

# ANNUAL REVIEW OF CONSTITUTION-BUILDING: 2021



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# INTRODUCTION

2021 was a tumultuous year for many reasons—including the ongoing Covid-19 pandemic, a series of military coups around the world and the rumblings of war from Russia—and was no less so in the world of democracy. The year began with the 6 January attacks on the United States Congress, seeking to overturn the presidential election, and democracy around the globe continued to suffer, stretching the number of years which have seen an overall trend of democratic decline to five—the longest such stretch since the third wave of democratization in the 1970s (International IDEA 2021).

Unsurprisingly, therefore, the chapters in the ninth edition of International IDEA's *Annual Review of Constitution-Building* reflect this instability. In Chapter 1, Adem Abebe picks up the increasingly common issue of 'unconstitutional constitutional amendments' through two high-profile court cases in Kenya and Peru. Specifically, Abebe reflects on the dangers brought about by uncertainty over the scope and grounds for court review, and calls for more consideration of explicit constitutional regulation of judicial review of constitutional amendments.

Chapter 2, by Brooke Davies and Sharon Pia Hickey, looks at various constitutional changes relating to the environment. In addition to surveying developments in Italy, Luxembourg, Switzerland and other countries where the environment was on the constitutional change agenda, they cover in some detail the Chile Constitutional Convention. The convention has been remarkable and innovative in many ways, and is notable in particular for being the first elected convention with gender parity—a precedent that should now set the

standard for constitution-making processes everywhere. Chapter 2 examines in some depth the work of the Committee on the Environment and how its proposals did or did not make it into the final draft. As discussed in the final chapter, which looks forward to potential future trends, constitutions are likely to pay increasing attention to nature, biodiversity and climate change, and many other countries will no doubt learn from the debates in the Chile Constitutional Convention.

In Chapter 3, Sumit Bisarya covers the new Constitution of Kyrgyzstan and the constitution-making process in Haiti, which ultimately stalled in the midst of successive political crises. While the two countries are very different, the discourse around and rationales for constitutional change were remarkably similar: specifically, disaffection with inefficient and corrupt governance under semi-presidential constitutions, which—according to the drivers of reform in both countries—prevented the president from delivering on their mandate. The answer to this, therefore, is constitutional change to a presidential system of government. As posited in the final chapter, this may well become a trend in the coming years.

In Chapter 4, Elliot Bulmer provides an account of constitutional near-crises in Samoa and Nepal, where in both cases unconstitutional dissolution of parliament was reversed by the courts. Bulmer concludes that one reason why these were near-, not full-blown, crises is that in both cases the relevant constitutional rules are clearly defined, and argues that the careful codification of the rules of parliamentary constitutionalism can enable other countries to similarly avoid crisis.

Kimana Zulueta-Fülscher and Thibaut Noël, in Chapter 5, describe a 'pandemic of coups' covering Myanmar, Chad, Mali, Guinea and Sudan. They note interesting similarities in the transitional constitutional arrangements put in place following the coup, but notable differences in the responses of regional organizations.

Lastly, Chapter 6 delves into the hazardous business of predicting the future and provides some thoughts on a range of issues that are likely to be on the constitutional agenda of different processes in the coming years.



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## REFERENCES

International IDEA, *The Global State of Democracy 2021: Building Resilience in a Pandemic Era* (Stockholm: International IDEA, 2021), <<https://doi.org/10.31752/idea.2021.91>>

## Chapter 1

# THE CONSTITUTIONAL REGULATION OF THE POWER OF COURTS TO REVIEW CONSTITUTIONAL AMENDMENTS

*Adem K. Abebe*

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## INTRODUCTION

Courts have increasingly become consequential actors in the politics of constitutional amendment (and at times during constitution-making). Perhaps an unprecedented judicial role was in the making of the 1996 South African Constitution, where the 1993 Interim Constitution included 36 principles against which the Constitutional Court would evaluate the draft constitution (Murray 2004; Butler 1997). The Court rejected several key provisions of the first draft in the first certification case (Certification of the Constitution of the Republic of South Africa 1996), before approving the revised version during the second certification case (Certification of the Amended Text of the Constitution of the Republic of South Africa 1996).

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common.**

While judicial certification of a new constitution remains exceptional, judicial involvement in the procedure and substance of constitutional amendments is common. For instance, in 2021, the Constitutional Court of Peru had to determine, in the absence of specific unamendable provisions or explicit mandate to review amendments, whether constitutional amendments passed through legislative approval and referendum are subject to judicially enforceable substantive limits. Similarly, Kenyan courts had, for the first time since the adoption of the 2010 Constitution, to determine whether there are judicially enforceable substantive limits on the amendment power.

Sometimes the judicial role is constitutionally anticipated, either through specific empowerment of courts to review amendments (e.g. the 1996 Constitution of Ukraine, article 159; and 2015 Constitution of the Central African Republic, article 95), through the inclusion of unamendable provisions (e.g. Germany) or through the inclusion of tiered constitutional amendment processes (e.g. South Africa), the latter two of which may be interpreted to impliedly empower the judiciary to substantively review amendments.

In some cases, however, the power to review constitutional amendments has been invoked by courts without specific textual foundation, often based on a theoretical distinction between the *constituent* and *constituted* powers or the *primary* and *secondary* constituent power (Gözler 2008; Roznai 2017), or fundamental alterations arguably *dismembering* the constitution's basic structure going beyond the conceptual possibilities of amendment (Albert 2019) and, in connection with these, the existence of inherent limits on the power of amendment enacted in compliance with the relevant procedural prescriptions. Such judicial assertion of the power to review constitutional amendments without a textual basis constitutes a hyper, more vigorous *Marbury v Madison* moment, the ultimate claim of judicial power (Choudhry 2017: 831).

In certain cases, courts have controversially invalidated not just constitutional amendments, but also existing/original constitutional provisions, relying on unspecified fundamental principles and/or international normative frameworks (Landau and Dixon 2020). Considering the difficulty of identifying the normative standards based on which courts can review amendments in the absence of specific principles, scholars and courts have resorted to constitutional history, as well as reference to supranational standards and 'transnational constitutionalism' (Dixon and Landau 2015).

Some courts, however, have declined to invoke a doctrine of unconstitutional constitutional amendment, instead limiting judicial review to procedural compliance, including in some cases constitutional requirements for public education and consultation (e.g. the Tanzanian (Supreme) Court of Appeal).<sup>1</sup> Such judicial

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**In some cases, courts have controversially invalidated not just constitutional amendments, but also existing/original constitutional provisions.**

1 *The Honorable Attorney General v Reverend Christopher Mtikila*, Civil Appeal No 45 of 2009, Court of Appeal of Tanzania (17 June 2010).

'underreach' is actually as likely a possibility as 'overreach', particularly in contexts of dominant political groups (Choudhry 2017: 831–32).

Scholarship on the judicial review of constitutional amendments has exploded in comparative constitutional studies (particularly led by Richard Albert and Yaniv Roznai). The primary focus of the scholarship has been on why courts shouldn't review the substance of amendments without a specific textual basis, or why courts should assume the implied power to review amendments or constitutional provisions, on what basis, and in what circumstances (especially comparing the process of constitutional amendment vis-à-vis the process of making the constitution—so-called 'approximation thesis' (Cozza 2021)).

Nevertheless, there is limited political and scholarly engagement on the role of constitutional recognition and regulation of judicial review of amendments. To be sure, political actors have in some cases adopted constitutional amendments to specifically preclude courts from reviewing amendments (e.g. India, Pakistan and Turkey) following judicial invocation of such power. There are also some works on why constitutions should empower courts to review constitutional amendments in view of similar power exercised by supranational courts and why such empowerment could counterintuitively constrain judicial power (Abebe 2019).

This chapter focuses on what, if anything, constitutions can, and should, do in relation to the substantive judicial review of constitutional amendments. Sections 1.1 and 1.2 discuss developments in Peru and Kenya, respectively, regarding judicial review of constitutional amendments. Section 1.3 argues that constitutions should expressly recognize and regulate the power of courts to review constitutional amendments, in view of the formally high level of political consensus, reflected in legislative supermajority and at times popular approval requirements, that in theory (though not always in practice) should underpin such amendments. Such an approach would simultaneously empower and constrain constitutional adjudicators. Beyond the judicial role, constitutions should also consider adopting robust amendment procedures to protect the most vulnerable and democracy-reinforcing aspects

of a constitution, notably through ‘inclusive majoritarianism’—a requirement for cross-party approval of certain amendments (Abebe 2020).

This chapter focuses on the substantive review of constitutional amendments, and not judicial review for compliance with procedural requirements, which it considers is an implied and necessary judicial function to give effect to the principle of constitutional supremacy.

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### 1.1. PERU

In 2019, a series of scandals implicating political leaders and judges generated popular protests that led to constitutional reforms, mainly reconstituting the Peruvian National Council of the Magistracy into a new National Judicial Board.<sup>2</sup> Notably, the reforms provided that all judges and prosecutors would undergo mandatory performance evaluation three and a half years after their appointment, mainly to identify needs for further training. In addition, all judges and prosecutors would need ‘ratification’ based on a public and reasoned vote of the board after seven years of their employment before they secure a permanent position.

The 1993 Peruvian Constitution provides for two distinct amendment procedures: the approval of two-thirds of all the members in the unicameral parliament in two successive sessions, or approval with an absolute majority in parliament and in a referendum (article 206). The 2019 amendment was adopted through the second procedure.

A law firm challenged the 2019 amendment relating to the National Judicial Board as unconstitutional in November 2020. The Constitutional Court admitted the case in a decision in January 2021 after six of the seven judges ruled that the case raises valid issues as to whether the court has the mandate to review constitutional amendments adopted through referendum.<sup>3</sup> The seventh judge ruled that the case was inadmissible on the grounds that the court does

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<sup>2</sup> See the background in the decision of the Peruvian Constitutional Court—Pleno. Setencia 890/2021, Caso de la Junta Nacional de Justicia, Expediente 00013-2020-PI/TC, 19 October 2021.

<sup>3</sup> Expediente N.O 00013-2020-PI/TC, Colegio de Abogados de Sullana, Auto 1 – Clarificación, 7 February 2021.

not have the power to review constitutional amendments adopted through the proper procedure.

The court had ruled in earlier cases—extensively cited in the decisions—that constitutional amendments exclusively adopted through parliament are subject to its review and may not violate the constitutional ‘identity’ or ‘essence’ (paragraph 7 of the preliminary/admissibility ruling), which, according to the court, include, among other issues, the dignity of human beings, popular sovereignty, the democratic nature of the state, the unitary and decentralized model, and the republican form of government. The decision was founded on the idea that constitutional amendments are the creation of ‘a constituted power, and consequently restricted in its actions by the legal limits contemplated in advance by the source that constitutes it’ (paragraph 5 of the preliminary/admissibility ruling). The dissenting judge found that ‘what seems essential to my colleagues ... may not seem essential to me’, and that the court was an organ of control of power, and ‘the first power it must control is its own’ (page 10 of the preliminary/admissibility ruling).

In its final decision, the court considered the validity of the amendments, from both formal and material/substantive perspectives.<sup>4</sup> The formal challenge related to allegations that the people were not properly consulted about the reforms as well as the manner of formulation of the referendum questions. The court unanimously rejected the challenges on formal grounds.

On the substance, the applicants argued that the requirements of partial evaluation and ratification for judges provided for in the amendments undermine judicial independence and impartiality. On this point, three judges found the challenge unfounded on the grounds that, while judicial independence is essential to the constitutional framework, the changes do not undermine it. Two judges upheld the challenge and declared the amendment unconstitutional. One judge, who found the case admissible in the preliminary hearing, died in the meantime, while the judge who found the case inadmissible reiterated the same position.

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4 Pleno. Sentencia 890/2021, Caso de la Junta Nacional de Justicia, Expediente 00013-2020-PI/TC, 19 October 2021.

Under the law establishing the court, at least five of the seven judges (before 2001, it was six of the seven judges) must uphold a challenge over the validity of laws (Tiede and Ponce 2014: 143, 159).<sup>5</sup> In this case, five of the seven judges found that the court has the power to review constitutional amendments, including those adopted through referendum, but only two found the amendment violated the constitutional essence. Therefore the amendment stands.

The supermajority requirement is not specified in the Constitution, but rather in the enabling organic law, which has been criticized for unduly protecting, and even for making it 'impossible' for the court to review the constitutionality of, impugned laws (Inter-American Commission on Human Rights n.d.). Specifying decision rules for constitutional courts in the Constitution may have avoided the possibility, and perception, of self-serving legislative restriction of judicial power.

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## 1.2. KENYA

In Kenya, a political deal known as the 'handshake' between President Uhuru Kenyatta and prominent opposition leader Raila Odinga ended pervasive political division and instability following contested presidential elections in 2017. Odinga had refused to participate in the rerun after the Supreme Court invalidated the election, partly on the grounds that reforms needed to occur prior to the re-election, including the disbanding and reconstituting of the electoral commission. As the demand was not met, Odinga withdrew from the rerun election, unleashing a period of instability (Burke 2017).

Following months of behind-the-scenes deliberations, Kenyatta and Odinga unveiled in March 2018 the now famous handshake, which identified key problems they agreed were afflicting Kenyan society, politics and economy, and paved the way for reforms to unify and outline a common ground to move Kenya's politics (and economy) forward. Central to the handshake was the objective of taming the winner-takes-all nature of politics that has made presidential

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<sup>5</sup> Article 5, Organic Law of the Constitutional Court Law No. 28301 (2004), <<https://www.tc.gov.pe/wp-content/uploads/2021/05/Ley-Organica-del-Tribunal-Constitucional.pdf>>, accessed 31 May 2022.

elections do-or-die affairs. The implementation of a robust devolution regime and checks and balances to tame the imperial presidency in the 2010 Constitution have not dimmed the attractions of the presidency.

With a view to consult the people, build political buy-in and identify specific measures, Kenyatta established the Building Bridges to Unity Advisory Taskforce (BBI Taskforce). The taskforce submitted a report—aspiringly subtitled ‘from a nation of blood ties to a nation of ideals’—following consultations around the country and with key stakeholders (Presidential Taskforce 2019). The government then established the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (BBI Steering Committee) to deliberate upon, conduct further consultations with key stakeholders, including county governors, and validate and propose ways for the implementation of the report, including through constitutional reform proposals. The committee produced a report (2020) and proposed a significant set of constitutional reforms, including notably with a view to reconstitute the national executive towards a semi-presidential system of government <sup>6</sup>and other legislative reforms.<sup>7</sup>

The draft constitutional amendments were reviewed and presented to the government as the Constitutional Amendment Bill in November 2020, and a national secretariat was established to collect signatures in support of the bill to present it as a popular reform initiative, one of the processes for constitutional amendment under the 2010 Constitution.<sup>8</sup> The secretariat submitted the required number of signatures and the bill to the Independent Electoral and Boundaries Commission for verification and submission to the county assemblies and the two houses of parliament for approval and, as relevant, referendum.

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6 The proposed constitutional reforms are available at <<https://www.bbi.go.ke/constitutional-reforms>>, accessed 17 May 2022.

7 The proposed legislative reforms are available at <<https://www.bbi.go.ke/legislative-proposals>>, accessed 17 May 2022.

8 The 2010 Kenyan Constitution provides for three distinct constitutional amendment procedures: the first exclusively involves supermajority in the two houses of parliament; the second involves supermajority in the two houses subject to majority approval in a referendum; and the third involves amendments through the popular initiative, subject to approval by a majority of the county assemblies, a majority in the two houses of parliament and, in some cases, in a referendum—see articles 255–57.



As the amendment process was unfolding, several constitutional petitions were filed in the High Court to challenge the amendment on both procedural and substantive grounds. Procedurally, the challenge mainly focused on whether the president has the power to lead amendments through popular initiative, and whether the required levels of public participation were achieved in pursuing the bill. Substantively, the petition focused on whether the Kenyan Constitution contains explicit or implied limitations on the amendment power, and whether the proposed amendments contradicted these limitations.

The High Court unanimously invalidated the proposed amendments on both procedural and substantive grounds.<sup>9</sup> Specifically, the court ruled that the amendments through popular initiative were initiated by the president, a power the court ruled he did not have under the Constitution. Moreover, the court held that the draft amendments were not prepared in a participatory manner as constitutionally required. Despite finding the amendment unconstitutional on procedural grounds, the court went ahead and determined whether the proposed amendments also failed on substantive grounds because they undermine the ‘basic structure’ of the Kenyan Constitution. Unlike other foreign courts that have held that the basic structure doctrine entails unamendability, the High Court found that the basic structure was amendable but through a four-step process involving public education, public consultation, approval by a constituent assembly and in a referendum (purportedly intended to replicate the process of enactment of the 2010 Constitution). The Court of Appeal subsequently upheld with a five–two majority the decision of the High Court.<sup>10</sup>

On further appeal, the Supreme Court held that the basic structure doctrine does not apply under the 2010 Kenyan Constitution, and accordingly the four-step process outlined in the High Court was inapplicable (with one judge dissenting).<sup>11</sup> According to the

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9 *David Ndii and Others v Attorney General and Others*, Petition No E282 of 2020, <<https://www.afronomicslaw.org/sites/default/files/pdf/BBI%20Consolidated%20Judgment%20-%20Final%20Version%20-%20As%20Delivered.pdf>>, accessed 24 May 2022.

10 *Attorney General and Others v David Ndii and Others*, Civil Appeal No E291, E292, E293 and E294 of 2021, <<http://kenyalaw.org/caselaw/cases/view/217967>>, accessed 24 May 2022.

11 *Attorney General and 2 Others v David Ndii and 79 others*, SC Petition No. 12 of 2021, 31 March 2022, <<http://kenyalaw.org/caselaw/cases/view/231325>>, accessed 24 May 2022.

majority, the doctrine was not necessary in view of the sufficiently robust procedural bulwarks against capricious amendments to the Constitution. The court also found with a four–three majority that the amendment bill was enacted through a participatory process, except reforms related to changes to electoral constituencies, which were added after the end of the consultative process. Nevertheless, the court found the entire amendment invalid on the grounds that the president does not have the power to initiate a popular amendment process (with a six–one majority) and the president did in fact initiate the amendment bill (with a five–two majority). As with the High Court and Court of Appeal, the Supreme Court did not clearly justify the need to decide substantive issues before determining procedural issues, especially once the amendment was found to be wanting on procedural grounds. In a similar case before the African Court on Human and Peoples’ Rights involving a challenge to constitutional amendments on procedural and substantive grounds, the court found that the amendment was procedurally invalid and therefore it was not necessary to determine the substantive compatibility of the amendments with continental standards.<sup>12</sup>

In sum, the Supreme Court rejected the basic structure doctrine (Bhatia 2022). Nevertheless, several judges left open the possible presence of implied limits on the amendment power. Notably, the case specifically related to amendments through popular initiative, but not the two other amendment procedures provided for in the Constitution, namely amendment through supermajority in both legislative houses, and amendment through supermajority in the legislative houses and approval in a referendum. The contestation over the substantive review of constitutional amendments is far from settled, especially regarding amendments that do not require referendum.

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<sup>12</sup> *Houngue Eric Noudehouenou v Republic of Benin*, Application No. 003/2020, Judgment of 4 December 2020, paras 77–79, <<https://www.african-court.org/cpmt/storage/app/uploads/public/5fc/fa5/8f0/5fcfa58f00c5c467702763.pdf>>, accessed 17 May 2022.

### 1.3. TOWARDS REGULATION OF THE JUDICIAL POWER TO REVIEW AMENDMENTS?

In both Peru and Kenya, the courts considered the power to review constitutional amendments in the absence of specific constitutional provisions regarding whether and through what procedures courts may do so. In view of the growing tendency of courts around the world to entertain cases involving amendments, it is arguably unwise for constitution drafters to leave the issue unregulated.

In Peru, the Constitutional Court for the first time found that it has the power to review constitutional amendments adopted through referendum. In Kenya, amendments through popular initiative may require approval in a referendum (article 257(10)). Indeed, one of the reasons for the Supreme Court's rejection of the basic structure doctrine lies in the fact that the Kenyan Constitution combines multi-staged political and deliberative processes and popular consultation and endorsement:

... in a case where the amendment process is multi-staged; involves multiple institutions; is time-consuming; engenders inclusivity and participation by the people in deliberations over the merits of the proposed amendments; and has down-stream veto by the people in the form of a referendum, there is no need for judicially-created implied limitations to amendment power through importation of the basic structure doctrine into a constitutional system before exhausting home grown mechanisms.  
(paragraph 205)

Indeed, in comparison with Peru—where the amendment process involves either a supermajority in a unicameral parliament, or an absolute majority in parliament and approval in a referendum—the amendment process through popular initiative in Kenya is much more cumbersome, involving approval in county assemblies, a bicameral legislature and, in some cases, by the people. The divergent approaches of the highest courts in Peru and Kenya to substantive review of amendments may be partly explained by these differences in the amendment procedure. Nevertheless, even in Kenya, despite

**In both Peru and Kenya, the courts considered the power to review constitutional amendments in the absence of specific constitutional provisions.**

the rejection of the doctrine in this case, the possibility for the judicial review of the substance of amendments remains.

In view of the constitutional silences, it is difficult to second-guess the intention of the constitutional drafters in Kenya and Peru on the existence of the substantive limits on the amendment power, and much less empower the judiciary to discover and enforce such limits. The judicial assertion of the power to review amendments in the absence of constitutional guidance is not unique to Peru or Kenya. Although some courts have declined to recognize either the existence of a basic structure or its judicial enforcement, other courts have claimed the power to review amendments not only on procedural but also on substantive grounds.

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**A more optimal approach might be to recognize the unique nature of constitutional amendments and establish specific regulations in relation to the substantive judicial review of constitutional amendments.**

Considering the possibility and experience of judicial divergences on the power to review amendments, constitutional drafters may be wise to consider a cautious but proactive approach to expressly regulate the judicial power to review amendments. Such specific regulation could range from completely excluding the review of amendments on substantive grounds (as in the 2017 Constitution of Turkey where the Constitutional Court is empowered to review constitutional amendments only in relation to form or procedure—article 148) to allowing review in all cases subject to the same rules as the review of ordinary statutes (as in the 2014 Constitution of Tunisia, article 144).

A more optimal approach might be to recognize the unique nature of constitutional amendments and establish specific regulations in relation to the substantive judicial review of constitutional amendments. The judicial review of amendments may be justified partly because traditional amendment procedures that rely on legislative supermajorities and/or referendums do not always ensure genuine broad political consensus, or may simply enable elite self-dealing. Constitutional amendment processes are also high-stakes exercises with potentially far-reaching, and long-term, effects that are difficult to reverse. Furthermore, international tribunals technically have the power to review amendments, and denying domestic courts the same power is unwise (Abebe 2019). Nevertheless, such a role should not be left to the absolute discretion of judges, considering that amendments constitute a major form of democratic self-government (Albert 2019: 218). There is also the possibility of

conflict of interest as constitutional amendments may also affect the judiciary.

The proposed regulation could address what should be the basis for the review of amendments (the principles that provide the test for review); whether such review applies to all amendments or not, for example by excluding amendments that require referendum; who may challenge amendments, or whether review would be automatic before or after the amendment's final adoption; the timing of such review (particularly whether review should be before or after submission to referendum as the case may be); and the judicial majority required before an amendment could be invalidated.

The constitutional regulation of the power of courts to engage in substantive review of amendments would simultaneously enhance the legality and legitimacy of the judicial role, and moderate and constrain the judicial influence in the amendment process (Abebe 2019). Without such specific empowerment, the judicial invocation of the power to review amendments would be legally and politically controversial, potentially exposing courts to backlash. Moreover, the specific regulation formalizes the judicial role, as, without such regulation, courts may and have refused to review amendments (Albert 2019: 222). Furthermore, courts cannot always be assumed to strengthen democratic constitutionalism in dealing with constitutional change (Albert 2019: 221, noting that the basic structure doctrine could be susceptible to judicial 'misapplication'). Accordingly, even democracy promoters and those who support the judicial role should have interest in regulating whether, when and how courts may review constitutional amendments.

In practice, the specific regulation of the power of courts to review constitutional amendments is rare. Even constitutions that recognize unamendable provisions are not always clear on whether the unamendable provisions are judicially enforceable, although in practice this may be assumed. In a few cases, courts are specifically empowered to determine whether a proposed amendment would violate the unamendable provisions. For instance, in Tunisia, all proposed amendments should be submitted to the Constitutional Court to ensure compatibility with the unamendable provisions (article 144). The 1996 Ukrainian Constitution similarly requires

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**In practice, the specific regulation of the power of courts to review constitutional amendments is rare.**

the submission of proposed constitutional amendments to the Constitutional Court to determine whether they are compatible with the unamendable provisions (article 159). The 2017 Constitution of Thailand allows one-tenth of members of either or both houses to sign a petition arguing that a proposed amendment violates unamendable provisions or otherwise falls under the provisions requiring a referendum (article 256(9)). In such cases, the speaker of the relevant house must within 30 days submit the petition to the Constitutional Court for determination. The 2016 Constitution of the Central African Republic (CAR) empowers the Constitutional Court to 'give its opinion' on proposals for constitutional revision (article 95). Unlike the Tunisian or Ukrainian Constitutions, the CAR Constitution is not clear on whether the review would be only against the unamendable provisions. The South African Constitution does not contain unamendable provisions. Nevertheless, in view of the adoption of a tiered amendment procedure, it empowers the Constitutional Court to review the constitutionality of constitutional amendments (Abebe 2014).

The author is not aware of a constitution that provides special rules for the judicial review of constitutional amendments. The absence of specific rules on the judicial review of amendments is remarkable in view of the prevalence of unamendable provisions, the presumed authority of courts to enforce such provisions, and the higher level of political and, at times, popular consensus that in theory should underpin constitutional amendments. While requirements for approval by a supermajority of judges exist, they are not specifically targeted at the review of constitutional amendments. For instance, in the Republic of (South) Korea, decisions of the Constitutional Court invalidating a law, banning political parties or on impeachment need the support of at least six (of the nine) judges (article 113(1)). In Peru, as noted, all decisions of the Constitutional Court require the support of five of the seven judges, although this supermajority rule is established in the act constituting the court rather than in the Constitution.

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## 1.4. CONCLUDING REMARKS

Constitutional regulation of the judicial review of amendments could arguably be ineffective as ultimately courts may still go beyond it by invoking other implied limits or notions—as has been the case in relation to constitutional amendments excluding the substantive review of amendments in India and Pakistan. Nevertheless, even if the risk remains, the regulation will still shape the choice architecture of the judicial role and make it exceedingly difficult for courts to deviate from it. Importantly, in relation to procedural requirements, such as a qualified judicial majority to invalidate amendments, courts would have no choice but to comply with them. Accordingly, such regulation would be consequential.

The specific regulation of the judicial power to review constitutional amendments can be an important device in taming regressive amendments. Nevertheless, courts may not always stand in the way of regressive amendments, either because they lack independence or because of an entrenched judicial culture. In fact, the more powerful courts become, the more they could attract temptations to capture them. In this regard, beyond the specific issue of regulating judicial review of constitutional amendment, the usual considerations relating to constitutional safeguards for judicial independence and designing mechanisms for consensual constitutional amendment also remain of paramount relevance (Abebe 2020).

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**The specific regulation of the judicial power to review constitutional amendments can be an important device in taming regressive amendments.**

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## Chapter 2

# CONSTITUTIONS, THE ENVIRONMENT AND CLIMATE CHANGE

*Brooke Davies and Sharon P. Hickey*

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**Constitutions can play a key role in providing a stable framework for environmental democracy.**

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## INTRODUCTION

In the wake of increasingly dire warnings about the looming impacts of climate change (Harvey 2022), states are considering, more than ever, how to advance laws and policies to prevent, mitigate and remediate environmental degradation. Constitutions can play a key role in providing a stable framework for environmental democracy by constraining short-term political incentives in favour of longer-term protection of the environment. Constitutional entrenchment of environmental protection may also be key in increasing democratic resilience in the face of economic, political and security challenges that will likely be exacerbated by climate change (Lindvall 2021).

While the recognition of a right to a healthy environment is not new and has appeared in constitutions since the 1970s, the onset of the climate crisis has spurred a series of innovations that have expanded the scope and nature of constitutional protection of the environment. Current environmental provisions in constitutions vary in both their substance and formulation, spanning rights, duties, statements of value, and directive or guiding principles. Some constitutions guarantee procedural environmental rights: rights to information, participation and access to justice in matters relating to the environment. Others empower or obligate the state to meet substantive goals, such as the mitigation of greenhouse gas emissions, adaptation to the effects of climate change, investment in

solar and wind energy, sustainable management of waste and water, revitalization and preservation of forests, and others. These rights and duties are sometimes linked with the rights of future generations or with Indigenous rights; they may seek to balance the principle of sustainable development with economic progress; or they may entrench an eco-centric worldview by recognizing the inherent rights of nature. Various constitutions also create specialized institutions (e.g. courts, ombudspersons or prosecutors) to monitor, enforce and protect environmental rights and provisions. Nevertheless, much depends on the legal and regulatory framework that translates text into action, and the effectiveness of institutions varies depending on their functional independence, resources and powers established by law.

This chapter will survey constitutional reforms related to the environment and climate change in 2021 to mid-2022. It begins by providing a global overview of different debates regarding environmental constitutional provisions during the year. It then shifts focus to Chile's Constitutional Convention, aiming to capture the key internal and external dynamics in the convention's thematic environment committee to provide insights for future constitution-making processes.

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## 2.1. A MIXED BAG: CONSTITUTIONAL TREATMENT OF THE ENVIRONMENT AND CLIMATE CHANGE IN 2021 TO MID-2022

New provisions relating to the environment were proposed in a variety of contexts in the last year, with mixed results.

In **Belarus**, a series of constitutional amendments were passed on 27 February 2022 in a referendum that was widely condemned by the democratic opposition and international community as an illegitimate and blatant consolidation of power by President Lukashenko (ConstitutionNet 2022; Reuters 2022). The amendments renounced Belarus's non-nuclear status, removing from article 18 Belarus's commitment to making its territory nuclear-free and neutral. Instead, article 46 now gives Belarus the ability to 'develop nuclear energy for peaceful purposes', and obligates it to 'ensure safety in the

production and use of nuclear energy' (Venice Commission 2022). The new provision is widely understood as less of a move towards a green energy policy and more about allowing Belarus to host nuclear weapons for Russia, consolidating its status as a client state, and as a possible quid pro quo for Russia's support for Lukashenko during the post-election crisis (Alberque 2022).

The constitution-making events of 2021 in **Haiti** are covered in detail in Chapter 3 of this publication. Regarding climate change, while the 1987 Constitution provided for fairly extensive environmental rights, the new draft both expands and restricts that legal framework (Haiti 2021). A prohibition on upsetting the ecological balance is expanded to expressly allow for the imposition of civil and criminal penalties for violations (article 21). The draft also retains a duty on the state to make natural sites 'accessible to all' and to create and maintain botanical and zoological gardens (article 21), an encouragement to develop alternative energy sources such as wind and solar (article 21), a duty on all citizens to protect the environment (article 87(h)), a prohibition on the importation of waste from foreign sources (article 23), and a provision authorizing sanctions legislation for harming flora and fauna (article 22). However, a commitment to maintain at least 10 per cent forest coverage, which was included in the 1987 Constitution (article 253), does not appear in the current draft. Given the ongoing political turmoil, it is unclear whether the referendum scheduled for late 2022 will be held at all, let alone pass.

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**In the June 2021 referendum, Swiss voters rejected three environmental proposals.**

**Switzerland's** environmental referendum in 2021 complicates the assumption that European voters' broad desire for more stringent climate change regulation will reliably translate to approval of such regulations at the ballot box (European Commission 2021). In a June 2021 referendum, Swiss voters rejected three environmental proposals. These included: (a) the government's proposed car fuel levy and air ticket tax; (b) a proposal to outlaw artificial pesticides; and (c) a proposal to give subsidies to farmers who use no chemicals in order to improve drinking water. While the latter two issues were expected to be defeated (and indeed were rejected by 61 per cent to 39 per cent), the rejection of the proposed car and air ticket levy was a blow to the government, which had planned for its passage to enable it to halve greenhouse gas emissions by 2030. Fear of the plan's economic impact during the ongoing Covid-19 pandemic was

cited as the primary reason for the narrow rejection of 51 per cent to 49 per cent (BBC 2021). However, in early 2022 Switzerland's Green and Social Democrat parties announced a popular initiative campaign for a 'Swiss Green New Deal', which may see a different result in the year to come should it meet the 100,000-signature threshold needed to be put to referendum (Ammann 2022).

Despite the above setbacks and missed opportunities, bright spots did exist in Italy, Germany and Slovenia, with potential expansion of environmental and climate protections in Luxembourg and in Chile (if approved via referendum) later in 2022.

On 8 February 2022, the **Italian** Parliament amended its Constitution to expand its environmental protections regime. While the process has been ongoing for three years, it gained new impetus as Italy sought to finance Europe's most ambitious post-pandemic national recovery plan with funding from the NextGeneration EU recovery instrument, hoping to use the EUR 191.5 billion package to attract green investment and transform the economy (Amante and Jones 2022; Roberts 2021). The reform amended two articles of the Italian Constitution. Article 9 now states that the republic 'protects the environment, biodiversity and ecosystems, also in the interest of future generations'. Additionally, it places a duty on the state to 'govern the methods and forms of animal protection'. Article 41 was also amended to prohibit private industry from damaging 'health and the environment', in addition to the existing limits of 'security, freedom, and human dignity'. Additionally, article 41 now empowers the legislature to regulate both public and private activity not only for 'social' purposes, but for 'environmental purposes' as well (Fuschi 2022). While the vote was hailed by parliamentarians and some environmental groups as a progressive step forward, it was ultimately a compromise that omitted provisions related to the sentience of animals and the promotion of sustainable development, both of which were ceded during extensive negotiations on the amendments (Sala 2021).

Climate change litigation continues to increase around the world, with a surge in strategic litigation that focuses on state compliance with climate commitments, challenges related to corporate action and/or responsibility, or alleged violations of constitutional and

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**On 8 February 2022, the Italian Parliament amended its Constitution to expand its environmental protections regime.**

human rights, among others (Setzer and Higham 2021). In **Germany** in April 2021, the Constitutional Court issued a landmark ruling in the case of *Neubauer, et al. v Germany*, holding that the provisions of the state's 2019 Federal Climate Change Act would be insufficient to meet Germany's climate targets under the 2015 Paris Climate Agreement and thus violated the Basic Law. The court agreed with the complainants' argument that the state had 'failed to create a legal framework sufficient for reducing greenhouse gases' by placing too high a burden on emissions reductions after 2030 to be feasibly attainable, violating their fundamental right to life and physical integrity enshrined in the Basic Law (*Neubauer* 2021). It further found that by virtue of article 20a, the state must consider 'how environmental burdens are spread out between different generations' (Sabin Center for Climate Change Law n.d.). Rather than appeal, the German Government passed an amendment to the Climate Change Act in June 2021 that accelerated the state's climate neutrality goal to 2045, raised the emissions reduction goal from 55 to 65 per cent by 2030 compared with 1990 levels, and set a goal of achieving negative emissions by 2050 (Nijhuis 2022).

In **Slovenia**, environmental organizations collected enough signatures to force a referendum on the government-backed changes to the Waters Act, which the government claimed would open the way for funds to protect water sources and strengthen regulation of construction. But ecologists, civil society organizations and some political parties warned the changes would allow environmentally harmful construction projects. With a turnout of 46 per cent (high for Slovenia), nearly 87 per cent of voters rejected the amendments (Spasić 2021).

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**Luxembourg's recognition of the sentience of non-human animals is a significant constitutional innovation.**

Finally, article 31, chapter II of **Luxembourg's** proposed constitutional amendments contain several provisions related to the environment, climate change and the protection of animals. The article provides that the 'State guarantees the protection of the human and natural environment, working to establish a sustainable balance between the conservation of nature ... and the satisfaction of the needs of present and future generations'. It also recognizes a state commitment to fight climate change and further recognizes the sentience of non-human animals, placing a duty on the state to ensure their well-being and protection. Luxembourg's recognition of the sentience of

non-human animals is a significant constitutional innovation, but its language does not go as far as Chile's draft constitution, which recognizes both the sentience of non-human animals and their right to live a life free from mistreatment (further analysed below in Section 2.3). On 9 March 2022 the Chamber of Deputies approved chapter II's proposed amendments, including article 31 (Luxembourg 2021). To pass the amendments, the chamber must now approve them in a second vote at least three months later (Luxembourg 1868).

However, despite these developments, it is Chile's process that has taken centre stage in 2022, as the country has produced an 'ecological constitution' that will be subject to referendum in September 2022. Due to the immense interest in Chile's reforms, a more detailed examination of the process and provisions follows.

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## 2.2. CHILE: CONSTITUTION-MAKING IN THE TIME OF CLIMATE CHANGE

The path to the Constitutional Convention began with Chile's 'social explosion'—mass protests that began in 2019 and coalesced around the call for a new constitution that would cure the perceived ills of the Pinochet-era constitution, which entrenched a neoliberal system that increased inequality and treated nature as a commodity (Sasse 2021; Sanders 2021). In response to the protests, Congress authorized a referendum in October 2020 (after the Covid-19 outbreak delayed the original May 2020 date) to determine whether the country should rewrite its Constitution, which passed by 78 per cent of those who voted (BBC 2020). Seventy-nine per cent also voted for a completely separate elected body to draft the new constitution rather than a mixed convention with 50 per cent representation from Congress.

In May 2021, the 155 members of the Constitutional Convention were elected (Bartlett 2021). Leftist parties and independents won the vast majority of the seats, while right/centre-right parties failed to reach the 52 (one-third) seats that would have been needed to block the approval of constitutional provisions, meaning that centre-left and left parties, together with independents, many of whom were left-of-centre, could pass provisions that were unpopular with the right

without impediment. In July, the convention elected as its president Elisa Loncón Antileo, an academic and Indigenous rights activist who planned to ensure conservation of nature in the new constitutional draft, and to inspire the world to adopt Indigenous philosophy recognizing the interdependence of humans and nature (Nugent 2021).

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**As expected, environmental issues were at the forefront of the convention.**

As expected, environmental issues were at the forefront of the convention. Three months after the start of the convention, the plenary approved a proposal from a coalition of 'eco-constituents' to declare a 'State of Climate and Ecological Emergency' in the Constitutional Convention, which provided that the convention must 'bear in mind, in all the commissions and proposals that it prepares, the guarantees of environmental education, prevention, precaution, non-regression, mitigation, adaptation, and transformation to face the climate and ecosystem crisis'. As a lithium- and copper-rich country, a major question was how Chile could maintain economic development from its mining sector (which contributes to over 50 per cent of Chile's exports (Bravo-Ortega and Muñoz 2015)) while protecting the environment and improving social conditions for all people. Another key issue was access to water resources, since Chile has suffered a multi-year drought and extensive water shortage due in part to chronic mismanagement, exacerbated by a business-friendly constitution that allowed exploitation and diversion of water for industrial farming and mining projects (Bartlett 2022; Matus et al. 2020).

The engine for climate proposals was the 'Environment, Rights of Nature, Common Natural Assets, and Economic Model' committee, one of the convention's seven thematic committees. It was given the mandate to propose constitutional provisions on issues ranging from the rights of nature, climate change mitigation, the protection of animals, the future of the country's mining industry, and more. The committee proved to be one of the most popular, receiving 1,700 requests for public hearings and 300 popular initiative proposals, more than any other committee (Follert 2022). It also sparked fears of an overemphasis on issues regarding the rights of nature at the expense of sustainable development of the country, whose economy relies heavily on mineral extraction (International Trade Administration 2022). Members of the committee, which was



composed of largely leftist and centre-left parties and non-neutral independents, promised transformative change to a state that was ranked in 2019 as the 25th most vulnerable country to climate change in the world (Eckstein, Künzel and Schäfer 2021).

However, those initial high hopes ran into significant obstacles. In March 2022, the committee initially presented to the larger plenary a report with bold and sweeping principles, duties, protections and remedies relating to the climate crisis, sustainability, Indigenous rights, animals, and glacial, water and mineral rights. After some back and forth, the plenary first adopted only one article and one paragraph out of 40 proposed articles, and in a second vote approved seven articles out of a reduced version of the report that included only nine proposed provisions (Paúl and Sanhueza 2022). The second report was then rejected in full by the plenary in April, failing to pass the initial hurdle of a 'general vote' on the report before article-by-article voting could begin (El Mostrador 2022).

The rejection of the second report led to intense acrimony between the committee members and the political parties that refused to back the second report in the April vote, with most of the outrage directed at the Socialist Collective. Committee and convention members were heard calling the Socialist Collective members 'traitors' in the plenary chamber, with Co-coordinator of the Environmental Committee Camila Zárate saying in a statement to the media: 'We regret that they have turned their backs on the citizens, the communities, the population and the territories that we have been mobilizing for years to achieve these great demands in this constitutional text. I hope that those who today rejected and abstained ... meditate on what they did today'. In turn, a leading member of the Socialist Collective, Tomàs Laibe, accused the Environment Committee of 'bullying' and 'persecution' and cited fundamental differences over issues of water, mining and the economic model, as well as the poor quality of the proposal, as the reasons for his party's rejection (Paúl and Sanhueza 2022). A revised second report was then submitted to the plenary, with 30 articles approved in the very last session of the convention. However, in the end the plenary rejected the most controversial provisions, including the nationalization of the country's copper and lithium mines and a 40 per cent royalty to the state for private mining activities.

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**Committee and convention members were heard calling the Socialist Collective members 'traitors' in the plenary chamber.**

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**The political configuration of the committee may have damaged the convention's external reputation and stoked public fears about the course of the draft constitution.**

So while the Environment Committee succeeded in promoting the approval of many new environmental safeguards and rights, the political configuration of the committee may have damaged the convention's external reputation and stoked public fears about the course of the draft constitution. In particular, the following factors influenced the tensions between the committee and the wider plenary:

- **The composition of the Environment Committee.** While the overall convention has been criticized for under-representing right-wing and centre-left parties (Paúl 2022), the composition of the Environment Committee leaned even further to the left, with a large number of environmental activists. This had several effects. For one, the committee's configuration in part led to maximalist proposals that were largely unacceptable to the larger plenary, which not only leaned more to the centre but also had a higher voting threshold than at committee stage. Second, the convention's decision to give the committee such an expansive mandate over both the environment and the economic model of the country arguably enabled the committee to put forward such far-left proposals, some of which would have fundamentally reshaped the economic reality in Chile (especially with respect to its mining industry) (Bnamericas 2022). Finally, as a result of these dynamics, the composition of the committee was such that it never became a forum where a broad swathe of delegates could reach consensus before the proposals went before the plenary (Follert 2022). Most centre and centre-right parties had no representation on the committee, with the prominent centre-left Socialist Collective itself only having one seat. More radical members of the committee faced virtually no obstacles—and did not feel the need to compromise—in putting together its proposals. The marginalization of the more conservative members in turn added to the external perception of polarization that undermined the entire work of the committee and, indeed, the convention. All in all, these dynamics meant that the committee had strained internal dynamics and a weak tempering force before the proposals reached the more moderate plenary.
- **Growing dissatisfaction with the convention.** Wariness of the left's control of the convention has also grown among Chilean citizens in recent months. Three opinion polls released in April

2022 showed for the first time that Chileans would be more likely to reject than accept the draft constitution, setting off alarm bells across the government. As a result, newly elected President Boric promised to take the ‘doubts’ expressed in the poll seriously, and second president of the convention, María Elisa Quinteros, vowed to ‘improve things’ (Paúl 2022).

- **Outside pressure.** Some Environment Committee members blamed interference by the business community for the rejection of the committee’s most radical proposals. Co-coordinator Camila Zárata characterized industry influence as a ‘significant siege’ on their work to reform the economic and environmental model of the country (Follert 2022). Beyond industry concerns, media coverage of the committee’s proposals has been mostly negative, fuelling wider fears about the direction of the draft constitution.

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### 2.3. A REVIEW OF CHILE’S PROPOSED ECOLOGICAL CONSTITUTION

Chile’s draft constitution is unprecedented and unparalleled in the number and breadth of its environmental provisions. While some robust and progressive language was ceded throughout the constitutional debates and negotiations, and the final result does not match the aspirations of all within and outside the convention, the final draft contains myriad novel substantive, procedural and institutional provisions that may serve as inspiration for future constitution-building processes, especially as more countries seek innovative approaches to address the climate crisis and environmental degradation.

#### Climate change and rights of nature

The final draft includes granting rights to nature (article 127), which, if passed, would make Chile the second country to constitutionally enshrine this eco-centric right after Ecuador. While the draft protects the right of nature to exist, to be respected, protected and restored, the approved draft provision removed the originally proposed express connection between the cosmovision of Indigenous peoples and rights of nature. However, in the ‘constitutional principles’ section, article 88 states that ‘individuals and peoples are interdependent with nature and form an inseparable whole with nature’, and article

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**Chile’s draft constitution is unprecedented and unparalleled in the number and breadth of its environmental provisions.**

34 states that ‘indigenous peoples and nations have the collective and individual right “to the recognition and protection of their lands, territories and resources ... and to the special bond they maintain with these ...”.’

The draft further protects other elements of the natural environment, creating a national system of protected natural areas (article 132), guaranteeing the protection of glaciers (article 137) and obliging the state to ‘conserve, protect and care for Antarctica, through a policy based on knowledge and oriented towards scientific research, international collaboration and peace’ (article 240). The state also has a duty to protect marine and coastal ecosystems (article 139(2)) and to develop a national port policy to regulate responsible use of the coastline (article 186). In a constitutional innovation, the state pledges to promote measures to conserve the atmosphere and night sky (article 135).

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**In recognizing the climate and ecological crisis, Chile’s new constitution would become one of the few constitutions to directly reference climate change.**

In recognizing the climate and ecological crisis (article 129), Chile’s new constitution would become one of the few—approximately 11—constitutions to directly reference climate change.<sup>1</sup> The passed proposal guts the most advanced language of the first proposal (which explicitly tied the climate crisis to human activity and imposed a state duty to address its effects at all levels) and instead echoes the current constitutional provisions in other constitutions that broadly cover adaptation and mitigation (Toral et al. 2021). Nevertheless, the draft contains key components of an ecological constitution and reflects core principles of prevention, precaution and progressiveness enshrined in environmental law and international agreements (including the Rio Declaration and the Escazú Agreement) and intergenerational solidarity (article 128). The placement of these principles within an ecosystem of actionable provisions may bolster their impact.

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<sup>1</sup> The constitutional provisions that explicitly mention climate change are primarily formulated as obligations of the state, or statements of principle. Ecuador’s Constitution is the most concrete in its formulation: ‘The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk’ (article 414).

### New constitutional rights for animals and humans

A key innovation of Chile's draft is the recognition of the sentience of animals and their right to live a life free from mistreatment. The draft declares non-human animals as subjects of special protection, entitled to state protection, and obliges the state to 'promote an education based on empathy and respect for animals' (article 131). The inclusion of a non-human animal's *right* is a distinct departure from the handful of current constitutional provisions pertaining to animals, perhaps for the first time placing a constitutional limit on human use of animals.<sup>2</sup> The present global constitutional approach is either viewing animals as natural assets for conservation and exploitation, or one of animal welfare: protection, dignity and compassion (notably not *empathy* as in the case in Chile). Previous jurisprudence, notably in Brazil and Ecuador, has interpreted animal rights through rights of nature (Stilt 2021; Gutmann 2022). In the case of Chile, the innovative combination—recognizing animals' sentience (and thus individuality) and their right to live a life free from mistreatment—tips the needle from a 'freedom from' to a 'right to' paradigm, and may invite judicial consideration of the expansiveness of these provisions, including for farmed animals, those subject to medical and scientific experimentation, those subject to violence for 'entertainment', and those kept in captivity.

In terms of human rights, the draft recognizes several innovative substantive rights in the face of climate change. It contains a state-guaranteed right to a healthy and ecologically balanced environment (article 104), a new state duty to ensure food sovereignty and security, including the right to healthy and adequate food (article 54), a right to a minimum of affordable and safe energy (article 59), a right to clean air throughout one's life (article 105), the right to responsible and universal access to nature (article 107), and the right to water, sanitation and a balanced ecosystem (article 140). The draft also incorporates procedural environmental rights core to environmental democracy: the right to informed participation and right to access information relating to the environment (article 154), but removes language from the initial draft that made public participation in

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**A key innovation of Chile's draft is the recognition of the sentience of animals and their right to live a life free from mistreatment.**

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<sup>2</sup> The freedom to undertake economic activities is predicated on compatibility with the rights enshrined in the constitution and with the protection of nature, albeit subject to limits determined by law (article 80).

environmental matters binding. Article 108(8) also guarantees access to environmental justice.

### **Nationalization of natural resources and regulation of mining**

As expected, the draft contains multiple provisions relating to natural common goods and to minerals. In relation to the latter, the draft grants the state 'absolute, exclusive, inalienable and imprescriptible domain of all mines and minerals, metal, non-metallic substances and deposits of fossil substances and hydrocarbons' regardless of ownership of the land on which they are located (article 145). The state reserves the right to regulate the 'exploration, exploitation and use' of minerals considering their finite nature, intergenerational concerns and environmental protection (article 145). The draft incorporates the 'polluter pays' principle, obliging miners to allocate resources to repair damage caused by their activities and, interestingly, constitutionally protects small-scale mining and quarrying (article 147).

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**Water has proven a key political issue in Chile. It is currently the only constitution allowing privatization of water.**

Protection, management and utilization of natural resources as common goods are robustly outlined in article 134. As mentioned in the previous section, water has proven a key political issue in Chile. It is currently the only constitution allowing privatization of water (1980 Constitution, article 19(24)). Clearly, a balance is needed between economic growth and protection of the environment, since lack of water is impacting both people and business (Cambero 2022). In the draft, the state can grant concessions for water on a temporary basis, which will not create a property right (article 134(5)).

Additionally, the draft provides that any person can demand compliance with the constitutional duties relating to natural common goods (with the mechanism and procedure to be set by law).

### **New institutions and mainstreaming environmental protection in existing institutions**

The draft creates an innovative institutional framework in relation to the environment. The draft creates a National Water Agency that will regulate the use of water, and Basin Councils as a decentralized unit of water management (article 144). The National Water Agency is mandated to impose administrative sanctions for non-responsible or non-sustainable use of water (article 144(2))

(f)). The draft constitution also proposes the creation of a robust Ombudsperson for Nature with dedicated regional offices, which is mandated to oversee state compliance with environmental obligations, provide recommendations on environmental concerns, process and investigate alleged violations of environmental rights, and bring constitutional and legal actions when such rights are violated (articles 148–50). The draft, with an eye to ensuring a well-qualified and independent ombudsperson, provides that environmental organizations shall propose a list of candidates from whom the ombudsperson will be appointed (by a majority of the bicameral legislature in a joint session) (article 150). While several environmental tribunals already exist in Chile, the new constitution would establish Environmental Courts in each region. Jurisdiction will include judicial review of administrative acts and resolution of claims relating to fundamental environmental rights and actions on behalf of nature (article 333). The draft constitution enables broad standing for an action alleging a violation of rights of nature and environmental rights, which can be taken not just by the Ombudsperson for Nature, but also any person or group. Likewise, under article 134(6), any person can demand compliance with the enumerated constitutional duties related to the natural commons, with the law to determine the procedure for this action. Apart from specialized environmental institutions, the draft mainstreams environmental protection in the objectives of existing institutions, such as the Central Bank (article 358).

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## 2.4. CONCLUSION

Looking ahead, it is likely that we will continue to see this wave of constitutional innovation be succeeded or surpassed by bolder, more expansive and more holistic provisions that include new substantive rights as well as oversight and enforcement institutions. As the realities of the climate crisis evolve, so will the constitutional provisions designed to address them.

Nevertheless, we will also likely see divergence in implementation depending, among other factors, on a state's constitutional, legal and regulatory framework, political dynamics and public support. Of particular importance regarding implementation is how future

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**As the realities of the climate crisis evolve, so will the constitutional provisions designed to address them.**

governments and courts will treat these provisions in relation to other duties and objectives, such as socio-economic rights, fiscal responsibility and economic development. We also cannot assume that the public will back any or most measures to combat climate change (as demonstrated by the defeat of the Swiss environmental measures via referendum), so it is likely we will see greater use of deliberative democracy mechanisms like citizens' assemblies to build consensus and pave the way for the passage of potentially unpopular laws and policies legislatively or via referendum. For example, Luxembourg's Climate Assembly will meet until mid-2022 to create proposals that go beyond Luxembourg's current National Energy and Climate Plan that will form part of the country's next steps to combat climate change (Schnuer 2022). Spain's Citizen Assembly for the Climate also recently approved 172 recommendations for government action related to consumption, food and land use, the environment and other areas, which will be presented to the government and congress (Asamblea Ciudadana Para El Clima 2022).<sup>3</sup> We also see the continued importance of an informed and active civil society, as in the case of Slovenia, which utilized the powerful constitutional mechanism of direct democracy, a citizen-initiated legislative referendum, to challenge amendments to the Waters Act that could have led to environmental degradation.

While Chile is seen as the golden child of environmental constitutional reform in the last year, the fate of the draft and the environmental provisions contained within will depend on whether voters will approve the draft in September 2022.<sup>4</sup> As such, much like the outcome of the climate crisis itself, the future of the most significant constitutional provisions related to the environment in 2021 and 2022 now hang in the balance.

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<sup>3</sup> Other examples include France's experience post-passing an increase in its carbon tax in 2018 (Noël 2021).

<sup>4</sup> The referendum (exit plebiscite) on the draft constitution was held on 4 September 2022. It was rejected by a margin of almost 62 per cent to 38 per cent. Nevertheless, renewed attempts at reform have begun and are likely to continue into 2023.



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## Chapter 3

# NO HALF-MEASURES—FROM SEMI-PRESIDENTIALISM TO FULL PRESIDENTIAL SYSTEMS IN KYRGYZSTAN AND HAITI

*Sumit Bisarya*

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## INTRODUCTION

Kyrgyzstan and Haiti—two very different countries in distant corners of the globe—exhibited interesting similarities in their constitutional reform processes in 2021: specifically, in the move away from semi-presidential systems towards a purely presidential form of government. In Kyrgyzstan constitutional change was ratified in a referendum on 10 January 2021, while in Haiti the process remained in limbo into 2022. Both were consistent not only in the objectives of their reform, but also in the rationale for doing away with semi-presidentialism—specifically, that the blockages imposed on politics by the divided executive had resulted in increased corruption and constraints on the directly elected president to deliver on the mandate given to him/her by the people. The arguments put forward by opponents of the reforms were also similar—that the result would be over-concentration of power in the office and person of the president.

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**In a time of increasing populism and distrust of politics, might transitions from semi-presidentialism to pure presidential systems become a trend?**

In a time of increasing populism and distrust of politics, might transitions from semi-presidentialism to pure presidential systems become a trend? If so, what can we learn from the 2021 processes which unfolded in Kyrgyzstan and Haiti? This Annual Review chapter unpacks the two reform processes, providing details of the constitutional changes and the politics of each process. It closes

with some concluding remarks on what these processes might indicate for constitutional transitions elsewhere.

Before examining the cases, some definitional issues should be clarified. By semi-presidential, I mean a system whereby the president is head of state and is directly elected by the people, but shares executive power with a government which is responsible to the legislature. In presidential systems, on the other hand, executive power is entrusted entirely to a directly elected president who is also head of government and where the legislature and executive have independent, secure tenures. Kyrgyz commentators and media often refer to the 2010 Constitution as ‘parliamentary’. Certainly, the legislature under the 2010 Constitution was more prominent and powerful than it was before, or than it is under the new 2021 Constitution. However, using standard comparative government terminology it would be classified as semi-presidential as it maintains a directly elected president with significant powers, albeit less power than before or after (Duverger 1980; Elgie 2011; Choudhry, Sedelius and Kyrychenko 2018).

Lastly, one should also note that semi-presidentialism per se is no indicator of weaker presidential powers than presidentialism. Indeed, some of the most authoritarian countries in the world, where power is most highly concentrated in the president, are semi-presidential. This occurs particularly in a form of semi-presidentialism known as ‘president-parliamentary’, where the government can be dismissed by the president, as well as through a no-confidence vote in the legislature (Shugart and Carey 1992).

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### 3.1. KYRGYZSTAN

#### Historical background

Following the break-up of the Soviet Union, Kyrgyzstan’s first independence constitution—similar to many in the region—provided formally for a semi-presidential system, but with a high degree of concentration of power in the president. The 1993 Constitution ‘established a presidential supremacy beyond limits’ (Venice Commission 2007), with a single pyramid of power atop which sat the president. Kyrgyzstan’s first president, Askar Akayev, used and

expanded these powers to the fullest, establishing Kyrgyzstan firmly as a 'crown-presidential' system, whereby the system of government is conceptualized as separate branches of power, but which all emanate from the same trunk—the president (Partlett 2022).

Importantly, however, the Constitution provided for term limits, and as President Akayev came to the end of his final term in 2004/2005, his level of popularity had diminished to a point whereby he had neither the political nor popular support to change the Constitution to extend his stay in power (Hale 2014: 194–99). While Akayev committed to stepping down from the office of president, he sought to maintain a grip on power through family members who ran for election and through his party. But when the February 2005 parliamentary elections saw Akayev's party win more seats than expected, it triggered large-scale protests, which became known as the Tulip Revolution.

Although hailed as a potential for democratic opening, unlike some of the contemporaneous 'colour revolutions' in the region—such as the Rose Revolution in Georgia or the Orange Revolution in Ukraine—the Kyrgyz protests did not result in any changes to the Constitution. Instead, Akayev's former prime minister, Kurmanbek Bakiev, who had resigned in 2002 and subsequently led the opposition to Akayev, inherited the same 'crown-presidential' constitution, with the same authoritarian effect.

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**Following another wave of protests in 2010, the Constitution was changed—and quite significantly. The victorious protest leaders deliberately designed constitutional changes that would prevent a 'winner-takes-all' system.**

Following another wave of protests in 2010, the Constitution was changed—and quite significantly. The victorious protest leaders deliberately designed constitutional changes that would prevent a 'winner-takes-all' system (Hale 2014: 319–20). The president was stripped of their powers to appoint and dismiss the government without legislative approval, and was limited to a single, six-year term. Additionally, article 70.2 provided that no party could win more than 65 seats in the legislature (out of a total of 120)—meaning that there could be no unilateral constitutional amendments.

These constitutional changes produced some strengthening of democracy in Kyrgyzstan. During the post-2010 years, the constitutional chamber developed increasing independence (Dzhuraev et al. 2015), and the only president to fulfil their term



under the 2010 Constitution left power peacefully. However, the 2017 elections were also criticized for, *inter alia*, ‘misuse of public resources, pressure on voters, and vote-buying’, and media bias in favour of the outgoing president’s former prime minister and preferred successor (OSCE 2018). In general, although representative government indicators improved and democratic performance as a whole was stronger than under the 1993–2010 constitutional framework, most other democracy attributes, such as rights’ protection, impartial administration and absence of corruption, either stagnated or saw only marginal improvements (International IDEA 2022; Transparency International n.d.b).

### 2021 constitution reform process

As in 2005, disputes over parliamentary elections were the trigger for massive protests in late 2020. Amidst allegations of large-scale vote-buying and voter intimidation, a number of contesting parties called for protests and demanded the invalidation of the results. The Central Electoral Commission invalidated the election, and the protests also successfully freed from jail former parliamentarian Sadyr Japarov, who had been imprisoned in 2017 for kidnapping. Within days parliament voted for Japarov to take the post of prime minister, and following the resignation of President Jeenbekov, Japarov became interim president.

In November 2020, parliament produced a draft constitution with minimal public knowledge, input or scrutiny (Venice Commission 2021). Public consultations were invited, but only for a brief period as a constitutional referendum was scheduled for January 2021. This plan was changed into a two-phase constitutional reform: a referendum in January 2021 on the system of government for the new constitution, followed by a referendum on a new constitution in April 2021. The former—held alongside presidential elections which saw Japarov win by a landslide—voted overwhelmingly for a presidential system (84 per cent). And a new presidential constitution was approved by a similar margin at a referendum on 12 April.

Beyond the lack of consultation or public engagement, there were also two other serious weaknesses in the process of reform. First, the legislature that voted on the draft had overstayed its constitutional term due to the invalidation of the 2020 elections. While there are

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**In November 2020, parliament produced a draft constitution with minimal public knowledge, input or scrutiny.**

no explicit limitations in the Kyrgyz 2010 Constitution on what a parliament which finds itself still *in situ* beyond its mandate can do, general democratic norms would suggest that such a legislature limit itself to only those actions necessary to exit from the constitutional crisis (Venice Commission 2020). Second, the constitutional procedure for amendment was not followed. Article 114.3 of the 2010 Constitution states that there must be an interval of two months between readings of the draft law for amendment. Further, article 97.6.3 of the 2010 Constitution gives the Constitutional Chamber of the Supreme Court the mandate to review draft amendments for their compliance with the Constitution. These represent important checks on the amendment process: to ensure adequate time for reflection and deliberation, and to ensure procedural integrity respectively. Both the mandatory delays and the review by the Constitutional Chamber were bypassed. However, it may also be noted that the Constitutional Chamber did sanction this expedited process (Imanaliyeva 2020), citing necessity due to extreme circumstances (Supreme Court of the Kyrgyz Republic 2020).

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**Japarov commented that the 2010 constitutional framework was ... a system 'by which three political parties unite, divide the country into three parts, and appoint some leftovers to the posts. That is why I propose to unite president with parliament'.**

During the constitutional reform process, Japarov commented that the 2010 constitutional framework was not parliamentary, but rather a system 'by which three political parties unite, divide the country into three parts, and appoint some leftovers to the posts. That is why I propose to unite president with parliament in order to have one organ...' (Radio Free Europe 2020). The parliamentary system of government has also been the target of criticism for the nationalistic Ata Jurt (Fatherland) party, and its successor Mekenchil (Patriots), which Japarov is closely associated with. For them, parliamentarianism runs counter to Kyrgyz tradition, which requires instead a strong president, a subordinate parliament and a strengthened role for the Kurultai—a traditional Kyrgyz assembly that acts as counsel to the leader (Engvall 2021). These calls for more centralized power were reflected in the new constitution.

The 2021 Constitution removes the position of prime minister as well as the power of the legislature to dismiss the government through a vote of no confidence. The direct election of the president is retained, with the added possibility of running for immediate re-election, which was removed in the 2010 Constitution. As such, it is clear that the office of the president is now the sole seat of executive power

and political leadership. In itself, this does not necessarily pose a threat for democratic governance. However, it should be balanced by sufficient oversight powers for the legislature, protections for the independence of state institutions, and incentives for the president to negotiate with a politically unaligned legislature rather than bypass the legislature and govern unilaterally. The text presents cause for concern in these regards.

Specifically, the 2021 Constitution provides that the president can exercise 'his powers through the adoption of decrees and order' (article 71). Read together with article 66, which delineates sweeping, overarching responsibilities of the president, this potentially provides a broad decree power that the president can use to govern unilaterally. In addition, the Constitution allows the president to call for a referendum unilaterally, a power which could be abused to both coerce and bypass the legislature.

In terms of oversight, there is no explicit power for questioning or censure of the executive by the legislature, and the legislature is shrunk in size from 120 seats to 90. In addition, the re-introduction of the possibility of recalling members of parliament further weakens the legislature vis-à-vis the president, who is secure in office.

With regards to state institutions, independence is in theory safeguarded in most cases through division of appointment powers between president and legislature. How strong this safeguard proves to be in practice depends greatly on the political composition and autonomy of the legislature. Notably, a separate Constitutional Court is reintroduced, as was the situation before the 2010 Constitution. In principle such a court could act as a check on overreach of executive (and legislative) powers. However, analysis of the Kyrgyz Constitutional Court pre-2010 shows that when political power was concentrated in the president, the court was weak, and it served to legitimize, rather than check, the decisions of the president. Only when political power was dispersed among different groups, as in the immediate months and years following the 2005 revolution, was it able to act as a significant check on power (Toktogazieva 2019).

Perhaps the most notable element in the new constitution is the establishment of a 'People's Kurultai' (article 7) as a 'public

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**The 2021 Constitution removes the position of prime minister as well as the power of the legislature to dismiss the government through a vote of no confidence.**

representative' body with a vague 'advisory, supervisory' mandate, tasked with giving recommendations on the direction of national development. The composition and selection procedure are left to be decided by law.

The Kurultai is a traditional people's assembly, and has a long history in Kyrgyzstan governance, including several recent incarnations, in particular during the run-up to the 2005 revolution and subsequent years. While framed as a consultative body, there are legitimate concerns that it could be manipulated by the president to manufacture popular legitimacy for their decisions in order to coerce or bypass the legislature (Partlett 2021).

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**In sum, the 2021  
Constitution  
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In sum, the 2021 Constitution commits Kyrgyzstan unequivocally to a system of government dominated by the president. While it falls short of some of the hyper-presidential systems in the Central Asia region, it establishes the president as the undoubted leader of state and government, and creates legitimate concerns that a populist, anti-democratic president could use the various tools and levers available to them to bring about democratic regression.

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## 3.2. HAITI

### Historical background

In 1804, following a successful rebellion of slaves, Haiti became one of the first countries in the world to promulgate a written constitution. Since then, Haiti has been no stranger to constitution-making, having promulgated 23 constitutions (Jude Charles 2020). Following decades of brutal dictatorship under Francois Duvalier (president of Haiti from 1957 to 1971) and his son Jean-Claude (president from 1971 to 1986), known colloquially as Papa Doc and Baby Doc, respectively, the 1987 Constitution was hoped to provide a framework for democratic governance and economic development.

However, progress has been slight and precarious at best. According to International IDEA's Global State of Democracy Indices, the country oscillated between authoritarian, democratic and hybrid regimes from 1987 to 2010, while for the last decade democratic progress has slowed and, in some regards, regressed, with Haiti consistently

categorized as a poorly performing hybrid regime. Large-scale corruption has been systemic and persistent, with Haiti consistently ranked towards the bottom of Transparency International's Corruption Perceptions Index (Transparency International n.d.a). With this rife corruption, and saddled with crippling debt by its colonial power and exploitation over decades by external powers (Linder 2022), Haiti has never managed to shake its moniker as the poorest country in the western hemisphere.

Thus, frustrations with the political system have led to various calls for constitutional reform, despite the 1987 Constitution's relative longevity (CCI 2020: 5). These have also included official initiatives to examine the need for constitutional reform, including the Groupe de Travail sur la Constitution under President Préval in 2009 and the Commission Spéciale sur L'Amendement de la Constitution de la Chambre des Députés of 2018.

In reaction to the authoritarian past, the 1987 Constitution sought to divide and limit power through numerous mechanisms, including the establishment of a semi-presidential system of government, a much-strengthened bill of rights and the reinstatement of a bicameral legislature. The 1964 Constitution of Francois Duvalier had established a life presidency, and this was replaced with strict term limits and regular elections at all levels of government. However, the numerous checks and balances often resulted in political conflict between president, parliament and prime minister, and accompanying levels of political instability: in the 33 years between 1987 and 2020, Haiti had 19 presidents and 23 prime ministers (Jude Charles 2020).

### **2021 constitution reform process**

The 2021 process was triggered in October 2019 when the scheduled parliamentary (and local) elections were postponed, which led to a situation in January 2020 whereby the legislative term of the entire lower chamber and the majority of the senate ended without a new legislature being elected, and President Jovenel Moïse was left to govern by decree (Fauriol 2021).

Pathways out of this institutional crisis were proposed by various internal parties as well as regional and international partners (UN Secretary-General 2020). Negotiations continued in a hostile

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**The 2021 process was triggered in October 2019 when the scheduled parliamentary (and local) elections were postponed.**

political atmosphere throughout 2020, but ultimately the president insisted that constitutional reform precede legislative elections, and in October 2020 he established by decree a new Constitutional Commission, called the Independent Advisory Committee for the Drafting of the New Constitution (Comité Consultatif Indépendant pour L'Élaboration du Projet de la Nouvelle Constitution (CCI)).

The decree established the CCI as an independent body (article 5) composed of five members (article 3) and with a mandate to consult with experts, public officials and the public at large in order to develop a draft text. The decree also included an article that provided eight guiding principles for the draft (article 2), including, notably, that the draft should allow for the 'rationalization and clarification' of the political regime (rationaliser et préciser la nature du régime politique) (article 2.4).

In a volatile political atmosphere, the CCI set about its work in a remarkably organized and efficient fashion. In November 2020 it released a 'Note du Cadrage' (framing paper), which provided an assessment of the functioning of the 1987 Constitution across various areas. With regards to the system of government, the Note finds that 'the application of the Constitution has proven difficult' and is 'marked by a permanent tension between an elected President and an appointed Prime Minister' (CCI 2020: 6, author's translation).

In the following months the CCI embarked on a series of consultations with various sectors of society and provided opportunity for comments, releasing three successive drafts between January and May 2021. The political opposition generally abstained from engaging with the CCI, claiming that the process was illegitimate and constitutional reform should only be undertaken once the legislature was re-established through elections.

The first CCI draft came attached with an additional section titled 'Avant Propos' (foreword). The Avant Propos provides an overview of the methodology the CCI used to develop the draft, listing the guiding principles from the decree, the previous studies of the Constitution that the CCI considered and the themes for expert consultations. It then explains the conclusions the CCI drew regarding its analysis of

the flaws of the 1987 Constitution, and how the draft is designed to respond to these perceived shortcomings.<sup>1</sup>

The principal shortcomings identified are as follows (CCI 2021a: 6–7):

1. The dual executive denies the president the powers to deliver on the mandate they were elected for, while at the same time creating ongoing tension between the president and prime minister.
2. The fragmentation of political parties makes a stable legislative majority impossible, and results in petty haggling over every vote, which transforms appointment processes into sources of patronage for parliamentarians.
3. Decentralization of responsibilities to local levels is without sufficient finances.
4. The non-concurrence of electoral terms means that there are too many elections—on average citizens go to elections every 18 months.

In sum, in the view of the CCI the efforts of the 1987 Constitution, in the wake of decades of brutal dictatorship, to deconcentrate power resulted in a dysfunctional system. The semi-presidential structure, and the sharing of appointment and policy/law-making powers functioned not so much as an effective check on tyranny, but as a marketplace whereby public officials would use votes as opportunities for self-enrichment.

With regards to institutional design, the CCI's proposed response to the weaknesses it identified was a streamlining of the political system with regards to the efficacy of the powers of the state. This would necessitate a presidential system, but one better adapted to the context of political party fragmentation by (a) changing the electoral system from a two-round to a plurality system and (b) providing disincentives for smaller parties through campaign financing rules. In addition, the first CCI draft changed the legislature from a bicameral to a unicameral system and aligned all electoral terms at five years, and to start/end on the same day. The legislature

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**The dual executive denies the president the powers to deliver on the mandate he was elected for, while at the same time creating ongoing tension between the president and prime minister.**

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<sup>1</sup> As a sidenote, this form of public explanation of the reasoning which has formed the basis for the thinking of constitution-making bodies is an exception, when it should perhaps be the norm. Often constitution-making bodies put forward their drafts with no formal explanation of why constitutional reform is necessary or of the objectives that have guided constitutional design choices.

was now excluded from participation in the appointment of key state bodies, including senior members of the judiciary (not including the Constitutional Court) and the electoral commission. In other areas, the intention to streamline governance by tilting power towards the president was evident in the setting of default rules—for example, with regard to the budget: if the legislature cannot agree on a budget, the version submitted to parliament by the president enters into force (article 123). Similarly, with regards to several important appointments to leadership positions in state bodies (including head of the armed forces, director general of the police, the board of the central bank), the president's nomination will be automatically appointed *unless* objected to by a two-thirds majority in the legislature (article 147).

Two additional changes from the first CCI draft regarding the office of the president are worth mentioning: first, the very strict rule against re-election was abolished, in favour of a two-term maximum. The amendment procedure was made far easier. Under the 1987 Constitution, amendments required two-thirds of each house of the legislature, followed by two-thirds of a joint sitting of the next legislature following elections (articles 282–84). Additionally, article 284-2 provided that no sitting president could benefit from the amendment passed under their government. Referendums to amend the Constitution were prohibited (article 284-3). Under the CCI first draft, amendments could be passed either through a two-thirds super majority in the legislature (article 268) or the president could submit a proposal for amendment to referendum with the support of a majority of the legislature (article 269). The term-limit provision was no longer protected from amendment.

It should also be noted that, similar to the electoral system for the legislators, the presidential election was changed from a two-round system to a plurality, one-round system—meaning that a president could win the expanded powers of the proposed new system while at the same time not having the support of the majority of voters.

Given that the opposition were essentially boycotting the process, and given the text of the first draft tilted the balance of power towards the president, the draft was subject to predictable public criticism and protests, where some accused President Moïse of



trying to entrench himself in power and return Haiti to its pre-1987 dictatorship (Celiné 2021).

The CCI responded with two more drafts, culminating in the final draft released in August (CCI 2021b, 2021c). The drafts saw a slight attenuation in the power of the president, including through: improved design of the Permanent Electoral Council, whose composition and appointment mechanism returned to a design similar to that under the 1987 Constitution; a strengthened amendment procedure and explicit prohibition of the provision on term limits; and—most notably—a return to bicameralism with the re-insertion of a senate, albeit one which would be significantly weaker than the senate under the 1987 Constitution. However, the overall structure of the Constitution—and its driving animus of a ‘rationalization of politics’ as called for by the original CCI framing paper—remained the same, as the CCI sought to consign semi-presidential government to history.

However, 2021 was a period of intense turmoil in Haiti, both within and outside politics, which led to further stalling of the transitional process, and, as of writing, Haiti is still without both an elected legislature and a new constitution. First, political opposition and street protests against President Moïse began to intensify from February 2021, which for many was when the president’s term should have ended due to a disagreement over when Moïse’s term began (Fauriol 2021); second, the scale of organized crime—in particular kidnappings—increased hugely throughout 2020 and 2021, leading the influential Catholic Church to call for a general strike and demand the president do more to prevent the ‘descent into hell of Haitian society’ (*The Guardian* 2021). Just as it seemed the crisis could not become more acute, a group of professional gunmen raided the presidential residence in the early hours of 7 July and assassinated President Moïse and badly injured his wife. Political in-fighting continued for the remainder of 2021, with the year coming to a close with neither elections nor a constitutional referendum in sight.

As of the time of writing, the CCI final draft remains on the table, potentially to be picked up when/if the political context allows.

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**The overall structure of the Constitution—and its driving animus of a ‘rationalization of politics’ as called for by the original CCI framing paper—remained the same, as the CCI sought to consign semi-presidential government to history.**

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### 3.3. CONCLUSION

Haiti and Kyrgyzstan are two countries with evident, and significant, differences. However, in 2021 both saw similar themes in the political discourse around constitutional change—longstanding disaffection with a political system that was deemed both corrupt and incapable of delivering for citizens, coupled with a constitutional crisis due to an irregular transition in power which created an opening for constitutional reform, and constitutional reform proposals which sought to streamline the framework for governance through strengthening the president by, *inter alia*, changing the system of government from semi-presidential to presidential.

Such changes are invariably met with caution. Mainstream constitutional design literature, and the constitutional assistance community, have developed an innate fear of constitutional change that involves increased concentration of power in the president (Vermeule 2014). These reservations are well founded based on countless empirical cases where concentration of power has led to authoritarian rule. However, the conditions of disaffection with politics and unconstitutional changes of government are by no means limited to Haiti and Kyrgyzstan, and similar debates over constitutional change are likely to echo in many other countries.

Numerous countries seem to be caught in a cycle between presidential-authoritarian systems and systems with more fragmented structures of power that are perceived as being corrupt and ineffectual. Finding constitutional design solutions to exit this cycle is beyond the scope of this chapter, and such solutions must be driven by context. However, such solutions will surely require creativity and innovation, rather than relying on mainstream concepts and mechanisms of separation of powers that have not evolved significantly since the Federalist Papers.

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## Chapter 4

# THE CODIFICATION OF CONVENTIONS AND CONSTITUTIONAL CRISES IN SAMOA AND NEPAL

*W. Elliot Bulmer*

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## INTRODUCTION

Several recent constitutional crises across the Asia-Pacific region have centred upon the rules, processes and procedures of government formation, government removal, and the summoning, prorogation and dissolution of parliament. This chapter concentrates on the constitutional crises in Samoa and Nepal in 2021; however, similar crises have been ongoing in Malaysia since 2020 and have occurred in Pakistan in 2022. In all these countries, democratic institutions have been brought to a standstill, apolitical heads of state have been brought into potential political controversy, the legitimacy of prime ministers has been challenged, and apex courts have had to solve political disputes—all because these mechanisms failed in some way. Despite this, they did not fail catastrophically; a combination of written rules and judicial enforcement provided a way out.

The rest of the chapter proceeds as follows: Section 4.1 provides a short background on the nature of these rules, their development as unwritten ‘conventions’ and their subsequent codification in written constitutions. Sections 4.2 and 4.3 are narrative summaries of the Samoan and Nepali cases. Section 4.4 concludes with some brief ‘lessons learned’ and general recommendations, for the benefit of the constitution-building community, on the codification of conventions in parliamentary democracies.

## 4.1. PARLIAMENTARY CONVENTIONS: ORIGINS, DEVELOPMENT AND CODIFICATION

Parliamentary democracy was a British discovery, not an invention. Its features were discerned rather than designed, as they emerged gradually in a process that began in the mid-18th century and continued until the early 20th century. Although there were some important statutory milestones along that road, from the Great Reform Act of 1832 to the Parliament Act of 1911, much of the change occurred as a result of decisions made by political actors, which set precedents that then congealed into ‘conventions’.

Conventions are the ‘unwritten rules’ of parliamentarism. They are not enforceable in any court, but are generally accepted as being morally and politically binding. The most important conventions had been recognized by the mid-Victorian era, in the writings of John Stuart Mill (1861) and Walter Bagehot (1873). Despite conventions being unwritten, some commentaries on the conventions achieved widespread acceptance and have become authoritative guides. The most enduring and influential was that offered by A. V. Dicey in *Introduction to the Study of the Law of the Constitution* (1915).<sup>1</sup>

Crucially, Dicey recognized that the conventions are not haphazard. There is an underlying logic that makes sense of the conventions, legitimates them and helps us in interpreting and applying them. This logic is that the government wins office, and continues in office, only on the basis of parliamentary ‘confidence’. A government that lacks such confidence cannot continue. Either the government must go

**Parliamentary democracy was a British discovery, not an invention.**

<sup>1</sup> Among the most important conventions, Dicey cited: 1. The party who for the time being command a majority in the House of Commons, have (in general) a right to have their leaders placed in office. 2. The most influential of these leaders ought (generally speaking) to be the premier, or head of the cabinet. 3. A ministry which is outvoted in the House of Commons is in many cases bound to retire from office. 4. A cabinet, when outvoted on any vital question, may appeal once to the country by means of a dissolution. 5. If an appeal to the electors goes against the ministry, they are bound to retire from office and have no right to dissolve parliament a second time. 6. The cabinet are responsible to parliament as a body, for the general conduct of affairs. 7. The action of any ministry would be highly unconstitutional if it should involve the proclamation of war, or the making of peace, in defiance of the wishes of the House. 8. If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought, at some point, not definitely fixed, to give way. 9. Parliament ought to be summoned for the despatch of business at least once in every year. 10. If a sudden emergency arises, e.g. through the outbreak of an insurrection, or an invasion by a foreign power, the ministry ought, if they require additional authority, at once to have parliament convened and obtain any powers which they may need for the protection of the country.

(by resignation) or parliament must go (by dissolution and a general election).<sup>2</sup>

With decolonization in the mid-20th century, parliamentary democracy based on British patterns and practices was extended to many newly independent countries. Where the conventions were felt to be insufficiently embedded to operate effectively on an unwritten basis, attempts were made to codify them, incorporating them into the text of new written constitutions (de Smith 1964; Twomey 2018).

To codify, however, is to choose. When conventions were doubtful or uncertain, constitution-makers had to make clear choices about which of several possible interpretations of the rules, or subtle differences of practice, to recognize. Since different countries adopted their constitutions at different times, under the influence of different drafters and advisors, the result was a series of variations on a theme. Sometimes small deviations from British practice were deliberately introduced, to reflect national needs, preferences or political realities. As S. A. de Smith notes:

It cannot be said that any of these rules exactly reproduces the relevant British conventions, if only because nobody can be sure what the British conventions on the matter are; but most of them are consonant with the principles of the British Constitution, and some of them would be strong candidates for inclusion in a written Constitution for Britain.

(de Smith 1964: 95)

These variations are particularly evident in the rules concerning: (a) government formation, (b) government removal and (c) the

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<sup>2</sup> As Dicey (1915) put it, 'They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State—the majority of the electors or (to use popular though not quite accurate language) the nation.'



summoning, prorogation and dissolution of parliament.<sup>3</sup> Since these rules are all intimately interconnected, it is vital, if parliamentary government is to operate smoothly and constitutional crises are to be avoided, that they are clear, legitimate and work coherently together.

There was, however, one important change from British practice. Whereas the interpretation and enforcement of unwritten conventions had depended on non-judicial actors, such as the Queen's private secretary, the constitutional codification of these rules brought the courts into play as arbiters. As will be seen in the two case studies below, this has had profound implications.<sup>4</sup>

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## 4.2. SAMOA

Samoa became independent in 1962 and adopted a Westminster model constitution with the important modification that, out of deference to Samoan custom, only the *matai*, or chiefs, could vote or hold office. Since 1990, Samoa has had universal suffrage, but still only *matai* can be elected. Although Samoa was initially a non-party state, the centre-right Human Rights Protection Party (HRPP), formed in 1979, quickly established itself as a hegemonic party of government. It completely dominated Samoan politics from 1982 until 2021. On the eve of the 2021 general election, the HRPP held 48 of the 50 seats in the unicameral Legislative Assembly.

Division, however, was sparked by a package of three bills—the Constitution Amendment Bill 2020, the Land and Titles Bill 2020 and the Judicature Bill 2020. The purpose of these bills was to prevent

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**Since 1990, Samoa has had universal suffrage, but still only *matai* can be elected.**

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- 3 For example, in some countries, the government automatically ceases to hold office when a new parliament meets after a general election (Constitution of Samoa, 1962, article 31(1)); in others, the government may be dismissed, before the parliament meets, if it appears that the government will not have majority support in the new parliament (Constitution of Barbados, 1966, section 66(1)). In some countries, the defeat of the government in a vote of no confidence automatically leads to a dissolution of parliament and a general election (Constitution of Jamaica, 1962, section 64(5)); in others, the defeat of the government in a vote of no confidence opens a window of opportunity—normally a few days—during which the government must either resign or request a dissolution of parliament (Constitution of Malta, 1964, article 76(5)(a)).
- 4 A landmark case was *Adegbenro v Akintola* [1963] 3 All E.R. 544, which concerned the question of whether the chief minister of a state in Nigeria could be deemed to have lost the confidence of the legislature only following a formal vote, or whether a letter to the governor signed by a majority of MPs was sufficient. The Judicial Committee of the Privy Council held that codified rules (requiring a vote in the House) replaced any incompatible unwritten convention (in this case, that the loss of confidence could be expressed in other ways).

appeals, even on constitutional grounds, from the Land and Titles Court to the Supreme Court and Court of Appeal. Instead, these bills would constitutionally separate Samoan law into two spheres—a sphere derived from common law, and a sphere derived from Samoan custom and tradition. The latter would be applied in the Land and Titles Courts by experts in Samoan customary law. A new Land and Titles High Court would have exclusive appellate jurisdiction over all matters concerning Samoan customary law. There were concerns that this would increase the power of the *matai* and undermine human rights and the rule of law (Library of Congress 2021). This, together with other concerns about corruption, provoked opposition within the HRPP. The HRPP deputy prime minister, Afioga Fiamē Naomi Mata’afa, resigned from the party in protest against these bills and became the leader of a new opposition party known as FAST (Fa’atuatua i le Atua Samoa ua Tasi, ‘Samoa United in Faith’).

The emergence of FAST and the split in the HRPP made the 2021 general election, held on 9 April, arguably the first genuinely competitive election in Samoan history. The result, initially, was a tie between HRPP and FAST, with each party winning 25 seats. One seat was won by an independent. As fewer than 10 per cent of the seats were won by women, the Electoral Commission awarded an additional seat to the female candidate with the next highest number of votes (under article 44(1B) of the Constitution, which establishes a 10 per cent gender quota). The next-ranking female candidate was from HRPP. The independent member then announced that he would support FAST, again resulting in a tie, with HRPP and FAST each having 26 of the 52 seats. This was, however, soon reversed, as the election of the additional female member was successfully challenged by FAST in the Supreme Court (Stuff 2021a), giving FAST a thin majority of 26 out of 51 seats.

Despite this, the incumbent HRPP prime minister refused to resign. He instead requested the head of state to dissolve parliament. This would be against established Westminster model conventions, which generally prohibit a prime minister whose party has been defeated in a general election from seeking an immediate dissolution so as to get another chance of victory. Nevertheless, the requested dissolution was granted on the basis of article 63(2) of the Samoan

Constitution.<sup>5</sup> FAST opposed the dissolution, arguing that a large number of election petitions had been filed, placing the eventual composition of the Legislative Assembly in doubt, and that they should wait until those petitions had been dealt with and the new Legislative Assembly had met. Moreover, the office of prime minister was not vacant, as the constitutional provision required, since the prime minister had not yet resigned, nor had his term of office expired (which it would do, under article 33(1), seven days after the first meeting of the Legislative Assembly following the general election). Samoa's Supreme Court held, in *FAST & Ors v Attorney General & Ors* [2021], that the dissolution was unconstitutional (Samoa Global News 2021), since article 63(2) of the Samoan Constitution allows for a dissolution in circumstances where a government cannot be formed, but it does not allow the incumbent government to dissolve the Legislative Assembly, following a general election, before it has even met (para. 80 of the judgment).

The Samoan Constitution establishes clear deadlines for the first meeting of the Legislative Assembly after a general election (45 days, article 52). On Friday, 21 May, with that deadline approaching, the head of state, Tuimalealiifano Va'aaleto'a Eti Sualauvi II, issued the proclamation for parliament to meet on the following Monday, but this decision was almost immediately reversed by another proclamation suspending the Legislative Assembly (Jackson 2021). FAST challenged the lawfulness of the suspension, and the Supreme Court upheld that challenge (Stuff 2021b). Accordingly, the Legislative Assembly met on Monday, 24 May, only for members to find that the outgoing HRPP-aligned speaker had defied the court order and that the doors of the parliament building had been locked. In a bizarre ceremony, members of the new government were sworn in in a tent outside of parliament (BBC 2021).

Rejecting the constitutionality of this move, the incumbent prime minister remained *de facto* in office in a caretaker capacity. The Court of Appeal finally settled the matter on 23 July, declaring that the swearing-in ceremony of 24 May was lawful, that the

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**In a bizarre ceremony, members of the new government were sworn in in a tent outside of parliament.**

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<sup>5</sup> Article 63(2): 'If, at any time, the office of Prime Minister is vacant, the Head of State shall, by notice published in the Samoa Gazette, dissolve the Legislative Assembly as soon as he is satisfied, acting in his or her discretion, that a reasonable period has elapsed since that office was last vacated and that there is no Member of Parliament likely to command the confidence of a majority of the Members.'

FAST government under the leadership of Prime Minister Mata'afa (incidentally, the first female prime minister in Samoa's history) was the lawful government, and that the outgoing government had been unconstitutionally occupying office for the previous two months (Lanuola Tusani T-Ah Tong 2021; *Attorney General v Latu* [2021] WSCA 6 (23 July 2021)). The position of the FAST government was eventually consolidated after disposing of the various electoral petitions. These resulted in six concurrent by-elections being held in November 2021, which gave FAST a clear majority (31 seats) over HRPP (20 seats).

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**In the end, Samoa had a democratic change of government.**

In the end, Samoa had a democratic change of government. The courts acted to uphold the constitutional rules: the early dissolution sought by the outgoing government was prevented, the new Legislative Assembly met on time (albeit in a tent, not in the parliament buildings) and a new prime minister was appointed—even if it took two months, and the decision of the Court of Appeal, to clearly establish that this was a lawful and constitutional course of action. Resolution of the crisis was made easier by clear constitutional rules (including specific deadlines for both the meeting of the Legislative Assembly and the resignation of the government following the meeting of the new Legislative Assembly) and a court system willing and able to enforce those rules.

It is also notable, however, that two further constitutional weaknesses contributed to cause or prolong the crisis. The first was the weakness of the electoral system, with uncertainty over the rules on the election of additional female members to meet the gender quota and a high number of petitions for electoral irregularities both contributing to uncertainty about which party had really won the election. The second was the perception that both the head of state and the speaker were HRPP loyalists. The mechanism for electing these officers favours the majority party: there is no rule designed to encourage bipartisanship or impartiality in these appointments. Within the confines of parliamentary democracy, a more impartial

head of state might have pushed back against the prime minister's advice first to dissolve parliament and then to hinder it from meeting.<sup>6</sup>

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### 4.3. NEPAL

Nepal is not a member of the Commonwealth and has never been directly under British rule. The influence of the 'Westminster model' comes indirectly from other countries in the region, notably India. Nevertheless, Nepal does 'retain a sufficiently close connection to the Westminster system' and 'experiences remain relevant and instructive, or at least provide interesting comparisons' (Twomey 2018: 2).

Nepal's 2015 Constitution did not seek merely to codify traditional conventions, but to amend them. In order to deliver a more stable form of parliamentarism, it limited the discretionary powers of both the prime minister and the head of state over the processes of government formation, government removal, and the prorogation and dissolution of parliament.

These rules were tested twice in 2021. The difficulty arose from a split in the governing Communist Party of Nepal (CPN), between the Unified Marxist Leninist (UML) and the Maoist Centre (MC) factions. Although they had a comfortable majority of 174 (of 275) seats, Prime Minister K. P. Sharma Oli (UML) faced internal opposition from Pushpa Kamal Dahal (MC). By November 2019, Dahal had become strongly critical of Oli's leadership, distancing himself from the prime minister and causing the government's majority to crumble (Pradhan 2019). Faced with that internal opposition and fearing a vote of no confidence, Oli advised the president to dissolve parliament in December 2020 and the president acted in accordance with that request (Adhikari and Masih 2020).

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**Nepal's 2015 Constitution did not seek merely to codify traditional conventions, but to amend them.**

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<sup>6</sup> According to Anne Twomey (2018: 694), the head of state has various options when faced with advice from responsible ministers that the head of state regards as unlawful or unconstitutional. These include: (a) querying the advice, seeking a formal legal opinion on the advice (e.g. from the attorney-general), to refer it to the court where the Constitution allows this (2018: 695), or to reject the advice or refuse the request; the latter is normally the last resort. Twomey also argues (2018: 699) that where the impugned action is 'plainly in breach of the constitution without the need for any court to declare it so', the head of state would be entitled to refuse to act.

However, the dissolution was successfully challenged in the Supreme Court. The Supreme Court held (Constitutional Bench, Writ N. 077-WC-0028) that there is no inherent right to request and obtain a dissolution based upon the conventional practice of any other parliamentary system (Malagodi 2021). The rules of the Constitution of Nepal apply, not the traditional conventional practice of Westminster. If the prime minister wishes to obtain a lawful dissolution, it must be done in accordance with the constitutional provisions and not otherwise. The 'dissolved' parliament was therefore reinstated in February 2021 (Malagodi 2021).

This judicial resolution of the first dissolution crisis did not, however, resolve the underlying political impasse. On 10 May 2021, Oli was defeated in a vote of no confidence (Sharma 2021). Unlike some other parliamentary systems, the Constitution of Nepal does not allow a prime minister who has lost the confidence of the house to 'appeal to the people' by means of a dissolution; he or she automatically ceases to hold office (Constitution of Nepal, article 77(1)(b)), but continues in a caretaker capacity until a successor is appointed.

The prime minister, however, again advised the president to dissolve parliament, and the president acted in accordance with this request. The supposed grounds of the dissolution were slightly different from the previous occasion: rather than dissolving to avoid an imminent vote of no confidence, the prime minister now insisted that since no party had a majority, and a government therefore could not be formed, a dissolution was permissible under article 76 of the Constitution.

The Supreme Court, following the previous judgment from February 2013, reversed the dissolution. Article 76 of the Constitution offers very limited scope for early dissolution. There is no possibility for a government to advise a dissolution in order to seek a new mandate from the people or to bolster its support. Early dissolution is always and only a by-product of a failed government formation process. The government formation process is complicated and convoluted, with many steps, all of which have to be exhausted before a premature dissolution can take place (article 76). In trying to avoid those steps—crucially by avoiding votes on the floor of the house, and instead

relying on assumed support by counting the members of each party, or by taking into account statements from members declaring whom they would support—the court found that the prime minister acted contrary to the intentions of the Constitution.

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#### 4.4. CONCLUSION

There is a tendency, in constitution-building or constitutional reform processes, for people to focus on high-profile contentious issues, whether these are substantive issues such as religion–state relations or distributional matters such as federalism. In general, much less attention is paid by civil society actors and the public, and sometimes even by political leaders, to the relatively boring, technical ‘mechanisms’ of the constitution, in so far as they relate to government formation and removal, rules on the dissolution, prorogation and summoning of parliament, and rules on the roles of the head of state and of the courts in upholding these rules. However, as the above examples show, getting these mechanical details right matters. Given the importance of comparative practice in this area, and the relative lack of popular passion on the issue, the design of these rules may be one area where international advisors can really be beneficial to national political actors—helping them to anticipate problems that might arise and to draft rules in a water-tight way.

Finally, Anne Twomey argues that the codification of conventions is problematic, because it excludes the flexible, common-sense, resolution of crises (Twomey 2018). These examples, and also the examples from Pakistan, Malaysia and several other countries not covered here, point to the opposite conclusion. It is absolutely vital that these rules are clear, coherent and comprehensive. When they have to be deployed, often in times of intense political drama and bitter divisions, the rules must be sufficiently robust, authoritative and legitimate. They must say what should happen, when and by whom, and so coordinate the functions and expectations of the various actors. These examples show how useful the courts can be in authoritatively interpreting, applying and enforcing these rules at times of crisis. The codification and justiciability of these rules is not a limit on parliamentary democracy, but a safeguard for it—a way of ensuring that the basic principles, identified by Dicey, are consistently

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**In general, much less attention is paid to the relatively boring, technical ‘mechanisms’ of the constitution, in so far as they relate to government formation and removal, rules on the dissolution, prorogation and summoning of parliament.**

applied. It is difficult to speculate, but had these rules not been clear, and had the courts not had the authority to apply them, it is perhaps likely that these crises either would not have been resolved, or would have been resolved in more authoritarian ways.

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## Chapter 5

# THE 2021 COUP PANDEMIC: POST-COUP TRANSITIONS AND INTERNATIONAL RESPONSES

*Kimana Zulueta-Fülscher and Thibaut Noël*

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## INTRODUCTION

2021 saw the highest number of ‘successful’ coups d’état in the last 20 years (Powell, Reynolds and Chacha 2022)<sup>1</sup> in countries as distinct as Chad, Guinea, Mali, Myanmar and Sudan. We exclude from the chapter cases where a non-state armed group took power unconstitutionally, such as in Afghanistan, and focus only on those coups d’état led by state armed forces.

According to the International IDEA Global State of Democracy Indices, these countries spanned from authoritarian regimes (i.e. Chad and Sudan), hybrid regimes (i.e. Mali and Guinea) to weak or low-performing democracies (i.e. Myanmar) in 2020 (International IDEA 2021). In all of these coups, the armed forces, or an important faction within the armed forces, took the lead; however, there are critical differences in the motivations of the coup leaders and the degree of public support, and also in the form of the transitional processes and the response from the international community.

It is important to consider the reasons why coups may happen in the first place, the type of support coup plotters may have and how that support evolves, to understand the way the post-coup transition

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**It is important to consider the reasons why coups may happen in the first place, the type of support coup plotters may have and how that support evolves, to understand the way the post-coup transition unfolds.**

<sup>1</sup> We understand successful coups d’état as those where a faction or group within a country’s ruling or political elite, including the armed forces, forcefully seizes executive power resulting in an unconstitutional change in the executive leadership (Marshall and Marshall 2022; see also Powell and Thyne 2011: 252).

unfolds (Thyne and Hitch 2020: 1860). This chapter describes the circumstances and events surrounding coups in five countries (Section 5.1). Key trends in post-coup transitions are then analysed, including some considerations for the international community to better prevent and respond to coups d'état (Section 5.2).

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## 5.1. A PANDEMIC OF COUPS

### Myanmar

On 1 February 2021, the Myanmar military detained high-level government officials, including President Win Myint and State Counsellor Aung San Suu Kyi, blocked newly elected parliamentarians from taking their seats and declared military-nominated Vice President Myint Swe as acting president. Myint Swe then, in violation of constitutional criteria and procedures (Noël 2022), declared a national state of emergency transferring legislative, executive and judicial powers to the commander-in-chief, General Min Aung Hlaing. The military also announced that elections would be held at the end of the state of emergency, which could span from one to two years according to the 2008 Constitution of Myanmar (articles 417, 421b).

The pretext for the coup was unproven allegations of electoral fraud in the 8 November 2020 general elections, which saw the governing National League for Democracy (NLD) winning 79.5 per cent of the elected seats in the union parliament. The military and its proxy party—the Union Solidarity and Development Party—claimed to have identified large-scale electoral fraud based on irregularities in the voter lists, but never provided concrete evidence.

The general public quickly mobilized against military rule through a nationwide protest movement known as the 'the Spring Revolution'. A group of MPs who won seats in the 2020 general elections—and with the agreement of 80 per cent of all elected MPs (CRPH 2021)—formed the Committee Representing the Pyidaungsu Hluttaw (CRPH) to represent the legitimate legislature, released a Federal Democracy Charter (FDC 2021) detailing the terms of an inclusive alliance against the military, and established the National Unity Government (NUG)—an interim executive branch composed of a wide range of pro-democracy forces also tasked with defeating the military junta

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(International IDEA 2022b). This coalition of pro-democracy forces came together in the National Unity Consultative Council (NUCC), a platform composed of the CRPH, and some political parties, ethnic armed organizations, civil society groups and state-level bodies. It is responsible, under the revised FDC, for strategic decisions to defeat the military regime and restore democracy. These interim institutions have operated mostly online. In September 2021, the NUG announced a 'People's Defensive War', endorsing the emergence of local self-defence and resistance groups (known as the People's Defence Force) aimed at keeping administrative control and protecting communities from the military regime's violence (National Unity Government 2021). Some ethnic armed organizations also resumed fighting against the military, offered refuge to ousted political leaders and military trainings to civilian resistance fighters, as well as participated in some of the aforementioned interim governing institutions.

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**The military regime has attempted to consolidate power by resorting to extreme violence, sentencing civilian leaders through sham trials, establishing new governing bodies and capturing existing institutions, while claiming to act in accordance with the 2008 Constitution.**

The military regime has attempted to consolidate power by resorting to extreme violence, sentencing civilian leaders through sham trials, establishing new governing bodies and capturing existing institutions, while claiming to act in accordance with the 2008 Constitution. The commander-in-chief established a State Administration Council (SAC) consisting of 16 members—mainly military officials—purportedly tasked with assisting him in exercising legislative powers. The SAC established a 'provisional government' and appointed General Min Aung Hlaing as prime minister, a post that does not exist in the 2008 Constitution. Additionally, the military regime captured existing institutions, including the constitutional tribunal and the election commission, by appointing new members who support its narrative and are accountable to the SAC. General Min Aung Hlaing also extended the unconstitutional state of emergency until August 2023, 31 months after the coup took place (BBC News 2021).

The international community has for the most part been hesitant to engage with either the military regime or the NUG, limiting as a result its own leverage. The United Nations largely relied upon the Association of Southeast Asian Nations (ASEAN) to assist in finding a way out of the crisis. On 24 April 2021, ASEAN brokered a 'five-point consensus' with the military regime, which provides a commitment to immediate cessation of violence, allows humanitarian assistance,

and calls for a mediation between all parties concerned (ASEAN 2021). The military regime, however, intensified its crackdown on opponents to the coup and has barred ASEAN from providing humanitarian assistance and from meeting deposed civilian leaders. In response, and after much internal debate, ASEAN has ended up excluding representatives of the military regime from some of its meetings and inviting instead ‘non-political representatives of Myanmar’. Canada, the European Union, the United Kingdom and the United States enacted targeted sanctions against military leaders and business associates (Aljazeera 2022c, Council of the EU 2022) but were slow to engage the NUG.

### Chad

On 20 April 2021, Chadian president Idriss Déby Itno died after sustaining injuries on the battlefield between the national army and a Chadian armed insurgency group, the Front for Change and Unity in Chad (FACT). Déby had just been re-elected for a sixth consecutive term, after 30 years of increasingly repressive rule. The 2018 Constitution provides that in case of vacancy of the presidency, the president of the National Assembly becomes interim president until new presidential elections are held within 90 days (Constitution of the Republic of Chad, article 81). It also prevents the interim president from dissolving the legislature or amending the Constitution (article 82). However, immediately after Déby’s death, a group of army generals led by the late president’s son—General Mahamat Idriss Déby—established a Transitional Military Council (TMC), dissolved the legislature and the government, and announced an 18-month transition. Opposition parties and civil society leaders denounced this coup and called for a civilian-led transition and the holding of an inclusive national dialogue to find a way out of the crisis (*Le Monde* 2021; RFI 2021).

The TMC enacted a transitional charter on 21 April 2021 (Republic of Chad 2021). The charter was developed by the TMC without extensive negotiations with the opposition. It concentrates most powers in the hands of the president of the TMC. The charter establishes three main institutions for the interim period: the TMC, headed by Mahamat Idriss Déby, comprises 14 members (senior military officials and regime allies) tasked with defining general policy orientations during the transition period (articles 36–47); a

transitional government tasked with ‘implementing policy orientations defined by the TMC’ (article 49), headed by a prime minister appointed by and accountable to the president of the TMC (article 51); and a National Council of Transition composed of 93 members from different stakeholder groups appointed by the president of the TMC (article 65) and responsible for ‘reviewing and adopting bills and the future constitution’ (article 67). The charter provides for an 18-month transition period, renewable once (article 97). What is more, in contradiction with African Union (AU) requirements (African Charter on Democracy, Elections and Governance (ACDEG 2007), article 25.5), there is no provision preventing perpetrators of the coup—some of whom are members of transitional authorities—to run in the elections that will end the transition.

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**The government committed to hold an inclusive national dialogue that would lead to a new constitution and elections by October 2022.**

In early May 2021, the president of the TMC appointed a transitional government led by Albert Pahimi Padacké—a candidate of the April 2021 presidential election—and included some but not all opposition parties. The government committed to hold an inclusive national dialogue that would lead to a new constitution and elections by October 2022. After five months of negotiations, with Qatar as mediator, the transitional government and 43 armed groups signed a peace agreement on 8 August 2022 providing for, among others, a ceasefire, a disarmament, demobilization and reintegration programme, and the participation of signatory armed groups to the national dialogue. The FACT—which did not sign the Doha peace accord—and Wakit Tama—a large coalition of opposition parties and civil society groups—announced they would boycott the national dialogue, as they considered it to be biased in favour of the TMC and the military (France 24 2022). The national dialogue, initially scheduled in February 2022, is (at the time of writing) scheduled to start on 20 August 2022.

Main opposition groups are also critical of transitional authorities and are concerned by a potential extension of the transition period and the concentration of power by the military leadership and the TMC (Arab News 2022; RFI 2022a). In May 2022, the leader of Wakit Tama and other opposition figures were arrested following protests against France’s support to the TMC (RFI 2022b).

The international community did not expressly condemn the coup, nor label it as such. France acknowledged the establishment of the TMC, referring to ‘exceptional circumstances’ (Republic of France 2021a, 2021b) and later called for a civilian national unity government and for elections to be held within 18 months (Republic of France 2021c). Similarly, the AU did not condemn the unconstitutional change of government and did not suspend Chad from its decision-making bodies (Peace and Security Council of the AU 2021a). The AU balanced its rules on unconstitutional change of government with the Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa and the OAU Convention on the Prevention and Combating of Terrorism. The AU implicitly argued that the suspension of Chad’s constitutional framework was justified by the fact that the country was under attack from foreign mercenaries (Peace and Security Council of the AU 2021c; Handy and Djilo 2021). The AU, however, required the TMC to commit to an 18-month transition led by civilian authorities, to amend the transitional charter to limit the role of the TMC to defence-related issues and to forbid its members to run in the elections at the end of the transition (Peace and Security Council of the AU 2021c). To date, such clauses have not been incorporated into the transitional charter. The reluctance of the international community to condemn the coup in Chad can be explained by the country’s important military contribution in regional counterterrorism operations (Gazzini, Moncrieff and Lesueur 2021).

## Mali

Mali experienced two coups d’état in less than a year. The first took place on 18 August 2020, when a group of military officers arrested President Ibrahim Boubacar Keita (IBK) and other high-level government officials. On the same day, President IBK was forced to announce his resignation and the dissolution of parliament (TV5Monde 2020). On 19 August, coup leaders established the National Committee for the Salvation of the People (CNSP), a five-military-member body headed by Colonel Assimi Goïta, to govern the country until interim institutions were established (Lorgerie 2020; Mateso 2020). The public and opposition parties welcomed the coup, which was carried out following weeks of mass protests demanding the resignation of President IBK (Mugabi 2020).

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The president of the CNSP enacted a transitional charter on 1 October 2020 (Republic of Mali 2020) drafted by a committee of experts appointed by the CNSP. Consultations were held with political forces, including the Rally of Patriotic Forces (M5-RFP—a coalition of civil society groups, opposition parties and religious leaders that led the aforementioned mass protests), and with the Economic Community of West African States (ECOWAS). The transitional charter established an 18-month transition and three main institutions: the president of the transition, who shall be the head of state chosen by a college appointed by the CNSP, and a vice-president in charge of defence and security issues (Chapter I); a transitional government headed by a prime minister appointed by the president of the transition responsible for defining and implementing a roadmap for the transition (Chapter II); and a National Council of Transition (NCT) consisting of 121 members representing various stakeholder groups and acting as the transitional legislature (Chapter III). The president, vice-president and members of the transitional government were forbidden to run in the first presidential and parliamentary elections that would mark the end of the transition (articles 9 and 12). The charter also granted immunity from prosecution to all members of the CNSP and every individual involved in the coup (article 23), a clause that appears non-compliant with the African Charter on Democracy, Elections and Governance (ACDEG), which provides that perpetrators of unconstitutional change of government coups shall be brought to justice (ACDEG 2007, article 25). The transitional charter complements the 1992 Constitution and takes precedence in case of contradictions between the two documents (article 25).

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**Under the first transitional government, tensions gradually increased between the civilian leadership and the military, who aimed to maintain their influence in interim institutions.**

Under the first transitional government, tensions gradually increased between the civilian leadership and the military, who aimed to maintain their influence in interim institutions. These tensions hampered any progress on constitutional and legislative reforms needed before holding scheduled elections in February 2022 to end the transition. The M5-RFP and several unions demanded a more inclusive transitional government, and after weeks of negotiations, President Bah N'Daw and Prime Minister Moctar Ouane announced a cabinet reshuffle whereby colonels Modibo Koné and Sadio Camara, respectively ministers of security and defence and members of the former CNSP, were removed (Akinwotu 2021; Jezequel 2021). On



24 May 2021, soon after the reshuffle, President Bah N'Daw, Prime Minister Moctar Ouane and several officials were arrested on the instructions of Vice President Colonel Goïta. On 26 May, N'Daw and Ouane were forced to resign while being detained. Two days later, the Constitutional Court acknowledged the vacancy of the transitional presidency and declared Colonel Goïta president of the transition (Constitutional Court of Mali 2021).

Notably, Chogel Maïga—a central committee member of the M5-RFP—was appointed the new head of the transitional government in June 2021 (Republic of Mali 2021a). In September 2021, the prime minister announced that national consultations on state reforms and on the timeline for the transition would be held in December 2021, thereby implicitly postponing the elections initially scheduled in February 2022. The national consultations—which were boycotted by opposition parties—recommended a six-month to five-year extension of the transition period (Republic of Mali 2021b). The transitional charter was then amended on 26 February 2022. It provides that 'the duration of the transition is defined in accordance with the recommendations from the national consultations' (article 19).

Both coups were condemned by Mali's main international partners (Le Point 2020; Republic of France 2020), and both the AU and ECOWAS immediately suspended Mali from their decision-making bodies (Peace and Security Council of the AU 2020, 2021b; ECOWAS 2020a, 2021a). After the first coup, ECOWAS also closed borders and stopped trade and financial transactions between its member states and Mali. Coup leaders then agreed to follow some of the recommendations put forth by ECOWAS, including: a transition led by a civilian president and a civilian prime minister; the prohibition for the military vice-president to become president of the transition; the prohibition for transitional authorities to run in the elections at the end of the transition; and the dissolution of the CNSP upon the establishment of the civilian-led transitional government (ECOWAS 2020b, 2020c, 2020d). After the second coup, ECOWAS accepted the appointment of Colonel Goïta as president of the transition but requested transitional authorities to appoint a civilian prime minister and to abide by the initial 18-month transition period. After the transitional government announced that the transition period would be extended, ECOWAS sanctioned all members of the transitional

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government (except President of the Transition Colonel Goïta and Minister of Foreign Affairs Abdoulaye Diop) and of the NCT and members of their respective families (ECOWAS 2021c). In early 2022, after the transitional government submitted a new timeline providing for a five-year extension of the transition and elections to be held in December 2026, ECOWAS and the West African Economic and Monetary Union (WAEMU) enacted further sanctions, that is the closure of members' land and air borders with Mali, the suspension of commercial and financial transactions with Mali (except for food, medical products and energy), the freezing of Mali's assets in ECOWAS central and commercial banks, and the suspension of Mali from financial assistance from the ECOWAS Bank for Investment and Development (ECOWAS 2022a).

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**ECOWAS lifted economic and financial sanctions on 3 July 2022, after the transitional government enacted a new electoral law and reduced the extension of the transition to two years.**

On 29 June 2022, the president of the transition appointed 25 members to a constitutional commission tasked with drafting a new constitution that would be submitted to referendum in March 2023 (Baché 2022). Presidential elections that would end the transition period are scheduled for February 2024. ECOWAS lifted economic and financial sanctions on 3 July 2022, after the transitional government enacted a new electoral law and reduced the extension of the transition to two years (ECOWAS 2022c). Previously, and amid growing tensions with its western partners and ECOWAS, Malian transitional authorities strengthened their ties with Russia, also by unofficially using the services of a Russian private military company—Wagner (Bermudez, Doxsee and Thompson 2022; Sagno 2022).

### **Guinea**

On 5 September 2021, officers of an elite special forces army unit, led by Colonel Mamady Doumbouya, overthrew 83-year-old President Alpha Condé in a coup d'état. Condé was the first democratically-elected president of Guinea—a country with a long history of military coups and juntas—who had headed the executive since 2010 (Fioratta 2021). Condé ran for his third term in presidential elections held in October 2020, after replacing the 2010 Constitution with a new constitution in March 2020, which also renewed the two-term limit that the 2010 Constitution would have subjected him to (Boucher 2019).

While Alpha Condé's first two terms were marked by economic growth and poverty reduction, the last years of his rule were increasingly authoritarian, particularly towards both individuals and institutions that opposed his intentions of constitutional reform, with arrests of political opposition leaders, media shutdowns, and the removal and replacement of, for instance, the head of the electoral commission, the head of the Constitutional Court and the minister of justice (Boucher 2020). The opposition Front National pour la Défense de la Constitution (FNDC) presented a case at the ECOWAS Court of Justice against ECOWAS and its member states for not enforcing its own regulations related to democratic alternation and respect for human rights (Diallo 2020), but apparently the case was suspended as Guinea's ECOWAS membership was discontinued after the coup. Additionally, the special forces led by Colonel Doumbouya defended President Condé by helping suppress public demonstrations against his constitutional reform and third term, and thereby increasing their power to the extent that President Condé established a new security unit—the Rapid Intervention Battalion—as a counterweight (Foucher and Depagne 2021). One theory that tries to explain why Colonel Doumbouya changed his allegiances and planned a coup has to do with the establishment of this new security unit creating incentives to use Condé's weakened legitimacy to remove him.

After the coup, Colonel Doumbouya dissolved the government and suspended the Constitution, and his forces arrested President Condé. He then established the National Rally and Development Committee (CNRD), which would function as the country's temporary executive, and replaced all regional governors with military commanders. On the other hand, imprisoned representatives of the political opposition started to be released (Foucher and Depagne 2021). The coup was initially welcomed by public celebrations, as well as the support of opposition leader Cellou Dalein Diallo (a former member of the FNDC until deciding to run for the 2020 presidential elections) (Fioratta 2021; Boechat 2020).

On 27 September 2021, the military junta unveiled a transitional charter (Republic of Guinea 2021), as the country's supreme law (article 84), allegedly to steer the country back to civilian rule, but probably also to calm donors and foreign investors (mainly Russia

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and China) to reassure them that the junta could be trusted, and that investments in its mining sector—upon which Guinea is heavily reliant, constituting 32 per cent of budget revenues—can continue (Krippahl 2021).

The transitional charter establishes a series of transitional institutions (Title II), including the CNRD, which includes all Guinea's armed forces, as the central institution that defines and provides strategic policy orientation, and guarantees national security and cohesion (article 37); the president of the transition and president of the CNRD, who shall be the head of state, the head of the armed forces, and the head of government, and who shall not only promulgate laws adopted by the National Council of the Transition, but also have regulatory powers, and generally ensure the proper functioning of public institutions (articles 38–47); the transitional government appointed by the president and accountable only to the president (articles 48, 50, 53); and the National Council of the Transition, an 81-member body, appointed by the president, which functions as the transitional legislature (article 56), and is also responsible for drafting and adopting the new constitution, and submitting it to referendum (article 57). No member of the aforementioned transitional institutions can run in the first local and national elections that will mark the end of the transition. Beyond, all attributions of the Constitutional Court are transferred to the Supreme Court, during the transitional period (article 79). And all laws and regulations that do not contradict the transitional charter remain in force.

Doumbouya was sworn in as president of the transition by the chair of the Supreme Court on 1 October 2021. Doumbouya then appointed Mohamed Beavogui—a non-partisan development expert—as the country's new prime minister on 6 October 2021 (Africanews and AFP 2021). The National Council of the Transition (CNT) was established on 22 January 2022, with members chosen and appointed by Doumbouya from lists submitted by political parties and associations. The president of the CNT is a prominent civil society activist and election expert—Dansa Kourouma—mandated to lead this institution to agree to a new constitution and the date for the next elections (Samb 2022; Aljazeera 2022b). On 1 May 2022, Doumbouya announced he would submit a proposal to the CNT for

a three-year transition period (Reuters 2022). A three-year transition period was subsequently approved by the CNT on 11 May 2022. This transition plan elicited condemnation from the FNDC and Cellou Dalein Diallo (who made an alliance with the political party of former foe Condé against the transitional government) (Africa Guinee 2022), and elicited concern from the international community, particularly ECOWAS (ECOWAS 2022b).

After the coup, the AU immediately suspended Guinea from activities organized by the regional bloc and ECOWAS also suspended Guinea from all its governing bodies until the restoration of constitutional order. ECOWAS further required that elections be held within six months of the coup and that no member of the CNRD would be allowed to contest in the presidential election. Beyond this, ECOWAS imposed sanctions on the coup leaders and their families, including travel bans and freezes of their financial assets, and called on the AU, the EU, the UN and other partners to support the implementation of these sanctions (ECOWAS 2021b).

## Sudan

On 25 October 2021, the Sudanese armed forces, led by General Fatah al-Burhan, 'ousted the civilian part of the civilian/military transitional government' in a coup d'état (Murphy 2022). This was the second (successful) recent coup d'état in Sudan, after the military overthrew long-time dictator, Omar al-Bashir, in April 2019, following months of popular protests (Stigant and Murray 2019). It was also the second attempt in 2021 after 'elements in and outside the military establishment' tried to overthrow the transitional government on 21 September 2021 but failed (Ibrahim 2021).

The transitional government was formed following the signing of the 2019 Constitutional Declaration by a revolutionary protest movement (Forces for Freedom and Change, or FFC) and the Transitional Military Council (TMC). It initiated a fraught and highly complex power-sharing arrangement between military forces and a fragmented group of opposition parties, civil society and non-state armed groups (Davies n.d.).

The Constitutional Declaration provided for a transition period of three calendar years (article 7). It established a number of transitional

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government bodies (article 10), including the Sovereignty Council as the head of state, the Transitional Cabinet as the supreme executive authority, and the Transitional Legislative Council (TLC) as the legislative power. The Sovereignty Council initially consisted of 11 members selected by the FFC and the TMC and was to be chaired by a military representative for the first 21 months, and then by a civilian representative (articles 11.2 and 11.3). The prime minister is chosen by the FFC, and all other ministers are nominated by the FFC and confirmed by the Sovereignty Council, except for the ministers of interior and defence, which are nominated by the TMC (article 15.1). The cabinet was sworn in on 8 September 2019, with Abdallah Hamdok—an economist—as the prime minister (Aljazeera 2019). The TLC was to be composed of representatives of the FFC (two-thirds) and individuals who were not part of the FFC (one-third). The TLC was never formed, and hence the Sovereignty Council and the cabinet continued exercising legislative powers, as provided for in the Constitutional Declaration (article 25.3).

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**In October 2020, the transitional government and a number of armed groups signed the ‘Juba Agreement for Peace in Sudan’. Critically, three armed groups’ representatives were added to the Sovereignty Council.**

In October 2020, the transitional government and a number of armed groups signed the ‘Juba Agreement for Peace in Sudan’ (Juba Agreement). Critically, three armed groups’ representatives were added to the Sovereignty Council (Juba Agreement, article 4.1), and the date for the transfer of power was postponed, which remained a controversial issue between military and civilian authorities up until the second coup (Reuters 2021; Abdulbari 2022). Even though the Juba Agreement appeared to reset the three-year transitional period (article 2.1), and thereby renew General al-Burhan’s chairmanship of the Sovereignty Council, observers have indicated that the transfer of power still troubled military leaders, who feared a loss of privileges, either by losing their economic power or by being prosecuted through transitional justice mechanisms (Saeed 2021).

After the coup, General al-Burhan (unconstitutionally) suspended parts of the 2019 Constitutional Declaration, including articles related to the composition and responsibilities of the Sovereignty Council, the Transitional Cabinet and the TLC (Saeed 2021; Aljazeera 2021). Initially, al-Burhan absorbed all functions of the Sovereignty Council himself to then reappoint its former military members and armed group representatives, and eventually also five civilians (some of which were linked to Al-Bashir’s political party)

purportedly representing the five regions of the country. Hamdok was immediately put under house arrest and the military declared a state of emergency (International Crisis Group 2022). Al-Burhan also increased the powers of the newly formed Sovereignty Council and gave state authorities sweeping powers to repress protests by force (Hendawi 2021).

On 21 November 2021, Abdallah Hamdok and General al-Burhan signed a 13-point Political Framework Agreement, aimed at resolving the present crisis and reinstating Hamdok as prime minister (Murphy 2022; Aljazeera 2022a; Debate Ideas 2021). Hamdok resigned on 2 January 2022, unable to rally enough support from the democracy movement and to agree with the military on establishing a 'technocratic' cabinet (International Crisis Group 2022). With Hamdok's resignation, the Political Framework Agreement, which officially reconstituted the Sovereignty Council and the transitional cabinet with unclear participation from civilian representatives, was shelved. Beyond this, the status of the 2019 Constitutional Declaration as a founding document for the transition became increasingly disputed (UNITAMS 2022). The UN Integrated Transition Assistance Mission in Sudan (UNITAMS) launched a political dialogue and consultation process that, in May 2022, was followed by a national dialogue facilitated and coordinated by UNITAMS, the Intergovernmental Authority on Development (IGAD) and the AU (Sudan Tribune 2022).

After this coup, the AU immediately suspended Sudan from participating in any of the activities organized by the regional bloc until the restoration of a civilian-led transitional authority (African Union 2021; Deutsche Welle 2021). IGAD took a softer approach, engaging the government of Sudan through the good offices of the member states' heads of state and government (Sudan Tribune 2021). Despite some external pressure for targeted sanctions on the coup leaders (Coons and Prendergast 2022), neither the AU nor IGAD, nor any other member of the international community, imposed sanctions, and the international community has for the most part continued to support the triumvirate in the political process they are facilitating (US Department of State 2022), although some bilateral donors, such as the United States and the World Bank, have

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suspended funding to Sudan until the restoration of the civilian-led government (Deutsche Welle 2021; Malhas 2022).

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## 5.2. KEY FINDINGS

All of the countries covered in this chapter were in some sort of transition towards peace and democracy up until the end of 2020, but progress starkly differed, with some countries (slowly) muddling through, others stuck, and still others going back on past (if brief) progress. It is against this background of increasing fragility that 2021 was witness to the highest number of coups in more than 20 years, and indeed by the end of 2021 all of the aforementioned countries were classified by International IDEA as full autocracies (International IDEA 2022a).

While most coup leaders claim their intentions are to replace corrupt or incompetent governments, and (eventually) give power back to the people (Thyne and Hitch 2020: 1861), past experience indicates that even when coups are directed against autocratic leaders and may sometimes lead to a process of democratization, more often than not they install a new autocratic leader who will increase levels of repression against the population (Derpanopoulos et al. 2016: 2; Zengin 2021: 5).

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At the same time, there are a number of key factors that may contribute to coups d'état actually taking place. First, coups are more likely in countries where they have taken place in the past, and the more recent the last coup, the more likely it is that a new coup will happen in the near future (Powell 2012: 1035; see also Thyne and Hitch 2020: 1867). Beyond this, the perception that leaders in government are losing legitimacy in the eyes of a majority of the population may also contribute to unconstitutional changes of power. This loss of legitimacy may be due to the inability of the government to provide services, including security, to its citizens. Except for Myanmar, in all other countries growing levels of discontent among civil society and political opposition, but also the general public, were finding expression in public demonstrations and protests directed against incumbent (transitional) governments before the respective coup took place (see also Powell 2012: 1034).



Coup leaders are also likely to make strategic calculations as to how the international community will react, and the extent to which the potential or actual support of some members of the international community will allow them to offset any negative consequences of their actions. In this regard, the international community appears to be in a bind as it faces a number of trade-offs and difficult decisions over whether to engage with coup leaders or sanction them (Thyne and Hitch 2020: 1864). Assisting coup leaders and interim institutions during transitions may increase the chances of democratization but may also animate other countries' military leaders to carry out coups. Enacting sanctions, on the other hand, may foster coup leaders to accelerate the return to civilian rule or may increase the likelihood that coup leaders veer towards autocracy and seek support from authoritarian third countries.

The need to maintain the public and the international community's support in the post-coup transition may at least partly determine the way in which the transition is designed—for instance, the types of institutions that will lead the transition and those with the ultimate power to make decisions, the level of inclusion of the institutional framework throughout the transition, and the length of the transition.

After the seizure of power, all coup leaders have sought to legitimize their position in the post-coup transition by enacting legal frameworks of some sort. In Chad, Guinea and Mali (after the 2020 coup), a transitional charter was unveiled; in Sudan, the previously existing post-coup transitional constitution was partly suspended to make room for new arrangements; in Mali (after the 2021 coup), the Constitutional Court declared the coup leader president of the transition before the transitional charter was amended to extend the transition period; in Myanmar, coup leaders declared a state of emergency and purported to cling on to the 2008 Constitution—a constitution drafted under military supervision—but disregarded it whenever necessary.

Coup leaders established post-coup institutional structures that were similar in many respects: (a) establishment of institutions mimicking the three powers of the state, that is executive, legislative and judiciary, while actual control relies on the leader of the coup; and (b) limited executive power-sharing, with civilian authorities always

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appointed and accountable to the coup leader as head of state. In the cases of Mali, Myanmar and Sudan, prior to the 2021 coups there was already a certain degree of executive power-sharing between civilian and military authorities: in Mali, president and prime minister were civilians, but control over policymaking and appointments remained with the military; in Sudan, the Sovereignty Council was initially shared in equal numbers by civilians and military personnel, and civilians appointed the prime minister and his ministers; and in Myanmar, the Constitution ensured that at least one of two vice-presidents and three ministers (as well as at least 25 per cent representation in parliament at the national and regional/state level) were military personnel. Prospective or past changes in this very delicate balance of power between civilian and military authorities arguably tipped all three countries' military leaders to carry out coups.

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**Coup leaders have often defined highly ambitious reform agendas that went beyond enacting reforms needed to hold elections and transfer power to an elected government.**

Beyond fragile power-sharing arrangements, coup leaders have often defined highly ambitious reform agendas that went beyond enacting reforms needed to hold elections and transfer power to an elected government. In all cases, except for Myanmar, constitutional reforms were planned to take place in advance of elections and following relatively inclusive stakeholder consultation processes (at least on paper). These reform commitments have on the one hand heavily burdened many of the transitions described above, and on the other hand helped justify extensions of initial roadmaps, arguably to allow more time for a new political settlement to be agreed upon (except for Guinea, which did not immediately announce a transition timeline). In Chad, the initial 18-month transition is now likely to be extended to 36 months due to delays in the pre-dialogue phase; Mali's initial 18-month transition was extended after a second coup to 24 months to allow for key reforms to be implemented; and Sudan's initial 36-month transition, reset after the signing of the Juba Agreement, is in limbo after the second coup. Extending transition timelines, and thereby the executive powers of military coup leaders and other unelected authorities, will not contribute to increasing their legitimacy, even if they manage to implement some reforms. Additionally, reaching agreements and implementing structural reforms may be more dependent on the leadership's legitimacy than on timing issues.

As mentioned above, even in those cases where large parts of the population demonstrated against the pre-coup government, such as Chad, Guinea and Mali, the discontent often quickly turned against the coup leaders, particularly once their determination to stay in power as long as possible became clear. In Chad, Guinea and Mali, an increasingly organized opposition either condemned the transition's roadmap or threatened to boycott the transition process altogether. In Myanmar and Sudan (after the October 2021 coup), the fact that the coup leaders were there to stay was immediately apparent, and the population promptly and vociferously demonstrated against the coup. In both cases, the authorities violently cracked down against mostly peaceful demonstrators, injuring and killing large numbers of them and thereby adding to their already long list of crimes and violations.

Regional and subregional organizations worldwide have developed guidelines and normative frameworks on how to deal with unconstitutional changes of government, and these differ in level of detail (Wiebusch 2016). Building on previous frameworks, the AU recently released a Declaration on Unconstitutional Changes of Government in Africa, which was adopted by the participants of an AU-convened Reflection Forum (15–17 March 2022) (African Union 2022). In this declaration, the AU reaffirmed its strong condemnation of all forms of unconstitutional changes of government in Africa and its appeal, among others, to use available legal mechanisms to find solutions to political concerns (article 1), 'to finalise and adopt the AU guidelines on the amendment of constitutions in Africa' (article 16), and 'to develop a comprehensive framework establishing different categories of sanctions that may be gradually applied ... in accordance with the gravity of the violation or threat to the constitutional order without compromising the well-being of ordinary ... citizens' (article 19).

Despite these guidelines, different regional and subregional organizations and their member states have tended to decide on whether or not to condemn unconstitutional changes of government on a case-by-case basis. This is despite the fact that comparative experience tells us that anti-coup norms can only be strengthened if states and organizations actually follow them. An inconsistent approach that distinguishes between different types of unconstitutional changes of government or between different

countries increases the likelihood of new coups and of coup leaders remaining in power (see Powell, Reynolds and Chacha 2022). In this sense, creating new policy guidelines that help member states address unconstitutional changes of government, including criteria for the recognition of post-coup transitional governments (e.g. establishing a civilian-led interim government inclusive of the main political forces, a limited role for coup leaders in decision-making and their inability to run in the first elections after the transition), or for establishing targeted sanctions, as well as assist the country in question to develop a realistic roadmap for a return to constitutional rule, is certainly important. But what the international community should think about more carefully is how to incentivize countries and organizations to actually implement those guidelines in a more coherent fashion.

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**The United Nations could take the lead in engaging regional and subregional organizations, and their member states, in developing a global framework to support the enforcement of post-coup transition roadmaps.**

While coherence is key and may mean the imposition of (targeted) sanctions and the temporary suspension of a country's membership in a given regional or subregional organization, diplomatic engagement may need to be maintained with *both* leaders heading the unconstitutional change of government *and* representatives of opposition parties, deposed governments, civil society, religious leaders and other groups with a stake in the country's future governance. These stakeholders need to identify and implement key priority reforms—to be distinguished from other structural reforms—that will allow a swift return to constitutional government. Beyond this, the United Nations could take the lead in engaging regional and subregional organizations, and their member states, in developing a global framework to support the enforcement of post-coup transition roadmaps.

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## Chapter 6

# LOOKING AHEAD

As the Annual Review goes into publication in mid-2022, what are some of the issues where we anticipate heightened attention and contention in the constitutional agendas of processes to come?

First, the Chile process—whether or not the draft passes at referendum—will likely inspire other processes in various ways. Climate constitutionalism, as surveyed in the Chapter 2, is already becoming a trend and we are likely to see increasingly creative thinking about constitutional rights and institutions to safeguard the environment in coming years, in particular through the use of citizen assemblies, as detailed in the 2020 Annual Review (Noël 2021).

Similarly, digital rights: the digitalization wave has entered all aspects of state, society and the economy, but prior to the Chile Constitutional Convention, there was only sporadic and tentative attempts to consider how digitalization affected, or necessitated new, constitutional rights. The Chilean draft expands privacy rights to metadata to protect against common methods of mass data collection; it provides for rights not just to digital connectivity, but also to ‘digital education’, ‘the development of technical knowledge’, ‘a right to participate in a digital space free of violence’, and ‘the right to informational self-determination’, described as the right to know, decide and control the use of data concerning the individual.

Staying with Chile, two aspects of the process may spread to other constitution-building processes elsewhere. First, as the first elected constitution-making body with gender parity, Chile has now set a standard that other processes will have to either replicate or explain

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**We are likely to see increasingly creative thinking about constitutional rights and institutions to safeguard the environment in coming years.**

why they cannot. Second, the role of independents: as described in Chapter 2, this was aided by the permitting of independent lists in the election to the Constitutional Convention. This has caused a number of challenges for the negotiations and perception of the convention, but the factor which drove the demand for independents, namely a distrust with political parties, is growing globally. Thus, while they may not choose the same mechanisms, the demand for independent constitution assembly members is something that will also have to be accommodated in other processes.

Many of the other issues captured in this Annual Review are also likely to recur in other countries in the near future. With signs of rough waters ahead for the global economy in the wake of the Covid-19 pandemic and the ongoing Russia–Ukraine war, dissatisfaction with governments will grow, providing fertile grounds for coups. Thus, the kind of post-coup constitution-making process will likely become more frequent, with an accompanying renewal of efforts by supranational organizations to strengthen normative frameworks against unconstitutional changes of government. Populism goes hand in hand with popular disillusionment with politics, and thus the transition from semi-presidential to presidential systems described in Chapter 3 will also likely recur beyond Kyrgyzstan and Haiti, including in Tunisia, where a constitution establishing such a similar change in system of government was passed at referendum in 2022.

Of course, the major global news event of 2022 has been the invasion of Ukraine by Russia, with the intention of preventing Ukraine from joining EU/NATO. Ukraine amended its Constitution in 2019 to express the ‘European identity’ of the Ukrainian people in the preamble, and the ‘irreversibility of the European and Euro-Atlantic course of Ukraine...’. In addition, the same amendments provide a duty on both executive and legislature to implement the state’s course ‘towards full membership of Ukraine in the European Union and North Atlantic Treaty Organization’ (articles 85(5), 102 and 116). If Russia had hoped the invasion would deter other countries from joining the EU/NATO, it seems to have had the opposite effect, and we see future amendments in other countries not just regarding joining NATO or other intergovernmental organizations, but also in terms of enabling increased defence spending, as is being debated in both Denmark and Germany at the time of writing (Moser 2022).



Beyond the scope of current constitutional debates, one wonders also whether and how constitution-making will tackle some of the other pressing issues of our time that are affecting the relationship between state and society, including urbanization and economic inequality.

Ran Hirschl's book *City, State: Constitutionalism and the Megacity* (Hirschl 2020) sets out for the first time a comprehensive argument of why urbanization is also a constitutional problem and requires greater consideration in constitutional design. In the last decade of the 20th century, 10 per cent of the world's population lived in urban areas; now it is over 50 per cent, and in 30 years it is estimated to reach 70 per cent. In the early 1990s, there were only 12 cities with more than 1 million inhabitants—now there are more than 550. However, Hirschl shows that most of the world's constitutions are basically silent when it comes to giving cities consideration and voice commensurate to their size and economic, political and social importance. This has started to happen in constitution-making processes in the Global South and—unless the teleworking initiatives started under Covid-19 bring about a true revolution in urbanization—may be another trend in constitution-making in the coming years.

The scale of economic inequality, and the accompanying disempowerment of the non-wealthy from politics, is a source of increasing social unrest throughout the world, and fuels the rise of populist presidents. But is this a constitutional issue, or one for government policy to address? There is a strong argument to be made that it is the former. Camilla Vergara's recent book *Systemic Corruption* and the International IDEA Discussion Paper *Constitutional Responses to Oligarchic Democracy* (Vergara 2020; Bulmer forthcoming) both make the case that control of political institutions by economic elites is baked into orthodox liberal constitutional design. It is thus a feature, not a bug. And only through bold and creative rethinking of institutional design can we change these dynamics.

Another similar issue in terms of creating frustration with classical constitutional mechanisms is with regards to the separation of powers as a means to prevent over-concentration of power. In 2021, International IDEA released a Primer on the constitutional roles,

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**One wonders also whether and how constitution-making will tackle some of the other pressing issues of our time that are affecting the relationship between state and society, including urbanization and economic inequality.**

rights and recognition for opposition and legislative minorities (Bulmer 2021), and early 2022 has witnessed numerous initiatives in the academic world looking at the same issue of empowering the political opposition. International IDEA will hold a practitioner workshop in July 2022, and turning to explicit empowerment of the political opposition may become an increasingly attractive mechanism for strengthening constitutional checks and balances.

The Covid-19 pandemic is also likely to have effects on constitutional design. First, the long economic fallout that is predicted to follow the pandemic, accentuated by the Russian invasion of Ukraine, will create additional strains on fragile polities, resulting in elevated levels of social unrest. This will bring with it an increase in the frequency of constitution-building processes around the world as leaders either are forced to make concessions through changes to the constitutional structure to meet the demands of protestors (as was the situation in Chile) or are overthrown and constitutional change accompanies regime change. Second, constitutional designers will learn from the pandemic in terms of designing emergency provisions that are better equipped to deal with another similar health emergency in the future—for example, allowing for parliamentary sessions when physical meetings are not possible and recognizing health emergencies as explicit grounds for a state of emergency.

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**Lastly, an issue that may arise is how to reverse abusive constitutional changes.**

Lastly, an issue that may arise is how to reverse abusive constitutional changes (Landau 2013). This could be relevant in various countries that have seen popular populist presidents use their strong majorities in the legislature or at referendum to amend the constitution in a manner to cause or accelerate democratic backsliding. Should elections in such a country be won by a more democratic candidate or party, but they do not have the supermajority necessary to reverse the constitutional changes, what can/should they do? Respect constitutional legitimacy and the rule of law and thus live with the anti-democratic mechanisms of the constitution, or make changes to the constitution under some claim that the previous anti-democratic amendments were somehow illegitimate?

We look forward to picking up some of these themes, and many others, in the next edition of the *Annual Review of Constitution-Building*, for 2022.

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# About International IDEA

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.

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## WHAT 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 democratic practices; offers technical assistance and capacity-building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

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## WHERE WE WORK

Our headquarters are located in Stockholm, and we have regional and country offices in Africa, Asia and the 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.

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2021 was a tumultuous year for many reasons—including the ongoing Covid-19 pandemic, a series of military coups around the world and the rumblings of war from Russia—and was no less so in the world of democracy. Unsurprisingly, therefore, the chapters in the ninth edition of International IDEA's *Annual Review of Constitution-Building* reflect this instability. The chapters cover a number of themes including constitutional regulation of environmental protection, judicial review of constitutional amendments, reforming semi-presidential systems, codification of parliamentary conventions and military coups.

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