



REPRESENTATION

VIEWS FROM THE GROUND UP

Report

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

7-9 November 2022

Jointly organised by
International IDEA
Constitution Transformation Network

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About the Melbourne Forum

The Melbourne Forum on Constitution Building in Asia and the Pacific brings together practitioners and scholars from across Asia and the Pacific to share their experiences of constitution building. All speakers at the Forum are directly involved in constitution building and implementation in their respective states and polities. The Forum provides an opportunity for understanding the experiences of different states, in-depth discussion of shared issues and challenges, and meaningful comparison across the region.

The Forum is organised under the auspices of the Constitution Building Program of International IDEA in collaboration with the Constitutional Transformation Network at Melbourne Law School.

Melbourne Forums to Date

Each Forum takes a theme of current global importance in constitution building to explore from the perspectives of states in the Asia Pacific region:

- 2016: First Melbourne Forum, Melbourne: *Constitution Building in Societies with Territorially Based Societal Conflict*.
- 2017: Second Melbourne Forum, Manila, Philippines: *From Big Bang to Incrementalism: Choices and Challenges in Constitution Building*.
- 2018: Third Melbourne Forum, Colombo, Sri Lanka: *Implications of Culture for Constitution Building*.
- 2019: Fourth Melbourne Forum, Yangon, Myanmar: *Inclusion and Participation in Constitution-Building Processes*.
- 2020: Fifth Melbourne Forum, online: *Representation in Democracies during Emergencies*.
- 2021: Sixth Melbourne Forum, online: *Democracy, Constitutions and Dealing with the World*.

The Melbourne Forum Model

The format of the Melbourne Forum is designed to encourage the interchange of ideas, leading to shared insights on the key themes and questions.

- Before the Forum, presenters from each case study country provide brief written responses to questions based on the theme of each session, which are collated here and circulated in advance of the Forum.
- Each presenter gives a short, five-minute oral presentation on the key insights offered by their case at the beginning of each session, with the majority of each session then devoted to questions and discussion.
- The experiences of all the countries represented at the Forum are often relevant across many, if not all, sessions. All participants are encouraged to join in the discussions in all sessions and share their knowledge and experiences in an open and collegial way.
- Active chairing aims to draw out insights from all participants, foster links, and summarise sessions.

Acknowledgements

The Seventh Melbourne Forum on Constitution Building in Asia and the Pacific was held online and in person in Melbourne, on 7–9 November 2022. The Melbourne Forum is organised jointly by International IDEA and the Constitution Transformation Network at Melbourne Law School.

The organising team consisted of Leena Rikkilä Tamang, Kimana Zulueta-Fülscher, Nyla Prieto and Billie Phillips from International IDEA; and Cheryl Saunders, Anna Dziedzic, Tom Daly, Dinesha Samararatne, Jayani Nadarajalingam, Faiza Rahman and John Sebastian from the Constitution Transformation Network.

This report shares the papers and the findings from a productive three days' discussion in Melbourne. We thank all participants for generously sharing their insights through presentations and discussions at the Melbourne Forum, and in written form in this report.

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1. Mapping the Issues

1. Mapping the Issues

Cheryl Saunders

Representation is a core feature of democracies. It may be a factor in the composition and operation of many public institutions such as the executive, the bureaucracy, and the police, to name only a few. The one institution for which representation is critical, however, is the legislature. The legislature performs the all-important function of making new law and, in one way or another, scrutinising the actions of the executive. Its legitimacy for these purposes depends on representation. All democracies provide for the election of members of the legislature, for periods that vary between three to five years for most lower Houses (arrangements for an upper House, if any, may differ). All democratic states have at least a central legislature and many also have legislatures at multiple levels of government.

A lot has been written about what ‘representation’ implies for the responsibilities of elected members of a legislature. Are they a kind of ‘agent’ for the constituency from which they were elected, and so obliged to act in a way that the constituency would want? And what would that mean in practice, given the different ways in which constituencies are drawn and the variety of views within any group of voters? Alternatively, should elected members be regarded as ‘trustees’ for their constituencies, who are expected to act in the way that, in their view, best serves the public interest? How realistic is the ‘trustee’ theory, given the need for members to seek periodic re-election? Neither of these theories adequately explains how democratic representation works in real life. Elements of both can be found in all democracies, in varying combinations. In the conditions of the 21st century, the usefulness of such theories to explain what representatives do, and to suggest what they should do, is further complicated by other cross-cutting factors, including the role of political parties and increasing emphasis on the importance of descriptive representation, to ensure that the legislature is some kind of a mirror of the people it is supposed to represent.

A lot also has been written about the design of systems of representation in the legislature. Issues raised by questions of design include the choice between presidential and parliamentary systems; whether the legislature should be unicameral or bicameral; the terms for which elected representatives serve; the type of electoral system used; ways to enhance descriptive representation; and techniques to ensure elections are free and fair. Decisions on all of these issues are important for shaping representation. They do so from the top down, however. Ideally, they are tailored to the perceived needs of the people who are represented, but they do not consider how representation actually works from their point of view.

This Report deals with the nature and quality of representation in legislatures from the perspectives of those who are represented: in other words, representation from the ground up. This aspect of democratic constitutions in action is rarely explored but is an essential precondition for the proper functioning of a system that draws its legitimacy from the people. It is explored through four themes in the chapters that follow:

- What do people want from their representatives, at and between elections?
- How do people get what they want or need from their system of representative democracy?
- What are the impediments to effective representation that delivers on the needs and expectations of the people, and how can they be overcome?
- What insights into the challenges for democratic representation can be gleaned from problems that require a global response, of which climate change is an example? To what extent and how do these challenges differ between states? Are they creating new frontiers for democratic representation?

A final section identifies some of the key insights to emerge from these themes.

The Report is a product of the Seventh Melbourne Forum on Constitution-Building in Asia and the Pacific, which was held in Melbourne in November 2022, in partnership between International IDEA and the Constitution Transformation Network at the University of Melbourne. It brought together participants from 16 jurisdictions across the Asia-Pacific region: Afghanistan, Bangsamoro in the Philippines, Fiji, India, Indonesia, Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Samoa, Solomon Islands, Sri Lanka, Taiwan, and Thailand. As with so many other issues, examination of comparative experiences with representation proved particularly productive in this highly diverse region of the world, in which some of the familiar questions raised by representation are further shaped by history, economic, social and political context, and the values and norms of customary law.

The Report draws on the proceedings of the Forum in the following ways. The sessions of the Forum were organised around the themes identified above. Discussion of each theme began with an examination of three or four case study jurisdictions, on the basis of written answers by participants to questions posed by the Forum organisers. Each of the chapters of this Report introduce the theme as developed through discussion, identify the questions, and publish the responses of participants, revised in the aftermath of the Forum. The conclusions of the Report reflect both the discussions in the concluding session of the Forum and the rich insights offered by the written responses of participants.

Two broader observations about the Report should be made, by way of introduction.

The themes of the Report raise challenging questions about the roles and responsibilities of states and their institutions in the conditions of the 21st century and how these can best be fulfilled. Notwithstanding global interdependence, the world is and is likely to continue to be organised on the basis of states, through which representative democracy can be made a reality. The Report assumes that the most fundamental responsibilities of representatives in democratic states are to enhance the wellbeing of their people, to care for their territory, and to act as responsible global citizens in a way that also reflects the interests of their people. If this is right, the people who are represented are entitled to expect that these responsibilities are met or, at least, pursued, in the collective public interest. Where the balance lies between the broad public interest and the interests of individual voters or groups of voters varies within and between countries and over time. We hope that the Report will generate further discussion of the assumptions on which it is based.

A second general observation concerns the effects of the passage of time. Developing principles and practices for effective representation are a key goal in the implementation of new constitutions. However

well this is achieved at the outset, the quality of representation can be affected, positively or negatively, by developments over time. These may be incremental, involving a form of state capture or sudden, as a result of a major upheaval or crisis. The challenges that representatives must face also vary over time, as the recent experience with the pandemic and the current threat of climate change show. The example of climate change also draws attention to the need for representatives to take account of the interests of future generations, and the peoples of the world as a whole. These may always have been implicit in the idea of representation but are taking on new urgency now.

A blue-tinted photograph of a woman at a protest. She is in the foreground, wearing a light-colored jacket and a face mask pulled down, with her right hand raised high in the air. Behind her, a crowd of other protesters is visible, some wearing face masks and holding flags. The background shows a city street with buildings and a tall monument. The overall scene is one of a public demonstration or rally.

2. What Do People Want from Their Representatives?

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Anna Dziedzic

People have different expectations of their representatives. These expectations are shaped by a range of factors: some are social, shaped by the needs of the people and the behaviour of voters and representatives themselves. Some factors are constitutional and relate to how the institutions of government are designed and implemented. Other factors are cultural and tie into the connections that people have and seek to have with their representatives beyond their role in the formal institutions of government.

The papers in this section of the Report examine the question: what do people want from their representatives? The case studies span the Asia Pacific region, extending from Afghanistan (under the 2004 *Constitution*), the Bangasmore Autonomous Region in Muslim Mindanao (a subnational unit within the Philippines with a transitional government and substantial degree of autonomy), and Papua New Guinea and Samoa; although all country contributions in this report also deal with this question. The cases are diverse, but there are some commonalities that provide interesting points of similarity and difference. One is the element of transition and change: in all four polities, new forms of government have been introduced as a result of post-conflict arrangements, colonisation, or in some cases both. As polities move between parliamentary and presidential systems and adapt to introduced forms of governance, these transitions present challenges for representation. Another commonality is the degree of legal pluralism in each legal system, which means that the formal institutions of representative government operate alongside and interact with other forms of law, including religious law, tribal law, and Indigenous customary law. In many cases, this has informed, at least in part, an aspiration for decentralisation in governance. Transition and pluralism provide contexts in which the nature of representation is negotiated, in complex ways, to meet the needs of societies and the governance structures (sometimes recently) put in place.

Each of the papers address the following questions, which were provided in advance to the authors and participants to guide discussion.

- What do people vote for at the time of elections?
- What do people expect from their representatives between elections?
- Are the answers affected by constitutional and institutional contexts (e.g. parliamentary or presidential system, nature of electoral system, or others)?

- What are the dominant assumptions about representation? For example, should representatives do what voters want/direct them to do; act in the broader public interest; follow the wishes of a political party; reflect the interests of a particular group; etc.)?
- Are there historical and/or customary factors that affect the approach to representation?
- Are any of these expectations different during times of crisis, and how?
- In systems with multilevel government, are the answers different at different levels of government?

The papers identify a range of attitudes and expectations in relation to representation. One finding that resonated across many of the case studies was the extent to which people want their representatives to provide them with direct assistance. In some countries, representatives are expected to ensure that government services, such as health, education, and infrastructure, are delivered to the constituency. In some systems, this expectation is reinforced by the representative's responsibility to distribute funds directly to the community, through constituency development funds or the like. In other cases, representatives are expected to lobby government for the allocation of funds, and are judged on their success in doing so. Sometimes, representatives are expected to provide more personal and individualised support to their constituents, for example in the form of material support, jobs, or scholarships. Such expectations are particularly prevalent where constituencies are relatively small and/or remote, where representatives are seen to connect local people to opportunities in government and at the national and international levels. Such expectations may be supported by other connections between the people and their representatives, for example when representatives are drawn from a particular family, village, community, religious, or ethnic group. In Samoa, notions of representation are deeply connected to the *Faamatai* and customary forms of governance, which, as Tootoooleaava Fanaafi Aiono-Le Tagaloa explains, build on a sense of identity and connection in which the matai system of familial representation shapes representation in local, national and international arenas. It is thought that representatives with this kind of connection are better placed to understand the people's needs; but ties of identity and affiliation can also create other kinds of responsibility and obligation, beyond those that emerge from elections and political representation in government.

A framing around 'service' not only affects expectations about what representatives do, but also the values that ought guide their conduct. These expectations are sometimes included in the criteria for eligibility to stand for election. In Samoa for example, only *matai* (chiefs) may stand for election to the national parliament and all candidates must fulfill a requirement of *monotaga*, a culturally-specific sense of service, to their families and communities. In some cases, the nature of representation promotes other values. In Papua New Guinea, for example, the need for leaders to obtain the electoral support from beyond their own village or tribe, has the potential to instil the sense of being a 'good neighbour' as a component of representation (although in some cases, the competitiveness of elections instead leads to conflict).

In many cases, these localised and even personalised expectations of representatives had greater purchase in the minds of the people, and the representatives themselves, than the kinds of expectations that constitutions envisage will be placed on elected representatives in a democratic system of government. Democratic theories of representation also provide different understandings of the role of representatives. A classic distinction is that made between delegates and trustees. Broadly put,

representatives who are ‘delegates’ are obliged to act in the interests of, or even as directed by, the people who elected them. Representatives who are ‘trustees’ are understood to have greater discretion to act in a broader public interest, governing for all. A third kind of representation, called ‘descriptive’ or ‘mirror’ representation, is the idea that the diversity of the people ought to be reflected in the composition of the legislature, requiring, for example, the representation of women, ethnic or religious minorities, or other identity groups. In all three examples, however, the focus is on how representatives act at the central level of government, as parliamentarians who make laws and policy in the name of the people and who provide oversight of government. An emphasis on service delivery requires a shift from the centre to the local.

People’s expectations of their representatives may also shift. The people might behave as *voters* seeking immediate and direct assistance at one time, or in relation to some kinds of issues; and at other times, as *citizens* seeking to practice and uphold democracy or on another plane. Such shifts are most noticeable at times of transition or crisis, but may also be temporal. Thomas Webster, in his paper on Papua New Guinea, explains such a change. What started out at the time of independence as an expectation that members of parliament would focus on developing national policy, has now become much more localised, with an expectation that representatives will directly fund community development and basic services. In Papua New Guinea, we can see how the structures of provincial government and the rules and practices of voting have evolved around these changing expectations.

The institutional framework and constitutional context play an important part in tailoring the expectations placed on representatives, at the central and local levels. The constitutional context includes the form of government (whether a parliamentary or presidential system is in place) and the type of electoral system (the way in which votes are counted, how constituencies are defined, and the presence of quotas or reserved seats), and the political party system. Shamshad Parsalay’s study of representation in Afghanistan under the 2004 *Constitution* illuminates the effect of the ‘single non-transferable vote’, combined with a highly centralised form of government. The result was a disconnect between what representatives promised before elections (to advance broad public interests) and what was expected of them in office (protecting the interests of their own communal groups).

The case studies focused in particular on the dynamics of decentralisation and multilevel government. In the Bangsamoro, Atty. Laisa Alamia, a member and deputy speaker of the new Bangsamoro Parliament, explains that the people expect more from their regional representatives than their representatives at the national level, because they are geographically closer, and bound by ties of kinship. The devolution of powers to the regional level, and shift to a parliamentary system of government at the subnational level, is regarded as a way to support this sense of identification and closeness. In Afghanistan, however, where regional and local governments were not implemented or were very weak, representatives at the national level were regarded as more important, and voting for representatives at the national level proceeded along strictly communal lines, to ensure that each ethnic and religious group had a ‘voice’ in the national government.

A key issue to emerge from these cases and the discussions at the Melbourne Forum, was the degree to which the people’s expectations of representatives chime with what constitutions expect of representatives. One question to arise is then the relationship between constitutional structures of governance and social expectations, and how one or the other or both shift to negotiate a stable understanding of representation in each particular context. For example, Tootoooleaava Fanaafi Aiono-

Le Tagaloa shows how this tension animates current discussions around representation in Samoa; she argues that to strengthen Western forms of representation in the parliamentary system of government, what is needed is the 'Samoanisation' of representation, so that it is harmonised with existing structures and the philosophy of representation in the Faamatai. If the disconnect is not resolved, the question then follows of whether and how it matters, not only for representation but for other assumptions we have about constitutions, such as the separation of powers, the role of the bureaucracy, and the relationships between levels of government.

Bangsamoro, Philippines: Representation in the Context of Transition

Atty. Laisa Masuhud Alamia

What do you anticipate will influence voters in casting their vote, once elections take place? What factors do you hope will be relevant?

Philippine elections have always been defined by its politics more than its democratic value. In areas such as the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) in southern Philippines, poverty and poor human development outcomes often riddle electoral politics with corruption, fraud, and in the worst cases, violence and deaths. These challenges, compounded by the spread of misinformation in recent years, undermine the capacity of our people to exercise their right to vote and make informed decisions during elections. If this continues to be the backdrop of our first parliamentary elections in 2025, then I suspect that voting choices would be largely shaped by factors such as financial resources, popularity, clientelism, and nepotism, among others. This holds true today, when political dynasties continue to exist and expand, reinforcing the nepotistic and patron/client systems that are very much alive in underprivileged and underserved communities.

The ongoing BARMM peace process will likely influence electoral patterns, too. The peace process sanctioned a new form of government (i.e. parliamentary) and systems that can affect how voters think of public office and mandates. The biggest change is the formation and election of regional political parties that can provide opportunities for voters to reflect more on their political ideologies and representation in the government. New political players and alliances are starting to form as well, as seen in the 2022 elections. The former revolutionary group and key party to the peace agreement, Moro Islamic Liberation Front, joined the polls after establishing their own political party (i.e. United Bangsamoro Justice Party). These shifts will matter to voters in 2025, and surface the importance of the political transition and the Bangsamoro Transition Authority (BTA) as the custodian of this process.

What I aspire, on the other hand, is for the BARMM transition to succeed in rebuilding a stable and effective democracy for our people. The kind where citizen voters can freely and safely cast their ballots and do so on the basis of the genuine interests and welfare of the Bangsamoro. I hope the electorate will have the agency to look past political favours and personal benefits in choosing leaders, and start examining the candidates' track record, integrity, and platform instead. I wish that they will be empowered to evaluate the candidates' values and principles and how these align with their own. I also hope that our peace project and the democratic reforms that come with it will encourage people to delve into parliamentary governance, its merits and requirements.

The cornerstone of such set-up is political representation, and so it will be critical to elect a parliament that effectively represents widely differing sectors and interests in making decisions.

What do people want and/or expect from their representatives now? Do you think this will change once representatives are elected? Will people have a sense that they are ‘citizens’ in a sub-national autonomous region?

At this point of the transition period, there are still limited indicators that people have fully grasped the changes in regional governance under our new organic law. People still think of the BARMM government as a service provider for the most part, which can lead them to overlook other parliamentary functions such as its representation, policy making, and oversight functions, among others. Understanding the fusion of the executive and legislative powers under a parliamentary government is still very much needed at this point. From where we are now at the parliament, I believe that people expect parliament members to give voice to their interests and concerns in the legislature and create laws that promote the general welfare of the Bangsamoro. The expectations also go beyond legislative functions as people turn to MPs to gain access to available services and programs in the regional government and more often than not, to provide public assistance themselves.

These present perceptions will likely change in the next years or even after the first regional elections. The work of the BTA will chiefly dictate this as it continues to craft foundational laws and reorganise the bureaucracy at the regional level. I also expect that voter citizens will have greater appreciation of the parliament once they are given the power to elect its members, in contrast to the present BTA parliament that is appointed by the president. A sense of citizenship will most likely emanate from this power as well. The elections, if held fairly and effectively, will only strengthen the Bangsamoro people’s right to self-determination and their ownership of the peace project.

Are the answers affected by constitutional and institutional context?

Yes. As mentioned, constitutional and institutional contexts play a key role in determining the citizens’: (1) expectations from the government; and (2) perceptions on the region as an autonomous political entity. For example, sectoral representation will be different this time because of the reserved seats for sectoral representatives like women, youth, non-Moro indigenous peoples, among others, in the parliament. Election rules — which we are crafting now — will also prescribe how citizens can make use of these democratic spaces to participate and be represented in the region. The election of a regional head will also take a new form — from the previous regional (Autonomous Region in Muslim Mindanao) governor elected by the people to a chief minister to be installed by the parliament. The expansion of powers and the devolution of basic services under the new regime will also broaden the regional government’s accountability to its constituents. These new systems will affect the way citizens view their government. A lot of transformative changes can happen in our transition to a parliamentary system as it promises better representative governance that can address exclusion and promote political participation among the Bangsamoro people.

Are there, or are there likely to be, dominant assumptions about what representation involves?

Under our new parliamentary government, representation will ideally have to involve a balanced set of functions. Members of parliament will be primarily expected to legislate laws of general interests, initiate measures relevant to their constituencies, be loyal to their party/party alliance’s political ideologies and representation, and work for the inclusion of their interests in the overall policy agenda of the

government. Most of these assumptions are yet to be seen at this point, given the appointive nature of the BTA parliament and the non-existence of a party system. It is still quite difficult to see how representation will play out with partisan politics, but I assume that district representation (regional) will take congressional representation (national) as a pattern. The access of members to certain discretionary funds which they can use for community projects, small-scale infrastructure, and other public assistance, also suggests that representation may entail lobbying for bigger budget appropriations and government investments on behalf of the constituencies.

Are there historical and/or customary factors that affect the approach to representation?

The patronage aspect in the citizens' approach to representation definitely takes root in the long history of marginalisation, poverty, and violent conflicts in the Bangsamoro. The limited opportunities of the people to actively take part in public affairs have narrowed their perceptions on what meaningful representation means. While our laws provide ideal frameworks for political participation, the majority of our people have fallen victim to corrupt leadership that interprets and implements the law rather poorly.

The novelty of the processes and structures also implies that the Bangsamoro people might need a little more time to adjust and adapt to their roles and freedoms under parliamentary democracy. The formation of political parties is particularly vital to the future of this democracy. This is because the party-list system that we have now at the national level has been in crisis for so long. It is in need of substantive reform, with its weak political parties and a framework that permits turncoatism, patronage, and corruption. The Bangsamoro's peace project can overturn these challenges as the ongoing political and social transformation opens great opportunities to build genuinely principled regional parties that will truly function for democracy and the Bangsamoro people.

Were expectations of representatives different during the pandemic (or in other times of crisis)? If so, how?

Expectations of representatives were greatly heightened. First, representatives were expected to act more urgently during times of crisis. Crises generated negative effects which were immediately felt by constituents. These included natural events like typhoons, floods, earthquakes; human-generated events such as armed conflict, internal displacement, and food shortages; and mixtures of both, such as the COVID-19 pandemic. When a crisis occurred, it was quite clear that response time meant life or death for the affected segment of the population.

This immediacy was amplified by the well-known and avowed role of the government as caretaker of its citizenry. Constituents became more acutely aware of the need for legislative response, and were quicker to call out when such response was absent or too slow. In concrete terms, legislative representatives were expected to take extraordinary measures with the goal of delivering quick and effective solutions. This meant convening more frequently, working overtime, and agreeing to do away with unnecessary procedural strictures that bogged down results. Notably, the longer it took for the legislature to effectively respond to the crises, the sharper the calls for action grew.

Second, representatives were expected to act more responsively. The crises experienced by the Bangsamoro brought about great uncertainty and turmoil in the region. There was a stronger pressure on legislative representatives to not only know the plight of their constituents, but also to generate evidence-

based interventions tailored to the affected areas, which would alleviate such problems. This also meant using not only legislative functions, but also oversight functions to check on the actions of the executive and to ensure that interventions were being implemented properly and in accordance with the law.

Lastly, representatives were expected to act more responsibly. Filipinos in general, and the Bangsamoro people being no exception, would turn towards their representatives in times of crisis. Both the urgency and seriousness of the crisis led to more intensive scrutiny of public officials. There was a stronger clamour for accountability in wielding governmental powers and in spending public funds. This meant that legislative actions and omissions were more easily remembered by constituents, and disparate treatments implemented for certain groups were more readily noticed and called out.

How does multi-level government have a bearing on these issues? Do people in the Bangsamoro think differently about representatives at the national and regional level?

Having a multi-level government indeed bears on these issues. The Bangsamoro people specifically perceive regional representatives as more accountable than national representatives. For one, the Bangsamoro people are aware that regional representatives have a narrower scope of duties and responsibilities, by virtue of their functions. Constituents know that the national legislature must deal with problems for the entire nation, as historically it has acted largely on the interests of other areas. They know that the regional legislature was established to focus on their needs and concerns, without much need to worry about the other localities. The Bangsamoro people also hold their regional representatives to a higher standard. There is an element of kinship which they associate with regional representatives. This is reinforced by both the sheer geographical distance of the region from the nation's set of power in Metro Manila; the experience of several years of marginalisation and disenfranchisement in terms of funding and national action; and the persistence of social, cultural, and historical forces that separate the Bangsamoro people from the rest of the nation.

On this point, I think it is important to remember that a majority of the inhabitants of the Bangsamoro chose to be included in the region through a plebiscite. When they trooped to the polling stations and voted 'yes', they expressed their buy-in to the promise of establishing a regional government that would know them and their aspirations, understand them, fight for them, and serve their interests better than the national government. This is critical because in creating the regional government, the Bangsamoro people expressed their consent to be governed. Such consent was arguably never manifested in their relationship with the national government.

On the basis of experience to date, are there ways in which representation might be enhanced (before or after elections in 2025), from the standpoint of the people?

Regional representation will be enhanced if dynastic and client politics are decisively curbed. The vote for inclusion in the Bangsamoro region is a vote towards genuine representation. This is a rejection of the kind of representation that has persisted in national and local politics, which is dynastic, oppressive, and exploitative.

Political dynasties continue to dominate circles of power in the Philippines, and there are palpable worries that the same would happen in the Bangsamoro regional government in the upcoming 2025 elections. Dynasties continue to propagate power by cornering key political positions, wielding great economic resources, and deploying armed groups to secure votes. They cultivate connections and alliances among themselves to keep out reformists and genuine representatives of vulnerable sectors, while simultaneously granting themselves undue privileges and economic opportunities to grow their hoard. Reforming this vicious cycle and culture is even more crucial for the region, in view of the Bangsamoro's peace journey. If left unchecked and unsupported, the fragile peace currently in place could easily devolve into armed conflict, human rights violations, economic hardship, and disenfranchisement.

‘Be Our Voice’: Representation in Afghanistan (2005–21)

Shamshad Pasarlay

On 15 August 2021, the world witnessed the collapse of the political order in Afghanistan, the creation of which the international community had invested a significant amount of effort and resources. On that day, the Taliban stormed to power and unseated the Islamic Republic of Afghanistan, of which the 2004 *Constitution* was emblematic. Traumatic and heartrending as it was, the fall of the Islamic Republic of Afghanistan provides an opportunity to reflect critically upon the political institutions written in the Islamic Republic’s 2004 *Constitution* and to think more broadly about the lessons that could be gleaned from the Afghan experience. For the purposes of this year’s Melbourne Forum, the scope of this inquiry will be limited to representation and the voter-candidate/representative relationship throughout the lifespan of Afghanistan’s 2004 *Constitution*.

Voter preferences at the time of elections

Afghanistan does not have a long history of elections. Although the country’s first written constitution adopted in 1923 provided for a partly elected and partly appointed state council, no real elections ever took place. Only the head of the state, the king, wielded absolute power in appointing the council of state. The 1931 *Constitution of Afghanistan* created a bicameral national assembly and provided that its lower house should be elected by popular vote. The *Constitution* did not clarify any electoral systems, but it required the assembly to adopt an election law that would clarify the method of election for the National Assembly. Under the first election law, elections to the lower house did not occur through secret ballots. Instead, the election law provided that those eligible to vote in a particular electoral district should convene a *Jirga*, (council)-like assembly, and elect one of their own to the National Assembly by consensus or by the agreement of the majority of its members.¹ At this initial stage, it seemed that geographical representation (or the representation of regional interests) primarily dictated the preferences of electoral constituencies.

By the 1950s, Afghanistan experienced an explosion of a wide range of political movements.² Representation became a far more serious matter of interest to these new party-like political currents. In response, the 1964 *Constitution* established an entirely representative lower house and inaugurated what is viewed as the first experiment with representative democracy in Afghanistan.³ Later, an election law was adopted that created single-member districts for parliamentary elections. While electors’ (voters’) preferences were driven by geographical consideration under earlier elections, the emergence of party-like political movements in the 1950s changed that and put the protection of civil and political rights,

¹ *Law of Elections for the Member of the National Assembly of Afghanistan* (1931).

² Louis Dupree, *Afghanistan* (Princeton University Press, 1973) ch 22; Thomas Rutting, ‘Islamists, Leftists — and a Void in the Center: Afghanistan’s Political Parties and where They Come from (1902–2006)’ (Konrad Adenauer Stiftung, 2006) <https://www.kas.de/c/document_library/get_file?uuid=3ed251b2-1783-f26b-3882-88e7872886ba&groupId=252038>.

³ See, eg, Marvin Weinbaum, ‘Nonparty Parliamentary Democracy’ (1972) 7 *Journal of Developing Areas* 57.

democratic values and economic interests at the forefront of voter preferences.⁴ Candidates too campaigned along those lines. After the 1964 constitutional order collapsed, from 1973 to 2001 Afghanistan was plagued by coups, countercoups, a foreign (Soviet) invasion, a civil war, and a repressive Taliban regime. In this period of political turmoil, no representative institutions existed; Afghanistan's divided ethnoreligious communities instead turned to violence to advance their interests and to ensure their survival.

After the fall of the Taliban, the inauguration of a new political era and the drafting of Afghanistan's 2004 *Constitution*, representation became central for the protection of the interests of the diverse communal groups. With the assistance of the international community, the representatives of Afghans assembled in Bonn, Germany, to map out the structure of representative institutions that could provide effective venues for the peaceful resolution of conflict. Throughout the lifespan of the 2004 *Constitution*, Afghans voted in four presidential elections (2004, 2009, 2014 and 2019), three parliamentary elections (2005, 2010 and 2018) and three provincial council elections.⁵ In nearly all of these elections, Afghans cast ballots along strictly communal lines. All of these elections resembled what Donald Horowitz has called an ethnic 'census' due to ethnic voting rather than elections.⁶ Afghans were unlikely to vote for representatives who hailed from other ethnic and religious groups because they seemed to trust their own representatives to advance their communal interests.

Notably, the 2004 *Constitution* prohibited ethnic and religious parties and required the representatives of the 'people' to consider the 'general interests as well as the supreme benefits of the people' in making decisions. The parliament as such was defined as an institution that manifested the will of all 'peoples' rather than the interest of a particular group.⁷ Although this provision did not negate voting across ethnic boundaries, it seemed to prohibit representatives to champion communal benefits over national interests. In practice, however, most constituencies expected their representatives to ensure that their communal interests are protected, and their voices are heard in the central government. This was the only metric they used to vote and judge their representatives between elections. In this way, the 'people' did not see themselves as 'citizens' in a democracy bound together by adherence to some types of overarching liberal democratic principles. Instead, they stressed their communal interests vis-à-vis other ethnic groups in a battle of representation.

A flawed electoral system

Those who inaugurated Afghanistan's post-Taliban political transition, and those who participated in it both took political representation seriously and were cognisant to orchestrate representative institutions. The civil war that was wrought upon Afghanistan in the 1990s was largely a struggle for political representation and communal survival. The 2004 *Constitution*, which was expected to pilot the post-Taliban political transition, was required to provide for an electoral system that promoted a balanced representation of all groups and ensured that the people's representatives were accountable to their

⁴ Hafizullah Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions* (Palgrave Macmillan, 2010) ch 2.

⁵ Mohammad Bashir Mobasher, *The Constitution and Politics of Ethnic Accommodation: Constitutional Defects in the Republic of Afghanistan (2004–21)* (Routledge, forthcoming).

⁶ Donald Horowitz, 'Ethnic Conflict Management for Policymakers' in Joseph Montville (ed), *Conflict and Peacemaking in Multiethnic Societies* (Lexington Books, 1990) 116. On Afghan elections: see *ibid*.

⁷ *Constitution of Afghanistan* (2004) art 81.

constituents. The *Constitution*, however, did not choose an electoral system for parliamentary elections. Instead, it mandated the ordinary legislature to adopt a law that would define the electoral system. It required further that the law of elections 'shall adopt measures to attain, through the [election] system, general and fair representation for all the people of the country'.⁸

Some have argued that the drafters of the *Constitution* had agreed that 'some form of list [proportional representation] was to be used [for parliamentary election]'.⁹ This decision was appended to the end of the constitution, but it was ultimately removed and was not included in the draft constitution, later ratified by the Constitutional *Loya Jirga* (Afghanistan's constitutional convention). The *Constitution* had empowered the legislature to draft and ratify the election law, but because no legislature was elected, the transitional government 'assumed the task of working out the details of the system in cooperation with the Joint Election Management Body (JEMB) and the UN Assistance Mission in Afghanistan (UNAMA)'.¹⁰ The Committee recommended to elect the country's parliament by what they viewed to be a closed-list proportional representation (PR) system. In this system, Afghanistan's 34 provinces would be divided into several multimember districts for which political parties would field candidates. Voters would cast their ballots for the party list rather than for individual candidates.¹¹ However, when the Committee presented the closed-list PR system to the cabinet of the transitional government for consideration and ratification, they failed outstandingly to make sense of how the system would work in practice.

The Committee's struggle to defend the closed list PR system coupled with a general mistrust of political parties in post-war Afghanistan provided an opening for a simpler, but highly uncommon, electoral system, the Single Non-Transferable Vote (SNTV).¹² President Hamid Karzai's cabinet favoured the SNTV not only because it was a much easier system to use but also because Karzai's advisors knew that it would produce a less organised and undisciplined parliament.¹³ Hence, the SNTV was chosen for the parliamentary election. At the same time, Karzai and his advisors indicated that the system could be reformed in the future if it proved unworkable.

In practice, the SNTV destroyed representation and citizens' hopes, if it existed at all, of belonging in a democracy in which the people's representatives ensured that the will and interests of the people are secured. The SNTV encouraged individual candidates to run for elections instead of political parties. Even members of political parties competed as politically unaffiliated, independent candidates. The SNTV led to the election of an unorganised, less cohesive, and highly undisciplined parliament that hardly achieved what the voters had mandated.¹⁴ Under this system, each of Afghanistan's 34 provinces was considered a single, multimember electoral district with the number of parliamentary seats allocated based on population. Afghans had only one choice and cast votes for only one candidate. The SNTV motivated a

⁸ Ibid art 83.

⁹ Andrew Reynolds, 'Electoral Systems Today: The Curious Case of Afghanistan' (2006) 17 *Journal of Democracy* 104, 106.

¹⁰ Ibid.

¹¹ Ibid 107.

¹² Afghans in 2004 did not have a positive impression about political parties. Afghans' views of political parties were shaped by 'the chaotic nature of multiparty politics in the 1960s and the subsequent Communist Party rule and Soviet occupation (1978–89)'. The inter-party conflict that caused a full-scale civil war in Afghanistan in the 1990s further painted a bad image of political parties in the eyes of the Afghans: *ibid* 107.

¹³ Mohammad Bashir Mobasher, 'Political Laws and Ethnic Accommodation' (Unpublished PhD Dissertation, University of Washington, 2017).

¹⁴ Ibid.

large number of candidates to compete for parliamentary seats because it made it possible to win a seat with a very small number of ballots. For instance, in the 2018 parliamentary elections, Kabul's 33 representatives were elected by winning only 23.4 per cent of the total ballots cast. 76.6 per cent of the votes went to the losing candidates. The top vote-getter had won only 2 per cent of the ballots whereas the last (or the bottom) three winners won a seat each with just 0.2 per cent of the total votes cast.¹⁵

Afghan voters normally expected their representatives to do what the voters required of them: to act in the interests of a particular communal group — the group that had voted for the representative. However, in constituencies where an absolute majority of the voters cast ballots for candidates who failed to gain a seat, the people had no idea who their representative was and whether the winning candidates in their constituency represented their voices and grievances. Further, this relieved the representatives of speaking in the broader public interest and focus instead on the group from which they hailed — a group whose votes had sent the representative to the parliament. For instance, a candidate representing group A only had to champion the interests of group A. Members of group B in an electoral constituency had to reach out to a candidate from their own group even though they did not vote for them and was not located in their district.

Candidates and representatives, however, were not required to make explicit which interests they would represent more rigorously at the time of elections. Instead, during election campaigns, nearly all candidates promised to advance the broader public interests rather than representing a specific group. When in office, representatives were not bound to act in the public interest at all and were not judged by that metric. Instead, they were assessed based on their accomplishments in advancing and protecting the interests of their own groups. The SNTV enabled (and in fact) rewarded such a game of expectation between the representative and the voters.

Finally, the 2004 *Constitution of Afghanistan* created a highly centralised state and concentrated all political, administrative, and financial authorities in the central government helmed by a powerful president. Although the *Constitution* created provincial and district-level councils, these local government units exercised no meaningful power. The weakness of local government institutions turned the focus of the voters to representation in the central government units — the parliament and the executive branch. They related much more strongly to representation in the central government because it was at the centre where power was concentrated. In fact, throughout the lifespan of the 2004 *Constitution* (2004–21), no elections were held for district councils. While political elites consistently pressured the central government to hold elections for district councils, the masses seemed to be completely unmoved by the lack of representative councils in their districts. It seemed that the people in the locales viewed customary (and informal) village assemblies as local representative forums. Hence, for the Afghans in the countryside, representation at the centre mattered the most.

Lessons from the Afghan case

Afghanistan had experienced more than three decades of political turmoil and a devastating conflict over ethnic representation and participation in the political process before the 2004 *Constitution* was ratified. After the fall of the Taliban in 2001, Afghanistan's warring factions, aided by the international community, assembled in Bonn, Germany, to create institutions that would substitute conflict and peacefully address

¹⁵ Mobasher (n 5).

questions related to political representation and the protection of communal interests — issues that were viewed as the root causes of the country’s brutal armed conflict.¹⁶ The international community that funded Afghanistan’s post-Taliban political reconstruction was adamant to quickly turn war-torn Afghanistan — a country that had only briefly experimented with a flawed representative democracy between the 1960s and 1970s — into a full-fledged democracy.

A lot can be learned from the experience of Afghanistan in fostering a functioning representative democracy in a deeply divided, conflict-ridden society. However, I wish to highlight two important lessons related to representation that could be gleaned from the Afghan case. First, the Afghan experience suggests that it is important to ensure the inclusion of all pertinent groups, including members of the outgoing regime as well as groups that may subscribe to questionable political commitments, in a transitional context. Lack of attention to inclusion in the Afghan context indeed adversely affected the country’s entire post-conflict transition. I spell out this aspect of Afghanistan’s political transition a bit further.

When the post-Taliban political transition began in Afghanistan, the winners of the war — both Afghan political elites and the international community — ensured that all ‘major constituent groups of Afghan society were represented [in the negotiations over the future of the state] and that all the external powers that had been fuelling the Afghan civil war would have at least some sympathetic elements’ around the table.¹⁷ However, they failed to extend an invitation to the outgoing Taliban notables to participate in the political process. Although some factions within the Taliban movement were willing to be part of the transitional process, the victors of the war were resistant to the Taliban’s participation. The victorious Afghan factions viewed the Taliban as too weak to disrupt the political order, whereas Afghanistan’s international allies excluded the Taliban from the negotiations because they viewed the Taliban’s ideological commitments as incompatible with the new political order they wished to install in Afghanistan.¹⁸ However, both parties overlooked an important and visible fact: the Taliban did have a constituency in Afghanistan concentrated primarily in the Pashtun-dominated regions of the south and the east. This constituency needed representation which was not granted.

When the Taliban were excluded from the transitional period, they decided to use alternative routes to ensure their voices were represented and their demands were heard. They retreated to the countryside to regroup and challenge the Afghan state through violent means. It was not too long before the Taliban began to effectively rival the political order created under the 2004 *Constitution* and ultimately doom the state in August 2021. I must stress that a complex set of factors brought the Afghan state down; each of these variables requires a more detailed examination than can be provided here. However, the exclusion of the Taliban from the whole state-building process proved to be a major miscalculation on the part of those who launched the transitional period. Lakhdar Brahimi, the UN’s Special Envoy to Afghanistan who helmed the Bonn Conference and played an important role in the 2002–04 constitutional process, later

¹⁶ For more details: see, eg, Amin Saikal, *Modern Afghanistan: A History of Struggle and Survival* (IB Tauris, 2004) ch 9.

¹⁷ James Dobbins, *After the Taliban: Nation-Building in Afghanistan* (Potomac Books, 2008) 45.

¹⁸ Zalmay Khalilzad, *The Envoy: From Kabul to the White House, My Journey through a Turbulent World* (St Martin’s Press, 2016) 166.

referred to the Taliban's exclusion as the 'original sin' of the entire transitional process.¹⁹ In hindsight, Brahimi was proven right.

Second, another tentative insight that could be gleaned from the Afghan case is the importance of constitutional clarity and detail regarding electoral systems.²⁰ The Afghan experience makes clear the pitfalls associated with leaving important questions about electoral systems unsettled within a constitution. Admittedly, not all constitutions around the world decide every detail about the electoral system to be used for electing political and other representative institutions. Instead, a large number of constitutions defer these questions to future resolution by the ordinary legislature.²¹ Regulating electoral systems through ordinary legislation provides the needed flexibility that may be required during political transitions. Entrenchment, by contrast, may produce a rigid electoral system that would be hard to change to align with the demands of effective political representation and accountability to the electorate.

The experience of Afghanistan, however, suggests that in transitional contexts — or at least in certain transitional contexts — settling the details (or important questions) of the design of the electoral systems within a constitution may be useful. Details may prove helpful in preventing future manipulation of the electoral systems by would-be authoritarians to use the electoral system to dismantle political opposition. The framers of the 2004 *Constitution of Afghanistan* had agreed that some type of list-based PR system should be used for parliamentary elections, but they did not include that in the *Constitution*. Instead, they empowered the transitional government to draft an election law that would codify that system. The framers' indecision about the electoral system provided an opportunity for the Transitional Administration of Hamid Karzai to engineer an electoral system, the SNTV, that did not benefit a strong and organised parliament that would effectively give voice to the people's demands.

In response, Afghan political elites demanded that the electoral system must be reformed to strengthen the link between the people and their representatives, 'promote service delivery from the government to the people' and enhance the legitimacy of representative institutions.²² However, both President Karzai (2004–14) and President Ashraf Ghani (2014–21) refused to reform the system and opted, instead, to pass election laws through presidential decrees in ways that weakened the parliament and other representative institutions. Throughout the past two decades, the SNTV remained intact and adversely affected the institutionalisation of the political parties and cross-ethnic coalition that could have represented better the interests of the people.²³ In this way, Afghanistan was deprived of one of the most important institutions to consolidate representative democracy.

Finally, although it is hard to conclude with confidence that a different electoral system — say proportional representation or a single transferrable vote system — would have worked better in Afghanistan, it could be assuredly stated that the SNTV did not assist political representation in

¹⁹ Lakhdar Brahimi et al, 'An Interview with Lakhdar Brahimi: Interviewed by March Sack and Cyrus Samii' (2004) 58 *Journal of International Affairs* 239, 344.

²⁰ Mobasher (n 5).

²¹ Rosalind Dixon and Tom Ginsburg, 'Deciding not to Decide: Deferral in Constitutional Design' (2011) 9 *International Journal of Constitutional Law* 636, 660.

²² Alex Thier and Scott Worden, 'Political Stability in Afghanistan: A 2020 Vision and Roadmap' (Special Report 408, United States Institute of Peace) <<https://www.usip.org/sites/default/files/2017-07/sr408-political-stability-in-afghanistan-a-2020-vision-and-roadmap.pdf>>.

²³ Mobasher (n 5).

Afghanistan; nor did it help the people to ensure their representatives did what the constituents demanded of them. Furthermore, because the SNTV enabled candidates to win a very small number of votes to get a seat in the parliament, it failed to facilitate accountability, undermined the legitimacy of electoral institutions, and proved futile in enabling the delivery of government service to the electorate. In fact, the SNTV produced a parliament whose members did not feel any obligations towards their constituents because they knew they had won without the votes of many in their districts. In many electoral districts, the majority of voters had cast ballots for the losing candidates. Therefore, a fairly strong case could be made that a different voting system could have helped representation work better in Afghanistan; at a minimum, it would not have created the pitfalls that came with SNTV and destroyed representation at a very critical time of political transition in war-torn Afghanistan.

Ground-Up Views on Representation in Decision-Making: Perspectives from Papua New Guinea

Thomas Webster

Introduction

The following provides a background to the discussions on the specific questions set out for Papua New Guinea.

The Representative Bodies of Government

There are three main levels of legislative bodies in Papua New Guinea, namely the National Parliament, the Provincial Assembly, and the Local Level Government. Elections are held every five years for the National Parliament, the last one having been held in 2022.

The single-chamber National Parliament is the highest-level decision-making body. After the 2022 National General Elections, the National Parliament comprised of 22 provincial seats enabling every province to be represented, and 96 single-member open electorate seats based on population and other factors. They represent an estimated ten million people in 2021. Local Level Government elections are held soon after the National General elections where communities organised into wards elect their Ward Councillors, and the Ward Councillors elect the President of their Local Level Government Council.

The National Parliament elects the Prime Minister who forms the Executive Government. The provincial seat member assumes the post of Chair of the Provincial Assembly and the Executive head of the Provincial Government as Governor.

The Provincial Assembly consists of nominated representatives and includes members of the National Parliament; Presidents of Local Level Governments; and three representatives of various groups as defined in legislation, nominated by the Governor of the Province. The Local Level Government is made up of Ward Councillors elected by communities/wards.

The other important body created by legislation in 2014 is the District Development Authority (DDA), where each Open Electorate is synonymous with a District in a Province. The District is also an administrative unit under the Provincial Administration. The DDA is made up of the Member of Parliament (MP) as Chair, the presidents of the LLGs in the electorate and three representatives from women, youth and church groups appointed by the MP. This body makes decisions on the use of electoral development funds allocated under the Annual National Government Budget.

The nation is divided into four geographic regions: namely, Southern, Islands, Momase, and the Highlands. The table below shows representation of the National Parliament and Local Level Government Councils and No of Council Wards by the four main regions of PNG.

Region	Provincial Seat <i>National Parliament</i>	Open Electorate <i>National Parliament</i>	No of LLGs <i>Local Level Govt</i>	No of Wards <i>Local Level Govt</i>
Southern	6	21	68	342
Islands	5	13	52	779
Momase	4	26	98	2,045
Highlands	7	36	114	2,215

Note: Data from Electoral Boundaries Commission Report, March 2022.

Voting System

The National Parliament elections are voted on using a simple limited preferential system for three candidates. At the end of the primary count, if no candidate has mustered at least 50 per cent plus one of the votes, the count goes into a runoff with the counting of second and third preferences distributed for a simple majority. Some attempts were made to have a similar limited preferential system for the Local Level Government elections, but the added costs and complications have resulted in those being discarded. Councillors are now usually elected by a simple show of hands at the community level.

Description of Block Voting and Cultural Influences in Voting

PNG is a diverse country and so the descriptions of people's expectations and cultural influence described here only relate to the author's experiences in his local area, some parts of the Jiwaka and Western Highlands Provinces in the highland region. Reports indicate that some areas of the highland region and other parts of PNG especially around the urban areas do vote as required by law, but most areas are controlled by local leaders.

Voter expectations of Members of Parliament from social media and other reports indicate similar views across the country.

The following discussions are structured around the questions set out from the Papua New Guinea perspective.

What do people vote for at the time of elections?

In most cases, people want improvements to basic services provided by the Government such as Transport, Infrastructure, Education and Health Services, income opportunities and so on. They would like to have good roads and bridges connecting their community to the main trunk roads and keep those roads in good condition. They would like to see good classrooms and teachers' houses and see the health facility buildings maintained with fully functional facilities.

The next question is, how do they strategise and position themselves? The experiences and voting patterns of people have evolved over the last two decades, especially with the MPs having access to an increasing pool of funds at their disposal. The formal establishment of Electoral Development funds in 2014 followed by increasing opportunities for access to National Government Development Budget funds has greatly shaped how they view their Members of Parliament. They will vote for someone who will be

effective in accessing funds at the national level for redistribution at the electorate level for community developments in basic services.

Most voters would give their first preference votes to a candidate from their village/tribe/clan grouping. That person would be more aware of their community needs and be someone who they can communicate with easily to discuss their problems and needs. Hence, communities try to put up a candidate in order to have a better chance of accessing development funds.

Fielding a candidate from the community is quite costly with conservative estimates of spending by most candidates at one million kina. This is for the individual candidate but there are also costs to the community. Community members are expected to contribute to campaign costs by hosting parties at times. They contribute to cooking, feeding, accommodating, and contributing cash for transporting the constant stream of visitors coming from other areas of the electorate to indicate their support for the candidate. They will also be expected to spend time and money travelling to other parts of the electorate with their candidate campaigning.

Communities have come to realise that if they vote according to the law, where the 'one person — one vote' principle is allowed, the community and the leaders are not going to be able to bargain and have the negotiating power with the Member of Parliament for funds from the District, the Provincial Development Grant, or from other sources. They have therefore come up with a Communal Voting System now described by Election Observers as 'Block Voting'. It is a setting where the community has agreed that they would support a candidate or certain candidates in discussions and negotiations during the campaign period. They could be from the clan base.

A 'Block Vote' agreement would be operationalised in the following manner. On the day of polling, when the polling teams arrive, the Ward Councillor would welcome them and make a statement saying something like this:

There are 2,000 ballot papers as per the common roll allocated to this polling area. As agreed, some young people will fill all first preference ballot papers for our candidate and the 2nd and 3rd preferences will be given by the voters.

Even if one wanted to support a good candidate from outside the clan base, the community would rally together for maintaining community goodwill, indicate their support and agree to 'block vote'.

In the case where two candidates standing are from the same community, if agreed to, the Councillor will ask the polling clerks to divide the ballots equally between the two candidates and the 1st preference votes would be evenly shared.

In most instances, the 2nd and 3rd may also have been negotiated between certain candidates. The ballot papers after completion of the 1st preference vote would then be split up among the agents of an agreed candidate and these agents would fill in the 2nd and 3rd preference votes on behalf of the voters.

A 'Block Vote' for 1st preference votes could also be arranged for a candidate or candidates from another area if there is no local candidate. The candidates would visit the communities to negotiate and canvass votes with representatives from the concerned community and in most cases, this would happen in a common community forum area. Often there would be a sponsor, a relative, or a friend who is the

connection not only during the campaign period but also later if the candidate is elected and becomes the MP.

The community would speak about their specific local needs such as a bridge over a river, teachers not living at the local school because of a lack of housing, etc. There would be a series of negotiations. If conditions were sufficient — such as the candidate having a sizable clan support base and being likely to win — and there was consensus among the main community group leaders, the ward councillor speaking on behalf of the council ward in some instances can indicate that the ward would block vote the first preference votes for the candidate. This would signify a special relationship between that community and the candidate.

Through relations, cultural groups, and connections through marriage, etc. people could establish themselves as conduits for getting in touch with a candidate and act as supporters and agents. If the candidate gets elected, they start to have an even closer relationship — acting as the representative of the community to inform the MP of the community's views on issues and developmental needs.

What do people want and/or expect from their representatives between elections? Do people have a sense that they are 'citizens' in a democracy?

In general, people from an electorate would first want their representative to be their spokesperson, speaking for the people of an electorate on issues at the national level, especially in Parliament. But it is equally important, and expected, for the MP to be able to get a larger share of resources from the national pool and distribute them to the electorate.

People would want to see their MP take the lead in times of crisis, especially when disputes arise between groups within the electorate or between a group from the electorate and a group from another electorate.

Members of Parliament are expected by people to contribute to funeral costs, compensation payments between groups, church and community projects, school fees and medical costs, etc. They are also expected to provide cash for airfares and simply to assist. Some Members of Parliament have publicly stated including on the floor of Parliament, that their people think of them as Walking ATMs that spit out cash at the push of a button when they describe how much pressure they are under as leaders. One can usually tell an MP's house from other houses in Port Moresby, the capital city. Groups of ten or more people would be congregated, sitting and loitering around the gates either waiting for the MP to come out and see them or for the MP to see them when driving home.

In the early years following Independence, there are stories told of how Members of Parliament would visit their electorates regularly, talk to them about what was happening at the national level, the laws that were being passed and how that would affect them as a people of the country. There were no expectations from the people for Members of Parliament to give cash out to the public. These days, when an MP visits a community, the MP is expected to give cash in thousands of kina, just for people to share and spend on whatever they want, and that is apart from the project funds. Hence, many MPs are reluctant to just visit communities for consultations and discussions because of such expectations.

The notion of citizenship in a democracy is still probably there but not so clear now in public discussions. The questions raised in Parliament often relate to what happened to the funds allocated for this project, what has the government done about land compensation payments etc., mostly around provincial and electorate-based issues. Parliament sessions and proceedings are broadcast live in the media and more

so now on social media. Representatives must be seen to be representing their people in negotiating strongly for their share of national resources.

Are the answers affected by constitutional and institutional context?

The 'Service Delivery Syndrome' in a way influences the people's expectations of the representative and that has limited the idea of their MP representing them at the national level, contributing to the governance of the nation-state. To a large extent, people expect the representative to get as many resources as possible for projects and activities for the electorate. This is also cyclically reinforced at elections when the deals and expectations are discussed. If the MP does not deliver, then one can expect challenges at the next elections.

Many observers and researchers point out the significant changes brought about by the emergence of Electoral Development Funds in the 1980s. Initially, these were small in the nature of about K250,000 for a Member of Parliament, that later increased to K500,000 in the 1990s, then about K1 million in 2000. Eventually, this reached more than K10 million when the formal District Development Authority (DDA) structure was established in 2014.

Whilst guidelines for Electoral Development Funds are provided on how much can be allocated to a sector like education, health etc., these are largely discretionary and the MPs determine to a large extent what the funds are spent on and how much they are spent on. There is an administrative reporting procedure done by the DDA to the National Department that disburses the funds, but the Auditor General has stated that Financial Expenditures by DDAs and Provincial Development Grants have never been audited.

In recent years, the Executive Government has allocated additional funds from National Development Project Funds to the MPs through DDAs in addition to the Electoral Development Funds as mandated. For example, a portion of the school fee subsidy funds budgeted under the Department of Education is provided to DDAs for the purposes of building education facilities in Districts. During the outbreak of COVID, K1 million was allocated to each DDA for response activities at the district level. Most MPs spent funds on things other than urgently needed equipment. Many rural health workers publicly came out lamenting the lack of basic items for them to use such as gloves and masks at the rural health facilities.

Politicians in PNG are under constant pressure from their supporters. Section 145 of the *Constitution* provides for a vote of no confidence against the Prime Minister, eighteen months after their election as Prime Minister. The PNG political scene is dominated by many small political parties with very little difference in political ideology, and are very fluid, resulting in frequent votes of no confidence. The Executive Government, especially the Prime Minister, is under increasing pressure to allocate funds to MPs in order to maintain their support. The people in the electorate have developed an increasing appetite for goods and services from the MPs. This has seen more of what one might describe as 'Raiding the National Treasury to Feed the Growing Appetite for Funds by the MPs'. The current and recent past Prime Minister have indicated a desire to change to a 'Presidential System' with the President elected directly by the people to avert this increasing pressure.

Are there dominant assumptions about what representation involves?

The most dominant expectation is for representatives to be part of the team that forms the government after election. Voters expect the Member of Parliament to be part of the governing party or coalition party, elect the prime minister and be part of the executive government for ease of access to development

funds for the electorate. If an MP is unfortunate enough to be a member of a party that lost out on the election of a Prime Minister, whether this is after the elections or in mid-term after a vote of no confidence, voters expect and will often publicly ask their representative to leave the opposition side and join a political party on the governing side.

Many MPs do indeed switch allegiances as experience shows that it does not pay to be on the opposition side. The Government side may stifle the flow of funds from Electoral Development Funds by giving priority when cash becomes available to DDAs where MPs are from the government side. There have been few Opposition Leaders and teams since the 1990s, with most parties' leaders and members wanting to be on the governing side alongside Minister and MPs, to access electorate development funds more easily.

The Office of the Integrity of Political Parties has been organising and training political party officials to develop party policies and advocate for the public to support political parties and the policies they promote. The voting by people is still largely influenced by personalities and clan-based support, whilst political parties seem to be important only in the formation of governments where every party seems to negotiate coalitions with the largest party for ministerial and other key positions in government.

Are there historical and/or customary factors that affect the approach to representation?

The 1995 Reforms to the Provincial and Local Level Government System enabled Members of Parliament to be involved in the political and administrative systems of provincial governments, especially in the use of development grants at Provincial and District (electorate) levels, and this has had a significant impact on the concept of representation.

Prior to 1995 and soon after Independence in 1975, the country had a Provincial Governments system with an elected legislature and executive government, led by a Premier who was elected by the legislature, except in one province where the Premier was elected directly by the people. Provincial Governments were responsible for areas defined as provincial government responsibilities, mainly basic services such as primary health care, primary education, provincial roads, bridges, agricultural crops, extension services, etc. Provincial Governments received a large portion of their budget from national government grants and could also levy taxes with many provinces having a goods and services tax. Provincial Government approved and managed the implementation of their budgets.

A few provinces functioned exceptionally well, while others managed to keep things just functioning. Some had weak administrative systems with abuse of funds by provincial politicians, ending up with the national government suspending the provincial government and having the affairs managed by a civil servant appointed as Administrator. As provincial governments were meeting the day-to-day basic service needs of the populations, the national members of parliament became more distant from the daily life and needs of the people they represented. Many of the people at that time were largely illiterate, not having had the benefit of education and not knowing what government, parliamentary representation, etc. was all about. The National MPs were often challenged at the national elections by provincial members of the assembly who had built up a closer affinity with the people.

The National Government responded by establishing the electorate development fund for Members to fund small projects in their electorate. But there was growing discontent by National MPs for provincial governments. The other dynamic was that Local Level Government Councils which had a strong presence

in many provinces before the introduction of provincial governments in 1977, were not happy with a provincial government system that seemed to have displaced them and usurped some of their powers and functions. At the same time, political party dynamics were adding to the growing discontent of national members as provincial governments built up strong political party networks that influenced and challenged the selection of National MPs.

The long-held dissent by National MPs led to a Bipartisan Parliamentary Committee being established, which reviewed the system and recommended the abolition of the provincial government system and its replacement with a new Provincial and Local Level Government System in 1995.

Under the new arrangements, it was expected that the responsibility for budgets and funding allocations for the Provincial Administration would be made by a Provincial Budget Planning and Priorities Committee chaired by the Governor, and a District Budget Planning and Priorities Committee chaired by the Member of Parliament. As it unfolded, Provincial Governors had control over funds allocated at the provincial level, with District Budget Planning Priorities Committees not being functional and having no funds. In 2014, the District Development Authority was established, providing the administrative mechanism for Members of Parliament to have control over funds allocated from the national government purse, and disbursed at the electorate level.

Culturally, in almost all parts of Papua New Guinea, the wealth and standing of a person in the community are measured by what one can give to the community by assisting others with their needs. In many instances, most people do not see it as wrong if something was gained illegally. If this benefits the community then they may consider this as legitimate.

Members of Parliament are therefore primarily seen as not only a community's representative to the National Parliament who participates in the governance of the country, but more importantly as a means of access to a greater share of funds for the benefit of the electors.

Are any of these expectations different during times of crisis, and how?

A Member of Parliament, as their elected Leader, is expected to take the lead in managing and resolving crisis consequences.

They want to see their MP lead and engage in discussions, first by resolving the dispute which is often a fight involving traditional weapons or even modern weapons. MPs are then also expected to take the lead in contributing cash, usually thousands of kina, to the peace settlement and often to each of the different groups so that members from groups then make additional contributions to give each other.

During such times, potential challengers for the next elections look for opportunities to contribute cash to disputing parties and make themselves available to assist. Members of Parliament know that they must turn up, otherwise, they leave a vacuum for potential challengers to get a footing.

How does multi-level government have a bearing on these issues? Do voters/citizens think of their representatives as operating at the provincial level, the national level, or both?

Whilst Members of the Parliament are also members of the Provincial Assembly by virtue of being a representative of the electorate in the province, they are most often seen as Members of the National Parliament and involved at the National Government level, and less so at the provincial level.

The Provincial Member and Governor are seen as the people's representative at the Provincial level. The Governors perhaps are often seen as representatives of the people at both the provincial as well as national levels.

The effectiveness of the District Development Authorities varies across the country. Whilst Presidents are members of the DDA, many people do not seem to be aware of the role they play, and the question is whether they also do have an influence on the projects implemented in the electorate. Council Presidents benefit from the allowances and other benefits paid by the DDA at the direction of the MP.

How could representation work better, from the standpoint of the people?

In 2021, the Electoral Boundaries Commission reviewed the electoral boundaries for the National Parliament and the Parliament considered this report in March 2022. This resulted in the creation of six new electorates for the 2022 general elections, with seven more approved for the 2027 general elections. This was the first time new representative electorate seats were created since the first post-independence elections in 1977.

There were calls for the creation of more parliamentary seats from many parts of the country, saying that their electorate was quite large and that they were not benefitting from government services and hence, wanted a new electorate to have increased opportunity for access to development funds. The Committee report sums up this view in the Executive Summary of their report:

Our people, and especially from the remote parts of Papua New Guinea are very critical of the lack of government presence and delivery of basic services to improve their living standards. They are now very vocal and calling for their Electoral Boundaries to be immediately changed.

There were also increasing calls from people of a few provinces for a greater degree of autonomy for the Provincial Government so that provincial governments had the power and authority to respond more effectively to the needs of people. Some of these provinces had more effective and better-represented provincial government systems prior to the 1995 reforms. In their view, they say, our people can be better represented and our basic needs served more effectively at this level, whilst remaining part of the greater nation-state.

Samoa: Lessons from the *Faamatai*

Tootooleaava Fanaafi Aiono-Le Tagaloa

Samoans are extremely confident people, at times bordering on arrogant. The issues that the questions posed attempt to tease out find their answer, as far as Samoa and Samoans are concerned, in the reason for their indelible self-assurance.

I mentioned this Forum to my father, Hon. Le Tagaloa Dr Pitapola, who became a Member of the Samoan Parliament in 1970, at the age of 33. He was Minister of State in Prime Minister Hon. Vaai Kolone's Cabinet, and the Coalition Government of both Hon. Vaai Kolone, a former Prime Minister, and former Head of State Hon. Tuiatua Tupua Tamasese Efi in 1985. My father served 27 years as a parliamentarian and was key in many significant changes that Samoa undertook in her journey as a modern democratic nation, since gaining Independence in 1962. He was the strongest and often the sole voice of dissent, for example, when Samoa adopted universal suffrage in 1990.

But I digress. When I mentioned the Forum to my father and the fact I was asked to respond to several questions on representation, he reminded me as follows:

Do not forget 'democracy' *is* the people. The *Faamatai* is centred on the *suli*. You cannot be a *matai* if you are not a *suli*.

To which I responded, 'and everyone is a *suli* and therefore everyone can be a *matai*'.

Representation or a representative system is not new to Samoa. Although we adopted the Westminster Parliamentary System with Independence, we were not unfamiliar with the selection and election of representatives for ourselves in the various expanding or collapsing concentric circles of life and living.

Philosophically speaking, the ideal social organisation for Samoa and Samoans is the *Faamatai*. This was graphically represented by the late Professor Aiono Dr Fanaafi Le Tagaloa in the form of a wheel. The hub being the *matai* and its spokes representing, from antiquity: the *tamaitai* — daughters of the *matai*; the *aumaga* — sons of the *matai*; and with modernity, two more spokes were added of the *faletua ma tausi* — wives of the *matai*, and *fanau lalovaoa* the young children of the *matai*.

The mention of 'with modernity' is important to note because, if you see, the group of *faletua ma tausi* — wives of the *matai* — refers only to the female spouses of *matai*. With modernity came a different view of roles and relationships that highlighted gender while the *Faamatai* focused on the roles and responsibilities themselves. An example is the arrival of the land agencies, whalers, traders and missionaries. They brought with them their culture and beliefs so that a woman's standing and position were largely dependent on that of: a) being married; and b) the man she married. A woman's place was in the home, and more particularly, in the kitchen.

Transpose this to Samoa where the arrival of Christianity was seen as the fulfilment of a prophecy handed down the generations of the *Malietao* family by a female Warrior *Nafanua* who conquered the whole of

Upolu and Savaii. Transpose this to Samoa where the *tamaitai* — daughters of the *matai* — are the makers of wealth, the holders of economic power, the *pae ma le auli* — peacemakers, the *taulasea* — healers, and on occasion the priestess. Transpose this to Samoa, where the *tamaitai* group focuses on your relationship to the *matai* (male or female) not your husband and being married. Transpose this to Samoa where the *tamaitai* is the embodiment of the sacred covenant between brother and sister — *feagaiga*, where a brother's care for his sister includes not only her protection but also her sustenance which includes the provision and preparation of meals.

The confidence of the Samoan lies in their certainty about their identity and their belonging. There is a well-known phrase that equates having this certainty of being Samoan, with having certainty as to identity: '*O le tagata ma lona Faasinomaga*'.

There is a clear order in the *Faamatai*. There is protocol and etiquette rivalled possibly only by the English and Asians. It saturates every aspect of life and is so entwined with living that if you do not know what you are looking for you will miss it.

Take Samoan architecture. The houses have specific purposes and therefore a specific shape that fits the relevant purpose. For example, the house in which meetings are held is also considered the ceremonial residence of the *matai*. It is called a *laoa* if it belongs to an orator *matai* and a *maota* if it is a chiefly *matai*. These houses are circular in shape to reflect the holistic approach to deliberations that are held in this particular house. These circular-shaped houses are supported in the centre by either one, two or three pillars; strong enough to carry the entire upper part of the house depending on its size.

Each *Nuu* or group of *matai* in a geographical location has its own Constitution which is recorded in its honorifics or *faalupega*. This Constitution designates which part of the *maota/laoa* each *matai* of the *Nuu* will sit and the role they will play in the deliberations and decision-making of the *Nuu* and Council of *Matai* — *Fono a Matai*.

Coming back to my earlier comment about the *Faamatai* and the source of Samoan self-assurance. The Samoan identity — *Faasinomaga* has three main pillars, much like those supporting the centre of a *maota/laoa* or *Fale Tele* (the circular-shaped house).

The first pillar is the *Matai* titles that a Samoan is heir to or *suli* of.

The second pillar is the lands owned by the *Matai* titles that a Samoan is heir to or *suli* of.

The third is the *Gagana Samoa* or the Samoan Language.

Thus, my response when my father said, 'Do not forget "democracy" *is* the people. The *Faamatai* is centred on the *suli*. You cannot be a *matai* if you are not a *suli*', was: 'and everyone is a *suli* and therefore everyone can be a *matai*'.

In Samoa as in every other country, there is a clear demarcation between rich and poor, overseas schooled and locally schooled and such. But this does not put a dent in a Samoan's confidence because despite modern advances, adaptations, or appropriations, as long as the *Faamatai* endures, so too will the Samoan identity and *Faasinomaga* grounded in the three pillars mentioned above.

In Western terms — every Samoan is *suli* or the heir of a number of *matai* titles, whether it is on their mother's side or father's, their maternal grandmother/father, their paternal grandmother/father and so on.

As a Samoan, you can choose which family to affiliate with. Often this is determined by those that your parents acknowledged and kept close contact with, and their parents in turn. But the choice is not limited by this. By being an heir or *suli* there is the potential for you to hold any *matai* title yourself. However, regardless of whether you hold the *matai* title of your various *aiga* — family, as a *suli* you nevertheless have access to lands belonging to the *matai* titles should you so need.

Where the Westminster Parliamentary system originated, representation was very much dependent on land holding and gender. This is not the case in the *Faamatai*, because a *suli* is not gender specific nor does the *Faamatai* practice or recognise primogeniture. Even the *matai* is not gender specific. A *matai* is looked at more as a role with an emphasis on duties and responsibilities rather than biology or anatomy.

According to the *Faamatai*, ownership of land resides in the *matai* title/name, not the person holding the title/name. Therefore, although the holder passes away, the ownership of the lands remains vested in the title that continues as it is passed on to successive titleholders. The *matai* holder's main responsibility is to care for the lands of the *matai* to ensure this 'right/heritage' survives intact for generations to come and ensure that all living *suli* where necessary, have access to the same.

The first experience a Samoan has of representation is in the various family gatherings that are called for an array of reasons. One that is particularly relevant to our discussion on representation is the selection of the *suli* or heir who will hold the *matai* title of the *aiga* should the title become vacant.

At such gatherings, all *suli* or representatives of the same are called together. The ideal place for the meeting is the ceremonial residence of the *matai* title in consideration. The Samoan process of decision-making is called *Soalaupule*. Unpacking of this term, which time does not currently permit, shows that the consultative process that is taken at such gatherings is that of equals where it is acknowledged that all present have something to say that is worthy of note by the rest. This also carries the connotation that for our decision to be sound, everyone's input is really needed. This consultative process is almost subliminally reinforced and physically manifested in the shape of the circular *Fale Tele* as alluded to earlier.

Decision-making in the *Faamatai* for this reason is by consensus and unanimity. This means full and actual consensus and not a majority + 1 as in many regional or international decision-making bodies. Many believe this means it takes forever to make a decision, but this is not necessarily the case. Perhaps only when it is a particularly hairy issue will it take a while, or if there is a particularly belligerent *suli* then it could take longer than expected. I think it can be said though that if the matter concerns the first two pillars of the *Faasinomaga* — i.e., *matai* titles and land belonging to the *matai* title — then it can take a little longer and rightly so.

When Samoa became independent, the first Prime Minister and the joint Heads of State sought the United Nations' endorsement of *matai* suffrage. Only *matai* voted in the General Elections. This is not surprising, as I have outlined above that Samoans are not unfamiliar with a representative system.

The *suli* of a *matai* unanimously decide on which *suli* will carry the title and its roles and responsibilities. The *matai* title holder will then represent the *aiga* or family and take the place and perform the role of the *aiga* in the *Fono a Matai* or the Council of *Matai* in the *Nuu*.

As mentioned earlier, each *Nuu* has a Constitution captured in its honorifics. In the same way, groupings of *Nuu* form Traditional/Customary Districts — *Itumalo Faaleaganuu*: for example, the island of Upolu which has the capital of Samoa, Apia, has three major *Itumalo Faaleaganuu*, and forms part of the national honorifics of Samoa. The representation from the local, to the district, to the national level is therefore provided within the *Faamatai* social structure and representation is manifested accordingly.

The same principles in decision-making of *Soalaupule* and unanimity — *autasi/afa e tasi* are observed at each level of representation.

Against this background of Custom, which is enshrined in the *Constitution of the Independent State of Samoa 1960*, I would like to come back to the questions posed to briefly elucidate the situation in Samoa, and also by way of conclusion.

As a Samoan, our *Faasinomaga* is of the utmost value to us, and so when we vote, we vote along our familial connections. This is of course noting that the ballot is the total opposite of consensus decision-making. Whether it is my mother's sister running, my first cousin, my mother, father, or brother — we vote along our familial connections. According to Samoan Electoral Law, with its many changes, you must vote where you reside, unless you are a *matai* in which case you can opt to vote where your *matai* title is from, if different to where you live. The other exception is if your parent or spouse is a candidate, then you can vote where they are running from, again, if different to where you live. If, however you are a *matai* and you have registered as a voter using your *matai* title, then you must vote where your *matai* title is from. And you can only change rolls every ten years!

Despite the adoption of universal suffrage in 1990, only registered *matai* are eligible to run as candidates in the General Elections.

At Samoa's General Elections in 2021 which saw a change of Government to an unknown party, FAST — *Faatuatua i le Atua Samoa ua Tasi* ('One Samoa — Faith in God'), after four decades of HRPP (Human Rights Protection Party) rule, our household of five voters all voted in different places. I voted with my father in Savaii, while living in Upolu Island, because my registration hadn't been shifted from the roll since my father last ran in the 2012 General Elections. Although I have been a *matai* since 1997, I haven't registered as a *matai*. My sister on the other hand registered as a *matai* and so she votes where her title is from, which is also different from where we live. Her husband hasn't registered as a *matai* either and so he votes where we live as he is from the area. My husband is a *matai* and the head of his *aiga* and so he too voted where his *matai* is from (one of seven *matai* titles that he holds), and not where we live.

My father and I voted for the candidate from one of his *aiga*, my sister voted for our aunt who was running, my husband voted for the harmony of his *Nuu*, and my brother-in-law voted in support of their familial connections. The hope is that we support our flesh and blood, those with whom we share our *Faasinomaga* or identity, or at least one of the many! In this way when my *aiga* wins in the 'introduced' arena of representation, they will take our family, our *Nuu*, our *Itumalo*, our *Faasinomaga*, onto a national, and possibly even an international stage.

O le ala i le pule o le tautua — The way to leadership is through service. Samoans see the role of being a representative as service. It is done every day in the home, in the *Fono a Matai*, and in the Church; and this service is not difficult to transfer to politics and democratic representation à la Westminster, even if through a ballot and not by *Soalaupule* or consultation and *autasi* or consensus.

If representation in a Western way is to be strengthened in Samoa, what needs to happen is for it to be progressively Samoanised so that it harmonises with the existing structures, culture, language, and philosophy of the *Faamatai*.

Everything introduced to Samoa from Christianity to the Westminster Parliamentary System has seen this adaptation and it has led to the creation of a hybrid, and in some cases a totally new entity, that capitalises on the best of the West. In the end, these are basically the aspects that meld well with the precepts and tenets of the Samoan *Faamatai*.



3. How Do People Get Effective Representation?

3. How Do People Get Effective Representation?

Dinesha Samararatne

Much of the debate on representation in constitutional government focuses on inclusion, representation of different groups in society, electoral reforms and institutional design. That is to say, the focus tends to be on the process of electing and selecting representatives and the role of the people in that process. Here, the general role that the people play is that of a voter. However, voting is only an aspect of a broader role of citizenship that an individual (and communities) play in a polity. In this session, the focus was on the relationship (or the lack of it) between the people and the elected representatives *between* elections. What is the relationship between the citizen and her representatives after voting has taken place? Between elections, what is the role of the people in ensuring effective representation?

The deliberations considered a wide range of mechanisms, formal and informal, by which people might seek to influence, persuade, or demand action from their representatives. It also considered other means by which people might try to ensure that their system of representative democracy meets their needs and delivers on its promise to foster the wellbeing of its people. These means span a variety of options, including recourse to other institutions and the potential of protected social and economic rights. The session drew on discussion papers from Nepal, Solomon Islands, India and South Korea and the questions discussed in this session included the following:

- Why might people seek to have recourse to their democratically elected representatives between elections?
- How accessible are these representatives to ordinary people? What strategies, formal and informal, can people use to communicate with their representatives? Do these strategies change depending on what it is that people want from their representatives?
- Are there forms of direct action, authorised by law, that people might take to get action from their representatives?
- Are there other public institutions through which people can pursue their expectations of/needs from representative democracy between elections?
- To what extent do constitutionally-protected social and economic rights assist people to ensure that a system of representative democracy meets the needs and expectations of its people?
- Are the answers to any of these questions different for different levels of government?

The distinction between the concept of a voter and citizen is useful in thinking about the expectation placed on elected representatives and state institutions. Voters may be responsive to factors such as personal benefit, patronage or social proximity. A voter may privilege short term interests over the long term. In contrast, a citizen may be willing to take short term risks and personal losses in order to achieve

political goals in the longer term as well as to resolve social problems. For example, a voter may take no issue with nepotism and may even support nepotism whereas a citizen may see reason to object to it. It was suggested at the session that elections incentivise voter-like behaviour among the people whereas in between elections the expectations of the people are conceptualised from the perspective of a citizen.

In between elections, the expectations of the people can be wide ranging. They certainly involve the expectation of a good life and the corresponding expectation that elected representative and the state will deliver the basic goods and services required for experiencing that quality of life. Therefore, the people expect governments to ensure the availability of job opportunities, and they expect the development of infrastructure in their locality. They also expect to be consulted in the development of legislative policy and to have the opportunity to participate in decision-making as far as possible. When such opportunities are not made available, the people may engage with elected representatives and state institutions in a confrontational manner, in the form of protests or strike action. Even where people's protests or strike action may disrupt the daily life of the polity, it is useful and even necessary to interpret these developments as expressions of citizenship by the people.

Constitutional systems include several institutions that are designed to meet the needs of citizens. Two main examples are the legislature and the bureaucracy. However, in recent times these institutions have been criticised for failing to fulfil their institutional mandates. Some elected legislatures have been subverted by strong executive presidents, while others have been subject to elite capture. In these scenarios, political parties operate to serve the interest of small but politically powerful groups in the polity rather than serve the interests of its voter base. The impression, therefore, is that these representative institutions no longer represent the people in a meaningful way. For instance, constituency development funds that are allocated to members of parliament may not be used transparently or meaningfully to achieve the common good, but rather to strengthen patronage networks or other political and personal aims. Similarly, the effectiveness of the bureaucracy in serving the interests of the citizen can be undermined due to lack of independence, not being fit for purpose and the widespread practices of bribery or corruption. When the main institutions designed to respond to citizen needs and aspirations are not functioning effectively it leads to dissatisfaction and to disenchantment with representative democracy as well. If the situation escalates to a manifest crisis, it can also lead to widespread protests, uprisings or even violence.

Courts and judicial institutions are not generally viewed as representative of the people in constitutional theory. In fact, this is a common critique of the judicial arm of the state. However, where people take the view that political institutions are failing to represent their interests or act in their best interest, people seek remedies before courts. Public interest litigation is an example of the way in which people seek judicial intervention in situations of institutional failure. Other examples include the judicial recognition of economic, social and cultural rights as well as the expansion of the scope of already recognised fundamental rights. While such judicial intervention may bring about immediate relief, the core challenge of ensuring that representative institutions represent the people in between elections remains.

A relatively more recent development in some jurisdictions such as India and Sri Lanka is the emergence of fourth branch institutions. These institutions include the Election Commission, the Human Rights Commission and the Right to Information Commission. Where these institutions have a constitutional mandate to act independently, people have petitioned them to seek remedies for failures in representation. In some instances, the Commissions proactively act within their mandate to issue

statements or recommendations to the Government. Such interventions can have the effect of holding political authorities in check and as a pushback on excessive use of power. Fourth branch institutions therefore have the potential to incentivise political institutions to respond more effectively to the people's expectations of constitutional government. Citizens Assemblies and People's Councils are other examples of efforts made to directly involve the people in decision-making and thereby by ensure more effective representation of the people in between elections.

Apart from the courts and fourth branch institutions, non-governmental organisations play a central role in translating people's aspirations for democratic governance into concrete demands from the state. This may occur through public campaigns, fact finding, litigation and other types of activism. However, non-governmental organisations have long been criticised for setting the agenda for their work based on priorities set by their funders. Funders in these instances tend to be foreign and therefore suspect for some. Moreover, local non-governmental organisations serve as a link between local communities and international networks and international organisations. These connections make it possible for the people to take up issues of malgovernance at the international level when demands made at the national level do not have an impact.

International organisations such as the United Nations and its several agencies, the World Bank and the International Monetary Fund too can have an impact on representation deficits at the national level. Where governments fail to effectively deal with human rights issues, the UN human rights mechanism provides limited relief at least in terms of offering recognition of the issue. The UN has a strong influence in the agenda setting of states. The Sustainable Development Goals are an example of agenda setting by the UN which can be means for pressuring governments to represent the people effectively including in relation to inclusion of women and addressing the effects of climate change. In contrast, interventions by organisations such as the World Bank and the International Monetary Fund have been criticised at the domestic level by people who demand that they be consulted and represented meaningfully in determining the conditions that these institutions impose on the state in their programmes.

Bridging the gap between the people and their representatives and representative institutions requires ongoing citizen education. It also requires proactive engagement with the people by public representatives and institutions. The concept of citizenship should be debated and discussed in educational institutions as well as more broadly in the public sphere. The direct involvement of elected representatives and representative institutions in such initiatives is essential. Public outreach and engagement by the legislature would be an example.

For many states in the Asia-Pacific region and in the wider Global South, strengthening the connections between the people and elected representatives between elections is a critical aspect of ongoing democratisation. It is the method by which political and economic questions that are only partially addressed through elections can be addressed. Ethnic conflict, environmental issues and economic development are examples. However, addressing the deficits in representation between elections is confronting and challenging. It reveals the failures of current institutional design and requires a review of key political institutions. The growing dissatisfaction with representative institutions and the corresponding (as well as opportunistic) push back against democracy that is evident in some polities suggest that this is a challenge that has to be met. In some of these contexts, public institutions may have been subjected to state capture and therefore institutional checks and balances may be ineffective in dealing with the representation deficit. In such contexts the people have a critical role to play in between

elections in ensuring effective representation. However, the people and their expectations can be difficult to discern and sometimes even contrary to values that inform constitutional government, an issue that returns us once again to understanding the importance of the distinction between voter and citizen.

Formal and Informal Connections between the People and Their Representatives in Nepal

Bipin Adhikari

Why might people seek to have recourse to their democratically elected representatives between elections?

The people (voters) intend to have recourse to their representatives for several things. If they come through civic groups, organised civil society, non-governmental organisations or local business communities, they usually seek the representatives' support or favours to establish their causes. These causes might be the allocation of budget funds for the upliftment of deprived communities, empowerment of women, adult literacy, agriculture loan, small businesses, etc.

But many people come to their elected representatives in the parliament or provincial assemblies to rally for development projects in their village or locality. They tend to see their representatives as development agents rather than legislators. For example, they would come to ask for the construction of roads and bridges, measures to prevent landslides, additional health posts, and so on.

Many voters also go to their representatives in order to find jobs, ask for help with transfers or promotions, facilitate their personal interests, or use them to bridge with the governments, when there are lapses.

While trade unionism is not inherently tied to constituency issues, it can certainly play a role in shaping the political landscape of a particular constituency and influencing the decisions of elected officials.

It is rare that the voters talk about larger policy issues, the lawmaking, and accountability of the government to the parliament or concerned legislative assembly.

How accessible are these representatives to ordinary people? What strategies, formal and informal, can people use to communicate with their representatives? Do these strategies change depending on what it is that people want from their representatives?

Nepal is still a predominantly rural society. People are connected with each other in their given social relations without any sophistication. There is a close relationship between the voters and their representatives. They are also linked in many cases through their political parties and their institutions. As such, as a matter of social norm, it is perfectly acceptable to visit each other when there is a need for it. Reaching out to representatives physically when they are needed is also quite expected, no matter how busy they are. However, in the cities and busy townships, this accessibility might not be the same. When the representatives are from professional or business sectors, they may not be as accessible.

Generally, the elected representatives have a private office, party office or designated place for meetings with the electorate or visitors. People who are seeking to meet their representatives may visit these places with prior appointments, or even without appointments. In the latter case, they might have to wait in a long queue. Making telephone calls about their issues is also quite common. Educated and modern representatives receive emails as well. Representatives generally prefer to attend town-hall meetings to keep in touch with their voters. They are usually invited to most of the public functions. This gives them the opportunity to speak on issues which might not be immediate issues of concern in a public forum. There is a strong tradition in Nepal for the people's representatives to go to their native village or constituency to celebrate national or communal festivals. This provides another opportunity to involve the voters. Oftentimes, the people become quite demanding on such occasions. They use the opportunity to pressure the representatives on everything that they consider to be their priority.

As partisan politics is quite common, very often representatives are surrounded by the same party votaries. But even in such situations, the representatives try to be seen as treating all the local people.

On occasion, representatives avoid such forums when they know they will not be able to survive in the given environment.

Are there forms of direct action, authorised by law, that people might take to get action from their representatives? Are they used in practice?

There are no such authorised forms of direct action. The *Constitution* provides for public interest litigation to order the government to act in a particular way. But this type of order can be made only against state action. If the act of a representative is not that of the state in the given situation, then generally the court will not intervene. There used to be a provision that allowed an ordinary citizen to move a petition to parliament, when there was a cause to be addressed, but the current Rules of the House of Representatives and the National Assembly do not have that provision anymore. However, political manoeuvring like blocking streets, bridges, and highways, are quite common in Nepal. General strikes are also common. This has often been helpful, and recently, political parties have been using it as a tool against the government. The capacity of citizens' groups to resort to general strikes to pressure the government has somewhat dwindled. There is no system of recall at any level of the federal system in Nepal, although there are sometimes calls to introduce this kind of system.

There is a lack of organised pressure groups representing the interests of peasants and small farmers in Nepal's agricultural sector. This means that the local people, who are primarily involved in agriculture, have not been able to effectively organise and influence their elected representatives. There are several possible reasons why this may be the case. One reason could be the lack of awareness among peasants and small farmers about their rights and the importance of collective action. This could be due to low levels of education and limited access to information and communication channels. Another reason could be the absence of strong civil society organisations and community-based institutions that can facilitate the formation of pressure groups and provide support to small farmers and peasants. The weakness of local governance structures and the limited resources available for community development may also contribute to this. Additionally, the dominance of large importers in the agriculture sector may make it difficult for small farmers and peasants to organise and assert their interests. This could be exacerbated by the unequal distribution of power and resources in Nepali society.

Are there other public institutions through which people can pursue their expectations of/needs from representative democracy between elections?

If what is meant by 'public institutions' is a juristic person working in the political sphere who is backed through public funds and controlled by the state, then there are no such institutions in Nepal through which people can pursue their expectations of and needs from representative democracy between elections.

The role of bureaucracy is very important everywhere, but it has a low reputation in Nepal. It is considered subservient to the political machinery with limited or no capacity to make it accountable to the rule of law.

The *Constitution of Nepal* provides for more than a dozen constitutional bodies as fourth branch institutions within the system. They are independent and impartial constitutional functionaries. They make recommendations to the concerned state apparatus in their mandated areas. They either help ensure transparency, integrity, and democratic accountability, or pose restraint on the unscrupulous or unacceptable exercise of power.

There are two types of constitutional bodies in Nepal.

The first type of constitutional bodies are:

- *Commission for the Investigation of Abuse of Authority (CIAA)*: it conducts, among other things, investigations of any abuse of authority committed through corruption by any person holding public office;
- *Auditor General (AG)*: among other things, it audits accounts of all state entities in accordance with law, having regard to, inter alia, the regularity, economy, efficiency, effectiveness and the propriety thereof;
- *Public Service Commission (PSC)*: among other things, it conducts examinations for the selection of suitable candidates to be appointed to the positions in the civil service;
- *Election Commission (EC)* : among other things, it conducts, supervises, directs and controls the elections and prepares electoral rolls;
- *National Human Rights Commission*: among other things, it ensures respect, protection, and promotion of human rights and their effective enforcement;
- *National Natural Resources and Fiscal Commission (NNRFC)*: among other things, it determines the detailed basis and modality for the distribution of revenues between the federal, provincial and local governments out of the federal consolidated fund and other provisions related with fiscal federalism in accordance with the *Constitution*.

The second type of constitutional bodies are called 'other Commissions'. They are concerned with the deprived women, indigenous and identity communities of Nepal. They are:

- *National Women Commission (NWC)*: among other things, it formulates policies and programmes concerning the rights and interests of the women and submits them to the government of Nepal for implementation;
- *National Dalit Commission (NDC)*: among other things, it conducts study and exploration as to the overall situation of the Dalit community, identifies areas of necessary policy, legal, and institutional reforms in that field, and makes recommendations to the government of Nepal;
- *National Inclusion Commission (NIC)*: among other things, it conducts study and research works for the protection of the rights and interests of the communities, including Khas Arya, Pichhada class, persons with disabilities, senior citizens, labourers, peasants, minorities and marginalised communities, backward class, people of Karnali, and the indigent class;
- *Indigenous Nationalities Commission (ICC)*: its functions, duties, and powers have been provided for in the federal law;
- *Madheshi Commission*: its watchdog functions, duties, and powers have been provided for in the federal law;
- *Tharu Commission*: its watchdog functions, duties, and powers have been provided for in the federal law;
- *Muslim Commission*: its watchdog functions, duties, and powers have been provided for in the federal law.

Even though these constitutional bodies are very important, they need to be further empowered and institutionalised to achieve their objective. The main issue is the lack of necessary human resources and a federally allocated budget.

Nepal has many non-state, not-for-profit, voluntary entities in the social sphere. Most of them work locally and with grassroots people. They have been the catalytic agents for change in Nepal. Their contribution to the democratisation of Nepal has been appreciated by all.

They represent a wide range of interests and ties. They include community-based organisations as well as non-governmental organisations. They give voice to the disorganised, voiceless segments of society. They raise awareness of social issues and advocate for change, empowering local communities to develop new programs to meet their own needs. They generate respect for the law, for the rights of individuals, for the rights of other groups to express their interests and opinions, and help with pluralism and diversity. Many of these organisations work with the constitutional bodies as well as their non-state partners. This helps both the segments in their role as institutions working for the public.

To what extent do constitutionally-protected social and economic rights/values assist people to ensure that a system of representative democracy meets the needs and expectations of its people?

The *Constitution* guarantees many economic, social, and cultural rights to the people of Nepal. These rights have been guaranteed according to the laws of the land. Many people think these laws are not enough to implement the constitutional guarantees. Therefore, very often, these laws have become

political issues in the country. Rights relating to education,¹ language and culture,² employment,³ health,⁴ food,⁵ housing,⁶ etc. mean a lot to the grassroots people. There is an ever-expanding human rights movement in the country. There is pressure on the government, and representatives in the legislatures at all governmental levels, to enlarge the ambit of these provisions, and increase their coverages. It has been a challenge to the economy with low yields.

Are the answers to any of these questions different for different levels of government (local, provincial, central)?

Generally, these answers are common to all levels of government. The federal government which has taken over the central government that existed in the past, and the local governments, which also enjoy separate set of powers and competences, have been comparatively better than the provincial governments at the mid-level which came into the picture after the federalisation of Nepal by the 2015 *Constitution*. All seven provinces are new and have been struggling to occupy their space under the *Constitution*. They have been fighting the centralising tendency of the federal government, and are also trying to create their own resource base to deal with the provincial level challenges. The coordination between provincial and local governments is also very weak. Many local representatives want the provinces to be dismantled. They think the local level governance is enough, and provinces are not necessary at all. The scenario is chaotic.

Do international institutions or external pressures help or hinder the effectiveness of democratic representation in Nepalese experience?

The role of most international institutions is great in Nepal. They have largely been supportive of the democratic process and have contributed to the strengthening of the democratic institutions. Their contributions in the areas of education, health, and other infrastructure development must be appreciated. It must, however, be noted that Nepal is a geo-political hotbed, and very often even democratic institutions come under pressure. One important example is the international informal blockade that Nepal had to face when it promulgated its new *Constitution*, rejecting external influence to do otherwise.

How might representation be improved in the Nepalese context?

There are two solutions. Firstly, Nepal's electoral laws must be revised to make sure that constitutional provisions on the democratisation of political parties, social inclusion in their representative structures, campaign finance, etc., are fully complied with. Secondly, there must be a cap on how many times a representative may contest elections for state structures and their political party leadership or high command. Thirdly, the Election Commission must be modernised and given all necessary support for holding free and fair elections. Finally, the Commission should regularly conduct voter education on all

¹ *Constitution of Nepal*, art 31.

² *Ibid* art 32.

³ *Ibid* art 33.

⁴ *Ibid* art 35.

⁵ *Ibid* art 36.

⁶ *Ibid* art 37.

relevant topics including democracy as a shared enterprise, the system of representation, protection of fundamental rights, popular accountability, and remedies before the people.

Democracy education is the process of imparting knowledge and skills to citizens to enable them to participate in democratic processes effectively. It is important in countries like Nepal, where democracy is relatively under-institutionalised and where citizens may not have a clear understanding of their rights and responsibilities. By providing democracy education, citizens can learn about the principles of democracy, the roles and responsibilities of different stakeholders in the democratic process, and the importance of participation in democratic processes such as voting and engaging in public debate.

The Election Commission of Nepal, as noted above, is a constitutional body that is responsible for overseeing the electoral process in Nepal. As such, it is well placed to provide democracy education to citizens. The commission can use its resources to organise workshops, seminars, and other events that educate citizens about democracy and encourage them to participate in democratic processes. Importantly, the Commission can do this work in the period between general elections and in partnership with non-governmental organisations with interest in electoral matters. This is crucial because it ensures that citizens are not only engaged in the democratic process during elections but also in the intervening periods. This sustained engagement can help create a culture of democratic participation and lead to the development of a trained and responsible citizenship.

Solomon Islands: Linking People and Their Representatives through Constituency Development Funds

Derek Gwali Futaiasi

Why might people seek to have recourse to their democratically elected representatives between elections?

One of the reasons constituents (the people) in Solomon Islands seek to have recourse to their democratically elected representatives is because of the limited presence of the state in many rural areas. For instance, the visibility of the state through infrastructures such as health is minimal. The lack of state presence in many rural areas explains, among other factors, the emergence of what is called constituency development funds (CDFs) in Solomon Islands. Generally, politicians see this mechanism as a result of the weak state in rural areas. CDFs were introduced to bridge the gap between the people and the state.

How accessible are these representatives to ordinary people? What strategies, formal and informal, can people use to communicate with their representatives? Do these strategies change depending on what it is that people want from their representatives?

The constituency development funds (CDFs) are a mechanism, among others, that intends to link people in rural areas to the state through their members of parliament. Over time, members of parliament established a regulatory framework for CDFs. At the constituency level, non-state actors like village committees link the people and the MPs. At other times depending on the circumstances, constituents deal directly with the MP. However, the channel taken by people to deal with MPs is through the constituency office.

Are there forms of direct action, authorised by law, that people might take to get action from their representatives? Are they used in practice?

Solomon Islands is a democratic country. There are several ways or forms that people might take action to get results from their representatives. At the national level, people or civil society organisations can voice their concerns when they are called or invited by the parliamentary committees to do so. Another way is through petitions to parliament by civil society. The third way is a consultation by Members of Parliament or provincial leaders on issues that the national or provincial government deems fit and proper. Recently, the national government encouraged MPs to consult their constituents in terms of extending the life of parliament from four to five years. Also, the Premier for Malaita province engaged in a provincial-wide consultation with various wards in Malaita to get their views on development issues

within its province. In Solomon Islands, there are no re-call provisions in its *Constitution*, but the law provides for the petition and peaceful marches.

Are there other public institutions through which people can pursue their expectations of/needs from representative democracy between elections?

In Solomon Islands, its *Constitution* established certain bodies to deal with leaders defined broadly. These bodies include the Ombudsman, Leadership Code Commission and Auditor General. The Public Solicitor's Office was also established to help people with their grievances. Most of these institutions are mainly based in Honiara. Infrequently, they visit rural areas. The courts are there as well to deal with grievances about leaders. Aggrieved parties can go to court when their rights are infringed by the state or state leaders. The courts are fairly independent, but are sometimes hindered in the performance of their roles due to a shortage of financial and human resources.

Are there constitutionally-protected social and economic rights/values that assist people to ensure that a system of representative democracy meets the needs and expectations of its people?

Chapter 2 of the 1978 *Solomon Islands Constitution* contains fundamental rights and freedoms. Equality and non-discrimination are among the essential principles embodied in the *Constitution*. The *Constitution* guarantees freedom of assembly and association. The *Constitution*, therefore, permits persons to associate freely to form or belong to trade unions or associations to protect their interests. The *Trade Unions Act* permits workers to form unions and associations.

In Solomon Islands, its 1978 *Constitution* does not explicitly state the following rights: the right to adequate food, adequate housing, education, health, social security, to take part in cultural life, to water and sanitation, and to work. However, some of these socio-economic rights are regulated by other legislation such as the *Labour Act*, *Workmen's Compensation Act*, *Safety at Work Act*, *Solomon Islands National Provident Fund (NPF) Act*, the *Employment Act*, the *Labour Act*, the *Workmen's Compensation Act*, and the *Safety at Work Act*, *Education Act*, and the *Penal Code*. Solomon Islands ratified the *International Covenant on Economic, Social and Cultural Rights (ICESR)* in 1982, but has reported only once, in 2001.

Do international institutions or external pressures help or hinder the effectiveness of democratic representation in Solomon Islands' experience?

International institutions help or play an essential role in ensuring the effectiveness of democratic representation by providing aid, policy advice and advocacy for the effectiveness of democratic representation. For instance, the United Nations Development Program (UNDP) continues to help fund reform programs for electoral reforms pertaining to the *Electoral Act*. Another example is the work of outside institutions that were given opportunities to observe the national general elections, and made reports and policy recommendations for reforms of electoral laws and related issues.

How might the performance of representation be improved in the Solomon Islands context?

One way to improve representation is to ensure proper recognition of the roles of non-state actors in governance and regulation. Another way to improve the performance of representation is for the government to introduce quotas for women, youths and vulnerable people in parliament.

India: ‘Thin’ Representation and Informal Channels of Communication between Representatives and the People

Gautam Bhatia

Why might people seek to have recourse to their democratically elected representatives between elections?

There are many reasons why people seek to have recourse to their democratically-elected representatives between elections. Constituency development work perhaps ranks the highest: in India, the existence of PMLAD funds — funds granted to every MP to undertake development work in their constituency — has blurred the line between legislative and executive functions and has vested legislators with administrative functions. Thus, MPs are often approached directly by people from their constituencies with respect to development work.

People might also seek to have recourse to their democratically elected representatives when they are performing their legislative functions, i.e., in advance of votes on contentious issues. This, however, is not very common: under the *Indian Constitution*, disobedience of the party whip triggers disqualification from the House, and therefore, individual legislators are more or less compelled to follow the party line. For this reason, it is more likely that people will attempt to have recourse to the party leadership rather than an individual MP.

How accessible are these representatives to ordinary people? What strategies, formal and informal, can people use to communicate with their representatives? Do these strategies change depending on what it is that people want from their representatives?

There are no formal channels of communication between representatives and the people, as such. Because the *Indian Constitution* was enacted in 1949, we do not find many of the features that subsequently enter the constitutional lexicon (for example, public participation in law-making).

Some laws — such as the *Forest Rights Act*, or other environmental laws — do have public participation requirements, but these do not mediate the relationship between people and *legislators*: they are specific to public participation in the context of industrial projects that have an impact on the local environment or on indigenous people’s ways of living.

Thus, the strategies are, for the most part, informal: they entail leveraging patronage (and, on occasion, kinship) networks to communicate with the representative in question.

Of course, protest has always been a strategy in its own right: for example, in 2020, a year-long public protest by farmers in North India ultimately compelled the repeal of three contentious ‘farm laws’, which had been passed with the goal of marketising Indian agriculture.

Are there forms of direct action, authorised by law, that people might take to get action from their representatives? Are they used in practice?

India’s *Constitution* does not really envisage a role for the People outside of elections. During the Constituent Assembly Debates, there were proposals made for a right of recall, but these were rejected. The issue has come up from time to time in political discourse but has not been taken forward. There is also no codified concept of a citizen’s initiative; thus, formal channels for public participation in the legislature are minimal.

One exception to this is parliamentary policy, according to which draft bills ought to be laid before the People, for their views and feedback, and a reasonable time must be given for the same. According to this policy, the texts of draft bills are published online, and (generally) a two-week or one-month period is provided for public feedback. There has been significant critique of this, however, focused on the short time period that is often provided for feedback, and the fact that draft bills are not made available in local languages.

Are there other public institutions through which people can pursue their expectations of/needs from representative democracy between elections?

Fourth Branch institutions exist in India. Unlike, say, the Kenyan or South African Constitutions, where there are a set of Fourth Branch institutions set out in the Constitution itself, and whose independence is guaranteed, the *Indian Constitution* does not have much to say about such institutions: the *Constitution* provides for Commissions that look into the welfare of Scheduled Castes and Scheduled Tribes, and for a Comptroller and Auditor-General, but does not go further.

Fourth Branch institutions are codified in legislation. Two well-known examples include the National Human Rights Commission and the Information Commission, both set up under the aegis of special laws. The Information Commission is set up under the *Right to Information Act*; since the passage of this *Act* in 2005, the *Act* — and its infrastructure — has been used extensively by citizens to extract information from government departments, and in the interests of transparency.

One problem with Fourth Branch institutions, however, is that the executive has control over appointments and tenure. This is exacerbated by the fact that since Fourth Branch institutions are not constitutionally entrenched, their composition and independence are subject to legislative majorities. This was seen recently when the *Right to Information Act* was amended to loosen tenure security and bring the Information Commission under greater control of the Executive. Thus, in the absence of constitutional entrenchment and guaranteed independence, there are perhaps limits to how well Fourth Branch institutions can perform their functions.

To what extent do constitutionally-protected social and economic rights/values assist people to ensure that a system of representative democracy meets the needs and expectations of its people?

The text of the *Indian Constitution* does not guarantee socio-economic rights; instead, these have been read into the *Constitution* by the Indian judiciary over the last four decades.

Because of the inconsistency in jurisprudence and difficulties in implementation, the record of socio-economic rights has been patchy. There are some famous success stories: for example, the ‘Right to Food’ case saw widespread improvements in the public distribution system, under the oversight of the Supreme Court.

Over time, the Supreme Court has expanded its role and evolved various judicial mechanisms to create a system of governmental accountability to the people. One of these is the ‘continuing mandamus’, through which — after rendering a judgment — the Court exercises ongoing supervision over its implementation (as happened in the ‘Right to Food’ case). During the COVID-19 pandemic, in a case involving the availability and pricing of vaccines, the Court also articulated a standard of dialogic judicial review as a means of securing State accountability.

Dialogic judicial review — especially in the context of socio-economic rights — is a judicial approach that has yielded success in the past; it remains to be seen whether it will become an established judicial doctrine in India.

Are the answers to any of these questions different for different levels of government?

India has a three-tiered structure of governance: there is the centre, the state, and the local government. In principle, the answers to the questions above do not significantly change with respect to the level of the government. In practice, however, with greater proximity to the people, the ability to secure accountability or the ability to engage with representatives, grows.

Do international institutions or external pressures help or hinder the effectiveness of democratic representation in the Indian experience?

Historically, this has depended on the nature and responsiveness of the national government. For example, the present government has often rejected reports by international institutions, with the World Hunger report being the most recent example. In the past, however, governments have been more responsive to international institutions. Thus, this is almost entirely dependent on the internal political situation at any given time.

How might the performance of representation be improved in the Indian context?

For the most part, India has what Roberto Gargarella has called a ‘thin’ system of representation. Other than periodic elections at both the centre and the state levels, there are very few other channels of communication between the people and their representatives. As noted above, one of the reasons for this is that the *Indian Constitution* was enacted in 1949; and it is in many of the later Constitutions that

we see more nuanced understandings of the separation of powers, and mechanisms for representation beyond elections.

There are, thus, many ways in which the performance of representation could be improved in the Indian context. The history of the *Right to Information Act* shows that, when functioning well, Fourth Branch institutions have been a major area of conversation between the people and the State. However, executive control has eroded much of their effectiveness. Thus, to start with, constitutional entrenchment — and guaranteed independence — of Fourth Branch institutions would help in improving the performance of representation.

Secondly, public participation in specific contexts, such as that of the *Forest Rights Act*, has been effective on many occasions. Extending public participation beyond specific contexts, and potentially constitutionalising it, might thus be another important way of strengthening the performance of representation.

Representation and Citizen Participation in Korea

Jeong-In Yun

Introduction

This paper focuses on the empirical aspects, particularly from the perspective of citizens who are represented, of how political representation has worked in the South Korean context. In South Korea's presidential system, people perceive members of the legislature and the president both as their representatives, and the political parties always lie between the people and their representatives. Therefore, the interaction between the people as citizens and the representatives is greatly influenced by the relationship between the legislature and the president, representatives and the parties, and people and the parties.

True to its purpose, I will answer the given questions one by one, and, if necessary, add some aspects which bear on contextual understanding of the Korean experiences and incorporate questions on comparing central and local levels.

Why might people seek to have recourse to their democratically elected representatives between elections? Do the people generally feel well represented?

As is generally the case with representative democracy, the actual actors of politics are not the people themselves, but the representatives who are mandated by the people. Thus, the people are destined to rely on their representatives to get what they want.

However, the institutional settings in Korea have fostered people's passive attitudes toward national politics. The Korean political system is a highly power-concentrated presidential system, with a very strong presidency and weak legislature (National Assembly). The recall of National Assembly members on the national level is not institutionalised, whereas the local assembly members and heads of local governments can be recalled. So, between elections, most representatives tend to be immersed in the power game between parties and political groups, with little attention to the people's needs and expectations. Nevertheless, people have no effective means to change or replace them no matter how poorly they work or how much their approval ratings fall. Due to the representatives' chronic lack of responsiveness and accountability, introducing a recall on the national level has been extensively discussed for the last decade. Several legislative bills have been proposed to the National Assembly to introduce it, and the recently proposed constitutional amendment bills also included it.

Under such a political environment, Korean people usually do not have much expectation towards the representatives, as they don't feel represented. However, if the representative(s) in a broad sense passed a certain point, then the people might take direct action, like the pro-democracy protests in the 1980s which led to democratisation in the end, and the candlelight vigils in the 2000s, one of which led to the impeachment of the President.

How accessible are these representatives to ordinary people? What strategies can people use to communicate with their representatives? Do these strategies change depending on what it is that people want from their representatives?

All around the world, candidates are the most attentive, responsive, and closest to ordinary people during an election period. However, soon after the election, the elected representatives often hide behind the notion of a free mandate and jump into the hectic political arena, instead of undertaking frequent and regular communication with the people as well as their constituency — such a pattern is very evident in Korea.

Apart from that, the most formal way to access the representatives, authorised by law, is a petition to the National Assembly. According to article 26 of the *Constitution* which provides the citizen's right to make a petition to public institutions, the *National Assembly Act* specifies the processing of the petition at the legislature.¹ Previously, the petitioner was required to present a written petition along with either the introduction of a National Assembly member or the consent of a number of people, but now it can also be done through a newly introduced electronic petition system (e-petition).² The new system does not necessarily require a willing National Assembly member's introduction; instead, the electronic submission requires more than 100 people's consent within 30 days, before it is made public. When the publicised petition gets more than 50,000 consents³ within 30 days, it is received.⁴

Another way is to participate in public hearings or legislative activity briefing sessions hosted by legislators, but this is quite passive. A more active way is to organise or participate in civic groups or non-governmental organisations by sending opinions to the representatives, asking for meetings, jointly holding events to persuade and press the representatives, or holding demonstrations. Another active way is to become a member of a political party and participate in the intraparty decision-making process from which results are greatly important to the representatives. This participation could include proposing agendas/opinions to the party and, via mobile voting, deciding on the party rules, organisation, and candidate nomination. However, there are several restrictions on using party platforms such as membership qualification (public officials and teachers are banned) and party establishment (local party is prohibited), so many people are excluded from accessing party politics.

Recently, however, social media platforms are favoured as alternative communication routes. An increasing number of representatives are running blogs, SNS, and YouTube channels to share their activities and collect public opinions. Many people are expressing their interests, preferences, complaints, and suggestions via SNS or YouTube. Sometimes they are run interactively. They are open to the public and have better visibility and accessibility to non-grouped individuals — yet still not enough compared to the local level or comparative cases.

¹ *National Assembly Act*, arts 123–6.

² *National Assembly Act*, art 123, inserted on 16 April 2019. The e-petition system is accessible via <https://petitions.assembly.go.kr/> and commenced on 10 January 2020.

³ Initially, the required number of consents was 100,000; but later in 2021, the number got halved through amendment of the *National Assembly Petition Regulation*.

⁴ Then, the Speaker refers the petition to the applicable committee for examination. After the examination, the petition is submitted to the plenary session if it requires legislation, or referred to the government if it fits the government's agenda.

Are there forms of direct action, authorised by law, that people might take to get action from their representatives? Are they used in practice?

On the national level, direct action applicable to the representatives in the National Assembly is very limited. There is no recall of National Assembly members, no citizens' initiative, and no referendum proposal. Even a citizens' initiative on constitutional amendment is not authorised. During the latest discussion on a constitutional amendment in 2018, the bill stipulating the right of the people's initiative reached the final draft, but for an unknown reason, it was not included in the final bill proposed by the President. As seen above, the online and offline national petition systems both function, but the results depend on processing by the representatives who have a large discretion.

In comparison, in recent years, the most active online petition platform was the 'Blue House National Petition',⁵ which was run by the presidential office from August 2017 with the slogan: 'If the public asks, the government will answer'. It was the most popular communication platform between the Moon Jae-In administration and the people, in which the government and Blue House officials responded to the petition that was supported by more than 200,000 people in 30 days. Since the platform was anonymously accessible and did not set a limit on the matters, many people favoured it over other channels such as petitions to the National Assembly, National Shinmungo,⁶ etc. In addition and more precisely, people thought the most effective way to get what they wanted, without circumventing other institutions, was to contact the President directly considering the concentration of power in the Korean context. Regardless of its limits and critiques, the Blue House Petition was very popular. Nonetheless, the Yoon administration, which started its term in May this year, replaced the system with the 'National Suggestions' platform. It is a real-name system and encourages the public to communicate and suggest policy ideas to the government.

On the local level, there are various forms of direct action used by residents. For example, according to the *Local Autonomous Act*, residents can request the enactment, amendment, or repeal of any ordinance of their local government (art 19); submit their opinions on the enactment, amendment or repeal of local government rules (art 20); and recall the head of local government and the local assembly members (art 25).⁷ Additionally, the *Local Finance Act* obliges the heads of local governments to implement a 'participatory budget system' which brings the residents into the budget process, such as formulation of the local budget (art 39).⁸ One noticeable aspect of the direct involvement of the people in local politics is the 'Residents Self-Governing Council'. This is a representative body of residents, composed of those selected by open lottery (among volunteers), who collect community opinions and make and implement plans.⁹ Currently, there are more than 1,200 of these Councils.

⁵ Its operation was closed on 9 May 2022, but the website is maintained as a presidential record: <<http://19president.pa.go.kr/>>.

⁶ <<https://www.epeople.go.kr/>>. The name *Shinmungo* [sin-mun-go] means the drum which originated from a drum hung in front of the royal palace of the Chosŏn dynasty, which people could beat to let the King know about their complaints. National Shinmungo is run by the Anti-Corruption and Civil Rights Commission of Korea.

⁷ There have been four attempts of recall so far. The only successful recall was in 2007, where two local assembly members lost their posts.

⁸ See the list of local governments running the system: <https://lofin.mois.go.kr/portal/bbs/bbsLink.do?ditc_cd=11>.

⁹ 'In order to invigorate grass-root autonomy and increase awareness of importance of participating in democracy, a residents' autonomous council may be established in each Eup/Myeon/Dong with residents within its administrative jurisdiction': *Special Act on Local Autonomy and Decentralisation, and Restructuring of Local Administrative Systems*, art 27.

Are there other public institutions through which people can pursue their expectations of/needs from representative democracy between elections?

There are public institutions through which people make indirect input on what they need.

First, the people request public independent institutions such as the Board of Audit and Inspection (BAI), the National Human Rights Commission of Korea (NHRCK), and the Anti-Corruption & Civil Rights Commission (ACRC) to check certain executive actions and make corrections. They can be categorised as Fourth Branch institutions:

The BAI is a supreme audit institution,¹⁰ established by the *Constitution* (art 97) and *BAI Act*. The people may tip off public officials' illegal or wrongful acts to ask for an inspection.

The NHRCK is a national advocacy institution for human rights protection,¹¹ established in 2001 by the *NHRCK Act*. The people make complaints on cases of human rights violations by state agencies or discriminatory acts by any actors. The ACRC is a central administrative agency that addresses civil complaints, files administrative appeals and fights corruption.¹² The people bring complaints against illegal or unfair administrative actions or unreasonable institutions. The ACRC runs an online petition platform named 'National Shinmungo'.¹³

Second, experts from the private sector attend and advise the various kinds of advisory councils established within each government department.

Third, 'The Centre for Public Participatory Legislation'¹⁴ run by the Ministry of Government Legislation¹⁵ is an online platform for people to take part in the legislative process. People may submit opinions on pre-announced legislative bills (including laws proposed by the government) which are in the process of being made and amended. This is distinguished from the citizens' initiative but still provides important input from the people since the legislators should consider the opinions submitted in the ensuing legislative procedure.

To what extent do constitutionally-protected social and economic rights/values assist people to ensure that a system of representative democracy meets the needs and expectations of its people?

The *Korean Constitution* enumerates various kinds of social and economic rights¹⁶ in addition to civil and political rights. This means that the *Constitution* guarantees the protection of social rights as a form of claimable constitutional rights, not merely as an abstract value, principle, or state goal.

¹⁰ 'The Board of Audit and Inspection Korea' <https://www.bai.go.kr/bai_eng>.

¹¹ 'The National Human Rights Commission of Korea' <<https://www.humanrights.go.kr/site/main/index002>>.

¹² 'The Anti-Corruption & Civil Rights Commission of Korea' <<https://www.acrc.go.kr/en/>>. It was launched in 2008 by the integration of the Ombudsman of Korea, the Korea independent Commission against Corruption, and the Administrative Appeals Commission.

¹³ See above n 6.

¹⁴ See its webpage: <<https://opinion.lawmaking.go.kr/gcom/gcomMain>>.

¹⁵ The Ministry of Government Legislation conducts overall work planning, supervising, and support of the government's legislative activities: <<https://www.moleg.go.kr/english/>>.

¹⁶ *Constitution of the Republic of Korea*, arts 31–6.

It normatively endows the legislature with the legislative duty to actualise the rights. So, if the legislation does not meet the people's needs — that is, there is non-performance or insufficient legislation — then the relevant individuals could file a constitutional complaint to the Constitutional Court. If the Court determines unconstitutionality thus invalidating the legislation immediately, then the people can abolish the unwanted legislation by circumventing apathetic representatives. If there is a worry about the legislative vacuum, then the Court could just confirm constitutional non-conformity and simultaneously demand the legislature to amend the laws.

Do international institutions or external pressures help or hinder the effectiveness of democratic representation in the Korean experience?

Any direct or explicit external pressures on the work of the Korean legislature are hard to imagine. However, depending on the matter, they could indirectly influence the representatives' choice of behaviours. For example, when specific issues dealing with international relations or diplomatic problems are closely related to public concerns or associated with national feelings, the representatives used to consider the strong reactions of the people in choosing their positions and actions. One of the most representative examples is related to policies dealing with the past between Korea and Japan. They touched upon the contestable status and conflicts between the two countries, thus raising highly-sensitive political questions. As most people are quite sensitive to that, the representatives — regardless of their affiliation, and ideological and political orientations — seriously take the people's reactions into account whilst juggling diplomatic tension, economic effect, and so on.

How might the performance of representation be improved in the Korean context?

The key to improving the performance of representation in the Korean context is to reform the party system, which would lead to more responsive and accountable representation. Two major parties, among others, have shaped national politics for the last several decades and are still influential. Additionally, existing parties enjoy firm region-based support due to solid regionalism. As a result, representatives mostly care about their affiliated parties (e.g. disciplinary measures, candidate nomination), and not people's feedback or even disappointments. Nevertheless, there is no choice but to vote for one of the established parties. This is because the emergence of new parties and healthy competition between parties have been hindered by institutional restrictions on the establishment and activities of parties.¹⁷ Improving fair competition in party politics might improve representation for the people between elections.

Conclusion

Overall, representative democracy in Korea has been relatively well-functioning for the last several decades since democratisation. The national elections and also the presidential elections took place

¹⁷ For example, in order to form a political party, registration with organisational requirements (e.g. number of members) is mandatory pursuant to the *Political Parties Act*. This high threshold was mostly institutionalised during the autocratic regime in the 1960s.

regularly without exceptions, even during the pandemic. Due to the high level of IT infrastructure, most public institutions that support the democratic system are accessible through online platforms.

Apart from such a formal aspect though, from the insider's view, most people are not satisfied with their representatives (National Assembly members and the President) and do not feel well-represented between elections. The people's prevailing discomfort and dissatisfaction toward their representatives have deep roots in a combination of institutional and non-institutional elements of national politics: for example, the constitutional design of power mechanism (e.g. concentrated and non-checkable presidential powers); the limited chances to be elected as the representatives (e.g. elite capture, election system); the political environment (e.g. antagonistic political culture, regional divide in party politics, strong party subordination); and the absence of measures to hold the representative accountable. Based on this observation, we have to find a better way to better utilise our representatives, and at the same time think of how to secure institutional reform against their resistance.

A photograph of a man from behind, pushing a large, heavily loaded cart on a busy street. The cart is piled high with various items, including a large sack tied with ropes. The man is wearing a light-colored short-sleeved shirt and a cap. The background shows a crowded street with other people and a person on a motorcycle. The entire image is overlaid with a semi-transparent blue filter. The text "4. Impediments" is centered in the lower half of the image in a white, sans-serif font.

4. Impediments

4. Impediments

Tom Daly

In Session 4 we asked what are the impediments to effective representation that deliver on the needs and expectations of the people, and what can be done to address these impediments and improve the quality of representation. Again, taking the view from the ground up provided a useful perspective to interrogate these questions.

The papers in this section of the Report focus on the diverse range of constitutional, institutional, political, structural, behavioural and cultural impediments to effective representation, and draw out the commonalities across Asia and the Pacific, the particularities of specific contexts, and the often intersecting and mutually reinforcing nature of different impediments in each country's context. Representative governments might fail to deliver what people need for any number of reasons. Institutions might be weak and lack capacity. Corruption may be endemic and permit powerful actors to manipulate government for their own personal gain. Governments and institutions may be captured by particular sectoral interests, dynasties or populist demands. There may be pressure from external forces (e.g. powerful states, international institutions, international obligations) that restrict what representatives can achieve. Times of crisis or emergency may expose or exacerbate these kinds of issues. However, they may also generate new kinds of engagement between citizens and their representatives.

The case studies presented at the Forum were Sri Lanka, Philippines, Indonesia, Thailand, and Pakistan. Evidently, meaningful representation and electoral choice are more acutely constrained in some contexts than others — a clear example being Thailand, currently under de facto military rule — but serious impediments are found in all contexts. The questions that guided discussion included:

- What reasons might explain why representatives fail to support the wellbeing of the people, care for their territory, and act as responsible global citizens?
- What happens to the nature and quality of representation when constitutional government is under threat of erosion or decay?
- Can the constitution assist to prevent or remedy such shortfalls or failures of representation?
- Can more active citizenship help to protect constitutional governance and prevent its erosion/decay? What might active citizenship look like and how might that be reflected in the constitution?
- What is the role of external actors in addressing these issues?

It may be helpful to consider the responses and discussions at this session under four broad themes.

The first theme concerns the diverse dimensions of exclusion. This is reflected most expressly in Dinesha Samararatne's written response examining representation in Sri Lanka, which lists key dimensions of exclusion through the distortion of the electoral system affecting who can stand for election and whose needs are catered for. Ethnicity, education, gender and wealth (or the pursuit of wealth, in some cases) all affect the idealised picture that every voter has an equal vote. It is also strongly conveyed in Afiya Zia's presentation of empirical data from Pakistan, which indicate the very different expectations women have of their representatives and highlight how women are acutely underserved, as both voters and citizens, in Pakistan's system of representation.

Other responses set out in this Report raise additional axes of exclusion: religion, family and kinship. For example, while discussion of family-based governance in Samoa helpfully highlights its positive aspects, including responsiveness and close connection between the government and the electorate, the 'dark side' of family-based governance can include the dominance of dynasties (e.g. in the Philippines) and exclusion of those lacking close family ties to elected representatives. In addition, the rural/urban divide should not be overlooked, which arose most sharply in discussion of Nepal in the previous session, but which is a live issue in many other states.

The second theme is the relationship between innovation and implementation. In multiple case studies we find examples of constitutional and institutional innovations that have the potential to significantly alter how representation functions. In the Philippines, for instance, the introduction of the initiative mechanism in the 1987 *Constitution*, empowering the people to initiate the process to amend the *Constitution*, has never been used, while the referendum process has been used mostly at a local level. Here, it is evident that the transformative potential of any constitutional innovation can become seriously attenuated where there is no practical plan for implementation. In particular, hard-won innovations included in the constitutional text can be stymied where they tend to dilute or discipline elected representatives' power, and where their implementation is left to elected representatives. In this sense, while the *Constitution* can serve a clear purpose as a touchstone statement of democratic values and principles, practical implementation of the text is key. In addition, it is helpful to maintain sight of the distinction between systemic change and constitutional change: not every transformation must be grounded in the constitutional text.

The third theme, which in many contexts helps us to understand the first two themes, is the structural and cultural factors that can institutionalise exclusion. These include the dominance of executive power (e.g. in Sri Lanka, Pakistan); the limited role of opposition and MPs in lawmaking and holding government to account; the nature of the electoral system itself; the institutionalisation of political parties and party culture; and finally, the role of unelected powers of varying legitimacy and visibility including courts, watchdog and electoral agencies, shadow power holders and interventionist military power.

In case studies explored in other sections of this Report, the electoral system itself is viewed as inherently problematic (e.g. the lack of proportional representation in Afghanistan). However, in many of the case studies in this section, the reasons for failure of representation to deliver what people need arise not from the design of the electoral system but from state capture, or dominance by sectoral interests, elites, dynasties, or families. The result may be that representatives are selected based on popularity or name recall rather than policies or commitments; representation is 'hollowed out', in the sense that candidates are chosen to win elections but subsequently manipulated by non-elected institutions (e.g. Pakistan); and a vicious circle is created which makes politics unattractive to ordinary candidates due to costs, which

cedes the representative space to moneyed elites (e.g. Philippines). Beyond state capture, the institutions that provide checks and balances — such as courts and fourth branch institutions (e.g. electoral and integrity bodies) — may also be compromised in their independence.

In cases of state capture or the dominance of economic elites, fundamental issues that should be open for democratic discussion are rendered off limits because they would challenge the interests of the powerful. This raises the question of whether the fundamental issue in many systems is the challenge of money in politics, and whether it distorts representation to such an extent that it renders many forms of institutional, regulatory or constitutional modification, or innovation futile. A more severe and overt disenfranchisement of the electorate is the phenomenon of a military (or civilian) coup d'état, which leads to the replacement of elected representatives with the appointees of a military government, or a nominally civilian government under military tutelage. In such a regime — where voting is policed, elections are controlled, and political opposition is heavily curtailed — the individual's vote is rendered largely meaningless. Moreover, while coups and crisis can strengthen the role and coercive power of the state, it can also lead the public to turn to non-state institutions.

The fourth and final theme is that the papers in this section of the Report point to a range of possible ways to address or at least mitigate impediments to effective representation. Potential constitutional measures include addressing the concentration of executive power by promoting and empowering the role of parliament to hold government accountable; strengthening other ways of holding all elected representatives accountable (e.g. achieving fully independent integrity agencies); and decentralisation as a way of bringing representation closer to the electorate and potentially addressing the common issue whereby national representatives are mainly viewed as service providers for local needs. Institutional measures might include direct public participation in local budgeting, oversight and policy making, and response to natural disasters (as seen in the Philippines for example); and making elected representatives generally more accessible to the public in order to disrupt the outsized influence of elites and dynasties. Public participation could also be enhanced in the law-making process, and it was noted that in Indonesia, courts have declared laws invalid for lack of public consultation. However, again, both constitutional change and fundamental institutional change can be difficult especially where the powerful have an interest in retaining the status quo. Reform through the courts can be equally problematic where it is not democratically grounded and especially where courts lack independence or are connected to sectoral interests (such as the military regime, or specific political parties).

More fundamentally, as discussed most clearly in the context of Pakistan and Sri Lanka, the concept of active citizenship has much to offer as a way of reconceiving the relationship between voters and their representatives as one that involves much more than periodically casting a ballot. This raises issues such as: peoples' expectations being met (or not) and how this affects the development of a civic relationship, public trust, and 'ownership' over governance; how to improve the ongoing connection between citizens and representatives beyond election time; the role of political parties and whether they operate in a democratic and open manner as mediators; and the need for civic education to inform voters, particularly when there is a new system of voting or new governance arrangements, but also more generally. Active citizenship also highlights the importance of alternative modes of representation beyond formal structures and channels to express the people's needs and expectations. Protest is one possibility, although it can be met by inaction by state institutions (e.g. Thailand) or repression (e.g. Sri Lanka). In some cases we see a demand for new structures, such as calls for the establishment of a People's Council in Sri Lanka as a mechanism to consult the people and keep them informed of executive and legislative

decisions. Overall, questions of effective representation and active citizenship might suggest a need to think about how constitutions deal with institutions and relationships that are not often elided by constitutions, such as economic governance or military power.

The Crisis of Representation in Sri Lanka

Dinesha Samararatne

In what ways is there a shortfall in the performance of representative government in Sri Lanka?

Today, Sri Lanka's shortfalls in the performance of representative government are evident in its economic crisis. In May this year, Sri Lanka officially defaulted from the payment of interest on two international sovereign bonds.¹ The failure to manage the Sri Lankan economy has resulted in a debt crisis and a balance of payment crisis, plunging the state into bankruptcy. This crisis is a result of the crisis of representative government. Elected representatives have failed to act in the interest of the People. In fact, in deliberately mismanaging the economy they have acted contrary to the interests of the People. A clear and recent example of this disconnect between the People and the elected representatives was the ban on the importation of chemical fertiliser in 2021. Despite warnings by experts and continuous protesting by the farming community, the Government introduced an overnight ban on chemical fertiliser and adopted a policy for the exclusive use of organic fertiliser.² In 2022, this short-sighted decision has contributed to a food crisis in Sri Lanka and very quickly placed the farming community at risk of being unable to continue with their livelihood.³

Has there been an improvement or deterioration over time? In either case, what role has the nature and quality of representation played?

The crisis of representation in Sri Lanka is not a new problem. Rather, this is a new level of crisis of an older problem that can be traced to Sri Lanka's colonial rule. The older forms of 'representation' were based on ethnicity, education, gender and wealth. In 1931, Sri Lanka was the first in Asia to be granted universal suffrage. Since then, Sri Lanka has performed well in terms of changes of governments through elections. Nevertheless, the crisis of representation was evident. A well-known example is the failure to guarantee respect for the rights of Tamil-speaking minorities in Sri Lanka. This resulted in a 30-year-long internal-armed conflict from the 1980s to 2009. Another example is the lack of representation of women in representative government.⁴ A further example of the lack of substantive representation of interests is

¹ Benjamin Parkin and Chloe Cornish, 'Sri Lanka Becomes First Asia-Pacific Country in Decades to Default on Foreign Debt', *Financial Times* (online, 19 May 2022) <<https://www.ft.com/content/0e02eef2-8482-4caa-9b3d-3ccda19b041a>>.

² Presidential Secretariat, 'Importation of Chemical Fertilizers Will Be Stopped Completely' (Web Page, 22 April 2021) <<https://www.presidentsoffice.gov.lk/index.php/2021/04/22/importation-of-chemical-fertilizers-will-be-stopped-completely/>>.

³ Marco Silva, 'Sri Lanka: Is a Push for Organic behind the Country's Unrest?', *BBC News* (online, 16 July 2021) <<https://www.bbc.com/news/science-environment-62149554>>.

⁴ Maithree Wickramasinghe and Chulani Kodikara, 'Representation in Politics: Women and Gender in the Sri Lankan Republic' in Asanga Welikala (ed), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Centre for Policy Alternatives, 2012) <<http://constitutionalreforms.org/wp-content/uploads/2020/03/Representation-in-Politics1.pdf>>.

'the estate sector' in Sri Lanka, which essentially is the community who work on the tea and rubber plantations in Sri Lanka and have historically suffered neglect and discrimination.⁵

Whether one takes the view that representation has improved or deteriorated over time is a difficult question to answer in the Sri Lankan context. The failures of representation were evident from the early days of Sri Lanka's democracy. It is possible to argue that the quality of representation has deteriorated over time. However, it may very well be the case that Sri Lanka is currently only experiencing the long-term consequences of an entrenched and continuous failure in representation. Some political developments stand out as high points of effective representation. They include the adoption of a policy on state-funded education and universal health care in the 1940s and radical land reforms in the 1960s. These reforms addressed inequalities in Sri Lankan society and ensured a minimum standard of living. In contrast, there are numerous examples of the abuse of authority by elected representatives and their failure to govern, which has resulted in a systemic collapse today.

Is the quality of representation affected by crisis, whether positively or negatively?

In the first part of 2022, many hoped for a 'system change'. The People came together in unanticipated and nationwide protests from January up until July 2022. During this time, 'Gotagogama' was the main site of continuous protests. These protests were, by and large, organic protests by people who were experiencing an existential crisis. The People demanded that the President and Prime Minister step down (and 'go home') and strongly condemned the elected representatives. In April, the Cabinet of Ministers resigned. In May, the Prime Minister resigned and in July, the President resigned. These unprecedented resignations were viewed as signs of the system change that was to come. The radical political agency exercised by the people in the continuous protests from January to July 2022 was described by Jayadeva Uyangoda as the transformation of Sri Lankans from 'voters' to 'citizens'.⁶ These developments suggest that the crisis itself was caused by severe and systemic failures in representation but that the People's organic response to the crisis led to a significant and unprecedented correction in representation.

The key question now in Sri Lanka is whether this unprecedented correction in the quality of representation was temporary and whether it was merely window dressing, a clever manipulation by the political elite. The first clear indication of this problem was the appointment of Ranil Wickremesinghe as Prime Minister upon the resignation of Prime Minister Mahinda Rajapakse. Ranil Wickramasinghe lost at the last general election and was nominated to the only seat allocated to his part in Parliament. His political career, electoral defeats, and track record as Prime Minister in previous Parliaments are full of contradictions to say the least.⁷ Upon the resignation of the President, a new President had to be elected from Parliament, as per the *Constitution*. The resigned President's political party, the Sri Lanka Podujana Peramuna which enjoys a strong majority in Parliament backed Ranil Wickremesinghe at this election,

⁵ Tessa Martin, *Estate Workers in Sri Lanka: An Account of the Legal and Policy Framework* (International Center for Ethnic Studies, 2020) <<https://drive.google.com/file/d/1zXrnzU1ETJSDMULW0PrmFJRxRo665EIB/view>>.

⁶ Jayadeva Uyangoda, 'The #GotaGoHome Protest Movement: Significance, Potential, and Challenges', *Sri Lanka Brief* (Web Page, 16 April 2022) <<https://srilankabrief.org/the-gotagohome-protest-movement-significance-potential-and-challenges-jayadeva-uyangoda/>>.

⁷ Simon Fraser, Robert Plummer and George Wright, 'Ranil Wickremesinghe: The Six-Time Sri Lankan PM Who Became President', *BBC News* (online, 20 July 2022) <<https://www.bbc.com/news/world-asia-61429791>>.

guaranteed him a secure win. Today, Sri Lanka is governed by a President who is appointed according to the *Constitution*, but lacks legitimacy among the People. The government has engaged in a crackdown on peaceful protests since the new President assumed office.⁸

It is too early to draw definite insights into the relationship between representation and the Sri Lankan crisis. For now, it is clear that the People responded to the crisis by exercising their political agency collectively. This led to a democratising process that the state is currently seeking to suppress.

What are the explanations for the state of representation in Sri Lanka? Are there problems of capacity, corruption, institutional capture, or other?

The signs of the crisis of representation in Sri Lanka were evident for a long time. In the early 20th century, it was evident for instance in the debates on universal suffrage. The members of the Donoughmore Commission were keen to introduce universal suffrage in Sri Lanka. However, the political elite went before the Commission and argued against such reforms. It was the women's suffragist movement and the labour movements that argued in favour of universal suffrage. The manipulation of majoritarianism and ethnonational identities is a key explanation of the Sri Lankan crisis. This in turn allowed corruption and impunity to thrive. These developments have also led to a severe crisis in the capacity of elected representatives to contribute to governance. However, today, the main factor that explains Sri Lanka's crisis is institutional capture. In Sri Lanka, this institutional capture has been facilitated to a great extent by the office of the Executive President.

The legislature and the executive have been captured by a political family and their allies.⁹ Consequently, constitutional checks and balances have been undermined. This explains the way in which Ranil Wickremesinghe was first appointed as Prime Minister and subsequently elected as President by Parliament. The democratic and constitutionalist forces in Sri Lanka continue to resist this capture. The People's protest, commonly known as the *Aragalaya*, was a high watermark of that resistance. However, experience suggests that it is very difficult to address this problem of capture.

Have international pressures or actors played a role, whether positive or negative (or both)? How?

This crisis has clearly revealed the relevance of international pressures to political representation in Sri Lanka. In 2021, the Government took up the position that it will not seek assistance from the International Monetary Fund (IMF) in addressing the economic crisis. However, the Government was compelled to seek IMF assistance early this year. Sri Lanka's unsustainable debt¹⁰ is driven to a great extent by the 'debt technologies' that have been in practice at the international level for a long time.¹¹ Sri Lanka is currently under pressure from its international creditors and is seeking negotiations with states and with several

⁸ Amnesty International, 'Sri Lanka: Penalized for Protesting: Sri Lanka's Crackdown on Protesters' (Report, 8 September 2022) <<https://www.amnesty.org/en/documents/asa37/5986/2022/en/>>.

⁹ 'Sri Lanka Election Result Paves Way for State Capture', *Centre for the Study of Corruption* (Blog Post, 1 September 2022) <<https://blogs.sussex.ac.uk/centre-for-the-study-of-corruption/2020/09/01/sri-lanka-election-result-paves-way-for-state-capture/>>.

¹⁰ Sumhiya Sallay, 'Addressing Sri Lanka's Debt: How to Move Forward' *Advocata* (Web Page, 3 December 2019) <<https://www.advocata.org/commentary-archives/2019/12/3/addressing-sri-lankas-debt-how-to-move-forward>>.

¹¹ NYU Gallatin Human Rights Initiative and Women and Media Collective, 'Sovereign Debt, IMF Negotiations and the Economic Crisis in Sri Lanka' (YouTube, 23 August 2022) <https://www.youtube.com/watch?v=2yafk7u_wAE>.

international organisations.¹² The UN Human Rights Council continues to scrutinise Sri Lanka's performance in relation to its human rights obligations as well.¹³ From the perspective of advancing constitutional democracy, these pressures are positive to some extent. International pressure is helping local actors to resist efforts by the government to abuse its authority. Examples from this year include the Declaration of Emergency by President Gotabhaya Rajapakse¹⁴ and the declaration of High Security Zones by President Wickremesinghe.¹⁵ On the other hand, the international approach to addressing the economic crisis may not necessarily be the best for Sri Lanka's economy, from the People's perspective and in the long run. The IMF approach might help in dealing with the immediate crisis, but the structural reforms that are required also demand a critical evaluation of how economic activity should be developed. Given the dominance of the approach of the IMF and the WB to Sri Lanka's crisis, it seems that the local and more democratic calls for deeper political and economic reforms may be eclipsed.

To what extent and how might the *Constitution* assist to prevent or remedy shortfalls or failures of representation?

The *Constitution* is seen by the People as the reason for the failures of representation in Sri Lanka. The Executive Presidency concentrates power in an individual office, thereby allowing the office bearer to undermine the other branches of the state. It has allowed a culture of impunity to prevail and has led to rule by law rather than the rule of law. The Sri Lankan Supreme Court has consistently held that the powers of the Executive President can be reduced only through a referendum. To date, no government has indicated a willingness to consult the People about reforming the Executive Presidency. Consequently, Sri Lanka seems to be unable to effect the most important institutional reform it requires for addressing the crisis. Sri Lanka has thus not been able to abolish the Executive Presidency. The *Constitution* has been criticised for failing to ensure that elected representatives act in the interest of the People. Questions are being asked about the inability of the *Sri Lankan Constitution* to hold elected representatives accountable for corruption and for failing to act reasonably. What has emerged from Sri Lanka's *Aragalaya* is a critique of the form of political representation that is dominant in liberal constitutional thought. It is also a critique that points to the limits of concepts such as the rule of law and the separation of powers.

At the same time, the *Constitution* was used as a basis for democratic demands by the People. For instance, it was used to engage in peaceful protest and to resist efforts by the Government to crush the People's activism. Lawyers and the Bar Association of Sri Lanka relied on fundamental rights guarantees under the *Constitution* in defending the rights of protestors. At present, several individuals and Transparency International have filed fundamental rights petitions before the Supreme Court claiming

¹² 'Sri Lanka: UN Human Rights Council Resolution Upholds the Need to Maintain International Scrutiny and Seek Justice and Accountability', *Amnesty International* (Web Page, 6 October 2022) <<https://www.amnesty.org/en/latest/news/2022/10/sri-lanka-un-human-rights-council-resolution-upholds-the-need-to-maintain-international-scrutiny-and-seek-justice-and-accountability/>>.

¹³ *Ibid.*

¹⁴ Meera Srinivasan, 'Sri Lankan President Gotabaya Declares Emergency Yet Again', *The Hindu* (online, 6 May 2022) <<https://www.thehindu.com/news/international/gotabaya-declares-emergency-again-as-protests-escalate/article65389712.ece>>.

¹⁵ 'President Revokes His Own Order Declaring High Security Zones', *Daily FT* (online, 3 October 2022) <<https://www.ft.lk/news/President-revokes-his-own-order-declaring-high-security-zones/56-740525>>.

that their right to equality has been violated due to the crisis.¹⁶ The respondents to this petition include the former President and former Prime Minister.

Could more active citizenship help to protect constitutional governance and prevent its erosion/decay? What might active citizenship look like and how might that be reflected in the *Constitution*?

Sri Lanka's crisis affirms what we already know from history. Active citizenship is essential for constitutional governance. It needs to achieve traction beyond a certain threshold in terms of reach if it is to have an immediate effect. In Sri Lanka, ethnic minorities, workers' movements, and women's movements have been actively engaged as citizens from the colonial era. Their reach and impact were not significant in that they did not yield clear democratic outcomes. Elected representatives could ignore them or, in certain cases, abuse the authority under the law to suppress their voices. In 2022, the scale was tipped in favour of the People due to the widespread nature of the People's protests. After July 2022 when many withdrew from the protest movement, this momentum was lost. The impact of the protests correspondingly declined. It is noteworthy that these protests were not led by political parties or by civil society organisations. In that sense, the *Aragalaya* was leaderless.

This points to the tasks left with professional bodies (such as the Bar Association), academics and knowledge institutions, cultural-religious institutions, civil society organisations, etc., to learn about Sri Lanka's democratic consciousness from its crisis and the *Aragalaya*. The question before many of us is the following — what can we learn from this experience about active citizenship and how can we use a constitution to support and sustain it? Should we think differently about constitutions and if so, why?

One key proposal emerged from the protest movement. This was a demand for a People's Council to be established, so that the People could be consulted and kept informed of executive and legislative decisions.¹⁷ At a glance, this proposal seems unclear and even problematic. However, this demand is symbolic of the critique that emerged from the Sri Lankan crisis of representation. The Government has recently established a National People's Council. Ironically, the chairperson of a sub-committee of this Council is MP Namal Rajapakse, son of Mahinda Rajapakse (former Prime Minister and former President) and nephew of Gotabaya Rajapakse (former President).¹⁸ This is yet another example of how people's democratic demands have been subverted by Sri Lanka's political elite.

Are there other insights from experience with representation in Sri Lanka that might be of relevance to others?

The Sri Lankan crisis is a reminder that political and economic governance are inseparable. However, constitutions have typically steered clear of substantive or normative prescriptions about economic

¹⁶ Lakmal Sooriyagoda, 'SC Grants Leave to Proceed with FR Petitions Filed against Gota and Others over Economic Crisis', *Daily Mirror* (online, 7 October 2022) <https://www.dailymirror.lk/breaking_news/SC-grants-leave-to-proceed-with-FR-petitions-filed-against-Gota-and-others-over-Economic-Crisis/108-246360>.

¹⁷ Hasini Lecamwasam, 'People's Councils: More Democracy, Not Less', *The Island* (Web Page, 5 July 2022) <<https://island.lk/peoples-councils-more-democracy-not-less/>>.

¹⁸ 'Member of Parliament Hon. Namal Rajapakse, Appointed as the Chairman of the National Council Sub-Committee', *News.lk* (online, 9 October 2022) <<https://www.news.lk/news/political-current-affairs/item/34544-member-of-parliament-hon-namal-rajapakse-appointed-as-the-chairman-of-the-national-council-sub-committee>>.

governance. Much of it is left to the discretion of the Executive. The debate about the justiciability of economic, social, and cultural rights is but one example. In contrast, international organisations such as the IMF and the World Bank may yield significant authority in determining (directly or indirectly) domestic economic governance.

In this context a central question that is asked in Sri Lanka is, what does it mean for people to be declared as sovereign in a constitution? In what ways can we draw from theories on constituent power to answer this question? How can citizens be involved in governance in a meaningful way, beyond declaring a vote at period elections?

A related set of questions is about 'sovereign debt'. What conceptual approaches help us to understand how people, including future generations, are held responsible for repaying debt that is taken by elected representatives and agents of the state? How should we review current processes on borrowing and economic management to make them more inclusive, representative, and transparent? What role does a constitution have in such a democratisation process?¹⁹

¹⁹ Jayadeva Uyangoda, 'Taking Aragalaya Ideas Seriously', *Groundviews* (Web Page, 19 July 2022) <<https://groundviews.org/2022/07/19/taking-aragalaya-ideas-seriously/>>.

The Consequences of Elite Capture for Representation in the Philippines

Benny Bacani

In what ways is there a shortfall in the performance of representative government in the Philippines?

While the Philippines is known as the oldest democracy in Southeast Asia with a political system patterned after that of the United States, our representative government has serious shortfalls on account of institutions being dominated by the political elite, oligarchs, and dynasties.

Among the 24 senators who are elected at large, 20 senators come from Luzon, 4 senators from Mindanao, and none from the Visayas. Members of the Senate include a brother and a sister, two half-brothers, and a mother and a son. More than half of the 24 senators have relatives who are also in politics. In the House of Representatives, 70% of the members are part of political dynasties.

The party list system which is intended to provide for representation of marginalised groups in the House of Representatives has been captured by the political elite and dynasties. At least 120 of the 177 party-list groups have links to political clans or big businesses, with unclear advocacies and representations, and nominees who are incumbent local officials or have pending court cases; or connections with the government or military.¹ The Philippine Centre for Investigative Journalism found that at least 70 party-list groups have connections to political clans or incumbent national or local officials.

Local governments of provinces, cities, municipalities, and barangays or villages, are also captured by the elite. 85% of governors in the Philippines are members of political clans. Around 75% of vice governors, 66% of mayors, and 74% of provincial district representatives are also part of political dynasties.

Elite domination of the Philippine political system weakens democratic institutions and peoples' representation. It entrenches the elite who capture the country's resources and political power over time. The country's presidential unitary system, where political power is highly centralised in the President and the national government in Manila, promotes patron-client relations between the centre and local politicians. Elections are decided based on popularity and name-recall of candidates, rather than ideologies and platforms of government. National officials depend on local politicians to deliver votes in exchange for government programs and contracts. Political parties are active only during elections in so far as they serve as vehicles for the election of the dominant elite. Elected leaders move to the political party of the candidate who wins the presidency, in anticipation of a windfall of public funds from the most powerful patron sitting in Manila.

¹ Bantay Daya Study.

The conduct of elections does not encourage ordinary citizens to stand as candidates for public office. While election laws have caps for election spending per voter, in practice, no candidate can win without shelling astronomical amounts to pay off leaders and supporters. Vote buying and selling is a hallmark of Philippine elections. A Presidential candidate needs at least USD1 billion to be seriously considered as a viable candidate. The need for a huge amount of campaign funds is true even for candidates down to the village levels. For a country with a per capita average income of \$3,300, only the moneyed political elite and those with backing from oligarchs, have the chance to win elections.

Is the answer different at different levels of government (to the extent that multi-level government exists)?

Elite capture of the political system in the Philippines is true in both national and local governments. The 1987 *Constitution* has strengthened the political and fiscal autonomy of local governments. On one hand, this provided the impetus for greater participation of citizens in local governance and the emergence of new local leadership that has the potential to alter the elite-dominated power structure in the national government. Yet in the last 30 years, local political dynasties have increased their control of local governments. This shifted the balance of power and patronage from the national elite towards local politicians who deliver the votes in national elections. To date, local political dynasties control 85% of local governments. In most cases, members of local political dynasties also hold elected national offices.

Has there been an improvement or deterioration over time? In either case, what role has the nature and quality of representation played?

There has been marked improvement in the policies for broader representation of citizens in governance, especially after the people power revolution in 1986. However, implementation of policies in the *Constitution* that require implementing legislations has failed under the elite-dominated national and local legislatures, which are protective of their continuing hold to political power. For instance, the state policy in the *Constitution* to regulate political dynasties has not been enforced because the elite-dominated Congress failed to legislate its implementing law. The party list system, which was intended to give representation to marginalised sectors in Congress, has been co-opted by the political elite. This has resulted in the proliferation of party list groups which are controlled by the political elite, with the resources and voting base to win the party list seats reserved by the *Constitution* to marginalised groups.

The *Constitution* requires that sectoral groups be represented in local government councils. This increases the representation of citizens in crafting local policies and budgeting public funds. The bottom-up planning and budgeting system from the village, up to the provincial levels, then to the national government, has broadened public participation. The emergence of active NGOs after the people power revolution has helped improve people's participation in governance. A younger and more urbanised population, less tied to patron-client systems, is a bright spot for improving representative government in the Philippines.

However, elite domination and political dynasties continue to be the main drivers of politics and governance even at the local level. It is not unusual for local politicians to organise their own civil society organisations (CSOs) or co-opt existing CSOs which they control as members of local and development councils.

The same institutional structures during the martial law period remained strong even after the people power revolution. Marcos was deposed but replaced only by a new set of political elites and dynasties.

The return to power of the Marcoses as a result of the recently concluded national elections, shows how deeply entrenched the domination of the elite and political dynasties of the country's democratic institutions is.

Is the quality of representation affected by crisis, whether positively or negatively?

COVID has restricted public representation in policymaking as the national government took total command and control of policies and programs to combat the pandemic. The Inter-Agency Task Force on COVID is a national government coordinating structure that determines policies for all local governments to follow and implement. The heightened role of the military and the police in enforcing anti-COVID measures in communities have constricted the people's voice — even of medical professionals in shaping public health policies.

On the other hand, management of other natural disasters in typhoon-prone Philippines is decentralised to local governments where civil societies have a greater role and responsibility.

Have international pressures or actors played a role, whether positive or negative (or both)? How?

The *Constitution* provides that the Philippines adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations. Except for the populist administration of President Duterte which had contentious relations with Western nations and the United Nations bodies on human rights, the Philippines is generally sensitive on how it is perceived internationally. Global rankings on gender equality, where the Philippines ranks highly, push the agenda for political participation of women. Global rankings on combatting corruption, where the Philippine ranks poorly, affect the country's competitiveness in the global market.

To what extent and how might the *Constitution* assist to prevent or remedy shortfalls or failures of representation?

Based on the Philippine experience, the political and electoral system design adopted in the *Constitution* is critical in addressing shortfalls or failures in representation. Instead of addressing the fundamental problem of elite domination of our political and electoral system since the colonial period, the presidential unitary political system in the 1987 *Constitution* has further entrenched the hold of dynasties and elites over the country's political power and resources. The growing demand for constitutional reforms from the populace to a shift to parliamentary-federal system underscores the need to develop strong political parties to afford strong representation of citizens in the crafting of public policies. Among the proposals is the conversion of the administrative regions into federal states to dismantle 'imperial Manila's' dominance. Commentators argue though, that shifting to a federal system may in fact entrench more regional dynasties than break elite domination of our political institutions. In any case, when political and electoral system design is the root cause of the failure or shortfall in representation, constitutional reforms may be the most viable and effective remedy.

The biggest bottleneck is the willingness of the political elite to constitutional reforms that may work against their political interests. The provision in the *Constitution* on initiative and referendum, where the

people can initiate the process to amend the *Constitution*, is an innovation in the 1987 *Constitution* in recognition of people power. This can be a tool to strengthen the direct participation of the people, not only to pass national and local laws, but also to amend the *Constitution*. But for more than 25 years, the Philippines has yet to enact a national law or amend the *Constitution* through initiative. Referendum is more successful but mostly in the local levels. The experience of the Philippines demonstrates that it will take time for the people to fully utilise it as a tool for greater representation and the participation of citizens in policymaking.

Could more active citizenship help to protect constitutional governance and prevent its erosion/decay? What might active citizenship look like and how might that be reflected in the *Constitution*?

As a product of the people power revolution, the 1987 *Constitution* has progressive provisions to promote active citizenship and the role and rights of CSOs and people's organisations. It provides that the right of the people and their organisations to effective and reasonable participation at all levels of social, political, and economic decision-making, shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms. Sectoral representation is made mandatory by the *Constitution* in governmental bodies at all levels of government.

The *Constitution* also provides that the State shall respect the role of independent people's organisations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means. It recognises people's organisations as bona fide associations of citizens, with demonstrated capacity to promote the public interest and with identifiable leadership, membership, and structure.

Are there other insights from experience with representation in the Philippines that might be of relevance to others?

Based on the Philippine experience, mere statements of aspirations and principles in the *Constitution* toward meaningful participation and representation of citizens in governance — without clear and strong implementation structures and processes — are insufficient to address failures and shortfalls in representation. Political reforms in the *Constitution*, such as the dismantling of political dynasties, must be self-executing, bold, and action-directed. Political reforms are most likely to fail when implementation is left to the will of the political elite whose interests are hurt if the reforms are enforced.

Political reforms are only one side of the coin — the other is having an empowered citizenry willing to assert their right to representation. In the Philippine experience, citizens are not blameless for the continuing control of the few elites and dynasties in the country's political system. Citizens allow their votes to be bought and elect the same leaders over time, whose claim to public office is founded on popularity, name recall, and being part of political families. Political parties in the Philippines are irrelevant and weak because there is no demand from citizens for real and genuine political parties. Therefore, equally critical to fundamental policy reforms is the need for political education of citizens.

Indonesia: Representation in the Context of Democratic Decline

Susi Dwi Harijanti

Introduction

It is important to note that according to the amended 1945 *Constitution*, Indonesia has three representative bodies at the national level. The first of these is the *Majelis Permusyawaratan Rakyat* (or the *MPR*, the People's Consultative Assembly) which consists of members of the *Dewan Perwakilan Rakyat* (or the *DPD*, the House of Representatives) and members of the *Dewan Perwakilan Daerah* (or the *DPD*, the Regional Senate). Each of them has its own powers, for instance the People's Consultative Assembly has power to amend the *Constitution*. The second representative body is the House of Representative which has functions of lawmaking, supervision, and budget. The third is the Regional Senate — a new institution set up by the amended *Constitution* to represent regions. However, according to constitutional norms, this new institution has weak powers. For example, it can only propose a bill through the House of Representatives, and it does not have power to approve or disapprove a bill. My contribution mostly deals with the House of Representatives.

Indonesia applies the presidential system of government. However, since the President wants to maintain strong relations with the House of Representatives to ensure most of his programs are approved, the President has appointed his ministers from several political parties to build 'coalition' with his party. The President has even appointed Prabowo, his competitor in the previous presidential election, to become minister of defence.

What reasons might explain why representatives fail to support the wellbeing of the people, care for their territory, and act as responsible global citizens?

The failure of representatives to fulfil the needs of society can be understood from a historical, political, or institutional point of view, among others. According to Bernard Manin, although representation comprises some important democratic components — for instance, the ability of citizens not to re-elect incumbents as a form of accountability — there are also non-democratic elements attached to the conception of representation which might provide the reason why representatives fail to perform their function for the interest of the public.¹ Due to its inegalitarian implication, an election is deemed to have a non-democratic character.² Manin describes the combination of democratic and non-democratic components as a 'mixed' form of government.³

¹ Bernard Manin, *The Principles of Representative Government* (Cambridge University Press, 1997).

² Ibid.

³ Ibid.

On the contrary, using Condorcet's democratic theory of representative government, Nadia Urbinati appears to be more optimistic in understanding representation and its relation to democracy. Urbinati argues that representative government is an original form of government that should not necessarily be identifiable with electoral democracy.⁴ Some scholars of electoral democracy tend to define democracy as the right to vote for representatives. Meanwhile, Urbinati chooses to expand the meaning of representation to include the political process and emphasise it as an essential component of democracy.⁵ According to Urbinati, representation is democratic under the condition that it provides a 'mode of political participation that can activate a variety of forms of citizen control and oversight'.⁶ As such, under Urbinati's account of representation, the failure to establish an appropriate mode of political participation might render the representative unresponsive to the needs of the people.

In the Indonesian context, at least two undemocratic features of Indonesia's representative government prevent the people from fully enjoying their rights.

The first is patronage and clientelism in Indonesian electoral politics. Against the background of Indonesia's transition to democracy, the mechanism of direct election to select representatives was seen as an important achievement in restoring sovereignty to the people. However, the culture of patronage and clientelism rooted in the authoritarian era of Suharto appears to persist.⁷ This has primarily benefited wealthy candidates, prevented equal participation, and disadvantaged the people whose interests are often subordinated over the pragmatic interest of the representatives. The high cost of campaign expenditures also shapes the intentions of representatives, once elected, to gain back the profit they have sacrificed.

The second feature is limited space for public participation in lawmaking. As Urbinati argues, the mechanism of political participation to control and oversee the government is what makes a representation democratic. Yet in Indonesia, people have been increasingly dissatisfied with many controversial laws passed without sufficient public consultation. Such dissatisfaction was expressed not only through demonstrations and petitions but also submissions of judicial review to the Constitutional Court, on the grounds of 'material review' (the constitutionality of the content), 'formal review' or procedural review (the constitutionality of lawmaking procedure). There has been a mechanism of public consultation under Law No. 12 of 2011; however, it suffers from the indeterminacy of how to implement it based on good standards of public consultation. Such indeterminacy seems to be valued by representatives as it gives them greater room for discretion to pass legislation.

Recently, as a response to the Constitutional Court decision regarding procedural review of the Law on Job Creation in which the Court declared the Law 'conditionally unconstitutional' and instructed further regulation of public participation in detail, the House of Representatives and the President as lawmakers have amended Law No. 12 of 2011 through the issuance of Law No. 13 of 2022.⁸ As a result, through Law

⁴ Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, 2006).

⁵ Ibid.

⁶ Ibid.

⁷ Edward Aspinall dan Mada Sukmajati, *Electoral Dynamics in Indonesia* (National University of Singapore Press, 2016).

⁸ Each bill should be discussed by the House of Representatives and the President to reach joint approval: amended 1945 *Constitution*, art 20(2).

No. 13 of 2022, there have been changes to the aspect of public participation, which are claimed to strengthen the involvement and participation of the public.

This new Law regulates how public participation should be conducted by introducing the right to be heard, the right to be considered, and the right to be explained. Sadly, however, the lawmakers seem too reluctant to include the right to be explained as a must, since they use word 'may' rather than 'should' in the new provisions.⁹ As a result, there is again a public question about whether the representation will conduct meaningful participation in debating a bill. Consequently, the Indonesian people do not have many expectations for the representatives. They have even felt unrepresented.

Another reason why the representatives fail to support the people heavily relates to the political system, in particular the role of political parties. One of the main functions of political parties is recruitment, which allows parties to fill its members with members of political institutions. In this regard, it is interesting to state Bruno S Frey and Alois Stutzer's opinion about politicians against voters.¹⁰ According to them: 'Politicians have a common interest to protect and extend these rents where possible. That means they have an incentive to form a cartel against the ordinary citizens'.¹¹ Moreover, Frey and Stutzer say:

In a democracy, politicians can use three main ways of gaining benefits at the citizens' expense, or 'exploiting' the general population:

- (a) Politicians may take decisions which they know to deviate from the voters' preferences. Political actors may do so because they have an ideology of their own, because they reap material and non-material advantages by so doing, or because they have insufficient information. For instance, politicians systematically prefer direct interventions in the economy to employing the price system, because regulations generally allow them to derive larger rents.
- (b) Politicians secure themselves excessive privileges in the form of direct income for themselves or their parties, pensions and fringe benefits, such as cars and houses.
- (c) Citizens' exploitation may take the form of corruption, i.e. direct payments for special services provided to payers, but not to others.¹²

In the context of Indonesia, what Frey and Stutzer argue has been reflected through several legislations that have been passed by the lawmakers, including the Law on Anti-Corruption, Law on Mine and Coals, Law on Job Creation including its amendment, and Law on Capital City. These Laws have lacked meaningful participation during the debate process in the House of Representatives.

⁹ The lawmakers may explain to the public the results of discussions on public input from the implementation of the right to be heard: amended 1945 *Constitution*, art 96(8).

¹⁰ Bruno S Frey dan Alois Stutzer, 'Direct Democracy: Designing a Living Constitution' (Working Paper No 167, Institute for Empirical Research in Economics, University of Zurich and Center for Research in Economics, Management and the Arts, September 2003) 6–7 <<http://www.crema-research.ch/papers/2003-05.pdf>>.

¹¹ *Ibid.*

¹² *Ibid.*

What happens to the nature and quality of representation when constitutional government is under threat of erosion or decay?

Under the threat of erosion or decay, representation will most likely lose public trust as the people are also complicit or play a key role in contributing to the incremental erosion of the nation's democracy. The people perceive representation as merely a 'rubber stamp' for what the Government wants to decide, which reminds the public of the inadequate performance of the equivalent body during the period of New Orde Government under the chairmanship of the late President Soeharto.

As many scholars have suggested, Indonesia's democracy is currently in decline. There are a range of illiberal tendencies to confirm the declining quality of Indonesia's democracy: executive illiberalism suppressing opposition and criticism; increasing populism and sectarianism; patronage and clientelism in electoral politics; and the decline in civil liberties.¹³

The state of democratic decline has influenced the quality of representation. In the Indonesian case, two important functions of representatives are impaired. The first is the representative function in lawmaking. The lack of opposition in the parliament has led to an almost automatic enactment of every law proposed by the President. Further, as previously explained, the parliament presumably took advantage of loopholes in the public participation mechanism and therefore failed to consult the affected communities of proposed legislation properly.

Movements opposing controversial legislation that continue to proliferate highlight the problem in the law-making process in Indonesia. One movement opposes the infamous 'Omnibus Law', a law revising 73 laws covering a broad range of vital issues including labour, environment, taxation, and industrial license. Both its content and the law-making process are highly controversial. In terms of content, many are concerned about the lower standard for environmental licences and the reduction of basic labour rights. As for the law-making issue, it is deemed to have been discussed and passed in a hurry without sufficient public consultation, especially during the unusual circumstances of COVID-19. Recently, the parliament passed Law No. 3 of 2022 in Indonesia's Capital City. The lawmaking process is also highly questionable as it was promulgated in just three months of deliberation, which does not make sense for law fundamental to a capital city. In addition, deliberation of the law involved very few affected communities; only one of many indigenous communities was involved in the consultative process.

Secondly, the representatives have not adequately performed their supervisory function to hold the government accountable as expected by the public. This is also likely due to the lack of opposition within the parliament. Many government actions have been questionable in the eyes of the public, including the handling of the pandemic, and yet the representatives choose not to use their right to inquire about the matter.

In current Indonesia's democratic decline, the representatives also abused their nomination function to replace the Justice of the Constitutional Court before his tenure expired. This recent action of the representatives has directly interfered with the independence and impartiality of the judicial function.

¹³ Thomas P Power, 'Jokowi's Authoritarian Turn and Indonesia's Democratic Decline' (2018) 54 *Bulletin of Indonesian Economic Studies* 307; Abdurrachman Satrio, 'Constitutional Retrogression in Indonesia under President Joko Widodo's Government: What Can the Constitutional Court Do?' (2018) 4(2) *Constitutional Review* 271; Marcus Mietzner, 'Authoritarian Innovations in Indonesia: Electoral Narrowing, Identity Politics and Executive Illiberalism' (2020) 27(6) *Democratization* 1021.

Thus, there is a tendency of ‘politization of the judiciary’ to happen in Indonesia. Having explained the quality of Indonesia’s representative body, this might be why it is infamously known as Indonesia’s least trusted and most corrupt institution.

Can the *Constitution* assist to prevent or remedy such shortfalls or failures of representation?

The fall of Soeharto in 1998 paved the way for democratisation in Indonesia, which is called *Reformasi* (reform period). Before the *Reformasi*, Indonesia was under an authoritarian regime, which undermined democracy and human rights. Against this background, the reform movement has demanded a stronger democratic institution and a greater commitment to human rights. However, as previously explained, Indonesia has been gradually experiencing a democratic decline after two decades of the reform movement.¹⁴ The current trends of democratic decline worldwide show that would-be authoritarians use both constitutional and sub-constitutional forms of change to advance their undemocratic agenda.¹⁵ Indonesia is no exception to that trend.

In response to the above questions, the amended 1945 *Constitution* has some potential to safeguard democracy, including preventing the further downfall of representation. Textually, the amended 1945 *Constitution* has the same features as many modern constitutions. It extensively recognises the range of constitutional rights and establishes the Constitutional Court and independent institutions. Yet the extent to which the *Constitution* can perform its ideal function in practice depends upon many factors outside the text. There is a possibility that an overwhelming majority of the coalition government in the parliament can propose and pass undemocratic amendments to the *Constitution*. As such, it is critical to ensure that the people consolidate so that they are able to challenge future threats to the basic values the *Constitution* protects.

In practice, although the amended 1945 *Constitution* has clearly provided a checks and balances mechanism reflected in the introduction of the Constitutional Court, the Court’s decisions have often been disregarded by the lawmakers. More seriously, they did not comply with the Court’s decision as shown by recent practice. On 30 December 2022, the President issued *Peraturan Pemerintah Pengganti Undang-Undang* (Perppu or Government Regulation in Lieu of Law) No. 2 of 2022 regarding Job Creation,¹⁶ as a response to the aforementioned Constitutional Court Decision on Job Creation. Rather than ‘revise’ the procedural aspect of the Law on Job Creation that the Court had said in its Decision by accommodating the rights to be heard, considered, and explained, the President instead chose to use his constitutional power to issue the *Perppu* that clearly neglects the three procedural rights of lawmaking. Mahfud MD, currently Coordinator Minister for Politics, Law, and Security and former Chief Justice of the Constitutional Court, considered that the *Perppu* ‘aborted the conditional unconstitutional that was pinned by the

¹⁴ Hadiz Vedi, *Localising Power in Post-Authoritarian Indonesia: A Southeast Asia Perspective* (Stanford University Press, 2010); Power (n 13).

¹⁵ Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021).

¹⁶ Article 22 of the amended 1945 *Constitution* provides a constitutional power to the President to issue *Peraturan Pemerintah Pengganti Undang-Undang* if there is an urgency. Without declaring a state of emergency, the President has an exclusive power to issue *Peraturan Pemerintah Pengganti Undang-Undang* which has the same effect as law. Bagir Manan, for instance, classifies this sort of law as ‘an extra ordinary rule’.

Constitutional Court'.¹⁷ As a result, the public, particularly, civil societies, have strongly raised their concerns about the future of the Constitutional Court to effectively carry out checks and balances mechanisms, which was one of the aims of the Court's introduction as a new state organ. But more seriously, the principle of the rule of law is in jeopardy as argued by civil societies.

Can more active citizenship help to protect constitutional governance and prevent its erosion/decay? What might active citizenship look like and how might that be reflected in the *Constitution*?

Active citizenship, which encourages the participation of the people in a democratic process, is truly needed in the current state of Indonesia's democracy. As Mietzner argues, civil society in Indonesia has been the source of resistance to democratic decline.¹⁸ Civil society has always been responsive to challenge any threats to democracy and human rights in Indonesia. The people utilised many forms of advocacy, from social media, street protests, and petitions, to bringing the case before the court, which has made much progress.

As mentioned previously, the public has been concerned about Indonesia's lack of public participation in lawmaking. Considering the civil society advocacy and public protests demanding accountability, there is currently noticeable progress in ensuring more meaningful participation. The Indonesian Constitutional Court declared a law unconstitutional on formal-procedural grounds for the first time. The Court held that the making of the Omnibus Law on Job Creation failed to guarantee meaningful participation as it provides limited space for public consultation.

Given the active role of civil society in Indonesia, it is reasonable to expect that active citizenship can help protect constitutional governance and play an important role in resisting democratic decline.

What is the role of external actors in addressing these issues?

Since Indonesia is considered as one of the most influential countries in Asia dealing with democracy, there have been several studies conducted both by international organisations and international scholars. International IDEA, for example, has consistently facilitated a dialog on democratic and constitutional reforms which produce important reports and publications that can be used widely.¹⁹ Regarding the improvement of Indonesia's electoral system towards better qualified election, International Foundation for Electoral System (IFES) has continuously assisted Indonesia's electoral institutions, civil society, and other stakeholders under various electoral issues, including electoral system design, electoral dispute resolution, voter education, among other things.²⁰ Both the International IDEA and IFES programs have involved a wide range of Indonesia's NGOs, civil societies, university research centres, and scholars.

¹⁷ 'Presiden: Perppu Cipta Kerja Beri Kepastian Hukum bagi Investor' [The President: Perppu on Job Creation Gives Legal Certainty for Investors], *Kompas* (Web Page, 30 December 2022) <<https://www.kompas.id/baca/polhuk/2022/12/30/presiden-perppu-cipta-kerja-beri-kepastian-hukum-bagi-investor>>.

¹⁸ Marcus Mietzner, 'Sources of Resistance to Democratic Decline: Indonesian Civil Society and Its Trials' (2021) 28(1) *Democratization* 161.

¹⁹ See, eg, 'Democratization in Indonesia: An Assessment' (Capacity-Building Series 8, 2000).

²⁰ See 'International Foundation for Electoral Systems' <www.ifes.org>.

Moreover, international scholars have made important publications, such as books or articles, that deal with the issues of democracy, constitutional reforms, human rights, and the rule of law in Indonesia.²¹ Often, they write publications with Indonesian scholars.²²

In addition to the above, it is important to note that since Indonesia has been a party to some international conventions on human rights (such as ICCPR and ICESCR), Indonesia has international obligations to make regular reports to the United Nations. Interestingly, this year the Indonesian Caucus for Academic Freedom (KIKA)²³ has cooperated with Scholars at Risk (SAR) to provide a report regarding the practice of academic freedom in Indonesia. This report was made due to the increased number of infringements of academic freedom that can negatively impact the development of higher education in Indonesia.

Concluding remarks

As many scholars argue that Indonesia's democracy quality is in decline, the next few years are decisive for Indonesia's future. To prevent democracy from deteriorating, representatives must take necessary and important measures through political party reforms. Additionally, the role of civil society together with educated people from universities should be enhanced to increase public awareness regarding management of the state's affairs.

²¹ See, eg, Thomas Power and Eve Warburton, *Democracy in Indonesia: From Stagnation to Regression* (ISEAS Yusof Ishak Institute, 2020).

²² See, eg, Edward Aspinall et al 'Elites, Masses, and Democratic Decline in Indonesia' (2019) 27 *Democratization* 505.

²³ KIKA is an organisation of researchers and academics who are concerned with human rights and basic freedom, specifically academic freedom. It was initiated on 6 December 2017 and has already issued the Surabaya Principles on Academic Freedom. Nurhadi Suahyo, 'Menggugat Kebebasan Akademik di Kampus (Merdeka)', *VOI Indonesia* (Web Page, 19 May 2022) <[https://www.voaindonesia.com/a/menggugat-kebebasan-akademik-di-kampus-\(merdeka\)-/6580333.html](https://www.voaindonesia.com/a/menggugat-kebebasan-akademik-di-kampus-(merdeka)-/6580333.html)>.

Thailand's Troubled Representation

Khemthong Tonsakulrungruang

The shortfall of representation

The Thai Parliament consists of two chambers: the House of Representatives and the Senate. The House of Representatives is elected, but the Senate is mostly appointed through an elaborate procedure. The latter is expected to be non-partisan. However, this arrangement is often interrupted by a coup, which replaces the Parliament with the unicameral National Legislative Assembly (NLA), members of which are handpicked by the junta. The latest NLA was installed by the National Council of Peace and Order (NCPO) from 2014 to 2019. The current Senate was appointed by the NCPO in 2019.

The ability of the Thai Legislature to represent and respond to the people's demands has never been high. A study of the Legislature under the 1997 *Constitution* suggests an increase in the public's satisfaction with the Parliament's representation because of the new electoral rules.¹ A mixed system introduced a national party list system which nudged political parties to focus on appealing policies. The legislative process became more efficient, and the result aligned with the people's demands. Still, a closer look reminds the reader that, even at the best of times, the Thai Parliament scored only an 'average' rating using the criteria and indicators of Inter-Parliamentary Union, ranging around 2.5–2.6 out of 5. That efficiency, unfortunately, has been on the decline ever since. The latest assessment of the NLA produces a score of 2.05.²

Thailand witnessed one of its greatest anti-government protests from 2019 to 2020. But while protests occupied the streets of Bangkok, and quickly spread to more than half of the country, none of the protesters' demands, ranging from human rights abuses to quality of education, from COVID mismanagement to economic regression, had been seriously discussed in Parliament. The stark contrast between street and parliamentary politics indicates a misalignment between the people's wish and the legislators' priority.

At a larger scale, Thailand has not witnessed any major policy changes for a long while. In addition to the abovementioned demands, the public regularly calls for other progressive policies such as same-sex marriage, the end to military conscription, liberalisation of smaller alcoholic drink producers, criminalisation of forced disappearance, an increase of minimum wage, and a better rail transport system. Some of these policies such as legalised abortion and gender equality, had to be ordered by the Constitutional Court. Ultimately, the public demands a new constitution, with a more participatory drafting process and the end to the military's presence in politics. Also, they ask for changes to the draconian *lese majeste* law. None of these are realised.

¹ Noraniti Sethaputra and Somkid Lertpaitoon, 'Executive Summary: Research Project on the Effectiveness of the Thai Parliament' (Democracy Development Study Center, Thammasat University) <<https://www.kpi-lib.com/multim/research/01/b4548-2.pdf>>.

² Ibid.

The Thai Parliament shows no response to crisis. There is no legislative change to address climate change, micro plastic, or COVID-19. In times of crisis, it conveniently leaves the task to the cabinet. During COVID-19, it refused to debate on the use of the Emergency Decree which granted the cabinet expansive power and severely suppressed human rights.³ It did not pass the COVID-19 law to replace such draconian measures.

More evidence of a callous Legislature is the vote of no confidence. Despite the public's call for Prime Minister Prayuth's resignation over many serious scandals, such as an involvement in trafficking of Rohingya and bribery in the police that links to the palace, the government coalition consistently votes in favour of Prayuth.

Lately, the House had to prematurely adjourn because a number of MPs were absent. There are at least 18 incidents where the House lacked a sufficient quorum to continue business.⁴ Some of these are because of the opposition's protests but more of them are because of internal fighting within the government. These incidents delay the House's deliberation of key policies.

Impediments to representation

The most obvious culprit is the military, which instils the culture of coups and fuels the use of the judiciary as political weapon. However, political parties themselves are also to be blamed for their lack of democratic culture. Lately tribalism in politics prevents better representation. The *Constitution* allows the Prime Minister to act as a gatekeeper. He must approve any bill that may have an effect on finance before it is submitted to the Parliament. Prayuth Chan-ocha abuses that power to categorically reject proposals from the opposition.

Coup d'état and the Hybrid Regime

The biggest share of the blame goes to coups d'état. The 2006 coup is generally regarded as the watershed moment. It interrupted Thailand's democratisation and marked the beginning of the decline. While a coup d'état is already an impediment to the people's will, the 2006 coup is particularly significant because it was induced by the anti-democratic ideology.⁵ The radical conservatives who engineered the 2006 coup systematically dismantled democratic structures as well as norms, leading to long-term consequences.

Ideologically, the 2006 coup was guided by hyper-moralistic and hyper-royalist sentiments as antidotes to liberal democracy.⁶ The 2006 junta, with support from many royalist conservatives, attempted to create a hybrid regime where the illiberal minority elites entrenched themselves in a superficially democratic constitutional regime. There would still have been an election, but it would have been tightly controlled by the Constitutional Court and watchdog agencies, which are installed by the conservative network.

³ Khemthong Tonsakulrungruang and Rawin Leelapatana, 'Thailand's Response to COVID-19: Human Rights in Decline and More Social Turbulence' in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge, 2022) <<https://www.taylorfrancis.com/chapters/edit/10.4324/9781003211952-16/thailand-response-covid-19-khemthong-tonsakulrungruang-rawin-leelapatana>>.

⁴ 'The Collapse of the Council', *iLaw* (Web Page, 8 August 2022) <<https://ilaw.or.th/node/6216>>.

⁵ Ukrist Pathmanand 'A Different *coup d'état*?' (2008) 38 *Journal of Contemporary Asia* 124 <<https://www.tandfonline.com/doi/full/10.1080/00472330701651994>>.

⁶ Thongchai Winichakul, 'Toppling Democracy' (2008) 38 *Journal of Contemporary Asia* 11 <<https://www.tandfonline.com/doi/full/10.1080/00472330701651937>>.

Parliamentary politics became vulnerable to further military intervention. Right-wing vigilante groups constantly monitored the government's steps. They freely staged a mass protest that eventually invited another coup in 2014.

Over the span of 16 years, the message is clear that electoral victory means very little. Popular vote is not a decisive factor in winning or maintaining power. The Election Commission can skew rules in favour of the pro-military side. The Constitutional Court aggressively dissolved Thaksin Shinawatra-related parties while endorsing the anti-Thaksin riots.⁷ The military refused to take orders from a Prime Minister. All of these developments discourage politicians from appealing to the public. This worsened as the 2017 *Constitution* permits the Senate, appointed by the NCPO, to vote for the Prime Minister. The Senate of 250 seats plays a disproportionate role, as it outweighs the 500-seat House in deciding the winner to the executive office. It is more important for political parties to appease the military and the conservative network than to win the popular acceptance.

A coup replaces the bicameral Legislature with a unicameral non-partisan NLA. In principle, the junta is supposed to appoint individuals from various backgrounds such as bureaucracy, business, academia, and NGOs, to the NLA. This model is supposedly superior to the elected house because it represents interest groups that are normally not able to win in an election, for example, NGOs and academia. However, in reality, the junta handpicks only its cronies whose loyalty is for the junta, not the people.⁸ The NLA may claim that it serves the interests of the people, but their actions speak otherwise. The NCPO is criticised for being paternalistic, deciding on behalf of the people without listening to what they really want.

Judicialisation of Politics

Since 1997, constitution drafters assigned the judiciary with the important duty of safeguarding Thailand's fragile democracy — the phenomenon known as judicialisation of politics. The judiciary, especially the Constitutional Court, and its auxiliaries, those watchdog agencies, assume a prominent role in Thai politics by arbitrating political disputes such as the eligibility of an office holder or constitutionality of the government's policy. As the political crisis continues, the judiciary is weaponised by being assimilated into the network of anti-democratic conservatives.⁹ The Constitutional Court was then at the forefront of attacking elected governments through two mechanisms: (1) dissolution of a political party; and (2) judicial review of key policies.

The Constitutional Court may dissolve a party that tries to overthrow a democratic regime with the King as head of state. The cause of dissolution is vague so that it allows the Court ample room to get creative. So far, the Court has dissolved at least eight parties under various reasons, from violation of political finance rule to electoral fraud. Even the slightest violation of electoral rules can result in dissolution as the Court deems that a mistake is a sign of having a wrong ideology. That overzealous interpretation of law has a chilling effect on remaining political parties not to touch upon more controversial issues such as the abolition of *lese majeste* or a debate on the palace's expenditure. Any topic related to the monarchy

⁷ Khemthong Tonsakulrungruang, 'Thailand: An Abuse of Judicial Review' in Yap Po Jen (ed), *Judicial Review of Elections in Asia* (Routledge, 2016) <https://www.academia.edu/30041220/Thailand_An_Abuse_of_Judicial_Review>.

⁸ Khemthong Tonsakulrungruang, 'Thailand's Newest Charter: A Quick First Look', *Constitutionnet* (Web Page, 24 July 2014) <<https://constitutionnet.org/news/thailands-newest-charter-quick-first-look>>.

⁹ Eugénie Mériéau, 'Thailand's Deep State, Royal Power and the Constitutional Court: 1997–2015' (2016) 46 *Journal of Contemporary Asia* 445 <<https://www.tandfonline.com/doi/full/10.1080/00472336.2016.1151917>>.

is strictly prohibited; thus, preventing any possibility to discuss monarchical reform as demanded by the people.

The Constitutional Court blocked several attempts to amend the 2007 and 2017 *Constitutions*.¹⁰ Both of the 2007 and 2017 charters were the products of the 2006 and 2014 coups respectively. Although they were voted for in a referendum, many were convinced that the origin of the charter was problematic. Hence an overwhelming majority opinion that these charters must be amended or even replaced. The Court held firm that these changes would violate the constituent power.

The Court also struck down major policies. In 2012, the Court upheld constitutionality of the *lese majeste* offence. In 2014, the Court found a plan for the mega-construction of a rail system in violation of sound budgetary principles. In 2021, the Court disagreed with same-sex marriage and declared a call for monarchical reform as an attempt to overthrow a democratic regime with the king as head of state.

The Constitutional Court is not always an inhibitive factor. The Parliament is sometimes too slow to respond to the public's calls for change; therefore, the Court plays the role of the agent of change. Its decisions forced the Parliament to amend the Penal Code on abortion and enact the law on gender equality. But these positive incidents are few and far between. Basically, judicialisation of politics permits the court to assert their political preference into politics. Its immense power and revered status grant it outsized weight in policymaking in an anti-majoritarian manner.

Weak Political Party Culture

Political parties themselves pose at least two obstacles to better representation. First, they are yet to be institutionalised. Most, if not all, parties are under the command of the party leader or shadow power holder. Thaksin Shinawatra is still the owner of Thai Rak Thai, the largest party. Palang Pracha Rath Party (PPRP), the current main coalition party, is under the total control of a former NCPO clique including Prayuth Chan-ocha, the Prime Minister. The lack of democracy within the party means MPs have no autonomy in voting. All must vote in accordance with the party's command regardless of the public's wishes.

Another problem is the understanding of the ideal role of an MP. In theory, MPs are supposed to represent the interest of their constituencies in the Parliament. In reality, few Thai MPs are keen to do the job properly. They are more focused on serving their constituencies in a more direct manner. Public infrastructure in Thailand is sporadic and many are in a poor state. MPs respond to their constituency's daily needs by negotiating for better public services, such as roads with no potholes, street lights, or running clean water. They would provide vaccine drives to communities during COVID and attend funerals to honour the families of deceased. This patronage system is likely a more decisive factor in winning in a constituency than their representation in the House. Many local dynasties, with a firm root within that province, will win an election no matter which party they switch to.

¹⁰ Khemthong Tonsakulrungruang, 'An Uphill Battle for a Constitutional Amendment in Thailand', *Verfassungsblog* (Blog Post, 2 December 2020) <<https://verfassungsblog.de/an-uphill-battle-for-a-constitutional-amendment-in-thailand/>>.

Proposals to remedy

A constitution can never directly break down the patronage system or prevent the military's intervention. Nor will it pacify hyper-royalism. Active citizenship is perhaps the best solution to these problems. However, Thais have tried and failed. In 2019–22, they staged a massive protest to put pressure on political parties, but the regime brutally cracked down on them. New advocacy groups continue to emerge across the country, but the military and the judiciary silence them.

But a constitution could still nudge a political party to better represent the people.

A political party needs free space to formulate policies. They should not fear the consequences of following the polity's wishes. The monarchy, the military, and the judiciary must not be above criticism and debate. A rule on political party dissolution must be revised, clarified, and reserved only for the most serious crimes.

Thailand has to rethink how it selects members of the Legislature. A party list system encourages MPs to think about policy in more than just a single constituency. That should be brought back. More challenging is the Senate, which represents the interests of the conservative elites who appoint them. Either the Senate must come from an election, or it must be abolished. If it is to remain, the Senate's power must be revised too. It should not be allowed to jointly vote for the Prime Minister.

The Prime Minister should no longer have a sole discretion in determining what is a bill related to finance. That power should be removed, or at least a definition of which bills apply must be given in a clear and concise manner.

Judicialisation of politics must be in check. The Constitutional Court and the Election Commission must be held accountable to their arbitrary interpretations of law. The Court's jurisdiction must be redesigned to avoid further assertions of judges' political preferences into policymaking. The Election Commission should be subject to judicial review.

In sum, a constitution should empower the Legislature both externally, by preventing intervention from non-elected bodies such as the Senate, the Judiciary, and watchdog agencies; and internally, by encouraging a more democratic culture and reducing the influence of the 'owner' of the party.

Impediments to Representative Politics in Pakistan¹

Afiya Shehrbano Zia

Pakistan is an Islamic parliamentary republic with a bicameral legislature (Majlis e Shura or Parliament) comprising of the upper house (Senate) and lower house (the National Assembly, NA) — the latter comprises of 342 seats contested via direct election, with some reserved for women (60) and religious minorities (10). There are four provinces represented in the NA: Punjab (148 seats), Sindh (61), Khyber Pakhtunkhwa (KP) (35), and Balochistan (14); as well as two territories: the capital, Islamabad (3) and the Federally Administered Tribal Areas (FATA) (now merged with KP) (12). The federal government operates from Islamabad; the head of the government is the Prime Minister and a President is elected by the electoral college outlined above. Each of the four provinces is governed by a Chief Minister who is the head of the provincial assembly. Local government is protected by the *Constitution* in articles 32 and 140-A, and each province has authority over District councils and Metropolitan corporations, which are the highest rural and urban tiers of local government, respectively. Both urban and rural local government have two or three tiers in all provinces, except KP. In 2010–11, several federal ministries, powers and finances were devolved to the provincial governments.

Approximately 108 million (out of 223 million) Pakistanis are registered to vote for a member of the National Assembly and a member of the provincial legislature from their respective constituencies in a party-based first past the post, 5-year cycle electoral system. The party with the most seats nominates a prime minister.

In what ways is there a shortfall in the performance of representative government in Pakistan?

The SSGP identifies 49% respondents who define democracy as ‘the rule of elected officials’, 31% consider it as ‘the rule of the people by the people’, and 18% categorise it as ‘government by the elite’. Regarding expectations of democratic governance, 47% believe it to be a system for the management of public services/resources, while 30% consider it to be the provision of fundamental services like food and shelter, and 9% expect it to be responsible for economic growth.

A majority (57%) indicate their preferred system of governance to be parliamentary democracy, while 16% feel dictatorship was the best mode; 11% indicate preference for a Presidential system and an equal percentage favour religious leadership; and only 8% feel a farmers’/labour party led system is appropriate.

According to this survey, a majority of Pakistanis regard parliamentary representative democracy to be the appropriate form of governance and recognise it as the rule of elected officials who are responsible

¹ The main source for the responses below is: Trust for Democratic Education and Accountability (TDEA), ‘State of Governance in Pakistan 2022: Household Survey Report’ (SSGP). This is based on a sampled survey of heads of 6,400 households across 111 districts from the four provinces and the federal capital. It is representative of the overall country, excluding 20 of the country’s 131 districts: <www.tdea.pk>.

for the management of public services and resources. However, an overwhelming percentage of respondents report that they are completely and largely dissatisfied with the performance and service delivery of governments at all tiers.

Is the answer different at different levels of government?

The SSGP reveals that a high percentage of respondents (67%) were completely and largely dissatisfied with the performance of the federal government, while 65% were dissatisfied with provincial governments, and 52% were discontented with local governments (the largest percentage of respondents (81%) that reported frustration with the performance of their government representatives reside in the province of Sindh, with Punjab featuring 52% dissatisfaction with their legislators).

The trust deficit for 6 listed institutions (parliament, judiciary, ECP, the federal, provincial and local governments) to deliver public good is concerning — 27% of respondents reported full distrust in Parliament (26% trusted it to some extent and only 12% completely); 26% distrust the judiciary (34% trusted it and only 14% completely); 30% do not invest trust in the ECP (21% trust it, only 8% completely); 33% are mistrustful of the federal (15% trust it, only 4% completely) and provincial governments (13% trust these and only 3% completely), and 32% do not trust their local governments.

Has there been an improvement or deterioration over time? In either case, what role has the nature and quality of representation played?

There is little data available for comparative electoral analysis² prior to the 2008 elections, but some polls and the SSGP 2022 offer two sets of data that indicate citizens' perceptions regarding the nature and quality of institutional representation. On the nature of representation; a majority of respondents (66%) report that they vote for candidates based on the political party they represent, but a relatively large majority (56%) claimed that personal affiliation/association with the candidate drives their decision. A competitive percentage (46%) say they vote on the basis of the personality of the candidate, while a high 35% say they vote based on the religious identity of the candidate; 23% vote according to kinship (baradari) and 10% were predisposed to vote according to the sect or gender of the candidate.

On the quality of representation; nearly 87% and 94% of respondents report that they have not contacted local government representatives or members of the National Assembly respectively for lack of confidence that the representatives would successfully resolve their issues or deal with their complaints. The 19% who did contact at least one elected representative across the different tiers, did so for service

² The Pakistan Gallup Poll data from 2011 records that about one in five (19%) Pakistanis said they would like to move permanently to another country if they had the opportunity — up from 6% in June 2008. The Poll also recorded that less than one-third of Pakistanis had confidence in the national government, local police, and honesty of elections, and the ratings for those institutions had declined over the last six years. It noted how Pakistan's military was the one institution that retained the confidence of an overwhelming majority (roughly 80%) of people in the country. The Poll found 81% of Pakistanis saw their government as rife with corruption — an increase of 13% over the last six years. It found approximately one in three Pakistanis approved of the leaders in the city or area where they lived but had less confidence in national leaders (approximately one in five): <<https://news.gallup.com/poll/157055/pakistan-troubled-state.aspx>>. In a report from 2020, Gallup found that preference for a democracy among the public has declined from 84% in 2014 and 2016 to 73% in 2017, and that personal preference for a dictatorship rose from 15% in 2014 to 21% in 2017: 'Public Opinion report on Democracy in Pakistan, Gallup, 2020' <<https://gallup.com.pk/wp/wp-content/uploads/2020/03/Democracy-in-Pakistan.pdf>>.

delivery issues such as, sewerage, water, unpaved streets, garbage collection and developmental concerns.

Is the quality of representation affected by crisis, whether positively or negatively?

The SSGP was conducted prior to the climate-induced devastating floods of August 2022, and at the time, 99% of the respondents reported that the biggest challenge in their lives was inflation in prices, while 88% considered inflation combined with a lack of income opportunity as the most critical issues in their area. Asked about their understanding of the reason for inflation, a high majority (87%) identified governance failures as the cause (specifically, 64% specified this to be due to the government's incompetence, 14% reasoned that this was due to corruption, while 9% held profiteers/market manipulators as responsible). Only 10% associated the current inflation with the COVID-19 pandemic and only 2% thought the reason was low yield/production.

What are the explanations for the state of representation in Pakistan? Are there problems of capacity, corruption, institutional capture, militarisation, or other?

All of these are irrefutable factors — along with, intermittent coups (of all varieties and arrangements) by the armed forces and surveillance by intelligence agencies on political parties/leadership — and they apply to Pakistan, but with the additional factor of the influence of cultural practices and traditional means of dispute resolution that are preferred over state institutions. The SSGP reveals that in times of crisis (financial, humanitarian, security/conflict), 37% of the respondents report that they turn to elders in the family or tribal/community leaders for assistance or resolution, while 30% approach the police, 19% ask jirgas (community tribunals to provide security or resolve disputes),³ and only a small percentage (4%) contact their representatives for either routine issues or in times of crisis.

Rather than strengthening democratic or civic levers, policy reforms tend to gravitate towards militarisation and policing voting behaviour, and judicial overreach undermines representative credibility as Pakistan's judiciary now brokers between the military and Parliamentary politics.

Have international pressures or actors played a role, whether positive or negative (or both)? How?

Some observers argue that it has been the pressure of international governments at the end of the cold war and the wave of a neoliberal economic order that have influenced electoral reforms and legitimised political leadership in Pakistan with a stress on economic governance/management. The Election Commission of Pakistan has been restructured and considerable reformative legislation has improved its functioning and mandate.

Past unpopular policies, such as being allies to the US in the War on Terror and drone strikes, have shaped the narrative that has allowed for populist leaders to emerge as acclaimed defenders of Pakistan's territorial and political sovereignty. However, the kind of 'regime change' allegations by the recently

³ Nationally, only 5% reported approaching the formal courts for dispute resolution (the majority of these were for the purpose of family disputes, followed by criminal cases).

deposed Prime Minister Imran Khan (2018–22) is not a mobiliser of votes necessarily, but the anti-West sentiment is more polarising and used regularly by the right-wing and religious parties as a constant.

To what extent and how might the *Constitution* assist to prevent or remedy shortfalls or failures of representation?

In the 75 years of Pakistan's independence, no Prime Minister has completed her/his term in office. The rationales for disqualifications (just as for accommodating military rule(rs)) have involved violations, amendments, suspension, and contradictory interpretations of the *Constitution* by the judiciary.

Asymmetry of civ-mil and civ-juridical-relations is a critical challenge and only a recent subject of study. Specifics about checks and balance of power between institutions — the military and the constitutional courts — are vague in the *Constitution* (there is no specific curtailment of the military's power enshrined in it) and many observers feel that only formal incremental reforms will allow for the military to stay out of governance.

Conceptually, commentators argue that constant institutional collisions undermine parliamentary supremacy, with courts themselves deviating from the Constitution and justifying this under the guise of 'national interest' or previously, as the 'Doctrine of Necessity'.⁴ While Bar Associations oppose this, even recent political turmoil has been managed by the courts using contempt powers, and the two unelected institutions — the armed forces and the constitutional courts — continue to jostle for tutelary roles.

One example of such a direct destabilising effect arising from such collisions is the Islamic piety clause set by art 62(1)(f) of the *Constitution* by military ruler, Gen Zia ul Haq, which has been termed a 'draconian law' since it carries the penalty of a lifetime disqualification if a parliamentarian is found to not meet its subjective and abstract standards of righteousness, sagacity and honesty. Legal experts point out that the penalty's duration is not part of the constitutional article but was read into its meaning by a Supreme Court bench when some politicians, including former Prime Minister Nawaz Sharif, faced art 62(1)(f) in 2018. That judgement is now being tested as the former Prime Minister Imran Khan faces cases that could possibly invoke the same clause and risk disqualification.

Could more active citizenship help to protect constitutional governance and prevent its erosion/decay? What might active citizenship look like and how might that be reflected in the *Constitution*?

The SSGP reveals that respondents' suggestion for improving representative governance was fairly equally divided, in that 27% felt that more 'commoners' or the average (wo)man should serve as representatives in Parliament, while 24% identified the need to improve local government structures/administration, and 23% felt strict accountability of all representatives was imperative, while 19% felt improvement was possible if serving representatives were to appropriately fulfil their responsibilities.

Some qualitative studies and rights' activists report on shifts in the power relations in rural constituencies, where stable cycles of elections and democracy has made landlords humbler in their interactions with voters. Under these circumstances, politics has become a matter of negotiation rather than coercion or

⁴ Salman A Raja, 'Gaming the Constitution', *The News International* (online, 28 July 2022) <<https://www.thenews.com.pk/print/977408-gaming-the-constitution>>.

ideology. Voters are aware of how representatives are close to power centres and are able to provide goods and services.

However, the notion of a corrupt political class dominates political chronicles and is common currency used by political opponents which enables and justifies interventions and interruptions by other state institutions and the vicious cycle spins on. This means that the collective interests of the rural poor are not projected upwards in national politics. While negotiations between voters and local leaders — and between these leaders and politicians — do meet voter demands on an ad hoc basis, voter interests never become the subject of public policy that can respond to their needs as a whole.

Further, the current bottom-up model forces Pakistan's political parties to compete by attracting 'electable' politicians — who are endlessly manipulable and malleable by non-elected institutions — and come together not to strengthen their parties, but to win elections. Some 200 families get elected to Parliament (sometimes 15 members from just one extended family/clan) making it impossible for new entrants. Candidates are eligible to stand from multiple constituencies.

Parties are not well-defined in law and there are over 150 registered with the ECP; almost none of them hold internal elections — and the ECP overlooks this — and their efficacy and legitimacy are limited to the personality and resources of the leader/founder. Parties are preoccupied with surviving mil-juridical pressures; but to sustain democracy, what is required is to organise and build core support bases of their own amongst rural voters, represent their interests when in power, and effectively provide public services in order to further reduce the relevance of local notables. Party structure and functioning requires critical change and reform. Several analysts have stressed on the need for a Proportional Representative system rather than the first-past-the post method, or at least a hybrid system (ranked voting) to allow for more entrants and a different kind of representative.

A gendered lens is critical for understanding citizenship as disaggregated data becomes available and shows deviant voting patterns amongst women voters. The evidence shows that neglecting women's electoral agency is a direct and consequential disadvantage for political parties.⁵ It also suggests that undervaluing rather than expanding women's electoral concerns is a losing strategy. Qualitative reports also reveal that civic responsibility and service delivery is a woman's issue, especially in a country that is deeply gender divided across private and public occupations, roles, responsibilities, and mobility.

In 2018, of the 106 million registered to vote, just over 44% or 46 million of the eligible voters were women (21.746 million actually cast their votes). Most respondents in the few studies/surveys on women voters find that the gender gap in voting has to do with women's lack of education. A vicious cycle exists in which women are voting in lower numbers as they do not feel motivated because politicians are not targeting them, and politicians are not targeting them because they do not see women as visible constituents. Men continue to be gatekeepers of women's engagement with public spaces and activities, and a 2019 study by Cheema et al suggests that working with both men and women is required to increase women's voting.⁶ A high 78% of respondents in the SSGP affirmed their support for women's reserved seats and 79% were in support for reserved seats for religious minorities. This data of those who oppose this affirmative action

⁵ Afiya S Zia, 'Lessons from How Women Voted in 2018', *The News International* (online, 28 July 2018) <<https://www.thenews.com.pk/tns/detail/568187-women-voters-follow-men-2018>>.

⁶ Ali Cheema et al, 'Invisible Citizens: Why More Women in Pakistan Do Not Vote' (IDS Working Paper Vol 2019 No 524, Institute of Development Studies, UK, February 2019).

policy correlate to the responses of those who reported that they considered the faith and gender of candidates when they vote.

Women voters were much more likely to name service provision issues such as electricity (8% higher), sanitation (6% higher) and gas (12% higher) in the top three issues, compared to male family members.⁷ They were less likely to name corruption (30% lower) or purchasing power (8% lower) as key issues compared to male members. The result is a deep disconnect between women voters and political parties. This study finds that ‘undecided’ women voters are 21% more likely than their male counterparts to agree or strongly agree with the statement that ‘political parties are only interested in people’s vote and not in their needs’. Various studies and reports also show that women community leaders are influential and there is increasing full-hearted support for women to participate in politics as workers, councillors and candidates, rather than only as voters.

Constitutional reform would require purging some of the amendments introduced by military rulers, while expanding and sharpening the democratic freedoms that exist in it; and specifying check and balance mechanisms and delimiting the role of the military and judiciary, while stressing on the mechanisms for the delivery of economic and fundamental rights of citizens.

Are there other insights from experience with representation in Pakistan that might be of relevance to others?

The SSGP reveals that most respondents (62%) affirmed that Pakistan’s media was independent and 63% reported that they enjoyed the freedom of speech without backlash (35% felt the media was not free and 29% reported fear of reprisal or censorship). Most respondents (54%) felt their issues were covered by the media and the main source for information (for 72% respondents) is Television, followed by social media/internet (47%) — the latter is a source relied on by more rural households than urban by a slight margin. However, 36% fear expressing their religious opinions freely or without backlash.

⁷ Ibid.



5. Representation and Climate Change

5. Representation and Climate Change

Jayani Nadarajalingam

Climate change is one of the most significant issues facing states and their peoples today. For some, it is an existential threat. It is an issue that significantly affects young people and future generations, who are not directly represented under current models of representation in legislatures. Action to address climate change requires the involvement of all levels of government, from the global to the very local.

There is international consensus on the need to address climate change, and plenty of evidence that failure to do so will be harmful to people all over the world. So far, however, governments, including those in democratic systems, have been slow to respond effectively to the threat. The situation is complicated by divisions within and between states. Larger economies, which have been responsible for the creation of the problem, are reluctant to restructure too drastically. Developing economies, whose contribution to global warming often is slight, might feel torn between contributing to the global effort to respond to climate change and protecting their own opportunities for economic development. Some states are more immediately affected by climate change than others, in a way that presents an imminent existential threat. These challenges place significant pressure on representation. The interests of the people themselves are mixed. Representatives may be reluctant to act because of concerns about the political fallout. Representatives may also be constrained in what they can do by state capacity, debt and international obligations.

The papers in this section of the Report use climate change as a form of case study, to better understand how representation works to meet the needs of the represented, how the constraints on representatives may be managed, and the development of new and creative forms of representation to problems that are global but also intensely local. The case studies presented at the Forum were New Zealand, Fiji, and Taiwan. Only the papers from Fiji and Taiwan are included in this Report, as Alison Anitawaru Cole's contribution was provided on a confidential basis. The issue, however, is important across the region, and all contributors actively engaged with the case study from their regional perspectives in discussion. The questions which guided discussion included:

- What do people want their representatives to do in relation to climate change? Is this different to what people want from the representatives in relation to other matters?
- What constraints — internal and external — exist that limit the capability of representatives to address climate change?
- How do these differ between states and at different levels of government within states?

- How do people and representatives navigate the constraints on their capacities to act to respond to climate change, on the domestic and international stage?
- Are entities other than the people (eg natural features such as rivers, or the environment itself) now acquiring a form of representation? How and why?
- To what extent are the interests of future generations taken into account by representatives? What are the implications of such a development for representative democracy?

While the three case studies are very different from one another in many ways, there are also some interesting commonalities; we identify three in particular.

First, all three case studies bring to the fore the increasingly prominent role played by youth movements in agitating their representatives on the topic of climate action. In Taiwan, youth movements are part of a longer and continuous history of active social movements. Wen-Chen Chang writes that while environment-focussed social movements have existed and exerted influence in Taiwan since the 1970s, the youth movement has more recently ‘become a leading force advocating for climate policy and legislation’. In Fiji, however, Romitesh Kant observes that youth movements fall within new forms of political participation that are driven by the challenge of climate change. He states that in Fiji while ‘disengagement by young people has been noted due to traditional hierarchies that lead to their exclusion from having their voices heard in decision-making at local levels’, there has been a mobilisation of young people among other groups. He suggests that these new forms of political participation ‘may begin to address collective action deficits that have plagued Fiji’. In New Zealand too, Alison Anitawaru Cole notes that there is a strong youth movement, which organised the largest public protest in the history of Aotearoa during the third national climate strike in 2019. In New Zealand, like in other parts of the world, court action has been undertaken by young people as an alternative to lobbying democratically elected representatives.¹

Second, the case studies highlight the urgent need for the mechanisms of representative democracy to be able to effectively respond to, and manage, powerful actors lobbying with only their self-interest in mind. This is of course a problem that has salience beyond climate change and one that representative democracies must tackle if they are to act effectively with the (longer-term) public interest in mind. In New Zealand, powerful and wealthy lobby groups linked to the beef and dairy industry are opposed to many environmental reforms and climate change responses, with the result that these industries successfully managed to remove themselves from the New Zealand Emissions Trading Scheme. Kant suggests that in Fiji, at national and local levels, ‘the elite’s capture of climate adaptation projects has exacerbated existing inequalities in social hierarchies’. Conversely, in Taiwan, Chang suggests that there is some contingent alignment between climate change advocates and the interests of some interest groups, particularly industry actors. She writes that ‘legislative and policy responses to climate change have clearly been in strong demand, not only by the environmental movement but also by industrial sectors due to energy scarcity’.

Third, the three case studies bring to the fore the need for genuinely *global* action in response to climate change. One persistent theme raised in discussions was the transactional nature of representation in

¹ See, eg, *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116.

many contexts: people want their representatives to provide them with direct, local assistance. A resulting concern is that a focus on direct assistance to local constituencies does not come at the cost of effective representation at the national and international level. As the problem of climate change shows, representation needs to be effective across many levels of governance, not least so that polities have the capacity to locally implement any undertakings they make on the international stage. Kant's paper describes the many capacity-related difficulties faced by Fiji in relation to implementation, difficulties which are widespread across the region and not limited to Fiji. In some instances, the issue isn't necessarily one of capacity per se but mistaken assumptions made by international organisations about what capacity entails (as a result of inaccurately generalising from what capacity looks like in 'the West' or 'global North' to other parts of the world). For example, Kant notes that large international organisations require stringent contract-based agreements such as land transfers and easements in order to provide climate financing; concepts and practices that do not necessarily exist in Fiji and many other parts of the world. The traditional land tenure and knowledge systems that do exist, however, Kant states, 'can inform sustainable adaptation strategies and must be considered in the design of adaptation policies. Hence there is the challenge of ensuring compatibility between traditional and Western governance systems'. The New Zealand and Fiji case studies bring attention to the fact that in many parts of the world, both state and non-state actors play a key governance role in responding to climate change. New Zealand has commitments to *tangata whenua* through *Te Tiriti* which mandates co-governance with Māori peoples. This has particular significance in relation to climate change, as Māori social, cultural, spiritual and economic wellbeing is particularly vulnerable to climate change.²

Finally, climate change highlights some of the limitations of conceptions and mechanisms of representation in the liberal-capitalist democracies, and the need to transition from anthropocentric to ecocentric understandings of the environment and fight against climate change. This transition raises many questions, most of which were left open at the Forum. Innovative developments in representation, however, might suggest some ways forward. The first is the application of representation to entities other than constituencies of people. One such example is the emergence of recognition and protection of the rights of nature, which include processes to represent the interests of natural features such as rivers and mountains in public decision making. Another is the growing acceptance of the need to consider — and perhaps represent — future generations in environmental actions. The second development is the call to place Indigenous values at the centre of responses to climate change. Values that might be roughly translated as concepts of custodianship or guardianship, and Indigenous practices in relation to land, provide an alternative understanding of the relationship between people and place to ground climate change resilience and action.

² See 'First National Climate Change Risk Assessment for New Zealand', *Ministry for the Environment* (Web Page, 2022) <<https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/adapting-to-climate-change/first-national-climate-change-risk-assessment-for-new-zealand/>>.

How Taiwan's Representatives Have Addressed Environmental Challenges

Wen-Chen Chang

What have been the principal environmental challenges in Taiwan in past decades? How have they been handled? With what degree of success?

An island nation located at the converging boundary between the Eurasian Plate and the Philippine Sea Plate, Taiwan is prone to natural disasters including earthquakes and typhoons during summer and fall seasons, which often lead to grave losses in lives and goods. With a central mountain range that occupies most of the island, becomes steep towards the eastern side, and includes Jade Mountain, the highest peak of East Asia, Taiwan's most developed areas are thus concentrated on the western side and the population density is extremely high.¹ Worse yet, despite the central mountain range, there are no domestic sources of fossil fuels, and geothermal energy and hydro powers are quite limited. As a result, Taiwan depends nearly totally — 98% — on energy imports including coal and natural gases to fuel its still rapidly advancing economy; Taiwan is ranked as the 22nd largest economy and the world's 15th largest exporter of merchandise in 2020, a critical part of which is related to semiconductors.²

Against such backdrops, Taiwan's environmental challenges have always been daunting, and if not dealt with properly, they can easily amount to governing crises that may bring down any government. Key environmental challenges include pollution control particularly in the populous western side, natural resources conservation for the central mountain range and the eastern coastal side, disaster prevention and management especially for earthquakes and seasonal typhoons, and most importantly, energy scarcity and its management. There should be no surprise that Taiwan's environmental movement occurred very early in the 1970s, despite the strict control over society by the Martial Law Decree that lasted for nearly four decades, and which was pivotal in leading social forces that opposed the authoritarian government and facilitating democratic transitions.³

The environmental movement and democratic transition helped the enactment, rather comprehensively, of a series of environmental legislation tackling all key challenges including pollution, natural resources conservation, disaster prevention and relief, and energy management. The Environmental Protection Agency was established in 1987, after the Martial Law Decree's suspension. The management of national

¹ In 2021, the population density of Taiwan amounted to around 646 people per square kilometre.

² Jeff Kucharski, 'Taiwan's Greatest Vulnerability Is Its Energy Supply', *The Diplomat* (Web Page, 13 September 2022) <<https://thediplomat.com/2022/09/taiwans-greatest-vulnerability-is-its-energy-supply/>>.

³ Jiunn-Rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart, 2016) 195–7; Jiunn-Rong Yeh, 'Transitional Environmentalism: Democratic Institutions, Courts, and Civil Society in Taiwan' in Akihisa Mori (ed), *Democratization, Decentralization, Environmental Governance in East Asia* (Kyoto University Press, 2012) 806; Jiunn-Rong Yeh, 'Institutional Capacity-Building towards Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization' (1996) 6(2) *Duke Journal of Comparative and International Law* 229.

parks was placed under the Ministry of Interior by the *National Park Act* passed in 1972. The Ocean Affairs Council was created in 2018 for coastal management and ocean affairs. The EPA is expected to be elevated to the Ministry of Environment and Natural Resources, which is integrating the various aforementioned agencies as well as setting up a new division in charge of climate change responses.⁴

Seen this way, the representation of Taiwanese people that has been made possible since the political liberalisation and democratic transition in the 1980s and 1990s has indeed been the key to successful responses, mainly through legislation, to Taiwan's daunting environmental challenges.

What are now the principal concerns in relation to climate change in Taiwan?

Energy management, if not already an energy crisis, is definitely the first principal concern of Taiwan in facing climate change. The second is disaster prevention and management.

As previously mentioned, Taiwan depends entirely on energy import given its scarcity of natural energy resources. Before any parliamentary election was made possible for Taiwanese people, the government controlled by the Kuomintang (KMT) constructed three nuclear power plants, all in the coastal areas, in the 1970s.⁵ These nuclear powers together with imported coal and natural gases fuelled Taiwan's rapid industrial development and made Taiwan one of the four dragons in the 1970s and 1980s. However, because coastal areas are seasonally threatened by strong typhoons and located in the earthquake-prone zone, grave concerns with the safety of these nuclear power plants were made, but they were nevertheless suppressed due to the Martial Law Decree. In the 1980s, when the KMT government released its plan to build the fourth nuclear power plant, again in the northern coast, this was met with unprecedented and serious oppositions by local residents and the burgeoning environmental movement.⁶ The opposition party, the Democratic Progress Party (DPP), officially formed in September 1988, and started its movement by opposing the fourth nuclear power plant.

When the DPP eventually won the presidential election in 2000, marking Taiwan's first peaceful transfer of government power, it quickly suspended the construction of the fourth nuclear power plant. The suspension angered the KMT legislators who then brought the case to the Constitutional Court.⁷ The Court held the suspension as not consistent with the constitutional limit to the government budgeting process. The construction continued. But the DPP government succeeded in adding a nuclear-free clause in the *Basic Environment Act*, in which art 23 states that 'the government shall establish plans to gradually achieve the goal of becoming a nuclear-free country'.⁸

⁴ The plan to elevate the EPA to the ministerial level was already written in the *Organic Act* by the Executive Yuan, Taiwan's cabinet, in 2010. Yet, the draft of the *Organic Act* for the Ministry of Environment and Natural Resources was only passed by the Executive Yuan in May 2022, and has just now been sent to the Legislative Yuan for further legislative proceedings: <<https://udn.com/news/story/6656/6290087>>.

⁵ The first nuclear power plant was built in 1971, the second in 1974, and the third in 1978.

⁶ Yeh, 'Transitional Environmentalism: Democratic Institutions, Courts, and Civil Society in Taiwan' (n 3); Yeh, 'Institutional Capacity-Building towards Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization' (n 3).

⁷ JY Interpretation No 520, 15 January 2001 (Withholding of the Fourth Nuclear Power Plant Budget Case): <<https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310701>>.

⁸ The *Basic Environment Act* was promulgated in December 2002: <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=00100001>>.

In 2011, the Fukushima nuclear disaster caused by the earthquake and tsunami gave an ever-strong momentum for suspending, again, the construction of the fourth nuclear power plant. The movement became so strong that it even pushed the KMT government under President Ma Ying-Jeou to officially declare the permanent suspension of the plant in 2014. In 2021, the last package of fuel rod was sent back to General Electric.⁹ With nuclear energy out of the options, Taiwan must rapidly develop a comprehensive energy plan in which green energy must be given a priority, with the gradual decrease of coal-fuelled power. This led to the passage of three key energy-related laws that will be discussed below.

The second principal concern is disaster prevention and management. On 21 September 1999, a major earthquake, measuring 7.3 on the Richter magnitude scale, hit the central part of Taiwan at midnight, causing thousands of deaths, dozens of people missing, and massive damages. This led to the issuance of an emergency decree, a decision by the Constitutional Court, and more importantly, the passage of the *Disaster Prevention and Protection Act* in July 2000.¹⁰

A further comprehensive revision to this *Act*, in response to climate change, was undertaken after another devastating event. In 2009, Typhoon Morakot, not the strongest but surely the deadliest typhoon in decades, brought catastrophic damage to Taiwan, leaving hundreds of people dead and dozens missing. It was a slow-moving storm producing huge amounts of rainfall in just two days, and causing enormous mudslides and severe flooding throughout the southern areas, including one massive mudslide which devastated an entire village of indigenous people and killed approximately 500 in the village alone.¹¹ The extreme rainfall was deemed as attributable to climate change,¹² and calls for the government to initiate a comprehensive plan for climate change adaptation were stronger than ever.

What do people want their representatives to do in relation to climate change? Are there conflicting pressures?

In Taiwan, legislative and policy responses to climate change have clearly been in strong demand, not only by the environmental movement but also by industrial sectors due to energy scarcity. Three key pieces of laws were passed, including the *Renewable Energy Development Act*,¹³ the *Energy Administration Act*,¹⁴ and most importantly, the *Greenhouse Gas Reduction and Management Act*,¹⁵ which was revised and renamed the *Climate Change Response Act* on 10 January 2023.¹⁶

⁹ News Report: <https://www.upmedia.mg/news_info.php?Type=5&SerialNo=109645>.

¹⁰ The text of the legislation is available at: <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0120014>>.

¹¹ Chun-Chieh Wu, 'Typhoon Morakot: Key Findings from the Journal TAO for Improving Prediction of Extreme Rains at Landfall' (2013) 94(2) *Bulletin of the American Meteorological Society* 155–60 <<https://doi.org/10.1175/BAMS-D-11-00155.1>>.

¹² Chun-Chieh Wang et al, 'How Much of Typhoon Morakot's Extreme Rainfall Is Attributable to Anthropogenic Climate Change?' (2019) 39(8) *International Journal of Climatology* 3454–64 .

¹³ The *Renewable Energy Development Act* was passed in 2009 and revised again in 2019: <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0130032>>.

¹⁴ The *Energy Administration Act* was also passed in 2009 and revised in 2019: <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0130002>>.

¹⁵ The *Greenhouse Gas Reduction and Management Act* was passed in 2015: <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=O0020098>>.

¹⁶ Kuo Chien-Shen and Matthew Mazzetta, 'Taiwan Passes Climate Law with Carbon Fee System, 2050 Net-Zero Goal', *Focus Taiwan* (Web Page, 1 October 2023) <<https://focustaiwan.tw/politics/202301100019>>.

The *Greenhouse Gas Reduction and Management Act* was promulgated in July 2015.¹⁷ Article 4 of the Act sets the long-term national greenhouse gas (GHG) emission reduction goal to be no more than 50% of 2005 GHG emission by 2050. Meanwhile, subject to the Executive Yuan's approval and in line with the required period review, the government may be permitted to adjust the said goal, taking into consideration: the *United Nations Framework Convention on Climate Change (UNFCCC)*, its agreements, and related international conventions decisions; together with domestic circumstances. Given Taiwan's barred access to the UN-related treaties and mechanisms, it was no small matter that the *UNFCCC* and related agreements were incorporated into the law.

Despite the progress in the passage of these three key pieces of legislation, criticism has still been strong. Many have called for a more comprehensive legislative response including stronger measures for carbon reduction, accelerating strategies for developing green energy, and feasible adaptation plans particularly for vulnerable communities in mountain and coastal areas.¹⁸ Recently, the government has responded to such a call by comprehensively revising the *Greenhouse Gas Reduction and Management Act*, renaming it as the *Climate Change Response Act*. In April 2022, the Executive Yuan passed the draft, which was sent to the Legislative Yuan for deliberation.¹⁹ On 10 January 2023, the *Greenhouse Gas Reduction and Management Act* was revised and renamed, setting an official goal of reaching net-zero emissions by 2050 and establishing a carbon fee system for large emitters.²⁰ In addition, the Executive Yuan's National Council for Sustainable Development is obligated to coordinate with government agencies and other stakeholders to issue climate action plans, which together with the implementations will be reviewed at a minimum of every four years.

Are the pressures on representation greater in relation to climate change than other matters? How are they being managed?

As mentioned above, green energy and disaster management have indeed seen stronger pressures not only from the environmental movement, but more importantly also from the industry sector.

Are there constraints — internal and external — limit the capability of representatives to address climate change?

Taiwan's legislature, the Legislative Yuan, has 113 members including 73 district-based legislators, 6 aboriginal legislators, and 34 legislators-at-large. The 34 legislators-at-large are elected from the lists of political parties in proportion to the number of votes received, and the number of elected female members on each party's list shall not be less than one-half of the total number.²¹ With the predominant number of the Legislative Yuan being district-based legislators, legislative agendas may at times cater more to local interests. Yet, in order to garner proportional seats, political parties including the major ones of KMT and DPP usually add a few activists for environment, women, or labour into their lists. These legislators may form alliances across party lines. For example, in October 2020, an alliance, the United

¹⁷ The official English translation of the Act is available at: <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=00020098>>.

¹⁸ For example, many of my colleagues co-authored a book entitled *Legislating Climate Change: Comparative Policy and Law in 2020*, calling for such a comprehensive law.

¹⁹ Executive Yuan: <<https://www.ey.gov.tw/Page/9277F759E41CCD91/93478f1b-503e-4129-9e73-70478a1eef68>>.

²⁰ Chien-Shen and Mazzetta (n 16).

²¹ Additional Articles of the *Constitution of the Republic of China*, art 4.

Nation Sustainable Development Goals Promotion Association, was formed in the Legislative Yuan across party lines.²² A few key agendas supportive of climate change responses were endorsed across party lines,²³ including the promotion of electric motor vehicles.²⁴ Legislators of different parties formed a group to join COP 26 and focus on energy transition.²⁵ Earlier, a proposal was made to build a green congress, pledging and implementing the use of solar power in the Legislative Yuan.²⁶

To what extent do the interests and constraints associated with climate change in Taiwan differ from those of other jurisdictions?

Taiwan has been barred from joining any UN-related treaties or mechanisms including the *UNFCCC* and related agreements. Transnational aspects of climate policies are often done through climate diplomacy. British Office Taipei and the European Union Centre in Taiwan²⁷ have been key advocates for green energy in Taiwan.

How do people and representatives navigate the constraints on their capacities to act to respond to climate change, on the domestic and international stage?

As discussed above, Taiwan's environmental movement has been strong since the very beginning. More recently, the youth movement has become a leading force advocating for climate policy and legislation. Domestically, they joined other movements to form an alliance focusing on intergenerational justice, which serves as a self-appointed watchdog for the Legislative Yuan.²⁸ In addition, another youth group, the Taiwan Youth Climate Coalition,²⁹ attends COPs annually to voice concerns and stage advocacy despite the government's lack of access.

To what extent are the interests of future generations taken into account by representatives? What are the implications of such a development for representative democracy in Taiwan?

As discussed above, the movement against the fourth nuclear power plant was critical to Taiwan's response to environmental challenges. In the movement, the idea of building a nuke-free home for the next generation or leaving children a nuke-free homeland without any threats from disastrous events, has always been relied upon for public mobilisation. As a result, the *Basic Environment Act* passed in 2002 incorporated sustainable development and intergenerational justice into the law. Article 2 defines 'sustainable development' as satisfying contemporary needs without sacrificing the ability of future generations to satisfy their needs.³⁰

²² See news report: <<https://futurecity.cw.com.tw/article/1929>>.

²³ See news reports: <<https://ec.ltn.com.tw/article/breakingnews/4038236>; <https://e-info.org.tw/node/235020>>; <<https://news.pts.org.tw/article/598706>>.

²⁴ See news report: <<https://www.bg3.co/a/kua-dang-pai-li-wei-gong-tong-hu-xu-jia-su-jiao-tong-zhuan-xing-95-li-wei-ting-dian-dong-ji-che-fa-zhan.html>>.

²⁵ See news report: <<https://www.mirrormedia.mg/story/20211108edi019/>>.

²⁶ Legislative Yuan: <<https://www.ly.gov.tw/Pages/Detail.aspx?nodeid=5255&pid=162899>>.

²⁷ European Union Center in Taiwan: <<http://www.eutw.org.tw/index-e.php>>.

²⁸ Taiwan Alliance for Advancement of Youth Rights and Welfare: <<https://www.youthrights.org.tw/news/334>>.

²⁹ Taiwan Youth Climate Coalition: <<http://twycc.org.tw/>>.

³⁰ *Basic Environment Act*: <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=00100001>>.

Dilemmas and Constraints of Action on Climate Change by Representatives in Fiji

Romitesh Kant

What are the principal concerns in relation to climate change in Fiji?

Due to a combination of political, geographic, and social factors, Fiji is recognised as vulnerable to climate change impacts: it is ranked 77th out of 182 countries for its vulnerability and ranked 79th for its readiness to respond to climate change in the 2020 Notre Dame Global Adaptation Index.¹ Agriculture and forestry, tourism, water, and energy all face the effects of climate change in Fiji. The sea level surrounding the Fijian Islands is expected to rise by 30–160 mm by 2030, compared to the average between 1980 and 1999.² This sea-level rise, combined with natural year-to-year variations, would exacerbate the effect of storm surges and coastal floods. As a result, coastal erosion and seawater intrusion gradually render coastal regions unusable, but extreme weather events frequently hasten the process.

Climate change is likely to enhance all weather-related hazards in Fiji. Compared to the 1986–2005 baseline, long-term warming in Fiji is anticipated to range from 0.6–2.6°C by the 2090s. Despite the wide range of the predicted temperature increase, there is still a great degree of uncertainty. According to the 2021 World Risk Report, Fiji is the world's 14th most disaster-risk country because of its high vulnerability and inability to cope with natural disasters.³ Cyclones and floods are significant threats, according to statistics gathered by the Pacific Catastrophe Risk Assessment and Financing Initiative (PCRAFI), which shows that of 129 documented occurrences in Fiji, 71 were tropical cyclones and 30 were floods.⁴ As evident from tropical cyclones (TC) Winston (category 5) and Yasa (category 4), Fiji's assets and infrastructure are vulnerable to climate-related damages. The many projected consequences of climate change have noticeably manifested in the loss and reduction of coral reefs and other important marine and terrestrial ecosystems. As a result, these occurrences are most likely to affect Fiji's poor, marginalised, and distant populations the most.

The effects of TC Winston led to an internal displacement of as many as 76,000 in February 2016. Additionally, 40,000 homes were damaged or destroyed, affecting approximately 350,000 people, most

¹ 'ND-GAIN Country Index' <<https://gain.nd.edu/our-work/country-index/rankings/>>.

² Fiji Meteorology Service, Australian Bureau of Meteorology, and Commonwealth Scientific and Industrial Research Organisation, 'Current and Future Climate of the Fiji Islands' (International Climate Change Adaptation Initiative, 2011) 7 <https://world.350.org/pacific/files/2014/01/1_PCCSP_Fiji_8pp.pdf>.

³ 'World Risk Report 2021' <<https://weltrisikobericht.de/weltrisikobericht-2021-e/>>.

⁴ Krishnan Narasimhan and Jennifer Cisse, 'The Case for Climate Disaster Risk Insurance in Fiji', *UN Capital Development Fund Blog* (Blog Post, 12 October 2020) <<https://www.uncdf.org/article/6145/the-case-for-climate-disaster-risk-insurance-in-fiji>>.

of whom lived in Viti Levu's northern region.⁵ Cyclones Mona and Sarai struck Fiji on 2 January 2019 and 12 December 2019 respectively, displacing 4,800 people.⁶

The Fijian government predicted in 2014 that 676 communities will likely be affected by the effects of climate change and may require relocation in the future.⁷ The Internal Displacement Monitoring Centre (IDMC) predicts that 3,614 Fiji residents will be relocated yearly because of storm surges and 2,076 due to cyclonic winds.⁸

What do people want their representatives to do in relation to climate change? Are there conflicting pressures?

Contemporary environmental and climate change law, and policy and politics in Fiji pose an interesting dilemma. On the one hand, anecdotal public opinion surveys demonstrate consistently strong support for environmental values; on the other, it seems that poor households and small and medium enterprises are not too concerned about long-term consequences on the environment.

Additionally, adaptation to climate change is hindered when people in Fiji (and the Pacific Islands) with strong religious traditions attribute natural disasters to the hand of God. The issue here is that if one thinks an issue/phenomenon has a divine explanation, it's not only futile to try to change it, but it's also an insult to God to even think about it.

At local levels, the elite's capture of climate adaptation projects has exacerbated existing inequalities in social hierarchies and produced jealousy and disputes. High levels of dissatisfaction have been noted with climate adaptation projects administered through local governance systems, particularly due to the dominance of chiefs and patriarchal structures at local levels that tend to exclude women, people with disabilities, and young people. In other instances where communities have been required to relocate, disengagement by young people has been noted due to traditional hierarchies that lead to their exclusion from having their voices heard in decision-making at local levels.

Climate change is driving new forms of political participation in ways which may begin to address collective action deficits that have plagued Fiji. For example, there has been a mobilisation of young people, women, and people of diverse SOGIESC concerning the Climate Action Network; these are a small number of people who understand what constitutes a political community. Fiji's vibrant civil society organisations have effectively collaborated with the government to bring climate action to global fora. Their success is due to the significant work and programs conducted at numerous levels, from local to national, regional, and international levels, to accelerate climate action in agriculture, oceans, climate finance, and low carbon development. At the national level, climate action campaigners and activists in Fiji include Save the Children Fiji, the Pacific Islands Climate Action Network, WWF Pacific, the International Union for Conservation of Nature (IUCN), the Locally Managed Marine Area Network, Diverse Voices in Action (DIVA), the Pacific Centre for Peacebuilding, and Transcend Oceania. The Fiji Commerce and Employers Federation and faith-based organisations like Global Compassion continue to collaborate with

⁵ World Meteorological Organization, 'WMO Statement on the State of the Global Climate in 2016' (Report, 2017) 18.

⁶ Internal Displacement Monitoring Centre (IDMC), '2020 Global Report on Internal Displacement' (Report, April 2020) 43.

⁷ '676 Communities Threatened by Climate Change', *Fijivillage* (online, 17 January 2014) <<https://fijivillage.com/news/676-communities-threatened-by-climate-change-krs295/>>.

⁸ IDMC (n 6).

communities, development partners, and the government to address climate change and develop sustainable response systems.

Are the pressures on representation greater in relation to climate change than other matters? How are they being managed?

Climate change action is still largely restricted to the elites, both state and non-state. This is due to a combination of factors. The main contributor to this has been the government's move towards greater forms of centralisation through slowly chipping away at the powers of sub-national institutions like municipal and provincial councils.

Pressures on representation are mainly around socio-economic issues such as employment, poverty alleviation, education, health care, etc. Greater efforts are required to bring climate change and their associated risks to socio-economic issues into the mainstream discourse.

What constraints — internal and external — limit the capability of representatives to address climate change?

Government action on climate change in Fiji has been thorough and holistic; however, Fiji's alignment with global discourses on development, sustainability, and resilience has resulted in the top-down response to climate change being influenced by the 'economic rationalist' narrative on climate change. Yet current participatory techniques are considered as ineffectual or as paying 'lip service' to the concept of public participation, as influential figures seek to conceal problematic or undemocratic political practices.

There are signs climate change is supporting innovations in terms of state development, by strengthening the capacity of the state to act in a planning capacity. As highlighted earlier, the national government has signed multilateral frameworks and developed a range of climate change adaptation policies; however, the government faces ongoing challenges in the area of implementation. The Fijian government has highlighted obstacles to adopting climate change mitigation and adaptation strategies, including a lack of capacity, information, expertise, and technology.⁹ These obstacles may hinder increased access to sex and age disaggregated data, detection of climate change impacts on vulnerable populations, and access to information for stakeholders. Institutional impediments, such as the inadequate integration of climate risks into national development planning, reduce the ability of local governments and sub-national development to carry out duties to improve local adaptation.¹⁰ Furthermore, the *Local Government Act* offers a structure for sub-national coordination of operations under the Ministry of Local Government, Urban Development, Housing and Environment direction. Local efforts to adopt climate change adaptation activities are not aligned with the central government's strategy, and a lack of finance, human resources, and technical expertise hinders successful localisation.¹¹

⁹ Republic of Fiji, 'National Adaptation Plan: A Pathway towards Climate Resilience' (Report, 2018).

¹⁰ Ibid.

¹¹ Asian Disaster Preparedness Center and United Nations Office for Disaster Risk Reduction, 'Disaster Risk Reduction in the Republic of Fiji' (Status Report, July 2019) 17.

To what extent do the interests and constraints associated with climate change in Fiji differ from those of other states?

The Pacific Islands are home to species found nowhere else on earth which are incredibly diverse, in terms of their ecosystems, geography, and demographics. Pacific Islanders have lived with natural environmental impacts for thousands of years and have adapted practices to accommodate periods of environmental fluctuation.

Despite this, a number of challenges constrain climate change efforts:

Remoteness of Islands

Logistical, technological, and weather-related obstacles are common in remote islands in the Pacific, causing delays to material-dependent projects. Excessive costs of transportation and certain goods divert spending from on-the-ground implementation. Long distances from markets can also limit economic growth.

Lack of Technical and Financial Capacity

Pacific Island countries face several capacity constraints such as financial and project management, climate modelling and spatial analysis, and infrastructure maintenance.¹² Sustained capacity in local NGOs (nongovernmental organisations) is also a challenge; as talented youth rise through the ranks of conservation programs; they are often recruited into higher-paying government or private sector jobs, or they seek opportunities abroad. Staff turnover problems hinder long-term conservation projects by causing significant portions of funding sources to be repeatedly used for capacity development. Local adaptation projects supported by external sources of funding (e.g. climate grants) often end when the grant is over if there is no sufficient local capacity to continue the project. Finally, a lack of technical capacity is also a challenge.

Governance

Complex land tenure structures commonly follow traditional or tribal governance systems which can conflict with Western judicial laws and processes, making governance approaches ineffective. This can deter climate financing from large international organisations who require stringent contract-based agreements such as land transfers and easements for protected areas. Nevertheless, traditional tenure and knowledge systems can inform sustainable adaptation strategies and must be considered in the design of adaptation policies. Hence there is the challenge of ensuring compatibility between traditional and Western governance systems.

¹² Matthew Dornan and Tess Newton Cain, 'Regional Service Delivery among Pacific Island Countries: An Assessment' (2014) 1(3) *Asia and the Pacific Policy Studies* 541 <<https://onlinelibrary.wiley.com/doi/10.1002/app5.45>>.

How do people and representatives navigate the constraints on their capacities to act to respond to climate change, on the domestic, regional and international stages?

Fiji's government has displayed global, regional, and national leadership on climate change and climate financing. At the global level, Fiji presided over COP 23 in 2017, becoming the first Pacific Small Island Developing State to do so, and aided in advancing the implementation of the historic Paris Agreement. As the first country to ratify the Paris Climate Accords, Fiji has emerged as a global leader in climate change governance.¹³ Fiji has ratified the *UN Framework Convention on Climate Change*, the *Montreal Protocol*, and the *Stockholm Convention*.¹⁴ Fiji has also ratified the *Convention on Biological Diversity* and the *UN Convention on the Law of the Sea*.

Additionally, Fiji is signatory to several regional agreements addressing the vulnerability of SIDS to climate change, including the 1994 Barbados Plan of Action, the 2005 Mauritius Strategy for Implementation, and the 2017 Framework for Resilient Development in the Pacific: An Integrated Approach to Climate Change and Disaster Risk Management (which incorporates early frameworks). Fiji is also the host nation and a member of the steering committee for the newly created Pacific Regional NDC Hub.¹⁵ Fiji has several climate-specific policies and programs at the national level. A National Climate Change Policy (NCCP) was adopted in 2012 and amended in 2018 (approved in May 2019) to accelerate adaptation and mitigation efforts and to enhance subnational climate planning.

Fiji continues to advocate for international climate change policy and increase its climate resilience measures. Fiji has demonstrated global leadership in recent years, by being the first Pacific Island Country (PIC) to be elected to the UN Human Rights Council; holding the UN General Assembly's Presidency in 2016–17; holding the Presidency and co-hosting the COP23 in 2017; being the host of the first-ever UN Ocean Conference in 2018; being the Chair of the Group of 77 plus China; and by being the Chair of the World Bank Small States Forum. In terms of disaster response and service and advice provision to help the most vulnerable and those in need, this cluster coordinates the activities of significant service agencies and foreign partners. The cluster encompasses: psychosocial support, protection, and counselling; gender-based violence support; assistance for people with impairments; and security for children and the elderly. As a result of its international climate change activism, Fiji received the 2019 Sustainable Development Leadership Award. It will advocate for even more ambitious international action to keep global warming to 1.5°C over pre-industrial levels.

Additionally, Fiji is also a party to regional frameworks that guide climate mobility policy development in the Pacific Islands, include the Framework for Pacific Regionalism,¹⁶ the Framework for Resilient Development in the Pacific: An Integrated Approach to Address Climate Change and Disaster Risk

¹³ Madeleine Cuff, 'Fiji Becomes First Country in the World to Ratify Paris Agreement', *The Guardian* (online, 16 February 2016) <<https://www.theguardian.com/environment/2016/feb/15/fiji-becomes-first-country-in-the-world-to-ratify-paris-agreement>>.

¹⁴ *United Nations Framework Convention on Climate Change*, 1992.

¹⁵ See 'Regional Pacific Nationally Determined Contribution Hub' <<https://pacificndc.org/>>.

¹⁶ Pacific Islands Forum Leaders endorsed the Framework for Pacific Regionalism in July 2014: <https://www.forumsec.org/wp-content/uploads/2018/02/Framework-for-Pacific-Regionalism_booklet.pdf>.

Management,¹⁷ the Samoa Pathway¹⁸ and the UN Pacific Strategy.¹⁹ Regional initiatives in the Pacific Islands include the recent Pacific Climate Change and Migration Project²⁰ and the current Pacific Climate Change Migration and Human Security Programme.²¹

Since the military coup in 2006, populist politics, unaccountable leadership, and opaque decision-making processes have been common features of Fiji's political landscape. Since transitioning to parliamentary rule in 2014, state authority has been concentrated around the executive. The central government has primarily dominated climate change policymaking. The Fijian government has successfully constrained individual liberty and suppressed public participation, while granting limited freedom to select groups that can serve regime legitimacy. In Fiji, political tensions make governance a contested topic, especially as they have a considerable impact on climate change adaptation.

Are entities other than the people now acquiring a form of personhood with implications for representation? How and why?

Section 40 of Fiji's 2013 *Constitution* provides the right to a healthy and sustainable environment:

Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures.

This includes the right to have nature maintained in a way that benefits current and future generations, through legislation and other means. As a condition of this right, the government must take steps to ensure the following: clean air; clean water; adequate sanitation; healthy and sustainable food; a safe climate; a non-toxic environment in which to live, work, study, and play; and healthy biodiversity and ecosystems.

To fully appreciate Fijian culture, one must grasp the importance of land and how it affects people's sense of self, social well-being, and cultural cohesion. *Vanua* is the indigenous Fijian term for this interdependence of physical, social, spiritual, and economic aspects. Moving will impact their financial, spiritual, and cultural well-being if the land is regarded as an extension of the person. Climate change, therefore, has a cultural influence because of the importance of land and how it shapes people's sense of self.

¹⁷ See Pacific Community et al, 'Framework for Resilient Development in the Pacific: An Integrated Approach to Address Climate Change and Disaster Risk Management (FRDP) 2017–2030' (Report, 2016) <http://tep-a.org/wp-content/uploads/2017/05/FRDP_2016_finalResilient_Dev_pacific.pdf>.

¹⁸ See General Assembly Resolution A/Res/69/15, 14 November 2015 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/628/45/PDF/N1462845.pdf?OpenElement>>.

¹⁹ See United Nations in the Pacific, 'United Nations Pacific Strategy 2018–2022' (Report, 2017) <https://unsdg.un.org/sites/default/files/2019-12/UNDP_WS_FINAL_UNPS_2018-2022.pdf>.

²⁰ See <<https://www.unescap.org/subregional-office/pacific/pacific-climate-change-and-migration-project>>. The project is implemented by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the International Labour Organization (ILO), and the United Nations Development Programme (UNDP).

²¹ See <<https://www.unescap.org/announcement/pacificclimate-change-migration-and-human-security-pccmhs>>. The programme is implemented by the International Organization for Migration (IOM) as the lead agency, ESCAP, ILO, the Office for the High Commissioner for Human Rights (OHCHR), the Platform on Disaster Displacement (PDD) and Pacific Islands Forum Secretariat (PIFS).

There are no moves in Fiji to grant legal personhood to the environment/nature. Additionally, there are no legal challenges before the courts dealing with s 40 of the *Constitution*.

To what extent are the interests of future generations taken into account by representatives? What are the implications of such a development for representative democracy in Fiji?

Fiji's *Constitution* includes the right to a healthy environment, which is a significant step forward. Furthermore, art 40(2) states: 'To the extent that it is necessary, a law or an administrative action taken under a law may limit, or may authorise the limitation of, the rights set out in this section.'

The Fijian regulatory framework has considered the importance given to the idea of sustainability, as demonstrated by the original consideration of the relationship between nature and human beings included in its *Constitution* adopted in 2013. While declaring the Fijian people's commitment to safeguarding the environment in the Preamble, the *Constitution* also mentions the 'prudent, efficient and sustainable relationship with nature' as one of its foundational values. Also, in considering individual environmental rights, it acknowledges 'the right to have the natural world protected for the benefit of present and future generations through legislative and other measures'.

Fiji has developed several significant environmental policies in the last few years, including the National Climate Change Policy 2018–30 (2019), the Fiji Low Emission Development Strategy 2018–50 (2018), the National Adaptation Plan Framework (2017), the Nationally Determined Contribution (NDC) Implementation Roadmap (2017), the National Biodiversity Strategy and Action Plan 2017–24, the National Air Pollution Strategy, and the Green Growth Framework (2014–17). These documents, which cover policies, strategies, and goals in great depth, are outstanding. The *Climate Change Act 2021* institutionalises Fiji's international obligations under the *United Nations Framework Convention on Climate Change (UNFCCC)* and the Paris Agreement,²² and enables the implementation of Fiji's Nationally Determined Contributions (NDCs). The *Act* also provides a framework for coordinated action enabling Fiji to develop and implement coherent and long-term climate change measures and policies; establishes relevant institutional and governance structures; and sets up a transparent system for monitoring, reporting, and verifying progress.

Implementing Fiji's Nationally Determined Contributions (NDCs) under the *UNFCCC* and the Paris Agreement is made possible by the *Climate Change Act 2021*. The *Act* establishes appropriate institutional and governance structures; creates a transparent system for monitoring, reporting, and verifying progress; and provides a framework for coordinated action to help Fiji develop and implement coherent and long-term measures and policies to address climate change.

²² *Climate Change Act 2021* (Fiji) <<https://www.parliament.gov.fj/wp-content/uploads/2021/09/Act-No.-43-Climate-Change.pdf>>.



6. Bringing the Threads Together

6. Bringing the Threads Together

Cheryl Saunders

Most of the jurisdictions on which this report draws are formally democracies, with legislatures that are elected periodically on the basis of a broad franchise, within a constitutional framework. The exception is Afghanistan since the Taliban returned to power in 2021. The discussion of Afghanistan in the report relates to the pre-2021 period.

The report offers a rich array of insights into the realities of democratic representation in 16 jurisdictions that are diverse in institutional form, legal system, geographical and population size, political stability, economic prosperity, geopolitical standing and culture. In this respect, as so often, the Asia-Pacific region offers a microcosm of the diversity of constitutional democracies across the world. The earlier sections of the report organise these insights along four themes: expectations of representation, mechanisms of representation, impediments to effective representation, and the particular challenge for democratic representation in relation to global issues such as climate change. It is hoped these will be used as a base on which more detailed studies can build.

This final section of the report develops three sets of insights suggested by the collective experience of the jurisdictions included in this report that cut across the four discrete themes around which Forum discussions occurred.

The first concerns the concept of representation itself. Despite the differences between them, a surprising trend towards a largely transactional approach to representation emerges from the experiences of most jurisdictions. This is particularly evident at the point of election when, in varying degrees, candidates rely on promises of infrastructure or other constituency-specific goods to secure election or re-election. It may have a role also between elections, not only in the delivery of promises for infrastructure or services but in the provision of other benefits to individual voters in the form of, for example, letters of reference or opportunities for employment, as described in the papers on Nepal and Papua New Guinea, amongst others.

The mechanisms through which transactions involving expenditure occur vary between jurisdictions. In some, it is systematised through a constituency development fund or its equivalent, in which public moneys are allocated to individual MPs to spend in their electorate. In others it is less formalised, and might consist of ad hoc promises for benefits in the particular electorate. The latter is more likely where the party system is well-developed, and in this context constituency expenditure is likely to be part of the platform of policies that parties use to sway electoral votes.

Within limits, transactional representation is unexceptionable. In constituency-based systems, voters properly expect their local member to understand and promote their needs and interests, individually and collectively. Problems arise when this notion of representation becomes dominant, side-lining other purposes that representation is intended to fulfil. Democratic representation assumes that law-making is legitimate because it is approved by a majority of elected members of a legislature who in turn represent their constituents. In parliamentary systems, the legitimacy of executive government similarly depends on the support of a majority of elected members, representing their constituents, who also are supposed to hold the government to account. A concept of representation that is purely or even significantly transactional, leaving little if any room for representation as the mechanism that links the people to the legitimacy of collective governance, offers an impoverished version of democracy. Several papers offered examples of this dynamic: from Thomas Webster's diagnosis of a 'service delivery syndrome' in Papua New Guinea to Gautam Bhatia's discussion of 'thin representation' in India, where representatives are more often called upon to undertake development work for their constituencies than to respond to law-making and policy matters. It prioritises the moment of election and focusses on the people as periodic voters but does not encourage the development of citizens, much less active citizens. It damages or breaks the chain of legitimacy on which democratic systems rely.

Transactional representation in the forms discussed in this report may have wider constitutional implications as well. Where the expenditure favours particular constituencies over others it runs counter to the principle of equal citizenship, on which the cohesion of a state relies. Decisions by elected members about the expenditure of constituency funds on infrastructure and other matters usurps the role of the administration, which should be better equipped to evaluate need and competing claims within and across constituencies. In discussions at the Forum, some participants suggested a link between this limited conception of representation and the diminishing role of the legislature, in both law-making and holding the executive to account. Indeed, in some contexts, constituency development funds have become a key mechanism by which incumbent executive leaders maintain the support of a majority of the parliament, as seen in the fluidity of parliamentary majorities in Papua New Guinea and Solomon Islands, for example. Transactional representation at the national level undermines the rationale for devolution as well, focussing the attention of national legislators on matters that can best be handled at a more local level of government and away from difficult questions affecting the state as a whole with which the national level of government is best equipped to deal.

A limited, more personalised notion of representation has many causes. Some are context specific, prompted by cultural assumptions and practices in states in which other relationships trump party political ties, such as the Samoan *Faamatai*. It may also reflect a history of marginalisation, poverty and conflict: patronage in the Bangsamoro Autonomous Region of Muslim Mindanao and communal voting in Afghanistan are examples. It follows that, to some extent at least, solutions are context-specific too. So, for example, some states have retained community development funds but tried to structure them in a way that makes distribution more equitable and transparent. A more generic cause, however, which is more widely applicable, stems from the dynamics of representative democracy rather than from local cultural factors. Promises of tangible benefits during an election campaign are the easiest way for candidates to attract the attention of the voters, at a time when candidates are most vulnerable to the views of the electorate. It is easy enough to see how and why this practice has evolved and now is so pervasive.

Possible solutions were canvassed during the Forum. They included, for example, a new focus on active citizenship across the whole of the electoral cycle, to encourage citizens to hold their representatives to account for decisions made by government and legislature by, for example, requiring explanation and justification of how the public interest is served. Crisis can also drive more active citizenship: one example, seen in Fiji, New Zealand and Taiwan, is the active participation of youth, women and other marginalised groups in calls for action on climate change. Active citizenship is not always possible or effective, especially when institutions are captured by powerful interests, as the examples of the Philippines and Thailand show. ‘Nudges’ to more responsive representation might be made through changes to the electoral system, political party regulation and parliamentary procedure. Another potential solution lies in efforts to revive legislatures as deliberative forums for significant public issues, building both on local practices of consultation and consensus building and on innovations designed to enhance democratic deliberation in countries across the world. Avenues for inclusive public participation in law making and decision making, including through social media such as the ‘Blue House National Petition’ and ‘Centre for Public Participatory Legislation’ in South Korea, might also enhance representation in these spheres. In Indonesia, the Constitutional Court has recently sought to impose and enforce requirements for greater public participation in law making. Solutions might also place renewed emphasis on representation itself, as for example in the new Bangsamoro Autonomous Region of Muslim Mindanao, where a shift to a parliamentary system with elected members as well as sectoral representatives seeks to change how citizens view their government, although it is acknowledged that such cultural change takes both time and devoted action. Significantly also, effective devolution of government has potential to tackle transactional politics at the national level by leaving decisions about the provision of infrastructure and services to lower levels of government where they belong, as seen, potentially, in efforts towards devolution in Nepal and the Bangsamoro.

This first set of insights, outlined above, has potential application to the concept and practice of representation even in relatively well-functioning democracies. A second group of issues arises in democracies where something clearly has gone awry, with the result that representative institutions are controlled by certain interests and groups of citizens are effectively excluded from political power. Flow-on effects of this degradation of representation typically include inequality and discrimination, ineffective and unaccountable institutions, and poor public policy choices. The exclusion of the rural poor and women, discussed in the paper on Pakistan but also a reality elsewhere, makes the point.

The details of this problem vary between states. Representative institutions may have become the preserve of a particular political or social grouping (for example chiefly and patriarchal structures in Fiji); particular ethnic or religious interests (as for example in Sri Lanka); or particular families or ‘dynasties’ (as for example in Indonesia and the Philippines, as well as Sri Lanka). The culture of coup d’état in Thailand and the consequent control of representation and the institutions government by the military and elites is an extreme example. The problem may be further exacerbated by corruption. It follows that solutions must also be tailored to context, at least to some extent. Generic responses are available as well, however, which may at least assist to ameliorate the situation. Constitutional guarantees of inclusion coupled with administration by more independent ‘fourth branch’ institutions are an obvious example.

Discussion at the Forum characterised all of these cases, collectively, as a form of state capture. Retrospective solutions are difficult, once power is entrenched and patterns of behaviour established. Preventative action is preferable, if this can be achieved. Most forms of state capture occur incrementally, offering an opportunity to intervene before the syndrome has taken hold. To do so, however, requires

vigilance, awareness of the potential for state capture and its modalities and, once again, active citizenship. Another challenge is to distinguish between changes to the status quo that are anodyne and, perhaps, even genuine improvements and those that represent moves towards state capture. The difficulty of diagnosis is illustrated by current developments in Indonesia, feared to be indicative of democratic decline. These are problems that require further reflection and research, to which the insights of this report can contribute.

A third set of insights that emerges from the report concerns the impact of external influence on representation from the ground up.

External influence takes many forms. One, which is familiar, is the involvement of external actors in the resolution of intrastate conflict and transition to democracy. Another form, on which the 2022 crisis in Sri Lanka throws light, is the involvement of international bodies such as the International Monetary Fund and World Bank to resolve economic crisis. In the case of Pakistan, international pressure influenced electoral reforms and generated forms of political leadership that emphasised neo-liberal forms of economic governance. Pressure from external actors can have positive benefits for constitutional democracy. In Sri Lanka, international pressure helped local actors to resist efforts by the government to abuse its authority through declarations of emergency and exceptional decrees. In Fiji, local activism combined with efforts at national, regional and international levels to accelerate action on climate change. External involvement, however, also risks the introduction of norms and practices that do not fit local context, unless care is taken to ensure local understanding and ownership. There is also a risk that external principles or preferences trump strategies that might be more conducive to local stability in the long run. The decision to exclude the Taliban from the processes of state-building in Afghanistan under the *Constitution of 2004* offers an example that ultimately had momentous consequences. The generational debt incurred in Sri Lanka may emerge as another example.

A related but more amorphous phenomenon does not necessarily stem from external assistance but is a consequence of global assumptions about the institutional arrangements for representative democracy. Democratisation has led to the introduction of institutions and practices that emerged from Western historical experience into states where they are unfamiliar and may adapt with difficulty. Elections for representatives of legislatures that operate on adversarial lines aided by strong party groupings is an example. From the standpoint of many of the states in the Asia-Pacific region, adversarial politics is not always welcome; parties may be weak or non-existent; other loyalties may be stronger than political allegiance; or people may place their trust in institutions that are not those of the state. It may be that, in time, the evolution of local political culture and techniques of institutional design will assist imported forms of representative democracy to adapt and work effectively in any context. It may also be, however, that the notion of representative democracy can itself broaden to absorb the preferences and experiences of legal traditions beyond the west, consistently with the underlying principles on which democracy rests, with benefits for the future of democracy everywhere. This Report may assist to prompt reflection about what such a development would involve.

One final aspect of external involvement raised by the Report stems from Part 5 on climate change. There are many pressing global problems, of which climate change is a clear example, that require collaboration between states, including democracies, across jurisdictional boundaries. The example throws light on representation in several ways. It suggests that any effective solution to climate change will require states to act in the interests of their people as citizens of member states of the global community, rather than

considering the immediate interests of their own state alone. Even on this basis, however, it shows how the interests of states diverge, creating different challenges for representatives to confront, with a particularly stark contrast between states with economies that are heavily dependent on practices that contribute to climate change and have benefitted from them, and states that have made a relatively minor contribution to climate change but are the most vulnerable to its effects. Progress will require compromise on all sides, which may be hard for representatives who are elected periodically to accept and navigate. In Taiwan, for example, a response by elected representatives to climate change was enabled by cross party support and strong demand not only from the environmental movement, but also from industrial sectors concerned about energy scarcity. There will be some important questions about whether and how representatives take their communities with them, opening up decisions made in the exercise of the external sovereignty of the state to greater transparency and participation than traditionally has been the case.

Contributors

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Dinesha Samararatne is a Professor at the Department of Public & International Law at the Faculty of Law of the University of Colombo, Sri Lanka. Her research interests include public participation in constitution-making, constitutional resilience, women and constitutional law, fourth branch institutions and the relevance of the global south in comparative constitutional law. Dinesha has published widely. Dinesha is a Senior Research Associate, Laureate Program in Comparative Constitutional Law and Co-Convenor of Constitution Transformation Network (CTN) of the Melbourne Law School, Australia. She is a member of the Editorial Board of the *Indian Law Review* and has served as a Co-Editor of the IACL Blog (2019–21). At the Melbourne Law School, she has been Postdoctoral Fellow (2019–20) and Kathleen Fitzpatrick Visiting Fellow (April–May 2018). In 2023 she was appointed as an independent expert to the Constitutional Council of Sri Lanka.

Cheryl Saunders is a Laureate Professor Emeritus at Melbourne Law School and Convenor of the Constitution Transformation Network. She works in the fields of comparative constitutional law and comparative public law more generally. She is a President Emeritus of the International Association of Constitutional Law and a former President of the International Association for Centres of Federal Studies. She is a senior technical advisor to the Constitution Building Program of International IDEA and a former Board Member of International IDEA. Cheryl’s work in the field is characterised by two assumptions. The first is that comparative constitutional law should be as global as possible in its reach, in both theory and practice. The second is the importance of context in comparative constitutional law, including recognition and appreciation of difference, despite the realities of globalisation. Both inform her involvement in the activities of the Constitution Transformation Network. She participates in networks of constitutional scholars and practitioners throughout the world. She has written widely on aspects of comparative constitutional law, with a particular focus on constitution transformation in Asia and the Pacific. She has had practical involvement in constitution making and change in Asia, the Pacific, Africa and the Middle East as an advisor with comparative expertise and an appreciation of how that can effectively be shared.

Khemthong Tonsakulrungruang is a lecturer at the Faculty of Political Science, Chulalongkorn University. He works in the areas of constitutional law, the judiciary, and legal philosophy. He publishes articles and chapters on these topics, including in *Routledge Handbook on Contemporary Thai Politics* (2020), *Thai Legal History* (2021), *Constitutional Courts in Asia* (2018), and in various journals including the *Journal of Contemporary Thai Politics*, *Journal of International Constitutional Law*, and *Washington Journal of International Law*. He is also a regular contributor to blogs on constitutional law and Thai politics, namely, New Mandala, East Asian Forum, and I.CONnect.

Thomas Webster currently holds a Professorial Research Fellow post at the PNG National Research Institute (PNG NRI) and since June 2021, is engaged as Team Leader of a Research Project on 'Autonomy and Decentralisation of Government in PNG'. He was also Project Team Leader of a 'Bougainville Referendum Research Project' from 2016–21 and a Member of the Bougainville Referendum Commission from 2019–20 that successfully supervised the Bougainville Referendum held at the end of 2019. Thomas retired as Director of the PNG NRI, a post he served with distinction from 2004–15. He has also worked at the University of PNG and served as head of the Provincial Administration of Western Highlands Province in PNG for a period of four years.

Jeong-In Yun is Research Professor at the Legal Research Institute of Korea University and affiliated with the Party Law Research Centre of Korea University in Seoul, Korea. She currently holds a Humanities and Social Sciences Academic Research Professorship granted by the National Research Foundation of Korea and previously held a Kathleen Fitzpatrick Laureate Visiting Fellowship in Constitutional Law at Melbourne Law School. She teaches and researches constitutional law. One of her current research projects investigates democratising representation in the modern constitutional context, and another deals with language in comparative constitutional law.

Afiya Shehrbano Zia (PhD in Women and Gender Studies) is a Visiting Scholar of the Allbritton Centre at Wesleyan University, USA, where she has held the Frank B Weeks chair as Visiting Assistant Professor of Feminist, Gender and Sexualities Studies (2021–22). She carries over 20 years of experience in research, teaching and activism. She has taught at the University of Toronto, Canada, and Habib University in Pakistan. She is author of *Faith and Feminism in Pakistan: Religious Agency or Secular Autonomy?* (2018, Sussex Academic Press) and has authored nearly two dozen peer-reviewed essays for scholarly journals and contributed chapters for over 10 edited volumes, including an award-winning Routledge publication on Human Rights. Afiya is an active member of the Women's Action Forum and is an advisory member of the Centre for Secular Space, UK.

Kimana Zulueta-Fülscher is Senior Programme Officer, Constitution-Building Programme, of International IDEA. She was previously Acting Head of the Constitution Building Programme and Programme Manager of the MyConstitution Project, located in Yangon Myanmar from 2018–20. Her research and work focus on comparative constitutional process and design, with a special emphasis on constitution-building processes in fragile and conflict-affected settings. She developed the database on constitution-building processes in conflict-affected settings, and published papers on Sequencing Peace Agreements and Constitutions in Political Settlement Processes, Substate Constitutions, and (S)electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings. She has a PhD in Political Science and International Relations from the Universidad Autónoma de Madrid, Spain (2007), and has lectured at the University of Edinburgh. She is part of the German civilian expert pool for peace operations since 2011, and part of the United Nations Development Programme Crisis Response Roster on Governance and Constitutions since 2017.



Online: Fanaafi Aiono-Le Tagalao, Shamshad Pasarlay, Wen-Chen Chang, Gautam Bhatia, Romitesh Kant

Front row: John Sebastian, Jayani Nadarajalingam, Benny Bacani, Thomas Webster, Faiza Rahman

Second row: Alison Anitawaru Cole, Leena Rikkilä Tamang, Cheryl Saunders, Billie Phillips, Bipin Adhikari

Third row: Khemthong Tonsakulrungruang, Susi Harijanti, Nyla Prieto, Afiya S. Zia, Dinesha Samararatne

Fourth row: Tom Daly, Jeong-In Yun, Anna Dziedzic, Derek Gwali Futaiasi, Kimana Zulueta-Fülscher

About the Organisers

International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organisation that supports sustainable democracy worldwide by providing comparative knowledge, assisting in democratic reform and influencing policies and politics. International IDEA's Constitution Building Programme raises awareness of the role constitution-building processes play in managing conflict and consolidating democracy. The Constitution Building Programme has produced a wide range of reports, handbooks and other resources on constitution building, available at www.ConstitutionNet.org.

The Programme's work involves:

- Providing technical assistance to national actors engaged in processes of constitution building;
- Providing knowledge and capacity-building resources that individuals and groups can use to strengthen their participation, and its quality, in processes of constitution building;
- Facilitating access to learning in comparative contexts so that national, regional and international actors have more options to consider when dealing with different constitutional issues;
- Servicing a global community of constitution building practitioners through physical and virtual spaces for dialogue.

Constitution Transformation Network

The Constitution Transformation Network (ConTransNet) at Melbourne Law School is a network of scholars and practitioners of constitutional transformation. Network members provide research and advice across the broad spectrum of constitutional change, encompassing peacebuilding, the process and substance of constitution making, and constitutional implementation. The Network takes a distinctively comparative approach to constitutional transformation, while exploring the expanding interface between domestic constitutions and international and regional influences, and the ways in which the very idea of a constitution is undergoing transformation in the face of internationalisation.

Network members work with global partner institutions and individuals to deliver quality, evidence-based advice, research and expertise on the development of constitution-making processes and the content, transformation and implementation of constitutions. More information on the members and the work of the Constitution Transformation Network is available at <http://law.unimelb.edu.au/constitutional-transformations>.

Explore the Melbourne Forum website:

<https://law.unimelb.edu.au/constitutional-transformations#melbourne-forum>

**International Institute for Democracy
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<https://www.idea.int/>



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Melbourne Law School**

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