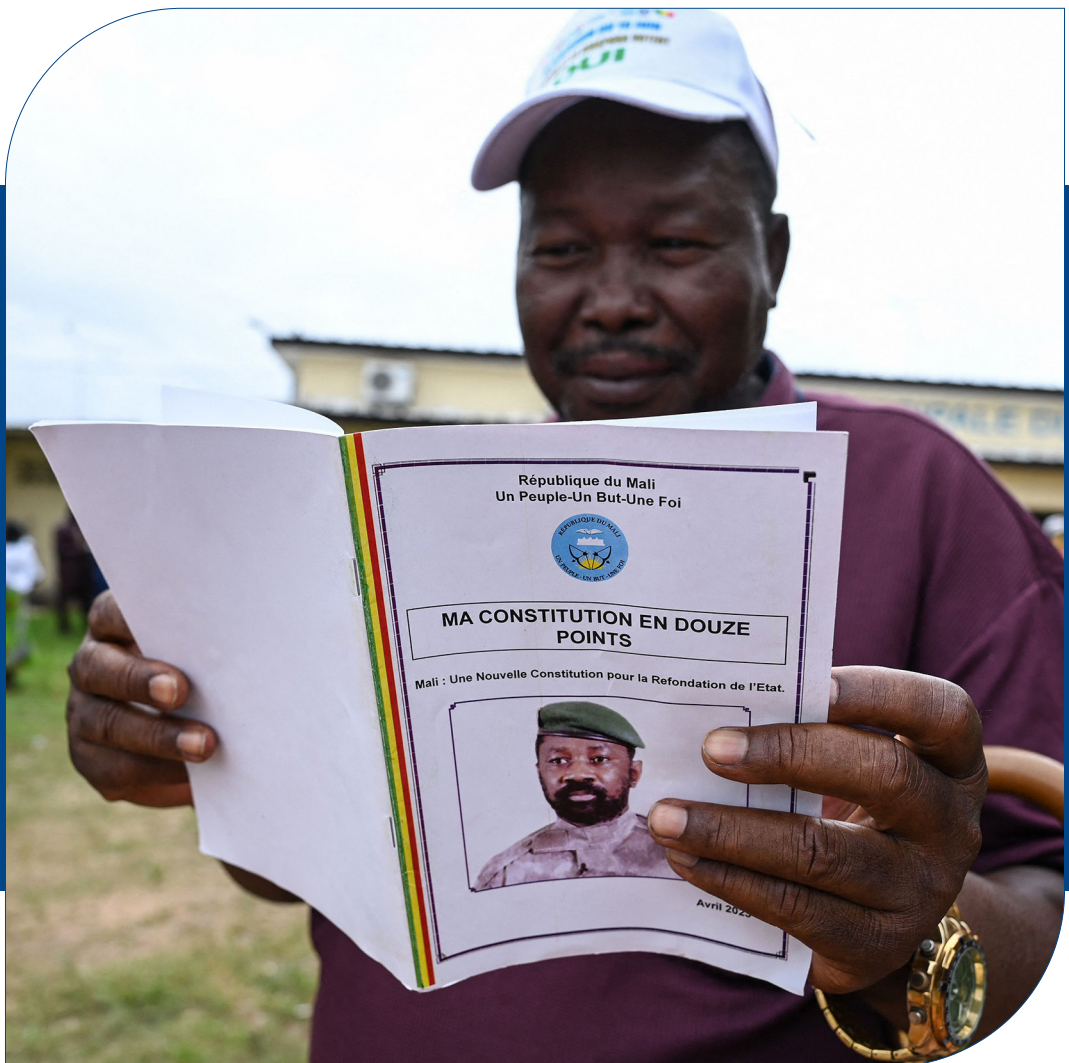


ANNUAL REVIEW OF CONSTITUTION-BUILDING: 2022



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INTRODUCTION

Sumit Bisarya

2022 was another year of widespread constitutional instability. As in previous years, there were over 20 countries around the world where there were concrete discussions over constitutional change—either in the form of major amendments (e.g. Belarus, Kenya) or through the operation of constitution-making or constitution-review bodies (e.g. Armenia, Chile, Syria).

The reasons giving rise to these processes vary. In some cases (e.g. Somalia, South Sudan, Sudan, Syria), constitutional reform is linked to peace-making or state-building processes. In others (e.g. Belarus, Tunisia), the processes are unilaterally driven to maintain power. In the Caribbean, there has been a wave of constitution-making activity sparked by the death of Queen Elizabeth II, as countries debate whether to follow Barbados in becoming a republic (e.g. Belize, Jamaica), while in West Africa there has been a spate of coups leading to the suspension or abrogation of extant constitutions, and new constitution-making processes led by military governments (e.g. Chad, Mali). In Chile, the trigger was a social uprising—following years of demands for constitutional reform—in 2019, while in Botswana there was no particular drama which forced a constitutional review, rather it came more in the context of a ‘health check’ on a constitution which has remained in place since independence from the British, and a feeling in some quarters that it was necessary to update and patriate the constitution through a Botswana-owned process.

2022 was another year of widespread constitutional instability.

However, judging by recent trends, few of these constitutional reform processes will result in constitutional change. Since 2015, there have been no examples of *inclusive* constitution-making processes which have resulted in large-scale constitutional change. Most processes stall or fail, and the only processes in recent years which have succeeded in making major changes to the constitutional framework are those driven unilaterally by an incumbent government (often using constitutional replacement to avoid presidential term-limit restrictions). In December 2022, International IDEA and the University of Edinburgh focused our annual Post-Conflict Constitution-Building Dialogue on the issue of 'Why Constitutional Reform Processes Fail'. The resulting research and policy paper (Zulueta-Fülscher 2023) indicates a number of reasons contributing to the stalling or rejection of constitutional reform initiatives, but it sheds little light on how to increase the success of constitutional reform taking place. Perhaps the most that can be said is that expectations should be managed regarding the chances of wholesale constitutional reform taking place, in particular in post-conflict settings, and options for incremental reform should be explored more rigorously.

The main site of constitutional change in recent years has been in unilateral, executive-driven processes, whereby governments have used the law as a weapon to diminish or destroy political competition.

The main site of constitutional change in recent years has been in unilateral, executive-driven processes, where reform is used to entrench the individual or group in power, in keeping with the broader trend of democratic backsliding, whereby governments have used the law as a weapon to diminish or destroy political competition. In a recent report (Bisarya and Rogers 2023), International IDEA examines in detail the institutional mechanisms through which backsliding takes place and distils some themes to form lessons learnt for institutional design which is more resilient to backsliding. The report encourages 'health check' reviews of constitutional frameworks to anticipate potential problems ahead rather than engaging in constitutional review only at moments of crisis, as was recently conducted in Sweden (Swedish Constitutional Committee 2023) and in the Netherlands (State Commission on the Parliamentary System 2018).

As always, the Annual Review of Constitution-Building studies issues which arose in a selection of these cases worldwide, with a view to both providing a record of recent constitution-building activity and distilling lessons on themes recurring in different processes.

In Chapter 1, Kimana Zulueta-Fülscher provides insights into the unsuccessful culmination of the Constitutional Convention in Chile and identifies five lessons learnt for neighbouring countries—such as Peru—where constitution-building is also on the political agenda.

The most important news story in world affairs in 2022 was undoubtedly the Russian invasion of Ukraine. In Chapter 2, Sharon Pia Hickey illustrates the impact it has had on constitutional frameworks around the world, including commitments to international military alliances or to state neutrality, increasing defence budgets, declarations of states of emergency and new forms of emergency, and increased militarization.

Another major news story which had cross-border implications for constitutional reform processes was the death of Queen Elizabeth II in September 2022, which—while not a direct cause perhaps—certainly has given renewed energy to those who wish to re-examine their constitutional relationship with the United Kingdom. In Chapter 3, Elliot Bulmer describes the social and political momentum towards Republican status across the Caribbean, by drawing on republican movements in Canada and Australia.

In Chapter 4, I discuss an issue which is often highly contentious in constitution-building processes but is seldom discussed in the literature—transitional provisions. I describe the transitional provisions in the constitutional drafts produced in Belarus, Chile and Mali, highlight some of the common functions of transitional options, and discuss the dilemmas constitution-makers often face in their drafting.

In Chapter 5, Alexander Hudson recounts the processes of constitutional change which took place in Sri Lanka and Tunisia. Both occurred in response to financial crises, but while Sri Lanka's incumbent president was forced to resign and the constitutional reforms diminished the power of the executive, Tunisia's incumbent president drove the reforms himself to aggrandize executive power.

Thibaut Noël picks up where he (and Zulueta-Fülscher) left off in the *Annual Review of Constitution-Building 2021*, and in Chapter 6 describes events in the constitution-making process in Mali, as

well as Burkina Faso—another West African country that recently underwent a military coup. Noël explains the options available to both military governments in terms of constitution-building processes and, in particular, the question of whether to replace or amend the existing constitution.

Lastly, in Chapter 7, Adem Abebe reflects on what the ‘Africanization of Democracy’ might look like. He reflects in depth on the constitutional debates over winner-takes-all politics in Kenya and how the 2010 Constitution has struggled to reduce the stakes of presidential elections. He suggests that the deepening of democracy in Africa should strengthen forms of inclusive government and provides insights into the role of the opposition in constitutional debates in Mali and Botswana.

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Chapter 1

WHAT LESSONS CAN CHILE PROVIDE TO ITS NEIGHBOURS AND BEYOND?

Kimana Zulueta-Fülscher

1.1. INTRODUCTION

The (temporary) failure of constitution-building processes is relatively frequent. Out of an average of 20 large-scale constitutional reform processes happening worldwide every year, few processes result in constitutional change. Myriad factors may contribute to these failures (see Zulueta-Fülscher 2023), and country idiosyncrasies are of course key. Still the failure of the constitution-building process that started in Chile after the October 2019 social uprising surprised analysts and observers.

As elsewhere in Latin America (see Negretto 2012; Landau 2019), voters in Chile elected representatives to sit in a Constitutional Convention mandated to produce a new constitution to be submitted to referendum. Having both an elected assembly and a referendum to ratify the new constitution is rare, as there is an assumption that elected representatives will generate a text that will on average respond to voters' demands, so holding a referendum may be unnecessary (Zulueta-Fülscher and Bisarya 2018: 11). In Chile, though, the draft was in fact rejected.

In this chapter, I analyse some of the factors contributing to this rejection, as well as its impact on the follow-up process that started in December 2022. The chapter also explores the failed attempt to start a process of constitution-building in Peru in April 2022 and the

The failure of the constitution-building process that started in Chile after the October 2019 social uprising surprised analysts and observers.

lessons that may be distilled from these experiences for countries in the region and beyond that may in the future decide to embark on (democratic and participatory) constitution-building processes.

1.2. CHILE'S 2019–2022 CONSTITUTION-BUILDING PROCESS: FACTORS CONTRIBUTING TO FAILURE

On 15 November 2019, after more than a month of social mobilization and mass protests, representatives of some of Chile's main political parties signed the 'Agreement for Social Peace and the New Constitution'. This agreement set the stage for the drafting of a new constitution for Chile and was incorporated in the 1980 Constitution through an amendment that would allow for constitutional replacement.

The agreement—and later, the amendment—provided for a referendum (eventually held on 25 October 2020) to ask Chilean voters whether they wanted a new constitution, and whether they would prefer a fully-elected constitution-making body—the Constitutional Convention—or a mixed body made up of existing parliamentarians and separately-elected representatives. With a turnout of over 50 per cent, Chilean voters overwhelmingly voiced their preference for a separate and fully elected Constitutional Convention to draft a new constitution (Sherwood and Ramos Miranda 2020).

While the first two decades after Chile's transition to democracy in 1990 had been a period of political stability and economic growth, the 1980 Constitution was increasingly perceived as unsuited to respond to some of the needs and demands of the wider population. Although several important amendments over the years had removed 'most of its authoritarian features' (Larraín, Negretto and Voigt 2023: 3; see also Heiss and Navia 2007; Correa 2023), its authoritarian origin was indelible, and a number of its key values endured even after the transition (see Couso and Coddou 2010; Heiss 2020, 2021; International IDEA 2023).

The Constitutional Convention was elected in May 2021, with an equal number of women and men, and reserved seats for Indigenous peoples—both were firsts for Chile. Participation in these elections was lower than for the referendum, with turnouts slightly above 40 per cent. The election results arguably constituted one of the factors contributing to the draft constitution ultimately being rejected in the (mandatory) referendum held on 4 September 2022. The 155-member Convention included a total of 48 non-partisan representatives in the lists of independents, in addition to 17 independent Indigenous representatives. The three-party coalitions that obtained the rest of the 80 seats were made up of a myriad of political parties, including 39 independents running under party lists. Finally, the four centre-right and right parties running under one coalition—Chile Vamos—obtained a total of 37 seats, less than the one third required to grant them a stronger negotiating position within the Convention (Figueroa et al. 2021). The Convention was, as a result, both ideologically tilted to the left and significantly fragmented (see also Tschorne 2023).

While some of the rules under which the Convention was to work were provided for in the Constitution (after the December 2019 amendment), the Convention fleshed these out in wide-reaching rules of procedure, including separate rules on the mechanisms and methodologies for civic education and public participation, and for the participation and consultation of Indigenous peoples (El Mostrador 2021). The rules took three full months to be adopted out of the 12 months the Convention had to draft and adopt a new constitution. Symptomatic of what was to happen in the negotiations on the content of the new text, the representatives became entangled in myriad discussions. These discussions included the call to lower the two-thirds majority threshold necessary for the plenary to approve the various articles of the new constitutional text (Reyes 2021)—something that was already provided for in the aforementioned agreement and the subsequent constitutional amendment (article 133). The already limited time available for the Convention to draft and adopt a new constitutional framework was, as a result, further curtailed.

The Constitutional Convention was elected in May 2021, with an equal number of women and men, and reserved seats for Indigenous peoples.

To fulfil its drafting responsibilities, the Convention was divided into seven thematic committees.¹ Membership of the different committees was on a voluntary basis, which led to some committees not being representative of the general party composition in the Convention. Unrepresentative committees and the fact that the approval threshold in the committees was lower than in the plenary—simple versus two-thirds majority—meant that articles that would only be supported by a relatively small minority in the Convention at large made it to the plenary. The plenary would then, for the most part, reject and send these back to the committee for review and resubmission. This created confusion on the part of the public. Given the widespread publicity and almost absolute transparency regarding the proceedings, the public was informed of every single committee proposal without, to a great extent, being able to understand where in the back-and-forth between committees and the plenary the given proposal was, that is, whether it had a chance of being approved in the plenary or no chance at all. Parts of the media seemed eager to take advantage of this confusion.

To be sure, not all controversial issues were rejected by the plenary. The left-leaning Constitutional Convention decided to constitutionalize issues that even representatives from the moderate left may have felt uneasy about, such as the right to abortion, extensive rights for Indigenous peoples (including the right to be consulted and to consent on issues that may affect Indigenous peoples' rights), a relatively ill-defined legal pluralism, or the 'potentially weaker protection of property rights in case of expropriation' (Larraín et al. 2023: 7). These constituted some of the 'poison pills' in Chile's constitution-making process (see Zulueta-Fülscher 2023: 17).

Beyond this, the decision-making rules provided for the plenary to vote on each and every article submitted by the different committees, but the plenary did not once debate or vote on the text as a whole. The mandate of the harmonization committee—established once

1 Political system, government, legislative power and electoral system; constitutional principles, democracy, nationality and citizenry; form of the state, regulation, autonomy, decentralization, equity, territorial justice, local governments and fiscal organization; fundamental rights; environment, rights of nature, common natural goods and economic model; judiciary, independent oversight bodies and constitutional reform; systems of knowledge, cultures, science, technology, arts and heritage (see Rules of Procedure, article 61).

the first draft constitution had been completed—was minimal, and it focused on solving some inconsistencies rather than on actively enhancing the quality of the text (Rules of Procedure, article 77).

The referendum campaign also informally started before the draft was finalized on 4 July 2022. The insufficient representation obtained by the right-wing coalition—less than one third—soon translated into its representatives either being excluded or self-excluding from negotiations with other members of the Convention. As they were unable to veto proposals in the plenary (and generally unhappy with the Convention's proceedings), some members of the coalition decided early on to work against the draft, both in and outside of the Convention. By the time the draft had been submitted for referendum, and the Convention had been disbanded, surveys had already been showing for months that a majority of voters would likely reject the draft. The campaign in favour of ratifying the draft was thereafter divided between those who supported the proposal without changes and those who argued that immediate amendments would be necessary. Beyond this, the weakness of newly elected President Boric, who was clearly in favour of the draft, turned out to be an added liability for the approval camp (see Piscopo and Siavelis 2023). The draft was ultimately rejected by more than 60 per cent of voters, with a turnout of more than 85 per cent.

1.3. CHILE'S 2022–2023 CONSTITUTION-BUILDING PROCESS: THE RETURN OF THE PENDULUM

Despite the general disappointment with the previous process, after months of negotiations most political parties represented in the Chilean Congress signed the 'Agreement for Chile' on 12 December 2022, thus launching a new constitution-building process.² On 13 January 2023, a new amendment incorporated the aforementioned agreement into the 1980 Constitution (Efe 2023).

This process was significantly more constrained than the previous one, both procedurally and substantively. In terms of process, the

² The Republican Party, a far-right party that was not interested in replacing the 1980 Constitution, did not sign the agreement and rejected the subsequent constitutional amendment. However, this party won a plurality of seats—with a total of 23 seats—in the Constitutional Council elections held on 7 May 2023.

parties agreed not to organize another entry-level referendum but to take as valid the mandate to write a new constitution given by the referendum held in May 2021. At the same time, there would again be an elected constitution-making body—the Constitutional Council—made up of 51 representatives, elected on 7 May 2023. The Constitutional Council would not be the only institution with a constitution-making mandate. A 24-member Expert Commission, established on 6 March 2023, would be responsible for producing a preliminary draft constitution to be submitted to the Constitutional Council on 6 June 2023. Half of the members of the Expert Commission were elected by the Senate and half by the Chamber of Deputies, proportionally representing the parties in each institution. The fact that the members of the Expert Commission had to receive a supermajority of four sevenths in each chamber, and the fact that both chambers, especially the Chamber of Deputies, were highly fragmented, meant that the profiles selected had to be born out of consensus, resulting in a higher number of academic experts than career politicians. Half of the members were nominated by the right-wing coalition, and half by centre-left and left political parties.

The Constitutional Council, established on 7 June 2023 had four months to approve, modify or reject the provisions in the preliminary draft. The Expert Commission would then write a report with recommendations on how to improve the text. The Constitutional Council would then need to either approve by three fifths or reject by two thirds each proposal made by the Expert Commission. Those proposals that are neither approved nor rejected would be analysed by a mixed commission, which would then make new proposals, and each of these proposals would then need to be adopted by the Constitutional Council by a three-fifths majority (see 1980 Constitution, article 152). It is unclear what would happen in the event the Constitutional Council were unable to achieve the three-fifths majority.

This may not be an issue given the composition of the Constitutional Council, where liberal and conservative parties (including the ultra-conservative Republican Party, which won more than 40 per cent of the seats in the 7 May 2023 election) have a two-thirds majority. Should the traditional right coalition—the former Chile Vamos—be able to agree with the Republican Party within the Council, they would

together be able to single-handedly accept or reject the preliminary draft submitted by the Expert Commission or any recommendations submitted thereafter. The party-controlled Expert Commission was meant to have the prerogative throughout this exercise but, given the overwhelming majority of one camp in the Council, that role may now be challenged.

The December 2022 agreement also included 12 fundamental principles that would guide and substantially constrain the constitution-drafting process (1980 Constitution, article 154). These principles significantly expanded the substantive constraints on the previous process (1980 Constitution, article 135), and include, for instance, that Chile will be a unitary but decentralized state; that Indigenous peoples will be recognized, and their rights and cultures protected; that Chile will be a social and democratic state functioning under the rule of law and aimed at promoting the common good; a state that recognizes fundamental rights and freedoms, and promotes the progressive development of social rights, always subject to the principle of fiscal responsibility; a state that provides for the separation of powers and a presidential system of government, with a bicameral legislature, as well as civilian control over the armed forces; a constitution that provides for at least four different states of constitutional emergency; and one that is committed to the protection and conservation of nature and biodiversity. To make sure that these principles are reflected in the final draft, the agreement (and the subsequent amendment) provided for the establishment of a 'Technical Admissibility Committee'. The members of the Committee were proposed in a single list by the Chamber of Deputies. This list had to be approved by a four-sevenths majority in the Chamber of Deputies and confirmed by the Senate by the same majority. The Committee is responsible for resolving claims put forward by members of either the Constitutional Council or the Expert Commission regarding provisions that allegedly infringe on any of the aforementioned principles (1980 Constitution, article 146). However, the composition of the Committee does not give either camp a sufficient majority.

In brief, in reaction to the previous process, parties in the legislature designed a new process that would give them significant, if indirect, control over proceedings. Constraints on the elected Constitutional

Council were to be ensured by two Congress-appointed bodies, the Expert Commission and the Technical Admissibility Committee. The unexpected results of the 7 May 2023 elections, and the significant plurality (and blocking majority) won by the Republican Party, make constitutional reform dependent on a party that has previously voiced its disinterest in changing the existing Constitution (see Couso 2023).

1.4. PERU'S QUEST FOR CONSTITUTIONAL REFORM: FROM FAILED CONSTITUTIONAL AMENDMENT TO FAILED SELF-COUP

While Chile's Constitutional Convention was drafting the new constitution, Peru's recently elected government was attempting to initiate a similar process to replace their 1993 Constitution, which was drafted by an elected (though not fully representative) constituent assembly after President Alberto Fujimori's 1992 self-coup (Widner 2005).³ On 25 April 2022, the recently elected President Pedro Castillo submitted a constitutional amendment bill to Peru's Congress proposing to hold a referendum on the establishment of a constituent assembly to draft a new constitution. Pedro Castillo was elected as President of Peru in June 2021, but legislative elections gave the opposition a majority in Congress. On 6 May 2022, the congressional constitutional committee, controlled by the opposition, rejected the proposal (Ámbito 2022).

Under the 1993 Constitution, and after its transition to democracy in 2001, Peru also experienced almost two decades of relative political stability, as well as sustained economic growth and poverty reduction (Carrión 2022: 210; Freeman 2023). However, the 2016 general elections marked a turning point. A polarized electoral campaign gave a very narrow victory to Pedro Kuczynski over Keiko Fujimori, daughter of the former President of Peru, Alberto Fujimori. Keiko Fujimori's party won a majority in Congress. Winning a majority in Congress had been the rule for opposition parties since the transition, but since 2016, both the legislature and the executive engaged in an unending (and constitutionally sanctioned) spiral of

³ Part of the opposition refused to participate in these elections, including Acción Popular and the Partido Aprista Peruano, a long-lived social-democratic political party that won democratic elections twice, in 1985 and 2006, with Alan García as its presidential candidate (Durand 1996: 200; Pásara 2021).

mutual obstruction and destruction, which resulted in a succession of seven presidential figures. This level of political instability clearly overshadowed even Chile's experience of political polarization.

While the Peruvian Congress can impeach the president for 'permanent moral incapacity' (1993 Constitution, article 113.2)—a dangerously vague ground that Congress recently used to remove former President Vizcarra (2018–2020), the president can also dissolve Congress if the latter has twice either censured or formally withdrawn its confidence in, Peru's Council of Ministers (1993 Constitution, article 134). The threat of constitutional impeachment and the counter-threat of congressional dissolution, in addition to the chronic crisis of representation (Muñoz 2021: 27), have substantively weakened the state's capacity and increased citizens' anger (see Gurmendi 2022).

Against this background, Pedro Castillo's presidency was marked by increasing chaos and instability. After Congress voted against his constitutional amendment proposal and his presidency was marred by allegations of corruption, his support dwindled. 'Three in four Peruvians disapproved of Castillo's chaotic presidency, which pursued no discernible policy agenda besides Castillo's persistent effort to avoid prosecution' (Freeman 2023). It all came to a head on 7 December 2022 when he announced the temporary dissolution of Congress and the establishment of an emergency government, as well as elections for a new Congress with constituent powers to draft a new constitution within nine months (El Comercio 2022). Without the support of the armed forces, and with the immediate resignation of most of his government, Castillo was promptly removed from the presidency, arrested and imprisoned (Santaeulalia and Gómez Vega 2022). His Vice President, Dina Boluarte, became the new President of Peru, and the first woman to hold that position in Peru's history.

Nationwide, Peruvians, and particularly Indigenous people from the impoverished south who had overwhelmingly supported Castillo in the elections (del Águila 2023), took to the streets to protest against his ousting and to demand the dissolution of Congress, immediate general elections and a call for a constituent assembly (Gurmendi

2022; Landa 2023).⁴ By May 2023, more than 60 protestors had lost their lives in confrontations with the police, while Congress continued to ignore their demands.

1.5. HOW CAN CHILE'S EXPERIENCE HELP PERU AND OTHER COUNTRIES IN THE NEIGHBOURHOOD AND BEYOND?

The first constitutional reform process in Chile had an immediate, though frustrated, impact in Peru; its failure has also determined the way in which the new 2023 process has been designed. In general, there are lessons that could be helpful to countries considering wholesale (democratic) constitutional reform.

Political elites reaching an agreement on the need for a new or revised constitution, and on the process to follow to draft and adopt it, can help enhance the process' legitimacy.

Perhaps most notable is the fact that the October 2019 social outburst in Chile was immediately followed by a political agreement that offered an institutional and legal way out of the crisis. This is no small feat, and one that prospered because it was sponsored by a conservative-leaning government that had previously not been keen on engaging in constitutional reform. Remarkably, political parties were also able to reach an agreement regarding the process of building a new constitution, while allowing Chilean voters to decide by referendum whether or not a new constitution should actually be drafted and which body should be responsible for that. Congress then transformed the agreement through an amendment to the 1980 Constitution which included more details of the process.

An elected and highly inclusive constituent body needs to maintain open communication channels with already-constituted institutions and stakeholder groups, as well as the

⁴ While support for convening a constituent assembly had not previously been significant, in January 2023, 69 per cent of Peruvians were in favour of such a move (IEP 2023).

capacity to negotiate across party lines within the constituent body itself.

Once Chilean voters had voiced their preference for a separately elected Constitutional Convention that would function in parallel to Congress, Congress itself was deprived of the possibility of directly influencing the constitution-making process. Initially, this did not appear to be problematic. Confidence levels vis-à-vis Congress were at an all-time low (Latinobarómetro 2021), and the Constitutional Convention needed independence from extant institutions to be able to debate and agree on a new (and perhaps innovative) constitutional framework.

At the same time, trust in political parties had also plummeted over the past decade. Awareness of this fact led to a new amendment to the 1980 Constitution (in March 2021) that provided for parity in the Constitutional Convention, as well as for the possibility to register lists of independents for the elections. Both of these measures were meant to increase the Convention's level of representation. However, the result of the elections in the end surprised political leaders, observers and analysts, as independents constituted almost two thirds of the Convention. Hence the Convention's composition was fragmented and skewed towards the left (Larraín, Negretto and Voigt 2023: 234; Tschorne 2023), with many of those left-leaning members of the Convention being independents with a relatively high level of technical capacity but little experience (and sometimes little inclination to engage) in political negotiations.

In hindsight, the constituted and constituent bodies, that is Congress and the Convention, should have engaged in open dialogue and perhaps even negotiation. While it is likely that an active role for Congress in the drafting of the new constitution would not have been accepted—especially after the results of the October 2020 referendum—innovative approaches to building a more constructive relationship between the institutions could have been helpful. For instance, Congress could have established a mixed (advisory) committee to serve as a sounding board for the Convention if a sufficient number of Convention members agreed to submit particular articles or the draft as a whole for comments. Recommendations submitted by the committee to the plenary would need to be adopted or rejected by (super)majority, thus forcing the

dialogue between both institutions. If a proposal was not approved or was rejected, a mixed commission could have been established between Congress and the Convention to develop and propose further suggestions.

If the constitution-making body is to be elected, process designers should think about ways to increase its legitimacy beyond the selection process.

While process designers focused on increasing electoral options, for example by allowing for lists of independents, to ensure a more representative constitution-making body, the modest voter turnout actually led to the underrepresentation of liberal-conservative political parties. It would appear that politically disaffected Chileans who rejected significant constitutional changes (or the process that would lead to those changes), or those who were generally disinterested in a process they did not see as immediately affecting them, decided for the most part not to go to the polls rather than vote for parties that advocated for more minimal changes to the constitutional framework. According to a survey conducted by the Universidad Católica de Chile (see Keefer and Negretto forthcoming), it appears that people who did not participate in the elections in May 2021 for the most part also rejected the draft in the referendum of September 2022. By making the September 2022 referendum mandatory and the elections to the Constitutional Convention voluntary, the process designers created an imbalance between the representation within the Convention and the body politic that was to ratify the resulting text.

Analysts have noted that, should the referendum have been voluntary, the draft would have been ratified, but would it then have been a legitimate draft if supported by less than 50 per cent of Chilean voters? On the other hand, making participation in the elections mandatory would probably have resulted in a more representative (and relatively more conservative) body. Depending on the majorities obtained by either camp, making more minimal changes to the existing constitution would have been less likely to respond to those Chileans who demanded meaningful changes. A third possibility would have consisted in establishing a threshold of participation for the elections to the Convention, for instance 50 per cent, below which the elections themselves would not have been validated.

First, candidates to the Convention would have been forced to focus their campaigns not only on winning their constituencies but also on motivating voters more generally to go to vote. This may have moderated their discourse. Second, if less than 50 per cent of voters turned out to vote, the vote would have been annulled, which may have been preferable to establishing a body that would draft a text to be later rejected in a mandatory referendum. Third, if more than 50 per cent of voters turned out to vote, the Convention would have had a higher degree of legitimacy, been more representative and perhaps had a higher likelihood of producing a draft that would be ratified.

Degrees of transparency need to be matched with a solid understanding of the process and the issues discussed.

Finally, while the process had been generally designed by political party representatives and members of Congress—including the two-thirds majority required to adopt provisions in the plenary—many details were left for the constitution-making body to decide. The fact that (1) committee membership ended up being voluntary, and hence some of the committees were unrepresentative of the Convention's composition, (2) committees could adopt provisions by a simple majority (as opposed to the two-thirds majority required in the plenary) and (3) high levels of transparency were not matched by a general understanding of the proceedings may have led to the Convention being discredited, as some of the most radical proposals from the committees—and later rejected by the plenary—made it into the public realm, through social and regular media, thereby fuelling disinformation and ultimately misconceptions regarding the draft.

Rules of procedure should facilitate deliberation within the constitution-making body around a constitutional vision and ways in which the different provisions would fit into that broader concept to build a coherent and implementable draft.

While a more empowered harmonization committee could have helped in improving the draft, giving such a committee a sufficient mandate would have required the plenary to vote on the text as a whole, in addition to voting on every single proposal for change. However, this convention decided not to deliberate or vote on the draft as a whole in the plenary (Larraín, Negretto and Voigt 2023: 239).

1.6. CONCLUSION

Some of the lessons learnt have already been appropriated as part of the 2023 process of constitution-making in Chile, and many inside and outside of the country are currently monitoring developments therein. At the same time, social and political circumstances change constantly due to dynamics both internal and external to the constitution-making body, in turn affecting the process's progression. While learning from past failures will hopefully lead to future improvements, and the eventual adoption of a broadly legitimate constitutional text, there is no guarantee that learning from the past will necessarily shield future constitution-makers from making their own mistakes or from being affected by extant political circumstances. On the other hand, failure may only be momentary, and learning from failure may eventually help to build a constitutional framework a majority can live with.

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Chapter 2

GLOBAL REVERBERATIONS: CONSTITUTIONAL RESPONSES TO THE WAR IN UKRAINE

Sharon Pia Hickey

In a global context of democratic backsliding, it is crucial to illuminate the potentially cynical exploitation of emergencies as a pretext for institutionalizing structures and mechanisms that will erode democracy in the future.

2.1. INTRODUCTION

Russia's invasion of Ukraine on 24 February 2022 sparked a deep crisis in Europe, effectively shattering a long-felt stability on the continent. The international community swiftly condemned Russia's actions before shifting to the imminent humanitarian crisis and economic disruptions on the horizon. The war has not only prompted a shift in political and military alliances, but also fuelled legislative and constitutional reforms. The latter, however, have not attracted sufficient attention. During times of insecurity, it is critical to examine quick reactions, even those that come to fruition on a wave of popular sentiment, for their long-term repercussions. Moreover, in a global context of democratic backsliding, it is crucial to illuminate the potentially cynical exploitation of emergencies as a pretext for institutionalizing structures and mechanisms that will (further) erode democracy in the future.

This chapter surveys constitutional debates and reforms initiated in response to the war in Ukraine, to highlight the expansion of military alliances, debates on neutrality, increased military spending, broader militarization and new states of exception. Collating individual state responses allows us to discern emerging patterns and anticipate their impacts in the decades to come. These changes extend beyond national borders to entrench or challenge solidarity in certain situations, affecting organizations such as the European

Union and the North Atlantic Treaty Organization (NATO), as well as multilateralism in general. Given the geographic locus of the war, the analysis is primarily focused on Europe, but it also considers global developments, including the defence of digital borders and evolving stances on common defence strategies in response to the invasion.

2.2. THE CONSTITUTIONAL BATTLEGROUND

Russia has always perceived the expansion of NATO as a threat to its sphere of influence (Tsygankov 2018). In particular, it has been wary of expansion on NATO's eastern front, and it has maintained that Ukraine's concrete steps to join NATO were a contributing factor to its invasion. While Ukraine's political orientation has fluctuated since its independence in 1991, it came to identify membership of the EU and NATO as key mechanisms of protecting its sovereignty and bolstering its defences against Russia. The 2014 Euromaidan protests galvanized this conviction, and in 2019 Ukraine amended its Constitution to proclaim the European identity of the Ukrainian people. It further used constitutional amendments to cement its place in the 'Euro-Atlantic family', its aspiration to join the EU and NATO as its 'irreversible course', and to empower and compel government officials to pursue this goal (Kyrychenko 2018).

Eight years after Russia's illegal annexation of Crimea in 2014 and the start of the war in Donbas, Russia launched a military invasion of Ukraine. As part of this invasion, Russia staged sham referendums in September 2022 in the occupied and administered territories which were widely condemned as illegitimate by the international community (Roth and Koshiw 2022). After signing 'treaties of annexation', **Russia's** Constitution was amended to add the names of four provinces—Donetsk, Luhansk, Kherson and Zaporizhzhia—to article 65, which delineates the federal structure of Russia (Federal Assembly of the Russian Federation 2022).

These constitutional manoeuvres highlight the symbolic and practical nature of constitutions, both as a reflection of national identity and as tools for shaping foreign policy. Russia's invasion and staged referendums underscore how constitutions can be used as a tool for claiming illegitimate territorial expansion, even in contravention of

international law and when rejected by the international community. As detailed below, the war has also led other countries to reassess their constitutional frameworks to reflect their shift in defence and foreign policy priorities and to respond to heightened security concerns.

2.3. GROWING MILITARY ALLIANCES

The war in Ukraine catapulted security to the top of Europe's political agenda, prompting several countries to reassess their military capabilities and alliances, thus leading to a transformation in Europe's 'security and defence constitution'—that is, the 'legal, institutional, and political arrangements governing security and defence across European States' (Moser 2022).

Triggered by the war, Russia's EU neighbours, Finland and Sweden, pursued monumental shifts after decades (or centuries) of military neutrality and nonalignment by filing for NATO membership on the same day, seeking security guarantees and a speedy accession process. **Finland**, which experienced Soviet occupation during World War II, shares an 830-mile border with Russia. While Finland has participated in numerous NATO-led operations and exercises, and it has collaborated on several projects related to security and defence, it retained an official policy of military nonalignment (Kauranen and Gray 2023). Nevertheless, on a surge of public support, Finland ended 75 years of military nonalignment and filed for NATO membership less than three months after the invasion.

Sweden likewise ended 200 years of neutrality and military nonalignment by applying for NATO membership. Although joining NATO did not necessitate a constitutional amendment, Sweden's opposition Left Party unsuccessfully pushed for a referendum, given that most of the electorate had voted for parties previously opposed to joining the alliance (Sveriges Radio 2022). Türkiye and Hungary unexpectedly opposed Sweden's and Finland's NATO accession, with Türkiye threatening to veto their applications for allegedly providing a safe haven for Kurdish armed groups such as the Kurdistan Workers' Party (PKK). With NATO membership requiring unanimity among existing members, Sweden and Finland engaged in trilateral talks

with Türkiye, leading to Sweden passing ancillary constitutional amendments related to freedom of association to address Türkiye's objections (Euronews 2022).

The constitutional amendment, approved by Sweden's Parliament in November 2022 in two rounds of voting with an intervening election, added to the constitutionally delineated limitations to freedom of association under section 24 for organizations 'which engage in or support terrorism' (Euronews 2022). The Left Party and Green Party opposed the amendment, citing ineffectiveness since terrorist activities are already criminalized under legislation. They further argued that the amendment would fundamentally change Sweden's precedent of penalizing acts rather than associations, thereby endangering democracy through the potential misclassification of democratic groups (TRT World n.d., Sveriges Riksdag 2022). The Swedish Bar Association echoed those concerns, and noted that since 'terrorism' is not defined in the Constitution, freedom of association is therefore dependant on a legislatively decided definition subject to change by a simple majority (Ek 2022).

South of Finland and Sweden, **Denmark**, also shed its reluctance to strengthen regional cooperation and integration mechanisms by joining the EU Common Security and Defence Policy. After the invasion of Ukraine, a multi-partisan parliamentary majority proposed an agreement to renounce Denmark's unique defence policy opt-out as an initially cautious signatory to the Maastricht Treaty (DIIS 2020). The narrative of those supporting the referendum centred on the need to 'stand together with the rest of Europe' (Pedersen et al. 2022), while critics raised concerns about a potential future supranational EU army that could compel Danish participation in unwanted missions (Nielsen 2022). Nevertheless, on 1 June 2022, nearly 67 per cent of those who voted approved the referendum, thus ending 30 years of Denmark's defence opt-out and signalling a shift in public attitudes towards this multilateral cooperation forum (Denmark Ministry of Foreign Affairs 2022).

2.4. INCREASING MILITARY BUDGETS

Global military expenditure has been steadily increasing in recent years. In the wake of the war in Ukraine, however, military spending surged to a record high of USD 2.24 trillion (MacKenzie 2022; Al Jazeera 2023), with the United Kingdom, Poland and Lithuania leading the push for NATO member states to meet—and surpass—NATO’s 2 per cent of gross domestic product (GDP) spending target by 2024 (Von Nahmen 2023). Non-NATO members have also increased their spending in response to the war in Ukraine. For example, in **Kazakhstan**, the decision to radically increase military spending was prompted by the realization that Kazakhstan’s forces could not withstand a situation similar to Ukraine’s, with concerns fuelled by ominously similar statements from Russian revanchists regarding both Ukraine and Kazakhstan, in which they failed to recognize (and in fact denied) the sovereign territory and statehood of these nations (Kumenov 2022).

Certain countries needed constitutional amendments to increase their military budgets. Three days after the Russian invasion, **Germany’s** government committed to raising defence spending to 2 per cent of GDP and to propel the army’s modernization through a special additional fund of EUR 100 billion. Chancellor Olaf Scholz’s address to the Bundestag on 27 February 2022, termed the ‘*Zeitenwende*’ (watershed moment) speech, marked a turning point for Germany by signalling a swift shift to a more proactive defence and foreign policy, including sending weapons to an active conflict zone. The budgetary increase was accomplished through an amendment to article 87a of the Basic Law, covering the Armed Forces. The amendment authorized the creation of a special trust ‘for the purpose of strengthening [Germany’s] ability to honour its alliance obligations and its defence capability’. The amendment also excluded this new fund from borrowing limitations constitutionally imposed under articles 115 and 109(3) of the Basic Law. The amendment was passed on 3 June 2022 with the support of 80 per cent of legislators, exceeding the two-thirds approval threshold. Despite this, critics contend that the original pledges were diluted during the first year of the war (Schmies 2022).

In the case of **Poland**, the war in Ukraine was a central factor in determining national policy in 2022. In March 2022, parliament passed a fast-tracked bill—the Homeland Defence Act—to modernize the army and increase defence spending to 3 per cent of GDP (Zylm 2023). The prime minister also sought opposition support to enact a constitutional amendment (Sejm of the Republic of Poland n.d.) that would exclude defence spending from public debt to prevent an overspend on the constitutional cap of three fifths of the value of GDP enshrined under article 216(5) of Poland’s Constitution (The First News 2022). The second proposed constitutional amendment would insert a subchapter into Chapter XI, which deals with extraordinary measures. The new clause under Chapter XIa, article 234a, would allow the seizure of assets and property without compensation in the event of an armed attack against Poland or causing a direct threat to Poland’s internal security, where it ‘may be presumed’ that these assets are being used to support the attack. While the scope of the article, exceptions and use of the seized property is to be defined by statute, the article specifies that the seized assets should be used to support those affected by the attack. The constitutional bill, which was submitted to parliament on 7 April 2022, was still making its way through the legislative process as of October 2023 (Sejm of the Republic of Poland n.d.). Commentators contend that Poland’s firm support for Ukraine, push for increased military capabilities and the prime minister’s reminder to the EU that ‘the real enemy is in the East’ underscore its aspirations for a transformative outcome: a reconfigured political order where the region becomes a counterbalance to the dominance of Western EU states (Gromada and Zeniuk 2022; Harper 2023).

2.5. DEBATES ABOUT CONSTITUTIONALIZING NEUTRALITY

For militarily nonaligned and neutral countries, the war in Ukraine has led to external and internal pressures to reconsider their long-standing policies and possibly amend their constitutions.

Switzerland, the byword for neutrality, came under intense pressure to place sanctions on Russia and confiscate Russian assets. Internationally, the nation came under the spotlight because of

the large amounts of money lodged in Swiss banks by Russian oligarchs and the Russian central bank (Leutenegger 2023). Despite adopting the EU sanctions package against Russia, Switzerland denied requests from Germany, Spain and Denmark to send Swiss-made ammunition to Ukraine (Preussen, Kijewski and Camut 2023). Debates were subsequently reignited within Switzerland about the meaning and application of neutrality, including whether there should be a stricter or more liberal interpretation (SwissInfo 2022).

Switzerland has long adhered to a legal framework of neutrality, with its 1999 Federal Constitution obliging the Swiss Federal Council and Federal Assembly to undertake measures to safeguard Switzerland's neutrality (Switzerland 1999: articles 173(1)(a), 185(1)). Switzerland contended that the EU sanctions package would not violate its obligations under the law of neutrality, making a clear distinction between multilateral diplomatic efforts to end the war through economic measures and supplying weaponry during an active conflict (Swiss Federal Department of Foreign Affairs 2022). In November 2022, a right-wing anti-EU organization, Pro Schweiz, launched a federal popular initiative to embed 'perpetual and armed' neutrality into Switzerland's Constitution. The amendment would prohibit Switzerland from joining a military or defence alliance unless it was under direct attack, and it would also ban 'non-military coercive measures' or sanctions. The proposal further specifies that Switzerland would use its permanent neutrality to prevent and resolve conflicts, including as a mediator (Swiss Federal Chancellery n.d.; SwissInfo 2022). To advance to a referendum, the Pro Schweiz neutrality initiative, which is also supported by the Communist Party and Swiss Labour party (Peoples Dispatch 2023), must collect 100,000 signatures by the expiry of the collection period on 8 May 2024.

In Ireland, the government faced domestic pressure to maintain its long-held status as neutral and militarily nonaligned. Critics accused the government of leveraging the war in Ukraine to promote European militarization and closer alignment with NATO after the prime minister and other senior officials stated that neutrality was a policy issue, and that Ireland was not 'politically or morally' neutral (Dáil Éireann 2022). This was a surprising declaration, given that military neutrality has been a core concept of Ireland's foreign policy

since independence. In response to these pronouncements, a left-wing political alliance proposed a referendum to cement neutrality in Ireland's Constitution, arguing that neutrality was generally assumed to be constitutionally protected (Dáil Éireann 2022). Although Ireland's 1937 Constitution does not enshrine neutrality per se, it establishes a framework for international relations that affirms Ireland's commitment to peace and friendly cooperation between states, adherence to the peaceful resolution of international disputes through arbitration or judicial means, and acceptance that recognized principles of international law should guide its conduct in relations with other states (Ireland 1937: article 29). While the exercise of international relations is in the domain of the executive in Ireland, with limited legislative oversight, jurisprudence mandates referendums for any new alignments that would transfer power from the state to an international body (Daly 2022). Referendums were therefore necessary for the founding agreements of the EU, but Irish voters initially rejected both the Nice Treaty and Lisbon Treaty over concerns, among other things, that the treaties would jeopardize Ireland's policy of neutrality through the creation of an EU military force (Sutherland et al. 2001; Brugha 2008). To save the treaties and assuage voters, the EU was obliged to provide assurances and a defence opt-out to Ireland. Each treaty then passed in a second referendum. The 2022 neutrality referendum bill was ultimately defeated in parliament, with the government stating that it was 'unnecessary' (Finn 2022). Nevertheless, the government announced that a national consultative forum would take place in June 2023 to debate Ireland's international security policy and chart a way forward (Ireland Department of Foreign Affairs 2023).

Even in non-neutral states, the war in Ukraine reignited debates on constitutional commitments, including in relation to military aid. A notable example is **Italy**. Article 11 of the Italian Constitution repudiates war as 'an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes'. Historically, this provision has been a point of contention, particularly regarding Italy's participation in military missions, such as those in Kosovo and Afghanistan (Pitingolo 2022). In 2021, the debate was rekindled when the Italian government decided to supply Ukraine with lethal weaponry; a decision later endorsed by the Meloni cabinet (Italy Ministry of Foreign Affairs and International

Cooperation n.d.). Article 11 has been the cornerstone of Italian pacifists' insistence against Italian involvement (direct or indirect) with international conflicts, but it is generally interpreted as preventing Italy from waging an offensive war or supplying military aid for offensive purposes (Zicchittu 2023). Nevertheless, there is ongoing debate on the contours of the article and whether its stipulations should be standalone or read in the context of other relevant constitutional articles (Spagnolo 2022).

These ongoing debates underscore the need for further discussion about the role of neutrality in a rapidly changing global landscape. While most countries in the world are formally militarily unaligned, fewer than 20 states in the world are declared as militarily neutral. Many of these states have not been 'neutral in the classical sense' for a long time (Bondolfi 2022), with room for geopolitical neutrality shrinking yet further in Europe since Russia's invasion of Ukraine. For example, in discussing the Common European Security and Defence Policy, a Member of the European Parliament from **Malta** objected that the EU was developing and augmenting military aspects of EU external interventions without regard for neutral member states (Times of Malta 2023). Indeed, the increasingly blurred lines between military and civilian aid make it difficult for neutral countries to maintain their traditional stances.

2.6. STATES OF EMERGENCY

States responded in various ways to Russia's invasion, including offers of humanitarian aid, diplomatic support and vocal support for Ukraine's territorial integrity. Several countries declared states of emergency in response to the invasion, and neighbouring countries in particular braced for incoming refugees. In **Moldova**, for example, parliament approved a 60-day state of emergency starting on 24 February 2022, during which special conditions were implemented for entering and exiting the country to control migration flow, protect refugees, and govern air space (Neagu 2022). In **Lithuania**, a member state of NATO and the EU, parliament unanimously approved a presidential decree imposing a state of emergency and deploying its army to the border regions in case of 'disturbances and provocations' from the military build-up in Belarus and Russia (Reuters 2022;

Peseckyte 2022). In March, parliament passed more controversial measures under a stricter state of emergency that limited freedom of expression and assembly, ostensibly, according to the prime minister, to limit ‘war propaganda and disinformation’ (Sytas 2022).

Citing the war in Ukraine, **Hungary** amended its Constitution in May 2022 to create a new category of legal emergency—a ‘state of danger’. According to the government, this amendment would allow quick action ‘in the event of war, armed conflict or humanitarian disaster in a neighbouring country’ to assist refugees and prevent and mitigate adverse economic effects (Hungary Today 2022). However, this amendment fits into a broader pattern of the Hungarian government’s use of states of emergency or exception to justify exertion of extraordinary legal powers. Prime Minister Viktor Orbán has previously been accused of misusing emergency powers during the Covid-19 pandemic to consolidate power and stifle dissent, and the most recent amendment underscores the potential for abusive instrumentalization of emergencies for constitutional reforms that may be misused in the future (Scheppele 2020).

2.7. INCREASED MILITARIZATION

Worldwide, militaries function under precise and rigid mandates, with their powers narrowly defined by seldom-amended constitutional provisions. Yet, as a result of the war in Ukraine and in the face of increased insecurity, several countries have amended their constitutions to expand the role and responsibilities of their security forces.

In 2022 **Singapore** amended its Constitution to establish a fourth division of the military—the Digital and Intelligence Service—adding to its army, navy and air force. Addressing parliament, Singapore’s defence minister stated that Russia–Ukraine cyberattacks illustrated the need to fight against external digital threats with a military approach (Zhang 2022). The minister argued that future wars will be hybrid in nature, combining conventional attacks and cyber espionage potentially targeting communications, financial systems, energy or transport. The potential for such attacks, he contended, necessitates a professionalized and dedicated service of ‘cyber

troops' possessing diverse skill sets in data science, psychology and anthropology, among others, to effectively harness emerging technologies like artificial intelligence and to defend Singapore's 'digital borders' (Singapore Ministry of Defence 2022).

Other countries passed constitutional amendments allowing the military to assist civilian police, giving rise to questions about the dangers of deepening and indefinite militarization of law enforcement of the separation of powers and to society at large. In June 2022, the **Seychelles** National Assembly passed a constitutional amendment to allow defence forces to enforce laws related to 'public security, environmental protection and maritime security' outside of states of emergency (Bonnelame 2022). The amendment, proposed by the attorney general, was stated to be in relation to drug trafficking and to assist law enforcement on outer islands. The president further tied the amendment to a 2008 Constitutional Review Committee recommendation to clearly delineate the function of the Defence Forces under article 163 of the Constitution (Office of the President of the Republic of Seychelles 2022). The amendment was criticized by Ombudsman Nichole Tirant-Ghérardi, who stated, 'The spectre of members of the defence forces maintaining law and order or running any essential service in the country on a permanent or semi-permanent basis does not sit well with [the] notion of democracy...'. (Bonnelame 2022). The Ombudsman joined the Seychelles Human Rights Commission and the Bar Association of Seychelles in filing a constitutional complaint stating that the amendment undermined basic democratic structures and threatened the rule of law and human rights (Bonnelame 2022). As at September 2023, a judgment is still awaited on that complaint.

In **Mexico**, the president has been increasing integration between the military and civilian police forces despite initial promises to the contrary. The military in Mexico has carried out civilian policing tasks since 2006, as part of then-President Felipe Calderón's 'war on drugs'. Subsequent presidents have continued to rely heavily on the military, and in October 2022, Mexico's Congress passed a constitutional amendment to allow the armed forces to continue performing domestic law enforcement duties until 2028. President Andrés Manuel López Obrador claimed this was necessary to tackle drug- and cartel-related violence. Less than two weeks later, the proposed

reform was approved by over half of Mexico's state legislatures, meeting the constitutional threshold to become law (Buschschlüter 2022). The following month, the Supreme Court upheld the constitutionality of the reform.

During the same period, the president announced that he was exploring ways to transfer control of the civilian National Guard to the military and allow indefinite authorization of military involvement in civilian law enforcement. Lacking the majority required for a constitutional amendment on this issue, the president pursued a successful legislative reform that transferred administrative and operational control of the National Guard to the Defence Secretariat. This reform was challenged by a coalition of over 70 civil society groups, and the Supreme Court found that the Constitution was unequivocally clear: the National Guard is a civilian institution connected to the civilian secretary of security. The president responded by criticizing the Court and pledged to advance another constitutional reform before his term ends to transfer control of the National Guard to the military (AP News 2023).

The impetus for and character of the amendments vary, but critics highlight the dangers posed by increased and indefinite militarization for the rule of law. This concern is especially prominent in conjunction with the increased use of states of emergency during the Covid-19 pandemic and the anticipated greater role of security forces in dealing with climate-change related disasters in the future. Balancing the perceived or real need for military intervention in law enforcement with the imperative to ensure due process, prevent human rights violations and strengthen civilian justice institutions is crucial to upholding the democratic principle of civilian government supremacy, especially amid growing insecurity.

2.8. CONCLUSION

The conflict in Ukraine is undeniably a turning point, potentially signalling a 'Zeitenwende' in global geopolitics. This war has instigated the crystallization of state allegiances and alliances. Some nations have sought to restate their EU-facing orientation, while others, notably Türkiye and Hungary, have seized the opportunity to

assert their geopolitical power within an evolving multipolar world. With the escalating conflict in Ukraine and the changing dynamics of international relations, the concept and practice of neutrality are under scrutiny. The question of whether to maintain, adjust or abandon neutrality principles is not merely a domestic issue for countries, it has broader implications for regional and global security as well. This conflict has not only shifted state dynamics but also markedly influenced governmental policies, by becoming an inextricable part of the constitutional discourse, whether genuine or opportunistic, or perhaps a combination of both. For instance, **Japan's** prime minister stressed the 'urgency' of reforming Japan's famously pacifist (and hitherto unamended) constitution in the face of changes to the global and regional security landscape (Iwamoto 2022). In **Mongolia**, a cited reason for a proposed transition from a semi-presidential to a parliamentary form of government was to avoid 'becoming another Kazakhstan or Ukraine' (Bayarlkhagva 2022).

The conflict has had profound effects on individual states. Its impacts have reverberated across various sectors, influencing budgets, sparking energy crises and escalating the cost of living. There is an impending threat to democracy due to the potential rise in authoritarianism and populism spurred by scarcity and insecurity. Therefore, constitutional amendments promoting or entrenching increased militarization or establishing new avenues to curtail civil rights, including freedom of assembly, association, and expression, merit particular scrutiny. The potential for governments to exploit such powers to solidify control and suppress dissent is a concerning possibility, which necessitates vigilance now and in the future.

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Chapter 3

REPUBLICANISM, DEMOCRATIZATION AND DECOLONIZATION IN THE COMMONWEALTH REALMS

W. Elliot Bulmer

Despite the rejection of republican models in previous constitutional amendment referendums, long-simmering republican debates have been reignited across the Commonwealth realms.

3.1. INTRODUCTION

The death of Queen Elizabeth II in September 2022 was a watershed moment in the constitutional history of all the Commonwealth realms. All of them had become independent after the Queen's accession to the throne in 1953. She was the only head of state they had ever known. Moreover, she was the last living link to the age of 'Imperial Britain', which has now passed. Even among those who might describe themselves as 'republicans-in-principle', the late Queen often commanded a degree of personal loyalty and respect. With her passing, that era has ended, and the same deference might not automatically be extended to King Charles III. Despite the rejection of republican models in previous constitutional amendment referendums (e.g. Australia in 1999, St Vincent and the Grenadines in 2009), long-simmering republican debates have been reignited across the Commonwealth realms.

This chapter examines these republican trends, exploring the meaning and political drivers of republicanism in the Commonwealth realms. Part 3.2 briefly summarizes recent developments towards republicanism. Part 3.3 examines the meaning of republicanism: What does the change to a republic mean? Does it really mean the completion of independence? Or is it a merely symbolic gesture—and if so, what does it symbolize? Part 3.4 discusses the drivers of republicanism: Why is this an issue now? Is it primarily a reaction to

the Queen's death? Or are there deeper changes driving it? Is it part of a wider demand for democratic reform? Finally, part 3.5 explores the institutions of a republic. If the monarchy is abolished, what is it to be replaced with, and how is that to be achieved?

Given the necessary brevity of the chapter, it cannot examine all of these questions in detail. Nevertheless, it tries to shed some light on the nature, causes and consequences of the republic debate across the Commonwealth. It concludes with the view that while republicanism is on the rise, republics are not necessarily easy to bring about. The difficulty of building sufficient consensus on a republican alternative, and the need to overcome high constitutional amendment thresholds, means that some countries could be stuck with the monarchy for a long time yet despite broad popular support, in principle, for a republic.

3.2. RECENT DEVELOPMENTS

In June 2022—notably, before the late Queen's death—Jamaica established a new Ministry for Legal and Constitutional Affairs and promised the creation of a Constitutional Reform Committee to lead a process of constitutional reform, with transition to a republic at its core (Linton 2022). The members of the Committee were not, however, selected until March 2023, when a list of 14 names was announced, including a mixture of government and opposition politicians, legal advisers both national and international, and representatives of faith groups, civil society and youth (Patterson 2023). Belize also moved closer to a republic in 2022. On 17 November of that year, the People's Constitutional Commission Act received assent. This established a 'sectoral' commission, representing 23 social, economic, cultural and civil society, and political organizations. The commissioners were sworn in on 14 November 2022, and the commission held its inaugural meeting 10 days later (Bradley 2022).

In total, at least six countries in the Caribbean region have signalled their intentions to become republics, including, in addition to Jamaica and Belize, the Bahamas, Grenada, Antigua and Barbuda, and St Kitts and Nevis (Yang 2022). However, this is not merely a Caribbean

phenomenon. Republicanism is also back on the agenda in Australia (Biar 2023). Even Chris Hipkins, the former prime minister of New Zealand, declared in favour of a republic, although he refused to make it a priority (McClure 2023).

Canada remains an outlier, at least in terms of the royalism of its political class. An opposition motion in the Canadian House of Commons, introduced by the Bloc Québécois on 25 October 2022, called for the severing of ties between the Canadian state and the monarchy. The motion was defeated by 266 to 44—with the Conservatives unanimously, and the Liberals near-unanimously, against; the left-wing NDP and the Greens were divided, and only the Bloc Québécois voted in favour (House of Commons of Canada 2023).

3.3. THE MEANING OF REPUBLICANISM

To understand the meaning of republicanism, it is necessary to dispel some common myths. Firstly, it is not a matter of independence, because the Commonwealth realms are already independent. The fact that they are independent is precisely what enables them to become republics by virtue of domestic constitutional change. Secondly, republicanism does not mean leaving the Commonwealth. Since the London Declaration of 1949, the question of whether to retain or abolish the monarchy has been separate from that of Commonwealth membership. According to Ashcroft polling, ‘clear majorities’ in all countries in the Caribbean region said that they would wish to remain part of the Commonwealth if they became republics (PR Newswire 2023).

The English—later the British—Crown came to exercise sovereignty over various territories by a combination of gift, inheritance, conquest, annexation and cession. Some of the territories thus gained were effectively annexed to the English state (e.g. Wales). Others were joined with England in an ‘incorporating Union’ that ended their independent existence through the formation of the British imperial state (e.g. Scotland). Most, however, became colonial possessions, which *belonged to* the imperial power but were not *incorporated*

into it.⁵ They were not represented in the imperial parliament at Westminster, but because they were possessions of the Crown, the Crown-in-Parliament nevertheless claimed the sovereign authority to legislate for them. Some colonies, such as Barbados and Jamaica, had their own legislative assemblies, elected on a narrow suffrage, from the beginning and only later came under the direct rule of the Crown. Most, however, began as Crown colonies under direct rule and achieved elected legislatures later. The Crown was, therefore, both the instrument and the symbol of imperial domination.

It might seem paradoxical, therefore, that for some countries the preservation of a symbolic link to the Crown was integral to their transition to independence. The Balfour Declaration (1926)⁶ and the Statute of Westminster (1931) provided the theoretical and legal foundations respectively for 'Dominion status': a status that would enable the substance of independence to be achieved while maintaining residual institutional, military, diplomatic, cultural and economic links within the British Commonwealth, represented by a common allegiance to the Crown. In the first stages of the post-World War II wave of decolonization, dominion status offered a path of least resistance to independence, as adopted by India and Pakistan in 1947, and Ceylon (Sri Lanka) in 1948 (see: Jennings 1949; 1956; Kumarasingham 2013).

The British literature on comparative commonwealth constitutionalism during the peak years of decolonization minimized the difference between keeping the monarchy and abolishing it in favour of a parliamentary republic. In the words of Sir Ivor Jennings, 'A republic is a gesture, like putting on a dinner jacket' (1963). Republicanism was presented as a symbolic rather than substantive change.

Downplaying the difference between a republic and a monarchy, so long as the mechanisms of the parliamentary system were preserved,

5 This was a very different pattern of imperial state-formation from that practiced by France, Portugal and some other European imperial powers, who insisted that their extra-European territories and their European territories were part of the same jurisdiction.

6 The Balfour Declaration described the Dominions as 'autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'.

reflected the preoccupation of late-imperial and post-colonial constitutional scholars (Sir Ivor Jennings and S.A. de Smith foremost among them) with the institutions of government, rather than the expressive aspects of constitutions. There was some recognition of the desire for 'autochthony', that is, for a constitution that fitted the needs and aspirations, even the culture and traditions, of the people adopting it. However, the notion of the constitution as the 'soul of the nation' (Ebrahim 1999) was not yet fully developed. The monarchical constitutions adopted by British Orders-in-Council at the time of independence dealt with such matters as official languages and the protected status of religious minorities or even traditional chiefs, but typically they contained nothing about the national flag, anthem or other symbols of national identity.

The idea of the republic as 'a gesture' was perhaps most sustainable in those countries where the differences between a monarchy and a republic were, indeed, largely cosmetic. India (1950–present) and Burma (Myanmar) (1947–1960), for example, established parliamentary republics where the president was a constitutional and ceremonial figurehead, bound by similar restraints and conventions as those which elsewhere bound the Governors-General (Twomey 2018; Kumarasingham 2020). These were followed by countries such as Bangladesh (1970), Sri Lanka (1972), Trinidad and Tobago (1976) and Malta (1976).

In most of post-colonial Anglophone Africa, in contrast, the abolition of the monarchy also meant the abolition of democracy. Republicanism meant either military rule (as in Nigeria and Sudan), a hyper-presidential system of government operating under an authoritarian one-party regime (as in Kenya, Ghana and Tanzania), or a personal dictatorship without even a pretence of constitutionalism (Uganda). Popular anti-imperialist appeals to republican autochthony were weaponized, if not against democracy in the abstract, then against imported forms of constitutional, parliamentary democracy, which were seen as a Western imposition (Berkeley 2002; Meredith 2013; Adejumo-Ayibiowu 2019).

This helps to explain why keeping the monarchy retains some appeal even in unlikely quarters: it stands as a barrier against something worse. As long as the Queen's head was on the banknotes and the

stamps, no megalomaniac president could put his own likeness there. Counterintuitively, the monarchy can be a 'republican' institution, in the sense that it helps to preserve the 'publicness' of the state against those who would otherwise seek to personalize power. Thus, even as they rejected British rule, elites in most Anglophone Caribbean countries at the time of independence wanted to maintain the British way of ruling—including the monarchy (O'Brien 2018: 968). In the words of S.A. de Smith, 'The last voice to incant the slogan "British is best" is likely to be a colonial nationalist on an obscure and remote island' (1961). Keeping the monarchy, if only in a symbolic figurehead role, was seen as a guarantee of democratic stability rather than as a negation of it.

This is an apparent contradiction only if we assume that monarchy and democracy are mutually antithetical, or if we regard the monarchy as inherently tainted by, and an instrument of, colonialism. In practice, however, this contradiction resolved itself, as the countries that maintained the monarchy also held on to democracy. In the Caribbean, the Crown was a popular institution, which was associated less with slavery than with its abolition (O'Brien 2018).

3.4. THE DRIVERS OF REPUBLICANISM

Republicanism today has some public support across the Commonwealth realms, although the first thing to notice is that the extent of such support varies widely between countries. According to Ashcroft polling conducted in May 2023 in all 15 realms, six (Antigua and Barbuda, Australia, Bahamas, Canada, Jamaica and the Solomon Islands) have popular majorities in favour of a republic (excluding 'don't know' and 'would not vote') (PR Newswire 2023). However, nine other realms (Belize, Grenada, New Zealand, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Tuvalu and the United Kingdom) have majorities in favour of the monarchy (PR Newswire 2023). The most monarchist realm is Tuvalu, with 71 per cent in favour of the monarchy and 26 per cent against, while the most republican are the Solomon Islands (34 per cent in favour of the monarchy and 59 per cent against) and Canada (23 per cent in favour, 47 per cent against) (PR Newswire 2023). Canada is also the

most ambivalent, with highest number of 'don't know' or 'would not vote', at 30 per cent (PR Newswire 2023).

Although it had long been predicted that the death of the Queen would have an effect on the republican debate (McKenna 2016), her death was not in itself a cause of republicanism. As already noted, Barbados became a republic in 2021, while the Jamaica Labour Party committed to a referendum on the monarchy in its 2020 manifesto (Munroe 2022).

Nevertheless, the Queen's death is an opportunity to renew and refresh the debate. A spokesperson for the Australian Republic Movement confirmed the view (McKenna 2016) that many people have a certain personal loyalty to the Queen rather than to the institution of monarchy, and the passing of the Queen opens the field to new possibilities (Biar 2023).

More broadly, however, the Queen's death personalized the demise of the old Britain. In 1953, although materially depleted by World War II and weakened by the independence of Burma (Myanmar), Ceylon (Sri Lanka), India and Pakistan, the United Kingdom was still a dominant power in Europe and the world. It still had the third largest navy.⁷ Britain remained an important trading partner, a military reassurance, a source of finance and technical expertise, a cultural power offering opportunities for elite education and an important destination of out-migration. That era is long gone, and the Queen's death makes the end of it unavoidably noticeable. At the time of independence, having a link with the British monarchy conferred prestige and legitimacy; now it feels anachronistic, perhaps embarrassing. The Ashcroft poll captured this sense of generational change: 'Most pro-republic voters in Jamaica and St Kitts said the monarchy had been good for their country in the past but makes no sense today' (PR Newswire 2023).

As well as this loss of economic influence and cultural prestige, the United Kingdom's hard power has collapsed. When Belize became independent, the monarchy was seen as necessary to keep the

⁷ Navies are complex, expensive organizations, calling upon vast reserves, technology, trained personnel and the ability to organize and mobilize resources. They enable geostrategic mobility and the control of trade. Naval power is therefore a useful proxy for global power, both economic and military (see Parry 2014).

British, who maintained a battalion-sized infantry force in Belize,⁸ invested in their security. Now, the United Kingdom would be unable to generate or deploy that scale of forces, even if it wanted to defend Belize's borders.

Another aspect of generational change is that, in contrast to the decolonization era, a monarchical safeguard against tyranny is no longer seen as necessary or effective. On the one hand, increasing confidence in the strength of democratic institutions means that a search for symbolic constitutional autochthony can now be pursued with less risk of stumbling into autocracy. On the other hand, governors-general have often been in the pocket of prime ministers and have not been able to resist aggrandizement of powers or minor acts of constitutional backsliding (O'Brien 2014). Willingness to experiment with alternative republican forms is both a sign of the maturity, and of the perceived inadequacy, of democracy in the Caribbean region; it is safe enough to be ready for improvement.

A more direct driver, at least in some countries, is a recent reassessment of the monarchy's legacies in relation to colonialism and racial justice. One might argue that if one person's death has really acted as a catalyst for republicanism, especially in the Caribbean, it was not that of the Queen, but that of George Floyd, a Black man in the United States whose murder by police in May 2020 sparked a global resurgence of racial awareness. Republicanism in the Caribbean is inspired by 'an awakening of Black consciousness across the world and in the Caribbean, in particular—largely spurred by the Black Lives Matter movement in the United States' (Yang 2022). It also benefits from 'the Windrush scandal, and the growing demand for reparations for slavery' (O'Brien 2022).

Racial issues play out differently in different countries. In Canada, a driving issue was the abuse of Indigenous children in the residential schools system. In 2022, a majority of Canadians supported calls for the Queen to apologize for the abuse (Otis 2022), which the Canadian Parliament declared to have been an act of genocide (Olawaju 2023). Although the monarch cannot be held responsible for such

⁸ Complete with armed reconnaissance, artillery, engineering and logistic support units, a flight of Royal Air Force Harrier attack aircraft, an anti-aircraft unit and a helicopter transport flight: a fully self-contained and self-supporting force.

actions, this shows how the Head of State cannot be disentangled from systemic structures of power; if those structures are seen as racist, the Head of State's position is compromised.

In the same way, a royal visit to Belize and Jamaica in 2022 was met with protestors calling for reparations and a formal apology by the royal family for their historical role in the 'enslavement and brutalization of Africans' (Yang 2022).

Nevertheless, the rhetoric of independence and decolonization features heavily in Caribbean republican discourse. The language is of 'unlinking themselves from the former empire' (Yang 2022). Independence achieved under the monarchy maintained the symbolism of empire. Parnell Campbell, the former Chair of the Constitutional Review Commission in St Vincent and the Grenadines, described the rejection of the republican constitution proposed in 2009 as a 'rejection of emancipation', claiming that, 'the people refused to be liberated from colonialism and slavery when they voted to keep the existing constitution' (Nation News 2019). A republic may indeed be a 'gesture' that does not add anything to juridical independence, but it is an important gesture that marks a desire for cultural independence. Many symbolic gestures have already been made. In the independent Caribbean, countries have their own national flags which are not—unlike in Australia and New Zealand—merely a variation on the Blue Ensign. In Jamaica, allegiance is sworn to the country, not to the monarch. Appeals to the Privy Council, in so far as these are a symbol of a country's continuing juridical subordination to the former colonial power, have recently been abolished in Saint Lucia. Becoming a republic is a continuation of this trajectory; 'the capstone of a much longer process of symbolic decolonisation' (Goddard 2022).

This Caribbean rhetoric of republicanism, focused on the symbolism of empire, colonialism, race and slavery, does not primarily consider the institutional merits of having a president instead of a governor general. The boundaries of republicanism are not always clear-cut. Besides the republican question, there are other pressures for constitutional change in the Caribbean: frustration with the narrow, exclusive, two-party majoritarian politics; a lack of checks and balances; concerns about judicial independence and the relative

weakness of fourth-branch institutions; patchy bills of rights riddled with 'savings' clauses; the death penalty and the lack of rights for sexual and gender minorities; and questions concerning economic governance (such as the awarding of public contracts); and the role of money in politics are some of the recurring issues in the region. In some countries, the republican question has been bundled together with other institutional reforms such as, but not limited to, the transfer of appellate jurisdiction from the Privy Council to the Caribbean Court of Justice, as was the case in the (rejected) 2009 referendum in Saint Vincent and the Grenadines (Bishop 2011).

In other countries, there has been an attempt to separate—for reasons of politics and presentation—the republican question from other constitutional changes. The limited scope of Barbados's 2021 reforms, simply swapping the governor general for a ceremonial president, was an example of minimal republican change—as close to a pure gesture as possible. In Jamaica, the objective, according to an interview given by the Minister of Legal and Constitutional Affairs, Marlene Malahoo Forte, is to separate the republican question, as the immediate priority, from other issues of constitutional reform that might arise in the future (Munroe 2023; O'Brien 2022). The monarchy was also treated as a standalone issue in the 2008 referendum in Tuvalu (where the proposal to establish a republic was also rejected by the voters). Of course, in Barbados and Jamaica, further constitutional change may well follow from the minimal republican proposal—their processes are ongoing at the time of writing. In Tuvalu, the rejection of a republic in the 2008 referendum did not prevent a parliamentary Constitutional Review Committee from raising the question a second time, alongside a much more far-reaching package of constitutional changes, in 2015–2019. Nevertheless, the attempt to separate them is revealing, because it shows that there is an attempt to distinguish between the symbolic change of becoming a republic and other more substantive changes to the constitutional system.

In Australia, in contrast, the republic debate has centred on the substantive, governance-related aspects. The Australian Republic Movement has proposed a complete draft constitution that does not merely swap the governor general for a president but also establishes the office of prime minister on a constitutional basis and codifies

constitutional conventions (Australian Republic Movement n.d.). In Australia, the case for the republic is being made primarily on democratic grounds rather than by linking it to decolonization. The Australian Republic Movement has, accordingly, sought to distance itself from questions of racial justice by carefully separating the question of the republic from that of representation and participation for Aboriginal and Torres Strait Islander people (Biar 2023).

3.5. REPUBLICAN INSTITUTIONS

A transition to republicanism requires two fundamental questions to be addressed: How will the head of state be chosen? and What powers will the head of state have? In relation to the first question, there are two basic choices: firstly, direct election by the people, and secondly, indirect selection by parliament or by an electoral college. In relation to the second question, the options are: firstly, to transfer to the head of state the same powers and functions as were previously exercised by the governor-general or, secondly, to give the head of state additional policymaking and political powers, so that they can be a more active counterweight to the prime minister. Since it would usually be inappropriate to give additional powers to a head of state who is not directly elected, these choices are structured into three options: (a) an indirectly selected president with—broadly—the same powers and functions as the governor-general; (b) a directly elected president with broadly the same powers and functions as the governor-general; and (c) a directly elected president with additional powers—essentially replacing parliamentary democracy with a semi-presidential form.

The 2021 amendment in Barbados adopted the first approach. The governor-general's powers and functions (which are largely ceremonial, with narrowly limited 'reserve' or discretionary powers) were transferred to a president who is selected by parliament. This was also recommended in Saint Lucia's 2011 Report (Government of Saint Lucia 2011: 118). The Australian Republic Movement proposes the second approach, with a directly elected president. However, although the final decision would be made by a national vote, the selection of the president would take place through a hybrid process, in which candidates would be put forward by parliamentary

bodies at federal, state and territorial levels; this is designed to mute partisanship and prevent the rise of a populist president who might upset the system of government. This proposal learns from the failure of the 1999 republic referendum, in which the pro-republic vote was split between those favouring the selection of a president by the proposed bipartisan appointment and those favouring direct election. The third approach—moving towards a stronger, executive presidency—has not yet been adopted (except in Kiribati, where it has been in place since independence) but has occasionally been suggested. For example, it was one of the ideas considered in Alan Disney's 2002 review of the Constitution of Tuvalu.

Where an indirectly elected figurehead presidency is recommended, a further design choice concerns the majority required. In Trinidad and Tobago, a simple majority is sufficient. Barbados, following recent reforms to the same effect as in Malta, requires a two-thirds majority in parliament for the election of the president. In principle, that rule should weed out partisan appointments and result in a president who has broad cross-party support (although it does not operate that way at present in Barbados, because the governing party has a clean sweep of the seats).

A final consideration is the process of republican change. The formal rules of constitutional amendment differ greatly between the realms. One of the reasons Barbados was able to move so swiftly to a republic is that its constitution can be amended by a two-thirds majority in parliament—which the government controlled at the time—without any need for a referendum. Elsewhere in the Caribbean—notably in Saint Vincent and the Grenadines in 2009—republican change has been thwarted by the need for a referendum (O'Brien 2018: 974). The prospect of a referendum causes caution in the other countries where they are required. As the Prime Minister of the Bahamas, Philip Davis, put it, 'The only challenge with us moving to a republic is that I can't.... I would have to have a referendum' (Ridgwell 2022).

The Australian constitution is also notoriously difficult to change. Proposed amendments need to achieve not only a referendum majority nationally but also a majority in at least four of the six states. Only eight amendments have been passed in a hundred and

twenty years. Canada's constitution has not been amended since its patriation in 1982. According to Richard Albert, the Constitution of Canada is, in practice, one of the hardest in the world to amend, especially as a transition to a republic would require the unanimous approval of all provincial legislatures (Albert 2023). Nevertheless, this has not prevented subtle changes to Canadian constitutional symbology, especially in the direction of secularism: the Canadian Parliament did not grant Charles III the title of 'Defender of the Faith' (Tasker 2023), while the redesigned emblem of the Crown of Canada removes religious imagery (Bergie 2023).

3.6. CONCLUSION: DECOLONIZATION AND DEMOCRACY

Republicanism is on the march across most of the Commonwealth realms. Generational change and the end of the era represented by the late Queen, the decline in British power and prestige, growing dissatisfaction with existing institutions and the demand for constitutional autochthony all build up pressure for the abolition of the monarchy. In the Caribbean region, however, where the realms are most densely concentrated, the demand for a republic is driven—at this time—primarily by a demand for racial justice, reparations and a more critical reassessment of the legacies of colonialism and slavery. Republicanism in the Caribbean, although not extending the political independence that has already been fully achieved, is best considered as an extension of decolonization. The most crucial part of it is a desire to break links with a monarchy that has come to represent the brutal and exploitative parts of the imperial past. In Australia, in contrast, republicanism is best understood as an extension of democracy and the desire to have an elected Australian as the head of the state.

Overcoming these hurdles poses a tactical challenge. In those places where it is needed, can a referendum in favour of a republic be passed? If there is a majority for republicanism, and agreement about the form that the republic should take, can the republic be adopted as a standalone change? Or will it always be bundled together with other demands, with the effect of dividing the pro-reform coalition? When we look at countries like Barbados and Jamaica, piecemeal

constitutional change on specific issues seems to have had a greater chance of success than 'big bang' reform, but in many places demands for a broader review of the whole political system cannot be ignored forever.

The difficulty, however, is that disagreements about the form that a republic should take, coupled with formal and informal constraints that make constitutional change difficult, might result in the failure of republican amendments despite the lack of support for the monarchy. This could result in 'zombie monarchism'—monarchy retained by default, but without enthusiasm or legitimacy.

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Chapter 4

TRANSITIONAL PROVISIONS: INSIGHTS FROM CONSTITUTION- BUILDING PROCESSES IN 2022

Sumit Bisarya

4.1. INTRODUCTION

Transitional provisions provide rules governing how the previous constitutional rules are phased out and new constitutional rules come into force. They are usually, although not exclusively, lodged at the end of a constitutional text and are rarely discussed until the main body of the constitution has been agreed, but they can be extremely contentious and carry important consequences. Perhaps the most famous example of all transitional provisions is found in article 1 section 9 of the US Constitution, which prohibited Congress from banning the slave trade for a period of 20 years.

Transitional provisions can cover a broad range of issues, including: when and how the new constitution will come into force; the status of existing law; when and how new institutions will be established, including the first elections; what happens to the tenure of existing officials; and specific time-bound rules for the transitional period (e.g. in Lithuania, the amendment procedure for certain provisions was altered for an initial period of 12 months, article 153 Constitution of Lithuania).

Transitional provisions can also be extremely contentious. The example from the US Constitution above is well known, but more recent constitution-making processes have seen drafts rejected due to specific issues in the transitional provisions. For example, most

Transitional provisions provide rules governing how the previous constitutional rules are phased out and new constitutional rules come into force.

observers attribute the Gambian National Assembly's rejection of the 2020 Draft Constitution to article 5 in the schedule dealing with transitional provisions. That article provided that the ongoing term of the incumbent president would count towards the two-term limit being introduced in the new constitutional text.

This chapter considers the texts from three constitution-making processes in 2022: Chile's draft constitution, which was put to referendum and rejected in September; Mali's draft constitution, developed by Constitutional Commissions in 2022 (see Chapter 5) and promulgated in 2023; and the constitutional text as amended through a process controlled by President Lukashenka in Belarus, as promulgated in February 2022. The discussion focuses primarily on Chile, not only because the text is more expansive and there are more issues to discuss, but also because the processes in the other two countries were unilateral with little, if any, negotiation. Nevertheless, both Mali and Belarus highlight some issues common to transitional provisions in constitution-making processes following military coups and in authoritarian contexts, respectively.

The following issues are addressed:

- breadth;
- status of incumbent officials;
- immunity from prosecution;
- timing requirements for implementation;
- monitoring implementation and default rules; and
- interim arrangements.

The purpose here is twofold. Firstly, to describe how transitional provisions played out in different constitution-making processes during 2022. Secondly, to highlight some of the key considerations and challenges in designing transitional provisions in democratic contexts (Chile), and how such provisions are also used to further the project of authoritarian constitutional reforms.⁹

⁹ For further guidance on designing transitional provisions, International IDEA is scheduled to publish a Primer on Transitional Provisions in 2024.

4.2. BREADTH

A striking feature of Chile's 2022 Draft Constitution (henceforth 'Chile draft') is its breadth of scope, and the transitional provisions are no exception. There are a total of 57 transitional provisions, many of which relate to a time frame within which legislation implementing various aspects of the constitution must be introduced. For example, within five years the president must submit a bill regulating Chile's Council of Justice (transitional provision 49), and within three years the president must submit a bill regarding protection of Indigenous, cultural and national heritage (transitional provision 57).

The quantity of transitional provisions reflects more than just the scale of transformation of the constitutional order (as opposed to Mali and Belarus where major restructuring was not on the agenda). These provisions, and the debates during the drafting of the transitional provisions, also reflect the Constitutional Convention's distrust of the incumbent political institutions. The political composition of the Convention differed significantly from that of the Congress and included many independent members with no interest in continuing a career in politics. They sought a constitution which would transform the Chilean state and society against the vested interests of the political establishment and attempted through the transitional provisions to provide mechanisms that would force political actors to implement the intent of the constitutional drafters.

The Belarus and Mali texts, on the other hand, are both brief in their transitional provisions. The relevant articles in the Belarus constitution number only eight (articles 141–148), while the Mali draft is even thinner—with a total of six articles which could be described as transitional provisions (articles 186–191, although only articles 189–190 are explicitly listed as transitional provisions). The sparsity of transitional provisions in these texts, in contrast to the Chilean text, resonates with the political context in both countries whereby the drafting authorities remained certain that they themselves would be around to oversee the early stages of constitutional implementation.

4.3. STATUS OF INCUMBENT POLITICAL OFFICIALS

All three texts provide that incumbent officials should remain in situ for the remainder of their tenure. However, there are some interesting wrinkles to consider.

Both the Belarus constitution and the Chile draft changed the rules regarding presidential term limits. In Belarus, there was no limit on the number of presidential terms under the extant constitution, and the 2022 amendments provide for an absolute limit of two terms. In Chile, under the existing constitution, there is a ban on consecutive terms, with no limit on the absolute number of terms, but the new draft allowed for one re-election with an absolute maximum of two terms (article 284.1). The question then arises: Which rule should apply to the person elected under the previous constitution but incumbent at the time the new constitution comes into force?

Unsurprisingly, the Belarus text does not apply the new term limits to the current or previous terms of Lukashenka. Instead, the clock would only start ticking after the next presidential election—making Lukashenka eligible for two more terms (article 143). The Chile draft, in contrast, specifically provides that the sitting president shall *not* be eligible for re-election (Fifth transitional provision, subsection 2).

In Mali, the relevant provisions regarding incumbent officials are found in the Transition Charter rather than in the draft constitution. Article 6 thereof provides that the mandate of the president of the transition lasts until the investiture of the new president following the first presidential elections under the Constitution, while article 9 prohibits the president and vice president of the transition from running in either the next presidential or legislative elections.

4.4. IMMUNITY FROM PROSECUTION

As with many constitution-making exercises in authoritarian or military coup contexts, the constitutions of Mali and Belarus seek to protect the current governments from future prosecution.

In Belarus, amended article 89 adds two clauses to the previous version which guarantee that the protection for the ‘immunity, honour and dignity’ of presidents is continued when they have left office. It explicitly provides that ‘a president who has ceased to exercise his powers cannot be held accountable for acts committed in connection with the exercise of his presidential powers’. Clearly these were lines drafted with Lukashenka, and his actions following the disputed elections of 2020, in mind.

In Mali, article 188 provides a sweeping statement to safeguard those covered by amnesty laws from future prosecution: ‘Acts committed prior to the promulgation of this Constitution and covered by amnesty laws may in no case be prosecuted, investigated or tried’. This enshrines a commitment from the Transitional Charter in the constitutional text, providing immunity to all those who participated in the events of 18 August 2020, leading to the transition and calls for an amnesty law to be promulgated to this effect.

Chile is no stranger to the issue of immunity for public officials, as outgoing junta leader Augustus Pinochet was made a ‘Senator for life’ following his defeat in the 1988 referendum, thus giving him immunity from domestic prosecution. The 2022 draft did not cover issues relating to amnesty, but it was an important issue in political debates at the time. Following through on a campaign promise, President Boric pardoned 12 people convicted in connection with the violence that occurred during the 2019 social uprising—a decision that was strongly criticized by the opposition.

4.5. STATUS OF INCUMBENT JUDGES AND SITTING COURTS

Constitutional transitions may often encompass broad reforms to the judiciary, which presents a particular set of challenges in the design of transitional provisions. Common scenarios include situations whereby the judiciary corps is to be renewed, in which case there may be a vetting procedure to screen sitting judges (e.g. see the Constitution of Kenya 2010, section 262), or where the architecture of the courts is reorganized, including through establishing a new Constitutional Court (e.g. as in Italy in 1948 or South Africa in 1994).

Such transitions of the judiciary require careful consideration in designing transitional provisions to balance the implementation of reforms with the independence of the judiciary and the integrity of ongoing cases.

Vetting was raised at various points in the Constitutional Convention debates in Chile but never considered seriously. However, the final draft made a number of changes to the court structure and jurisdiction—including the establishment of a judicial council, the creation of new courts, changes to the mechanisms for accessing courts and important modifications to the powers of the Constitutional Court.

In designing the transitional provisions, the considerations relevant to all new or reformed institutions applied—when the institution will be established, what happens if it is not and what happens to the existing institution and personnel. However, when courts are the subject of reform, additional transitional provision considerations arise, such as what happens to ongoing cases already filed in the courts which are to be reformed and—in the case of courts of judicial review—who adjudicates constitutional disputes until the new court is established.

The Chile draft constitution provides numerous details in transitional provisions 39–49, including on issues such as whether and how the new retirement age for judges will affect sitting judges (transitional provision 40), when and how the new specialist courts should be established (transitional provision 44), when the president must submit the bill to establish Chile’s Council of Justice and how judicial appointments and governance will take place in the interim (transitional provision 49). Of particular note are provisions on the transition from the extant Constitutional Court to the one envisaged in the draft Constitution.

A question remained regarding what should happen to ongoing cases, given that the jurisdiction and powers of the Court were to be changed. Here, transitional provision 45.1 provided that the Constitutional Court should take no new cases regarding appeals for inapplicability and set a timeline of six months for the processing and ruling on all current cases.

The tight timeline was based on the timeline provided in transitional provision 45.3 whereby the new Constitutional Court was to be established within six months, with the relevant legislation submitted to Congress within only 60 days. Given that the new Constitutional Court would be established before some of the institutions tasked with appointing its judges, special rules were also provided for the first nominations. For example, judges to be appointed by Chile's Council of Justice would, for the first bench, be appointed by the Supreme Court instead (transitional provision 45.4). Further, as the draft constitution envisaged that the renewal of membership of the Constitutional Court would be staggered, it was necessary in the transitional provisions to also provide for a system whereby the first judges appointed would serve for terms of different lengths.

4.6. TIME REQUIREMENTS FOR IMPLEMENTATION

In any constitutional transition, a number of implementing laws are required to bring into force new institutions and to reform existing institutions in line with the new constitutional order. Some constitutions have used transitional provisions to specify not only the laws which must be passed but also to stipulate a time frame by which such laws should be passed. For example, in transitional provision 3, the Argentine Constitution requires a law to be passed on popular initiatives within 18 months, while in the 2008 Maldives Constitution the transitional provisions call for a host of new institutions to be established within a specified number of days. The archetypal example of this kind of time-frame requirement is the 2010 Kenya Constitution, which contains in its fifth schedule a list of almost 50 areas of legislation which need to be passed by parliament within specified times, with the possibility of dissolution of parliament if it does not meet the deadlines (section 261).

Such transitional provisions act as constraints on the first legislature(s), and thus one can expect that in situations whereby the constitution-making body is distrustful of the sitting or incoming legislature, it is more likely to include in the form of transitional provisions detailed and demanding requirements for implementing legislation to be passed.

Indeed, this was the case with the Chile's Draft Constitution. The Constitutional Convention had a political composition which was significantly different from that of the sitting Congress, and many of the members were independent candidates who had a strong distrust of the political establishment. Thus, there was much debate over how to ensure that Congress would implement the Constitution in line with the intentions of the Convention. This distrust was evident in the transitional provisions, which contained a raft of requirements for legislation along with a demanding timeline for their initiation and passage, in addition to several mandated consultation processes. Undoubtedly, one reason behind all these transitional provisions, as discussed above, was that the envisioned scope of reform provided for in the draft constitution was vast; but certainly, distrust of the sitting Congress was a strong animus for the tightly controlled time frame. A further sign of this distrust can be found in transitional provision 7, which provides for a higher threshold for the amendment of articles in the chapter on nature and the environment for the duration of the sitting Congress's term (nature and environmental issues were one area where the positions of the majority in the Constitutional Convention differed significantly from those of Congress members). Indeed, many members in Congress considered installing a higher amendment threshold for all provisions during the term of the sitting Congress, but this was met with strong opposition.

In Mali, the brief transitional provisions section contains no such requirements, partly because the draft constitution is, to a large extent, similar to the previous 1992 Constitution in the sense that little implementing legislation is required. It is also because—despite the provision prohibiting the president of the transition from running in the elections at the end of the transition—it is likely that the military authorities in power will retain informal power over the political actors in the near future.

Similarly, in Belarus, the scope of change was much smaller than in Chile, and President Lukashenka was confident he would remain in power for at least the short to medium term, thus the transitional provisions did not require a detailed time frame for implementation. However, one exception was a new institution called the All-Belarusian People's Assembly. This unelected assembly gave constitutional status to an informal Congress which had met

periodically during Belarus's history (Yeliseyeu 2020). Lukashenka sought to portray this move as a concession to protestors in that it would take on powers previously concentrated in the Office of the President, as well as the very important issue of 'deciding on the legitimacy of elections' (article 89.6). However, the likely effect would be the opposite, as its composition would be decided by statute, and with the president's party controlling the legislature, he could be sure that the membership of the Assembly would be constructed of his loyalists. In this way, the Assembly would serve as a legitimating tool to give apparent popular consent to the actions of the president, while also using its appointment powers to ensure key state institutions were staffed with presidential loyalists. To bring this charade into effect as soon as possible, article 144 in the transitional provisions provides that the statute establishing the Assembly must be adopted within a year, and for good measure to ensure Lukashenka has absolute control, the second paragraph of the same article provides, 'In order to organize the proper work of the All-Belarusian People's Assembly, the President holding this position on the date of entry into force of the amendment to the Constitution may be elected Chairman...'

4.7. MONITORING IMPLEMENTATION AND DEFAULT RULES

While many transitional provisions contain timelines for implementing legislation to be passed, few contemplate what happens if such timelines are not respected. Provisions such as the threat of dissolution in the 2010 Kenya Constitution's transitional provisions remain very much the exception. In Kenya's Constitution, the transitional provisions also established an independent body called the Commission for the Implementation of the Constitution which was given a mandate to oversee implementation during the transitional period, including reviewing draft legislation, raising public awareness and issuing reports.

In Chile, early drafts contained a similar commission, which was also proposed in the report of the Ministry of the Secretary of the Presidency (Government of Chile 2023). However, it was removed

from later drafts. The final draft, however, did contain one provision concerning enforcement of the timelines related to the electoral law.

The draft constitution called for a revolutionized composition for the legislature which included *inter alia*, gender parity and a quota system for Indigenous peoples. Article 3 of the transitional provisions requires the president to initiate the legislative process to bring the electoral laws in line with the requirements of the new constitution within one year, but the Convention went further by also considering what should happen if the legislation were not adopted. Subsection 2 of the same article addresses this possibility by stipulating different previous laws and constitutional provisions which would be used as defaults in the event Congress did not pass new or amended electoral laws.

Providing default rules such as this is a way to ‘nudge’ (Thaler and Sunstein 2021) the Congress to act. It also provides a mechanism for ensuring that this aspect of the Constitution is implemented should Congress not act. However, speaking in general terms, setting defaults may also come with political implications, as the default rules may suit some parties more than others, thus putting those parties in a strong negotiating position when it comes to legislative bargaining.

4.8. INTERIM ARRANGEMENTS

Where constitutional changes call for the establishment of new institutions with assigned responsibilities, the question arises as to what institution carries out these functions until the institution(s) in question are up and running. For example, if a constitutional transition calls for the establishment of a new Constitutional Court to conduct judicial review, who reviews legislation for compliance with the constitution until this new Court is functional? Even if establishing the Court is the very first piece of business for the legislation following promulgation of the Constitution, who assesses the constitutionality of the Act establishing the Court (Bisarya 2016)?

In the case of Mali, article 190 simply provides that ‘until the new institutions are established, the established institutions continue

to exercise the functions and powers'. The only exception to this is that the High Court of Justice, a body appointed by the National Assembly with the sole function of deciding on impeachment cases against the president (1992 Constitution of Mali, articles 95–96), is dissolved as of the promulgation of the Constitution. As the power of impeachment under the draft constitution is given to the two houses of the legislature, and as currently no such bicameral parliament exists, it may be assumed that the president cannot be impeached until the new legislature is elected.

In Belarus, the only new institution envisioned by the draft is the All-Belarusian People's Assembly, as described above. Pending its establishment, article 145 provides that its powers will be carried out by those institutions responsible for such functions under the extant constitutional order—which would be under the control of the president, or the president's party, through the legislature.

In Chile, the existing institutions carry on until the new institutions are in place. For example, as described above the existing constitutional court would continue to function—but not take on new cases—until the new constitutional court is established. However, the above question remains valid—What would happen if the legislation establishing the new constitutional court were to be challenged? The Chile draft would appear to have a gap in this regard.

4.9. CONCLUDING REMARKS

This brief overview of transitional provisions in constitutional texts from Belarus, Chile and Mali illustrates the importance of the issues they cover, the complex intricacies of designing such provisions in situations where large-scale constitutional transformation is envisaged, and the frequency with which certain issues arise across different contexts.

The contrast between Mali and Belarus on the one hand, and Chile on the other, as well as highlighting some of the more obvious differences between the democratic contexts in these countries, emphasizes the importance of transitional provisions in contexts such as that in Chile where the drafters of the constitution distrust

the sitting legislature to implement the new constitution fully and effectively.

Lastly, despite their importance and ubiquity, as observed in the introduction to this chapter, there is little available literature on transitional provisions. We hope to address that gap with an upcoming Constitutional Design Primer, to be published in 2024.

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Constitutional texts

Where to find the constitutions referred to in this chapter

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

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Chapter 5

EXECUTIVE POWERS IN FLUX: 2022 IN SRI LANKA AND TUNISIA

Alexander Hudson

During and after economic or political crises, attention often focuses on what the executive branch did or did not do to avert disaster.

5.1. INTRODUCTION

During and after economic or political crises, attention often focuses on what the executive branch did or did not do (or could or could not do) to avert disaster. In such contexts, constitutional amendments that change the structure or powers of the executive can appear to be a good solution to perceived problems in institutional design that contributed to the crisis. Both Sri Lanka and Tunisia faced crises in 2022 that instigated major constitutional conflict and change. In the case of Tunisia, the constitution was replaced, giving the president dramatically *enhanced* powers in comparison to the other branches of the government. In contrast, in Sri Lanka, the constitution was amended to *diminish* the power of the president, empowering instead the parliament. The two cases illustrate both the common focus on executive powers in contemporary considerations of constitutional change and the significance of economic crises in motivating constitutional revisions. Moreover, their diverging attempts to solve the central problem of executive power can be instructive for countries facing similar intersections of economic and constitutional challenges.

5.2. SRI LANKA

The power of the president—particularly with regard to the appointment of senior government officials—has been a frequent point of attention in the development of the Sri Lankan constitution. The most recent constitutional amendment was a direct response to massive protests against the government’s role in creating a severe financial crisis in the country (Welikala 2022). At one point, protestors stormed the president’s residence (Davies and Fraser 2022), and they were eventually successful in forcing the resignation of the government.

As originally ratified in 1978, the constitution provided for a semi-presidential form of government (Elgie 2011), with the powers of the president rather predominant in comparison with the unicameral legislature. Constitutional amendments alternatively limiting or expanding the powers of the president (*vis-à-vis* the legislature) were passed in 2001 (17th), 2010 (18th), 2015 (19th), 2020 (20th) and 2022 (21st—originally introduced as the 22nd). As discussed in some detail below, these amendments have chiefly concerned the powers of the president to appoint members of what have been called ‘fourth-branch’ institutions (Tushnet 2021), such as the Election Commission, Public Service Commission and Audit Service Commission, but they have included a number of other provisions that relate to who may run for the office of president (chiefly in terms of citizenship and term limits). The most recent amendment is widely seen as an attempt to undo the Covid-19 pandemic-enabled power grab of the 20th amendment, as reported in the *Annual Review of Constitution-Building: 2020* (Abebe and Welikala 2021).

The recent series of amendments is indicative of a fundamental unresolved question in Sri Lankan constitutionalism regarding the optimal balance between executive effectiveness and accountability. This chain began with the 17th Amendment’s creation of a Constitutional Council that both nominated and confirmed people for presidential appointment to the fourth-branch institutions, Sri Lanka’s Supreme Court and its Courts of Appeal. The amendments that followed adjusted both the composition and powers of such a council (at times renamed the Parliamentary Council). A key issue has been the degree to which the president has been bound by the

nominations made by the Council. While the 21st Amendment's relative re-empowering of the legislature is likely to increase the accountability of the executive to both the legislature and to fourth-branch institutions, recent history suggests that it is unlikely to be the final resolution of the issue.

Some scholars place the Sri Lankan presidency at the centre of larger concerns about both democracy and development in the country. Venugopal argues that: 'Sri Lanka's executive presidency was born out of an elite impulse to create a more stable, centralised and authoritarian political structure that would overcome and reverse the negative economic effects of a populist electoral democracy... The presidency itself was rescued from crisis by the Mahinda Rajapaksa presidency (2005–2014), but at the cost of rejecting the project and rationale that gave rise to it and by embracing the electoral populism that it was created to resist' (Venugopal 2015: 673). The narrative that Venugopal develops can be seen clearly in the constitutional changes in the 17th through 21st Amendments. It also highlights the centrality of the Rajapaksa family in these developments. The pro-presidential 18th and 20th Amendments were passed under the leadership of Mahinda Rajapaksa (18th) and Gotabaya Rajapaksa (20th).

Perhaps the clearest way to illustrate the various configurations of the appointment powers of the president under the various amendments is through a table (see table 5.1 on page 79).

While the 21st Amendment appears in many ways to return presidential powers to their levels under the 19th Amendment, this is not quite the case. Critics of the amendment have pointed out that while the 21st Amendment restores the Constitutional Council, the new appointment process (for the council itself) allows the president to install allies in 7 of the 10 seats (Centre for Policy Alternatives 2022). Thus, while the president is bound to follow the recommendations of the Constitutional Council for appointments to the various Commissions that govern fourth-branch institutions (which was not the case under the Parliamentary Council it replaces), this body is not likely to have significantly different views from those of the president. In reverting to the approach of the 17th Amendment, the 21st Amendment also limits the power of the president to make

Table 5.1. The appointment powers of the president under the various amendments

17th Amendment (2001)	18th Amendment (2010)	19th Amendment (2015)	20th Amendment (2020)	21st Amendment (2022)
Constitutional Council	Parliamentary Council	Constitutional Council	Parliamentary Council	Constitutional Council
(a) the prime minister (b) the speaker (c) the leader of the opposition in parliament (d) one person appointed by the president (e) five people appointed by the president, on the nomination of both the prime minister and the leader of the opposition (f) one person nominated upon agreement by the majority or the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which the prime minister and the leader of the opposition belongs and appointed by the president.	(a) the prime minister (b) the speaker (c) the leader of the opposition (d) a nominee of the prime minister, who shall be a member of parliament (e) a nominee of the leader of the opposition who shall be a member of parliament Provided that, the people appointed in terms of subparagraphs (d) and (e) above shall be nominated in such manner as would ensure that the nominees would belong to communities which are communities other than those to which the people specified in paragraphs (a), (b) and (c) above, belong.	(a) the prime minister (b) the speaker (c) the leader of the opposition in parliament (d) one member of parliament appointed by the president (e) five people appointed by the president, on the nomination of both the prime minister and the leader of the opposition of whom two persons shall be members of parliament	(a) the prime minister (b) the speaker (c) the leader of the opposition (d) a nominee of the prime minister, who shall be a member of parliament (e) a nominee of the leader of the opposition who shall be a member of parliament Provided that, the people appointed in terms of subparagraphs (d) and (e) above shall be nominated in such manner as would ensure that the nominees would belong to communities which are communities other than those to which the people specified in paragraphs (a), (b) and (c) above, belong.	(a) prime minister (b) the speaker (c) the leader of the opposition in parliament (d) one member of parliament appointed by the president (e) five people appointed by the President, upon being nominated as follows:- <i>(i) one member of parliament nominated by agreement of the majority of members of parliament representing the government</i> <i>(ii) one member of parliament nominated by agreement of the majority of the members of parliament of the political party or independent group to which the leader of the opposition belongs</i> <i>(iii) three persons nominated by the speaker by agreement of the prime ministers and the leader of the opposition</i> (f) one member of parliament nominated by agreement of the members of parliament other than those representing the government and those belonging to the political party or independent group to which the leader of opposition belongs, and appointed by the president
Council recommends people for appointment to the Commissions	Council makes observations on appointments	Council recommends people for appointment to the Commissions, provides three options for Chairpersons of Commissions	Council makes observations on appointments	Council recommends people for appointment to the Commissions, provides three options for Chairpersons of Commissions
	Limit of two terms for presidents removed	Limit of two terms for presidents restored		
		Dual citizens may not run for office	Dual citizens may run for office	Dual citizens may not run for office
Party of sitting president: Sri Lanka Freedom Party	Party of sitting president: Sri Lanka Freedom Party	Party of sitting president: Sri Lanka Freedom Party	Party of sitting president: Sri Lanka Podujana Peramuna	Party of sitting president: United National Party

Source: Developed by the author.

appointments in other key areas by requiring the approval of the Constitutional Council for presidential appointments to the key legal institutions, including Sri Lanka's Supreme Court, Court of Appeal, Judicial Service Commission and Attorney General. Here again, the likelihood that the president is supported by 7 of the 10 members of the Constitutional Council serves to limit the check that the Council is likely to exert on the president.

The critique from the Centre for Policy Alternatives also highlighted another issue in the development of presidential powers in Sri Lanka: the concentration of ministerial portfolios in the hands of the president (Centre for Policy Alternatives 2022). In the amended text of article 44 (following the 21st Amendment), the president remains designated as the minister of defence and may take on any other portfolios they deem fit. The 21st Amendment also continues the practice established by the 20th Amendment through which the president has the power to choose ministers and is only required to consult the prime minister 'where he considers such consultation to be necessary' (article 44.(1)). While the cabinet is answerable to parliament (article 43.(2)), the president retains control of its composition and activities.

On balance then, the 21st Amendment has restored the appearance of the division of powers that prevailed under the 19th Amendment but has not in practice significantly reduced the dominance of the president over the prime minister and Cabinet. In the current Sri Lankan context, it appears that the impulses towards the 'stable, centralised and authoritarian political structure' that Venugopal identified have remained forceful. While the country had returned to a level of stability by the end of 2022, the deeper structural financial issues that provoked the 2022 protests remain unresolved. It is unlikely, then, that the 21st Amendment represents a long-term decision about the nature of presidentialism in Sri Lanka.

5.3. TUNISIA

Tunisia has been seen as having achieved some of the best outcomes from the Arab Uprisings of 2010–2011. It was the only country affected by that wave of popular mobilization to democratize

(Brownlee, Masoud and Reynolds 2015). Most relevant for the current analysis is that the 2014 constitution was celebrated for the participatory process that created it (Maboudi 2019; Maboudi and Nadi 2022), and for the compromises between Islamist and secular parties it instantiated (Netterstrøm 2015). In 2022, that constitution was replaced through a very different process, and for apparently different ends. Quite in contrast with the move in Sri Lanka to rein in the powers of the president, the new constitution in Tunisia dramatically increased the powers of the president. The two countries arrived at a moment of crisis from very different contexts of executive powers and moved in different directions.

The political and economic context in Tunisia is an important background for the constitutional change. To a slightly lesser extent than Sri Lanka, Tunisia faced serious economic challenges as the pandemic receded (Teyeb 2021). Much of the blame for this may lie with the political system established by the 2014 constitution, which empowered parliament but did not establish a strong party system (Al-Ali 2022). However, President Kais Saied's response to these legitimate problems was extraordinary. After months of intermittent protests and in the midst of a wave of Covid-19 infections, President Saied removed (and then replaced) the prime minister and suspended parliament on 25 July 2021, citing the constitutional provision for emergencies in article 80 (Deutsche Welle 2021; Parker 2021).¹⁰ Then, in March 2022, President Saied dissolved parliament after some of its members attempted to continue the body's work through an online meeting (Pérez-Peña 2022). It was in this context that the 2022 constitution was drafted.

The contrast with the participatory constitution-making process that created the 2014 constitution was stark. The president's vision of the drafting process did include opportunities for public input. The first step was a 'public consultation' through which Tunisians could use an online platform to submit their views on a set of questions about political reform. A large number of people (534,915) are reported to have participated (International Commission of Jurists 2022b). This was followed by a 'national dialogue', which some observers have characterized as 'exclusive and non-transparent' (Khan 2022).

¹⁰ It should be noted that article 80 requires parliament to remain in session throughout the emergency period.

These mechanisms were to feed into a draft authored by a National Consultative Commission.

However, whatever effectual public input there may have been at those stages was ultimately fruitless. The text submitted by the National Consultative Commission was heavily revised by the presidency before publication, and this revision to the Commission's work was denounced by the head of the Commission (Al-Ali 2022). In the month leading up to the 25 July 2022 referendum to ratify a new constitution, three texts were in circulation: an official draft released through a presidential decree, an edited version of that text released through a second presidential decree (this being the text to be ratified), and the original draft from the National Consultative Commission that they released on their own initiative (Khan 2022). Opposition parties largely encouraged a boycott of the referendum, and the new constitution was approved by nearly 95 per cent of the voters who participated (30 per cent of those eligible) (Volkman 27 July 2022a).

There has been widespread international criticism of the new constitution, chiefly on two grounds: (a) the extreme concentration of power in the hands of the president (International Commission of Jurists 2022a), (b) the many vague provisions that would require further ordinary legislation to clarify and make effective (Al-Ali 2022).

On the first point, the text is astounding in the degree to which the president is given power over the legislature, the courts and fourth-branch institutions. Provisions enhancing the power of the president or removing checks on the president's authority are found across the constitution. Some of the most notable points include: giving legislative proposals from the president priority over those of the legislature's members (article 68), removing the oversight role of the Constitutional Court and parliament during states of exception (article 96), allowing the president to bypass legislative consideration of laws (and the well-informed and substantive debate that entails) by submitting them directly to a referendum (article 97), and making the government accountable to the president rather than to the parliament (articles 101–102, 112). The power of the president may also be indirectly increased by the removal of four of the five constitutional provisions that established independent regulatory

bodies in the 2014 constitution (International Federation for Human Rights 2022). Only the Electoral Commission remains—itsself less independent than before. In their absence, the president may have more direct authority to regulate in these areas (which include broadcasting and human rights).

The significance of leaving matters to ordinary legislation quickly became clear as a new electoral law was issued by presidential decree in September 2022. The new law moved the electoral system from one of party-list-based proportional representation to a single-member district plurality system, required individual candidates to fill in their candidacy papers (rather than a party), and removed quotas for women and candidates under 35 years of age (Yerkes and Al-Mailam 2022). While there is nothing specifically unconstitutional or anti-democratic in this change, in the larger context of a new constitution that empowers the president, the new law's effect of reducing the salience of political parties can be understood as an indirect step in that direction. As might have been expected, turnout in the election for the lower chamber of the parliament was very low, at only 11 per cent in the second round in January 2023 (Amara and Mcdowall 2023). Most opposition parties (including the most influential—Ennahda) boycotted the election, contributing both to the low turnout and to an election result that tilted towards parties and movements that support the president (Volkman 2022b). The parliament (now dominated by members who support President Saied) met for the first time in almost two years in March 2023 (Ben Bouazza 2023).

The legal and practical powers of presidents in Tunisia are now at a remarkably high level. The constitutional changes have given the president full control of the government, a high level of control over the courts and the few fourth-branch institutions that remain, and a central role in the legislative process. At the same time, the change in the electoral system has further disempowered and atomized parliament. Before these changes, it appeared that two of the problems in Tunisian politics were a dysfunctional parliament filled with weak parties and competition between the prime minister and president over power (Ottaway 2021). In a sense, these problems have been resolved: parliament has a lesser role in law-making and oversight, so its lack of capacity matters less, and the prime minister

is now entirely beholden to the president, thus making conflict unlikely. However, the resolution to these issues can hardly be said to have enhanced the quality of Tunisia's democracy. International IDEA's measures of democratic performance in the Global State of Democracy Indices show that between 2017 and 2022 there were significant declines in 7 of the 17 mid-level indicators of democratic performance, namely Credible Elections, Free Political Parties, Elected Government, Effective Parliament, Civil Liberties, Judicial Independence and Civil Society.

5.4. COMPARATIVE LESSONS

Sri Lanka and Tunisia both encountered crises in 2022 that their existing institutions appeared unable to solve. In the case of Sri Lanka, the concentration of power in the hands of the president (which had been intended to provide more stability and direction) resulted in a government that appeared to have more interest in self-preservation (and personal enrichment) than delivering for the people. In the case of Tunisia, the inability of parliament to unify around a coherent legislative agenda provided a pretext for the president to seize power, first through a state of exception, and then through the replacement of the constitution. Public perceptions of the locus of responsibility for an ineffective policy response tend to fall on the institution that was preeminent at the time: the Tunisian parliament and the Sri Lankan president. Entering these crises from different levels of executive power, the two countries have since moved in different directions.

The two cases illustrate the limitations of constitutional design as a solution to structural economic or political problems (Ginsburg 2017). While constitutional design features have particular effects on policy and economic outcomes when one considers a large number of countries (Persson and Tabellini 2003), their effects in specific cases are not as predictable. As we have seen, economic crises can afflict strong and weak presidencies.

There has been a longstanding global impulse towards empowering executives at the expense of legislatures (Schneier 2006: 123), and in this way Tunisia followed the global trend, but to an exaggerated

degree. It is possible that Tunisia has now joined Sri Lanka in a form of government that Guillermo O'Donnell called 'delegative democracy' (1994). In O'Donnell's description: 'Delegative democracies rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office' (O'Donnell 1994: 59). Such a system of government may, if other conditions are propitious, result in broadly positive outcomes for development. It does not however tend to advance other goals of democracy, such as transparency, accountability or the rule of law. The recent constitutional reform in Sri Lanka can be understood to move that country on a path that is more likely to attain these ends, but the limited nature of the reform still highlights the common presidential impulse to preserve as much power as politically possible.

5.5. CONCLUSION

The Covid-19 pandemic provided a test for many constitutional orders, as various countries employed long states of emergency, high levels of new spending, and remote procedures in legislatures and courts to get through the most difficult periods. As the pandemic ended, the hoped-for second-coming of the 'roaring twenties' failed to materialize, as the pandemic was followed by high levels of inflation and the Russian invasion of Ukraine. We should therefore expect that in the next few years more countries will face compound financial and constitutional crises of the kind encountered in Sri Lanka and Tunisia.

In such circumstances, the design of the executive branch is likely to be a focus for constitutional revisions. Advocates for democracy must of course be open to the possibility that institutional disfunctions have contributed to the crisis, but comparative knowledge of the limitations of institutional design cautions us against the idea that there are simple constitutional answers to complex economic failures. Rather, the core principles of democratic constitutionalism in terms of rule by law, limited government, and checks and balances between branches are keys to stability and democratic consolidation—even in times of crisis.

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Chapter 6

REFURBISHING OR REPLACING? RESTORING CONSTITUTIONAL ORDER IN POST-COUP TRANSITIONS

Thibaut Noël

6.1. INTRODUCTION

Between August 2020 and September 2022, there were seven successful military coups d'état in Africa, namely in Mali (August 2020 and May 2021), Chad (April 2021), Guinea (September 2021), Sudan (October 2021) and Burkina Faso (January and September 2022), a sequence unprecedented in the past two decades (Hudson and Towriss 2022; Maclean 2022; Powell, Reynolds and Chacha 2022; Zulueta-Fülscher and Noël 2022).

After the seizure of power, all coup leaders announced a period of political transition, during which structural reforms would be enacted before returning to constitutional order and transferring power to a democratically elected government. In each of these countries, coup-makers sought to legitimize their position in the post-coup transition by enacting interim legal frameworks of some sort (Zulueta-Fülscher and Noël 2022). In Burkina Faso (after the January 2022 coup), Chad and Mali (after the 2020 coup), transitional charters complementing the existing constitutions were unveiled; in Guinea, a transitional charter was enacted to replace the then existing constitution; and in Sudan, the previously existing transitional constitution was partly suspended to make room for new arrangements. Besides establishing interim governing institutions, these temporary legal frameworks define broad reform objectives that transitional authorities must achieve. These broad objectives include addressing

Between August 2020 and September 2022, there were seven successful military coups d'état in Africa.

the security and governance crisis that led to the coup, as well as conducting constitutional reforms—either explicitly, through a commitment to adopt a new Constitution (Chad, Guinea and Sudan), or more implicitly through a duty to engage in institutional reforms with a view to rebuilding the state (Mali, Burkina Faso)—and holding new elections to end the transition. In all cases, constitutional reforms were planned in advance of elections.

However, these constitutional reform processes have proven controversial, notably because of profound disagreements among national stakeholders about the process, sequencing and scope of the contemplated reforms. While transitional authorities have embarked on large-scale constitutional overhauls they claim are attempts to restore democratic rule, other stakeholders consider that transitional authorities which accessed power through unconstitutional means lack the legitimacy to undertake such major reforms. Instead, these actors contend that the transition should be short, focus only on those reforms needed for organizing elections for a swift return to constitutional order, and let the newly elected government initiate a more comprehensive constitutional reform process after the transition.

This chapter focuses on constitutional reform processes during post-coup transitions in Mali and Burkina Faso. It examines the choice—and controversies—between making a new constitution and amending an existing constitution to restore constitutional order.

It begins by identifying the differences between making and amending constitutions, discussing the implications of such a distinction in post-coup settings and questioning its relevance. The next section unpacks the constitution-making process in Mali by providing details of the process and contents of the reform. The final section explores options for restoring constitutional order in Burkina Faso by taking a prospective look at the future constitutional reform process. The chapter closes with some concluding considerations on the choice between a new or amended constitution to restore constitutional order following a coup.

6.2. MAKING OR AMENDING CONSTITUTIONS IN POST-COUP TRANSITIONS

When considering the constitutional reform process, transitional authorities must decide whether to amend the constitution in force at the time of the coup or to produce a new constitutional text. Generally, this choice depends on a combination of contextual factors, such as the scope of the contemplated changes and the status and public acceptance of the existing constitution (Böckenförde 2017; Constitution Transformation Network and International IDEA 2018; Democracy Reporting International 2019). In post-coup transitions, other contextual considerations may also have an influence on this choice. Importantly, the decision whether to amend a constitution or make a new one has implications for the procedure to be followed.

Perhaps most importantly, the approach to constitutional reform in post-coup transitions may be influenced by the legitimacy of the transitional authorities. When constitutional reforms are led by actors who came to power through unconstitutional means and are not inclusive of all major political forces in the country, the constitutional process and its outcome risk lacking consensus and being contested by various segments of society. In such cases, it may be preferable to limit constitutional change to those amendments necessary for organizing free and fair elections to end the transition and for establishing a genuine system of checks and balances after the transition. A more comprehensive constitutional reform process can be pursued by future elected governing authorities after the transition period. In the two countries under consideration, coup leaders established transitional institutions allowing for some power-sharing between military and civilian authorities. However, the coup leaders held ultimate decision-making power, with civilian authorities appointed and accountable to the military leader as the head of state.

The time available for the constitutional reform may also have an influence. Making a new constitution through an inclusive and democratic process requires extensive negotiations and may involve the establishment of one or several dedicated bodies, and it therefore tends to take years. In contrast, as amendments generally focus on specific issues and are discussed within the existing legislature,

they may be quicker to achieve. Time constraints on constitutional reform processes are particularly relevant in post-coup transitions, notably due to international community responses. After the coups in Mali and Burkina Faso, the Economic Community of West African States (ECOWAS) requested a quick return to constitutional order in compliance with its mechanism for responding to such unconstitutional changes of government (ECOWAS 2001, article 45). Burkina Faso reduced its transition period from 36 to 24 months after negotiations with ECOWAS, while Mali initially committed to an 18-month transition but extended it by two years after a second coup. Although holding coup-makers to timetables has proven difficult, the time available for constitutional reform in post-coup transitions is thus limited.

Ultimately, the choice between amending the constitution in force at the time of the coup or producing a new one has implications for the procedure to be followed. Amending an existing constitution requires compliance with the amendment procedure provided for in that constitution. In contrast, a new constitution may either be produced following the amendment or replacement (if any) procedure prescribed in the existing constitution, or through a new process agreed upon and deemed legitimate by all relevant stakeholders. In Francophone jurisdictions, guided by the general principles of the original constituent power theory¹¹ and historical practices, it is relatively common to break legal continuity with the previous constitution and define a new process for making a new constitution, which usually involves a referendum for its adoption. This approach provides greater flexibility to those directing the constitutional process in determining the procedure for making and adopting the new constitution (Constitution Transformation Network and International IDEA 2018).

11 The original constituent power refers to the power to make a new constitution. This power is sovereign, absolute and cannot be subject to procedural or substantive limitations. In a democracy, the original constituent power belongs to the people. In contrast, the derived constituent power refers to the power to amend an existing constitution following prescribed rules set by the original constituent power. The derived constituent power is exercised by the institutions provided for in the existing constitution made by the original constituent power.

6.3. MALI: A CONTESTED UNILATERAL CONSTITUTION-MAKING PROCESS

The transition in Mali began following a military coup conducted on 18 August 2020 against President Ibrahim Boubacar Keita. On 1 October 2020, the coup leaders enacted a transitional charter that complements the 1992 Constitution and takes precedence in the event of contradictions (Republic of Mali 1992, 2020). The charter initially provided for an 18-month political transition period (later extended by 24 months following a second military coup on 24 May 2021), during which several reforms need to be adopted before holding elections. The tasks entrusted to the transitional authorities include ‘rebuilding the state’, ‘initiating political and institutional reforms’ and ‘implementing the 2014 Agreement for Peace and Reconciliation in Mali resulting from the Algiers process’ (Republic of Mali 2020, article 2). While these commitments imply the need for constitutional reform, the charter does not specify whether these changes must be effected through amendments to the existing 1992 Constitution or by making a new constitutional text.

6.3.1. The constitution-making process

In December 2021, the transitional government organized a series of national consultations to define the roadmap for the transition. Despite a boycott by dozens of political parties, participants in the consultations recommended the making of a new constitution (Republic of Mali 2021, recommendation 5). To implement this recommendation, Colonel Assimi Goïta, the president of the transition, appointed two consecutive constitutional commissions by presidential decree, in June 2022 and January 2023, respectively (Republic of Mali 2022, 2023a). The first commission was mandated to produce a preliminary draft of the new constitution within two months. A finalization commission was then charged with finalizing the draft within two weeks. The finalization commission submitted the final draft of the new constitution on 27 February 2023 (Republic of Mali 2023b), and its contents were ‘validated’ by the president of the transition (Maïga 2023). While neither the transitional charter nor the 1992 Constitution specify the procedure for adopting a new constitution, the new draft constitution itself requires that it be submitted to the people for approval through a simple majority vote in referendum, without a prior vote in the National Transition

Council, the interim legislative body (article 191). After originally being scheduled for 29 March 2023, the constitutional referendum was postponed to 18 June 2023 by the transitional government to allow the newly established Independent Election Management Authority (AIGE) to make the necessary preparations for the vote (RFI 2023). According to the results published by AIGE, the new constitution was approved by referendum on 18 June 2023, with a 96.8 per cent majority in favour and 38.2 per cent turnout (AIGE 2023; Cour Constitutionnelle de la République du Mali 2023). The new constitution will be the basis for a series of elections, including local elections initially scheduled for June 2023, legislative elections in October 2023 and presidential elections in February 2024. These elections would end the transition period and restore constitutional order in the country.

6.3.2. Contents of the draft constitution

The draft constitution (Republic of Mali 2023b) contains significant changes to the 1992 Constitution by envisaging replacing the semi-presidential system (Republic of Mali 1992) with a hyper-presidential system in which the president's prerogatives will be greatly expanded. The president, elected by direct universal suffrage, will be head of state and head of the executive. The president appoints the prime minister and the Council of Ministers, who are politically accountable only to the president (articles 57 and 78). As such, the president defines national policy orientation (article 44), while the prime minister and government implement it (article 76). The president has the power to enact regulatory acts to implement legislation (i.e. derived executive power) and to regulate policy areas that do not fall under the scope of the legislative domain (i.e. autonomous regulatory power) (articles 66 and 116). The president would also have wide-ranging, unchecked emergency powers (article 70), along with significant discretionary powers of appointment in the civil and military administration (article 67). In legislative matters, the president may submit bills to parliament (article 119); may require parliament, through the government, to vote on a bill in a single vote only on those amendments proposed or accepted by the government (article 122); may request the parliament, through the government, to authorize time-limited ordinances on matters reserved for parliamentary law-making (article 121); and may submit to a referendum any question of national interest or any bill relating to

the organization of state institutions after receiving the non-binding opinion of the Constitutional Court (article 60). The president also has the power to dissolve the National Assembly (article 69). What's more, while the President of the Republic is now the head of the executive branch and is thus a political actor, the president is also the guarantor of the independence of the judiciary (article 134) and as such chairs the Supreme Council of the Judiciary (article 64). The draft constitution provides for impeachment of the president by the legislature in cases of high treason, but the substantive and procedural requirements of this mechanism make it nearly impossible to implement (article 73). To summarize, the president will have regulatory power, exert significant influence over the legislative process (despite lack of political accountability to parliament), be involved in the management of the judiciary and have discretionary power for appointing much of the civilian and military administration. Thus, the draft constitution establishes a new system of government that concentrates power in the presidency and does not ensure an effective balance of powers between the branches of government (Dolumbia 2023; International IDEA 2023).

Another notable change relates to the role of the military. Besides their mission to maintain public order and protect territorial integrity against external threats, the armed and security forces would participate in the 'economic, social and cultural development and environmental protection of the country' (article 89). Furthermore, they would be responsible for 'ensuring the enforcement of the law' (article 89). This expanded role is not consistent with the principle of civilian supremacy and may create the potential for military intervention if civilian institutions break the law. Critics argue that this provision may effectively constitutionalize coups d'état (Dolumbia 2023).

Some other proposed changes are aimed at operationalizing some of the commitments made in the Agreement for Peace and Reconciliation resulting from the Algiers process concluded in 2015 between the government of Mali and the Coordination of Azawad Movements (Republic of Mali 2015). The draft constitution provides for the establishment of a Senate composed of members representing decentralized territorial authorities, traditional authorities and Malians in the diaspora (articles 95 and 97), in accordance with a commitment to increasing the representation

of northern populations in decision making at the national level. The weight of decentralized entities in legislations would likely remain limited, however, as the National Assembly would be able to make the final decision on all bills in case of disagreements between the two chambers (article 123). Similarly, while the Algiers agreement includes a commitment to establishing decentralized territorial authorities with 'extensive powers' (Republic of Mali 2015: article 5) and a transfer of 30 per cent of state budgetary revenues to decentralized authorities (Republic of Mali 2015: article 14), the draft constitution only guarantees the existence of territorial authorities and the principle of elective and free administration of decentralized institutions (articles 174 and 176). Thus, the structure, composition, responsibilities, functioning and financing of decentralized institutions are left to ordinary legislation, subject to a simple majority vote in the legislature. In other words, the commitment to extensive decentralization made during the 2014 peace negotiations does not have strong constitutional guarantees.

Despite these concerns, the draft constitution incorporates several positive advancements in comparison to the 1992 Constitution (Dolumbia 2023; International IDEA 2023). These include an eternity clause to restricting the number of presidential terms to two, with the aim of reinforcing the guarantees of democratic alternation at the highest level of the state (articles 45 and 185). It also establishes a single, non-renewable term for members of the Constitutional Court, along with a more inclusive and balanced panel of appointment authorities, to ensure greater independence of the Court (article 145). Importantly, it introduces post facto judicial review of legislation through incidental referral for enhanced protection of constitutional rights and freedoms (article 153).

Overall, given that the new electoral law may allow the President of the Transition to run in the presidential elections at the end of the transition—in contradiction with the transitional charter (Baché 2022; Diallo 2022)—and that the draft constitution guarantees immunity to past coupists (article 188), this draft constitution seems to have been tailor-made to enable the coup leader to stay in power for another 10 years with expanded constitutional powers. Under the transitional charter, the President of the Transition cannot run in the presidential and legislative elections at the end of the transition (article 9), but

the new electoral law enables military personal to run in elections on the condition they resign four months before. The current president of the transition could therefore resign from the presidency and the military four months before presidential elections and potentially run in the presidential elections.

6.3.3. A contested process and outcome

The decision to make a new constitution during the transition period has been met with opposition from various Malian political actors who believe that the focus should be on organizing elections for a swift return to civilian rule and constitutional order. Many argue that a president who came to power through a coup d'état lacks legitimacy and does not have the legal authority to initiate major reforms such as drafting a new constitution. Instead, they assert that transitional authorities should have initiated a process to amend the 1992 Constitution in accordance with the amendment procedure outlined in that Constitution to make the necessary changes for conducting elections (Daniel 2023c). This would have included establishing a new election management body and modifying the mandate of the constitutional court in relation to elections. Several political parties have also opposed the constitution-making process because it was designed by the president, without inclusive negotiations, and because the two commissions tasked with drafting the new constitution were not inclusive of all major political forces in the country (Daniel 2023c).

In addition to questioning the legitimacy of the process, various significant political stakeholders have also criticized the contents of the draft new constitution for different reasons. The Rally of Patriotic Forces (M5-RFP—a broad coalition of political parties, civil society groups and religious leaders) argues that the draft does not provide sufficient guarantees for democracy and that it excessively concentrates power in the presidency (Baché 2023; Daniel 2023c; Sogodogo 2023). Judges' unions have also voiced concerns, claiming that the draft does not provide sufficient guarantees for the independence of the judiciary (Traoré 2022). Importantly, most of the signatory groups of the 2015 peace agreements have opposed the draft constitution (Daniel 2023a; Le Monde 2023; TRT Français 2023). They consider that the draft does not reflect the commitments to extended decentralization of power and enhanced

representation of northern populations in decision-making and state apparatus, as were central to brokering the peace agreement. Over 20 Muslim organizations, including the influential Malian League of Imams, have also called for the rejection of the draft constitution (Daniel 2023b). They argue that the principle of secularism in the draft constitution does not fit with the role of religions in Malian society and that it constitutes a legacy of French colonization. They requested to define Mali as a multi-religious republic instead of a secular republic (article 30). These groups did not coordinate their efforts to campaign against the draft new constitution ahead of the referendum.

Despite these criticisms and the absence of consensus, the new Constitution was adopted by referendum on 18 June 2023, with a 96.8 per cent majority in favour and 38.2 per cent turnout according to official results (AIGE 2023; Cour Constitutionnelle de la République du Mali 2023). The constitutional referendum further exacerbated criticism of the legitimacy of the constituent process, as the adoption of the new constitution only required a simple majority of voters in the national referendum (article 191) and because the vote did not take place in Kidal region, which is controlled by signatory armed groups of the Algiers peace agreement, nor in towns under the control of jihadist terrorist groups (MODELE Mali 2023).

6.4. BURKINA FASO: OPTIONS FOR RESTORING CONSTITUTIONAL ORDER

6.4.1. Two coups, two transitional charters

Burkina Faso also experienced two coups d'état in less than a year. The first occurred on 24 January 2022, when a group of military officers led by Lt-Col Paul Henri Damiba deposed President Roch Marc Christian Kaboré. The coup was carried out following weeks of mass protests against the government's inability to stem the security collapse in the face of increasing attacks by Islamist groups on the military and civilians in the country (Douce 2021). The coup leader, Lt. Col Paul Henri Damiba, was sworn in as president on 16 February, and enacted a first transitional charter on 1 March 2022 (Republic of Burkina Faso 2022b). On 30 September 2022, the president of the transition, Damiba, was himself overthrown in a second military coup

amid divisions within the military leadership. The new coup leader, Captain Ibrahim Traoré, assumed the role of transitional president and enacted a new transitional charter on 14 October 2022 (Republic of Burkina Faso 2022b).

Both transitional charters complemented the 1991 Constitution in force before the coups and took precedence in the event of contradictions (first transitional charter preamble and article 35; second transitional charter article 24) (Burkina Faso 2022a, 2022b). However, these two charters present different approaches for returning to constitutional order. The first transitional charter provided for a 36-month transition (article 36). It tasked transitional authorities to ‘ensure a return to a democratic life based on a new Republic’ (article 2). The reference to a new republic in the wording of the first transitional charter seemed to imply the adoption of a new constitution rather than reverting to the pre-coup 1991 Constitution. However, neither this charter nor the 1991 Constitution specified the process for adopting such a new constitution. The second transitional charter shortened the duration of the transition to 21 months as of the second coup (article 21). It is also more vague regarding the type of constitutional reforms to be conducted during the transition, as it tasks transitional authorities to ‘initiate political, administrative and institutional reforms with a view to strengthening democratic culture and consolidating the rule of law’ (article 2). This formulation leaves it to the transitional authorities to determine the approach to restoring constitutional order. A decision on what would be the basis for returning to constitutional order has yet to be made in Burkina Faso.

6.4.2. Options for restoring constitutional order

From a prospective approach, national stakeholders in Burkina Faso may have several options for restoring constitutional order.

One way to proceed would be to return to the constitutional framework in place prior to the coup, namely the 1991 Constitution, as amended to 2015. The initial text of the 1991 Constitution established a hyper-presidential system that allowed the president to dominate the executive branch and exercise overarching influence on the legislative and judiciary branches. The President du Faso, who was the head of state and de facto head of the executive, could

appoint and dismiss the prime minister, their government, and all high civilian and military positions, and dissolve parliament. The executive had multiple constitutional instruments for exerting overarching influence on the legislative or bypassing it. The President du Faso also chaired the judicial council, appointed judges and six out of the nine members of the constitutional court. During the transition period following the overthrow of President Blaise Compaoré in 2014, the 1991 Constitution was amended to address some of its contentious provisions. The interim legislative body, the National Council of Transition, enacted several amendments to address some of the most contentious provisions of the 1991 Constitution before the general elections that ended that transition. These amendments introduced new guarantees for political alternation (e.g. by entrenching the two-term limit on the presidency and allowing independent candidates to run in elections); limited—to a minimal extent—a few powers of the president (e.g. excluding constitutional amendment bills from the list of bills that can be submitted directly to referendum by the president); enhanced the constitutional guarantees for the independence of the judiciary (e.g. by transferring the responsibility to appoint judges and prosecutors from the president to the judicial council and by removing the president and the minister of justice from the judicial council); and advanced the constitutional protection of human rights (notably by introducing *ex post* judicial review and broadening access to the Constitutional Council). If the 1991 Constitution (as amended in 2015) were to be used as the basis for restoring constitutional order under the ongoing transition, democratically elected institutions could consider initiating a constitution review process after the transition. However, given that the 1991 Constitution (as amended in 2015) grants a central role to the president in the governance system, the future president may not have an interest in pursuing constitutional reform.

A second approach would consist of amending the 1991 Constitution (as amended in 2015) during the transition and using the amended text as the basis for holding elections at the end of the transition. These amendments could focus on creating a better balance of power within the executive on one hand (e.g. by replacing the 'president parliamentary system' with a 'premier-presidential' type of semi-presidential system), and between the executive and the legislative branch on the other hand.

A third alternative would be to adopt the 2017 draft constitution. This draft was developed by a constitutional commission from April 2016 and December 2017 (Republic of Burkina Faso 2017). The commission consisted of 92 members, divided into 23 stakeholder groups. Notably, it included the same number of representatives from the ruling party and opposition parties, along with representatives from different functional groups including, among others, civil society organizations, religious authorities, unions and defence and security forces. Each stakeholder group selected its own representatives. Importantly, each of the 23 stakeholder groups had a veto, as the draft had to be adopted by consensus by the commission before being submitted to referendum. Compared to the 1991 Constitution (as amended in 2015), the 2017 draft constitution creates a better balance between the executive and the legislature, further tames some presidential powers (e.g. by defining a time limit on the use of the state of exceptions and by requiring the president to consult the opposition on issues of national interest), improves the independence of the judiciary (e.g. by reducing the role of the president in the selection process of members of the constitutional court), strengthens guarantees for political alternation (e.g. by providing that the two-term limit on the presidency would apply to the incumbent president at the time of the adoption of the new constitution), and expands the bill of rights. However, the system of government remains 'president-parliamentary' and the directly elected president would remain the keystone of the governing system. The president would retain authority to define the country's general policy orientations and to dismiss the prime minister at will. In addition the division of responsibilities between the president and the prime minister lacks clarity. The 2017 draft provides that the prime minister must countersign presidential acts, except acts that fall under the exclusive power of the president (article 79), but does not define what acts fall under this category. Similarly, the draft provides that in the event of cohabitation (i.e. when the president and prime minister are from different parties or coalitions), the government defines and implements the policy orientation of the state except for the *domaines régaliens* ('regalian' or 'royal' domains) reserved for the president (article 54). However, the draft does not specify what the 'regalian domains reserved for the president' are. The limited scope of changes embodied in the draft constitution can

be partly explained by the fact that it was adopted by consensus and that each stakeholder group had a veto power.

Considering the uncertainty surrounding the level of support for the 2017 draft today among the various political forces in the country, a fourth option could be to revise and adopt it during the ongoing transition.

Lastly, a fifth alternative would involve the development and adoption of a new constitutional text, which could serve as either a permanent or interim constitution. However, considering that the end of the transition and the transfer of power to newly elected institutions is scheduled for October 2023, time is limited for facilitating an inclusive and democratic constituent process that would allow for the forging of consensus among all political and societal forces. It would be challenging to achieve a brand-new text that is widely accepted and supported by the diverse national stakeholders within this timeframe.

While each of these options would have its own implications, the most crucial aspect is to ensure that all the relevant stakeholders agree upon the chosen approach and consider it legitimate. Therefore, it is essential to engage in inclusive negotiations to foster a broad consensus among key societal and political actors regarding the process for restoring constitutional order.

6.5. CONCLUDING REMARKS

The choice between amending the constitution in force at the time of the coup and making a new one to restore constitutional order arises early in post-coup transitions. This choice depends on a combination of contextual factors, including the scope of contemplated changes, the status of the existing constitution, the timing of the transition and, most importantly, the legitimacy of transitional authorities and the relationship between the military and the civilian actors during the transition. It is crucial that the approach to constitutional reform in post-coup transitions be discussed and agreed upon by all the main political forces in the country. In situations where there is no broad consensus on the transition roadmap and the transitional

authorities lack legitimacy and are not inclusive of all major political forces, it may be preferable to limit constitutional change to those amendments necessary for organizing free and fair elections to end the transition and for establishing a genuine system of checks and balances for after the transition. A more comprehensive constitutional reform process could be initiated by future elected governing authorities after the transition period.

In post-coup transitions, the international community has strongly emphasized the need for fast-track restoration of constitutional order and adherence to the transition timeline. In the case of Mali, the ECOWAS has welcomed the constitutional referendum and the promulgation of the new constitution (ECOWAS 2023a, 2023b) despite the fact that this new constitution does not comply with democratic governance standards outlined in the Protocol on Democracy and Good Governance. It is crucial for the international community to place greater importance on the process of returning to constitutional order (and not only its speed) and carefully assess the contents of the future constitutional framework. Hastily drafting a new constitutional framework without consensus may result in instability after the transition and increase the risk of future unconstitutional changes in government.

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Chapter 7

WINNER-TAKES-ALL POLITICS AND OPPOSITION EMPOWERMENT: TOWARDS 'AFRICANIZATION' OF DEMOCRACY?

Adem. K. Abebe

African societies have histories and practice of collective and legitimate, often participatory and deliberative, governance.

7.1. BACKGROUND AND INTRODUCTION

African societies—from complex empires and kingdoms to chieftaincies and small village communities—have histories and practice of collective and legitimate, often participatory and deliberative, governance. Democratic elections for the selection of powerholders and definition of relations between citizens and government and among citizens were, however, largely unknown prior to colonial experience (Wiseman 1990). Elections as the principal means of expressing consent and sources of democratic legitimacy—and means of channelling popular desire as the basis for public policies—are principally a post-1950s phenomenon, often as part of the initial post-independence political dispensation.

Under the tutelage and influence of the former colonialists, most African countries established classic majoritarian forms of democracy where the electoral winner would govern while electoral losers await their turn in the next elections. In addition to the absence of a history and established experience with electoral democracy, post-independence African states had little in the form of organized forces outside the purview of the state and capable of constraining and holding the government accountable. Moreover, the bureaucracy constituted the main source of patrimony and rent-seeking, and it was organized in an exploitative framework whereby all state institutions, public media and law enforcement bodies served the

narrow colonial interests, now replaced by post-independence leaders (Wanki and Ngang 2019). In the context of weak national identity, absence of a functioning administrative apparatus with cross-country presence, lack of experience with rule of law, and appalling economic and literacy conditions, democratic accountability had a difficult foundation upon which to emerge and endure (Fukuyama 2014)¹².

Indeed, for all their novelty and vibrancy, elections immediately before and after independence in many African countries soon gave way to *de jure* or *de facto* one-party dictatorships (Wanyande 2000). The inherited majoritarian systems of governance had little chance to gain traction and were quickly abandoned in favour of ostensible unity and consensus under the banner of one-party systems. The rejection of multiparty democracy was partly justified on the grounds of the importance of unity to propel African development, for which political competition was seen as antithetical. For instance, Tanzania's independence hero and first president, Julius Nyerere, writing on one-party government, argued that democracy does not necessarily require a 'formal opposition' (1997: 158) and 'that there can be no room for difference' in the battle to raise standards of living, eradicate disease and banish superstition and ignorance—much like the united fight against colonialism. The nation-building and development-based arguments were strengthened by historical readings that Africans were amenable to, and practiced more, 'consensual' forms of democracy, in contrast to 'majoritarian' democracy that does not ensure 'meaningful and substantive' representation (Wiredu 1996, 1997, 2001). Regardless of the intentions of proponents of one-party systems, their exclusiveness, absoluteness and abuses of power often degenerated into dictatorships, military coups and, in some cases, civil wars.

With the renewed wave of social, economic and political upheavals in the 1980s and early 1990s, many African countries revised their constitutions and (re)established multiparty elections as the only formal and legitimate channels for assuming political power. Although judicially enforceable fundamental rights were widely guaranteed, the new frameworks did not fundamentally alter the majoritarian nature of the political frameworks where elected

¹² Note, in particular, the importance of state capacity and economic development for sustainable rule of law and democratic accountability.

presidents and political groups in many contexts continue to claim and exercise almost absolute powers (similar to what Guillermo O'Donnell (1994) called 'delegative democracies' in the context of Latin America¹³). Political power remains centralized, and the bureaucracy, including law enforcement bodies and public media, lack effective autonomy and professionalism. They instead remain adjunct and patrimonial tools of ruling political cliques.

Significant improvements have been achieved under majoritarian political systems since the early 1990s, with many countries witnessing alternations of power, some more than once, even as large parts of the continent still languish under dictatorships and authoritarian regimes. Courts and independent institutions have also played a key role in protecting constitutionalism and fundamental rights (Kibet and Fombad 2017). Nevertheless, even countries that have witnessed repeated handovers of power still struggle with winner-takes-all politics, with the winning political groups exercising centralized power, dominating the bureaucracy and controlling the distribution of public resources. For instance, in Ghana, one of the icons of African democracy, winning presidential candidates often secure just over 50 per cent of the votes but appoint all mayors and chief district officers (articles 242 and 243, 1992 Constitution, as amended), even in regions where the opposition candidate won overwhelmingly. Africans remain 'dissatisfied democrats' due to the perceived unrepresentativeness of governments, and the achievement of limited 'democratic dividends' in the form of better and more equitable governance, sustainable economic growth or the delivery of basic services (Mattes 2019).

Stakeholders in several countries have increasingly framed winner-takes-all politics as the systemic and fundamental hinderance to the emergence of accountable and democratic governance and taken initial measures to address it. This chapter briefly discusses (in section 2) ongoing and historical efforts in Kenya, where winner-takes-all politics was central to the thinking in drafting the 2010 constitution and framed contestation and reform debates in the country in late 2022, and on into 2023. Section 3 briefly covers

13 'Delegative democracies rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office' (O'Donnell 1994).

attempts in 2021/2022 to recognize and address winner-takes-all politics through opposition empowerment in Mali and Botswana. The concluding thoughts draw on the reform drives to frame debates about the 'Africanization' of democracy and hope to trigger further political and intellectual engagement and experimentation.

7.2. ADDRESSING WINNER-TAKES-ALL POLITICS IN KENYA

Kenya perhaps represents a paradigmatic example of a context where majoritarian and winner-takes-all politics have been central to political and legal reform contestations and narratives. A post-independence experiment with a decentralized system ('Majimbo') and ostensibly inclusive national government was quickly altered in favour of a centralized and de facto one-party state, which was constitutionalized in 1982. The one-party system was abolished in 1991 alongside the establishment of a two-term limit on presidents and first multiparty elections, held in 1992. Nevertheless, the central government, incumbent president and his party continued to dominate politics, the bureaucracy and security sector until 2002.

In 2002, a coalition of opposition parties led by Mwai Kibaki defeated the designated successor of outgoing president Daniel Arap Moi—who completed his second and last term—partly on a platform to address winner-takes-all politics (Mueller 2008). However, the coalition subsequently collapsed, and the constitution reform process faltered after President Kibaki reneged on the coalition agreement and pursued a unilateral reform process, resulting in the rejection of the draft constitution in the 2005 referendum. The contestations and tension before and after the failed referendum, and the resulting continuity of the winner-takes-all political framework, sowed the seeds for the post-election violence in 2007 (Republic of Kenya 2008; Branch and Cheeseman 2009).

The reform process that followed African and international peace efforts led to fundamental reforms to address winner-takes-all politics through the 2010 Constitution (Cheeseman et al. 2019): a devolved system of government; 50-per-cent-plus-one majority requirement for presidential elections; formal autonomy

of the bureaucracy (notably through a strengthened civil service commission and relatively autonomous institutions responsible for security and the rule of law); a judiciary led by a powerful Supreme Court; new independent rule of law, accountability and democracy promotion institutions; and constraints on the president's power, notably through requirements for parliamentary approval of key appointments. Initial suggestions, especially by opposition-leader and then interim Prime Minister Raila Odinga, for a parliamentary system of government, which would have fundamentally redefined the political system, were not pursued (Akech 2023).

Tense electoral contestations in 2013 and 2017 showed that the laudable reforms in the 2010 Constitution had not reduced the stakes in presidential elections, and the winner-takes-all mentality largely continues. Following the judicial invalidation of the 2017 presidential elections, the main opposition candidate Raila Odinga refused to partake in the rerun and instead insisted on a number of reforms, including to the election management body (Independent Electoral and Boundaries Commission (IEBC)) (Burke 2017). The rerun was conducted without Odinga, who subsequently declared himself the 'People's president' and continued to organize protests, until 2018 when President Uhuru Kenyatta and Odinga engaged in a 'handshake' that effectively gave Odinga a co-governing role, and collapsed the official ruling-opposition divide (Mugambi 2022).

Notably, the handshake led to a consultation drive towards reforms aimed at further enhancing mechanisms to address winner-takes-all and identity politics, which resulted in the Building Bridges Initiative (BBI) towards a number of proposed constitutional (and legislative) reforms, including a shift towards a (bloated) semi-presidential system of government (Laibuta 2020), with a new prime minister and two deputy prime ministers, and office of the leader of opposition with adequate financial resources and technical capacities (Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report 2020). The handshake, however, fomented the emergence of a new opposition group led by then Vice President William Ruto, who went on to narrowly defeat Odinga in presidential elections in August 2022. Odinga continues to reject the outcome of the elections despite the Supreme Court finding no evidence to support overruling the outcome (Supreme Court of Kenya 2022b).

Ruto campaigned against the BBI reforms, which were ultimately invalidated by the Supreme Court on procedural grounds (Supreme Court of Kenya 2022a). Nevertheless, after ascending to power, perhaps in anticipation of Odinga-led protests, Ruto noted that the role of the opposition should be constitutionally recognized and strengthened, particularly in view of the ban on simultaneous candidacy in presidential and parliamentary elections. That ban entails that the losing presidential candidates—often with significant popular support—have no formal political roles. Ruto accordingly proposed to parliament that constitutional reforms be pursued to recognize the office of the leader of the opposition (Abuso 2022).

Despite the proposal, Odinga has been leading protests against what he calls an illegitimate government taking measures that have worsened the cost of living and against measures related to the electoral commission (Abuso 2023b). Odinga has also called for the re-tabling of the BBI reforms (Abuso 2023a). While Ruto has ruled out the possibility of another 'handshake', he has agreed to pursue deliberations with Odinga through bipartisan bodies (Iliza 2023). In line with the agreement, on 11 May, the coalitions led by Ruto and Odinga signed an Agreement to Establish a Structured Framework for Bipartisan Talks and Negotiations on Matters Relating to the Nation of Kenya (on file with author). The framework agreement establishes a Joint Bipartisan Dialogue Committee composed of an equal number of people from each coalition, with joint co-chairs. On the agenda are several constitutional issues, including governance issues, effective checks and balances, restructuring and reconstitution of the Independent Electoral and Boundaries Commission, the position of Leader of Opposition and safeguards to protect government and state institutions from 'capture'.

The consequences of these deliberations cannot be foretold, but they may involve enhanced roles for the leader of the opposition in governance to tackle winner-takes-all politics. In view of the protests, some Kenyan intellectuals are already blaming the presidential system of government as inherently amenable to winner-takes-all politics, and they propose inclusive politics founded on a 'modified form' of a parliamentary system of government (Akech 2023).

The drive in Kenya to balance majoritarian politics founded on free and credible elections with a more representative and inclusive democratic governance framework continues. As more and more African countries progress towards competitive elections and regular alternations of power, similar deliberations on addressing the capacity of democratic frameworks to deliver democratic dividends, improve and democratize the *exercise* of power (rather than merely *access* to power) will likely take centre stage, and with them the need to address winner-takes-all politics.

7.3. TOWARDS EMPOWERING THE OPPOSITION IN MALI AND BOTSWANA

The problem of winner-takes-all politics and enhancement of the status and participation in governance of the opposition have also been discussed in Botswana and Mali.

In Mali, one of the key outcomes of the deliberations in the Assises Nationales, finalized in December 2021, was the (re)affirmation of the status of the Leader of the Opposition. Despite the specific discussion and outcome of the process on the leader of the opposition, the draft constitution adopted in a referendum in June 2023 does not specifically mention the opposition. In this regard, while the government has not clarified what will happen to the outcomes of the Assises Nationales that have not been included in the constitution, it is possible that they could come into effect through legislation and policy.

Indeed, Mali currently has a law providing for the rights and duties of the opposition. This law was first adopted in 2000 and expanded in 2015 (Republic of Mali 2015). The revised law recognizes the opposition as a fundamental element of pluralistic democracy (article 4) and anticipates a right to be consulted on issues of major national concern (article 7). Moreover, opposition groups are entitled to access to state media in the same way as the ruling political party or coalition (article 10). Crucially, the law provides for a Leader of the Opposition selected by the opposition party with the highest number of seats in the National Assembly (article 13). The Leader is appointed through a presidential decree with the rank of a minister

and constitutes a shadow cabinet with benefits as determined by the Council of Ministers (article 15). The President and Prime Minister may consult the Leader of Opposition on matters of national interest and foreign policy. The Leader of Oppositions may also request audience on such matters and can participate in visits by of foreign dignitaries (articles 16, 17 and 18).

In view of this, the absence of reference to the opposition in the new constitution may not imply the abandonment of the outcomes of the Assises Nationales. Revisions to the law on the opposition may enhance its role further. In this regard, opposition political parties, civil society organizations and international partners working towards the promotion of democratic and inclusive governance in Mali should devise mechanisms of operationalizing the outcomes of the Assises Nationales, including on the role, powers, responsibilities and status of the opposition and the Leader of the Opposition.

Botswana has also been engaged in a constitutional review process, the outcomes of which were captured in a report released in 2022. A report by the Botswana Commission of Inquiry into the Review of the Constitution, appointed by the President, proposed the establishment of a Parliamentary Select Committee, including representation from the opposition, to participate in the appointment of the chief justice and deputy, as well as representation of the opposition in the judicial service commission (paragraphs 22.1.4, 22.1.8). As there is very little direct reference to the opposition in the current constitutional framework, these proposals could go a long way to enhancing the constitutional prominence of the opposition. Nevertheless, they represent minimal progress. Moreover, so far, it is not clear whether and how the president will take the report's proposals forward or whether the proposed reforms on the opposition will ultimately be incorporated into the constitution. They have nevertheless triggered some debate on ways of taming the presidency and addressing the winner-takes-all consequences of politics.

It is important to note that the leader of the opposition in Botswana—who is the leader of the party with the highest number of seats in parliament that is not in government—has been recognized since independence, with some key prerogatives, including the right to make official statements in parliament on matters of national

concern. Notably, the leader is also a member of a selection committee of parliament and of the business advisory committee—which is charged with overseeing the overall administration of parliament. The proposals from the Commission of Inquiry would, if adopted, promote some of these guarantees to the constitutional level.

7.4. CONCLUDING THOUGHTS: TOWARDS 'AFRICANIZATION' OF DEMOCRACY?

Historically, democratic constitutions have focused on enabling credible, free and fair electoral competition and constraining those in power, that is, constitutional institutions were visualized and designed primarily from the perspective of electoral winners. While few countries included modicums of enforceable fundamental rights and decentralization, the initial constitutional and legal frameworks of post-independence African states conferred almost absolute powers on winning political leaders and groups. As Nwabueze aptly observed, 'the President, in effect, is the chief of the new nation, and as such entitled to the authority and respect due by tradition to a chief' (1974: 106). Furthermore, ostensible developmental aspirations led to 'loosening the constitutional and legal framework established at independence and shifting its bias towards instrumentalism [with leaders above the law, which was merely their tool]' (Ghai 1991: 8). In view of the predominance of the state and government as the primary political and economic actor, and the overlap between party and state/government, the majoritarian democratic model effectively engendered winner-takes-all politics and what Kwasi Wiredu decried as 'institutionalized uncooperativeness' founded on traditional checks and balances (cited in Jacques 2011: 1025).

Despite improvements in the post-1990 democratic dispensations, there is a growing realization that even where competitive elections have become the norm and resulted in alterations of power, the exercise of power remains paradigmatically winner-takes-all, and popular satisfaction with the delivery of democratic dividends remains low. This fundamentally undermines the legitimacy of state institutions, and accountable, responsive and effective governance, and in turn development and stability. While access to power has,

over time, become more democratized, the exercise of power remains non-democratic, with 'imperial' presidencies still prevalent along with pervasive levels of corruption and ineffectiveness (Prempeh 2007: 497). Even countries that have seen repeated alternation of power are struggling to deliver democratic dividends. In this context, Wiredu wrote that 'the majoritarian democracies transplanted [in Africa], sometimes with the encouragement of external economic well-wishers, are in many cases, uniquely unsuitable' (2001: 233). Wiredu consequently expressed hope for 'the elimination of the gross blemishes of majoritarian democracy that in post-colonial Africa have been so utterly crippling in their effects' (2001: 243–44). Fukuyama similarly warned readers to be 'wary of foreigners bearing gifts of institutions' (2014: 320).

The increasing focus on enhancing democratic dividends (beyond enabling and achieving competitive elections and alternation of power) is likely to see attempts at tackling arrangements and problems that are at the root of winner-takes-all politics. This may include the promotion and empowerment of decentralized levels of government, to ensure the separation of policymaking political institutions (the cabinet) from the autonomous, capable, professional and accountable administration/bureaucracy (including law enforcement institutions), effective checks and balances—especially in the form of empowered and independent judiciaries, depoliticization and representativeness of key democracy and rule of law promotion institutions ('fourth-branch' institutions, such as electoral commissions)—and, as this contribution noted, the inclusion of the opposition in governance.

The constitutional developments discussed here—and others through legislation and related instruments—raise broader and enduring normative and practical questions regarding the imagination and operationalization of democracy in Africa, particularly concerning the majoritarian understanding founded on a ruling–opposition divide and its winner-takes-all consequences. Prominent African philosophers and political leaders have envisaged and proposed more 'consensual' (non-party) as opposed to 'majoritarian' forms of democracy drawing on historical African heritages (Wiredu 1997: 310). More recently, an assessment of popular preferences also observed that Africans favour 'consensus democracy', which is one

that 'places limits on the extent of political competition, but without compromising the principle of political accountability' (Cheeseman and Sishuwa 2021).

The nascent and growing move towards including the opposition in governance in Africa is in line with Principle V of the Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government (AHG/Decl.5 (XXXVI)), which calls for the 'recognition of a role for the opposition'. The Declaration also specifically calls for 'guaranteeing access to the media for all political stake-holders'. Nevertheless, practical and comprehensive outlines of ways in which to operationalize these (alternative) visions of democratic frameworks remain sketchy.

A comprehensive observation and assessment of this shift in constitutional conception and practice to identify the various modalities of opposition empowerment at the constitutional, legislative and other levels may be necessary to interrogate its prevalence, consequences and future trajectories. Whether these shifts represent a deeper rethinking to 'Africanise' democratic representation, and particularly whether they seek to minimally operationalize Wiredu's proposition for 'democracy by consensus', requires further investigation. What is clear is that the African public would prefer a democratic framework that strikes a balance in favour of cooperation and inclusivity over adversarial winner-takes-all politics. This turn towards inclusive and cooperative politics may be particularly interesting in places where politics is not pursued alongside sufficiently clear social, political and economic ideologies and classes or leadership values. Constitutional thinkers and makers should grapple with how best to give effect to this evolving popular democratic imagination.

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