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Rethinking constitutional reform in the Pacific:
What can we learn from the Indonesian experience?

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Rethinking constitutional reform in the Pacific: What can we learn from the Indonesian experience?

Abstract

There is a distinct difference between proposing new constitutional frameworks and the process of establishing those frameworks. The latter involves forms of renegotiation with varying legacies of the past in any particular setting. This makes transforming proposed reforms into meaningful practice that can sustain over time less than straightforward. In fact, the outcomes of reform processes are often ambiguous mixtures of trade-off and compromise. By anatomizing the constitutional reform process that occurred in Indonesia from 1999-2002, the following paper identifies potential challenges Pacific Island Countries (PICs) face along what are invariably fraught and uncertain paths. Yet, the comparative insight from Indonesia suggests that a gradualist approach to constitution-making that takes advantage of opportunity, timing and momentum can provide a path to accepted constitutional reform.

Keywords: Constitutional Reform; Indonesia; Legacies; Pacific Island Countries

Bio:

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Introduction

Normative ideas of constitutions may help inform what policy makers and politicians are seeking to establish, but these tell us little about how a country ends up with the framework it does. There is a significant difference between proposing a constitutional framework and the process of establishing that framework. Constitutional reform vis-à-vis established socio-political power configurations is not straightforward. A reform process involves a renegotiation with unresolved tensions and varying legacies of the past. Underlying societal conventions, cultural practices, and authoritarian legacies can restrict or predispose specific options. The ways in which this unfolds can produce distinct trade-offs and unexpected patterns of transformation and modification (Carnegie 2012: 71-79). The question is whether or not the re-configurations that take place are sufficient to produce a legitimate competitive regime for the long term.

In the following paper I argue that successful (if it can even be called that) constitutional reform in Pacific Island Countries (PICs) will depend on the ability to translate opportunity, timing and momentum into gradual reform that is accepted and reproduces over time. To help build the argument I draw on a comparative example of constitutional reform that occurred in Indonesia from 1999-2002. The use of the Indonesian case underscores the ways in which a gradualist and incremental approach to reform can translate into a meaningful level of constitutionalism from a troubled past. It also underscores obstacles that PICs may face along what are invariably fraught and uncertain paths.

Cautious Comparison

In countries with authoritarian legacies, one of the key steps in striking different social contracts is constitutional reform. The institutions created in those fundamental laws have important implications for altering a country's political process and the shape of the future accumulation, exercise and maintenance of political power. In the case of Indonesia, after the downfall of Suharto's authoritarian New Order regime in May 1998, the country managed to complete four rounds of constitutional amendments from 1999 and 2002 at sessions of the People's Consultative Assembly (MPR, *Majelis Permusyawaratan Rakyat*) (Carnegie 2010: 112). As a result, the

original 1945 Constitution grew from 37 articles to 73, of which only 11 percent remain unchanged from the original constitution. There were changes to the system of presidential elections and the composition of legislatures. The Supreme Advisory Council was abolished. There was a constitutional mandate to allocate a specified amount from the national budget to education. A Constitutional Court was approved and established. And there was a phased removal of the military's pre-allocated seats in Parliament (Horowitz 2013). In the intervening years, Indonesia has, if not always without difficulty, transitioned from authoritarian rule to a functioning democracy with all its benefits and shortcomings (Carnegie 2013: 64). Despite ongoing challenges, this is not an insignificant achievement especially given the previous decades of authoritarian rule.

Before investigating how and why these developments became reality, and what instruction, if any, they provide for constitutional debates across PICs, a few caveats are probably in order. Firstly, the way Indonesia amended its constitution is not being held up as some sort of ideal of democratic or constitutional reform. Second, the expectation that constitutional reform will inextricably lead to the realization of a more constitutionally democratic state is a false assumption. Third, it is prudent to exercise caution before drawing any definitive conclusions from a cross-regional comparison. I would stress that the insights here are illustrative rather than indicative.

As Benedict Anderson (1991) rightly noted, people who perceive themselves as part of a political community ultimately imagine it. In this respect, the nation is a social construct that rests upon a process of invention and reinvention of traditions. We all know there are fairly significant differences between Indonesia and PICs. Political cultures differ, configurations of politico-business elites and patterns of civil-military relations differ, as do the respective positions within the international system of power and privilege; not to mention the time and context of the reform process. There is little doubt that distinct conditioning factors will affect constitutional reform in the PICs in different ways. They have to renegotiate with their own specific legacies of the past. But with qualifiers in place, highlighting why things ended up the way they did in Indonesia does offer useful insight on the complicated challenges of constitutional rearrangement and possible ways through them.

Getting past the past

From a normative standpoint, Indonesia was not exactly a model of democratic constitution-making. Firstly, there was a tangible lack of strategic planning on how vital components of the process would proceed, i.e. timing, conduct, and proposed outcomes. Secondly, there were high levels of popular distrust and skepticism about the MPR's ability to function as an effective constitution-making body. Thirdly, there was a minimal amount of public participation in the process and the little that did occur was pretty poorly organized. This did not augur well for a positive outcome.

For fear of sounding too pessimistic, it should be noted that the real issues related more to the grip exerted by Indonesia's founding 1945 Constitution. Starting with Sukarno's Guided Democracy in the late 1950s but then particularly under Suharto and his New Order regime, the rhetoric of upholding the constitutional integrity of the fledgling republic and the nationalist project was deployed as a grammar of legitimacy. It was used as a justification to intensify the centralization of authority. This meant that local elites were firmly attached by patronage networks to a hierarchical state power-base in Jakarta (Asshiddiqie 2005; Carnegie 2012: 75).

To elaborate, Suharto set about restructuring the political system and coopting or neutralizing potential opposition within the ruling coalition through a mixture of 'fear and reward' across and between the state bureaucracy, business, and the military. Local elites supported central elites in anticipation of reciprocal benefit and thereby reproduced the configuration of power and authority (Antlov 1995). As Harold Crouch (1979: 578) once noted, "the New Order bore a strong resemblance to the patrimonial model....political competition among the elite did not involve policy, but power and the distribution of spoils."

This excessive centralization of authority eventually descended into a form of sultanism where power and resources were concentrated around Suharto's personal rule (MacIntyre 1991; 2000: 248–273). Suharto's control of this elaborate patronage machine ensured that virtually every important economic and political player, particularly the military, was dependent on some form of state patronage. This reliance on state patronage extended through Golkar across the archipelago with personal favours exchanged between state officials, business interests, and community elites. Suharto sat at the apex of not just a political structure but also "a system akin to business franchising" that allowed him "to bestow privileges on selected firms, so he effectively awarded

franchises to other government officials at lower levels to act in a similar manner” (McLeod 2000: 101). It was an “entrenchment and centralization of authoritarian rule by the military, the appropriation of the state by its officials, and the exclusion of political parties from effective participation in the decision-making process” (Robison 1986: 105). This meant Indonesia had a state “overdeveloped” in relation to an “underdeveloped” class structure.

The New Order can be seen as “a self-perpetuating patronage system from top to bottom, rewarding those who [are] in it and penalizing all those who are excluded” (MacIntyre 1991: 45). Suharto’s regime was such a major socio-economic and political agent that a pattern of economic growth beset by patrimonial rent-seeking and economic inequality took hold. Those who were ‘in’ had little interest or ability to challenge the system but the flip side was that Suharto had to keep the economic benefits coming in. Middle-class beneficiaries saw themselves as ‘in’ and subsequently displayed political ambivalence toward overturning this cozy status quo. They swapped demands against state power for the stability of authoritarian corporatism. In fact, the embrace of the patronage system made them hesitant to sacrifice what they had for political change.

Nonetheless, Suharto’s ‘repressive developmentalism’ relied too heavily on personal cronyism and resource revenues. This reliance trapped the regime within a structure of peripheral capitalism. It meant a type of development yoked to the demands and vagaries of international capital. Indonesia was internally dependent on the export of raw materials but externally dependent upon international markets and overseas finance. It culminated in the eventual erosion of confidence in Indonesia’s economy on world markets. The regime’s tenuous economic credibility along with its bankrupt political legitimacy disintegrated in the wake of the 1997 Asian Financial Crisis.

Is it all about the process?

Given the previous decades of rule, the post-Suharto constitutional amendments were really geared towards preventing a reversion to this sort of authoritarianism, which had consolidated itself within and through the 1945 Constitution from 1959-1998. But many nationalists in Indonesia hold inviolable two key aspects of the republic’s identity, namely the rejection of an Islamic state and the upholding of the state ideology (Pancasila) respectively (Carnegie 2012: 73). For political

gatekeepers of the Republic's inheritance, the prospect of opening the Constitution to change that might jeopardize these twin pillars was and is viewed as non-negotiable. Incumbents and reformers were faced with the tricky and perplexing problem of trying to dismantle the most authoritarian, personalistic and highly centralized structures of Suharto's rule whilst not disturbing these dual pillars.

In this context, the above political dialectic occasioned a process best characterized as uneven and cautious. It was beset with foot-dragging and trade-offs. Having said this, the MPR's decision to take responsibility for constitutional amendment as an 'insider job' rather than 'outsourcing' it to some external body forced parliamentarians to negotiate, compromise and find some form of consensus. In other words, there was a renegotiation conditioned by specific social imaginaries and historical experience. A bit like gravity, you cannot see it but it exerts a pull nonetheless.

Interestingly, rather than pushing through contentious and sweeping reforms, Indonesia's adoption of a "gradual, insider-dominated, elections-first [approach to] constitution making" helped steer it away from potentially damaging polarization and intergroup violence (Horowitz 2013: 262). This may seem counterintuitive but the compromises reached through pragmatic interactions helped smooth the process. What we recognize here in a very Aristotelian way is that political activity is what constitutes stable futures from troubled pasts (Carnegie 2008: 518).

The constitutional amendments enacted post-1998, saw the MPR taking responsibility for reducing its own power. Since 2004, it is no longer the highest governing body in Indonesia but stands on a comparable footing with the DPR (*Dewan Perwakilan Rakyat*, People's Representative Council), the State Audit Board (BPK), the Supreme Court and the Constitutional Court (Ellis 2005: 1-19).

The restructured MPR now consists entirely of popularly elected members of the DPR and DPD (*Dewan Perwakilan Daerah*, Regional Representatives Council) The adoption of a non-majoritarian 'list-PR' electoral system is meant to give greater recognition to Indonesia's diverse socio-cultural and ethnic makeup through representation, i.e. if a party gets say 7 percent of the vote that should translate broadly to 7 percent of the seats in parliament. This design prevents any one party gaining an outright majority and dominance. The increased competition for office, logistically at least, represents a gradual dilution of the system of top-down executive appointments and manipulated assembly votes (Carnegie 2008: 523). Constitutional limitations on the power of the executive also meant the DPR gained more power in the legislative process.

Having said this, whether there is a dramatic change in the new incumbents' representational priorities is harder to gauge.

Since 2004, the president is now directly elected and can only serve one renewable five-year term (Liddle and Mujani 2006: 132-139). There is a qualified majority voting formula in place for presidential elections whereby the president elect must gain over half the total country wide vote in addition to over 20 percent of the vote in half of the Indonesian provinces (Ellis 2005: 1-19). The thinking behind the formula is that it favours moderate candidates who can appeal to different interests and form alliances across party lines and maintain broad support in the legislature and across the country (Liddle and Mujani 2006: 132–139). This is not to say Indonesia's constitutional reform is without issues, far from it. The reality of reform is always far more messy and paradoxical than first assumed.

In Indonesia, although an increase in contestation and competition for office is supposed to improve representation and legitimacy it has been accompanied by new emergent layers of corruption. New provincial political elites still seek to maintain their patronage links with the centre (Carnegie 2009: 524). Similarly, although altering the composition of parliament is meant to eventually lessen regional distrust of central government, in many cases, community interests remain marginalized and relatively subordinated to the interests of local patrons of national parties. Suffice to say, personality and money politics still loom large (Johnson Tan 2006: 88–114).

Reform is a one and a bit steps forward one step back kind of process. Problems and flaws are still apparent. Indonesia continues to struggle with corruption issues, ongoing policy ineffectiveness, judicial problems, institutional frictions, and personality politics but not insignificant reform has eventuated along with a routinization of politics (Carnegie 2012: 77).

It is far from perfect and long on compromise but Indonesia's constitutional reform is not a negative outcome. Given the prospect of authoritarian redux, the most important development in the wider scheme of things is that the new constitutional framework of political contestation is accepted and major political actors submit to that framework. In fact, it is better to gauge these developments by matters of time and degree and against what preceded it. The 'legal state' of Indonesia is now more democratic in form than previously. There is a clearer separation of powers between the executive, legislature and judiciary and human rights protections are now more delineated as norms, if not always in practice. It takes perseverance for function to follow form.

Are there any lessons for the Pacific?

What has all of this got to do with the Pacific? Well, firstly, the Indonesian experience shows us that countries do not emerge with readymade constitutions and a sense of constitutionalism overnight. Constitutional reform does not derive exclusively from a free play of unconstrained choice. The obstacles that militate against reproducing constitutionalism are multiple. Different “imagined de-colonizations” generate distinct tensions over how to define postcolonial identities and oppositional group identities can forge and crystallize in response to the emergence of the modern nation-state and its coercive or exclusionary practices (Carnegie et al 2016: 56). Just introducing generic or imitative articles in a constitution is rarely going to be sufficient to placate these realities.

Secondly, the routinization of constitutionally mandated politics is really more to do with acceptance. In other words, relevant political actors must eventually accept and operate (and consequently be contained) within the constitutional rules of check, balances, contestation and procedure that are being established. Yet, legacies of the past can be resilient and often lead to modified forms of continuation. If a more democratic form of politics is to emerge without reversal then negotiation and compromise are required.

Thirdly, gradual constitutional reform of overly centralized political power structures can assist in reorienting habituated patterns of accumulating and exercising political power. Restructuring existing assemblies or establishing different representative bodies open up symbolic political space and recognition for previously marginalized segments of society. This can lay crucial foundations for the cultivation of more effective representation and a greater degree of democratic legitimacy. It is through efforts to bring about institutional reform that an organizational context exists with the potential to cultivate different behaviour and promote politics. In other words, compositional and processual alterations can provide steps toward improving representation and accountability over time, albeit constrained and by degrees.

Conclusion

As the Indonesian experience shows, constitutional rearrangement vis-à-vis political power is a complex affair. The process of constitutional reform in Indonesia involved gradual renegotiation with varying legacies of the past and followed an unusual path. As such, it seems misplaced to assume that processes of reform will follow or reflect western norms. If the Indonesia experience teaches us anything, it is that constitutional reform does not need to. A country is no less a constitutional democracy if what emerges does not meet a western liberal definition of constitutional democracy. But there is no one-size-fits-all definition, rather many variations.

Yet, merely to state this raises difficult questions of interpretation. There are complex local terrains with multiple conditioning factors to consider and these affect decisions and strategies of reform in different ways. But if we can learn from different perspectives and experiences, we might just improve our chances of coming to grips with the ambiguous relationship between political agency and narratives of history, culture, and identity in the study of constitutional reform.

In fact, ambiguity is to constitutional reform what push is to shove. Generic prescriptions transferred from outside deserve to be treated with caution and an intelligent skepticism. They are not necessarily appropriate for countries with specific patterns of socio-economic arrangements, religious tensions and ethno-cultural cleavages. When countries have different political institutionalization, sociocultural heritage, or economic fundamentals, thinking that they can achieve constitutionalism in a manner that fully conforms to abstract constitutional norms is an unreasonable expectation.

Legacies of the past will no doubt represent unavoidable parts of any prospective constitutional reforms in PICs. Success (if it can even be called that) will depend largely on translating opportunity, timing and momentum into meaningful reform that is accepted by political actors and the people themselves. If they can build and sustain accepted reforms over time and reproduce a constitutional politics themselves, then there is the possibility of shielding the pluralism and variety of their diverse societies from the capricious abuse of executive power and a ‘tyranny of the majority’ conformity. Lastly, we must leave those who find pleasure in passing sweeping censures on whole regions to do so as they like. PICs will live on with or without their approval.

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