

FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

The second Melbourne Forum on Constitution Building in Asia and the Pacific

Manila, the Philippines

3-4 October 2017

Jointly organised by International IDEA, the Constitution Transformation Network and the Department of Political Science, University of the Philippines Diliman

Session VI Conclusions

Closing Remarks

Sumit Bisarya

Constitutional transitions occur in many forms. In thinking about whether constitutional change should happen all at once or gradually over time; or whether an overhaul in the system and structure of governance is necessary (for example, unitary to federal, or presidential to parliamentary); or whether more minor adjustments within the same overall institutional structure will suffice, it appears logical to posit that the scope and pace of reform should be related to the need for change. If a revolutionary transition is underway, it might necessitate complete replacement with a new, and radically different, Constitution. On the other hand, if the goal is to maintain the overall political order, perhaps tweaks to the allocations of power within the same institutional set-up, and/or incremental changes over time would seem more fitting.

The cases discussed in the second Melbourne Forum made it clear that this seemingly logical statement is actually nothing of the sort. Instead, the cases demonstrate a series of nuances in context which determine whether change is of the 'big bang' or 'incremental' variety.

In the first place, the cases highlighted that the dichotomy of 'big bang' and 'incremental' is generally a false one. What constitutes a 'new' Constitution versus an amended Constitution is not always clear, as there were cases of constitutions which are transformed in their content completely, but have maintained that they are still an amended version of the original (eg South Korea) and Constitutions which are declared as replacements but are highly similar in content to their predecessor (eg the 2013 Constitution of Vietnam). Further, there were cases such as Chile and Indonesia which are 'big bang' in scope, but incremental in time.

Secondly, the notion that the magnitude and pace of reform might be related to the need for change was framed using Argentine scholar Roberto Gargarella's term of 'drama'. That is, constitutional change should respond to the predicament (or 'drama') at hand. However, constitutional transformations usually take place in hotly contested political arenas where often there may be disagreement as to what the drama is, and therefore what scope of reform might be required. The current process in Chile is an example where the government driving the reform felt constitutional replacement was needed – not least, it reasoned, because the current Constitution suffers from a deficiency of legitimacy, because although it has been amended significantly, it remains the 1980

Constitution promulgated under the military regime of Augusto Pinochet. However, the opposition – including the UDI party whose founder wrote the Constitution – believes such change would be destabilizing, and that if any changes are made, it should be limited to minor amendments.

Now, with regards to contextual factors which might affect the scope and pace of reforms, there were three common themes recurring through the country case discussions: the context of the overall transition, history and culture. The workshop also interrogated the phenomenon of deferral in constitutional negotiations, and that discussion is also worthy of further follow-up.

With regards to the context of the overall transition, there are often political parameters which constrain the scope and pace of reform. For example, pacted transitions – where the change in political order is negotiated between an outgoing and incoming regime – lend themselves more to an incremental form of reform, rather than wholesale replacement, as the outgoing regime’s consensus is necessary to keep moving in the direction of reform. The transition following the 1988 referendum which removed Augusto Pinochet in Chile would be a paradigmatic case. But even when the prior regime is no longer in power, there may be compelling reasons to seek incremental reform. For example, in Sri Lanka President Rajapaksa may have lost re-election, but there remain concerns that to push constitutional reform efforts too far, or too quickly, might swing support back to Rajapaksa and lead to his return to politics – thus demolishing the chance of even minimal reform.

Historical antecedents also seem to weigh heavily as a factor in the types of reform. For example, in South Korea the notion of a directly-elected President is considered one of the greatest achievements of the democracy movement, and along with unhappy memories of the indirectly-elected President system in place before 1987, strengthen the resistance to changing this. In Thailand, the long history of constitutional ruptures mean that the process would not need to be constrained by concerns of legal continuity as long as the draft would be ratified in a referendum.

Similarly, and perhaps part of an overlapping concept, the cases illustrated an intangible element of constitutional culture which also influences the pace and scope of reforms. For example, in both South Korea and Taiwan restructuring executive-legislative relations seems possible, but removing the directly-elected president does not as people have become too attached to the idea of electing directly the head of state – it has become *culturally embedded*. Such institutional inertia, or ‘stickiness’ was present in a number of cases. The contrast between Chile and Argentina also brought out the importance of culture. In the lead-up to the 1994 constitutional reform, President Menem threatened to go directly to the people to ask them in a referendum whether they wanted constitutional change, and promulgated a decree to this effect. Although the referendum never happened, the President did not have the power to call a referendum yet the Court did not prevent it. Chile’s constitutional culture, on the other hand, is more adherent to legality and rule of law than to claims of popular will, and thus such a plebiscitary move would not have been possible.

With regards to deferral, the cases discussed in the workshop served to highlight both how important this can be in constitutional transitions, but also the variety of forms it can take.

There were at least five types of deferral highlighted in the cases: (i) agreeing to disagree (ii) deferring the decision into the future (iii) allowing an exit plan for the outgoing regime (iv) no constituency to force a decision and (v) lack of time.

With regards to the first type, the case of India provided several examples concerning religion, and particular reference was made to the Indian Constitution’s treatment of cow slaughter. Some in the Constituent Assembly wanted to see the Constitution provide for a prohibition of cow slaughter in the fundamental rights provisions, while others thought such a clause had no place in a secular

Constitution. The compromise was Article 48 which is found in the non-enforceable directive principles section and only asks the State to ‘take steps for...prohibiting cow slaughter’.

Deferring decisions into the future, or making current decisions subject to review, was illustrated again by the case of India with regards to Article 44 which directs the State to ‘endeavor to secure a uniform civil code’, but also by the case of the 1990 Constitution of Fiji whose Article 161 mandated a complete review of the Constitution within seven years from promulgation, and subsequently after every ten years.

Third, deferral can help the ‘losers’ of the reform package to prepare an exit plan. The discussion on current reform efforts in Sri Lanka highlighted a possible illustration of this type of deferral, with the abolition of the directly-elected President to be postponed for one election cycle to allow the incumbent, and his supporters some time to peacefully transition out of power.

Sometimes deferral happens because there is no constituency powerful enough to force a decision, even though the framers know a decision will be necessary at some point. Again in India the framers used deferral with regards to redefining the number and boundaries of states. While they knew this issue would have to be dealt with, in particular with regards to linguistic provinces, they had an existing framework which could be workable in the immediate future, and there was no regional forces strong enough to force the case for an immediate decision.

Finally, the 2005 Constitution of Iraq defers a series of decisions, such as the status of the city of Kirkuk and the scheme for sharing natural resource revenue, in large part because of the tight timeline to complete the Constitution imposed by the international community.

The issue of deferral, and its varieties, have been well studied in the existing academic literature,¹ but the workshop discussions encourage further exploration of this recurring and critical issue.

Sumit Bisarya

Sumit Bisarya is the Senior Programme Manager for Constitution-Building at the International Institute for Democracy and Electoral Assistance (International IDEA). He develops global comparative knowledge, policy and advocacy resources and provides technical support to in-country constitution reform programs. Previously, he worked with the International Development Law Organization based in Rome, Italy where he was manager of the IDLO’s field programs. He designed, managed and implemented rule of law assistance programmes in Afghanistan and East/Horn of Africa (Ethiopia, South Sudan, Kenya and Somalia). He has been engaged in constitution-building assistance programmes in a range of countries and contexts including Tunisia, Nepal, Myanmar, Kenya, Somalia, South Sudan and most recently in Chile and Ukraine.

¹ See eg Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011); Rosalind Dixon and Tom Ginsburg, ‘Deciding Not to Decide: Deferral in Constitutional Design’ (2012) 9 *International Journal of Constitutional Law* 636.