Lijphart 2012; Bulmer 2017) senates are critical elements of constitution-making and reform processes. Indeed, 2016 featured reform processes to which senates were crucial, particularly in Côte d'Ivoire, Italy and Thailand. Whether the purpose of the reforms was to establish, weaken or strengthen senates, there is invariably a recognition that they are consequential. In this regard, the fact that the reforms in all three countries proposed senates smaller than, and largely organized according to different rules from, the lower legislative chamber could enhance their position and reduce the possibility of redundancy.

Based on the reforms in the three countries, it is possible to make three tentative observations. First, in all cases, the issues were ultimately decided in constitutional referendums, which allowed the people a direct say. Nonetheless, the reforms were promoted by the ruling party/regime with little incentive to seek public input or, crucially, to compromise at the debating and drafting stage. It is possible that the referendums may have been seen as sufficient sources of legitimacy and partly justified the decision to avoid broad public engagement at the drafting stage. In the particular case of Italy, the referendum procedure was essentially constitutionally established as a deadlock-resolution mechanism to bypass the lack of sufficient parliamentary consensus. Referendum options or requirements for the approval of constitutional reforms may therefore have the unintended consequence of undermining incentives for public engagement in, and political compromise on, the drafting and debating of reforms, which have been shown to have greater possible impact on democratic progress than participation at the ratification stage through constitutional referendum (Eisenstadt et al. 2015).

Second, levels of public engagement and political pluralism appear to be inversely related to the outcome of the referendums. The people overwhelmingly rejected the reforms in Italy following intense political debate, mainly after the drafting of the reforms but before the date of the referendum, due to concerns over the effect of the reforms, the personalization of the reform proposals, and,

crucially, the freedom and strength of political groups to launch organized opposition, including based on issues or concerns unrelated to the reforms.

In contrast, the referendums in Côte d'Ivoire and Thailand were not conducted in the context of political freedom and meaningful pluralism that characterized the process in Italy. In Thailand, voters approved the reforms but the military dominated the process and there was little space for public discussion of their substance or organized opposition. In Côte d'Ivoire, the president, riding the wave of an overwhelmingly popular electoral win (gaining over 80 per cent of the votes cast) in the 2015 presidential elections, dominated the process and had the necessary support in parliament, thanks partly to a boycott by the main opposition party of the 2011 legislative elections. Despite some scattered opposition to the overall project, the proposed reforms were drafted and approved too quickly for an informed public debate to occur or for organized opposition to emerge. In addition, considering the fact that the reforms in Côte d'Ivoire and Thailand were comprehensive and touched on other more or equally controversial proposals, the referendum outcomes, and the position of the various opposition groups, may not have been solely attributable to the senate reforms.

Third, while senates were established and/or empowered in Côte d'Ivoire and Thailand (both unitary states), in Italy (a highly decentralized, regionalized state) the proposed reforms would have curtailed the powers of the senate. Moreover, the reforms in Côte d'Ivoire and Thailand expressly anticipated the representation of local and regional interests/authorities in the national legislative process—a crucial function of senates in federal states. The reforms to the Italian senate would have aligned it with the federal practice of regional representation. In addition, the senates in the two unitary states anticipate a significant number of appointed members. The senates in Côte d'Ivoire and Thailand were also designed to ensure better representation of diversity, particularly in terms of professional/social groups, which could provide lessons for federal countries. That said, in none of the cases is the representation of identities, such as ethnicity or religious groups, an expressed goal, although the appointment processes in Côte d'Ivoire and Thailand could potentially be cognizant of such diversity.

Beyond their composition, the legislative, oversight and appointment powers and functions of the proposed senates are increasingly comparable, regardless of whether the country is decentralized/federal or unitary. Indeed, where there are variations, they exist *within* unitary or federal countries perhaps as much as *between* unitary and federal countries. While lower houses in unitary states generally have powers to override senates, in practice this can be difficult. Moreover, in certain cases, the lower house either does not enjoy such power, or requires a special procedure or majority. Accordingly, constitutional drafters and international advisers working in the constitution-building field when dealing with senate reforms should look beyond the federalism/unitary divide to draw crucial lessons.



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Endnotes

1. This chapter uses 'senate', 'second chamber' and 'upper house' interchangeably.
2. The main exceptions to this trend in federations are Venezuela and the small federations of Comoros, Micronesia, St Kitts and Nevis, and the United Arab Emirates, which do not have second chambers.
3. Established in January 2016, the Advisory Board has five members: a federal chair, two other federal members and two ad hoc provincial or territorial members for the province or territory where a vacancy is being filled. See <<https://www.canada.ca/en/campaign/independent-advisory-board-for-senate-appointments.html>>, accessed 15 June 2017.
4. The nationality-by-birth requirement for candidates and both of their parents was formally established during Bedie's regime and especially aimed at excluding Ouatarra, who served as prime minister in the final years of President Félix Houphouët-Boigny, from the presidency.
5. This provision could have been influenced by the French Constitution (article 45, paragraph 4) but in France it is the government, not the president, that makes the request to the lower house to adopt definitively a law over which the two houses cannot agree. The provision therefore enhances the powers of the president with regard to the legislature and the government.
6. For a list of all Italian governments and elections (in Italian) see <<http://www.governo.it/i-governi-dal-1943-ad-oggi/i-governi-nelle-legislature/192>>, accessed 9 June 2017.
7. Following the referendum, the Constitutional Court of Italy invalidated crucial aspects of the *Italicum*, necessitating new rounds of discussions to revise the electoral law (Damiani 2017).
8. The empowerment of the Constitutional Drafting Committee to draft organic laws implementing the constitution is a unique aspect of the Thai constitutional reform process, where the constitutional drafting process has essentially been 'extended' to include the drafting of several organic laws.

5. Constitution-building processes in Armenia and Georgia



Sumit Bisarya and Ellen Hubbard

Introduction

This chapter reviews the recent constitution-building processes in Armenia and Georgia. These countries are witnessing interesting and relatively rare developments in that, in both, the driver of the agenda for constitutional reform is the transformation from a presidential to a parliamentary system—completed in the case of Armenia, ongoing in Georgia. In addition, both are examples of major constitutional transitions taking place in the absence of crisis.

The only previously recorded case of a democracy moving from a system with a directly elected president to a parliamentary system is Moldova in 2000 (Samuels and Shugart 2010). Even that change was ruled unconstitutional by the Constitutional Court in 2016, and Moldova has since reverted to the previous semi-presidential system. In general, among the reasons for this rarity are the natural stickiness of institutions, the problems associated with mobilizing the necessary resources for reform in the absence of crisis, and a reluctance by constitutional designers to experiment with unfamiliar systems of government.

Despite the historical rarity of these events, Georgia and Armenia are not alone in the current constitution-building landscape in considering the replacement of a directly elected president with a parliamentary system. There has been significant mobilization to this end in both the Philippines and Sri Lanka. The constitutional agendas in Armenia and Georgia are driven firmly by their national

political contexts, as detailed below, but the brief concluding section alludes to certain caveats and considerations that can be derived from these two cases to inform similar constitutional transformations elsewhere.

Armenia's 2015 constitutional amendment

Background

Despite numerous attempts at democratic constitutional reform in recent decades, when Armenia's current President, Serzh Sargsyan, was elected in 2008 the Armenian Constitution gave him essentially unlimited power (Galyan 2015; see also Partlett 2015: 85–100). President Sargsyan initiated constitutional reforms in 2013, which culminated in 2015 in Armenia's shift from a semi-presidential system to a parliamentary system (Galyan 2015). Faced with a limit to his presidential term in 2018, critics argue that Sargsyan moved Armenia to a parliamentary system to allow him to maintain political control as prime minister after stepping down as president (Stepanian and Bedevian 2015). They contend that Sargsyan's constitutional reform process, rather than promoting democratic reforms, has maintained Armenia's pattern of centralized political power, only transferring it from the president to the prime minister and their party.

Constitutional reform processes in 1995, 2001 and 2005 paved the way for President Sargsyan's consolidation of power (Galyan 2015). Following independence from the Soviet Union, the then President, Levon Ter-Petrosyan, established a Constitutional Commission in 1991 to draft a new constitution with the stated goal of guaranteeing individual rights and improving the economy. Upset with the Commission's slow and disjointed progress, in 1993 an opposition group known as the National Alliance initiated its own drafting process (Defeis 1993). At the time, Armenia's political and economic environment was destabilized by hostilities with Azerbaijan over the Nagorno-Karabakh region (International Crisis Group 2012). Following a 1994 truce with Azerbaijan, in 1995 Armenia's parliament, the National Assembly, accepted the Constitutional Commission's draft constitution. The main feature of Armenia's 1995 Constitution was sweeping presidential political control, potentially in response to the tumultuous fall of the Soviet Union which was quickly followed by the conflict with Azerbaijan (Bremmer and Welt 1997). The 1995 Constitution created a semi-presidential system with an extremely powerful president with the power to dissolve parliament at will, and appoint or remove judges, prosecutors and government officials at all levels (Bremmer and Welt 1997).

The 2005 constitutional reforms weakened some aspects of presidential power, in particular by transforming the regime from presidential–parliamentary to premier–presidential, but the president still faced few limits in terms of control.

In the parliamentary elections of 2012, the Republican Party of Armenia (RPA) won a big majority via 44 per cent of the party-list votes, and 29 of the 41 seats in the constituency elections, giving it 69 representatives in the 131-seat parliament and extending Sargsyan's dual control of the executive and legislative branches as President of Armenia and Chair of the RPA (Galyan 2015).

Since 1995, constitutional reform processes and elections have been widely criticized as flawed and tainted by substantial vote rigging (Stec 1997). President Sargsyan's 2008 election was met with protests that were violently suppressed. The 2012 elections passed without violence, but widespread election fraud continued to damage the legitimacy of election processes in Armenia (International Crisis Group 2012). Election rigging and Armenia's history of political clientelism represent ongoing issues that are detrimental to effective democratic constitutional reform.

Armenia's post-Soviet political history and the timing of President Sargsyan's constitutional reform process led many critics to believe that the 2015 reforms are only the most recent mechanism for enabling an Armenian leader to stay in power (Waal 2015). When asked directly whether he would seek to become prime minister after he leaves office in 2018, President Sargsyan said only that there 'is still a great deal of time' (Aravot 2017). RPA members, however, have stated that Sargsyan is too valuable to Armenia to retire, and there is no reason he should not be prime minister (RFE/RL Armenian Service 2015a).

The 2015 amendment process

President Sargsyan leveraged the RPA's parliamentary majority and his individual executive power to institute top-down constitutional reform. In 2013 Sargsyan set up a Specialized Commission on Constitutional Reform, unilaterally appointing all nine members (Galyan 2015). The Commission's members came from Armenia's Constitutional Court, the government and the legal field, but no members of the opposition or civil society were included. A draft of the proposed constitution was first made available to the Armenian public in mid-2015. In August 2015, Sargsyan met with parliamentary and ex-parliamentary representatives, but the major opposition parties refused to attend, claiming that the meetings were a pretence rather than a genuine inclusion of diverse opinions (Petrosyan 2015). The Commission issued periodic press releases but overall the amendment process lacked transparency (Galyan 2015).

The European Commission for Democracy through Law (Venice Commission) has generally supported Armenia's recent constitutional amendments. With regard to the change in system of government, however, it has warned against making such changes 'to advance the positions of incumbent or future power holders' (Venice Commission 2015a: 12).

The procedure for amending Armenia's Constitution provides for approval by an absolute majority in parliament, followed by a referendum (article 111). The

National Assembly approved the Commission's draft amendments on 5 October 2015. In a referendum held on 6 December 2015, a declared 63.5 per cent of voters supported the amendment on a turnout of 50.5 per cent (RFE/RL Armenian Service 2015a, 2015b). In the aftermath of the referendum, the European Platform for Democratic Elections reported extensive election fraud and restrictions on the rights of observers and voters, in a total of 1080 voting violations (Eastern Partnership Civil Society Forum 2016).

Parliamentary–presidential to parliamentary republic

President Sargsyan's 2015 amendments to the Constitution transfer all executive power to the prime minister and make the government responsible to parliament; change presidential elections from direct to indirect; and create an electoral system that appears designed to create a dominant position for a single party in parliament. In combination, the new Constitution favours the consolidation of power in a single party, with a prime minister as head of both the party and the executive. After criticism from the Venice Commission, the final draft amendments softened some of the more overtly majoritarian provisions. Nonetheless, the adopted draft still raises concerns about single-party rule.

Under the 2015 constitutional amendment, Armenia's National Assembly is structured towards single-party dominance. The Assembly must be governed by a stable majority and additional restrictions impede the formation of parliamentary factions (Venice Commission 2015a). According to the amended Constitution and Armenia's Electoral Code, the parliament is elected using a proportional party-list system (European Country of Origin Information Network 2016). The electoral system has two parts: a closed national list and an open district list. In order to gain parliamentary seats, each party must meet a 5 per cent threshold and each party alliance (two or more parties according to the 2016 Electoral Code) must meet a 7 per cent threshold (OSCE/ODIHR 2017).

A stable majority is defined as 54 per cent of the seats. If a stable majority is not reached by a party or a party alliance in the first round of elections, the parties and party alliances are given six days to form a coalition in order to reach a stable majority (OSCE/ODIHR 2017). If a stable majority does not result from the first round and a coalition cannot be formed to create a stable majority, a second round of elections is held between the top two party lists from the first round of elections.

The Constitution allows for the possibility of a ruling parliamentary coalition as opposed to mandated single-party rule through party alliances or coalition building following the first round of elections. However, in the context of Armenia's history of flawed election processes and political clientelism, a ruling parliamentary alliance or coalition is unlikely (Galyan 2015). Armenia's first parliamentary elections under the 2015 constitutional amendments were held in

April 2017. The RPA held on to its parliamentary majority, winning 58 of 105 seats (55 per cent).

With executive and legislative power centralized in the hands of the majority party, any checks and balances must come from a plurality of parties in the National Assembly. However, the amendments restrict permissive electoral mechanisms that would promote pluralism (Galyan 2015). On the Venice Commission's urging, a provision prohibiting outright the formation of new factions after elections was removed, but the amendment adopted still makes the formation of new factions extremely difficult (Venice Commission 2015c). As adopted, article 105 states that factions must only include parliamentarians 'of the same party as any pre-electoral alliance of parties' (Venice Commission 2015c: 7).

In accordance with Armenia's transition to a parliamentary republic, the president is reduced to a symbolic position and is no longer popularly elected. The National Assembly elects the president based on nominations by any of at least one-quarter of its members. The candidate who earns three-quarters of the votes of all members is elected president. If a president is not elected in the first round, a second round is held and the candidate who earns three-fifths of the votes becomes president. If a president still is not elected, a third round is held between the two candidates with the highest number of votes from the first round (Venice Commission 2015a). The third round elects as president the candidate who earns the majority of the votes of all parliamentarians.

The remaining amendments adopted responded to some of the concerns raised by the Venice Commission regarding judicial independence. On the Venice Commission's recommendation, the Supreme Judicial Council determines the grounds for judicial removal and makes the ultimate removal decision (Venice Commission 2015c). The Council, an independent state body that safeguards judicial freedom, keeps Armenia's judiciary as a whole relatively independent (Venice Commission 2015c). However, the adopted draft still leaves judicial appointment powers under the purview of the National Assembly. Despite the Venice Commission's desire to separate parliament entirely from judicial appointment and removal, the adopted draft allows the National Assembly to elect the judges on the Constitutional Court by a three-fifths majority of all members (Venice Commission 2015c).

In conclusion, following the 2015 constitutional amendment, the executive, legislative and judicial branches of the Armenian government are all susceptible to undue influence from a parliamentary majority. With the stated intent of promoting stable government, Armenia's new electoral system facilitates the formation of a majority in parliament by a single party through constitutionally mandated electoral requirements and restrictions on the formation of parliamentary factions. Finally, although comparatively more independent, the judiciary is still vulnerable to the majority party's influence through the National Assembly's role in appointing judges to the Constitutional Court.



The proposed amendment to the Georgian Constitution

Background

Following the dissolution of the Soviet Union, Georgia temporarily restored its pre-Soviet 1921 Constitution, but then fell into a brief civil war. In 1993, an official constitutional commission was convened to draft a new constitutional framework (Partlett 2015). The 1993 drafting process was marked by transparency and the wide inclusion of opinions from politicians, historians, legal experts and the general public (Intskirveli 1996). The resulting Constitution, adopted in 1995, created a presidential system—a decision driven by the first incumbent, Eduard Shevardnadze. Following the so-called Rose Revolution in 2003, constitutional reforms were instigated to formally create a semi-presidential system, but one which in practice still reflected a ‘hyperpresidency’ (Fairbanks Jr 2004) under the newly elected President, Mikheil Saakashvili.

During Saakashvili’s rule, the United National Movement (UNM) repeatedly amended the Constitution, first and foremost to strengthen the power of the president (Hale 2015). Subsequently, towards the end of Saakashvili’s term and with presidential term limits looming, Saakashvili initiated and successfully passed another series of reforms that moved Georgia to a premier–presidential system with a more powerful prime minister to balance the weight of the executive presidency. A possible hypothesis for this was that Saakashvili wanted to protect his legacy by ensuring that there would be no single officeholder capable of reversing the neoliberal economic reforms he had begun. However, in 2012 the billionaire businessman, Bidzina Ivanishvili, founded a new political party, Georgian Dream/Democratic Georgia which, under the Georgian Dream (GD) coalition, has dominated elections ever since. It currently holds 115 of the 150 seats in parliament.

The amendment process

The GD coalition won more than 75 per cent of the parliamentary seats in the October 2016 elections, and used its position to push for extensive constitutional changes. Shortly after the election, in December 2016, the GD parliamentary chairman, Irakli Kobakhidze, submitted a draft resolution to set up a constitutional amendment commission. GD stated that, in contrast to the UNM’s repeated undemocratic constitutional amendments, its goal in instituting comprehensive constitutional amendments was to prevent future abuse of the political system by a party gaining a constitutional majority and using this power for subjective party political ends (Venice Commission 2017). To this end, GD claimed that the constitutional amendment process would include input from the president’s office, the government, the judiciary, parliamentary and non-parliamentary parties, civil society and legal experts, and would seek the Venice

Commission's approval. However, the president boycotted the constitutional commission's work entirely, and all parties except GD boycotted the commission at its final drafting stage (Zedelashvili 2017).

The commission claimed transparency in the amendment process by sending a draft in May 2017 to all the Georgian provinces for public review and including the wider political spectrum in the process. While not all parties supported the process, notable opposition parties, such as the UNM and European Georgia, participated in some of the public discussions organized by the parliamentary secretariat in all major cities. These were well organized and vibrant discussions in town hall-style settings, and well attended by local government officials, local party activists and civil society actors. The president and his team ran a parallel campaign, mostly to increase public awareness of the risks attached to the proposed revocation of the post of a directly elected president. Both were highly visible processes that helped to increase public awareness of the fact that the tabled document was not a consensus document. All in all, the various campaigns resulted in a notable increase in media attention, and in public discussion about the impending constitutional changes.

The Venice Commission released its opinion on the draft on 16 June 2017. After complying with some of the Venice Commission's June recommendations, on 22–23 June parliament voted on the amendments in the first and second of three required readings. In a clear indication of the political polarization surrounding the amendments, all 115 GD representatives approved them at the first readings, while all the opposition members of parliament abstained.

Negotiations continued between GD and the opposition throughout the summer, often brokered by the Venice Commission. GD continued to commit to implement all the recommendations from the Venice Commission, but maintained that it would not respond to ultimatums from the opposition. Relations between the president and both the parliamentary speaker and the majority party became extremely tense during this period, and the president declined to open the June parliamentary session requested by the speaker, to enable a plenary hearing and voting on the drafts in their second and third readings (in June and September). In line with the parliamentary rules of procedure, the parliamentary sessions were still convened and votes were held by the majority faction.

The draft amendments

GD's proposed constitutional amendment seeks to change Georgia from a semi-presidential to a parliamentary system of government, with a president indirectly elected by an electoral college (known as the Electoral Board) consisting of members of parliament, the supreme councils of the autonomous republics and individuals from local government nominated by political parties. The draft also weakens the president's powers, commensurate with a parliamentary head of state.

Under the current electoral system in Georgia, 77 of the 150 MPs were elected by proportional representation (PR) with a 5 percent minimum threshold. The remaining 73 members are elected to single-member constituencies, and a run-off is held if no party secures 50 per cent of the vote to garner a parliamentary majority. The amendments originally proposed moving to an entirely party-list based election, with a threshold of 5 per cent. It was also originally proposed that all unallocated seats would be assigned to bolster the party that wins the most votes. In addition, the draft proposed banning pre-electoral blocs, causing increasing concern among smaller parties. Following the Venice Commission opinion of June 2017, which criticized these moves as being detrimental to political pluralism, the measures were watered down somewhat in the version adopted by parliament. The threshold was reduced to 3 per cent for the elections of 2020, before returning to 5 per cent in 2024, and a limit was put on the number of bonus seats. The draft constitutional amendments relating to Georgia's parliamentary structure also include a prohibition on the formation of party blocs, scheduled to be in force for the 2024 elections. Constitutionally removing all notions of electoral blocs or alliances prevents smaller parties from overcoming the 5 per cent threshold and entering parliament. They would instead lose some of their votes to the largest party.

In keeping with the move to a parliamentary system, GD's constitutional amendments remove the president's ability to check the power of parliament by depriving the presidency of any real power. The amendments transfer all executive power over internal and foreign policy to the government and the prime minister (Venice Commission 2017). The explanatory note to the June amendment specifically describes the status of the president as 'highly symbolic' (Venice Commission 2017).

With regard to the election of the president, 50 per cent of the Electoral Board will be composed of members of parliament, representatives of the governing councils of the autonomous republics and local government representatives. The latter are often aligned with the government. Combined with the lack of a supermajority requirement in at least the first round of voting, this makes it highly likely that the president will be aligned with the parliamentary majority.

The proposed amendments extend the majority party's influence over the judiciary. The Constitutional Court is composed of nine judges who serve single 10-year terms. The president, parliament and Supreme Court each appoint three judges. The June amendments incorporated the provision that the three judges appointed by parliament need only a majority of MPs, despite the fact that the Venice Commission (2017) urged a provision that would allow for the input of a broad political spectrum, such as a super-majority.

The Supreme Court is composed of at least 28 judges who are appointed through a simple vote by a parliamentary majority based on the recommendation of the High Council of Justice. GD adopted an appointment process by

parliamentary majority, despite the Venice Commission's urging that the Council or the soon-to-be non-executive president make the formal appointment (Zedelashvili 2017). Filtering the appointments through parliament risks politicization of the process and, given the changes to the system described above, undue influence by a parliamentary majority. Lastly, a portion of the High Council of Justice is elected by a majority of all MPs. Again, the Venice Commission recognized the danger of reducing checks and balances against a parliamentary majority and recommended the introduction of a super-majority threshold and deadlock-breaking mechanisms for the appointments (Venice Commission 2017), but again these recommendations have thus far gone unheeded.

In sum, the constitutional amendments in Georgia aim for a transformation from a semi-presidential to a parliamentary system of government. By weakening the powers and electoral mandate of the president, maintaining the 5 per cent threshold and allocating lost votes to the largest party (albeit within limitations taken from the Venice Commission recommendations) and allowing the parliamentary majority strong influence over the composition of the judiciary and the presidency, the new system risks minimizing the fetters on a parliamentary majority that may well not represent a majority of voters.

Conclusion

The cases of Armenia and Georgia reflect similar concerns from opposition and external observers that the shift to a parliamentary system combined with an electoral system that rewards the largest party may diminish the checks and balances on ruling majorities, and could be driven by a desire on the part of incumbents to preserve their power. Whether these concerns are valid will be determined in time, but it appears that in both cases there were a number of areas in which constitutional designers could have intervened to further reduce the risk of dominance by the major party in parliament.

With transitions from directly elected presidencies to parliamentary systems so rare, the cases of Armenia and Georgia (should the amendments pass) will be extremely interesting to monitor in the coming years, with regard not just to the performance of the new system but also the process of transition to a completely different form of government. Interestingly, and perhaps wisely, in Georgia the debate has focused as much on the timing of the transition as on the substance of the changes to constitutional design, and the shifts in electoral system for both president and legislature are to be staggered. While this may be driven by political self-interest, in that district-based MPs were reluctant to move to PR, the delay may help political actors and the electorate prepare themselves for what is an entirely different system of government and politics.



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6. Deconstructing West Africa's fourth wave of constitutional change



Yuhniwo Ngege

Introduction

In the 1990s, a wave of democratic change swept across West Africa, ushering in a new political and constitutional order in many countries across the region. Fuelled by a combination of events at the global level, as well as other domestic political, economic and social pressures, this development led to fundamental changes in the constitutions of these countries. It was a dramatic break with an institutional and constitutional culture in which one-party dictatorships had thrived in the 30 years since independence.

Now, less than three decades later, what might be called a fourth wave of constitutional reform appears to be engulfing the region. The first wave happened in the late-1950s and early-1960s when many countries in the region, which were still colonies at the time, adopted new constitutions as part of the transition to independence. The second wave occurred right after independence, between the late-1960s and the 1970s, when—as part of the quest to build stronger nation states out of the independent political entities that emerged from decolonization—the independence constitutions, some of which had established multiparty parliamentary systems of government, were quickly replaced or amended to establish one-party presidential systems of government. The third wave took place in the 1990s as part of the culmination of the ‘third wave of democratization’ following the collapse of the Soviet Union and the end of the Cold War.

In 2016 alone, at least 12 of the 16 countries that make up the Economic Community of West African States (ECOWAS) either floated talks about constitutional reform or effectively engaged in some form of constitutional change. In Gambia, for instance, President Barrow promised reforms to the country's 1997 Constitution (JollofNews 2016). In Togo, opposition members of parliament continue to push for amendments to the 1992 Constitution (Boh 2016), while in Nigeria voices continue to add to calls—which have increased over the years—for reforms to the 1999 Constitution (Amasike 2016). In September 2016 political rivals in Guinea Bissau also agreed to a roadmap for a new constitution as part of efforts to resolve the country's political crisis (UNIOGBS 2016). While concrete constitutional reform processes are yet to emerge from these cases, reform processes progressed to advanced stages in many other contexts. In March 2016 voters in Senegal approved changes to the existing Constitution in a referendum (IFES 2016). Côte d'Ivoire came next with voters adopting a completely new constitution in October. Elsewhere, constitutional commissions were established to consider either wholesale constitutional replacements (Burkina Faso) or amendments (Benin, Mali, Liberia, Sierra Leone). In Ghana, a Supreme Court decision to throw out a legal challenge that had delayed reforms initiated a few years before paved the way for the process to resume. In Mauritania—the only West African country outside ECOWAS—constitutional reforms have also been part of the political agenda of President Mohamed Ould Abdel Azziz.

What are the drivers of this new wave of constitutional change? Are there any common patterns? How does the new wave compare to the most recent and consequential wave of constitutional reform—that of the 1990s, which was designed to build and strengthen democracy? This chapter draws on selected country processes from the region to reflect on these questions. It focuses predominantly on country cases where reform has progressed to an advanced stage or been completed at the time of writing, namely: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Liberia, Mali, Mauritania, Senegal and Sierra Leone. The chapter briefly surveys each of these cases from a process and content perspective. This provides the basis for identifying the extent to which commonalities or differences exist in terms of drivers of change. The chapter goes on to compare the current wave with previous processes of constitutional change in the region. The conclusion reflects on some lessons to be drawn from current processes.

Mapping the cases

Francophone West Africa

Benin

Patrice Talon became President of Benin in March 2016, replacing Yayi Boni at the end of his second and last term. Shortly after his inauguration, Talon, who had campaigned in part on a platform of constitutional reform, established the National Technical Commission for Political and Institutional Reforms (Africatime 2016). Its 35 members were drawn from civil society, political parties, academia and other stakeholder groups to conduct broad consultations with a view to recommending areas for reform of the existing Constitution. In June 2016 the Commission presented its recommendations, which can be grouped into three clusters (L'Autre Fraternité 2016). The first is the restoration of the balance of powers, perceived to have disproportionately shifted in favour of the executive, by proposing reforms to presidential term limits, and strengthening the position of the constitutional court and of the legislature in relation to the executive. The second and third clusters involved strengthening the independence of the judiciary and enhancing the effectiveness of the electoral and party systems, respectively.

At the beginning of 2017, the government finalized draft amendments to the Constitution, which included a single term for the president and public financing for political parties that gain at least one-fifth of the seats in at least one-fifth of the electoral districts or constituencies. In April 2017, the government abandoned the reform process after failing to obtain the supermajority (three-quarters) required for the bill to be considered in parliament.¹ The 60 MPs in the 83-member National Assembly who voted for the draft have since stated their intention to activate their power to initiate constitutional amendments under article 154 of the Constitution to reintroduce the bill (Africatime 2017c). However, because the same procedure applies regardless of whether parliament or the executive takes the initiative, it is likely to face similar obstacles.

Burkina Faso

In October 2014 Burkinabé President Blaise Compaoré was forced into exile after a pro-democracy uprising in the capital, Ouagadougou, following attempts to engineer constitutional amendments that would have paved the way for him to prolong his rule. His departure triggered a political transition that eventually led a new democratically elected president to call for an overhaul of the existing constitutional framework. In June 2016 President Roch Marc Christian Kaboré set up a 92-member Constitutional Commission to draft a new constitution. The draft constitution, which the Commission published in January 2017, limits the

presidential term of office to a maximum of two five-year terms and prohibits future amendments to this provision. It also bars members of parliament from serving more than three terms and abolishes the senate. In addition, it weakens the formerly strong executive presidency by strengthening the position of the prime minister, who must be appointed from the parliamentary majority. When a political party or parties different from that of the president constitutes that majority, the prime minister and the president, under article 56 of the draft, must define a consensus national policy. In the absence of a consensus between the two, the government must define and implement the national policy. This creates a cohabitational relationship of equals and, due to the fact that article 78 makes the prime minister the head of government, the latter could effectively see executive power swing in their favour in cases of conflict with the president. The draft must be discussed in the current parliament and in consultations conducted across the country and the Burkinabé diaspora before being put to a referendum. If eventually approved, it will abolish the fourth republic established on 2 June 1991 (Roger 2017).

Côte d'Ivoire

Côte d'Ivoire's reform process followed on from promises made by the incumbent President, Alasane Ouatarra, during the 2015 presidential election campaign, but has its roots in the discriminatory citizenship provisions in the 2000 Constitution and the eight-year civil war that partly resulted from these provisions. The reform process was therefore one way of breaking with that past. Established in May 2016, a 10-member constitutional commission submitted its report in September and the draft constitution was adopted in a referendum in October the same year. There was widespread criticism of the non-inclusive nature of the process and, overall, the new Constitution mostly reinforces executive power. For details on issues relating to the upper chamber of the legislature, see Chapter 4 of this Annual Review.

Mali

Mali's ongoing reform has its roots in two coups d'état in 2012, which quickly evolved into an armed rebellion between the Tuareg-dominated North region and the government-controlled South. A 2015 Peace Agreement signed in Algiers called for constitutional reforms to enable the implementation of some of the Agreement's key compromises, such as greater self-rule for the North region. In April 2016 President Ibrahim Boubacar Keita established a 13-member committee of experts to oversee the process of amending the 1992 Constitution. He argued—not without opposition—that the reforms would also strengthen some of the institutions of the Constitution. The committee's draft provides for a bicameral parliament through the introduction of a senate. The new senate will replace the higher council of local collectivities. It also provides for the

establishment of a Court of Accounts. Under current rules, the president can bypass the current referendum procedure for triggering certain constitutional amendments by convoking parliament to meet in congress for that purpose (Barma 2017). Parliament will have to debate and approve these proposals before they go to a referendum.

Mauritania

Mauritania's process was the outcome of a supposedly inclusive national dialogue between the government and political parties, held in October 2016, to address issues related to governance and state reform. Reaction to the process, however, has been hostile from both the opposition and even some former heads of state (Africatime 2017b). The fact that the national dialogue process was boycotted by some major parties could partly account for this. In the second reading in March 2017, the lower house of the assembly approved the government's draft proposals, which scrap the senate and the High Court of Justice, and introduce changes to the national anthem and the national flag. The bill is unlikely to pass the senate, however, which had earlier rejected it at the first reading, arguably to protect its own institutional interests. For this reason, the government has decided it will invoke article 38 of the Constitution, which authorizes the president to submit the proposed amendments to a referendum (Africatime 2017a). At the time of writing, the government is still to officially confirm the referendum date. Meanwhile, opponents have interpreted the government's action as trying to force through reforms that some think are either mistaken or driven by bad faith. The opposition has organized protest marches across the country, resulting in increased political tensions.

Senegal

In March 2016 voters approved amendments to the existing Constitution. The amendments maintain the current limit of two terms for presidents, while reducing the maximum length of each term from seven to five years. The main driver of reform was President Macky Sall's desire for shorter term lengths for elected presidents. However, the reforms also introduced changes in 14 other areas, such as local government, political party finance, the composition and selection procedure for the Constitutional Council and its competence, and the rights of citizens to a healthy environment and land ownership.

Anglophone West Africa

Unlike in Francophone Africa, where many of the ongoing reforms were initiated between 2015 and 2016, those in Anglophone Africa started much earlier. The key countries are Ghana, Liberia and Sierra Leone.



Ghana

Ghana's nine-member Constitution Review Commission was established by the ruling National Democratic Congress in 2010 following broad political agreement between political parties in the run-up to the 2008 general election on the need to reform the 1992 Constitution (Pwamang 2016). Its mandate was to ascertain the views of Ghanaians on the operation of the Constitution, articulate any popular concerns or issues for amendments, make recommendations to the government and provide a draft bill of possible amendments (Constitution Review Commission 2011: 10). The Commission presented its recommendations in December 2011. While cautioning against unwarranted amendments to the Constitution, which it deemed fundamentally sound, the Commission recommended that any amendments must seek to strengthen good governance. Shortly after accepting about 90 per cent of the Commission's recommendations, the government published a white paper. One proposal was to retain the two four-year terms but amend the Constitution to clarify that a person may not serve as president for more than eight years in total, whether consecutively or alternatively (Government of Ghana 2012: 11). Another proposal was to prevent the president and deputy from defecting while in office by compelling them to resign before they could switch party allegiance (Government of Ghana 2012: 11). To oversee the implementation of the recommendations it retained, the government set up a five-member Constitutional Review Implementation Committee (CRIC). A legal challenge to the process in 2012 disrupted and stalled the CRIC's work, but the Supreme Court rejected the challenge in a 2015 decision (*Asare v Attorney General*), paving the way for the process to resume.²

Liberia

In Liberia, the reform process—which commenced with the appointment of a five-member Constitution Review Committee (CRC) in August 2012—was primarily designed to substantially amend or replace the 1986 Constitution, which had become almost obsolete and irrelevant to the socio-political and economic realities of the country since the end of the civil war. Key on the reform agenda were questions of dual citizenship, decentralization, executive and legislative powers, term limits for members of the executive and the legislature, and the secular or non-secular nature of the state. In August 2015, exactly three years after it was set up, the CRC presented its final report, which contained 25 recommendations (UNDP Liberia 2015). This followed a national constitutional conference five months before, where delegates from 73 electoral districts across the nation converged to discuss its proposals. Its recommendations included a reduction of the presidential mandate from the current two six-year terms to two four-year terms; and that of senators from nine years to six years, and representatives from six to four years.

Sierra Leone

Sierra Leone launched its reform process in 2013 with the main objective of strengthening multiparty democracy. The Constitutional Review Committee report finalized in 2016 recommended the introduction of four new chapters to the Constitution to address the issues of local government and decentralization; citizenship; land, natural resources and the environment; and strengthened media freedoms.

It is important to point out, however, that political bickering among different groups and shifting priorities have seen the processes in Liberia and Sierra Leone either stall or significantly delayed. In all three cases, parliament must first vote on a bill to amend the constitution, after which citizens will have to approve or reject it in a constitutional referendum. In late 2016, for instance, the House Committee on Governance of the Liberian Legislature announced that cost issues make a referendum on the commission proposals unlikely any time soon.

Mapping the drivers

A number of patterns emerge from the country cases mapped above that allow them to be grouped into two distinct categories according to the drivers of the new wave of reforms. The first relates to crises, and these are analysed as crisis-driven reforms. The second relates to reforms driven not by the onset of any major crisis, but by a need—real or imagined—to strengthen and improve the functioning of existing institutions.

Crisis-driven reforms

Seeger et al. (1998) define a crisis as a sudden onset of events in society that may be expected or unexpected. Examples include war and conflict, natural or induced disasters and economic shocks. This definition suggests that crises may take violent or non-violent forms, but their immediate impact on society is usually negative. Anticipated or not, the onset of a crisis typically requires an urgent response to minimize the associated damage (Coyne 2011). A crisis can illustrate deficiencies in the organization and functioning of the community that can result in either institutional changes to the existing political constitution or a new constitution (Coyne 2011) in order to address the damage caused. Against this background, Topanou (2016: 3) has argued that crisis-driven constitutional reforms are necessarily positive because they tend to have noble purposes as their objective is to seek long lasting solutions to the social, economic or political malaise plaguing the community. In this way, a related objective is often to break with history or the status quo by charting a new future for the country. Going back to the various cases mapped above, a number of currently unfolding country

constitutional reforms appear to fit this category. These are those which owe their origins specifically to violent conflict or popular uprising.

The first such case is Burkina Faso. This is the only process in this category in which the immediate trigger was a popular uprising rather than violent conflict. While some violent incidents, such as the burning down of the parliament building and several killings, did occur in Burkina Faso, these were too isolated and the number of deaths too few to fit the traditional definitions of violent conflict. The sudden uprising against President Compaoré provided the impetus for the adoption of the Transitional Charter in 2015, under which transitional elections took place and a new government was elected. The new government is now spearheading the ongoing reforms to replace the 1991 Constitution. Professor Augustin Loada of the University of Ouagadougou has aptly described the ongoing process of writing the constitution of the fifth republic as falling within the logic of breaking with the Compaoré era and the popular uprising, and moving the country forward (Loada 2017).

The second ongoing reform process to fall within this category is that of Mali. The country was one of the few success stories of the democratic experiments of the 1990s. By many accounts, and despite challenges along the way, it was largely a successful constitutional democracy in the two decades following the adoption of a democratic constitution during the transitions of the 1990s (Smith 2001; Bingen et al. 2000). The 1992 Constitution itself still enjoys great popular legitimacy, as witnessed by the many failed attempts in the past to amend it—first in 2001 and again in 2008 (Bamassa and Aboubacar 2016; Wing 2015: 457). Wing further highlights its swift reinstatement following the coups d'état that disrupted the democratic constitutional order in 2012, and opened the path to Tuareg rebellion and ultimately civil war, as additional evidence of its popular legitimacy and the commitment to its preservation (2015: 541). The ongoing reform, specifically as outlined in the Algiers Peace Agreement of 2015, is central to the process of finding a permanent solution to the crisis.

As their roots lie in violent conflict, the reforms in Liberia and Sierra Leone largely fall within this category as well. The only difference is that they are taking place decades after conflict. In Liberia, the reforms are coming 23 years after the conflict that they partly seek to address. The aftershocks have been so strong and lingered for so long with other negative effects that policymakers, after many earlier half-hearted attempts at reform, finally realized that the country could not move forward in the absence of major constitutional reform. In Sierra Leone, the reform is coming more than 15 years after the conflict. While its Constitutional Review Committee describes the process as designed to 'to strengthen the existing multi-party democracy and to create an open and transparent society', (2016: 6), the process was actually mandated by article 10 of the Lomé Peace Accord (1999) aimed at ending Sierra Leone's civil war.

To the extent that a peace agreement—the Linas-Marcoussis Accords of 2003 to end the Ivorian civil war—specifically mandated it, it is also fair to place the recent Ivorian process in this category. However, because of the political context in which it was initiated and the dynamics around the reform process as it unfolded, it is analysed fully in the section below.

Reforms designed to strengthen the status quo

Like crisis-driven reforms, the constitutional reforms that fall into this second category might seek to change the entire political constitution or simply be limited to institutional changes within the existing constitutional dispensation. However, in contrast to crisis-driven reforms, which by their nature and the context in which they take place are generally seen at least in theory as dictated by positive goals, these reforms can be seen from two perspectives. At one end of the spectrum, in the absence of any genuine crisis, reforms are driven by the need to ameliorate and strengthen the functioning of existing institutions or perhaps to create new rights for citizens (Topanou 2016:3). In a sense, they can be seen as preventive, as they aim to proactively address emerging issues or fissures in society that in the long term might provoke a major crisis that requires a constitutional overhaul, as is often the case with most crisis-driven reforms. Ghana, Senegal, and arguably Benin, appear to fit this category.

In the case of Ghana, the objective of the reforms was, in the words of Commission member and Supreme Court Justice Gabriel Pwamang, ‘to improve upon the performance of institutions established under the Constitution and thereby deepen good governance and democracy’ (Pwamang 2016). In announcing the Commission that was to drive the reform process in Senegal, President Macky Sall underscored the need to modernize state institutions in order to offer citizens the means to live in harmony and solidarity. He further emphasized that state institutions are a fundamental *acquis* in the global search for the human ideal, hence the need to reinforce and adapt these institutions when necessary for future generations. In addition, he stated that the reform process aimed to anchor constitutional stability; modernize, stabilize and strengthen democracy; reinforce the rule of law; and improve good governance in public affairs (Ba 2016). In Benin, the same underlying intentions could be discerned from the pronouncements of public figures such as President Talon and the Rapporteur General of the Commission, although other Beninese experts challenged the underlying motives. Topanou (2016: 2), for instance, questioned the need for constitutional reform in a country that has repeatedly demonstrated its capacity to resolve all the major political and constitutional crises it has faced within the existing constitutional framework.

At the other end of the spectrum in this category are reforms that are purely opportunistic and therefore inherently negative. This is so even when they are sold in terms such as ‘institutional modernization’, ‘strengthening’, ‘amelioration’,

and so on. A detailed examination reveals their underlying purpose as more self-serving than born out of any objective necessity. Côte d'Ivoire's 2016 process perhaps best illustrates this point.

Designed to replace the 2000 Constitution, which had become a symbol of exclusion and in President Ouattara's own words 'outdated', the new Constitution—as discussed below—introduces new provisions that will certainly help to change Ivorian politics for the better. At the same time, it concentrates a great deal of power in the president, and all the civilian and military personnel of the state serve at his/her pleasure. In addition, unlike the 2000 Constitution, the need for presidential candidates to show a clean bill of health is no longer a requirement. The new Constitution abolishes the upper age limit of 75 years for presidential candidates, and imposes a presidential term limit of two five year-terms. Unlike the trend in many constitutions in the subregion, however, it does not entrench the provision, which makes it easy for abusive amendments—especially as the new Constitution also introduces a less rigid amendment procedure. Reading all of this together with the incumbent's age, which is 75 at the time of writing, certainly leaves much to interrogate for motives of possible opportunism. In fact, some local analysts (e.g. Lobe 2016) argue that the new Constitution makes it easy for the incumbent to initiate amendments to the term limits clause should he wish to run for a third term—especially given that he currently has the necessary parliamentary majority.

Comparing past and present processes

How do the current processes differ from earlier processes? Focusing specifically on the wave of constitutional reforms of the 1990s, this question is analysed from two perspectives—motivations and process.

Motivations

When considering the broader political history and development of the post-colonial African state, together with the broadly based passions animating the transitions of the 1990s, it is a fair argument to make that a genuine desire to democratize the post-independence African state drove the constitutional reform processes of the 1990s. While the quest for democracy and the consolidation of independence had initially gone hand in hand in the post-colonial African state, the imperative of building nation states from the polities that emerged from decolonization as well as strong developmental states soon led to shifting priorities. In this context, democracy seemed like a goal that was incompatible with the immediate objective of building strong developmental states and therefore had to be deprioritized. Hence the quick abandonment of political pluralism, and the rise of 'strongman' leaders soon after independence. Viewed from this perspective, the constitutional reform processes that unfolded in the

context of the democratization processes of the 1990s can be described as truly amounting to a new constitutional moment for the post-independent African state. In laying down the groundwork for stronger institutions and the rule of law, they marked a break with the culture of rights abuses, strongman leaders, weak institutions and one-party rule that were key features of the post-colonial African state.

However, with the exception of Burkina Faso and Mali, and to some extent Ghana—where the process, as shown above, was a product of political consensus between all parties on the need for reform—it is difficult to assess many of the processes in this fourth wave in the same light. The intense domestic social, political, economic and even international pressures that characterized the 1990s processes have not driven the constitutional reforms currently unfolding in West Africa. For the most part, political opportunism of one form or another, often to satisfy the agenda of one individual or a group of elites, seems to be an important factor at play. This is the case even when they are cast in terms of ‘modernizing’, ‘ameliorating’ or ‘improving’ the performance of existing institutions, as in Benin, Liberia, Senegal and Sierra Leone, or sold as a breaking with the past, as in Côte d’Ivoire. As noted above, Patrice Talon’s reform project in Benin garnered little public interest. Topanou (2016: 3) argues that without a proper constitutional autopsy to assess where the current Constitution has fallen short of expected performance, the proposed reforms appear misplaced. The Commission signalled more or less the same message when it failed to make an explicit recommendation on the single-term presidential mandate, which was central to Talon’s reform agenda. While taking note of both the advantages and the risks of a single-term presidential mandate, the Commission indicated that it is a solution that would require technical modifications in order to obtain the best results. This vague formulation—together with the Commission’s specific recommendation that the current two five-year terms could be maintained—seems to suggest that the body was not itself convinced of the necessity for a single mandate. In fact, the false urgency that the political leadership created around the reforms has been best expressed by the former General Rapporteur of the Commission, Professor Joel F. Aivo: ‘we are not running any risks if we do not revise the Constitution, people will not die . . . stop the fear mongering’ (NIMD/AWEPA 2017).

Macky Sall’s reform project in Senegal—of which presidential term limits was also a primary focus—was also largely seen in some internal circles in opportunistic terms. To his critics, the reform was more about his own political rebranding and image building to cast himself in a different light from his predecessor, Abdoulaye Wade, who had gained notoriety for wanting to prolong his rule. Cyrille Omar Toure, one of President Sall’s key critics and a member of the country’s *Yen a Marre* [Fed up] movement, described the constitutional referendum in an interview as a farce. In his view, Sall faced few obstacles to reducing the presidential mandate with immediate effect if he was truly

committed to it (Meier 2016). In this regard, it is important to note that the clause on the presidential term of office—article 27 prescribing two seven-year terms as was the case then—was mutable. President Sall's coalition controlled parliament and the experience with President Wade on the subject had left many Senegalese with a bad taste. In 2001 President Wade pushed through a new Constitution that reduced the presidential mandate to two five-year terms, which he would argue in 2007 could not be applied retrospectively to him. In 2009 Wade pushed through a new amendment increasing the mandate back to the original two seven-year terms. This means, arguably, that the political, popular and constitutional conditions—considering also that a parliamentary or referendum procedure were all options constitutionally opened to Sall—favouring such an initiative were all present. Second, the Constitutional Council's opinion, which the president sought on the matter, was only advisory and not binding. In an advisory opinion (2016), the Council held that the president's proposal to reduce the presidential mandate from seven to five years, with immediate retroactive effect even on the mandate to which he was elected, was against the general principles of law and the 2001 Constitution. It is also worth noting that in 2013 President Sall set up but later rejected the recommendations of a Commission on constitutional reforms considered much wider and more far-reaching than the modest proposals he embraced in 2015 (European Parliament 2016). Considered together, these elements—even if inconclusive—might lend some support to the arguments of his critics such as those in the *Y'en a Marre* movement.

The same hypothesis broadly applies to the case of Côte d'Ivoire, where Ouattara sold his project as designed to break with a history of exclusion and civil war. Yet, the constitution-making process itself was anything but inclusive, and the urgency of the reforms was questionable. Conclusions from several focus groups conducted by the civil society platform POECI tended to suggest few Ivorians believed that, with the rising cost of living, unemployment and corruption, focusing on a new constitution was a priority (Iob 2016). Furthermore, many of the substantive features of the Constitution aimed to concentrate power in the president. The timing of the reforms also opened up Ouattara's motives to scrutiny. Given that he is, in theory, in his last term, it is possible to argue that the timing is part of building his legacy—to go down in history as the leader who finally gave the country a new constitution where his predecessors, especially those associated with the Linas-Marcoussis Accords that provided for it, all failed. The same might also be said of the last-term leaders driving reform in other former crisis- and specifically conflict-driven contexts, such as Liberia and Sierra Leone.

This is not to completely dismiss the fact that these reforms, however opportunistic they may seem, do provide a few substantive benefits. First, public funding for political parties is a common feature of the new Constitution of Côte

d'Ivoire (article 25) and the amended Constitution of Senegal (article 4). It was also in the proposed draft amendments to the Constitution of Benin. Second, the controversial citizenship question which plagued Ivorian politics for so long has hopefully been put to rest in the new constitution, and a candidate for president need no longer prove that both their parents are of Ivorian nationality (article 55). Similar issues are on the agenda in Sierra Leone and Liberia. Third, term limits and durations, which remain highly topical not only in the subregion but across most of Africa, are also addressed. While they vary in function according to the context, the overall desire has been to limit rather than expand the number of terms that politicians can serve, or at least shorten the length of each mandate. In Senegal, for instance, as noted above, the amended Constitution reduces the presidential term length from two seven- to two five-year terms (article 27) and prohibits future amendment of the clause (article 103). In Benin, a single term for the president—despite other theoretical arguments against it—would also have been instituted had parliament not rejected the draft. In Sierra Leone, the Constitutional Review Committee has recommended against changing the two-term limit in the 1991 Constitution (2016: 56), while in Liberia the Commission report recommended introducing term limits for the executive and the legislature (Butty 2016). On balance, however, the argument remains that the reforms introduce few positive game changers that will radically transform the functioning of these polities.

Process

The second point of comparison between the two cases is the question of process. The key development here is the reliance on constitutional commissions or expert committees—appointed by the executive in all the processes examined—as the primary institutional mechanism for driving the constitution-making process. This is so even if some degree of public consultation and debate is often conducted, and referendums and parliaments—as shown above—have remained the main forums for determining the ultimate fate of the process. In some cases, such as Burkina Faso, Côte d'Ivoire, Ghana, Senegal and Sierra Leone, this is not unusual as the commission or committee approach has historically been the main institutional mechanism for driving reforms. In others, such as Benin and Mali, however, using appointed commissions for ongoing processes contrasts significantly with the sovereign national conferences of the 1990s. Described by authors such as Lund and Santiso (2003: 253) and Robinson (1994: 576) as a typically African and a specifically Beninois innovation, many francophone countries in the subregion, including Benin and Mali, adopted national conferences as the main institutional model for political constitutional reform. As an instrument for constitutional change, Robinson (1994: 576–77) sees national conferences as grounded in Rousseau's ideas about popular sovereignty and the right of the people to negotiate the social contract. This conception of popular

sovereignty might explain why, for the 1990 reformists, it was insufficient to convene a national conference—it was also critical to specifically characterize them as ‘sovereign’.

There are three further possible explanations for this. First, delegates to the national conferences in many contexts where they were convened lacked electoral legitimacy as they were appointed and not elected. Given this, claiming sovereignty creates a sense of popular legitimacy that compensates for the absence of electoral legitimacy. Second, arrogating sovereignty signalled—often to the discomfort and opposition of incumbents, who then tried to suspend, dissolve or reassert control over the conference once participants declared it ‘sovereign’—that the body was a constituent authority with *ab initio* powers over and above any other existing or constituted authority.³ Third, a ‘sovereign’ status also implied a constituent original character, meaning that it alone could determine its mandate and the scope of that mandate. The urgency of the times required such measures. Hence, shortly after declaring themselves sovereign, delegates to the national conference in Benin suspended the Constitution and gave themselves the mandate to draft a new one. They also dissolved parliament, created the post of prime minister and appointed an interim government to lead the transition. In Mali, delegates to the national conference successfully exercised similar sovereign powers. By contrast, the presidentially appointed commissions that have led, or are leading, the current processes have remained constituted authorities, and been careful to confine their work within the mandate specifically defined by the act or authority that constituted them. This caution—deliberate or not—is itself a pointer to the very different political context in which these processes are unfolding.

Conclusion

To conclude, at least two lessons can be drawn from these new developments. The first is that, as far as the process is concerned, the preference for commissions rather than national conferences is not without implications for inclusion and broad public participation from the outset. With respect to the 1990s national conferences, it is theoretically possible to argue that large membership—ranging from 500 in Benin to 2000 in Mali—makes broader representation and the inclusion of all different societal interests and groups more likely, while the comparatively smaller sizes of the recent commissions—ranging from five in Liberia to 80 in Sierra Leone—reduces the space for broad inclusion and representation of different voices. A gender analysis, for instance, of the membership of seven of the eight cases in this chapter reveals a significant underrepresentation of women, ranging from 10–33 per cent representation. The result at best is the loss of other important voices in the process. Worse still, such exclusion could create legitimacy problems that raise issues over ownership and

the endurance of the resulting constitution. In some cases, perceived exclusion of any form can lead to violence. This at least is what emerges from the 2016 Côte d'Ivoire process, where the media reported violence in some 100 polling stations (Bavier 2016).

Second, reforms that do not seem to be grounded in tangible social, economic and political problems of the day—and these need not necessarily be of crisis proportions—are likely to be seen by most people as opportunistic, also resulting in legitimacy and endurance challenges. As shown above, public sentiment, particularly with respect to the processes in Benin, Côte d'Ivoire and Senegal, has been lukewarm, dismissive or hostile, even if the constitutions in the latter two cases were adopted in the referendums that followed. The turnout statistics—42 per cent for Côte d'Ivoire (Bavier 2016) and 38 per cent for Senegal (IFES 2016)—tend to confirm this. In both cases, violence was also reported (Bavier 2016; *La Croix* 2016). Although parliament ultimately rejected the proposed reforms in Benin, palpable tension and uncertainty characterized the entire period in which the process unfolded. The same types of tension are animating the reforms in Mauritania, where there is political and popular opposition to the process (*Mail and Guardian Africa* 2016). This confirms the view held by some observers in the region (e.g. Topanou 2016: 2) that opportunistic reforms create a climate of general malaise.

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Endnotes

1. The rules for amending the Constitution via parliament rather than a referendum require that parliament first decide on the admissibility of the bill by a two-thirds majority. If the bill is declared admissible, it is then debated on its merits, after which any proposed amendments must be adopted by a four-fifths majority for the amendment to be binding.
2. In *Asare v Attorney General*, the plaintiff challenged the constitutionality of the process and asked the Supreme Court to declare it null and void on the grounds that only parliament, under the Constitution, had the authority to initiate a constitutional amendment process.
3. In Togo, for instance, President Eyadema surrounded the conference with troops and regained control over the process once the delegates declared the conference ‘sovereign’ and purported to have deposed him as commander in chief.

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