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Decolonising Comparative Constitutional Law (and Democratisation Studies)?

Tom Gerald DALY & Dinesha SAMARARATNE

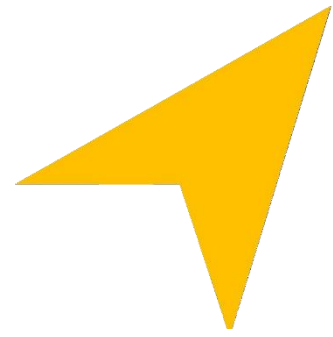
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Authors: Tom Gerald Daly and Dinesha Samararatne

Note: This is the introductory chapter to the book Tom Gerald Daly and Dinesha Samararatne (eds), *Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways* (Oxford University Press).

Abstract: What factors drive constitutional change and sustain positive transformation? How are democratic values recognised, restored, and preserved through constitutional change? How can these questions be answered in a manner that is relevant to most of the world? This introductory chapter presents the motivations and aims of the collection; situates this work within the rapidly expanding literature on the building, decay, and breakdown of liberal democracy; reflects on the considered methodological approach pursued and the need to decolonise comparative constitutional law and democratisation studies; explores and interrogates the conceptual framework of democratic consolidation and constitutional endurance as it applies to the seven case studies (Ethiopia, The Gambia, Malaysia, Maldives, Myanmar, Sri Lanka, and Thailand); and provides a summary of each chapter.

Keywords: constitutional democracy; democratic consolidation; constitutional endurance; democratisation; democratic decay; democratic breakdown; Asia; Africa; decolonisation; comparative constitutional methodology

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1

Decolonising Comparative Constitutional Law (and Democratisation Studies)?

Tom Gerald Daly and Dinesha Samararatne

1. Introduction: A Distorted Conversation

If the global conversation on building constitutional democracy were a wedding, we would always see the same democracies represented at the top table, with others scattered across the room at various degrees of proximity to the central guests. Some democracies would be seated close by, while many would be seated at the third-tier tables, far from the heat of the action, craning their necks to hear the speeches. Others would not feature on the invitation list, perceived as having no real connection to the gathering, viewed as misfits, or simply because the organisers did not think to invite them. If you asked those at the top table why they warrant their central position, they might respond reflexively, or even defensively: ‘we have been a constitutional democracy for centuries’; ‘we are the cradle of modern democracy’; ‘we constructed a leading democracy after dictatorship’; ‘we are one of the biggest democracies in the world’; or ‘we are ranked as a top democracy by all international democracy assessments’. They might consider the very question to be an affront, even (or indeed, especially) if their democratic systems are experiencing serious challenges.

Perhaps one or two top-table guests might, with refreshing honesty, concede that their privileged position is owed not just to their democratic credentials, but equally—or even primarily—to an admixture of geopolitical, historical, material, military, and epistemic power. Some, later in the evening, might even quietly admit that their imperial-colonial past means that they have at least two democratic stories: the construction of a viable constitutional democracy at home and the repression—often harsh, long-lasting, and only bitterly relinquished—of the democratic voice abroad: some rare acknowledgment of the ‘chequered history through which democracies have emerged as well as functioned’, as Nitasha Kaul puts it.¹ To say so out loud, however, might be to commit a grave error. The conversation might stop abruptly, appalled faces turning to the taboo-breaking speaker before a loud voice intervenes to smooth over the proceedings with a genial story about how we are all in this together and headed for the same destination—‘Getting to Denmark’, in the rather problematic shorthand phrase employed by development professionals to denote development toward a state with well-functioning political and economic institutions: ‘stable, democratic, peaceful, prosperous, inclusive, and [with] extremely low levels of political corruption.’²

That much of our global conversation on democracy-building is organised in this way does not mean that it is entirely futile, arid, meaningless, or hypocritical. However, it does mean that it is often exclusionary, closed, stale, and hindered by myriad forms of self-regard, self-delusion, and self-dealing, which arises perhaps more as a form of cultural mood music than any individual wrongdoing. On the current model, in both the academic and the political arenas, those at the top table decide what constitutional democracy ‘is’, what is valuable about it, how it should function, who counts as a democracy and who does not, whose deficiencies are scrutinised and whose are glossed over. Most importantly, they decide and narrate how viable and sustainable constitutional democracies are constructed, which often involves a re-telling of their own stories, nation-building myths, and democracy-building fables, rather than listening attentively to others’ experiences.

There is at least a laudable decades-long trend toward greater inclusion, but this has only marginally reconfigured the top table to include key states such as India, South Africa, and Colombia; the dynamic still generally involves the top table occasionally beckoning over other guests to pose specific questions—‘how does Ethiopia organise its federal structure?’, or ‘are there signs of judicial activism in Malaysia?’ Questions designed to fill a gap in the top-table story of constitutional democracy. Questions with pre-set parameters. Questions that interrogate rather than opening a dialogue, leaving the summoned interlocutor standing instead of offering a seat. Questions that leave many stories untold. Or, untold on their own terms. To be heard, interlocutors must employ the top table’s idioms and connect with top-table preoccupations and anxieties, refracting their experiences in a form of triangulation and intellectual tribute that distorts,

¹ Nitasha Kaul, ‘Democracy in the Non-West: Facts, Fictions and Frictions’ in Centre for Bhutan Studies (eds), *Beyond the ballot box: Report from the deepening and sustaining democracy in Asia conference* (Centre for Bhutan Studies 2013) 116.

² Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Profile Books 2011) 39.

dislocates and devalues articulation of their own democratic understandings, experiences, aspirations, and anxieties.

Of course, the metaphor of a wedding is itself problematic. Practically, it might suggest that the guests at each table are engaged in lively dialogue. However, certainly if we think in geographic terms, conversations about democracy-building among neighbours, especially those of differing political-regime leanings, are often marked more by long silences and deep misunderstandings than shared understandings, or stunted by an undue focus on what is happening, or has happened, at the top table. In our wedding scenario, Asian and African guests would be placed at opposite ends of the venue, frustrating the potential for productive cross-regional conversations and maintaining the top table as the central point of focus and single common referent. (Indeed, ‘Africa’ and ‘Asia’ can themselves be problematic metageographical colonial constructions impeding alternative visions of the myriad transnational connections across these contiguous continents; a point we pursue in more detail below).³

More fundamentally, our choice of wedding metaphor and imagery might be exclusionary, erecting obstacles to transnational understanding that might not be immediately obvious: weddings, after all, do not look the same everywhere. Who gets married and how varies significantly across cultures due to a range of factors and the answer continues to change across time. Yet, across the world, we can at least say that all weddings will have key features that distinguish them from other occasions: individuals are being recognised publicly as a union (not necessarily limited to two individuals); the ceremony involves specific words and rites (whether civil or religious); there is some form of witness; and there is some form of communal celebration. If one of these elements is missing (e.g. communal celebration or formal dress) it will still count as a wedding. If some details are different (e.g. the bride’s dress is colourful, or red, or white, or the groom carries a ceremonial sword) it will still count as a wedding. Yet, if other details are missing (e.g. there is no recognised office-holder to perform the ceremony, or one person is purporting to marry themselves) it is patently *not* a wedding. We can argue, then, over the different details and models in between these two poles, but there is at least a cross-cultural baseline agreement about what a wedding is, what it is about, who is involved, and how it works. There is at least an agreement that simply claiming an occasion is a wedding does not make it so if key elements are missing. So it is with constitutional democracy, but the problem remains: who gets to ask the questions about how to achieve sustainable constitutional democracy and what that destination truly means, and who gets to provide the answers?

³ As Gyan Prakash offers, ‘Asia’ emerged as a geographical category from the *longue durée* of colonialism’: see Gyan Prakash (ed), *Design and Modernity in Asia: National Identity and Transnational Exchange 1945-1990* (Bloomsbury Publishing 2022) xiii. Similarly, it has been observed that the boundaries of ‘Africa’ have shifted depending on the governance priorities of colonial powers: see Martin W Lewis and Kären Wigen, *The Myth of Continents: A Critique of Metageography* (University of California Press 1997) ch 4 and ch 5.

2. This Book: Radically Re-Orienting Our Centre

What factors drive constitutional change and sustain positive transformation? How are democratic values recognised, restored and preserved through constitutional change? How can these questions be answered in a manner that is relevant to most of the world? These are the key questions that we raise in this edited volume, and we do so by configuring a very different ‘top table’ of states as our central focus. We draw from two geographical regions—Asia and Africa—and organise our analysis both jurisdictionally, with seven case studies that have experienced a democratising event in the past decade (Ethiopia, The Gambia, Malaysia, Myanmar, Sri Lanka, Thailand, and Maldives⁴), and thematically, building on the empirical surveys to offer analytical insights on seven themes arising from the case studies: the concept of ‘office’ and its relationship to political and constitutional development; the role of governing institutions in these processes of development; the roles played by political parties, which depart from established dominant ‘Western’ frameworks of thinking; the curious, diverse, and often marginal place of courts in our case studies; the often central importance of civil-military relations, which manifests in highly diverse ways; the salience and explanatory power of constitutional culture; and the impact of the COVID-19 pandemic.

Our aims are twofold. First is to make a contribution to the growing global comparative and inter-disciplinary literature on democratic consolidation, backsliding and resilience through analysis of case studies that are otherwise understudied, and which are rarely, if ever, compared to one another. Secondly, we aim to contribute to domestic constitutional debates in the case study countries by generating contextualised theoretical and comparative insights of relevance to the consolidation and development of constitutional democracy.

This collection has been developed at an inflection point for global democracy, where a perceived worldwide ‘democratic recession’⁵ has prompted seismic shifts in both comparative constitutional studies and democratisation studies. The recent rise of movements and trends of authoritarian populism, ‘executive aggrandizement’, ‘autocratic legalism’, institutional decay, party system degradation, hyper-partisanship, political corruption, political violence, identity politics, ‘cultural backlash’, and inter-ethnic tension in both longstanding stable constitutional democracies of the West and democracies of different vintages outside the West has generated a rapidly expanding body of literature on everything from the drivers of populism, neo-authoritarianism and neo-despotism to mechanisms for counteracting it, as comparative constitutional theorists, historians, political scientists, sociologists, and economists have addressed these issues from multiple angles.⁶ At its heart, whether it adopts an institutionalist, theoretical, or

⁴ Although ‘The Maldives’ and ‘Maldivé’ are often used interchangeably, this collection tends to use ‘Maldives’.

⁵ Larry Diamond, ‘Facing Up to the Democratic Recession’ (2015) 26(1) *Journal of Democracy* 14.

⁶ See e.g. Mark Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2019) (hereafter Graber, Levinson and Tushnet (eds), *Constitutional Democracy in Crisis?*); Surendra Munshi (ed), *Democracy Under Threat* (Oxford University Press 2017); Pippa Norris and Ronald Inglehart, *Cultural Backlash: Trump, Brexit and the Rise of Authoritarian Populism* (Cambridge University Press 2019); Steven Levitsky and Daniel Ziblatt, *How Democracies Die: What History Reveals About Our Future* (Penguin 2018); Jonah Goldberg, *Suicide of the West: How the Rebirth of Tribalism, Populism, Nationalism, and Identity Politics is Destroying American Democracy* (Penguin Random House 2018); Aziz Z Huq and Tom Ginsburg, *How to Save a*

sociological approach, this literature grapples with the major question of *how we can reconcile the relationship between constitutional democracy* (i.e., government based on the legitimacy of popular consent as well as the restraints of the rule of law) and the *forces that work against its social entrenchment* (including pure majoritarianism or exclusionary populism, ethnic nationalism, traditionalism, authoritarianism, or a mixture of some or all of these counter-ideologies).

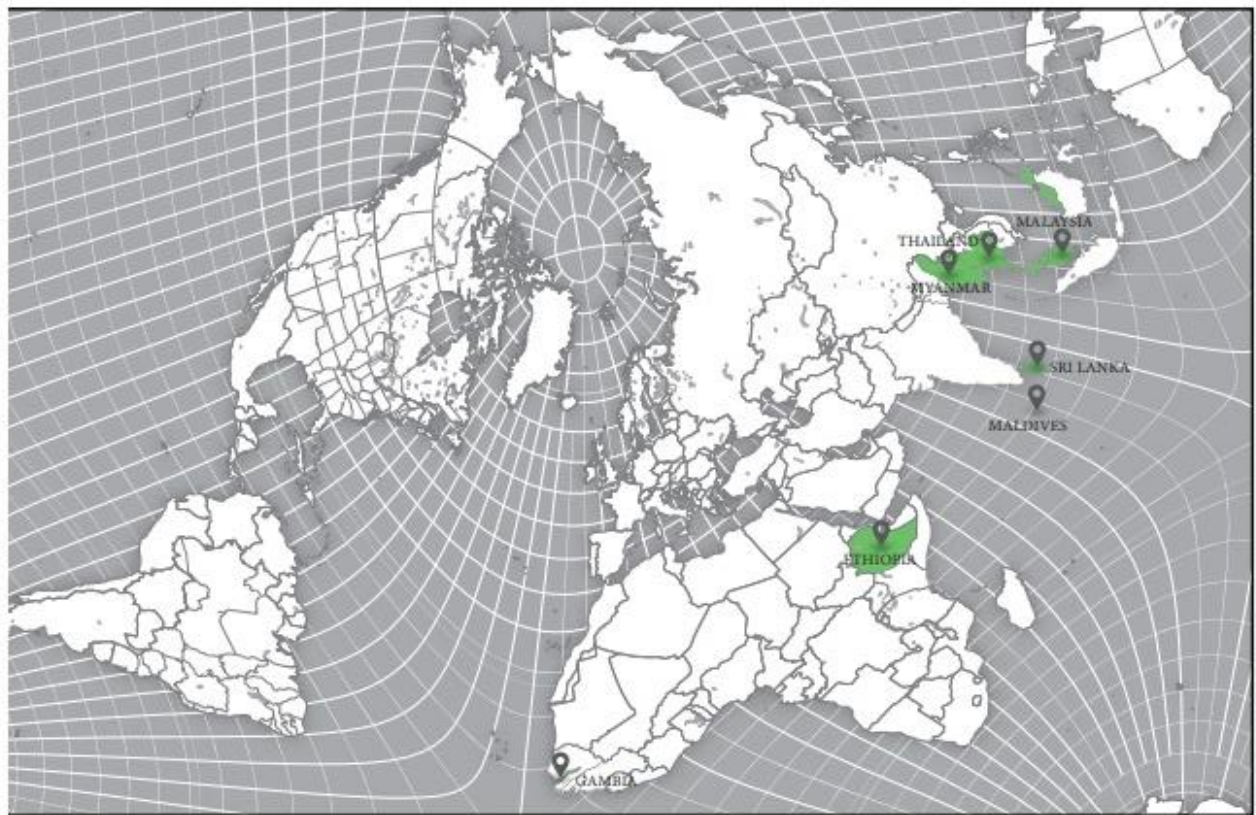
One way to enter this unfolding global conversation would be to take it on its established terms, which have been largely hammered out on the anvil of Western realities. However, to take such an approach would reduce our case studies to mere additions and glosses to a global story whose frames are pre-set, somewhat rigid, and distortive. It might leave us looking in all the wrong places, seeking to understand the very different realities of our case studies through frames of populism while eliding forms of elite power (e.g. military power, business elites), an excessive focus on elected executives (overlooking e.g. monarchs), or proceeding from unhelpful assumptions (e.g. that political parties broadly operate in the same way everywhere). Our aim is to disrupt the dynamics of triangulation and intellectual tribute to ‘top table’ epistemic centrality by centring our case studies as a different type of top table; as worthy of study on their own terms, in their own words, not because of perceived successes in democratic and constitutional development, but because their stories provide rich insights into *both* successes and failures, the simultaneity of positive and negative trends, and questions of momentum, trajectory and teleology. We might add that, together, the case studies have a population close to that of the USA—over 300 million individuals whose lives are directly affected by the quality of governance they experience, the extent to which their voice is heard in the halls of power, and the degree of protection they receive from the depredations of the state and dominant social, political, and economic forces. However, we offer this information merely to inform our reader, not to fall into the trap of justificatory burdens for analysis that are not applied to analysis of top-table states.

Moving from the wedding metaphor employed above, an illuminating visual representation of our approach to radically re-orienting our centre is the ‘authagraph’ world map reproduced in Figure 1.1 below. This is a re-engineering of the familiar Mercator-Miller projection map, which presents the world more accurately and allows for alternative presentations of familiar continental landmasses. In this version, Africa and Asia are placed centrally, with other continents in the periphery, and we have added pin symbols identifying the country case studies. This disrupts the

Constitutional Democracy (University of Chicago Press, 2018); Carolyn M Hendriks, Selen A Ercan and John Boswell, *Mending Democracy: Democratic Repair in Disconnected Times* (Oxford University Press 2020); Suzanne Mettler and Robert C Lieberman, *Four Threats: The Recurring Crises of American Democracy* (St. Martin's Press, 2020); Tímea Drinóczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2021); Wojciech Sadurski, *Poland's Constitutional Breakdown: Freefall 2015-2018* (Oxford University Press 2019); Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 85 *The University of Chicago Law Review* 545; Debasish Roy Chowdhury and John Keane, *To Kill A Democracy: India's Passage to Despotism* (Oxford University Press, 2021); Tarunabh Khaitan, ‘Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India’ (2020) 14(1) *Law & Ethics of Human Rights* 49; Emilio Meyer, *Constitutional Erosion in Brazil* (Hart Publishing, 2021); and Juliano Zaiden Benvindo, *The Rule of Law in Brazil: The Legal Construction of Inequality* (Hart Publishing, 2022).

totalising and ‘slippery’⁷ concepts of ‘Global North’ and ‘Global South’, pushing us to reflect instead on questions of core and periphery, of inclusion and exclusion, of epistemic dominance and epistemic injustice, which can cut across the North/South axis in both the global and regional arenas. Decolonising comparative constitutional law and democratisation studies, in this sense, challenges us to re-imagine and re-conceive the world we are analysing in spatial as well as intellectual terms. As an approach it has strong affinities with Oklopcic’s notion of ‘comparing as (re-)imagining’.⁸

Fig. 1.1 Authagraph World Map



The Global North and Global South may be mutually constitutive, and epistemic and geopolitical power imbalances cannot simply be wished away, but we can, for now, for here, within the world of this project, utterly transform who counts as ‘the centre’ by transforming the (perceived) hinterland into heartland. What does it look like to conceptualise and theorise

⁷ Jean Comaroff and John L Comaroff, *Theory from the South OR How Euro-America is Evolving Toward Africa* (Paradigm 2012) 45 (hereafter, Comaroff and Comaroff, *Theory from the South*).

⁸ Zoran Oklopcic, ‘Comparing as (Re-)Imagining: Southern Perspective and the World of Constitutions’ (hereafter Oklopcic, ‘Comparing as (Re-)Imagining’) in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020) (hereafter, Dann, Riegner, and Bönnemann, *The Global South*).

constitutional and democratic development afresh from the core we have fashioned for this collection? This challenge lies at the centre of our call to diversify and decolonise the field in terms of methodology, mindset, and practice, which is the main driving force for putting together this collection. The spatial-intellectual recalibration pursued here is one under-considered option to achieve an immediate, insurgent re-ordering in the context of a developing decolonising conversation focused on *permanently* de-centring Europe and North America through a ‘Southern turn’ or ‘facing South’.⁹ This can trap us in an assumed positionality and relational bond, the Global North living rent-free in our heads even as we try to escape its influence, with the moment of achieving de-centring always lying on a distant, unknowable, or recursive horizon.

While the principal contribution of the editorial introduction is often to draw out the main themes from the contributions, the seven thematic chapters as an organising strategy have cleared the ground for us to probe deeper into questions about knowledge building, both at a theoretical level and a ‘human’ or practical level, generating insights into how practice and theory are co-constitutive in any comparative praxis. These reflections encompass three dimensions. First, we discuss our approach to comparative methodology and theory-building, seeking to articulate our frustrations with dominant methodologies in comparative constitutional law, our attempt to forge a different approach, and the importance of community, embeddedness, collaboration and community-building in decolonising comparative constitutional law and democratisation studies. Second, we provide a brief overview of our two organising concepts, constitutional endurance and democratic consolidation, teasing out their relationship and sometimes antagonistic framing, as well as their application to the case studies. Third, we discuss three key features common to the case studies, focusing on the cyclical nature of endurance and regression, the central importance of critical events and crises, and the multi-dimensional insights into institutions at the heart of change processes. Fourth, and finally, we provide a summary of each chapter.

3. Comparative Methodology and Theory-Building

3.1 The Case Studies

All of the states in this collection share two key features: they have undergone a democratising event in the past decade; and the ensuing political and democratic transitions have been understudied. Each of the country case studies have experienced a regime change (or two) within the past decade with the promise of some form of democratic renewal. Some reform processes are still ongoing (e.g the hopeful transition to democracy in The Gambia after the dictatorship of Yahyah Jammeh), while others have faltered, after some early successes (e.g. Sri Lanka’s years of political instability and crisis after hopeful elections in 2015), or been starkly disrupted by a

⁹ See e.g. Philipp Dann, Michael Riegner, and Maxim Bönnemann, ‘The Southern Turn in Comparative Constitutional Law: An Introduction’ (hereafter Dann, Riegner, and Bönnemann, ‘The Southern Turn’) and Florian Hoffmann, ‘Facing *South*: On the Significance of An/Other Modernity in Comparative Constitutional Law’ (hereafter Hoffmann, ‘Facing *South*’) in Dann, Riegner, and Bönnemann, *The Global South* (n 8).

military coup (e.g. Myanmar). It is vital to better understand why some states maintained a positive—albeit non-linear—trajectory while others have not.

The case studies and thematic analyses offers us comparative insight to understanding how the relationship between democracy-building, democratic reversal and institutional endurance plays out in conditions of ongoing constitutional development, generally discussing events up to the cut-off point of 31 August 2021, although some have incorporated more recent developments. Spanning West Africa to Southeast Asia, as offered above, these are not countries that are often compared. In fact, the case studies differ on many counts. They include common law, civil and mixed legal systems. They also include unitary, federal, and hybrid structures and different forms of government spanning across presidential, parliamentary, monarchical, and republican forms. They have experimented with different ideological regimes from socialism to capitalism and reflect diverse states of economic growth and development. Their historical evolution demonstrates both similarities in terms of uneven trajectories of democratic constitutional development as well as differences in constitutional institutions and cultures. Importantly, they represent differing experiences with Western colonialism prior to the decolonisation era, with two—Ethiopia and Thailand—lying outside this paradigm, while the remaining five states here gained independence between 1948 and 1965 during the collapse of the British Empire. Importantly, states (and different areas within states) experienced varying levels of direct colonial control. Some states also experienced Portuguese and/or Dutch colonisation (e.g. Maldives, Sri Lanka). Further comparison is offered in the tables below, (which use the term ‘colony’ to capture diverse arrangements) as well as Sections 4 and 5 of this Chapter.

Table 1.1 Case Studies: Central Characteristics¹⁰

Case study	Population	Constitution	State structure	Political system	Size
Ethiopia	117.9m	1994	federal republic	parliamentary	1.104 m km ²
Thailand	69.95m	2017	unitary monarchy	parliamentary	513,120 km ²
Myanmar	54.81m	[2008] 2021 coup	unitary republic	military junta	676,578 km ²
Malaysia	32.78m	1957	federal monarchy	parliamentary	330,803 km ²
Sri Lanka	22.16m	1978	unitary republic	presidential	65,610 km ²
The Gambia	2.487m	1997	unitary republic	presidential	10,689 km ²
Maldives	543,620	2008	unitary republic	presidential	300 km ²

¹⁰ This table was compiled by the editors drawing on statistics from the World Bank (population) <<https://data.worldbank.org/indicator/SP.POP.TOTL>>; Constitue Project (constitution) <<https://www.constitueproject.org/>>; and World Population Review (state size) <<https://worldpopulationreview.com/>>.

3.2 A Different Model for Theoretical Development

As indicated above, this book seeks to theorise from understudied jurisdictions of the Global South, which is useful at two levels: (i) it adds to our understanding of the Global South and, more importantly; (ii) it has the potential to change the way we think about the field of comparative constitutional law (as well as democratisation studies).

Evidently, the existing cross-disciplinary literature has offered a range of explanatory theories in understanding, and normative theories in responding to, the global phenomenon of democratic backsliding, decay¹¹ and crisis, with proffered solutions including recalibrating judicial review to address pathologies in the political system and process, enhancing ‘fourth branch’ protections (e.g. through electoral and integrity bodies), re-tooling party selection of leaders, reforming economic models, and addressing the distortive effects of social media on democratic discourse and organisation. As such, it has provided new analytical insights and spurred reconsiderations of normative principles and institutional designs in the study of democratic backsliding and institutional resilience.¹²

Most importantly, recent analysis of challenges facing democracy has pushed a sea-change in the comparisons made between ‘the West and the rest’. Intensifying challenges to democratic governance in Western states mean that the perceived differences between ‘well-functioning’ democracies of the Global North and dysfunctional and less democratic states of the Global South (where analysis has tended to focus on poverty, conflict, and post-colonial implications) have become more open to question. These developments have been accompanied by comparative work that has become more genuinely comparative as between the West and the Rest in relation to the decay and endurance of constitutional democracy.¹³ We see a shift from a stubborn standpoint of oppositional North/South mutual alterity (whether along presumed stable/fragile, rule of law/rule by law, or legal innovation/adoption axes) to something more like what we might call a ‘continuum of sameness’.¹⁴ This shifts our gaze from labelling challenges as intrinsically ‘Southern’ to contemplation of the differing configurations and intensities of both factors promoting, and challenges for, maintaining sustainable constitutional democracy in our case study cluster.

However, genuine comparison needs to be pushed further and to incorporate a greater range of states than the ‘canonical’ Global South case studies that are prioritised in the literature, such as

¹¹ ‘Democratic decay’ is more commonly used to refer to democratic backsliding in an established liberal democracy, but here is employed to also cover democratic reversal in younger, fragile and hybrid democratic systems.

¹² See e.g. Rosalind Dixon, *Democracy and Dysfunction: Towards a Responsive Theory of Judicial Review* (Oxford University Press, 2022, forthcoming); Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press 2021); Tarunabh Khaitan, ‘Guarantor Institutions’ *Asian Journal of Comparative Law* (forthcoming; published online 22 September 2021); Tom Gerald Daly and Brian Christopher Jone, ‘Parties versus Democracy: Addressing Today’s Political-Party Threats to Democratic Rule’ (2020) 18(2) *International Journal of Constitutional Law* 509; Ganesh Sitaraman, *The Great Democracy: How to Fix Our Politics, Unrig the Economy, and Unite America*, (Basic Books 2019); and Shoshanna Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019).

¹³ See e.g. Graber, Levinson and Tushnet (eds), *Constitutional Democracy in Crisis?* (n 6); and Tom Gerald Daly, ‘Democracy’ in Jaakko Husa, Jan M Smits and Catherine Valcke (eds), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, forthcoming).

¹⁴ See Hoffmann, ‘Facing South’ (n 9) 55.

India and South Africa. We also need to revisit in more detail, and against a broader canvas, the major assumptions that underlie our understandings of societies' commitment to constitutional democracy, the view of constitutional democracy as the 'only game in town' for the political organisation of states, and the now-discarded notion that constitutional democracy, once established, will only ever be a 'one way street' to ever deeper consolidation. The latter, of course, could never be taken for granted in the countries to be studied in this collection, but we need a finer-grained account and comparison of the different reasons for this in these states. An older and unique example of such an approach is *The Role of the Judiciary in Plural Societies* edited by Neelan Tiruchelvam and Radhika Coomaraswamy. Published in 1987, this volume places the Philippines, India, Sri Lanka, the Mozambique and Tanzania in comparison in assessing the role of courts in dealing with questions related to ethnic conflict, rights and justice.¹⁵

Several decades later, this book accordingly seeks to theorise our understandings of democratic consolidation, backsliding and constitutional endurance from a different standpoint to existing literature. All too often, theory elaborated on the basis of Western empirical realities (or of a select few Global South states such as India and South Africa) is simply applied, albeit often in modified form, to understudied states that are treated as peripheral in the global constitutional conversation. As indicated above, we have sought to pursue a different model for constructing theory in this collection. Rather than setting out general theoretical frameworks and applying them to the case studies, we seek to derive general conclusions from particular case studies and to construct a better theoretical framework for comprehending what are complex realities.

This has been an iterative process carefully managed through the editorial process, and communicating effectively with both case study and thematic chapter authors, with the editors drawing out the insights from the case studies to the full. Shifting our approach in this way allows the experiences of these states to more fully inform our theoretical understandings of democratic consolidation and constitutional endurance—if not quite with a 'clean slate', at least less encumbered by existing understandings. One of the main strengths of this edited volume lies in exploring often overlooked African and Asian states, and placing them in conversation with each other. This approach allows us to maximise the insights to be gained from these case studies, in a way designed to genuinely broaden and deepen the field.

This model also underlies our approach to structuring the book. In particular, we have opted for detailed thematic chapters rather than a more general overview of key themes for two reasons. First, many of the institutions, processes, and constitutional cultures in the types of states whose experiences we wish to foreground operate and interact in ways that strongly challenge our existing understandings of political order and constitutionalism (even in the Global South). We see it as important to develop a more systematic theoretical lexicon that can capture these differences, which impact on everything from constitutional pre-commitment, to 'organ-isation' of the political system as a network of offices, to reform momentum. Second, providing fuller attention to key

¹⁵ Neelan Tiruchelvam and Radhika Coomaraswamy (eds) *The Role of the Judiciary in Plural Societies* (Frances Printer 1987). For a review of the book, see Arun K Thiruvengadam, 'Revisiting the Role of the Judiciary in Plural Societies (1987) - A quarter century retrospective on Public Interest Litigation in India and the Global South' in S Khilnani and others (eds) *Comparative Constitutionalism in South Asia* (OUP 2013) 341.

dimensions and sources of democratic instability is essential to reading the case studies themselves against a broader context. We seek to move beyond what might seem like a wilderness of single instances to a nuanced understanding of shared constitutional features and pathologies in these carefully selected case studies, in a way that avoids broad-brush rubrics such as ‘constitutionalism of the Global South’, which can often unhelpfully lump very disparate country experiences together simply on the basis that they do not belong to the Global North.

3.3 Context, Collaboration, and Community-building

The collection brings together an international team of scholars and thought leaders with diverse cross-disciplinary knowledge encompassing law, history, and politics, policy experience, and in-country expertise, including both established thematic experts and emerging experts. In a literature still dominated by scholars from, based in, or educated in the Global North, in this volume we were intentional about including a diverse range of voices and facilitating their engagement with one another, with full gender balance across the contributors. The inclusion of new voices has helped to broaden representation in the literature and add nuance and diversity to the way in which the relationship between institutional resilience and democratic backsliding is understood.

The structure and development of this collection was designed to maximise its potential, by inviting authors from the case study jurisdictions to write the case study chapters, sequencing the thematic chapters to be written after the case study chapters and conducting workshops for the drafts. We designed the process to develop single-jurisdiction case studies over a period of time and in conversation with each other. At the same time, the case studies fed into the development of the thematic analysis. First, we invited scholars or practitioners who were intimately familiar with constitutional developments of the jurisdiction to draft their analysis. At the same time, authors invited to make a thematic contribution developed their own first drafts. We then met virtually across six webinar workshops in June 2021 to discuss these drafts. The aim of the workshops was to provide a platform for comparison, discussion and reflection on the different experiences, perspectives and challenges addressed in the chapters. The thematic authors had the opportunity to listen and learn from the experts on each jurisdiction at these workshops. The second stage involved the substantive revision of all chapters based on this exchange of ideas.

To some extent, this approach resonates with the notion of ‘slow comparison’ proposed by Dann and others.¹⁶ Comparison, in our efforts, was individual but benefitted from insights shared from other similarly situated jurisdictions. They further benefitted from thematic inquiries. To this extent, the comparative work and methodology in this volume is essentially collaborative. Throughout the development of the collection we have remained acutely aware that each constitutional system is its own creature, embedded within its own unique matrix of cultural, legal, and political traditions and understandings, which requires not an artificial scholarly positionality of undefined ‘elevation’ but one of ‘embeddedness’. However, while each of the case studies is a single-jurisdiction study, fully understanding any system in context requires creative collaboration

¹⁶ See e.g. Dann, Riegner, and Bönnemann, ‘The Southern Turn’ (n 8) 35.

between both the ‘insiders’ and ‘outsiders’, in an ethos of open, reflective and iterative dialogue based on the shedding of assumptions, attentiveness, and a form of intellectual kinship. It has required all of us to openly acknowledge the limitations of our understanding but has also required us to question why we think about specific challenges, concepts, and frameworks, or institutions in the way that we do. We can never fully bridge the insider-outsider gap, but focusing closely on what that gap looks like can help us to better address this deep challenge of comparison in constitutional law, which so often limits its prospects. It is also our hope that this is not just a community for now, but part of a community-building exercise that can enrich all of our work and collectively provide intellectual and mutual supports that strengthen over time. While we can continue to issue claims to the centre for recognition, for inclusion, and for equity, we can work to incrementally construct our alternative sites and networks of intellectual exchange.

The presence of contributors from the Global North not only reflects this need for insider-outsider collaboration, but also reflects the relevance of the empirical and thematic analysis far beyond the seven case studies. In this connection, it may be noted that these authors, too, come from systems that are in many ways ‘peripheral’ in the global conversation on constitutional democracy (e.g. Australia, Ireland, New Zealand), which has helped in fostering understandings of how knowledge and theory are constructed ‘in the shadow of global constructions’,¹⁷ although how each of us experiences this differs greatly from state to state depending on recognition at the Global North ‘top table’, cultural linkages, and geographic proximity to the most active sites of intellectual engagement, as well as access to material resources. Finally, this form of aggregative comparison also requires collaboration with the reader, inviting them to examine their own preconceptions and understandings, and inviting them to read actively by engaging in their own process of comparison from their knowledge base.

4. Our Organising Concepts: Democratic Consolidation and Constitutional Endurance

Before closing our introduction with a summary of the chapters, it is worthwhile to set out and interrogate the overarching conceptual framework for this collection. As the book’s title suggests, and reflecting the collection’s cross-disciplinary nature, our two main organising concepts are constitutional endurance and democratic consolidation, which connect two major fields: comparative constitutional studies¹⁸ and the field of ‘consolidology’ in political science. As discussed below, these two concepts capture different dimensions of shifts toward, and away from, constitutional democracy in this collection and are complementary while also generating productive conceptual and analytical tensions. Endurance highlights the idea of continuity, stability, and resilience, while consolidation expresses the idea of movement, change, adaptability,

¹⁷ Carlos Arturo Villagrán Sandoval, ‘Interrogating “Constitutionalism of the South” and New Pathways for Research: The Case for a Central America in the Global Debate’ (*Völkerrechtsblog*, 8 August 2017).

¹⁸ We are mindful here that some authors such as Oklopcic take issue with the nomenclature of ‘comparative constitutional studies’, preferring the term ‘comparative constitutional inquiry’. We employ ‘studies’ here as the cross-disciplinary term with the most recognition. See Oklopcic, ‘Comparing as (Re-)Imagining’ (n 8) 81–91.

trajectory and teleology. Evidently, endurance does not mean the absence of change; change and reform may be central to resilience. Conversely, consolidation does not merely relate to the implementation of a specific single constitution: indeed, processes of democratisation may transcend specific constitutional texts.

We might first clear the conceptual ground with two observations. For the purposes of this collection, we eschew any assumption of Western-style liberal democracy as the destination point. However, this does not mean the absence of any foundational normative commitment or a lapse into relativism. We understand democracy broadly, as a political system comprising, at minimum, full, free and fair elections, protection of core liberal and democratic rights, and meaningful constraints on government. In this manner, we seek to avoid foreclosing the possibility of post-liberal, non-liberal or perhaps ‘alt-liberal’ visions of democracy. This does not, however, entail any acceptance of the concept or narrative of ‘illiberal democracy’, in the Hungarian or Singaporean senses, whose excessive centralisation of power and denial of political pluralism runs contrary to our basic predicates for a ‘true’ democracy.¹⁹ Moreover, we should keep in mind Linz and Stepan’s distinction between ‘liberalization’, which may involve limited measures (e.g. easing censorship) and ‘democratization’, which relates to more fundamental political regime transformation, as well as their observation that while ‘transitions may begin that are never completed’, this does not mean return to the *status quo ante*.²⁰ We also must remain alive to the fact that some claims for ‘decolonisation’ in the political sphere, or for the construction of an autochthonous democracy, can merely provide rhetorical cover for unconstrained, or at least highly exclusionary, executive or majoritarian power—although this is certainly not universal.

In addition, taken together, and relying on datasets from both Freedom House and the Varieties of Democracy Institute (V-Dem) we can view our case studies at the time of writing as falling into two broad camps: three ‘harder’ authoritarian regimes (Ethiopia, Myanmar and Thailand, which are categorised as ‘not free’, ‘closed autocracy’, or ‘electoral autocracy’) and four ‘hybrid’ regimes featuring a blend of democratic and authoritarian characteristics (The Gambia, Malaysia, Maldives, and Sri Lanka, which are categorised as ‘partly free’ and either ‘electoral autocracy’ or ‘electoral democracy’, with the latter having much higher Freedom House scores). Of course, such indices are seriously limited and can only ever tell us pieces of a complex truth.²¹ Here, triangulation and comparison of indices, and their testing against qualitative analysis, helps to avoid the possible trap of over-reliance on naked datasets. Moreover, these cannot be viewed as entirely hard or traditional categories: the four ‘hybrid regimes’ lie along different points of the

¹⁹ See e.g. Renáta Uitz, ‘Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary’ (2015) 13(1) *International Journal of Constitutional Law* 279; and Jan-Werner Müller, *What is Populism?* (University of Pennsylvania Press 2016) ch 1 and ch 2. This is, of course, a conceptual minefield: Tucker, for instance, sees a stark contrast between Hungary as a ‘populist neo-illiberal democracy’ and Singapore’s ‘liberal authoritarianism’. See Aviezer Tucker, *Democracy Against Liberalism: Its Rise and Fall* (Polity Press, 2020).

²⁰ Juan Linz and Alfred Stepan, ‘Democracy and its Arenas’ in Juan Linz and Alfred Stepan (eds), *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and Post-Communist Europe* (John Hopkins University Press 1996) 3–4 (hereafter Linz and Stepan, ‘Democracy and its Arenas’).

²¹ Kim Lane Scheppele, ‘The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work’ (2013) 26(4) *Governance* 559.

‘ever-widening grey zone’²² between the poles of recognisable liberal democracy and authoritarianism, and some scholars prefer the nomenclature of a ‘new despotism’ to capture a strange new species of state-regulated extractive capitalism that seeks to leap-frog to economic modernity by placing emphasis on privatisation of life rather than encouraging the growth of the public square.²³ Even in authoritarian states governance practices have changed, with ‘modern authoritarianism’ making concessions to the international arena (e.g. economic openness, limited political competition) to maintain power and a semblance of legitimacy.²⁴ Nor are they static. Assessment frameworks are descriptive but not predictive: they can paint a picture of the present but not of what is to come, reminding us that many of the democratising events in our case studies were something of a surprise.

This brings us to the first conceptual framework, democratic consolidation, which is essentially contested but nevertheless useful. Democratisation theory, developed by political scientists alongside the global expansion of democracy—the ‘third wave of democratisation’, which swept across Southern Europe, Latin America, Asia, and Africa from the 1970s into the late 1990s—separates the overall democratisation process into two phases: ‘transition to democracy’, defined as the movement toward full, free and fair elections in post-authoritarian states, whether through revolution, a political pact, or the gradual ceding of power by an authoritarian regime; and ‘consolidation of democracy’, which might be defined as the development of a minimal level of democratic governance in the period following the first democratic elections.²⁵

Three starting observations can be made here. One is that theorists diverge sharply on when a constitutional democracy might be considered to be ‘consolidated’, which ultimately depends on the underlying definition of democracy itself. For those adhering to a more minimal procedural conception centred on the electoral process, consolidation can be considered achieved when, for instance, a state has experienced two peaceful transitions of power through full, free and fair elections and there are no significant threats to democratic rule.²⁶ This, however, has been criticised as bringing a range of West-centric assumptions into play; exemplified by Huntington’s ‘two-party turnover’ test for consolidation (requiring two alternations of parties in government), criticised by Schmitter as revealing an ‘Anglo-Saxon bias’ in its excessive adherence to the model of strong two-party systems in Anglo-Saxon countries such as the USA and the UK, and for over-inclusion

²² András Bozóki, ‘Illiberal Democracy Belongs to the Hybrid Regimes: Reflections on Jeffrey C. Isaac’s Illiberal Democracy’ Public Seminar 2 August 2017.

²³ See John Keane, *The New Despotism* (Harvard University Press 2020).

²⁴ See Andrew Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians* (Freedom House, June 2017).

²⁵ See e.g. Philippe Schmitter and Javier Santiso, ‘Three Temporal Dimensions to the Consolidation of Democracy’ (1998) 19(1) *International Political Science Review* 69, 72, 77. An alternative conceptual framework from the 1990s, aimed at examining ‘quality of democracy’, places much less emphasis on the temporal aspects of democratisation and has never quite supplanted the other two.

²⁶ Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oxford University Press 1991) 266.

of states within the democratic fold.²⁷ Second, alternative frameworks place additional emphasis on the rule of law and the protection of civil liberties and fundamental rights.²⁸ However, this gave rise in the 1990s to forbiddingly complex frameworks for assessing whether consolidation had, in fact, been achieved.²⁹ Recent patterns of regression across third-wave democracies have raised further questions about whether third-wave analysts under-estimated the time-scales needed to entrench self-sustaining constitutional democracy, including not only implementing a new constitution but also fostering a very different constitutional culture.

Third, and perhaps most importantly, these frameworks related to ‘third wave’ democratisation processes that were, compared to our seven case studies, far more linear, usually involving a rather clear shift from authoritarian rule to democratic rule, including a change of government, a new constitution in an overtly democratic cast, and new institutions (e.g. a new constitutional court or a shift to a multi-party system in states such as Spain, Hungary, Brazil or South Korea). In this sense, democratic consolidation and the entrenchment and implementation of a new constitution could be viewed as coextensive. Among our case studies Maldives or The Gambia come closest to this paradigm, the former facing the challenge of faithful implementation of the text and spirit of its first democratic Constitution adopted in 2008, the latter facing the challenge of installing a new constitution capable of giving voice to the democratic transition following the ouster of dictator Yahya Jammeh in 2016. Across the other case studies, the dominant picture is one of ‘ambiguous transitions’³⁰ evincing greater fluidity, complexity, and non-linearity—the ‘uneven pathways’ of this collection’s title—as well as heightened antagonism between the constitutional framework and democratic development, raising the difference between ‘big bang’ constitutional change and incremental change, and the constraints of attempting

²⁷ Philippe Schmitter, ‘The Consolidation of Political Democracies: Processes, Rhythms, Sequences and Types’ in Geoffrey Pridham (ed), *Transitions to Democracy: Comparative Perspectives from Southern Europe, Latin America and Eastern Europe* (Dartmouth, 1995) 550.

²⁸ Philippe Schmitter, for instance, made use of a bipartite classification of procedural and structural *minima*, encompassing ‘civic rights of contestation and association, secret ballots, universal suffrage and ‘the rule of law’ and ‘regular elections, multiple political parties, associational recognition and access, and an accountable executive.’ See Schmitter, *ibid.*

²⁹ Alfred Stepan and Juan Linz constructed perhaps the most complex formula for democratic consolidation, as involving three separate but interrelated elements: (i) *behavioural* consolidation (the absence of any significant anti-democratic movements in a polity); (ii) *attitudinal* consolidation (requiring public support for democracy as the most legitimate form of government); and (iii) *constitutional* consolidation (entailing the submission by all political and other actors in the regime to a specific framework of laws, institutions and procedures; ‘the rule of law’). ‘Democratic consolidation’ was further subdivided into five ‘arenas’, each with its own guiding principles, provided in parentheses here: *civil society* (freedom of association and expression); *political society* (free, fair and regular elections); *rule of law* (unconditional adherence to the Constitution); *state apparatus* (usable and effective bureaucracy); and *economic society* (institutionalised market economy). Linz and Stepan suggested that progress in these ‘arenas’ could be assessed against any or all of the three overarching sub-types of consolidation to provide a better picture of the overall consolidation process. See Linz and Stepan, ‘Democracy and its Arenas’ (n 20).

³⁰ See e.g. Kinkino Kia Legide, ‘Exploring the Limits and Challenges of Compliance with Transitional Justice in the Context of Ambiguous Transitions: The Case of post-2018 Ethiopia’ (Journal of Law and Conflict Resolution, forthcoming, 2022).

democratisation within the framework of an ambivalently democratic constitution, discussed further below.³¹

Two additional points should help to clarify our employment of this framework. First, it is important to recognise that the international context for these developments has itself changed since the third wave of democratisation was at its peak in the 1990s. Whereas post-1974 (and certainly post-1989) theorists tended to assume a single destination—some form of Getting to Denmark, albeit often a more neoliberal and ‘low intensity’ democracy than the real Denmark itself—we now live in not merely a multi-polar world but a multi-model world where Danish democratic imaginaries compete with Getting to China or Getting to Singapore, while many other empirical referents (including neo-colonial powers like the USA and old colonial powers like the UK and France) are facing serious democratic challenges. That said, on the positive side, compared to the transitions of the third wave, we now do not lack for other ‘Denmarks’: why do we not speak of getting to Botswana, South Korea, Uruguay, Seychelles or Tuvalu, all of which have highly-regarded non-Western democratic systems? Second, our case studies suggest that we should focus not only on empirical referents for a ‘final destination’ but also intervening destinations: depending on a state’s starting point, the aim might be first to get to Malaysia, Mongolia, South Africa, or Uruguay. Evidently, the very notion of a destination must be handled carefully: our destinations are not static, as both democratic practice and democratic understandings are continually changing.

The second conceptual framework, constitutional endurance, owes its origins to the work of Elkins, Ginsburg and Melton, offering empirical assessment of the endurance of national constitutions and identifying a positive correlation between constitutional longevity and democratic quality, political stability, rights protection, and economic performance.³² This has had a significant impact in comparative constitutional law, prompting reflection on the ‘quest for stability’,³³ and the optimal balance between constitutional rigidity (setting down effective rules of the game superior to ‘ordinary’ politics) and flexibility (allowing for continual updating of, and avoiding ossification, of the constitutional order).

While the literature appears somewhat undecided on whether greater ethnic diversity may negatively affect constitutional endurance due to the heightened difficulties in agreeing the rules of the game,³⁴ it is clear that ethnic divisions have affected the trajectory of democratisation in our case studies, reflected here most starkly in Ethiopia’s ethnically-based federal structure and

³¹ See e.g. Cheryl Saunders, ‘Session IV Conclusions’ from the second Melbourne Forum on Constitution Building in Asia and the Pacific, ‘From Big Bang to Incrementalism: Choices and Challenges in Constitution Building’, Manila, 3-4 October 2017 <https://law.unimelb.edu.au/__data/assets/pdf_file/0004/2607394/Report-conclusions-Saunders.pdf accessed> 3 November 2022/

³² See Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) (hereafter Elkins, Ginsburg, and Melton, *Endurance of National Constitutions*). See also Dag Anckar, ‘Democracy and Constitutional Endurance’ (2014)10(1) *Taiwan Journal of Democracy* 23.

³³ See Giacomo Delledonne, ‘Crisis, Emergencies and Constitutional Change’ in Xenophon Contiades and Alkmene Fotiadou, *Routledge Handbook of Comparative Constitutional Change* (Routledge 2021)

³⁴ See Andreas P Kyriacou and Francisco José López Velásquez, ‘An Examination of the Long-Term Determinants of Constitutional Endurance: Geography, Diversity, and Historical Legacies’ (2015)171(3) *Journal of Institutional and Theoretical Economics* 432, 436 (hereafter Kyriacou and López Velásquez, ‘Long-Term Determinants’). Cf Elkins, Ginsburg, and Melton, *Endurance of National Constitutions* (n 32) 138.

Myanmar's estimated 135 ethnic groups (across eight major groups), but also in Malaysia's ethnocentric politics and the struggles between the Sinhalese majority and Tamil minority in Sri Lanka, among others.³⁵ Moreover, approaching this expanding literature with a decolonial lens, one finds that it can all too easily slip into familiar (neo-)colonial frames and analytical registers. Consider, for instance, a 2015 study building on the constitutional endurance framework to offer that countries with a greater percentage of land in the tropics (used as a proxy for extractive industries and the institutionalisation of inequalities) are at a higher risk of constitutional failure, or that the 'genetic distance' of a country from the USA may be a factor in constitutional endurance: 'the bigger the differences, the more difficult it becomes to understand and adapt complex technological and institutional innovations coming from the U.S.'³⁶ The same study offers, in addition, that 'a longer colonial experience reduces the risk of constitutional failure'³⁷ and positively compares the benefits of British colonisation with French colonisation, for instance, as regards the durability of the constitutional order.

None of this is couched in any language acknowledging what might be deeply problematic cultural assumptions underlying the framing and interpretation of the statistical data, or the deficiencies in comparison: it is one thing to note the greater durability of institutions in former British colonies compared to their French counterparts, for instance (which is relevant to five of our case studies), but this utterly marginalises the unanswerable but necessary question of how a community or polity may have developed without the predations of colonisation. For anyone reading such studies in a 'peripheral' post-colonial state in the Global South—or, indeed, the Global North—there are very uncomfortable echoes of the purportedly objective pseudo-scientific treatment of governance, politics, and race of the nineteenth and twentieth centuries, even if such work is produced in good faith.

That said, the concept of constitutional endurance provides useful intellectual resources for analysing and understanding the broader context of the democratising episodes in our seven case studies. First, it trains our mind on constitutional longevity. Taking Africa and Asia as starting categories, and removing Latin America as a hotspot of constitutional replacement, recent research suggests that the average duration of a constitution in sub-Saharan Africa is 17.14 years whereas it is 61.4 years in the rest of the world (including Asia).³⁸ However, our suite of states includes notable diversity in basic constitutional endurance: as Table 4 shows, we see a spectrum from Malaysia, which has had the same constitution since independence in 1957 (65 years), to Thailand, where no less than 17 constitutions have been promulgated since 1932, most recently in 2017. In fact, only four countries worldwide have had more constitutions, all located in Latin America and

³⁵ Here we are cognisant of studies on the very creation of 'ethnicity' as a concept during the Empire which should inform constitutional discourse. See e.g. Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Harvard University Press, 2012).

³⁶ Kyriacou and López Velásquez, 'Long-Term Determinants' (n 34) 434, 436.

³⁷ Ibid, 444.

³⁸ Niall Ferguson and Daniel Lansberg-Rodríguez, *The Constitution of Disposability/Constituciones desechables* (Fundación para el progreso 2017) 65.

the Caribbean.³⁹ The other case studies have had much fewer constitutions, ranging between three (Myanmar) and seven (Maldives). The constitutions in force date from the 1950s, 1970s, 1990s, and 2000s. Providing an average figure for constitutional durability across the seven states would therefore be misleading.

In Thailand, which has been a central case study for the endurance literature, the replacement rate correlates, to a significant extent, with the frequency of coups and we see some negative correlations, as one might expect, with democratic performance: as Table 4 indicates, the country has a low Freedom House score of 29/100, and is categorised as a ‘closed autocracy’ by the V-Dem (Varieties of Democracy) Institute. In this connection, the constitutional endurance framework makes a useful distinction between ‘churn’ (frequent constitutional replacement alongside institutional continuity) and ‘cycling’ (irresolvable competition between two groups, which produces constitutional replacement dynamics when power alternates).⁴⁰ Myanmar has, at first blush, a much better basic record on constitutional survival, with three constitutions since 1948, yet it is also categorised as a ‘closed autocracy’ by V-Dem, but with a much lower Freedom House score of 9/100. Yet, this simply underscores the air of unreality generated where a constitution is not formally suspended, abrogated or replaced following a military coup: in Myanmar we see claims from the military junta that the 2008 Constitution remains in force, despite the impossibility of its application since the coup took place in February 2021, and against the insistence by the opposition (partly in exile) that the Constitution is no longer in force. Constitutional endurance, in such a scenario, is a chimera, especially where the repudiation and rupture of democratic governance enshrined in the Constitution is so much swifter and overt than other forms of decay, backsliding or reversal,⁴¹ and where the opposition has adopted an interim framework, the Federal Democracy Charter—the latter underscoring the resilience of the democratic movement in the face of the strongest headwinds.⁴² Further complicating the picture, when we look at the United Nations Development Programme’s Human Development Index in Table 4, Thailand is one of the top two performers (alongside Malaysia, with its 1957 Constitution) and has the highest GDP of all seven case studies. Its rule of law score from the World Justice Project (WJP) also compares well to the other case studies with more durable constitutions, which are all ‘middle performers’ in the WJP Index’s 140-country dataset—although all are on a downward trend in that Index.

The constitutional endurance framework is clearly useful, then, but it must be carefully approached. Our case studies warn us not to fetishise constitutional endurance as an end in itself: if a state has a constitution that is more authoritarian in character, its replacement by a more

³⁹ Ecuador (20), Haiti (24), Venezuela (26) and Dominican Republic (33). See Ferguson and Lansberg-Rodríguez, *ibid.*, 61–64.

⁴⁰ Elkins, Ginsburg, and Melton, *Endurance of National Constitutions* (n 32) 23–24.

⁴¹ On the conceptual and practical distinctions between democratic decay and democratic breakdown, see e.g. Tom Gerald Daly, ‘Breaking Down the Meaning of Constitutional Breakdown’ in Ulad Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Constitutionalism under Stress: Essays in Honour of Wojciech Sadurski* (Oxford University Press, 2020).

⁴² See in this collection: Ohn Mar Zin, Naw Janet, and Kimana Zulueta-Fülscher, ‘Myanmar’s Transition to Peace and Democracy: The Journey Reversed’ PAGE NUMBER [p.2, p.18, p.23 manuscript].

democratic text is surely welcome. Here, there is wide variation in constitutional rigidity. Myanmar's 2008 Constitution, before the 2021 coup, is indicative of the problems raised by a hybrid text produced enshrining a 'disciplined' democratic regime contemplated by the armed forces according a veto to the armed forces regarding amendment.⁴³ At the other end of the spectrum, as Zulfa notes, the 2008 Maldivian Constitution dispensed with special amendment requirements in previous constitutions, requiring merely a majority vote in parliament, which is viewed as problematically stacking the odds towards hyper-presidentialism in a text that already enshrined expansive executive presidential powers.⁴⁴ The longer-lived Malaysian and Sri Lankan constitutions have been amended 45 and 20 times, respectively, with flexibility producing many deleterious effects on the protection of fundamental liberties and checks-and-balances.⁴⁵

Yet, this is not simply about constitutional updating: our case studies also indicate what might be viewed as 'intra-constitutional cycling'. In Sri Lanka, for instance, we see a tug-of-war of amendments as two political blocs with competing visions of the constitutional and political order gain the upper hand: between an empowered executive presidency and a more balanced 'semi-presidential' power relationship between president and parliament. Whether constitutional length is an impediment to the text operating as an effective coordination mechanism is an additional question: four of the seven case studies have constitutions of near, or over, 300 articles, placing them at the highest end of the global scale. The Constitution of Myanmar is the longest, at 457 articles in total.

5. Three Key Features

While summaries of the chapters are provided at the end of the introduction, it may be helpful here to draw out three further key features of the constitutional landscapes covered in this collection.

5.1 Constitutional Change: Endurance and Decay as Cyclical

The jurisdictional analysis in this collection reveals that endurance and decay tend to have a recurrent pattern. Observing this pattern compels us to revisit the manner in which we approach constitutional developments. As illustrated in the case studies, it is difficult to predict when and how political opportunities for constitutional change come about. It is even harder to predict when political opportunities for democratisation come about.

However, when they occur, the case studies suggest that those moments were interpreted as moments for transition to democratisation and constitutional endurance. In most of our case studies, within a short period of time there was a return to more authoritarian government. If this

⁴³ See the discussion of the 'Seven Step Roadmap to Disciplined Democracy', *ibid*, PAGE NUMBER [p.5 manuscript].

⁴⁴ See in this collection, Mariyam Zulfa, 'The Maldives Constitution 2008: Winds of Change at the Fifteenth-Year Crossroads' (hereafter, Zulfa 'The Maldives Constitution 2008') PAGE NUMBER [p.9 manuscript].

⁴⁵ In Malaysia, for instance, the sheer scale of change is further revealed when one considers that the 45 amendment Acts have made over 600 textual alterations to the Federal Constitution since 1957. See e.g. Andrew Harding, *The Constitution of Malaysia - A Contextual Analysis* (Hart Publishing 2012), 103: updated to November 2022 by the author of chapter 15, Wilson Tay Tze Vern.

is in fact the experience in constitutional change, how should that inform the way we think about constitutional endurance and democratic decay? The case studies reveal the way in which the same constitutional actors and institutions can radically alter their constitutional commitments to contribute to democratic decay, as we see in Ethiopian Prime Minister Abiy Ahmed's shift from substantive commitment to democracy to mere rhetorical use of democratic language, the military's shifting positions in Thailand and Myanmar, or the heightening repression of the Malaysian government during the COVID-19 crisis. What factors contribute to such behaviour? In what ways can constitutional practice respond to such developments? The thematic analysis offered in this volume suggests that political parties play a crucial role here. Civil-military relations is another dimension which can be both a driver of such cyclical experiences as well as the means by which constitutional endurance can be undermined.

From a practice perspective, anticipating a cyclical progression between constitutional endurance and democratic decay can be very useful. It can help constitutional actors who are often in the minority to strategise differently about their principled interventions and about sequencing of reforms. It will also help to manage expectations and limited resources in more sustainable ways. Importantly, many of the case studies underline that a democratising episode, even if stymied or reversed, leaves traces in the body politic. For that reason, rather than speaking of linear 'pendulum swings' or static cycling, we could use the metaphor of a spiral or corkscrew.

5.2 Critical Events and Crises

In the jurisdictions examined in this edited volume, several critical events occurred during the writing process itself, and authors, mostly based in-country, had the unenviable task of updating their analysis to account for such developments.

All seven case studies were inevitably affected by the COVID-19 pandemic, which has evidently had a significant impact worldwide on democratic practice and developments. The case study cluster presents a range of diverse experiences, including how the pandemic affected democratisation, albeit in different ways and to different extents. In some, the effect appears minimal, or at least manageable, to date. In others (e.g. Sri Lanka, Ethiopia, or Malaysia) the impact has been dramatic and goes directly to the concerns of this volume. The pandemic occurred at the mid-point stage in developing this edited volume, giving rise to several conceptual and practical challenges which we reflect on further below. At a minimum, it required that we review and expand the substantive focus of the volume, including the addition of a thematic chapter. Suffice to say that while it was disruptive it provided us with a useful foil to examine the relevance of crises to constitutional endurance, democratic consolidation and democratic decay. It is notable that preliminary assessment of the pandemic's impact worldwide suggests that its impact has been asymmetric: while many established democracies have shown resilience, declines are viewed as

concentrated in hybrid and authoritarian states due to abuse of emergency powers and a hike in political repression.⁴⁶

In addition to the COVID-19 pandemic, several jurisdictions experienced additional political and economic crises, including the outbreak of conflict in Ethiopia, a military coup in Myanmar, and severe economic crisis in Sri Lanka. Dealing with the impact of these developments for scholarship, for professional commitments and to all concerned at a personal level, gave us the opportunity to learn more deeply about the demands of meaningful comparative work. Contributing to the global knowledge pool on constitutional endurance and decay while dealing with the multi-dimensional critical events and sometimes a crisis was difficult, to say the least. The authors had deep and rich insights and interpretations on the constitutional developments that they were examining. However, many of us lacked the intellectual, cultural and economic resources that are necessary for translating that to scholarship. In seeking to bridge this gap in producing this volume, we have been reminded of the need to think of solidarity at multiple levels, personal, institutional, intellectual and beyond. It should encourage us to review practices of knowledge development to ask what must change if knowledge production is to be more inclusive and representative.

While many of these crises, of course, have laid bare the deficiencies in governance that trouble us in this collection, they have also reminded us of the reserves of strength, resilience, determination and innovation that can be found in the face of such adversity, both in the scholarly communities and the wider societies in which they are embedded. Interestingly, considering the key finding of Elkins, Ginsburg and Melton that crisis does not necessarily impact upon constitutional endurance, to date, these crises have not (yet) led to constitutional change—although that is debatable in the context of Myanmar, as discussed above. Finally, events in both our case studies and Global North democracies alike require us to reflect on how we tend to think of crises as acute phenomena, overlooking the importance of latent crisis or chronic crises (e.g. concerning the legitimacy of the political system or ruling elites), which may not present an existential threat to the constitutional order but continually reveal its structural deficiencies.⁴⁷ This is not only an important contextual feature, but one that Global North democracies need to better comprehend.

5.3 New Old Actors

This volume also offers new perspectives on constitutional actors. The monarch in Thailand and the military in Myanmar, Sri Lanka and in Thailand, for instance, make a significant impact on constitutional governance. Civil-military relations, in particular, is an area that is marginal to scholarly inquiries about constitutional endurance and decay, except as actors that place constitutional governance at risk. The collection also challenges us to see familiar actors with fresh

⁴⁶ See e.g. International IDEA, *Global State of Democracy Report 2021: Building Resilience in a Pandemic Era* (International IDEA, December 2021).

⁴⁷ See Benjamin M Studebaker, 'Legitimacy crises in embedded democracies' *Contemporary Political Theory* (published online: 9 September 2022).

eyes, including Mouli's observation that the existing literature tends to assume that there is a broad global understanding of 'what a party is', overlooking the salience of the 'past lives' of parties as grassroots or social organisations in post-colonial and Southern states. More fundamentally, the first thematic chapter trains our minds on the importance of 'office' in processes of constitutional change and continuity, which helpfully disaggregates and re-frames how we tend to focus on institutions and institutional frameworks. Finally, the post-colonial case studies remind us that, while democratic institutions can be framed in some way as a colonial inheritance, a significant part of that inheritance is clearly a legacy of 'authoritarian shadows' bequeathing an array of laws and tools to stifle democratic organisation and expression to contemporary governments.⁴⁸ We see similar dynamics in any state seeking to transition from authoritarian or undemocratic rule more generally, as indicated by references to a 'tradition of authoritarianism' in Ethiopia and the Maldives, for instance, encompassing a spectrum from monarchical to one-party to dominant party rule.

6. Summary of the Book

As the discussion above suggests, this book is designed to be of interest to a diverse international audience of scholars, teachers and students of law, history, politics, and development. There are a variety of 'entry points' to the book for scholars and practitioners; whether one is interested in law and development, dynamics of democratisation, democratic backsliding, constitutional design, the interface between law and politics, post-colonial studies and decolonisation, federalism, or conflict and peace-making. The text has been written with the aim of achieving maximum clarity and is structured in a way to aid the reader, with a logical flow from the introductory framing chapter, to the seven thematic chapters, and finally the seven country-specific case studies. The editors have encouraged cross-references between chapters to ensure the collection works as a coherent and meaningful meeting of minds across all authors.

6.1 Thematic Chapters

In Chapter 2, the first thematic chapter, Jason Grant Allen draws on the seven case studies to elaborate a key theme in, and conceptual framework for understanding, any process of constitutional development: public office. He defines offices as institutionalised jural positions whose content (i.e. rights, powers, duties) determines the official's position vis-à-vis other officials and subjects of various status. Constitutional orders, by turn, are networks of offices. Office, for Allen, has been relatively neglected in modern Western public law theory, but is fundamental to understanding any politico-legal order (Western or non-Western, modern or pre-modern). His framework of analysis opens up several perspectives on 'constitutional development'. First, it provides a model for tracking changes over time as (i) changes to the content of offices within a

⁴⁸ See e.g. Dag Anckar, 'Democracy as a Westminster Heritage' (2011) 7(1) *Taiwan Journal of Democracy* 56; and Ravi Ahuja, 'Authoritarian Shadows: Indian Independence and the Problem of Democratisation' (2018) 46(5–6) *Social Scientist* 3.

stable catalogue of offices and (ii) changes to the overall catalogue of offices. Secondly, it provides a framework to conceptualise the interaction between competing constitutional orders, such as the official state constitutional order and parallel religious or ethnic social orders that bolster or compete with it. Thirdly, it provides a framework within which to articulate a minimum normative concept of ‘constitutionalism’ that could avoid some of the usual objections lodged against ideas of democracy and the rule of law in the post-colonial context.

Chapter 3, by Kimana Zulueta-Fülscher, explores the role of governing institutions, as either catalysts, allies, or potential obstacles to reform, by analysing the structure and character of these institutions in the seven case studies. Central to this chapter is the very complex relationship between (and within) the executive and the legislature in parliamentary monarchies or republics, presidential, semi-presidential and assembly-independent systems. Looking at these systems, the chapter also focuses on the relationship between the political, the electoral and the political party system, in an attempt to assess whether and how this interaction may have contributed or not to stable and resilient governments with enough power to push through reforms. It stands out that all seven countries have endured significant setbacks to reform processes mostly aimed at consolidating democracy by way of increasing the accountability of state institutions and rebalancing executive-legislative relations. Some of the factors contributing to these (temporary) failures include the highly fragmented and weak nature of many opposition coalitions, the personalized nature of political parties and high levels of party corruption, which result in weak parliaments that fail to serve in their oversight capacity, the general fluidity of the political party system, and short-termism of many political leaders and their electorate. Underlying the latter are two different worldviews—liberal-republican and communitarian and/or ethno-nationalist—that help build narratives and expectations as to the way politics is practiced, and the role and aim of governing institutions in processes of democratic consolidation.

Chapter 4, by Mouli Banerjee, provides a ‘state of the field’ critical overview of the role of political parties in democratic transitions, especially in nation-states of the Global South. With specific references to the seven case studies, the chapter maps the patterns that emerge in the interactions between party politics and fluxes in regimes within nation-states. It conceptualises the role of political parties in democratic strengthening or backslides along two broad thematic parameters: first, in relation to the historical, legal, and institutional contexts within which parties exist; and second, in relation to the dynamic roles parties play as agents. The chapter focuses on parties as individual units instead of party systems, and touches upon questions of party constitutionalisation, party bans, party finance, party institutionalisation, and the linkages between political parties and business elites, autocratic or military regimes, populist leaders, and dynastic politics. It also sheds light on the previous lives of parties as grassroots or social organisations and locates post-colonial parties in their historical context. By doing so, the chapter understands parties as heterogeneous, constantly shifting, dynamic entities, and provides the thematic rubrics against which place of parties in democratisation processes in the selected case studies in this volume as well as in other states in transition globally can be better understood.

Chapter 5, by Julius Yam, draws on the case studies to challenge two common ways of understanding constitutional courts in transitional regimes—the ‘Descriptive View’ and the ‘Normative View’. The Descriptive View describes constitutional courts as active participants in transitional politics, while the Normative View suggests that successful transition requires constitutional courts taking up a democracy-building role. The chapter argues that both have failed to properly account for the exceptionality of regime-change. The exceptional nature of transitions suggests that there is tremendous diversity among the paths of transitional regimes, patterns of constitutional politics and courts’ involvement during transitional periods. The fact that courts are operating in transitional regimes tells us very little about their actual judicial roles. The exceptional nature of transitional regimes also has normative implications. The chapter contends that the exceptionality of regime-change can potentially work against judicial intervention. Exceptionality, in and of itself, is not a justification for a stronger judicial role. It is argued that there are situations where it is in fact desirable for courts to stay out of transitional politics.

Chapter 6, by Shanil Wijesinha and Daniel Alphonsus, examines two primary issues: the connection between constitutions and civil-military relations; and how security sector reform intersects with democratic consolidation and constitutional endurance, especially at moments of democratic transition. Drawing from literature on militarisation, they examine how constitutional features regulate and influence civil-military relations; that is, the balance of power between civilian authorities and the security sector. This includes analysis of: the executive powers of the head of state; the role and powers of the commander-in-chief; the role of the military; and the ‘military imprint’. It also reflects on the limitations of constitutions and constitutional reform as tools to balance civil-military relations, and how contextual factors and the balance of power foreground any such effort. Finally, they consider strategies for recalibrating unbalanced civil-military relations.

Chapter 7, by Cheryl Saunders, examines the relevance of culture for the establishment and resilience of constitutional democracy. Her analysis seeks both to understand the impact of culture on constitutional endurance and to identify responses that may be useful to maximise resilience. Drawing on the range of experiences with democratisation across the seven country case studies, the analysis begins by exploring the properties of culture that have a bearing on constitutional democracy and identifying the variety of communities with whom aspects of culture might be associated. A necessarily stylised distinction is drawn between three phases in making and maintaining democratic constitutions: the period during which the foundations are laid; implementation of a new or changed constitution; and consolidation over time. The findings of the chapter endorse the relevance of culture. They also point to some critical questions that remain unresolved about how constitutional culture can be adapted within a confined time frame to support extensive constitutional change.

The final thematic chapter, by Joelle Grogan, reflects on whether the COVID-19 crisis has served as a catalyst for deeper commitment to constitutional consolidation and proof of the resilience of democratic institutions in the case studies; or as a means of furthering democratic decay and deconsolidation. It traces the central themes, questions and issues raised by the case

studies as regards the measures adopted in response to the COVID-19 pandemic. It connects this with an examination of whether the predicted dangers of the abuse of emergency powers took place, and whether countries were successful in limiting the potential for abuse, as well as preventing or sanctioning it. It also considers the degree to which constitutional limits on the use of emergency powers during a pandemic, as well as provisions for parliamentary oversight and judicial scrutiny, have provided an effective safeguard against the abuse or misuse of power during pandemic among the case studies.

6.2 Case Studies

In Chapter 9 Satang Nabaneh presents the first case study, focusing on The Gambia. She examines how, after 22 years of uninterrupted authoritarian government headed by Yahya Jammeh, in 2017 The Gambia formally began the transition to democracy after the ‘unprecedented’ 2016 presidential elections. Observing that incumbents in semi-competitive authoritarian regimes often retain power despite having to regularly compete in multiparty elections, she highlights that what happened in The Gambia is the first time in post-colonial Africa’s political history that a ‘military-turned-civilian’ dictator lost an election. For Nabaneh this transition sparks a key question: What are the prospects for democratic consolidation and constitutional endurance in the Gambian case? While conventional assumptions categorised The Gambia as a ‘least likely’ case, she argues that there is a fair chance for democratic consolidation given The Gambia’s context of the withering of an authoritarian regime and its replacement by a democratic government. This chapter gives an overview of the constitutional change processes, the role of governing and judicial institutions, and the influence of entrenched political culture on democratic constitutional performance after more than two decades of autocratic rule.

Chapter 10, by Adem Kassie Abebe, describes and interrogates the (hopes for) transition to democracy in Ethiopia that was set off by the protest-induced reshuffle within the ruling party in April 2018 (mainly up to October 2020). In addition to describing the main issues, actors and reforms in the transition, the chapter outlines some insights relevant to policy and scholarly understanding of political transitions and constitutional design. The chapter observes that the transition not only failed to deliver democracy, it has also degenerated into civil war, necessitating a more confounding double transition from conflict to peace and to democracy. The chapter highlights the importance of constitutional arrangements even in authoritarian settings; the need to build a coalition of democracy to backstop a transition and ameliorate inherent vulnerabilities to conflict; and the criticality of reforms outside the legal and constitutional framework. The chapter concludes with observations on the magnetic pool of a socio-political tradition of authoritarianism in stalling, and even reversing and worsening, democratic and constitutional transitions.

Chapter 11, by Mariyam Zulfa, examines the introduction of multi-party democracy and multi-candidate elections in Maldives for the first time in its constitutional history in 2008. Since then party politics has gained ground with ten parties active on the ground today. Experience since the new constitution’s inception has shown that no one political party has attained the

constitutionally required 50 per cent +1 votes in the first round. Zulfa offers that the resultant coalition-making is anomalous to the presidential system upon which the Constitution is predicated and requires review. She argues that the embeddedness of a constitutional culture resulting from centuries of monarchical and later authoritarian rule, as well as the relative youth of political parties, manifested in their lacking liberal ideological bearings and continued factionalisation and disagreements amongst party elites, which are all signposts for review as the democratisation process embraces more citizen participation. The Maldivian case study illustrates that constitution-making processes are sites for power play by political elites. While political parties create a space for greater public participation, something more is required for the true benefits of individual rights guaranteed by the Constitution to flow to the people and to entrench institutional resilience.

Chapter 12, by Luwie Ganeshathasan, analyses the failures of Sri Lanka's 2015–2018 constitutional reform process. The chapter starts with a brief explanation of the country before addressing Sri Lanka's constitutional evolution since its independence. This includes discussion of fraught ethnic relations, majoritarian politics, and secessionist claims. The central focus of the chapter is the political change that occurred in January 2015 with the election of President Maithripala Sirisena. Special attention is paid to the Nineteenth amendment to the Constitution of 1978 enacted during this period and the larger constitutional reform process; including a discussion on the manner in which the political opposition to these reforms manifested itself both within and outside the government. This chapter also provides a brief comment on Sri Lanka's response to COVID-19 and the pandemic's impact on constitutional governance. In the final section, Ganeshathasan reflects on the reasons for the failure of the 2015–2018 reform effort, discussing the failures both in terms of process and substance that allowed the momentum and public support for curtailing the powers of the executive president to be squandered, and which provided ammunition for a counter-narrative as to why a stronger executive president was in fact needed.

Chapter 13, by Ohn Mar Zin, Naw Janet and Kimana Zulueta-Fülscher, explores Myanmar's political journey from colonial times to the 2021 military coup d'état, which reversed ten years of a difficult yet hopeful transition to peace and democracy. After decades of military rule, Myanmar's shift to a civilian government in 2010, under a military-sponsored Constitution, constituted a significant turnaround, which paved the way for the start of a transition to peace, democracy, and economic development. However, the 2008 Constitution guaranteed key institutional powers to the armed forces, which ensured that it controlled key ministries in the executive, and afforded the possibility to veto constitutional amendment proposals in the Union Parliament. The armed forces, and its Commander in Chief, remained thus key actors—and potential veto players—in Myanmar's myriad transitions. This chapter closely looks at the democratic transition first under the military-sponsored Union Solidarity and Development Party (USDP) and since 2015 under the government of Aung San Suu Kyi's National League for Democracy (NLD). It also describes the way in which the very fragile and politically-charged dynamics between the NLD, the armed forces and a myriad ethnic groups and their representatives, challenged progress in the peace negotiations, and as a result on constitutional reform and the planned transition towards federalism and institutional reform. The coup d'état on 1 February

2021, after the NLD again won the November 2020 elections by a landslide, constituted a setback, though it allowed the emergence of a stronger resistance movement against the armed forces.

Chapter 14, by Khemthong Tonsakulrungruang, argues that Thailand has suffered from a phenomenon known as ‘abusive constitutionalism’, where a constitution not only does not produce vibrant democracy, but rather, we see constitutional change employed by an authoritarian leader to entrench his rule and undermine democracy. This chapter traces Thailand’s rapid decay from 2014 to 2020 where a military junta ordered the drafting of the 2017 Constitution and conditioned its electoral victory. However, this chapter argues that the junta could not act alone. A network of anti-democratic elites, namely royalists, the military, the judiciary, and business conglomerates are responsible. They are bound by the political, economic, and most importantly ideological ties of ‘Thai-style democracy’, which places nationalism, royalism, and moralism over democratic values such as rights and liberties, a free and fair election, and the supremacy of the constitution. Tonsakulrungruang explores how the anti-democratic network develops such a concept and discusses the impact of abusive constitutionalism.

In the final case study, Wilson Tay Tze Vern examines the significance of Malaysia’s ‘regime change’ in the general election of 2018, and its tumultuous aftermath. He contextualizes the ‘regime change event’ within the ethnocentric landscape of Malaysian politics, setting out the prelude to the landmark events of 2018. He also explains why the driving forces behind the watershed moment of 2018 were able to make only limited reforms at best, and ultimately lost their grasp on power altogether. Nonetheless, his analysis sounds a note of hope, arguing that despite the appearance of the ‘old guard’ having returned to power, the Malaysian political landscape has been altered in profound and long-lasting ways which bring Malaysia closer towards genuine multi-party democracy. Constitutional mechanisms for a transition of power at federal level have been successfully tested and developed, marking further steps in the country’s path towards a mature democracy. Most importantly, the political crises that have rocked Malaysia in recent years have served to underscore the resilience of constitutional democracy and institutions in the country. While the practices and principles of constitutional democracy have been severely tested by the political turmoil of 2018-2021 and the concurrent onset of the COVID-19 pandemic in Malaysia, and have held firm, he sees grounds for cautious optimism as we look to the future.

7. Concluding Reflections

Seeing Non-Linear Constitutional Change through New Eyes

Anyone who has come to this book will probably share at least some of our fundamental normative commitments concerning the importance of constitutional democracy (broadly construed) as a form of political order and the importance of better understanding its myriad manifestations across our shared world. They might also share some of our frustrations with the state of the existing global conversation on democracy-building and democratic decay, and might therefore be sympathetic to our intellectual and methodological responses to these frustrations. We are at a moment where not only is momentum building around critiques of how we approach comparative constitutional law and the study of democratisation, but real-world events are challenging us to

confront, and in some cases shred, or at least unbind ourselves from, established theoretical and conceptual assumptions and binaries. We might summarise our aim in this book as exploring the relationship between democracy-building, constitutional endurance, and democratic decay in five central ways: (i) accounting for the onset of democratising events; (ii) accounting for constitutional endurance (also known as institutional resilience); (iii) accounting for the reversal of democratisation (understood here as democratic decay, backsliding, or deconsolidation) or even the breakdown of democracy entirely; (iv) based on i), ii) and iii), reviewing the heuristic model of liberal constitutional democracy that has served constitution-making across the world in the past several decades; (v) questioning assumptions and practices associated with the dominant model that might have contributed to its current precarity; and based on all of the above, offering normative prescriptions and institutional reform options for guarding against backsliding and strengthening resilience.

However, our aim here is not to be definitive or to push an inflexible methodological model or worldview. Rather than presenting ourselves as holding all the answers, we want to be understood as trying to ask unasked questions, to shine a light on understudied contexts, to provide a platform to new voices, and to prompt reflection, responses and engagement from the overlapping scholarly and practitioner communities across the Global South and Global North. We urge our readers to seek us out, to challenge us, and to join us in this project. In this connection, one collection cannot address all of the possible questions that arise concerning democratic consolidation and constitutional endurance in the Global South: key questions for future work include issues such as prevalent corruption, the salience of multi-level governance, the roles played by international actors in democratising events (especially ‘non-paradigmatic’ events), and the salience of constitutional replacement in neighbouring countries, where the literature suggests a ‘contagion’ effect that might be missed in analysis that focuses solely on the domestic arena.⁴⁹

While this collection does not paint a generally rosy picture, it reminds us that broad global narratives such as ‘democratic recession’ can hide a range of positive developments that buck the perceived dominant downward trend, and which may still, over time, bear fruit. Most importantly, we hope that readers come away from this book with a renewed resolve to avoid any temptation to simply label any country contexts as ‘too complicated’, and to view the states here, not as mere ‘reservoirs of raw fact’,⁵⁰ but repositories of insight. While we can never capture the full reality, we can always get a better picture of what trends are dominant, what is the direction of travel, and what lessons we can learn from even unsuccessful democratising events.

A very final point to be made concerns accessibility: it is not sufficient to simply produce knowledge in the English language. Our hope is that this work will also be translated into other languages, especially the languages of the case studies, to reach and be in dialogue with audiences that must remain central in our mental frames: namely, those located in our radically re-oriented centre.

⁴⁹ Kyriacou and López Velásquez, ‘Long-Term Determinants’ (n 34) 432, 435.

⁵⁰ Comaroff and Comaroff, *Theory from the South* (n 7), cited in Hoffmann, ‘Facing South’ (n 9) 55.

Table 1.2 Case Studies: Constitutional Endurance and Replacement⁵¹

Case study	Independence	Constitutions	Articles in current Constitution	Amendments to current Constitution (at Nov. 2022)	Current Constitution drafting/review process
Ethiopia	N/A never colonised (except: Italy 1936-1941)	4 (1994, 1987, 1955, 1931)	106	2	No
Thailand	N/A never colonised	17 (2017, 2014 (int.), 2007, 2006 (int.), 1997, 1991, 1991, 1978, 1977, 1976, 1974, 1972, 1968, 1959, 1952 (rev.), 1949, 1947 (int.), 1946, 1932, 1932)	279	0	No
Myanmar	1948	3 ([2008]-coup 2021, 1974, 1948)	457 (and 5 schedules)	1	No formal process opposition Federal Democracy Charter
Malaysia	1957	1 (1957)	183 (and 13 schedules)	45	No
Sri Lanka	1948	4 (1978, 1972, 1948, 1947-Soulbury)	172 (and 9 schedules)	20	No
The Gambia	1965	3 (1997, 1970, 1965)	319 (and 4 schedules)	9	Drafting ongoing 2 draft constitutions (2019 and 2020)

⁵¹ This information is sourced by the editors from the case-study chapters in this collection and the Constitute Project <<https://www.constituteproject.org/>>.

Maldives	1965	7 (2008, 1997, 1968, 1953, 1942, 1932, 1931)	301 (and 3 schedules)	1	No
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Table 1.3 Case Studies: Political, Systemic and Democratic Change⁵²

Case study	Systemic change	Coups
Ethiopia	monarchy → republic monarchy → one-party system unitary → federal one-party system → multi-party system	1 1974 (3 attempts: 1960; 1989; 2019)
Thailand	absolute monarchy → civilian government civilian government → military government military government → civilian government (multiple cycles)	13 1932, 1933, 1939, 1947, 1951, 1957, 1958, 1971, 1976, 1977, 1991, 2006, 2014, (7 attempts)
Myanmar	colony → independent state civilian government → military government military government → civilian government (multiple cycles)	5 2021, 1988, 1962, 1853, 1837 (1 threatened 1958)
Malaysia	colony → independent state federation (with Malaya, Sabah, Sarawak and Singapore; 1963) → federation (without Singapore; 1965)	0
Sri Lanka	colony → independent state parliamentary → presidential presidential → semi-presidential	0 (1 attempt 1962)
The Gambia	colony → independent state monarchy → republic dictatorship → democratic transition	1 1994 (1 attempt 2014)

⁵² This table was compiled by the editors. The information in this table is sourced from the case-study chapters in this collection, the Colpus dataset (<<https://www.johnjchin.com/colpus>>) and the Cline Center dataset ‘Frequency of Coup Events from 1945 to 2022, by Country’ (<<https://clinecenter.illinois.edu/project/research-themes/democracy-and-development/coup-detat-project/freq-table>>). It may be noted that this table is not intended to be definitive; rather, it is intended to be illustrative of the relative and variable frequency of political change in the case-studies. Coups are coded differently in a variety of datasets and there is often contestation within a state as regards the numbers of coups. In Ethiopia, for instance, the 1974 event can be characterised as a revolution, while the 2019 event in Amhara region was characterised by the federal government as a coup attempt but characterised differently by others. See further, Alem Kebede, ‘Ethiopia: The Role of the Military in the Political Order’ *Oxford Research Encyclopedias: Politics* (published online: 19 November 2020); and ‘Attempted Coup Leaves Ethiopia’s Army Chief and 3 Senior Officials Dead’ Reuters (23 June 2019).

Maldives	absolute monarchy → constitutional monarchy constitutional monarchy → presidential republic presidential republic → constitutional monarchy colony → independent state constitutional monarchy → presidential republic (some features of semi-presidentialism) presidential republic → democratic semi-presidential republic	0
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Table 1.4 Case Studies: Democracy, Rule of Law, and Development Indices⁵³

Case study	Democracy (Freedom House)	Democracy (V-Dem Institute)	Rule of Law (World Justice Project)	Human Development Index (UNDP)	GDP (International Monetary Fund 2020)
Ethiopia	23/100: not free	electoral autocracy	0.39	0.498	96.61bn
Thailand	29/100: not free	closed autocracy	0.50	0.800	500.29bn
Myanmar	9/100: not free	closed autocracy	0.36	0.585	81.26bn
Malaysia	50/100: partly free	electoral autocracy	0.57	0.803	337.28bn
Sri Lanka	55/100: partly free	electoral democracy	0.50	0.782	80.68bn
The Gambia	47/100: partly free	electoral autocracy (marked as possibly belonging in the 'electoral democracy' category)	0.49	0.500	1.83bn
Maldives	40/100: partly free	electoral democracy	N/A	0.747	3.74bn

⁵³ This table was compiled by the editors. Sources: Freedom House, 'Countries and Territories' <<https://freedomhouse.org/countries/freedom-world/scores>> accessed 3 November 2022; V-Dem Institute, *Democracy Report 2022: Autocratization Changing Nature?* (2022) Table 1: 'Regimes of the World, 2010-2021'; World Justice Project Rule of Law Index <<https://worldjusticeproject.org/rule-of-law-index/>>; and World Population Review, 'GDP Ranked by Country 2022' <<https://worldpopulationreview.com/countries/by-gdp>> accessed 3 November 2022.