Introduction: Constitution-Making and Constitutional Change

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Abstract All moments of profound constitutional change are extraordinary: the choice to replace or overhaul an existing text may be spurred by a variety of circumstances, including perceived failure of a previous iteration of the state, the end of an authoritarian regime, the cessation of internal or inter-state conflict, a ‘coming together’ of various political units into a larger federal entity, or conversely, secession of one unit from a larger state. All produce a highly charged political environment, which inevitably impacts the constitutional reform process. The chapters in this section, throwing open a window onto this subject in its theoretical, legal, political, and comparative complexity, emphasise that moments of wholesale constitutional renewal under extreme conditions render what is already a difficult and complex process a legal, political, social, practical and logistical challenge of the highest order.

This section addresses the process of constitution-making and constitutional transformation under extreme conditions.

Of course, all moments of profound constitutional change are extraordinary: the choice to replace or overhaul an existing text may be spurred by a variety of circumstances, including perceived failure of a previous iteration of the state, the end of an authoritarian regime, the cessation of internal or inter-state conflict, a ‘coming together’ of various political units into a larger federal entity, or conversely, secession of one unit from a larger state. All produce a highly charged political environment, which inevitably impacts the constitutional reform process.

Yet, the conditions under which a new constitution is produced may be viewed as lying on a spectrum, from overall stability to serious and multi-dimensional instability. At one end of the spectrum we have, for instance, constitution-making in post-financial crisis Iceland in 2010–13 or preparations for the constitution of an independent Scotland in 2014 – both of which drew on firmly rooted democratic constitutional
traditions, an entrenched culture of political deliberation, and an overall context of peace. Located much farther down the spectrum we have, today, the stymied process of major constitutional reform in post-war Sri Lanka, with its fragile peace and unresolved ethnic tensions, the contested constitution-drafting process in the Philippines, proceeding alongside a peace process to end a long insurgency in the south, a ‘war on drugs’ that has seen thousands killed, and sustained government attacks on the country’s democratic institutions, or the ‘peace-at-any-cost’ approach to drafting a constitution for Libya, in a context where rival governments and dozens of militias compete for legitimacy and control over resources, provoking an intense humanitarian crisis that has seen hundreds of thousands internally displaced, many more lacking access to basic services, and civilians subjected to extrajudicial executions and sieges.

The latter examples are extreme instances, but underscore the reality that the conditions for achieving significant constitutional change are often far from ideal. As Manar Mahmoud observes in her chapter on Tunisia and Egypt, contemporary framing of constitutional change tends toward the idealistic notion of “the opportunity to create a new future” despite the often severe practical challenges in reaching that future, or even agreeing on what it should look like. This echoes David Landau’s caution elsewhere: “Constitution-making moments should not be idealized; they are often traumatic events.” Moreover, as the chapters herein suggest, such periods of fundamental transformation can be fraught with danger by reopening the constitutional settlement, possibly to the advantage of enemies of constitutionalism.

The chapters in this section, throwing open a window onto this subject in its theoretical, legal, political, and comparative complexity, emphasise that moments of wholesale constitutional renewal under extreme conditions render what is already a difficult and complex process a legal, political, social, practical and logistical challenge of the highest order. Andreas Braune’s leading chapter, on constitution-making in the name of democracy, provides a useful theoretical and historical framing for the country-specific studies that follow, and poses a number of fundamental questions: Who should get to make or amend the constitution? Does founding a new constitutional settlement require dispassionate, paternalistic, even non-democratic intervention? Do extreme conditions change our answers to these questions? In the following chapter Fatih Öztürk’s analysis underscores just how complex our understandings of ‘true’ democracy can be in the face of strong élite veto actors, as well as the need to appreciate the historical context of reforms – a challenge I faced first-hand while working in Turkey for the Council of Europe. Mahmoud’s analysis of

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1See e.g. the website of the Centre for Policy Alternatives (CPA), a key policy actor in the constitutional reform process: [http://www.cpalanka.org/](http://www.cpalanka.org/).
2See e.g. Thompson (2016).
3See Al-Ali Z (2017) Report: Libya’s final draft constitution – A contextual analysis. 4 October 2017 [http://bit.ly/2BZsyRd](http://bit.ly/2BZsyRd). See generally ‘Libya’ in Human Rights Watch, World Report 2018: Events of 2017 (Human Rights Watch, 2017).
4Landau (2012).
5See Andreas Braune’s chapter below. See also Partlett (2012).
constitution-making processes in Tunisia and Egypt underlines the crucial impact of political constellations and attitudes to constitutionalism on the process, while Ricardo Sousa da Cunha’s chapter on security reform in East Timor demonstrates the path-dependent impact of certain constitutional choices as constraints on State actors, and how different modes of constitutional practice can give the constitution ‘teeth’.

This introduction cannot cover all aspects of the chapters to follow. Instead, it picks out two trends in contemporary constitution-making processes, which have gathered pace in recent decades, and which are raised in different ways by the chapters here. The first is a greater focus on public participation as a core source of constitutional legitimacy (‘inclusiveness’). The second is the increasing role of international actors in domestic constitution-making and amendment (‘internationalisation”).

Taking each trend in turn, first, the increasing focus on public participation in constitution-making and constitutional change has developed to the point that it has been described as “a new norm”. In this section, the issue arises in Braune’s sustained critique of the orthodox position that, in order to be legitimate, the founding of a democratic constitution must itself be democratic in nature. It also arises more concretely in Mahmoud’s chapter in the comparison between the Tunisian constitution-drafting process, where political fragmentation produced a dynamic toward consensus-seeking and the design of the constituent assembly and input of civil society actors ensured an inclusive process, and the Egyptian experience, where the dominance of one political force produced a top-down, zero-sum, winner-takes-all approach to the exercise, excluding women, Coptic Christians, students, and trade unions (and in the second drafting process, Islamist political forces).

It is understandable that the participation norm holds significant intuitive appeal, as a way to bolster the perceived legitimacy of the constitutional change and its connection to all sectors of society, and as a form of deliberative process that can serve as a good model for political deliberation under the new constitution. Highly exclusionary drafting processes, such as Egypt’s processes or Hungary’s “iPad Constitution” of 2011 (so-called because the drafting process was so opaque that at one point the only detail known was that it had been partly drafted on an iPad), have rightly been criticised for making no real attempt to consult the public, reflect areas of overlapping societal consensus, or produce a text over which all sectors of society can feel ownership.

However, despite its potential benefits in many contexts, the ascendancy of the participation norm nevertheless raises a host of questions that are acutely problematic, especially in the context of constitutional transformation under extreme conditions.

First, the very question of public participation implies a need to identify who ‘the people’ are. In some states this is relatively straightforward: as Sousa da Cunha’s chapter on East Timor indicates, successive experiences of defending the territory

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6See chapter 1, Saati (2017). See also e.g. Gluck and Brandt (2015).
7See e.g. Suteu (2015).
8See e.g. ‘Hungary’s iPad Constitution’ Common Sense Society 11 March 2011 http://bit.ly/2GKMkDz.
(and cultural expressions of that experience) forged a common identity where previously none existed. As Mahmoud observes, producing a new constitution (or constitutional settlement) is commonly viewed as one way of reconciling different peoples within the state and forging a common identity. However, Mahmoud also recognises the “problematisation of the constitutional identity of the society”. In some states, especially those with serious ethnic, religious or national cleavages, addressing the very question of who ‘the people’ is – as a necessary precondition to ensuring an inclusive constitutional transformation process – may lead to contestation that could overwhelm the constitution-making or amendment process as a whole. This is especially so where recognition of separate peoples or nations within the state is viewed as a threat to the legitimacy or continued existence or nature of the state itself. It can also arise in other contexts, such as involvement of a diaspora and recognising multiple constituent peoples.

At a practical level, in some contexts, and for a variety of reasons, the state may also simply lack the capacity to ensure a fully inclusive process, as a recent book on public participation in African constitution-making and amendment processes recounts. For instance, the overlapping security, social and political crisis in Libya placed severe constraints on the possibility of a widely inclusive constitution-drafting process by the Constitution Drafting Assembly (CDA), with a particular impact on the participation of women. In Egypt, as Mahmoud’s chapter discusses, the stifling of political participation under the ancien régime left an “unbalanced” political landscape in which parties aligned with swathes of the electorate of a secular disposition were far less able to effectively represent their interests than parties of an Islamist cast, unlike the more balanced Tunisian political landscape.

More generally, in highly challenging socio-political contexts, an excessive focus on inclusiveness in the constitutional reform process could render the attempt to seek consensus even more difficult, may frustrate necessary élite bargaining, may provide ammunition for ‘spoilers’ (i.e. actors who refuse to engage in the process and attempt to destabilize it through violence) to deny the legitimacy of a text whose content is generally approved and whose ownership is adequately broad-based, or may be overtaken by ‘ordinary’ politics (as seen in Kenya’s constitutional referendum of 2005, where a popular referendum scuppered a new constitution due to a lack of confidence in the sitting government). There is also some evidence for the contention that, depending on how such input is managed, significant public participation may hamper the quality of the resulting constitution. The 250-article Brazilian Constitution of 1988, for instance, drafted through a highly inclusive process, is a bloated text stuffed with promises, rights, policy statements and serious contradictions.

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9 Abbiate et al. (2017).
10 See Hammady (2017).
11 See Ojielo (2013).
12 As Oscar Vilhena Vieira states: “The participation of social movements, civil society organisations and interest groups was massive. More than 20,000 people circulated through the [Constituent] Assembly every day, in a process that is considered the most democratic moment of Brazilian political life.” Vilhena Vieira (2013).
The final popular approval of the text by referendum can leave a sense of contested legitimacy, as seen in the thin 52% margin by which the reform package ushering in a system of strong presidentialism in Turkey was passed, discussed here by Öztürk. This is not in any way to argue that constitution-making and amendment under extreme conditions should simply be left exclusively to élites, or more narrowly, the government of the day. However, it also appears important to avoid elevating public participation to the status of a rigid principle, especially in the context of extreme conditions.

Rather, it appears sensible to recognise that participation should be pursued only where it does not lead to greater conflict in the process of constitutional transformation or threaten the entire project, can be adequately inclusive (and not only partially inclusive or based on ‘cherry-picking’ of participants), and where input is properly channelled toward, and balanced alongside, expert drafting (which may be provided by a range of domestic and international actors). It certainly should not overwhelm or obscure other principles, not least the need for a coherent constitutional text that is workable, realistic, and which addresses the very particular challenges faced in the state. As Cass Sunstein has argued, in any state “a constitution should be ‘negative’ in the sense that it should be directed against the deepest risks in the relevant nation’s political culture”, which is a crucial insight for constitutional transformation under extreme conditions, and which speaks to Braune’s focus on output-legitimacy as well as input-legitimacy. It suggests a very careful balancing of internal and external expertise and knowledge, as well as public involvement.

The last two points, in referring to the actors involved in constitutional transformation, raises the second trend on which the chapters in this section prompt reflection: namely, increasing international involvement in constitution-making and amendment. This trend is raised, albeit in an oblique manner, in Braune’s discussion of the external legislator as a framer of the constitution being a central element of Aristotelian political theory, and more generally, his reference to “the necessity of some anchor point outside the sovereignty of the demos and its constituent power”. As a practical reality, as Mahmoud observes, such engagement has become the norm. This is particularly obvious in the intervention of intergovernmental bodies such as the International Institute for Democracy and Electoral Assistance (International IDEA) and the United Nations (UN), but includes a much wider array of actors. Overlapping with such external assistance (but not interchangeable with it), there is also a discernible uptick in the migration of constitutional ideas and constitutional borrowings from elsewhere, and as Christine Bell has observed regarding post-conflict states, the ‘pull’ of international law (and international norms of constitutional law).

may be particularly strong in transitional societies where a context of conflict can no longer be invoked to justify departure from international standards. Equally, the intimate oversight relationship between international institutions and such societies creates powerful incentives for such state [sic] to ‘play ball’ (or be seen to) with international legal norms.

13 See Sunstein (1993).
14 See Ginsburg (2017).
15 Bell et al. (2007).
This insight holds, not just for post-conflict states, but for a variety of states embarking on significant constitutional change under extreme conditions. Indeed, of the four case-studies analysed in this section – Egypt, Tunisia, East Timor, and Turkey – the latter three are good examples of the influence of international actors and norms in constitution-making under extreme conditions.

The Tunisian drafting process was shaped not only by the practical intervention of international actors – not least the Venice Commission’s opinions on the Constituent Assembly and draft text\(^\text{16}\) – but also by an openness among the drafters themselves to international norms. In East Timor, the domestic-international relationship was much more intense. The 2002 Constitution was drafted at breakneck speed under the aegis of a transitional governing body, the United Nations Transitional Administration in East Timor (UNTAET) established by a Security Council resolution following international military intervention to restore peace after conflict spurred by the Timorese vote to secede from Indonesia in 1999.\(^\text{17}\) The recent Turkish shift to a presidential system raised serious concerns from the EU and Venice Commission, the latter warning of a possible “dangerous step backwards” for democracy due to excessive empowerment of the president and “further weakening the already inadequate system of judicial oversight of the executive”.\(^\text{18}\)

Of course, highly internationalised constitution-drafting processes can lead to charges of a standardised “cookie-cutter” approach to constitution-making. That said, what looks like cookie-cutter language in a new constitution can have real life depending on how it is implemented. For example, Sousa da Cunha’s chapter on East Timor highlights that the reference in Article 1 of the Constitution to the “State based on the rule of law” has been invoked to place significant constraints on security forces – through the globalised device of a proportionality test (mentioned nowhere in the constitutional text) to achieve stricter scrutiny of military action. Here, we see how international influence and constitutional borrowing has been crucial in how the constitution holds up under times of severe stress.

It is also interesting to note that international involvement does not necessarily go hand in hand with greater inclusiveness, and the perception of extreme conditions can be a decisive factor in how the process unfolds. While in Tunisia international involvement did support greater inclusiveness (although it seems that it was domestic actors’ preference in any case\(^\text{19}\)), in East Timor the UN governing body’s preference for a rapid transition and installation of a new order, in which adoption of a constitution was viewed as a key milestone (and, some have argued, due to pressure from the international community to bring a costly UN mission to an end) was viewed

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\(^\text{16}\)The list of opinions is available on the Venice Commission website at [http://bit.ly/2E1Clbd](http://bit.ly/2E1Clbd).

\(^\text{17}\)See the chapter ‘Overview of the Constitution-Making Process’ in Devereux (2015).

\(^\text{18}\)CDL-AD(2017)005-e Turkey – Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017 (Venice, 10–11 March 2017) [http://bit.ly/2n04vhN](http://bit.ly/2n04vhN).

\(^\text{19}\)Cherif (2017).
by civil society actors as cutting across a longer, more inclusive process in which a range of different options could be fully considered.\(^{20}\)

Unhelpfully, there often appears to be a form of inchoate assumption among scholars and policymakers that both trends will always pull in the same direction toward more effective constitutional government and stable constitutional settlements. Indeed, a greater degree of international involvement in constitution-making may increase pressure on domestic actors to conform to the developing norm of public participation. However, these trends have significant potential to cut across one another, diminishing the effectiveness of the resulting constitutional structure as a whole.

First, in terms of the fundamental capacity of the constitution to act as an accepted settlement, each trend reaches out to different sources of legitimacy, which are not necessarily compatible, or at least fully reconcilable. In terms of process and product (i.e. the resulting constitutional text), an inclusive process may result in a text that deviates from best international practice (although ‘best practice’ models are themselves problematic), while strong international involvement may tend toward the adoption of ‘best practice’ models, but may have no local ownership with élites or the people, or connection with local conceptions of public power and individual rights. Not every process will manage to blend and reconcile the resulting tensions.

Second, in terms of substance, the two trends may produce a constitution lacking in coherence. By way of example, inclusiveness may tend toward a greater presence, or greater use, of direct democracy mechanisms in the constitution, whereas stronger international influence tends toward a more central status accorded to international law. This has the potential to ‘build in’ unresolved and unacknowledged tension between different sites of authority (e.g. the people, parliament, courts, and international bodies and courts) and raises again the question of who ultimately ‘owns’ the constitution. This, in turn, speaks to Braune’s discussion of the argument for a ‘constitutionalizing dictatorship’ and a deferral of true democratic ownership of the constitution in order to secure the implementation of a democratic constitution where the societal soil is not yet conducive to its flourishing. This tutelary role has tended to fall to the courts in contemporary constitution-making (which is touched on in Sousa da Cunha’s chapter, and which is also reflected in the plan to establish a strong constitutional court in the 2014 Tunisian Constitution), but in practice has rarely succeeded where excessive reliance is placed on courts.\(^{21}\)

These are just some reflections prompted by the four chapters, which provide a host of other insights, and which each amply demonstrate not only the importance of the discussion pursued in this section, but the real need for further research in this area.

\(^{20}\)Devereuz (2015).

\(^{21}\)See Daly (2017).
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