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Constitutionalizing conflict: Beyond constituent power—Afterword to the Foreword by Sergio Verdugo

Christine Bell*

This Afterword affirms Verdugo's thesis that the concept of "constituent power" is not helpful to evaluating the legality or legitimacy of constitutional replacement moves, drawing on experience of how constitutional revisions are fashioned to attempt to end violent intrastate conflict. I sketch an alternative approach to that of constituent power reasoning for evaluating the legality and legitimacy of constitutional revisions. This approach involves determining whether the constitutional move seeks to replace the underlying political settlement or not, and if so how, including whether it does so in a way that makes the settlement more democratic and pluralist or less so—recognizing that commitments to democracy and pluralism also require to be reconciled.

1. Introduction

In his Foreword, Sergio Verdugo usefully questions whether the concept of constituent power is helpful to deciding when and how constitutions can be legitimately replaced.[1]

He suggests abandoning the concept. I tend to agree. My own work focuses on contemporary attempts to use peace and transition processes to move to a new constitutional order that will enable conflict to be terminated. These processes tend to bear out Verdugo's thesis, notably his arguments that (i) there is a lack of connection between constituent power as an accurate descriptive account of constitutional beginnings, and the reality of how constitutions are made in practice; (ii) the theory is unable to

* Professor of Constitutional Law and Assistant Principal (Global Justice), University of Edinburgh, Edinburgh, United Kingdom; Executive Director, Peace and Conflict Resolution Evidence Platform (PeaceRep), www.peacerep.org. Email: christine.bell@ed.ac.uk.This article was made possible by the Peace and Conflict Resolution Evidence Platform, which receives funding from the UK Foreign, Commonwealth and Development Office. Nothing in this article reflects the views of the funders, nor have they any responsibility for its content or sought to influence it.

1 Sergio Verdugo, *Is It Time to Abandon the Theory of Constituent Power?*, 21 Int'l J. Const. L. 14 (2023).

support good political or legal decision-making on what is a normatively permissible or impermissible exercise in constitutional change. In this Afterword, I consider how his arguments are reinforced by examining post-conflict exercises in constitutionmaking (Section 2), and sketch out an alternative approach to considering the validity of constituent power, and to deciding on the nature of an attempted constitutional change (Section 3).

2. Constitutionalizing conflict

"Constitutionalizing conflict" involves combining statecraft and constitution-making to address violent conflict. The aim is to reshape political and legal institutions to better manage inter-group conflict, thereby encouraging people to resolve their political differences through institutions rather than violence. The process entails revising the country's political settlement and translating this revision into a written constitution. As Verdugo notes, these revisions occur over time and seldom unfold in a linear way. Instead of a single "we-the-people" moment of creation, constitution-making often advances iteratively through negotiation and brokering.

In conflict settings, new constitutions often originate from peace or transition agreements, which serve as pre-constitutional documents, or even draft constitutions. These agreements aim to outline the essentials of a new political settlement that will later be formalized in a new constitution. The development process often goes through different stages: from more elaborate interim governance arrangements to provisional constitutions, and eventually to "permanent" constitutions.[2] Even so-called "permanent" constitutions are often designed to be explicitly or implicitly temporary to lower the stakes of reaching a permanent settlement. Indeed, it is useful to think of post-conflict constitution-making as involving an almost perpetual process of transition.[3] Therefore, "constitutional unsettlement," to use Walker's terminology,[4] rather than settlement, often marks the inception of a fluid "political unsettlement" that must respond to a series of challenges as regards its terms of inclusion.[5]

Courts engage in constitutional adjudication of the validity of the new order at various points: sometimes in response to appeals from those resisting change who seek to maintain the status quo; sometimes in response to appeals from proponents of change who seek to forestall a regressive move; and sometimes because the court itself is given a position in the peace process, by a peace agreement, to be an arbitrator of change and so part of the mechanism of transition. Some examples illustrate.

In Nepal, a peace-and-democratic-renewal process culminated in a peace agreement that established an elected constituent assembly to draft a new constitution,

[2] *See further* Christine Bell & Kimana Zulueta-Fülscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process* (Feb. 15, 2017), https://peacerep.org/publication/sequencing-peace-agreements-and-constitutions-in-the-political-settlement-process/.

[3] Tania Paffenholz, *Perpetual Peacebuilding: A New Paradigm to Move Beyond the Linearity of Liberal Peacebuilding*, 15 J. Intervention & Statebuilding 367 (2021).

[4] Neil Walker, *Our Constitutional Unsettlement*, 3 Pub. L. 529 (2014).

[5] Christine Bell & Jan Pospisil, *Navigating Inclusion in Transitions from Conflict: The Formalised Political Unsettlement*, 29 J. Int'l Dev. 576 (2017).

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that would reflect the peace agreement principles and underlying bargain set out in the Comprehensive Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist), 2006.[6] However, reaching a final constitution proved very difficult due to strong disagreement over the degree and modality of federalism, making it challenging to achieve consensus across different constituencies. The Supreme Court intervened several times to prevent delays in the constitution-making process. Eventually, the urgency brought on by a major earthquake and the subsequent need for recovery prompted compromise, leading to the adoption of a new Constitution in April 2015. However, this compromise leaned toward a relatively centralized vision of the state, that was somewhat at odds with earlier peace agreement commitments to federalism and the inclusion of various marginalized groups. By January 2016, protests led by the Madheshi community, which advocated for a more pluralist framework—including new provincial boundaries, proportionate representation, and a population-based allocation of seats in the legislature—were partially addressed in a new constitutional amendment. Although the amendment was rejected by the Madheshis as inadequate, it was put in place. While a form of constitutional settlement has been reached, ongoing debates over amendments indicate that discussions on the terms of inclusion are far from over—both constitution and underlying political settlement remain unsettled.

In Kenya, a failed constitution-making process in 2005 led to a post-election crisis in 2007–08, marked by widespread political and ethnic violence. A power-sharing agreement was brokered to pave the way for a second constitution-making effort. The resulting 2010 Constitution institutionalized many of the reforms aimed at changing the political incentives that had fueled the violence. However, the 2017 election process was again disputed, and for the first time the Supreme Court annulled the results. A second election was held but was boycotted by the opposition. Under pressure and support from civic peace initiatives, the President and the Opposition leader subsequently agreed to a further reform process. The Building Bridges for a New Kenya Initiative (BBI) that emerged established a fourteen-member taskforce, representing diverse ethnic groups and political camps, to engage in nationwide consultations. The resulting report recommended comprehensive constitutional reforms and civic proposals.[7] However, the High Court halted a subsequent constitutional amendment process for violating the Constitution,[8] in a ruling that was largely affirmed by the Court of Appeal—on grounds that the amendments violated the Kenyan Constitution's basic structure (put another way, that they were an impermissible exercise of constituent power, rather than

[6] Comprehensive Peace Accord between Nepal Government and the Communist Party of Nepal (Maoist), signed Nov. 22, 2006, www.peaceagreements.org/viewmasterdocument/333.

[7] Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (Oct. 2020), https://nation.africa/resource/blob/2486392/88e5205129241296af3755acd99809c1/bbi-report-data.pdf.

[8] David Ndii & Ors. v. Attorney General & Ors., Kenya High Court, 2021, http://kenyalaw.org/caselaw/cases/view/207503/.

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amendment).[9] The Supreme Court on appeal rejected the basic structure argument, but also found the amendments impermissible in terms of a simpler reading of the amendment power of the Constitution.[10] Playing out in the different High Court / Court of Appeal versus Supreme Court routes to finding the amendments violated the constitution were considerations of the appropriate role of the President, the Parliament and the public in constitutional amendment process, but also considerations of the appropriate role of the Courts themselves—the Supreme Court saw a danger in the High Court's move to elucidate a basic structure doctrine, as itself a possible form of unconstitutional amendment. As Murray writes, Kenya offers "an account [neither] of constitutional moments nor, really, of constitutional settlements but of a form of ongoing constitutional bargaining, characterized by a mix of idealism and tenacity, resistance, opportunism, and negotiation, and influenced by both domestic and international interests."[11] In other words, the interplay between political settlement bargaining, constitution-making, and the various court decisions is best understood as continuous processes of statecraft, involving elite agreement, popular deliberation and contestation, and judicial rebalancing of the relationship between the two.

Nepal and Kenya demonstrate that the simple binary distinctions of "constitution-making" versus "constitutional amending," or "interpreting the constitution" versus "gutting the constitution," do not accurately capture the complex, evolving process of statecraft. In this ongoing process, constitutional moves and counter-moves, as well as associated court judgments, are interlinked. Incremental constitution-making, as part of a peace or transition process, is a form of continual deal-making in an experiment of attempting to establish political institutions and laws as enduring mechanisms of conflict resolution, capable of replacing armed violence as a mechanism of achieving political goals.

Beyond the context of conflict, the historical accounts of constitutional development in the Western states of Lerner and Loughlin usefully illustrate that constitutional iteration and statecraft have been central to how forms of private power were made public or "public-ized" gradually over time even in societies we now regard as peaceful.[12] As Verdugo argues, narratives of constituent power often serve more as post-hoc justifications or heuristic devices, rather than as accurate descriptions of the constitution-making process in practice. The language of constituent power masks the reality that turning power-based authority into public authority is a lengthy, nuanced process with moments of both progress and regression, as a process of stitching together agreement, watching it unravel, and reworking it again.

The examples from Nepal and Kenya also illustrate another point made by Verdugo: namely that the concept of constituent power does not necessarily help

[9] Independent Electoral & Boundaries Comm'n v. Daiv Ndii & Ors, [2021] KECA 363 (KLR), http://kenyalaw.org/caselaw/cases/view/217967.

[10] Attorney-General & Ors. v. Ndii & Ors., [2022] KESC 8 (KLR), http://kenyalaw.org/caselaw/cases/view/231325/.

[11] Christina Murray, *Making and Remaking Kenya's Constitution*, *in* Constitution Makers on Constitution Making: New Cases 37, 67 (Tom Ginsburg & Sumit Bisraya eds., 2022).

[12] Hanna Lerner, Making Constitutions in Deeply Divided Societies (2011); Martin Loughlin, Foundations of Public Law (2010).

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courts resolve questions about the constitutional legitimacy of a move to replace a constitution. In deeply divided societies, the question of continuity with the previous constitutional order itself tends to be a highly politically contested matter that requires negotiation. Narratives that assert past constitutional legitimacy are often countered by claims of historical exclusion of particular groups and constitutional illegitimacy, because these arguments are core to the conflict. These narratives are inherently polarized, and overcoming that polarization is essential to any effort to negotiate a more peaceful future. Decisions over whether to revise or replace a constitution signal which account of its legitimacy is being endorsed. Different parties to a new political settlement with different positions on the legitimacy of the past order will need to craft a compromise on the process of constitutional change with respect to the pre-existing constitutional order, as much as on the map of the future it provides. In South Africa, for example, what was essentially a new political settlement and constitution was formally introduced as an amendment to the apartheid-era constitution. This strategy minimized the risk of elements of the white population challenging the new constitution amid violent unrest. Paradoxically, affirming continuity with the old order enabled the new constitutional settlement by preventing legal challenge from potential spoilers to the peace process. This approach was reached through mediation rather than by debating whether the constitution was truly being amended or replaced.

Process innovation also characterized the plan for how the interim constitution would lead to a post-election, post-apartheid "final constitution." The drafting was to honor Constitutional Principles embodied in the interim document with a one-off "certification" adjudication of whether it had done so, by the newly reshaped Constitutional Court. This arrangement came from mediated compromises aiming to bridge the gap between the African National Congress (ANC) stance of "no constitution until after elections" and the then South African Government / National Party position of "no point in negotiating if it can all be re-written post-election." An initial rejection of the text by the Constitutional Court led to amendments to the "final" constitution before it was finally certified. This example highlights the broader truth that courts are both legal and political actors in constitutional development. Sometimes peace process design even allocates them a specific role in managing the transition, as in South Africa but also Nepal.

3. Reconstructing an alternative approach

If the concept of constituent power is rejected as useful, is there an alternative way to assess when and how a constitution can be radically revised in ways that are legitimate politically and legally? I suggest there is, and I briefly outline key elements of an alternative approach grounded in a deeper understanding of the relationship between political settlement and constitutional settlement.

Political settlement is a term that has emerged in development literature, with a range of meanings, to capture the formal and informal ways that power is held and exercised, and in particular to describe elite agreements and their relationship to

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political and legal institutions.[13] Lawyers often use the term "political constitutionalism" to capture the reality that the formal power-maps of constitutions sit alongside the more political understandings of how power is held and exercised. However, the term "political settlement" better captures the idea that invisible power structures and elite deals, as much as specified constitutional provision, link political actors and institutions. The constitutional settlement, then, is that part of the political settlement articulated in relevant legal text.

Table 1 illustrates the ways in which political settlement and constitutional settlement can be changed independently and in conjunction, and offers examples of which particular forms of change can change one or both.

As Table 1 indicates, sometimes both the political and constitutional settlements change, such as in a revolution. Conversely, neither may change with the status quo persisting, although constitutional interpretation and permitted amendment may subtly adjust both settlements over time, with the constitution and the political settlement maintaining a dialectical, mutually constitutive relationship.

Sometimes the political settlement shifts but the constitution remains unchanged. This relationship occurs when those effecting a wholesale revision of the political settlement have an incentive to hide it by maintaining the existing constitutional framework. A prime example is coup d'état, where the orchestrators often aim to preserve the constitution and even the constitutional court, using these as markers of their legitimacy as rulers. This happens even though the political settlement, specifically the relationship between institutions and elites, has been completely upended by the power grab. Coup-makers often seek to maintain the constitution because it offers a basis for their legitimacy and the argument that the coup is itself merely an attempt to restore order to enable a return to the constitutional order.

It is also possible for a constitution to undergo radical changes while the political settlement—meaning the relationship among elites and between them and the state institutions, as well as the basic framework of the state—remains largely unchanged (see Table 1). For example, in Ireland in 1937, a kind of constitutional "repatriation" introduced a new constitution that amended the constitutional structure as part of establishing a fully post-colonial "national" ethos, including new forms of constitutional rights. However, this did not fundamentally alter the political settlement in

Table 1. Constitutional change versus political settlement change

	POLITICAL SETTLEMENT CHANGES	**POLITICAL SETTLEMENT STAYS THE SAME**
CONSTITUTIONAL SETTLEMENT CHANGES	Revolution	Constitutional renewal or "nationalization"
CONSTITUTIONAL SETTLEMENT STAYS THE SAME	Coup d'état "tweaks," radical amendment, or reinterpretation	Status quo

[13] *See* Debate, *Special Section on Political Settlements*, 117 Afr. Aff. 636 (2018).

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terms of the nature of the state or the elites who could access political power through the state's institutions. Similarly, the 1982 amendment in Canada had largely the same objective of providing a fully post-colonial articulation of the nation, captured in a new constitutional framework. It created a more autochthonous form of constitution, but tweaked, rather than fundamentally overhauled, the country's elite power dynamics.

4. What determines "constitutional legitimacy"?

The concept of constituent power aims to identify when a radical change to the political system is underway, in order to evaluate its constitutional legitimacy. However, I agree with Verdugo that the focus is misplaced. The crucial question is not whether the constitution is being altered within its existing framework, but whether the *political settlement* is being changed, and if so, whether this change aims for greater inclusion and democracy or leans toward exclusion and authoritarianism. To phrase it using the language of Douglass C. North and colleagues in the field of political settlement: does the constitutional move strive for a more "open access order," a rules-based project that envisions an inclusive, participatory state? Or does it aim to create a "closed access order," concentrating private power in the hands of a few?[14]

These questions are not merely political but are also normative, with implications for constitutional doctrine. Moves to make power more public are constitutionally legitimate in a normative sense, while those that privatize power are not.

When courts face a revision to the political settlement, whether framed as internal or external to the constitution, they have three options. First, they can sidestep issuing a judgment. Second, they can deem the change procedurally legitimate or illegitimate under the terms of the existing constitution, without engaging substance. Third, they can invoke the deep magic of the constitution's fundamental principles to connect substance to process and either declare a procedurally proper amendment to be illegitimate and abusive or, conversely, decide that a radical reinterpretation is actually enabled by the true meaning of the constitution without formal amendment. However, assessing the legitimacy of the court's decision requires both a political evaluation of the changes to the political settlement and a normative assessment of whether these changes advance or hinder the state's terms of inclusion and participation.

For example, in the 1970s, Sri Lanka moved to repeal and replace the independence constitution granted by the British, which included protections for the Tamil minority. While characterized as repatriation, the move had a dual purpose: it redefined the concept of the "nation" not just in ways that broke from the colonial past but also in a way that was less accommodating of Tamils and dismantled their minority rights. When a Tamil activist tried to obtain an injunction against the repeal of the Constitution from the Supreme Court, the Court essentially ruled that the new constitution would either be lawfully created, meaning an injunction invoking the provisions of the old

[14] On open and closed access orders, see Douglass C. North, John Joseph Wallis, & Barry R. Weingast, Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History (2009).

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Constitution would not be possible, or unlawfully created, making the injunction unnecessary. The Court reasoned that litigation before the constitutional amendment was "too soon," since it aimed to challenge something that was not yet actualized.[15] It also noted that litigation post adoption of the new constitution would be futile as it would need to rely on an independence Constitution that was by that point defunct.

The concept of "a properly constituted new constitution"—essentially a notion of "legitimate constituent power"—prevented any legal challenge and enabled a shift away from pluralism toward a more privatized concept of "the nation" in the name of repatriation. Curtailing law's role as an avenue of interrogation of the exclusions of the proposed constitution set the stage for an ongoing cycle of violent conflict and struggles against authoritarianism. Crucially, as regards the conflict that unfolded, the decision meant that the Court effectively removed itself from any role in setting democratic or inclusionary limits on constitutional change, also eliminating a potential non-violent means of addressing the exclusionary dynamics of the new constitution. The closing of political and legal avenues for peaceful negotiation of group inclusion often leads to violence, although this should not be taken as a justification.

The point of the example for our purposes is that the key question of the new constitution's legitimacy cannot be resolved by considering whether it was a proper exercise of constituent power, and the court got it "right" or "wrong." It is resolved by a political judgment over whether an attempt was being made to create a more democratic, pluralistic, or privatized political settlement. The question of whether the court "got it right," then, has to be decided by deciding whether it responded in way that advanced or diminished the constitution as a tool of public law.

Are all questions of the validity of what is understood as an exercise of constituent power therefore merely a matter of political judgment? I would argue they are not. Law plays a vital role in maintaining a space where politics can thrive to provide an alternative to violence. It does so through the constraint of constitutionalism and public law itself. This is somewhat analogous to the Lon Fuller argument that law has an "internal morality" because it must comply with basic rule-of-law principles if it is to operate reconizably as law at all. Public law is the law that makes authority public rather than private, designed to ensure that power is used to benefit all rather than just a select few. Any political assessment of the legitimacy of an assertion of a new constitutional order must consider not just the democratic implications of the move, including important issues such as whether it empowers an overly strong executive, but also its implications for ensuring pluralism, particularly by protecting key groups that may be excluded in ways that elections cannot address. If the move aims to privatize power to one group, it will undermine the constitution as constitutional, because it will advance a project of private power.

Patrick Glen's broad historical and comparative work on cosmopolitan states provides a full and robust account of how arguments over what a constitution is and does, as a public law instrument, play into political argument over who the

[15] *See* C. Suntharalingam and The Attorney General & Ors, S.C. 1 of 1972-Application for Injunction), 76 NLR 126.

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constitution serves.[16] He introduces the concepts of "multivalent cosmopolitan constitutionalism" and "bivalent nationalist constitutionalism." These concepts align closely with the idea of whether the constitution is inherently understood to be open-textured and committed to a pluralistic conception of the state, or understood to assert a singular, exclusive concept of "the nation," catering to a dominant group or vision. Interestingly, his historical review shows empirically that every move to eliminate cosmopolitan constitutionalism runs up against political and legal reactions that invoke the concept of constitutionalism—often successfully—to revive pluralist claims. He suggests that it is difficult to fully insulate an attempt to use a constitution to privatize power, from challenge rooted in the idea of constitutionalism itself.

Returning to deeply divided societies with clear conflict arenas, the shift away from or toward minority inclusion is often a turning point in whether polarization and violence will gain traction. However, moves away from inclusion also motivate non-violent civic reform efforts aimed at connecting democracy and pluralism in an attempt to bridge social divisions and build more peaceful futures. These efforts seek to rejuvenate the capacity of institutions to provide mechanisms of ongoing non-violent conflict resolution. Often, the use of violence by state and non-state actors to achieve other ends merely results in a lengthy detour back to this non-violent project.

5. Conclusion

In conclusion, like Verdugo, I find little to be resolved about a constitution's status or legitimacy by asking the question "is this a proper exercise of constituent power?" The concept is perhaps useful semantically to distinguish the act of constitution-making from the act of applying the constitution. Instinctively, it seems useful to be able to distinguish between exercising power to write a constitution and exercising a power under the constitution, despite the in-between gray zones where it is difficult to decide which is which. It would be possible of course to do this without the term "constituent power"—we could simply refer to "working within the constitutional framework to evolve it," and "working outwith (as in 'outside of') the constitutional framework to replace it," and acknowledge that there may be fact-patterns that cause debate as to which is which. Perhaps omitting the phrase "constituent power" would better signal that the use of the word "power" does not resolve the legal or political questions that arise.

[16] H. Patrick Glen, The Cosmopolitan State (2013).

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