Chapter 4

THE CODIFICATION OF CONVENTIONS AND CONSTITUTIONAL CRISES IN SAMOA AND NEPAL

W. Elliot Bulmer

INTRODUCTION

Several recent constitutional crises across the Asia-Pacific region have centred upon the rules, processes and procedures of government formation, government removal, and the summoning, prorogation and dissolution of parliament. This chapter concentrates on the constitutional crises in Samoa and Nepal in 2021; however, similar crises have been ongoing in Malaysia since 2020 and have occurred in Pakistan in 2022. In all these countries, democratic institutions have been brought to a standstill, apolitical heads of state have been brought into potential political controversy, the legitimacy of prime ministers has been challenged, and apex courts have had to solve political disputes—all because these mechanisms failed in some way. Despite this, they did not fail catastrophically; a combination of written rules and judicial enforcement provided a way out.

The rest of the chapter proceeds as follows: Section 4.1 provides a short background on the nature of these rules, their development as unwritten 'conventions' and their subsequent codification in written constitutions. Sections 4.2 and 4.3 are narrative summaries of the Samoan and Nepali cases. Section 4.4 concludes with some brief 'lessons learned' and general recommendations, for the benefit of the constitution-building community, on the codification of conventions in parliamentary democracies.

4.1. **PARLIAMENTARY CONVENTIONS: ORIGINS, DEVELOPMENT AND CODIFICATION**

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Parliamentary democracy was a British discovery, not an invention. Its features were discerned rather than designed, as they emerged gradually in a process that began in the mid-18th century and continued until the early 20th century. Although there were some important statutory milestones along that road, from the Great Reform Act of 1832 to the Parliament Act of 1911, much of the change occurred as a result of decisions made by political actors, which set precedents that then congealed into 'conventions'.

Conventions are the 'unwritten rules' of parliamentarism. They are not enforceable in any court, but are generally accepted as being morally and politically binding. The most important conventions had been recognized by the mid-Victorian era, in the writings of John Stuart Mill (1861) and Walter Bagehot (1873). Despite conventions being unwritten, some commentaries on the conventions achieved widespread acceptance and have become authoritative guides. The most enduring and influential was that offered by A. V. Dicey in *Introduction to the Study of the Law of the Constitution* (1915).[1]

Crucially, Dicey recognized that the conventions are not haphazard. There is an underlying logic that makes sense of the conventions, legitimates them and helps us in interpreting and applying them. This logic is that the government wins office, and continues in office, only on the basis of parliamentary 'confidence'. A government that lacks such confidence cannot continue. Either the government must go

1 Among the most important conventions, Dicey cited: 1. The party who for the time being command a majority in the House of Commons, have (in general) a right to have their leaders placed in office. 2. The most influential of these leaders ought (generally speaking) to be the premier, or head of the cabinet. 3. A ministry which is outvoted in the House of Commons is in many cases bound to retire from office. 4. A cabinet, when outvoted on any vital question, may appeal once to the country by means of a dissolution. 5. If an appeal to the electors goes against the ministry, they are bound to retire from office and have no right to dissolve parliament a second time. 6. The cabinet are responsible to parliament as a body, for the general conduct of affairs. 7. The action of any ministry would be highly unconstitutional if it should involve the proclamation of war, or the making of peace, in defiance of the wishes of the House. 8. If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought, at some point, not definitely fixed, to give way. 9. Parliament ought to be summoned for the despatch of business at least once in every year. 10. If a sudden emergency arises, e.g. through the outbreak of an insurrection, or an invasion by a foreign power, the ministry ought, if they require additional authority, at once to have parliament convened and obtain any powers which they may need for the protection of the country.

(by resignation) or parliament must go (by dissolution and a general election).[2]

With decolonization in the mid-20th century, parliamentary democracy based on British patterns and practices was extended to many newly independent countries. Where the conventions were felt to be insufficiently embedded to operate effectively on an unwritten basis, attempts were made to codify them, incorporating them into the text of new written constitutions (de Smith 1964; Twomey 2018).

To codify, however, is to choose. When conventions were doubtful or uncertain, constitution-makers had to make clear choices about which of several possible interpretations of the rules, or subtle differences of practice, to recognize. Since different countries adopted their constitutions at different times, under the influence of different drafters and advisors, the result was a series of variations on a theme. Sometimes small deviations from British practice were deliberately introduced, to reflect national needs, preferences or political realities. As S. A. de Smith notes:

> It cannot be said that any of these rules exactly reproduces the relevant British conventions, if only because nobody can be sure what the British conventions on the matter are; but most of them are consonant with the principles of the British Constitution, and some of them would be strong candidates for inclusion in a written Constitution for Britain.
> (de Smith 1964: 95)

These variations are particularly evident in the rules concerning: (a) government formation, (b) government removal and (c) the

2 As Dicey (1915) put it, 'They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State—the majority of the electors or (to use popular though not quite accurate language) the nation.'

summoning, prorogation and dissolution of parliament.[3] Since these rules are all intimately interconnected, it is vital, if parliamentary government is to operate smoothly and constitutional crises are to be avoided, that they are clear, legitimate and work coherently together.

There was, however, one important change from British practice. Whereas the interpretation and enforcement of unwritten conventions had depended on non-judicial actors, such as the Queen's private secretary, the constitutional codification of these rules brought the courts into play as arbiters. As will be seen in the two case studies below, this has had profound implications.[4]

4.2. **SAMOA**

Since 1990, Samoa has had universal suffrage, but still only *matai* can be elected.

Samoa became independent in 1962 and adopted a Westminster model constitution with the important modification that, out of deference to Samoan custom, only the *matai*, or chiefs, could vote or hold office. Since 1990, Samoa has had universal suffrage, but still only *matai* can be elected. Although Samoa was initially a non-party state, the centre-right Human Rights Protection Party (HRPP), formed in 1979, quickly established itself as a hegemonic party of government. It completely dominated Samoan politics from 1982 until 2021. On the eve of the 2021 general election, the HRPP held 48 of the 50 seats in the unicameral Legislative Assembly.

Division, however, was sparked by a package of three bills—the Constitution Amendment Bill 2020, the Land and Titles Bill 2020 and the Judicature Bill 2020. The purpose of these bills was to prevent

3 For example, in some countries, the government automatically ceases to hold office when a new parliament meets after a general election (Constitution of Samoa, 1962, article 31(1)); in others, the government may be dismissed, before the parliament meets, if it appears that the government will not have majority support in the new parliament (Constitution of Barbados, 1966, section 66(1)). In some countries, the defeat of the government in a vote of no confidence automatically leads to a dissolution of parliament and a general election (Constitution of Jamaica, 1962, section 64(5)); in others, the defeat of the government in a vote of no confidence opens a window of opportunity—normally a few days—during which the government must either resign or request a dissolution of parliament (Constitution of Malta, 1964, article 76(5)(a)).

4 A landmark case was *Adegbenro v Akintola* [1963] 3 All E.R. 544, which concerned the question of whether the chief minister of a state in Nigeria could be deemed to have lost the confidence of the legislature only following a formal vote, or whether a letter to the governor signed by a majority of MPs was sufficient. The Judicial Committee of the Privy Council held that codified rules (requiring a vote in the House) replaced any incompatible unwritten convention (in this case, that the loss of confidence could be expressed in other ways).

appeals, even on constitutional grounds, from the Land and Titles Court to the Supreme Court and Court of Appeal. Instead, these bills would constitutionally separate Samoan law into two spheres—a sphere derived from common law, and a sphere derived from Samoan custom and tradition. The latter would be applied in the Land and Titles Courts by experts in Samoan customary law. A new Land and Titles High Court would have exclusive appellate jurisdiction over all matters concerning Samoan customary law. There were concerns that this would increase the power of the *matai* and undermine human rights and the rule of law (Library of Congress 2021). This, together with other concerns about corruption, provoked opposition within the HRPP. The HRPP deputy prime minister, Afioga Fiamē Naomi Mataʻafa, resigned from the party in protest against these bills and became the leader of a new opposition party known as FAST (Faʻatuatua i le Atua Samoa ua Tasi, 'Samoa United in Faith').

The emergence of FAST and the split in the HRPP made the 2021 general election, held on 9 April, arguably the first genuinely competitive election in Samoan history. The result, initially, was a tie between HRPP and FAST, with each party winning 25 seats. One seat was won by an independent. As fewer than 10 per cent of the seats were won by women, the Electoral Commission awarded an additional seat to the female candidate with the next highest number of votes (under article 44(1B) of the Constitution, which establishes a 10 per cent gender quota). The next-ranking female candidate was from HRPP. The independent member then announced that he would support FAST, again resulting in a tie, with HRPP and FAST each having 26 of the 52 seats. This was, however, soon reversed, as the election of the additional female member was successfully challenged by FAST in the Supreme Court (Stuff 2021a), giving FAST a thin majority of 26 out of 51 seats.

Despite this, the incumbent HRPP prime minister refused to resign. He instead requested the head of state to dissolve parliament. This would be against established Westminster model conventions, which generally prohibit a prime minister whose party has been defeated in a general election from seeking an immediate dissolution so as to get another chance of victory. Nevertheless, the requested dissolution was granted on the basis of article 63(2) of the Samoan

Constitution.[5] FAST opposed the dissolution, arguing that a large number of election petitions had been filed, placing the eventual composition of the Legislative Assembly in doubt, and that they should wait until those petitions had been dealt with and the new Legislative Assembly had met. Moreover, the office of prime minister was not vacant, as the constitutional provision required, since the prime minister had not yet resigned, nor had his term of office expired (which it would do, under article 33(1), seven days after the first meeting of the Legislative Assembly following the general election). Samoa's Supreme Court held, in *FAST & Ors v Attorney General & Ors* [2021], that the dissolution was unconstitutional (Samoa Global News 2021), since article 63(2) of the Samoan Constitution allows for a dissolution in circumstances where a government cannot be formed, but it does not allow the incumbent government to dissolve the Legislative Assembly, following a general election, before it has even met (para. 80 of the judgment).

The Samoan Constitution establishes clear deadlines for the first meeting of the Legislative Assembly after a general election (45 days, article 52). On Friday, 21 May, with that deadline approaching, the head of state, Tuimalealiifano Va'aleto'a Eti Sualauvi II, issued the proclamation for parliament to meet on the following Monday, but this decision was almost immediately reversed by another proclamation suspending the Legislative Assembly (Jackson 2021). FAST challenged the lawfulness of the suspension, and the Supreme Court upheld that challenge (Stuff 2021b). Accordingly, the Legislative Assembly met on Monday, 24 May, only for members to find that the outgoing HRPP-aligned speaker had defied the court order and that the doors of the parliament building had been locked. In a bizarre ceremony, members of the new government were sworn in in a tent outside of parliament (BBC 2021).

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Rejecting the constitutionality of this move, the incumbent prime minister remained de facto in office in a caretaker capacity. The Court of Appeal finally settled the matter on 23 July, declaring that the swearing-in ceremony of 24 May was lawful, that the

5 Article 63(2): 'If, at any time, the office of Prime Minister is vacant, the Head of State shall, by notice published in the Samoa Gazette, dissolve the Legislative Assembly as soon as he is satisfied, acting in his or her discretion, that a reasonable period has elapsed since that office was last vacated and that there is no Member of Parliament likely to command the confidence of a majority of the Members.'

FAST government under the leadership of Prime Minister Mata'afa (incidentally, the first female prime minister in Samoa's history) was the lawful government, and that the outgoing government had been unconstitutionally occupying office for the previous two months (Lanuola Tusani T-Ah Tong 2021; *Attorney General v Latu* [2021] WSCA 6 (23 July 2021)). The position of the FAST government was eventually consolidated after disposing of the various electoral petitions. These resulted in six concurrent by-elections being held in November 2021, which gave FAST a clear majority (31 seats) over HRPP (20 seats).

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In the end, Samoa had a democratic change of government. The courts acted to uphold the constitutional rules: the early dissolution sought by the outgoing government was prevented, the new Legislative Assembly met on time (albeit in a tent, not in the parliament buildings) and a new prime minister was appointed—even if it took two months, and the decision of the Court of Appeal, to clearly establish that this was a lawful and constitutional course of action. Resolution of the crisis was made easier by clear constitutional rules (including specific deadlines for both the meeting of the Legislative Assembly and the resignation of the government following the meeting of the new Legislative Assembly) and a court system willing and able to enforce those rules.

It is also notable, however, that two further constitutional weaknesses contributed to cause or prolong the crisis. The first was the weakness of the electoral system, with uncertainty over the rules on the election of additional female members to meet the gender quota and a high number of petitions for electoral irregularities both contributing to uncertainty about which party had really won the election. The second was the perception that both the head of state and the speaker were HRPP loyalists. The mechanism for electing these officers favours the majority party: there is no rule designed to encourage bipartisanship or impartiality in these appointments. Within the confines of parliamentary democracy, a more impartial

head of state might have pushed back against the prime minister's advice first to dissolve parliament and then to hinder it from meeting.[6]

4.3. **NEPAL**

Nepal is not a member of the Commonwealth and has never been directly under British rule. The influence of the 'Westminster model' comes indirectly from other countries in the region, notably India. Nevertheless, Nepal does 'retain a sufficiently close connection to the Westminster system' and 'experiences remain relevant and instructive, or at least provide interesting comparisons' (Twomey 2018: 2).

Nepal's 2015 Constitution did not seek merely to codify traditional conventions, but to amend them. In order to deliver a more stable form of parliamentarism, it limited the discretionary powers of both the prime minister and the head of state over the processes of government formation, government removal, and the prorogation and dissolution of parliament.

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These rules were tested twice in 2021. The difficulty arose from a split in the governing Communist Party of Nepal (CPN), between the Unified Marxist Leninist (UML) and the Maoist Centre (MC) factions. Although they had a comfortable majority of 174 (of 275) seats, Prime Minister K. P. Sharma Oli (UML) faced internal opposition from Pushpa Kamal Dahal (MC). By November 2019, Dahal had become strongly critical of Oli's leadership, distancing himself from the prime minister and causing the government's majority to crumble (Pradhan 2019). Faced with that internal opposition and fearing a vote of no confidence, Oli advised the president to dissolve parliament in December 2020 and the president acted in accordance with that request (Adhikari and Masih 2020).

6 According to Anne Twomey (2018: 694), the head of state has various options when faced with advice from responsible ministers that the head of state regards as unlawful or unconstitutional. These include: (a) querying the advice, seeking a formal legal opinion on the advice (e.g. from the attorney-general), to refer it to the court where the Constitution allows this (2018: 695), or to reject the advice or refuse the request; the latter is normally the last resort. Twomey also argues (2018: 699) that where the impugned action is 'plainly in breach of the constitution without the need for any court to declare it so', the head of state would be entitled to refuse to act.

However, the dissolution was successfully challenged in the Supreme Court. The Supreme Court held (Constitutional Bench, Writ N. 077-WC-0028) that there is no inherent right to request and obtain a dissolution based upon the conventional practice of any other parliamentary system (Malagodi 2021). The rules of the Constitution of Nepal apply, not the traditional conventional practice of Westminster. If the prime minister wishes to obtain a lawful dissolution, it must be done in accordance with the constitutional provisions and not otherwise. The 'dissolved' parliament was therefore reinstated in February 2021 (Malagodi 2021).

This judicial resolution of the first dissolution crisis did not, however, resolve the underlying political impasse. On 10 May 2021, Oli was defeated in a vote of no confidence (Sharma 2021). Unlike some other parliamentary systems, the Constitution of Nepal does not allow a prime minister who has lost the confidence of the house to 'appeal to the people' by means of a dissolution; he or she automatically ceases to hold office (Constitution of Nepal, article 77(1)(b)), but continues in a caretaker capacity until a successor is appointed.

The prime minister, however, again advised the president to dissolve parliament, and the president acted in accordance with this request. The supposed grounds of the dissolution were slightly different from the previous occasion: rather than dissolving to avoid an imminent vote of no confidence, the prime minister now insisted that since no party had a majority, and a government therefore could not be formed, a dissolution was permissible under article 76 of the Constitution.

The Supreme Court, following the previous judgment from February 2013, reversed the dissolution. Article 76 of the Constitution offers very limited scope for early dissolution. There is no possibility for a government to advise a dissolution in order to seek a new mandate from the people or to bolster its support. Early dissolution is always and only a by-product of a failed government formation process. The government formation process is complicated and convoluted, with many steps, all of which have to be exhausted before a premature dissolution can take place (article 76). In trying to avoid those steps—crucially by avoiding votes on the floor of the house, and instead

relying on assumed support by counting the members of each party, or by taking into account statements from members declaring whom they would support—the court found that the prime minister acted contrary to the intentions of the Constitution.

4.4. **CONCLUSION**

There is a tendency, in constitution-building or constitutional reform processes, for people to focus on high-profile contentious issues, whether these are substantive issues such as religion–state relations or distributional matters such as federalism. In general, much less attention is paid by civil society actors and the public, and sometimes even by political leaders, to the relatively boring, technical 'mechanisms' of the constitution, in so far as they relate to government formation and removal, rules on the dissolution, prorogation and summoning of parliament, and rules on the roles of the head of state and of the courts in upholding these rules. However, as the above examples show, getting these mechanical details right matters. Given the importance of comparative practice in this area, and the relative lack of popular passion on the issue, the design of these rules may be one area where international advisors can really be beneficial to national political actors—helping them to anticipate problems that might arise and to draft rules in a water-tight way.

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Finally, Anne Twomey argues that the codification of conventions is problematic, because it excludes the flexible, common-sense, resolution of crises (Twomey 2018). These examples, and also the examples from Pakistan, Malaysia and several other countries not covered here, point to the opposite conclusion. It is absolutely vital that these rules are clear, coherent and comprehensive. When they have to be deployed, often in times of intense political drama and bitter divisions, the rules must be sufficiently robust, authoritative and legitimate. They must say what should happen, when and by whom, and so coordinate the functions and expectations of the various actors. These examples show how useful the courts can be in authoritatively interpreting, applying and enforcing these rules at times of crisis. The codification and justiciability of these rules is not a limit on parliamentary democracy, but a safeguard for it—a way of ensuring that the basic principles, identified by Dicey, are consistently

applied. It is difficult to speculate, but had these rules not been clear, and had the courts not had the authority to apply them, it is perhaps likely that these crises either would not have been resolved, or would have been resolved in more authoritarian ways.

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