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### Replicate, reform or reject?

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# Annual Review of Constitution-Building: 2019





# **Annual Review of Constitution-Building: 2019**

Adem Abebe, Sumit Bisarya, W. Elliot Bulmer, Erin C. Houlihan  
and Thibaut Noel

With additional and particular thanks to Anna Dziedzic, Rohan  
Edrisinha, Tom Ginsburg, Christina Murray, Gabriel Negretto and  
William Partlett

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International IDEA  
Strömsborg  
SE-103 34 Stockholm  
Sweden  
Telephone: +46 8 698 37 00  
Email: [info@idea.int](mailto:info@idea.int)  
Website: <<https://www.idea.int>>

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## Preface

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The 2020 edition of the *Annual Review of Constitution-Building* marks the end of a decade that has been critical for democracy and for International IDEA. As the global democracy landscape faces increasing challenges related to backsliding and institutional fragility, International IDEA has stepped up its efforts to strengthen and advance democracy around the world, with constitution-building as a key pillar of our work. Notably, the publication of this Annual Review also marks the 25th anniversary of International IDEA, a year of celebration but also reflection about the past, present and future of democracy.

Constitutions are crucial to democracy and good governance, peacebuilding and conflict transformation, state building and rule of law, human rights and accountability. Understanding these relationships and trends, developing relevant knowledge resources and using them to assist ongoing transformation processes is an important element of our work to support democracy and development.

Since its launch in 2013, the Annual Review has become one of the leading resources among professionals and practitioners in the global constitution-building community. At a time when the need for shared knowledge and comparative experiences is stronger than ever before, International IDEA is pleased to contribute its knowledge and resources to global discussions on constitution-building processes and constitutional design.

International IDEA is privileged to work alongside national stakeholders and international partners in many of the countries discussed in this edition. We are proud to have been part of inclusive processes that can contribute to the stability of political settlements, sustainable peace and democratic resilience. The examples and insights shared in this edition show the strength of International IDEA as both a producer of global comparative knowledge and a provider of technical assistance with on-the-ground, direct experience.

Our expertise—along with our network of international constitution-building and peacebuilding advisors, practitioners and scholars—enables us to reflect on trends, developments and changes in constitution-building processes and constitutional design choices around the world. We emphasize the importance of national ownership and of adapting—not adopting—comparative practice to the specific national context, and of providing options—not solutions—based on comparative practice.

In addition to covering the latest developments in constitution-building trends around the world, this year's edition of the Annual Review includes a discussion with some of our international partners and colleagues. They reflect on a decade of constitution-building processes with the aim of providing useful insights for the decade to come.

Dr Kevin Casas-Zamora  
Secretary-General  
International IDEA

# Introduction

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Erin C. Houlihan

Each year, International IDEA's *Annual Review of Constitution-Building* addresses events and developments in constitution-building processes and constitutional transitions around the world in the past year. This seventh edition, covering developments in 2019, marks the end of a decade. As with previous years, the chapters discuss a range of issues related to both process and design considerations. All chapters take a comparative perspective.

The chapters are connected, broadly speaking, to challenges and developments in managing participation and elite consensus-building in constitutional reform processes, and in negotiating the distribution and exercise of power in transitioning and post-conflict states. Key issues relate to challenges in sustaining constitutional pacts, structuring territorial power and autonomy, and designing ways to engage the public.

Because 2019 marks the close of a decade, International IDEA engaged in a series of discussions with international experts and scholars to identify key insights and reflections on the evolution of constitution-building over the past 10 years. Chapter 1 summarizes the key takeaways from these discussions. The commentary highlights notable trends, identifies recurring issues and key innovations, examines the shifting role of the international community, and ponders some successes and challenges in constitution-building as a means of promoting peace and democracy.

Chapters 2 and 3 consider developments in 2019 from the perspective of two distinct yet related notions, or aspects, of constitutions and constitution-building processes, which are sometimes in tension with one another—constitutions as the result of pacts between elites, and constitutions as an expression of the shared vision and values of 'the people' as determined through robust public

participation processes. In Chapter 2, Adem Abebe looks at challenges with sustaining constitutional pacts, and considers design mechanisms to protect against backsliding when power balances change. To ensure that these pacts are secure, constitutions often include guarantee mechanisms, most commonly in the form of stringent amendment procedures. Abebe examines the cases of Guinea and Zimbabwe and considers the efficacy of such mechanisms in safeguarding particular constitutional pacts during 2019. His analysis highlights that, while rigid amendment formulas may provide sufficient protection in states with effective democratic competition, alternative safeguards may be necessary in transitional contexts. Abebe suggests requiring that amendment of key provisions be rooted in a further pact; meaning that amendment formulas should complement common reliance on supermajoritarian thresholds or unamendable provisions with additional requirements for some degree of opposition agreement.

In Chapter 3, I examine one of the most notable trends in recent years—the increased involvement of the public in constitutional reform—with a focus on The Gambia and Mongolia. The chapter first surveys developments in scholarship and practice in participatory constitution-building. I then consider the different ways in which process designers in both countries approached public participation, and whether and how public feedback influenced elite decision-making in later stages. Both The Gambia and Mongolia embraced participation as a centrepiece of their constitutional reform projects, and both recognized citizen engagement as a normative good as well as a substantive and instrumental tool that could be used to shape the bargaining agenda and foster legitimacy. The chapter sheds light on some of the ways in which public participation can influence the political dynamics of constitution-making, as well as some of the limitations of that influence on desired outcomes.

In Chapter 4, W. Elliot Bulmer considers how constitutions change by examining innovative choices in the design of governance arrangements made by two regional jurisdictions undergoing transitions to greater autonomy. In both Tobago and the Autonomous Region of Bangsamoro, negotiations between the regions and their central governments have long centred not only on issues of autonomy, but also on the more complex issue of how power will be exercised within the regional units. While the political systems in federal or devolved countries often broadly replicate the system of the ‘parent’ state, both Tobago and Bangsamoro, rather than being tied to historical precedence, have taken more novel approaches. Tobago has sought to reform the familiar system by using a method for constructing the second chamber of parliament that differs from that of the central government, while retaining the underlying logic of the principle of representation. Bangsamoro has in comparison, sought to reject the presidential system familiar to the Philippines and to instead introduce a quasi-parliamentary system of government.

Chapters 5 and 6 both focus on the complexities of federal systems and the challenges of negotiating and renegotiating federal state structures. In Chapter 5, Thibaut Noel considers federalization processes in Myanmar and South Sudan—two countries in which the structure of the state is highly contested, and commitments to federalization are central to complex and long-term peace processes. Noel reviews the history and trajectory of negotiations on federalization in both states and compares the ways in which demands related to shared rule, self-rule and boundary delineation have been prioritized and addressed. He then considers developments and setbacks in 2019 toward reaching agreements on key issues and challenges that likely lie ahead within each process. Noel’s examination highlights the fact that, though parties to a conflict may broadly agree on the need for federalization during the early stages of the political settlement process, the process of building consensus on the details of a federal system and concretizing commitments remains a far more complicated and challenging task.

In Chapter 6, Sumit Bisarya similarly considers the drawing (and redrawing) of the ‘federal map’, comparing developments in defining the federal structure in South Sudan with changes to the status of Jammu and Kashmir in India. Bisarya focuses on the high-stakes issue of boundary delineation. In South Sudan, where the ongoing federalization process is tied to peacebuilding, debates on boundary delineation among contesting elites are understood as connected to their ability to shore up patronage networks within territories of influence. In India, where the special status of Jammu and Kashmir has endured since 1951, steps taken to divide the state into two Union Territories posed a legal conundrum and triggered a constitutional challenge in the Supreme Court. In both cases, changes to the federal map have been elite driven and unilateral, raising questions about whether systems that can be changed in this way can truly be called federal.

# 1. A decade of constitution-building processes: some reflections from international experts

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Sumit Bisarya (editor)

The year 2019 marks the end of the second decade of the 21st century, and much has happened in that time. The period has been marked by important events, such as the independence of South Sudan in 2011, as well as some notable trends, such as global mass social protest movements and a concerning decline in perceptions (and the quality) of democracy around the world. Since the latter half of the 20th century, constitution-building has become increasingly associated with peacebuilding and political transition processes as an important tool to support conflict mitigation and to secure political participation and inclusion. Moreover, the process of constitution-building has itself come to be understood as important for legitimacy, democracy and peace; the international community is increasingly involved in national constitution-building projects. As it has for centuries, the field of constitution-building continues to evolve in interesting and surprising ways.

To mark the end of the decade, International IDEA engaged in a series of conversations and discussions with international experts who have had first-hand experience in a variety of constitution-building processes around the world. The discussions were not intended as a systematic or comprehensive survey of the evolution of constitution-building over the past 10 years. Rather, the aim was to gather a range of opinions and insights on general trends, recurring issues and innovations, the role of international engagement, and successes and challenges in constitution-building to promote peace and democracy.

Comparative constitution-building experts who participated in these discussions included the following scholars, practitioners and advisors:

- **Adem Abebe**, Editor, ConstitutionNet.org, International IDEA
- **Anna Dziedzic**, Global Academic Fellow and Associate Director of the Centre for Comparative and Public Law at the University of Hong Kong, speaking on the constitutional and legal systems in the Pacific Islands
- **Rohan Edrisinha**, Former UN Development Programme Senior Constitutional Advisor in Nepal, and Senior Constitutions Advisor for the UN Department for Peacebuilding and Political Affairs
- **Tom Ginsburg**, Professor of International Law and of Political Science at the University of Chicago, and Senior Advisor to the International IDEA Constitution-Building Programme
- **Christina Murray**, Professor Emeritus of Human Rights and Constitutional Law at the University of Cape Town, and Constitution-Making/Power-Sharing Expert, UN Standby Team of Senior Mediation Advisers
- **Gabriel Negretto**, Professor of Political Science at the Catholic University of Santiago de Chile, speaking on constitution-making in Latin America
- **William Partlett**, Associate Professor at Melbourne Law School, speaking on constitutional reforms in the post-soviet Europe/Eurasia region

This chapter summarizes some of the key takeaways from these conversations, which centred on five common questions. Expert comments have been edited for clarity and approved by the participants.

**Q1: What have been some of the general trends in constitution-building over the last decade?**

- (TG) Motives for changing constitutions have been increasingly often driven by authoritarian consolidation, rather than democratization.
- (WP) Certainly in the post-Soviet region there have also been several attempts to use constitutional reforms to advance self-interest, although this has sometimes backfired—for example, the popular revolution which followed the reforms of President Sargsyan in Armenia.
- (CM) I am not so sure whether there is increased frequency of authoritarian constitution-making, or whether constitution-building for

liberal democracy reasons has become less frequent. If that is the case, the question is why this is so? As another trend, I would add the failure of constitution-building as a conflict resolution tool.

- (GN) In Latin America, there has been an increasing burden based on constitutional reform, in terms of the expectations of the general public. People have translated demands for better education, health care and other issues of social equality into demands for constitutional change, with expectations that the new/revised constitution will deliver on these issues.
- (CM) I would say this is also true in Africa—at least in the sense that public demands for change often seem to default to demanding constitutional change. This may be in part because government is practised in an authoritarian way, within constitutional bounds, although constitutional arrangements actually permitted something better.
- (AD) In the Pacific Islands, constitutional change most often occurs through amendments, rather than making a new constitution. A common trend this decade, perhaps linked to this, is that many processes have stalled or collapsed, often due to elections and shifting parliamentary majorities. This could be an indication, perhaps, of the challenges of constitutional reform conducted by the regular legislature.
- (AD) Another feature which may be an emerging trend in the Pacific is the role of courts in constitutional reform processes. While the court has always been active in Papua New Guinea, its role in adjudicating amendments has grown this decade. Also, in Vanuatu we saw the court intervening to rule that reforms had to be ratified in a referendum. It will be interesting to see whether this becomes a broader trend in the coming years.
- (AA) Perhaps it was already the case, but it seems that constitution-building has become a more common part of the lexicon for people working in political transitions, and also on the part of popular movements demanding change.

Q2: Why have authoritarians sought to change—rather than simply ignore—constitutions? What are some counterexamples where constitutional reforms have been more successful at promoting peace and/or democracy?

- (RE) In certain countries in Asia, it has been a case of both—ignoring constitutional constraints, and then dismantling them.

- (TG) Functional accounts are persuasive. Many cases in Africa seem to revolve around avoiding presidential term limits; in Morocco, constitutional change was used to diffuse/co-opt the local Arab Spring revolution.
- (CM) Hungary deserves mention here as a particular and important example. I think there, the reasons have been symbolic as well as functional.
- (GN) I would add two general observations: ruling under the law provides legitimacy, and so much of authoritarian constitution-making comes down to window dressing. Second, the constitution provides a coordination mechanism among elites.
- (WP) There has been an interesting element to this in the post-Soviet space—what I term the ‘theatre’ of constitutional reform. The 2020 amendments in Russia are a prime example: a multi-day referendum, which coincided with the 75th anniversary of the end of World War II, was used to approve amendments that could have been approved in parliament. The motive was to paint a picture, through this ‘theatre’, of renewed mass support for the state.
- (RE) At the same time, the decade has not been without its democratic constitution-building successes. Nepal has its challenges, but should certainly be considered a process of democratization. In the Philippines, Bangsamoro gave up its secession demands based on a constitutional solution for increased autonomy.
- (TG) I would add Tunisia as a democratization success story. Kenya too, at the start of the decade, may be considered at least a partial success, in terms of the context of electoral violence at the time of constitutional reform.
- (CM) Fiji could also be considered a partial success, as it was one step further away from dictatorship. But let’s also note here that we are really only considering constitution-building in the wake of crisis. Constitutional *change*, often in the form of targeted amendments, occurs much more frequently, and one might assume with a greater degree of ‘success’.
- (WP) Successful democratizing processes in the post-Soviet space have been observed in Armenia, Kyrgyzstan and Moldova. Ukraine should also be included, as it has passed a raft of reforms at both the constitutional and sub-constitutional levels, both in the wake of the Maidan Revolution and continuing under current President Zelensky.

- (AA) I think it is part of a trend of the institutionalization of politics in Africa. Even authoritarians want to use the constitution to make, or prevent, change. They have the numbers and control to achieve their desired results through constitutional processes, so why deviate? Guinea and Burundi changes were perhaps questionable in terms of process, but more often than not—especially when they can rely on dominant parties or controlled referendums—it is possible. But it is important to also note the counter examples—I would say we have seen four types of process—regression, resistance to regression, progress and resistance to progress. Sometimes resistance works: Burkina Faso in 2014, and Mali in 2012 and 2018, serve as examples where popular mobilization prevented the abuse of term limits and empowerment of the executive, respectively. Niger in 2010, Mozambique in 2018 and Senegal in 2016 are also positive examples of progression. But there are also many examples wherein popularly driven, progressive changes were stalled/blocked by incumbent forces for the status quo—Tanzania for example, and also perhaps the current process in The Gambia.

**Q3: What recurring issues have featured in constitutional design debates in the past decade? Have there been any noteworthy innovations?**

- (AD) In the Pacific, a recurring issue is responding to political instability, though this certainly predates the last decade. Constitutional protection and recognition of customs have also been major features in processes, for example in Tuvalu and Samoa.
- (CM) In this regard, constitutional change is often used as a tool of political mobilization; claiming that the constitution undermines traditional values has traction. So proposing to tighten things up is a powerful political tool.
- (AD) Sometimes what is *not* on the constitutional agenda is also telling. The issue of women's participation in politics has been a recurring debate. The region has extremely low levels of women's representation in parliaments, and constitutional reforms often see a push for special measures met with an equally strong pushback from conservative elements. Samoa was successful in establishing a women's quota, although that was quite modest (10 per cent) and the constitutional amendment was made by a government with a strong parliamentary majority.

- (TG) Rights provisions have been expanding for longer than the past decade. Constitutions are also saying more about anti-corruption and the environment.
- (CM) On rights, clearly justiciable socio-economic rights now seem almost routine. Rights provisions are also becoming more detailed in order to speak to particular constituencies. For example, words relating to women and other groups in the Kenyan Constitution do not formally change their rights, but do speak to these groups.
- (GN) The expansion of individual rights or the inclusion of new socio-economic rights (such as access to water) has been a feature of several constitutional changes during the last decade in Latin America. Among other recurring issues, it is important to mention reforms intended to improve judicial efficiency and accountability, reduce public corruption, and increase direct popular participation. Controversial reforms and judicial interpretations relaxing executive term limits have also been salient topics of debate.
- (WP) A common debate in post-Soviet contexts has been how to make formal rules matter in cultures in which they have historically been ignored. There is some space here for innovation, either through adapting/reforming extant institutions such as the procuracy or through more innovative approaches, such as the Office of the Chancellor of Justice in Estonia.
- (WP) While not common enough to be called a trend, the decade has been bracketed by the constitutional reforms in Kyrgyzstan and current debates in Armenia, in which there have been drives (successful in the former, as of yet undetermined in the latter) to abolish constitutional courts and assign responsibility for judicial review to the regular courts.
- (WP) The example of Kazakhstan is interesting, and perhaps an innovation. Rather than prolong his already decades-long tenure as president, and in order to plan his succession, former President Nazarbayev reformed the Constitution to reduce the powers of the president and give constitutional status to the Security Council, of which he made himself lifetime head, and from where he can control events from behind the scenes.
- (RE) Federalization has been a common debate in post-conflict contexts, but with the exception of Nepal most of these processes have yet to arrive at a constitutional resolution. In Asia, religion and cultural issues continue to be at the forefront of many constitutional reform debates.

- (CM) Many processes seem to have stalled or collapsed due to devolution/autonomy issues. It might not have been the only issue, but certainly in contexts as varied as Tanzania, Solomon Islands, Mali and Yemen, negotiations over the structure of the state were a central challenge. Term limits—and more generally how to constrain executive power—have been another recurring issue. It is also important to recognize the importance of issues such as same-sex marriage and abortion, around which there is often mass mobilization on both sides. Groups on both sides often opportunistically use these issues to either smuggle through other issues, or to block reforms, and thus often have an important effect on the passage (or not) of reforms.
- (AA) There has been progress both ways. Decentralization has been a common issue on the constitutional agenda, including during processes in Mozambique, Kenya, The Gambia and Senegal. Term limits, of course, have often been central. Various issues relating to the distrust of political actors—such as fourth-branch institutions and independent prosecution services—have been on various agendas. The inclusion of women in politics is meeting with less resistance, at least in terms of formal constitutional provisions—even in authoritarian contexts such as Guinea.

#### Q4: How has the process of constitution-building evolved over the past 10 years?

- (ALL) There is now much more involvement of the public.
- (WP) Even in post-Soviet contexts, we have seen increased efforts to engage the public in constitutional reforms. The timing is instructive: the last decade has been a period of relative stability following the economic depression and violent civil conflict. Together with an emerging civil society, which did not exist before, and the growing use of social media, this has resulted in more calls for public engagement in processes of constitutional change.
- (GN and TG) The randomly selected citizen assemblies of Iceland, Ireland and Mongolia are certainly an innovation, and perhaps becoming a trend as a new form of public participation.
- (CM) In addition to greater public involvement, there have certainly been demands for broader inclusion, to make the constitution-making bodies themselves more representative of society. Whether this has happened or not, I don't think we know.

- (AA) In Africa, expert commissions have been a common feature of constitution-making. Previously they were more common in anglophone countries, but in recent years francophone countries have more frequently used commissions, compared with the large conferences of the 1990s. However, the commissions seem to be more expert/independent in composition in anglophone countries, whereas in francophone countries they are more often appointed by the president. Another important difference between anglophone Africa and the rest of the continent relates to constitutional rupture: in places such as Burundi, Comoros and Guinea we have seen arguments that constituent power overrides constitutional change constraints, whereas anglophone countries have been more inclined to ensure constitutional continuity.

**Q5: What has been the role of, and receptiveness to, international assistance in constitution-making? What other forms of cross-border learning have been at play? Has the globalization or regionalization of norms been an important factor?**

- (AA) Expert commissions and civil society organizations in general have not only accepted, but also demanded (and expected) international assistance. Political actors are more likely to resist such assistance.
- (AD) Among the Pacific Islands, there is an openness to listen to international expert advice, but also the confidence to reject it. There is a strong sense of national sovereignty and ‘doing things our way’, rather than any sense of regional norms. International norms, of course, are present in most contexts because of the constitutions that countries were left with at independence.
- (GN) The recent movements for constitutional reform in Chile and Panama show there has been a learning process in the region with respect to the Bolivarian model of using deep public participation to legitimize one side of the debate. Interestingly, the countries most often referred to at the moment in Chile are from outside the region—Iceland and South Africa.
- (WP) The post-Soviet space is really divided into two regions. On one side are countries such as Armenia, the Baltic states, Georgia and Ukraine, which welcome globalized norms of constitutionalism, and where the advice of the Venice Commission has been influential. On the other side are countries such as Belarus, Kazakhstan, Russia, Tajikistan and Uzbekistan, where the common denominators are national sovereignty, national identity and founding myths. But these countries also learn from

each other: I believe Russian President Vladimir Putin would have observed and considered the reforms adopted in Kazakhstan before deciding to go the way he did with the 2020 amendments.

- (TG) I would say there has been greater resistance to international assistance efforts over the past decade, and a need to be more strategic about the way assistance is provided. Some hard questions need to be asked by international assistance providers regarding the objective of international advice and the meaning of national ownership in this context. The best examples of international assistance I have seen have been where a plurality of international organizations works together to provide different views and forms of advice.
- (CM) I agree that we need to look at how we give advice/support, although I would stop short of saying there has generally been greater resistance. Do we really know? It would be excellent to have some research on the idea of where and how advice has been most effective.
- (AA) In Africa, the role of the Africa Union (AU) has been interesting to watch. There has been a nascent regionalization of constitutional law standards. For example, the 'broad consensus' requirement for constitutional amendments is having an impact, as is the African Court on Human and Peoples' Rights. For example, one case against Côte d'Ivoire concerned the composition of the Electoral Commission, which was composed of representatives of political actors and dominated by the ruling party and presidency. The court said it was not impartial, and is incompatible with the requirement of the African Charter on Democracy, Elections and Governance on neutrality and independence. In another case against Tanzania, the court found that a constitutional ban on independent candidates was incompatible with the African Charter.
- (AA) Given the rise of popular movements which have become more common to change regimes and trigger constitutional change, the international community has become more nuanced in its responses to unconstitutional changes of government over the course of the decade. Compared with the previous stance, which rejected all coups and military roles in political transitions, perhaps in recent cases we have seen an increasing acceptance of the military's role in transitional governments? There has been no change in regards to the unconstitutional retention of power. An illustrative example is Burundi in 2015: the president tried to amend the Constitution, was blocked by the Senate, and then used a friendly Constitutional Court instead. AU technocrats tried to take a stand, but political organs pushed back. If there is any progress in this

realm, it is with regards to public pressure on the AU to be forceful in regard to term limits.

- (AA) Lastly, on external assistance in Africa I would say there is an increasing network among Africans, and an increasing trend to look for constitution-makers, and those providing technical assistance, to reference comparative examples from within the continent, rather than the older examples of the USA, Canada, Germany, etc.

## 2. The vulnerability of constitutional pacts: inclusive majoritarianism as protection against democratic backsliding

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Adem Abebe

### Introduction

Constitutions are increasingly theorized as outcomes of bargains or pacts in which contesting political elites agree on a governance framework in a transition from conflict to peace and authoritarianism to competitive democracy, or the consolidation of peace and democracy (Elkins, Ginsburg and Melton 2009). To protect such pacts, contesting parties and constitutional designers rely on tried and tested tactics: making amendment procedures more stringent than those required for regular legislative decisions.

Nevertheless, the circumstances and context that force or incentivize dominant political groups to compromise or concede—described here as moments of vulnerability—do not always last; resurgent or emergent political personalities or groups have on many occasions backtracked on or removed key constitutional pacts. Traditional amendment procedures that rely on supermajorities, referendums and even unamendable provisions do not always succeed in taming resurgent or new political hegemony from reversing critical compromises.

This chapter explains the challenge of maintaining moments of vulnerability that engender pacts by using reform processes that were approved or initiated in 2019, using Guinea and Zimbabwe as case studies. It also considers how constitutional drafters may seek to effectively protect key constitutional pacts.

After describing the moment of vulnerability, the third section covers the case studies. The next section argues that the effective safeguarding of critical pacts requires conditioning change to comparable pacts based on what I call ‘inclusive majoritarianism’. The last section concludes.

## Constitutional pacts and the ‘moment of vulnerability’

While constitutions are sometimes described as identifying, affirming and/or proclaiming the fundamental values of the imagined ‘people’, the institutional architecture they establish is often a product of the ideas of the time and context and, crucially, the power balance among the dominant forces at the time of constitutional writing or change. As Mark Graber notes (2006: 200), ‘most constitutions are compromises, not declarations of shared values or blueprints of the good society’. Despite the recognition and increasingly ubiquitous role of popular participation in constitution-making processes, ultimately, constitutions, especially their institutional framework, are predominantly ‘bargains among elites’ (Elkins, Ginsburg and Melton 2009: 7). In short, constitutions are primarily elite pacts, among themselves and collectively with the people.

Some contemporary constitutions are written in contexts where the dominant group feels vulnerable and has to make concessions to defuse pressure and maintain power. In other cases, the dominant political personality or group may have been removed and a replacement has not emerged, with many aspiring but unsure political constellations jostling for power. In all cases, constitutions that evolve as pacts, bargains or concessions are often made at moments of vulnerability and uncertainty.

Constitutions that are written under a single dominant personality or political group are unlikely to constitute or be described as pacts. A level of power balance in which incumbent forces are not that much more powerful than their opponents—what Javier Coralles (2018: 7) calls ‘reduced asymmetry’—is necessary for a constitution-making process to result in a negotiated bargain or ‘power-diffusing constitution’.

Nevertheless, pacts may also be agreed even where constitutions are written under a single dominant force in an attempt to ensure the alternation of power within the group, such as through presidential term limits. For instance, Tanzania in 1995 was the first country in Africa to experience a transfer of power as a result of term limits when the incumbent president left power after serving two terms. The term limits were introduced into the Constitution following the departure of long-time leader Julius Nyerere. With his departure, Nyerere and the ruling party sought to preclude the dominance of a single person and ensure the peaceful transfer of power through term limits (*Vanguard Africa* 2019). This intraparty pact has held up since then; although there is talk of tampering with the term

limits to allow current President John Mangufuli to run for more than two terms, he has ruled out this possibility (*The African Exponent* 2019).

More recently, President Pierre Nkurunziza of Burundi led the drafting of a new constitution in 2018 while serving a contested third term. There were concerns that the new Constitution would remove term limits or otherwise allow him to run again (Vandeginste 2018). Nevertheless, internal dynamics in the ruling party ensured the retention of the two-term limit on presidents (with terms extended from five to seven years). Although the new Constitution does not explicitly count past terms, Nkurunziza was expected to step down (before his unexpected passing in June 2020) and a new president was elected in May 2020. The strength of the ruling party and the aspirations of its diverse members have ensured that term limits are included as an intraparty pact.

The moment of vulnerability or reduced power asymmetry that generates constitutions-as-pacts may not always last; there is often a risk that one party to the pact will renege. To insure against this risk, parties and constitutional drafters rely on a time-tested strategy—rigid amendment procedures. In a context of free, fair and competitive democratic elections that modern constitutions assume, amendment procedures that require supermajority parliamentary approval (alone or in combination with referendums, or double legislative approval with an intervening election) are accepted as effective political safeguards against the reversal of key components of the pact by either resurgent or emerging political hegemony. Although cumbersome amendment procedures can be criticized as undemocratic and anti-majoritarian, they are accepted as necessary to ensure constitutional stability and political competition.

Under ideal democratically competitive circumstances, standard constitutional amendment procedures may provide sufficient insurance against the reversal of fundamental constitutional pacts. Nevertheless, the assumption of genuine democratic competition does not always hold, and an old dominant political force may recuperate or a new one may emerge. Therefore, pacts last only as long as the power balance remains in place; when power shifts to the extent that there is one dominant political force, the pact may be undone through unilateral constitutional changes.

Constitutions are rarely self-enforcing. The continued relevance of constitutional limits on government power requires sustaining comparable levels of power balance and moments of vulnerability as at the time of constitutional negotiation. Elkins, Ginsburg and Melton (2009: 66) write that the endurance of constitutional bargains depends on '(a) whether the parties feel that they would be better off under different terms, (b) the expected sanctions for breaching the agreement, and (c) whether the existing agreement can be amended easily or otherwise accommodate change'. While the authors outline these conditions in a context of constitutional death or replacement, the conditions can be similarly applicable in cases of significant constitutional amendments.

In short, constitutional pacts require guarantee mechanisms, which mainly come in the form of stringent amendment procedures. Nevertheless, standard amendment procedures assume free and fair elections and the guaranteed presence and performance of a strong opposition—that is, democratic competition to at least disrupt ostensibly legal but self-serving reforms. For instance, attempts to remove term limits have failed in Zambia (Frederick Chiluba in 2001), Malawi (Bakili Muluzi in 2002) and Nigeria (Olusegun Obasanjo in 2006) principally due to the strength of opposition parties, which empowered divergent voices within the president’s party. Where constitutional pacts are adopted as intraparty bargains, the parties need to remain strong in order to prevent dominant personalities from undermining the pacts. Furthermore, courts may provide additional safeguards to ensure respect for pacts, especially through the use of unamendable provisions which are recognized specifically in the constitution or judicial interpretation (on Colombia, see Marinero 2010).

The people are naturally the ultimate guarantors of constitutional frameworks, including key pacts. Where a pact draws bright red lines, such as presidential term limits, potential popular mobilization could either discourage attempts to remove pacts or unseat those who violate them. For instance, protesters in Burkina Faso forced former President Blaise Compaore out of power in 2014 when he attempted to amend the Constitution to continue his more than two-decade rule (Signe 2014). Finally, international institutions and other external actors may also influence respect for (or even violation of) constitutional pacts.

The next sections discuss how the moments of vulnerability at the time of constitutional adoption led to the adoption of pacts on key areas, and how resurgent or new political hegemons reversed such pacts in Guinea and Zimbabwe.

## Guinea-Conakry

In a March 2020 referendum, Guineans approved a new constitution to replace the 2010 Constitution. The president enacted the new Constitution into law the following month (AFP 2020). The 2010 Constitution was drafted in a context of a transition from dictatorship to a democratic dispensation under a military government that took power following the death of long-time authoritarian leader Lansana Conte in 2008. Divisions within the military, powerful opposition and international pressure forced the military to give up power under a new constitution.

A key rallying point for the opposition to Conte’s authoritarianism was the removal of a two-term limit on presidents, first introduced in the wave of reforms in the 1990 Constitution, through a referendum in 2001 (Niang 2019). This change allowed Conte to run again and win a third term in 2003. Following his

death in 2008, there was broad agreement that the two-term limit should be reinstated. The absence of a dominant force leading the constitution-making process, whether within government or the opposition, as well as the experience with Conte made term limits inevitable. In addition, the political class and the drafters sought to make it impossible to remove the term limits in the future. Accordingly, article 154 of the 2010 Constitution provided that ‘the number and the duration of the mandates of the President of the Republic may not be made the object of a [constitutional] revision’. In short, there was effectively a pact among the political class, as well as with the people, regarding the importance of presidential term limits and their inviolability.

Alpha Conde, who became the first president under the 2010 Constitution, was a vocal opponent of the 2001 referendum removing term limits. After establishing himself at the helm of the dominant ruling party, he won two successive terms. Under the Constitution, his current second term should have been his last. Nevertheless, political dominance came with a temptation for the elderly Conde, who turned 82 in March 2020. His supporters and political allies started to promote the idea of allowing him to run again.

Aware of the prohibition on constitutional revision to change term limits, the ruling political group cleverly distinguished between revisions and the making of a new constitution. Accordingly, while tampering with the term limits was the principal objective (Niang 2020), the government relied on versions of the constituent power of the people to adopt a new constitution. This distinction was clearly against the intention of the 2010 Constitution (Abebe 2019).

To strengthen their call for a new constitution, Conde and his supporters alluded to the fact that the 2010 Constitution was adopted under a military dictatorship and was without a popular referendum, and therefore lacked popular legitimacy. Yet all political groups, including Conde’s, had supported the decision not to submit the document to a referendum in order to accelerate the transition from military rule to democracy.

This claimed lack of popular legitimacy and clumsy drafting of the provision prohibiting *revisions*, without specifically prohibiting the making of *new* constitutions, mean that tampering with term limits provided ostensible moral and legal justification for pursuing a new constitution. Under the new Constitution, a president can serve two terms of six years each. In the absence of a specific provision counting terms served under the 2010 Constitution, Conde was able to run again in—and won—the October 2020 elections.

The reliance on unamendable provisions to safeguard a critical pact failed to achieve its purpose to ensure the peaceful alternation of power.

## Zimbabwe

In December 2019, after months of work behind the scenes, the Government of Zimbabwe tabled before parliament a bill to amend the 2013 Constitution that would allow the president to promote judges to higher offices and do away with requirements to publicly interview candidates (Hofisi 2020). This bill followed the enactment of the first amendment to the Constitution in 2017, which empowered the president to appoint the three highest judicial offices—the chief justice, deputy chief justice and judge president of the High Court—without the need for public interviews, subject merely to non-binding consultation with the Judicial Service Commission (Hofisi 2017). In March 2020, the Constitutional Court invalidated this amendment on the grounds that the Senate vote did not achieve the required number of votes for a valid constitutional amendment. The court gave the Senate 180 days to revote on the amendment, failing which the amendment becomes invalid (ICJ 2020). The 180-day period expired at the end of September 2020, but the government sought an extension of the period, and the Constitutional Court granted a provisional order suspending the nullification until a final decision after hearing all parties could be rendered. The amendment is presumed to be invalid and the government would have to go through the entire constitutional amendment process if it wants to reinstate it. The proposed bill would expand the exemption from public interviews to the promotion of key judicial officers.

The 2013 Constitution was an outcome of the 2008 Global Political Agreement (GPA) (Mutisi 2011) to quell the violence and political paralysis that accompanied Zimbabwe's most competitive elections, in which the late Morgan Tsvangirai won the first round of presidential elections against incumbent President Robert Mugabe but refused to join the run-off because of the government's oppressive and violent tactics. The GPA was signed under the auspices of the Southern Africa Development Community between the ruling party (ZANU-PF) and the two main opposition parties (MDC-T and MDC).

A central element of the GPA was the making of a new constitution, spearheaded by a Select Committee on Constitution Making Process (COPAC) composed of 25 members of parliament from the three parties (ConstitutionNet 2011). Although the constitution-making process was supported by expert thematic committees, involved broad popular, stakeholder and civil society consultation, and was finally approved in a referendum, fundamental decisions were made through bargaining and compromise in the Select Committee. Indeed, the endorsement of the draft constitution by the three political groups in the committee was critical for its overwhelming (almost 95 per cent) popular approval in March 2013.

The 2013 Constitution of Zimbabwe was a quintessential pact negotiated between the ruling party and a strong opposition. Had it not been for the power balance, the Constitution was not ‘one ZANU-PF would have written’ (Mushonga 2014). In particular, the opposition was a victim of the weaponization of the judicial process and sought to ensure that judicial appointment and removal processes were safeguarded against government manipulation, while the ruling party aimed to maintain the president’s dominant role in the appointment process. The opposition also wanted parliament to vet and approve candidates. As a compromise, the parties agreed to a process that grants significant powers to the independent judicial service commission, as well as a competitive and transparent process of public advertisements and interviews for all key judicial positions, while the president retains the formal power of appointment.

Following the ruling party’s dominant performance in both the 2013 and 2018 elections, in which it secured a majority enabling it to unilaterally amend the Constitution, ZANU-PF sought to roll back some of the negotiated bargains. The judiciary, perhaps one of the critical areas of deliberate compromise, was a target of both the 2017 and 2019 amendment initiatives.

Considering the bargaining process that led to the 2013 Constitution, and Zimbabwe’s history of regressive constitutional amendments, including to reverse unfavourable court decisions (Madhuku 1999; *The Zimbabwean* 2020), it is surprising that the Constitution did not entrench provisions related to the judiciary and make them subject to a referendum for amendment. Nor was the idea of unamendable provisions considered.

## Pacts for pacts: inclusive majoritarianism

While substantive human rights and other provisions have increasingly become standard across constitutions, key institutional designs remain principally outcomes of contestation and concessions—pacts principally between political leaders, but also involving the people as demanders and/or guarantors of such pacts. Pacts are the outcomes of broad consensus. Constitutional pacts are particularly notable in relation to provisions limiting entry into office (such as presidential term limits and candidacy requirements) and presidential powers (such as those limiting the presidential role in appointing judicial and other office holders). Given the choice, dominant leaders are likely either to consider such limits unnecessary or to avoid them, perceiving them as limits both on their personal freedom to run and on their current or prospective offices.

To safeguard these pacts and concessions, constitutional drafters employ a range of mechanisms broadly defined as constitutional amendment procedures, which are designed to enable a degree of flexibility to adapt to changing needs, circumstances, knowledge and evolution of ideas as expressions of popular

sovereignty, while ensuring a level of constitutional continuity and stability (International IDEA 2014). Amendment procedures normally take the form of some combination of a legislative supermajority (in one or two houses), referendum, double legislative approval (with an election in between) and, in federations, the approval of a specified number of states. Constitutions may also include unamendable provisions or prohibit amendments during certain periods, such as states of exception (war, emergencies).

Common procedural requirements for amendments—which may broadly be classified as ‘supermajoritarian’—are assumed to ensure that constitutional pacts are not casually distorted or abandoned and serve as proxies for cross-party approval of reforms. Such requirements are designed to prevent a single group from engaging in self-serving amendments to convert their transient dominance into long-term constitutional advantage. Supermajority requirements assume that, given a level of competitive democracy, opposition voices will secure enough legislative seats to be able to block amendments exclusively pushed by the ruling political group (Böckenförde 2017). Nevertheless, as noted in relation to the case studies described here, electoral competition favours incumbents, including through outright rigging or suppression of the opposition, leading to the dominance of a single group. This is a reality in many contexts and should not simply be wished away when designing amendment procedures.

Pragmatism may require that constitutional amendments must directly require pacts as the only basis to change at least the most critical and explicit pacts, i.e. pacts for pacts. Therefore, constitutional amendment procedures should reconsider the common reliance on supermajoritarianism, or unamendable provisions, and complement it with what I call inclusive majoritarianism. Under inclusive majoritarianism, a constitutional amendment would be valid only if it is approved by an absolute legislative majority (or a relatively low supermajority), but the composition of this majority must include votes from the incumbent party as well as a determined percentage of opposition votes. Inclusive majoritarianism may be seen as an adaptation of the idea of ‘separation of parties, not branches’ (Levinson and Pildes 2006). Rather than relying on the size of the legislative majority as a proxy to engender broad political consensus in support of amendments, this approach would pursue broad consensus more directly by ensuring that amendments have support beyond the ruling party or coalition, regardless of the size of its dominance. Referendums can still complement, but not substitute for, inclusive majoritarian procedures, and can safeguard against cross-party ploys to abuse power or undermine the voices of the people or political and legal accountability. In countries with diverse communities, the referendum rules may require certain levels of approval across a determined number of regions/groups.

The concept of broad consensus as the basis for the legitimacy of constitution-making and revisions has been endorsed at the African level. Article 10(2) of the

African Charter on Democracy, Elections and Governance requires states parties to ensure that ‘the process of amendment or revision of their constitution reposes on *national consensus*, obtained if need be, through referendum’. The idea of inclusive majoritarianism ensures that amendments are in fact based on broad consensus.

By requiring cross-party approval, inclusive majoritarianism could make change difficult, and even allow a political minority to prevent necessary changes through veto, thereby entrenching the status quo that represents the judgments of past generations at the expense of the current generation’s right to self-governance. The proposal may therefore lead to a situation in which the fear of illegitimate amendments could protect an illegitimate constitutional framework. Dominant groups could then claim the right to entirely bypass the constitutional framework.

Nevertheless, inclusive majoritarianism does not require all minority groups to approve proposed amendments. It should only prevent a single political party or aligned coalition from changing the constitution. As such, requiring that a small proportion of the opposition agrees to the proposal would suffice. In addition, in many contexts, electoral outcomes exaggerate the dominance of the winning party, partly as a result of incumbent abuses, and partly as a function of the electoral system, especially in countries with first-past-the-post electoral systems. The requirement for cross-party approval would provide a necessary correction. Moreover, to reduce its abuse, constitutions may require inclusive majoritarianism for changes to vulnerable provisions in a single parliament but require that the change be approved by a supermajority in two successive parliaments (i.e. after an intervening election).<sup>1</sup>

Inclusive majoritarianism can be justified on both legitimacy and practical grounds. Because an amendment would require interparty engagement and compromise, the outcome is likely to more effectively approximate the popular consensus, which is the principal determinant of democratic legitimacy. It also has practical benefits. For instance, the process encourages better deliberation and the consideration of the passion, reasoning, ideology and interests of a diverse set of political groups. Requiring interparty approval of constitutional amendments would help prevent political forces from enacting capricious and self-serving constitutional amendments. The relative difficulty of enacting amendments may therefore be seen as an acceptable trade-off. A pragmatic problem requires a pragmatic solution. The process would also encourage political groups to develop a culture of regular engagement and compromise, and to recognize the legitimacy of each other’s existence. These experiences can engender a politics of moderation even in daily political discourse.

In recognition of the fact that inclusive majoritarianism makes constitutional change particularly difficult, it is suggested that it should only be used to safeguard the most vulnerable pacts, which will inevitably be contextual, against

change in the form of constitution amendment, revision or replacement. Provisions limiting access to or retention of public office, particularly the presidency, presidential powers, the electoral system, and provisions protecting the independence and authority of courts and fourth-branch institutions could be considered. For other provisions, standard amendment procedures relying on supermajorities, referendums and time (or a combination) could suffice.

## Concluding remarks

These case studies demonstrate how constitutional amendments could be used to undermine key pacts at the time of constitution writing. This chapter argues that inclusive majoritarianism can provide an effective political safeguard against formal constitutional regression.

Overall, as pacts, constitutions should require comparable pacts to change them. With such a safeguard, constitutional pacts sow the seeds of their own reversal. Nevertheless, the ultimate protection of democratic constitutionalism requires constitutions to be seen as a pact with the people. Sufficient public ownership of the constitutional framework, and particularly key pacts, is therefore critical, regardless of the elite bargaining origins of the constitution. Political actors are unlikely to resort to capricious amendments if they expect a public backlash, which is best secured by establishing a genuine democratic framework. The most secure way to protect and sustain a democratic dispensation is to create the conditions for genuinely competitive democracy.

Accordingly, while inclusive majoritarianism could help check attempts to undercut such conditions, it is not a substitute for innovative mechanisms to address the incumbency advantage, strengthening the capacity, resources and policy orientation of political parties, and improving popular understanding, ownership and support for constitutional democracy.

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### Endnotes

1. I thank Sumit Bisarya (Head of Constitution-Building, International IDEA) for this idea.

### 3. The how and why of participatory constitution-building: (re)examining expectations, processes and outcomes in The Gambia and Mongolia

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Erin C. Houlihan

#### Introduction

Historically, constitution-making was understood as a legal-political exercise best undertaken by jurists and political elites. In Philadelphia in 1787 a select group of white, mostly wealthy, landowning men deliberated what was to become the US Constitution—a text that would reorganize the conflict-affected lives and prospects of millions of men and women of diverse national origins, indigenous peoples and hundreds of thousands of enslaved African Americans. Constitution-making is a high-stakes process that involves the (re)distribution of access to power and resources, the recognition of identities, and the protection of individual and collective rights. In practice, and as the Philadelphia experience reveals, constitution-making is a process of negotiation and bargaining that operates within a framework of constraints, interests, passions and reason (Elster 1995). It involves a series of decisions to establish the rules and forums in which the constitutional text is written, deliberated and ratified. These choices are recognized as highly consequential for the future of peace and democracy, though in ways that are not yet fully understood (e.g. Elster 1995; Ginsburg et al. 2009; Ghai and Galli 2006).

For nearly two centuries, public participation in constitution-making was limited to voting in elections for constitution-making bodies and in ratification

referendums. Moreover, voting rights were limited to narrow segments of the population. Public participation has since expanded to other stages of constitution-making in ways that parallel changing perceptions about the purpose and importance of constitutions and constitutional reform processes, and which are rooted in the development of legal and normative frameworks on democratic governance, human rights and peace. In post-conflict and transitional constitutional reform processes in particular, public participation is increasingly understood as crucial for popular legitimacy and outcomes for democracy and sustainable peace. The ways in which participation influences and contributes to—or potentially detracts from—these desirable outcomes, however, is not systematically understood.

Today, constitution-*making* is better understood as the centrepiece of a broader constitution-*building* process. Constitution-*building* describes a long-term, inclusive and participatory process that combines the legal, political and social aspects of state transformation. It involves initial consensus-building and bargaining around the design of institutions for the drafting and adopting of the constitutional text, choices about how decisions are made within those institutions, and developing practices and conventions for interpreting, implementing and nurturing the text following promulgation (Ghai and Galli 2006: 9). The notion that constitutions and constitutional cultures are *built* through the inclusion and participation of ‘the people’ has, since around the 1990s, transformed from an aspirational ideal into a transnational norm, particularly for post-conflict and transitioning states (Hart 2003; Saati 2017; Franck and Thiruvengadam 2010).

Accordingly, citizens today generally *expect* to be consulted in the constitution-making process, and process designers incorporate participation in various ways and at various stages of the constitutional reform process. The ways in which participation processes are designed at the country level, the participatory mechanisms selected to collect and assess public opinion, and how this data is fed into decision-making processes differ in significant ways and are highly dependent on context, resources and access to comparative knowledge (see Brandt et al. 2011).

This chapter examines the public participation processes undertaken in The Gambia and Mongolia in 2019 as part of their constitutional reform endeavours. It seeks to contribute further insights into the relationship between decision-makers’ assumptions and expectations about the normative, substantive and instrumental utilities of public participation (as inferred from public statements and documents); the influence of context-specific constraints and opportunities; and methodological decisions about the design of the participation process and choice of participation mechanisms.

The chapter is organized into four parts. The first provides a brief overview of current scholarship and frameworks on participatory constitution-building and

considers gaps between scholarship and practice. The second examines public participation in The Gambia in 2019 as part of the country's ongoing process to develop a new constitutional text. The third focuses on Mongolia's 2019 constitutional amendment process and the use of deliberative polling and other participatory measures to obtain public opinion. It concludes by drawing brief comparative observations and considerations.

## Overview of scholarship and practice on participatory constitution-building

For centuries, philosophers and political theorists have contemplated the values and risks of public participation in the conduct of government affairs. In the 20th century, democratic peace theory scholars found empirical support for the long-held belief that liberal democracy is essential to sustainable peace (Levy 1989: 88; Saati 2015). In the 1990s, two UN Secretary-General reports accordingly linked democratization to peace and security, formally incorporating participatory constitution-building into the global peace agenda (UN Secretary-General 1992, 1996). This normative proposition has been further buttressed by developments in international (and national) law since the 1970s, which seek to apply the *right* to participation in the conduct of public affairs (ICCPR, article 25) to the process of constitution-making (Hart 2010; Franck and Thiruvengadam 2010).

Accordingly, waves of scholarship on public participation in constitution-building provide theoretical and some empirical insights into the presumed instrumental, normative and substantive benefits of participation on desirable social, political and governance outcomes. Briefly, this includes, *inter alia*, educating the public on constitutional issues and fostering civic engagement (see e.g. Rousseau [1761]1923; Mill 1862); strengthening attitudes about democracy (Moehler 2008); improving the content of a constitution, constitutional endurance and the process of democratization (e.g. Samuels 2006; Ginsburg et al. 2009; Elkins et al. 2008; Gluck and Brandt 2015); and contributing to more sustainable peace at the country level (Ghai and Galli 2006; Hart 2003; Samuels 2006) and globally (e.g. Levy 1989; Hegre et al. 2001). Public participation is also lauded for helping to build a narrative of popular legitimacy for the new governance dispensation and a sense of guardianship over the constitutional text, which is crucial for effective constitutional implementation and performance (Hart 2003; Moehler 2008; Ihonvbere 2000).

However, public participation also poses risks. Particularly in conflict-affected states and divided societies, where constitutional reform is often linked to peace- and nation-(re)building aims, designing a participation process is a delicate task. Prior studies have suggested that in some circumstances, broad public participation may lead to discord between decision-makers who have ultimate authority over the constitutional text, those who will be responsible for

implementation, and the broader public (e.g. Widner 2004; Gluck and Brandt 2015). Other risks include exacerbating conflict fault lines or inciting new forms of unrest through the manipulation of the participation process by interest groups, the ethnicization of public opinion, or the rise of anti-pluralist or anti-constitutionalist populist agendas (Ghai and Galli 2006; Gluck and Brandt 2015). Moreover, public opinion is not always aligned with democratic principles, values and structures; majoritarian constitution-making, though potentially highly participatory, may in practice contribute to a constitutional structure that undermines democracy and/or is less than optimal for marginalized communities (e.g. Partlett 2012). Broad participation may also make it more difficult for negotiating elites to develop compromise positions and to build the political consensus necessary for the adoption of the text (e.g. Horowitz 2002; Arato 1995).

One key challenge for understanding the presumed benefits and risks of public participation is that there is no uniform definition of what constitutes ‘participation’ in the literature other than by empirical observation that the public has, in some way, taken part (Saati 2015). Participation is variously operationalized according to different normative and empirical criteria, which limits the ability to systematically examine the relationship between particular participation mechanisms, the manner in which results are used, the stage(s) of the constitution-making process during which participation takes place, and presumed outcomes for democracy, peace, legitimation, etc. given a country’s particular context.

Scholars and practitioners increasingly recognize that many theories and assumptions about public participation are untested and have called for more systematic and empirical investigation (e.g. Widner 2005, 2008; Moehler 2008; Diamond et al. 2014; Ginsburg et al. 2009; Saati 2015). A notable contribution to bridging this gap includes Abrak Saati’s (2015) work to define a framework to analyse and categorize participation *types*. This framework considers who initiated the process, the form of communication used, the degree of inclusion and who had the final authority over the constitutional document. Participation types are categorized as false, symbolic, limited, consultative and substantive, which facilitates the examination of the relationship between types of participation and levels of democracy.

While Saati’s typology considers participation in the constitution-making process as a whole, other scholars have examined whether the nature and use of particular participation modalities during various stages of constitution-making is significant for democratic outcomes. This research has identified links, for example, between outcomes for democracy and highly inclusive participation processes that take place during the drafting stage, compared to when participation takes place during debates over an already-drafted text or during ratification (Eisenstadt et al. 2015, 2017).

Adding to this work is a growing body of scholarship on deliberative democracy and constitution-building. This body of research focuses on the role of citizen assembly bodies—such as mini-public random assemblies and deliberative polling—in facilitating informed citizen deliberation in a way that is normatively, instrumentally and substantively useful for constitution-making (e.g. Fishkin 2003, 2009; Smith and Setäl 2018). Recent studies have shown that well-designed deliberative citizen bodies—for instance those that include participants who are descriptively representative of broader society, which provide unbiased learning and consultation opportunities, and which involve a degree of transparency—can also serve as trust proxies for the wider public, enabling average individuals to make better trust judgements about the proposed constitution or amendment without expending significant cognitive effort (Warren and Gastil 2015). Deliberative citizen bodies may thus be understood as contributing to the legitimacy of the resulting constitutional text (and perhaps to enhanced participatory governance) in ways that are distinct from other participation mechanisms, and may play different roles depending on when such bodies are used within a constitution-making process.

Process designers must therefore determine *which* participatory mechanism(s) should be used, *when* participation will take place throughout the various stages of the constitution-building process, and *how* participation feedback will influence (and constrain) both the content of the draft and the elite negotiation process to adopt the text. Moreover, designers must manage public expectations about what participation can *realistically* achieve. Public consultation and broad public buy-in is not a substitute for political consensus among elite decision-makers, though it may shape elite calculations and bargaining dynamics. Moreover, not all widely held public opinions are necessarily appropriate to include in the final text. Such process design and management decisions are made within a country-specific ecosystem of constraints and opportunities shaped by the state's political and cultural history; security situation; demographics; traditional or customary structures and practices; access to human, financial and material resources; access to technical expertise; and a range of other factors. To complete this formative task in an optimal way, country-level decision-makers require comparative knowledge rooted in empirical evidence to inform the planning of public participation processes.

## Public participation in The Gambia

The Republic of The Gambia is a West African nation of around 2 million people surrounded on three sides by Senegal. From 1994 to 2016, the country was governed as an authoritarian dictatorship in which civil society and the political opposition were oppressed, extrajudicial killings and forced disappearances were

prevalent, and state resources were treated as the personal property of the ruling elite (HRW 2019).

The Gambia's 1997 Constitution, which remains in force, contains a number of provisions that support democratic governance. Over time, the document was amended under Yahya Jammeh's regime in ways that *inter alia* weakened accountability, granted broad immunity to the president and created institutional conflicts of interest (Jobarteh 2018; Constitutional Review Commission 2020). In practice, it did little to curb regime abuses over two decades and therefore enjoys limited popular legitimacy.

In 2016, in a surprising victory, a coalition of opposition parties headed by Adama Barrow won the presidential election—in part on a platform for constitutional reform, democratization and development (Helal 2017; Searcey and Barry 2017). Given the country's history, the new constitutional text must enjoy popular legitimacy and demonstrate to the public both symbolically and functionally that the 'new' Gambia is more inclusive, participatory and democratic than the Gambia of Jammeh.

One may infer from contemporary public debates, official statements, and policy and planning materials that Gambian decision-makers and citizens alike recognized the importance of the participation process. The very decision to develop a new constitution (rather than amend the 1997 text) is both symbolic and functional. While aiming to provide an enhanced architecture for democratic governance, it also represents a break with the past. Gambians broadly accept the idea that a well-designed participation process can support the construction of a democratic constitutional text that meaningfully reflects the interests and desires of the Gambian people. There is also a strong belief that participation is important to build popular legitimacy for the new constitutional order, enhance people's education and engagement in the country's transition, facilitate trust and reconciliation across communities and between citizens and political leaders, and enlist a cadre of citizen guardians for the new constitution and Gambian democracy. Moreover, the process is seen as a test of the capacity and commitment of Barrow's government to meaningful 'system change' (Jobarteh 2018). The issue of public education and civic engagement is particularly important for process design because article 226 of the current Constitution requires a new constitution to be approved by 75 per cent of voters in a popular referendum, with a 50 per cent turnout threshold.

In 2017, following government-led consultations with key civil society groups and other stakeholders, the National Assembly enacted the Constitutional Review Commission (CRC) Act, which established the initial drafting body as an independent commission composed of 11 members appointed by the president. The law obligated the president to ensure that all individuals appointed to the commission are of high moral character and have appropriate qualifications, and to regard the 'geographical, professional, age and gender diversity of The

Gambia' (CRC Act, article 4). The law's provisions on the composition of the CRC may be understood as an attempt to ensure that the initial drafting body would be inclusive and non-partisan.

The law further obligated the CRC to 'seek public opinion and take into account such proposals as it considers appropriate', and to afford Gambians both within and outside the country 'the opportunity to freely express their opinions and make suggestions on matters they feel should be considered in the Constitution' (article 6). It further empowered the CRC to publish the draft constitution and the body's final report in a manner as the commission considers fit (article 21(3)).

Though the CRC was entirely appointed by the president, which may tend in some circumstances to undercut public trust in such a body, the selected commissioners were nationally known personalities who enjoyed broad public respect as being apolitical and credible authorities. In addition, civil society organizations were asked to nominate a member to be appointed by the president, which supported representation of this sector, and the body was gender balanced. The CRC's composition therefore generated a high degree of public trust from the outset.

In subsequently designing the public participation process, CRC members surveyed comparative practice, assessed the Gambian context and legal history, consulted with international advisors, and accepted suggestions from key stakeholder organizations and individuals. Key among the commissioners' concerns was ensuring that the participation process would be contextualized and appropriate within the framework of The Gambia's cultural and social traditions, community structures, and local resources and expertise. It also needed to involve extensive civic education and ensure the inclusion and participation of women, youth, persons with disabilities, the elderly, rural dwellers and members of the diaspora. The role of youth is particularly important in the country's transition; mobilized young people and youth organizations played a major role in electing the opposition coalition in 2016, and the movement remains active in the constitution-building, transitional justice and governance reform processes (e.g. Bah 2018). The CRC was well aware that their choice of participation mechanisms and sequencing of participation opportunities needed to effectively engage young people. Further, designers were aware of and concerned about methodological issues related to particular participation mechanisms, such as self-selection bias and potential access challenges.

With these aims in mind, the CRC designed a participation process that perhaps typifies a 'good practice' approach to participatory constitution-making according to extant understanding among scholars and practitioners alike. It involved quality assurance and monitoring and evaluation measures; the establishment of a specialized CRC website containing background information and links to legal materials,<sup>1</sup> planning documents and CRC reports in multiple

local languages; and the use of a variety of participation opportunities and mechanisms to ensure broad inclusion.

The process began with broad civic education campaigns and the distribution of a constitutional ‘issues’ survey document in print and online across the country. Following this initial campaign (which continued through other institutional partners), the CRC and its teams across the country convened a series of community participation forums and targeted focus groups (e.g. with women, the disabled and youth). They also organized household surveys, one-on-one meetings and interviews, published online surveys and advertised opportunities to submit written proposals. Prior to engaging communities, the CRC held awareness meetings with local and traditional leaders to sensitize them to the constitution-building and participation processes and request their assistance in reaching local populations. Prior to and during the community-based and online survey processes, the CRC also accepted solicited and unsolicited position papers and recommendations from organizations and individuals. An initial text was then drafted and released to the public for further comment, along with an explanatory memorandum translated into five local languages. The CRC then revised the text and publicized the ‘final’ draft along with an explanatory memorandum, as well as the body’s report to the president. The publication of the CRC’s report was particularly important for transparency, as it detailed how the public consultations were carried out, the manner in which public opinion was addressed, coverage data and the challenges faced (CRC 2020).

In total, the CRC received 107 formal position papers, held 106 in-country public consultations in a three-month period, and convened 263 focus groups with 7,890 people across the country. It also held external consultations with Gambian diaspora in nine countries, and face-to-face consultations with organs of the state, civil society, international organizations, interest groups and faith-based organizations plus some individuals. Public meetings involved 874 people and household surveys and were administered to 9,263 registered voters from among 1.06 million. Over 1,300 people completed online surveys (CRC 2020).

The Gambia’s participation process was inclusive, consultative and substantial. For example, it involved multiple phases and mechanisms that enabled the CRC to systematically review feedback and incorporate findings into the draft and follow-up consultations. It also supported broad access through the use of multiple national languages and mixed outreach mechanisms, such as radio broadcasts, plays and concerts. Though the CRC’s report to the president notes challenges that influenced both the level of inclusion and the quality of participant feedback, these problems were reportedly minimal.

Yet participation opportunities were not evenly distributed throughout the various stages of constitution-making. There was limited public participation during the process design stage, when parliament and the government informally

consulted with civic groups prior to drafting the CRC Act. Public participation primarily centred around consultations to develop and deliberate the initial text and through (anticipated) voting in a ratification referendum. Moreover, it could be argued that the idea of facilitating trust and the notion of trust proxies was integrated throughout the process—both through the appointment of nationally known and trusted members to the CRC, which helped imbue the body with a high degree of trust, and through the CRC’s participation methodology, which incorporated local and traditional leaders as well as other trusted groups.

The normative and instrumental values of the public participation process were revealed in notable ways in The Gambia. For example, to the extent that the CRC’s process was intended to enlist a cadre of citizen guardians to safeguard the constitutional text and the process as a whole, and to build popular buy-in for the content of the CRC draft, its efforts were demonstrably successful in the lead-up to political deliberations. Following the CRC’s submission of its draft to the president, citizens were concerned that the text would be altered prior to its publication in the *National Gazette* as a bill for consideration by parliament (as required under article 101 of the 1997 Constitution). This concern was understandable given the country’s history of dictatorship and disputes within President Barrow’s governing coalition that arose during the drafting process (e.g. van Eyssen 2019). Accordingly, activists and the media mobilized to demand that the draft be published without alteration by the executive. This illustrates both the degree to which civic space and freedom of speech have expanded in The Gambia since the 2017 transition, and popular sentiment about the draft constitution. Indeed, a majority of civil society organizations asserted that the text represents the opinion of the Gambian people. In its defence, they began monitoring the actions of the executive and legislature and demanding through the media that the Independent Electoral Commission hold a timely referendum (e.g. Jeffang 2020; Camara 2020; Jobarteh 2020).

In May 2020, President Barrow published the unaltered draft constitution as a parliamentary bill despite his concerns (and those of his allies) about key provisions. Since the Gambian constitution-building process uses a kind of relay approach, wherein the draft developed through a participatory process is handed over to a different body for subsequent political deliberations, contentious issues in the popularly supported draft needed to be resolved through political deliberations in the later parliamentary review process.

This is important because although the draft enjoys broad public support, a vocal and influential minority of Gambians suggested it should be rejected. Criticisms range from the political (relating to term limits and qualification provisions and their implications for President Barrow), to the normative (relating to suggestions that the draft ‘plagiarizes’ the Kenyan Constitution and does not reflect Gambian values), to the substantive (relating to provisions on

decentralization and self-governance, executive–legislative relations, fundamental rights, representation and the judiciary) (e.g. Darboe 2020; Colley 2020).

Perhaps as a result of these unresolved, politically contentious issues, the bill on the new constitution failed in its second parliamentary reading in September 2020: it received 31 of the 42 votes required to move to it into committee for deliberation and potential revision. Despite this setback and the country's political divisions, popular demands for a new constitution and public support for the draft remain strong. Political negotiations to resolve contentious issues in the draft remained ongoing at the time of writing.

## Public participation in Mongolia

In November 2019, Mongolia enacted a series of significant amendments to its 1992 Constitution. This process marked the culmination of a unique and innovative approach to participatory constitution-building through the use of deliberative polling.

Deliberative polling is a mechanism that provides insights into what the opinions of the broader public *would theoretically be* if they had the opportunity to become more informed and engaged in constitutional issues (Center for Deliberative Democracy n.d.). It uses weighted random representative samples of the polity to comprise the deliberative assembly, making it methodologically complex and highly technical (Center for Deliberative Democracy n.d.; Fishkin and Luskin 2005). Like other citizen assemblies or 'mini-publics', deliberative polling—depending on when it takes place and how the resulting recommendations are used—may also provide a kind of trust proxy for the wider public and contribute to the overall legitimacy of the process and the constitutional text (Warren and Gastil 2015). The Mongolian leadership understood the instrumental and normative assumptions about deliberative polling as a participation mechanism, and the importance of ensuring the effective representation of public views as part of the constitutional reform process (Knowles 2017; Naran 2019). Their choice of this mechanism illustrates their view of what participation can do, and also their access to necessary technical advice on the design and roll-out of the deliberative polling process (Martinovich 2017).

The Mongolia case is particularly interesting for two main reasons: (1) the types of participation mechanisms used and (2) the way in which participation opportunities were sequenced at different stages of the constitution-building process. Decision-makers established several participation processes at the agenda-setting stage (including the use of deliberative polling) and continued to hold public consultations during later deliberations on the text (see Eisenstadt et al. 2015, 2017). At one point there was a proposal to hold a ratification referendum, but this did not occur.

Since the 1990s, Mongolia has become one of the region's most important democracies. Its 1992 Constitution was promulgated in a highly participatory process during the transition from Soviet socialism to democracy and a free-market economy. The text embraces key democratic principles such as the rule of law, separation of powers and the protection of human rights. Mongolia is a different country today, however, than it was in 1992, and constitutional challenges have arisen.

Observers note that Mongolia's politics, like in much of the world, have become increasingly partisan. Some suggest that partisan influence has encroached on the independence of the civil service and judiciary, among other institutions, and that problems with corruption have not been sufficiently addressed. Moreover, Mongolia has faced challenges with government instability: it has had 14 prime ministers in 24 years (e.g. Bulag 2014; Ganbat 2007; Ginsburg and Ganzorig 2001; Naran 2019). Successive governments have struggled to identify and implement policy priorities and to maintain growth in the country's extractive resource-based economy (Naran 2019). The Constitution was amended in 2000 through a process that was criticized for being far less participatory and inclusive than that undertaken in 1992. Subsequent attempts to amend in 2011, 2012 and 2015 were unsuccessful, and faced similar criticism for a lack of participation (Support to Participatory Legislative Process project 2016; Odonkhuu 2016, 2020).

Notably, as in The Gambia, Mongolia's participatory constitutional reform project was initiated by the new ruling party as part of a 2016 campaign promise rooted in public demands. In that election, the Mongolian People's Party (MPP) won 85 per cent of seats in parliament. According to article 68 of the 1992 Constitution, a three-fourths legislative majority is needed to amend it, which gave the MPP unliteral power to change the constitution. However, the MPP upheld its campaign commitments, which indicates that both the political leadership and the public understood that public participation was both necessary and foundational to the desired constitutional, societal and political transformation (Naran 2019).

In 2016, as part of the amendment planning stage, parliament established two working groups comprised of constitutional scholars and other experts to study the need for constitutional amendment and to conduct public consultations. Using primarily conventional methods such as town hall events and meetings, the working groups consulted with over 3,000 citizens and developed a series of recommendations for parliament and the government on issues for constitutional reform.

In 2017, following a successful pilot on policy planning for the capital city of Ulaanbaatar, parliament enacted the Law on Deliberative Polling and amended the 2010 Law on Constitutional Amendment Procedure to require that the process be conducted prior to amending the constitution (as well as for other

specified development planning). After passing the law, parliament enacted a resolution for a deliberative polling process that included a list of six constitutional topics for deliberation. These were reportedly determined by the MPP but were based on the results of the working groups' research and public consultations (Naran 2019; Odonkhuu 2017). The resolution established a Deliberative Council charged with administering the polling, developing opinion questionnaires and balanced briefing materials, nominating experts and developing recommendations for constitutional amendment for parliament (Odonkhuu 2017). Parliament would consider these recommendations during the initial drafting phase, which was performed by a limited-membership working group. It is notable, though fairly common, that the results of the deliberative polling were not binding on the Deliberative Council; nor were the recommendations of the Deliberative Council binding on parliament when it drafted the initial text. It is worth noting that the conclusions and recommendations of citizen assemblies and similar deliberation bodies are not often binding on political institutions. Exceptions include the Citizens' Assemblies on Electoral Reform in British Columbia (2004) and Ontario (2007). In Mongolia, some of the polling results were supported in the Deliberative Council's final recommendations, while others were rejected (Odonkhuu 2017).

Mongolia's participation process also included further opportunities for public comment on the draft constitutional text during the later phases. Like in The Gambia, decision-makers used a variety of participation mechanisms to ensure broad and representative inclusion. This included, for example, publishing the initial draft (and subsequent revisions) online to inform the public of the content and allow comparison against deliberative polling recommendations, establishing an open period for written and online feedback on the various drafts, and convening multiple consultation meetings with citizens and key organizations. Though there is limited evidence that participation mechanisms used during this phase expressly targeted women, youth or other marginalized groups as they did in The Gambia, members of parliament did consult their local constituencies following the first reading of the amendment bill. The at-large processes reached over 327,000 Mongolians, while the constituency consultations reached over 40,000 (Odonkhuu 2020).

Public participation played less of a role in the final stage of the constitution-making process. As noted above, decision-makers opted not to hold a ratification referendum on the proposed amendments, though such referendums are permissible under the 1992 Constitution (article 68). As the governing party, and to enhance legitimacy, the MPP used its supermajority to pass a referendum resolution. The move was opposed by the opposition, however, and ultimately vetoed by the president for other reasons. The referendum debate, along with a series of substantive political disagreements over the content of the amendments, was finally resolved through a multiparty negotiation process that involved the

executive branch (Odonkhuu 2020). Such last-minute negotiations and revisions are not uncommon, but there is a risk that they may undercut the potential benefits of public participation with regard to the popular legitimacy of the ratified text.

Mongolia's combination of deliberative polling during the agenda-setting phase and multiple other participation opportunities and mechanisms at later stages of the process might reasonably be categorized as broadly participatory, but also somewhat limited. Arguably, all segments of the population were able to participate at some stage of the reform process, and those who wanted to, did so. It is not clear, however, how inclusive participation was, or whether (or how) public feedback impacted the content of amendment provisions over several drafts. The political deliberation and bargaining process that took place in the weeks prior to adoption reveal that public opinion may have played less of a substantive role, in practice, in setting the agenda and determining the content of the text than may otherwise be supposed, and more of an instrumental role in influencing elite negotiations. For example, while deliberative polling and the use of broad participation opportunities throughout the process likely supported public trust and legitimacy—which is crucial for constitution-building—the potential use of a ratification referendum (rather than public consultation feedback on the draft itself) appears to have been an important bargaining chip in negotiations between the MPP, the opposition and the president to resolve contentious issues and ultimately build consensus on the final text.

The Mongolia case demonstrates that attempts to categorize a country's participation process *as a whole* are likely to be misleading. Mongolia, like many other countries, employed different participation types at different stages of the constitution-building process to achieve different normative, instrumental and substantive objectives. The use and sequencing of deliberative polling and public consultations in the agenda-setting and drafting and deliberation stages, and the threat of a ratification referendum during elite deliberations in particular, raise interesting questions about how we systematically understand the relationships between particular participation mechanisms and levels of inclusion, the timing of participation opportunities at different stages of the process, elite bargaining, and outcomes for legitimacy and democracy.

## Concluding remarks

In contemporary constitution-building, the role of the public has expanded significantly, as have expectations and assumptions about what public participation processes can achieve. Today, the public generally expects to be consulted in some way in processes to reframe the state, reform the governance dispensation, and redistribute political power and resources. Given the high stakes of the constitutional reform process, and the normative and legal *right* to

participate in the conduct of public affairs, this is understandable. However, the gap between what we assume public participation *can* do (and *how* this is accomplished), and systematic empirical support in the literature, is troubling. Further information and comparative, practical guidance is crucial to support decision-makers at the country level to make more informed choices when designing their participation process, sequencing participation opportunities and constructing participatory mechanisms.

This cursory review of The Gambia and Mongolia cases highlights the interactions between various constraints, interests, passions, reasons and assumptions as they pertain to the design of participation processes. These cases demonstrate that motivated decision-makers do sometimes buy in to the presumed instrumental, normative and substantive benefits of participatory constitution-making, and seek to design processes in a way that can optimize their overarching and specific objectives as they relate to the various stages of constitution-making and the constitution-building process as a whole. Practitioners therefore require a better understanding of how to get the most out of their participation processes and how best to mitigate potential risks.

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### Endnotes

1. The CRC website contains downloadable documents shared with the public, including the initial and revised draft constitutional texts, explanatory memoranda and the final report, among others. It is accessible at <<https://crc220.org/>>.

## 4. Replicate, reform or reject? Autonomous institutions and constitutional innovation in Tobago and Bangsamoro

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W. Elliot Bulmer

### Introduction

This chapter examines recent constitutional developments in two jurisdictions that were both in the process of transitioning to greater autonomy in 2019: Tobago (in Trinidad and Tobago) under the Constitution Amendment (Tobago Self-Government) Bill of 2018 and Bangsamoro (in the Philippines) under the Bangsamoro Organic Law (Republic Act 11054).

This chapter does not focus on the degree of autonomy, or on the factors that led to the desire for greater self-rule, but on the innovative governance arrangements proposed or designed for Tobago and Bangsamoro. Plans for Tobago include a novel form of second chamber, the ‘House of the People’, which would comprise elected representatives of socio-economic ‘sectors’. Bangsamoro, in a country with a long tradition of presidential government, has chosen a quasi-parliamentary system for its regional institutions. What is on the table in Tobago and Bangsamoro is not merely a transfer of the geographical location of power, but a change in the way that power is exercised. These deviations from the ‘parent constitution’ are perhaps unexpected and are worthy of some attention.

## Constitutional replication, reform and rejection

Constitutions rarely emerge in a vacuum. They are shaped by ideas, institutions and interests interacting in a particular social, economic and political context. Where a new constitution is adopted, inertia and path dependency often determine the range of available constitutional choices (Negretto 2013). In the transmission of constitutional designs from one constitution to another—from ‘ancestor’ to ‘descendant’ constitutions—proverbial apples do not fall far from the tree and new chips tend to resemble the old block.

This may occur in the transmission of national-level constitutions over time, even after major political ruptures; new constitutions often resemble the old one they have replaced (Varol 2016). It may occur in the process of ‘migration of constitutional ideas’ from one country to another (Choudhry 2008), especially where the second country is a former colony or dependency of the first. For instance, the similarity of ‘Westminster Model’ constitutions to the British archetype has been well documented (Dale 1993; de Smith 1964). Even if there is no colonial connection, borrowing may occur from ‘prestige’ constitutions which, in their place and time, have a good reputation, to countries seeking to emulate them. For example, in the 19th century, the US Constitution was widely copied in Latin America (Gargarella 2014), while the Belgian Constitution was copied in places such as Romania (Parau 2013: 507–09).

There are many deviations from the default of constitutional replication. First, where constitutional replication must adjust to different contexts, allegiance to familiar institutions is strong, but the circumstances dictate a process of adaptation rather than mere adoption. For example, when the Westminster Model was exported to diverse societies that required federalism or other guarantees for minorities (see de Smith 1964: 106–09), the aim was still to preserve, in the words of the preamble to Canada’s Constitution Act 1867, ‘a form of government similar in principle to that of the United Kingdom’. Doing so within the context required rearranging those forms to accommodate territorial, linguistic and religious differences.

A second cause of change is deliberate reform, which entails changes that go beyond the minimum necessary rearrangements to fit the context, but which nevertheless build upon the familiar system and do not reject its basic premises. Such reforms may occur when political pressures lead to reforms that might have been long advocated in the ‘ancestor’ constitutional order, but which cannot be achieved there for political reasons. For example, article 77 of Syria’s 1930 Constitution enabled the president to dissolve Parliament on the advice of the Council of Ministers. This altered a rule against dissolution found in the Constitution of the French Third Republic (the ancestor of the 1930 Syrian

Constitution) that was widely believed to have made French governments fragile and unstable, but which in France had not been feasible to amend (Gooch 1935).

Third, a new constitution can reject its predecessor. This may occur when one ‘godfather’ constitution is replaced by another—in a sense, a country’s constitutional order is ‘adopted’ from one constitutional ‘family’ to another. For example, the Romanian Constitution of 1923 and the Bulgarian Constitution of 1879 were closely modelled on the then-prestigious Constitution of Belgium, while the Romanian Constitution of 1948 and the Bulgarian Constitution of 1947 exhibited Soviet influence. These constitutional orders thereby ceased to belong to the family of liberal European constitutional monarchies and became members of the Soviet family. A previous constitutional order might also be rejected due to internal political changes—such as a desire for a more autochthonous constitution that rejects a colonial heritage of foreign influence, or a recognition that the existing constitution has failed and needs replacement.

Decisions on deviation from the familiar constitutional order have implications for the design of autonomous subnational institutions. When a new subnational institution is being created, the national constitution can be regarded as the ‘ancestor’ constitution and the instrument creating autonomous regional institutions as the ‘descendant’ constitution. The political systems of federal or devolved countries often display predictable parallels between the two major levels of government: if the federal level is presidential, then the state level is likely to be so too, with directly elected state governors; if the federal level is parliamentary, then the state level is likewise generally parliamentary. Although there are rare exceptions, such as the quasi-federal regionalist system in Italy, where a country that is parliamentary at the national level has directly elected regional governors (presidents of regional governments), the large democratic federations—such as Argentina, Australia, Belgium, Brazil, Canada, India, Malaysia, Nigeria and the United States—all conform to this pattern of parallels. That the new institutions for Tobago and Bangsamoro differ in greater or lesser ways from the mere replication of national-level institutions is therefore worthy of analysis. Are these cases examples of *reform* or *rejection* of ‘ancestor’ constitutional models?

## Tobago

### Context and background

When the British gained control of Tobago after the 1762 Treaty of Paris, they established a bicameral legislature, in the typical style of British plantation colonies, consisting of a House of Assembly elected on a restricted (white, male, property owning) franchise and a nominated Legislative Council. This was replaced in 1874 with a unicameral legislature consisting of six nominated and eight elected members, which in turn was replaced in 1876 by direct rule by the governor (O’Brien and Gayle 2018). In 1889, Tobago was united with

neighbouring Trinidad and lost its self-governing status, although it continued to have its own financial board and treasury administered by a resident commissioner who was an *ex officio* member of the Trinidad Legislative Council (Rowley 2018).

When Trinidad and Tobago became independent in 1962, Tobago continued to be incorporated into a unitary state without distinct representative institutions. Nevertheless, ‘There was an acceptance that Tobago is a distinct community with a history and life of its own and must not be regarded as a mere appendage of Trinidad’ (Rowley 2018). Demands for Tobago self-government were first effectively voiced in 1977 by A. N. R. Robinson, Member of Parliament (MP) for Tobago East (O’Brien and Gayle 2018).

Proposals for Tobago autonomy circulating in the late 1970s led to the enactment of the Tobago House of Assembly Act 1980. The assembly’s powers were limited to formulating and implementing policy on matters referred to it by a government minister. It was responsible for implementing national policy in Tobago relating to functions including economic planning, programming and development of resources, infrastructure and finance. It had a limited scope to make by-laws for the proper management of facilities it operated (Rowley 2018).

Although the Tobago House of Assembly was originally a statutory body, it was given constitutional recognition in 1996 (Constitution Amendment Act 1996). At the same time, but by ordinary law (Tobago House of Assembly Act 1996), its powers were somewhat expanded to include the power to propose bills that, if approved by the assembly, would be transmitted to the secretary to the Cabinet and, subject to Cabinet approval, would be submitted to the Parliament of Trinidad and Tobago for enactment into law (Tobago House of Assembly Act 1996: section 29). However, in 30 years no such ‘Assembly laws’ have been enacted (Rowley 2018). In other words, in practice Tobago has only an administrative, rather than legislative, form of devolution.

### Recent developments

The current chapter in the constitutional reform process began with the election, in 2015, of a People’s National Movement (PNM) government for Trinidad and Tobago led by Dr Keith Rowley, himself a Tobagonian (O’Brien and Gayle 2018). An initial bill proposed in 2016 stalled, but a revised bill to amend the Constitution (Constitution Amendment (Tobago Self-Government) Bill 2018) was introduced into the Parliament of Trinidad and Tobago on 9 March 2018 and passed on its first reading. The bill was referred to a Joint Select Committee, which was to report by 31 July 2019. However, progress on the bill has been slow; it was not reported out of committee until late December 2019. In early 2020 it was further delayed by the COVID-19 pandemic and the bill lapsed at the dissolution of Parliament on 3 July 2020. Following the general election held on 10 August 2020, which saw the PNM returned to power with a slightly

reduced majority, the bill—now known as the Constitution (Amendment) (Tobago Self-Government) Bill 2020—was reintroduced to the House of Representatives. It received its first reading in October 2020 and was referred to a joint committee due to report by 31 December 2020. As such, progress on the bill continues, although having been interrupted by the dissolution and general election, it is no nearer to the end of the legislative process.

### Constitutional innovations

If passed, the constitutional amendment would vastly increase Tobago's autonomy and reinforce the degree of constitutional protection given to that autonomy. It would transform the basis of Tobago's self-government from a devolved administrative arrangement to one that is genuinely (if asymmetrically) federal: it would have two levels of government, each established by the constitution and each with constitutionally entrenched powers. Tobago's legislature would have authority over the 'peace, order and good government of Tobago' except in relation to a list of 11 scheduled matters, principally including civil aviation, immigration, foreign affairs, judiciary and national governmental institutions, meteorology and national security (but not policing).

This chapter focuses on the proposed changes to the institutions of self-government, rather than their powers or constitutional status. The Tobago House of Assembly is currently a unicameral body consisting of 12 elected members and four nominated members (three chosen on the advice of the chief secretary and one on the advice of the minority leader), plus a presiding officer who may be chosen from outside the House of Assembly (Tobago House of Assembly n.d.). The bill would replace this with a bicameral Tobago Legislature. The House of Assembly would become the lower house, and a new upper house, the People's House, would be created.

The powers of the proposed People's House mirror those of the Trinidad and Tobago Senate. It would have the right to scrutinize bills and propose amendments, and have a suspensory veto over bills other than money bills—although the veto period allowed to the People's House would be three months, as opposed to six months for the Senate of Trinidad and Tobago (Constitution of Trinidad and Tobago, section 64; Constitutional Amendment (Tobago Self-Government) Bill 2018, section 18).

The bill stipulates that the People's House would consist of 13 members. Seven would be elected by the people from geographical constituencies corresponding to Tobago's seven parishes—making the House of Assembly the only partially directly elected second chamber in the Commonwealth Caribbean. The remaining six members would be elected from 'sectoral' constituencies—commercial and business, tourism, agriculture, environment, services and legal—through a list of recognized organizations, the details of which will be determined by subsequent legislation.

The inclusion of independent members representing various aspects of civil society is not novel. It is a form of ‘functional’ or ‘vocational’ representation, reflecting the idea that representation should be concerned not only with party labels or programmatic policy goals, but with the inclusion of diverse forms of expertise, experience and socio-economic interests. Examples of second chambers based on functional representation include the Irish Senate, the National Council of Slovenia and the former Senate—abolished in 1999—of the German State of Bavaria.

Already in Trinidad and Tobago, nine senators (29 per cent of the total) are currently appointed at the president’s discretion among ‘outstanding persons from economic or social or community organizations and other major fields of endeavour’ (Constitution of Trinidad and Tobago, section 40). This is a common feature in Commonwealth Caribbean second chambers (O’Brien 2014), which are criticized as lacking democratic legitimacy. The link between the social, cultural and economic interests ostensibly being represented and the individuals appointed to office is opaque and sometimes tenuous. There is broad scope for discretion, and potential for the abuse of power and political patronage. In practice, appointed Senates in the Caribbean have only marginal value; debates about their reform or abolition continue (O’Brien 2014).

Election by sectoral constituencies is an attempt to preserve the functional representation of interests while overcoming the problems associated with appointments. It transfers the element of discretion from the president to the sectoral organizations, which will presumably want to further their sectoral interests above those of a particular party. This approach also ensures that balanced sectorial interests are represented: it would not be possible under the proposed system for Tobago to appoint two representatives from the agricultural sector and none from tourism; both are entitled to have a voice.

Nevertheless, election by sectoral constituencies is not immune to manipulation. The proposed constitutional amendment would allow Parliament to determine the list of bodies authorized to participate in the election, the manner of voting and the weighting of votes. To list is to choose, and incumbent governing majorities could manipulate these lists to include or exclude particular groups. Political patronage may therefore still operate in a way that is indirect and paradoxically less transparent. Specifying the list of organizations in the constitution would be more resistant to manipulation but would be unworkable in practice: constitutions are hard to change, but civil society organizations are constantly in flux.

Functional representation provides for the inclusion of socio-economic elites through certain recognized civil society organizations but does not include ordinary members of the public. This raises a normative question of whether functional representation is legitimate on democratic grounds: why should powerful vested interests, which presumably can make their voices effectively

heard in elective politics, have guaranteed seats in the People's House? This is particularly the case in a small community like Tobago, where the political and socio-economic elites are small and overlapping. That question cannot be answered conclusively here, but it is important to note that the proposed People's House—despite the name and the inclusion of a directly elected element—is not an exclusively popular assembly. It is instead a continuation, formalization and modification of the elite, interest-based representation that has long been a feature of Caribbean second chambers.

This proposal for Tobago can therefore be regarded as an example of constitutional reform, rather than replication or rejection. The specific mechanism of selection is innovative, but the principle on which it rests—that of a second chamber that acts as a House of Review, bringing experience, expertise and societal interests to bear on legislation—is conservative.

## Bangsamoro

### Context and background

The Bangsamoro region in Mindanao, southern Philippines, was the scene of a violent conflict between the armed forces of the Philippines and guerrilla forces supporting self-government for the Muslim ('Moro') community of Mindanao. The dispute between the Moro people and the Philippine Government has many causes—from grievances over the status of customary law and land tenures to lack of development and economic opportunities. According to the Philippine Government's Office of the Presidential Advisor on the Peace Process, 'the Muslim-dominated provinces in Mindanao are among the poorest provinces in the country with per capita incomes and human development indices below the national average' (Government of the Philippines n.d.). However, the dispute is also one of identity, arising from tensions between a Muslim enclave and a largely Catholic country. As one leading Bangsamoro politician explained, under condition of anonymity, 'We are Moros ['Moors'] and the Moros have been fighting against the Spanish for a thousand years.' To his mind, this was a conflict whose origins could be traced back to—and indeed far beyond—the earliest days of Spanish colonization.

The very long-running process has involved various political groupings and their military wings with different aims at different times. The Moro National Liberation Front (MNLF) was willing to accept a degree of autonomy within the Philippines. After the fall of Ferdinand Marcos' authoritarian regime and the adoption of a new constitution in 1987, attempts to accommodate this demand led to the creation of the Autonomous Region of Muslim Mindanao (ARMM) in 1989 (Republic Act 6734). Another agreement reached between the Government of the Philippines and the MNLF in 1996 resulted, in 2001, in an expansion of the powers of the ARMM institutions (Republic Act 9054). The rival Moro

Islamic Liberation Front (MILF), initially a more hard-line offspring of the MNLF, nevertheless continued to insist on full independence as an Islamic state until after the death of its former leader Salamat Hashim. Only in 2010, at peace talks in Kuala Lumpur, did Mohagher Iqbal, the chief negotiator for MILF, finally renounce independence and express a willingness to accept an asymmetrical autonomy arrangement (Marcelo 2018; Digal 2010).

### Recent developments

President Rodrigo Duterte, elected in 2016, is the first president to come from the Mindanao region. Determined to find a lasting resolution to the Bangsamoro problem, he almost immediately launched a discussion of federal proposals to reform the Philippine Constitution. However, this process of federal reform has stalled, in part due to concerns that federalism would worsen already problematic aspects of the country's political system: namely, its oligarchic nature, dominance of the state by locally entrenched political dynasties, the weakness of political parties, the pervasiveness of corrupt clientelist relations between political bosses and citizens, and the consequent lack of coherent policymaking and programmatic accountability.

It was clear from the outset that the form of autonomy envisaged for the Bangsamoro Autonomous Region must go beyond that provided by the existing ARMM. Although they arose from the peace process, the laws establishing and conferring additional powers on the ARMM authorities (Republic Act 9054) did not fully involve Moro leaders in their drafting (Casauay 2015); the ARMM was therefore widely regarded as 'a failure, marred by corruption and mismanagement' (Marcelo 2018).

While the previous president, Benigno Simeon Aquino III, signed the Bangsamoro Framework Agreement on 15 October 2012, it was not until March 2014 that the final Comprehensive Agreement on the Bangsamoro was signed. However, Congress did not ratify the resulting Bangsamoro Basic Law that was to constitute the legal framework under which the Bangsamoro Autonomous Region was to govern itself before Duterte was elected president. Under pressure to reach a solution in Mindanao but with the path to federalism blocked, Duterte pursued a bespoke autonomy arrangement for Bangsamoro in the form of a Bangsamoro Organic Act that critically amended the draft Bangsamoro Basic Law.

In early 2019, a two-part plebiscite was held in Western Mindanao. In the first round, held on 21 January, voters in the territory of ARMM were asked whether they wished to accept the new Bangsamoro Organic Act (BOA). Although the BOA is merely an act of the legislature of the Philippines, and not a fully-fledged constitution, endorsement by referendum gives it 'super-statute' (Eskridge and Ferejohn 2001) status. The BOA functions, in effect, as the autonomous regional constitution for the Bangsamoro Autonomous Region of Muslim Mindanao (BARMM), setting out the principles on which the autonomous region is based

and the structures of its government. On 6 February, polls were held in the districts Lanao del Norte and Cotabato to determine whether they should be included in the autonomous jurisdiction. Their ascent enlarged the geographic area included in the BARMM, which is now larger than the former ARMM.

The new regional government, with Cotabato as its capital, was initially inaugurated on 29 March 2019 under the Bangsamoro Transition Authority (BTA). The BTA, a transitional unelected body consisting of 80 members, brings together the political leadership and former guerrilla fighters of the MNLF. The BTA combines legislative and executive functions for the autonomous region, but its primary duty is to complete the establishment of the new autonomous administration and prepare for elections.

### Constitutional innovations

Three constitutional innovations in BARMM are notable. First, despite the Philippines' long experience of presidentialism, the BOA provides for a quasi-parliamentary system in Bangsamoro—a *wali* (governor) who acts as the ceremonial and constitutional head of Bangsamoro, and a chief minister (elected by the Parliament of Bangsamoro) to exercise executive power. This arrangement is considered quasi-parliamentary because the chief minister can only be removed during the term of office for which he or she is elected by a two-thirds majority vote in Parliament. Therefore the normal rule of parliamentary confidence, which would require a chief minister to resign, or seek a dissolution, if a majority of MPs withdrew their support, does not apply. In part, the requirement for a two-thirds majority to remove the chief minister was a deliberate attempt to ensure executive stability, but it may also demonstrate a degree of confusion or misunderstanding of how parliamentarism works. The executive's dominance is further reinforced by the rule that a vote of no confidence automatically leads to the dissolution of Parliament, meaning that parliamentarians who cast a ballot in such a vote risk losing their seat (BOA, article VII, section 36).

Second, the BOA provides for the establishment of a Council of Leaders, consisting of the members of the Congress of the Philippines from Bangsamoro, provincial governors and mayors of cities in Bangsamoro, and representatives of traditional leaders and non-Moro indigenous communities. This innovative institution, unparalleled in the country's history, acts as an advisory body to the chief minister and has a coordinating role, reaching 'up' to the national level and 'down' to local levels and into indigenous communities. It reflects a concern not only for increased autonomy for Bangsamoro, but also for better-quality governance through improved cooperation between different levels of government.

Third, the Parliament of Bangsamoro is to be elected via a hybrid electoral system in which half of the seats are filled by proportional representation, 40 per cent elected from single-member districts, and 10 per cent reserved for women,

youth, traditional leaders, *Ulama* (Muslim scholars), non-Moro indigenous peoples and settler communities. The provision for sectoral representation is shared with the national Congress of the Philippines, where 59 of the 297 seats are chosen from national party lists representing indigenous peoples and other minorities (IPU 2016). However, the shift to having half the seats proportionally elected is an innovation. In addition, the BOA contains a very strong anti-defection provision that makes MPs entirely dependent on their party machines: a party's leadership may, without any procedural or substantive restrictions, remove any MP who has been elected on a party list and replace him or her with another party member (BOA, article VII, section 19).

Based on the author's discussions with leading members of the BTA in December 2019, there are two sets of reasons for the change in the system of government. The first relates to questions of governance and development. Bangsamoro leaders regard the Constitution of the Philippines as dysfunctional because it has sustained a political system characterized by weak, personalized parties, dynastic politics, lack of programmatic accountability and widespread corruption. The adoption of a parliamentary system—or something very close to it—in Bangsamoro was intended to address these weaknesses. The institutions, from the tenure of the chief minister to the electoral system and the strong anti-defection rules, are all designed to encourage effective but inclusive governance based on the united leadership of a chief minister heading a programmatic party or coalition.

The second set of reasons are symbolic and identitarian. The Moro leadership sought the establishment of the office of *wali* to provide moral and civic leadership and to act as a focus of identity. The *wali* provides a symbolic institutional connection to the former Sultanate of Sula and reflects the Islamic character of the people. There are parallels between the office of *wali* and that of the Yang di-Pertua Negeri—who combines the functions of a constitutional head of state with those of a state religious head—in Malay states.

There are ongoing personal, cultural and economic links with Malaysia, especially to the states of Sabah and Sarawak. Bangsamoro elites have seen the parliamentary system working well in Malaysia to deliver both stable governance and economic development. Bangsamoro's leaders perceive Malaysia's constitution as prestigious and worthy of emulation. Taken together, recent changes in Bangsamoro amount to a rejection, rather than merely reform, of the institutional arrangements of the Philippines—and also of the former ARMM. They represent a shift in the constitutional frame of reference away from the Philippines towards Malaysia.

## Concluding remarks

This chapter does not seek to provide a comprehensive answer to the question of how (or why) constitutions change. It simply isolates two cases of constitutional change on the agenda in 2019, both of which relate to regional autonomy, to examine how the ‘descendant’ institutions replicate, reform or reject those of their ‘ancestor’ constitution.

Tobago exhibits reform—the introduction of an elected element combined with a change in how non-partisan members of a Commonwealth Caribbean second chamber are selected. Yet there is no fundamental change to the principle or logic of representation. The members directly elected from the parishes are likely, in the absence of proportional representation, to perpetuate existing patterns of two-party majoritarian politics, while the sectoral members of the People’s House will continue to represent the ‘great and good’. The rest of Tobago’s institutional design is closely comparable to other Commonwealth Caribbean governance institutions, making necessary allowances for the federal system. There is constitutional evolution only within a fairly narrow, well-worn path. Bangsamoro’s changes are more radical, rejecting one ‘ancestor’ constitutional order in favour of another, both for identitarian reasons and in hopes of achieving better governance. At the same time, the BOA highlights the limits of constitutional rejection. The rules, conventions and norms of parliamentary government found in Malaysia, which ultimately descend from the Westminster Model, are absent in Bangsamoro—which continues to be influenced by the presidential institutions and political culture of the Philippines.

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## 5. Contested state structures: comparing negotiations about federal system design in Myanmar and South Sudan

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Thibaut Noel

### Introduction

In countries where the state structure is contested, grievances frequently revolve around access to public power. In these contexts, establishing a federal system is sometimes seen as a viable solution not only to redefine access to public power and resources among different groups across the country, but also to address demands for autonomy and recognition of identity.

Federalism is a constitutional mechanism for dividing responsibilities between at least two levels of government in a country. It combines elements of self-rule and shared rule (Elazar 1987; Mueller 2017). Self-rule refers to the level of autonomy granted to the subnational governments to regulate certain policy areas. Shared rule implies the participation of subnational units in the conduct of public affairs at the federal level. The federal scheme is entrenched in the constitution and can only be altered with the consent of the federal level and the subnational units.

Given its potential to satisfy demands for increased power sharing while maintaining the country's territorial integrity, federalism has been hailed as a relevant tool for conflict resolution (Anderson and Keil 2017; Keil 2012). A federal scheme can help redefine power sharing by granting control to different territorially concentrated groups over specified policy matters (self-rule), and by ensuring their participation in decision-making at the federal level (shared rule).

In the past 30 years, several countries, such as Bosnia and Herzegovina (1995) and Nepal (2015), have established a federal state structure in an effort to resolve internal conflicts rooted in demands for increased access to power. Myanmar, South Sudan and Somalia are currently considering doing so.

While warring parties may agree on the importance of federalism at an early stage of a political settlement, negotiations over the design of a future federal system can be long and challenging. In Nepal, for example, despite a commitment to federalism from all major political forces in 2006, nine years of protracted negotiations were necessary for stakeholders to agree on its design.

This chapter provides a comparative overview of how the negotiations over the design of a future federal state structure unfolded in 2019 in Myanmar and South Sudan; both are currently engaged in a federalization process as an explicit commitment in a peace process. It analyses the competing interests shaping the negotiations on federalism and identifies the federal design elements that have been discussed in detail and those that still deserve more attention.

## Negotiations about federal design in Myanmar

The quest for federalism in Myanmar dates back to the pre-independence era. In 1947, representatives of the Bamar community and three ethnic minority groups agreed to form a state after independence, in which autonomy, the right to secession and representation of the main ethnic groups in national-level institutions would be guaranteed (Aung, Khine and Aung 2019; Kipgen 2018). However, the centralized system of government established after independence did not fulfil this pledge (Crouch 2019; Williams 2009). When ethnic minorities pushed for federalism, the military staged a *coup d'état* in 1962 that led to four decades of centralized military rule. Since then, more than 20 ethnic armed organizations have taken up arms against the government in a quest for a genuine federal system.

Myanmar's current Constitution, adopted in 2008 by the military, is contested (Government of Myanmar 2008). It sets up a hybrid system that guarantees the military control over three key ministries (defence, border affairs and home affairs), at least 25 per cent of the seats in parliament at both union and state/region level, and accordingly a veto over constitutional amendments. The 2008 Constitution also introduced limited federal features. On the one hand, it establishes two levels of government: the union level, and the subnational level consisting of seven Bamar-majority regions and seven ethnic states. Most of the legislative responsibilities, however, are granted to the union level. On the other hand, all regions and states are equally represented in the upper house of the union parliament, but they have a limited influence on federal policies as the upper chamber does not have the power to veto legislation. Further, the union president appoints the chief executives in states and regions (chief ministers);

therefore there is no direct electoral link between the state/region governments and their citizens.

### Stalled negotiations in the peace process

In October 2015 the government, the military and eight ethnic armed organizations signed the Nationwide Ceasefire Agreement (NCA), which was a significant milestone towards sustainable peace (UN Peacemaker 2015). The agreement includes a commitment to establish a democratic federal system and lays out the process for negotiating the future state structure. Through a series of peace conferences, representatives from the government, the military, political parties and signatory armed groups (NCA Ethnic Armed Organizations) were to negotiate guiding principles for restructuring the system of government. The outcome of these negotiations would form the basis for amending the 2008 charter.

Constitutional reforms and federalization gained further momentum with the landslide victory of the National League for Democracy (NLD) in the general elections in October 2015. The party came to power promising to amend the 2008 Constitution, and the new NLD-led government initially prioritized the peace process as an avenue for constitutional change. Up to the third peace conference held in July 2018, 51 broad federal and governance principles were agreed upon. However, the process stalled in 2019. The political dialogue was stuck on key questions of access to power, autonomy and self-determination. In addition, about half of the ethnic armed groups, including those that de facto control the largest territorial areas, still refuse to sign the NCA and join the negotiations. A fourth peace conference was held in August 2020, but mostly focused on a plan to continue the peace process after the November 2020 elections.

At least two reasons may have contributed to the deadlock. First, the large number of issues on the agenda, and the lack of systematic priority-setting, has prevented the negotiating parties from engaging in in-depth discussions about key governance reform topics. Second, negotiations on the design of the future federal system primarily focused on elements of self-rule and started on highly divisive topics such as the right to self-determination and substate constitutions. As a result, no significant agreements on fundamental principles for institutional reforms were reached during any of the four peace conferences. The principles agreed upon either reiterate commitments that were already provided in the NCA or are too vague to provide a sufficiently clear framework for designing the future federal state structure.

### Bringing negotiations to Parliament

In response to the deadlock in the peace process, and in an attempt to deliver on its campaign promise before the November 2020 elections, the NLD-led

government changed its strategy to push for constitutional change in 2019. On 29 January 2019, the ruling party established the Joint Parliamentary Committee for Constitutional Amendment (JPCCA). Composed of 45 members representing all parties in the Union Parliament on a proportional basis, including military lawmakers, the JPCCA was tasked with reviewing and proposing amendments to the Constitution.

The committee first invited its members to submit proposals for changes chapter by chapter. On 15 July 2019, the JPCCA submitted a report to Parliament compiling all 3,765 recommendations collected during the first phase (ConstitutionNet n.d.a). This inner-parliamentary process shed light on the competing demands and different priorities for reforms of the main groups in Parliament (International IDEA 2019; Kyaw 2019).

The NLD concentrated primarily on reducing the role of the military in politics. Most significantly, the ruling party sought to gradually reduce the proportion of military appointees in Parliament over the next three general elections, from the current maximum of 25 per cent to 5 per cent in 2030. Additionally, the NLD proposed to alter the existing constitutional amendment procedure by reducing the approval threshold from 75 per cent to two-thirds of members of the Union Parliament. With this change, the military would lose its ability to veto constitutional amendments. The ruling party aimed to further assert civilian control by proposing (i) the maintenance of civilian governance during states of emergency, (ii) civilian decision-making over the appointment of all ministers, and (iii) civilian control of the National Defence and Security Council. While proposing to significantly curtail the military's role in politics, the ruling party did not envisage any significant changes to the current state structure or propose concrete options for the design of the future federal system.

The proposals put forth by the various ethnic political parties were the most far reaching. Ethnic parties broadly agreed on reducing the military's involvement in politics. Most of them favoured removing all military members from the legislative branch and the Cabinet. In addition, ethnic political parties submitted detailed proposals related to the design of the federal system, with an emphasis on elements of self-rule. Although they differ in detail, ethnic parties generally proposed to redefine the sharing of legislative responsibilities by transferring many competencies from the federal level to the states and regions, or to a new list of concurrent powers. Some of them further recommended granting constituent units residual powers and the right to adopt substate constitutions. Most of them sought to enhance states' and regions' autonomy over their executive branch by proposing chief ministers to be elected by the constituent unit legislatures, rather than the current system of appointment by the president. The Shan National League for Democracy (SNLD)—the second-largest ethnic political party in the Union Parliament—is the only party that has also focused on elements of shared rule in detail, by submitting comprehensive proposals on

the system of representation at the union level. The SNLD proposed to radically strengthen the influence of non-Bamar-majority states in the legislative process at the union level by (i) re-delineating the federal map around eight constituent units (consisting of one Bamar-majority unit and seven non-Bamar-majority units), (ii) restructuring the upper house so that Bamar-majority areas are represented by just one-eighth of the total membership, while seven-eighths are elected by the ethnic minority areas and (iii) by granting an absolute veto power to the upper house on all legislation. The party also favoured the representation of constituent units in the judiciary and in fourth-branch institutions at the union level, by proposing the Constitutional Tribunal and the Election Commission to consist of one member from each constituent unit. Therefore, with the exception of the SNLD, most of the ethnic parties focused on the design of the federal system by prioritizing elements of self-rule in an attempt to enhance the autonomy of the constituent units.

The military and the former ruling Union Solidarity and Development Party (USDP) objected to this constitutional review process from the outset on procedural grounds (Arkar and Latt 2019). Instead of presenting proposals within the committee, both groups submitted five separate amendment bills directly to the Union Parliament in 2019 (Aung 2019; ConstitutionNet n.d.b). Their proposals are narrow in scope. Like the ethnic political parties, the military and its proxy, the USDP, proposed that state and region legislatures be empowered to elect chief ministers. Both groups further recommended allowing chief ministers to define the number of ministries and to appoint ministers of their Cabinet. These proposals to enhance states' and regions' autonomy over their executive branch could be interpreted as a strategic approach by the military and the USDP to counterbalance the NLD's dominance at the union level, rather than a genuine desire to move the federalization process forward. Similarly, by wishing to retain the overall structure of the constitution, the military expressed its desire to maintain its role in politics.

During the second phase of this inner-parliamentary process, the JPCCA prepared two constitutional amendment bills (ConstitutionNet n.d.c). As the voting procedure within the committee did not require consensus, the ruling party, with the support of small parties, was able to decide which proposals to retain (Zulueta-Fülscher 2020). Therefore, no real bargaining efforts took place within the committee. Only the proposals submitted by the NLD during the first phase were approved by the JPCCA and included in the final amendment bills (International IDEA 2020). None of the proposals submitted by ethnic political parties related to federalism were considered. Despite its critical importance to the peace process and the commitment provided in the NCA, the federalization process did not appear to be a priority for the NLD in 2019. The ruling party prioritized civilianization over federalism.

The two amendment bills were submitted to the Union Parliament on 27 January 2020 (Aung 2020). The vast majority of the 114 proposed amendments were eventually rejected. They failed to meet the parliamentary threshold, which requires any amendment proposal to be approved by more than 75 per cent of parliamentarians. Only four minor amendments were approved, none of which significantly changed the Constitution.

### Demands for self-rule sidelined by competing agendas

The series of peace conferences (2015–2018) and the inner-parliamentary process launched in 2019 represented two consecutive opportunities to fulfil the NCA's commitments to democracy and federalism. Yet no significant progress was made on the design of a future federal system.

Most of the discussions related to federalism have focused primarily on elements of self-rule, with the NLD willing to maintain a rather centralized system and ethnic minority groups advocating for greater autonomy for the constituent units. With the exception of the SNLD, the vast majority of stakeholders engaged in the constitutional reform debate have yet to formulate concrete proposals on the system of representation of constituent units in union-level institutions. This situation might be partly explained by the existence of a majority group and a dominant national political party in the country. Even if institutional arrangements were established to ensure the representation of constituent units at the union level, ethnic minority groups fear that they might still have a limited influence over federal policymaking, and therefore focus most of their demands on enhanced self-rule.

Nevertheless, ethnic political parties could have some leverage on decision-making at the union level, even within the current constitutional framework. If ethnic minority parties could secure 25 per cent of the seats in the Union Parliament through a united coalition, the NLD or the military/USDP would need its support to elect their presidential candidate in the legislature; the ethnic coalition could leverage this bargaining position to demand concessions in return.

The NLD's change in strategy in 2019 exposed the competing demands and priorities of the main groups in Parliament in the run-up to the 2020 general elections. While the ruling party prioritized the civilianization of the Constitution, ethnic parties pushed for a decentralized federal system. The military and the USDP tried to take advantage of this divide to maintain the status quo (Kyaw 2019). Although they all agreed to federalism in the NCA, these three political groupings demonstrated different levels of commitment to moving the federalization process forward.

Even though the road towards federalism in Myanmar remains very uncertain, the constitutional review process initiated by the NLD in 2019 was not fruitless. Most significantly, this inner-parliamentary process allowed the different political forces represented in the legislature to officially present their proposals for

constitutional reform. Ethnic political parties took this opportunity to suggest provisions that detail the type of federal system they envision for the country. These proposals could serve as a basis for future constitutional negotiations and could inform future peace conferences to be held under the new government in 2021. To materialize the federal promise provided in the NCA, however, peace stakeholders in Myanmar must seriously engage in comprehensive and in-depth negotiations on options to set up elements of both self-rule and shared rule. Such an approach could potentially ease trade-offs between the main stakeholders on core features of the future state structure.

## Negotiations on federal design in South Sudan

### From unanswered demands for a Sudanese federation towards federalism in an independent South Sudan

Demands for a federal state structure in South Sudan date back to before independence. When debating the future of the larger Sudan in 1954, delegates from the South requested to establish a federation after independence from the British, in which the North and South would be granted equal status and some level of autonomy (Johnson 2014; Mo 2014). This demand was not considered, and a unitary state structure was established at independence in 1956. The disagreement between the South and North culminated in two civil wars (1955–1972 and 1983–2005). The second civil war ended in 2005 with the signature of a Comprehensive Peace Agreement, which established autonomy arrangements and granted the South the right to hold a referendum on secession after six years (UNMIS 2005).

The people of South Sudan voted to secede from Sudan in 2011. After independence, demands for federalism once again emerged during the drafting of the Transitional Constitution (Johnson 2014; Aalen and Schomerus 2016). Representatives from the Equatoria region made substantive calls for a federal arrangement, fearing that a centralized and unitary state structure would marginalize the minority groups settled in the region. The transitional charter adopted by South Sudan's Parliament in July 2011 provides for the drafting of a permanent constitution, and establishes a decentralized, quasi-federal state structure for the transition period. The Transitional Constitution divides executive and legislative responsibilities between the national and state levels. States are granted significant legislative competencies and have autonomy over their executive branch as their chief executives (governors) are elected by state citizens. States are also represented at the national level through the upper house of Parliament, the members of which are elected by state legislatures.

Demands for federalism regained traction in 2013 when a civil war erupted along ethnic lines following President Salva Kiir's dismissal of Vice-President Riek Machar. The ruling Sudan People's Liberation Movement (SPLM) split, as

Machar and his supporters formed the SPLM-In-Opposition (SPLM-IO). The insurgency and demands for federalism resulted from the centralization of power by the ruling SPLM. In addition, President Kiir exercised a constitutional provision allowing him to remove state governors and appoint new state chief executives in the event of a crisis (article 101.r of the 2011 Transitional Constitution). While this provision requires new elections to be held in the concerned state within 60 days, in most cases they were not. This allowed the national government to curb opposition at the state level and undermine decentralization. The SPLM-IO requested a federal solution to the conflict, arguing that it would remedy the centralization of power, the exclusion of some groups from the public administration and their marginalization in politics. Despite mediation efforts led by the international community and a peace agreement in 2015, the armed conflict between the two warring leaders only ended in September 2018 with the signature of a revitalized peace agreement (R-ARCSS) (UNMIS 2015; Intergovernmental Authority on Development 2018). The R-ARCSS stipulates a pre-transition period of eight months leading to the formation of a new government of national unity. This government of national unity will govern during a three-year transitional period, which will culminate in the adoption of a permanent constitution that will establish a federal system.

#### Initial discussions on federal design during the pre-transition period

In 2019, the pre-transition institutions focused on negotiating and implementing critical prerequisites for the transition period. Parties to the conflict had to find a compromise on the composition of a coalition government, the integration of the armed forces, the review of key legislations and the incorporation of the revitalized peace agreement in the 2011 Transitional Constitution.

Although the negotiations over a permanent federal constitution are scheduled to take place during the transition period, a few pre-transition institutions were tasked with negotiating key elements of the federal structure that were central to the conflict. The Independent Boundaries Commission was responsible for brokering a compromise on the number and the delineation of constituent units, as well as the restructuring of the upper house of the federal parliament. These two issues were of particular importance as they would determine the degree of representation and influence each warring party will enjoy under the government of national unity during the three-year transition period (International Crisis Group 2019b).

The controversy over the number of states sparked in 2015, when President Kiir unilaterally increased the number of states from 10 to 32 in order to favour his political base, the Dinka community, and to curb the increasing territorial control of the SPLM-IO over the Great Upper Nile region (International Crisis Group 2019a). The SPLM-IO objected to this new delineation from the outset. The opposition party first favoured the establishment of 21 states, before calling

for a return to the original 10 states that South Sudan had at its independence in 2011. Despite several months of protracted negotiations, the Independent Boundaries Commission failed to propose a federal map on which all warring parties could agree upon.

Due to the slow progress made on substantial matters, including on the delineation of the federal map, the pre-transition period was extended twice in 2019. A transitional government of national unity was only formed on 22 February 2020, after the president announced a return to the original 10 states plus 3 new administrative areas. During the three-year transition period to come, stakeholders will have to agree on a permanent constitution and the design of the federal state structure.

### What's next? Materializing the demands for self-rule and shared rule in a permanent federal constitution

As the constitution-making process unfolds, discussions on the future federal scheme are likely to focus on elements of both self-rule and shared rule. During the negotiations on the R-ARCSS, opposition groups advocated granting more autonomy to the states in order to enhance the influence of constituent units in national-level decision-making, and to make national institutions, such as the public administration and security forces, more inclusive of the country's diverse communities. The R-ARCSS reflects these demands for both self-rule and shared rule. In addition to prescribing that the future federal constitution shall devolve more responsibilities and resources to the states (self-rule), the revitalized agreement also includes a commitment to reorganize the military, to restructure the upper house of the federal parliament, and to establish a Fiscal and Financial Allocation Monitoring Commission (FFAMC). The upper house of parliament and FFAMC are two institutions through which constituent units would be able to participate in decision-making at the federal level (shared rule).

Calls for federalism in South Sudan encompass demands for both self-rule and shared rule. This fact may be explained, in part, by the country's social, partisan and economic configuration. South Sudan contains approximately 60 different ethnic groups, none of which constitutes a majority. If politics continue to be structured around ethnic lines, several political groups might have a chance to counterbalance or reduce the dominance of the ruling SPLM at the federal level by forming a coalition in opposition. Perhaps most significantly, South Sudan's economy largely relies on extractive industries located in the northern part of the country. Each year, the government derives 70 to 90 per cent of its budget from oil revenues (Cordaid 2014; Reed 2020). Most of the states do not have a sufficient tax base, and therefore rely on the redistribution of public funds from the central level to function and deliver public services. In this context, constituent units have a strong interest in defining institutional arrangements that would guarantee them a say over the allocation of public funds, and on wider

policymaking decisions at the federal level. Having access to power at the federal level would entail access to the public funds necessary to implement federal- and state-level policies. Similarly, a key aspect of the federalization process in South Sudan is opposition groups' demands to restructure the public administration, including the armed and security forces, to make these institutions more inclusive of the country's diverse communities. Given the underdevelopment of the private sector, such an overhaul is a central demand driving the debate over federalism as it would provide employment opportunities and a source of income to different ethnic groups in the context of a post-civil-war economy.

## Concluding remarks

The cases of Myanmar and South Sudan illustrate that, while warring parties may agree on the pertinence of federalism at an early stage of a political settlement, negotiating the design of the future federal system remains a challenging task. This is because the term 'federalism' says little about the institutional details involved. To materialize a commitment to federalism, stakeholders have to agree on the number and delineation of constituent units, their level of autonomy (self-rule) and the extent to which these constituent units can influence federal policymaking (shared rule).

In Myanmar, the negotiations on federalism have mostly centred on self-rule. The demands for enhanced constituent unit autonomy put forth by ethnic political parties have been sidelined by the ruling NLD party, which has prioritized civilianization over federalism. The focus on self-rule is rooted in history. Before colonial rule, some of the ethnic states were sovereign separate entities that had their own governance system and control over their political affairs. After independence, the successive centralized state structures did not provide incentives for ethnic minorities to 'buy in' to union-level institutions. The lack of consideration of elements of shared rule might also be partly explained by the presence of a majority group and a dominant national political party. Minority parties have focused their demands on self-rule due to fears that they might not be able to meaningfully influence decision-making at the federal level.

In South Sudan, demands for federalism have instead encompassed elements of both self-rule and shared rule. Taken together, the concentration of financial resources at the national level of government, the lack of sufficiently broad revenue sources at the constituent unit level, and the absence of a natural majority group in the country might, to a certain extent, explain why several stakeholders have an interest in defining institutional arrangements that would guarantee constituent units significant influence over decision-making at the federal level.

As the negotiations in the two countries evolve, competing perspectives on the set-up of the federal scheme are likely to emerge. More in-depth and

comprehensive negotiations that cover elements of both self-rule and shared rule might facilitate cross-issue bargaining and compromise, thus providing key stakeholders an opportunity to give a concrete meaning to their commitment to federalism.

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## 6. Making and re-making internal boundaries: debates on the ‘federal map’ in South Sudan and India—Jammu and Kashmir

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Sumit Bisarya

### Introduction

Federalism can be thought of as a country’s constitutionalized spatial arrangement of public power. One of its core features is that it allows self-governance over a list of constitutionally prescribed responsibilities for a community within a specified geographical space. Therefore there is perhaps no alteration to a federal scheme more significant than changing the boundaries which delineate that space.

The number and boundaries of states—referred to here as the ‘federal map’—is often a contentious issue during transitions from a unitary to a federal system, for example in recent constitution-building processes in Nepal, Somalia and Yemen. This chapter focuses on how these debates arose and unfolded in 2019 in two very different settings—South Sudan and India. The number and boundaries of states is contentious for different reasons. In some contexts, the delineation of a constituent unit enables a territorially concentrated community to form a political majority and therefore exercise a degree of self-governance. This is the most common driver of state creation. It was, for example, a critical issue for the Madhesi community during Nepal’s constitution-building process, and in South Africa for the white-dominated National Party and the Inkatha Freedom Party.

Another consequence of decisions on the number of states is each state’s ability to influence central decision-making. For example, one consequence of the

expansion of the number of states in Nigeria over time from 3 to 36 has been an increase in the power of the federal government vis-à-vis state governments. Sometimes this may become contentious due to ethnic demographics. For example, Myanmar is divided into 14 constituent units—seven ethnic states and seven regions that have an ethnic Bamar majority. In constitutional amendment proposals in 2019, some ethnic political parties proposed redrawing the federal map to create eight constituent units by combining the seven Bamar-majority regions into one unit. In their view, this would honour a promise made during the country’s founding in 1947 regarding equality of representation among its ethnic groups. This was also an issue in the early development of the United States: states were admitted to the union in such a way as to balance the representation of slave-owning and free states in the Senate.

Lastly, the contours of the federal map may affect access to natural resources. For example, Yemen’s civil war was partly triggered by contention over the proposed federal map, particularly access to the sea for the Azal region, where the Houthi movement was based (Shuja Al-Deen 2019).

Underlying these issues of access to public power and resources are three additional considerations. First, boundaries can raise long-standing claims to an ethnic ‘homeland’, which can drive mass mobilization and trigger violent conflict. Such contexts are also often used to mobilize the base for nationalist parties at the centre. The Sri Lankan Civil War of 1983–2009 and the accompanying politics of Tamil and Sinhala nationalists is a stark example, but one of many worldwide.

Second, at the local level, boundaries can have significant effects on the daily lives of communities. For instance, the challenges faced by local communities in the Central Border Region of Ireland/Northern Ireland due to Brexit were likened to ‘opening a wound’ risking political polarization, significant negative consequences for local businesses and an increased sense of marginalization (Hayward 2017).

Third, particularly in contexts of elite patronage politics, the process to delineate states can be a forum for contestation of resources among elites at the centre, as rival groups seek to draw the federal map in a way which will favour their own patronage networks.

Each of these factors can result in losers as well as winners. The creation of a state for one community may generate a new minority within that state that now feels at risk of marginalization (e.g. see Bisarya 2020). Likewise, more seats in central institutions (or more access to natural resources) for one state means fewer for others.

## Contexts and criteria

Negotiations over the number and boundaries of constituent units can arise in various contexts (Anderson 2014). While the issue most obviously arises in the

context of unitary to federal transition (e.g. Nepal, South Africa), there are also cases where transitions to federalism occur before the federal map is drawn (e.g. Somalia), and many cases where the federal map is redrawn over time as unsettled issues become untenable under the existing arrangements (e.g. India, Nigeria).

Two cases are discussed in detail below: India, which redrew its federal map with regard to one specific state, and South Sudan, for which the entire federal map was under negotiation.

The criteria that decide boundary delineation (or that drive political negotiations) include economic/capacity considerations, historical considerations, socio-cultural issues and political geometry (Anderson 2014). These criteria recur in several different frameworks for boundary delineation, ranging from the India State Reorganization Commission of 1956 to the Somalia Provisional Constitution of 2012. Notably, the resolution establishing the 1956 State Reorganization Commission put forward as the ‘first essential consideration’ the ‘preservation and strengthening of the unity and security of India’.

While these criteria played some role in the process, or at least the rhetoric, of the two cases discussed here, national politics was the overarching driver in both countries in 2019.

## South Sudan

### Overview

At its independence in July 2011, South Sudan maintained its existing 10-state structure. However, after the breakout of conflict in 2013, this became a critical issue of contention as different parties sought to change the number and boundaries of states to suit them and their networks. Under a peace agreement signed in 2018, different institutions and mechanisms were established in 2019 to resolve the issue of the federal map, but they were unable to reach a consensus. In early 2020, the parties ultimately agreed to return to the 10-state structure, with three administrative areas.

### Historical background

The delineation of internal boundaries in South Sudan has a long history. It can principally be traced to the evolution of provincial boundary demarcation under Sudan’s Anglo-Egyptian administration from the start until the middle of the 20th century (Johnson 2010). Provincial boundaries were frequently made and remade during this time, often as part of a conflict management strategy to bring rival groups together (Johnson 2010: 21). As well as being fluid over time, the borders that were put in place were ‘flexible to the point of invisibility’ (Johnson 2010: 21), as levels of provincial authority waxed and waned, and the nature of some of the pastoral communities meant that territorial jurisdiction was never complete. Transfers of districts between provinces was common, brokered

between local leaders and then ratified by the central authority in Khartoum, as was the relocation of communities from one part of the country to another.

This porous and inconstant provincial boundary landscape was codified at independence on 1 January 1956. This date has become a touchstone for subsequent peace negotiations over boundaries. It was referred to in the 1972 Addis Ababa Agreement that ended the first Sudanese Civil War, the 2005 Comprehensive Peace Agreement at the end of the second civil war, and—as discussed below—in the 2018 Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) signed at the end of the most recent violent conflict. However, and importantly with regards to the current process, there is no single authoritative source that shows the provincial boundaries as of that date. Regardless of the precise boundaries, present-day South Sudan comprised three large provinces at independence—Bahr El Ghazal to the West, Equatoria to the South and Upper Nile to the North.

Over time, with the industrialization of agriculture and the discovery of oil and other natural resources, control over fixed territories became an increasingly important issue for those contesting political power, and a central driver for the two civil wars. In 1994, a new federal constitution was promulgated which divided the South into 10 states. This process was both arbitrary and largely theoretical, as most of the territory in the South was out of the control of government forces (Johnson 2014).

As part of the 2005 Comprehensive Peace Agreement which ended the second Sudanese Civil War, the southern part of the country received increased autonomy for an interim period, which included an interim constitution that reaffirmed the existing 10-state structure (Interim Constitution of Southern Sudan, section 1(2)).

The agreement also provided for an independence referendum on 9 January 2011, in which an overwhelming 99 per cent of people in the South voted for secession. The Republic of South Sudan came into being on 9 July 2011, along with a Transitional Constitution that restated the 10-state structure (Transitional Constitution of South Sudan, section 162.1).

The vote for independence highlighted a public united behind the idea of an independent South Sudan, but long-standing divisions soon surfaced among political elites. In December 2013 violent clashes broke out in an army barracks on the outskirts of the capital city, Juba. In the following days, leaders thought to be loyal to Vice-President Riek Machar were rounded up and jailed. Machar himself escaped Juba to begin an armed rebel resistance. President Salva Kiir accused Machar of seeking to instigate a coup, while Machar accused President Kiir of fabricating the attempted coup in order to eliminate potential rivals. Over the next five years, fighting continued across South Sudan as regional leaders defected from one side to the other. In particular, cities in the Greater Nile region continue to suffer from violent conflict.

After the failure of initial peace talks in 2015, the peace agreement was resurrected and signed in Addis Ababa in September 2018. The R-ARCSS includes a process—launched in 2019—to reach a consensus on the federal map.

### Post-independence changes to the federal map

While the parties to the conflict were numerous and fluid over time, the two major parties were the Sudan People's Liberation Movement-in Government (SPLM-IG) forces, under President Kiir, and the Sudan People's Liberation Movement-in Opposition (SPLM-IO) forces, under current First Vice President Riek Machar. The roots of this conflict go back at least two decades and are highly complex (see Johnson 2012 for a detailed account). It is important to note that while both leaders come from different ethnic groups (Dinka and Nuer, respectively), and have power bases located in different regions (Bahr El Ghazal and Upper Nile, respectively), the conflict can only partly be explained in ethno-territorial terms. The political ambitions of the two leaders and their immediate circles of elites, coupled with different visions for the SPLM and the country, underlie and predate the ethnic dimensions of the conflict. Accommodating these ambitions is a central factor in the redrawing of the federal map and the overarching peace process (Schneider 2013).

In mid-2014, the SPLM-IO proposed to divide the 10 existing states into 21 states, along the lines of the district boundaries in place at independence (Radio Tamuzuj 2014). In response, President Kiir in October 2015 announced his plan to dissolve the 10 states and create a new federal map with 28 states; he also amended the Constitution to this effect. In January 2017 he increased this number via presidential decree to 32 states. Interpretations of the motives behind these initiatives vary, but most commentators agree that both sides sought to create a federal map that would strengthen and/or maintain their patronage networks and military circles by creating more positions of power within their territorial areas of influence, gerrymandering borders to shape states around local majorities and ensuring that oilfields lay within areas controlled by loyalists (de Waal and Pendle 2019; Stimson Center 2016).

### The R-ARCSS process

The R-ARCSS, signed in September 2018, sought to end the five-year conflict. Its central features include a power-sharing transitional government; a complex disarmament, demobilization and reintegration (DDR) process; and a process to write a new 'permanent' federal constitution. The process is divided into two phases. The first centres on DDR and the return of Riek Machar and his followers to Juba to take their place in the Transitional Government of National Unity. The second consists of a period of transitional governance through a series of power-sharing institutions at the federal and state levels. These are tasked with overseeing a range of reform processes, including constitutional reform. Notably,

the parties sought to include negotiations on the federal map in the first 'pre-transitional' phase, before constitutional reform negotiations have even begun. This prioritization of the boundary talks emphasizes the centrality of this issue in the overall peace process.

In order to forge a new federal map, the R-ARCSS calls for the establishment of two bodies—(1) a Tribal Boundaries Committee (TBC) composed of international experts and (2) an Independent Boundaries Commission (IBC) comprised of both South Sudanese and internationals. The TBC was to conduct consultations and gather data to 'define and demarcate the tribal areas of South Sudan as they stood on 1 January 1956, and the tribal areas in dispute in the country' (R-ARCSS, 1.15.18.1). This was interpreted as concerning only boundaries that were in dispute as a consequence of the move to 32 states (RJMEC 2019: 9). The IBC's mandate was to make recommendations on the number and boundaries of states, as well as on the Council of States (upper house of the national legislature). If the IBC was unable to deliver a report, the R-ARCSS called for the issue to be decided by referendum.

The TBC was established on 9 January 2019. It produced maps of the 32-state structure as well as maps showing the boundaries under dispute. But it was unable to complete the actual demarcation, citing a lack of time and resources, and instead provided recommendations for how the government could complete the task in the future (RJMEC 2019).

The IBC was established on 28 February 2019 and began meeting in March. It submitted its final report in July 2019. Six of the South Sudanese members, as well as the four international members, supported reverting to the 10-state structure. The other four South Sudanese members voted for 32-plus states. As the rules of procedure required that seven South Sudanese members had to agree in order to make a determination, the final report could not contain a conclusive recommendation. However, the report recommended resolving the issue through political dialogue among the parties and not through a referendum.

Political dialogue continued sporadically throughout the second half of 2019, mediated by the Intergovernmental Authority on Development (IGAD) and the deputy president of South Africa, David Mabuza. As the year ended, agreement on the number and boundaries of states was the primary issue preventing progress on implementation of the peace agreement and the formation of the transitional government. Eventually, deadlock was broken in February 2020 following mediation by the president of Uganda and the prime minister of Sudan. This came with the announcement of an agreement to return to the 10-state structure, but with three 'carved-out' areas that would be under the administration of the federal government. These were Abyei, an oil-rich region on the Sudan/South Sudan border which has had special administrative status since 2004 and has long been the site of contention between the two countries; Ruweng, another oil-rich region primarily populated by Dinka within the Nuer-majority state of Unity;

and Pibor, a long-marginalized area in Jonglei state which had received special administrative status, almost akin to another state, following a peace deal signed between the president and local rebel leader David Yau Yau in 2014. The stability of this latest formula for the state structure of South Sudan remains uncertain.

## India—Jammu and Kashmir

### Overview

There are many asymmetries within India's federal structure—particularly with regards to Jammu and Kashmir (J&K). Located on the border with Pakistan and home to a majority Muslim population, it received a negotiated special status at independence that limited the national parliament's powers within the state. This special status has long been contested, often violently, and has never been far from the main agenda in national political debates.

In August 2019, the Union government undertook a series of legal measures that abrogated the special status of J&K and divided it into two Union Territories. These actions have been challenged as unconstitutional. At the time of writing, the Supreme Court has yet to decide the case.

### Historical background and the origins and contents of article 370

The area known as Jammu and Kashmir consists of three regions: Jammu, which has a Hindu majority; the Muslim-majority Kashmir valley; and Ladakh, dominated by Muslim and Buddhist populations. The state as it was at independence, and until August 2019, came into being through the 1846 Treaty of Amritsar in which the Hindu ruler (Raja) of Jammu and Ladakh added the Kashmir Valley to his jurisdiction by purchasing it from the East India Company.

Throughout the first half of the 20th century, as British colonial rule of India gradually weakened and the independence movement grew, tensions continued to rise between the Hindu and Muslim populations in J&K. National-level discussions between leaders of the Congress Party and the Muslim League about Muslims' place in the political framework of newly independent India broke down; the Muslim League withdrew from the Constituent Assembly and announced Pakistan's secession from India. Princely states, of which there were 565 including J&K, were given a choice to accede to Pakistan or to India or declare independence.

Concurrently, tensions within J&K peaked with the imprisonment of the (Muslim) opposition leader, the declaration of martial law by the Maharaja and armed incursions across the border from Pakistan. The Maharaja requested military help from India, but such assistance was predicated on J&K's accession to India, which in turn was conditional on an eventual referendum for the people of J&K to decide their future. No referendum was ever held, partly because—despite Prime Minister Nehru's conviction to the contrary—the Government of

India was anxious that the people might choose accession to Pakistan (Chandrachud forthcoming).

At the same time, the Constitution of India needed to be completed, but with the status of J&K in limbo it was unclear how it might fit in—or not—to the final constitutional framework. The solution was to draft a temporary provision, later to become article 370, to govern the relationship between India and J&K in the interim. The article had several components that limited the reach of both the Constitution and the legislative power of the Union Parliament into the affairs of J&K. The temporal nature of this article is embodied in 370(3), which states that the president can amend article 370 or declare that it ceases to be operative, but only on the recommendation of the Constituent Assembly.

The J&K Constituent Assembly was convened in 1951 and promulgated a constitution of Jammu and Kashmir—which committed J&K as an integral part of India—in 1956. The Constituent Assembly was permanently dissolved on 26 January 1956 without making any recommendation to the president on the abrogation or otherwise of article 370. Therefore, article 370 continued to be a part of the Constitution until 2019.

### August 2019: a constitutional conundrum and the reshaping of Jammu and Kashmir

In 2019, the government faced a constitutional conundrum. It wished to change the status of J&K, and to reshape the federal map around it. But in order to do so, article 370 of the Constitution required the consent of the J&K Constituent Assembly—which no longer exists. The government’s solution to this puzzle was as follows.

In December 2018, the president of India issued a proclamation under article 356 of the Constitution to put J&K under President’s Rule for the first time in 22 years. President’s Rule puts governance of the state under the power of the president and union legislature. The grounds for President’s Rule have their origins in the withdrawal of confidence in the J&K government by 25 MPs from the ruling national party, the Bharatiya Janata Party (BJP).

On 5 August 2019, the president issued an order ‘with the State government’s concurrence’—meaning, under President’s Rule, the governor, who is a representative of the central government—with several consequences for the status of J&K (Gazette of India, Presidential Order C.O. 272 of 2019). Importantly, the order amended article 367, which pertains to the interpretation of certain terms in the constitutional text. Specifically, it stated that reference to a ‘constituent assembly’ should now be read as referring to the ‘legislative assembly’. This removed the problem of relying on the recommendation of a non-existent body to amend/abrogate article 370.

President’s Rule allowed the recommendation of the Union Parliament to substitute for that of the J&K legislative assembly regarding decisions on the

status of article 370. The Union Parliament duly passed a resolution on 5 August recommending to the president that article 370 cease to be operative.

With the special protections of article 370 now removed, on 9 August 2019 the Union Parliament passed the Jammu and Kashmir Reorganization Act, which converted the state into two union territories: Jammu and Kashmir, and Ladakh.

### Constitutional challenges

Given the heated debates that have surrounded the status of J&K since the agreement on accession, and the elaborate and convoluted constitutional pathway required, it is not surprising that the government's actions of August 2019 generated debate and opposition regarding the constitutionality of the procedure used. The key challenges can be summarized as follows.

First, the government cannot amend article 367 by presidential order. Article 370(1) provided that modifications can be made to the application of the constitution to J&K by presidential order, and this mechanism was indeed used several times over the past 70 years to erode J&K's special status. However, as stated above, article 370 cannot be amended except on the recommendation of the constituent assembly. The government argues that modifying article 367 falls under article 370(1) as it is not directly an amendment to article 370. This argument is bolstered by a 1972 Supreme Court precedent that allowed the word 'governor' to replace 'Sadar-i-Riyasat' once the latter office was replaced by the former through an amendment to the J&K Constitution.

There are two main objections to this argument. First, the 1972 case was clarificatory in nature (Bhatia 2019). Yet, the 2019 amendment to article 367 substantially changes the operation of article 370. Therefore, the government has sought to do indirectly what it cannot do directly, and this constitutes an unconstitutional action (Bhatia 2019). Second, the 1972 case concerned recognition in the constitution of a change that had already been affected by the constituent power of J&K through an amendment to the state constitution. No such action could be said to have preceded the August 2019 presidential order.

A second argument concerns the substituting authority for the consent of the Constituent Assembly. This argument has three facets. First, can a legislative assembly substitute for a constituent assembly? The former is a constituted power, and the latter is a constituent power; the Indian Supreme Court has long held that there is an important distinction between the two (Khosla 2019). Second, consent was not even given by the legislative assembly of J&K, but by the governor. Yet the governor is an agent of the central government, and therefore the central government has obtained its own consent, not that of the state (Bhatia 2019). Third, all of this was done under President's Rule—a temporary arrangement designed to return to a state of normalcy. It could be considered questionable to permanently alter the federal map, dividing a state into two parts and converting them to union territories, during a period in which neither the

people nor state representatives have a mechanism through which they can be consulted.

Ultimately, the Supreme Court of India will decide on the constitutionality of the division of the state of Jammu and Kashmir into two union territories. On the one hand, the government seems to have been constrained by a constitutional impossibility left in place after the Constituent Assembly of J&K dissolved without making a recommendation on article 370. This gave what was meant to be a temporary article permanent status. On the other hand, regardless of the challenges associated with complying with the letter of the law, the modality of dismembering Jammu and Kashmir seems to go against the spirit of article 370.

## Concluding remarks

The 2019 cases of redrawing the ‘federal map’ in South Sudan and India took place in very different contexts. The former occurred in the shadow of independence and emerging from peace negotiations to end a civil war; the latter came after seven decades of instability and contention regarding the status of J&K. However, in both cases the changes to the federal map were driven by decisions taken by the central government, with no real consultations with the affected populations. The long-term effects of these centre-driven dynamics are uncertain for both states, but comparative history indicates that such an approach rarely brings long-term stability.

While the flexibility of India’s federal map has been a hallmark of India’s ability to respond to linguistic diversity and internal conflict, the evolution of events in South Sudan and India in 2019, with unilateral decisions to adjust the federal map purely in response to national political considerations, raise questions about whether such systems can really be considered federal.

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## About the authors

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**Adem Abebe** is the editor of ConstitutionNet, part of International IDEA's Constitution-Building Processes Programme. He is a member of the Executive Committee of the African Network of Constitutional Lawyers, a member of the editorial board of the *Ethiopian Journal of Human Rights*, editor of the *African Journal of Comparative Constitutional Law* and Extraordinary Lecturer at the Centre for Human Rights at the University of Pretoria in South Africa.

**Sumit Bisarya** is the Constitutions Advisor at the United Nations Department of Peacebuilding and Political Affairs. He formerly headed International IDEA's Constitution-Building Processes Programme. At International IDEA, he oversaw global knowledge production in the field of constitution-building processes and constitutional design, as well as the provision of technical assistance to national constitution-building processes in a range of contexts around the world. Previously, he managed field operations for the International Development Law Organization. He has a BSc in Neuroscience from Brown University and a Juris Doctor from Columbia Law School.

**W. Elliot Bulmer** is a Lecturer in Politics at the University of Dundee. He previously served as a Senior Programme Officer with International IDEA's Constitution-Building Processes Programme and was the editor of International IDEA's Constitution-Building Primer series from 2013 to 2020. He specializes in comparative approaches to constitutional and institutional design and has provided technical assistance and capacity building in support of constitutional change processes around the world, with recent projects on Afghanistan, Myanmar, Ukraine and Tuvalu.

**Erin Colleen Houlihan** is a Programme Officer with International IDEA's Constitution-Building Programme. She advises on constitution-building in a range of contexts around the world, develops comparative knowledge products, and manages tools and databases related to both constitution-building processes and constitutional design. She has previously served in a variety of senior leadership and technical advising roles with country-based rule of law, human rights and good governance assistance programmes, primarily in conflict-affected states. She holds a Juris Doctor and an MA in Foreign Affairs from the University of Virginia and an MA in Special Education from Loyola Marymount University.

**Thibaut Noel** is an Associate Programme Officer with International IDEA's Constitution-Building Programme. He conducts research on comparative constitutional design to support stakeholders involved in constitution-building processes in Myanmar and other countries. Prior to joining International IDEA in 2020, he worked with several national and international organizations on constitution-building and electoral assistance programmes in Asia, and on conflict prevention initiatives in West Africa.

## About International IDEA

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

### What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

### Where do we work?

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

<<http://idea.int>>

International IDEA's *Annual Review of Constitution-Building* provides a retrospective account of constitutional transitions around the world, the issues that drive them, and their implications for national and international politics.

This seventh edition covers events in 2019. Because this year marks the end of a decade, the first chapter summarizes a series of discussions International IDEA held with international experts and scholars throughout the year on the evolution of constitution-building over the past 10 years. The edition also includes chapters on challenges with sustaining constitutional pacts in Guinea and Zimbabwe; public participation in constitutional reform processes in The Gambia and Mongolia; constitutional change and subnational governance arrangements in Tobago and the Autonomous Region of Bangsamoro; the complexities of federal systems and negotiations on federal state structures in Myanmar and South Sudan; and the drawing (and redrawing) of the federal map in South Sudan and India.

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



**International IDEA**

Strömsborg  
SE-103 34 Stockholm  
Sweden  
Telephone: +46 8 698 37 00  
Email: [info@idea.int](mailto:info@idea.int)  
Website: <http://www.idea.int>

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