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PREFACE

The era opened by the collapse of communism in 1989 was at first commonly understood with reference either to democracy or the market economy, or to a combination of the two. The legal dimension of this epochal change did not take long to impress itself on social scientists as well as experts in constitutional law. The purpose of this volume is to make constitutional developments the primary focus of the great contemporary transformation in a comparative perspective. In this comparative macropolitical perspective, the concept of democracy seems limited, limiting and tendentious. Political reconstruction, broadly conceived in national, international and global terms, can better serve as our main orienting concept. An alternative way for understanding the historical significance of the post-1989 legal and political developments also calls for a comparative perspective in constitutional history. Contemporary political reconstruction and constitutional reforms amount to an axial break with the ideologies of revolutionary social transformation in the international system of nation-states that marked the 1914–1989 period, and open an era of new constitutionalism which is distinctly global and differs significantly from the constitutionalism of the pre-1914 era—"the long nineteenth century."

The majority of the essays included in this volume were presented at a conference at the International Institute for the Sociology of Law in Oñati, Spain, on June 13–14, 2002. These were first published with a few additional papers in a special issue of *International Sociology* (18.1[2003]) and have been revised for the present volume which included three new chapters and a new introduction, Chapter One. Two of the new chapters extend the coverage of this volume to include constitutional developments in the European Union and Fiji, and the third, to the latest global constitutional trend, making it the most comprehensive empirical survey in comparative constitutionalism.

INTRODUCTION

CHAPTER ONE

CONSTITUTIONAL DEVELOPMENT AND POLITICAL RECONSTRUCTION FROM NATION-BUILDING TO NEW CONSTITUTIONALISM*

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On December 12, 2000, the US Supreme Court declared the vote recount ordered by the Florida Supreme Court four days earlier unconstitutional, and decided that Governor George Bush had won the Presidential election, despite the fact that the majority of the national popular vote and, as became subsequently clear, of the disputed popular vote in Florida, were cast for his opponent. (*Bush v. Gore*, 531 U.S. 98 [2000]) Across the millennium line, in December 2001, the Iranian courts were sending reformist legislators to jail in a fierce political battle against the Majles (parliament) that continued unabated for a few years. In the last days of 2001, the Russian Supreme Court ruled against President Putin's attempt to restrict a rival media owner in another ongoing and complicated politico-legal battle, while the Supreme Court of Zimbabwe reversed an earlier decision against land confiscation by the government, though leaving resort to courts open to individual white farmers in cases of expropriation. On January 1, 2002, massive demonstrations against irregularities in the Zambian presidential elections took place in front of the Supreme Court of Zambia rather than the President's palace. Two days later, a court in Bahrain annulled the government's ban on the freedom of expression by a publicist accused of inciting sectarian strife. These events, all occurring around the turn of the millennium, are clear indications of the continuation of the salient involvement of the judiciary in politics from the end of the twentieth to the beginning of the twenty-first century.

* This is a reworked version of the article 'Law, Political Reconstruction and Constitutional Politics' which was published in *International Sociology*, Vol 18(1): 7–32, Sage (London, Thousand Oaks, CA and New Delhi).

The conspicuous involvement of courts in politics is one aspect of the "judicialization of politics," the "global expansion of judicial power" (Tate & Vallinder 1995) or the rise of "juristocracy" (Hirschl 2004). Our examples show this judicialization of politics as an important consequence of political reconstruction—post-colonial reconstruction in Zambia, post-Communist reconstruction in Russia, post-revolutionary Islamic reconstruction in Iran, with Bahrain pursuing its modest constitutional reconstruction with the ebbing of the third global wave of democratization (*Huntington* 1991) on the shallow waters of the surrounding Persian Gulf. The third global wave of democratization culminated in what is called the 'new constitutionalism'. In the post-Communist constitutional reconstruction of the 1990s, the idea of the rule of law was augmented and redefined by the protection of rights through constitutional courts or other organs of judicial review. This followed the lead of the European Union in what is called the 'new constitutionalism' where democracy had become increasingly combined with the national and supranational involvement of judicial power in politics.

By 2005, however, there were indications that the trend in judicially directed constitutional politics had peaked, and was being reversed in many countries. The rejection of the Constitution of Europe by France and the Netherlands in the spring of 2005 halted the global trend in constitution-making, and the EU led trend toward increasing juridification of the global order. Meanwhile the impact of the US-propelled Security Council Resolution 1373 and the subsequent ones requiring the modification of the laws of the member states to conform to the norms of the 'global war on terror', had already set in motion a powerful global counter-trend toward the spread of state of emergency and restriction of constitutional rights.

It is far too early to assess the current constitutional developments. Some features of the new pattern are becoming clear, however. With the global war on terror following September 11, 2001, the executive branch of government throughout the world passed national security measures to restrict constitutional and human rights, and tended to displace the judiciary from the political arena.[1] In April and May 2005, we witnessed a forceful attempt by Egypt's authoritarian government to roll back the

[1] At the time of this writing in March 2007, there is a major confrontation between President Parwez Musharraf and protesting judges and lawyers in Pakistan as a result of his suspension of the Chief Justice of the Supreme Court for looking into disappearances covered up by the anti-terror emergency laws.

two-decade expansion of judicial power into politics, mainly through an assertive Supreme Constitutional Court. The imprisonment of the opposition's presidential candidate and the disciplining of two senior judges who had publicly charged electoral fraud provoked a major confrontation between the government and the judges, backed by the main opposition, the Muslim Brotherhood, and by massive demonstrations in the streets of Cairo in favor of judiciary independence that were suppressed heavy-handedly. The Muslim Brotherhood, which includes some prominent judges among its members and won eighty-eight seats in the People's Assembly in 2005 despite widespread electoral fraud, assumed the championship of constitutionalist contention by protesting against the state of emergency law and advocating constitutional reform after the election of. In March 2007, President Mubarak struck back by rushing through the People's Assembly and an immediate referendum a set of 34 illiberal constitutional amendments that not only replaced the state of emergency law in effect since 1981 by the constitutionally retrenched suspension of civil rights (Article 179), but also removed the judicial oversight of the elections, which was given to a state-appointed elections commission (Article 88).

The politics of constitution-making are thus becoming increasingly indistinct from routine politics and tactical consideration. A constitution went into effect in Iraq on October 15, 2005, by executive fiat and American dictate and in complete mockery of constitutional procedure. A month later on November 21, 2005, in a referendum following a month-long intensive campaign, the Kenyans rejected a draft constitution which had been in the making since 2000 through a participatory, 'people-driven' process but had been lately hijacked and revamped by the government of the democratically elected President Mwai Kibaki In September 2006, a military coup in Thailand suspended the (nine-year-old) Constitution, dissolving the two houses of parliament (which had not sat since the elections six months earlier that had been voided by the courts) and the Constitutional Court. The military government appointed by the king promised speedy return to civilian rule and political reform through a new constitution which is in fact slow in the making. In October 2006, the Serbians approved in a referendum a constitution which was entirely dependent on routine politics and the nationalist concern to keep Kosovo, but also rolled back both judicial power and local democratization. And in November and December 2006, Kyrgyzstan, the last country to boast a 'tulip revolution' (in March 2005), unceremoniously and cynically went through the haphazard

proclamation of two different constitutions.[2] In the last two examples, constitution-making as the instrument of political reconstruction seem to have degenerated into a new form of routine politics and horse-trading among the newly empowered elite and political groupings.

The Old and the New Constitutionalism—and the Age of Ideology In Between

With the human rights revolution of the last decade of the twentieth century, including the emergence of the right to political participation in sound democratic government,[3] the development of the international constitutionalist tradition entered a new global stage. This stage is marked by the massive adoption of bills of rights, on the one hand, and of constitutional courts, on the other. (Klug 2000: 9–10, 56–57) Some of the cases studied in this volume show the distinctive features of the new era of judicial politics, while others prove the survival of modes of constitution-making and political reconstruction distinctive of earlier periods, notably the age of modernization of the nation-states. It is therefore useful to begin with a sketch, in very broad strokes, of five stages in world constitutional history, each with its typical mode of constitution-making:

1) The medieval and pre-modern era down to the eighteenth century, where the dominant pattern of legal development in many traditions consisted of law-finding and jurisprudence while law-making was confined to administrative law by royal decrees;
2) The modern stage of political reconstruction by rational design in the age of democratic revolutions in the late eighteenth century, when constitution-making itself was introduced as the procedure for the elaboration of a rational design for political reconstruction, alongside parliamentary law-making as an expression of national sovereignty and the principle of separation of powers;

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[2] The Constitutional Court appeared informally in Parliament to endorse the November constitution, a procedure President Kurmanbek Bakiyev deemed unconstitutional in December.

[3] Klug (2000: 9–10) calls this the "the strong principle of equality." The implicit contrast is with the state-centered notion of legality, where equality under the bureaucratic rule of law goes hand in hand with what Max Weber called passive democratization.

3) The age of modernization in the second half of the nineteenth and early twentieth centuries, when (authoritarian) constitutions served as instruments of state-building and rationalization of the centralized bureaucratic *Rechtsstaat*, and law-making by parliaments and administrative organs dominated legal development;
4) The era of ideological constitutions as instruments of social transformation according to total ideologies and their offspring (1917–1989), marked by the subservience of narrowly conceived rule of law and legality to the dominant ideology of the regime. This constitutional era comprised the period of de-colonization (1947–1970s), in which a significant number of new states wedded ideological constitution-making to developmentalism,[4] as the age of ideology spread from the first and the second worlds to the emerging third world.
5) The era of new constitutionalism since 1989, marked by a mixture of increasingly judicialized legislation by parliaments and administrative organs and legislative jurisprudence by the constitutional courts and supra-national judiciary organs. (Stone Sweet 2000: 139–52, 200–205) For Stone Sweet, this mixture spells the end of the classical separation of powers pertaining to the old constitutionalism. This makes for a distinct mode of constitutional rationalization in the global era. The era created its own transcendental justification or principle of legitimacy in the form of an enhanced rule of law, which observers have variously characterized as 'constitutional democracy', 'liberal democracy' and 'deliberative democracy' (Nino 1996; Habermas 2001; Sunstein 2001; Chambers 2003), 'new constitutionalism' (Stone Sweet 2000) and '*democratic* rule of law' (O'Donnell 2004).

The organization of authority and division of power within the state typical of the modernization stage remains an important subject of constitutional regulation down to the present, more so in some parts of the world than in others. The typical constitutions of this stage are authoritarian with the aim of state-building and centralization of power. They usually did include a bill of rights, whose validity was qualified by the addition of the phrase "except by the law," and with no independent mechanism for their enforcement. Rights were thus rendered largely decorative under the bureaucratic rule of law. The bureaucratic *Rechtsstaat* created in the era of modernization and state-building has

[4] Including some countries that had acquired independence earlier, such as Egypt in our sample.

continued to expand throughout the world to the present. The partial and probably inadequate response of the new constitutionalism has entailed a global expansion of judicial review of the regulatory state, or administrative judicial review. (Shapiro 1996) As Nathan Brown shows in Chapter 2, the Arab Middle East began experimenting with this mode of constitution-making in Tunisia and Egypt under Ottoman suzerainty in the 1860s, and remains for the most part stuck at that stage, with authoritarian constitutions that aim at the rationalization of state power rather than its limitation. The Arab authoritarian constitutions during the third wave of democratization were not, however, the only ones; the 1980 Constitution of Chile and the 1982 Turkish Constitution were also authoritarian, with special reserve provisions for the military. Furthermore, Turkey (already with a constitutional amendment in 1928), Egypt (culminating in the constitution of 1971) and Iran (in 1979) proceeded to the fourth mode, ideological constitution-making. Egypt took modest steps beyond it in the 1990s, thanks to a self-recruiting Constitutional Court, but is facing the current onslaught on judiciary independence by the authoritarian state; Turkey is moving toward new constitutionalism with the constitutional reforms that began in 2003 with a view to joining the European Union, but Iran is deeply stuck in the ideological mode, with a set of unique clerical organs acting as the guardians of Islam as the basis of its explicitly ideological constitution.

Needless to say, the five-stage schema I offer above is selective with respect to the features highlighted for each period. Different features would stand out with even a small shift of focus away from constitution-building and constitutional development, in turn suggesting a different periodization. Kim Scheppele, for instance, selects another salient feature of the era of new constitutionalism which stretches far back in time. Focusing on the globalization of public law, she distinguishes two waves. In the first wave of "public law globalization," the development of constitutionalism was set in motion by the international conventions on human rights and lasted from 1948 to 2001, but with special momentum in the 1980s and 1990s. The second wave was set in motion by September 11 and 'the global war on terror.' Scheppele (2004) argues very cogently and with a great deal of supportive evidence that September 11 has inaugurated a new era of international state emergency. Counter examples and opposite indications are not easy to find, especially in the country that set this wave in motion, namely the United States. On the contrary, Judge Richard A. Posner

has recently argued that the American constitution is "not a suicide pact," and that

> a constitutional right should be modified when changed circumstances indicate that the right no longer strikes a sensible balance between competing constitutional values, such as personal liberty and public safety. (Posner 2006: 147)

Under the circumstances of national emergency, Judge Posner's well-known cost-benefit analysis suggests that the greater the value of information obtainable through torture, the greater the amount of coercion that should be deemed constitutional! Nevertheless, only time can tell if the strong trend in the expansion of executive power, and in the restriction of civil liberties and rights and their constitutional protection that marks Scheppele's "second wave of public law globalization" continues irreversibly.[5] The one indication of the reversal of the trend so far has been the failure of the Conservative government of Canada to extend the two anti-terrorist measures passed after 9/11/2001, and their lapse on March 1, 2007.

There is also considerable chronological and practical overlap between the ideological stage and "new" constitutionalism, and many countries share their respective ideal-typical features in varying intermixtures. The era of social transformation through state-building for the late-comers in the twentieth century was also the age of ideology. The constitutionalist tradition absorbed the notion of ideology as the totalitarian states paid lip-service to the idea of a written constitution, thereby creating a distinct genre that I have called 'ideological constitutions'.[6] The model of ideological constitutions was widely adopted in the third world, though the ideology of social transformation it was to serve varied from case to case (in our sample, from secularism in Turkey to socialism in several post-colonial constitutions to Islam in Iran).

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[5] See her forthcoming book with Harvard University Press.

[6] See Arjomand 1992 for the justification of the term. The ideal-typical characteristics of ideological constitutions are (a) the conception of constitution primarily as an instrument of social transformation and only secondarily as the foundation of the political order, and (b) the nullification of civil and human rights when found inconsistent with the ideological principals underlying the constitution. An 'ideological constitution' is designed not for the limitation of government but for the transformation of the social order according to a revolutionary ideology. Limited government and civil liberties therefore have to give way as the constitution itself is now an instrument of social transformation. (Arjomand 1992: 46)

Most of the new states that gained independence in the 1960s and 1970s received constitutional models transplanted from the former colonial power. As Julian Go puts it succinctly in Chapter 4, "world society was a world differentiated by empire." The former British colonies adopted the Westminster model, and the former French colonies the French model of government and style of constitution-writing. A number of former colonies adopted the ideological model, while others combined elements of it with transplanted constitutional models. Ideological constitutions thus became the legacy of totalitarianism to the third world, as it emerged from the era of colonialism and imperialism, and an enduring one that has so far survived the strains of democratization and human rights.

Despite the overlaps of the periods, a decisive factor in the adopting of one constitutional model of political reconstruction in preference to another is the timing of constitution-making and the prevalent global legal culture(s). (Arjomand 1992) Had the South African constitution-making taken place in the bipolar world of the 1960s and 1970s, instead of the newly globalized constitutional culture of the 1990s, the African National Congress would most probably have opted for an ideological constitution to go with a third-worldist war of national liberation. (Klug 2000: 68) The decisiveness of the timing or historical period of reconstruction has an important implication. The advantages and drawbacks of being a latecomer in the international processes of economic development and political modernization have often been debated. As the timing of political reconstruction is critical for the choice of constitutional model, one may speak of the advantages of South Africa and Eastern Europe as the late-comer beneficiaries of the new cycle of constitutionalism as compared to Iran, whose Islamic revolution left its indelible mark on its ideological constitution. Be that as it may, the judicial leadership of the transition to democracy in South Africa not only conformed to the model of new constitutionalism but actually made it one of its trend-setters. This leadership was made possible by the certification power granted to the South African constitutional court in the making of the post-apartheid constitution. With it, judicial review was built into the constitution-making process in South Africa from 1993 to 1996.

Although the East European revolutions thought of themselves and have been characterized as restorative (Preuss 1995) and self-limiting (Arato 2000), the historical truth is otherwise. In history, as Theodor Mommsen knew well, all restoration is also revolution. Return to old forms of limited government and *Rechtsstaat* after 1989 was an impos-

sibility. As Kurczewski (1999: 187–89) notes, the rule of law cannot mean the same thing before and after the great 1917–1989 divide made by communism and fascism as grand ideologies of total social transformation. The abuse of "legality" by communism and fascism necessitated a new, amplified, rights-based conception of the rule of law, which includes justiciable human rights substantively, and specifies mechanisms and institutional devices for safeguarding the rule of law—most notably the constitutional courts, and in some countries, additionally, the office of the Ombudsman. It has been noted (Bryde 1999a: 28–29) that while the American-style, "diffuse" judicial review appears as a good guarantor of the rule of law in the old, narrow sense, the constitutional courts, modeled on Hans Kelsen's design in the Austrian Constitution of 1920 but with a very significant extension, have lent themselves admirably to the guarantee of the rule of law in the new, amplified sense. After World War II , as the age of ideology reigned supreme in the Soviet bloc and spread to what came to be called the third world, the Western occupying powers in Germany, Italy and Japan a new kind of court to prevent the return of the old regimes and their collectivist ideologies. The key to the role of the constitutional court as the instrument of the new constitutionalism is the idea of transition to democracy—first in post-fascist Germany and Italy, then in post-authoritarian southern Europe, and finally in post-communist Eastern Europe and Russia. The constitutional courts of Germany and Italy provided a model for the judicial overseer of the transition to democracy, which was adopted in Spain, Portugal and Greece after the fall of authoritarian regimes in the late 1970s. A decade later, the jurisprudence of the German Constitutional Court in particular became the model for the new constitutionalism of the later generation of constitutional jurists in Central and Eastern Europe and in South Korea.

The Constitutional Court of the Federal Republic of Germany had quickly assumed a historic mission after its establishment in 1951. The Germans had not wanted a constitution as it would perpetuate the division of the country, and the German Basic Law for the zones of Western occupation was drafted at the insistence of the Americans by representatives sent by state parliaments, using the Constitution of 1848 as its starting point, with a badly drafted bill of rights. The Constitutional Court took it upon itself to develop the constitutional law of Germany by continuously expanding the Basic Law and thus making it into a living constitution. Its jurisprudence developed a number of categories, such as 'unconstitutional', and therefore null, 'incompatible

with the constitution', and therefore to be re-legislated, and 'unconstitutionally applied'. It also expanded the very broad definition of rights and developed its distinctive doctrine of proportionality: there is always a pertinent protected right, and the state can override it in principle, but the key judicial decision concerns proportionality of the two principles. (Bryde 1999a; 1999b)

It is interesting to note that the legal theory developed by Kelsen did not deal with the process of transition from one legal regime to another, and simply instead maintained that a revolution or a *coup d'état* means a change in the basic norm (*Grundnorm*) or hypothetical foundation of the legal hierarchy. This excessively formalistic view, though enormously popular with the compliant third-world jurists for justifying regime changes by military *coups* (Mahmud 1993), was of little help for resolving the key problem of transition to democracy, namely the "conflict between values and interests protected by old law and the legitimacy of the new constitutional order." (Bryde 1999b: 235) The constitutional courts devised a jurisprudence adequate to this task in the course of their practice. Furthermore, although Kelsen had considered his constitutional court as the guardian of the constitution, he significantly excluded the protection of constitutional rights from its jurisdiction. The protection of human rights was added to the functions of the Kelsenian model after World War II, and has become one of the primary functions of constitutional courts in the new constitutionalism, just as they assumed the function of guiding the transition to democracy.

In the American context, "the rights revolution" usually refers to the conjuncture of two phenomena in the 1960s and 1970s: the emergence of the "regulatory state," with roots in the New Deal, and its interaction with the American Common Law system in which ordinary courts have the power of judicial review. There was a huge increase in federal government power, and federal statutes and federal constitutional law emerged after the New Deal—and with a vengeance after World War II—to give nationally standardized rights protection. The result was a decentralized pattern of constitutionalization of social, and an expanding array of civil, rights guided by the jurisprudence of the Supreme Court. (Sunstein 1990) This pattern is distinct from the rights revolution in the global context and in the sense used in this essay.[7] The rights revolution in the global context had its roots in the 1948 UN Universal

[7] In fact, it can be argued that this early development immunized the American legal system against the effects of the later global rights revolution.

Declaration of Human Rights and the 1950 European Convention of Human Rights, and the international conventions of the 1960s—the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. The global rights revolution, however, gained momentum only gradually and after acquiring an international institutional embedding in the Commissions set up alongside the UN Human Rights Instruments in the 1970s and 1980s,[8] most notably in the Convention on the Elimination of Discrimination Against Women (1981). The human rights NGOs grew around the global institutional network thus created by the UN. Women's NGOs, in particular, were very effective in framing abuses and violence against women as issues in universal human rights and thus mobilizing international support for their alleviation.

Reaching beyond the European Communities that eventually formed the European Union, the European Court of Human Rights has provided a mechanism for the enforcement of the 1950 European Convention of Human Rights against the member states of the Council of Europe. Meanwhile, the European Court of Justice, beginning in 1969, was empowering itself with human rights jurisdiction. Furthermore, by insisting that the EEC Treaty created "a community based on the rule of law" (1986, ECJ 1365) and that it was "the constitutional charter of a Community based on the rule of law," (Opinion 1/91) (Cited in Finer, Bogdanov & Rudden 1995: viii, 4) the European Court of Justice emerged as the supreme exponent of constitutional principles and assumed the function of judicial review of EU law. This process of rapid erosion of national sovereignty after 1973 as a result of the supremacy of EU laws and its deep penetration into the national legal systems of the member states (Weiler 1999: 19–45, 96–99) culminated in the EU constitutional convention which began drafting a constitution for Europe under the chairmanship of the former French President, Valéry Giscard d'Estaing in December 2001. The convention's draft was published in July 2003, but was not accepted by Poland and Spain. The draft Treaty establishing a Constitution for Europe was eventually agreed upon at

[8] The most important of these are the Charter-based Commissions on Human Rights, Status of Women, Prevention of Discrimination and Protection of Minorities, and the treaty-based Committees on Human Rights, on the Elimination of All Forms of Racial Discrimination, on Economic, Social and Cultural Rights, Against Torture, on the Rights of the Child and on the Elimination of Discrimination Against Women.

the end of October 2004 by the heads of the 25 member states of the EU to be put to vote for ratification in each country. It was rejected, however, in the national referenda in France and the Netherlands on May 29 and June 1, 2005, respectively, and most scheduled referenda in other countries were cancelled. In taking over the EU's six-month agenda-setting presidency in January 2007, German Chancellor Angela Merkel announced it would revive the European constitution project, but this may prove unrealistic.

The controversies surrounding the European constitution mainly focused on the mention of Christianity in the preamble, which was not adopted, and the voting powers of the populous states of Spain and Poland. The more difficult intellectual problems were not seriously debated. True, the awareness of the democratic deficit in the EU and the criticism of the Brussels committocracy was an important factor in the rejection of the constitution by the Left. But constructive alternatives were not really explored. Weiler (1999) has argued that the continuous political reconstruction of the Western European nation-states into the European Union since 1958 resulted in the "constitutionalization" of the legal structure of the European Community. As Dieter Grimm shows in Chapter 11, however, the applicability of the very notion of 'constitutionalization' to Europe is highly questionable. Globalization had entailed a good deal of juridification, both in Europe and in other regions of the world. But such juridification, through supra- and transnational regulations, commercial arbitration international regulations and intermixture of public authorities and private agencies, seriously blur the lines of accountability, division and distribution of power and the rights and duties of citizenship that are still defined by the constitutions of the era of the nation-states. This explains why the administrative judicial review of the European Court of Justice (and of the European Court of Human Rights) is not enough to remedy the noted 'democracy deficit' of the EU constitutional structure.

Although Japan, like West Germany and Italy, had one of the first post-World War II constitutional courts, East Asia did not follow the European pattern for a long time. In fact, the Constitutional Court of Japan did not strike a single law in the first half-century of its existence. Nationalist China had its distinctive organ of judicial review, the Council of Grand Justices, created by the constitution of 1947 and transferred to Taiwan under the Kuomingtang's one-party rule, but it did not shake the authoritarian tradition of the rule of law and one

party system, and has played a relatively minor role in the more recent democratization of Taiwan, confining itself to creating some checks on state bureaucracy in administrative law, while the rapidly growing legal profession turned directly into national politics, first creating the category of 'out of party' (*dangwai*) politician and then forming a new political party. (Ginsburg 2007) The notable exception in East Asia is South Korea under the Sixth Republic.

The legal tradition of the developmental state of South Korea, which guided its economic miracle, was authoritarian and statist, as in the rest of East Asia. It was marked by the instrumental use of law by the government and "prosecutorial supremacy" in procedure. (Ginsburg 2003) The Korean democratic movement in the 1980s coincided with a sharp growth in the size of the legal profession, including a group of human right lawyers who had defended political prisoners and formed a clandestine society in 1985 which later became formalized as the *Minbyeon* and, as an alternative to the bar association, eventually drew hundreds of activist lawyers. Its leader, Park Won Soon, in alliance with student activists and social scientists, formed the People's Solidarity for Participatory Democracy in 1993. While the students and labor unions organized demonstrations against the regime, a synergy developed between lawyers that even affected the conservative prosecutors. The courts and legal strategies were devised in tandem with the tactics of an energized civil society. Legal academics joined the activist lawyers and civil society groups and injected their ideas to the democratic movement, and the legal profession, according to Ginsburg (2007), thus had a profound impact on Korea's democratic transformation.

With the constitutional bargain between the authoritarian regime and the two main opposition groups in October 1987, Korea adopted the German model for the Constitutional Court set up in 1988. This choice was important for paving the way for Korea's rapid entry into the era of new constitutionalism. Plans for a constitutional court modeled on Germany's had in fact been laid down in the brief democratic interlude of 1960–61, but never implemented. The Korean Constitutional Court adopted the above-mentioned categories of German constitutional jurisprudence, which facilitated its dialogue with the legislative and executive branches of government and its ability to provide guidelines for avoiding constitutional defects in legislation and administrative regulations. Article 68 of the Constitutional Court Act of 1988 also adopted the German system of giving access to any citizen and civic

group through the filing of constitutional complaints, thus enabling it to enhance citizenship rights and maintain a dialogue with civil society. (Ginsburg 2003: 218–21)

The activism of the Korean Constitutional Court brought it into conflict with the conservative Supreme Court. The conflict between these two highest courts is not unusual in new constitutionalism, and can become intense, as it did, for instance, in Russia and the Czech Republic (Trochev 2005). Unlike the latter case, however, the Korean Constitutional Court has not only been successful in challenging the overlapping jurisdiction of the Supreme Court in certain areas of judicial review, but has also been able to offer the lower courts a more liberal alternative to resort to than the conservative Supreme Court. It has also put an end to prosecutorial supremacy and frequently overturned prosecutorial decisions. Furthermore, in contrast to its Japanese counterpart, the Korean Constitutional Court has not shied away from issuing administrative guidelines for the instruction of state bureaucracy. (Ginsburg 2003: 239–44)

In other regions, the wave of post-Soviet multiplication of constitutional courts, with rights jurisdiction built-in, more or less coincided with another independent trend. The World Bank adopted the position that the rule of law was an essential prerequisite for economic development (Rowat, Malik & Dakolias 1995), and stimulated an extensive program of legal training and institutional designs for improving access to courts, which had a considerable impact on Latin America. This latter development fostered a new idea of political reconstruction: the reconstruction of "the post-developmentalist state in the semi-peripheral countries" in order to meet "the regulatory needs of the new neo-liberal development model." (de Sousa Santos 1999: 73–74) Like the two European waves of democratic transition and the growth of the European Court of Justice and the European Court of Human Rights, this primarily Latin American wave of post-developmentalist reconstruction provided a globally spread institutional structure for the enforcement of human rights, albeit with special emphasis on property and contract. The confluence of these diverse institutional developments and the growth of international, UN-centered rights organizations and NGOs produced the global rights revolution of the 1990s, which was celebrated by the 1993 UN World Conference on Human Rights, with more than 5,000 NGOs in attendance. (Roan 1996: 139)

From Ideological Constitutions to the New Constitutionalism

The newly established constitutional courts assumed the function of guiding the transition to democracy after 1989. A noteworthy example is the certification power granted to the South African constitutional court in the process of post-apartheid constitution-making. The constitutional court was required to certify the consistency of the draft produced by the Constituent Assembly with the Constitutional Principles set forth in the interim constitution of 1993, and issued two robust constitutional judgments in the course of its approval of the 1996 constitution. (Klug 2000: 154–59) This is a remarkable case of the juridical review of the constitution itself. With the extension of their jurisdiction over the rights, and even more with the assumption of the authority to interpret constitutional principles in the transition to democracy, it is now more accurate to speak of the constitutional courts as the guardians of "the invisible constitution" (Sólyom),[9] or "the guarantors of the basic consensus on which democracy is founded." (Sajó 1999: 242)

The post-ideological reconstruction of legality by the constitutional courts in the period of transition to democracy requires a "transitional" politicization of public law and an instrumental use of law. This inevitable instrumentalization of law for the purpose of political reconstruction creates some tension with the rule of law in the old and narrow sense of prevention of abuse and arbitrary exercise of power through institutional devices. (Teitel 2000: 189; Krygier 2001: 4, 22; Tamanaha 2001: 238) The tension, however, is minimal compared to that created by constitutional law as an instrument of social transformation in the previous era of ideological constitutions.

If the amplified notion of the rule of law is a reaction to the experience of totalitarian ideologies, the constitutional courts can be said to be the institutional response to the same experience. Ideological constitutions often syncretically included an impressive bill of rights, but took back with one hand what they pretended to give with the other by subordinating them to higher ideological principles (Arjomand 1992) The constitutionalization of human rights in the 1990s put an end to this possibility. Article 70/A of the Hungarian Constitution declares that the Republic "shall ensure human and civil rights," in that order, "for everyone within its territory." The emergence of constitutional

[9] See Sólyom, *infra.*

courts as guardians of the new constitutional orders is largely due to their being instruments of unconditional enforcement of individual rights. As such, they have a critical role in the reconstruction of legality in the amplified sense implicit in the new constitutionalism. (Teitel 2000: 23–26)

In ideological constitutions, revolution (or "principles thereof"), the people (or "aspirations thereof"), or Islam (or the "principles of the *Shari'a*") assume the place of the higher law. Kelsen had, in effect, elevated the principle of logical consistency and hierarchical grounding of ordinary laws on a 'basic norm' in the allegedly gapless order of legal positivism to the position of the higher law. This paved the way for the enthronement of constitutional interpretation by the German and Italian constitutional courts. Constitutional interpretation thus takes the position analogous to that of the higher law—an idea from the natural law tradition that hovers over the Common and Civil Law systems alike. In the process of de-ideologization of the communist constitutions, the legal-positivist value of consistency was coupled with that of human rights to constitute the transcendental basis of the new rule of law, or the higher law of the new constitutionalism.

As László Sólyom, the former President of the Constitutional Court and current President of the Republic of Hungary, later explained, "all references to ideologies or intellectual trends were removed from the text" of the Constitution, and were replaced, through the decisions of the constitutional courts, by "a clear hierarchy of fundamental rights." Furthermore, as politics and ideology had to be overcome simultaneously in the new normative order, and "the establishment of the formal rule of law over politics was the greatest order of the day, this principle was practically equated with the principle of legal certainty." (Sólyom 2000: 5–6) From 1992 onward, the rule of law became a sufficient criterion of (un)constitutionality on the basis of two underlying principles which served as its technical pillars: "legal certainty and the coherence of the Constitution." The constitutional courts considered the maintenance of "the principle of coherence of the Constitution its vocation, thus claiming authorship of Hungary's 'invisible constitution.' (Sólyom 2000: 41) Here, Sólyom invests the formal positivistic value-idea of coherence with substantive content to mean the normative coherence of a constitutional order and balance among its institutional components found in the international constitutionalist tradition.

The characterization of the new constitutionalism in terms of "the higher law constitutionalism model," where "a layer of substantive constraints on the use of public authority is added" to those of the

old constitutionalism (Stone Sweet 2000: 21), is thus very apt. The correspondingly extended definition of the amplified, post-ideological rule of law deserves citation in full:

> In polities where constitutional courts have been established, a new top rung on the normative hierarchy has been established, the constitution. The mission of constitutional courts is to defend the superior status of the higher law, by ensuring that all lower order norms, including statutes, conform to it. Thus the *Rechtsstaat* is today the constitutional *Rechtsstaat*, and the *état de droit* has been constitutionalized. (Stone Sweet 2000: 28–29)

In short, the revival of the rule of law in the context of, indeed in a new marriage with, the rights revolution has radically altered its meaning. The new meaning may be emerging gradually but it nevertheless signals a new axial shift in legal order and political organization. The transcendent idea of the law itself becomes an axiological necessity, just the idea of a higher law is a necessity for the Common Law tradition, and as ideology became the guiding principle of ideological constitutions. More tellingly, logical coherence and consistency had forced itself as the supreme value upon the legal positivists only to be transformed into the normative idea of the coherence of the constitutional order under new constitutionalism. This formal view of the higher law disguises the substantive higher law of new constitutionalism which is best captured by the key principle in the jurisprudence of the European Court of Human Rights and was nationalized into the human rights jurisprudence of Canada, New Zealand and Australia. (Zines 1991: 55–64). The higher law consists in the protection of human rights of the individual but in "a free and democratic society." The norm of proportionality determines when a right can be trumped by the requirement of "a free and democratic society" with adjustment for the country concerned at the discretion of the judges according to ECHR's doctrine of "margin of appreciation." A democratic qualification has been added to the idea of Natural Law as the higher law, but the people (*demos*) has no part in the determination of what a 'free and democratic society is'. The latter is determined by the judge directly and the jurist indirectly and in the long run.

Every transcendent idea is in need of interpretation and thus generates or reinforces the institutional authority of those empowered to interpret. That is why the contemporary creed of the rule of law strengthens the authority of judges and jurists. Just as priests institutionalize the values of religion and scientists those of science, so the possessors of legal authority, knowledge and expertise are needed to institutionalize the transcendent idea of the rule of law under new constitutionalism.

Constitution-making and Reconstruction of the Political Community

There are significant differences in the pattern of interface between legal developments and attempts at political reconstruction in different parts of the world. The issue of the constitutional construction of national identity and the role of religion in the new nation-state was raised in the first new post-colonial states created in the late 1940's and early 1950s—that is, the same period of the post-war reconstruction of Germany, Italy and Japan. It is interesting to note, however, that the number of constitutions with religious provisions increases sharply in the 1990s.[10] The need for the constitutional reaffirmation of particularistic religious identity has evidently not subsided in the era of globalization.

Although Israel was not unaffected by the developmentalist ideology, the debate over socialism vs capitalism, typical of the bipolar world of ideological constitutions of the fourth era, gave way to the tension between Jewishness and democracy, with the first term containing two elements: the Jewish religion and its role in the Jewish state. As Ruth Gavison shows in Chapter 3, this pitted the orthodox against the secular Jews, and the Jewish ethnic identity as the sole or central basis for nation-building after the 1948 war, which pitted the Jews against Arab citizens. The first problem is analogous to the constitutional handling of Islam in the Islamic Republics of Pakistan and Iran (Arjomand 1993); the second, to the constitutional handling of ethnic identity and citizenship in post-colonial political reconstruction of multi-ethnic societies.

Religious constitutional provisions, though often merely declaratory, entrench a set of extra-legal values. These provisions may lie dormant for a long time, but can also have a tremendous impact on constitutional politics because they make possible potentially powerful alignment of social forces behind religion as the higher law *against* legality, and thus create a different kind of duality that results in a constitutional crisis which can wreck the legal order. The power struggle between President Khātami (1997–2005) and the clerical Leader, Ayatollah Khāmane'i, illustrates this danger very well. Legality was championed by an elected President, who endeavored to use his plebiscitary authority to define the rule of law, while the Leader (supreme clerical jurist) claimed

[10] See Go, *infra*, Figure 3.

divine legitimacy as the protector of Islam and trumped the rule of law at will.

Although the definition of the political community was a primary function of the first written constitutions of the age of democratic revolutions, which made them the basis of nation-building in the United States ("We the people") and France ("*la Nation*"), its members were conceived generically as individual citizens.[11] (Howard 1992: 113, 120) This function ceded its primacy to the definition of the state structure in the era of state-building and bureaucratic *Rechtsstaat.* It was in this latter form, and as instruments of rationalization of the structure of authority, that the constitutions were imported by the state-builders of the Ottoman Empire, imperial Japan and Iran—who incidentally found their encumbrance with the democratic definition of the political community a great nuisance.

The primacy of the definition of political community reemerges with a vengeance in our fourth stage, this time exacting a constitutional definition of ethnic and religious identity. It is no longer the generic we the people, whose ethnic and religious identity is implicit and therefore legally irrelevant, but we the people of this specific country which has to overcome backwardness in the imperialist race, or this colony that has to be liberated. Ethno-national and religious dimensions of collective identity become explicit, indeed reified, and impregnated with legal implications. It is primarily we the Iranians, Egyptians or Nigerians, we the Jews in Israel and we the Muslims in Pakistan.

The post-totalitarian transition to democracy involves an altogether different set of problems with the definition of political community than did the post-colonial transition into nation-states. Law is used both instrumentally and expressively (through other rituals of passage) to delegitimize the old regime and justify the new political order. Analytically, here we have a parallel to the constitutional construction of national and religious identity as a means of demarcation of new regimes in the previous stage of constitutional development. Parliamentary legislation to redefine the boundaries of political community in post-communist Eastern Europe through purges and "lustration" laws has usually drawn the constitutional courts into the politics of reconstruction (with

[11] In the American case, this citizenship had a dual aspect. The individual was a citizen of the United States, as defined in the Constitution and the citizen of one of the federal states, as defined by the Articles of Confederation.

different results—in the Czech republic, the Constitutional Court approved the purges and in Hungary, the Constitutional Court rejected them). However, in sharp contrast to the construction of national and religious identity, the rhetoric of the rule of law has played a central role in the constitutional redefinition of post-communist political community. (Teitel 2000)

In contrast to the presumed moral worth of nativism against the colonial rulers, the task in the era of new constitutionalism is the moral definition of democratic political community. In the context of the human rights revolution, as Grażyna Skąpska shows in Chapter 10, the main focus of the moral redefinition of the new democracies in contrast to the totalitarian regimes they replace is the latters' violations of human rights. (In South Africa, the post-colonial moral redefinition coincides with facing, in truth and reconciliation, the human rights violations of the apartheid regime.) There can, however, be other significant foci for the contrastive redefinition of the reconstructed political order. Most notable of these is the role of women in the new political order. The transition from Franco's authoritarian rule to constitutional monarchy in the late 1970s was also a transition from a patriarchal regime to one based on gender equality. The Spanish Constitution of 1978 was explicit in basing the legal definition of the new democratic political community on gender equality. The transition from patriarchal authoritarianism to gender-egalitarian democracy in Spain raises the moral problem of which gender in the transitional generation should bear its cost, which is the subject of Chapter 14 by Ruth Rubio Marin.

Political reconstruction of societies formerly torn by civil strife, divided into racial castes, or into the powerless and the *apparatchiks* ("us and them") and thus scarred by severe past human rights violations also require the generation or regeneration of social solidarity on the basis of "restorative Justice." The moral reconstruction of these societies must therefore go beyond constitutional and political settlement, as Abraham Lincoln and Nelson Mandela knew well. In such cases, as Braithwaite (2002: 207–8) puts it, "Rituals are needed to heal the damaged souls of the people. . . . Forgiveness cannot be forced;" it can, however, be facilitated by providing "citizens with rituals that expose us personally to the sorrows and sufferings of the other." Hence, the world-historical significance of the hearings of the Truth and Reconciliation Committee in South Africa and of similar bodies in Central Eastern Europe, and the persuasiveness of Skąpska's attempt in Chapter 10 to approach the issue from a comparative religious perspective.

Different institutions can become engines of constitutional politics; and the distinction between routine and constitutional politics is frequently blurred. There is a very interesting contrast between the constitutional developments in Hungary and Poland. Both countries are marked by the typical Eastern European constitutional continuity and absence of legal rupture in the process of transition to democracy. (Preuss 1995: 94; Teitel 2000: 205–6) In Hungary, we have had, to quote László Sólyom's famous words, a "rule of law revolution."[12] In Poland, as Jacek Kurczewski shows in Chapter 8, we see the same tinkering with communist laws. The difference between the two cases concerns the major agency of constitutional change: the constitutional court in Hungary as compared to the parliament in Poland. The Polish Constitutional Tribunal, modeled after the French *Conseil Conctitutionnel*, was a weaker institution than the German-inspired Hungarian Constitutional Court, and the separate office of the Ombudsman was set up to deal with the human rights questions. We shall explore the consequences of this difference in the next section. At this point, it may be more useful to summarize the important differences among the eight major cases of contemporary political reconstruction studied in this volume into four pairs of countries. In the first three, judiciary organs facilitate political change, while in the last, they provide a mechanism of resistance to change in earlier political reconstruction. (See Table on p. 24)

If state-building in the post-World War II period can account for the salience of developmentalism and ideology in its pattern of constitution-making, the experience of state failure and ensuing civil wars in post-colonial Africa, and of state destruction in Afghanistan and Iraq, have suggested a new function for constitution-making as a means for conflict resolution. As the optimistic era of state-building with the end of colonization after World War II gave way to one of widespread state-failure and national disintegration, this new use of constitution-making suggested itself. Resolution of conflict and strife that follow state failure and destruction could take the form of an internationally-brokered constitutional pact. Although this use of constitution-making is new, it does resonate with Hobbes's idea that the purpose of the social compact was to end the war of all against all. The focus on conflict inserts inter-ethnic relations and multilingualism at the expense of the citizen-state relations in classic, liberal constitutional models, promoting

[12] See Sólyom, *infra*; see also Őrkény, A. & Scheppele 1999.

Comparisons in Terms of Relative Independence of Major Institutions of Constitutional Regimes since 1989

Country	Presidency	Parliament	Constitutional Court	Other
Hungary	—	+	++	—
South Africa	—	++	++	—
Poland	—	++	+	+ (Ombudsman)
Israel	—	++	+	—
Russia	++	—	+	+ (Federalism)
Egypt	++	—	+	—
Turkey	+	+	—	++ (The Military)
Iran	—	—	—	++ (The Supreme Jurist; Council of Guardians)

++ = Very Important
+ = Important
— = Unimportant

group rights at the expense of individual and civil rights, and shares with the East European transition the feature of establishing negotiation as a principle of constitution-making, alongside the classical principle of the constituent power of the people.

Endemic ethnic conflict in Africa also results in shifting the focus to group rights at the expense of the individual rights of citizenship. Constitutional rights as developed in the era of the nation-states were the rights of individuals as the nation was assumed to be ethnically homogenous. This assumption was transplanted to Africa in the post-colonial wave of constitution-making, and did much violence to the reality of the new African states. After many civil wars and instances of genocide, the constitutions of the 1990s have learned the hard way to acknowledge the reality of ethnic groups and have linked citizenship to group rights. The 1995 Constitution of Kenya, for instance, shows the impact of the foundering of numerous post-colonial nation-states on the rock of ethnicity. It defines citizenship ethnically, recognizing 56 indigenous communities that existed in 1926 as the basis for citizenship. (Odoki 2005: 337–38) Awareness of ethnic pluralism is even stronger in the constitutional design for the 1997 Constitution of Fiji.

Chapter 7 by Jill Cottrell and Yash Ghai is a first-hand account of the making of the Constitution of Fiji from March 1995 to July 1997, and its analysis as an attempt at constitutional engineering to assure political stability in a multi-ethnic society. The need for a new and more inclusive constitution was felt ever since the overthrow, in 1987, of a government democratically elected under the independence constitution of 1970 that had, however, upset the pattern of domination by indigenous Fijians. The Constitution of 1997, abrogated after a coup in May 2000 and restored by the High Court in November of the same year, did not prevent subsequent *coups d'état*, nor bring political stability, though it may have served as an anchor in the ongoing political storm. If so, it may exemplify the halfway point between constitutions as acts of foundation of political regimes, and routine power grabbing in politics. It is, however, a noteworthy attempt to discard the often unwarranted implicit eighteenth-century conception of the political community as homogeneous, one and indivisible, and to come to terms with power-sharing in multi-ethnic polities. Constitutional engineering thus moves beyond J. S. Mills-inspired liberal constitutionalist guarantees of rights of minorities within the body of national citizens, presumed to be ethnically homogeneous, and faces what he considered the impossible task of devising a democratic system of government for a multi-ethnic society.

Finally, the most recent East African constitutional experience provides a new function for protracted constitution-making in authoritarian regimes as political theatre for schooling in citizenship and as a substitute for democratic politics, providing a one-time chance for grass-roots political participation denied to the people in routine politics. This is illustrated by the process of constitution-making set in motion by international pressures to democratize in Uganda and Kenya. The Ugandan Constitutional Statute of 1988 set up a Constitutional Commission which first met in March 1989. It engaged in popular dialogue, receiving 12,377 from local councils and 3,392 from individuals and civil society groups. (Odoki 2005: 255). It submitted its draft constitution to the President on December 31, 1992, and simplified versions of it were published in the six major languages in 1993. The Constituent Assembly was elected in March 1994 and enacted a Constitution based on the draft in September 1995, which was promulgated by the President on October 8, 1995. It assured the landslide re-election of President Musevenie in May 1996, but does not seem to have had any major democratizing effect. Constitution-making in Kenya between 2000 and

2005, which had been set in motion by international pressures, became even more of a "people-driven process" under the energetic leadership of the Chairman of the Constitutional Commission, Yash Ghai, who traveled widely throughout the country and held many hearings. (Cottrell & Ghai 2004) It dominated the politics of democratic transition from President Moi's regime, but the new democratically elected government reneged on its electoral pledge of support and wasted no time in seriously tampering with the draft constitution which was rejected by the national referendum of November 21, 2005.

The obvious political challenges to constitutional reconstruction aiming at conflict resolution in polities torn by civil strife and/or stabilizing political order in the ethnically and/or religiously fragmented societies such as Canada, Israel, Fiji and South Africa are compounded by an enormous intellectual challenge stemming from that fact that the philosophical foundation underlying the constitutionalization of rights is individualistic and secular. It excludes group rights to political participation and religious and other collectivist conceptions of constitutional order. To call constitutional democracy 'deliberative' and talk about its "epistemic value" (Nino 1996: ch. 5) may be a step in the right direction but it still rests on the same philosophical foundation and offers little guidance for consociational constitutional design for distribution of power within the state. This should not be surprising because the treatment of the political right to participation in government and creation of legal norms in legal theory has always lagged behind that of protection of civil rights and liberties. Under these circumstances the only approach to constitutional engineering may be a pragmatic one, like the *ad hoc* constitutional reconstruction of federal and provincial power structures in South Africa analyzed in Chapter 6 by Heinz Klug.

There have been recent attempts at the theoretical level, however, to free constitutional and legal thinking from the inappropriate model of the unitary nation-state with an integrated hierarchical legal structure. Bouaventura de Sousa Santos's study on Mozambique, for instance, explores the idea of "the heterogeneous state" with a pluralistic legal structure corresponding to a historically stratified "palimpset of political and legal cultures" (de Sousa Santos 2006: 47) that comprises traditional, colonial and popular-revolutionary, and finally trans-national law from different historical periods. A "double decentering of the state" is presented as a result of the "subnational legal plurality" acting "in combination with supranational legal plurality." (de Sousa Santos 2006: 44–45)

Nationalization of Global Trends and Legal Transplantation

Although transnational trends, global governance and integration through the law cannot be dealt with directly, the essays on Turkey and Poland mention the insinuation of the European and international human rights into national legal systems—a process akin to what Weiler (1999: 28, 33, 98, 100) calls "nationalization" and "infra-nationalization" in the European Union.[13] The inclusion of a Charter of Rights and Freedoms in Canada's first Constitution in 1982 was a major early instance of national constitutionalization of human rights, and in turn influenced similar nationalization and constitutional entrenchment of human rights in other constitutions, notably that of South Africa. A decade later, in 1992, Israel passed its bill of rights in the form of two new Basic Laws, and the Supreme Court stepped into the arena of judicialized politics with the vengeance of the latecomer. (Hirschl 2004; Chapter 3 by Gavison) More generally, as the idea of constitutional review is closely linked to the defense of human rights in new constitutionalism, the constitutional courts have acted as a channel for nationalization of human rights—mainly in Western and Eastern Europe and South Africa, but also in Egypt.

Legal transplantation obviously plays a major role in the transmission of the constitutionalist tradition. Go elaborates on the transmission of two distinct constitutional models to the former British and French colonies in Chapter 4, while Sólyom offers us valuable insights into the transmission of German neo-constitutionalist jurisprudence to Central Eastern Europe in Chapter 12. But we also find examples of legal transplants of a less obvious—and for that reason, analytically more interesting—kind: transplanation across different eras in constitutional history. Preuss (1995: 68–72) delves into the Weimar constitutional debates in search of the roots of the post-Soviet "constitutional reflexivity." The survival and revival of strong Presidency in Russia and Egypt and the inclusion of Iran in our sample offer us a good reason for doing the same, and for demonstrating that "transplanting frequently, perhaps always, involves legal transformation." (Watson 1993: 116).

As we shall see below, authoritarian constitutionalism of the era of state-building survives—indeed to the extent that justifies making it into an ideal type. Several new constitutions have been promulgated by the

[13] See Kogacioğlu, *infra* on Turkey and Kurczewski, *infra*, on Poland.

rulers in the Arab Middle East, and the Egyptian President has made continuous use of emergency decrees.[14] As Anders Fogelklou shows in Chapter 9, the Russian constitution was designed by President Yeltsin, and some sweeping measures to reorganize the Russian state have been taken by Putin's presidential decrees. Although the constitutional discussions of strong presidency arose in the context of the Weimar constitutional crisis in 1930s, they can help us characterize the legal situation in Russia as well as in other contemporary authoritarian regimes such as Egypt that have been variously described as "neo-patrimonial" (Eisenstadt 1970) and "neo-Sultanistic." (Chehabi & Linz 1998) From the legal point of view, local resistance to centralization in Russia can be said to have a "feudal aspect," too. It is interesting to note that the strongest provincial governors who successfully resisted Putin's centralization could do so under the rule of law project by establishing their own regional constitutional courts. (Trochev 2004)

In his study of the Weimar constitutional crisis, Rossiter (1963[1948]: 9–10) used the term "constitutional dictatorship" to describe "the delegation of legislative power" through the device known as 'the enabling act'. The Weimar debate between Carl Schmitt, on the one side, and Otto Kirschheimer and Franz Neumann, on the other, had focused on "the plebiscitary personage of the federal President," making him a competitor in law-making of a parliament he has the right to dissolve. This debate highlighted the distinction between "legality" and "legitimacy"—with the latter serving as the "justification of direct plebiscitary law-making." (Kirschheimer 1996[1933]: 86) The legal transfer of special power used for issuing emergency decrees results in "dual legality." (Kirschheimer 1996[1932]: 47; Fraenkel 1941) In Neumann's (1996[1937]) conception, this duality arises from the tension between the rational conception of law and its political conception (as sovereignty). It results in the subsistence of a rational-legal order whose assertion can, however, be trumped by political law. Political law can take the form of the decree of a plebiscitary "constitutional dictator" or a charismatic leader or an authoritarian military dictator.

The use of emergency decrees discussed in the Weimar literature results in the fusion of legislative and executive power. Analytically, this contrasts with the fusion of legislative and judiciary functions in constitutional courts, which also first surfaced in the Weimar constitutional

[14] See Brown, *infra*.

debates. I am suggesting that the first divergence from the norm of separation of powers throws considerable light on dual legality currently evident in regimes such as Egypt's. In the post-communist reconstruction of Russia, we find a combination of both types of divergence from the norm of separation of powers, with legislation by Presidential emergency decrees, on the one hand, and constitutional jurisprudence of the high courts, on the other.[15] More generally, many of the Presidents of the present era of international state of emergency are beginning to bear an uncanny resemblance to the constitutional dictator of the Weimar era. Furthermore, in discussion of Carl Schmitt's infamous definition of sovereignty by the ability to determine "the state of exception" and thereby partially suspend the rule of law, Scheppele (2004: 1009–15) points out that while the Germans learned the lesson of the rise of Nazism by severely restricting the state of emergency after World War II, the Americans drew the opposite lesson of empowerment of their government to prevent the emergence of unacceptable regimes abroad and evolved the so-called 'national security constitution' that has so readily been adopted to the new global war on terror.

The tension between Presidentialism and court-centered constitutionalism is also classically discussed in the Weimar constitutional debates. In 1928 and 1929, Kelsen offered a theoretical justification for constitutional courts by elevating the principle of constitutional legality above parliamentary legislation and arguing that its technical interpretation and the determination of the constitutionality of legislative and administrative acts was a non-political function, and therefore required a body of experts in constitutional law. (Kelsen 1928; Dyzenhaus 1997:150–52) In 1931, Carl Schmitt argued that, in view of the inconsistencies of the Weimar Constitution and the evidently political nature of judicial review by the constitutional court, it was the duty of the President, by virtue of his direct election by the people (his plebiscitary legitimacy) and his independence from factional party politics, to act as the "guardian (*Hüter*) of the constitution." Kelsen responded by reaffirming that the politically neutral constitutional court, and not the elected President (whose powers were defined by the constitution and who was therefore an interested party in the determination of constitutionality), was the organ entitled to the authoritative interpretation of the constitution.

[15] See Fogelklou, *infra*.

The constitutional court was therefore the true "guardian of the constitution." (Dyzenhaus 1997: 76–77, 108–23)

Weimar constitutional ideas were transplanted into constitution-making in the second half of the twentieth century. General de Gaulle's legal advisors were evidently familiar with the debate, and sided largely with Schmitt, declaring the President the guardian of the constitution and responsible for its implementation in Article 5 of the 1958 Constitution of the Fifth French Republic.[16] However, a non-judicial *Conseil Constitutionnel* was also set up with the power of reviewing parliamentary legislation before it would go into effect. The French Constitution of 1958 was in turn largely transplanted into the draft constitution of the Islamic Republic of Iran prepared by the provisional government of Mehdi Bazargan in the spring of 1979. A unique feature of the old Iranian constitution of 1906–7, designed to accommodate the Shi'ite norms of authority (Arjomand 2000), however, was assimilated to the French design of the *Conseil Constitutionnel.* The 1979 draft constitution proposed a mixed panel of secular and clerical jurists to review the bills for constitutionality and conformity with Islam. It was called the Council of Guardians of the Constitution. The draft constitution was thoroughly Islamicized by a clerically-dominated Assembly of Experts and changed almost beyond recognition. The split function of guardianship of the Constitution, transplanted from the 1958 French Constitution, however, survived this Islamicizing onslaught. In the Constitution of 1979, the council is simply called the Council of Guardians, with its guardianship of Islamic standards as the higher law boosted and made the exclusive prerogative of its clerical jurists. However, it retains the incidental function of supervising the election included in the French model.

The paths of subsequent development of this transplanted institution in France and Iran diverged widely. The Gaullist institution of the *Conseil Constitutionnel* took a life of its own soon after de Gaulle stepped down as the President. In 1971, it constitutionalized human rights in France by declaring the Preamble to the previous constitution of 1946 as well as the 1789 Declaration of the Rights of Man and the Citizen part of the French Constitution. The *Conseil Constitutionnel* has

[16] The term 'guardian' (*negahbān*) was used in the Persian rendition of this phrase, as it is in the English translation in Finer, Bogdanor & Rudden (1995: 214). It does not, however, occur in the French original: "Le Président da la République veille au respect de la Constitution…"

since become judicialized and active in constitutional review alongside other European constitutional courts. (Sajó 1999: 236–37) The Iranian Council of Guardians, by contrast, has used its power of constitutional interpretation to justify its peculiar use as an instrument of political control, arguing that the supervision of elections was entirely discretionary (*estesvābi*) and entitling it to rejection of candidates for Presidency, the Majles and other elected bodies. It has acquired worldwide notoriety by abusing this power as the regime's gatekeeper by massively disqualifying candidates for elected office. As we shall see in the following section, this institution was to undergo further transformation as a consequence of the ideological constitution into which it was transplanted.

Constitutional Politics, Judicialization of Politics and Politicization of the Judiciary

Constitutional politics is generally conceived in opposition to routine politics and policy making. We need, however, to be more precise in our definition. Our focus on political reconstruction requires a broad sociological definition of constitutional politics in preference to a more strictly legalistic one. Stone Sweet (2000: 21–22) defines constitutional politics narrowly as the regulation of decision-making by public officials and other individuals through "the rule-making of constitutional judges." It seems preferable to call this "judicial[ization of] politics," while giving constitutional politics a broader macrosociological meaning as the politics of reconstruction—be it in the form of construction of new political communities, modernization or transition to democracy—where socio-political forces and institutional interests are aligned behind competing and heterogeneous principles of order. (Arjomand 1992) According to this broader, more inclusive sociological conception, constitutional politics would comprise fascist, socialist and Islamic reconstruction as well as liberal and social-democratic reconstruction and the constitutional jurisprudence/judicial politics of the new constitutionalism. The latter type of judicial politics would be included in constitutional politics as it "generate[s] the ongoing construction, or development, of the normative basis of the state itself." (Stone Sweet 2000:29)

Constitutional politics, when successful, typically result in compromises, in written constitutions and in constitutional legislation and jurisprudence, that can be explained by the relative strength of social

and institutional forces and interests behind the constellations of value-ideas, on the one hand, and by the procedural rules and the dynamics of constitutional debates on heterogeneous principles of order, on the other. The procedure has been analyzed by Elster, who presents "the constitution-making process as shaped by two forces: arguing and bargaining." (Elster, Offe & Preuss 1998: 77) In this process, the pressure to disguise self-interest as public interest under public scrutiny tends to favor the first force; group interests and institutional self-interest, the second. Constitutions and constitutional measures promulgated by monarchs and presidents in our sample are thus biased by the institutional interests of monarchy and presidency, while Iran's theocratic constitution, made by a predominantly clerical assembly under orders from a charismatic religious leader, is biased by the interests of the clerical estate.

Pushing the same procedural logic, Elster (1995) maintains that a rupture between routine and constitutional politics is beneficial to the process of constitutional change. Constituent assemblies are a better mechanism for constitution-making than ordinary parliaments. In the era of new constitutionalism, we can add the contribution of the new Constitutional Courts as a process transcending routine politics. Sometimes, constitutional experts can transplant a blue-print independently of routine politics. As Gavison points out, the relationship between political reconstruction and constitution-making is far from simple. Radical political change may occur in the context of constitutional continuity or major changes in constitutional law may occur without any political upheaval.[17] Furthermore, as we have seen, different institutions can become engines of constitutional politics; and the distinction between routine and constitutional politics is frequently blurred.

The distinction is important, nevertheless. While Hungary has emerged as something of a paradigmatic case of new constitutionalism, the constitutional development in Poland is marked by a striking absence of any rupture between routine politics and constitution-making. (Skapska 1999) Poland missed the "constitutional moment" in 1989, while Hungary had the advantage of accepting a constitution in that moment of rupture with communism, which transplanted some of Kelsen's constitutional theory, including the role of the constitutional

[17] See Gavison, *infra*.

court.[18] If we compare the essays by Sólyom and Kurczewski (Chapters 12 and 8), it is hard not to be impressed by the directionality and rationalizing consequences of the former and the haphazardness and lack of direction of the latter:

> The faltering of institutional reform in Poland suggests that rules which work well for governing may nevertheless impede constitution-making. (Osiatynski 1994: 32 as cited in Skapska 1999: 166)

The influence of the constitution in channeling constitutional politics is obvious. By directing political action into various legal and political channels, it sets boundaries for the arena of political contention. The case of Iran, as analyzed by Keyvan Tabari in Chapter 5, clearly shows the constitution itself to be the crucial determinant of the form and arena of constitutional politics during Khātami's Presidency (1997–2005), with the alignment of social and political forces behind its contradictory theocratic and democratic principles. The supreme jurist or Leader, and the appointed clerical office-holders, including the Head of the Judiciary, backed by the revolutionary guards, stand behind the former principle, the elected President and parliamentarians, backed by the majority of the people, behind the latter. The paper constitutions of the age of ideology made a difference to the shape of the succeeding states in the subsequent era of new constitutionalism. The Soviet Union split into the Commonwealth of Independent States precisely along the once artificial lines of its paper constitution, while "Czechoslovakia was arguably destroyed by the fact that the communist constitution gave the Slovaks unusually strong veto powers." (Elster, Offe & Preuss 1998: 80) The paper constitutions of Hungary and Poland were gradually and repeatedly modified during the collapse of communism, much of the existing law that was good on paper but had never been applied properly was retained—indeed made possible a "rule of law revolution"—and many of the social rights transmitted from earlier constitutional models by the communist constitutions could be properly constitutionalized in the new ones.[19]

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[18] According to Professor Kim Scheppele, Kálmán Kulcsár, the main drafter of the 1989 constitution, had studied with Kelsen at Berkeley in the early 1960s. I am grateful to Professor Scheppele for this and the information in footnote 18 below.

[19] Social rights were not invented by the ideological constitution-makers. The Weimar constitution of 1919, for example, included a set of social rights, and the Basic Law of 1949 describes Germany as a social *Rechtsstaat.* Hungary made social rights universal by taking them from the International Convention on Social, Economic and

Our macrosociological definition should enable us to put these instances of constitutional politics in a broader comparative perspective. One important comparison is between new constitutionalism and ideological constitutions. We find striking examples of negative or defensive constitutional politics in Turkey and Iran, where the constitutional courts and other organs of constitutional review as well as ordinary and special courts (National Security Courts in Turkey and the Special Court for Clergy in Iran) engage in political activism in defense of the official ideology of the regime. The constitutions of Turkey and Iran belong to our ideological type. With the global transplantation of legal institutions, the Constitutional Court of Turkey was set up in 1961 (reorganized in 1982), while the Iranian Constitution of 1979 set up the Council of Guardians (which is technically not one[20]). As ideological constitutions warrant the repressive use of judicial power through the courts to protect the constitutionally-entrenched ideology of the regime, we find the surprising assumption of a new function of ideological guardianship by the constitutional courts and organs of judicial review and constitutional interpretation in Iran and Turkey.

The Turkish Constitutional Court has arguably been the least restrained constitutional court in the world. Between its establishment in 1982 and 2000 the Court annulled 72% of the cases it received for abstract review. In addition, since 1983 it has closed 18 political parties, including three political parties with representation in the parliament. (Shambayati 2007) Incidentally, the parliament has no role in appointments to the court and no power of interpellations over its judges. Just as Iran, the representatives of the people cannot be trusted to have a say in guarding the ideological foundations of the regime of which they are a subsidiary part. In Chapter 15, Dicle Kogacioğlu shows how, in dissolving the Islamic and Kurdish political parties, the Turkish con-

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Cultural Rights in 1989. Nor were the former communists responsible for their constitutionalization in the post-Communist era. According to Professor Kim Scheppele that Catholic natural lawyers were behind the move to put social rights in the Polish constitution of 1997.

[20] Plans for a constitutional court with the power to impeach the President to share the function of ideological guardianship have been elaborated, largely as a contentious response to the former reformist President Khātami's claim to be responsible for the implementation of the Constitution according to its Article 113 (yet another carry-over from the 1958 French Constitution) and his setting up of a commission to oversee this function. (Arjomand 2005) The plan was unveiled recently, at the end of Khātami's last term, and it is a foregone conclusion that the new constitutional court will be clerically dominated.

stitutional court has explicitly acted as the protector of the Kemalist ideological principles of secularism and nationalism. In Chapter 5 by Tabari, we see the clerically-dominated Council of Guardians act as the guardians of the Islamic ideological principles of the Constitution of the Islamic Republic of Iran, and as the interpreter of Islam as the higher law. This repressive use of the organs of constitutional review has adverse consequences for the rationality of legal systems. In Iran, it has all but demolishing the Majles (parliament) as a legislative institution. We may therefore conclude that in constitutional orders with entrenched ideologies, constitutional courts are more likely to act as guardians of the ideological foundations of the regime than as protectors of rights. Surprising as it may seem, the Turkish Constitutional Court as one of the major institutions guarding the Kemalist, secularist foundations of the regime closely resembles the Iranian Council of Guardians in the theocratic republic. Both bodies perform the same function of guarding the constitutionally entrenched ideological foundations of their respective regimes.

This brings us to the process of constitutional politics and the extent to which it takes place in an institutional frame. Constitutional politics may take fully institutional forms. Jacob (1996) presents a comparative spectrum of the scope of judicial politics and the extent of involvement of judges (of ordinary and constitutional courts) in constitutional politics. The United States stands at one end of the spectrum and Japan at the other, with Germany and France in the middle. Three of the essays in this volume highlight similarities as well as differences between two important constitutional courts as agents of constitutional politics in Hungary and Russia. Both courts wield considerable pedagogical authority and have played an important role in the rationalization of the legal order, the first overtly through the constitutional review of legislation, the second (especially after its reconstitution in 1995) through its massive correspondence and the issuance and publication of "definitions." Thus, both Hungary and Russia offer instances of the positive use of judicial review in the process of political reconstruction or transition to democracy. There is, however, a sharp contrast with regard to the involvement of military force as well as the alignment of political forces and constellation of institutional interests in Hungarian and Russian constitutional politics. The Russian constitutional court is in a much weaker position vis-à-vis the President, has competitors in judicial review—both the Supreme Court and the Supreme Arbitrazh Court—and developed only later the mutually accommodative

relationship with the parliament that prevailed in Hungary in the 1990s. Even in Hungary, however, constitutional politics of that decade was the politics of compromise. As Kim Scheppele shows in Chapter 13, the constitutional court and the parliament have different objectives and institutional interests, which usually result in compromises formulated in the final version of the revised laws.

As broadly defined here, however, constitutional politics need not be confined to courts, and need not even be institutionalized. The factors that have prevented the proclaimed plans for writing a constitution in Israel pertain to constitutional politics in the strict sense, yet their arena is the parliament, electoral campaigns and the public sphere.[21] The constitutional politics of Iran under President Khātami were very minimally institutionalized, and were largely taking place in the public sphere and in the street, as are the ongoing constitutional politics of resistance to the attack on judiciary independence in Egypt. More generally, constitutional politics are the politics of institution-making, which may result in failure. In that case, they will remain uninstitutionalized. Here we need to think of the judicialization of politics and the politicization of the judiciary as opposites in terms of the degree of institutionalization. The possibility and extent of judicialization of politics depend on the successful institutionalization of judiciary power, generally, and the consolidation of judicial review of legislation and administration in particular. Conversely, the politicization of the judiciary results, in part, from a low degree of institutional development and autonomy of the judiciary within the polity. Such politicization is a serious problem in regimes with ideological constitutions, which undermine the rule of law and consequently judicial authority and autonomy.

Latin American legal reforms presume the logic of the above schema, as does the violent action of their opponents. There, the project of "judicialization of politics or…expansion of judicial power is intimately related to the construction of a new state form." (de Sousa Santos 1999: 82) The aim is the dispersing of social conflict through judicialization of politics. This judicialization is successfully blocked by the opponents of democratization in the violent constitutional politics of Colombia, where some three hundred judges were assassinated between 1978 and the end of the century. (de Sousa Santos 1999: 75)

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[21] See Gavison, *infra*.

Recent developments in Iran present an extreme case of negative politicization in which the arena of constitutional politics shifts away from the parliament as the main legislative organ to the press and informal channels of protest and even into the streets, while the functions of political control are increasingly assumed by the judiciary and the main organ for constitutional review. The revolutionary courts, instituted by Khomeini to liquidate the enemies of the revolution and thus serve as instruments of transition from monarchy to Islamic theocratic government, have never been disbanded and continue to be used as instruments of repression. More ominous still is the degeneration of the organ of constitutional review—the Council of Guardians,[22] and the ordinary courts into instruments of political control for the repression of dissent and opposition to the ideology of the regime. The increasingly repressive use of courts is the opposite of the rule of law—not only in the amplified, new sense, but also in the old sense of the *Rechtsstaat*, as it involves frequent violation of due process and other legal formalities.

The requirement by law that the European constitutional courts justify their decisions in writing has turned them into engines of legal rationalization and institutional development. (Stone Sweet 2000: 144–45). By contrast, the Iranian Council of Guardians is not required to give written judgments and very rarely gives legal reasons for its vetoes. Its review of constitutionality of laws is consequently entirely negative. The absence of any written constitutional jurisprudence and the lack of any constructive judicial input by the Council of Guardians in the efforts at the Islamicization of the judiciary have contributed to the failure to institutionalize a unified and distinctly Islamic judiciary structure.[23] This has in turn had a destabilizing and anti-institutional impact on Iran's constitutional politics, shifting it away from the constitutional organ of the regime and into the public sphere, where the

[22] Indeed, the massive disqualification of candidates for elective office is not a judicial act, and no legal rationale and judgment is offered for it. The Council simply acts as the gatekeeper of all elective offices, and has thus become mired in the dirty politics of repression and disenfranchisement in the elections.

[23] The Special Court for Clergy acts as an arm of the supreme clerical Leader and is separate from the judiciary. The President's constitutional commission considers it unconstitutional. The failure of the measures to Islamicize the judiciary has been admitted more than once by the current Chief of Judiciary Power, who has been undoing some of them—notably the so-called "general court" for dispensing Kadi justice where the judge was also the prosecutor.

free press was debating constitutional issues until it was muffled by President Mahmud Ahmadinejād in 2005–6, and then to the streets with demonstrations by workers, teachers and students. In contrast to the judicialization of politics in Western and Eastern Europe within a highly differentiated institutional structure, the current Iranian constitutional crisis represents the extreme politicization of the judiciary in the context of a contraction of the institutional division of labor. (Arjomand 2000; 2005)

Democracy, the Enhanced Rule of Law and the Structure of Political Order

Some analysts have expressed concern that the additional features of the new constitutionalism are not just more than but *against* democracy. Such concerns are provoked by the triumphalist glorification of the new constitutionalism. During the conference in which this volume originated, the daily *El Pais* (6/14/02) carried a statement by the President of the Spanish Constitutional Court, Manuel Jimenez de Parga, that parliaments were outmoded nineteenth-century institutions while the constitutional courts could lead the judiciary reform necessary for bringing the politico-legal order up to date with the requirements of the twenty-first. Waldron (1999: 162) is clearly on the defensive in arguing for "legislation by a popular assembly as a respectable source of law" in order to counter "the indignity of legislation," as is Gavison in expressing her concerns about the judicial activism of the Israeli Supreme Court.[24] To refuse to come to terms with the new constitutionalism as a global trend, however, by opposing it to the hackneyed clichés of republicanism and majoritarian democracy involves the risk of appearing so simplistic and institutionally undifferentiated as to blur democracy into mob rule. Any serious critique of the new constitutionalism has to acknowledge the complexity of the heterogeneous and potentially conflicting elements it comprises.

One of these components is judicial activism, or more generally judicial empowerment, to use Scheppele's terms,[25] which has received a lot of attention in the literature. Judicial power needs to be evaluated not just in relation to other branches of government, but also in relation

[24] See Gavison, *infra*.
[25] See Scheppele, Chapter 13, *infra*.

to the citizens on whose behalf it is exercised. What needs emphasis is that empowerment is not a zero-sum game, and judicial review also results in the political empowerment of the citizens.

As least since the Code of Hammurabi, access to the justice of the ruler has been recognized in human societies as an important form of empowerment. With the institutional differentiation of the judiciary functions, this empowerment under the rule of law, in Dicey's classic formulation, takes the form of access to ordinary courts. Somewhat more recently, Kelsen (1961[1945]: 87–90) pointed out that the civil right of access to courts allows for possible participation in the creation of legal norms and is therefore also a political right. With the advent of the constitutional courts and the citizens' access to them through *actio popularis*, to use Kelsen's (1928: 245) term, a new layer of empowerment is added through the rule of law under new constitutionalism, and one that can be considered democratic participation in law creation and constitutional reconstruction.

Latin American legal reformers rightly consider the satisfaction of "suppressed judicial demands . . . a form of political enfranchising of politically excluded population." (de Sousa Santos 1999: 78) The development of *actio popularis* in the form of "constitutional complaint" (*Verfassungsbeschwerde* in German, *amparo* in Spanish) has established, theoretically speaking, a potent form of enfranchisement that gives the ordinary citizens a channel for participation in constitutional reconstruction. If we think the impact of the rule of law upon the political order as the opening of access to ordinary and constitutional justice, we cannot escape the conclusion that it results in a significant redistribution of power in the political structure. It empowers both judges and the citizenry against the government and the political class.

Furthermore, the impact of the rule of law on the power structure extends beyond individuals, and is particularly important for the empowerment of civil society. Civic organizations, social movements and NGOs are more resourceful than individuals and in a stronger position to take advantage of judicial access for the creation, to use Kelsen's terms, of individual and constitutional legal norms. This empowerment by the rule of law is central to Hegel's idea of civil society.

The Hungarian and Russian citizens in the post-communist era have access not only to ordinary courts, but also to constitutional courts. As Sólyom and Scheppele show in Chapters 12 and 13, the right of access to constitutional courts is very popular, and numerous individuals in both countries have used this newly acquired right. Some have set in

motion the generation of constitutional legal norms or have secured review of administrative acts. This right is potentially more valuable than a single vote in parliamentary, local and presidential elections. This the citizens of the Islamic Republic of Iran, who have had their votes counted in five successive national elections since 1997 and find themselves no nearer to the rule of law, know full well. Perhaps the most eloquent testimony to the empowerment of judges, citizens and human rights NGOs comes from Egypt, where "legal mobilization" through a sharp rise in the recourse to administrative courts and the Supreme Constitutional Court and by capitalizing on Egypt's international human rights obligations indeed appears as "an alternative path to democratization." (El-Ghobashy 2006: 153) But the same recognition of the political importance of civil rights and of empowerment by the rule of law is behind the phenomenon of legal mobilization in countries as different as Turkey (Kogacioğlu 2003) and China (Gallagher 2006).

The concept of democracy seems limiting and tendentious in our comparative, macropolitical perspective. This is not to say that democracy cannot be defined analytically. But however rigorously defined, democracy seems inadequate as a short-hand description of the complex contemporary politico-legal regimes. Beer (1992) argues convincingly that the constitutionalization of rights alters the character of majoritarian democracy fundamentally, and, in fact, defines the new "human rights constitutionalism" in contrast to it:

> "Human rights constitutionalism" combines the features of majoritarian democracy and constitutionalist restraint on power. . . . Human rights constitutionalism insists upon a broader conception of rights and government responsibility than democracy, with its focus on majority rule and political liberties . . . (Beer 1992: 18)

If Beer could say this with reference to Asia around 1990, it applies all the more so to the new global constitutionalism in the new century.

The enhanced rule of law under the new constitutionalism can perhaps be conceived a little more fully as comprising three elements: 1) majoritarian democracy and organization of the state authority; 2) human rights and 3) constitutional courts and/or other national and transnational organs for judicial review of administration and legislation. The higher law of the new constitutionalism, I have argued, can be said to consist of the protection of human rights of the individual but in a free and democratic society. If so, 'human rights' and 'freedom of democratic society' are its two fundamental principles, irreducible to

a single hypothetical *Grundnorm* and therefore impossible to implement without judicial interpretation and mediation of judges.

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PART I

NATION-BUILDING, MODERNIZATION AND POST-COLONIAL RECONSTRUCTION

CHAPTER TWO

REGIMES REINVENTING THEMSELVES:

CONSTITUTIONAL DEVELOPMENT IN THE ARAB WORLD*

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Constitutionalism and constitution-writing have been dominated for the past two centuries by metaphors of collective self-definition: a constitution is an attempt by a political community to express the fundamental rules and values of political life. The strongest institutional expression of such metaphors is the constituent assembly: a body of elected representatives, defining or redefining the nation. The United States and France helped give birth to this idealized image of constitutional composition. Constitutional politics is to transcend normal politics; indeed, such politics attempts to define the rules according to which normal politics operates (Ackerman, 1992). Most constitutions actually adopted in the 19th century seemed far more prosaic affairs than the image of transcendent self-definition might suggest. They involved temporary compromises, ambiguous silences, and often did not survive the immediate circumstances that brought them into being. In several areas, those drafting the constitutions were as likely to turn to the Belgian and Prussian as models over the American and the French, precisely because of the way these less prominent documents avoided some of the constitutionalist implications of their more famous counterparts.

Over the past half-century, revolutionary and newly independent governments have often drawn on the metaphor of collective self-definition in drawing up their own constitutions. Constituent assemblies have been elected and constitutions written, often growing more fulsome in their espousal of ideological principles even as they increasingly have failed to provide for genuine accountability. This pattern led to an increased

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cynicism about constitutions generally, leading most scholars and political analysts away from constitutional analysis for many years.

The series of dramatic political transformations in Southern Europe in the 1970s, South America in the 1980s and Central and Eastern Europe drew attention back to constitution-writing. Once again, the image of the nation defining itself emerged: especially in the heady days following the collapse of old regimes (before the constellation of post-transition political forces had sorted itself out), transcendent politics seemed the order of the day.

Yet at the same time, a far different metaphor for constitution-writing emerged from the process of political reconstruction in post-Communist societies: 'rebuilding the ship at sea' (Elster et al., 1998). When societies reinvent themselves, they cannot do so out of whole cloth, nor can they ignore their immediate environment and focus only on the long-term future. Instead, they must use existing institutions in order to make new ones, and they generally face severe constraints.

If post-Communist constitutions should be seen in this more modest way, how much more must constitutions issued by existing regimes. In the Arab world, and in the Middle East more generally, most constitutional documents have been promulgated less by the nation assembled than by existing regimes seeking tools to enable them to face domestic and international challenges.[1] Sometimes governing elites have been badly divided internally, at other times they have been united. And constitutions have been issued to address a varying range of concerns: international, domestic and internal to the state itself. This article traces the enabling aspects of Arab constitutions over the past century and a half, concentrating on the very recent past. In some ways, the past two decades have seen a definite (if limited) upsurge of interest in constitutionalism in the Arab world. Yet that change should not

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[1] Those inventing the 'rebuilding the ship at sea' metaphor insist that the post-Communist societies actually had a fairly clean institutional slate. They further claim that the focus on self-interest can be mitigated by political deliberations (building on some strains of a 'deliberative democracy' approach). I do not contest either of these conclusions here. Yet the first claim is not applicable to the Arab world. The second may seem applicable, because leaders regularly justify their policies by appeals to general ideologies and societal interests—indeed, they probably do so more regularly than political leaders in democratic societies who also must appeal to particular constituencies. Yet even if the need to give public justifications tempers their behavior, I do not think it determines it.

obscure an underlying continuity. For while the Arab world has joined the global trend toward greater interest in constitutional structures, the changes of the past few decades have not reversed the patterns of the past: constitutions remain politically enabling documents in a variety of settings.

Middle Eastern Constitutions as Enabling Documents

The history of Arab constitutional documents can be divided into three periods. In the 19th century, regimes ruling much of the Arab world experimented with written constitutions in response to fiscal and international crisis. In the first half of the 20th century, newly independent Arab states issued written constitutions in order to affirm their sovereignty. And in the 1960s and 1970s, constitutions became ideological manifestos for self-styled revolutionary regimes.[2]

Late 19th Century

In the second half of the 19th century, Egypt and Tunisia (then autonomous parts of the Ottoman Empire) issued constitutional documents that were brief both in their length and their viable lifespan. In addition, the eastern part of the Arab world came under the Ottoman Constitution of 1876 (in effect briefly from 1876 to 1877 and then restored in 1908). Since these documents did not survive the immediate circumstances that brought them into being, they are generally seen in retrospect as experiments in importing inappropriate political forms, and perhaps even as externally imposed or designed only to please European audiences. But the short history of these documents tells a different tale: in each case, the constitution was a project of elite factions eager to shore up and reform an existing regime.

The Tunisian Constitution of 1861 was issued as part of a reform program that aimed to assert central control over outlying areas and reverse the regime's military decline. It was abandoned in the midst of a rebellion three years later. While European (especially French) influence was felt in the drafting process, the document is European neither in structure nor content. It established a 'Grand Council' that was to ensure

[2] My periodization and analysis here is similar to the more global one introduced by Arjomand (1992).

that Tunisia would be governed by law and that sound fiscal practices would be followed. Yet the creation of the Grand Council was only designed to render members of the political elite accountable to each other (Brown, 1967; Womble, 1997). The Council itself was largely an appointed and self-perpetuating rather than elected body.

The text of the Tunisian Constitution hints at its intended purpose of enhancing the authority of the state through law and administrative and fiscal rationalization. Much attention is given to chains of command, definitions of responsibilities, proper procedures and public finances. Indeed, the document might be seen as a bold attempt to convert Tunisian finances from the personal accounts of the ruler to a state budget. The Tunisian Constitution seems to have been designed to serve constitutionalist ends in limited but real ways: political authority was to be rendered more accountable and effective but truly democratic elements were avoided.

The Ottoman Constitution of 1876 was issued in circumstances quite similar to those surrounding the Tunisian Constitution of 1861. Like Tunisia, the Ottoman Empire had embarked on a program of administrative centralization and rationalization, but by 1875 it faced a series of grave, even existential threats: internal revolt, bankruptcy and external war. In this environment, a group among the political elite of the Empire determined on constitutional government as the key to necessary political and fiscal rationalization and reform. The authority of state actors was not to be diminished, but it was to operate on a more legal and rationalized basis. Accountability, fiscal reform and rationalization would serve as tools to strengthen the Empire and enable it to face its formidable domestic and international challenges. The draft they finally submitted to the sultan most closely resembled the Belgian Constitution of 1831; others noted parallels with the Prussian Constitution, itself a more royalist version of the Belgian model.

The constitution itself—drafted by a narrow group of leaders and issued by imperial edict—drew authority from, rather than granting legitimacy to, the sultan and the political elite. The constitution did create an elected parliament, but the body had few clearly established powers. When the parliament began to use some of the constitutional tools at its disposal, the sultan suspended the document after less than two years of operation (Devereux, 1963).

In 1908, the Ottoman Constitution was revived and amended after a military coup. It then remained in effect, at least in theory, until the collapse of the Empire after World War One. The document had a

lasting impact on Arab constitutional history in that it provided a starting point for many subsequent documents. And the attempt to balance parliamentary authority with a monarchy provided the basis for similar efforts in Syria in 1920, Egypt in 1923, Jordan and Iraq under their British mandates, and Kuwait in 1962.

The final constitution promulgated in the Middle East during the 19th century was the Egyptian Constitution of 1882. It was issued when Egypt was afflicted by the same crises that beset the Ottoman Empire in the previous decade: bankruptcy, domestic turmoil and foreign threats. The Egyptian Constitution was partly a result of pressure from an elected assembly, first formed in 1866. By the end of the 1870s, the formerly placid assembly was showing increasing resentment at European financial control (that followed bankruptcy in 1876) and the accompanying political influence. The country's prime minister drafted a document in 1879, but it was not until 1881 that parliamentarians succeeded in having the document issued (ironically, they simultaneously secured the dismissal of the prime minister who had been its principle architect). Thus, the assembly obtained not only a constitution; they also secured the potentially important precedent that a prime minister without the confidence of the parliament was in an untenable position.

Egyptian constitutionalists therefore should not be seen as fundamentally different in their aims from their Tunisian or Ottoman counterparts. They came from the political elite and saw a constitution as a way of rendering government more efficient and fiscally responsible. Their aim was not to end all royal prerogatives—nor did their draft even contain them all within constitutional channels—but to diminish the royal discretion and render it more responsive to domestic rather than foreign concerns. Once again, democracy was hardly an issue: the Council, though elected, ensured representation primarily of the provincial notability (Cole, 1993; Scholch, 1981).

As with the Tunisian and Ottoman constitutions, the Egyptian document contained at best tenuous and ambiguous limits on royal authority; the Egyptian Constitution was distinctive in that the parliament not only asserted an ambitious interpretation of its prerogatives but did so successfully (and with the backing of the military). Yet shortly after having secured this triumph the parliament went into recess, never to reconvene. Under foreign threats, the political elite of the country split into two hostile camps, and Britain occupied the country in the ensuing struggle. The constitution was then forgotten.

Constitutions as Declarations of Independence

The second wave of constitutional texts came with formal independence in the years following World War One. In 1919 and 1920, a short-lived assembly in Damascus wrote a constitution for the 'Syrian Arab Kingdom' based on the Ottoman Constitution. An Egyptian constitution was issued in 1923, shortly after the country's formal independence. Jordan, Iraq, Lebanon and Syria all developed constitutions while still under imperial control. These documents reflected varying degrees of colonial influence. For instance, the Syrian Constitution was based largely on the earlier document drafted before the imposition of the French mandate, though France did insist on critical changes. The Iraqi Constitution, by contrast, was far more of a British initiative (though it followed the 1876 Ottoman Constitution fairly closely) designed partly to facilitate firm Iraqi-British relations after the conclusion of the British mandate.

In the period after the Second World War, Tunisia, Morocco, Kuwait, Algeria, Qatar, Sudan, Libya, Bahrain and the United Arab Emirates all issued constitutions as they became independent. Indeed, the only Arab countries that lacked written constitutions by the 1970s were those that had escaped direct imperial rule: Saudi Arabia and Oman. While some Arab countries therefore had begun experiments with written constitutions prior to formal independence, in the postwar era, constitutions had become an essential part of proclaiming sovereignty.

Written to proclaim or enable independence, these constitutions tended to share certain features. First, while they often drew on the metaphor of the nation assembled in the form of a constituent assembly, only in very exceptional cases did such a body actually play a major role in composing the constitutional text. In Kuwait, an elected 'Founding Assembly' (*almajlis al-ta'sisi*) discussed a constitution clause by clause with an Egyptian legal expert hired to draft the document. In Jordan, important constitutional amendments were passed by an elected parliament shortly after independence. In all other cases, however, constitution-writing was a far more closed affair. Generally, a small number of legal specialists appointed by the ruler would draft the documents far from public scrutiny. In many cases, their work would be ratified by a constituent assembly or presented to a popular referendum but only as a means of securing legitimacy for the document rather than introducing changes. Some rulers (especially in peninsular monarchies) even dispensed with such formalities and issued the constitution by

decree, perhaps viewing any popular role as an implicit limitation on their own sovereignty.

Second, the independence-era constitutions generally established very strong executives, sometimes robbing other institutions of any effective tools to hold the executive accountable to the law or the people (or even to the constitution itself). Several tools tended to move the executive partially outside the constitutional order. First, in countries in which constitutions were issued by decree, the text could be amended by decree; even in those countries with ritualistic plebiscites there were no serious limitations on the executive's ability to amend the constitution at will. For instance, in Morocco, the king deliberately ignored constitutional provisions for amendment (because it would have meant resorting to a parliament where his domination was incomplete); instead, he simply abrogated constitutions and submitted new ones (with the desired changes) directly to the people for the customary near-unanimous approval (Ghalab, 1993). Second, constitutions took a variety of steps to rob parliaments of any means to hold ministers politically accountable. Sometimes this was done directly by making ministers explicitly unaccountable to parliament; sometimes the same end was accomplished through subtler means (such as requiring a supermajority to bring down a minister or establishing a single-party system that made it virtually unthinkable). It should therefore be of little surprise that many Arab parliaments have never entertained a serious no-confidence motion, much less passed one. Third, constitutions granted only vaguely limited emergency authorities to executive. Use of this authority often required the executive to obtain the consent of a (generally quite pliant) parliament, but once declared, states of emergency have found a way of existing indefinitely (for instance, Egypt has seen a near-continuous state of emergency since the outbreak of the Second World War). Fourth, the executive retained effective domination of constitutional interpretation. This was rarely explicit: judicial review has become surprisingly widespread in the Arab world (Brown, 1998). Yet the constitutional courts that were created generally lacked tools to establish independence from the executive and many critical constitutional provisions were worded so vaguely that only a very ambitious court indeed could have rendered them into tools of genuine accountability. Bereft of any independent voice interpreting the constitution, executives have generally been unrestrained in creatively crafting constitutional interpretation to their advantage. For example, Vice President Zayn al-ʿAbdin Bin ʿAli deposed President Habib Bourguiba in 1986, citing a constitutional

provision regarding the president's incapacity. But that provision gave no guidance on how such a procedure should be carried out, allowing Bin ʿAli simply to adduce a physician's memorandum after the fact to justify his action (*7 Nuvimber*, 1992).

Finally, the constitutions of independence generally established some democratic and liberal forms of government while depriving them of any tools to operate effectively. Rights were enumerated at great length but described in impossibly vague terms and also explicitly defined or limited by law. Elections were mandated in presidential systems but voters presented with a single choice determined by a stacked parliament. In monarchical systems, the king retained tools that allowed him to override or ignore elected parliaments. The problem with these constitutions from a liberal democratic perspective is not—as is often claimed—that their provisions were ignored; this only happened on exceptional occasions. The more frequent problem was that constitutional provisions were constructed in such a way as to rob them of any effectiveness. On rare occasions in which elected institutions showed some vitality—Egypt in the 1930s, Morocco in the 1960s, Kuwait in the 1970s and 1980s—the ruler moved simply to shut them down, suspending the parliament and sometimes the entire constitution.

Constitutions as Ideological Manifestos

The third and final wave of constitution-writing occurred in already independent Arab states anxious to mark new directions. Self-styled revolutionary regimes came to power in many Arab countries, beginning in the 1950s. Generally, such regimes moved immediately to suspend the existing constitution and establish a ruling group (for instance, a 'revolutionary command council' was formed in Egypt and Iraq), arrogating all executive and legislative power. Such regimes often built special 'revolutionary' or 'security' court systems as well, allowing them to bypass the established judiciary.

The revolutionary regimes did not apologize for their concentration of authority in the hands of the executive; indeed, they claimed it was necessary for government to meet national challenges effectively. A political system hamstrung by liberal mechanisms could not free the nation of the effects of imperialism and unequal social and economic relations. Economic development could not occur, new rulers argued, unless governments were empowered to overcome the obstructions of powerful social classes and private economic interests. The new regimes

promised accountability but not in any constitutional sense. Indeed, such regimes were profoundly anti-constitutionalist in spirit: they promised accountability not through institutions, laws and procedures, but through direct representation of the national will.

On some occasions, such regimes (such as in Egypt and Syria) sought to institutionalize themselves after several years in power; on other occasions (such as Algeria and Libya) they resisted such steps for a considerable period. But even those states that postponed formalizing their rule in constitutional form felt the need to issue documents explicating their ideological and programmatic orientation. 'National' or 'revolutionary' charters were thus written in several countries; in other countries, constitutions took on an almost bombastic character, pledging the state to meet socialist goals, realize the national mission and overcome class differences (Arjomand, 1992). Egypt led the way in this regard, issuing a 'National Charter' after embarking on an 'Arab socialist' path in 1962; this was followed by a provisional constitution two years later

These documents—whether or not they took constitutional form—were indeed designed to give fundamental guidance to the polity. Yet they were to do so not solely through legal and institutional mechanisms; in a few cases (Egypt in the 1960s, Libya in the 1970s), they showed a degree of open contempt for such methods. The documents were not constitutionalist in spirit. They nevertheless stemmed from important moments of self-definition for existing regimes, and even those states that avoided constitutions used the metaphor of the nation assembled to write or approve national charters.

The three constitutional moments in the Arab world share two essential features. First, existing regimes composed constitutions; they were not constituted by them. Second, constitutions were designed to enable these existing regimes, whether through fiscal reform, establishing sovereignty, or proclaiming new ideological directions.

A further notable feature is that constitutions often grew less constitutionalist over time. The earliest documents established parliamentary bodies that took their oversight role quite seriously even though they lacked many tools necessary to play it effectively. Indeed, the earliest experiments foundered precisely when the new structures took themselves too seriously. The constitutions of the second, independence-era generation were often formally more complete but only in some cases (such as Jordan in the 1950s, Egypt from the 1920s to the 1950s, and Kuwait since the 1960s) did they establish viable structures of

accountability; even then such structures endangered and sometimes ended their own lives if they pursued a constitutionalist vision too energetically. With the possible exception of the first generation of constitutions, then, Arab constitutions have not been designed or intended to limit authority in any effective way. The Arab world has grown rich in constitutions but poorer in constitutionalism over the past century.

Yet in the past two decades, there are some embryonic signs that a fourth constitutional moment may be emerging. Those states that have avoided issuing constitutions have finally dropped their resistance and Arab judiciaries and parliaments have shown some signs of life in a few cases.

A Fourth Constitutional Moment?

Recent constitutional experimentation in the Arab world has occurred in a new environment—or perhaps more accurately, in an environment bearing greater resemblance to the early era of constitutional development than to the eras of independence and nationalist ideologies. Juridical sovereignty is no longer a motivation for constitution-writing (with the exception of Iraq, in which constitution-drafting was connected with the restoration of an Iraqi government after the American invasion and Palestine, which has attempted to use the consitutional process as a way of establishing a claim to sovereignty; Brown, 2000). And the era of self-styled revolutions has ended as well; the last bout of 'revolutionary' constitutions came with 'corrective' revolutions in Egypt and Syria in 1971.

Yet regimes have discovered some newer uses for constitutions and rediscovered some older ones. Arab states have come under a variety of domestic and international pressures; and constitutional design and redesign have provided them some tools for crafting constitutional responses. The global resurgence of liberalism; the desire to allow for sharply controlled democratic openings; the need to parry opposition as regimes jettison welfare commitments and confront fiscal crisis; the exigencies of political succession; and (in one dramatic case) foreign invasion have inspired some constitutional experimentation.

First, the Arab monarchies of the Arabian peninsula, historically the most reluctant to issue constitutions, have finally joined the fold. The new documents seem designed partly to govern matters of succession and relations within the ruling families. Second, some countries have

amended constitutional texts or issued new ones in order to negotiate political liberalization and (just as important) its limits. Third, previously moribund constitutional structures (constitutional courts and parliaments) have begun to revive in a small number of countries, allowing for some constitutionalist openings (Brown, 2001). Fourth, Iraq embarked on process of constitution drafting after the American invasion in a manner that was unprecedented in the region (though it mimicked processes in other areas).

Constitutions in the Arabian Peninsula

At the beginning of the 1990s, the Arabian peninsula was a desultory participant in the Arab constitutional tradition. The Saudi government had promised a constitution for two generations but written none; Oman had not even issued a promise. The United Arab Emirates had titled its constitution 'temporary' at independence and never written a permanent one. Qatar had an even more modestly titled 'Temporary Amended Basic System' and dragged its heels in implementing its rather skeletal provisions. Bahrain and Kuwait both had suspended critical elements of their constitution (allowing for elected parliaments) and effectively assigned all authority to a cabinet appointed by the ruler. Yemen had similarly seen a constitutional experiment effectively ended in the mid-1970s.

Yet a dozen years later, the Arabian peninsula was probably the most active part of the Arab world in constitutional terms. Saudi Arabia and Oman issued 'basic laws' during the 1990s; at the same time the United Arab Emirates made its constitution permanent by the simple textual step of removing 'temporary' from the title. Kuwait restored full parliamentary and constitutional life in 1992; Bahrain moved to do so in 2002 (while introducing some changes designed to make the parliament less obstreperous than it had been in the 1970s). Yemen, the sole republic on the peninsula, wrote a new constitution in 1991; the document survived a brief but bitter civil war in 1994.

What accounts for this sudden burst of activity? Reading the texts of these documents suggests that the constitutions address a critical concern of the peninsular monarchies: ensuring dynastic continuity and harmony of the ruling family. In this regard, it is worth noting that (except for Yemen) states in the peninsula are governed less by single rulers than by ruling families (Herb, 1999). And these systems have shown an odd combination of stasis and instability. In one sense, the monarchies of

the Arabian peninsula are quite stable: all can trace their rule back at least one century. Yet in another sense, these monarchies are among the least stable of Arab regimes: even when monarchical rule has been unchallenged, the rule of individual monarchs has sometimes been less than the lifetime tenure prevailing for rulers elsewhere in the region. Of the six current peninsular monarchs, for instance, two achieved their positions by overthrowing their own fathers.

Qatar has seen two successful coups since independence (and one failed counter-coup); Saudi Arabia witnessed a royal deposition in the 1960s and an assassination in the 1970s. Oman's sultan was deposed in 1970. In three other states, however, monarchs have left their positions only when they received a higher calling. Three of Kuwait's amirs have died since independence. Authority passed immediately to the designated successor except in 2006 when the crown prince was incapacited and the throne went to another family member. Succession in Bahrain followed the same pattern in 1999. The United Arab Emirates has been headed by the same ruler since independence, though member emirates have witnessed transitions.

Two features of peninsular patterns of succession merit special notice. First, in all cases, irregular successions have been prompted by divisions within the ruling family. Smooth transitions have occurred most frequently when the question of succession is clearly settled (often at the time of the accession of the new monarch). Peninsula monarchies are generally not absolutist: rulers often have few formal checks on their authority, but ruling families are large, powerful, demanding, and sometimes quite quarrelsome. Ruling family members have died at the hands of their relatives (in Kuwait in 1896 and in Saudi Arabia in 1975) but not at the hands of their other subjects.

Second, smooth transitions have been far more common in those countries with clear constitutional procedures addressing the issue. Saudi Arabia suffered through two irregular successions with no constitution; Kuwait's ruling family—as sharply divided as any—has followed constitutional procedures each time. In short, ruling families make succession difficult and constitutions help ease those difficulties. In the 19th century, Arab rulers along the Gulf arrived at a variety of agreements with Great Britain that turned them into virtual protectorates. Generally, the British guaranteed continued rule of the ruling family in return for gaining control over foreign affairs and security. In one case—that of Qatar—the British explicitly recognized not only the amir but also the succession of his son. With the British withdrawal from

the Gulf in 1971, such arrangements came to an end. In a sense, then, the constitutions of the area might be seen as the functional equivalent of the Royal Navy. Constitutional succession mechanisms offer a possible tool for containing or pre-empting such problems. They are not perfect solutions but they are attractive enough to have spread to all peninsular monarchies.

This focus on succession and relations among members of the ruling family is best illustrated by the most protracted drafting process for a constitution the world has seen: that of the Saudi Basic Law, promised in 1932 and promulgated in 1992. Upon unifying the kingdom, the rulers of Saudi Arabia had promised that a basic law would be issued to organize the political system. Four kings passed from the throne before the document was issued. Long anticipated as a liberalizing reform, the Basic Law, when finally issued, struck most democracy-minded readers as not worth the wait. Even by the standards of Arab constitutional documents, provisions for rights and freedoms were very weak. Taxes could only be imposed by law, but since laws were simply issued by decree this imposed no limitation. The state was charged with providing for education, health care and employment, which it was already doing and would soon (due to fiscal crisis) do less well. The document also provided for the existence of a consultative council and a budget, but provided little guidance on how these were to be implemented. (A consultative council was indeed appointed.) The constitution did contain numerous references not simply to Islam but to the Islamic *Shari'a*; if there were any limitations on political authority implied in the document, they could only be found there.

When finally promulgated by royal decree, the Saudi Basic Law addressed this problem by strengthening the position of the king. Not only was the king granted almost unlimited authority in his lifetime, he was also allowed to appoint his successor. The king was also constitutionally empowered not simply to appoint and dismiss ministers but also to serve as chairman of the Council of Ministers—essentially combining the throne and the premiership.

Amended Constitutions and Establishing the Limits of Liberalization

Elsewhere in the Arab world, the last few decades have seen the waning of revolutionary and socialist ideologies as well as controlled experimentation with political liberalization. Such liberalization has never progressed to full democratization and constitutional texts have been

one of the tools to enforce such limitations. Ruling regimes in Egypt, Morocco, Jordan, Algeria, Tunisia and Yemen have sought to diminish their authoritarian character for a variety of reasons. In all cases, they have used constitutional mechanisms, such as elections, to show a friendlier face while ensuring that the basic contours of the regime remain unchanged.

The pioneer in this effort was the Egyptian regime. In 1971, a new 'permanent' constitution was introduced that affirmed the paramount position of the executive and enshrined a one-party state. The constitution included some concessions to liberal norms (such as promising the rule of law and insisting that officials would be held personally liable if they balked at enforcing a court ruling), though these reforms were either vague or marginal. Yet a gradual political liberalization over the following decade led Egypt's leaders to tinker with the constitutional text. In institutional terms, the most notable changes involved the disestablishment of the regime's sole party; its constitutional tasks (including oversight of the press) were assigned to a newly created upper house of parliament. In short, party pluralism (still dominated by the regime's favored party) was to be held in check by a presidentially dominated upper house. The party's grip on the press (all journalists had been required to join the single party, which owned all daily newspapers) would be replaced by a less intrusive system in which the president would select loyal editors (subject to the approval of the upper house) (Brown, 1997).

The Egyptian experiment with constitutional engineering in support of constrained liberalization was sufficiently successful to induce other countries to follow. In 1989, Jordan restored an elective parliament, followed two years later by a national 'dialogue' resulting in a charter of proposed constitutional reforms. In a sense, the dialogue proved too open: the constitutional amendments were not adopted, but the experiment in limited liberalization continued. Algeria followed a similar path to a less controlled conclusion. Facing severe economic challenges, the Algerian one-party state secured approval in a plebiscite for a new constitution that backtracked on the government's socialist and welfare commitments while allowing for a multiparty system. The Algerian experiment seemed based on the Egyptian model, because it furthered presidential authority by weakening the party and diminishing the constitutional role for the military. The electoral system was designed to offer opposition meaningful representation without realistic hope of obtaining a parliamentary majority. The experiment collapsed in failure, however, when Islamist forces realized a tremendous victory in

the first round of parliamentary elections; a second round would have certainly resulted in the outcome the experiment was partly designed to prevent—an Islamist majority. A military coup forcefully prevented an Islamist electoral victory but also sparked a bloody civil war. In 1996, the regime was ready to try again with a new constitution that disallowed sectarian parties and established an upper house that, like its Egyptian counterpart, seemed designed to act as a counterweight to the parliament. The latest Arab state to embark on the path of closely controlled liberalization has been Morocco, which issued a new constitution in 1996; this document followed the now familiar path of establishing an upper house to contain the effects when allowing party pluralism produces a more unruly lower house.[3]

These experiments in constitutionally controlled liberalization were all tightly monitored. Yet in some cases, they have allowed openings that have progressed beyond the narrow bounds apparently anticipated. There are two possible sources of pressure for such constitutional reform. One is from outside the regime, among opposition forces. And indeed, in many Arab states, opposition movements increasingly define their demands in terms of constitutional reform. But in no country have they achieved anything more than cosmetic changes. The second source for pressure lies within the state apparatus. In particular, some judicial and parliamentary structures in the region have shown signs of independent life. None has transformed the regime which brought it into being, but some have managed to push political life in a more constitutionalist direction. The Arab experiences in liberalization have to be seen as starkly different from other political experiments occurring at the same time in Latin America and Southern, Central and Eastern Europe. Indeed, while the experiments elsewhere were unmistakable steps in the direction of democratization, in the Arab world far more modest (and reversible) political liberalization is at issue.

Awakening Slumbering Structures: The Egyptian Supreme Constitutional Court and the Kuwaiti Parliament

Egypt's 1971 Constitution gave a firm legal basis for a new court that was to stand at the apex of the Egyptian judiciary: the Supreme Constitutional Court (SCC). When first established, the court was built as

[3] In 2002, Bahrain seemed about to follow the same pattern, restoring the constitution but modifying it to include an upper house.

an instrument of executive oversight over the judiciary: justices were appointed to short, renewable terms by the president. Yet in 1979 the basis for a far more autonomous SCC was created when legislation was passed giving the sitting justices the authority to nominate new members. The term was lengthened so that justices serve until the mandatory retirement age. In addition, the president of the SCC has often been (by tradition, not by law) its most senior member.

The 1979 law worked its effect slowly. In the 1980s, the court moved twice to strike down the country's electoral law, necessitating the dissolution of parliament and the election of a new one. By the early 1990s, the activist ʾAwad al-Murr had assumed the presidency of the court and the SCC struck an extremely assertive pose. Over half the laws were contested before the SCC was declared unconstitutional. In some ways, the SCC's reading of the constitution caused the regime few fundamental problems: justices tended to vitiate the socialist provisions of the document while giving more expansive reading of clauses that furthered economic liberalization. But on other issues—such as civil and political rights—the SCC was particularly active, translating some of the broad but vague guarantees of the Egyptian Constitution into more effective protections.

The SCC did stop short of challenging the political order on fundamental questions. For instance, it displayed uncharacteristic procrastination in examining the president's constitutional authority to transfer security cases from the civil to the military courts (a likely violation of the constitution's guarantee that each citizen had the right 'to resort to his natural judge'). And the SCC also turned back most challenges to the legal order on Islamic grounds that arose after the constitution was amended to state that 'the principles of the Islamic *shariʿa* are the principal source of legislation' (Cotran and Sherif, 1999).

Yet by the late 1990s, the SCC had provoked the country's leaders to consider some counter-measures. The speaker of parliament suggested modifying the law governing the SCC but backed off. A modest change was actually introduced by decree, removing the retroactive effect of SCC rulings on matters of taxation. (When the SCC struck down the statute establishing a sales tax as unconstitutionally delegating the authority to set rates to the executive, bureaucratic confusion followed because of the impossibility of returning all the taxes already collected.) The decree was later submitted to the parliament where it was approved, partly because the SCC justices decided against resisting the change. In 2001, President Mubarak departed from general past practice by not appointing the most senior justice as court president;

instead he turned to a respected but far less activist judge from outside the SCC to assume the post. And with his death, a lower-ranking and less-independent figure was appointed.

Experimentation with parliaments over the past two decades has led to similarly disorderly results (Baaklini et al., 1999). Diverse regimes throughout the Arab world have worked to co-opt various social and political groups, split loyal from disloyal opposition, and show a democratizing face through experimenting with freer parliamentary elections. At the same time, various tools have been used to keep such parliaments from challenging executive supremacy. First, as mentioned earlier, most regimes have brought in upper houses (generally including presidential appointments or representatives of regime-dominated groups) to balance more independent parliaments. Second, a variety of older constitutional tools are used to avoid parliament on sensitive matters. For instance, executives generally retain the authority to issue laws by decree when parliament is not in session. While the parliament can overturn the legislation (or, in some cases, is required to approve it for the law to remain effective), use of this decree authority allows the executive to take the initiative in promulgating controversial laws. Significantly, courts have sometimes diminished this authority. On 4 May 1985, the Egyptian SCC overturned a 1979 presidential decree-law governing a wife's right to divorce on the grounds that no emergency justified the use of the authority to issue laws by decree. That ruling may have inspired other courts. Syrian courts have insisted that they may review official actions taken under a state of emergency. In Jordan, the government used its authority to issue decree-laws to promulgate a restrictive press law. The country's High Court overturned the law on grounds similar to the Egyptian SCC decision. The ruling earned a public rebuke from the king but forced the issue back into parliament. The Jordanian government hardly abandoned the practice of reserving sensitive matters (including changes in the electoral law itself) for periods when the parliament was not in session (Brown, 2001).

Most significantly, regimes have designed rules of electoral competition in a variety of ways to secure the parliament they want. Such rules include party-list systems, gerrymandering, proportional representation with high requirements to enter parliament, restrictive rules on founding parties, rejection of international monitoring, and assignment of oversight of balloting to the Ministry of Interior.

Yet in many instances use of these tools gives imperfect or unruly results. The Kuwaiti government has manipulated the rules of electoral competition for parliament on several occasions but often found

itself encountering a body difficult to dominate. Twice it suspended parliament and more recently it has held out the threat of dissolution through constitutional means (requiring new elections). In 1999, it finally followed through on such a threat and found itself facing a newly elected parliament no more submissive than the one it replaced. As discussed earlier, the Algerian regime carefully designed rules that failed to give it the majority it anticipated. The Egyptian regime has been as diligent as any other in designing rules to guarantee a small, loyal opposition. Those efforts—based as they were partly on manipulation of the voting itself—were dealt a series of blows by the SCC. First, the SCC twice struck down a party-list system on the grounds that it unconstitutionally restricted the rights of individuals to seek office. Second, the SCC finally struck down provisions of the electoral law for election monitoring on the grounds that they did not fulfill the constitutional provision for judicial supervision of voting. The combined effect of these rulings has not eliminated that majority secured by the governing National Democratic Party (NDP). But it has allowed a large number of independents to enter parliament, many ready to be swayed by the NDP but not operating under party control. From the 1950s through the 1970s, the Egyptian parliament was generally regarded as a very pliant body; in the 1980s and 1990s it was transformed into an arena for public debate but not for meaningful oversight of the executive. In the past few years, however, the body has shown initial signs of moving beyond such limited roles.

Taken together, the examples of the SCC and the limited revival of Arab parliaments suggest an anomalous pattern: Arab constitutionalism is less wedded to democracy than initially appears.[4] The ability of the SCC and a few Arab parliaments to strike an independent pose is based on their institutional autonomy more than it is based on any democratic mechanisms. The SCC is extremely undemocratic in its composition: it is a largely self-selecting body. And that is the precise feature that has allowed it to develop a constitutional jurisprudence independent from the executive branch. The undemocratic nature of constitutional courts has been commonly noted, but parliaments are a very different matter. The Arab parliaments that have shown the most

[4] As noted in the Conclusion of this article, the politically enabling functions of constitutions have often been noticed (Elster and Slagstad, 1988; Brown, 2001). The tension between constitutionalism and democracy was a staple of liberal political thought and has recently re-emerged as a subject of scholarly attention.

independence are those that have escaped from party domination. Freedom to form political parties in the Arab world is not a mechanism of democratic governance; instead it generally leads to regime determination to dominate the political field by forming its own party. In the Arab world, strong parties are generally regime sponsored; it is through a strong party that Tunisia, Egypt, Iraq and Syria have subjugated their parliaments. The more independent parliaments in the Arab world—in Kuwait, Palestine and Jordan—while hardly able to bring any effective measure of executive accountability can still strike an independent pose precisely because parties are weak and parliamentarians elected on an individual basis.[5]

An Example Not to Be Repeated? Imposed Constitutionalism in Iraq

A starkly different model for Arab constitutional development arose in Iraq between 2003 and 2005. The Iraqi experience had three features that distinguished it sharply from other attempts in the Arab world to write constitutions. First, it was wholly imposed. Earlier Arab constitutions had been written at times of heavy foreign pressure and some had been written in a country under direct foreign control. But in the Iraqi case the United States took an extremely active role in determining matters of process and substance, even participating in the actual drafting (for the country's interim constitution in 2004) and brokering agreements among major political actors (for the country's permanent constitution in 2005). This role was made possible, of course, by the American invasion and occupation of the country. Perhaps only Iraq's first constitution, written under the British mandate, showed such signs of foreign involvement.

Second, the Iraqi constitution—unlike previous Arab documents—played far more of a constituting role. The old regime was destroyed in the spring of 2003 and many critical state institutions had either collapsed or been dismantled. The document thus broke the regional pattern of reflecting the desire of entrenched existing authorities.

Third, the constitutional drafting process, while not fully participatory, was impressively pluralistic. The country's 2004 interim constitution was written in secret with the text not released until after it had been completed. But the 2005 permanent constitution was written in

[5] The only exception to this rule is Morocco, where the throne dominates even though party life is more pluralistic.

a far more public process in which it was possible for many Iraqis to observe—if not share in—the drafting. And most key elements of Iraqi society were represented. In the end, the document reflects above all the desires of the Kurdish and Shi'i religious parties. But even reaching an agreement between them proved difficult, and some other parties did participate in significant if secondary ways.

The combination of these three elements may make the Iraqi case resemble more closely the other cases of political reconstruction considered in this volume (though the heavy American involvement still stands out as quite unusual). But there is little sign of any likelihood of the experiment being repeated in the Arab world. Without an American invasion, no constitutional process would have begun, and that is a novelty that neither the United States nor regional states show a strong desire to repeat.

Conclusion

In the Arab world, most constitutional documents have not been produced by the nation assembled; they have instead been issued by existing regimes seeking tools to face domestic and international challenges. In the late 19th century, patrimonial regimes used constitutions in unsuccessful attempts to reinvent themselves as constitutional governments in an effort to promote fiscal responsibility and administrative rationality. In the first part of the 20th century, regimes under colonial domination sought to reinvent themselves as sovereign entities, again using written constitutions as a tool. Later in the 20th century, independent regimes sought to reinvent themselves as revolutionary forces; constitutions and national charters were a favored tool.

Rather than the metaphor of the nation assembled, a more appropriate image is that of an unaccountable ruler declaring his will. Some Arab constitutions actually take this form (though most—including some monarchical constitutions—claim to emanate from the sovereign people). Constitutions have functioned as exercises in self-discipline for rulers, declarations of independence for countries, and programmatic statements by ambitious regimes.

Such power-enhancing functions of constitutions should come as no surprise to those operating in a liberal constitutional tradition. Montesquieu himself presented despotism, understood roughly as government without law and limits, as destructive of the ruler's own interests: 'As

people who live under a good government, are happier than those who without rule or leaders wander about the forests; so monarchs who live under the fundamental laws of their country, are happier than despotic princes, who have nothing to regulate either their own or their subjects' hearts' (Montesquieu, 1977: 142). The world's first three constitutions written by sovereign entities—the American, French and Polish—all aimed to buttress central authority at a time of dire crisis. More recently, Stephen Holmes has observed: 'The metaphors of checking, blocking, limiting and restraining all suggest that constitutions are principally negative devices used to prevent the abuse of power. But rules are also creative. They organize new practices and generate new possibilities which would not otherwise exist' (Holmes, 1988: 227).

Arab constitutions have very infrequently been liberal in inspiration, though in their earliest and most recent formulations, liberal structures and devices have been inserted. In some ways, the past couple of decades have seen a definite (if limited) upsurge of interest in constitutionalism in the Arab world. Recent constitutional innovations have stressed regularization of authority, bounded democracy and a modest increase in the autonomy of some constitutional structures (especially courts and parliaments). Given the anti-constitutionalist spirit of much post-independence Arab politics, this is a remarkable development. Recent constitutional developments are also remarkable in how much they effectively separate constitutionalism from democracy. Yet these changes have yet to undermine the politically enabling functions of constitutional texts.

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CHAPTER THREE

CONSTITUTIONS AND POLITICAL RECONSTRUCTION? ISRAEL'S QUEST FOR A CONSTITUTION*

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Israel's constitutional history suggests that the relationships between social reconstruction and constitutionalism may not be simple and direct. When the political and social reality was transformed dramatically, in May 1948, it was not combined with constitution-making. To the contrary, Israel relied on a sweeping continuity clause, keeping existing laws unless they were replaced by Israeli legislation, or were inconsistent with the foundation of the state. The initial drive toward a constitution in the 1980s, on the other hand, was motivated by a wish to deal effectively with new threats to the 'old regime' and its self-understanding, which were growing in strength and visibility over the years. This makes the Israeli case an interesting one, since often the process of constitution-making is used to mark and to facilitate a substantial change in regime or self-definition. The legal-political tool of a new constitution is used to emphasize the break with the past, its commitments and its failures. The convergence of a new constitution and a major change in political and social structure is not accidental or purely symbolical. Yet cases that do not 'obey' these rules may illuminate interesting features about the strengths and limits of constitutional processes, as well as help us identify features of social processes which may explain when constitutions are a suitable method to achieve change and when they are not. Finally, such cases may contribute to our understanding of the force and the limits of constitutionalism.

In this article I use 'constitutionalism' to mean that aspect of regimes that distinguishes between constitutional and ordinary politics by entrenching constitutional provisions and making them harder to change than other aspects of the legal system. 'Political reconstruction'

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for me means major changes in a society's self-perception or self-definition.[1] Constitutions always include a part dealing with regime structure. This part is designed to structure and rationalize government, and give it stability and legitimacy. Often, constitutions also include bills of rights, and a general credo (Gavison, 2002a). We should see that these parts fulfill different functions, and may even be at some tension. Regime structures permit and facilitate the working of government. They do not usually include any substantive constraints on the products of the political process. Credos and bills of rights do just that. They create a potential tension between the likely products of deliberative democracy or other political processes, and the need to 'obey' the substantive constraints of the constitution. Furthermore, while regime structures may be neutral between competing views of the good life, substantive commitments may be seen as partisan and divisive.[2] Finally, we need to distinguish between types of political reconstruction. The simplest type is a reorganization of the regime (as happened when France moved from the Fourth to the Fifth Republic). A more radical reconstruction involves the constitution of a new state. The most radical of all transformations consists of creating or founding a new society.

The paradigm is the case in which a new constitution is both a tool for, and a reflection of, a major political reconstruction. An obvious example is the most ancient constitution—that of the USA. The federal constitution truly 'constituted' the USA, because before it the 13 states were a loose and ineffective confederation. Its adoption reflected the fact that important elites wanted to change the political structure of their society, and managed to initiate a process that implemented that wish. The same can be said for the more recent cases of Spain and South Africa. In these cases, new constitutions were a part of a process of major political reconstruction. Only in South Africa the change has been both in the definition of the state and in its conception of the society served by that state—the new constitution finally included many parts of society which had been excluded under the old regime. In

[1] These definitions are stipulative to a large extent. They have complex relationships to common usage of the terms. Thus, constitutionalism is often seen as co-extensive with limited government. Under my characterization, a state may have limited government without constitutionalism (although the UK seems to be the only example left of that), and some states may have constitutions without effective limits on government.

[2] Compare the differing conceptions of a constitution in the liberal and in the civic republican traditions, and the relevance of the distinction to the inclusion of bills of rights and general credos in constitutions; see, for example, Webber (2000).

all these cases, however, the society in question is the people actually residing within the state.

There are cases in which a constitution is made, or seriously amended, without such reconstruction. A good example is Sweden (for a detailed description, see Ruin, 1988). England's Human Rights Act 1998 may be a step toward a constitution, which does not signify a major political reconstruction. In such cases it is interesting to inquire why the change takes the form of a constitutional amendment, and what is the dynamic responsible for the change and its timing.

On the other hand, there are cases in which revolutionary political and social reconstruction is made without a corresponding change in constitutional structure. The state creates a semblance of continuity despite the reconstruction, as if there were seemingly no need for radical change in the legal structure. Sometimes, a constitutional change follows after a few years.[3] At other times, the restructuring is achieved, on the face of it, without an accompanying constitutional change. This is what has happened in some of the countries in Central and Eastern Europe, which have gone through processes of democratization after the collapse of Soviet regimes.[4]

Israel, I argue, exemplifies the latter two phenomena. First, it had a revolutionary political moment without a constitution, then an attempted constitutional revolution which did not seek to implement a social or a political change. Rather, the 'constitutional revolution' attempted to arrest the growing power of new elites, which seemed to threaten the power structure of 'old' Israel.

The First Anomaly: No Constitution at 1948

The foundation of Israel was a revolution on all possible levels. Israel was founded as the nation-state of the Jewish people. The Jewish community in Israel fought to end the British mandate, and to gain international support for its foundation. Even more important, the Jewish community in Israel itself was the product of the success of the modern Zionist movement to gather in Israel a substantial number of

[3] See Kurczewski's description of Poland's experience in Chapter Eight.

[4] See Elster (1996), Elster et al. (1998), Holmes and Sunstein (1995). An interesting example is the fact that the unification of Germany found no reflection in the constitutional materials. The Basic Law of the FDR was simply applied to the whole of Germany!

Jews from many countries, who created almost from scratch, in about 50 years, an infrastructure for the Jewish state. In the process, Jews undertook roles which they have given up for hundreds of years as they lived in various host countries, without taking responsibility for tasks of government or defense. Moreover, the conception of the new state was that it was to serve all Jews who wanted to end their life as minorities in host countries. The collective it served did not include all the people in the state—and included potential citizens still living all over the world. Israel thus sought to give at least a potential political meaning to a collective that hitherto had no shared political framework. In short, the foundation of Israel was truly a political reconstruction of revolutionary dimensions.[5]

In part, Israel planned to have a constitution because this was required by the UN Resolution on Partition. But it would also be very natural for Israel to use a constitution as a festive and a celebratory way of establishing itself. Its founding fathers explicitly planned to have one. Committees were appointed to prepare the documents, and a working draft was adopted. Israel wanted very much to stress the ways in which its foundation broke away from the past: the Jewish community fought the British mandatory authorities and rejoiced in gaining independence from them. Israeli Jews celebrated their newly acquired control over immigration and land acquisition, both prohibited by British White Books because of the pressure of the Arab population. It was particularly important for Israel to stress its independence after the Holocaust, in which a large part of the European Jewish community had been murdered. Moreover, as we saw, the Zionist movement itself was a revolutionary movement, seeking both to move large number of Jews from their homes to Palestine, and to change the form of hundreds of years of Jewish experience and existence.

In part, these celebratory functions were performed by Israel's Declaration of the Foundation of the State, which is the legal document establishing the new state. The Declaration speaks of the historical background to the foundation of Israel as a Jewish State. It promises equal rights to all its citizens irrespective of nationality or religion, calls for peace and coexistence in the region, and specifies that Israel's

[5] For an analysis of the revolutionary aspects in Zionism and early Israeli society, see Eisenstadt (1985).

governing bodies will be elected under the provision of the new constitution enacted by the constituent assembly.[6]

Against this background, the willingness of Israelis to live under the legal regime inherited from the British mandate was truly amazing. Some Israeli scholars, mainly lawyers, lament this failure to enact a constitution and think it was merely a case of shortsightedness or political power-seeking (Negbi, 1987). Others suggest that the reasons against a constitution were sufficiently strong to both explain and justify this failure (Goldberg, 1993).[7] The latter argue that the young state did not have the conditions that would have permitted the enactment of a rigid constitution. I return to this point later. Before I do that, however, we can start by noting what made it possible for Israel not to enact a constitution upon its foundation.

A country must have working institutions. If it has to structure them from scratch, a constitution is a natural way of doing so. This is especially true if the 'old' institutions are ones tainted by a history of tyranny, colonial conquest or systemic corruption. A constitution is a must if we are looking at a federal state, which must structure the relations between member-states and central government so that these may not be changed unilaterally by either party. A constitution is also necessary if we want to impose legal limits on the power of the primary legislature, and to secure the limits of governmental power from arbitrary change by the government itself. Such wishes may be paramount if the new state is one established after a traumatic experience with abuse of the power of legislatures.

Neither of these conditions existed for Israel at its inception. Israel is a unitary (and rather small) state. The 'old' mandatory institutions lapsed by British decision on 14 May 1948. However, mandatory rule allowed the Jewish and the Arab communities a lot of autonomy. The Jewish community used it to structure political institutions. The *Yishuv*

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[6] For text and background, see Gutmann (1988). Soon after the state was established, petitioners invoked the Declaration to invalidate laws inconsistent with it, but the court decided it was *not* a constitution and that the celebratory parts did not have legal effect. They have been used in interpretation of laws and arrangements, as part of the credo of the state. In 1994, the Declaration was inserted into the Basic Laws as a principle of interpretation of all laws. President of the Supreme Court Aharon Barak thinks this gives the Declaration a constitutional significance within Israel's legal system.

[7] It is interesting to note disciplinary divides here. Most lawyers see the failure to enact a constitution as a serious disadvantage. Many political scientists see it as inevitable or desirable, or both.

(Hebrew word for the Jewish community) had a legislature, elected by general, proportional elections; and an executive elected by the legislature. These naturally functioned as transitory bodies for the emerging state. These Jewish institutions were in a sense 'old'. They had the full legitimacy of the Jewish community, unlike the departing British institutions (Horowitz and Lissak, 1978). They were democratic, based on proportional representation, and did not require rationalization or restructuring. Finally, two reasons combined to make the need to limit the power of the legislature less obvious than it would have been in other 'new' countries. One was the British tradition of parliamentary sovereignty. The other was the fact that the majority of the Jewish community saw their own institutions as trustworthy and as an important part of their success in achieving a state. Only the opposition felt that these institutions could be the source of serious abuse of power against the citizens of the new state.[8]

The design of the Declaration of the Foundation of the State failed because Israel was immediately thrown into a battle for its very existence against Arab forces who sought to undermine it. The transitory institutions functioned until the end of the war. When the constituent assembly was finally elected in 1949, the transitory legislature hastened to transmit to it all regular legislative authority. The assembly therefore became, in addition to having a constituent function, Israel's first parliament, the Knesset. Once this was done, the road was open for the government to initiate a discussion on the question whether Israel should enact a constitution, which would define its political organs and its credo. In June 1950 the Knesset decided, after a long debate, not to enact a constitution at that stage (the Harari decision; for a detailed description see Rackman, 1955). Rather, it was decided to enact a series of basic laws as chapters in a constitution; which, when completed and finalized, would form Israel's constitution (Gutmann, 1988).

The debate preceding the Harari decision indicates very well the central controversies that allowed the government to go back on the promise of enacting a constitution. First was the sentiment that the great

[8] This is a phenomenon often found in countries obtaining their liberation from a colonial power. The elation of liberation often leads to a regime under which those responsible for the struggle for liberation are given a lot of political power. It is not rare, however, that the past liberators turn into local tyrants. It should be noted that at this stage the Arabs who remained under Israel's control did not take part in these institutions, but they did participate in the elections to the constituent assembly.

challenges ahead require effective government, and that a constitution might interfere with the necessary effectiveness. This sentiment was founded on a fear of judicial review, but also encouraged the uncontested retention of a large number of emergency powers enacted by the British mandatory authorities to combat Jewish and Arab unrest. It was easier to invoke these ready-made British rules than to re-enact them explicitly as laws of the Jewish state.[9] In addition, Ben-Gurion, the first prime minister, did not want to keep the fully proportional election system of the *Yishuv*, thinking that it generated too many small parties and complicated governability. Entrenching existing institutions was thus unattractive to him.

Second was the fear that a constitution would force a decision on the ideological rift between those who saw modern Judaism as a secular form of ethnic identity, and those who insisted that the only authentic mode of being Jewish is religious. In the Declaration, this rift was bridged by a creative ambiguity.[10] But a real constitution created two difficulties. First, it suggested that the Torah was not good enough. Second, and more important, it would have established arrangements which were inconsistent with at least some Jewish law; and it would have affirmed that powers of law-making and law enforcement belong to authorized and elected people and not to religious leaders following religious law.

Third was a debate between a free market and a socialist economy. It is important to note that the issue of the status of non-Jews in Israel, especially the native Arabs, was hardly mentioned (Gavison, 1985). Despite the internal Jewish controversy about the meaning of the Jewishness of the state, a large majority would have supported the declaration of the state as Jewish. However, this debate as well as a sensitivity to the Jewish-Arab issue might have led to the decision not to include such a declaration in the constitution itself.[11] A telling argument which

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[9] In fact, the need to repeal these emergency powers used against Jews was a prime reason the right-wing opposition used to call for a constitution. In fact, when Begin came to power in 1977, the only rule abolished by his government was the one authorizing deportations. To this day, Israel has kept the largely obsolete Mandatory Press Ordinance, reluctant to either let go of some of its emergency powers or to enact them as Israeli laws; see Lahav (1978).

[10] The Declaration invoked the belief of all signatories in the 'rock of Israel'. For religious people this expression is God, while for atheists it meant the continuous element of Jewish national existence.

[11] Some suggested that the new state be called 'Judah', but the suggestion was dropped so as to permit a semantic space for non-Jewish citizens of the state.

was also made against entrenching a constitution at that stage was the expectation that the freedom to control immigration would soon lead to a substantial increase in the number of Jews living in Israel. It was felt that the minority of Jews then living in Israel should not seek to bind those who would soon become full members.

The government was quite consistent in its refusal to create a constitutional gradation. A few months after the Harari decision, Israel enacted the law most centrally identified with the Jewishness of the state—the Law of Return 1950, which grants every Jew the right to immigrate to Israel and acquire its citizenship. There was a great excitement when the law was passed. Some MKs (members of the Knesset) suggested there be an enactment to prevent the law ever being abolished. Ben-Gurion replied that abolishing this law was inconceivable, but that the Harari decision meant that no law should be legally entrenched. Quickly it became clear that the supremacy of the Knesset's law had great political advantages. In 1948, Israel 'incorporated' all existing law, including the Millet system governing matters of personal status. In 1953, it enacted the Rabbinical Courts Law, granting rabbinical courts exclusive jurisdiction on matters of marriage and divorce of Jews in Israel. When the law was challenged in court incidental to a criminal prosecution for bigamy, arguing that it violated rights to freedom of conscience, the court conceded the violation, but explained that its hands were tied by the principle of legislative supremacy (Cr. App. 112/50, *Yosipof* v. *Attorney General* 5(I) P.D. 481 [Hebrew]). The advantages of legislative supremacy as a 'silencer' of deep political debate were exemplified in another case, dealing with the explosive issue of 'Who is a Jew'? Israel's Law of Residents' Registration demands that a person provide data about his or her 'nationality' and 'religion'. Under Jewish law, a Jew is a person born to a Jewish mother or who was converted. The instructions the minister of interior gave were that only such people could be registered as Jews. In 1968, just after the Six Days War, a petition was brought on behalf of two children born in Israel to a Jewish father and an agnostic mother (HCJ 58/68, *Shalit* v. *Minister of Interior* 23(II) P.D. 477 [Hebrew]; for a detailed description see Burt, 1981). They did not seek to register as Jews in their religion, but wanted to register as 'Jews' or 'Hebrews' in their nationality. The court wanted to avoid decision. It asked the Knesset to delete 'nationality' from the registrar. The Knesset refused. The court then expanded its panel from the usual three to the extraordinary panel of nine (all of the judges at that time). In a long decision, with highly charged opinions on all sides, the court decided five to four in favor of the petitioners. The opinions talk about

the meaning of nationality, and the essence of Judaism, and the role of judges in deciding ideological controversies. The Knesset responded with a heated debate and an amendment to the Laws of Registration and Return, defining 'a Jew' as 'a person born to a Jewish mother or who was converted'. When a third child was born to the family, another petition was submitted. A panel of three judges rejected the petition in a less than two-page opinion, invoking the clear language of the law (HCJ 18/72 *Shalit* v. *Minister of Interior* 26(I) P.D. 334 [Hebrew]). These cases show how the absence of judicial review of legislation permitted the political system, and the courts, to avoid charged political confrontations over matters of ideology. In this way, political controversies were mitigated and various *modus vivendi* arrangements were reached. When the political system decided to give an orthodox definition to 'a Jew', or when it decided to maintain the religious control over matters of personal status, the court could not be used to decide the issue in a different way.

At this first stage, Israeli society is clearly controlled by the generation of the founding fathers of the state. These are Europeans, who came with the Zionist waves of immigration. Mostly, these are secular or even anticlerical people, whose vision of Israel is that of the nation-state of Jews, similar to ideas of nationalism then fashionable in Europe. In addition, Zionism was triggered by the perception that Jews were unsafe in Europe, and that political independence might be the only way to mitigate this threat. While Jewish society in the early years was pluralistic in many ways, and there was a lot of internal open debate—the ruling class as a whole did not feel threatened, and did not feel a need to entrench its own values and credo. This situation explains another unexpected feature of Israel: the fact that it was constituted as a democracy. The background conditions mostly worked against democracy. Palestine has never been governed by democratic forces. Most of the Jewish elites came from nondemocratic traditions. The military and the economic situation were very hard. Yet the vision of the founding generation, and its level of self-assurance and solidarity, resulted in a stable democracy.

The process of enactment of basic laws under the Harari decision was slow. The first Basic Law, relating to the Knesset, was enacted in 1958. It had one entrenched provision, specifying that elections in Israel be general, secret, proportional and equal.[12] In 1969, the Supreme

[12] The entrenchment did not result from a concern with equality. It was the small

Court invoked that entrenched provision to overrule a provision of the Elections Financing Laws which did not grant financing to new lists. The court held that this arrangement offended against the entrenched guarantee of equality. The legislature granted new lists some financing, but entrenched all elections law in a sweeping way to avoid further challenges (HCJ 98/69 *Bergman* v. *Minister of Finance* 23(I) P.D. 693 [Hebrew]).

The process of enacting basic laws progressed very slowly, and the provisions of these laws were not entrenched. The court held that these laws were in fact regular laws for all intents and purposes. By the 1980s, two related major issues kept these basic laws from covering all material constitutional issues: Israel did not want to enact a bill of rights, and it did not want to entrench all basic legislation and give the court the power of judicial review.

In the meantime, Israeli society has been changing in massive ways. The 1948 war meant that most of the Arabs who were expected to live in the Jewish state found themselves outside Israel's borders. In the first decade, Israel's population more than doubled, receiving many of the European refugees, and Jews who had to leave their countries of residence in the Arab Middle East. As a result, the Jewish population of Israel became more mixed, with a majority of traditional and religious Jews coming from Muslim countries. The year 1967 saw another major change in Israel. Egypt, Jordan and Syria cooperated in escalating a situation creating grave risks for Israel and closing off its rights of passage through the Suez Canal. The Six Days War ended up with Israel controlling all of the land between the sea and the Jordan river, as well as the Syrian Golan Heights and the Egyptian Sinai. The year 1973 brought with it another war against Israel's Arab neighbors. A coordinated attack by Egypt and Syria sought to upset the political deadlock and undo the changes of 1967. This time Israel's victory was preceded by heavy initial losses. The 1973 trauma, and a feeling of growing alienation, brought about the first change of rule in Israel in 1977. The Labor Party, which ruled since the 1920s, was replaced by the right-wing Herut, which captured the support of many of the Oriental Jews who felt humiliated and estranged by the ruling Labor leadership. In the meantime, the role of the religious bloc started

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parties' answer to Ben-Gurion's wish to change the electoral system and reduce the number of parties.

changing as well. Until 1967, the National-Religious Party was always a partner in Labor's coalition, and the deal was that they gave Labor full discretion in foreign and security matters, but expected protection of their own school system and their ability to maintain their way of life. The non-Zionist, ultra-religious groups (*Haredim*) cooperated with the government from without, and demanded only public support and financing of their schools, as well as an exemption from military service for their youth, to revive the lost world of study that disappeared in Europe. After 1967, the Zionist religious party started to be very active in the effort to settle the territories occupied in the 1967 war. They now wanted full partnership in government, and their leaning was towards the right, not the left. The *Haredim* grew in number and in political power, especially after an oriental *Haredi* group, *Shas*, started to grow very quickly. On the other hand, secular Jews grew less tolerant than their ancestors had been to features such as a religious monopoly over marriage and divorce, or limitations on commerce on religious holidays. Calls for separation of state from religion grew as the last wave of immigration from the former Soviet Union, now being the largest group in Israel, came to its own. Most of these immigrants were secular, and many of them were non-Jews. But the religious establishment had enough political power to prevent these called-for changes. Resentment among the sectors grew. This deepened with the feeling of both the right and left that the other sector was leading the state to disaster with its policy over the future of the Occupied Territories. This debate has led to an oscillation between narrow governments, which do not enjoy broad legitimacy, and broad unity governments, which are paralyzed.

At the same time, the Arab population of Israel was growing in number and strength. Despite huge waves of Jewish immigration, they have kept to a stable 17 percent of the population. After 1967, they strengthened their ties with Arabs across the Israeli borders. Their demands for equal rights, for Palestinian self-determination and for recognition of their status as an ethnic minority grew more vocal. In the 1980s, the Arab leadership in Israel explicitly asked that the Jewish nature of Israel be revoked. Their ideal is that Israel becomes, in both reality and self-descrip-tion, a neutral state in which all non-civic features are privatized, so that Arabs do not feel like foreigners and second-class citizens in a state defined as a Jewish state. There is some Jewish support for these claims, but most Jews feel extremely threatened by these expressions. The tensions have grown and intensified since the

eruption of violence between Israel and the Palestinians in October 2000, with no end in sight.

No wonder the Zionist secular European Jewish liberal elite started to feel very threatened. The major secular parties (Labor and *Likkud*) are each trapped by their need to have the religious parties on their side if they want to have a narrow government. The left is in addition burdened by its reliance on the Arab vote. The alliances between the various political powers in Israel meant that new elites, quite foreign to the ideals and vision of the founding fathers, may now obtain political power, or at least constrain it to an extent which is seen as unacceptable by the old guard (Horowitz and Lissak, 1989; Kimmerling, 2001a, 2001b).

The Second Anomaly: Attempted Constitution-Making since the 1980s

We saw that the process anticipated by the Harari decision—a slow but systematic enactment of basic laws that will end up covering all of the constitutional material, which would then be unified and enacted into a constitution—did not materialize. This process indeed did not seem related to any major social or political change. Rather, it wanted to delay the moment of constitution-making to the unspecified future.

The persistent efforts to conclude the constitution since the 1980s are different. Their failure may be related to the fact that at least three different forces and aspirations are at work. One group seeks to work within the Harari process, seeking to complete constitutional material by enacting a bill of rights and judicial review and entrenching the lot. Here, the purpose is *not* to achieve political or social change. Rather, it is the response of some parts in the political system to the fact that new political powers are moving from the margins into the center of political life. Notably, these efforts seek to limit the power of religious and ultra-religious parties in Israel's political life. In addition, they are trying to entrench the western, secular and liberal identification of Israel. This group is ambivalent concerning the need and justification of entrenching Israel's Jewish uniqueness. They are interested mainly in the institution of judicial review, based on growing mistrust of the political branches and their willingness and ability to enact desirable legislation.

A second group concentrates on breaking the governmental deadlock and providing effective government. Mostly, they propose a move to a

presidential democracy, arguing that this is the only way to move out of paralysis in the rifted Israeli society. This group has an internal division between right-wingers who see the old elites as their enemies, and those who couple this vision with a secular liberal vision of the state.

A third group stresses the need to reach a constitution by agreement, and seeks a dialogue among all major groups. This group may well discover that a constitution by agreement may be impossible. It may then decide to join forces with one of the other groups supporting a constitution.

Not surprisingly, both the orthodox and the Arabs are ambivalent on the question of the constitution. The Zionist religious groups are split between those who object to the process and those who are willing to risk some losses in order to entrench the Jewish nature of the state. The Arabs see that a decent constitution may make them less vulnerable, and give the court more power, but they are reluctant to pay the likely price of entrenching the self-description of the state as Jewish and arrangements such as the Law of Return. The ultra-religious are persistently against a constitution. They fear it may limit their political power, and generate arrangements less favorable to them than the present situation. Finally, many in all parties are very reluctant to give up their power, and especially to pass it to the judiciary, which is seen by many as a non-representative body identified with the group of secular liberal elites of the first group. They resent a process which seems to them to empower the representatives of one segment of the Israeli population just as it is losing its electorate force.

By the beginning of the 1990s, all major constitutional matters had already been enacted as unentrenched basic laws. Since the beginning of the 1980s, the processes discussed earlier had generated an increased judicial activism.[13] The Supreme Court started relaxing to the point of abolishing the requirements of standing and the requirement of justiciability. It expanded the bases of judicial review of administrative action, and started getting involved on a systematic basis in matters of great ideological dispute. Some of this activism related to state and religious matters, and the courts often supported religious pluralism and liberal ideals. This fact earned the court a series of new critics, mostly from the religious bloc. They resented the fact that the court sought to impose its own values, and to undermine in this way the judgments

[13] See Gavison et al. (2000) for a detailed description and different evaluations of judicial activism.

and decisions of the political branches. Naturally, this new fact made the religious bloc more wary of the power of judicial review.

Towards the end of the 1992 Knesset term, MKs from the secular-liberal camp who supported the constitution realized that they would not be able to complete it. Instead, they sought to identify areas of broad consensus, and legislate them, hoping that completion of the process would be easier when the first steps had been taken. This compromise resulted in two basic laws dealing with human rights. The first, the Basic Law of Freedom of Occupation, was entrenched and allowed a limited period of grace for existing legislation not consistent with it. The second, and more general, Basic Law on Human Dignity and Freedom included a similar statement that the rights under it could not be violated, but it was not entrenched, and it contained full protection of existing legislation. Neither law specified a power for courts to invalidate inconsistent legislation. Both laws contained a provision specifying that their purpose was to entrench human rights in Israel, defined as a 'Jewish and democratic state'. This formulation was a result of the compromise that made the National-Religious Party endorse the legislation. They figured that they could afford to entrench the protection of non-controversial rights, and gain an explicit legal declaration, in a basic law, that Israel was not merely a democracy, but a state, which was both Jewish *and* democratic.

Soon after the enactment of these laws, the now president of the Supreme Court, Judge Aharon Barak, dubbed these laws 'a constitutional revolution'. Some scholars thought that these laws were an evolution—not a full-fledged revolution. However, in 1995, in a lengthy decision,[14] the Supreme Court ruled that the laws gave it the power to invalidate laws inconsistent with them, but it chose not to exercise its power in that case.[15] In the first decade of the legislation, the court judged many times that it had the power to do so, but in fact did so in just three cases.[16]

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[14] C.A. 6821/93 *Bank HaMizrachi United Ltd* v. *Migdal Communal Village* 49(IV) P.D. 221 [Hebrew].

[15] A controversy developed among the judges concerning the jurisprudential bases of the new legislation, and especially about the appropriateness of dubbing the 1992 laws as a 'revolution'. All judges agreed, however, that the laws did give the court the power to review legislation, which seemed to be inconsistent with them.

[16] See: HCJ 6055/95 *Tzemach* v. *Minister of Defence* 53(V) P.D. 241 [Hebrew]; HCJ 1715/97 *Bureau of Investment Managers in Israel* v. *Minister of Finance* 51(IV) P.D. 367 [Hebrew]; HCJ 1031/99 *M. K. Kabel* v. *Government of Israel* (not published, decision of

The religious bloc quickly regretted its agreement. The first case litigated under the allegedly innocent Freedom of Occupation Law dealt with a petition to challenge the *Kosher* monopoly over the importation of meats into Israel. The court accepted the challenge,[17] and the maintenance of that monopoly required the amendment of the basic law, complete with the addition of an override clause, and a law establishing that monopoly. The religious bloc lost faith that the 1992 laws would not harm their interests. In addition, President Barak proposed an interpretation of the 'Jewish and democratic' description, under which Judaism would be interpreted as the universal values contributed by Judaism to the world's heritage. Some religious leaders concluded that they would object to the entrenchment of even the Ten Commandments if the Supreme Court would be the ultimate interpreter.

Attempts to move on with the legislation failed. Moreover, there has been an initiative in the Knesset to establish a constitutional court along continental lines, with the express goal of limiting the power of the Supreme Court, led by the anti-establishment component of the second group, supported by the religious bloc. This initiative was defeated after a major public campaign by the court and its supporters in parliament. The sentiment, however, is still very much there, affecting the political will to move towards a constitution.

The Lessons of the Israeli Case

The first lesson is that, in the absence of the formal and structural conditions requiring a constitution—notably a federal state and a record requiring legal limits of the legislature—major social and political transformations may be achieved without a rigid constitution. The basic fact is the political reconstruction. The constitution is the tool, even if it is also a mode of mobilization. Yet Israel is clearly an exception among nations in passing a moment of liberation and foundation without a constitution. As we saw, this failure to enact a constitution was related to issues on all three levels of the constitution: the regime structure, a bill of rights and the credo part of major commitments.

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26 March 2002—available at: www.court.gov.il) [Hebrew]. Note that the years indicate when the petition was submitted, not the year of the decision. The first decision was delivered in the 1997 case in 1998.

[17] HCJ 4676/94 *Mitra-el Ltd* v. *The Knesset* 50(V) P.D. 15 [Hebrew].

Israel reminds us of another lesson: levels of the protection of the rule of law, democracy and human rights are not dictated by the presence or the absence of an entrenched constitution or by its content. While Israel's record on the three is not perfect, it still stands out in the region for its record on all of these. In fact, on all three, Israel has improved its record over the years of its existence. It has a multiparty political system with a free press and an independent judiciary; its system allows for regular real elections with occasional changes of government; and its court has protected human rights (within Israel, as distinct from the Occupied Territories) without a constitution no less than courts in countries with such documents.

More importantly, the absence of a constitution allows for a variety of low-visibility arrangements, that may mitigate social and political tensions, which would have been hard to ignore if they had been entrenched in the state's constitution. This has been the case in Israel for both the Jewish-Arab debate on the legitimacy of seeing Israel as the nation-state of Jews, and for the internal Jewish debate concerning the meaning of the Jewishness of the state.[18] It also allows for a salutary experimentation with regime structure, which may be needed in a state which is changing as quickly and radically as Israel has changed in its 50 years.

On the other hand, the absence of a constitution may make the central political arrangements too unstable and vulnerable to hasty changes by temporary majorities. More important, the absence of a constitution prevents the legal distinction between a shared political framework, setting the rules of the game and some basic commitments, and the political game itself. Such a distinction is very important especially when the conflicts between groups and factions are deep and systematic. Some people speculate that if Israel had enacted a constitution in 1948 or even in 1950, when its political elites were more or less of a unified vision, this would have made it easier for Israel to function today. Others claim that the new tensions in Israel would have under-

[18] Clearly, these issues would not have been decided once and for all even if a constitutional document included an explicit reference to them. However, when credos and bills of rights are included in constitutions, the chance that they will reach adjudication, and thus be decided on the basis of 'principle', rather than by dynamic political compromise increases; see Webber (2000).

mined that old constitution. As is often the case, both claims may have some truth in them.[19]

Another point of interest relates to the relationships between democracy and theocracy, between elected political representatives and religious leaders. To many, both inside and outside Israel and Judaism, the description of Israel as a Jewish state means that it cannot be a democracy because it is based on religious principles. While matters of marriage and divorce are still governed in Israel by religious laws (without any preference for Judaism), Israel is no theocracy. The complexity derives from the fact that Judaism is the only religion co-extensive with one nation, or the only nation whose members belong to the same religion (at least historically). When Israel is described in its laws (and in the UN resolutions and international discourse) as a Jewish state, it is distinguished from an Arab state, not from a Muslim (or a Christian) one. So Israel's problems of state and religion are more similar to those encountered in western democracies than to those witnessed in most of the Muslim world.[20] A persistent effort by some religious elements to strengthen the power of religious pronouncements, and question the legitimacy of secular political institutions, including the courts, has not yet changed that picture.

However, the complexity is illustrated by a famous dictum by the president of Israel's Supreme Court at the time, Meir Shamgar. Shamgar was addressing the claim of Meir Kahane that his party should not be banned for being racist and undemocratic despite the fact that it advocated denial of civil and political rights to Israeli Arabs, since these arrangements were dictated by Judaism. Since Israel was a Jewish state, it could not ban a party advocating Jewish requirements, even if those were anti-democratic. Shamgar upheld the ban saying that Israel

[19] It is not clear whether Israel would have defined itself as a Jewish state had it enacted a constitution in 1948. In fact, it might have avoided this self-definition in order to bypass the internal Jewish debate on the question. Yet one of the reasons for the enactment of the 1992 laws was that they included this self-definition, which satisfied both the Jews who wanted to counter the Arab challenge and those who wanted to insist that the state is not a 'normal' democracy in terms of its religious orientation. If Israel's regime structure had been entrenched in a constitution, it may have been impossible to amend some of the regime features, possibly leading to a breakdown of the constitution itself.

[20] The richness of what happens in the Muslim world can be seen in the articles in this present issue by Brown, Tabari and Kogacioglu.

is Jewish just as France is French. In neither case, he suggested, does its distinctness offend against its democratic nature.[21]

Israel could well benefit from a constitution. But now it may be extremely difficult to enact one that would enjoy the broad legitimacy which would permit it to fulfill its functions. We may conclude that the chances that 'regular politics' will generate a serious political change are very unlikely. Politicians need a serious emergency, or a clear necessity, or an unrelenting demand from their voters, to initiate a change that will limit their own powers. These are hard to create within 'regular politics'. These conditions existed in 1948. They were not very present in 1950. It is unclear whether enough of the major groups in Israel can be persuaded that now is the time when the enactment of a constitution is called for. Even if most agree that a constitution would be good, it is unclear if they can agree on what arrangements and values this constitution should enshrine.

This creates an apparent paradox, which may in fact be a truism: the more divided a society is, the greater the importance of a constitution to its political stability. However, the more divided a society is, the less likely it is to agree on a constitution. This is especially true for the 'substantive' parts of the constitution (bills of rights and basic values). But in divided societies, each group either wants its own values enshrined, or that no one group's values be enshrined. When a society is very ideological, and facing very serious ideological and military challenges, as Israel is, neither arrangement is likely.

Rules of institutional wisdom also follow: fear of judicial review worked against a constitution, especially a bill of rights, from the outset.[22] Those interested in a full constitution with judicial review had to try and persuade politicians that these fears were unfounded. In Israel, the opposite happened. At the same time, the court insists

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[21] E.A. 1/88 *Neiman* v. *Chairman of Central Elections Committee* 42(IV) P.D. 177 (Hebrew]. Shamgar is relying here on the fact that 'Frenchness' may be both a civic identification, which may be open to all, and a particularistic cultural one. The Jewishness of Israel is ambiguous between religious and cultural meanings, but it is particularistic under both. More important, it may sound as if it excludes non-Jews from full and equal citizenship. This will not make Israel a theocracy, but may cast serious doubts on its being a democracy toward non-Jews. However, Shamgar rejected Kahane's position, and ruled that a proposal to deny political rights to non-Jews would lead to banning that party as anti-democratic.

[22] Indeed, this is the main argument brought against bills of rights where they do not exist, as in Australia. In Sweden, New Zealand and the UK, the bills that were adopted did not give courts the power to invalidate primary legislation.

on maintaining the extremely apolitical method of appointing judges, in which the judges themselves have a veto power over most judicial appointments, especially to the Supreme Court. The result of these processes is that the enactment of a constitution with judicial review by the existing court system is extremely unlikely. Those who think, as I do, that a special constitutional court is not a good idea in Israel, may be strengthened in their conclusion that Israel will be better off, after all, without an entrenched constitution.[23]

The present high visibility of various attempts to enact a constitution for Israel are thus extremely interesting. Only time will judge if they succeed, and what kind of a political and social order they will seek to entrench.

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[23] The best solution might be an entrenched constitution with explicit rejection of judicial review over primary legislation (Gavison, 2002b). At the present level of distrust, it is not clear that this solution is politically feasible. In countries with a constitution and a constitutional court, a similar activism by the court may lead to political attempts to weaken or even paralyze it. See the discussions of Russia, Hungary and Egypt in this volume.

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CHAPTER FOUR

A GLOBALIZING CONSTITUTIONALISM?

VIEWS FROM THE POSTCOLONY, 1945–2000*

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In the second half of the 20th century, at least 91 countries emerged into statehood from western colonial rule. Upon independence, they each drafted and promulgated a national constitution.[1] Moreover, 65 percent of these postcolonial states have rewritten their original constitution since independence, in many cases more than once.[2] This constitutional construction and reconstruction in the postcolonial world has been massive in scope. By the early 1970s, postcolonial constitutions accounted for roughly two-thirds of all the world's constitutions. As decolonization continued into the early 1990s, postcolonial constitutions, together with the constitutions of ex-Soviet countries and other secessionist states, accounted for more than four-fifths of them (Beer, 1992b).

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[1] Israel and Bhutan are the only two countries the author knows of which has not yet issued a single-document constitution.

[2] I am referring here to all countries of the world, still in existence today, that attained independence following colonial rule by European powers and the US from 1945 to 2000. These countries form the universe of states discussed in this article. I exclude countries of the former Soviet Empire, the Asian empires (e.g. China, Japan) as well as countries which later seceded from postcolonial nations (e.g. East Timor, Bangladesh). These countries can rightfully be considered postcolonial, but they are not former colonies of the European powers and the US, which is my prime concern in this article.

Of course, the fact of postcolonial documentary constitutionalism is not entirely remarkable.[3] Nearly all countries of the world—new or old, colonizer or colonized, rich or poor—have their own single-document constitution (Lutz, 2000: 118). On the other hand, postcolonial constitutions are indeed remarkable in the sense that constitutions are not logically necessary. That is, there is no immediately necessary connection between having an independent state and writing a single-document constitution. A constitution does not *have* to exist in written form, neither does it have to be issued in a single document. The first written constitution in Europe was Poland's in 1791, but independent states had been in existence long before that.[4] Nor do constitutions, once codified in a single document, have to be similar. But on many counts they are. All existing constitutions share some same basic features. Not only are they all packaged in a single written document, they all specify in one way or another the organization of political power, the division of governmental labor, the major principles and goals of governance, and so on. It is due to these basic similarities that Albert P. Blaustein, a constitutional consultant and compiler, was able to publish his pamphlet *Framing the Modern Constitution: A Checklist* (Blaustein, 1994). Aimed for constitution-builders in new states, the pamphlet identifies the basic elements which any constitution should have and which most written constitutions have in fact.

Postcolonial constitutions thereby affirm that documentary constitutionalism has become a globally shared mode of organizing socio-political formations. Postcolonial constitutions are part and parcel of a 'globalizing constitutionalism' (Klug, 2000: 2). This is a point which the neoinstitutionalist approach to world society has been quick to seize (Boli-Bennett, 1976; Meyer et al., 1987, 1997). Neoinstitutionalism highlights the cultural and cognitive dimensions of the world system.

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[3] According to Beer (1979: 11), a 'written constitution' is equal to 'documentary constitutionalism', which is the 'worldwide agreement that a modern nation state needs a single document of basic law setting forth constitutional arrangements'. Documentary constitutionalism 'thus refers only to the adoption by a nation state of a single document to state its fundamental formal law on the major divisions, structures, principles and powers of government, and rights and duties of citizens; different, then, from "the constitution" of a nation, which may consist of other documents like judicial decisions, speeches by a key leader, theories, public values, customs, and so on'.

[4] Poland's Constitution was written right after the American Constitution and four months before the first written French Constitution (Ludwikowski, 1996: 9–14). To this day, Britain does not have a single-document constitution. Britain is an exception in this regard, but by this token it reveals the historically arbitrary nature of written constitutionalism.

It seeks 'to account for a world whose societies, organized as nation-states, are structurally similar in many unexpected dimensions'. It predicts that new states entering the global system are likely to 'take on standardized forms' and eventually 'appear to be similar to a hundred other nation-states around the world' (Meyer et al., 1997: 151–2). In regard to constitutions, neoinstitutionalism is an informative approach. It suggests that all states have constitutions, and all constitutions come in a very similar package, because the larger system dictates that they should. World society provides the 'standard sociopolitical forms' by which new states must work. Documentary constitutionalism is one of them (Boli-Bennett, 1976; Meyer et al., 1997: 155).

In accordance with the neoinstitutionalist approach, it can be said that Blaustein's constitutional checklist represents but the most rationalized and explicit articulation of the standard constitutional form. It lays out the basic elements evident in most if not all constitutions. On the other hand, if Blaustein's checklist speaks of a standard constitutional form, it also speaks of the possibility for multiple constitutional models rather than any single one. Logically, the elements of the checklist could be combined in a number of different ways, contributing to heterogeneity as much homogeneity in the global constitutional order. This therefore begs the question: Where does the influence of world society on postcolonial constitutions end and where does it begin? Put differently, on what counts exactly do postcolonial constitutions evidence a globalizing constitutionalism that is truly global?

This article provides an overview of postcolonial independence constitutions since 1945. It also examines their most recent rewritten forms (as of the year 2000). The analysis is admittedly broad and cursory. It covers a limited set of features in the constitutions. It focuses upon constitutional texts rather than implementation or practice. But it does nonetheless offer some preliminary insights into world society's influence on the postcolonial constitutional order. It also speaks of something on which neoinstitutionalist approaches have been silent: the contrapunal tendencies of homogenization *and* hetereogeneity.

Decolonization and the Independence Constitutional Order

It would be misleading to claim that neoinstitutionalist approaches to world society predict full homogenization in the global system. They allow for possible disjunctures between world norms on the one hand and actual policy implementation or subnational, individual-level practices

on the other (Boyle et al., 2002; Meyer, 1999; Meyer et al., 1997). All of these possible disjunctures are relevant for considering the limits of world society's impact upon national constitutions. But for postcolonial states, something else must be considered—namely, empire. Indeed, for postcolonial states, 'world society' has never been simply worldwide; nor have its scales been simply 'national' or 'individual'. Rather, 'world society' for postcolonial states has been a world of empires, a series of societies fractured along imperial and intra-imperial lines (Go, 2003). In this light, it is not surprising that the first constitutions of the postcolonial world were indicative of global norms, but only in a limited sense. They were indicative of global norms by their mere existence. The very fact that all postcolonial countries adopted written constitutions indicates that by the mid-20th century, when decolonization began, any state entering the system had to have a single-document constitution in order to be a legitimate nation (Ludwikowski, 1996: 1). On the other hand, the genre and substantive provisions of postcolonial constitutions varied greatly. These variations suggest that if there was constitutional isomorphism at all, it occurred *within* imperial boundaries rather than across them. They also suggest that when isomorphism did in fact occur across imperial boundaries, it followed other *subglobal* scales of influence, not the purely global scale of 'world society'.

Consider, first, provisions in the independence constitutions for organizing and choosing executive power. The provisions varied, but the variations followed intra-imperial lines. For instance, many ex-British countries retained associations with the Commonwealth. They therefore kept the British monarch as the ceremonial head of state and adopted the Westminster parliamentary model in their constitutions (even Zambia and Botswana, who did not maintain the monarch as the head of state, adopted the parliamentary model). Conversely, most of the ex-French countries entered independent status with constitutions calling for presidential rather than parliamentary systems, thereby following the constitution of the French Fifth Republic. These states, then, simply adopted the constitutional model of their former imperial master. There was no single dominant model in world society for organizing and choosing executive power.

An analysis of the regime types specified in the independence constitutions from 1945 to 1994, cross-tabulated with empire, demonstrates this intra-imperial influence further.[5] I coded the indepen-

[5] The last independence constitution was the Constitution of Palau in 1994. For this

dence constitutions into four basic categories: (1) ruling monarchies, or systems where there is a monarch serving as both head of state and of government, (2) parliamentary systems (including systems with ceremonial monarchs and a prime minister, elected by parliament, as the head of government), (3) presidential systems (the president is a head of state, popularly elected) and (4) semi-presidential systems (where the president has a separate electoral mandate from the head of government, typically chosen by the legislature). The constitutions in this set come from countries around the globe, from the Pacific to the Caribbean to the Middle East, Asia and Africa. The dates of the independence constitutions tend to be concentrated at certain points, but are distributed throughout (see Figure 1). Yet, despite these possible points of variation, there appears to be a strong relationship between regime type and the former colonial power of the country (see Table 1). Thirty-eight out of the 49 ex-British colonies adopted parliamentary systems in their independence constitutions. Eighteen out of the 23 ex-French colonies adopted presidential systems (see also Go, 2002: 560–4; de Winton, 1979). These figures affirm that independence constitutions were intra-imperially isomorphic, rather than globally so.

Empire, however, served as only one subglobal scale of influence on the independence constitutions. A handful of the independence constitutions reveal at least two other factors. Algeria's Independence Constitution (1963), for example, began with a Preamble that declared:

> The Algerian people have waged an unceasing armed, moral and political struggle against the invader and all his forms of oppression. . . . In March 1962 the Algerian people emerged victorious from the seven and half years' struggle waged by the National Liberation Front. . . . Faithful to the program adopted by the National Council of the Algerian Revolution in Tripoli, the democratic and popular Algerian Republic will direct its activities toward the creation of the country in accordance with the principles of socialism and with the effective exercise of power by the people, among whom the *fellahs*, the laboring masses and the revolutionary intellectuals shall constitute the vanguard. Having attained the

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analysis four constitutions are missing. I was unable to locate copies of the independence constitutions of some countries (Equatorial New Guinea, Suriname and Syria). To keep the data consistent with examinations of later constitutions, I exclude South Vietnam, no longer in existence. Finally, some of the independence constitutions are only available in their amended form (about eight of them), typically a year or two after the first independence constitution. This is because most of the independence constitutions come from compilations by Peaslee (Peaslee, 1950; Peaslee and Peaslee, 1965, 1974), who reprints the constitutions as they exist at certain intervals. The original unamended independence constitutions are therefore not always available.

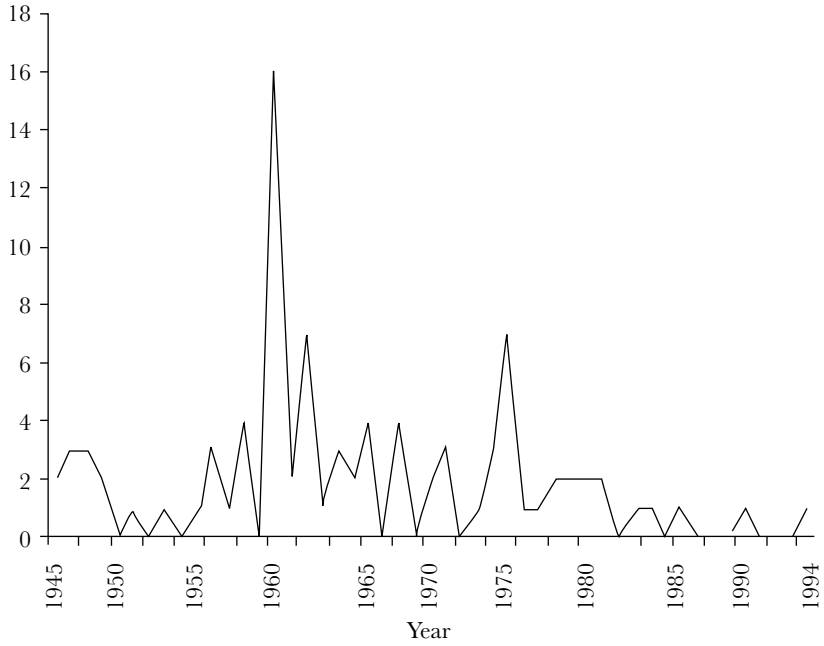

Figure 1 *Timing of Independence Constitutions*

objective of national independence which the National Liberation Front undertook on November 1, 1954, the Algerian people will continue its march toward a democratic and popular revolution. (Preamble, Algeria Constitution 1963)

Table 1 *Regime Type by Former Empire Independence Constitutions 1945–94*

	Regime type				
Former empire	Ruling monarchy	Parliamentary (Westminster)	Presidential	Semi-presidential	Total
Belgium	1	0	2	0	3
Britain	4	38	5	2	49
France	2	3	18	0	23
Germany	0	1	0	0	1
Italy	0	1	0	0	1
Netherlands	0	1	0	0	1
Portugal	0	2	0	0	2
S. Africa	0	0	1	0	1
United States	0	2	2	0	4
Total	7	48	28	2	85

As Arjomand (1992) has noted, the Algerian Independence Constitution represents a constitutional type that belies the standard western constitutional model. For example, rather than merely reflecting the structure of state power or mapping out state institutions and functions, it appears as an instrument of social transformation. The constitution incorporates ideological goals, proclaiming that the people will follow the socialist program of the National Council of the Algerian Revolution. It also lays out definite economic and social programs, such as 'the creation of a national economy whose administration will be ensured by the workers'. Furthermore, there is a strong temporal aspect to the constitution. The Preamble narrates a long story about Algerian resistance to French rule, situating itself in the present moment of independence in Algerian history, and then projects a socialist future. Finally, at the center of it all is a single political party, the National Liberation Front, which is declared to be 'the single vanguard party in Algeria' (Art. 23). All of these constitutional features are traceable to a socialist constitutional model (e.g. the constitutions of the Soviet Union and China). In this model, constitutions are intended to map the historical progress of society, charting its movement toward the final state of Communism. New constitutions, therefore, are to be written at each stage in the evolution, reflecting the particular historical moment and projecting a future (Duiker, 1992: 331). This explains the strong temporal component in the language of the Algerian Preamble.[6] Furthermore, in the socialist constitutional model, specific goals are explicitly laid out in the constitution. The projects, policies and programs that need to be undertaken by the state in order for society to evolve are all enumerated (e.g. Art. 10 of the Algerian Constitution). Finally, constitutions of the socialist type are not so much intended to limit government as they are designed to express that the constitution is, in a sense, limited by the ruling party (Triska, 1968: xi). In the 1936 Soviet Constitution, the Communist Party was declared to be 'the leading and guiding force of Soviet society and the nucleus of its political system and of all state and social organizations' (Motala, 1994: 117–18).

Algeria's Independence Constitution was thus influenced by the socialist constitutional model, a model which Arjomand (1992: 63) calls 'the ideological constitution'. But so too were other independence

[6] In this regard the Algerian Constitution is remarkably similar to the Preamble to the Constitution of the People's Republic of China (1954).

constitutions, including the Constitution of the Vietnam Democratic Republic (1959) and the constitutions of the former Portuguese colonies: Angola, Cape Verde, Guinea-Bissau, Mozambique and Sao Tome. The constitutions of yet other countries adopted the socialist model of naming and heralding a single political party. Among these were the Central African Republic, Comoros, Ghana, Malawi and Sudan. Even those constitutions which did not explicitly provide for single-party states carried strong socialist influence. Various elements of the constitutions of Egypt, Tanzania, and Guinea, as well as Mali, Benin, and Togo can all be traced to socialist influence, either at the time of independence or shortly thereafter (Silveira, 1976; Motala, 1994: 120, 156).

Besides ideology, there was a second trans-imperial and yet subglobal scale of influence: religion. Close to one-quarter of the independence constitutions (23 out of 91) either explicitly name a specific religion as the official state religion or provide for a certain religion rather than others to have a special place in the nation. Most of these independence constitutions were Islamic. To take just one example, the 1959 Constitution of Tunisia declares: 'In the name of God, the merciful! We, the Representatives of the Tunisian people, meeting at the Constituent National Assembly, proclaim, that this people, who have liberated themselves from foreign domination . . . on remaining true to the teachings of Islam, to the ideal of a Union of the Great Maghreb, to their membership of the Arab Family, to their co-operation with the African peoples in building a better future and to all peoples struggling for justice and freedom.' Article 1 stated that 'The Tunisian State is free, independent and sovereign. Islam is its religion, Arabic its language and the republic system is its regime.' Article 3 further declares that 'The Tunisian republic is a part of the Great Maghreb and is working for its unity, within the framework of common interests.' Article 37 holds that the religion of the president of the republic is Islam. Thus, as Romdhane (1989: 5) argues, the Tunisian Independence Constitution was not strongly influenced by the Constitution of France, Tunisia's former colonial master. Its sources must rather be traced back to constitutional ideas of Islamic intellectuals who had been part of the Nahda reformist movement, a movement that once embraced Turkey, Egypt and Tunisia alike.

Other African countries with Islamic provisions in their first constitutions include Algeria, Libya, Morocco, Mauritania, Comoros and Somalia. Islam, though, was not the only religious influence on independence constitutions. The early constitutions of Cambodia and

Laos proclaim Buddhism as their state religion. The Independence Constitution of Laos is especially notable, for it declares the King to be the 'High Protector' of Buddhism and demands that he be 'a fervent Buddhist' (Art. 7 and 8). The Constitution of Burma also incorporated Buddhism. While it does not declare Buddhism the official religion, it does give it a special place. Article 21(1) asserts: 'The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union' (see also Maung, 1959: 98).[7]

In short, while the norms or hegemonic assumptions of world society contributed to the fact that postcolonies adopted written constitutions, particularities in any given constitution were shaped by subglobal (and yet not quite national) registers: imperial, religious and ideological. The independence constitutions therefore reveal that if there was a world society that determined constitutional construction, it was a society fractured internally by multiple scales of influence. Constitutional models flowed intra-imperially and, in the case of religion and Communism, transnationally. No single constitutional model had reached the point of global dominance.[8]

World Society and Constitutional Reconstruction by the End of the Century

The hitch is that few of the original independence constitutions lasted. By the end of the 20th century, at least 59 out of 91 independence constitutions had been significantly amended or displaced by the promulgation of new ones. In Africa, constitutional change was the rule of postcolonial politics, typically beginning in the few years immediately following independence (Le Vine, 1997). Across the postcolonial world, constitutional reconstruction similarly proceeded apace. Beginning in the 1990s, constitutional reconstruction reached a high point. As Figure 2 suggests, many of the postcolonial constitutions in existence in 2000 were written in the 1990s.

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[7] For more on religious constitutionalism in the western world, see Markoff and Regan (1987); in comparison with Iran and Pakistan, see Arjomand (1993).

[8] Theories of world society in the neoinstitutionalist tradition overlook these subglobal scales of influence and differentiation (Strang and Meyer, 1993; Meyer et al., 1997: 131).

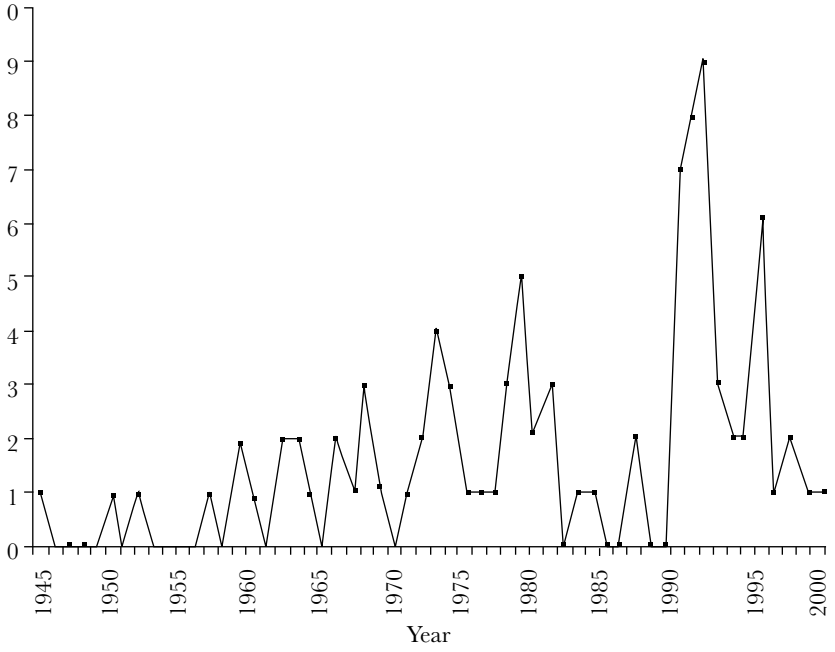

Figure 2 *Constitutions in Existence: Year Written*

The timing of these new or changed constitutions offers opportunity to consider broader events and processes in world society and their relationship to the constitutional order. These events and processes are numerous, occurring at various levels. For instance, since the height of decolonization in the mid-20th century, there has been a massive wave of democratization, one which arguably had its beginnings in the early 1970s and then proceeded strongly after 1989 with the fall of the Soviet Union (Huntington, 1991). There has also been a concomitant increase in global attention to human rights and self-determination (both individual and national); popular skepticism toward dictatorships and the concentration of political power; the delegitimation of Communism and a valorization of neoliberal economics. Political reconstruction through rational control, as manifest in constitutional reconstruction, has been part and parcel of these larger global trends, not only in the former colonies of Europe or the Soviet Union but around the world as a whole (Klug, 2000: 8–11; Lutz, 2000). What have these changes in the global sociopolitical order meant for constitutional reconstruction in the

postcolonial world? Have the previous subglobal lines of differentiation evidenced in independence constitutions been transcended?

There are clear trends indexing a constitutional convergence not evident in the independence constitutions. For example, many of the formerly socialist constitutions have shifted away from naming single-party regimes. The proportions are small but suggestive. Among the independence constitutions that were later changed or replaced, close to 20 percent called for single-party rule, while only 10 percent among the new or changed constitutions call for it. Algeria's 1963 Constitution heralded the National Liberation Front as 'the single vanguard party' that would ensure stability, serve as the only 'powerful organ of impulsion' and control the National Assembly (Preamble, Art. 23, 27); but Algeria's existing constitution, last changed in 1996, makes no such references. It rather contains a new article that guarantees and recognizes the right among citizens to create political parties (Art. 42).[9] Similarly, the 1975 Independence Constitution of Cape Verde (promulgated in 1980) set up an official single-party regime, naming the African Party for the Independence of Cape Verde (PAICV). In contrast, the 1992 Constitution (last amended in 1995) dismantles the single-party regime and explicitly calls for multiple political parties, each having the right to broadcasting time on public radio and television. It declares forthrightly, in fact, that the new regime is to be a 'regime of pluralist democracy' (Preamble, Art. 47, 56). The socialist constitutional model seems to have lost whatever influence it once had among earlier postcolonial constitutions, perhaps reflecting a new post-Communist constitutional order.

Increased attention to human rights has also had an impact on postcolonial constitutional reconstruction. Of course, the influence of human rights consciousness on the first independence constitutions was already strong. Concomitant with the Universal Declaration of Human Rights by the United Nations in 1948, nearly all of the independence constitution had some sort of rights provisions. This is true even for the independence constitutions of the former British Empire—a notable development considering that in the British legal tradition there has been no urgent need for fundamental rights to enjoy special

[9] It also decrees against founding parties on the basis of 'religious, linguistic, racial, sex, corporatist or regional' bases, states that parties 'cannot resort to partisan propaganda on the elements mentioned', and cannot 'resort to any form of any nature of violence or constraint' (Art. 42).

constitutional and legal protection against parliamentary interference (Moderne, 1990: 324–5; Smith, 1964: Ch. 5). Still, the provisions for rights in these independence constitutions were not exactly the same. The details certainly differed, but more tellingly, so too did the form by which they were codified. A little over 20 percent of the independence constitutions (19 out of 89) did not have sections devoted to rights under a separate title. Rights in these constitutions, when enumerated at all, were enumerated in the preamble or in other articles. Partly influential on these constitutions was the legal tradition of the French. In the constitutions of the Fourth and Fifth French Republics, rights are enumerated in the preamble rather than guaranteed in substantive provisions of the constitution (Nwabueze, 1973: 43). Thus, following intra-imperial isomorphism, just over half of the ex-French colonies adopted this mode in their independence constitution while only 15 percent of the ex-British colonies did so (see Table 2).

Whatever the source of the difference in the independence constitutions, the difference was significantly overcome through constitutional reconstruction in the last part of the 20th century. Of all the postcolonial constitutions in existence, only 10 percent do not have rights provisions under a separate title. Among the independence constitutions, the figure was 20 percent (see Table 3). This shift affirms a larger global trend: rights have become an important element of constitutionalism (Beer, 1992a; Klug, 2000: 12).

Table 2 *Number of Independence Constitutions with Rights under Separate Title, by Former Colonial Power*

	Rights under Separate Title?		
Former empire	No	Yes	Total
Belgium	0	3	3
Britain	6	41	47
France	12	13	25
Germany	0	1	1
Italy	0	1	1
Netherlands	0	1	1
Portugal	0	5	5
S. Africa	0	1	1
United States	0	4	4
Total	18	70	88

Table 3 *Number of Constitutions with Rights under Separate Title: Comparison of Independence Constitutions and Constitutions New or Amended*

Separate title?	Independence constitutions	New or amended constitutions in existence in 2000	All existing constitutions
No	21% (18)	9% (6)	10% (9)
Yes	70% (70)	91% (62)	90% (82)
Total	100% (88)	100% (68)	100% (91)

A final point of convergence has to do with provisions for heads of state: there has been an increase in constitutions calling for a popularly elected president. Actually, this change has played out on two interrelated registers. First, there has been a decrease in constitutions calling for a monarch to be the head of state[10] (and see Table 4). Second, there has been a simultaneous trend toward giving presidents a popular mandate. Among the independence constitutions that were later replaced or amended, 46 percent not only called for a president to be the head of state but also provided that the president be elected through popular direct vote or an electoral college. The others called for a hereditary head of state (e.g. monarch) or a president elected by the national legislature, following the parliamentary or Westminster tradition. This changed by the end of the century. As the independence constitutions were reconstructed, the proportion of constitutions stipulating popularly elected presidents increased. Close to 74 percent of the 68 constitutions that were new or amended by the end of the century call for a popularly elected president, an increase of close to 30 percent (see Table 5).

[10] Among the independence constitutions, close to 40 percent had monarchs as heads of state; among the new or amended constitutions in existence in 2000, this figure decreases to 10 percent (see Table 4 in the text). In part this has been driven by the devaluation of the British monarch in the former British Empire. Many ex-British countries who had initially maintained the British monarch as their head of state upon independence later adopted republican constitutions, thereby replacing the British monarch with an indigenous president (Nwabueze, 1974: 63–5). But many of the countries having indigenous monarchs in their independence constitutions, such as Burundi, Laos and Libya, have also replaced those monarchs with presidents. Today, the very few countries who maintain indigenous monarchs as heads of state include Cambodia, Jordan, Morocco and Lesotho.

Table 4 *Monarchs vs Presidents in Independence and Latest Constitutions*

Head of state	Independence constitutions	New or amended constitutions in existence
Monarch	38% (34)	9% (6)
President	62% (55)	91% (62)
Total	100% (89)	100% (68)

Table 5 *Method of Electing Presidents: Independence vs New or Amended Constitutions*[a]

	Independence constitutions	Latest constitutions
Hereditary monarch	28% (18)	8% (6)
Chosen by legislature[b]	26% (17)	18% (12)
Direct vote or electoral college	46% (30)	74% (50)
Total	100% (65)[c]	100% (68)

[a] Among countries with new or changed constitutions.
[b] Includes chosen by special council or leadership of party.
[c] Three missing.

The shift toward popularly elected presidents represents a transcendence of intra-imperial isomorphism. In the independence constitutions there was a notable relationship between the constitutional model of the former colonial power and whether or not the head of state was popularly elected. For instance, few ex-British colonies adopted popular election in their independence constitutions. Under 20 percent did so, while the great majority (over 80 percent) followed the Westminster model and called for the legislature to choose the president. By the same token, most of the ex-French colonies (75 percent) adopted the French model of popularly elected presidents.[11] In clear contrast, among the new or amended constitutions by the end of the century, the majority of ex-British colonies joined the ex-French colonies in calling for popularly elected presidents (see Table 6).

In sum, intra-imperial influence on choosing heads of state is no longer relevant in the new postcolonial constitutional order. Provisions for electing heads of state have converged, suggesting a more global shift away from parliamentary models and toward systems with presidents

[11] On the Constitution of the French Fifth Republic and the Reform of 1962, see Duverger (1992) and Mathur (1997: 186).

Table 6 *Election of Heads of State by Former Empire (Former Colonies of Britain or France only)*

	Independence constitutions		Latest constitutions	
	Ex-British	Ex-French	Ex-British	Ex-French
Method of election				
Hereditary or legislature[a]	38	6	10	4
Direct vote or electoral college	8	19	18	22
Total	46	25	28	26

[a] Includes hereditary monarchs, presidents chosen by legislature, special council or leadership of party.

having popular mandates (Shugart and Carey, 1992: 2–3). Along with the devaluation of single-party, socialist constitutions and the increased proportion of constitutions with significant titles for rights, this shift marks a new globalizing constitutionalism on at least two levels, not just one. Not only does world society dictate the need for a constitution, it now seems to dictate particular models for constitutional reconstruction, as certain models in the global repertoire have become dominant. The latest postcolonial constitutions have shied away from constitutions valuing monarchies, single-party regimes or Communism, and parliamentary modes of selecting executive power. They have instead tended toward constitutions that uphold the value of fundamental or human rights and presidents who were elected through universal suffrage. This has brought a new homogenization in the reconstructed constitutional order.

Complexification and Differentiation in Globalizing Constitutionalism

Convergence and homogenization, however, does not mean total identity across postcolonial constitutions. At least two processes have worked against it. First of all, at the level of individual constitutions, there has been a process of complexification attendant with homogenization: the elements preceding constitutional reconstruction have been often synthesized with the dominant constitutional elements in the global repertoire. Such case-level complexification is glaringly evident in post-socialist constitutions. To take one example, consider the shifts

in Cape Verde's constitutions. Cape Verde's Independence Constitution exemplified the socialist model of ideological constitutions. The text of the constitution proceeded in the historicist mode. It narrated the exploitative past, the socialist present and Communist future. Declaring the Republic of Cape Verde to be a 'revolutionary national democratic state' and calling for 'the building of a society free from the exploitation of man by man', the Independence Constitution was thus pitched as an agent of transformation (Art. 3). It also set up an official single-party regime, naming the African Party for the Independence of Cape Verde (PAICV) as 'the guiding political force of the society and the State' (Art. 4). It further provided that the PAICV, as the official party, would dominate legislature and then elect the president. The rewritten Constitution of 1992 (as amended later in 1995) changed all of that, following global trends in the wake of the Soviet Union's demise. Like so many other new constitutions, the latest constitution calls for a direct election of the president (Art. 117). And, as we have seen already, the new constitution dismantles the single-party regime and calls for 'pluralist democracy' (Preamble, Art. 47, 56). But if these elements follow global trends, their articulation in the specific text of the constitution stands peculiar. In fact, the genre of the older social-ist-style constitution persists in the new constitution. Referring to the early years of independence, the Preamble bemoans that the 'affirmation of Cape Verde as an independent state did not coincide with the setting up of a regime of pluralist democracy, and instead the organization of political power obeyed the philosophy and principles which characterize one party rule regimes'. It then declares:

> Notwithstanding the social and political reality in which the country found itself [in the moment of independence], a process of quick and deep changes was under way, as the populations and the emergent political forces embraced the values which characterize a Democratic State based on the rule of Law and which, by their content, had already shaped a 'de facto' model that was not reflected in the text of the Constitution. The present constitution is designed to equip the country with a normative framework, the value of which is based on the establishment of the new model and not particularly on the harmony imprinted on the text. The choice for a Constitution laying down the structuring principles of a pluralistic democracy, leaving out the conjunctural options of governance, shall allow for the necessary stability of a country of meager resources and for political alternation without disruptions.

The new constitution, just as in the socialist-style constitution, is still historicist and ideological. The only major difference is that now, rather

than single-party domination and socialism, the constitution calls for pluralist politics and an almost neoliberal mode of economic development. 'This Constitutional Law', concludes the Preamble, 'formally embodies the profound political changes that took place in the country and creates the institutional conditions for the exercise of power and citizenship, in a climate of liberty, peace and justice, which are the foundation of all the economic, social, and cultural development of Cape Verde.' The genre of the socialist constitution therefore remains intact, despite reconstruction.

In addition, substantive provisions in the new constitution call for transformation, just as did the provisions in the socialist constitution. The difference is that now the projected transformation is toward neoliberalism. For example, the first constitution had declared that the state would contribute to 'the building of an independent national economy' (Constitution of Cape Verde 1975, Art. 10). By clear contrast, the newer constitution declares that the 'The State shall support the national economic agents in their relation with the rest of the world and, especially, the economic agents and activities that contribute positively to the integration of Cape Verde into the world economic system' (Art. 88). The constitution even proclaims that 'The state shall promote and support foreign investment which might contribute to the economic and social development of the Nation' (Art. 89), as well as specifying and claiming to respect the 'Public sector' of the economy alongside the 'Private sector' (Art. 91). These provisions suggest that as elements from the globalizing constitutional repertoire were incorporated into the form of pre-existing ideological constitution, a novel synthesis rather than transcendence resulted. Neoliberalism, as a globalizing discourse, was syncretized with the older, persisting socialist constitutional model, such that the new Cape Verde Constitution is more radical in its liberal-economic provisions than even the most longstanding constitutions of western capitalist societies.[12]

[12] The more recent Constitution of Laos (1991) is a further case in point. While still maintaining the dominance of the Lao's People's Revolutionary Party, it also formalizes a mixed socialist and capitalist economy. Article 14 declares that the state 'protects and expands all forms of state, collective and individual ownership, as well as private ownership of domestic capitalists and foreigners who make investments in the Lao's People's Democratic Republic.' Article 16 declares that the 'economic management is carried out in line with the mechanism of a market economy with the adjustment by the state'. The extent to which these kinds of provisions are inserted due to aid-tying policies of groups like the World Bank remains to be seen.

Provisions for religion in postcolonial constitutions also carry the marks of synthesis. We have already seen that upon independence, 23 out of 91 countries (or 25 percent) had provisions for an official religion or for elevating one particular religion over another. Remarkably, by the end of the century, the number and percentage of constitutions with such religious provisions remained exactly the same (see Table 7). This lack of change has been not due to the persistence over time of the original independence constitution. As the last column in Table 7 shows, even among those constitutions new or amended, the proportion of constitutions with special provisions for religion is identical with the proportion in the independence constitutions. In fact, all the countries that began their constitutional career with religious provisions kept them intact despite constitutional reconstruction. The only exception is Burma (Myanmar).[13] All the other constitutions maintain their original religious provisions, even though many of these constitutions are recent. For instance, the constitutions or constitutional amendments in Laos (1991), Mauritania (1991), Algeria (1996), Comoros (1996), Morocco (1996), the United Arab Emirates (1996), the Maldive Islands (1998), Cambodia (1999) and Pakistan (1999) all provide for an official or named religion.

The persistence of religious provisions through constitutional reconstruction in the last decades of the 20th century contributes to a notable syncretism. Take the Constitution of the Maldive Islands. On the one hand, the constitutional history of the Maldives reveals the globalizing

Table 7 *Number of Constitutions with Special Provisions for Religion*

Religion?	Independence constitutions	All existing constitutions (2000)	New or amended constitutions only
No	75% (68)	75% (68)	76% (52)
Yes	25% (23)	25% (23)	24% (16)
Total	100% (91)	100% (91)	100% (68)

[13] Conversely, the Independence Constitution of Sri Lanka (Ceylon) did not have a provision for Buddhism, but its most recent constitutions added one. Its 1978 Constitution (still in effect pending the vote on a 1997 draft constitution), declares: 'The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the state to protect and foster the Buddha Sasana' (Art. 9). The 1997 draft constitution keeps the same provision and wording (1997, Art. 7).

trend of convergence. Emerging from British rule, the independence constitution replaced an indigenous sultan with a president (Independence Constitution of the Maldive Islands 1968, Art. 22). The most recent constitution (1998) calls for the president to be 'elected by a general public vote' (Constitution of the Maldive Islands 1998, Art. 35). Thus, like so many other postcolonial constitutions, the Maldives Constitution shifts from monarchical and parliamentary models and toward the presidential model.[14] On the other hand, not only does the new constitution declare Islam to be the state religion (Art. 7), it also declares that the president must be a male Muslim of Sunni following who 'has not been convicted of an offence for which a *hadd* is prescribed in Islam' (Art. 34). Further, it declares that the 'President shall be the supreme authority to propagate the tenets of Islam in the Maldives' (Art. 38). Finally, the new constitution places particular limitations on how the president is elected. For example, while the president is supposed to be popularly elected by secret ballot, the list of candidates is decided only by the legislature, the exclusively Muslim People's Majlis. The People's Majlis then selects from this list a single candidate, whose name is finally, and only then, presented to the public for a vote (Art. 35). Thus, even as the constitution is isomorphic with larger global trends of organizing and electing executive power, it also articulates with it elements from the transnational Islamic constitutional repertoire (not to mention—by having the parliament restrict the choice of candidates to one—elements from the British parliamentary system). Past and present, global and subglobal, transnational and local, are synthesized.

In short, the existence of these religious provisions, the related qualifications on executive power made in Islamic constitutions, and the persistence of the ideological genre evident in post-socialist constitutions are notable because they index subtle processes of complexification at the level of individual constitutions despite ostensibly global trends toward convergence. As post-socialist states emerged from the wake of Communism's collapse to confront the globalizing hegemony of neo-liberal and western democratic principles, they reconstructed their pre-existing constitutions not by erasing them completely, but by blending elements of them with globally emergent ones. Similarly, as

[14] The country's constitution of 1998 also joins the global rights regime, maintaining a separate section for the 'Fundamental Rights and Duties of Citizens' (Constitution of the Maldive Islands 1998, Chapter II).

religious-minded states reconstructed their constitutional orders, they drew from the pre-existing repertoire of religious constitutionalism, articulating them with elements appropriated from the overarching global repertoire. These constitutions therefore affirm Arjomand's observation that 'as the international repertoire of political culture grows by accretion, the later the constitution, the more syncretic it tends to be, and the larger the number of heterogeneous and potentially conflicting principles of order it embodies' (Arjomand, 1992: 75). Such complexification at the level of individual constitutions has served as one process impeding full homogenization.

Of course, religious provisions and socialist constitutionalist genres are not globally dominant. The proportion of socialist constitutions prior to reconstruction had been relatively small; religious provisions are evident in only one-quarter of all existing postcolonial constitutions. Still, there is another process which has impeded full homogenization. The process, which we might refer to simply as 'differentiation', occurs at the global level and not only at the level of a handful of individual constitutions. To see this we can reconsider some specific provisions regarding executive power in the new postcolonial constitutions. Already we have seen that the latest postcolonial constitutions seem to converge on provisions for popularly elected presidents. This trend represents a break from intra-imperial scales of influence and toward an emergent, global constitutional order. Still, to have a president as the head of state constitutes only one part of providing for executive power. A president may be the head of state and head of government at once (a monocephalous presidency); or a president may be the head of state while another figure, such as a prime minister, functions as the head of government (a bicephalous executive). Both of these options are well represented in the most recent postcolonial constitutions. In fact, there has not been a single dominant trend on this count. Of all existing constitutions that call for presidents to be the head of state, about half simultaneously establish monocephalous presidencies. The other half call for bicephalous presidencies, providing for a president to serve as the head of state while a prime minister serves as the head of government. This represents a notable shift from the independence constitutions. In the independence constitutions, the states with constitutions calling for presidents as heads of state also tended to make them heads of government. The proportion of constitutions that had bicelaphous presidencies was comparably small (nine out of 47, see Table 8). Now, however, the proportions are equal: 34 call for monocephalous presidences, while 35 call for bicephalous presidencies.

Table 8 *Number of Monocephalous and Bicephalous Presidencies among Independence Constitutions vs Latest Constitutions*

Type	Independence constitutions	Existing constitutions
Monocephalous presidencies[a]	38	34
Bicephalous presidencies[b]	9	35
Total	47	69

[a] President is head of state and head of government.
[b] President is head of state, prime minister head of government.

It may be that the change in the proportion between bicephalous and monocephalous presidencies has been determined by colonial legacy. As noted already, many of the independence constitutions of former British colonies maintained Commonwealth association and kept the British monarch as the head of state with a local prime minister as head of government. Then, during constitutional reconstruction, they replaced the monarch with a president. It may be, then, that this shift from monarch to president in the ex-British countries has led to the increased number of bicephalous presidencies, ultimately making the proportions of bicephalous and monocephalous presidencies roughly equal. But if this were the case, former British colonies would tend to have bicephalous presidencies, while ex-French colonies would persist in monocephalous presidencies. A contingency table demonstrates that this is not so (Table 9). In fact, former British colonies with new or amended constitutions since their first independence constitution tend to have monocephalous presidencies rather than the Westminster-style bicephalous structure. These former colonies include Kenya, Malawi, Pakistan, Sierra Leone and Sri Lanka. (Burundi, a former Belgian colony, began with an indigenous monarch and today has a monocephalous presidency.)

An examination of the routes of change, though looking only at two data points (independence constitution versus new or amended

Table 9 *New or Amended Constitutions: Type of Presidency by Former Empire*

	Monocephalous	Bicephalous
Former British	19	9
Former French	4	18
Total	23	27

constitution), further affirms that there is no simple relationship between beginning with a monarch and ending up with a bicephalous presidency. Colonies that began with monarchies have been just as likely to end up with a monocephalous presidency as they have been likely to end up with a bicephalous presidency. Among the new or amended constitutions, 18 began with monarchies. Of these, six maintained monarchies through constitutional reconstruction, seven ended up with monocephalous presidencies, and five ended up with bicephalous presidencies (see Table 10).

Nor has the new difference in proportion been associated with the trend toward popularly elected presidents. Of all the constitutions that call for a president to be elected popularly (direct vote or electoral college), about half bifurcates executive power, while the other half keeps it concentrated by making the president both head of state and head of government. Similarly, about half of the constitutions that call for legislative election have bicephalous presidences while the other half have monocephalous presidencies (Table 11). This suggests that while a popularly elected president has become an increasingly dominant constitutional scheme in the postcolonial world, it has not carried with it a dominant model for organizing executive power. Neither monocephalous nor bicephalous presidencies have attained hegemony. Ultimately, then, isomorphism in *electing* executive power has been simultaneous with a differentiation on a global scale in *organizing* executive power. Homogenization and differentiation have proceeded hand in hand.

Table 10 *Change in Executive: From Independence Constitutions to New or Amended Constitutions*

Type of change	No.	%
No change[a]	24	36.9
Monarch to monocephalous presidency	7	10.8
Monarch to bicephalous presidency	5	7.7
Monocephalous to bicephalous presidency	23	35.4
Bicephalous to monocephalous presidency	6	9.2
Total	65	100

[a] Eighteen began as presidents; six began as monarchs and remained monarchs.

Table 11 *New or Amended Constitutions with Presidents: How President is Chosen in Bicephalous and Monocephalous Presidencies*

	Monocephalous	Bicephalous	Total
Chosen by legislature[a]	7	9	16
Direct vote or electoral college	27	26	53
Total	34	35	69

[a] Includes chosen by special council or leadership of party.

Conclusion

World society has had important influences upon postcolonial constitutions. One is the basic need for a written constitution. World society dictates that constitutions are necessary for modern statehood, expressing a near hegemony of legal-rational principles for controlling authority and political construction or reconstruction (Meyer et al., 1987). Written constitutions have become so important for state legitimacy in the world system that some social scientists characterize them as a universal requirement. According to Dahrendorf's three-stage universal sequence of state-building, writing a constitution is the very first. The career of modern statehood begins with 'the hour of the lawyers' (Dahrendorf, 1990: 3).

The second influence of world society upon postcolonial constitutions, however, has been less directly determinate. To have a written constitution is one thing. To write that constitution in one genre over another, or to include in it particular provisions rather than others, is a different story altogether. In the independence constitutions, these particularities were largely influenced by subglobal circuits: empire, religion and ideology. While constitutionalism as a requirement for statehood was dominant in the immediate decolonization period, the particular models ultimately adopted by the new states were determined by sub-global scales. So-called 'world society' was a world of empires.

Of course, as constitutional reconstruction proceeded after independence, the sub-global scales of influence evident in the independence constitutions were partially transcended. Postcolonial constitutions by the end of the 20th century have converged on certain points. Monarchical schemes, parliamentarianism, single-party rule and socialist ideology as organizing principles for constitutions have decreased, while pluralism and popularly elected presidents have increased. Still, convergence on

one register has been concomitant with complexification and differentiation on others. For any individual constitution, the influence of prior constitutional models did not simply fade away. The old blended with the new, the local articulated with the global, producing novel syntheses. And on a global scale there has been differentiation. World society limits the range of models for organizing executive power, but it has not yet determined which single model among them is to be chosen. Thus, if a globalizing constitutionalism has emerged at all, it is one wracked with divergence as much as convergence, a differentiation in content as much as a homogenization in form. The trick for understanding the complexities of world society is to apprehend both at once.

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CHAPTER FIVE

THE RULE OF LAW AND THE POLITICS OF REFORM IN POST-REVOLUTIONARY IRAN*

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The rule of law is a central topic of the current political and constitutional discourse in Iran. While this phenomenon has been studied by social scientists, it remains to be adequately investigated by students of public law. This article is a step in that direction; it focuses on the jurisprudence of the ruling system in Iran during Mohammad Khatami's presidency (1997–2005).

Global interest in the rule of law has grown considerably since the implosion of the Soviet Empire. The American Bar Association has been engaged in an ambitious program to help reform the legal systems of the former Communist countries and, contemporaneously, the World Bank has vigorously pursued a policy aimed at establishing the rule of law in developing countries as a prerequisite to economic development. In the course of such programs, and in academic dialogues, the rule of law as a universal concept is being gradually defined. Notwithstanding cultural differences, globalization is creating consensus on a set of core elements. This article shows that many of the themes pertaining to the rule of law being discussed elsewhere are also discernible in the current debate in Iran.

The Rule of Law and the Reform Movement

The former Iranian president, Hojjatoleslam Sayyed Mohammad Khatami, deserves credit for promoting the current discourse on the rule of law in his country, and for explicating many of the issues in that debate. Khatami's first major public pronouncements on the subject were made during his successful campaign for the presidency in

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the summer of 1997. He maintained that the time had come, in the quieter aftermath of the turbulent era of revolution and the 1980s war with Iraq, for the supporters of the Islamic Republic of Iran to conduct their political rivalry within the framework of the law. This was a prescription for the political reconstruction of a country still slowly recovering from the cumulative impact of momentous destabilizing events. Khatami, however, also saw an older problem: a culture of disregard for the law, which preceded the revolution. Iranians, he said, had long viewed the law negatively—as the instrument of oppression by the powerful. Hence, he proposed that a major function of the Islamic government should be to promote general respect for the law, His promise was to institutionalize the rule of law (Khatami, 1997a: 18–19, 38; 1997b: 72, 76–7, 82).

Khatami's views were related to specific contemporary contexts. A troubling background was some ruling clerics' condoning of physical attacks by the zealots of the Party of God (*hezbollah*) on their opponents. Reporting on one such occasion in 1995, a newspaper that reflected the position of Khatami's political group asked in a celebrated critical article, 'Which Way Do We Go, Respecting the Law or Self-Help?' (*Salam*, 27 August 1995).[1] After Khatami was elected president, such discourse became much more widespread and developed. Not only a new lexicon for conduct toward the law, but also new legal concepts were introduced. What is more, beyond the tools of syllogistic argumentation, which was trapped in the confines of the orthodox principles of Islamic jurisprudence (*osul-e feqh*), the debate about the rule of law now came alive by the resort to philosophy, Shi`ite mysticism (*'erfan*), and even western thoughts. Khatami's vernacular has now become the language of the realm; it is even spoken by his opponents (Hajjarian, 2000: 26; Arjomand, 2000: 286; Mojtahid-Shabestari, 1996: 42–66).

Underlying this cultural shift has been a political change in Iran. Khatami ran for president as an independent, but his candidacy was supported by the two political groups that had a reputation, respectively, as populist and reformist (Khatami, 1997a: 6–7).[2] Khatami's landslide victory, with over 20 million or nearly 70 percent of the votes, was a remarkable surprise. It heralded the emergence of a public that clearly

[1] 'Be kodam jahat miravim, qanunmandi ya khodmadari?', reproduced in 'Abdi (2000: 71–3).

[2] They were Khatami's own Association of Militant Clerics (*majma'e ruhaniyun-e mobarez*), and the Party of Agents of Construction (*hezb-e kargozaran sazandegi*).

differentiated between the factions within the regime, and rejected the status quo. Equally ominous for the conservative clerical elite was the fact that the largest bloc of Khatami's votes was cast by the youth. This is the segment of the population to which the regime is by far the most sensitive (Sciolino, 2000: 276). The voting age in Iran is 15 and more than one-half of the population is younger than 25. The views of the youth toward the Islamic Republic is not shaped by the distant circumstances that caused the 1979 Revolution. They do not revel in the glories of the Revolution's triumph. They are highly educated, politically aware, and more willing to accept reform than radical upheavals—in line with their horror at the excesses of the Revolution (Khosrokhavar, 2001).

Khatami disclaimed any radical intent. Instead, he aligned himself with those who maintained that the regime was in serious need of repair but that it could, indeed, be repaired (Hajjarian, 2000: 19). Khatami eventually came to call their campaign the Reform Movement (*jonbesh-e eslahi*) (Khatami, 2001: 23). The Reformists are not a political party, as political groups in Iran have not yet matured much beyond mere congregations around individual leaders (Khatami, 2001: 15).[3] The Reformists include the more progressive clergy and the less religious technocrats. They are supported by a broad band of those disenchanted with the regime. Khatami is the recognized 'symbol' of the Reform Movement.

Khatami's Reform Movement is faithful to the regime's Islamic character. Following four impressive victories in national elections in the last five years, however, it has staked a solid political and social base for a jurisprudence different from that of its conservative rivals in the regime. The Conservatives are led by the ruling clergy, and include the traditionalist merchants of the Bazaar and the more religious technocrats.[4] The Conservatives' votes totaled roughly one-third of the Reformists' in Khatami's first run for president and only 20 percent of the Reformists' votes in his second run (Hajjarian, 2000: 23; Seifzadeh, 2002: 2). Many of these votes, however, came from fervent supporters—

[3] The major Reformist groups are the Participation Front of Islamic Iran (*jebhehye mosharekat-e Iran-e eslami*), the Organization of Strivers of the Islamic Revolution (*sazeman-e mojahedin-e enqelab-e eslami*), and the two listed in note 2 (Seifzadeh, 2002: 4).

[4] The Conservatives main groupings are the Society of Militant Clergy (*jame'eh-ye ruhaniyat-e mobarez*), the Society of Instructors of the Seminaries (*jame'eh-ye moddaresin hozeh-ye 'elmiyeh*), the Board of Islamic Coalition (*heyat-e mo'talefeh-ye eslami*), and the Society of Muslim Engineers (*jame'eh-ye eslami-ye mohandesin*) (Seifzadeh, 2002: 2–3).

religious zealots or beneficiaries of entitlement programs created for the veterans of the war with Iraq—who have also served as shock troops to control the streets for the Conservatives.

The distinctive characteristics of the Reformists' jurisprudence are rooted in the Reform Movement's rejection of the rigid orthodoxy demanded by the Conservatives. In asserting that there may be more than one reading (*qera'at*) of Shi'ite Islam, the Reform Movement generally endorses freedom of thought and expression. The unity of the 'community of believers' (*ommat*) does not preclude diversity of political parties. Indeed, a policy of 'tolerance' (*tasahol va tasamoh*) is called for, as the regime needs to turn enemies into rivals and rivals into friends. The policy of 'rejection and elimination' (*tard va hazf*) must be discontinued, since the regime ought to take more passengers on its 'train' rather than force them out. People are won over to Islam by 'kindness', not by 'harshness'. Even those who are not Shiite or Muslim could contribute to the goals of the regime. Indeed, 'Iran belongs to all Iranians' (Khatami, 2001: 25; 1999b: 97; Hajjarian, 2000: 23–4, 369; Mohajerani, 1999: 325–6, 376, 342, 346).

To the Reformists the element of 'Republic' in the Islamic Republic is pivotal. It means the same as it does 'everywhere in the world', which is 'popular sovereignty'. Only that reading of Islam which has been approved by the vote of the people is the binding political interpretation of Islam. Otherwise, the commands of even the highest clerical jurist (*mojtahed*) binds an individual—who chooses him as his 'source of emulation' (*marja'-e taqlid*)—only in religious matters, and different individuals may choose different clerical jurists for that purpose (Hajjarian, 2000: 198–9). In this perspective Khatami justifies the role of Islam in Iran as the unifier of the nation (Khatami, 1999b: 105). This is a political reason; the context is not a domain of faith.

The challenge of Khatami's Reform Movement has dominated Iran's constitutional politics and has seriously undermined the legitimacy of the regime in the eyes of the educated public. Its impact on Iran's constitutional law, however, has been far more limited. Nor, one should note, has it caused any serious rift in the regime with respect to economics or—reported disagreements notwithstanding—foreign policy.

Written Constitution

Khatami's proposed institutionalization of the rule of law assumed the existence of specified laws. The laws that Khatami wished to promote

were contained in the written Islamic Constitution of 1979. Acts violating the constitution were illegal, he said, and those who aimed to subvert the constitution had to be suppressed (Khatami, 1997a: 21). The constitution was approved overwhelmingly by the people in the heat of the revolutionary fervor and under the influence of the charisma of the Grand Ayatollah Ruhollah Khomeini. In effect, it certified the dominance of a new ruling group in Iran, a select group of the high-ranking clergy, closely knit—in many instances by marital or tutorial bonds—and now organized in a hierarchy designated by Khomeini. What is more, this constitution allowed no possibility of amendment without that group's consent.

The Islamic government that the constitution proposed had no precedent, and no template to use. This was the first time that the Shiìte clerics had seized power. The closest that the clergy had come to influencing the constitutional law of Iran was in the Supplementary Fundamental Law of 1907, following the Constitutional Revolution. While they helped the secular constitutionalists impose the principle of 'conditional government' (*mashrutiyat*) on the hitherto absolute power of the king, the Shi'ite clerics' own share of power—in the form of a committee to ensure that the legislation would conform to Islam—was never delivered as the enacting provision was ignored.

Velayat-e faqih and the Leader

It was only in 1970 that the notion of a full-fledged Islamic temporal government was introduced by Khomeini (Akhavi, 1996: 231). Especially noteworthy was his new formulation of the concept of *velayat-e faqih* (the Islamic jurist's guardianship) as the divinely ordained rule by the highest-ranking clerical jurist, in the guise of the guardian of the community of believers during the occultation of the last, Hidden Imam. The Islamic Constitution, substantially shaped by Khomeini's lieutenants, defined the supreme clerical jurist entitled to *velayat* as the Leader (*Rahbar*), and endowed that office with the person of Imam Khomeini. After Khomeini's death in 1989, Hojjatoleslam Sayyed 'Ali Khamaneh'i was selected as his successor, according to the constitution, by the Assembly of Experts (*majles khebragan*), an elected body with exclusively clerical membership. He received 60 votes of the 74 members present (Arjomand, 1992: 157). Khamaneh'i's rule since has not required the approval of any other institution or the direct vote of the people; neither has he asked for such approval or vote.

Unlike Khomeini, the new Leader, Khamaneh'i, is not regarded as the highest-ranking religious authority (*marja'-e taqlid*). Nor does Khamaneh'i have the revolutionary credentials of Khomeini, or his charisma. Consequently, much more than his predecessor, Khamaneh'i must take into account the views of the members of the clerical ruling class. Nevertheless, Khamaneh'i occupies a supremely powerful office by virtue of the constitution. Khamaneh'i, and less so the office of the Leader, have been the subject of criticism in Iran. Khatami, however, has maintained his unwavering allegiance to both (Khatami, 1997a: 11–12; Arjomand, 2000: Note 1). Aside from personal ties—Khameneh'i was especially close to Khatami's father—Khatami has looked to Khameneh'i, who has a relatively moderate past, for support against his more conservative opponents in the regime (Sciolino, 2000: 84–7).

Khatami has described the Leader's role as providing guidance, supervision, and coordination among the three branches of the government. In fact, however, the Leader's powers under the constitution put him virtually in control of all three branches (Art. 110). His specified executive powers—which include the command of the armed forces and the Corps of the Guardians of the Islamic Revolution—are much greater than the president's, and Khatami has acknowledged that he is expected to exercise his share of the executive powers under the control of the Leader (Khatami, 1997a: 8, 11, 33–4). The Leader also appoints and dismisses the head of the Judiciary. Finally, he has the decisive voice in legislation in the frequent deadlock between the principal legislative body, the Majles (*majles-e shuray-e eslami*), and the organ charged with ensuring the constitutionality of legislation, the Guardian Council (*shuray-e negahban*). Khamaneh'i has not shied away from exercising these vast powers.

Limited Government

There is no constitutional accountability for the Leader. His term of office is indefinite. He could be dismissed, however, by the Assembly of Experts, but only in cases of proven moral turpitude or incompetence (Arts 5, 107, 109). That is a highly improbable measure for the exercise of popular sovereignty, as the nominees for membership of the Assembly of Experts must be approved by the Guardian Council, one-half of whose members are directly appointed (and dismissed) by the Leader, and the other half, although approved by the Majles, are nominated by another appointee of the Leader, the head of the Judiciary.

Is the Leader's authority then unlimited? Is Iran back to the position of autocracy (*estabdad*) against which it staged two revolutions in the last century? The Leader, indeed, has supporters who maintain that his authority is absolute (*motlaq*). In this view, the Leader could overrule not only the constitution but even the Divine law (Akhavi, 1996: 262–6). Khatami has, apparently pointedly, abstained from this view (Arjomand, 2000: Note 1). His political writings on the subject indicate that he considers the traditional Shi'ite constraints on the temporal ruler inadequate, and that limitation consisted of merely advising the ruler that punishment in the afterlife and popular uprising in this world awaited unjust rule (Khatami, 1999a: 428–34). Indeed, Khatami allows the questioning of the scope of the 'jurisdiction' of the Leader. These questions, however, Khatami points out, should be referred to the Guardian Council, which is vested with the authority to interpret the constitution by the vote of three-quarters of its members (Khatami, 2001: 18). Considering the Leader's dominant power in appointing the members of the Council, this is, at best, a circumscribed check on the Leader.

The Leader, however, is not unfettered by the influence of the other members of the ruling clergy in the Guardian Council—and in other institutions of the regime. The Guardian Council has not always acted according to the Leader's wishes, although it has ultimately yielded to them. When its long delay in ruling on the complaints about the 2000 Majles election caused considerable unease, the Leader formulated a specific resolution. Rather than adopting it as its own, the Council merely announced it as the Leader's response to its request for guidance in the matter. Thus, it left standing the declaration in the request that the Council itself could not certify that election, which implied that it was void. Twelve years earlier, the Guardian Council acted nearly the same way toward Khomeini with respect to a previous Majles election. It ignored his repeated suggestions that it should declare that election valid before finally announcing, pointedly, that the election was certified by virtue of Khomeini's personal directive (Mohtashemipur, 2000: 182, 188, 191).

This pattern in the Leader's relationship with the Guardian Council is also noticeable in the area of legislation. The Council has been especially attentive to its constitutional responsibility to confirm that all laws passed by the Majles are compatible with the constitution and Islam. Exercising this authority, the Guardian Council has returned many laws to the Majles demanding their revision. The resulting lengthy legislative process often interfered with effective governance even when

Khomeini was alive. His solution was to create still another council, the Interest Council (*majmaʿ-e tashkhis-e maslahat-e nizam*, or the Council for Assessing the Interest of the System), which included all the six clerical jurists of the Guardian Council. Incorporated by a 1989 amendment into the constitution, the new, 31-member Council advises the Leader on how to handle the impasse when the Majles fails to accommodate the Guardian Council's objections. The stalemate would be treated as a problem that 'cannot be solved by conventional methods', and the Leader would have to personally 'resolve' them (Art. 110.8, 112). Thus, in effect, the amendment has given the Leader the final say in interpreting the constitutionality of legislation. The Guardian Council had no choice but to acquiesce in this diminution of the original scope of its authority. On the other hand, the institutionalization of the advice to the Leader, in the form of the Interest Council, restricts the Leader's freedom of action. The oligarchic attribute of the Iranian conciliar heirocracy is further manifest in the fact that several grandees are members of both the Interest Council and the Guardian Council—as well as the Assembly of Experts. In this perspective on decision-making in Iran, Khameneh'i appears more as the first among equals.

Separation of Powers

The constitution provides for the separation of powers among the three branches of government, which is noteworthy in considering the critical differences that President Khatami's administration has had with both the legislature and the Judiciary. Two well-publicized areas of disagreement have been the treatment of the press and the matter of political prisoners. In these disputes Khatami's virtually sole remedy has been to appeal to the Leader, often in private, as the coordinator of the three powers. The Leader's intervention was decisive also in the dispute between the Majles and the Judiciary, in 2001, on the restriction of the Majles's right to choose members of the Guardian Council from among a list nominated by the Judiciary (Amuzegar, 2002: Notes). The Leader's discretion, therefore, has served as the principal guarantor of the separation of powers.

Khatami has declared that he would aim at seeking predictable rules for the Leader's coordination of the three branches (Khatami, 2001: 18). The records of the Leader's discretion when exercised could be valuable as precedent. The Leader, however, has avoided thus diluting

his privilege. For example, he would pardon a jailed Majles deputy rather than agreeing with the Majles that as a matter of principle the Judiciary did not have the power to put a deputy in jail for expressing any views on the Majles floor (*The Economist*, 18 January 2002).

Constitutional Executor

Khatami has maintained that it is his duty as president to implement the constitution, pursuant to its Article 113—a vestige of the earlier drafts that, anomalously, has survived the otherwise considerable transfer of functions to the Leader (Arjomand, 2000: 287). Employing this provision to promote the rule of law, Khatami has interpreted it to mean that he has to protect the people's constitutional rights. Accordingly, he established a commission to receive reports of violations of the constitution. The commission has compiled over 100 complaints it considered valid and reported them to the president. The commission's efforts have not gone much further, as the president does not have adequate power to stop violations of the constitution. He could investigate violations and warn the violators. (Mehrpur, 2001: 53, 55–60). It is the Judiciary, however, which the constitution entrusts with the task of seeing that its violations do not go unpunished. The Judiciary, on the other hand, has taken concrete measures to punish those it considers to be violating the law—many of them Khatami's supporters. When these measures have been challenged as exceeding the Judiciary's constitutional authority, the Leader has taken the Judiciary's side (Arjomand, 2000: 288).

The Leader has, thus, in a sense endorsed the independence of the Judiciary. In that fashion, indeed, the head of the Judiciary also invokes the principle of the independence of judges when he is asked why they do not follow his public pronouncements on the fair administration of justice (*Tehran Times*, 20 February 2002). This judicial independence, however, should be viewed together with the institutional limitations imposed by the constitution. The head of the Judiciary is appointed and dismissed by the Leader, and he, in turn, appoints the chief of the Supreme Court, who supervises all the courts, and the prosecutor general. Furthermore, the constitution provides that all these main officers of the Judiciary be clerical jurists (Arts 156, 161, 162). Khatami has gone as far as charging that the Judiciary is in the hands of 'dogmatic and regressive clerics' (Arjomand, 2000: 288). Critics blame them for establishing a new culture of 'judicial lawlessness' (Amuzegar, 2002: 3).

The United Nations human rights observers have reported that the Judiciary was largely responsible for the ongoing abuses in Iran (Agence France-Press, 20 March 2002).

The president can protest against unconstitutional conduct by the Judiciary. This right, under Article 113, does not contravene the principle of separation of powers as it stems from the president's constitutional position not as the head of the executive branch but as the highest official after the Leader. Khatami maintains that the Guardian Council has endorsed this interpretation, despite the Conservatives' continuing efforts to refute it (Khatami, 2002: 5–6; Mehrpur, 2001: 46–51). Accordingly, Khatami has issued 'several warnings', but until recently he had refrained from taking the more drastic measure of making this fact public, because he believed 'the less tension we brought to society, the greater the possibility would be for peaceful resolution of issues' (Khatami, 2001: 13). His repeated warnings, however, have been ignored. As a result, Khatami submitted a bill in September 2002 to increase the power of the president in order to enable him to perform his duties as the executor of the constitution (Khatami, 2002: 6).

Although the bill is unlikely to change the situation significantly even if passed by the Guardian Council, this may be Khatami's boldest challenge to the ruling Conservatives. It is the extreme limit of his hallmark strategy of 'active calm'. Khatami's own role in that strategy has been private intercessions with the powerful in the councils of the regime, while he calms the more activist Reformist deputies and press. Circumspection may be native to this gentle man, but it also reflects Khatami's estimation of his political power. Do not expect him to mobilize his still massive popular support to effectuate radical change in the Islamic Republic. He rejects the shock option of 'withdrawal', suggested by many dejected Reformists (Khatami, 2002: 20). Khatami has faith in plodding for moderate changes in the face of real adversity (Khatami, 2001: 12). His ambitions are confined to harvesting the existing constitution. He avoids talks about any liberating amendment.

Due Process

The Judiciary's conduct has brought into public debate in Iran another aspect of the rule of law, which could be summarized as due process. The constitution provides for non-retroactivity of criminal laws, the right of habeas corpus (in that the detainees must be immediately notified

in writing of the legally justifiable charges against them), the right to speedy proceedings and to open trial, the right to counsel, presumption of innocence, and the right to jury in political or press offenses. It bans torture as a means of obtaining confession. The constitution even expressly states that the Leader is equal before the law (Arts 32, 37, 38, 107, 165, 168, 169). Khatami has endorsed these specific rights—in contexts that implied they were not being observed by the Judiciary (Khatami, 2001: 13, 22). Newspapers are full of reports about detainees being held without a formal charge for long periods of time, confessions forcefully obtained, the right to counsel denied, trials held behind closed doors, and counsel intimidated for vigorously defending political prisoners. Speaking on the administration of justice in the non-political cases, the head of the Judiciary himself summed up the general conditions, in March 2001, as being worse than even in the underdeveloped 'third world' countries. He cited as major problems long delays in processing cases, unequal application of the law, too many prisoners, terrible prison conditions, long detention of suspects without trial, the use of torture to obtain confession, and psychologically unfit judges (*Mahnameh Pezhwak*, April 2002).

The constitution establishes one system of courts with a general jurisdiction, excepting only violations of military or police duties, which it refers to the special military tribunals. The Reformists have maintained that all other special courts are unconstitutional. The regime, however, has continued to employ the special Revolutionary Court—with its vague and broad jurisdiction—and the Special Court for the Clergy to prosecute its critics. In their proceedings, these courts have violated many of the due process principles. They impose punitive bonds, fail to hold open trial, refuse jury, and deny meaningful right to counsel (Kadivar, 2000: 210–11; Mehrpur, 2001: 73, 111–113, 117).

Courts for Political Control

The Special Court for the Clergy—which has the crucial function of ensuring the loyalty of the core group of the theocracy's supporters—is independent of the Judiciary; it is directly subordinate to the Leader. The Judiciary and the Guardian Council have been led by other forceful figures of the regime that have vigorously defended their institutional prerogatives. All these three organizations, however, have supported each other against challenges in the Majles, the executive, the press

and the dissident clergy. As such they have constituted an integrated juridical system.

The head of the Judiciary, for example, has defended the legitimacy of the Special Court for the Clergy on grounds of the prerogatives of the Leader, and the Guardian Council has rejected the laws passed by the current (Sixth) Majles—dominated by the Reformists—which would have undermined that court's legitimacy (*RFE/RL Iran Report*, 2002). On the other hand, however, this juridical system had an ally in the Fifth Majles—dominated by the Conservatives—which confirmed the Guardian Council's sweeping interpretation of its supervisory power over the legis-lature's election process (Arjomand, 2001: 328) and pushed for press laws desired by the Judiciary. In both of these, the collaboration of that Majles and the juridical system was against the efforts of the Reformist executive, while now the juridical system confronts both the Reformist Majles and the executive branch.

This cohesion of the Conservative incumbents of the juridical system is only in part due to ideology. Attempts to Islamicize the laws—to enact the revolutionaries' claim that Shi'ite Islam was a total way of life and total ideology—could not go much beyond the incorporation of a few archaic measures of punishment from the *Shari'a* (notably, retaliation or *qesas*) in the criminal code. Further Islamic codification was abandoned when it became apparent that the *Shari'a* lacked provisions to govern situations in modern Iran not contemplated by the traditional Islam. The extended application of the general principles of Shi'ite jurisprudence has also been seriously hampered by the shortage of judges with adequate training in Islamic law. Ultimately, the imperative of governance has forced the rulers of Islamic Iran to resort to the same foundation for laws as used by secular states: the interests of the regime. They have rationalized that this transformation is justified by a juristic principle, *maslahat* (public interest), long rejected by Shi'ism (Arjomand, 2001: 313–14; Schirazi, 1998: 161–253, 302–3). The controlling factor in the Iranian legal system, in fact, has been the interests of the ruling conservative clergy. The expedient of preserving the regime has been invoked to justify the deployment of the courts for the transparent purposes of political control. This mockery of the rule of law has aggravated the public's cynicism and mistrust, ironically when people have been sensitized to the law's potential virtues by the Reformists' campaign.

The Judiciary's reach into politics has been extensive. It has made highly charged statements on foreign policy and has maintained its own investigative arm for gathering information on national security matters

(*Radio Azadi*, 27 May 2002, 27 August 2002). Many key members of Khatami's administration have been summoned to court and intimidated (Khatami, 2002: 25). Reformist deputies and writers in the two pillars of Khatami's support—the Majles and the press—have been relentlessly hounded. Rejecting the defense of parliamentary immunity, the Judiciary has jailed deputies, many on charges of violating the press law. Informal intercession with the Leader has proved more productive than the current Majles's repeated efforts to pass new press laws. The Guardian Council has remanded three such bills (*RFE/RL Iran Report*, 2002). While the motive behind many cases brought to court is political, the Judiciary refuses to acknowledge that fact so that it may deny jury and open trial, which the constitution requires for political charges. The Judiciary's claim that the law does not clearly define political offenses has been refuted by President Khatami, whose efforts to further clarify the definition by new legislation has also been frustrated by the Guardian Council (Khatami, 2002: 21; *Radio Azadi*, 29 July 2002).

Legislative Authority

In the previous section we see one instance of the interaction of three institutions (the Guardian Council, Judiciary, and presidency) claiming constitutional rights to shape the rule of law in Iran. There are still three more such claimants: the Majles, the Interest Council and the Leader. If the implementation of the constitution is the responsibility of the president, its interpretation the prerogative of the Guardian Council, and its enforcement the duty of the Judiciary, the Majles has the right to legislate, that is to enact in specific laws the principles embedded in the general clauses of the constitution. This prerogative of the Majles, however, is absolute only with respect to initiating legislation. As mentioned before, the Guardian Council could remand legislation it deems incompatible with the constitution or Islam and, should an impasse then ensue between it and the Majles, the Interest Council would have the privilege of advising the Leader about the final shape of the legislation. In such cases the Leader, or in practice the Interest Council, in effect becomes the ultimate legislator. This scenario is not hypothetical; the Reformist deputies have complained that the Guardian Council has opposed all their bills (*Radio Azadi*, 21 August 2002).

Hard-line members of the Guardian Council, on the other hand, have expressed regret that they allowed the Reformists even to be elected to the Majles. Indeed, the Council has claimed considerable authority

over who could be a candidate for the Majles and the election process. The constitution (Art. 99) gives the Council the duty to supervise the Majles elections, and the Council has interpreted this as a 'certifying' (*estesvabi*) responsibility, making the validity of all aspects of the election contingent on its approval. The constitution requires that the candidates for the Majles be committed to Islam, which under the existing election law has included commitment to the principle of *velayat-e faqih*. While these restrictions have eliminated many aspirants, the Council has added further specific qualifications, and has refused the demand that it make public its deliberations on the qualifications of the applicants. Its decisions are not subject to appeal. Among certified candidates, the Council has used its strict supervision of the election process to help the type it favors, for example by designating many more mosques than universities as polling stations (Mohtashemipur, 2000: 139, 146, 150, 154–5; Mehrpur, 2001: 115; *Radio Azadi*, 2 September 2002).

The import of these limitations on the choices of candidates available to the electorate is felt in the failure of the Majles to produce a strong Reformist leader, despite that institution's history as the incubator of popular heroes. Indeed, the elective Islamic Majles has been emasculated by the triumvirate of Guardian Council, Interest Council and the Leader—all appointees of the conservative clerical oligarchy—not just by the forfeiture of its ability to legislate. It has also been refused the right to investigate those institutions which are under the direct control of the Leader, and has been pressed to obey the Leader's command—not even to debate those topics which he forbids (*Radio Azadi*, 27 May 2002, 30 May 2002; Kar, 2001: 463).

Human Rights

The regime, however, could not stifle the growing public discussions—within the Majles as well as the press—about popular sovereignty as the ultimate legitimizing source of law, and the concomitant topic of inalienable individual (human) rights. Abstracted in the concept of 'liberty' (*azadi*), these have been the persistent and continuous primary goals of popular movements in Iran for over a century. It is indeed in the penumbra of *azadi* that one observes the historical roots of the Iranians' quest for justice and lawfulness, as in 'the house of justice' (*'adalatkhaneh*) of the 1905 Constitutional Movement, and the 'legally legitimate government' (*hokumat-e qanuni*) of Mosaddeq's National Front

movement of the early 1950s. It is on this tradition that the current Reformists' rhetoric claims to rest.

The 1979 Constitution provides many rights for the individual. These human rights, however, are made subject to Islamic norms. Khatami's explication of this portentous limitation is instructive. He rejects 'liberalism', which he considers as Islam's only rival ideology, because it permits all freedoms naturally desired by individuals. This is not desirable for Khatami since he wishes the imposition of religious restraints on freedom in order to promote spiritual values that would lift humans to be 'godly' (Khatami, 1993: 136–7, 205; 1997a: 32). The anti-reformists represent an attitude on human rights harsher than Khatami's, who views them as furnishing the antithesis to the liberals. As Khatami has put it, in the anti-reformist jurisprudence there are only duties and no rights for the individual, freedom and religion are deemed incompatible, and people have no say in governance and must obey their clerical rulers unconditionally (Khatami, 1999b: 95–119). In practice, however, the Reformist Islamic jurisprudence differs from its conservative rival only in containing the extent of clerically imposed religious restrictions on freedom.

Freedoms of Thought and Expression

The Islamic Republic restricts freedom of thought. The Baha'is are persecuted for their religious beliefs. Only the religions of the 'people of books'—Christians and Jews—and the Zoroastrians are recognized. Much harsher treatment (death) awaits a Muslim who changes his or her religion. Freedom of expression is repressed in Iran. Not only publicly stating certain views, but even discussing certain topics are punishable. The sanctionable views are enumerated in various laws. The constitution prohibits publication of views violating the principles of Islam or public interests. The press law is more detailed and adds such other specific instances of illegal acts as insulting the Leader and the high clergy (Mohajerani, 1999: 344, 378, 404). The special courts have prosecuted defendants for offenses they ruled prohibited which do not appear in the laws: for example, publishing lies and causing public unrest (Kadivar, 2000: 39, 85). All of these strictures are interpreted broadly and applied universally—to Majles deputies, the clergy, the press and ordinary citizens. No forum has been immune, including the floor of the Majles, the mosques and venues outside Iran. While

the constitution bars prior restraint, the chilling effect of self-censorship has been obvious.

The regime controls all media of mass communication. Because of the significance of radio and television these monopolies have been placed under the direct command of the Leader. In practice, they have functioned as the mouthpiece of the Conservatives, depriving the Reformists of the opportunity to broadcast their views. The same can be said about the unique institution of mass Friday prayers, which serve as the weekly town meetings throughout the country, where current political issues are discussed. Only Conservatives are allowed as speakers. The Reformists have fared better with respect to the press. Nonetheless, many Reformist publications have been ordered to close, and many editors and reporters have been charged and imprisoned, for virtually any writing the Conservatives considered offensive. Protections guaranteed the press under the law are ignored as courts of doubtful jurisdiction, and improper procedures, are employed.

Right to Assembly

Freedom of assembly is restricted in Iran. Those not loyal to the regime have long been prevented from holding mass public meetings. These open door 'demonstrations', historically, have been a crucial political institution in Iran. The Conservatives have now effectively extended the ban on demonstrations to the Reformists, who have come to avoid their use lest they provoke unbearable physical attacks by the conservative forces—civilian and uniformed (*Radio Azadi*, 2 August 2002). The regime also prevents organization of its opponents in guilds, labor unions, student organizations, teachers' associations, physicians' associations, lawyers' bars and writers' unions. In general, only the Islamic version of these institutions are allowed. The Reformists' persistent talk about civil society has created much expectation but little result in removing this stunting obstacle.

The regime has destroyed and suppressed all political parties not deemed loyal. The Reformists' campaign for 'political development' through expanding political 'participation' (*musharekat*) has not aimed at ripping open this confining circle of 'insiders' (*khodi*). Opponents who continue their political activities in exile are treated as enemies. Indeed, the Reformist groups are now complaining bitterly about the threat to their own freedom by the conservative forces. They point

out that their members and followers are attacked, that all aspects of their lives are spied on by unauthorized agencies of the regime which are controlled by the Conservatives, that they are virtually prevented from having any publications, and that they live in the constant fear of assassination by agents of the Conservatives. The Reformists' fear has increased as the Conservatives who control the regime's instruments of coercion now imply that the Reformists have become enemies of the Revolution (*Radio Azadi*, 21 July 2002, 28 July 2002).

Conclusion

The public discourse on the rule of law in Iran has gained momentum. It is unlikely to end soon. It has introduced to the Iranian society some concepts which were not quite familiar, and it has encouraged it to examine its assumptions about power, rights, and government. Those in power have been challenged to show that their decisions are in accord with the constitution. Arbitrary exercise of authority has become more difficult. Some of the adventures by rogue elements have been exposed and condemned (Klein, 2002: 11–12; Sciolino, 2000: 233–48). Law and order has been largely maintained. The political battle among groups loyal to the regime has been essentially non-violent, with glaring exceptions such as the brutal use of force against student dissidents in July 1999. Revolutionary changes have been avoided.

The regime, however, has failed to protect basic human rights as they are universally defined. Its own definition of human rights denies individuals their fundamental right to choose and, instead, imposes on them the guardianship of a select group. Popular sovereignty is rejected in favor of religious beliefs. Due process is often disregarded, and the Judiciary is abused in the service of factional political ends.

A written constitution, which was prepared in haste and in times of revolutionary turmoil in the unconventional theological image of a charismatic leader, now deceased, is adhered to as a dogma. Among its glaring defects is its incapacity to adjust to changing realities. This, when change is presaged by the internal demographics of unemployed and restless youth, and the external requisites of relations with assertive foes.

Political participation is kept limited to those who pass strict loyalty tests. Among those excluded are some of the best Iran needs in order to join an increasingly integrated globe which is leaving it behind.

The paradox of the architect of Iran's rule of law is that Mohammad Khatami prides himself in having an open mind (Khatami, 1997a: 2). That is ironic; yet, it may be his redeeming promise of hope. Khatami's timid leadership of a loose coalition of political organizations, confined only to those activists acceptable to the regime, has yet to prove that it could reconstruct the Islamic Republic by establishing the rule of law through the implementation of a constitution that favors the resolute protectors of the status quo. This may be a futile effort to round the proverbial square. The Reformist platform has relied on a jurisprudence of the meek, who may be in the majority but very much act as the weak.

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Postscript
January 2006

Given a chance to revise an article about current events published more than two years ago, it is tempting to rewrite, and perhaps rectify, one's interpretation. This is resisted here with the rather audacious claim that history has mostly justified the underlying presumptions of that interpretation. Substantiating that claim is the goal of this postscript.

On December 6, 2004, President Mohammad Khatami came to vindicate himself before a constituency that was once his most ardent supporter: the student body at Tehran University. He sat on the stage behind a small desk, which was half covered with a bouquet of red roses. The Martyr Chamran Hall—named after an idealistic Berkeley graduate who lost his life soon after the 1979 Revolution—was not big enough. Khatami anxiously cautioned his security guards not to be rough on the overflow crowd. He then apologized to the students for the inconvenience. Civic gentility, inclusion, and tolerance were the principles which Khatami also demonstrated in his attentive listening to critical comments directed at him that day—many in anger and anguish. "I have never brought action against anyone (who attacked me)," he allowed, in contrast to "some other agencies" of the regime. He singled out the Judiciary. "*Efsha kon, efsha kon*! (Reveal, reveal!)," shouted the students. They wanted Khatami to lash out against the powerful who stalled their reform movement. Pressed, Khatami revealed the following fact which was emblematic of his tenure.

In 2003, the Guardian Council, having just blocked Khatami's two boldest initiatives aimed at limiting its role in elections, brazenly disqualified most Reformist candidates for the pending 7th Majles. Khatami seriously considered using the President's only remaining prerogative to postpone the elections. The Leader, Ayatollah ʿAli Khamaneh'i, opposed him. They met. They reached a compromise as the Leader accepted Khatami's specified "conditions" to ensure "fair and free" elections. The elections were then held, but the Guardian Council "reneged on its promise and even ignored the Leader's directive (*nazar*)." It did not observe Khatami's conditions.

The cheated elections of the Majlis produced an overwhelmingly majority of anti-Reformist deputies. Khatami's reign was irreparably enfeebled. A year too late, Khatami's revelation now was his vintage anemic protest. "Why did you remain silent? Why did you retreat?"

the students asked. Khatami responded: "If there was a retreat, …it was before a system I believe in." "My belief has been in reforms inside the system. I consider the Islamic Republic the great achievement of…our revolution.… I consider it imperative to protect this system." To Khatami reform was a way of strengthening the regime. His program was to implement the existing Islamic Constitution, not to change it.

Continuing in his dialogue with the students, Khatami now lashed out against those who had wanted more. "I have a claim against them!" He admonished them for not learning from the experience of the past. Three times since the constitutional revolution, he argued, the progressives had failed because they alienated their potential supporters among "the majority of people who are religious" by their obsession with "political demands" (Mansurian, 2004). Khatami was justifying his personal beliefs in his depiction of the practical reality of Iran's society.

This was the season of the 9th Presidential election. The Constitution barred Khatami from running for a third term. His valedictory session with the students, planned in part to encourage them to preserve, turned, instead, to a requiem for his principles (Quchani, 2004).

The Reformists' once vibrant discourse (*gofteman*) about the rule of law, and "political development," has now been reduced to tiresome analysis of their electoral failures (Modarresi, 2005). What passes for constitutional politics in Iran at the time of this writing is scholastic arguments about whether Khomeini really meant his Islamic government to be subject to popular will (Ansari, 2006). The new phase of this old debate began with the followers of Ayatollah Mohammad Taqi Mesbah Yazdi (Tavassoli, 2006). His renewed prominence is due to the fact that Mesbah is President Ahmadinezhad's *marjaʿ -e taqlid* (the religious source of emulation). The timing of the debate is important because the elections of the members of the Assembly of Experts - which is empowered to dismiss and appoint the Leader- are scheduled to take place soon. In those elections, Mesbah is expected to be a key player (Razavi, 2006).

Mesbah's position is that the *faqih* (Leader) does not have to heed the people's view. He may at times choose to defer to the public as an expedient, to facilitate their cooperation. Mesbah says that Khomeini also used the promise to establish a Republic in that expedient way, in the special circumstances prevailing just after the Revolution. The

Reformists disagree vehemently and maintain that Khomeini really believed in listening to the people: he wanted both Republic and Islam. The supporters of Khamaneh'i have taken a similar position (*Shargh Online*, 2006). Neither, however, denies the right of the Leader, "in special cases," to overrule the people (*Sharq*, 2006).

Several years ago, this subject was more thoroughly reviewed in a scholarly manner by Mohsen Kadivar. Kadivar is a progressive Reformist, but his conclusions about Khomeini's views are essentially the same as Mesbah's: Khomeini's vision of an Islamic regime is incompatible with popular sovereignty (Razavi, 2006; Kadivar, 2002). The key conflict is in the concept of *velayat-e faqih*. For Khomeini the "real legitimacy," is that of the "religious *velayat* (deputyship);" he employed "legal legitimacy (vote of the public)" only to "pacify the public and international opinion." Kadivar argued that Khomeini could maintain that he did not lie or deceive; it was the adoring and trusting public's fault if they did not notice Khomeini's delicate distinction (Kadivar, 2002).

Khomeini probably did not need the concept of *velayat-e faqih* to rule supreme himself; he was extraordinarily popular. His successors, however, are not so lucky. They are left with the contradiction inherent in the duality of his Islamic Republic. Sovereignty is not divisible and could not be shared. The contrary arguments of those who believe in the present Islamic Republic remain unconvincing.

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CHAPTER SIX

POST-COLONIAL COLLAGES: DISTRIBUTIONS OF POWER AND CONSTITUTIONAL MODELS

WITH SPECIAL REFERENCE TO SOUTH AFRICA*

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With independence, African states received newly crafted constitutions. In the first wave of decolonization these constitutions were drafted by the colonial powers and were closely modeled on one another. Despite the inclusion of bills of rights, in the case of the formerly British colonies, and other post-Second World War innovations, these documents mostly failed to prevent the re-emergence of a bureaucratic authoritarianism reminiscent of the colonial order—whether in the guise of state socialism, one-party states, or simple military dictatorships.

In the most recent period of state reconstruction, following the end of the Cold War, new constitutions were once again spreading across Africa; this time, however, there has been a greater emphasis upon democratic forms, including in the South African case, the creation of a democratically elected constitution-making body. While there could be no formal model in this moment of democratic constitution-making, in fact this coincided with the efforts of a major rule of law movement in which legal models have become a source of symbolic currency in the process of state reconstruction.

While I have previously shown how different constitutional models and ideas are deployed by competing internal constituencies to advance their particular goals (Klug, 2000), in this article I want to explore the adoption of particular features of post-Cold War constitutionalism—constitutional courts; devolved forms of state authority;

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and independent constitutional bodies—created with the purpose of fragmenting and taming state power. While based on the available 'hegemonic' models, these constitutional arrangements take on new forms in the postcolonial collage which has emerged from this latest round of state reconstruction.

Constitutional Models, Constitution-Making and State Reconstruction

The defining feature of the wave of political reconstruction and constitution-making that has characterized the end of the Cold War is its historical timing (Arjomand, 1992). Not only has the alternative of state socialism and many of its associated forms been at least temporarily discredited but also there has emerged a hegemonic notion of electoral democracy and economic freedom that is rooted in the history of 20th century struggles for democracy and individual freedom. From the suffragettes to the civil rights and feminist movements, from labour struggles to the struggle for self-determination and decolonization, and on to the struggles for democratization in Latin America, against apartheid in South Africa and state socialism in Eastern Europe, the sum and combination of social movements and struggles that have characterized the 20th century have shaped international political culture.

Apart from this prevailing political culture, it is also possible to define certain trends that may be particularly salient in the context of each episode or wave of state reconstruction. Particular institutions, such as constitutional courts, have for example, reappeared at different times as significant elements of the constitutional structure adopted in the reconstruction of states, yet been completely absent as a viable option at other times. Likewise, each new wave of state reconstruction seems to produce new variations in the division of power, between centre and periphery and between different organs of government, as well as new conceptions of the relationship between different branches of government. The latest wave has seen the mass adoption of bills of rights and constitutional courts as well as the creation of a range of new independent institutions designed to both protect democracy on the one hand and simultaneously circumscribe the powers of legislative majorities and democratically elected governments on the other.

If this latest period of political reconstruction has been dominated by an international political culture fashioned out of the political hegemony

gained by the collapse of state socialism, this does no more than set the outside parameters to the politics of constitution-making. Furthermore, this does not mean that the new hegemony does not contain within itself a degree of conflict and indeterminacy that allows for a range of alternative responses by those engaged in the constitutional politics of state reconstruction within different national contexts. In fact, even those states who consciously attempted to define themselves as part of the 'new world order' exhibit a range of responses. These reflect not only their own particular historical contexts, but also their historical experiences of the social and political struggles that have shaped the now dominant international political culture, that their different processes of reconstruction are addressing.

While reflecting many of the broad trends identified by Saïd Arjomand (1992), international political culture is characterized in this latest period by a contradictory set of alternatives. On the one hand, there is the emphasis on human rights as the core contribution of 20th-century constitutionalism, while on the other hand, there is a set of institutional arrangements and claims for institutional and economic autonomy that demonstrate the power of the Bretton Woods institutions and transnational capital in this latest wave of state reconstruction. Thus, although bills of rights and constitutional courts empowered to review the constitutionality of legislative enactments are a common feature of post-Cold War constitutions, these constitutions are also marked by broad guarantees for the creation and protection of market economies, independence of national banks controlling the value of a state's currency, independent oversight of state expenditures and an emphasis on the new state's recognition and incorporation of international or global norms rather than the nationalist assertion of local identity so common in the rhetoric of state formation.

Constitutionalizing Power: The Separation of Powers, Regionalism and Independent Institutions

In the case of South Africa, despite the particularities of its history and democratic transition, the basic features of the new constitutional order—including a bill of rights, constitutional court and a plethora of independent institutions—conform to the basic elements of the post-Cold War international political culture. However, the constitutional outcomes—the 1993 'interim' and 1996 'final' constitutions—of

South Africa's democratic transition also reproduced the post-Cold War international political culture in a particular hybridity. This outcome reflects the specific political struggles and historical legacies which shaped and gave legitimacy to each particular constitutional option. It is this interaction then, between the authority of particular alternatives (Scheppele and Soltan, 1987) and the conflicting demands of local politics, which determines whether particular constitutional options are excluded or adopted. This process of exclusion and adoption then frames the particular constitutional collage which will emerge as the basis of the reconstituted state.

Despite very different agendas and interpretations, the negotiating parties in South Africa came to accept the inclusion of a constitutional court and bill of rights at a very early stage in the transition. In fact, the ANC had issued a list of constitutional principles as early as 1988 which committed the organization to some form of judicial review and the adoption of a bill of rights, while the National Party regime had requested the South African Law Commission—a government-sponsored law reform body—to investigate group and individual rights as part of its own preparations for the reform of apartheid. Thus the central legal development in implementing the 'transitional' 1993 Interim Constitution was the establishment of a constitutional court to give effect to the supremacy of the constitution and the new human rights culture introduced by the commitment to constitutionalism.

Likewise, the inclusion in the 1993 Interim Constitution of a plethora of institutional checks and balances reflected the attempt to fragment state power so common in post-Cold War constitution-making. At one level, these were rooted locally in the difficulties of the political transition. First, in the need for an independent body to oversee the first democratic elections, and second, in the creation of a range of institutions designed to secure a level political playing field and accommodate the de facto exercise of dual power during the period leading up to the first elections. At another level, these institutions were inspired by the existence and practice of independent electoral commissions in a number of foreign jurisdictions.[1]

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[1] The idea of an independent electoral commission was, in fact, introduced at an ANC Constitutional Committee organized conference on electoral systems after the ANC was invited by the National Democratic Institute to send a delegate to join their election observer mission—headed by Bruce Babbitt—to Guatemala in October 1990.

While the dangers of governmental abuse of power was well recognized by the different parties, agreement to include mechanisms designed to disperse and control the exercise of power in the 1993 Interim Constitution was facilitated by the emphasis on accountable and transparent government reflected in the international debate on governance during this period (see World Bank, 1989; Commission on Global Governance, 1995). On the one hand, mechanisms were introduced to distance certain decisions from party political or purely government control and to ensure transparent and clean government, while on the other hand there were various institutions designed to further human rights and to prevent the abuse of government power. The first category included the Independent Electoral Commission, the Judicial Service Commission, the Public Service Commission and the Financial and Fiscal Commission, which serve to insulate the electoral system, judicial and public service appointments, as well as the distribution of financial allocations and resources between the regions, from purely party political dynamics. Provision was also made for the appointment of an ombudsperson called the Public Protector,[2] an Auditor-General[3] and a parliamentary standing committee with powers of parliamentary supervision over the National Defence Force.[4] The procurement of goods and services by government was also to be insulated from political interference by the creation of independent tender boards at every level of government.[5]

The second category of mechanisms established to check abuses of power and to promote human rights includes the Human Rights Commission,[6] with a mandate to develop an awareness of fundamental rights and to investigate any alleged violation of human rights, and the Commission on Gender Equality[7] which was constitutionally charged with the duty to promote gender equality. Apart from an advisory function with respect to proposed legislation and the power to educate and investigate, the Human Rights Commission was empowered to receive complaints and to assist, even financially, those adversely affected by

[2] Constitution of the Republic of South Africa 1993, section 110.
[3] Constitution of the Republic of South Africa 1993, section 191.
[4] Constitution of the Republic of South Africa 1993, section 228(3).
[5] Constitution of the Republic of South Africa 1993, section 187.
[6] The Human Rights Commission Act 54 of 1994 established an independent and impartial Human Rights Commission, as mandated in sections 115–118 of the 1993 Constitution.
[7] Constitution of the Republic of South Africa 1993, section 119.

a violation of their fundamental rights to seek redress before a competent court.

Significantly, it was the embrace of independent institutions within the new state structure that permitted the emergence of a new form of independent institution designed to address certain particularities of the South African situation. Given the fact that democratization would most likely preclude the old political elite from political power, institutions were developed to insure the participation of all formal political factions in particular decision-making processes. The Financial and Fiscal Commission, for example, is appointed by the president but is required to include representatives from each provincial executive council.[8] Although designed to render advice and to make recommendations to the relevant legislative authorities on the distribution of financial resources between the different levels of government, the constitutional requirement that the Commission be consulted prior to the allocation of revenue and that its recommendations be taken into account will give significant weight to the Commission's advice. The parliamentary standing committee to monitor the National Defence Force also provides for the participation of all political parties in the control of a vital state institution.

Another central feature of the post-Cold War process of political reconstruction has been the delinking of the control of currency values and fiscal policy from the government of the day through the creation of constitutionally independent central banks.[9] Both the 1993 Interim Constitution and the 1996 Constitution provide for an independent central bank[10] along with a number of other mechanisms designed to 'stabilize' the financial structure of the state by removing political discretion and requiring consultation in the distribution of revenue between different spheres of government[11]—national, provincial and local—as well as an independent commission to recommend levels of remuneration for public officials.[12]

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[8] Constitution of the Republic of South Africa 1993, section 200.

[9] Even the UK, which does not have a written constitution, saw the newly elected Labour Party government in 1997, in one of its first official acts, grant independence to the Bank of England.

[10] Constitution of the Republic of South Africa 1996, sections 223–225.

[11] See Constitution of the Republic of South Africa 1996, sections 214(1) and 220.

[12] Constitution of the Republic of South Africa 1996, section 219(2).

Despite this clear adherence to the dominant post-Cold War paradigm of fragmented power and the insulation of financial powers from the 'instability' of democratic politics, the attempt to constitutionalize a particular economic orientation as well as to constitutionalize the relationship between capital and labor—through the inclusion of a right to freely engage in economic activity and a labour relations clause in the 1993 Constitution's Bill of Rights—proscribed the limits of the post-Cold War paradigm in the context of South Africa's constitutional politics. First, the broadly crafted right to economic activity clause of the 1993 Constitution[13]—interpreted by its proponents as guaranteeing a free market economy—was replaced by a more limited clause guaranteeing the right of individuals to freely choose their trade, occupation or profession.[14] Second, because the labor movement's mobilization of working-class support for a non-racial order was central to the ANC's success, the labor movement was able to make an important claim for recognition beyond the formal management/worker relationship, asserting its right to represent workers as a class and arguing for the explicit recognition of socioeconomic or class interests in the new constitutional order.

Although the new constitutional dispensation on the one hand tracks the post-Cold War paradigm in limiting state power and leaving redistributive issues to the market, on the other hand the South African process of reconstruction also brought forth particular mechanisms designed to address the legacy of apartheid. Significantly, the attempt to follow the dominant post-Cold War paradigm by constitutionalizing economic priorities and existing property relations created political space for the inclusion of a counter-hegemonic trend which was further consolidated in the 'final' 1996 Constitution. Thus, the 'final' constitution includes various mechanisms designed to address the legacy of apartheid including: constitutional protections for state policies of affirmative action;[15] provisions for the restitution of land as well as specific protections for land reform;[16] and also the introduction of socioeconomic rights as justiciable rights within the Bill of Rights.[17]

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[13] Constitution of the Republic of South Africa 1993, section 126(1).
[14] Constitution of the Republic of South Africa 1996, section 22.
[15] Constitution of the Republic of South Africa 1996, section 9(2).
[16] Constitution of the Republic of South Africa 1996, sections 25(5) and (7).
[17] Constitution of the Republic of South Africa 1996, sections 26 and 27.

Another innovation is the idea of cooperative government which attempts to constitutionalize an interactive relationship between different levels of government. Declaring that the three spheres of government—national, provincial and local—are 'distinctive, interdependent and interrelated', the chapter on cooperative government proceeds to place duties on these respective institutions regulating their interaction. An important aspect of these duties is the requirement to 'exhaust all other remedies before' approaching a court to resolve a dispute between different levels of government. While this section secures the prerogatives of the different layers of government it also makes clear that they do not exist in isolation of one another and attempts to regulate the inevitable tensions which will arise. The result is an attempt to both flatten the inevitable hierarchy which exists between these levels of government and to provide a principled scheme for managing their relationship.

Cooperative Government and Regionalism in South Africa

Entering the negotiations the three major political parties held distinct if developing views on federalism, regional government and diversity. For the African National Congress (ANC) a future South Africa would have to be based on a common citizenship and identity which could only be achieved through a collective effort to overcome apartheid's legacy (ANC, 1994: 1–3). The National Party (NP), on the other hand, conceived of a future South Africa in which local communities would be able to voluntarily choose to pursue their own living arrangements without interference from the state (NP, 1991a; 1991b: 12). Finally, the Inkatha Freedom Party (IFP) advocated complete regional autonomy which it described as 'federalism', as a means to ensure the self-determination of particular communities (see IFP, 1993).

Although the protagonists of a federal solution for South Africa advocated a national government of limited powers, the transitional 1993 Constitution reversed the traditional federal division of legislative powers by allocating enumerated powers to the provinces. This allocation of regional powers—according to a set of criteria incorporated into the constitutional guidelines and in those sections of the constitution dealing with the legislative powers of the provinces—was, however, rejected by the IFP on the grounds that the constitution failed to guarantee the autonomy of the provinces. Despite the ANC's

protestations that the provincial powers guaranteed by the constitution could not be withdrawn, the IFP pointed to the fact that the allocated powers were only concurrent powers and that the national legislature could supersede local legislation through the establishment of a national legislative framework covering any subject matter. This tension led to an amendment to the 1993 Constitution before the constitution even came into force. According to the amendment the provinces were granted exclusive powers in enumerated areas of legislative authority.[18] Difficulty arose in distinguishing the exact limits of a region's exclusive powers and the extent to which the national legislature was able to pass general laws affecting rather broad areas of governance. Although the provinces had the power to assign executive control over these matters to the national government if they lacked administrative resources to implement particular laws, the constitution provided that the provinces had executive authority over all matters over which they had legislative authority, as well as matters assigned to the provinces in terms of the transitional clauses of the constitution or delegated to the provinces by national legislation. The net effect of these provisions was continued tension between non-ANC provincial governments and the national government over the extent of regional autonomy and the exact definition of their relative powers.

It is in this context that three particular cases were litigated before the constitutional court in 1996. All three cases involved, among other issues, claims of autonomy or accusations of national infringement of autonomy by the province of KwaZulu-Natal, where the IFP was declared the marginal winner of the regional vote in 1994. As such they also represent three moments in which the constitutional court was called upon to help shape the boundary between contending claims of constitutional authority to govern, unresolved by the negotiated settlement. While two of the cases directly implicated actions of the KwaZulu-Natal legislature and its attempts to assert authority within the province—in one case over traditional leaders and in the other the constitution-making powers of the province—the first case involved a

[18] Areas deemed of exclusive jurisdiction to provincial legislatures included: agriculture; gambling; cultural affairs; education at all levels except tertiary; environment; health; housing; language policy; local government; nature conservation; police; state media; public transport; regional planning and development; road traffic regulation; roads; tourism; trade and industrial promotion; traditional authorities; urban and rural development; and welfare services.

dispute over the National Education Policy Bill,[19] which was then before the National Assembly.

Objections to the National Education Policy Bill focused on the claim that the 'Bill imposed national education policy on the provinces' and thereby 'encroached upon the autonomy of the provinces and their executive authority'. The IFP argued that the 'Bill could have no application in KwaZulu-Natal because it [the province] was in a position to formulate and regulate its own policies'.[20] While all parties accepted that education was defined as a concurrent legislative function under the interim constitution, the contending parties imagined that different consequences should flow from the determination that a subject matter is concurrently assigned to both provincial and national government.

KwaZulu-Natal and the IFP in particular assumed a form of pre-emption doctrine—based on an inverted notion of the US federal pre-emption doctrine—in which the National Assembly and national government would be precluded from acting in an area of concurrent jurisdiction so long as the province was capable of formulating and regulating its own policies. In rejecting this argument, the constitutional court avoided the notion of pre-emption altogether and instead argued that the 'legislative competences of the provinces and Parliament to make laws in respect of schedule 6 [concurrent] matters do not depend upon section 126(3)', which the court argued only comes into operation if it is necessary to resolve a conflict between inconsistent national and provincial laws.[21] The court's rejection of any notion of pre-emption is an interpretation of the constitution which enables both national and provincial legislators to continue to promote and even legislate on their own imagined solutions to issues within their concurrent jurisdiction without foreclosing on their particular options until there is an irreconcilable conflict.

Having avoided siding categorically with either national or provincial authority, the court took a further step arguing that even if a 'conflict is resolved in favour of either the provincial or national law the other is not invalidated' it is merely 'subordinated and to the extent of the

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[19] Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995, 1996 (3) SA 165 (CC); hereinafter NEB Case.

[20] Para. 8, NEB Case.

[21] Para. 16, NEB Case.

conflict rendered inoperative'.[22] Supported by the comparative jurisprudence of Canada[23] and Australia,[24] the court was able to make a distinction between 'laws that are inconsistent with each other and laws that are inconsistent with the Constitution',[25] and thereby argue that 'even if the National Education Policy Bill deals with matters in respect of which provincial laws would have paramountcy, it could not for that reason alone be declared unconstitutional'.[26]

While the constitutional court's approach clearly aimed to reduce the tensions inherent in the continuing conflict between provincial and national governments, particularly in relation to the continuing violent tensions in KwaZulu-Natal, it also took the opportunity to explicitly preclude an alternative interpretation. Focusing on an argument before the court which relied upon the US Supreme Court's decision in *New York* v. *United States*,[27] the court made the point that 'Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states'.[28] Furthermore, the court warned that 'Decisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution.'[29] In effect the court's approach was to begin to draw a boundary around the outer limits of provincial autonomy while simultaneously allowing concurrent jurisdiction to provide a space in which different legislatures could continue to imagine and assert their own, at times contradictory, solutions to legislative problems within their jurisdiction.

The scope of such a definition of concurrent jurisdiction was immediately tested in a case challenging two bills before the KwaZulu-Natal provincial legislature which purported in part to preclude national action affecting the payment of salaries to traditional authorities in KwaZulu-Natal.[30] In this case, brought by ANC members of the KwaZulu-Natal legislature, the objectors argued that the bills were unconstitutional as

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[22] Para. 16, NEB Case.
[23] Para. 17, NEB Case.
[24] Para. 18, NEB Case.
[25] Para. 16, NEB Case.
[26] Para. 20, NEB Case.
[27] 505 US 144 (1992).
[28] Para. 23, NEB Case.
[29] Para. 23, NEB Case.
[30] Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and

they amounted to an attempt to 'frustrate the implementation of the [national] Remuneration of Traditional Leaders Act', by preventing the Ingonyama (Zulu King) and traditional leaders 'from accepting remuneration and allowances which might become payable to them in terms of the national legislation'.[31] Furthermore, the object of this provincial legislation 'was to create a relationship of subservience between them [traditional leaders] and the provincial government', an object outside the scope of the province's concurrent powers with respect to traditional authorities.[32]

The court's response was to first lament that the political conflict concerning KwaZulu-Natal had degenerated to a state in which the right to pay traditional authorities, as a means to secure influence over them, should have become an issue. Recalling that traditional leaders 'occupy positions in the community in which they can best serve the interests of their people if they are not dependent or perceived to be dependent on political parties or on the national or provincial governments', the court noted that its role is limited to deciding 'whether the proposed provincial legislation is inconsistent with the Constitution'.[33]

Faced with intractable political conflicts between the IFP and ANC in KwaZulu-Natal, the court reasserted its duty to interpret legislation narrowly so as to avoid constitutional conflicts and upheld the legislative competence of the KwaZulu-Natal legislature and the constitutionality of the two bills. In effect, the court allowed the KwaZulu-Natal legislature to continue to imagine its own authority in this area, merely postponing clear questions of conflict between the national and provincial legislation to a later date. The outer limits of the court's tolerance for alternative constitutional visions was, however, reached in the third case in which the court was asked to certify the Constitution of the Province of KwaZulu-Natal.[34]

The certification process, of both the national as well as provincial constitutions, is itself a unique aspect of the South African process of reconstruction. Given the nature of the negotiated transition, in which

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Other Privileges to the Ingonyama Bill of 1995, 1996 (4) SA 653 (CC); hereinafter Amakosi Case.

[31] Para. 16, Amakosi Case.

[32] Para. 16, Amakosi Case.

[33] Para. 18, Amakosi Case.

[34] Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996, 1996 (4) SA 1098 (CC); hereinafter KZN Constitution Case.

the ruling racial minority would not give up power without some guarantee of the outcome and the opposition's demand that South Africans be able to exercise national self-determination through a democratic process, the only way forward was a two-stage constitution-making process. The first involved the adoption of a negotiated constitution leading to South Africa's first democratic election. The second involved the newly elected legislative bodies forming a constitutional assembly for the purpose of adopting a democratically fashioned 'final' constitution. In order to get agreement on this process, the parties negotiated a deal in which a set of constitutional principles were included in the negotiated interim constitution and the newly created constitutional court was mandated to certify that the 'final' constitution conformed to these mutually agreed upon principles. While some courts, such as the Indian Supreme Court and the German Constitutional Court have articulated doctrines under which they are prepared to evaluate constitutional amendments against the basic structure and principles of the constitution, this was the first instance in which a court was required to certify that a democratically created constituent body, usually considered the embodiment of popular or national sovereignty, had not exceeded its mandate.

Declaring the new text of the final constitution 'unconstitutional', despite its adoption after last-minute political compromises by 86 percent of the democratically elected Constitutional Assembly, was on its face a bold assertion of the power of judicial review. Yet, the constitutional court's denial of certification was far more measured and subtly crafted than this bold assertion of 'unconstitutionality' implies. In fact, the constitutional court was careful to point out in its unanimous, unattributed, opinion, that 'in general and in respect of the overwhelming majority of its provisions', the Constitutional Assembly had met the predetermined requirements of the constitutional principles. In effect then, this was a very limited and circumscribed ruling. This analysis was confirmed when the major political parties rejected any attempt to use the denial of certification as a tool to reopen debates, instead the Constitutional Assembly focused solely on the issues raised by the constitutional court (Madlala, 1996: 4, col. 2). This was not to be the case when it came to the provincial constitutions proffered by the two provinces—Western Cape and KwaZulu-Natal—where opposition parties gained power and attempted to use the provincial constitution-making process as a means to further local autonomy.

Although the KwaZulu-Natal draft constitution had been unanimously adopted by the provincial legislature, the constitutional court held that there were 'fundamental respects in which the provincial Constitution is fatally flawed',[35] and therefore declined to certify it. The court considered these flaws under three headings. Two sets of problems were essentially procedural in nature and involved attempts by the KwaZulu-Natal legislature: (1) to avoid the court's determination of the text's inconsistency with the interim constitution;[36] or (2) to suspend the certification process itself until particular sections could be tested against the final constitution.[37] While the court rejected these devices as being in conflict with the certification process and attempting to circumvent the process respectively, the most significant problem with the text was the KwaZulu-Natal legislature's usurpation of national powers.

Referring to the court's decision in the National Education Policy Bill case, in which it made a 'distinction between the history, structure and language of the United States Constitution which brought together several sovereign states . . . and that of our interim Constitution',[38] the court held that parts of the proposed KwaZulu-Natal constitution appeared to have 'been passed by the KZN Legislature under a misapprehension that it enjoyed a relationship of co-supremacy with the national Legislature and even the Constitutional Assembly'.[39] Drawing a clear boundary around the permissible constitutional aspirations of the IFP in KwaZulu-Natal, the court rejected the draft text's attempt to both 'confer' legislative and executive authority upon the province[40] and to 'recognize' the authority of the government and 'competence' of the national parliament in other respects.[41] While recognizing the right of the IFP-dominated KwaZulu-Natal legislature to exercise its powers to draft a provincial constitution, even possibly including its own bill of rights, the court clearly rejected the attempt by the IFP to assert its vision of regional autonomy beyond the core meaning of the negotiated compromise represented by the 1993 Constitution. Furthermore, the court clearly silenced the extreme option of provincial sovereignty

[35] Para. 13, KZN Constitution Case.
[36] See para. 36–38, KZN Constitution Case.
[37] See para. 39–46, KZN Constitution Case.
[38] Para. 14, KZN Constitution Case.
[39] Para. 15, KZN Constitution Case.
[40] Para. 32, KZN Constitution Case.
[41] Para. 34, KZN Constitution Case.

stating that the assertions of recognition were 'inconsistent with the interim Constitution because KZN is not a sovereign state and it simply has no power or authority to grant constitutional "recognition" to what the national Government may or may not do'.[42]

Although the IFP had walked out of the negotiations in which the interim constitution was drafted and refused to participate in the Constitutional Assembly during the making of the 1996 Constitution, it nevertheless proceeded to produce its own provincial constitution and submitted it to the constitutional court in terms of the 1993 Constitution. Even as its vision of regional autonomy became increasingly isolated, the IFP still imagined that it could be achieved within the parameters of the 1993 Constitution. Its rejection by the constitutional court silenced this particular attempt, but did not foreclose on the IFP's vision of greater regional autonomy.

Instead of suffering defeat, the IFP was able to take solace from the court's refusal, on the same day, to certify the draft of the final national constitution, and in particular the court's decision that the draft of the final constitution had failed to grant provinces the degree of autonomy they were guaranteed in the constitutional principles.[43] However, when the 1996 Constitution was finally certified by the constitutional court[44] the IFP remained dissatisfied over the limited degree of provincial autonomy recognized in the constitution. However, by then the IFP, as the governing party in KwaZulu-Natal, was not about to exit the system. Instead, they joined the other opposition parties in saying that they would take the opportunity in the following year's legislative session to review the constitution,[45] thus keeping their claims alive.

Although traditional notions of federalism assume the coming together of formerly sovereign entities and their retention of certain specified powers, South Africa's 1996 'final' Constitution represents an increasingly common means of constitutionalizing the relationship between different spacial jurisdictions within the nation-state. South Africa's 'constitutional regionalism' is one in which the constituting act created a structure in which powers are allocated to different levels of

[42] Para. 34, KZN Constitution Case.

[43] See, Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC).

[44] See, Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (2) SA 97 (CC).

[45] *Mail and Guardian*, 11 November 1996.

government and includes a complex procedure for the resolution of conflicts over governance—between the respective legislative competencies, executive powers and relations with other branches and levels of government. Unlike its German, Indian and Canadian forebears however, South Africa's Constitution places less emphasis on geographic autonomy and more on the integration of geographic jurisdictions into separate functionally determined roles in the continuum of governance over specifically defined issues. While provision is made for some exclusive regional powers these are by and large of minor significance, all important and contested issues being included in the category of concurrent competence.

Conclusion: Constitutional Models and their Hybridization

The US Constitution was, for almost a century and a half, the essential prototype of a written, single-document constitution. But, it was only in the 20th century that the US Constitution began to emerge as a popular source of constitutional structures and institutions for constitution-makers. Even then, constitution-makers have been very reluctant to incorporate some of the most basic American structural and institutional forms. For example, although notions of federalism and bills of rights were readily taken up, the content was often quite different: very few constitution-making bodies have accepted the notion of a national government of limited powers, instead the subunits—regions and provinces—have been given limited powers; likewise, bills of rights have often been included but the mechanisms of enforcement have remained weak. In the case of judicial review, for example, many constitutions have explicitly adopted the idea of judicial or constitutional review, yet there has been a marked reluctance to accept the corresponding American idea of lifetime judicial appointments. Instead, constitution-makers have tended to favor limiting judicial appointments to a particular term of years, thus keeping the membership of the highest constitutional court more closely tied, through the appointment process, to the broad contours of changing political circumstances. With non-renewable terms of seven to 12 years, constitution-makers have tried to both insure judicial independence while making the court as a whole subject to democratic shifts that produce the changing political forces who control the appointment process.

In more specific ways, US constitutional formulations and their history have been used by constitution-makers as the anti-model. The

Indian Constituent Assembly, for example, sent its official constitutional advisor, Sir B. N. Rau, on visits to Ireland, Britain and the US, where he met with scholars, judges and politicians. As a result of discussions Rau had with Justice Felix Frankfurter, India's constitution-makers specifically rejected the phrase 'due process of law' (see Seervai, 1983: 692–3) for fear of replicating the American Lockner era jurisprudence which was understood to have blocked progressive legislative action and thus slowed social change, an outcome antithetical to the goals of social transformation the constitution-makers felt were to be encouraged by India's postcolonial constitution. Although the Indian Supreme Court would with time, and through the development of the concept of equality in the administrative law arena, produce its own jurisprudence protecting many of the claims considered under the due process clause of the US Constitution, in its first constitutional case, *A. K. Gopalan* v. *The State of Madras*,[46] the court relied in part on this particular history of the constitution-making process to reject an interpretation based on the US Constitution.[47] As the court recognized, the constitution-makers had with all deliberate intent avoided a simple adoption of the US Constitution's protection of due process (Seervai, 1983: 692–3).

In the South African case, constitution-makers who were aligned to the ANC—and who, after the elections, were the great majority in the Constitutional Assembly—were concerned that any property clause adopted should clearly distinguish between expropriation, which would require compensation, and diminution in the value of property as a consequence of mere governmental regulation, which would not be considered eligible for compensation. Although the jurisprudence of Commonwealth jurisdictions clearly distinguishes between a taking and loss of value due to regulation, the concern of the South African constitution-makers was roused by the protracted takings jurisprudence of the US Supreme Court. They were concerned to avoid the concept

[46] 13 Supreme Court Journal 174 (1950). Gopalan was reconsidered and rejected in R. C. Cooper v. Union, 3 Supreme Court Reports 530 (1970).

[47] 13 Supreme Court Journal 174 (1950) at 184–185. As Chief Justice Kania argued, 'Four marked points of distinction between the clause in the American Constitution and Article 21 of the Constitution of India may be noticed.… The first is that in the USA Constitution the word "liberty" is used *simpliciter* while in India it is restricted to personal liberty. (2) In the USA Constitution the same protection is given to property, while in India the fundamental right in respect of property is contained in Article 31. (3) The word "due" is omitted altogether and the expression "due process of law" is not used deliberately. (4) The word "established" is used and is limited to "Procedure" in our Article 21.'

of an inverse condemnation or regulatory taking which threatens to make government regulatory action subject to the ability of the public to pay for the material consequences to individual property owners (Chaskalson, 1995). While the South African Constitutional Court has yet to face this issue squarely, the property provisions of the 1996 Constitution only protect property against arbitrary deprivation and explicitly define the legal process of expropriation so as to exclude governmental regulation, and include a list of factors to be used in determining the amount of compensation due the former owner in the case of an expropriation.

Similar efforts may be seen in the creation of federal arrangements in Canada, India and Nigeria, where despite different political contexts and origins, the basic geographic distribution of power—emanating from the national government and limited in its distribution to the subunits—inverted the original federal form created in the US. Even in the Federal Republic of Germany, where US influence over the constitution-making process was quite direct, especially on the issue of federalism, the constitution-makers drew on local forms to evolve a completely different structure, one in which the regional units or *Lande* both participate directly in the creation of national legislation and implement federal policy and legislation within their own jurisdictions. While not necessarily serving as a simple anti-model in these cases, it is clear that even in the field of federalism, in which the US was the originating model, subsequent constitution-makers have sought their own particular forms.

It is in the jurisprudence of supreme courts and constitutional courts around the world that the true use of the anti-model may be witnessed. The highest courts of constitutional review in Canada, India, South Africa, Zimbabwe and even the Privy Council of the House of Lords in reviewing cases from the Commonwealth, all engage in extensive discussion of comparative constitutional jurisprudence and the case law of the US Supreme Court in particular—quite unlike the rather parochial focus of courts in the US. However, despite extensive citation of US cases, and reliance on some of the arguments employed by US Supreme Court justices, by and large the US jurisprudence has been increasingly used as counter-example, as a source of distinction, or merely distinguished as inapposite. In the case of the South African Constitutional Court, for example, despite early predictions and fears that the court might follow US jurisprudence uncritically, differences in 'constitutional language and structure, as well as history and culture' has led the court to be fairly circumspect (Blake, 1999: 197).

The outcome of this latest wave of state reconstruction and constitution-making in particular is the creation of a new collage of constitutional mechanisms and principles. While in many cases these have tracked the particular models of governance which have gained dominant symbolic power in the post-Cold War era, in others the engagement of external models and local prerogatives has produced hybrid solutions tailored to address the imperatives of each particular state's history and process of reconstruction. In South Africa and many other formerly colonial contexts, this latest wave of state reconstruction is producing a new postcolonial collage of governmental institutions and processes that hopefully will begin to address the needs of democratic governance which has proved so difficult to maintain in the postcolonial era.

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CHAPTER SEVEN

CONSTITUTIONAL ENGINEERING AND IMPACT: THE CASE OF FIJI

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> The lessons of May 2000 have been traumatic as well as salutary, but it is an open question whether we are any the wiser or that anything has been learnt.
>
> Ratu Joni Madraiwiwi, Vice-President of the Fiji Islands[2]

I Introduction

The politics of Fiji have been closely tied to its constitutions. The origins of the social, political and economic organisation of Fiji lie in the policies of Britain, the colonial power, in the late 19th century when it acquired control over the country. The centre piece of the policies was the preservation of the traditional institutions of indigenous Fijians, particularly the chieftaincy, land and customary practices. Economic development was based on foreign, principally Australian, capital, largely invested in the sugar industry, and indentured labour recruited from India. The various communities of colonial Fiji, Fijians, 'Europeans', Indians, Chinese and 'part-European', were segregated by race, which determined their entitlements, political rights and economic situation, and there was no sense of a common political community. It could not

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[2] Australia-Fiji Business Forum at the Gold Coast in Queensland, Australia, *Fiji Times*, p. 7, 2/11/2004. Madraiwiwi is a High Chief who has always taken a very liberal approach to inter-ethnic relations; he was briefly a High Court judge but resigned.

even be said in Furnival's terms that the various races met only in the market place, for the market itself was highly regulated and ascribed different roles in and differential access to the market, with indigenous Fijians embedded more in custom than market transactions. Until independence in 1970, many of these policies were based on administrative practices, but there were some laws which protected indigenous institutions, land and customary practices. The independence constitution was the first attempt to provide a constitutional basis for Fiji's social, political and economic organisation. The constitution was basically a codification of the system of segregation, and thus a great portion of it was devoted to the status of the racial communities and their differing relationship to the state. A considerable portion of it was also devoted to the constitutionalisation of the social, political and economic systems of indigenous Fijians. The constitution effectively ensured their political dominance and control of the apparatus of the state.

The constitution came under stress as the fundamental assumptions of the protective policies about indigenous Fijians seemed to come apart. The contradictions of the constitution—torn between the market and the insulation from it of key economic resources and social customs, and between universal franchise and racial hegemony—had surfaced in the early 1980s, when the Indian based political party won a majority in the House of Representatives. However, it was in 1987, when a coalition of the Indian party and a non-racial political party won the elections and formed government, that Fijians realised that the 1970 constitution could not be counted on to guarantee their political control. The response was a military coup by Sitiveni Rabuka, third ranking officer in the overwhelmingly ethnic based military force.

The military dominated administration replaced the independence constitution in 1990. It provided more explicitly for the political segregation of races by removing provisions aimed at a measure of political integration through common roll seats. It sought to ensure Fijian hegemony by allocating a majority of seats in the legislature to Fijians, restricting the offices of the president and the prime minister to Fijians, and strengthening Fijian institutions. To meet the criticism of this patently racist constitution, the military included a provision whereby the constitution would be reviewed within seven years. After initial hesitation, other communities did contest elections and this led to some form of dialogue between their leaders and the makers of the coup. The sharp decline in the economy, the plunder of state resources by the administration and its cronies, the repression of human rights,

and external pressures triggered off the review of the 1990 Constitution, widely blamed for the crisis, which led eventually to the 1997 Constitution.

This chapter examines the making and orientation of the 1997 Constitution. If the 1970 Constitution codified the existing configuration of power to maintain the status quo, and the 1990 Constitution gave stronger foundation for that configuration, the 1997 Constitution attempted to change power relationships and eventually the basis of politics, moving towards greater political integration and aiming to develop a common political community out of diverse races. The principal focus of the chapter is the social engineering aspect of the constitution, through a number of new devices, particularly the forms of representation and the structure of government.

II Background

Fiji became a British colony in 1874 when its principal chiefs signed a Deed of Cession of their islands to the British Crown in the hope of securing, in their own words, 'civilisation and Christianity'. For several years before the handover to the British, European and Australians had begun to settle in Fiji and some trade in sandalwood and sea cucumber had commenced. Land was being appropriated by the settlers and some Fijian chiefs had run up debts that they were not easily able to repay. Problems of law and order seemed to loom ahead. It was considered that Britain, which was viewing Fiji with interest, might be able to restore order and financial stability. Thus the fortunes of Fijians were taken out of their hands. Unlike other British colonies with outside settlement, the colonial authorities adopted relatively benign policies towards the indigenous people. Britain wanted to protect them from the kind of exploitation that other indigenous peoples had faced by maintaining their traditional political, social and economic structures. At the same time, Britain was anxious to develop the resources of the colony so that it could become self-sufficient and meet the costs of administration. For this purpose it invited external investment, principally by a sugar company from Australia, and secured cheap indentured labour from India (then also under British control), sowing the seeds of a market, albeit administered, economy.

The policies of protection of indigenous Fijians through the preservation of their traditional system, and economic development by importing

capital, management and labour cast Fiji into a deep contradiction. The traditional system was incompatible with a market economy and yet could not be entirely isolated from it. To develop sugar plantations, land was required. But land was owned collectively by indigenous clans and held under rules which did not allow easy alienation.[3] Alienation would in any case have deeply disrupted traditional political and social orders, since land, as in feudalism, was central to them.

To this conflict between tradition and modernity was added the conflicts of interest between the three major racial communities. Land was provided on terms that were congenial neither for sound economic development nor for relations between the racial communities. The segregation of these communities and the isolation of the indigenous people from the market meant that the relations among them were largely determined by administrative policies—and pointed to the importance of the political. Colonial history is interpreted largely in terms of administrative regulation of racial claims and relations.[4] On independence, Fiji acquired a constitution which largely adopted the colonial framework.

The roots of the crisis which led to the overthrow of an elected government in 1987 and the repudiation of the constitution lie squarely within that colonial system. Major societal changes, through education, the economy, physical and social mobility, urbanisation, and integration into world economy, undermined many of the assumptions of the 1970 constitution. None of the racial communities remained (if they ever were) monolithic or unified by common interests. None could be isolated from the mainstream of the economy or administration. Common interests developed which cut across racial divides. Economic incentives and efficiency could not be maintained in the face of interaction of ancient rules and market economy. The traditional system came under great stress. Yet the maintenance of that system was critical to the logic of the political settlement of the 1970 Constitution. The steady under-

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[3] For our present purposes, it is sufficient to note that the British view (that land was held communally with superior rights of chiefs) prevailed, with far reaching consequences both internally within the indigenous communities and their relations with others. See Peter French, 'The Founding of an Orthodoxy: Sir Arthur Gordon and the Doctrine of the Fijian Way of Life' 77(1) *Journal of the Polynesian Society* 6–32, and by the same author, *The Charter of the Land: Custom and Colonisation in Fiji* (1969).

[4] See Brij Lal, *Broken Waves: A history of the Fiji Islands in the Twentieth Century* (Honolulu: Center for Pacific Studies, University of Hawaii, 1992), an outstanding study of Fiji's history.

mining of the assumptions underlying that settlement greatly reduced its ability to handle Fiji's intricate problems and racial relations. Nor did its overthrow with the backing of the army produce more workable instruments of governance. It became increasingly evident that a new dispensation, broadly fair and acceptable to all the communities, was necessary to restore stability, revive the economy, and produce a modicum of national consensus.

This was at heart of the crisis that the new constitution had to resolve. But the problem was not analysed in precisely these terms by the key players. They still saw the problem in terms of adjusting, not transcending, racial claims and entitlements. The constitutional process became the means to wage racial strife by another name. Fortunately there were various aspects of the process, different from earlier attempts, which limited conflict and moved the debate to a different terrain.

It is possible to give only the barest outline of the 1970 Constitution. By then Indians outnumbered indigenous Fijians (240,960 to 202,176) and there were small numbers of other settler communities: 6,590 'Europeans', 9,687 'part Europeans' and 17,314 'others', who included Chinese and other Pacific Islanders, including Rotumans, whose island was administered as part of Fiji. The 1970 constitution provided for separate representation of the principal communities but, to meet the Indian insistence on non-racial electoral system, included a minority of seats which were racially allocated but voted for by electors of all races, as a first step towards a fully non-racial system.[5] This 'consociational' element was not reflected in the composition of the executive, designed on the Westminster parliamentary system of majoritarianism and the 'winner takes all'. The allocation of seats in the House of Representatives was such that with a little support from their traditional allies—'Europeans', 'part Europeans' and Pacific Islanders—indigenous Fijians would dominate the executive. So it turned out, until the 1987 elections, when the 1970 ethnic equation was upset by the force of social and economic changes.

The 1970 Constitution contained a number of provisions to protect the interests of indigenous Fijians. Their land holdings (comprising about 83% of all land in the country) had entrenched protection against alienation to non-Fijians, traditional social and political structures,

[5] Thus there were 27 ethnically reserved seats and 25 common roll seats.

(operating at clan, provincial and national level—culminating in the Great Council of Chiefs)[6] were retained and woven into the apparatus of the state, and a Senate with a predominance of indigenous Fijians had veto powers over certain legislation. A bill of rights protected all citizens, but individual rights were qualified by collective rights for indigenous Fijians, and were characterised by numerous restrictions and rules for their suspension. It failed to establish a culture of rights.

The 1970 settlement was a mix of the democratic and the oligarchic, liberalism and ethnic separatism, equality and paramountcy of indigenous Fijians, market with restrictions on land and labour, a unitary state with significant autonomy for one community only, and freedom of religion with the close relationship of one religion to the state. The system depended on maintaining the separation of races, or more accurately, keeping Indo-Fijians outside the alliance of others.

Thus the conflict which was the substratum of the new exercise in constitution making was about many things—the design and symbols of the state, different understandings of citizenship, conflict between individual and group rights, forms of representation, land, differences of status and aspirations between commoners and chiefs, the role of the church, the clash between traditional culture and modernity.[7] All these were part of a meta-conflict: the competing claims of the indigenous Fijians and Indo-Fijians, which subordinated or subsumed other conflicts. The conflict has been articulated and elaborated most commonly in the discourse of or negotiations over constitutional arrangements. Indigenous Fijians believe that as the original inhabitants, they should have priority over other communities, particularly the Indo-Fijians. Not only should they have all the resources in the country, but they should also be the rulers of Fiji, a kind of senior partner to other communities in the running of the state. This claim inevitably leads to group entitlements and allocations and results in situations in which different citizens, identified now predominantly by race, have different rights. Because indigenous social structures are tightly integrated, the political dominance of Fijians leads to the intrusion and influence of their

[6] Really a colonial invention, but still in existence; now often known by its Fijian name—*Bose Levu Vakaturaga* (BLV).

[7] For an account of these inter-linkages, particularly between traditional Fijian social structures, the church and the army, see Winston Halapua, *Tradition, Lotu, and Militarism in Fiji* (Lautoka: Fiji Institute of Applied Studies, 2003).

communal institutions on the state.[8] Indo-Fijians had a different vision of Fiji, that of an independent republic based on equal citizenship, a politically integrated society (exemplified through non-racial electorates) but respecting cultural diversity.

The result was an unsettled public space; a sense of alienation on the part of non-Fijians, a feeling of insecurity on the part of Fijians, aggravated rather than moderated by growing inter-racial contacts (in the work place, professions, education) that could not be accommodated through institutions which were still largely racial.

III Process of Constitution Making 1995–7

Before 1995 constitution making in Fiji had not been participatory—perhaps because of an instinct that compromises are essential in a multi-ethnic society but can only be made by party leaders in secret and confidential negotiations. Even parliamentary party members were not privy to negotiations for the independence constitution. For the 1990 constitution a multi-party committee appointed to make recommendations was criticised for the pre-dominance of pro-government members, and its failure to produce a unanimous report. It did invite and receive public submissions, but these represented standard party positions. The parliamentary Joint Select Committee approached its task in the traditional spirit in 1997 (see below), but in other respects the 1995–7 process was different from that in earlier periods. The task of public consultations and making recommendations was given to a small, independent commission. It made strenuous efforts to consult the people and educate itself in constitutional options for a complex and conflict prone society. But the last word was not with it—with some significance for the final product.

In June 1993 a cabinet sub-committee, to which were invited leaders of the two major opposition parties, National Federation Party and the Fiji Labour Party, was established to examine the question of review. It was assumed, rather than debated or agreed, that actual reforms would be adopted by Parliament in accordance with the amendment procedure of the 1990 constitution, requiring two-thirds support in each

[8] In the British period, the association of indigenous institutions with the state was for precisely the opposite reason—their subordination to and manipulation by the state.

House, and the votes of a substantial majority of Fijians in the Senate. The terms of reference and membership of the commission generated considerable controversy and two years expired between the first initiatives of the government and the establishment of the commission.

The Government wanted the starting point to be the 1990 Constitution, and Fijian interests to have pride of place. The Opposition wanted a new start, with the terms of reference reflecting the necessity of national unity and fairness to all communities. The result was a compromise which emphasised the opposition's goal but also referred to the special concerns of indigenous Fijians, albeit within a framework for the protection of rights of all communities and adherence to international standards of individual and group rights. This set the scene for a wide-scale review.

There was controversy over the membership and chairperson of the commission, but eventually agreement was reached on a commission comprising one Fijian and one Indo-Fijian under the chairmanship of Sir Paul Reeves, a former Governor General of New Zealand, an Anglican archbishop and a Maori (all factors which should have made him attractive to Fijians). The government appointed a politician and former minister, Tomasi Vakatora, known for his anti-Indo-Fijian attitudes (his appointment being interpreted by the Indo-Fijian parties as a bad omen and indication of the intransigence of the government). The Indo-Fijians nominated a distinguished historian and intellectual, Brij Lal. It was required to produce its report by 30 June 1996. This deadline was later extended to 30 September 1996 at the request of the commission.

The small size of the commission made it impossible to have the direct representation of a wide range of interests, and it was not possible to do much about 'facilitating the widest possible debate throughout Fiji on the terms of the Constitution of Fiji' as required by its terms of reference. This could have been done by securing the co-operation of civil society organisations, but these were few, and there is little evidence that the commission considered this option. A multi-racial NGO, Citizens' Constitutional Forum (CCF), was established by some academics and political activists to promote public participation in the process, and developed good relations with the commission. It held a number of consultations which brought together influential individuals and organisations, and with the assistance of local and overseas experts, tried to develop some consensus. The CCF became a source of approaches and ideas (and a co-ordinator of views and recommenda-

tions of others) as fruitful as the commission itself. It presented detailed proposals to the commission.

The Commission's own account of its work shows that the high priority in terms of timing was given to public hearings.[9] The Commission spent most of July, August and September holding public (or occasionally private) hearings around the country. The public, however, were not helped to think through constitutional issues. Neither the commission nor other organisations facilitated any discussion of the 1990 Constitution although the commission's task was to review that constitution. The hearings produced a large number of submissions; they were, as the commission had wanted, 'fair, open, transparent, inclusive and thorough'.[10] But they were for the most part recitations of party positions, even when they were presented by religious or social organisations. From members of both major communities, the submissions were uniformly similar, and tediously presented[11] Even as party leaders were trying to find common ground, their supporters were reiterating old, antagonistic positions—and the submission of the prime minister's party, the SVT,[12] was full of Fijian paramountcy and advocacy of the retention of the principles of the 1990 Constitution.[13] Its tone was so negative and vitriolic that Rabuka had to distance himself from it.[14] By contrast the joint submission of the NFP and FLP was much more conciliatory and reached out to cooperation with other communities.[15] However, there were several submissions from non-political groups that transcended narrow ethnic perspectives and addressed fundamental social problems, and which also tried to develop some consensus in society. This kind of participation was unusual in comparison with

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[9] Constitution Review Commission, *The Fiji Islands: Towards a United Future*, Parl. Paper No. 34 (1996). Chap. 4 'How the Commission went about its task'.

[10] Brij Lal, *Another way: the politics of constitutional reform in post-coup Fiji* (Canberra: Asia Pacific Press, 1998), p. 165.

[11] Ibid., p. 168.

[12] Full name; 'party of chiefs'.

[13] SVT, *Respect and understanding: Fijian sovereignty, the recipe for peace, stability and progress* (an excerpted copy is printed in Lal, ibid., pp. 143–154).

[14] He told Parliament that no international instrument countenanced the domination by one group over others, particularly not the draft Convention on the rights of indigenous people that the party had relied on. Such claims 'would be a breach of the natural birthright of every individual in any country, to equality before God and the laws of his or her country, as well as the Charter of the United Nations' (*Daily Hansard*, 30 June 1997).

[15] National Federation Party and the Fiji Labour Party, *Towards racial harmony and national identity* (there are excerpts in Lal, *Another Way*).

previous review processes which were dominated by political parties. However, after these hearings and submissions, there was relatively little role for the public.

The report presented to President Mara, and published at the beginning of September 1996, was unanimous. This happy result was due to the good relations that developed between Vakatora and Lal under the encouragement of the chair. The experience of travelling around the country listening to the views of the ordinary citizen seems to have brought them together. They realized the reality of life for the ordinary person, the fact that ethnic rivalries did not dominate the lives of people, and that there was a genuine willingness to work together for the common benefit, despite elements of grandstanding on the part of some who gave evidence. The Commission's report and recommendations provide an excellent insight into its thinking and vision of the future. Few constitutional reports of this kind anywhere have gone into such clear exposition of the lessons of the past or elaboration of the vision for the future. It subjected the provisions of the 1970 and 1990 Constitutions to a critical scrutiny. In a closely argued report, the commission set out the values, structures and procedures for a multi-ethnic Fiji.

However, the impact of the report was undermined by the failure to publish it in Fijian or Hindi, and by its length (753 pages). The report itself, and the stages which led to its ultimate enactment as a constitution, disappeared into smoke filled rooms, to emerge only as a constitutional amendment Bill. The parliamentary phase lasted from the completion of the report until the enactment of the amendment Bill, and comprised two elements: the work of the all party Joint Parliamentary Select Committee ('JPSC'), and that of the full parliament. The Select Committee met in closed sessions, without advisers, and its members were urged to keep the discussions confidential (and no record of discussions seem to have been prepared).[16] The main work of the Committee took about 6 months, and it produced an agreement dated April 14, 1997 on the most important issues, including the electoral

[16] Both prime minister Rabuka and the Opposition leader Jairam Reddy said on the occasion of the tabling of the Commission report in Parliament (10 October 1996) that open debate in the chamber would not be fruitful at that stage, implying grandstanding. They preferred confidential negotiations in a select committee. Annex III (2–3) (Annex 14(7) of the report of the Select Committee Parliamentary Paper No. 17 of 1997.

system.[17] The Committee continued its work, and was still sitting as the House of Representatives debated the final Bill.

Negotiations in the committee involved a good deal of compromise. The Fijian members did not really want any change to the 1990 Constitution; the Indian wanted radical change. Each in the end accepted things that were basically unpalatable to them. If the JPSC was unable to work out an agreement of a particular issue, they would turn it over to the party leaders (a practice reminiscent of the South African process where Mandela and de Klerk were used to break deadlocks).

The Bill was introduced by the Prime Minister on June 23. In the debate in the House there was a great deal of rhetoric about tolerance (the greatest acrimony being reserved for exchanges between the FLP and the NFP!). Many Fijian members spoke against aspects of the Bill, most notably arguing for Fiji to be a Christian state, or generally regretting the loss of the Fijian dominance in the 1990 Constitution. Every member of parliament (save for 2 absentees) voted for the Constitution. Apparently Rabuka had told his Ministers that if they did not support it they would lose their portfolios, and other MPs that Parliament would be dissolved.

Both the government and the CCF published brochures on the substance of the new constitution and the latter held some meetings. But as previously, much of this activity was directed towards urban areas, and the outreach to the Fijian community and villages was limited. CCF also organised itself to exert pressure on the government to implement the constitution, and invited local and overseas experts to advise on the drafting of relevant legislation, for example on the freedom of information and affirmative action. The Select Committee had responsibility for the implementation of the constitution, working with an experienced draftsperson recruited primarily for preparing legislation for this purpose. It also took the initiative to organise meetings for MPs in conjunction with the Inter-Parliamentary Union on increasing the effectiveness of parliamentary procedures and the organisation of multi-party coalition government. One of these meetings led to agreement on a set of principles and rules to govern the formation and operation

[17] This document is reproduced in Ganesh Chand and Vijay Naidu, eds. *Fiji: Coups, crises and reconciliation 1987–1997* (Suva: Fiji Inst. of Applied Studies, 1997) p. 176.

of coalition government (known as Korolevu Declaration),[18] members having realised that insufficient attention had been paid to this matter during the drafting of the constitution.

IV Commission's recommendations

The main concern of the commission was to facilitate the formation of multi-ethnic governments, which it considered would achieve the objectives of the review, namely racial harmony, national unity, and the economic and social advancement of all communities. The key to this goal was the electoral system, but the establishment of multi-ethnic government would involve removal or adjustment of the four principal problems that the commission had identified: communal representation, the ethnic base of political parties, majority government and the paramountcy principle.

The commission dealt with the principle of Fijian paramountcy by highlighting its role in the protection of the rights and interests of indigenous Fijians, rather than authority for them to dominate other communities. Consequently it recommended the retention of the constitutional entrenchment of laws protecting Fijian social and economic interests. It also recommended giving the Bose Levu Vakaturaga a constitutional status. It proposed that the President (largely ceremonial) would be an indigenous Fijian, and the Bose Levu Vakaturaga would make nominations from which Parliament (in a joint meeting of the two chambers) would elect to that office. It recommended transferring the veto over protective legislation from the Senate to Bose Levu Vakaturaga. Presumably the commission made these recommendations (which in some respects seem to go against their basic non-racial approach) to persuade indigenous Fijians that political dominance was not necessary for the protection of these rights and interests.

The commission was interested in a root and branch reform of the political system in which the salience of ethnicity would rapidly give way to economic, social and national interests. Its vision was that of a non-racial country in which individuals would cooperate across racial divides and a Fiji nationalism would supplant or transcend ethnic consciousness. This goal would eventually be reflected in the growth of

[18] Parliamentary Paper No. 15 of 1999.

non-racial parties, and in the interim period by voluntary cooperation between ethnically based parties, each appealing to a broader constituency than its own ethnic community.

The commission believed (partly based on consultations with Donald Horowitz) that all these developments could be secured through electoral engineering, and regarded the voting system as 'probably the most powerful instrument for shaping the whole political system, because it encourages politicians to behave in ways that maximise their chances of electoral support', winning elections being their main motivation (para 10.20). It rejected proposals by political and other groups either for a requirement that the prime minister should appoint a specified number of ministers from the different communities or that the constitution should entitle every political party which had secured at least 20% of parliamentary seats to a proportionate share in the cabinet (p. 18). Neither of these suggestions would in its view have fundamentally altered the nature of politics, parties or modes of representation, or reduce the salience of the ethnic factor (para 9.87). Nor was there any guarantee that a multi-ethnic government in these conditions would provide a sufficient degree of goodwill and trust for fair and effective government.

It considered that the overriding goals of multi-ethnic government, racial harmony and national unity could not be achieved until the electoral system moved away from communal seats ('reserved seats') to non-racial seats ('open seats'). It realised that the move could not be made in one fell swoop, but believed that if there were a significant majority of open seats, its objectives could be achieved. Otherwise the demands of community would dominate, and 'parties would have little inducement to become multi-ethnic in their membership and policies' (para 9.155). It proposed a House of Representatives of 70 members divided into 45 open seats (in which there were no ethnically based restrictions on candidates or voters) and 25 reserved seats (12 for indigenous Fijians and Pacific Islanders, 10 for Indo-Fijians, 1 for Rotumans and 2 for General Voters).

The commission proposed to 'de-ethnicise' the Senate. Senate membership would be based on territory—more specifically, the 'distinctive identity' of provinces (apart from a limited representation of small communities who might not make it to the House of Representatives). Each province would elect two members, without restrictions on candidates or voters. The commission said that it was evident that 'members of all communities share a sense of belonging to the provinces with which

they have their closest links' (para 9.177). The sense of a common identity arises from link to the *vanua* (land owning clan) (important for indigenous Fijians) or residence or cultivation of land (for other communities). But it also arises from 'shared or complementary interests'. This would enhance identities within provinces and integrate provinces with the nation, especially as political parties would play a key role in elections (para 9.179).

In the commission's view, the system for the voting in open seats had to facilitate racial integration. For this task it opted for the Alternative Vote (AV) system for both the House of Representatives and the Senate (chap. 10). It rejected the first past the post plurality system (used previously) as being undemocratic and producing a disproportionality, nationally, between votes and seats. It rejected the proportional system as it could encourage voting by ethnicity (which while producing fair representation, hinders inter-ethnic integration). For it the main attraction of the AV system (for the open seats) was that it provides incentives for moderation and cooperation across ethnic lines. Based on a preferential system, it allows for 'vote pooling' as political parties can agree on the trading of preferences by advising its supporters to cast their second votes for another party. The rule that the winning candidate has to secure at least 50% plus one votes means in many cases that few candidates or parties would be able to muster a sufficiency of votes only from their own community. Votes from even a minority community in the constituency could tilt the balance in their favour. In due course this type of cooperation would lead to multi-ethnic or non-ethnic parties, and facilitate national unity and a broader national agenda.

The commission realised that only if there are two or more parties representing each community can competitive alliances be built across ethnic lines (otherwise cooperation would take the form of a grand or national coalition, which is not what the commission favoured). Heterogeneous constituencies would also be necessary 'because the incentive for cooperation across the ethnic divide is the likelihood that the candidate or candidates of a community-based party will be unable to succeed if supported only by the votes of that community' (para 10.44). To facilitate heterogeneity, it recommended three member constituencies for open seats, thus covering a wider area than under single member constituencies, and some form of gerrymandering.

The commission made several other recommendations to ease ethnic tensions, provide a strong protection of human rights, ensure social justice (especially through affirmative action for the genuinely

disadvantaged and rules about national institutions like the civil service and judiciary reflecting the national make-up), and to reinforce what they hoped would be a less confrontational style in parliament by providing for a committee system to carry out much of the work of scrutiny of government. Further, there were proposals to protect several long cherished interests of indigenous Fijians, built largely on the concept of collective and indigenous rights. The commission was anxious that all its proposals should be seen as part of a coherent scheme; each proposal depended for its effectiveness on other proposals. For example, the reconceptualisation of the Senate would complement and reinforce changes in composition of and voting for the House of Representatives. The rules proposed for the election of the president would have brought the issue before the more inclusive chamber and afforded it greater legitimacy (notwithstanding that only an indigenous Fijian qualified for office).

V Modifications by the Joint Parliamentary Select Committee

The internal inconsistencies of the constitutional scheme were heightened by the proposals of the Joint Parliamentary Select Committee on the Report of the Fiji Constitution Review Commission ('Select Committee') which met from 9 October 1996 until 13 March 1997. The CRC report itself was read by very few people—and they for the most part did not include the politicians who had to deal with it. It is possible that the politicians had not fully absorbed the closely reasoned justifications of the commission; it was clear that the Select Committee had rejected the most critical recommendations of the commission, designed to refashion the style of politics.[19]

[19] Mr. Jai Ram Reddy told the Select Committee at its first meeting that it could adopt one of two approaches to the commission report.

> We could deal with the report as a composite document. That is the approach that the Commission itself has recommended. The Commission has been at pains to point out that the report is a mosaic whole, namely that each part is inextricably linked to and with other parts of the document, and therefore it must be considered as a whole.
>
> The second approach will be for the Committee to go through the document chapter by chapter, or indeed item by item so that we can identify those matters that we can agree upon and those that are not agreed upon, and in this way we can isolate those controversial matters which will require more prolonged discussions or negotiations (Annex IV(6)).

Many politicians were not happy with the emphasis on national identity at the expense of communal affiliations and institutions. A majority of them had become comfortable with racially oriented electorates and politics, however much they criticized communal electoral system. Many also felt that changes in the system of government were ahead of public opinion. Others, who had not favoured the commission's interest in comparative constitutions and experiences, emphasized the uniqueness of Fiji's circumstances. When tabling the commission report in Parliament, President Mara cautioned that in the talk about multi-racial harmony it was important to 'recognise the existence of our different races, cultures and customs. Only so can we fully respond to the challenge of achieving this harmony we all desire, and which will be the richer for being structured in an honest, realistic and disciplined way'.[20]

The main amendments of the Select Committee related to the system of government. They accepted the restoration of modified open seats but inverted the proportion between open and reserved seats. Out of a house of 71 members, only 25 seats would be open; the balance would be divided: indigenous Fijians 23, Indo-Fijians 19, General Electors (which would continue to include Pacific Islanders) 3 and Rotumans 1 (representing over-representation of indigenous Fijians (slightly) and the General Voters [significantly]). This would reduce incentives to form multi-ethnic parties or mergers, since Fijians and Indo-Fijians could win elections or be in a strong position to enter the cabinet if they were united—reversing the critical importance of the open seats. Although the system of AV was accepted, its significance from a non-racial perspective was diminished not only by reducing the number of open seats, but also by specifying that those seats would be contested in single member constituencies, thus restricting the extent of ethnic heterogeneity.

The Committee adopted the latter approach and divided the chapters of the report between five committees for detailed examination.

[20] Select Committee Report, Annex II (2). At the first meeting of the Select Committee, Mr. Rabuka reminded members of the diversity of ethnic groups, cultures and faiths in Fiji, which give 'identity, solace and confidence to our citizens as individuals and distinct groups. They cannot be ignored in the kind of exercise we are embarked upon in the interests of all our people and communities'. He said that the constitution must be rooted in Fiji's history, including rights of the indigenous people, and that it must be acceptable to the people.

The proposal for an elected Senate was rejected, eliminating the prospects of further elections on an open seats basis, and opportunities for cooperation between parties of different ethnic communities. And the continued membership of nominees of the Bose Levu Vakaturaga retained the distinct ethnic element and the ethnic veto that the commission was anxious to exclude. The appointment of the president by the Bose Levu Vakaturaga rather than the more representative Parliament likewise retained the salience of the ethnic factor.

Having rejected opportunities to move towards a more multi-racial/non-racial ordering of the legislative system, the Select Committee opted for a mandatory coalitional government. There had been considerable talk among politicians about a government of national unity and the moment seemed right for its constitutional recognition.[21] After considerable debate, the Select Committee agreed that any party which obtained 10% of the seats in the House of Representatives would be entitled to a proportionate number of ministries. The commission had complained that in the submissions of political parties on coalition/national government, few had given details or appeared to have thought through how it would work. It would seem that in agreeing on a system against which the commission had set its face, the politicians paid even less attention to its implications.[22] For example, the commission had recommended that the maximum number of ministers should be 15, to prevent the appointment of a larger number in order to discourage awkward scrutiny of the conduct of the government or votes of no confidence. The committee ignored this limit, even though in coalitions the tendency may be to increase the number to please coalition partners.

VI Impact of the constitution

The constitution came into force in 1998 and in 1999 the first elections were held under it. These were won outright by the Fiji Labour Party

[21] In presenting the draft constitution to the House of Representatives, Mr. Rabuka invited other parties to join his government even at that time, without waiting for the enactment or coming into force of the new constitution. 'But let us not just talk about the concept of multi-national government, let us act on it now.' (HR, Daily Hansard, 23 June 1997).

[22] In the rush, the Select Committee (or the drafter) did not have time to iron out internal inconsistencies—as between section 99 and the Compact (s. 6(g)) which speaks of coalitions only of the willing!

headed by Mahendra Chaudhry who became Prime Minister. A year later there was a strange sort of coup headed by an unsuccessful and corrupt businessman, George Speight. He took over Parliament, seized most of the Government and many MPs, and held them for up to 56 days. During this period the Head of the Military Forces purported to abrogate the Constitution, and established a military government, followed 6 weeks later by a civilian government, led by Laisenia Qarase. The following year the courts held that the coup had been unlawful, and the constitution was still in force. Without alacrity the country was returned to constitutional rule and elections were held in 2001. These were won by Qarase's new party, the SDL. During the subsequent years various coup plotters were tried and many convicted (though some precipitately pardoned). In 2006 another election was also won by Qarase's party, with the Fiji Labour Party led by Chaudhry not far behind. Following this election, for the first time the multiparty government system was brought into play, having been litigated twice under previous governments. The electoral, power sharing and some judicial aspects of this history are considered in this paper. What we do not discuss is the extent to which all these events have revealed the most fundamental rifts in Fiji society: those between the Fijian elite and the rest of Fijian society.[23]

The orientation of the political system

Discussions on political systems for ethnically divided societies have been preoccupied by debates on the relative merits of consociational and integrative approaches. The colonial model was that of imperial control organised on the basis of a plural society, racially segregated. The end of imperial authority opened up the possibility of genuine consociation, but it was not really grasped, despite racial representation in the House of Representatives, as it would have threatened Fijian paramountcy. The 1990 constitution completed, in formal legal terms, this hegemonic model.

The commission has a great deal to say on this model, almost entirely critical, and its own recommendations were oriented very differently—

[23] There is considerable literature on this including Robertson and Sutherland. *Government by the Gun: The unfinished business of Fiji's 2000 coup* (Annandale, NSW & London: Pluto Press and Zed Press, 2001); see also Halapua, *Tradition, Lotu, and Militarism in Fiji*, above.

towards a model of political integration along a largely liberal democratic system. But it could not escape from the legacy of the past, or the stridency of Fijian extremists, and retained large doses of 'asymmetrical' consociationalism and huge autonomy for indigenous Fijians which increasingly trespasses on the state, the common space. So its own model is neither integrative nor consociational.

Parties and Elections

In terms of the hopes of the Reeves Commission of ethnic harmony, the most significant event was perhaps the election of an Indo-Fijian Prime Minister in 1999. Of course, the events that followed depended also on who that Prime Minister was and how he behaved while in power, on how others responded to his election and his behaviour, to the economy and a host of other factors. But in view of the importance attached by the Reeves Commission to the electoral system, this remarkable event demands that we explore how that electoral system worked. But more important now, with three elections having been held under the Constitution, it is important to ask whether the system shows any sign of achieving its integrative aims.

For many years there were two large and clearly differentiated parties: the Alliance Party (AP) and the National Federation Party (NFP).[24] The latter was the Indian party, born from the cane belt (though in 1969 it joined with a small Fijian party), and the former mainly Fijian, though it always had some Indo-Fijian members, and some 'others'. By the time of the 1999 elections the AP had ceased to exist, though the Fijian Alliance Party (FAP) purported to inherit some of its features. The SVT was the creation of the Great Council of Chiefs in the aftermath of the events of the mid-1980s. And the Fiji Labour Party (FLP) had come into existence in 1985 and was the first party to have a left-wing agenda, and was an avowedly multi-racial party.[25] It won the elections in 1987 (in coalition with the National Federation Party) and its leader, a Fijian, became Prime Minister. But it had always been viewed in some quarters as at bottom an Indo-Fijian party, and it was this that

[24] Recent history is complex and there is now a host of parties and initials. The Fijian names are long, and translations not always consistent. Here we deal in detail with as few parties as compatible with (we hope) clarity of exposition, and do not spell out full names of parties normally known by their initials.

[25] Stephanie Hagan, "The Party System, the Labour Party and the Plural Society Syndrome in Fiji" 25 J of Commonwealth and Comp Pols. 126 (1987).

accounted for the 1987 coups that its electoral success inspired. Since then it has become rather less multi-racial. Its coalition with the NFP fell apart after the adoption of the 1997 Constitution. The NFP was electorally wiped out in 1999 (though it had a slight revival in 2006). The SVT survives, but barely—indeed it was reported in 2005 to have dissolved itself in order to join with the new multi-racial party (NAPF) under Ratu Epeli Ganilau, a high chief who is one of the most outward looking in his approach to relations between the peoples of the Fiji Islands.[26] The FLP split before the 2001 election and a small number formed the New Labour Unity Party with members from various ethnic groups which itself dissolved to join the NAPF. The Party of National Unity, a Fijian led, avowedly multi-racial party, won 4 seats in 1999, and was an ally of Labour.

There has been a kaleidoscope of newer Fijian parties, including the SDL of the Prime Minister (formed just before the 2001 election). This multiplicity of parties has been the cause of much concern in the Fijian community, and there was constant talk of merging parties to be able to offer a more concerted front vis-à-vis the Indo-Fijian parties. The diffuse and shifting nature of Fijian party support is also not conducive to the development of coherent polices in any other area of life. In 2005 it was reported that 13 Fijian parties were registered with the Election Commission. However, by the 2006 elections few Fijian parties put up candidates, there having been some consolidation of parties,[27] though there were 57 independent candidates (mostly Fijian). Fiji now seems again to have effectively a two-party system.

When we turn to consider how the electoral system, intended to encourage moderation, worked, we find a picture of increasing polarisation. In 1999 the more 'radically Indian' Fiji Labour Party won outright,[28] while in 2001 the SDL was able to form government with a

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[26] The party is the National Alliance Party of Fiji; the National Democratic Party formed in 2004 from the previous FAP, NLUP and the SVT is reported to have dissolved itself to join the new party—From *Fiji Times*, April 13, 2005. Ratu Epeli is a former Army Commander and son of the Governor-General (and then President) before the first coup. One example of his imaginative approach is his suggestion that the BLV nominate a non-Fijian as Vice President "Chief suggests non-Fijian as VP", *Fiji Times*, December 3, 2004.

[27] Under the leadership of Vakatora—see Fraenkel, "The Perils of Majoritarianism in Fiji; The 2006 Polls in Perspective" http://archives.pireport.org/archive/2006/May/perils.pdf.

[28] It is a bit misleading to characterise the FLP as radical Indian, though they may be so viewed by many Fijians. But for purposes of analysing the 1999 election especially

conservative Fijian party ally, and in 2006 the SDL gained an absolute majority, winning every Fijian communal seat while the FLP won every Indo-Fijian communal seat. At all elections, parties with the greatest cross-cultural claims have been left out in the cold. In 1999 these were the two parties that tried to work together in the spirit of Reeves as they had done in the JPSC—the SVT and NFP. In 2006 the other 'Indo-Fijian party', the NFP, ran 45 candidates, none of whom came anywhere near being elected, and none of the 50 candidates of the new NAPF won a seat. To a limited extent this is a result of the AV system, which tends to exaggerate differences even more than the FPTP system. But other parties have also simply not obtained sufficient votes, as the following table shows (major parties emboldened):

PARTY	1999		2001		2006	
	% of votes	% of seats	% of votes	% of seats	% of votes	% of seats
SVT	**17.14**	**11.26**	**4.4**	–	0.03	–
FAP	**9.66**	**15.49**	**1.2**	–	X	X
NLUP	X	X	1.34	2.82	X	X
NAPF	X	X	X	X	2.93	–
VLV	2.68	4.22	0.1	–	X	X
FLP	**33.93**	**52.11**	**26.53**	**38.03**	**41.06**	**43.66**
NFP	**13.58**	–	**1.15**	**1.41**	6.35	–
NVTLP	2.57	1.4	0.8	–	0.47	–
PANU	3.26	5.63	1.3	–	0.81	–
UGP	1.55	2.81	.34	1.41	X	X
SDL	X	X	**27.48**	**45.07**	**43.61**	**50.7**
CAMV	X	X	**4.21**	**8.45**	X	X
BKV	X	X	2.5	–	X	X
UPP	X	X	X	X	0.84	2.82

The NFP obtained only 6.35% of first preferences in 2006 which would have entitled it to 4 seats on a strictly proportional basis. The NAPF would have got 2 seats on that basis. The disproportion between the UPP's votes and seats reflects the fact that its main appeal is to 'general voters', whose constituencies are small. There are also two independent members, one in a general voter constituency and one

it tends to be regarded as such because the NFP was behaving moderately by virtue of its alliance with the SV.

in the Rotuman communal seat and both elected after more than one round of counting.

The actual result in 1999 has been compared with what would have happened under first past the post and proportional systems:[29]

Party	AV (actual)	FPP	PR	AV/STV[30]	All open PR
FAP	11	6	7	12	8
FLP	37	34	21	27	24
GVP	2	–	1	2	–
NFP	–	–	10	4	11
NVTL	1	1	3	2	3
PANU	4	4	3	5	3
SVT	8	18	15	10	14
UGP	2	4	2	1	1
VLV	3	2	8	6	7
Indep.	3	2	1	2	–

The idea was that parties would cooperate to give each other their second and other preferences. Since the 1999 election, Professors Jon Fraenkel and Donald Horowitz have been engaged in controversy on whether the Fiji electoral experiment has been a failure.[31] Fraenkel pointed out that while Reeves assumed that 'Only moderate parties with conciliatory politics will agree to trade preferences', in fact all parties did so.[32] Furthermore, one would expect a Fijian voter or party to put either an extreme Fijian party at the top of his preferences, then a more moderate one, or the other way round, followed by a progression through a more moderate Indian party with the more extreme Indian party at the bottom. Instead there were instances of party preferences of a very different pattern; in some open constituencies some parties had the following preferences pattern: Radical Fijian party, Radical

[29] From table provided by Father David Arms in his contribution to, Arlene Griffin ed., *Election Watch II: A Citizens' Review of the Fiji Islands General Election 2001* (Suva: CCF, 2002) see p. 116.

[30] Proposed by David Arms: AV for the communal seats and Single Transferable Vote for the open seats.

[31] E.g., J. Fraenkel and B. Grofman, "Evaluating the impact of electoral reform on inter-ethnic accommodation: the alternative vote in Fiji" 121 *Public Choice* 487–506 (2004) (a version is available on the internet: http://polis.unipmn.it/epcs/papers/fraenkel.pdf), and "Does the Alternative Vote Foster Moderation in Ethnically Divided Societies? The Case of Fiji" 39 (5) *Comparative Political Studies*, Volume pp. 623–651(2006).

[32] In Griffen op. cit p. 89.

Indian party, Moderate Fijian party, Moderate Indian party. In 12 open constituencies the FLP's preference was: Radical Indian (itself), Moderate Fijian, Radical Fijian, Moderate Indian. They attribute counter-intuitive patterns like this to the overwhelming emphasis on the part of the FLP and its allies to keep out the SVT and NPF. Even one Fijian party with the policy of making the country a Christian state entered agreements with the FLP to achieve the same result—and in 6 constituencies assisted the FLP to win.[33]

Elsewhere Fraenkel has written,

> …party preference transfers were not, to any significant degree, associated with political deals on ethnically divisive issues. More important motives included negative ranking of parties that posed the greatest electoral threat, elevation higher up the rankings of no-hope candidates or independents who were likely to oppose little political threat inside Parliament, personality-specific deals and efforts to make arrangements in the hope of securing political office.[34]

In this emphasis on the desire to keep the other coalition out we see a pattern not uncommon in developing countries where politics is so often about getting into power, rather than what is to be done with power once acquired (other than feathering one's own nest).

It has been suggested that in 1999 the Labour Party understood this system and made it work to its advantage far more than other parties. In the 1999 election the result in half the seats involved counting second or other preferences; of those 36 seats the result in 21 was the same in terms of individual elected as if the FPTP system had been in operation, but in 15 instances the result was different, and the FLP was the winner in most of these.

In 2001, the VLV no longer entered into agreements with the FLP while the FLP was trading preferences in at least some constituencies with the NFP. Only 28 seats were decided on preferences, and of these only 10 ended up with a different party winning than had obtained a majority of first preferences. But of these, 9 were won by the SDL

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[33] Horowitz has replied to the analysis of Fraenkel and Grofman, arguing that the evidence from Fiji still supports the thesis that AV generally offers an incentive to moderation—"The Alternative Vote and interethnic moderation: A reply to Fraenkel and Grofman" 121 *Public Choice* 507–516 (2004), and "Strategy Takes a Holiday: Fraenkel and Grofman on the Alternative Vote" 39 (5) *Comparative Political Studies*, pp. 652–662 (2006) Arguably the 2006 election is some evidence against this view.

[34] "Electoral Engineering and the Politicisation of Ethnic Friction in Fiji" in Bastian and Luckham, *Can Democracy be Designed*? (London: Zed Press, 2003) 220, 248.

and by virtue of transfer of votes from a more moderate party: the NFP, the NLUP, the SVT (and one from the FLP). So the SDL seems to have learned to play the electoral game.

In 2006, all but 11 seats were decided on first ballot (of these 9 were in open seats, one was the Rotuman communal seat and one a general voter seat). In other words, in communal constituencies the AV system has become largely an irrelevance, and was relevant in only a minority of open seats. The FLP and the NFP had an agreement, though not a watertight one: the NFP's preferences led to the SDL winning in a few instances, and to the FLP winning in a few others; the same is true of the NAPF's preferences. All the open seats were won by one or the other party (13 SDL and 12 FLP). The results in the open seats were pretty well parallel to ethnic make-up of the electorate: more Fijian constituencies voted SDL and more Indo-Fijian ones FLP; and at the ends of this racial spectrum candidates also mirrored the local position.

Fraenkel has also suggested that the explanation for the results in 1999 does not lie in the PSC decision to have fewer open seats than proposed by the CRC. Indeed, he suggests that more open seats would have led to an even greater swing to Labour in 1999—and to the SDL in 2001![35] He also suggests that more ethnically heterogeneous constituencies would have had similar effect.

The carrying out of preference voting is largely done by the parties. Voters may indicate their own choice preferences, or simply vote for a party, leaving the party preferences to apply (known as voting 'above the line' because of the structure of the ballot paper).[36]

Over 90% of the voters in 1999 ticked above the line. Ben Reilly commented:

> Because it was ultimately party leaders, not voters, who determined where preferences would be directed, ticket voting served to undermine the incentives for preference-swapping between candidates, as deals struck in advance at a national level formed the basis of most vote transfer arrangements.[37]

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[35] "Redistricting via Coups and Constituencies: The Construction of Ethnically-Mixed Constituencies in Fiji 1970–2001" *Journal of Pacific Studies*, 28 (1), 23–55.

[36] For specimen ballot papers see www.elections.gov.fj/voter/how-to-vote.html.

[37] "The Global Spread of Preferential Voting: Australian Institutional Imperialism?" *Australian Journal of Political Science*, Vol. 39, No. 2, July, pp. 253–266, 265n.

The system tended to produce results that surprised the electorate, who found it generally somewhat hard to understand.[38] Voters who vote below the line must rank all candidates; parties and voters may focus on their second or even third choice, but by the time votes are being transferred to 4th or 5th choices, they are really going to candidates the party or voter had expressed a wish not to have elected! The voting deals struck in 2001 seem to have been far more tactical than principled.

For these, and reasons of disillusion, there is a very high proportion of spoilt ballots, overall 11.89% in 2001[39] and 8.8% in 2006 (mostly accounted for by voters who ticked below the line, instead of numbering, or otherwise failed to make any more than a first preference, or marked both above and below the line). Turnout declined in the 2001 election, despite voting being compulsory, but rose in 2006 to 87.7%. In 1999 there was also some resentment at the compulsion to vote; some suggested that this partly accounted for the low vote for the parties responsible for it, the SVT and the NFP.

Preferential voting is an appealing idea. But it is not surprising that AV has been sceptically received by many in the Fiji Islands. The system, being so strongly majoritarian, makes it very difficult for a new party (like the NAPF) or a party trying to recover from a serious decline (like the NFP) to get into the system, for they cannot get into Parliament at all. Fiji politics actually do involve some issues of policy—unlike many developing countries. But there is no evidence so far that benefiting from a moderate party support has had any moderating influence on party politics. The SDL would fear to lose the 80% of Fijian voter support that it enjoys. Actually getting a member in Parliament is likely to have more impact; but unless and until the FLP and SDL splinter (which may yet happen) this system may prevent any other mono- or multi-ethnic party getting a toe-hold. A more significant impact on the two main parties may be the power sharing executive.

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[38] See Fr. David Arms, "Towards a More Representative Electoral System" in CCF publication of the same name—the 2nd 'Constitutional Matters' lecture, (Suva, School of Social and Economic Development, USP, 1999) 4,23.

[39] Walter G. Rigamoto, "The 2001 General Elections—assessment and reflections" Arlene Griffen ed., *Election Watch II: A Citizens' Review of the Fiji Islands General Elections 2001* (Suva: CCF, 200) 4,9. He blamed also misleading press advertisements by candidates, and similar cards distributed to voters.

Power sharing

Any party that receives 10% of the seats in Parliament is entitled to seats in cabinet. The party does not have to accept. In 1999, the SVT had the necessary number of seats, but when the Prime Minister wrote to offer seats in cabinet and the party wrote back with a number of conditions, the Prime Minister interpreted this as a rejection and proceeded to appoint the cabinet without members of that party. The Supreme Court held that these conditions were not such as the Prime Minister was bound to accept and that he was entitled to treat this as a rejection.[40] Although the courts thus endorsed Chaudhry's position, there was a good deal of feeling that he had accepted the SVT response as a rejection with almost indecent haste. Indeed his reaction was thought not to be in accordance with the Compact—the non-justiciable part of the Constitution that called on parties to try to resolve disagreements through good faith negotiation. It was also not in accordance with at least the spirit of the Korolevu Declaration signed by party leaders including Chaudhry.[41] It should be noted that Chaudhry had appointed a cabinet in which a majority of the members were Fijian, including his deputy Prime Minister.

After the 2001 election the boot was on the other foot. Qarase invited the FLP to join the cabinet—they were the only other party that met the constitutional criterion- but did so in the most unwelcoming terms:

> The policies of my Cabinet will be based fundamentally on the policy manifesto of the [SDL], as the leader of this multi-party coalition. Our policies and your policies on a number of key issues of vital concern to the long-term stability of our country are diametrically opposed. Given this, I genuinely do not think there is sufficient basis for a workable partnership with your party in my Cabinet.

When Chaudhry replied accepting the invitation but indicating that he considered that policies should be negotiated, the Prime Minister tried to treat this as a rejection. In fact, he had invited members of another Fijian party and independents. Again the issue went to court and the court here decided that Qarase was obliged to offer seats and that Chaudhry's letter did not amount to a rejection. The Supreme

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[40] *President of the Republic v. Kubuabola* Misc Case No. 1 of 1999 3.9.1999 (unrep).

[41] Above. In 2001 Chaudhry himself relied on this document when Qarase tried to exclude him!

Court observed that the development of conventions on this would call for "a degree of give and take and good faith on all sides."[42]

Qarase then wanted not to remove any of his existing ministers but simply to add the FLP Ministers, producing a ridiculously large cabinet, and to give them mostly insignificant portfolios. The issue went back to the courts over the number of members of the cabinet that the Labour Party was entitled to; the Supreme Court held that if the Prime Minister wanted to give cabinet posts to other parties in his coalition, these had to come from the share that was rightly that of his party.[43] After months of wrangling, Chaudhry decided not to take up any ministries.

The power sharing rules produce potentially a very odd situation where one party does not win the election outright. For example, suppose one party obtains 35% of the seats and is able to form an alliance (either before or after the election) with several small parties, none of which has as many as 8 (10%) seats but who between them have 20% of the seats. Each of these is likely to demand at least one seat in cabinet. Another party has perhaps 30% of the seats and is entitled on the basis of the Constitution to 30% of the seats in cabinet. Only 15% of the members remain in opposition, and the party that 'won' may have fewer seats in cabinet than the second largest party.

Ethnic diversity and party diversity in cabinet are not necessarily the same thing. Though for most of 2001–6 there were no Indo-Fijian members of the cabinet,[44] there were two 'others'.[45] And now that there is for the first time a power-sharing cabinet, 1 SDL Minister is an Indo-Fijian and 2 FLP Ministers are Fijian. Fraenkel has suggested that multi-ethnic innovations may come from within the major parties rather than as a result of constitutional engineering.[46] If so, however, these may take some time. In 1999, 6 FLP MPs were Fijians, in 2006 only 4, while there are 2 Indo-Fijian SDL MPs. While each party put forward candidates in the 'opposite' communal seats (FLP having 15 candidates in Fijian communal seats, and the SDL in all but one of

[42] *Qarase v. Chaudhry* [2003] FJSC 1. The correspondence between the party leaders is appended to the decision.

[43] *In re the President's Reference, Qarase v. Chaudhry* [2004] FJSC 1.

[44] There was one on the ticket of the SDL, but he had to resign due to allegations of financial impropriety.

[45] This assigning of ethnicity is distasteful and may be a bit haphazard; we base the ethnicity on names and photos on the Parliament website if there is any uncertainty.

[46] "The Perils of Majoritarianism in Fiji" above.

the Indo-Fijian seats), the votes received are derisory and one assumes that the motive is to give some electoral experience to candidates rather than any expectation of winning.

The first multi-party cabinet was inaugurated after the 2006 elections. It is less than ideal as a reflection of the Reeves vision—or even that of the Constitution—for there are considerable divisions in the FLP—not only connected with this issue, but Chaudhury remains on the outside and considers himself free to call for the dismissal of ministers in the cabinet in which his colleagues serve. More: since the recommendation of the Reeves report to limit the number of ministers was not accepted, there are 24 cabinet ministers of whom all but 2 Senators (themselves Fijian nominees to the Senate by the Prime Minister) are members of the 71 strong House of Representatives, and 12 Ministers of State (deputy ministers), all MPs. The total make-up of the Government is 12 SDL cabinet Ministers, plus the 2 Senators and one independent (all essentially SDL supporters), and 9 FLP Ministers, and the 12 Ministers of State (none FLP). Twelve Ministers and 9 Ministers of State are Fijian, and 8 Ministers and 1 Minister of State Indo-Fijians. The result is hardly proportionate to the party make-up of the House, nor to its ethnic composition (37 Fijians, 30 Indo-Fijians, 1 Rotuman and 3 'others').

There is another sharing arrangement. The Leader of the Opposition appoints 8 members of the Senate (as compared to the 9 to be appointed by the Prime Minister)—a provision carried over essentially from the non-power sharing model in the earlier constitutions. Section 64(2) requires that the Leader of the Opposition's nominees must be from the parties entitled to sit in the cabinet. In other words, the notion that some senate members would represent a non-government view is completely lost. This is a matter of drafting oversight, and has led to litigation.[47] The Supreme Court found itself compelled to decide to the effect described here, though there was a dissenting judgment from Sir Arnold Amet from PNG who tried to make the provision work in a way that best achieved his view of the objective, namely of broadening the membership of the Senate.

All this haggling and litigation somewhat discredited the Constitution in the eyes of the people. A system designed to increase harmony seemed to be proving very disruptive! These disputes could have been resolved

[47] *In re the Constitution, Reference by HE the President* [2002] FJSC 1.

had the politicians been prepared to behave in the sort of cooperative way that the constitution was designed to encourage—instead their stiff-necked behaviour was one of the factors which led to the Constitution's overthrow. Of course, many of the problems derived from the way the JPSC amended the Reeves proposals. Some problems would have arisen even had the Reeves conception been carried through.

Certain other features of the system that were supposed to enhance cooperation and accountability have either not been implemented or have not had the desired effect. Neither the Freedom of Information legislation nor the Leadership Code required by the Constitution has been enacted, though the current government has promised their introduction shortly. However, a prominent Labour politician has said that the sectoral committees of Parliament required by the Constitution are working 'extremely well'.[48]

Role of the Courts

The Constitution set up a new court structure and included a Supreme Court above the existing High Court (the court of unlimited jurisdiction) and the Court of Appeal. The system set up under the Constitution is a fairly standard one in modern constitutions: there is a Judicial Service Commission (JSC), though a rather small one; the Chief Justice is appointed on the advice of the Prime Minister who must consult the Leader of the Opposition. The JSC appoints the other judges, but must consult the Prime Minister and the Leader of the Opposition. Judges' remuneration must not be reduced during their term of office, and removal of a judge must only take place following the decision of a tribunal of three people who have held high judicial office (the President removes, but does not have to remove even if the tribunal advises him to do so). Above the High Court, judges may be appointed on fixed term contracts or for session of the court (this is used to bring in foreign judges to staff the courts, including for particular cases). The judges brought in have been largely experienced, even distinguished judges from the region, including Australia and New Zealand. This element in the system has almost certainly been significant in some of the important constitutional cases.

[48] K. Datt response to the President's address on the Opening of Parliament, June 8 2006.

The courts have been very important; they have heard cases, as just mentioned, on the power sharing arrangements for the cabinet, on the nomination system for the Senate (both designed to produce inter-ethnic cooperation) and on the tick below-the-line; they have actually decided, as mentioned earlier, that the coup of 2000 was illegal and insisted that the Constitution be reinstated, and that a review of the Constitution set up by the interim government was unlawful.[49] And they have been trying people accused of complicity in the coup of 2000, including the leader of the coup, George Speight, and the Vice-President, both of whom were convicted.

There is respect for the higher courts generally, but some unease about the attitude of the government to judicial independence, and about the support of the former Chief Justice, Sir Timoci Tuivaga, for the 2000 coup.[50] Although after the return to constitutional rule some distinguished persons accepted appointment to the Bench, two soon resigned. "Did Sir Timoci's adventures cause or contribute to the resignations of Justices Jai Ram Reddy as President of the Court of Appeal[51] and Ratu Jone Madraiwiwi as a High Court judge?" asked a senior Indo-Fijian lawyer.[52]

The Government has not always complied with all dispatch with the decisions of the courts. Notably they did not return the country immediately to constitutional rule, and especially they did not give way in favour of the People's Coalition Government, which they ought to have done following the decision that the coup was unlawful.[53] More recently the government has been over-enthusiastic in some eyes to grant

[49] *Republic of Fiji v. Chandrika Prasad*, Civil Appeal No. ABU0078/2000S.

[50] See e.g. Brij Lal, "In George Speight's Shadow: Fiji General Elections of 2001" 37 (1) *J of Pacific History* 87, 88 (2002).

[51] Reddy was leader of the NFP; then resigned after the 1999 election and was appointed to the Court of Appeal. He resigned after the coup but was reappointed, but left to take up a position on the International Criminal Tribunal for Rwanda.

[52] Sir Vijay Singh, "A Diminished Judiciary" [2000] JSPL 1—an internet journal: http://www.paclii.org/vu/journals/JSPL/ visited May 17 2005.

[53] This refusal was itself the subject of litigation: the CCF took the President to court seeking a ruling that the dismissal of Chaudhry was unconstitutional. Scott J held that "I find that such departures from the normal requirements of the Constitution as occurred in relation to [the dismissal of Chaudhry, the dissolution of Parliament and the appointment of Qarase as interim Prime Minister) were justified on the grounds of necessity": *Yabaki v. President of the Republic of the Fiji Islands* [2001] FJHC 156. The Court of Appeal declined to reverse the decision since there had been an election and the country had returned to constitutional rule.

clemency to those convicted of involvement in the coup. They allowed the VP to remain in office for an unseemly length of time after his conviction and then released him on a Compulsory Supervision Order after serving only 3 months of his sentence.[54] In 2002 the *Fiji Times* commented, "the law has been subverted, undermined, circumvented and ignored by the highest in the land including those who were sworn in to uphold it".[55]

Concluding reflections

We conclude with some reflections on the role of constitutions, with specific observations on the fortunes of the 1997 Constitution. The first point is that a constitution almost always has some impact on politics. It succeeds in setting up institutions. The electoral system will determine access to executive power; and the constitution will aggregate or divide state power. What is difficult is to predict precisely what the impact will be. For example it is hard to predict what kind of political party will benefit from which electoral system; or how power, once aggregated, will be exercised. There is no guarantee that power will be exercised in accordance with the values prescribed in the constitution, or even the procedure for its exercise. An institution may end up serving purposes completely contrary to its purported aims (e.g., the judiciary may become deeply implicated in the web of corruption instead of fighting it).

Our second conclusion is that constitutions are seldom effective in achieving values and objectives. For example, the electoral rules of the AV system were carefully structured to promote moderation and reward ethnic parties that cooperated with parties of other ethnic groups. Yet the manipulation of the rules by parties, driven principally by the ambitions to get into parliament, rather than truly cooperate with others, frustrated that objective. Extremist parties of each community were able to make pre-election pacts, having no desire to work together after elections, and often with the objective of undermining the prospects

[54] See the exchange between Senator Emberson Bain and the Attorney General in the Senate—Hansard, December 10, 2003 http://www.parliament.gov.fj/.

[55] May 19 quoted in Asinate Mausio, "Fiji" *The Contemporary Pacific*, Vol. 15, No. 2, Fall 2003, pp. 440–447.

of its ethnic opponents. Similarly, the purpose of mandating coalition government was to provide a framework for resolving issues, contentious as between ethnic groups, and promoting consensus, yet the politics of forming—or resisting—such government further aggravated ethic tensions and conflicts.

Most constitutions underrate the self-interest of politicians (although recent constitutions have several provisions to curb corruption and eliminate conflicts of interests). Experience in a number of states show that politicians are obsessed about getting power but have little idea of what to do with it, other than personal aggrandisement. Alliances to pursue policy objectives are therefore rare. Alliances are opportunist, and therefore unstable. The values that constitutions embody seldom feature in their schemes and alliances.

In the same vein, both the commission and the Select Committee had placed much reliance on the Compact in moderating relations between ethnic communities. It aimed to set up procedures for amicable resolution of differences through good faith negotiations and to encourage the majority party to consider the interests of minorities in forming government—both were spectacular failures. Racial polemics worsened after the new constitution was adopted.

Internal contradictions both in the scheme of the commission and in the modified scheme adopted by the Select Committee seriously compromised the objectives of their recommendations. The objective of moving towards non-racial voting was frustrated by a pre-dominance of reserved seats (and the continuation of nominees of the BLV in the Senate). Even more striking was the failure of the goal of political integration, through the retention of the autonomy of indigenous Fijians and their institutions.

> A set of parallel, indigenous institutions, known as the Fijian Administration, extends from village level right up to the national arena and in linked to the national government by the Ministry of Fijian Affairs. It is quasi-federal… The Administration's executive arm is the Fijian Affairs Board, while the BLV, 14 provincial councils, and the 189 district councils comprise its legislative arms. There are also other, quasi-government agencies that are part of the ethnic Fijian structure of governance; the most important of these is the Native Land Trust Board [responsible for the land relations between indigenous owners and lessees of other races]. The aboriginal system of governance is semi-democratic at best, and is incorporates the chiefly hierarchy, where heredity, not elections, typically determines who exercises authority… Ethnic based Fijian nationalists who assert religiously-based justifications for Fijian political ascendancy

> and traditionalism consider this indigenous system more authentic, legitimate and deserving of support than the national and democratic state structures.[56]

This 'indigenous' system, which was in fact strengthened in the 1997 Constitution by according constitutional status to Fijian customary law,[57] has been critical for mobilising opposition to Indo-Fijians, garnering support for coups, and promoting Fijian chauvinism.

To this system of Fijian Administration might be added the armed forces. Although notionally a part of the state apparatus, it is composed almost exclusively of indigenous Fijians (and well in excess of the defence needs of the country). It serves to strengthen the links between the 'indigenous' institutions of Fijians, and in informal ways is incorporated in that system. The failure to tackle the problem of an ethnic army which posed a constant threat to democracy and a significant role of Indo-Fijians in government (as history so well demonstrates) has a negative effect on the willingness of Indo-Fijians to participate actively in the political process or to assert their rights. In the last few years under Commander Bainaramana, the military have been supportive of maintaining constitutional rule. They planned actively, and positively, for the possibility of the coup being declared illegal; they have since indicated that they would not support another coup.

A major problem was that, though the constitution planned a fundamental change in ethnic relations, the style of politics, and goals of state policies, the constitution making process failed to educate the public in those aims and values, and win their support. The intellectually clear and convincing arguments of the report were lost on the people due to its excessive length. No attempt was made to disseminate its analysis and recommendations to the people, politicians, churches, social organisations. Instead, considerable efforts were made to discredit the report and the constitution, usually by a total falsification of the aims and provisions of the constitution. The commission did little to develop a consensus on its recommendations, by opening a dialogue with critical players, as the process proceeded or after its report.

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[56] Henry Srebrnik, 'Ethnicity, Religion, and the Issue of Aboriginality in a Small Island State: Why does Fiji Flounder?', 364 *The Round Table*, pp. 190–91(2002).

[57] 186.-(1) The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes. (2) In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.

The attempted coup and the considerable support among indigenous Fijians showed that the process had failed to generate a consensus. The commission's recommendations reflected consensus among its members—no mean feat—but not that of the public (its report being severely criticised by sections of the public)[58] or the politicians. This is no criticism of the commission which was handicapped by shortage of staff and other resources, and was given a very short time. The blame must lie with political parties who did little to generate an environment in which consensus could gradually be built up; indeed the public hearing, largely orchestrated by political parties, did much to poison the atmosphere. Nor after the 'unanimous' support of the constitution in the Select Committee and Parliament, did many parliamentarians try to build support for it. Instead many of them attacked it, claiming unfair pressure on them to adopt the constitution, and tried to delegitimise it, alleging that it did not represent public opinion.

The failure to develop a consensus was particularly unfortunate given the scale of changes that it promoted, while underlying causes of tensions remained unaltered. The lack of trust among communities and the stakes were high. The tensions were not merely the result of stereotyping or misunderstandings. The ramifications of the colonial organisation of the economy and contradictions between 'tradition' and 'modernity' so elemental in that organisation, and the uncertainties of a globalising economy meant that a very great deal was at stake. The commission did not adequately place these circumstances in their analysis, and left them largely untouched. So the constitution was out of tune with underlying social and economic realities. A constitution can rarely operate against the tide of these realities.

[58] See pp. 81–86 of Lal, *Another way* (above).

PART II

CONSTITUTIONAL RECONSTRUCTION SINCE THE FALL OF COMMUNISM

CHAPTER EIGHT

PARLIAMENT AND THE POLITICAL CLASS IN THE CONSTITUTIONAL RECONSTRUCTION OF POLAND

TWO CONSTITUTIONS IN ONE*

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> Public life in Poland requires profound and total reforms that should lead to the introduction of lasting self-governance, democracy and pluralism. We shall therefore strive both for the reconstruction of the state structure, and for the setting up and support of independent and self-governing institutions in all spheres of social life. Only such change will secure a fit between the organization of social life and the needs of the human being, the aspirations of society and the national aspirations of Poles. These changes are also necessary in order to combat the economic crisis. We consider pluralism, democratization of the state and the opportunity for the full enjoyment of the constitutional freedoms as the fundamental safeguard that the drudgery and renunciations of workers will not be wasted again. (Programme of the Independent and Self-Governing Trade Union [Solidarność], approved on 7 October 1981 by First Congress of Solidarność in Gdańsk-Oliwa)

In this article, I try to demonstrate with reference to Poland that one should take seriously the conventional wisdom that constitutions act at various levels of societal structure, that they are complexes of rules and not just one logical, consistent and well-hierarchized structure, and that they serve important social functions that are not necessarily those expressed by the founders or constitutional lawyers. More generally, the Polish case illustrates that a constitution is the shorthand commentary

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of the ongoing discourse among the actors in the political process at the time of the decisive constitutional compromise.

A Short History of Transitional Constitution-Making

The Constitution of the Republic of Poland as adopted by the National Assembly on 2 April 1997 is composed of 243 articles with a preamble. This rather lengthy text had followed a rather lengthy process of drafting and discussion of the new constitution, that started in 1989. If this were the Civil Code the time taken would be of little surprise, though even here the Napoleonic exemplary speed could set the example. With constitution-making, one usually expects a somewhat faster and more concentrated process. Poland was the first among the former Communist countries to change the system. So how did it turn out to be the last, or almost the last, to change its constitution? Was it a lack of interest in the constitutional law, or rather, as I argue here, a lack of interest in some of the provisions in the constitutional text. Endogenous political transformation in Poland was a lengthy process of both gradual emancipation from the old regime, and the sequential experimentation with the political arrangements (Kurczewski, 1999). I contend that the new constitution fits the new political balance between the new political actors in the Polish democracy at the end of the transformation process. In order to grasp this, however, one must first retrace the constitution-making process within its political context back to the Round Table negotiations at the end of the Communist rule in 1989, and then look more closely at the content of the constitutional text as finally approved.

That the new Constitution of Poland was legally recognized in 1997 should not blind us to the fact that there had been a constitution in action before that date. By this I do not mean the so-called 'Small Constitution' of 1992, but the constitutional regime that had been in development since 1989. Nor were the official rules laid out in the 1952 Constitution ignored.[1] The Communist regime was already so

[1] The 1952 'Polish' Constitution was—as recently found in the archives—first drafted in Polish, then translated into Russian to be sent to Joseph Stalin who amended the draft, adding, inter alia, notes in Russian on Prussian, Austrian and Russian colonialism, then translated back into Polish with his amendments and passed unanimously by the Seym of the Polish People's Republic on 22 July 1952.

interested in legalistic legitimation throughout the 1980s that constitutional lawyers were pressing towards legalizing every change. After all, the constitutional court itself had already been set up before 1989 in the attempt to develop the 'socialist state of law' as it was then called. The pre-1980 arrangement under which the dualistic party-state was legalized through the Brezhnevite 1976 preamble, telling of the 'leading role' of the Communist Party, had proven itself to be insufficient during the 1980–1 peaceful rebellion of Solidarity and against legal claims then presented against the ruling regime. The accountability of the supreme ruler—first secretary of the Communist Party—could not be legally established and therefore the state court, reintroduced in order to deal with issues of constitutional accountability, could not deal with the misdeeds of the past. General Jaruzelski's regime was seeking, with the help of its legal experts, to ameliorate the position after the first, unconstitutional assumption of extraordinary powers on 13 December 1981. But the internal logics of the dictatorship had moved regime from civil Party rule to military Party rule, the general in the role of first secretary was in no way more accountable than the first secretaries he succeeded; his election as the first president of the new Polish Republic in 1989 meant a decisive break with the past. From that moment on, the top ruler became the highest public official under the rule of law.

In June 1989, elections were held in which the ruling Communist Party allowed the opposition to run for parliament for the first time. For this purpose, the second House, the Senate, which had been abolished in the referendum of 1948, was recreated and given power of veto over the decision-making of the first House, the Seym. The veto could, however, be overturned by the Seym, where the opposition was allowed rather limited scope as only one-third of the seats was open to free election, while of the remaining seats another third was allocated to the previous ruling party and the final third to its systemic subordinated allies of the last 40 years—the Peasants Party, the Democratic Party and the Left Christian groupings. The election results were a great surprise to the ruling party. All seats in the Senate, except for one, went to the opposition organized in the so-called Civic Committees, the exception being an independent candidate, while all the Communist candidates lost. In the main House, the Seym, the Civic Committees filled their allotted quota but in view of the Communist failure, the former allies declared their political independence; so the Communists changed

overnight from unchallenged ruler of the country into parliamentary minority. The fragility of the new arrangement was evident both internally and internationally. Poland was still a member of the Warsaw Treaty wherein the doctrine of military intervention in order to keep Communists in power was adhered to; all its neighbours were still ruled by Communist Party dictatorships. Internally, power was hierarchically organized down to the local level and run by the Communist Party with the help of the political police and the army, fresh from the experience of direct involvement in ruling the country for the Party during the martial law period. Not surprisingly, the opposition decided not to test the mood of the old rulers further. As agreed, the first secretary of the Communist Party, General Jaruzelski, was elected as president—a post recreated after some 40 years for the purpose—by a one-vote majority in the parliament, and after the failure of his collaborator, General Kiszczak—minister of the interior and head of the political police—to form the government, Tadeusz Mazowiecki, one of the leaders of the Civic Committees and Solidarność advisor, was approved as prime minister of the national cooperation government, with General Kiszczak as one of his deputies and the minister of interior.

These events explain why the new constitution was not drafted and passed in Poland in 1989 or immediately afterwards. Round Table agreements were not constitutional law as such. They took the form of the protocol of agreements that included also the detailed list of necessary amendments in the law. The constitutional law of the Communist Polish People's Republic was then in force, and it was in the old Communist-controlled parliament that the ruling party introduced the necessary constitutional amendments as well as other legislation necessary to re-legalize Solidarność, to set up the presidency and second House, to legalize civic committees and other independent associations and to open (partially) the elections. The Round Table agreements as a political covenant and the amended 1952 Communist Constitution were thus the institutional frame for the first phase of the transformation to democracy. One should remember that though jointly agreed at the Round Table, the project was multi-ended for its diverse participants. The ruling camp within the ruling Communist Party was thinking in terms of the continuing, though limited power, while there must have been disgruntled elements who were then silent but who were thinking about regaining lost ground. The opposition was not entirely in unison either, some elements were not included or distanced themselves from the electoral process, expecting immediate abolition of the Communist

rule and hoping for its total expulsion from politics. Moderates from both camps met even if their goals were different. The new, post-electoral situation changed the picture. The constitutionally weak Senate was politically the strongest, as most clearly showing the actual distribution of sympathies within public opinion. The Senate was the only institution with full democratic legitimacy and, as such, developed its own legislative initiative to press the Seym. The Senate, seeing itself in the role of the sole, legitimate representative of the people, also took as its task to prepare the draft of the new constitution of the democratic Poland. The Seym became a floor for a redefinition process attempted by its various factions. While engaged individually in proving their willingness to follow the mood for change prevailing in the nation, members of the old regime parties were engaged in the reconstruction of their collective identities. The Peasants Party, a minor partner of the old regime coalition, was gaining in strength as it served now as a needed parliamentarian ally for the Civic Committee parliamentarians, while the Communist Party, under strain both at home and internationally in the face of disintegrating Soviet Communism, was weakening, until it dissolved itself and gave way to two offsprings, of which the legitimate one, called Social Democracy, was to become the major political force in the years to come. The already morally weak, as non-democratically elected, Seym with its transforming parties was unable to take any constitutional initiative. It soon became clear that despite the Round Table agreements, new, fully democratic elections were needed. The presidency of General Jaruzelski was suffering also on a daily basis from lack of democratic legitimacy, so when Lech Wałęsa, the leader of Solidarność, who had until then been kept outside the increasingly parliamentary politics, demanded that a new and nationwide election of president was necessary, the idea was instantly accepted and a new constitutional amendment was made.

The presidential elections of 1990 provided a new shock for public opinion. First, though it seemed self-evident that Wałęsa represented the until now democratic opposition, as democratically elected president of the many million-strong trade union Solidarność, he was challenged by Mazowiecki. Time had come for the hitherto united opposition to divide. In fact, the division reflected the divisions that had already existed within the milieu of Solidarność militants since 1980, and been reinforced during the mutual debates the internment camps where most of them had been imprisoned by General Jaruzelski on 13 December 1981. The next surprise was that the then disoriented public cast the

second highest number of votes for the candidate from political nowhere offering clumsy mixture of populist promises and new age ideas. The post-Communist candidate was, for the first and last time, marginalized in these elections. The last Seym of the People's Republic and first Senate of the Third Republic[2] dissolved after two years of hectic work, giving way to the first wholly democratic Polish parliament (1991–3), in which more than a dozen new parties were present regrouping among themselves the old political forces—the Communists, the agrarians and the democratic opposition.

Not surprisingly, the ambition of the non-Communist members of the first Seym of the Third Republic was to pass the new constitution. In order to abolish the 1952 Communist Constitution, despite its latest democratizing amendments, the so-called 'Small Constitution' was drafted and passed on 17 October 1992 by a weak coalition majority. Its official title tells the whole story, as it was called the Constitutional Law of 17 October 1992 'on mutual relations between legislative and executive power in the Republic of Poland and on territorial self-government'. A short preamble states that 'In order to improve the functioning of the supreme powers of the state until the new Constitution of the Republic of Poland is approved, the following is stated', and the following include Chapter 1 on General Principles, Chapter 2 on Seym and Senate, Chapter 3 on President, Chapter 4 on Government, Chapter 5 on Territorial Self-Government, and Chapter 6 on Final and Transitional Provisions—all comprised in 78 articles. The 77th article repealed the 1952 Constitution with several articles excluded and several left in force. The document was then followed by the still valid Constitutional Provisions that included the basic principles, such as Article 1: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice', which had been introduced into the old Communist constitution after 1989; and chapters on the Constitutional Court, the State Tribunal, the Supreme Chamber of Control and the Commissioner for Citizens' Rights (Ombudsperson); on Courts and Procuracy; on Elections; on Basic Rights and Duties of Citizens, with the post-1989 amendments; on Coat of Arms, Anthem and Capital; and on Amending the Constitution. Altogether 61 old constitutional provisions were left in force. It

[2] Called 'Third' after the Old Polish Respublica in existence until 1795, and the Second Republic, 1918–39.

is noteworthy that this constitutional collage enclosed 139 articles, of which 27 articles (19 percent) were classified as relating to the rights and duties of citizens.

Constitutional Rights and the Constitution of 1997

Freedom, rights and liberties were considered generally the main focus of the 1989 transformation. However it soon became obvious that there was less consensus on rights than on the political arrangement for power. President Wałęsa was advised to advocate the Bill of Rights, that would be accepted separately as fundamentally linked with the political constitution dealing with the division of powers as practically entrenched. Wałęsa's draft Bill of Rights was based upon the earlier draft prepared by the Polish Helsinki Committee and published in 1990 in the journal *Rzeczpospolita.* It was reworked later on by liberal lawyers and sent to the Seym on 12 December 1992 as a separate draft constitutional law. Social, economic and cultural rights had been formulated in specific chapters as duties of the public authority to be accounted for through the political responsibility of the government. Many individual rights were explicitly included in the document as well as the principle and mechanisms for the direct implementation of the proposed Charter of Rights and Freedoms before the common courts of the country, and for the *actio popularis* against the all legal acts before the constitutional court. The Ombudsperson and Christian nationalists attacked the draft, first as it neglected the hitherto constitutional principle of 'social justice', and second as it acknowledged only individual rights and not the collective rights of families.[3] On 21 January 1993, the Seym met to discuss the drafts of two constitutional laws: the Charter of Rights and Freedoms proposed by President Wałęsa and the extensive Social and Economic Rights Charter drafted by the post-Communist Alliance of the Democractic Left (SLD) that developed around the social democracy and lately absorbed it into the new conglomerated party. Centre-liberal parties supported the president's draft while rejecting the Left's, while the Left including the Agrarians, was supporting both. The third position was taken, however, by the Christian Nationalists and Christian Democrats who attacked the liberal individualistic concept of rights, and referred

[3] See Nowicki (1993). On the Catholic concept of family rights in this context, see Kurczewski (1997: 14–17).

to the Vatican Charter of Family Rights. It is remarkable that in this debate the basic triangle was formulated so clearly. Triadic elements reappeared even at the explicit axiological level: the presidential draft listed as three basic values, human dignity, freedom, and equality before the law; the Social and Economic Charter draft emphasized labour, property and social partnership; while one of the fundamentalist anti-liberal critics referred to the family, nation and state as the organic triad. The presidential draft was sent to the parliamentary committee for further work by 251 votes, with 72 votes against and 34 abstentions; the draft of the Social and Economic Charter was rejected by 199 with 139 votes in favour and 27 abstentions. The work was not completed as parliament was dissolved prematurely by the president because of its inability to form the stable government majority.

Citizenship need not be individualistic, or at least full citizenship can sometimes be enjoyed by the individual through participation in a community. The controversy between an individualistic and collective concept of rights cannot be excluded at the meta-level of interpretation. Solidarność's struggle between 1980 and 1989 for recognition by the Communist authorities indicates, indeed, the process of implementation, from bottom up, of individual freedom of association as well as the process of granting to Solidarność the right of participation in public life at national as well as at company level. After 1981, the authorities acknowledged the freedom of employees to associate within any trade union other than Solidarność; the issue was, indeed, how to force the authorities to acknowledge the existence of Solidarność. In changing the Polish law on association in 1989 we, i.e. Solidarność, abolished such right of associations to associate in order to dissolve the totally uncontrollable structures sedimented through decades of bureaucratization of the voluntary activities within society. As I see it now, we inadvertently applied the individualistic philosophy of rights to the same purpose as the Communists, who had allowed individual independent trade unions in the enterprises after the introduction of martial law. But they had not allowed them to associate at the national level in order to prevent the re-emergence of Solidarność. Communities have a life of their own, even if it is possible to reduce it to the life of their members. The problem is well known from the area of ethnic minority rights, to grant each individual the right to practise the national identity means something different than to grant the legal right to the minority as a corporation. The contradiction between the subjective definitions of the nation and the social reality of how nations function is another relevant reference here.

The freedom to associate means thus the right to create with others a new social body that may be granted full corporate rights, just as the freedom of national self-determination means the right to form a national state. This type of collective right seems not well enough distinguished in the classical social theory of rights. In Poland, the Catholic plea for recognition of rights of family meant, among other things, the rights of families to associate with each other as the distinguishing mark of the family as an emergent community *qua* corporation. The liberal versus Catholic controversy was not about the dignity of the human being, which both acknowledge, but about the claim of the exclusivity, or priority, of the individual as the subject of rights. Seen from this meta-perspective, the political conflict in the Polish Assembly focused on two oppositions: (1) positive claims or social rights of the individual (upheld by the Left) versus positive claims or social rights of the family (proposed by the Right); and (2) protective or civic and legal rights of the individual (defended by the liberals) versus positive claims or social rights against an individual via the state (favoured by the Left and the Right). In the post-Communist context it emerges that the so-called collectivism of the Left amounted to the totalitarian predominance of the polity over an atomized society, the liberal solution is in making the individual as strong as possible by making both polity and other collectivities individual-dependent, while the Right stresses the role of collectivities (family, nation, church) against both the state and the individual.

The new elections resulted in a parliament (1993–7) dominated by the Social Democrats, ruling in coalition with the Peasants Party. Politically, however, this was divided into two distinctive periods. First was that of the uneasy cohabitation of the Left government with President Wałęsa. The drawbacks of the earlier constitutional arrangement became manifest: the original role of president, who was made powerful in order to safeguard the (reformed) Communist rule in line with the naive expectations of the Round Table days, was reinforced by the general presidential election. Three types of ministers were now in existence: ministers selected by the prime minister for his or her cabinet; ministers of defence, interior and foreign affairs, nominated by the president; and ministers in the presidential chancery, appointed by the president directly. The system had already worked badly previously, but its malfunctioning became more obvious once the political sympathies of the prime minister and the president were in evident conflict. This had been mitigated by change of interpretation and constitutional 'custom' in 1995, once post-Communist politician Aleksander Kwaśniewski won

the presidency against Lech Wałęsa. The need for constitutional reform was evident to the politicians, who were in general against the strong presidency advocated and practised by the previous incumbent. The Left coalition felt strong enough to take lead in the constitution-making process. On the other hand, it was its first comeback into power and the first democratic ascension to power. So the Left hesitated; instead of enjoying its dominance, it decided to have the more far-sighted goal of nurturing a Constitution of the Whole Nation. This needed the involvement of everybody in the constitutional process. The popular draft initiative was allowed, with Solidarność, now outside the parliament, in the minds of the post-Communist politicians. Such broad cooperation was all the more necessary since the decision had already been made in 1992 that the constitution was to be approved by the whole nation in a referendum. There was thus the danger that the text approved by the Assembly may be rejected under influence of opposition outside the parliament. A multitude of drafts was collected to be worked out by the Constitutional Committee of the National Assembly, while the Solidarność came up with its own draft, signed by 959,270 people in 1994. In an unusual motion, the new leader of Solidarność, Marian Krzaklewski, who was not a member of parliament, was invited to take part in the constitutional debate. The prospects for consensus, however, were grim. The final settlement was made in 1997, coming as a surprise to the interested audience that had grown accustomed to the permanence of the constitutional debate in Poland. 'Let us assume that in the year 2000, the international conjunctures will continue to be good for us.... Let ussuppose in the end that, during the coming five years the work on the constitution will be faster than in 1989–1995, and that—contrary to the past—it will be enlivened by the general ideological principles common to all the authors. I presume thus just such an optimistic scenario', wrote one of the political analysts in 1995.[4]

But the constitutional stalemate at the beginning of 1997 was broken—as the public was told—by the compromise worked out by the then ex-prime minister and actual leader of the opposition Freedom Union, Tadeusz Mazowiecki. He worked out the very careful wording that had to be acceptable to both warring sides in the constitutional debate, including the Catholic Church behind the scenes:

[4] See Graczyk (1995: 89; cf. title of Kurczewski, 1994).

> We, the Polish Nation—all citizens of the Republic—*both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources*, equal in rights and obligations towards the common good—Poland, beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, and for *our culture rooted in the Christian heritage of the Nation and in universal human values*…hereby establish this Constitution of the Republic of Poland as the basic law for the State.[5]

To provide the context, it is important to note that the draft, as adopted by the Constitutional Committee of the National Assembly on 19 June 1996, had no preamble and no mention of God at all, while the so-called 'Citizen's Draft', authored by the trade union Solidarność in June 1994 in Gdańsk, started with the preamble that opened with the statement that 'We, the Polish Nation—Recalling our almost one-thousand-year history, bound to our Christian faith and cultural heritage.… We hereby, in the name of God, solemnly resolve upon and decree this Constitution for the Third Republic.' The political fact was that, despite the declaration by more than 95 percent of respondents in all representative surveys—whether under Communism or in times of freedom of expression of beliefs and opinions—that they believe in God, the nation was now divided into two: believers and non-believers. In reality, some believers were rallied by Solidarność behind its draft, some together with nonbelievers supported the agnostic draft drawn up mostly by the post-Communists. The final document thus reflects this fundamental political division expressed in the idiom of religious division. Moreover, the liberal (Freedom Union was considered a liberal party) solution under the circumstances was *not* to support the agnostic silence on the issue, but to find a way to express both conflicting views in the same document.

It was pointed out that, in contrast to the detailed discussion of the prerogatives of various public offices and the rather vague social rights offered the citizens, the constitutional draft presented to the public was void of provisions dealing with citizen access to power, financing of political parties, principles of electoral law, access to public media and access to information about public institutions and their staff, in other

[5] My italics. All citations from the constitution and its drafts, unless stated otherwise, are taken from Wyrzykowski (1998). This text later inspired European Christian Democrats to discuss in November 2002 the introduction of the equivalent formula in the forthcoming European Constitution.

words all that decides whether the state is a game for a few thousand people closed within the inner circle of power, or is the open organization serving citizens and accountable before them (Kurczewski, 1994).

Scholars have commented on the apparent similarity of the rights protected by the individual constitutions of the emerging democracies, observing that the human rights protected by these constitutions are not typically limited to traditional 'negative rights', such as the right to life, liberty, and property, but also include positive social, mostly non-justiciable rights such as the rights to health care, subsistence and education. Moreover, the 'negative rights' or 'freedoms' are 'trans-liberal' in that they tend to include the right to basic institutional preconditions that are required for their implementation:

> Generally speaking the study of the post-communist constitutions gives rise to the observation that the boundaries between traditional negative rights and their 'trans-liberal' expansion, institutional guarantees, and positive rights are in flux. The order of this spectrum mirrors a decreasing degree of judicial enforceability and of an increasing necessity for political and administrative discharge of the respective state obligations. Moreover, a great number of institutional guarantees and positive rights causes the institutional after-effect of a shift of state authority from the courts to the other branches of government, primarily to the executive branch. (Elster et al., 1998: 87)

W. Sadurski discussed the safeguarding of rights with reference to the

> …continuum between two points: on the one extreme, the rights are fully entrenched, even against constitutional amendment. On the other extreme, while the rights are spelled out in the constitution, the legislature has a broad constitutional mandate to refine, construe and restrict them in the ordinary process. In the first extreme, rights cannot be changed without the change of a Grundnorm (i.e., there is no legitimate way of restricting a right without upsetting the basic constitutional legitimacy of the legal system). On the other extreme, constitutional rights play no role as an effective restraint upon legislative rights. The strength of constitutional rights can be located: the closer the system comes to the first extreme point, the stronger the constitutionalization of rights. (Sadurski, 1998: 46)

He then assessed the constitutional draft as closer to the second extreme: the framers could have used the model which was available to them in the form of Wałęsa's constitutional project which stated explicitly:

> The rights and liberties safeguarded by the Charter can be restricted only by a statute and only when the Charter so provides. The fact that the

> current drafters have not incorporated this wording suggests that they had a different construction in mind: an across-the-board authorization for the legislature to restrict all rights. If this is the case then the usefulness of constitutional rights is questionable. (Sadurski, 1998: 47)

But what if 'usefulness' is not the aim, at least not the usefulness which Sadurski seems to have in mind when giving his judgment. A few paragraphs further into the review of the constitutional draft he himself makes mention of other criteria of usefulness that might have been used by the drafters. His arguments were in vain. The final text of the constitution retains all the weak points he criticized. 'One reason why the current drafters may have decided not to imitate this model is simply that they tried to distinguish themselves—for reasons of political convenience—from the authors of the Walesa's draft', wrote Sadurski wryly, adding,

> However, there may be a deeper reason, having to do with the (implicitly adopted) philosophy of rights which fails to appreciate the role of constitutional rights as prior, relatively flexible, and determinate restraints upon the exercise of state power. (Sadurski, 1998: 51)

Though there is no reason to deny the first interpretation, as the game of distinction is played not only among the academicians but among politicians as well, there might be too much 'philosophy' imputed to the drafters in the second part of this statement. As we discuss presently, it is not so much the rejection of rights as restraints upon the exercise of state power as the willingness to put the exercise of rights under the control of the state power. The goal of constitution-makers in the eighth year of Polish democracy was not so much the entrenchment of rights as the entrenchment of power.

Professor Osiatyński, taking pride in his participation in the final drafting of the Polish Constitution of 1997, has stressed the importance of the provisions permitting the direct enforceability of rights:

> The leading provision, Article 8.2, holds that the provisions of the Constitution are directly effective. Articles 77 through 80 provide for the right of redress when rights and freedoms have been violated, the right of judicial protection, the right to appeal a court decision, the right to address the ombudsman, and most importantly, the right of constitutional complaint. . . .
>
> The introduction of judicial complaint and constitutional complaint is equalled with a departure from the tutelary model of the protection of rights only via the media or the ombudsman. . . . Now, every person can address personally the state and its officials—not as a subject, but as an equal. (Osiatyński, 1999: 53–4)

Professor Popławska offers a more sceptical view on the practical significance of this achievement, reminding us that constitutional complaint may only be submitted by a citizen after having used other methods of appeal and protection of his or her rights and further observes that the scope of constitutional complaints 'will prove to be disproportionately narrow as compared with the social expectations which arose, chiefly, due to unfamiliarity with law', leading to dissatisfaction with constitutional court in general (Popławska, 1999: 84). According to the official statistics, in the period from 17 October 1997 to 31 December 2000 there were 580 constitutional complaints registered of which 77 were referred to examination, 48 judged on their merits, 21 in which court passed judgments and eight in which the court had stated the unconstitutionality of the questioned legal norms.[6] In 2001, out of 2444 petitions only 26 were defined by the court as proper complaints and settled. Out of these 26, only in four cases was the unconstitutionality of legal provisions stated (*Rzeczpospolita*, 3 April 2002).

In the years that followed the 1989 Round Table, the constitutional law was dynamic. It was composed of rules of uneven degrees of implementation as well as of different character. Moreover, the aggressively creative interpretation named 'Falandyzacja', after its forefront proponent, Professor Falandysz, Lech Wałęsa's presidential minister, was used in order to conquer the questionable areas of political competence. Not only was the constitution-making in an academic sense open to the political struggle, as we have illustrated with help of the notion of the constitutional triangle, but so was the everyday constitution-making in sense of the enactment and accompanying reinterpretation of the rules of the game by the political actors. Some elements were made *via facti* and then pretended to be the constitutional custom. The open character of the constitution was reinforced by the auxiliary character of the constitutional court serving rather as a body of experts than power as such.

During the transition period, the institution of Ombudsperson, set up in 1988 by the Communist government, proved of special significance. The Ombudsperson was offered wide discretion by the law and empowered to file judicial proceedings to enforce civil rights and liberties. Law Professors Ewa Łętowska, the first incumbent of that office (1988–92), and her successor, Tadeusz Zieliński, were accountable to parliament

[6] See www.trybunal.gov.pl of 9.06.2002.

only, and were thus able to extend the scope of the recognized rights. Already in 1989, Łętowska was invoking diverse articles of the Covenant on Civil and Political Rights, thereby thickening the rather weak concoction of rights found in the constitution itself and was thus breaking the barrier between the local legal system and the West. To the surprise of Communist politicians, the new office became extremely popular with the public and soon some of the new, democratic politicians began to resent its popularity and interference with their executive sovereignty. The role of the Ombudsperson in implementing civic and human rights in Poland may be treated as functionally equivalent to that played by the constitutional court in Hungary (Kurczewski and Sullivan, 2002: 262–6). The entrance of the new Poland into the Council of Europe was the first important accession that helped the reformers to find a legal basis for the Council's requirements, the fundamental changes in law and its application. When in 1992 the jurisdiction of Strasbourg Court was also accepted by the Polish parliament, the formally isolated legal system of the sovereign state (though its sovereignty was of no avail against the threats of the Brezhnev doctrine) in practice opened up and extended abroad, with Polish citizens starting to queue for the implementation of ultimate justice regarding their rights as prescribed by the European Convention of Human Rights.

Parliament and Political Reconstruction

The Communist practice had paid lip service to the election mechanism, compensating with the stress on the representation. In theory the ruling subject was defined as 'urban and countryside working people', whose instruction was issued by the official vanguard—the Polish United Workers Party (a Marxist combination of former Communist and socialist parties) together with its allies, the Polish People's Party (Agrarian) and Democratic Party (middle class of employed intelligentsia and self-employed artisans and shopkeepers). Practically, it meant that candidates were nominated by the ruling party or at least had to be approved by it, while the electorate was offered no choice between the lists. Constitutionally, the Seym was sovereign, and this concept, which had been empty in the party-state, overnight assumed real meaning in 1989 with the disappearance of the Communist Party dictatorship. Article 101 of the Communist 1952 Constitution imposed upon the parliamentarians the duty 'to give account to the electorate of their own work as

well as that of the organs to which they have been elected'. The 1985 Law on Rights and Duties of the Deputies added the further duty 'to present and explain to the electorate the basic goals of the state's policy as well as the specific laws and decisions' (Art. 7). Other parts of this law imposed an obligation to meet with the electorate in the district and to lobby for various local interests. But more significantly, even the law as modified after the 1989 stated in its Article 1 that: 'Deputies and Senators represent the electors and fulfil their mandate according to the will of the electors following the good of the Nation'.

The concept of free mandate had not been eliminated by the Communists but was in practice suppressed. Reiterated again in 1989, it had been then reinforced through the introduction of the relevant principle in the Small Constitution of 1992 and alterations in the specific regulations. Though the emancipation of parliament was sudden, the transformation of the role of parliamentarian was gradual and in effect completed in Poland only after the new 1997 Constitution was followed by the further amendments in the law of the country. The constitution reiterated that 'Deputies shall be representatives of the Nation. They shall not be bound by any instructions of the electorate' (Art. 104).

One should recall that, established in 1985, in what was still Communist Poland, the constitutional court was the first court of its kind in Central and Eastern Europe. As with the other constitutional court systems, the Polish court had been empowered to decide on the constitutionality of the acts of parliament and other legal acts. However, afraid of too much independence for such a court, the Communist reformers who decided on its creation and competences, decided that the court's rulings concerning the parliamentary decisions could have been invalidated by the qualified majority of the parliament. In this way, the parliament was enjoying full sovereignty after 1989, as granted by the letter of the Communist Constitution of 1952. This power, which amounted to a 'legislative veto' over the constitutional judgments of the constitutional court, was exercised by parliament most fiercely and successfully in the case of decisions concerning social and economic rights, which, if implemented, would have been costly to government. Parliament's use of its power to override these judicial decisions thus enhanced the efficacy of the policies known as 'Balcerowicz's shock therapy', which permitted Poland to attain the greatest speed of economic development after the universal economic decline that accompanied the disintegration of the old command economy. But the same therapy was applied not only against the legalistic doubts but above all against the 'short-term' views of the public.

The initiators of the privatization in Poland report that Mazowiecki's government formulated its initial privatization plans in an atmosphere of considerable optimism. Despite the fact that the first post-Communist government in Poland consisted of a coalition appealing to the Solidarity tradition, its economic leaders were more influenced by the liberal point of view, and many of them believed that the main goal of the post-Communist structural reforms was to establish a traditional capitalist system of corporate governance that would put an end to the spontaneous (as well as often illegal) appropriation of state property by the local *nomenklatura*, and would limit the extraordinary powers of the workers' councils at the enterprise level. The speedy 'commercialization' was aimed at imposing the new legal regime in the state sector, centralization of decisions and rapid privatization à la Thatcher. It came out, however, that 'government's optimism was somewhat premature: the interests of the insiders turned out to be much more difficult to override than originally expected, and British-style methods of privatization were shown to be of little use in the largely sui generis situation of a post-Communist economy' (Frydman et al., 1993: 176–7). The 1990 Law on Privatization of State-Owned Enterprises is seen by the 'privatization-entrepreneurs' as a compromise: though the privatization decision-making was centralized in the Ministry of Ownership Transformation, it 'also gave the employees a virtual veto power over the corporization decision' and provided that up to 20 percent of the shares of each company could be purchased by workers and management at a 50 percent discount off the issue price. The implementation forced further compromises and delays except for the 'small privatization' of stores, workshops and other small units. Complaining about the politicization of the privatization process, authors must concede that the political problems had 'rather deep roots' and public opinion polls were showing the steady decline of support for privatization (Fedorowicz, 1996: 26). The actual pace of the privatization process was markedly slower than in some other ex-Communist countries. Still, the compromise was linked with full exploitation of the newly recovered post-1989 notion of the 'free mandate' of the democratically elected representatives (Kurczewski, 2000).

This is made most clear by the experienced politician who co-authored the transformation:

> [The] classical case is Balcerowicz's leap in the initial period. In June 1989, when we were going to elect ourselves, I had no idea as to the scope of the so-called transformation or change of the order. Change was

> significantly harming the significant part of my electorate. And here we have the case in which I (and the majority of the deputies) was acting in the way harmful for the aspirations of the electorate and in contradiction to what was proclaimed in the electoral program. The electoral program was changed because conditions changed. This is the reason for the deep political crisis as we are in effect facing today the rejection of politics. We shall pay the price for it for a very long time. One could ask today therefore if that was not a political mistake. Were we right when assuming then that this is necessary? I still do not see any other way to set up conditions for [a] market economy when the central system was breaking down. (from an interview during research on political representation in Poland; see Kurczewski, 2000)

This statement provides the best illustration of the whole politics of transformation and the role the representative democracy played in it. The free mandate legitimized the leap (whether backward or forward, it did not matter) to the capitalist economy above the electorate; the free elections legitimized the free mandate of the political class to do so.

Final Remarks

Once the compromise was achieved between political parties which had been fighting each other bitterly, the constitution was passed by parliament on 25 April 1997, and was accepted by the nation in a referendum. Solidarność, from outside the parliament, rejected the compromise. The empirical nation appeared at the polling booths with 42 percent of those entitled to vote, of whom only 53 percent voted in favour of the constitution, while 46 percent voted against it.

Of the constitution's 243 articles, 50 (21 percent) deal directly with the rights that are widely defined, programmatic and non-programmatic, and are offered to the nation in exchange for its approval. It is interesting that though the scope of constitutionalized rights was extended almost twofold, as compared with the Small Constitution, the share of rights-related text had remained similar in the two. These rights are under permanent reinterpretation, not only by the constitutional court but also by society and the politicians. This is the inevitable fate of rights such as 'the freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture' that 'shall be ensured to everyone' (Art. 73) or the duty of 'public authorities [that] shall pursue policies ensuring the ecological security of current and future generations' (Art. 74). Of

course, many rights are justiciable, but in fact the constitutionalization of rights entailed varying quality of rights.

More importantly, despite the wide political contestation of the new constitution, there has been no significant attempt to alter it since 1997. The fact is that it serves one purpose well, namely, the working compromise between the contesting political actors. Despite the hot debate on rights and values, the unchanged minimal textual share of rights in the constitution reflects that other parts were of more importance. The number of rights had been increased but the working of the political machinery of the state was specified and precise. Usually constitutions are officially interpreted as hierarchical normative structures with internal congruency. Constitutional history of post-Communist Poland would suggest a different view, however, that constitution is dualistic. It is composed of two parts, the internal constitution of the political class and the external constitution for the 'citizen' and for 'everyone'. In the first, one finds dozens of articles on the internal structure of the supreme organs of power and their mutual relations; in the second, dozens of rights of varying quality offered to citizens and 'everyone'. The constitutional turmoil in the first seven years of the new republic was manifestly over the rights but in fact was concerned with struggle over the role of parliament, government and presidency. Once the original contestants—General Jaruzelski and Lech Wałęsa—were eliminated from politics democratically, relative peace reigned despite electoral oscillations between Right and Left in power.

Article 4 of the Polish Constitution states:

1. Supreme power in the Republic of Poland shall be vested in the Nation.
2. The Nation shall exercise such power directly or through their representatives.

This article best reflects the constitutional dualism. Constitution was accepted by the nation directly, but the draft was made by the representatives. 'The right to order a nationwide referendum shall be vested in the Sejm' (Art. 124). The referendum, constitutional claim, direct governance and direct constitutionalism are left under the control of the political class. Politics has been moved from the now bankrupt shipyards to the parliamentary bars and halls.

The paradox of the country's constitution-making after 1989 is that on the one hand its length was justified in terms of the importance

attached to the constitution as such. Three parliaments and three presidents successively were engaged in the task, and almost all of the major political parties proposed their own drafts. Solidarność, when ousted in elections from parliament, succeeded in gathering enough signatures so that its draft was also included in the final set to serve as the draft base for the National Assembly. On the other hand, since 1997, when the constitution was passed, it has been used by the constitutional court but has not become the political frame of reference for the politicians or for the public. This paradox disappears when a distinction is made between two components of the constitution: the internal constitution that defines political actors and their mutual relations, and the outer constitution that lists rights and principles and is left to a closed judicial elite to be interpreted. In this way, a compromise had been secured within the otherwise divided political class that as collective 'insiders' safeguards its power against the threats of so-called populism, surmounting the claims and possible challenges from the outsiders. This happens behind the veil of democratic-participatory constitutional text that at first sight allows for public legislative initiative and referenda, and makes constitutional legal action seemingly open to citizens.

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CHAPTER NINE

CONSTITUTIONALISM AND THE PRESIDENCY IN THE RUSSIAN FEDERATION*

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The Russian president, Vladimir Putin, has emphasized the idea that the state should be a leading actor in post-Communist reconstruction. Proponents of the liberal point of view, too, have argued that the state is a crucial instrument for achieving post-Communist goals, including paradoxically the idea that the state powers should be limited and that a civil society should emerge (Weigle, 2000). A constitution should be an important tool for such a delicately balanced transition. The central question of political reconstruction is therefore: what type of constitution should be adopted and what role should it play?

The question becomes even more urgent if you put the Russian presidential system in a constitutional context. The role of presidentialism and the constitutional foundation of the presidential regime have provoked a great deal of scholarly discussion (Shugart and Carey, 1992; Linz and Valenzuela, 1994). For Huskey (1999), the deeply rooted social, moral and economic problems in Russia would be similar even with a parliamentarian regime; historical experience is more important than concrete institutional arrangements. On the other hand, Gadzhiev (2001), attributes the weak Russian state and its relative inability to implement constitutional and legal norms to the institutional design of the Russian Constitution with its emphasis on presidential power. Given the strong personalistic elements in Russian political culture, Nichols (1999) has argued for a presidential system. The Russian Federation is a new state but an old nation and the president should be independent from lobbying groups (Nichols, 1999: xxi).

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In this article it is argued that constitutionalism, in the narrow meaning of the rule of law in the political process, coexists with a mildly authoritarian, state-oriented presidential regime such as the Russian Federation under Vladimir Putin.

In Russian discourse, political reconstruction has been seen as more or less cynical 'political technology' and Putin's way to power is the primary example of such a kind of technology (see Pavlovsky, 2002). This is an accurate observation, but it should not diminish the significance of the presidential figure in the state-building process in the Russian Federation. Political reconstruction is a process of state-building closely connected with the creation of integrative symbols and mechanisms. It is precisely in the process of political reconstruction that presidentialism performs an integrative function. For the first time in modern Russian history a figure has appeared who does not seem to arouse severe opposition or give rise to dramatic confrontations.[1] Polls show continuing support for the president (Interfax, 9 January 2002). Although this popularity may have several causes, it cannot be denied that the president's role in creating an image of national leadership in his person has few parallels in modern times. The traditionally personalistic, authoritarian and patriarchal political culture in Russia (Afanas'ev, 1997) could in Putin's presidency find a manifestation in which tradition and modernity is united.

The scope of constitutionalism in the Russian Federation, however, is limited in the sense that constitutionally grounded prohibitions of violations of human rights in the Russian Federation are seldom well enforced (without even mentioning the Chechnya problem, which cannot be dealt with here). The constitution is not very effective in several areas.

Modern Constitutionalism

In the European tradition, constitutions formed the *framework* for the legal order and the political process but did not interfere in its actual workings. Such 'thin' (Lane and Ersson, 2000) or 'procedural' (Preuss, 1999) constitutions were and are partly still to be found in Northern Europe, for example, in Sweden or in the UK. This type of constitu-

[1] The stagnation period under Brezhnev was an exception but this model cannot be repeated.

tion conforms to the traditional role of a constitution as a document conferring powers to various state institutions. 'Thick' constitutions (Lane and Ersson, 2000), by contrast, have a more substantial content with power-constraining provisions which will affect the outcome of the political process. The legal order is in a precise sense dominated by constitutional norms mainly through mechanisms such as judicial review of administrative and legislative acts. Well-known examples are the USA and Germany, where the constitution controls the executive, the legislator and the judiciary.

The difference between these two types is a matter of degree and the difference diminishes gradually. The general trend during the last century has been for constitutions not only to determine procedures but also to set limits for the outcome of the political process, including the legislative activities of parliaments. Even pure power-conferring constitutions will also implicitly be power-constraining as human rights bills on the national and international level have been added to the traditional separation of powers. Moreover, supranational institutions have come to circumscribe the powers of democratically elected parliaments and governments. This tendency is also clearly to be noticed in states such as Sweden and the UK (Campbell, 2001).

The emergence of 'thick' constitutions on the European scene has had several underlying causes, but the main reason for this new constitutional structure has been the idea that the constitutional norms had to protect minorities and therefore had to be enforced against a parliamentary majority (Peczenik, 2000). The constitution should be normative and not just declarative also in those parts which are not strictly power conferring.

The power-constraining model is based on the relative autonomy of law and of the courts, including constitutional courts. Legal discourse consisting of a mixture of normative arguments and the value preferences of the judges will have an impact on the political process (Stone Sweet, 2000). Judicial discretion has limits, and should at the same time be legal and rational (Wroblewski, 1992). A legal decision is *normatively* constrained which does not exclude the possibility and sometimes also the desirability that its wider consequences be taken into account through a teleological interpretation. However, only certain kinds of consequences are allowed to influence the court's decision in a rule-governed state. Comprehensive comparative studies on legal reasoning by courts, and especially by supreme courts or constitutional courts, confirm the idea of basic constraints in judicial decision-making (MacCormick and Summers, 1991, 1997).

Constitutionalization

Constitutionalization is a consequence of the direct legal effects of a constitution and can be considered the technical mechanism for imposing constitutional norms upon the legal order, and on certain parts of the political order (Favoreu, 1990; Stone Sweet, 2000). Courts and constitutional courts are the main instruments for the constitutionalization process but there is a whole range of other devices for making a constitution dominate or have an impact on the political and legal order, thereby also penetrating society. For example, a constitutional text could prescribe that certain legislative acts be adopted in order for constitutional norms and principles to be effectively implemented. Only if these norms have not been adopted may the courts use the constitution directly.

At the same time, the concept could be used in comparative analysis to describe the *degree* of constitutionalization (Fogelklou, 1999). Different states have different degrees of constitutionalization of the legal and the political order. In the West this is not always a positive phenomenon. Involving constitutional norms in private law disputes, for example, makes the legal order more complex and less transparent. You need strong reasons to constrain the decision-making powers of democratic majorities. But constitutionalization is of great importance for the newly created democracies in Eastern Europe, where the constitution is an instrument of change and the basis for legal and political reforms.

The process of constitutionalization may be made precise by distinguishing its several dimensions (Fogelklou, 1999). The categories used here are normativity, strength, rigidity, density or preciseness, relevant protection, comprehensiveness and efficacy of a given constitution. These categories could be used either to compare existing constitutions or to assess the degree of constitutionalization. By *normativity* is meant the legal force of the constitution; the constitution should not primarily be declarative, but also have a direct force or validity. The constitution could play with several normative modalities in its provisions (someone 'shall' or 'ought to') and it could also restrict itself only to proclaiming certain state goals, which cannot be judicially enforced but might still be taken seriously by the legislator. Constitutional values may have a greater or lesser impact on the political system. The *strength* of a given constitution is decided by the possibilities of constitutional control and other enforcement means; the *rigidity* refers to the restrictions of constitutional change. The categories *density* and *preciseness* measure

how detailed constitutional regulation will be; it implies that scope of the constitution can become greater as more constitutional problems are given a normative answer, typically by a constitutional court. Legal certainty in the constitutional sphere will increase. Preciseness also refers to the structure of constitutional norms. Constitutional provisions could be more or less open textured, giving possibility for the courts to use their discretionary powers. By interpreting the precise content of constitutional provisions, most (constitutional) courts contribute to constitutional density and preciseness. By *relevant protection* is primarily meant the content of the bills of human rights, which can be compared with the international documents of human rights such as the UN 1966 International Covenants and the 1950 European Convention of Human Rights. If some rights mentioned in those documents are not included in the constitutional text of a particular state, a significant omission of constitutional protection has been made. *Comprehensiveness* is determined by the scope of the content of the constitution: what areas will it regulate and which areas will it leave out? If important areas are not constitutionally regulated, then those fields are without constitutional protection and the legislator may more freely adopt legislation that serves less general interests.

Efficacy, meaning constitutional legality, and adherence to the constitutional norms primarily by governmental bodies, is a final condition for a successful constitutionalization process. Efficacy, which is normally taken for granted in established democracies, should be included in an analysis of post-Communist transition and has to be distinguished from *effectiveness*, which relates to the issue of whether the goals of a given constitution are being fulfilled. Degrees of efficacy and of effectiveness are both difficult to assess.

Constitutionalism and Post-Communism

The general pattern in Eastern and Central European states after 1989 has been to adopt thick constitutions, with relatively strong judicial protection, for the simple, basic reason that in those states the constitution is an instrument of transition, an instrument of change. Memories and experiences of political repression and other abuses by the state resulted in the adoption of constitutions that limit the activities of the state. External influences played an important role. For this reason the power-constrain-ing functions of constitutions, and not their

power-conferring functions, have been central in the Central and East European constitutional discourse (Sajo, 1999). Here it is not only a question of protection of minorities against a majority, but also of protection against authoritarian and repressive tendencies of a strong presidential regime.

The constitution as the basis for a process of change and for constitutionalization can only be successful if it occurs under certain conditions. It must be a document which is entrenched against changes of the legislative majority, and be of some longevity. It should form the basis for control of legal acts, making it possible to declare norms implicit in these acts unconstitutional. The constitution should provide for the protection of those rights which are likely to be violated by legislative and administrative institutions (Sadurski, 2001). Finally, it should be congruent with the value system of the national community (Bogdanor, 1988: 10; Sadurski, 2001).

This last condition, that the values enshrined in the constitution in a post-Communist state should conform to the moral standards of the community where it is adopted, points to a fundamental paradox in the constitutionalization process in Central and Eastern Europe. The constitution is adopted in order to introduce political and societal changes, and at the same time, it must not deviate too much from the political and social environment in which it is supposed to function. But this latter demand is problematic. The potential positive function of a constitution as a legal transplant capable of promoting change could be lost. Instead of being *adapted* to a given community, new functions will emerge and the purpose of the constitution will be *transformed* (Nelken and Feest, 2001), giving rise to less positive and even to negative effects, for example, legitimizing substandard political and administrative procedures or decisions.

Constitutionalization and the Structural Potentials of the Russian Constitution

The Russian Federation adopted a *potentially* thick, liberal constitution (Sakwa, 1996) through a referendum on 12 December 1993, giving far-reaching possibilities for a process of constitutionalization process primarily through the activities of the Russian Constitutional Court. In order to implement constitutional norms and principles, the constitution also prescribed the mandatory adoption of a number of federal constitutional laws and ordinary federal laws.

The beginning did not, however, bode well for the new constitution. The adoption of the constitution had been preceded by violent struggle between the president and his administration, on the one side, and the parliament, the Congress of People's Deputies, on the other, which ended with the siege and an armed attack on the seat of parliament, the White House, on 3 October 1993. The positive result of the referendum, in all probability manipulated and exaggerated, was consequently achieved through electoral fraud (Shevtsova, 1999; Dunlop, 2000; Umnova, 1998). Although many constitutions were born in a time of crisis and upheaval, few have been adopted through electoral manipulations. But this incident has not affected the validity or legitimacy of the Russian Constitution on the central, federal level. Looking more closely at the Russian Constitution from the point of view of constitutionalization criteria, one cannot fail to notice that Russian constitutional law comprises several normative constitutional sources, thus fulfilling the condition that a constitution should be *normative* to serve as the basis for the process of constitutionalization.

1. (a) The Constitution of the Russian Federation is said to have supreme force and have direct validity on Russian territory (Art. 15, Part I). (b) Constitutional norms are to be found not only in the constitution itself but also international norms, which are part of the legal system of the Russian Federation (Art. 15, Part IV). These international norms consist of ratified treaties and 'generally accepted principles of international law'. Although the content of the 'generally accepted principles of international law' is disputed, they still fall under Russian constitutional law. According to one author, since Article 4 of the UN 1966 International Covenant on Civil and Political Rights, dealing with the possibility of restrictions of human rights in case of a state of emergency, has stricter demands than the Russian Constitution, the international norm should prevail over the Russian Constitution (Chernichenko, 1997). (c) Moreover, in the second chapter of the constitution, it is said that 'the rights and freedoms are directly valid' (Art. 18). This provision points to the possibility of unwritten norms. This means not only that explicit constitutional norms are valid, but also that unwritten legal principles form a part of the Russian legal system. Moreover human rights and freedoms not explicitly mentioned in the constitution are also normative sources (Art. 17, Part I, Art. 55, Part I). (d) Finally, the decisions of the Russian Constitutional Court must be regarded as valid precedents, i.e. valid norms in Russian constitutional law,

although this is not an undisputed standpoint (Livshits, 1997; Ebzeev, 1997b: 507).

2. The new Russian Constitution is *rigid* in the sense that possibilities for changing it are very restricted. Except for Chapters 1–2 and 9, amendments in other parts of the constitution must be passed by three-quarters of the members of the Federation Council, two-thirds of the members of the Duma and two-thirds of the 89 federal units, which are called the 'subjects' (Art. 136). Changes in Chapters 1–2 and 9 must be taken by a specially convened constitutional assembly and should be regulated by a federal constitutional law.
3. It is beyond any doubt that the constitutional text gives *basic* protection in the area of human rights, especially in the field of constitutional protection of the rule of law in the narrow sense (Art. 46–54), but also in other basic human rights sectors. Lack of precision concerning restrictions of human rights is to be noted since the constitution does not connect each human right with its respective limitations, but puts them all together in the same basket (Art. 55, Part III).
4. The constitution certainly is open, consisting as we have seen of norms directly derived from the constitutional text, norms taken from decisions of the constitutional court, unwritten legal principles and norms from international documents, particularly in the area of human rights. It is open and *comprehensive*, encompassing large areas with open boundaries but as we see later, the president's powers are not fully covered by the constitutional text but have grown in practice.
5. The Russian Constitution is potentially a thick constitution with large technical possibilities for constitutionalization but it is neither very efficacious nor very effective (Okunkov, 1996b). In Russian discourse, the normative and in this sense ideal character of the constitution comes out clearly in the expression *realisatsiya*, (implementation) of the constitution. This ontologically correct distinction between norms and reality has acquired another status in Russia than in the West. Whereas the general assumption in the West is that valid legal (including constitutional) norms are normally obeyed, this cannot be taken for granted in Russia. Lack of constitutional legality is then only an example of lack of legality in general or of legal nihilism, which has a mighty tradition in Russia and which has been strengthened during recent times of upheaval and chaos (Yakovlev, 1995; Smith, 1999; Sergeyev, 1998; Luchin, 2000; Fogelklou, 2000b).

Constitutionalization and the Russian Presidency

The constitution and its interpretation by the Russian Constitutional Court give vast powers to the president. The provisions on the presidency in the constitution were partly formulated in response to President Yeltsin's needs and interests (Ludwikowski, 1996). The formal model for the Russian Constitution in this part was the French semi-presidential Constitution of 1958, crafted for General Charles De Gaulle. The main idea of the French presidency was to create an institution which was to be 'the supreme judge of the national interest' (Michel Debré, cited in Bell, 1992: 15).

The Russian president, however, wields formally more power than his French counterpart, especially as France has moved to a more full-fledged parliamentary system, with the president actively taking part in parliamentary electoral campaigns and the prime minister deciding the actual national policy. The Russian president can veto legislative acts, as can the US, and has a vaguely defined right to adopt his own legislative measures, a prerogative which the French and US presidents do not have. The powers of the Russian president rest on a formally strong democratic legitimation; he is elected for a four-year term by the people, and has the right to be re-elected for a second time.

The role of the president has been controversial, but in constitutional practice it seems to have been twofold; the first role is that of the head of state, as personification of the nation and as guardian of the constitution. As such, the president stands above the triad of legislative, executive and judicial power and has a coordinating and controlling power. Acting in that sense as head of state, he or she is the guarantor of basic human rights and liberties, but also of the sovereignty and territorial integrity of the state (Art. 80, Parts II and II).[2]

The provision that the president shall decide the 'basic directions of the external and internal policy of the state' (Art. 80, Part III) can be regarded as a clarification of what has been said of the president as head of state. But it could also be seen as a norm granting the president the power to be head of the executive and to decide fundamental political issues. This is also the case. In his or her second role, the president is

[2] This derives from the Constitution of the French Fifth Republic and ultimately from Carl Schmitt's idea of 1931. See Arjomand's introductory (Chapter 1) above.

head of executive. The president's programme, and not that of the prime minister, will set the political agenda (see Okunkov, 1996a).

A possibility of difference of opinion between president and prime minister, as is the case in France, does not exist. The minister must be loyal to the president (Chetverin, 1997: 359). The prime minister could be dismissed by the president at any time (Art. 117, Part II). President Yeltsin dismissed four prime ministers in less than two years. This power is seen as a consequence of his being head of the executive, determining the political programme of the country (Baglai, 2000: 581).

All other members of the government beside the prime minister are appointed by the president on proposal from the prime minister (Art. 111, Part I). According to the Federal Constitutional Law on Government (Art. 32, Part I), ministries and institutions involved in the use of the armed forces, maintenance of security and conduct of foreign policy are directly subordinated to the president. The law does not demand that the leader of these organizations and ministries should be nominated with the consent of the prime minister.

In order to fulfil all numerous functions of the president, a large presidential administration has been established. Putin has already made some changes in the relevant legislation which is based on decrees from the president and his predecessor but with a minuscule constitutional support (Fogelklou, 2000a). There is a head of the administration, who is a key political figure. There are two main departments dealing with state and law and with control respectively. Another important figure is the director of the Office of the Administration, who deals with and controls material support (housing, cars, medical service, etc.) not only for the president and his administration but also for the members of the government, the two chambers of the Federal Assembly, the highest courts and the Central Electoral Commission. The financial resources of the Office of the Administration are very large. On the other hand, there is weak external financial control over the administration itself.

The officials of the Security Council are included in the presidential administration. The Security Council—as an independent consultative body with coordinating and controlling functions—conducts a uniform security policy: foreign and domestic policy and emergency situations are under its control. This body is only mentioned in the constitution, and has been established through presidential decrees. The powers of the Council seem to have been expanded under Putin. It is mainly this body that decided the use of military force in Chechnya in 1994 and 1999 through normative and operational presidential decrees (Fogelklou, 2000a).

Given this normative and organizational background, the powers of the government and in particular those of the prime minister appear less important. The government is a vast body with a wide range of tasks. The leading, operative cabinet consists of the prime minister and the deputy prime ministers. Although the constitution (Art. 113) states that the prime minister shall determine the guidelines for the activity of the government, the impact of the prime minister on policy questions must be in accordance with those of the president and his administration, leading to a partial duplication of the work of the government. For example, both the Ministry of Justice and the main Department for State and Law of the Administration deal with legal reform (Huskey, 1999).

A newly elected president must propose a candidate for prime minister to the Duma, the lower chamber of the Federal Assembly, even if it is the same person as before the presidential elections. The time for elections for president determines the tenure of the government. Conversely, parliamentary elections do not as such affect the composition of the government. The political will of the majority of the Duma does not, from a constitutional-legal point of view, affect government policies.

Even though the Federal Constitutional Law on Government states that if the prime minister resigns all the other members of the government have to go, the government as a collective body does not have political responsibility before the Duma but only in relation to the president. The ministries have only individual responsibility before the Duma. Consequently, the provisions for a vote of no-confidence in the government (Art. 117, Parts III and IV) are not very useful, since they presuppose a parliamentarian system.

The relation between the president and the Federal Assembly is nowadays much less controversial than it used to be under Yeltsin. The comprehensive legislative and budgetary powers given to the Duma do not seem to threaten the president's policies, and already in Yeltsin's time, massive legislative efforts were made possible in the Federal Assembly through compromises and negotiations. Putin now enjoys a comfortable majority in the Duma after the elections in 1999, during which the media in a concerted action attacked strong competitors to the newly founded party Yedinstvo (Unity), which supported him and won the elections.

According to the constitutional court, presidential decrees may be adopted in areas in which the Federal Assembly should have legislated, but has not yet done so. With the bulk of new legislation now in place,

the area for presidential decrees gradually decreases. Nevertheless, according to the chair of the constitutional court, Baglai, the president still enjoys some constitutive legislative powers because he has to decide 'basic directions of the external and internal policy of the state' (Baglai, 2000).

Most of the laws that are prescribed by the constitution in order to implement constitutional principles are now in force. Legislative constitutionalization has consequently been successful even though the important federal constitutional law to regulate the procedure of changing Chapters 1, 2 and 9 of the constitution has not been adopted.

Under Yeltsin some attempts by the Duma to impeach the president were made but never succeeded, partly due to the difficult constitutionally regulated impeachment procedure (Art. 93).

The Presidency and the Constitutional Court

The major instrument for the constitutionalization process in Russia, however, is the Constitutional Court. It is through the court that the constitution could acquire strength. Since the majority of judges in the Russian Constitutional Court supported the parliament in the fight between Yeltsin and the parliament, it was suspended after the crisis in September–October 1993, and did not resume its activities until 1995 with a new law from 1994 as its basis.

The collective memory of this incident must be one of the reasons why the constitutional court has rather consistently supported presidential powers in the Russian Federation (Epstein et al., 2001). According to the present law, judges are elected by the Federation Council for 15 years with a 70 year age limit and no possibility of being re-elected. Appointments made according to the old law of 1991 had been for life, with the consequence that presently the court consists of two categories of judges. The old constitutional court, which consisted of 13 judges, was divided into two main factions in relation to Boris Yeltsin.

In the reconstructed court, a division between a more pragmatic and a more principled side can be discerned, and political differences continue to exist. The first chair of the reconstructed court asserted that 'political restraint', which to his mind characterizes the activities and roles of most constitutional courts in the world, must be the guiding principle for the court's activities (Tumanov, 1996). Restraint can be seen as a pragmatic strategy for avoiding a clash with those political institutions which have the power to retaliate.

The style and methods of the courts mean a clear break with Russian formalistic judicial traditions. The Russian Constitutional Court uses a variety of methods, proceeding from the usual linguistic and semantic points of departure to historical, teleological and systemic methods and the use of principles, including unwritten ones. They often refer to earlier decisions, and several types of arguments can be found in one case (for example, Decision of 7 June 2000 (on Internet: http:/ks.rfnet/ru/pos/).

An important circumstance is the existence of dissenting opinions which highlight the problem from various perspectives. The norm in the Federal Constitutional Law on the Constitutional Court, which requires the court to take into consideration only questions of law, does not seem to have prevented the court from discussing wider possible consequences of a decision (see, for example, Decision of 18 January 1996, dissenting opinion, N. V. Vitruk; available at: http:/ks.rfnet/ru/pos/).

However, this more open-ended argumentative method and style is not without danger. In particular, the use of the systemic method, in which several provisions in the constitution are interpreted together, opens the possibility for the court to exercise far-reaching discretion. As an example one may refer to the very important Chechnya decision which gave the president large powers to use military force without clear legislative support (Fogelklou, 1997).

The majority of the court on 31 July 1995 affirmed the constitutionality of the presidential decrees ordering the use of military forces in Chechnya without formal statutory support. The present use of military forces in this region might then be seen as an example of implied powers, given to the president and founded on the judgment of 1995. Another controversial decision of the court was to give the president the right to propose the same candidate for prime minister three times to the Duma, thereby forcing the Duma to accept his candidate. If the Duma refuses the same candidate three times, the president can still appoint him or her prime minister and dissolve the parliament (see Art. 111, Part IV and Luryi, 1999).

President Putin and Constitutionalism

The changes in the Russian constitutional order implemented by President Vladimir Putin, which have aroused mixed feelings in Russia and abroad, must be seen against the background of the lack of efficacy of federal norms in various regions and republics and the lack of

effectiveness of the Russian state in general. His attempts to curtail the powers of financial 'oligarchs', although partially selective, must also be understood as a way of dealing with lobbying groups and with a few important corrupt officials. The term *diktatura zakona* (dictatorship of the law) which Putin used, perhaps as a paradox, shows the ambiguity of the situation. The term *diktatura* could refer to the Leninist dictatorship of the proletariat, which now has been turned around and used in the opposite direction, in the sense that Lenin defined dictatorship as a way of governing without being constrained by law. But it could also refer to a narrow conception of law and constitutionalism as legality, as a legislative act (*zakon*), representing the will of state.

The way that Putin implemented his ideas point to the latter interpretation. Following the Russian tradition, the *state* emerges as the main instrument for his reforms and not various social groups and parties. The constitution as such is not relevant for his strategies. In reality he changed the constitution, without changing it formally, and the constitution did not consequently form a constraint for his activities. Without feeling constrained by the constitution, he has thus established through presidential decrees a new federal organ, the State Council, and has created seven presidential districts as representatives of his administration. He has also made several other centralizing measures, which would make it possible for him to dismiss governors when they have committed grave violations of the legal order (Fogelklou, 2000a).

Also, as a Russian legal scholar (Lazarev, 2001: 461) puts it, the way Putin came to power was 'not positive' for Russian constitutional development, and would lead to a narrow, legalistic conception of constitutionalism.

From a formal point of view, Boris Yeltsin's resignation before the end of his tenure and his replacement as acting president by Prime Minister Vladimir Putin followed the rules of the constitutional game. In the elections on 26 March 2000, Putin became the first elected leader of Russia to come to power by a constitutionally valid procedure, replacing the former president. For the first time in Russian history, a change of power at the top took place in a formally democratic way. Putin, a former head of the Federal Security Service had become prime minister in August 1999, being the fourth prime minister to be appointed within less than two years. The most important measure taken after Putin's appointment was the use, for the second time, of military means to stabilize the situation in Chechnya, resulting in terrible hardships for the civilian population. The employment of military force in Chechnya

proved to be rather popular with a large segment of the Russian voters, and contributed to the victory of Yedinstvo in the parliamentary elections in December 1999.

A more important factor behind Putin's success was President Yeltsin's sudden resignation in December, making Putin as prime minister acting president according to Article 92, Part III. That gave him an excellent chance to win the presidential elections, which had to take place within three months of Yeltsin's resignation.

Putin's first act as acting president was to give immunity to the former president. The constitution and the president's legislative powers were thus used as a strategic tool, while the values that the constitution is supposed to promote receded a long way into the background (Fogelklou, 2000a).

What kind of constitutionalism then has developed in the Russian Federation? In the area of presidency, it must be regarded as a thin constitutionalism, the function of legitimizing decisions being much more important than the function of constraining decisions. Seeing the constitution as a whole, one could opt for two main interpretations of Russian constitutionalism. The first would be to designate it as *transitional constitutionalism,* pointing to the fact the constitutional structure of the Russian Federation is not stable but in a process of transformation or perpetual reinterpretation. A new president, and you will get a different constitution. Russia, however, has a *potentially* strong or thick constitution (Sharlet, 1996).

Any constitution is a normative programme for the future; the time factor is central and consequently *consolidated* constitutionalism can emerge as a result of the constitutionalization process and internalization of the constitutional norms (Fogelklou, 1999). Constitutional control would only become more effective when and if the Russian society has become stabilized (Schwartz, 2000). Perhaps Putin's programme of putting the emphasis on order first, and only then on the rule of law, could be seen in this perspective.

Presently, however, it would be more truthful to assert that we are dealing with a formally strong but in reality in several areas a weak or thin constitution, and that it will remain so in the near future. Such a type of constitutionalism could be called formal or thin constitutionalism. Constitutional values do not gain deep ground in society and the president's accountability is poorly developed. The main functions of the constitution are to legitimize and legalize decisions, but it will not affect the outcomes of the political process very much. This could be

a counterpart to what has been called *delegative* democracy (O'Connel, 1994), or to what in Russian discourse is called *upravleamaya demokratiya* (managed democracy). Elections determine the compositions of parliaments and local assemblies but in the period between elections political power is exercised without much dialogue with the public. The media is more or less under the control of the executive.

In this interpretation of Russian constitutionalism the efficacy of the constitution is maintained, i.e. constitutional legality is intended to be observed; there is no open *non-compliance* with the constitution, but more ambitious goals of the constitution are not achieved, and in several areas, they are not intended to be achieved by a potential constitutional lawgiver. The constitution is not very effective, but its relative ineffectiveness does not create great discontent. Constitutional control is limited in various formal or informal ways. The constitutional setting is far away or even incompatible with the political and social reality (Huskey, 1999), and will to a large extent have only symbolic functions (Blankenagel, 1999). The two latter statements are too emphatic. Thin or weak constitutional constraints surround the Russian president, but they *exist* normatively and are to a certain extent also present in the political process and in the political reality.

Time will decide whether this formal or thin constitutionalism will continue to prevail, or if a more consolidated kind of constitutionalism will slowly develop in Russia.

How should one assess such a state of affairs? This question again leads us back to the advantages and problems with a presidential regime with weak constitutional constraints. We cannot discuss this question in detail. The disadvantages of a political culture associated with persons rather than with institutions remain. The problems of constitutional efficacy, constitutional legality, particularly in the regions and in the bureaucracy, and effectiveness in reaching intermediate constitutional goals do not seem to have improved significantly under Putin, although legislation has, to a large extent, now been adopted in the various regions conforming to the federal constitution. Putin's centralizing method of political reconstruction, however, has met resistance in some national republics. Strong federal units such as the republics Tatarstan and Bashkorstan will continue to oppose the president's centralizing strategies. On the other hand, political stabilization, improved legal certainty, stronger reform possibilities, a constitution in conformity with a personalistic political culture and a certain distance from various interest groups by the president could be seen as advantages of such a presidential regime.

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CHAPTER TEN

INSTITUTIONAL INNOVATIONS AND MORAL FOUNDATIONS OF CONSTITUTIONALISM IN EAST CENTRAL EUROPE: COPING WITH THE PAST HUMAN RIGHTS VIOLATIONS

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"Never again!" is a slogan of anti-dictatorial movements throughout the world. Taken seriously, this slogan evokes an obligation to face the past human rights abuse, and promote "the most basic hope" (Ignatieff, 2001) that the particular moments of horror in these societies will be recorded and adjudicated. It presents also an important semantic foundation for constitution building. As Andras Sajo emphasizes with respect to post-communist constitutions, they are "fear creatures", since they reflect "the fears originating in, and related to, the previous political regime" (Sajo, 1999, p. 2).

On the other hand, the scope and range of past gross human rights violations and the very recent memories of them pose great challenges to post-dictatorial formation of constitutionalism. Such challenges are not new, though. They were already present when Germany was rebuilding her constitutional order after 1945, and had to answer questions on how to promote the formation of a new, liberal and democratic, constitutional community after Auschwitz. They were also present in other European countries, such as France, Belgium and the Netherlands which have to deal with the occupying Nazi regimes collaborators. Very recently, they were present in Latin America or South Africa, and the list could be continued including other countries and continents, as for instance Asia.

Similar questions have become pertinent in Eastern and Central Europe. Among them are issues of how to incorporate the *Gulag* experience into the process of forming new constitutions and installing the

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rule of law, how to treat the perpetrators and instigators of atrocities, and how to compensate their victims, and how to reconstruct the morally devastated societies? One should also not forget that victims and perpetrators were here entangled in manifold links and interconnections in their daily lives. There also existed a vast "grey area" of activities that are difficult to define: the regime informants who never actually informed, the great numbers of petty regime functionaries and fellow travelers, mere cowards, blatant opportunists, as well as persons who were blackmailed or thought they could protect their families and friends. One should also consider the nature of the change, i.e., the fact that the democratization and liberalization process started not because of revolutions, civil wars, or lost wars, but because of negotiations and pacts between some members and supporters of the former regime, and some members of its opposition, sometimes because of elections, sometimes because of moves made by the most reform-oriented representatives of the old regime themselves—as was the case with *perestroyka* in the former Soviet Union—and sometimes because of long years of societies trying to find loopholes in the system and use them to their advantage.

The past entanglements, as well as the nature of the changes, have resulted in certain typical post-communist contingencies: great ambiguities and ambivalences that challenge efforts aimed at forming clear-cut definitions and clear-cut approaches toward the past. These contingencies, ambiguities and ambivalences are reflected in concepts that function as semantic foundations for the new social and political order and its institutional framework, and as important factors in its legitimization. However, contingent concepts, such as the very concept of the rule of law, also have their hidden meanings. In light of the main argument of this paper, one of the important tasks for those investigating social and political reconstruction after the collapse of a totalitarian regime consists in analyzing public discourses, digging into the hidden meanings of what is being used to legitimize the new order and determine specific paths in the development of post-dictatorial and post-totalitarian constitutionalism. It can be argued that such an analysis contributes importantly to the explanation of the emerging institutional developments in post-authoritarian societies, to the explanation of their distinctive constitutional processes.

This paper will focus on the political and cultural discourses that link the rule of law—as a minimal requirement of constitutionalism (Nino 1996:25)—and other important political and cultural concepts

related to past human rights violations in Eastern and Central Europe. In other words, it will debate semantic foundations of the emerging constitutionalism after the former regime collapse from the sociological and anthropological points of view since, as argues Adam Czarnota, the strictly legal approach is not satisfactory here (Czarnota, 2005, p. 124).

A map of my analysis follows. Firstly, I will briefly outline the differentiated approaches to past human rights violations, mostly in East Central Europe, but with some regard paid to these activities in other parts of the world. Secondly, I will explore how the past is dealt with in political debates in order to legitimize new governments and differentiate them from the past dictatorships. Finally, I will try to investigate the hidden, deeply rooted and even archetypal meanings of the dominant concepts. In the concluding remarks of this paper I will return to my initial arguments on the discursive foundations of institutional reconstruction and constitutionalism after the collapse of communism.

Approaches to Past Atrocities: A Brief Outline of Behavioral Examples and the Main Hypothesis

According to anthropologically oriented philosophy of law, the very notion of a constitution, of the rule of law itself, as well as the basic legal concepts of crime, punishment, human rights, human dignity, perpetrators and victims all function as legal rhetoric: they link legal meanings with those ascribed to them by their addressees, and appeal to the set of resources already available in the given culture. Simultaneously, however, they have a creative function since they constitute a legal, i.e., constitutional community united by common understanding and common values. (Boyd White 1985:30). In light of such propositions, to investigate the formation of a socially binding constitutional order would mean delving into the hidden meanings of concepts used in constitutional and political debates. Here a special place is held for past human rights violations since dealing with them attests to the sincerity of the initial slogan "never again," and leads to the hidden, cultural resources that would assist post-totalitarian societies in restoring their integrity, their internal bonds. From the sociological perspective, coping with the past human rights violations—especially punishing the perpetrators and instigators—can contribute to the reinstatement of basic accepted values in society, following the Durkheimian approach to social solidarity.

Institutionalization of efforts to deal with a totalitarian or dictatorial past takes the form of trials aimed at punishing crimes committed in the name of the state, and "disqualifying," i.e., ousting its former officials (Offe 1994:198). This form is currently known as lustration or de-Communization in Central and Eastern Europe, and historically as de-Nazification in postwar Germany. It can also encompass procedures, which aim to compensate victims, financially or morally. The most recent case of a victim-oriented approach to the past is found in negotiations for legally binding resolutions that would enable the compensation of forced laborers from Eastern and Central Europe who worked in Germany during World War II. The adopted strategies to deal with the past human rights violations could also focus on truth telling and reconciliation in an open debate, and in the form of some transitory, extra legal procedures.

All of these issues prove to be extremely difficult to tackle: they involve great efforts and civil courage on the part of societies, political elites and the judiciary. They also provoke some questions concerning their "output"—the historical truth which emerges from the trials, compensation or reconciliation. On the other hand, the "input"—the construction of institutions and procedures which are to deal with the difficult issues of the past—manifests the profound cultural differences between societies which have to face the reality of their own past. This is especially the case if that past has included crimes against humanity and violations of fundamental human rights by functionaries, and the tacit consent, more active collaboration, or indifference of the social majority.

The significantly different approaches taken by the post-totalitarian or post-authoritarian societies are illustrated by behavioral indicators. German society has had to come to terms with a totalitarian past twice within the last half-century or so, and comparatively speaking, has done it most thoroughly with respect to the communist past. With regard to the legacy of Communism in the former GDR this was done through the activities of the Gauck Commission, which collected evidence of collaboration with the Communist regime, the thorough investigation of crimes, and the resulting trials. Thus, Germans are among those who have most forthrightly undertaken efforts to confront their recent past. As has been observed, they have achieved it in three ways:

1. in the form of regular trials of those regime functionaries who were guilty of crimes, as direct perpetrators or as instigators;

2. in the form of disqualification procedures in cases where guilt cannot be a strictly legal issue because the penal code of the time did not include the concept of the given crime; and
3. in the form of discovering the past and coming to terms with it, as opposed to concealing it (Offe 1994:34). In Germany, each person, and not only citizens, has a right to have an access to his/her own files with names of the secret collaborators not erased.

Next to the Germans, the Czechs have undergone rather thorough and comprehensive lustration and de-Communization, mostly because of the final approval of it by President Vaclav Havel. The Czech lustration law of 1990, however, had been strongly criticized, above all because of the presumption of guilt (Siklova 1996; Gintis 1999). This law is then representative of the ever-present conflict between righting wrongs of the past and staying true to the rule of law principle. Also there is the problem of the secret police files—the possibility of their verification and their vast numbers.

The legal approach, with its stress on judicial procedures, was applied much later in the Polish lustration law. This law, passed in 1997, declared that civil servants, deputies, senators, judges and candidates for these positions must disclose whether they consciously collaborated with the secret police or worked for them between 1944 and 1990.[1] This approach is also based on sequestration of the archival records of the secret service in the Institute of National Remembrance. In Poland each citizen has a right to apply to have access to his/her file, but currently the decision is taken on the basis that the applicant has been victimized. Only applicants recognized as victims will be granted access to files. This law is constantly strongly criticized in Poland, not only because of doubts with regard to the evidence—secret police

[1] Modern usage of the term lustration was initiated by the Czechs, and their comprehensive lustration law of 1990. Under this law, every citizen has a right to apply to a special office for the result of his/her lustration, a document stating whether he/she was registered as a collaborator of the secret police (StB). This document is required to serve in certain government posts, run for office, or work in certain government offices. Those who hold positions requiring lustration must resign if they refuse to provide their lustration results. People who disagree with the findings in their report can seek redress from the Appeals Commission. The anomaly of the Czech lustration process is that it only affects those labeled "candidates for collaboration," i.e., those whose collaboration was questionable. The worst perpetrators never applied for their lustration, quietly resigned from governments posts, and moved to new, more lucrative positions as entrepreneurs (Siklova, op. cit. p. 58).

files—and the exclusive control over these files by the Office of State Security, but also because of the limited access to the files, the exclusion from the process of the general public. Currently, in 2006, after the series of scandals when the whole lists of collaborators' names were published in some newspapers and on the Web, there are projects to change the law substantially, and open the files to everybody. Another important feature of the Polish approach to the past human rights abuse presents a strong support for the establishment of extra judicial bodies and procedures, such as truth commissions, or truth and reconciliation commissions, or, as currently with respect to the files of collaborators within the Catholic Church, commissions of "truth and care" in order to deal with cases in which the strict adherence to the rule of law principle is not satisfactory. It does not help to clear unclear cases.

Yet another institutional reaction to the past was taken by the Constitutional Court in Hungary, quite in accord with the description of the Hungarian revolution as "lawful" in the strictly legal, positivistic sense. As the most important agent in the formation of a constitutional community in Hungary after the collapse of the communist regime, the Constitutional Court there has several times referred to such values as legal certainty and clear definitions of legal concepts as foundations of constitutionalism. Retroactive justice and the possibility of punishing political perpetrators, instigators, and functionaries therefore runs counter to the principles of legal certainty and is outweighed by the lack of a clear-cut legal concept that would enable precise definitions of crime and punishment. This approach did not prevent the publications of lists of agents' names, and accusations. Finally, in Hungary, too, a law was passed according to which a very limited number of officials was subjected to lustration.

In still other societies which have had to deal with their dictatorial past—including countries in Latin America, or Africa—court-like institutions and tribunals, truth commissions, or truth and reconciliation commissions have been established whose aim has been not only to deal with the past but also to enable the compensation of victims and reconciliation between formerly lethal enemies. This was in order—as has been argued by Archbishop Desmond Tutu—to "heal" the divided and traumatized people and to unite a polarized nation (as cited in Ignatieff 1996). In yet other countries, such as Bulgaria or Russia and most post-Soviet republics (with the notable exception of the Baltic Republics), such steps to deal with the past have not been undertaken at all—except for the efforts of the most courageous civic organizations,

like the Russian *Memorial*—and compensation of victims has been rarely discussed and most seriously limited. Here, the horrors of the former regime are largely concealed.

The various methods of dealing with the past—punishment and trials of perpetrators, disqualification known as lustration and de-Communization in Central and Eastern Europe, or de-Nazification in Germany after World War II, the compensation of victims, and seeking the truth as a foundation for reconciliation as, for instance, in South Africa, or concealment of the past—are cultural phenomena and not purely legal or political endeavors. Their social instantiations reveal, in light of the main hypothesis of this paper, rhetorical and discursive practices aimed at reconstructing or distorting the historical truth and facing one's own past. Again in light of this hypothesis, to investigate institutions formed to deal with past wrongs means to dig into the implicit and explicit techniques which reflect the deepest, residual convictions, values, and worldviews—those which involve the most primary foundations of social life.

Totalitarian Past, Political Identity, and Legitimization of the New, Democratic Government

One of the most important tasks of the new regimes consists of defining its identity and legitimizing itself. This means finding its semantics that would pose a frame of reference for political structure and political actions, and enable politics to define itself. As Niklas Luhmann argues, modern political systems "require possibilities of self-observation and self-description, i.e., an 'identity' of their own, to guide their own operations." What follows, is the "semantic steering of the self-observation of a particular kind of social system: the political system" (Luhmann 1990:120–21). This occurs through the provision of language and the concepts in which the political systems describe and differentiate themselves from their environments and from their past, and thus legitimize their own existence.

Therefore, one way of building a new order is to draw a boundary between the old and the new, and to declare various aspects of the old regime illegitimate, and of the new regime legitimate. Such an effort to draw a decisive line between the "old" and the "new" was probably most notable after the French Revolution, marked by the introduction of the new calendar. It started a new epoch "from zero" and posed a decisive rupture in that society's history.

Contemporary revolutions are played on two scales as far as past human rights violations are concerned: either they declare the old regime illegitimate or even criminal, and, therefore, create conditions for punishing the former human rights abusers, or they take an unclear, ambivalent attitude toward it. In the first case, the former system and its legal order are defined as opposed to legality, as *Unrecht*. This conceptualization of a "zero" starting point in history, of a rupture or discontinuation enabled the punishment of the officials of the old regime in postwar Germany, regardless of their claims that they—as state officials (*Beamten*)—were obliged to observe the binding law.

Current examples of facing the past are provided by the post-Communist societies in Central and Eastern Europe. These are cases of great difficulties with facing the past and simultaneous reconstruction of devastated societies as well. With regard to the latter issue, one has to remember that the long coexistence of the victims with the perpetrators—seventy years in Russia and fifty years in Central and Eastern Europe—and the complete permeation of Communism that left great numbers of perpetrators and victims behind, makes dealing with the past even more difficult. Moreover, the processes of democratization that started in the second half of the twentieth century worldwide, and, above all, in Central and Eastern Europe, resulted from negotiations and pacts between the reformist members of the old regime and the moderate members of the opposition in Poland and Hungary, followed by other countries of the Communist bloc, with the notable exception of Germany. There, the "round table" negotiations proved inconclusive, and quietly died out before the unification of Germany took place (Preuss, 1996).

Hence, we see ambivalent aspects in approaches toward the past in the political debate. On the one hand, it seemed feasible to continue reforms that were initiated by the reformist members of the old regime—to continue *perestroyka* in Russia, and the economic reforms in Hungary or Poland—and to protect their initiators. On the other, one had to deal with the past legacies. To deal with such ambivalences the concept of "refolution"—a mix of popular anti-regime sentiments and reforms initiated "from above" by enlightened reformers—was coined. Another concept was embodied in the slogan of drawing a "thick line" proposed by Tadeusz Mazowiecki, Prime Minister in the first Polish democratic government. Instead of a "zero" starting point, this was to be a line dividing the past from the present and future that

would facilitate national consolidation as well as legitimization of the new government.

The concept of the "thick line" proved to be insufficient when confronted by legacies of past human rights abuse. One had to deal with perpetrators and instigators of the most atrocious crimes committed by the functionaries of the old regime until the very last days of its existence (Łoś and Zybertowicz 1999). Moreover, it became apparent that it is not possible to get rid of a nation's history, and it is unavoidable to answer questions related to the past especially because of the democratic nature of the new regime. Hence, as it is argued, democratization presents conditions in which the officially sponsored versions of history and the tabooing of the past runs out of control, together with historical myths and delusions. Then "atrocities vehemently come to the surface" (Reinprecht 2001:102).

In accord with this argument, the popular debate in Poland about the bestial murder of nearly the entire local population of Jews by their neighbors in a small Polish town in 1941, began after publication of a book on those events in 2000.[2] Indeed, in Poland and elsewhere in post-Communist Europe, open, public debates on the engagement in and support of human rights violations committed under a totalitarian regime, on the deportations of whole populations, and on the defamation of national heroes were possible because of the fulfillment of fundamental requirements of democracy: the existence of a free press and constitutionally protected freedom of speech. Thus, in Central and Eastern Europe, as elsewhere, it soon became evident that it is not enough to establish formally democratic structures and proclaim democratic constitutions, but that democracy rests on social and cultural capital, on skills that enable participation in public debate. It also became clear that some approaches to the past, notably those connected with the "thick line" policy proclaimed by the government in order to consolidate society, could acquire quite an authoritarian tone, even if promoted by respected former dissidents. If the voices of such "tacit heroes" of the resistance to totalitarianism are not heard, and the daily life experiences of persons who lived under an oppressive regime are not taken into account, then, applying the already classic

[2] The extracts from the whole debate on Jedwabne see in English http://free.ngo.pl/wiez/jedwabne/main.htlm.

Albert Hirschman proposition, 'loyalty' disappears, the legitimization of the new, democratic government is put in question, and the danger of 'exit,' of refusal to cooperate with, and to participate in democratic procedures becomes quite serious (Hirschman 1970).

Another crucial concept used as a semantic tool in the new regime's self-definition and legitimization is the concept of *Rechtsstaat,* a state ruled by law. Indeed, as has been emphasized many times, events that took place in East Central Europe were not only peaceful, "velvet" or self-limiting, but first and foremost lawful (Kidaly 1995:12). The very concept of *Rechtsstaat* presented a powerful ideology of lawfulness, and justified the remarkable lack of revenge. The principle of a state ruled by law was duly proclaimed in all post-Communist constitutions as their opening norm. It led to subsequent introduction of important institutions aimed at protecting the rule of law and the constitution, namely, the constitutional review by the constitutional courts and tribunals with extensive prerogatives, judicial review of governmental decisions, and the institutions of an ombudsperson whose function was the protection of civil rights. Notwithstanding the notorious difficulties in the practical application of the rule of law principle in societies characterized by a low level of legality and a great deal of corruption, its symbolic meaning and its message could not be underestimated: it meant a break with the lawlessness and human rights violations of the past regimes of horror, and the fulfillment of the slogan "never again!"

However, the rule of law provision itself could be interpreted in quite different ways: either in its narrowly positivistic meaning, or as referring to deeper, cultural resources already present in a given society. With regard to narrow legal interpretation of the rule of law, it has been observed that it is badly suited for dealing with the former human rights abuse and, indeed, can be used as protection for the old regime functionaries and thus contribute to the preservation of the *status quo* (Morawski 1999:47). This is especially true where the law is still applied by judges educated and trained under the prior regime. On the other hand, the rule of law principle could be interpreted in a way that refers to the more open-ended concepts of human dignity, justice in its various conceptualizations, and human rights. One of these rights is of crucial importance for dealing with the past—for revealing or concealing it, and for the inclusion or exclusion of different voices in the public debate. This is the right to truth, linked deeply with the very Central European dissident tradition, first and foremost with the famous Vaclav Havel (1985) proposal of "living within the truth" as opposed to the lie (Havel 1985:57).

Thus, to face past human rights violations would mean, above all, to learn the truth about them which means no less than a society learning the truth about itself. This is a most difficult endeavor, since the truth about a society's past is extremely broad. It has many aspects and is, as any truth about a society, the subject of manipulation, distortion, and interpretation from different perspectives. A researcher into the truth-seeking about the communist past taking place in the form of parliamentary debates in Poland comes to the conclusion that it reflects plural, even conflicting truths. Furthermore, these truths are predominantly those presented by powerful social groups who try to validate their version of the past (Łoś 1995). The same conclusion can be drawn from observations concerning the authoritative resolutions of various public discourses, and the role of mass media in the transformation of the truth into a media event (Wexler 1995). The discourse about the past and historical truth thus creates a space for power struggle, symbolic domination, and symbolic oppression.

Learning the truth about the past also means deciding how the new officials will treat the guilt of the old ones. Evaluation of a system leads to the evaluation of its functionaries, collaborators, and the behavior of the whole society when confronted with a criminal regime. Sometimes this leads to the "cleansing" of the structures of the state apparatus, the justice system and the retraining of functionaries tainted by collaboration with the former regime. If coming to terms with the past is oriented to prosecuting and punishing, we can call such an approach to the past perpetrator-oriented.

However, learning the truth about the past could lead to compensation and honoring of its victims above all, and then to rectifying the wrongs committed by the regime as much as possible. The truth could be instrumental as a basis for a victim-oriented approach to the past and, subsequently, a fulfillment of procedural justice requirements—not only the "cleansing" of social institutions, but also the "healing" of social wounds. Finally, learning about the past and coming to terms with it could build a foundation for the reconstruction of social bonds on the basis of reconciliation, to create an "organic" based on cooperation, and not the "mechanic" based on the fear of punishment, type of social solidarity.

As we are dealing here with truly primal values and norms related to the foundations of social order upon which social cohesion rests (guilt, punishment, compensation, reconciliation, or concealment of the past)—of a Durkheimian sacred sphere—the most important cognitive understandings and epistemologies are arguably provided by religious

semantics. Thus, religious semantics can be seen here as that cultural factor which provides institutions, discourses, and actions with archetypal meanings, justifications and legitimations, even in secularized societies. In the remainder of this paper this hypothesis will be developed, in an ideal-typical way, by reference to the three dominant religious semantics in East Central Europe: the Protestant, the Catholic, and the Christian Orthodox, first and foremost to the powerful Russian Orthodoxy These semantics help to overcome contingencies, and to absorb ambiguities that result from the legacies of the past and impede the process of dealing with past atrocities. Having the deep religious affinities it does not, however, mean that they reveal the actual religious composition or denomination of the societies in question, but rather that they reflect the historical and culturally transmitted meanings which support formation of institutional arrangements and the discourses that concern institutions.

The Protestant Way of Dealing With Past Atrocities: The Predominantly Perpetrator-Oriented Approach

The most tentative outline of the Protestant way of dealing with atrocities committed by the functionaries of a totalitarian or dictatorial regime would certainly stress the learning of the truth about the past with the aim of punishing those who committed crimes, and strongly emphasizing individual responsibility for one's own deeds as an aspect of justice, next to the compensation of the actual individual losses. Here the individual guilt and punishment of the perpetrator is connected to the concept of human dignity understood as the "right to just punishment" and an aspect of the dignity of a human, i.e., rational, person.[3]

Such a right to just punishment refers primarily to individual responsibility for one's own salvation, accompanied by methodical investigation of individual cases and the courage to come to terms with one's own

[3] The "right to be punished" is based on the argument regarding the moral nature of punishment. This right has been expressed by the American philosopher of law, Herbert Morris, who was opposed to therapeutic attitudes towards perpetrators of crimes. The source of such a right lies in the fundamental right to be treated as a rational human being. It is further a consequence of the fundamental right to human dignity because the realization of such a right is based on the recognition of the perpetrator as an autonomous and free person (Morris 1975:573).

individual history and virtuous as well as evil deeds. The calculation, balancing of arguments, and reckoning—related to the concept of an "economy of salvation"—is also important in establishing the exact punishment in individual cases (Weber 1958:98). The concretization and individualization of guilt precludes its being ascribed to an anonymously acting "system", approached passively as a kind of historical inevitability. Rather, it is considered the doing of real people, functionaries or collaborators of the regime who were actively representing it, and who can be actively dealt with.

The Protestant individualization and concretization of guilt, responsibility and punishment corresponds directly with the structures of modern legal reasoning. Legal decisions and verdicts concern individual guilt, and the punishment of a perpetrator or instigator is based upon proven evidence. Such reasoning also invokes specific methods of learning the truth in the form of legal procedures and debates about guilt and the calculation of just punishment. The methods of learning the truth and decisions on individual guilt will then be subordinated to the principles of legality, and the functioning of the *Rechtsstaat*. In modern societies, the Protestant, perpetrator-oriented, legality-based, and individualistic approach is paradigmatic, or one could even say, classic for penal procedures in the state ruled by law. Moreover, in light of propositions formulated by American socio-legal scholar, Mark Osiel, the trials of perpetrators—and this author referred to Argentinean show trials—are able to implant liberal values in society and observance of human rights quite in accord with the above-mentioned theory of Emile Durkheim that the function of criminal law is to reinstate of basic values in society (Osiel 1997).

Nevertheless, even if the Protestant approach to past atrocities brings a possibility that perpetrators will be punished, that individual responsibilities will be investigated, and that debates about past wrongs will be subject to legal procedures and controlled by them, there are some basic, cultural and institutional conflicts which are inherent in, or characteristic of this approach. Such conflicts are most visible during the deep, overwhelming social change caused by the collapse of the old regime. They result from the separation of two spheres: that which belongs to God and the mundane sphere which belongs to the state authority. They are also connected with the specific legacy of the past regime in form of the above-mentioned unclear, "grey zone" of changing roles of perpetrators and victims, their entanglements and complex relationships.

The first of such conflicts concerns the *Rechtsstaat* principle as belonging to the sphere of the state authority separate from the sphere of God, and affects issues of justice, or just punishment for collaboration with the regime. This is especially difficult if there was no clear legal prescription or clear definition of the crime and punishment at the time, even if the contribution of a given person to a human rights violation is indisputable. The second conflict concerns the issue of the guilt of state functionaries who were fulfilling their duties and following orders. Both of these conflicts in the contemporary secularized world involve the relationship between law and morality, the official obligations of public servants and their private morals in the public and private spheres respectively. Because the Protestant approach to guilt and punishment is based on the systemic differentiation of separate legal, moral, religious, private and public spheres, some difficulties arise when the crimes and atrocities are beyond the law or not subject to legal regulation.

Such difficulties became manifest during the trial of Eichmann in Jerusalem, in the perpetrator's infamous attitude toward his own deeds. There, the perpetrator of the most advanced forms of genocide justified his deeds: firstly, by reference to his duties as a state functionary—as a *Beamte* fulfilling his duties (what came to be known as the "banality of evil"), and, secondly, by stressing the lack of clear legal prescriptions on which his punishment could be based since he was not personally involved in the killing of a single human being.

As we know, the proceedings in this case were modeled on the Nuremberg proceedings after the Second World War, and they were based on legal foundations broader than written law. In the case of the recent Communist past in Germany, the conflict between the duties of the state functionaries, who were following orders, the lack of a clear legal basis for punishment of human rights violations in some cases, and the actual wrongs done by these officials, was mostly resolved in a strictly legal fashion. Case by case, the legal basis for the punishment of each official was sought. Sometimes this resulted in punishment, sometimes in the lack of it; sometimes the punishment was evaluated as not corresponding to the committed crime,[4] and sometimes the reason for punishment was sought in the distant past while the actually named

[4] Such a highly disputable case is presented by the relatively low punishment of medical doctors responsible for prescribing drugs to East German athletes. The drugs were taken by the athletes who were not advised about the sometimes fatal consequences and damages.

crime had nothing to do with the atrocities committed by the given functionary of the communist regime.[5]

One also observes that the truth thus obtained during trials represents something which in Anglo-Saxon legal systems is called a procedural truth, not necessarily consistent with "real" truth, i.e., the empirically-tested truth concerning actual events. As has been mentioned, the discrepancy between the rule of law and dealing with past atrocities is observed in the case of the Czech lustration and de-Communization: some of the past crimes have been justified by the past totalitarian or authoritarian legal system, while others go unexamined because evidence has been destroyed. In the Czech Republic, for instance, it is estimated that 10% of the files were stolen or destroyed by officials and agents in the first days of the Velvet Revolution. The biggest problem is the difficulty in verifying the information contained in the files. As it is maintained, of the 140,000 people listed in the files, over half were labeled "candidates for collaboration," and many other names were enlisted through blackmail or without their actual knowledge (Siklova, op. cit.: 58). Similar problems are faced by other societies, notably by the Polish which is also trying to deal with the problem of lustration, i.e., a "cleansing" of state structures in a legally regulated way.[6]

The Victim Oriented Approach: "Catholic" Ways of Discovering the Truth, and "Healing" Social Wounds

Considering these difficulties with the realization of just retribution, or the *Rechtsstaat* principle, the Czech President Vaclav Havel signed into the law in 1993 the "Law on the Illegitimacy of, and Resistance to the Communist Regime." The effects of that law are victim-oriented: to morally justify and honor individuals and groups who, based on moral conviction, resisted and fought against the former regime. It also provided a basis upon which to rehabilitate or elevate, as well as to compensate those who had suffered under that regime became the first

[5] The proceedings against Erich Mielke, the former head of the Stasi, the GDR secret political police, are a good example. Mielke headed the Stasi for over 30 years until 1989, but he was prosecuted for events related to the killing of two police officers in 1936.

[6] In Poland, the first serious attempt to implement lustration ended in disaster when a quickly prepared list of alleged agents was presented in the Parliament, naming, among others, the then President Lech Wałęsa.

subject of the new government. Considering this specific legislation as not strictly legal but more proclamative, its appeal to consciousness and morality, its stress on the moral justification and honoring of victims, and its emphasis on their moral convictions in fighting against the criminal regime leads us to consider another, archetypally-rooted discourse on guilt, violations of human rights, and genocide. One has to add that in such countries as Poland, despite the great difficulties in the punishment of perpetrators, the compensation of the former regime victims goes on smoothly and efficiently (Kulesza 2002). This is the Catholic discourse regarding perpetrators and victims, justice and a supreme, natural law, and truth-seeking procedures.

First and foremost, the Catholic doctrine, especially as represented by Augustine and Thomas Aquinas, consists of a critical attitude towards state authority. Such criticism has deep roots in the Catholic philosophy of law and political philosophy articulated by Thomas Aquinas in the concept of the divine origin of natural law, which has priority over state laws, and the theory of justified civic disobedience. The former legitimizes critical attitudes toward the state and its officials if they violate divine, i.e., natural law. The latter indicates the importance of civil society in the defense of human rights.

Furthermore, the crucial religious institutions of Catholicism stress that the moral compensation of the victim takes priority over punishment of the perpetrator. However, this is closely linked with confession as a truth-seeking technique, and expiation as an individual's way of dealing with one's own past. Then comes absolution and mercy. Here God's laws, transformed into morality in secularized societies, are placed above the formal, state penal law. Therefore, confession as a means of uncovering the truth is placed above the legal procedures of collecting and testing evidence, repentance and expiation take priority over formal punishment, and punishment, in turn, is defined primarily in terms of consciousness—individual, internal self-punishment. According to such conceptualizations of guilt and punishment, the latter should be connected with mercy, and possible reconciliation between the victim and the perpetrator.

The Catholic approach to human rights abuse does not exclude legal, penal proceedings and punishment, but its conceptualization of the victim and his dignity, the perpetrator and his guilt, punishment and expiation, and the procedures of truth finding all illustrate the Catholic attitude towards the mundane sphere of state authority as not separate but subordinated to the sphere of God's laws. Moreover,

in light of Catholic doctrine, protection of human dignity and human dignity itself are defined as not separate from but formed within the community. Hence, the far less individualistic and more communitarian society features a "Catholic way."

There are striking affinities between the Catholic approach to guilt and punishment and the institutions constructed for dealing with past wrongs known as truth and reconciliation commissions focused on truth-finding, and, simultaneously, on political mercy, and, finally, on political reconciliation, independent or instead of regular trials based upon legal procedures of gathering and testing evidence and punishing perpetrators. Truth commissions have been appointed in many countries in Latin America, in South Africa, currently the establishment of such a commission is debated in Poland, and many local truth commissions start to function in that country spontaneously. Typically, in each case a profound ethical and political debate has taken place about the value of criminal prosecutions. Often, though necessarily not always, prosecution is seen as opposed to or sometimes only supplementing the truth telling and reconciliation.

Speaking of a Catholic way or approach to the past, one has to stress the role of the Catholic Church as an institution critical of state authorities in the former communist countries in East Central Europe. This was an institution which acted on the part of civil society, but also as one which decided, authoritatively, on mercy and reconciliation. This became most evident in Poland where the activity of the Roman Catholic Church aimed at protection of human rights and posed a prominent player in the post-Communist transformation. However, the Catholic Church played an important part during initial round table negotiations in Poland too, promoting reconciliation.[7] Currently, in Poland the Catholic Church is deeply engaged in the establishment of a so-called truth and ethics commission on the national level, and in the particular dioceses of the so-called truth and care commissions whose aim would be to investigate the collaboration of the clergy with the communist secret police.

The most revealing empirical illustration of a truth and reconciliation stressing approach to the past were provided by the truth, or truth

[7] In Poland, the representatives of the Catholic Church was present at the "round table" talks in 1989 as observers, but nevertheless they played and important part in those negoatiations (Gebert 1990).

and reconciliation commissions in Latin America, but above all, by the Truth and Reconciliation Commission in Republic of South Africa. According to its analyst, the Truth and Reconciliation Commission in South Africa was essentially seen as a forum where the victims and perpetrators of apartheid could tell their stories. A link was drawn between "confessional and tribunal": a "legal tribunal" and "public confessional" (Christodulidis 1999:4–5).

In a specific way, the establishment of truth and reconciliation commissions was linked with the concept of human dignity and, simultaneously, with the community: societal bonds and their ethical foundations. Differently than in the "Protestant" way described earlier, here human dignity was conceptualized firstly, as a right of victims to historical truth, as affiormation of victims indeed, and secondly, as linked with the right to free speech, and as a foundation for social bonds restoration in a communicative action. Needless to say, these commissions and public confessions made before them are much better suited to debating of the unclear cases, sorting out those, in which the collaborators were also victims.

There are, however, several problems that emerge from the analysis of the functioning of the truth and reconciliation commissions and their outcomes as institutionalizations of a "Catholic approach" to past atrocities in the context of massive human rights abuse in modern society. These problematic issues result from an unclear relationship between guilt and punishment on the one side, and mercy and reconciliation on the other, and the unclear relationship between the "higher laws" of God and the mundane, manmade state law. The latter is even more visible in modern, pluralistic societies where the necessarily arbitrary proclamations about the content of natural law are contested by a democratic, civil society. Hence, it is not at all clear whether confession is a better way to obtain the truth than regular court proceedings, and whether reconciliation could replace the punishment of perpetrators. Finally, and perhaps most importantly, in real societies an argument stressing the subordination of state law to God's laws could easily be manipulated by those who hold power—either political, military, or religious. Another approach to the past human rights violations presents the Polish lustration law, according to which the truth is exchanged for amnesty, but not for amnesty for the perpetrators of crimes directly involved in violation of human rights. Institutes of national remembrance, partially modeled on the German Gauck Commission have been also established in Poland and other Central European new democracies.

The task of these institutes is to gather data and evidence, and to reveal files not only to such persons, who can prove their personal interest in them as the former victims, but following the broad public demand, to the general public. Therefore, in such countries as the Czech Republic, Slovakia, and in the near future also in Poland, the files are published on the Internet.

Orthodox Passivity Towards Violations of Human Rights?

It seems important to ask, why, in certain situations or in certain societies, neither disqualification nor punishment takes place, despite the millions of victims and the existence of concentration or labor camps, and despite the political will of some politicians to reveal the truth? The most prominent example of such a reluctance present Russia, Belarus, the Ukraine or Bulgaria, where, despite the enormous human rights abuses, not only have no efforts been undertaken to clean up the social structures and institutions, but there is apparently neither political nor popular social will to obtain compensation, and the perpetrators are living well and undisturbed within the same society in which they committed their most atrocious crimes.

Amazingly enough, not only does no lustration law exist there, but no significant effort has been made to learn the truth, not to mention the restoration of the regime's victims dignity. We are dealing here with the examples of a pervasive phenomenon: complete impunity of the most egregious human rights abuses and state crimes, such as extra-judicial executions, tortures, psychiatric commitments of political prisoners, or detention in labor-camps that had been undertaken on a systematic and wide-spread scale. Moreover, the totalitarian and criminal past is still symbolically present, and even celebrated, at least in Russia and Belarus: during the last presidential elections in Russia, the totalitarian past was symbolized by portraits of Stalin who is publicly adored. It should be emphasized that Russia, next to the eastern Ukraine, were controlled by the Communist Party for seventy years, and nowhere else in this region was the number of victims and perpetrators so vast (Applebaum, 2003). The usual explanation for this indifference to the historical truth, the absence of any efforts to punish perpetrators, not to mention instigators, and the insignificance of efforts to compensate victims is Russian society's deep lack of respect for the legal system, and the rule of law. (Fuller 1968, Polish ed. 1993:13). Such a lack of

respect, and the lack of understanding of the importance of law for civil society functioning, is considered as a major legacy of the Russian colonization of her western territories. The explanation is given also by the weakness of civil society, indeed the complete lack of tradition of independent and spontaneous social organization, and the current revival of a neopatrimonial system in Russia (Lynch 2005:159).

Another possible but very tentative answer that may help explain such an indifference toward past human rights abuse could be connected to certain features of the Byzantine Orthodox unification—or *symphonia*—of the Church and state authority, and the absence of human rights discourse. All this does not mean that contemporary Russian, Belorussian or the Ukrainian, or perhaps also Bulgarian society are deeply religious; on the contrary, it seems that presently at least religion plays mostly a rather decorative role. However, in accordance with my proposition presented here, one should look for an explanation of this rather astonishing approach to the historical past and its victims in the deep structures of thinking, and in worldviews and semantics rooted in its fundamental cultural heritage, provided by Orthodox Christianity, first and foremost by the powerful Russian Orthodoxy.

First of them is the stress on forgiveness, on the love of enemies (Berman, 1993:360,366). Above all however, the Orthodox faith and theology emphasize the community instead of the individual. However, this theology is hardly directly applicable to the real world and actual social and political phenomena. Therefore, one cannot seek advice there on how to manage social and political affairs, or find the ethical foundations of the social and political order, since Christian Orthodoxy is characterized by a great power of liturgy, deep mysticism and lack of interest in wordly affairs. Hence, guilt, sin, crime, and punishment are here conceptualized in terms of guilt and crimes against God, against divine commandments, and against religious, i.e., mystical life (Przybył 2000). Contributing to this mysticism is also a deep belief in the forgiveness and omnigraciousness—*Apocanastasis*—of God. It is believed that some day, in the unknown future, God will forgive everybody, including Satan as the originator of evil in the universe, otherwise God would not be omnigracious (Tokarczyk 1986:197). Such a conviction is subcutaneous to all Christian Orthodox thinking because any other solution would contradict these key attributes of God. Therefore, any evil or virtuous human action can only be judged at the Last Judgment, at the end of the world, when earthly time has reached its end (Tokarczyk 1986:198). Thus, all efforts to judge and punish the crimes

undertaken in the real world seem quite meaningless when confronted with God's Last Judgment, especially if the theological, not mundane, ethical, and not legal aspects of human action is considered.

Two Brief Conclusions

As the moral and political philosopher, Hanna Pitkin, maintains, constitutions are not only something that we have but above all they are also something that we do "…founding, framing and shaping something anew" (Pitkin 1987:168). Therefore, constitutions, the rule of law, and the protection of human rights present also a salient part of modern political discourse. In East Central Europe, these concepts were used in order to legitimize the change and to integrate societies after the collapse of their former regimes and to build new constitutional orders based on the rule of law. However, as we have observed, these concepts, and the relevant institutions that protect the rule of law do not easily take root "in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure" (Carothers 1998:96).

In Eastern and Central Europe we are also dealing with other challenges faced by the rule of law and the installation of constitutionalism. These are posed by the legacies of the totalitarian past, large-scale human rights violations, and uncounted numbers of perpetrators and victims. Therefore, shaping of constitutionalism in those countries has an important moral dimension. Dealing with this past these societies are using important, politically influenced and culturally rooted discursive resources and techniques. Therefore, I have tried to reconstruct, in an ideal-typical way, the characteristic discursive resources and semantic techniques and tools used to deal with the past gross human rights violations in the process of institutionalization of the liberal constitutional order. Although my conclusions are only of a hypothetical and very tentative nature, it seems that the potential for political and social reconstruction lies in those societies which have a will to confront their past, to punish the worst perpetrators, and to compensate their victims. The methods of doing so are modeled on religiously-based arguments and techniques, transformed into cultural discourses and value structures that constitute the context of the institutional formations, even in the secularized societies.

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CHAPTER ELEVEN

THE CONSTITUTION IN THE PROCESS OF DENATIONALIZATION*

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I. The Claim of the Constitution

In 1973 Niklas Luhmann could still assert that a radical change in the state of the constitution and the institutional and operational understanding of constitutional arrangements comparable to the establishment of the constitutional state in the late eighteenth century has never occured again.[1] In the meantime, such change is looming. Its cause is the process of the decline of statehood [*Entstaatlichung*], which could not then be foreseen. In essence, this consists of the transfer of public power to non-state actors and its exercise in non-state procedures. This has consequences for the constitution because it originally referred to the state. Its historical significance lay in the juridification [*Verrechtlichung*] of public power, and public power was identical to the state power. Owing to the advantages associated with this, the constitution has been regarded as a civilizing achievement up to the present day.[2] Pre-state forms of political rule not only had no constitution, they could not have had one. The question is whether this achievement can survive in the "postnational constellation."[3]

By constitution I understand here the law produced through a political decision that regulates the establishment and exercise of political rule. The constitution in this sense is a novelty of the eighteenth century that

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[1] Niklas Luhmann, "Politische Verfassungen im Kontext des Gesellschaftssystems," *Der Staat* 12 (1973): 4.

[2] Luhmann, "Verfassung als evolutionäre Errungenschaft," *Rechtshistorisches Journal* 9 (1990): 176.

[3] Jürgen Habermas, *The Postnational Constellation* (Cambridge, MA: MIT Press, 2001).

of course did not arise out of nothing, but had not previously existed in this form.[4] The normative constitution came into being in 1776 on what was then the periphery of the western world, in North America. Thirteen years later, in 1789, it reached Europe. In Europe and the other parts of the world it influenced, the whole nineteenth century was permeated and determined by the struggle around the spread of the constitution. The victory the idea of constitutionalism seemed to win at the end of the First World War, however, turned out to be short-lived. Only toward the end of the twentieth century, after numerous detours and reversals, did constitutionalism prevail universally. Today constitutionless states are the exception, which, of course, is not to say that the constitution is intended or taken seriously everywhere.

Concerning its novelty, we should not let ourselves be deceived by the fact that the notion of "constitution" is older than the US and French constitutions. Before their appearance it was not a normative concept but an empirical one.[5] Brought into political language from the description of nature, it designated the condition of a country, as shaped by the character of its territory and inhabitants, its historical development and prevailing power relations, its legal norms and political institutions. With social philosophy's increasing effort to restrict state power in favor of the freedom of subjects, the notion of "constitution" was narrowed; its non-normative elements were gradually cast off until the constitution finally appeared to be the condition determined by public law. It was nevertheless not the kernel of constitutional norms but rather the condition they determined that was designated by the word "constitution."

Only with the late-eighteenth-century revolutions in North America and France, which violently overthrew ancestral rule and established a new order on the basis of rational planning and legal codification, was there a transition from a descriptive to a prescriptive concept. Since then the constitution has ordinarily been identified with the complex of norms that fundamentally and comprehensively regulate the establishment and exercise of state power. The empirical constitution did not disappear, but returned in the shape of the "constitutional reality"

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[4] See Dieter Grimm, *Die Zukunft der Verfassung*, 3e (Frankfurt: Suhrkamp, 2002), 31f., and *Deutsche Verfassungsgeschichte*, 3e (Frankfurt: Suhrkamp, 1995), 10ff.

[5] See Heinz Mohnhaupt and Dieter Grimm, *Verfassung*, 2e (Berlin: Duncker & Humblot, 2002).

that influences the law. But when we speak of constitutionalization, we always speak of the legal and not the factual constitution. The legal constitution does not reproduce social reality but addresses expectations to it, the fulfillment of which does not go without saying and for just this reason requires legal support. The constitution thus takes its distance from political reality and only thereby acquires the ability to serve as standard for political behavior and judgment.

If the legal constitution did not arise earlier, this is because it depends on preconditions that did not exist in the past. For a long time the constitution in the sense of a law that specializes in norming political rule lacked an object.[6] Before the functional differentiation of society there was no social system that, by its delimitation from other systems, specialized in the exercise of political rule. Rather, the tasks of ruling were divided up by location, subject matter, and function among numerous independent bearers. There was no comprehensive political body to which the particular rights of rule could have been ascribed. Rights referred less to territories than to people. Their bearers exercised them not as independent functions but as an adjunct of a certain social status, namely, as landholders. What are now held apart as private and public were still mixed together.

This is not to say that rule was exercised without any legal bounds. To the contrary, there was a dense mesh of legal bonds that were traced back to a divine foundation or held traditionally. For this reason they had priority over the enacted law and could not be altered by it. But these legal bonds did not represent a constitution in the sense of a particular law specializing in the exercise of political rule. Just as the authority to rule was only a dependent adjunct of other legal positions, it was governed by the corresponding law. From this we see that not every juridification of authority results in a constitution. The many works devoted to the ancient or medieval constitution do not thereby lose their value. But one must not confuse these constitutions with the normative text, implemented on the basis of a political decision, that claims to regulate rule.

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[6] See Helmut Quaritsch, *Staat und Souveränität* (Frankfurt/Main: Athenäum, 1970), 182ff.; on the older order of domination, see ibid., 196ff., as well as Otto Brunner, *Land und Herrschaft*, 6e (Darmstadt: Wissenschaftliche Buchgesellschaft, 1970); on the significance of the transition to functional differentiation, see Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt/Main: Suhrkamp, 1997), 595ff., and *Die Politik der Gesellschaft* (Frankfurt/Main: Suhrkamp, 2000), 69ff.

From the perspective that interests us here, the decline of statehood, however, it is more significant that only with the modern state does an object emerge capable of having a constitution. Like the normative constitution, the state too was a historical novelty, but temporally it preceded the constitution. State-building arose when religious divisions removed the basis for the medieval order based on divine revelation and a new form of political domination developed in continental Europe in reaction to the confessional civil wars of the sixteenth and seventeenth centuries.[7] It was based on the conviction, prepared by Bodin and other French theorists, that civil wars can only be settled by a superior power that raises itself above the warring parties and possesses sufficient power resources to establish and enforce a new order independent of contested religious truths, and thus to reestablish domestic peace.

In this effort, the princes of various territories, starting with France, undertook to unite the numerous, scattered prerogatives and consolidate comprehensive public power over the territory. Because of the need to build a new order, public power also included the right to make laws, which was no longer limited by a higher law derived from God. In fact, rulers continued to regard themselves as divinely legitimated, and did not disavow the bindingness of divine command. But this command no longer had legal effect. Instead, law was made by a worldly authority and in this sense positivized. As positive, it no longer drew its validity from its accordance with God's plan for salvation, but from the ruler's will; divine or natural law, its name notwithstanding, lost its legal quality and was now only morally binding.

The previously unknown notion of the "state" soon became used for this new kind of polity. If it was later also applied by historians to earlier periods, this was a matter of the reassignation of an object of another kind. The state possessed sovereignty, defined as the highest power, subordinate to no other external or internal power. Like the thing it designated, this concept too was new.[8] At its core, sovereignty

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[7] See Roman Schnur, *Die französischen Juristen im konfessionellen Bürgerkrieg des 16. Jahrhunderts* (Berlin: Duncker & Humblot, 1962); Charles Tilly, ed., *The Formation of the National States in Western Europe* (Princeton: Princeton University Press, 1975); Perry Anderson, *The Rise of the Absolutist State* (London: Verso, 1979); Kenneth Dyson, *The State Tradition in Western Europe* (Oxford: Oxford University Press, 1980).

[8] See Quaritsch, *Staat und Souveränität* (no. 6), and *Souveränität* (Berlin: Duncker & Humblot, 1986); Hans Boldt et al., "Staat und Souveränität" in Otto Brunner, Werner Conze, and Reinhart Koselleck, eds., *Geschichtliche Grundbegriffe*, vol. 6 (Stuttgart: Klett, 1990), 1; Paul Ludwig Weinacht, *Staat* (Berlin, 1968).

signified the ruler's right to make the law for all his subjects without himself being legally bound. Externally, this designated the right to determine domestic conditions free from the interference of other states. The means for enforcing this claim was the monopoly on the use of force in Max Weber's sense,[9] the flipside of which was the elimination of all intermediary powers. The establishment of the sovereign state thus went along with the privatization of society. The mixture of private and public was dissolved.

Of course, the establishment of the state was not an event but a process that did not reach its conclusion anywhere on the continent before the French Revolution and had scarcely begun in England when it was limited by the Glorious Revolution of 1688.[10] Unlike the French and American Revolutions that followed a century later, England saw a revolution in defense of the old order, namely the rights of parliament, against the crown's transformative designs. For this reason it did not lead to a constitution in the modern sense.[11] On the continent, however, there was now an object capable of having a constitution in the form of a state that did not hold a number of prerogatives but public power, and specialized in its exercise. If nevertheless no constitution in the modern sense emerged, this was because the state developed under these conditions as an absolutist princely state, defined precisely by not being bound by law.

This is not to assert the complete absence of legal restrictions on the ruler. There were restrictions of this kind even under absolute monarchy. But insofar as they were not simply the vestiges of earlier historical layers, they could only be conceived as self-restrictions on princely power. Normally they were wrested from the ruler by particular groups of well-placed subjects and fixed in so-called charters [*Herrschaftsverträgen*], whose validity was based on the unanimous wills of the participants.[12] As contractually binding, however, these restrictions always presupposed

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[9] Max Weber, *Economy and Society* (1921), pt. I, ch. 1, §17; pt. II, ch. 8, §2; ch. 9, §2. See Andreas Anter, *Max Webers Theorie des modernen Staates* (Berlin: Duncker & Humblot, 1995).

[10] See Hans-Christoph Schröder, *Die Revolutionen Englands im 17. Jahrhundert* (Frankfurt/Main: Suhrkamp, 1986).

[11] But see the short-lived "Instrument of Government" imposed after the abolition of the monarchy under Cromwell: text in Samuel Gardiner, ed., *The Constitutional Documents of the Puritan Revolution* (Oxford: Oxford University Press, 1968), 405.

[12] See Rudolf Vierhaus, ed., *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze* (Göttingen: Vandenhoek und Rupprecht, 1977).

the authority of the monarch to rule. They restricted his authority to rule, which was in principle comprehensive, only punctually. They did not benefit all the subjects; rather, their effects were reserved for the privileged contractual partners. As far as they extended, they juridified political rule, but nowhere did they appear with the comprehensive claim to legitimation and regulation that distinguishes the modern constitution.

Nor did the social philosophy of the time, which saw at once that the new concentration of power confronted it with the question of a non-transcendental legitimation of rule, extend its efforts as far as the idea of a constitution.[13] For social philosophy, any rule that—assuming rational behavior—could be *thought of* as emerging from the free agreement of all was legitimate. In this way, the consensus of the subjects of rule was elevated to the central category grounding legitimacy. In social contract theory, however, it was neither traced back to an actual contract nor fixed in a written agreement, but rather used as a hypothetical test of whether one could consent to rule. The theory of the social contract thus did not fundamentally place in question existing rule that was independent of consensus as long as it corresponded to the particular rational imperatives for which the contract was only a theoretical bridge.

Nevertheless, the conditions under which philosophy assumed the readiness of rational beings to leave the state of nature and submit themselves to government changed in the course of time.[14] In response to civil war, it even arrived at a justification of absolute rule: only when the individual ceded all his natural rights to the state and completely submitted to it would the state be in the position to guarantee his physical safety, which, in the face of the existential threat of civil war, had the highest priority. Once the absolutist state had successfully concluded the civil war and re-established domestic peace, the complete surrender of natural rights no longer appeared plausible. Now it sufficed for the individual to give up the right to use force in pursuit of his own interests. Otherwise he retained his natural freedoms, and

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[13] The sole exception was Emer de Vattel, *Le droit des gens ou principe de la loi naturelle* (Leiden 1758); see Mohnhaupt and Grimm, *Verfassung*, 91f., 105.

[14] See Otto von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*, 5e (Aalen: Scientia, 1958); Wolfgang Kersting, *Die politische Philosophie des Gesellschaftsvertrages* (Darmstadt: WBG, 1994); Diethelm Klippel, *Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts* (Paderorn: Schöningh, 1976).

the state drew its justification precisely from protecting those freedoms from encroachments.

These ideas were put into action when in North American and France ancestral rule was toppled by revolution and the resulting power vacuum had to be filled. In this situation, it was decisive for the emergence of the constitution that in both cases the revolutionaries were not satisfied with replacing the overthrown rulers with other ones. Acting as representatives of the people, they first designed a model of legitimate rule; only on the basis of this model were individuals called upon to exercise the rights of rule. Central here were two basic principles that had been developed in theory as mere regulative ideas and were now reformulated as real conditions: first, that legimate domination arose from the consensus of those subject to it; and second, that the latter had innate and inalienable rights, the securing of which was the legitimizing aim of political rule.

The task of securing equal freedom, which according to the conviction of the time would lead to prosperity and justice without intervention by the state, also required power. The French Revolution therefore touched neither the state nor its attribute of sovereignty. It rather completed the state-building that had begun under absolutism by dissolving the intermediary powers that had survived under the absolutist regime, thus making public and state power identical. By the same stroke, however, the bearer of state power was replaced. The nation took the place of the monarch. Rule could therefore not be legitimated by one's own but only be a derived right. Article Three of the 1789 *Déclaration des droits de l'homme et du citoyen* formulated the basic principle of the democratic constitutional state: "The principle of all sovereignty resides essentially in the nation. No body or individual may exercise any authority which does not proceed directly from the nation."

Unlike in France, in America the revolution was not preceded by state-building in the continental sense. In the motherland of the American colonists, religious disunity had not led to the rise of absolutist monarchy but, to the contrary, to the strengthening of parliament and an essentially liberal legal order. The American revolutionaries therefore were not in a position to take over a state in the continental sense in order to supply it with a new basis of legitimacy and adjust it to the principle of individual freedom. Nonetheless, they too constituted a political unity they understood as a government, which possessed the qualities of states. Although the American state lagged behind continental states in its tasks, instruments, and bureaucratic apparatus, it too

was the focal point of all public power, which it took from the people so that there could no longer be any claim to rule that could not be traced back to its will.

The possession and exercise of public power were thus separated. The political system therefore had to be organized in a way that established a relation of legitimation and responsibility between those who possessed the ruling powers and those who exercised them, as much as possible preventing their misuse. It was these constructive tasks of state organization and limitation that well-nigh compelled legal regulation. Only law had the ability to elevate the consensus concerning the project of legitimate rule above the fleetingness of the moment, to make it last, and to give it binding force. It helped the Americans, who were the first to take this step, that they already had a familiar model for the legally binding organization of public power in the English declarations of rights and colonial charters bestowed on them by the mother country,[15] while in its revolution thirteen years later France could look to the American model.

First, however, it was necessary to clear another hurdle: since its positivization, the law that was now to bind the state was a product of precisely this state. Under these circumstances, the state could only be bound successfully if one resorted to the idea of a hierarchy of norms, but cut it off from its transcendental roots. This led to a splitting of the positivized legal order into two complexes: a traditional one that was produced by the state and bound the individual; and a new one that proceeded from or was ascribed to the sovereign and bound the state. The latter is the constitution as distinct from the laws and taking precedent over them. This was the very step by which the Americans surpassed the English "constitution."[16] While the English "constitution" did not constitute government but only partially restricted it, American and then French constitutional law was to precede all governmental powers. In the constitution the law accordingly became reflexive: the process of legislation and implementation were for their part juridified.

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[15] See Alfred H. Kelly and Winfried A. Harbison, *The American Constitution*, 4e (New York: Macmillan, 1963), chs. 1 and 2; Willi Paul Adams, *Republikanische Verfassung und bürgerliche Freiheit* (Darmstadt: Luchterhand, 1973), 30ff.; Donald Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 13ff.; Gerald Stourzh, *Wege zur Grundrechtsdemokratie* (Vienna: Böhlau, 1989), 1ff.

[16] See ibid., 155ff.; Grimm, Die *Zukunft der Verfassung*, 75ff.

Primacy is therefore an indispensable element of constitutionalism. Where it is missing, the constitution cannot carry out the task for which it was invented.[17] In America and France this was clear from the beginning. In the *Federalist Papers* it was compared to the relationship of principal to deputy, or servant to master.[18] Sieyès summed it up in the distinction between the *pouvoir constituant* and the *pouvoir constitué*.[19] The *pouvoir constituant* generates the *pouvoir constitué*; its decision is thus not itself legally bound. But it does not go beyond creating and regulating legitimate rule. Ruling itself is a matter for the *pouvoir constitué*. However, the latter may act only on the basis of and within the framework of the constitution. In a constitutional state there can be no extra- or supra-constitutional powers beneath the *pouvoir constituant*. Only thus can the goal of the constitutionalization of public power be ensured—a "government of laws and not of men."[20]

As against older legal restrictions on rule, the constitution was not only rule-modifying but rule-constituting, limiting state power not only for the benefit of a privileged group but generally, and deploying its state-limiting effect not only in certain respects but comprehensively.[21] This is not to assert the total juridification of the state. That would render politics impossible and ultimately dissolve it into a mere implementation of the constitution. The constitution is not to make politics superfluous but only to channel it, commit it to certain principles, and contain it within certain limits. It prescribes certain principles

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[17] See Rainer Wahl, "Der Vorrang der Verfassung," *Der Staat* 20 (1981): 485.

[18] *The Federalist*, no. 78.

[19] Emmanuel Sieyès, "Was ist der Dritte Stand?" in Eberhard Schmitt and Rolf Reichardt, eds., *Emmanuel Sieyès, Politische Schriften* (Berlin: Akademie, 1975), 117–96; Pasquale Pasquino, *Sieyès et l'invention de la constitution en France* (Paris: Odile-Jacob, 1998).

[20] *Marbury v. Madison*, 5 US (1 Cranch) 137 (163).

[21] In more detail, see Grimm, *Die Zukunft der Verfassung*; Peter Badura, "Verfassung und Verfassungsgesetz," in *Festschrift für Ulrich Scheuner* (Berlin, 1973), 19; Ernst-Wolfgang Böckenförde, "Geschichtliche Entwicklung und Bedeutungswandel der Verfassung," in *Staat, Verfassung, Demokratie* (Frankfurt/Main: Suhrkamp, 1991), 29; Otto Brunner, "Moderner Verfassungsbegriff und mittelalterliche Verfassungsgeschichte," in H. Kämpf, ed., *Herrschaft und Staat im Mittelalter* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1956), 1–19; Gerhard Dilcher, "Vom ständischen Herrschaftsvertrag zum Verfassungsgesetz," *Der Staat* 27 (1988): 161; Hasso Hofmann, "Zur Idee des Staatsgrundgesetzes," in *Recht—Politik—Verfassung* (Frankfurt/Main: Metzner, 1986), 261–95; Charles H. McIlwain, *Constitutionalism Ancient and Modern*, 1966 3e (Ithaca: Cornell University Press); Heinz Mohnhaupt, "Von den 'leges fundamentales' zur modernen Verfassung," *Ius commune* 25 (1998): 121; Quaritsch, *Staat und Souveränität*, 178ff.

and procedures, not outcomes. But it is comprehensive insofar as no one who lacks constitutional legitimation is entitled to exercise public power, and no act of rule can claim validity that is not consistent with constitutional requirements.

This tacitly presupposes the concentration of all ruling authority in the state. Only on this presupposition could the claim to comprehensively juridify political rule through a special set of legal norms addressed to the state be redeemed. This presupposition implies a clear distinction between private and public. Only when society is privatized in the sense that it does not possess the instruments of rule, while, conversely, all authorities to rule are concentrated in the state, can the principle of freedom, which is fundamental for the private realm, and the principle of bindingness, which is fundamental for the state, hold. Here we have not one conceivable form of constitution among others, but a constitutive feature of constitutionalism in general. The constitution would be undermined if the state enjoyed the freedom of the private, just as if the private possessed the coercive means of the state. To this extent, the border between private and public is essential to constitutionalism.

But the constitution was also bound to the state in the sense that its comprehensive validity claim was territorially limited from the beginning. Although the idea of constitutionalism claimed universal validity, it was realized in the particular, in different states, from the start. These were separated by borders, beyond which state power did not extend. The borders might shift, for example as a result of wars. But that did not alter the fact that only one state power existed on the territory of a state, and that it did not share its entitlement to rule with anyone. To this extent, the constitution also presupposed a clear separation of inside and outside. Had its borders been permeable to external claims to rule, it could not have fulfilled its own. Above the state was not a lawless space, but rather international law. However, it regulated only relations between states and lacked a supranational power that could hold sway irrespective of state power.

Of course, a constitution could fail to fulfill its function of comprehensively juridifying public power, for instance because it was pourous and contradictory from the start, was unable to adjust to later social change, or lost acceptance. There are many examples of this in constitutional history. But such a failure diecredits constitutionalism as little as the existence of numerous semi- and pseudo-constitutions that sprang up shortly after the founding of the constitutional state in the

American and French revolutions and continue to appear today. The constitution's character as an achievement is rather demonstrated by the fact that in such cases its function can only be taken over by another constitution, not sustained without one. No functional equivalent can stand in for a failed or ineffective constitution.[22]

II. The Consequencess of Denationalization

The decline of statehood places not individual constitutions but constitutionalism as such in question. The reason for this lies in the constitution's reference to the state. The rise of the state awoke the need to tame it legally and at the same time allowed it to be satisfied in the form of the constitution. From a historical perspective, the constitution presupposes the state as a form of political community. It is distinguished from older forms of the political community by the bundling of the various scattered powers and their concentration in a uniform public power, including the authority to use physical force within a delimited territory. Denationalization thus means that ruling authority is detached from the state and transferred to non-state bearers. This transition need not necessarily lead to the end of the state. It is entirely possible that it will remain as a basic unit of a new political order; however, just as it had initially *not yet* arrogated all powers, in the future it will *no longer* possess all powers.

The constitution is of course not only affected when the state disappears. Its claim to comprehensively regulate political rule is already impaired when the identity of state power and public power dissolves, so that acts of public authority can be taken on the territory of the state by, or with the participation of, non-state institutions. The notion of denationalization allows us to grasp two processes that started in the second half of the twentieth century, without their consequences for constitutionalism initially being noticed. They concern precisely the two borders that are presupposed by and constitutive of the constitution: that between inside and outside, and that between private and public. In the domestic realm this has to do with the participation of private actors in the exercise of public power. Outside the state it has to do with the rise of supra-national entities or institutions that can make decisions that claim validity within state territory.

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[22] See Luhmann, "Politische Verfassungen," 168.

Regarding the border between private and public,[23] it is striking that sovereign measures often no longer come about through one-sided state decisions in legally regulated procedures, but are rather the result of bilateral agreements between state bodies and private interests that come out of informal negotiations. We encounter such negotiations in the fields of administration and adjudication, but also in legislation. Either the state enters into negotiations over the content of a law with its private addressees or the latter offer talks with the propect of avoiding or mitigating regulation. The result can be a negotiated bill that must then go through the constitutionally prescribed procedures in order to become generally binding. But the legislative power can also serve merely as a threat in order to reach an agreement in which a private party that creates a problem agrees to commit itself to "good behavior" while the state responds by forgoing regulation.

While agreements that result in a bill only reach their goal when they subsequently achieve legal form through the designated state procedures, in the case of agreements that replace law, not only the negotiation but also its result, the solution of the problem, remain in the informal realm. All the same, the desired effect only sets in when both sides feel bound by it. For this reason, such negotiations cannot be equated with the long-customary influence of pressure groups on legislation. The attempt to influence legislation is limited to a prelimary stage that is not governed by constitutional law, whereas the final decision is solely a matter for the state. Where informal agreements replace the law, however, the results of negotiations and the content of regulation are

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[23] On this, see the early essay by Ernst-Wolfgang Böckenförde, "Die politische Funktion wirtschaftlich-sozialer Verbände und Interessenträger in der sozialstaatlichen Demokratie," *Der Staat* 15 (1976): 457. On the following: Dieter Grimm, "Verbände", *Handbuch des Verfassungsrechts*, 2e (Berlin: Duncker & Humblot, 1994), "Bedingungen demokratischer Rechtsetzung," in Lutz Wingert and Klaus Günther, eds., *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit, Festschrift für Jürgen Habermas* (Frankfurt/Main: Suhrkamp, 2001), 489, and "Lässt sich die Verhandlungsdemokratie konstitutionalisieren?" in Claus Offe, ed., *Demokratisierung der Demokratie* (Frankfurt: Campus, 2003): 193; Arthur Benz, *Kooperative Verwaltung* (Baden-Baden: Nomos, 1994); Helge Rossen-Stadtfeld, *Vollzug und Verhandlung* (Tübingen: Mohr Siebeck, 1999); Andreas Helberg, *Normabwendende Selbstverpflichtungen als Instrument des Umweltrechts* (Sinzheim: Pro Universitate, 1999); Tobias Köpp, *Normvermeidende Absprachen zwischen Staat und Wirtschaft* (Berlin: Duncker & Humblot, 2001); Lothar Michael, *Rechtsetzende Gewalt im kooperierenden Verfassungsstaat* (Berlin: Duncker & Humblot, 2002); George Tsebelis, *Veto Players* (Princeton: Princeton University Press, 2002); Matthias Herdegen and Martin Morlok, "Informalisierung und Entparlamentarisierung politischer Entscheidung als Gefährdungen der Verfassung?," *VVDStRL* 62 (2003): 7.

identical. It therefore does not do justice to the negotiations to describe them in terms of influence. They can only be adequately grasped in terms of participation.

With regard to denationalization, this means, on the one hand, that there are now private parties who are no longer restricted to their general civic status as voters, participants in public discourse, and representatives of interests; beyond this they participate in political decision making without being subject to the principles of legitimation and accountability to which the constitution submits the bearers of public power. On the other hand, to the extent that the state commits itself at the negotiating table, the constitutionally prescribed decision-making authorities and procedures are downgraded. This affects the legislature in particular. The negotiations are conducted not by it, but by the government. If a bill emerges, it can only attain legal validity through a parliamentary decision. The majority parties, however, are under practically irresistable pressure to ratify. If there is an agreement to forego regulation, parliament remains outside the game altogether.

Without parliament, the advantages of parliamentary procedures are lost. These are above all transparency, participation, and control. They have no place in negotiations. Negotiations are not public, include only those who possess veto power rather than all those affected, and give the opposition no chance to intervene. But the weakening of parliament also affects the content of the law or its informal substitute. Since the government only negotiates with those in a position to veto, their interests have a better chance of being considered. Under these circumstances the law risks falling short of general acceptance on which its legitimacy is based. The reason for privileging particular private parties lies not in their pre-political strength, which to a certain extent can be shrugged off, but in the procedures created by the state that reward precisely the positions of social power the constitution sought to neutralize.

The losses affect not only the constitution's democratic claim, but also the rule of law. The linchpin of all constitutional functions is the law.[24] Without the law's inherent formality, its effect would not obtain. These agreements, however, evade this formalization. As a rule they are set into writing, but not necessary publicized. Rather, the parties to the negotiation have discretion over whether and how they are announced. Compliance is not institutionally guaranteed. Sometimes reporting

[24] For more detail, see Grimm, *Zukunft der Verfassung*, 159.

duties and control mechanisms are included, sometimes not. Above all, however, affected third parties have no legal protection against informal agreements. Often even the necessary knowledge of the agreement's content is lacking. If one knows nothing about it, one can neither bring a claim against it nor have it reviewed. In the absence of a law there is neither a legal standard for controlling compliance nor an object for constitutional review.

Despite these losses to democracy and the rule of law, the practice cannot simply be eliminated because it has its own logic. This results from the fact that many state tasks can no longer be adequately fulfilled with the specific state tool of imperative law. Sometimes the tasks are such that the use of imperative tools is in fact impossible because they elude regulation. Research results or economic upturns cannot be commanded. Sometimes the use of imperative tools is not legally permissible because basic rights ensure private actors' freedom of choice. Ordering them to invest or obliging them to create jobs would be unconstitutional. Sometimes imperative tools are in fact possible and permissible, but ineffective or inopportune, be it because the addressees of regulation could evade it, because the state lacks the information for effective steering, or because the implementation costs are too high.

Negotiation owes its emergence to this situation. To this extent, it has structural causes and is thus largely immune to constitutional prohibition. The claim of the constitution can therefore only be reestablished by constitutionalizing the practice of negotiation. This would of course be essentially to approve it, including its basic characteristic, its informality. A thoroughgoing formalization would deprive it of its distinctiveness and therefore has little chance of success. On the other hand, if informality is retained, constitutional regulation cannot penetrate to the core of the phenomenon but only alter its parameters, for instance by requiring publicity, making it obligatory to inform parliament, and opening possibilities for constitutional review.[25] That does not change the fact, however, that the constitution cannot cope satisfactorily with phenomena that cross the border between private and public. It can fulfill its claim of comprehensive regulation only to a diminished extent.

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[25] See Winfried Brohm, "Rechtsgrundsätze für normersetzende Absprachen," *DÖV* 1992, 1025; Herdegen and Morlok, "Informalisierung und Entparlamentarisierung."

Like the border between public and private, the border between inside and outside has not disappeared.[26] In relations among states it retains its traditional significance. The authority of the state and the applicability of domestic law ends at the border. Above states, however, entities and organization have developed that, while owing their existence to international treaties between states, differ from traditional international organizations since their activity is not limited to the international realm but penetrates states. This is because they are authorized to take acts of public authority that claim domestic validity without being transformed by the state into national law. On the other hand, the pooling of sovereignty has not gone so far that various states have been fused into a new superstate that would displace rather than relativize the borders between inside and outside.

This development is not expressly directed against the constitution. More recent constitutions often open themselves to international law by stipulating that it be applied domestically or allowing sovereign rights to be transferred.[27] All the same, the constitution does not remain untouched. It determines the conditions under which states may transfer sovereign rights to supranational entities. Once transferred, however, their use by these entities is no longer subject to the rules of the national constitution.[28] It then regulates domestic laws and their application only partially—namely, to the extent that they stem from a national source of law. These are, however, confronted with a growing number of legal measures that make the same validity claim as national law, but without having to satisfy the same constitutional requirements. The most advanced example of this is the EU, with its numerous sovereign rights replacing the regulative power of the nation-state.

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[26] On the significance of the state's borders, see Udo di Fabio, *Der Verfassungsstaat in der Weltgesellschaft* (Tübingen: Mohr Siebeck, 2001), 51ff.

[27] See Udo di Fabio, *Das Recht offener Staaten* (Berlin: Erich Schmidt, 1998); Stefan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Inderdependenz* (1998); Rainer Wahl, "Internatioalisierung des Staates," in Joachim Bohnert, ed., *Verfassung—Philosophie—Kirche, Festschrift für Alexander Hollerbach* (Berlin: Duncker & Humblot, 2001), 193, and "Der einzelne in der Welt jenseits des Staates," in Wahl and Joachim Wieland, eds., *Das Recht des Menschen in der Welt* (Berlin: Duncker & Humblot, 2002): 59; Jan Hecker, "Grundgesetz und horizontale Öffnung des Staates," *AöR* 127 (2002): 291.

[28] This is recognized in principle, although the particulars are still contested. See the ruling of the Bundesverfassungsgericht on the review of European legislation, *BVerfGE* 37, 271; 73, 339; 89, 155. See Dieter Grimm, "The European Court of Justice and National Courts," *Columbia Journal of European Law* 3 (1997): 229; Anne-Marie Slaughter, Alec Stone Sweet, and Joseph H. H. Weiler, eds., *The European Court and National Courts* (1998).

So far there has been no supranational arrangement of the same density either outside Europe or on a global scale. But other international organizations also contribute to the relativization of borders. The most prominent of these is the WTO.[29] To be sure, it does not itself make law, but rather provides a forum for the treaty agreements of its member-states. But since 1995 its dispute-settlement mechanism has made its treaty-based law independent of the contracting parties and submitted them to the decisions of the WTO authority. The World Bank and the IMF lack such powers.[30] They may not interfere in the politics of states. However, law and justice are not considered politics in this sense. As a result, they often make their financial assistance conditional on domestic legal changes the affected countries usually cannot avoid. To this extent, the requirements of their own constitutions concerning political decisions are supplanted.

Alongside these institutions created by states, meanwhile, are global actors like multinational firms and non-government organizations, which, by virtue of the range of their activities, can largely follow their own systemic logic without having to respect the standards and obligations that prevail within states. All the same, they too cannot live without legal regulation. The globalized sector of the economy depends on a transnational law no national legislator can provide. But even the international organizations developed by states can only satisfy this need in part. Global actors therefore take up law-making themselves. Beyond nation-states and the international organizations they have established forms of law-making that are no longer under the control of politics, be it domestic or international, but are driven mainly by large global law firms and international arbitration panels.[31]

In addition, international courts relativize the constitution to the extent that they do not stay within the traditional framework of international law and may only administer justice if parties submit

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[29] See Armin von Bogdandy, "Verfassungsrechtliche Dimensionen der Welthandel sorganisation," *KJ* 264 (2001): 264, 425; Markus Krajewski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation* (Berlin: Duncker & Humblot, 2001).

[30] See Jerzy Kranz, *Entre l'influence et l'intervention* (Frankfurt/Main & New York: Peter Lang, 1994); Ibrahim Shihata, *The World Bank in a Changing World*, 2 vols. (Washington DC: World Bank, 1995).

[31] See Gunther Teubner, *Global Law without a State* (Aldershot: Artmouth, 1997); Boaventura de Sousa Santos, *Toward a New Common Sense* (New York & London: Routledge, 1995); Klaus Günther, "Rechtspluralismus und universaler Code der Legalität," in *Habermas Festschrift*, 539.

themselves to judgment in a concrete case in advance. The European Court of Human Rights is an early example of this. In the meantime, however, international criminal courts have emerged to try war crimes and crimes against humanity even when it concerns members of states that have not submitted themselves to their jurisdiction or have refused to hand over the accused.[32] Here again, the jurisdiction of the EU has an exceptional position. It was the European Court that secured the immediate validity of Community law and its precedence over national law, including national constitutions. In this way, it considerably narrowed the latter's field of application, and for its part took up functions that constitutional courts possess on the national level.[33]

This development is nevertheless still far from the end of stateness. States are ceding functions to supranational units and organizations. But they are doing so in the interest of increasing problem-solving capacity without thereby making themselves superfluous. Rather, in the end supranational organizations and even global economic actors depend on states. The reason is that as yet no supranational political unit or international organization possesses the means of physical coercion, which belongs specifically to states. As soon as the coercive enforcement or implementation of international law is required, national authorities must step in. This is true even of the EU. The norms whose implementation is in question may be made externally; their implementation is a national matter and falls under national law. But this does not change the fact that the scope of validity of the national constitution constricts as that of externally-made law expands.

The question this raises is whether and how the achievement of constitutionalism can be preserved in view of this development. Here we must distinguish between the national and the international level. On the national level the possibilities appear limited. National constitutions can provide for the state's opening to supranational arrangements

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[32] See Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law," *European Journal of International Law* 9 (1998): 2; Theodor Meron, *War Crimes Law Comes of Age* (1998); Symposium: "Genocide, War Crimes, and Crimes Against Humanity," *Fordham International Law Journal* 23 (1999).

[33] See Joseph H. H. Weiler, "The Transformation of Europe," in *The Constituon of Europe* (1999), 10; Carlos Rodríguez Iglesias, "Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht," *EuR* (1992): 225; Franz C. Mayer, "Europäische Verfassungsgerichtsbarkeit," in Armin von Bogdandy, ed., *Europäisches Verfassungsrecht* (Berlin: Springer, 2003), 229.

and establish the conditions for the transfer of sovereign rights. Beyond this, they can safeguard constitutional requirements in the determination of national negotiating positions for supranational decision-making processes, such as parliamentary participation. This is not unimportant, since supranational legislation is consistently executive legislation, following a model of bargaining rather than deliberation.[34] This does not, however, guarantee that these positions will prevail. Other possibilities on the national level are not visible. The national constitution has neither formal nor material influence on laws that penetrate the state from the outside.

The more important question is thus whether the constitution can be transferred to the international level. There has been much discussion of this of late. Scholars see constitutionalization at work everywhere. A constitutionalization of the EU was ascertained very early on. But in the meantime a constitutionalization of international organizations like the WTO and the UN has been perceived as well. Even international law as a whole is supposed to be on the way to a constitution.[35] This observation is correct insofar as a strong push toward juridification has been occuring at the international level. But not all juridification merits the name of constitutionalization.[36] Rather, constitutionalization

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[34] See Armin von Bogdandy, ed., *Gubernative Rechtsetzung* (1999).

[35] On the EU, see Weiler, "The Transformation of Europe"; Ingolf Pernice, "Multilevel Constitutionalism," *CMLR* 36 (1999): 427; Christoph Möllers, "Verfassungsgebende Gewalt—Verfassung—Konstitutionalisierung," in von Bodgandy, ed., *Europäisches Verfassungsrecht*, 1; Peter Badura, "Die föderative Verfassung der Europäischen Union," in *Festschrift für Martin Heckel* 1999, 695; Stefan Oeter, "Europäische Integration als Konstitutionalisierungsprozess," *ZaöRV* 59 (1999): 901; Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin: Duncker & Humblot, 2001). On the EMRK, see Christan Walter, "Die EMRK als Konstitutionalisierungsprozess," *ZaöRV* 59 (1999): 961. On the WTO: Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991); Stefan Langer, *Grundlagen einer internationalen Wirtschaftsverfassung* (1995); von Bogdandy, "Verfassungsrechtliche Dimensionen der Welthandelsorganisation"; Krajweski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation*; *Peter-Tobias Stoll*, "Freihandel und Verfassung," *ZaöRV* 57 (1997): 83; Martin Nettesheim, "Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung," in Claus-Dieter Classen, ed., *Liber amicorum Thomas Oppermann* (2001), 381. On the UN: Bardo Faßbender, "The United Nations Charter as Constitution of the International Community," *Columbia Journal of Transnational Law* 36 (1998): 529. On international law: Jochen A. Frowein, "Konstitutionalisierung des Völkerrechts," *BDGVR* 39 (1999): 427.

[36] On constitutionalization and "international" constitutional law, see Giovanni Biaggini, "Die Idee der Verfassung—Neuausrichtung im Zeitalter der Globalisierung?" *ZSR* 119 (2000): 445; Robert Uerpmann, "Internationales Verfassungsrecht," *JZ* (2001): 565; Christian Walter, "Die Folgen der Globalisierung für die europäische Verfassungsdiskussion," *DVBl.* (2000): 1; Ingolf Pernice, Peter M. Huber, Gertrude Lübbe-

has shown itself to be a special form of the juridification of rule that presupposes the concentration of all ruling authority within a territory, and is distinguished by a certain standard of juridification. This standard includes a democratic origin, supremacy, and comprehensiveness.[37]

The need for juridification develops where political rule is exercised. Whether it can be satisfied in the form of a constitution depends on certain preconditions and standards being met. More strongly put, the question is whether the constitution, as a form of juridification that originally referred to the state, can be detached from it and transferred to non-state political entities that exercise public power. If not, it will remain a matter of mere juridification, which is by no means worthless, but should not be passed off as equivalent to a constitution. Of course, the question cannot be answered in the same way for all political entities that are ascertained to exercise sovereign powers or make decisions whose effect is tantamount to such powers. There are important differences between them in the degree of consolidation and plenitude of powers that are relevant to the possibility of constitutionalization.

If we ask this question first of all concerning the EU, we find a structure that has grown far beyond traditional international organizations but has still not become a state. It unites a considerable number of sovereign rights in different political fields that can be exercised with immediate validity in the member states. Even without a monopoly on the use of force, which its members so far retain, it is closely interwoven with the member states and their legal orders in a way similar to the national and the member states in a federal state. The resulting need for a juridification of the public power has surely long since been satisfied. Primary Community law, which spread step by step, has overlain the EU with a tightly-woven net of provisions that have preeminence over the secondary Community law produced by the EU and fulfills most of the functions of constitutions in the member states.

Measured by the demanding concept of the constitution that has become the standard since the American and French Revolutions, they

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Wolff, and Christoph Grabenwarter, "Europäisches und nationales Verfassungsrecht," *VVDStRL* 60 (2001): 148–349 (esp. 155ff., 199ff); Rainer Wahl, "Konstitutionalisierung—Leitbegriff oder Allerweltsbegriff?" in *Der Wandel des Staates vor den Herausforderungen der Gegenwart, Festschrift für Winfried Brohm* (Munich: Beck, 2002), 191; Ulrich Haltern, "Internationales Verfassungsrecht?" *AöR* 128 (2003).

[37] See in more detail Dieter Grimm, "Ursprung und Wandel der Verfassung," in Josef Isensee and Paul Kirchhof, eds., *Handbuch des Staatsrechts*, vol. I, 3e (Heidelberg: C. F. Müller, 2003), 58.

lack only one element—which, however, is surely essential. They are, not only in their development but also according to their legal nature, international treaties that have been contracted by the member states and can only be altered by them in the intergovernmental Conference, which is not an EU organ, with subsequent ratification within each member state. The public power the EU exercises accordingly emanates not from the people, but from the member-states. Responsibility for the basic order that sets its goals, establishes its organs, and regulates its authorities and procedures cannot be ascribed to the constituent power of the people. Nor is any EU organ that represents the people responsible for it. As distinct from the constitution as the basic legal order of states, it is heteronomously, not autonomously, determined.[38] Not being attributed to the people, it lacks a democratic origin, which is an element of any somewhat meaningful notion of a constitution.

Admittedly, there can be no doubt that the EU, by virtue of its consolidation and volume of powers, is capable of being constitutionalized. Nothing prevents the member states from giving up their control over the basic legal order of the EU in a final international treaty, placing the Union on a democratic basis, and thereby bestowing upon it self-determination over the form and content of its political community. They could then still reserve the right to participate in amendments of the constitution—not, however, as the bearers of federal power, but rather as parts of its organs. With this, the treaties, without requiring any other substantive change, would carry over into a constitution in the full sense of the word. Yet, by such an act, the EU would quietly transform itself from a federation of states into a federal state. For the line separating the two is heteronomy or self-determination of its basic order.

A constitutionalized EU would nevertheless be no more immune to a relativization of its borders than the nation-states are.[39] Its constitution could not, any more than the national constitutions, fulfill the claim to comprehensively regulate all acts of rule on its territory. The constitutional question is therefore posed again at the global level. Here too the process of juridification is proceeding apace. Its main fields of application are, although unconnected, economic relations and human

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[38] See Dieter Grimm, *Braucht Europa eine Verfassung?* 1995.

[39] See Walter, "Die Folgen der Globalisierung für die europäische Verfassungsdiskussion."

rights. The share of compulsory international law that therefore takes primacy over the treaty-making power of the states is increasing. It is also increasingly judicially enforceable. That the internal constitutionalization (of states) is now being followed by external constitutionalization (of the community of states), as is asserted,[40] however, does not prove true upon closer examination. If we maintain the distinction between juridification and constitutionalization, it emerges that already the basic precondition for the latter is lacking: an object that could be constitutionalized.

Just as public power at the international level breaks down into numerous unconnected institutions with sharply limited jurisdictions, so its legal regulation breaks down into numerous unconnected partial orders. A bundling that could make them appear as the expression of unified intention and would also allow a unified interpretation of them is not to be expected even in the long term. Even more, democratic legitimation and responsibility is far off. The aspiration contained in the concept of constitutionalism can therefore not even be approximately realized on the global level. This is no reason to attach little value to the progress connected to the increasing juridification of the world order. To equate it with a constitution, however, is to paper over the fundamental difference and create the impression that the declining significance of national constitutions can be made good at the international level. There is no prospect of that for the time being.

(Translated by James Ingram)

[40] So Di Fabio, *Verfassungsstaat in der Weltgesellschaft*, 68.

PART III

CONSTITUTIONAL COURTS AND THE NEW CONSTITUTIONALISM

CHAPTER TWELVE

THE ROLE OF CONSTITUTIONAL COURTS IN THE TRANSITION TO DEMOCRACY

WITH SPECIAL REFERENCE TO HUNGARY*

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Constitutional justice and constitutional courts usually receive little attention in analyses of the institutions of the new democracies in Central and Eastern Europe: they simply take the necessity of a new, democratic constitution for granted. In fact, a constitution that includes fundamental rights and freedoms and the fundaments of democratic state machinery, with separation of powers and an independent judiciary, is a *sine qua non* and the starting point of the new order. Existing constitutions had to be revised as a technical minimum, or new constitutions adopted in the ideal case. This did not satisfy the new regimes, however, and reality superseded theoretical expectations. All new democracies set up a constitutional court, and the very existence of these courts obviously served as a 'trade mark' or as a proof of the democratic character of the respective country. Institutions like the Council of Europe had been aware of the impact of constitutional courts on democratic development, and clearly encouraged their establishment.[1] So the beginnings of the new constitutional states may rightly be described as 'the hour of the lawyers'.[2] For the analysts of the transition, however, this hour

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[1] Membership in the Council of Europe counted as recognition as a democratic state. For that reason, all new democracies applied for it at the earliest possible time. In the admission process the existence of a constitutional court has been a particularly important point and the Council scrutinized the conditions of the constitutional review. The more the democratic functioning of a given state was uncertain, the more the Council of Europe prescribed measures for strengthening the powers of the constitutional court, as in the cases of Belarus and Azerbaijan, for example.

[2] This frequently cited phrase of Lord Dahrendorf's rings especially true for Hungary, where lawyers played a decisive role in the Round Table negotiations and this profession was then overrepresented in the new parliament. Indeed, the Round Table itself originated from a proposal of the Independent Lawyers' Forum in 1989.

is rapidly coming to a close, and the politicians are replacing the lawyers. This makes it all the more timely to study the phenomenon of constitutional justice in all its complexity.

In this article I take the Hungarian Constitutional Court as my starting point, but will extend my observations to the role of the new constitutional court in the post-Communist states in general. It is not only because I know the Hungarian Constitutional Court best, or because the work of that court is well documented (Brunner and Sólyom, 1995; Sólyom and Brunner, 2000; Dupré, 1996; Spuller, 1998), but also because the court came to enjoy certain authority among the new constitutional courts and was soon seen as a model case by the established courts and in the international literature. Furthermore, it has the unique advantage that its activity was accompanied by continuous theoretical self-analysis during its first nine years (1990–8). The analysis focused on the role of the court within the transition and tried to create a conceptual framework, often offering genuine technical solutions for transitory issues, while the parliament decided on these cases on a more ad hoc political basis. These studies kept a record of how the court saw itself and its tasks in the midst of the actual transition.[3]

The Three Generations of Constitutional Courts in Europe

The structural differences between the constitutional review in the USA and the European model of constitutional justice are well known. The characteristics of the latter originate from the first constitutional court, the Austrian *Verfassungsgerichtshof* of 1920. The European-style constitutional courts are not a branch of the judiciary, but separate, *sui generis* 'constitutional organs', with the exclusive power to carry out constitutional review of legislative acts. Furthermore, the constitutional control is not only centralized but also typically takes the form of abstract review. All these facts proved decisive for the self-understanding of the constitutional courts which emerged in the second half of the 20th century.

[3] As the president of the court I regularly presented a critical evaluation of the praxis of the court and ideas on future developments. The studies were for internal use and were open for discussion. A variant of the first report was made public during my time in office (Sólyom, 1991). Subsequent reports were published, together, in 2001, with a systematic analysis of the whole work of the court (Sólyom, 2001).

These courts are inseparable from democratic changes. The three generations of the European constitutional court all emerged from a 'system change': the first generation, the German and Italian constitutional courts, were set up after the fall of the Fascist regimes, in the early 1950s; the second generation, the Spanish and Portuguese courts, followed the collapse of the authoritarian regimes of Franco and Salazar in the 1970s. The third generation, the constitutional courts in the new post-Soviet democracies, were founded in the 1990s, this time expressly as symbols of the new, democratic system and as the latest link in the chain of an established tradition.[4] The three waves of democratization in Europe did not originate among the people. The change of regimes in many of the countries was the result of neither a real revolution, nor popular upheaval. In Germany and Italy, democracy was established under the tutelage of the victors (mainly the USA); the Spanish and the post-Communist changes were based on negotiations between elites not democratically legitimized.[5] The new constitutional courts were created out of a deep mistrust for the majoritarian institutions, which had been misused and corrupted in the Fascist and Communist regimes. In this given historical setting, the constitutional courts believed they represented the essence of the democratic change, and enjoyed 'revolutionary legitimacy'. Little wonder if some constitutional courts have been inclined to replace the motto 'we the people' with 'we the court'.

Such feelings on the part of a European constitutional court judge may be supported by the abstract competence of the court. If laws

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[4] All courts were aware of this. In the early 1990s a *bon mot* of Roman Herzog, then president of the German Constitutional Court and later the *Bundespräsident* of Germany, circulated, according to which the Spanish and Portuguese courts were the daughters of *Karlsruhe*, and the Polish and Hungarian courts, the granddaughters.

[5] Of the parties at the Round Table, the Communists had not been elected freely and democratically, and the Oppositionists were not elected at all. As can be seen in the minutes of the Hungarian Round Table negotiations, it was sometimes necessary that the Opposition side, too, remembered its own lack of democratic legitimation. The Round Table negotiations opened in the spring of 1989 on the basis of a protocol signed by the Oppositionists and the Communist Party. An essential provision of that document was that 'the parties will enforce the realization of the agreements reached by all political means at their disposal'. This meant that the overwhelming Communist majority would pass all bills, the wording of which had been worked out and agreed upon at the Round Table. Hence the real legislator and the constituent assembly was the Round Table, and parliament provided for the formal legality. The minutes and documents have been collected and published in eight volumes (*A rendszerváltás forgatókönyve*, 1999–2000).

are reviewed without any concrete case or controversy, that is, without any factual basis or actual plaintiff, the only possible determination of unconstitutionality is by the formal declaration of a law as null and void. This is why Hans Kelsen called his constitutional court a 'negative legislator' in 1920. But as early as 1830, de Tocqueville had noted that behind the decisions taken in concrete cases lay hidden the power of the American judges over Congress. By contrast, the conflict between a European constitutional court and the parliament is necessarily open and provocative, and the power of the constitutional court is in no way 'hidden'. This setting gave the new constitutional courts in the new democracies additional potential momentum.

Judges of European constitutional courts are not ordinary judges. The courts are composed overwhelmingly or totally of professors of law, elected or nominated for a term of between eight and 12 years. The new constitutional courts instituted after democratic change were thus open to the partisans of the transition and to innovative spirits. The American literature emphasizes that there were no former Nazis sitting in the first German Constitutional Court.[6] This has not necessarily been the case with former Communists after the negotiated transitions. The ethos of neutrality of the constitutional court had become so strong and compelling by the time of the third generation that—in Hungary at least—it could never be said that the opinions of the court reflected the former party affiliation or sympathies of the judges.[7] Professors of law, who are predominant in the constitutional court, tend to produce long, theoretically based opinions on a comparative law basis, and have thus provided a channel for assimilating foreign constitutional standards and developing the constitution into a definite system in the early stage of the transition.

When the German Constitutional Court was established in 1951, nobody could foresee the global trend of constitutionalization of the

[6] It is also true that none of the judges elected after the unification of Germany came from the former GDR.

[7] Of the first five judges of the Hungarian Constitutional Court, the democratic opposition nominated two and the Communist Party two, the fifth being a neutral person agreeable to both sides. The court commenced working with these judges on 1 January 1990 and supervised the 'transition' in the strict sense, that is the free elections and the setting up of the new parliament and government. Subsequently, the new parliament elected five judges in July 1990. Splitting in the court occurred along quite distinct criteria, such as activism versus self-restraint, or liberal or socialist views with regard to social rights, views also shared by the Catholic judges.

law and the generations of constitutional courts to come. The seminal novelty of the German Constitutional Court, the protection of individual fundamental rights, which was added to Kelsen's norm control, was not based on a decision made by any constituent assembly. The Basic Law entrusted the individual protection of rights to all courts. The 'constitutional complaint' (*Verfassungsbeschwerde*) only gradually developed in the practice of the German Constitutional Court, eventually emerging as a recourse for the individual at the highest level in constitutional matters,[8] just as it became clear that the constitutional court was not simply one of the numerous specialized supreme courts in Germany,[9] but a unique, separate 'constitutional organ' placed above the ordinary judiciary. This took at least 10 years and was to the merit of the court itself, which worked it out and fought for this status. By doing so it gave a new quality to constitutionalism. Both the protection of individual rights and the unlimited access of citizens to the constitutional court connected the constitutional review directly to the great human rights movement of the second half of the 20th century. The double function of the constitutional court—the review of laws and protection of individual rights—was to continue easily into the second generation of constitutional courts, where the constitutional complaint fitted into the tradition of *amparo*.[10] The third generation, however, seems to have returned to Kelsen and the dominance of abstract norm control. But the lessons of history have been invaluable for the third generation as well. Here the legislators who introduced the constitutional review were as ignorant of the consequences of having a constitutional court as the German constitution-drafting *Konvent* had been several decades before, and acted similarly out of political motives and with unclear notions about norm control. The third-generation courts, however, could draw on the practices of the German Constitutional Court in its early years, and were able to see that in the formative period of 'transition' the status of a constitutional court was in its own hands.[11]

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[8] The constitutional complaint was only incorporated into the Basic Law in 1969. Before that its legal basis was a provision in the Constitutional Court Act (Pestalozza, 1991: 159ff.).

[9] Out of the same, deep mistrust against German state organs that was beneficial for setting up a constitutional court, the Allied Powers were against any concentration of judicial power and maintained the German tradition of separate special courts.

[10] See the essay by Ruth Rubio Marín on Spain (Chapter 15, below).

[11] In the early 1950s, the German government had a study written by the most prestigious constitutional law professor of the time criticizing the ambitions of the

Adopting the contemporary constitutional tradition, a significant trait of the third generation, is not limited to assimilating constitutional standards and legal solutions; it embraces behavioural patterns and legal culture as well.

Constitutional Courts in the Post-Communist Transition: Mission and Tasks

The generation of the granddaughters of the German Constitutional Court shows a number of peculiarities, notably the courts' competences, which derive from the historical context of their establishment, and their overall abstract character.

Extraordinary Circumstances and Inevitable 'Transitional' Cases

The dimension of the third wave of democratization in Europe was indeed extraordinary; its scale was that of world history. Because of the reordering of the global political scene, the post-Soviet and European post-Communist transitions received a great deal of international attention, which was extended also to the new constitutional courts. Furthermore, this huge wave produced a much larger number of constitutional courts than the democratization in Southern Europe in the 1970s. The new courts were established in very different political and historical environments. Therefore, one must be cautious about generalizations. In the differentiated pattern of domestic performances and successful adaptation of the new constitutional courts to the European constitutional culture, the historical regions of Europe obviously reappeared.[12]

Not only were the new courts more numerous, they had to reflect the historical event that had brought them so necessarily into existence. The basic question was certainly the role of the 'extraordinary circumstances': did such circumstances modify or justify the modification

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constitutional court. The court answered in a 100-page opinion about its legal status as a *sui generis* 'constitutional organ', which was not a part of the judiciary. The *Statusdenkschrift* was among the first documents I read on being elected to the Hungarian Constitutional Court.

[12] Not only are there clear differences between the successor states of the Soviet Union and the others, but the fault line between Western and Eastern Christianity is also very visible. The role of the Polish, Hungarian or Slovenian courts and their acceptance by the Western constitutional courts are not mere chance.

of constitutional standards; did the unique historical events allow the suspension of some constitutional guarantees; in short, was there a 'transitional constitutionality' different from the 'normal' one? The historical fact of the transition could not be denied. The new courts faced the inevitable agenda of transition: they had before them the issues of punishing the political crimes of the past, which raises the problem of retroactive criminal legislation; the issue of 'lustration', i.e. the unveiling of the activities and identification of agents of the Communist secret services, and probably their temporary exclusion from key public offices; and a feature particular to the post-Communist transition, the (re)construction of private property.[13] This was connected with the issue of privatization of former state property, especially with the question of whether previously nationalized or confiscated property was to be returned to the former owners, or whether other ways of compensation for past injustices were compatible with the constitution as well.

The answers to these genuinely 'transitional' questions have determined the style of the transition in the given country. These answers varied, just as the judicial practices of the western democracies concerning similar transitional problems had not been uniform (and just as legal theory has remained divided, too, in the crucial question of the conflict between natural justice and formal constitutional guarantees). This uncertainty was embarrassing for the new courts in the 1990s. The courts also diverge in respect of their willingness to conceptualize or consciously bring forward any special transitional problems. In the constitutional courts which adhere closely to the German-type jurisprudence—that is, the belt from the Baltic States down to Slovenia, including the Polish, Czech, Slovak and Hungarian courts (and even *Karlsruhe*, which in respect to these cases also belongs to the 'transitional courts')—statements of principle regularly appear.

The Hungarian Constitutional Court introduced and enforced a coherent theory, coining the somewhat paradoxical term 'revolution under the rule of law' (Sólyom and Brunner, 2000: 38ff., 219–21). Very roughly, the court emphasized, on the one hand, the revolutionary character of the changes: the new Constitution of 1989 introduced a new constitutional order, which was of a new quality, fundamentally different from the previous regime. This fundamental difference needed

[13] Nationalization or other forms of appropriation were on the agenda in other transitions also, for example Portugal and South Africa.

to be reinforced by the court because of the 'lawful' character of the 'revolution' and all the resulting legal continuity.[14] On the other hand, the court insisted that the revolutionary changes be carried out under strict compliance with the constitution and constitutional laws, declaring in an important 1992 debate that 'the given historical situation can be taken into consideration. However, the basic guarantees of the rule of law cannot be set aside by reference to historical situations and to justice.... A state under the rule of law cannot be created by undermining the rule of law. Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice' (Sólyom and Brunner, 2000: 214, 221). Indeed, one of the dividing lines between the attitudes of the courts towards the past was the classic choice between substantive justice and the guarantees of positive constitutional law.[15]

Retroactive Criminal Legislation

The relevant issue was the question of retroactive criminal legislation. The usual terms 'accounting for the past' or 'overcoming the past' are confusing, but show how difficult it is to formulate technically the demand for justice that was quite natural from the moral point of view and broadly shared by the population. As a problem of constitutional law, however, it can be clearly expressed as follows: can formal criminal law guarantees of the constitution be put aside if their enforcement would result in 'unbearable injustice'? Does the constitution also have absolute force in extraordinary historical situations—as for instance in the time of the 'transition'? But the problem was more momentous here because behind the concrete issue the credibility of the new system was at stake. Accordingly, the problem for the constitutional court was: what is the ultimate law that governs and determines all other legal norms?

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[14] For instance, in the review of the lustration law (Decision 60/1994: 24 December 1994; Sólyom and Brunner, 2000: 306). According to the nature of the 'peaceful transition', retaliatory actions—if any—remained very limited. The successor parties of the Communist Party were returned to power by free elections in many post-Communist countries and showed considerable interest in blurring the line between the last, 'soft' period of Communist rule and the new democratic order.

[15] As the question emerged in connection with the applicable law and its retroactivity in the Nuremberg Courts in 1945, the legal philosopher Gustav Radbruch provided the answer: if positive law would lead to unbearable injustice, the principle of justice must prevail. The *Radbruchsche Formel* became very popular again in the 1990s as the question had to be decided whether the statute of limitation could be amended retroactively in order to punish Communist crimes.

Is it the new constitution that represents the new, democratic order, or is there an even higher source of law, i.e. the natural law? May natural law supersede the constitution, and if so under what conditions? Do extraordinary situations exist which suspend the formal rule of law? Are such exceptions, implying as they do the rule of values over the rules of law, inherent in the constitution? One cannot help commenting that these are not only legal, but also eminently political questions, whose effect goes far beyond the particular case of the punishment of political crimes of the past. The answer of each constitutional court was to be in accordance with the history of the country, and with the special conditions of its transition.

In the decade before 1989, Hungary was a 'mature post-totalitarian society' (Linz and Stepan, 1996: 296), in which the citizens could feel themselves relatively free because much was allowed them.[16] But in the new constitutional democracy, they had rights instead of permissions. The difference between a permit and a right was the essence of the system change; and this difference had to be demonstrated in symbolic issues of the transition. The ruling of the Hungarian Constitutional Court, that the criminal law guarantees of the constitution are absolute and cannot be suspended, either in the interest of justice or because of the extraordinary historical situation, is to be seen in this setting. In the broader context of trustworthiness of the new regime, the previous 'soft authoritarianism' resulted, paradoxically, in the fact that only the absolute force of the constitutional guarantees represented the domain where the contrast with the old regime was absolute. This is why the court equated the rule of law with 'legal certainty'. It was exactly this difference, the superiority of law over political demands, which had to be maintained and sanctioned.

To briefly give the example of retroactive criminal legislation in three states, namely, Germany, Poland and the Czech Republic, the constitutional court yielded directly to 'justice,' ruling that the statute of limitation could be changed retroactively. By contrast, the Hungarian Constitutional Court insisted on the principle of the absolute force of the constitution and repeatedly struck down laws that reset the duration of the limitation period or otherwise manipulated it. It has to be

[16] Certainly, after 1963 the suppression of freedoms was not omnipresent or brutal. But is it better to live not under oppression but under a lie? One should remember Adorno's maxim: 'Es gibt kein richtiges Leben im falschen'—there can be no good life in falsehood.

noted, however, that the Hungarian court found another way to render justice: criminal prosecution under international law. The court ruled that the Geneva Conventions were directly applicable in Hungarian criminal courts and crimes falling within the categories of war crimes and crimes against humanity could be brought to trial because for these crimes there was no limitation under international law. So the most serious crimes, like the massacre of demonstrators committed during and after the revolution in 1956, could be punished.[17]

Today we see that the criminal sentences—if any—were confined to a few, rather symbolic cases in the post-Communist countries, irrespective of the different principal standpoint of the constitutional courts. But the different courts sent the public different messages on constitutionality and on the absolute reliability of the constitution in this very sensitive historical period. The attitude of the constitutional court to the past, which manifested itself in all three types of symbolic transitional cases, determined the 'style' of the transition.

The 'Restoration' Approach and the 'Prospective' Approach

One type of constitutional policy on system change can be called the 'restoration' approach, and its opposite, the 'prospective' approach. These policies embrace all genuine transitional cases, but the best examples of them come from the privatization/compensation issue. The restoration approach considers the 40 years of socialism as non-existent from the legal point of view. Nationalization laws and their effects are taken as if they had never been valid; ownership is to be restored as it was before nationalization. Similarly, the natural course of time that led to the end of the limitation period is disregarded if the court allows the statute of limitation to be reset and turns politically motivated crimes already prescribed into crimes prosecutable and punishable now. This approach presupposes a total break with the law of the Communist era. Such a break was possible only in Germany, where a new legal order was introduced overnight.[18] Elsewhere, the harmonization of the body of law with the new constitution took years. Manipulation of time has a limited scope; and in fact, it was confined to exemplary cases of political criminality and the restoration of private property. However,

[17] Decision 53/1993: 13 October 1993 (Sólyom and Brunner, 2000: 273). Subsequently, in trials between 1996 and 2002, several prison sentences were delivered.

[18] Regiments of civil servants and judges who were sent to East Germany enforced the new law. But even so, over 100 pages of transitory regulation were needed.

the latter raises the question of equality: why are only particular groups of persons and certain sorts of property included? It is not by coincidence that in all new democracies the most enduring constitutional court processes dealt with time limits, objects and persons entitled to restoration of property rights—and above all, with the constitutionality of respective differences in treatment.[19] The restoration approach may easily be linked with the ideology of justice. The German, Polish and Czech constitutional courts followed this policy.

The 'prospective' approach does not go back to a pre-Communist era. While emphasizing the revolutionary nature of the changes and the new quality of the system based on the rule of law, it recognizes the fact that the new order emerges on the grounds of legal continuity. In the negotiated system change, for instance in Hungary, the new constitution was passed by the old, non-freely elected parliament with its overwhelming Communist majority. Under such conditions the new quality of the new constitutional democracy was to be emphasized, above all, by demonstrating the absolute force of the constitutional guarantees, and then by giving priority to legal certainty. Against this background, in Hungary, the state could keep the property that it had obtained by means of nationalization and could sell it freely. Privatization and compensation were separated. Former owners were given a more symbolic monetary compensation.

Lustration

Lustration was at its most drastic and consequential in Germany and, perhaps, in the Czech Republic. The political class in Hungary did not seem willing to see to the task radically. The lustration law was passed too late, in 1994. So it could not fulfil the original function of such laws: to keep out of the new state machinery those who, on the grounds of their former position or activity, might endanger the successful start of the new system. What remained was to reveal the functioning of the Communist secret services, and to identify their agents publicly. Background checks extended only to a limited circle of public officials, who could escape making public their files by resigning. The constitutional court reviewed the law in terms of access to public data and privacy rights (Decision 60/1994: 24. December 1994; Sólyom

[19] To summarize the German situation, the German Constitutional Court delivered a decisive judgment on (equality in) compensation as late as 2000.

and Brunner, 2000: 306). But the question remained unresolved from the moral point of view.

Leaving the Transitional Period Behind

Although the policy of the Hungarian court concerning the 'extraordinary circumstances' was developed in the celebrated 'transitional' cases, its decisive impact was on the whole jurisprudence of the court. First of all the principled legal certainty grew into a general test of constitutionality. The contradiction between formal guarantees and natural law values was forgotten, all the more so because there emerged no more genuine transitional cases, and the court developed its technical components. Legal certainty was the means for extending the protection of the right to property, to include social security entitlements and to vested rights in general, and conversely, it was the basis of limiting free discretion in administrative decisions (Sólyom and Brunner, 2000: 41, 284, 322, 364). Similarly, many of the technical—indeed original—solutions and tests developed in the compensation cases[20] were used later on in quite different and independent contexts. Furthermore, the court used its earlier general arguments against 'extraordinary situations' when it rejected arguments put forward by the government in support of its austerity laws due to the 'economic emergency situation' in 1995 (Decision 43/1995: 30 June 1995; Sólyom and Brunner, 2000: 322).

Concrete issues apart, the Hungarian court tried to restrict 'transitory' themes to leave behind the transitional period as quickly as possible. In its decisions the court anticipated the 'normal' conditions of the rule of law and operated as a constitutional court should in a consolidated democratic state. The Hungarian Constitutional Court made clear that the borderline between 'normal' and 'extraordinary' situations was relative, and took action against some 'old' European constitutional courts that expressed reservations about the newcomers (Sólyom, 1996:

[20] The court was not satisfied with arguments usual elsewhere according to which governments had a wide discretion in the compensation issue. It wanted to develop a coherent theory and found it in the notion of distributive justice, that is in the idea that costs of the transition had to be distributed across the whole society, and favoured classes, such as the former owners, were also required to share the burdens of transformation (Sólyom and Brunner, 2000: 25–35). Technical solutions using notions borrowed from Roman law (*novatio* of obligations of the state) or such as 'original burdens' (with respect to restituted property) were later used independently from the issue of compensation.

139). There were, however, constitutional courts that emphasized their particular transitional character and that of their democracy.[21]

Contribution to Stability

Another common trait of the third-generation constitutional courts is their contribution to the stability of the new democracies. In general, constitutional review has a neutralizing function. Under the circumstances of transition, it is especially important that political debates be transformed into pure constitutional law issues and decided in legal terms—and it is even more important that both the new political class and the people accept this way of conflict resolution. The other side of the coin is that politics push the responsibility parliaments and the governments do not wish to bear towards the constitutional courts, as was clearly the case in Hungary with regard to compensation and the death penalty.[22] The contribution of the constitutional court to stability may be appropriate in areas that really shake the population, such as the collapse of social welfare systems, unemployment and the disappearance of the paternalistic state. This explains why the interpretation of social rights was among the most important tasks of the new constitutional court.

The consolidation of the organization of the new state, settlement of conflicts of competence and protection of the independence of the judiciary and the autonomy of local governments have also been decisive factors for the well-functioning of the new democracies. Throughout the political changes in Central and Eastern Europe, the office of president was the focus of political and constitutional controversy. The choice between a parliamentary and presidential system

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[21] On the initiative of the Georgian Constitutional Court a Conference of Constitutional Courts of New Democracies was founded. All post-Communist states were invited, although the members are in point of fact the courts of the successor states of the Soviet Union—less the three Baltic courts.

[22] The prime minister asked the constitutional court for interpretation of the constitution when in 1990 different concepts on compensation threatened the ruling coalition with dissolution. In the case of the death penalty, the parliament—and everybody else—knew that review of the relevant provision of the Criminal Code was pending in the constitutional court. But no MP or faction brought the issue of abolition into the House. After the court did abolish the death penalty, the parliament claimed the legislator should have decided such an important question. Considering that 80 percent of the population was for capital punishment at the time it is not likely that any elected representative would have raised such an unpopular issue as abolition or vote in favour of it.

was influenced partly by tradition, as in Hungary,[23] but also by the very presence of charismatic leaders. In a certain type of political culture, notably in the Soviet successor states, great change and turbulence are hardly imaginable without a strong personal leadership. It was up to the constitutional court to delineate the powers of the president and, in parliamentary systems, to lay down the constitutional criteria of the system itself. The courts resolved actual conflicts between the head of state and the head of government, especially in cases of 'cohabitation'. All 'classic' themes in this field are present in the case law of the new constitutional court: the interpretation of the status of the president as the commander in chief of the armed forces, his or her powers of appointment, especially the right to refuse a nomination, and so on.[24] The Hungarian example may show the seriousness of the problem. In the parliamentary system of Hungary, the president repeatedly maintained before the constitutional court that he was part of the executive power, and claimed the right to decide, in consensus with the prime minister, all matters that are beyond administrative tasks in the narrow sense. In response, the court defined exactly the status and powers of the president (Decision 48/1991: 26 September 1991; Sólyom and Brunner, 2000: 46ff., 159).

The Hungarian Constitutional Court also had to protect the independence of the judiciary. Its attitude towards local governments and other autonomous bodies was rather ambiguous, depending on whether their independence needed protection, or their exaggerated ambitions and corporatist attempts needed to be curtailed.[25] These cases were in fact decisive in the formation of the new democracy.

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[23] The Hungarian Constitution reverted to a parliamentary system after the Second World War, with its rather symbolic president. This was the only point in respect of which the Hungarian transformation might be called 'restorative'. In the debates about the president's future role, a consensus could be reached only on the basis of this historical reference to 1946. The presidential system has been favored in countries with a traditional French influence.

[24] The Russian, Moldavian, Polish and Hungarian cases are all well known. Is it by chance alone that both the Hungarian and Polish cases emerged out of the 'media war'? See Sólyom and Brunner (2000: 46).

[25] For the courts, see, for example, Sólyom and Brunner (2000: 48), and for local governments, see Sólyom and Brunner (2000: 49, 263, 284). During the nine years of the first constitutional court a strong corporatist trend was present. Unions wanted to regain the semi-statist position they had enjoyed under socialism; all professions (but even hobbyists such as hunters and anglers) wanted to have their own chambers with delegated powers to carry out public authority tasks. The court resisted them. For a typical case, see Sólyom and Brunner (2000: 364).

But the most important contribution to the stability of the new order, consciously performed by the Hungarian Constitutional Court, was the restoration of the authority of the law itself and its change from an instrument of power into a principled system regulated by the constitution. Efforts of the constitutional court to raise the principle of 'legal certainty' to an essential part of the rule of law, if not identical with it, have to be seen in this context.

Practical Effects of the 'Global Constitutional Movement'

International Instruments and Courts

The new courts were surely not aware that they were the heralds, witnesses and above all constituent parts of a global expansion of judicial power or a new era of constitutional review. They simply experienced very favourable international trends and took advantage of them. The circumstances were clearly different from that of the earlier generations. The third-generation courts were born into a world of flourishing international human rights jurisdiction. International remedies were already well known and had been ardently desired in socialist times. Joining the Council of Europe and the European Convention of Human Rights were among the first steps of the new democracies after the fall of Communism, and symbolized acknowledgment of their democratic character.[26] The unifying influence of Strasbourg case law is evident regarding both the 'old' and 'new' constitutional court. For the third-generation courts, whose competences are typically confined to abstract norm control, the differences between deciding a concrete violation of a convention right and reviewing a law *in abstracto* should be taken into consideration (Sólyom, 2000: 1317, esp. 1324ff.). But it is no longer easy to ascertain whether a human right standard stems from Strasbourg or from one of the constitutional courts, as we now have a common grammar of constitutionality in Europe.

[26] Hungary and some other socialist states had ratified the Covenant on Civil and Political Rights back in the late 1960s/early 1970s, but did not join the first optional protocol on individual complaint. Hungary did so in September 1988. The possibility of enforcing human rights against the state signalled the changes already taking place and was perceived in this sense. Later on, the European Convention of Human Rights thrust the Covenant into the background. This change can be seen also in the decisions of the constitutional court, which in the beginning cited in parallel the Covenant and the Convention; but later on the judgments of the Strasbourg Court became dominant.

The new courts profited from the world-historical dimension of the collapse of Communism in that they shared the international interest in the new institutions of new democracies. This offered a unique opportunity for publicity and for introducing themselves into the international community in a self-controlled manner. This was important with regard to the plethora of well-intentioned assistance programmes, that were often ill-considered owing to lack of knowledge of the history and the present stage of development of specific countries. Even in that ambiguous environment, the constitutional court developed a mechanism for international cooperation that was qualitatively superior to any former relationship. Two institutions should be mentioned: the Conference of the European Constitutional Courts, which dates back to 1972, and the Commission for Democracy through Law of the Council of Europe, the 'Venice Commission', established in 1990. These institutions served as very important organizational and technical means for the globalization of constitutional justice. Their integrative impact was momentous. The other side of the coin is the symbolic importance of the international acknowledgement of the new courts for their domestic development. This acknowledgement in turn provided them with a kind of protection from the government or political forces of their own country.[27]

New Traits in the Reception of International Standards

In this context, receiving foreign law was not legal transplantation in the traditional meaning. As the idea of the constitutional court itself was imported, assimilation of foreign constitutional case law was quite natural. The reception of constitutional jurisprudence became more and more rapid with the subsequent generations of courts, although the material to be assimilated had grown substantially. Traditional areas of influence from French or German law can be identified more in the structure and powers of the courts than in their jurisprudence,

[27] Measures against the constitutional court, as in Belarus, were noted and criticized by international organs. Even seemingly small irregularities were noticed. The yearly evaluation of Hungary by the European Union expressed concern at the government leaving seats vacant in the constitutional court for years thereby endangering the continuity of the jurisprudence of the court. Apart from one case when the government issued a statement criticizing the court's decision which partly struck down the government's austerity package of 1995, keeping the seats vacant was the government's only recourse against the constitutional court. However, it proved to be effective: the term of the first judges ended and all of them left the court within a year in 1998/9, and a totally new court had to continue the work of the founders.

and appear more in the overall legal culture than in the constitutional decisions. A strong, and traditional, German influence is nevertheless obvious in Poland, Hungary, the Czech Republic and Slovenia, usually owing to the professional education of the judges.[28]

The Hungarian Constitutional Court, however, was eager to balance out foreign influences. For instance the idea of *diritto vivente*, i.e. the court reviewing the law not as it has been written and promulgated but in the meaning as it is applied in the ordinary courts, was borrowed from the Italian *Corte Costituzionale*. The Hungarian Constitutional Court used the concept of 'the living law' to extend its competence to deciding the constitutionality of the application of the law by the courts and government agencies—an important step from abstract norm control towards more concrete protection of rights. In maintaining a law in force with an obligatory 'constitutional interpretation', the Hungarian court followed the German practice, although it soon realized that the same lesson could have equally been learned from the US. The Hungarian decisions on freedom of speech could rightly be called 'Hungarian First Amendment Jurisprudence' because they bore the clear mark of the US Supreme Court. In other places, one recognizes Dworkin's ideas on equality or on the moral reading of the constitution. All this shows that the Hungarian court received fewer direct legal solutions,[29] preferring rather to introduce theoretical concepts and notions. Even more important for the Hungarian court was the model established by other courts, their behaviour in difficult political situations and their skill in balancing precedents and new solutions.

The reception of international constitutionality by the Hungarian court thus included far more than adaptation of foreign standards. The court sought emancipation. It wanted to be an equal partner of the elder, established constitutional court, and was eager to perform in a similar way. It therefore spoke from its very first breath the common language of the European constitutional law and doctrine.[30] Strasbourg

[28] Half the judges of the first Hungarian Constitutional Court had spent years in Germany mostly as Fellows of the Humboldt Foundation. One could meet Humboldt Fellows in most of the courts from Lisbon to Warsaw.

[29] The rare citations were intended more to convince fellow judges and occasionally remained in the final text of the opinion.

[30] Paradoxically, it was beneficial here that the majority of the judges were former professors of civil law and not constitutionalists. Knowledge of socialist constitutional law has been of little advantage. In contrast, students of civil law were well trained in comparative law and had a sense for dogmatic discipline.

cases were being cited even before Hungary had officially declared its intention to join the European Convention of Human Rights. The court was not only eager to receive standards, but it also delivered original solutions not only in the transitional cases, where there were no ready-made models, but also in classic areas such as the constitutionality of capital punishment, abortion, or in a new approach to environmental rights (Sólyom and Brunner, 2000: 41, 284, 322, 364).

Another new trait of the reception was mutuality. In the genuine transitional themes such as privatization and lustration, a one-way take was impossible. Furthermore, the model court in Germany was in that respect a contemporary. Hungary's court of course took notice of the solutions of fellow courts, but only as parallel attempts, being convinced that in these cases each country would find its own way. Due to international interest and easy exchange of information, the ideas of the new courts could also themselves be assimilated. Arguments of the Hungarian decision for abolishing capital punishment were cited by the South African Constitutional Court, for instance, and their impact can be followed in similar decisions in the Baltic States, the Ukraine and Albania. Efforts of the new constitutional court to contribute to global constitutionality have not been in vain—at least not in that lucky historical period.

The Abstract Competence and its Consequences

Return to Kelsen?

The German Constitutional Court has coupled the Austrian model of centralized constitutional review of laws with the protection of individual constitutional rights by introducing and developing the institution of 'constitutional complaint'. Although that term occurs in some constitutional court acts of the post-Communist states, very few of them are comparable with the German *Verfassungsbeschwerde*, which is a remedy against the violation of an individual constitutional right by the action of any state authority.[31] Most of the 'constitutional complaints'

[31] A review of administrative acts would not constitute a novelty. The constitutional complaint became significant because it extended to final judgments as well.

of the third generation tend, however, to be motions to review the constitutionality of a law applied by an ordinary court.[32]

So the third generation of constitutional courts seems to have returned to Kelsen: their main and defining competence is the *a posteriori* abstract norm control.[33] The grounds for it are not clear and may differ from country to country. One may presume that judicial enforcement of fundamental rights in individual cases was less comprehensible for legal minds of the socialist school than the constitutional review of legal norms, which could be compared with the socialist idea that the hierarchy of norms shall be free of contradictions.[34] In any case, the abstract profile of the new constitutional court constituted a revival of the Kelsenian model and intensified the problem of the relationship between the constitutional court and the legislative. Early socialist laws (as in Yugoslavia and Poland) and drafts (in Hungary) excluded nullification of acts of parliament from the powers of the constitutional court. The new, democratically elected MPs inherited the concept of a single supreme organ (i.e. parliament) as the source of all power, which

[32] This 'quasi-constitutional complaint' is a kind of norm control, in which the sanctions of unconstitutionality of the law are the same as with the abstract norm control: the constitutional court nullifies the law with an *erga omnes* effect. The difference is that in the case of a constitutional complaint the applicant can reopen his or her case, in which the nullified norm cannot be applied. For an extensive discussion of the variants of proper and quasi-constitutional complaints, see Brunner (2002: 191, 202–28). Of the third generation, only the Czech Republic and Slovenia have a constitutional complaint proper. The newly introduced variant of the complaint in Slovakia cannot yet be evaluated.

[33] The review of the constitutionality of a law—with the power to declare it null and void—makes a court a constitutional court. This follows from Kelsen's conception and this is the requirement for the admission to the Conference of the European Constitutional Courts as well.

[34] In Hungary, the restriction to abstract norm control can be considered a consequence of overhasty legislation. Inevitably, the necessarily huge caseload accompanying constitutional complaint was a deterrent (as illustrated by the case of the Hungarian Ministry of Justice deleting the constitutional complaint from the draft of the Constitutional Court Act in 1989), and resistance by the ordinary judiciary also played a role, foreshadowing future conflicts between the Hungarian Constitutional Court and the Supreme Court. In Hungary, of all ministers and central state organs, only the president of the supreme court and the general prosecutor criticized the draft of the Constitutional Court Act, arguing that individual complaints would make the constitutional court too powerful. They held impossible that final judgments of ordinary courts could be challenged before the constitutional court. This conflict has endured until today. According to the constitution the supreme court may issues resolutions on the uniform application of the law (Art. 46). This special kind of judgment is binding on all courts. The constitutional court holds that such resolutions—as binding legal norms—are subject of norm control, while the supreme court denies it.

was now reinforced by the consciousness of democratic legitimacy. This 'transitory' variant of the counter-majoritarian difficulty was in the early days frequently addressed in speeches in the Hungarian parliament whenever the constitutional court struck down a law. Despite this difficulty, the constitutional court had its position recognized by parliament and government within a short time in Central Europe, and parliamentary resistance to the constitutional court lost its force.

Mitigating Conflicts and Cooperation with the Legislature

The Hungarian Constitutional Court gave a contradictory answer to the structural problems concerning the legislature. It offered the parliament cooperation but at the same time it produced an increasing number of positive norms. Ironically, both trends presupposed each other and were conditioned by express competences of the court as well as its interpretation of its own powers.

The court began with introducing cooperative sanctions instead of annulling laws, which was the only response to unconstitutionality foreseen in the Constitutional Court Act. Originally in order to avoid legal gaps, the court annulled unconstitutional laws for a future date giving the legislator time to amend the law. In other cases, the court did not strike down the law but determined its constitutional interpretation and maintained it within this meaning. In both cases, the constitutional court overstepped the classic role of Kelsen's 'negative legislator'. The opinions suggested how the unconstitutionality of the law might be removed. For instance, the entire Data Protection Act can be found in the decision two years earlier that declared the generally used PIN (personal identity number) unconstitutional; the Education Act contains pages from the Church Property case word for word, which enlarged upon the neutrality of public schools and the possibility and limits of state subsidy to religious committed schools. The Decision on Popular Referenda determined not only the regulation to be passed but also prescribed concrete procedural steps for the parliament to settle actually pending initiatives for referenda (Sólyom and Brunner, 2000: 9, 139; 14, 246; 43, 371). As laws were formally not annulled lightly, parliament was not humiliated and followed the advice of the court, while the latter was content since the law-maker accepted its conception of constitutionality. We can see how important such cooperation was if we consider that in the period from the first

court to 1998 about 30 percent of the challenged laws and regulations proved to be unconstitutional.[35]

Yet another typical competence of third-generation courts also promoted cooperation. The court can establish the unconstitutional omission of the legislature to pass an act. In that case the constitutional court obliges the law-makers to pass the law required by the constitution within a deadline. And what court would stop here and not tell the law-makers how to fill the gap? The Hungarian court interpreted this competence extensively. It established legislative omission not only in the case of total lack of a norm, but also if the existing regulations were incomplete. So the court decision could prescribe a constitutional solution, and at the same time oblige the legislator to act in the prescribed manner.

From 'Negative Legislator' to Judicial Legislation

The abstract norm control, unconstitutional omissions and the absence of constitutional complaint give the court an overall abstract profile. This is reinforced further by 'abstract' interpretative powers. The abstract competences are interconnected with producing positive norms. Positive norm-giving by the new constitutional court goes beyond the necessary and normal judge-made law quantitatively and qualitatively. It is a specific and salient trait of the third generation of constitutional courts.

Unfortunately, the pioneers of the democratic transition, Poland and Hungary, were not able to start the new era with a new constitution, even if amendments necessary for the democratic order were achieved. The respective symbolic needs of the people remained unsatisfied owing to the lack of a new constitution. Paradoxically, this situation was favourable for the constitutional courts. Viewed from the technical perspective, the patchwork constitutions with their inconsistencies and gaps allowed these courts certain room for manoeuvre and for developing unwritten constitutional principles, substitute rules and creative interpretations. In

[35] This figure remained constant during the time and includes pre- and postconstitutional law as well. It is to be noted, however, that the bulk of unconstitutional rules was not in laws of parliament but in ministerial decrees and in local government regulations.

both Poland and Hungary,[36] it became difficult to differentiate between the interpretation and explanation, on the one hand, and the writing of the constitution, on the other. Furthermore, the lack of a new constitution shifted the symbolic representation of the new constitutionalism over to the constitutional court—the new organ of the new system that filled the text of the fundamental law with a really new spirit. The wide acceptance of the Hungarian and Polish constitutional courts by their respective populations was surely a consequence of these courts' policy of accepting this unprecedented role.

Third-generation constitutional courts often have competences which empower them to declare primary constitutional norms. Such competence is called the 'abstract interpretation of a constitutional provision' in Hungary and in Russia, or 'the obligatory interpretation of a legal norm' in Poland. These are a kind of advisory opinion, and as such unthinkable in the US Supreme Court. Moreover, the opinion is binding on everybody. If the opinion is binding and abstractly formulated, then it is a legal norm.[37]

Central state organs, which can usually ask for interpretation of a constitutional provision, want decisions on concrete, mostly politically immediate issues.[38] The answer of the court seems to be determined by the abstractness of the question. The concerned parties may then

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[36] The so-called Polish 'Small Constitution' (valid until 1997) only regulated the state structure. Therefore constitutional principles—as the rule of law—and many fundamental rights had to be introduced and defined by the constitutional court. The principles developed by the court were then incorporated into the new Polish Constitution of 1997. In Hungary, the most important example may be the interpretation of presidential powers (Sólyom and Brunner, 2000: 45, 159). Despite a uniform language of the constitution that speaks of 'rights', the court had to create general rules on the difference between real individual rights and policy obligations ('state goals'). In the constitutionally warranted market economy it was essential to clarify that there was no 'right' to the market economy, and that the 'right to work' constituted a real right only as a free choice of profession or enterprise but gives no right to obtain a given job. Such differentiation was important in the field of social rights and environmental rights in general (Sólyom and Brunner, 2000: 35, 24, 322, 298). 'Rights' of local governments enshrined in the constitution mean constitutionally protected competences, but no rights proper.

[37] In fact the relationship between the concreteness of the motion for interpretation of the constitution and the abstractness of the answer of the court is the crucial problem of that competence.

[38] For example, Compensation Case I (Decision 21/1990: 4 October 1990; Sólyom and Brunner, 2000: 105). In such a case the abstract interpretation substitutes a preliminary norm control. In the Hungarian Compensation Case II it was in the other way round: the constitutional court refused the preliminary control of the Compensation Act, which was still being debated in the House at the time of the motion. Instead, the court announced its opinion concerning some principal questions about the conception

explain the answers that have the authority of the constitutional court behind them. This is why the abstract interpretation was so popular at the beginning in Hungary and Russia.[39] This further explains why it is widely believed that the abstract interpretation of the constitution is meddling in politics and should therefore be terminated. Despite this, the abstract interpretation remains an essential and effective means for giving a normative answer to problems concerning fundamental rights or state organization. The Hungarian Constitutional Court developed the admissibility requirement that the question shall be construed in a way that 'it can be answered *in abstracto*, appropriate for application to other cases, too'.[40] The court was not concerned whether or not there was a real case behind the hypothetical case as submitted. This was for the constitutional court as irrelevant as the question whether or not Dulcinea del Toboso really exists for Don Quixote.

By way of binding interpretation, the constitutional court can declare a constitutional rule. It did so in such important questions as the powers of the president of the republic in the parliamentary system of government, the relationship between direct and representative democracy, the non-derogation of the achieved level of environmental protection, the equal protection of property rights.[41] The normative kind of abstract interpretation was reconciled with the concrete case through the introduction of multilevel decisions. The constitutional court gives an answer to the question asked according to the abstractness of the statement of the problem. Then either an immediately relevant or more general constitutional principle is declared, or the court applies the

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of the draft—as if it were a case for interpretation of the right to property and of equal protection (Decision 16/1991: 20 April 1991; Sólyom and Brunner, 2000: 151).

[39] In the first six months of the Hungarian Constitutional Court the abstract interpretations were more important than the abstract norm control cases. In Russia, after the abstract interpretation was introduced in 1994, four important cases were delivered within a year. There is another ground for the popularity of that competence—from the side of the courts. The abstract interpretation can be used as a subsidiary for missing competences; so it can be a substitute for the competence of settlement of conflicts between higher state organs or for preventive norm control. Numerous Hungarian and Polish cases demonstrate this.

[40] This was declared again in a presidential power case (Decision 22/1992: 10 April 1992). Due to the political circumstances in 1991 and 1992 relating to questions of the competence of the president of the republic, the constitutional court was forced to overemphasize the abstract character of this competence. But the court was soon able to reconcile the abstract norm giving and the concrete answer in a new type of decision.

[41] Examples can be found in Sólyom and Brunner (2000: 159, 371, 298, 108).

principle to a practical problem, for example the referendum (Sólyom and Brunner, 2000: 43–4).

Besides abstract interpretation of the constitution and the legislative omission, the third-generation constitutional courts declare positive rules also in abstract norm control decisions. Such positive rules go beyond the given case, and in their abstract wording they are apt to function as real legal norms.[42] Positive norms appear in different positions within the decision per se. The Polish court leaves them in the reasoning, the Czech court put sentences from the reasons before the decision like an American headnote (or the *Leitsatz* of the German court). In Hungary, the general norms are at the top of the operative part of the decision, and therefore their binding character is indisputable. These general norms seem not to function as reasons for the concrete decision on the constitutionality of the norm under review, but the other way round—that is, they may justify the principles which are more directly connected with the concrete case and which give a direct reason for the decision. In other words, they appear as a premise from where, as from a constitutional provision, the decision follows in the last resort.[43]

The Monopoly of Interpretation of the Constitution

The abstract character of the third-generation constitutional court intensified the problems with the democratic legislature, but as we have seen, the courts could resolve them by cooperation, which was, however, balanced out by a peculiar judicial legislation. The other delicate

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[42] How much courts like expressing opinion in a positive statement is to be seen in Russia where the constitutional court reinstated the 'message for the legislator', a statement on the situation of constitutionality, in its rules of procedure after the legislator cancelled it in the Constitutional Court Act.

Similarly, the Polish Constitutional Court reinstated in its internal rules of procedure the competence of binding interpretation of laws after the new Constitutional Court Act omitted it from the powers of the court.

[43] For instance at the head of the decision on restitution of church property, six rules establish the meaning of separation of church and state and the consequent duties of the state. Some principles of data protection are in the *tenor*, others in the reasons of the decision on the PIN (personal identification number). Rules for all subsequent decisions on social security benefits are announced in the operative part of the first, leading decision. In fact the court amended the Criminal Code by defining new rules to replace those nullified in the decision on government defamation (Sólyom and Brunner, 2000: 246, 139, 322). The other side of the coin is that it is capricious which rules remained in the reasons and which appear expressly as an abstract norm. One can assume the political situation at the time was an influence, but so were subjective factors. In any case, the positive rule-making of the third-generation courts should always be considered with a view to the full decision.

relationship, that between the constitutional court and ordinary courts, is different from the two earlier generations, where the constitutional court decides on concrete constitutional complaints. In the new courts, there is certainly no parallel jurisdiction in the same concrete case, and no overturning of final judgments of ordinary courts by the constitutional court is possible.[44] The problems emerge in another—namely the abstract—way. The question now is how a uniform interpretation of the constitution can be guaranteed in all fields of its execution and application. Constitutional reality is feasible only with the judicial enforcement of constitutional rights. On the other hand, constitutional reality is inconceivable without the monopoly over the interpretation of the constitution. This is a real structural problem, characteristic of the third-generation constitutional court, which results from returning to the Kelsenian model. The guarantee of the monopoly of a normative interpretation of the constitution by the constitutional court requires the arrangement of its relations with the ordinary courts. For the majority of the constitutional courts in the third generation, legislation has already made clear that the enforcement of individual constitutional rights is the domain of the ordinary courts.[45] But this is precisely what makes the question of the monopoly of final interpretation of the constitution so important in the third-generation countries. Unexpectedly, the rivalry between both jurisdictions accompanied the first decade of the new democracies,[46] and might have negatively influenced the establishment of authority of constitutional courts.[47]

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[44] In the few countries which introduced the constitutional complaint, the 'classic' tension between ordinary and constitutional justice is also present (Holländer, 1997: 445).

[45] It is the decision of the legislator to introduce or not the constitutional complaint. The Hungarian Constitutional Court never questioned that Article 70/K of the Constitution, that provides that claims arising from a violation of fundamental rights shall be enforceable in a court of law, refers to the ordinary courts.

[46] In the course of the constitutional reforms of 1997 in Poland, the Polish Supreme Court not only objected to the introduction of the constitutional complaint but it claimed the power to carry out the constitutional review in concrete cases (Brunner and Garlicki, 1999: 51). Decision No. 8. of the Federal Supreme Court of the Russian Federation issued on 31 October 1995 authorized the ordinary courts to apply the constitution directly if 'the court comes to the conclusion' that a law is unconstitutional. The ordinary judge may turn to the constitutional court only if he or she is uncertain about the constitutionality of the law. The process is similar in case of conflict between a law and a decree (of lower rank). What is remarkable is not only that such a provision, which should have been passed as a provision of the constitution or at least by the Constitutional Court Act, was issued by the supreme court. It is even more surprising that the constitutional court let it pass without saying a word.

[47] A further negative effect is that the ordinary courts were not able to develop protection of fundamental rights comparable with the constitutional complaint. For

However, the Hungarian Constitutional Court managed to extend its constitutional interpretation to the courts and other authorities as well, without encroaching on the independence of the judiciary. The means was the constitutional review of the 'living law' referred to earlier in this article. This leads undeniably to the constitutional review of the judicial practice, yet not in concrete cases, but as it appears in the general consolidated application of the given norm. Hence, the constitutional review includes the scrutiny of the judge-made law instead of the concrete judgment. The uniform judge-made law that has existed for a long time is a legal norm. The independence of the judiciary remains intact should the constitutional court review the constitutionality of these 'laws'. In case of unconstitutionality, the constitutional court annuls the norm itself or construes the possible constitutional meaning of the norm. The concrete judgments of the courts are not discussed. This seems to be the most acceptable way of enforcing the monopoly for the constitutional court over the interpretation of the constitution.[48] A Kelsenian constitutional review limited to review of laws may go no further than this.

Further Hungarian Peculiarities

The role of the Hungarian Constitutional Court in the reconstruction of the new political system was embedded in the traits of the third-gener-ation courts and their common tasks in system transition. Some Hungarian peculiarities have already been referred to. We now consider some further specific traits. The jurisdiction of the constitutional court was quite extensive. Besides the *a posteriori* abstract norm control and the aforementioned abstract interpretation of the constitution and rectification of legislative omissions, the court reviews the conformity of laws with treaties and the conformity of treaties with the constitution as well,[49] reviews laws passed but not yet promulgated, resolves

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instance, according to the policy of the Hungarian Supreme Court fundamental rights are sufficiently protected if the courts apply constitutionally perfect laws—in this case there is no need for direct application of the constitution either.

[48] The living law developed in administrative decisions may be reviewed in the same way.

[49] The court established this power in the Decision 4/1997: 22 January 1997 (Sólyom and Brunner, 2000: 356). For a detailed analysis of competences see Sólyom and Brunner (2000: 76–89).

conflicts of competence, and has other powers such as protection of local governments and of the autonomy of universities, or the impeachment of the president. Until 1998, the court also had the power of preventive review of draft laws. In retrospect, one can say, however, that what counts is not the large number of competences. Some competences can substitute others.[50] It is the exercise of the competences in practice that is decisive.

The Hungarian Constitutional Court modified its competences. On the one hand, it exercised self-restraint in order to avoid involvement in the legislative process: the court refused to exercise preventive review of draft laws before reaching the final wording.[51] For practical reasons and in harmony with European development, the court killed this competence. To keep out of politics, furthermore, the court developed strict criteria for the admissibility of motions for abstract interpretation of the constitution. On the other hand, however, the court extended the use of legislative omission and introduced positive normative statements in all of its competences. Moreover, it also tried to shift its powers from the abstract control of norms towards providing individual protection. In the absence of powers to review the decisions of ordinary courts, it was only possible to go halfway: the constitutional court extended the constitutional review to the 'living law'.

The future role of the constitutional court was programmed by the regulation of standing, the effect of which could not be foreseen even by its author. In Hungary everybody is entitled to file an abstract norm control; he or she is not required to show any violation of his or her rights or interests. This *actio popularis* is unique in the world. The opposition at the Round Table enforced its acceptance.[52] The unlimited standing opened the door to citizens to participate in the constitutional transformation of the entire legal order. An unexpected flow of motions reached the court.[53] About 90 percent of the applications came from

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[50] Establishing legislative omission is rarely expressly regulated in constitutional court acts but is widely used in the European courts within their other powers.

[51] The Constitutional Court Act also made possible the preventive review of draft laws during the parliamentary debate.

[52] The idea came from the environment protection law (Sólyom, 1980: 19). As earlier in relation to the environmental law, in 1989 at the Round Table I proposed an *actio popularis* against the socialist concept that granted an action only to state organs, unions and registered associations, which were under state control.

[53] The huge caseload is the other side of the coin. In the first four years on average 1700 motions were filed per year. About half of them were admissible.

the people. Moreover, the large part of the laws challenged would never have been brought to court by ministers or parliamentarians because that would have contradicted governmental interests, or had heavy financial consequences, and so on. No wonder that hundreds of citizens who were tangibly affected by the reduction of social security benefits challenged the austerity package of the government in the constitutional court. But in countless cases, just the intent of objective enforcement of constitutionality was behind the *actio popularis*. Turning to the constitutional court became a special channel of direct democracy, and for the influence of the citizenry upon legislation. This possibility, and the frequent effect of such actions, the invalidation of laws (even laws taking force not long previously), the coverage of these events in the press, and the cases when the court refused the challenge, all constituted a unique learning process of constitutionalism for the citizens. The *actio popularis* contributed to the popularity of the constitutional court. People felt that they had an ultimate forum to call upon; they appreciated the impartiality of the court as well. Popular support in turn strengthened the constitutional court's legitimacy and its position in the political system.

The court enjoyed freedom in procedural questions.[54] It did not feel itself strictly bound to the petition but used it as a procedural starting point and extended the investigation to the complex problem, involving all respective norms in the review. One may say the court posed questions and answered them.

All this freedom and active use of powers served the policy of the constitutional court: it sought to deliver an exhaustive interpretation to each provision of the constitution as soon as possible, and to develop the constitution into a coherent system. In fact, within five or six years the court addressed all rights and had a voluminous and all embracing jurisprudence comparable to that of other courts achieved over 30 years. No doubt this was a risky undertaking because premature statements and errors were not easy to correct later on. But the benefits for the legal certainty and making the constitution a workable

[54] The Constitutional Court Act contains only a few procedural rules, leaving further regulation to a procedural order determined and worded by the court but passed as a law. This solution was due to the hasty circumstances under which the Constitutional Court Act was made in the last weeks of the Round Table. The court created its rules within a year but these have not been passed until now because of debates between the court and the parliament, which is unwilling to pass unamended a text made by another organ.

tool certainly outweighed the risks. Moreover, the court worked on a *principled* system. This may help to understand the notion of the 'invisible constitution',[55] which expressed the concept of the constitution as a system of principles.

By receiving international and eminently European standards, the constitutional court became the representative in Hungary of an important ideological trend, which was non-nationalist and which emphasized the return to Europe, and the same time an equality with older democracies. This sole idea remained shared by both sides despite the deep splits in domestic politics, but no other organ was able to represent it credibly. The court developed 'transnational constitutionalism' on this basis (Scheppele, 1996: 5).

In the 1990–8 period, the Hungarian Constitutional Court was an activist court, sometimes extremely so, but in many cases it shaped even its own competences in a self-restraining manner. It developed the abstract character of the third-generation courts to the upmost, but tried to extend its competences to concrete cases and individual rights' protection as well. On the one hand it emphasized legal certainty, a formal character of the rule of law. On the other, the court exercised a moral reading of the constitution, put the right to human dignity on the top of the hierarchy of fundamental rights and connected it with equality: the right to equal dignity constituted the base of the most important decisions. The Hungarian Constitutional Court avoided taking notice of the transition as though it wanted to repress it. At the same time, it formulated a conceptual framework for transitional cases and called it 'the repository of the paradox of the "revolution under the rule of law"'. Indeed, the constitutional court created the system change and was a creature of it. As a columnist wrote, bidding farewell to the first constitutional court in 1999: it was the superego of the transformation (Babus, 1999).

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[55] 'The constitutional court must continue its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an "invisible constitution" provides a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interest' (President Sólyom concurring in the Death Penalty Case, Decision 23/1990: 31 October 1990 [Sólyom and Brunner, 2000: 118, 126]).

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CHAPTER THIRTEEN

CONSTITUTIONAL NEGOTIATIONS

POLITICAL CONTEXTS OF JUDICIAL ACTIVISM IN POST-SOVIET EUROPE*

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Written constitutions became a commonplace of political life in many parts of the world by the end of the 20th century, but it was not until the Second World War that politically strong courts possessing at least some powers of judicial review became a routine part of those constitutions. It took even longer for judges to convince their co-governors in the other branches that everyone had to govern within the bounds of constitutional principle and that judges, in large measure, got to say what those bounds were. The result? It is hard to deny that there has been a 'global expansion of judicial power' (Tate and Vallinder, 1995) and that a wide variety of democratic regimes have learned 'governing with judges' (Stone Sweet, 2000). When judges use constitutionally granted powers of judicial review, however, they do not use these powers unopposed. Knowing when to stand ground and when to bend to the strong views of politicians allows courts to remain influential over the long term. But why do courts ever win these battles when they have the power of 'neither the sword nor the purse' (Bickel, 1962)?

In this article, I examine how and why constitutional courts have become such an important part of the political landscape in modern

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democratic regimes by focusing on two new constitutional courts. While most analysts of regimes undergoing democratic transformation see the new governments as distinctively different from more established democracies because the new ones are not fully 'consolidated' (Linz and Stepan, 1996; di Palma, 1990; O'Donnell and Schmitter, 1986; Elster et al., 1998), I believe that we can learn a great deal about the more established democracies from looking at the experiences of the newcomers. In short, moments of political transformation are good to study not because they are different in kind from what becomes normal politics, but precisely because they reveal in sharper relief the problems buried in what passes for normal in 'consolidated' democracies.

In both Hungary and Russia, strong forms of judicial activism have apparently met somewhat different fates. Hungary had in the 1990s one of the most powerful courts in the world, though a series of new judicial appointments effectively neutralized the court as a political force after 1998. Russia, on the other hand, had an activist court that was forcibly closed for political reconstruction in 1993 and reopened only in 1995 under severe constraint. The Russian Constitutional Court then kept its head down in fractious national politics and has survived. In each country, the high court has been targeted by politicians, but the court in Hungary lasted as a strong political force much longer and accomplished much more in bringing Hungarian law into compliance with international human rights norms during the immediate political changes of the 1990s than the Russian court was able to do in the same period. In Russia, however, there are signs that the constitutional court is increasing its influence in contemporary politics as Russia enters its second post-Soviet decade just as the Hungarian Constitutional Court has declined in influence.

Institutions and Evasions in Constitutional Ethnography: A Tale of Two Courts

Since the changes of 1989 (in East Central Europe) and 1991 (in the former Soviet Union), law has changed immensely in the countries formerly governed by socialist legality. Not only have new parliaments been passing laws at a fast and furious rate (and the speed often shows in the infelicities of draftsmanship), but also all of the former Soviet world countries have drafted new constitutions and created new constitutional courts.

Constitutional courts in the former Soviet world have, by and large, not had an easy time of it. Some are still not able to create a visible presence in governance, or even to get themselves established at all as an independent power (see the Central Asian states, Ukraine, Azerbaijan, Belarus and, so far, Yugoslavia) (Schwartz, 2000: 3). Others have tried to oppose the government but have paid a price. The Bulgarian Constitutional Court challenged the neo-Communist government in the mid-1990s and ran into fierce political opposition but survived (Dimitrov, 1999); the Russian Constitutional Court, as we will see later, opened in 1991, but then was shut down in 1993, reorganized and reopened under new management in 1995 (Hausmaninger, 1995). A few have been very active, garnering apparently deep legitimacy among the public as well as the recognition from the political branches of government that they are permanent features of the new political landscape (e.g. Hungary, Poland, Slovenia, Estonia) (Schwartz, 2000). But there have been rocky times even for the successful courts.

Even though the politicians do not always approve of them, constitutional courts are enormously popular institutions in general wherever they are actually working independently throughout the former Soviet world; citizens see in these courts a real hope for the recognition of human rights and the rule of law. Sometimes, however, the very popularity of the new constitutional courts is threatening to the new political forces in post-Communist societies because, under the open access rules of many of these courts, ordinary citizens can go to the constitutional courts in order to do an end-run around politics. The politicians, not surprisingly, do not always like this.

So—what do the politicians do? Often the politicians try anything they can to neutralize the courts while not bringing the wrath of the public down upon their heads. The incentives for politicians to do this are increased by the political and economic climates within which these courts operate. Politicians in the former Soviet world are often caught between impossible pressures, because they work with fragile state institutions that are not firmly entrenched, because they face strong international pressures to make painful reforms, and because they have to be responsive to the large parts of the population who experience declining economic fortunes. As a result, politicians often say one thing while doing another, and they trade off one pressure group's demands against another's. Political instability, brought on by many splintering political parties in the new parliaments, makes it hard for the new executives to build stable alliances. And economic constraints make it

hard to realize rights. The politicians are under enormous pressures to keep themselves in power while making things better for their citizens, creating markets and opening them up to outsiders, and being fiscally responsible to international financial institutions—and to do all of this while maintaining democratic legitimacy, respect for human rights and the rule of law. And of course the new politicians are often tempted by the personal rewards and opportunities for personal revenge that power brings. Not surprisingly, when constitutional courts add things to the long lists that the politicians have to consider or when constitutional courts require that politicians listen to some pressures and ignore others, the politicians resist.

How can constitutional court judges in newcomer democracies exert their visions of the constitutional order given the fragility and basic impossibility of governance that these governments face? Courts in these difficult political circumstances find ways to evade certain political pressures while still upholding their ability to be independently accountable to a population that expects them to ensure the realization of rights. To see how this works, let's look at Hungary and Russia.

Hungary: Judicial Activism and Constitutional Negotiation

The Hungarian Constitutional Court, through the 1990s, practically ran Hungary. In fact, Hungary in the 1990s qualifies in my view as a 'courtocracy' (see Scheppele, forthcoming). Whatever the issue in Hungarian politics, the Hungarian Constitutional Court practically always had the last word. As a result, it was the strongest body of state through the 1990s.

The Hungarian Constitutional Court not only struck down nearly one law out of every three that came before it (see Table 1) but it developed a broad roaming jurisdiction while reviewing a stunning number of laws. Some of the court's ambitious jurisdiction came directly from the constitution which said in Article 32(a)(3) that 'anyone' could challenge the constitutionality of any active legal norm in Hungary. As a result, thousands of petitions were sent, mostly by ordinary citizens, to the court asking that laws be reviewed. Broad powers were also conveyed by the Constitutional Court Act, which allowed the court to review laws before, during and after their passage under specified circumstances as well as to issue abstract interpretations of constitutional principles upon request of state officials. The Act also allowed

the court to review *non-action* of the parliament as a possible constitutional violation (unconstitutional omissions). If the court found that the parliament had a constitutional obligation to pass a law on a specific subject but had not, the court could require the parliament to legislate on the subject within constitutional boundaries that the court would outline. The power to declare unconstitutional omissions was not an infrequently used power and created a long agenda for the parliament. And because the Constitutional Court Act explicitly refused to give the court discretionary jurisdiction, every legitimately posed constitutional question had to be answered by the court.

The court also added to the scope of its review through its use of interpretive principles that guaranteed the court would find many laws to be unconstitutional. For example, the court developed the view that it would examine not just the directly challenged provisions asked for in the petitions it received. Instead, in the view of the court, its responsibility for ensuring constitutional legality required it also to review the whole law under challenge on the theory that some of the directly challenged parts, if voided, might have implications for the coherence of the rest of the law. In addition, given that the constitutional court did not have jurisdiction to hear 'constitutional complaints' (cases where a petitioner could claim that her or his rights were violated because an otherwise constitutional law was unconstitutionally applied to them), the court adopted a strategy of deciding that a law was unconstitutional if any plausible interpretation of the law would result in its unconstitutional application. Since the court was reviewing laws abstractly, there was generally no specific interpretation on the table to narrow the review. The result was a far-reaching, far-ranging jurisprudence in which the constitutional court was constantly giving the parliament homework assignments to revise laws to ensure their constitutionality. Between 1990 and 1995, the court found that 273 national laws were unconstitutional and it declared frequent constitutional omissions that required new legislation from the parliament (see Table 1).

And the parliament nearly always complied. For those few situations in which the parliament didn't, it was usually because the new law required a two-thirds vote and there was simply not a two-thirds coalition able to agree on the specifics of the new law. But everyone officially agreed on the proposition that the laws should be made constitutional and that it was emphatically the province of the constitutional court to say what the (constitutional) law was. The court was a powerful

institution, arguably the most powerful institution of state in Hungary, throughout the 1990s.

This picture is accurate as far as it goes. But politically speaking, the reality was a bit more complicated. The Hungarian Constitutional Court did in fact issue many sweeping decisions protecting rights and requiring changes in the laws to ensure that rights were protected. And high-level politicians from virtually all of the political parties in the parliament indicated in interviews that they felt that they had to follow all decisions of the court, without exception.[1]

Table 1 *Profile of the Decisions of the Hungarian Constitutional Court*[a]

	1990–3	1994–5	Totals
Total judgments	847	479	1,326
Number of cases involving the review of national laws	506	399	905
Number of national laws found unconstitutional[b]	146	127	273
Percentage of all reviewed national laws declared unconstitutional	28.9	31.8	30.2
Number of unconstitutional omissions cases[c]	246	14	260
Number of abstract interpretation cases[d]	16	3	19
Number of local government cases	79	63	142

[a] *Source*: 'The Constitutional Court of Hungary', pamphlet published by the Hungarian Constitutional Court, 1996. After 1996, the court stopped publishing these official statistics.

[b] Statutes, regulations and decrees issued at the national level are included together because they are all positive law with binding force, and cases are combined regardless of the origin of the case in a citizen petition or a request for review by state officials.

[c] Constitutional omissions are findings that the parliament had behaved in an unconstitutional manner by failing to enact a law on a particular subject. The court did not publish their rates of agreements with these petitions.

[d] These are cases in which the court was asked for an abstract interpretation of a constitutional provision not arising in the course of review of a statute.

But if one were to look at the laws themselves several years after the court's big decisions, the laws were positioned not at the point that

[1] This statement is based on interviews I did in 1994–6 with all of the major party leaders, save the Smallholders, whose leaders refused to be interviewed.

the constitutional court said was required, but rather somewhere in between the initial law that the parliament passed and the constitutional court's requirements. What happened? After the court issued its decisions requiring revision of specific laws, the parliament would rewrite the laws, attending to the major things that the court had required, but finding new ways to get at what the MPs had originally wanted. The court would then review the new law, sometimes requiring further changes, sometimes finding that parliament's changes were sufficient. While neither side would call it this, these successive waves of legislation, followed by constitutional review, followed by revision of laws and further constitutional review produced something like a negotiation about the proper policy. The laws in the end were not what either side asserted they should be in the first round. In short, the parliament often did not get its way on the first try; it had to make changes in the laws that it initially passed before it would be allowed to go forward with at least some of what it wanted. But the court, too, did not get exactly what it wanted in the end either, though it always got the worst of the human rights offenses removed from the laws. What happened in the middle?

It is easiest to show what happened through examples, and let me give two from different fields of constitutional law. One involves the centerpiece legislation of the first elected government between 1990 and 1994 which allowed the prosecution of those who had committed human rights abuses without punishment during the Soviet period, but who could not be tried after 1989 because the statute of limitations on their crimes had tolled. The other involves the centerpiece of state policy between 1994 and 1998 in the second elected government: the effort to engage in radical economic restructuring by attacking the system of social rights. By focusing on two different areas of state policy in two successive governments, we can see a pattern of court—government interactions.

The Zétényi—Takács Law

A working majority in the first post-Communist parliament in Hungary, a majority that consisted largely of those who had been persecuted under the Communist regime, very much wanted to root out former Communists and prosecute them for their Soviet-era offenses against human rights. The first law passed by the first post-Communist parliament extended the statute of limitations for all crimes not prosecuted in

the Soviet time 'for political reasons' and was named after its sponsors Zsolt Zétényi and Imre Takács. The constitutional court, in a forceful opinion extolling the virtues of the rule of law, forbade this extension, claiming that it amounted to a retroactive application of the criminal law, creating a crime after the fact.[2]

The parliament, disappointed, tried again, but limited itself the second time around to particularly egregious crimes. When the second law was appealed to the court, the court (perhaps surprisingly in light of its earlier opinion) agreed with the parliament and found it to be constitutional.[3] The court in the second case argued that war crimes could be an exception to the general rule about retroactive extensions of statutes of limitation. Under international law, the court noted, war crimes have no statute of limitation, and because most of the crimes covered in the second law could count under international law as war crimes, international law rather than domestic law allowed the extension of the statute of limitations in those cases. That was how it came to be that although the court's first decision said that there were to be no prosecutions of offenses committed in the Soviet time, there were nonetheless a number of trials of police who shot into the crowds in 1956 in places like Sálgotárjan. The court established a bright line that no one crossed on the point that retroactive applications of law were unconstitutional. But the anti-Communists in the new parliament got to prosecute some of the worst offenders from the Soviet period by giving the court a way to find for them through an application of international rather than domestic law (Halmai and Scheppele, 1996). Both sides, in consequence, could be said to win.

The Bokros Package

A similar negotiation occurred with the court's decisions on the government's radical austerity package, written by Lajos Bokros, the then-finance minister. When the parliament passed this radical cutback in social welfare programs in 1995, under threat from the International Monetary Fund, the court responded by finding that parts of the austerity program having to do with the system of state support for

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[2] Decision 11/1992 of the Constitutional Court of the Republic of Hungary: On Retroactive Criminal Legislation (translated in Sólyom and Brunner, 2000: 214–28).

[3] Decision 53/1993 of the Constitutional Court of the Republic of Hungary: On War Crimes and On Crimes Against Humanity (translated in Sólyom and Brunner, 2000: 273–83).

maternity leave, child-care and child support were unconstitutional.[4] The court gave itself some room for maneuver, however. The justices said in their first decision on the matter that the parliament had erred by moving too fast and not giving people a time to adjust to the sudden loss of previously stable family payments. The parliament was given explicit instructions that said that it could change Hungary's welfare system, but only if it were done slowly, deliberately and with due notice to citizens. In addition, the court found that there were at least some constitutionally entrenched social rights that had to be protected no matter what. The government had to guarantee pensions, some sick pay and a minimum (unspecified) standard of living, but it could modify other things.

Again—if you went back to Hungary several years later, you would have found that much of the social safety net was gone, despite that sweeping first decision of the constitutional court (Haney, 2002). How was that possible unless the parliament flouted the decision of the court? Parliament did not ignore the decisions of the court but followed them narrowly. The parliament honored the court's rationale by phasing in the changes and giving people a chance to adjust—but parliament also found ways to means test the social benefits, turning them from universal entitlements into welfare supports. In the end, parliament both complied with the court's decision and did much of what it had wanted to do, all of which the constitutional court approved in the second round. The parliament's new laws were arguably within the boundaries set by the first opinion. But they were also clearly designed to accomplish what the parliament had wanted all along, to cut back Hungary's generous and universal welfare rights to get the budget under control, a plan that the court initially thwarted.

Making Sense of Judicial Activism in Hungary

Were the Hungarian judges merely caving into political pressures and giving up constitutional principle when they approved the parliament's later tries at doing the same thing in different ways? The judges of the 'Sólyom Court' (after president László Sólyom) had a reputation for being fiercely independent defenders of human rights, for not allowing the parliament to compromise in its devotion to rights. That

[4] Decision 43/1995 of the Constitutional Court of the Republic of Hungary: On Social Security Benefits (translated in Sólyom and Brunner, 2000: 322–32).

reputation was clearly deserved. But it was also the case that, seeing the political landscape and the economic costs realistically, the court often softened its sharp edges in later cases. The final policy was a compromise between the court and parliament. In the end, the court's directives were softened by politics just as the parliament's goals were modified in light of constitutional principles. If one had to guess what state policy was simply from reading the court's most sweeping initial decisions, one would often be wrong.

The court in some ways had to pay attention to the political climate when it backed off in the later cases. Did the judges then call the constitutional questions as they saw them free of political influence? Yes, they clearly did at first, and then they allowed the possible to overcome the ideal. Is this a loss of judicial independence? No, I don't think so, but it is a way of discovering that the judicial role is always dependent on forces outside legal control. Through this 'two steps forward and then one step back' approach, the court managed to remain to fight on another day and to improve rights protection at the same time. It clearly pushed state policies in constitutional directions.

The Hungarian Constitutional Court was a strong defender of human rights. It was also a savvy political actor that needed to protect itself from direct political attack. One might also say that the politicians in Hungary were similarly savvy. They figured out how to comply with the main thrust of the court's decisions (because otherwise they would have lost legitimacy even faster in the public mind) while still getting much of the substantive result that they wanted. The parliament and the government did not govern alone, but neither did the constitutional court.

What happened to the court eventually? Because of the way that judges had been appointed all at once in 1989 and 1990, their nine-year terms were up at nearly the same time. A rotation system had been built into the constitution, but it had been amended at the suggestion of the court in mid-decade. That amendment left the court vulnerable to political influence when the new government that took office in 1998 decided not to reappoint any of the judges, and to name their own allies to the bench. The new judges turned out to be unwilling to fight the new government even though the government did many things that the Sólyom Court would not have allowed.[5] The result

[5] The government of prime minister Viktor Orbán did not just effectively close the constitutional court, but it also limited the number of formal sessions of the parliament,

was that the Hungarian Constitutional Court fell off the political map altogether. It now issues few decisions at all, and even fewer of any political consequence (Scheppele, 1999). (For more detail on the cases in this section, see Scheppele, 2002.)

The Political History of the Russian Constitutional Court

By contrast, the Russian Constitutional Court was far more embattled and far less successful in carving out a place for itself in Russian political life in the 1990s, though it too got off to an activist start. In its first major decision, issued only a month after starting its work in 1991, the Russian Constitutional Court declared unconstitutional President Boris Yeltsin's plan to merge the police and the internal security forces into a single ministry under his control because it violated the separation of powers. The early court, and particularly its visible president, Valerii Zorkin, went on to become involved in a series of highly charged political questions, ruling, for example, that Yeltsin's decrees banning the Communist Party and seizing its assets were (at least in part) unconstitutional. In Yeltsin's eyes, the court persistently sided with the Communist-controlled parliament against the reform-minded president. Independent commentators, however, can be forgiven for thinking that the court was in fact doing what the much-amended but still persisting Soviet-era constitution required.

The court really got into trouble, however, when court president Zorkin went on to personally negotiate the proper relations between the legislative and executive branches outside the boundaries of any specific petition to the court. By becoming a mediator in a stand-off between the parliament and the president, Zorkin made himself vulnerable to accusations of taking sides in the matter. When the court officially determined that Yeltsin's decree granting himself emergency powers in 1993 to cope with a recalcitrant parliament was unconstitutional, Yeltsin dealt with the court's opposition to his policies by simply shutting it down.

By that time the battle literally erupted in the streets. The Communist-dominated parliament refused to cooperate with a stubborn state

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placed shadow ministers with real power under direct control of the prime minister's office and did its best to undermine the multiparty system in Hungary. The election of 2002, which turned Orbán's FIDESz party out of office, saw the number of parties in the parliament reduced from six to only three.

president, and Yeltsin, as commander in chief, called out the tanks. Both the parliament and the court were closed, and Yeltsin proclaimed the power to rule by decree while a new constitution was written and passed through a national referendum. The court remained shut for all of 1994 and resumed operations again only in 1995 under a new constitution and a new Constitutional Court Act that added six new judges in an effort to change the court's direction. Justice Zorkin is still on the court, but no longer its president.

Since the court has been reconstituted, it has become much more modest in what it does, issuing fewer decisions that have such direct and major political consequences. It has moved away from a heavy emphasis on separation of powers cases toward more cases elaborating the rights of individual citizens (Sharlet, 2001: 71). As in Hungary, the constitutional court is quite approachable for ordinary citizens, who can appeal directly to the constitutional court whenever they feel that a decision of a state body (from pension board to local council to court) has violated their rights. Still, faced with 10,000–15,000 petitions per year, the court issues only about two dozen official rulings annually. So why do ordinary citizens still petition the court in such great numbers when the court, which might sensibly feel itself to be politically vulnerable, does so little?

Constitutional Law under the Political Radar

As it turns out, the court has taken to handling a great many cases in ways that fly under political and legal radar. Instead of only doing wholesale constitutional law in major, formal rulings, the court also does retail constitutional law through the publication of 'delimitations'. Though both political debate and academic commentary (in Russian as well as in English) have focused entirely on the major rulings, in fact the court arguably does even more important constitutional work in these less formal opinions.

So what are these delimitations?[6] They are judgments issued by the court in its official capacity that explain why the court is not going

[6] I am using the English worlds 'decision,' 'opinion' and 'judgment' to refer to any binding pronouncement of the court (*reshenie* in Russian), but I am using the English term 'ruling' to translate the Russian *postanovlenie*, which refers only to those judgments that have been made through a formal procedure within the court. *Opredelenie*, which I am translating as 'delimitation', refers to opinions or judgments that have not been through this process.

to make a formal ruling in the matter, which is why they do not appear to do much. But that would be a misleading conclusion. In fact, these delimitations can do quite a lot, including finding statutes unconstitutional.

Delimitations originated in the correspondence between petitioners and the court.[7] The procedures within the court require that the staff does a full analysis of all petitions that the General Secretary's office deems to state plausible constitutional claims so that the judges, in their plenary sessions, can make informed decisions about which cases they should select for formal oral argument. If a petition was rejected, the court would send these legal analyses back to the petitioners (and perhaps to the state body against which the complaint had been lodged) with a note saying that the petitioner's case would not be formally decided, but the court would explain what it thought everyone's rights were in the matter. At first, the legal status of these letters was unclear, but the court has been increasingly publishing these responses to petitioners so that they are available more widely, and the court also cites these decisions as if they were the legal equivalent of their formal rulings.

Published delimitations have been increasing at a rapid rate (see Table 2). In 1995, the court issued 111 of them, but by 2000, there were 287 delimitations published in a single year, of which 42 percent had 'positive content'. While the court published only 158 formal rulings from 1995 through the middle of 2001, the court published 1154 delimitations in the same period, 29 percent with 'positive content'.

Delimitations fall into two categories:

1. 'Dismissal delimitations' discuss the reasons why the petitioners' arguments do not make a successful constitutional claim although they raise legitimate constitutional questions. For example, the Delimitation of 3 February 2000[8] rejected the petitioner's argument that dormitory rooms had to be included in the state housing stock available for privatization. A previous ruling of the court found that another section of the same law was unconstitutional as a violation of the individual right to own private property because the law failed

[7] The information reported here was based on data I collected on trips to the Russian Constitutional Court in December 2000, November 2001 and May 2002.

[8] Delimitation of the Constitutional Court of the Russian Federation based on a complaint of citizen Nina Petrovna Medikova about the violation of her constitutional rights by Article 16(1) of the law of the Krasnodarski Krai 'About a Special Regulation of Land Use in Krasnodarski Krai', 3 February 2000.

Table 2 *Types of Decisions of the Russian Constitutional Court Published under the Terms of the 1994 Constitutional Court Act*

	1995	1996	1997	1998	1999	2000
Number of rulings on the Merits (*postanovlenia*)[a]	20	22	25	34	26	17
Total number of delimitations indicating refusal to accept the case (*opredelenia*)	111	101	119	191	222	287
Number of these delimitations with 'negative content'	111	101	99	140	142	167
Number of these refusals with 'positive content' (*opredelenia s polozhitel'nym soderzhaniem*)	0	0	20	51	80	120

Note: Compiled from Rossiiskaya Iustistia, October 2001: 43–4.
[a] See http://ks.rfnet.ru/

to include communal apartments in the housing stock available for privatization. But the court this time said that dormitories were relevantly different. The petitioner lost the claim, but the 'limits' of the legal norms were further elaborated in the explanation of why dormitory rooms were different from rooms in communal apartments.

2. 'Dismissal delimitations with positive content' involve cases where the petitioner's claim is successful in the sense that the petitioner generally gets what she or he is asking for, but the court justifies the absence of a ruling because the 'delimitation with positive content' appears to simply extend a previous—and still valid—ruling of the court. For example, a petitioner challenged a law in the Krasnodar region that deemed a purchase of land to be legally void when one of the buyers did not have a residency permit to live in the region (Delimitation of 2 November 2000).[9] The court found the Krasnodar

[9] Delimitation of the Constitutional Court of the Russian Federation about the refusal to admit for consideration the request from the Soviet District Court of the City of Krasnodar pertaining to the review of the constitutionality of Article 4 of the Law of the Russian Federation 'About Privatization of Housing in the Russian Federation', 2 November 2000.

> law to be unconstitutional because it interfered with the right of private property of the petitioner. The court rested its reasoning on previous rulings of the court that had found unconstitutional the system of residency permits. Therefore, the court felt it could declare this regional law unconstitutional through a mere 'delimitation' of the previous rulings, even though the court elaborated a different constitutional right.

From these examples, it is possible to see that, far from being minor and inconsequential decisions, the delimitations actually look like absolutely normal constitutional cases—and they can even result in laws being declared unconstitutional.

The Politics of 'Delimitations'

The Russian Constitutional Court's need for delimitations comes from limitations on its powers built into the Constitutional Court Act of 1994. While constitutional drafting took place after Yeltsin had shut down the other branches of government, there was serious talk in Yeltsin's circles of abolishing the constitutional court altogether. Many observers expected that the constitutional court would not survive the new constitution. But in the end, the court was preserved. The Constitutional Court Act, however, specifies that in any case that the court chooses to take for a final ruling, it must have public, oral proceedings of an adversarial nature in which the petitioner and her or his opponents have an opportunity to argue before the court. Depending on the case, there may even be fact-finding and presentation of expert opinions—and so the hearings can go on for days. But then, buried in Article 34 of the Constitutional Court Act is the following simple statement:

> A chamber [panel] of the Constitutional Court of [the] Russian Federation may not consider other cases referred to its jurisdiction by the present Federal Constitutional Law until a decision on the case being heard has been taken.

The court has two panels, each of which can only take up one case at a time. At the rate of one ruling per panel/month × two panels × 12 months, one would expect 24 rulings per year, which is what the court actually produces. Article 34 drastically limits what the court can do.

So what happens to the other 15,000 or so petitions that the court gets each year? Article 71 of the Constitutional Court Act gives a potential way out of the dilemma. It indicates that the court can make

opredelenie (delimitations) that fall short of formal rulings. But the law does not say what those are or when they can be used. The court has therefore concluded that delimitations do not require public hearings and do not fall under the 'one case at a time' rule. As a result, many more of them can be issued.

At first hesitantly, and then right out in the open, the Russian Constitutional Court has been issuing hundreds of consequential delimitations that have attracted little attention from politicians or from academic commentators on the court's practices. But because they bypass the strict restraints of the Constitutional Court Act, they allow the court to answer many more petitions. The longer the court publishes these opinions, the bolder they get. While the court issued only 'negative' delimitations at first, 20 'positive delimitations' appeared in 1997. By 2000, the number of positive delimitations increased to 120 in a single year, when the number of formal rulings in that year was only 17 (see Table 2).

But the constitutional court is not completely safe in politics yet. In fall 2001, a draft law that would have limited the court's legal powers only to the court's direct orders (pointedly excluding the court's reasoning from being binding in any other case) made it as far as the second reading in the parliament. Persistent proposals circulate to merge the constitutional court with the supreme court. In the meantime, the constitutional court seems to be trying to do constitutional law without upsetting any particular political applecarts. By using small-scale delimitations instead of issuing so many large opinions on important political matters, the court has bought itself some space for developing constitutional ideas and perhaps having a bigger effect in Russian political life in the long run.

Comparing the Hungarian and the Russian Constitutional Courts

The Russian and Hungarian constitutional courts, despite their radically different surface characteristics, are actually closer than they look. Both courts had to learn how far they could push the political branches before the political branches pushed back. And both courts had to look for opportunities to bring the public and the politicians along in the recognition of human rights while still keeping themselves out of (political) harm's way. Though the Hungarian Constitutional Court legislated

out in the open, the Russian Constitutional Court is also very active, but in smaller and more modest ways. What is surprising, and hopeful, is that judges in both countries tried to stand up for constitutional principle in difficult political climates.

The difference between the two courts is less in what they tried to do and more in whether the other branches tolerated what they did. The Hungarian Constitutional Court had a more supportive political climate through the 1990s while the Russian Constitutional Court seems to have a more supportive environment now. In the end, however, the Hungarian Constitutional Court was cut down by a politicized appointments process while the Russian Constitutional Court had been closed earlier in the decade by a more brutal use of force. The Hungarian Constitutional Court is still quiet, having retreated into political oblivion. In the meantime, however, the Russian Constitutional Court has lived on to fight another day by making smaller, more incremental changes in the name of constitutional principle.

Conclusions: Democracy and Judicial Power

So far, I have left unanalyzed whether it is a wise or appropriate thing in a democracy for judges to have so much power. While I believe that a normative case can be made for increased judicial power in democratic polities (Scheppele, forthcoming), I want to take up more sociological considerations here to explore the empowerment of constitutional courts. Why do citizens keep going to constitutional courts in such great numbers? Why do constitutional courts typically have higher approval ratings than the presidents and parliaments? What can we learn about the way that judicial power is being used in democracies resulting from recent political reconstruction that sheds light on developments in 'consolidated' democracies?

The sociological answer lies in examining the actual politics of democratic responsiveness. Critics of judicial activism have generally contrasted actual marauding judges with ideal democratically responsive politicians and argued that judges are therefore 'counter-majoritarian' (Bickel, 1962) because they do not have to face popular elections themselves. The critics very rarely compare what actual democracies do in the absence of judicial review with the concrete, substantive policies that follow in democracies that have strong judicial power. As a result, counter-majoritarian critics make the crucial mistake of comparing a

flawed and real process of judicial review with a hypothetically idealized 'pure' democratic order. Not surprisingly, the idealized one looks better.[10]

But what happens to democratic responsiveness in actually existing democracies? Going back to the cases of Hungary and Russia, one can see precisely why mass publics were quickly dissatisfied with the politicians who were elected to govern in their name. In Hungary, the government that was elected in 1990 ran on a promise to engage in structural reform. Instead, the government seemed preoccupied with 'the politics of retribution' (Deák et al., 2000). Popular approval for the government dropped precipitously. The constitutional court stepped in and tried to push the government to keep its own promises, through making decisions that struck down the laws that would have consumed the government in revolutionary revenge. Public approval of the court soared.

The second elected government campaigned on a platform of reform, but also (for the socialists who led the coalition) capitalized on their reputation for ensuring social welfare. When that government betrayed its campaign promises and radically cut the social safety net, the court held the government to its promises as well. A poll published shortly after the constitutional court made its decision in the Bokros package cases showed the court's popularity ratings at close to 90 percent (*Magyar Hírlap*, 5 July 1995), while support for the government plummeted (Arato, 2000: 74).

In the Hungarian case, the court in many ways did what the politicians did not—ensure that the voters got what they voted for. Far from being counter-majoritarian, the Hungarian Constitutional Court paid attention to what citizens had said they wanted. Democratic elections produced politicians who veered off their promised courses almost immediately. The allegedly undemocratic court was in fact more democratically responsive, if by that one means staying close to what substantial democratic majorities indicated that they wanted in elections.

In Russia, Yeltsin's initial rise to power and promises of reform were greeted with excitement. But Yeltsin could not work with the parliament

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[10] In what follows, my theoretical approach has been influenced by Michael Burawoy's cautionary tale about how *not* to do comparative analysis: by comparing an ideal in one system with the grubby reality in another. See Burawoy and Lukács (1992).

and governed by decree. The court tried to stand up to this high-handed exercise of unconstrained power, but fell victim to Yeltsin's ability to use raw force. After the smoke cleared, the court turned its attention instead to the petitions of individual citizens whose rights had been abused by state decisions. Not surprisingly, more Russians had faith in the court than in Yeltsin, who left office with his popularity ratings nearly at zero.

With the presidency of the wildly popular Vladimir Putin, who promised as a campaign slogan the 'dictatorship of the law', the court appears more protected, though it is buffeted around on a regular basis by the Duma. Putin apparently supports the court and the court's increasing boldness in its delimitations shows that it feels more secure in its place in Russian politics. The case for a democratic court in Russia is much less clear than it is in Hungary, precisely because one does not have great policy differences at the moment between the elected president and the unelected court to tease out the differences. But the fact that about 15,000 Russians send petitions to the court each year indicates that many believe that the court will stand up for them. Russians typically complain not against the president or his major federal reform legislation, but instead against local corruption, inept local bureaucrats and unsympathetic lower court judges. In this, there is still room for increased democratic accountability without threatening the constitutional court's political protection.

Judicial review, in practice, may be therefore more democratically responsive than the results of elections, in practice—however much the two institutions differ in theory. The idea that democratic principles cannot be defended by courts is only preposterous if one has the a priori view that courts cannot be democratically responsive because their members are not elected. But if one examines how elected officials respond to citizen input between elections, then one may be able to see how democratically elected politicians may in fact betray their mandates. Instead, these apparently 'undemocratic' courts may rise to the occasion and act on specific citizen preferences between elections.

Both the Hungarian and Russian examples show how courts might in fact be better structured to keep their fingers on popular pulses than elected officials. Because these courts have few barriers in the way of hearing outpourings of citizen complaints, they are better positioned to know how citizens are experiencing the policies of their governments than are the elected branches. (The lack of sensitivity of Russian and Hungarian MPs can be explained in part by noting that they rarely

have staffs to deal with constituent issues.) Courts are empowered to act on the basis of this information and, as we have seen, they do. While not every judicial decision receives great popular acclaim, most citizens seem convinced that courts are the institutions most likely to defend their interests against the (rest of the) state. After all, while politicians typically hear only powerful individuals and interest groups, courts hear individual citizens who can petition one by one.

Citizens in emerging democracies are finding that, no matter whom they vote for in elections, they have the same policies in the end: increased gaps between the haves and have-nots; torn social safety nets; electoral promises not kept. What is a giant growth in opportunity for those prepared for a globalized economy is a rude awakening for those who are not. This story is a common one, particularly in new democracies. Citizens quickly get cynical about organized politics and find that constitutional courts are more responsive, providing leverage that the ordinary citizen with a concrete problem can use more easily and precisely than voting.

Finally, the focus of this volume is on political reconstruction. But is this a story about newcomer democracies only? I think not. The problems to which aggressive constitutional courts are the answers are present in more established democracies as well. Throughout established democracies, there is discontent with elected officials nearly everywhere, along with a sense that politicians are bought by special interests, unresponsive to democratic publics between elections, and likely to work to benefit themselves and the interests that directly supported them to the exclusion of others. Voter turnout, one measure of engagement with politics, is low in many consolidated democracies. In the US, for example, turnout of less than half of the electorate is routine. Due to peculiar voting rules, consolidated democracies like France and Italy get heads of state who are opposed by more than half of the voting public (let alone the non-voters). And, to get ruling coalitions, consolidated democracies like Austria and the Netherlands have to take on wildly unpopular minority right-wing parties in order to get a governing coalition. It is not surprising if many citizens feel that democracies are not particularly responsive.

The theory of counter-majoritarian courts developed in the US, where the courts have a number of features that make them structurally unable to perform the role of democratic conscience in divided governments. The US Supreme Court, in particular, is nearly unreachable in the typical case; moreover, judges with life tenure and a set

of doctrinal tricks avoid reaching either the merits or the broader implications of particularly contentious questions. But the new constitutional courts are organized differently, and the structural differences make them better suited to play this democratic role. For one thing, the barriers to access are often very low, as we have seen in Hungary and Russia, where citizens do not need to exhaust other remedies or have a lawyer. For another, judges are appointed for a fixed term of years, which means that there is a regular rotation of personnel that creates a predictable relationship to voting cycles. Finally, the constitutions that these judges interpret are longer, more detailed texts that include both more concrete instructions on how the political branches are to act and more rights that citizens can use in their claims against the state. Because the constitutions embed a denser political compact at the outset, courts have more to work with in bringing democratic politicians to responsiveness.

The American example, with its brief text, its diffuse system of review, its lifetime judges and its barriers to access, simply is not a typical case. The constitutional courts of Germany, Italy, France, South Africa, Colombia and Spain (for example), and the supreme courts of India, Israel, Canada and the Philippines (for example) are all very active, and (with some local qualifications) they are all considered to be essential components of, rather than limitations on, democratic governance. The cases of Hungary and Russia, then, are not just about the temporary gyrations of transitional democracies, but instead particularly clear examples of how even consolidated democracies need political institutions that ensure that the voices of citizens are heard between elections.

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CHAPTER FOURTEEN

WOMEN AND THE COST OF TRANSITION TO DEMOCRATIC CONSTITUTIONALISM IN SPAIN*

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The Spanish Constitution and the Consolidation of the Spanish Democracy

The first Spanish constitution dates back to 1812. It symbolizes Spain joining in the bourgeois revolutions of the late 18th century. However, it was not until the 1931 Republican Constitution that Spain initiated its democratic constitutional venture. Unfortunately, the Republican experience was soon interrupted by the 1936–9 Civil War, which was followed by Franco's dictatorship from 1939 to 1975.

The current Spanish Constitution was enacted in December of 1978 and marks Spain's transition to democracy (for an overview of the different aspects of Spain's democratic transition, see de Blas et al., 1993). Although Spain's struggle with accommodating 'nationalist forces' is, to this day, the largest unresolved question, it is generally agreed upon that the Spanish Constitution has played a central role in consolidating Spain as a modern democracy within the larger European context (Hernández Gil, 1982; Peces Barba, 1989). Purposefully vague about those issues that most threatened the ultimate goal of consensus at the time, the 1978 Constitution came to be generally accepted as a valid framework for Spain's modern democratic venture. It extracted broad, if not unanimous, consensus in Spain's at the time largely polarized society. In the midst of an economic crisis, the Left was pressing for the constitutionalization of the welfare state and for republicanism, whereas the growing entrepreneurial class, happy to see Franco's paternalistic interventionism go, was not willing to accept principles that would risk progress towards a modern capitalist society. Nationalist forces, such as

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the Catalan and the Basque, reacting against the repression of their cultural identity and political autonomy during Franco, were asserting strong historical claims of self-government. Finally, the Catholic Church was trying to have its say too, on issues such as divorce, abortion and the state funding of religious schools.

The Spanish process of transition has been signalled for its positive singularity and its peacefulness. The monarchy, whose historical legitimacy had been interrupted, was restored by Franco as a solution to the problem of his succession. However, instead of perpetuating Franco's regime, King Juan Carlos of Borbón led the country through a peaceful transition to democracy (Powell, 1991). With the coming into force of the constitution, there was a shift in the basis of legitimacy of the monarchy—from a title of succession to General Franco to the popular will expressed through the constitution. From a strictly constitutional point of view, the process was remarkable indeed: there was no constituent moment in purity, there was no full rupture, no revolution. Instead, there was a transformation process which formally proceeded under the legal instruments and apparatus of the old regime.

For the general population it was clear that the 1978 Constitution represented the best attempt to let the old wounds behind (for some, the wounds of the Civil War, for others, those of the dictatorship as well) and look forward to the consolidation of Spain as a democratic country within a broader European framework. Indeed, since its coming into force, in December 1978, the constitution has been accepted as a constitution of consensus. It has served centrist, left-wing and right-wing governments peacefully. Only once, in February of 1981, was there a short-lived intent of military coup, which was hindered by King Juan Carlos. In all this time, the constitution has only experienced one small reform, to allow EU citizens to be elected in municipal elections so as to comply with the Treaty of Maastricht. The only serious challenge to its legitimacy comes from those sectors within Basque nationalism, which claim a right of full self-determination, a claim that cannot be accommodated within the current constitutional framework.

Spain's current constitutional reality is not unlike that of many of its western homologues. It is a social democratic state under the rule of law (*Estado social y democrático de derecho*); the powers of the monarchy are now largely symbolic. The real powers are divided between the three traditional branches and shared, according to jurisdictional divides, between central authorities and the Autonomous Regions which have granted themselves statutes of autonomy (*estatutos de autonomía*) spelling

out their jurisdictional spheres, within the bounds marked by the constitution, each of which has its own legislator and executive. Although as a result of this gradual decentralization Spain is now a quasi-federal country, Spain's 'indissoluble unity' was constitutionally entrenched as a condition for the recognition of the national entity of some of its regions and their broad self-governing powers.

The constitution sanctioned a detailed bill of fundamental rights with civil liberties and political rights, as well as some social rights, echoing, like other constitutions of the time, the major international human rights declarations and conventions of the time. It designed a system of guarantees for the protection of such rights, some of which can be claimed as subjective titles, before the courts. Some, though not all, of these rights also enjoy constitutional *amparo*, which is the writ of constitutional complaint before the constitutional court by individuals whose rights have been violated and who have not found no redress in the ordinary judiciary. The constitution also recognized a set of 'leading principles of the social and economic policy' as constitutional goals to be achieved gradually.

Finally, the constitution also foresaw the creation of a new organ, the constitutional court, as the ultimate guardian of the constitution, separate from the ordinary judiciary. This court has been functioning since 1981. The 12 justices that comprise it are elected for a nine-year term and are appointed by the different branches of government. Among its main functions are those of exercising judicial review in order to check the constitutionality of statutes, the protection of constitutional rights through the *amparo* writ and the adjudication of conflicts of jurisdiction between the different branches of government, and, more importantly, between the central authorities and those of the Autonomous Regions. The importance of this court in bringing in from above a democratic culture has also been widely acknowledged. Given that the transformation of the ordinary judiciary was only gradual, as there was no process of lustration after Franco, the educational force of the doctrine of a court committed to the legally binding value of the constitution and to a 'taking rights seriously culture' cannot be overstated. Thus, in spite of some marginal and predictable tensions between it and the ordinary judiciary, its authority has been widely respected.

The Contribution of Western Constitutionalism to Women's Emancipation and its Challenges

In many non-democratic systems, the hierarchical and authoritarian nature of the political regime is reproduced in patterns of oppression of some groups, including women. This is why in many such societies the arrival of constitutional liberal democracy with its entrenchment of universal suffrage, and its recognition of fundamental rights, including the right not to be discriminated against on the basis of sex, is celebrated as a victory for women's emancipation (Rubio-Marín and Baines, forthcoming). Indeed, the recognition of women's agency and autonomy through their status of formal equality before the law has become one of the most salient signs of the civilizational progress that constitutional democracies embody. Moreover, the reception of western democratic constitutionalism after the Second World War has taken place in the midst of an expansionist wave of international human rights instruments sanctioning women's equality with men, such as the UN Convention on the Elimination of Discrimination Against Women. Many national constitutions are 'receiving' international gender norms like this, and this is having an effect on the shaping of constitutional strategies to enhance the status of women (Rubio-Marín and Morgan, forthcoming). Indeed, in some cases, women's equality with men is actually taken to epitomize the country's successful modernization and democratization (Elver, forthcoming). And so part of the accepted truth becomes that, for women, the reception of liberal democratic constitutionalism is a clear sign of progress.

This is not to say that feminists inside and outside the western hemisphere have unqualifiedly celebrated western democratic constitutionalism and its commitment to a gender-neutral legal order as a proof of progress. One common source of criticism raises the question as to whether the western liberal constitutional model of sex equality exports a culturally and/or religiously embedded notion of gender equality under the false pretence of universalism on which the idea of human rights rests. Think, for instance, of the claims raised by some feminist Islamic movements and some indigenous women throughout the world who are striving for a definition of women's emancipation in ways that allow them to preserve their cultural and religious identities. For them, importing foreign and ready-made versions of sex equality is not what is needed. Instead, they claim agency in the internal process of revision and interpretations of their cultures and religions to conquer a more egalitarian coexistence with men.

A second way in which exporting western constitutionalism and its conception of sex equality can and has been regarded with scepticism has to do with uncontrolled forms of liberal market economy that often arrive hand in hand with the new democratic model. The emphasis on formal equality and the primacy accorded to traditional liberal (i.e. negative) freedoms under the new constitutional regime, to the detriment of social rights and notions of substantive equality, is regarded as a doubtful conquest for women in some former Communist countries. Clearly, the issue raised is a larger one, and does not affect women only. But it has an obvious differential impact on women because of their childbearing capacity and the liabilities attached to it in competitive markets, and because of women's disproportionate representation among the most vulnerable and economically deprived sectors of the population.

These two concerns are now commonplaces that raise the issue of what *equality* is and should really be about. They bring into the picture the complexity of linking the female condition to questions of religious and cultural identity as well as social class. There is, however, one more perspective that I believe has not received sufficient attention thus far. It has a distinctively transitional nature and takes as a presupposition what the two previous ones actually question: that western liberal constitutionalism indeed advances women's equality. Assuming that to be the case, the question is: who ought to 'pay' the price of the disruptions entailed by the ideological and political shift? The issue then is how to distribute the costs of the transition to a new vision of sex equality between the actual men and women, even if this is to benefit the coming generations of women. It is a genuine transitional concern in that it takes into account that some of the social realities that the new regime hopes and promises to change will only change with time, that such changes require readjustments in people's actual lives, and that such readjustments entail certain costs. It is my basic sense of fairness that to the extent that it is possible the costs of adjustment should be borne by men, as the formerly privileged and successors of the privileged group. That the new constitutional regime would instead have the effect of further curtailing the life options of already oppressed women, setting on them the main burden of the democratic readjustment process, seems totally unacceptable. An ad hoc constitutional doctrine should be developed in each country facing this sort of transition so as to ensure the protection of those women who see the new constitution come into force during their adult life, the generation 'caught in between'.

Bringing Equality Home: Women under the Spanish Constitution

The statement that, for women, the reception of liberal democratic constitutionalism entails progress has certainly proven true in Spain. In few areas can we observe the transformation that Spain has undergone better than in the changes women have experienced under the new constitutional order. Under Franco, women were relegated to the private realm and oppressed in a patriarchal family structure which was conceived as the main cell of civil society. The husband was legally the 'head of the family'. Only he was entitled to dispose of and manage joint assets. He was also recognized as the main holder of the *patria potestas* over the children. As we discuss in the following section, women were first obliged and later actively encouraged to take indefinite leaves from their jobs at marriage. Phrased in the protectionist terminology of the time, with clear inspiration in the then prevailing Catholic social doctrine, one of the declared purposes of the dictatorship was to free married women from the strains of the factories and the workshops. Women were systematically discriminated against in their pay. They were expected to do all the housework and the raising of the children. Divorce was not an option. As for the public sphere, women did not even have voting rights.

Only two-and-a-half decades later, the situation has dramatically changed. Following the non-discrimination imperative of the constitution the whole legal order has been 'cleaned up', so as to ensure formal equality.[1] In most areas men and women now enjoy an equal legal status. It is more and more difficult to find the overt and direct discriminations that were so common under Franco. New legislation has been enacted to protect women in every sphere. The civil, criminal and labour codes have all been changed to accommodate women's needs and views. The process is still active and in some fields has been largely influenced by notions of gender equality shaped in supranational law, mostly European law.

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[1] Article 14 of the constitution sanctions the right to equality before the law and explicitly prohibits discrimination on the basis of sex. The constitution also contains a provision (Art. 9.2) encouraging public powers to take concrete actions to remove the obstacles that hinder the effective enjoyment of equal rights by those groups that have traditionally been victims of discrimination, a clause that has been generally interpreted as expressing a commitment to a notion of substantive equality. Also, women's equality in marriage and at work are specifically, though implicitly, sanctioned as constitutional rights in Articles 32.1 and 35.1 of the Spanish Constitution.

The Spanish Constitutional Court, which started operating in 1981, has contributed to this progress too (Rubio-Marín, forthcoming). Its cases regarding sex discrimination can be divided almost neatly into two decades. The second decade (1991–2001) has produced interesting and emancipatory doctrine dealing mostly with employment-related forms of discrimination—a task for which the reception of European law has been essential. However, the focus in this article is on the interesting cases that the court decided mostly during its first decade (1981–91). These cases were almost exclusively about how to repair discriminatory situations that had their origin in pre-constitutional norms. They have deserved rather little scholarly attention, presumably because of their transitional, parochial and 'backward'-looking dimension.

The first striking fact is that during this phase there were as many cases brought by men as by women. The vast majority of the claims brought by women had to do with situations generated under pre-constitutional norms, which either encouraged or forced them to take indefinite leaves of absence from their work when they got married. The other major source of claims during that time were claims that women brought in defence of benefits that pre-constitutional norms recognized mostly as compensation for their seclusion in the homes and their status of imposed economic dependency.[2] The articulation of such claims was possible because the constitutional court decided from an early stage that the decision of how to re-establish equality (whether by cancelling or extending the disputed privilege) is part of the right to equality itself and not something external to it. This encouraged women to fight for the preservation of those pre-constitutional benefits, when, after the constitution came into force, they were deprived of them, generally by their employers, on the grounds that after the constitution such benefits had become discriminatory either because they unjustifiably excluded men or else because they had stereotyping effects on women as a class, contributing to the perpetuation of women's oppressed status.

Men's use of the non-discrimination clause during this period resulted from a straightforward formal reading of this constitutional provision.

[2] Thus, we find the case of a woman asserting her right to preserve an orphanage pension, that was initially granted to women until they either entered into a religious order or got married but only granted to men until they reached the age of 25 (see Sentencia del Tribunal Constitucional, henceforth, STC, 68/1991 of 8 April), or that of a woman claiming the prerogative to early retirement, which was recognized only to women (STC 16/1995 of 24 January).

As soon as the constitution came into force, they claimed every possible benefit or prerogative recognized to women only, regardless of their ultimate purpose and of whether or not the apparent benefit was part of an overall scheme oppressing women. Men fought to gain the few privileges that were recognized to 'women only'—one could call them the crumbs of the banquet—to compensate for women's role as main caretakers of the home and of family dependants.[3] Not surprisingly, the claimed 'privileges' were too often only pieces of the overall sexist social structure which had induced women to abandon the workplace.[4]

Voluntary and Mandatory Marital Work Leaves and their Constitutional Reparation: A Story of Grievances

By far the most common cases brought by women to the constitutional court during the first decade under the umbrella of 'sex discrimination' were those in which they claimed a right to recover an employment which they had lost, in many cases, many, many years before. Under Franco, many working sectors were regulated by the state. Many of the regulations of the late 1940s and 1950s (including in sectors such as utilities, national television, railways, banking, etc.) contemplated mandatory leaves (*excedencias forzosas*) for women at marriage, an institution which has deserved some though not much scholarly attention (see, for all, Suárez González, 1967; Gorelli Hernández, 1998: 143; García Blasco, 1983; Galiana Moreno, 1983: 269–75). It was foreseen that women, under those circumstances, would only be able to recover their employment provided that a suitable position became available in their companies, if and when they became 'heads of the family'. In the context of the family law of the time, this implied that the husband either died or became physically or mentally disabled and thus unable to work. Many of these regulations provided that women would be

[3] Among the claims we find men asking for a survivor's pension in the same terms that it was recognized to women (i.e. at a certain age and without having to prove economic dependency or inability to work) (see, for example, STC 104/1983 of 23 November); men asking for orphanage pensions in the same terms granted to women, i.e. with no age limit (see, for example, STC 315/1994 of 28 November); and men asking for benefits which were exclusively recognized to women, such as compensations for the care of family members (see, for example, STC 3/1993 of 14 January).

[4] See, for instance, STC 207/1987 of 8 January, where the male plaintiff claims the right to early retirement that had only been granted to female stewardesses in the understanding that the demands on their looks justified the differential treatment.

compensated with a 'dowry' in proportion to their past service time. This all represented a clear attempt to keep married women outside the labour market, encouraging their role as housewives and unburdening employers. In 1961, in the midst of a growing awareness about the changing social role of women, a statute on the Political, Professional and Labour Rights of Women was passed turning these marital leaves for married women voluntary, rather than mandatory, for the future. Spain was undergoing a transformation from an agrarian to industrial society and it was expected that women would help men in procuring for the family, as raising living standards made it increasingly difficult to rely on one income only.

Then the constitution came into force in 1978 sanctioning the non-discrimination principle. In March 1980, the new Labour Code came to implement the constitutional non-discrimination principle specifically proscribing sex discrimination at work. In the beginning of the 1980s, Spain underwent an economic recession. In view of the increasing unemployment rate, many women undertook actions to recover their lost positions of employment. Some did so in the understanding that in view of the prohibition of sex discrimination at work both in the constitution and in the new Labour Code the old regulations had become void. Others, still complying with the old regulations, waited until the habilitating condition was fulfilled, i.e. until they lost their husbands or became 'head of the family' for some other reason. Some of these women had been on leave for more than 25 years. Because their employers were often not ready to take them back, many cases ended in the courts. Several of these cases eventually reached the constitutional court.

It is interesting to review the jurisprudence that such cases generated as it constitutes a perfect example of the risk of denying the transitional aspects of a new emancipatory sex equality doctrine. Constitutions do not create reality, at least not immediately. Proclaiming women's equality is proclaiming a normatively sound ideal to be implemented from then on, more than making a descriptive statement that reflects the existing order of things. Ignoring this means giving life to a fiction that hides necessary processes of structural transformation and the tensions that go with them. Let me elaborate somewhat further.

The Story

The constitutional court resolved the first of such disputes in a decision of February 1983.[5] At stake were the claims of five women who had worked for Telefónica (Spain's at the time publicly owned phone company), until they married, all at different times, ranging from the mid 1950s to the early 1960s. Under Telefónica regulations dating back to 1947 and 1958, they had been forced to quit their jobs when they got married and, as usual, it was foreseen that they would only recover them when and if they became heads of their respective families. In July 1981, all of them took legal actions to recover their jobs in view of Telefónica's refusal to take them back. The appeal that exhausted the ordinary judiciary path before the claim was brought to the constitutional court was decided in favour of Telefónica. The labour court (Tribunal Central de Trabajo), which had heard the appeal, agreed that the treatment given to the plaintiffs had been discriminatory but, following its own precedents, held that the legal action to react against such discriminatory treatment was only brought to bear once the generic constitutional mandate (Article 14's prohibition against sex discrimination treatment) was concretized, in the field of employment, through the 1980 Labour Code. Since that new Labour Code provided that those legal actions to react against damages and wrongs caused in the framework of a contractual relation expired after one year, the court held that the plaintiffs' action had expired one year after the Labour Code came into force, i.e. in March 1981. Only those women who had reacted before that time could then recover their employment. That was not the case of our Telefónica workers. So, once they exhausted the ordinary judiciary path without success, they brought their claims to the constitutional court.

The constitutional court revoked the labour court's decision and granted the plaintiffs' claims in the understanding that the time to react against the discriminatory treatment was three years after the constitution had come into force. To arrive to this conclusion, the constitutional court held that the regulations forcing indefinite marital leaves had become invalid as soon as the constitution came into force. There was no need then to wait for the Labour Code to specify the prohibition of sex discrimination in the employment field, as the constitution itself is

[5] See STC 7/1983 of 14 February.

a legally binding norm. The fundamental rights contained in it derive their normative force from the constitution and not from the legislation concretizing or regulating their application in different spheres.

Crucial to the resolution of this case, and those that would follow it, was also its unprecedented doctrine about the statute of limitations of constitutional actions to react against violations of constitutional rights that had their roots in pre-constitutional norms. In several other prior cases, the court had decided that although, like legal norms in general, and unless they explicitly provide otherwise, a constitution does not have retroactive effects, given the specific nature of the constitution as a legal norm that incorporates the fundamental values which are constitutive of the new political order, some retroactivity has to be acknowledged. It is not sufficient to invalidate *pro-futuro* all those old norms which can no longer be interpreted in accordance with it, as the 1978 Constitution's third derogatory provision recognizes. Rather, a constitution must be able to affect also those situations which are generated after its coming into force but have their roots in pre-constitutional acts and norms which were consistent with the old legal order. This general doctrine then needs to be applied on a case-by-base basis, to ponder, among other things, whether the pre-constitutional norms or acts had or had not exhausted their effects before the constitution came into force and whether or not the interests of third parties were affected.[6]

In 1983, the question discussed was not so much that of whether the situation was or not affected by the retroactive force of the constitution. No one had doubts that the pre-constitutional norms in this case were generating clearly discriminatory effects after the constitution had come into force. After all, the contractual relationship of the female workers, even under the old regulations, had only been suspended. The question instead became that of the time limit to react against what, after the constitution, became *ipso facto* an unconstitutional discrimination on the basis of sex.

In addressing this question, the constitutional court elaborated a new doctrine stating that, although constitutional rights are permanent and do not prescribe, that does not mean that there may not be time limits

[6] See SSTC 9/1981 and 4/1982. In both of these cases the court was unwilling to revoke judicial decisions made before the constitution came into force which, the court thought, were the result of valid applications of the laws of the time, even though in the first case the court granted that the judicial decision had resulted from the application of a law that would *not* pass constitutional scrutiny.

to the actions that one may undertake to react against their specific infringements for the sake of legal certainty and the rights of third parties. Neither the constituent nor the legislator had however decided what such time limits were. Thus, in an exercise of interpretation the court decided that what had to be primarily taken into account was the specific field in which the fundamental right at stake deployed its effects to derive from it the specific nature of the constitutional action. In this case, since as soon as the constitution came into force the marital work leaves regulations became void that had to be considered the starting point for counting the prescription period (*dies a quo*). Then, since the ultimate aim was to reestablish a work contractual relation, the referential source to decide the lifetime of the legal action had to be the statute that ruled the contractual relationship. When the constitution came into force, the valid regulation was a statute which provided that those actions that derive from the work contract, unless specified otherwise, prescribe three years after the end of the contractual relation.[7] Since the plaintiffs could bring their legal actions as soon as the constitution came into force (i.e. 29 December 1978), applying the three-year statute of limitations the court understood that they could hold valid claims to recover their employment until 31 December 1981. And because in this case the plaintiffs had undertaken their actions in July 1981, their claims were recognized.

Not everyone in the court agreed with the majority ruling. The dissenting voice of the well-known civilist Justice Díez Picazo underlined its oddity at the time, as did two more judges when, 10 years later, the court was still applying the same doctrine.[8] If the discriminatory loss of an employment amounted to a constitutional violation, the violation did not cease just by the mere fact that it got consolidated in time. And if the constitutional violation was still active and producing its effects at the time the constitution came into force and after that, why should the time limit to react against it start counting since the constitution came into force? Also, why should the court call on an ordinary statute, the Labour Code, to decide the lifetime of actions which have their origin in the constitution? Moreover, however plausible this doctrine of the statute of limitations, what was one to make of the fact that in 1983,

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[7] See Statute on Employment Contracts (Ley de Contrato de Trabajo) of 1944, Article 83.

[8] See dissent by Justices González Campos and Gabaldón López in STC 59/1993 and dissent by González Campos in STC 70/1993.

when, for the first time, the court set this doctrine, the three-year period that it held as the 'valid reaction time' had already expired?

It is not surprising, then, that after a few victories for women (the victories of those women who had undertaken their actions in the lapse between December 1978 and December 1981),[9] the court was soon forced to deny the claims of those women who had only reacted after December 1981, even if in some of the cases the habilitating condition to regain the lost employment according to the old regulations (the fact that they became head of their families) had taken place only after that date.[10] For the court, that was an irrelevant consideration. After the constitution came into force, both husband and wife had automatically become 'head of the family'. The idea that the wife could only become such if and when the husband died or became unable to work was the expression of the sexist family scheme under Franco, a scheme which the constitution had invalidated.

There was only one exception to this time limit. In one of the cases the court decided that if the wife had become head of the family in the old meaning of the concept, *before* the constitution came into force, then the time of that event—in the case at stake, the time of the death of the husband—and not the coming into force of the constitution, signalled the moment from which to start counting the three-year prescription time as the wife had been able to request her employment already since then.[11] The plaintiff, a woman who had been subject to the mandatory marital leave regime, had lost her husband in April 1977 and had asked to be readmitted to the company only in May 1980, a few months after the new Labour Code prohibiting sex discrimination at work had been passed. For the court, the discriminatory situation had ceased with the death of her husband, because she was able to regain her employment since then and, thus, there was no need for her to wait for the constitution to come into force. She, on the other hand, had argued that she would not have lost her job to start with had it not been for the mandatory leave regulation and that since it is only with the coming into force of the constitution that such regulation became altogether invalid, that, and not the husband's death, had to signal the *dies a quo* for prescription purposes.

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[9] See SSTC 8/1983; 13/1983; 15/1983; 86/1983.

[10] See STC 58/1984. See also SSTC 59/1993 and 70/1993, where the wives claimed readmission after both of their husbands had died in 1987.

[11] See STC 38/1984.

After the mandatory leaves cases, some cases about voluntary leaves reached the constitutional court. The response, in the end, was the same. Even when women had 'chosen' to go on leave under the option that the old regulations granted to them, they did not have to wait to become head of the family in the old sense to regain their employment because, again, that condition was automatically fulfilled with the coming into force of the constitution.[12] Underscoring the collective dimension of gender discrimination, the court mentioned the fact that when a measure is discriminatory because of its impact on women as a group, it becomes irrelevant whether an individual woman actually wants that measure to be applied to her, as 'the consent of the discriminated individual cannot remedy the inherently unconstitutional nature of the treatment at stake'. The court added: 'discrimination is a social phenomenon which has to be treated and valued as such'.[13] For the court, the voluntary regime was as discriminatory as the compulsory regime, for, under the appearance of granting women an option, it indeed aimed at keeping women off the labour market and secluded in the homes instead of encouraging their professional fulfilment.

Regarding the issue of the statute of limitations, there was at least one case that gave hope that the constitutional court was going to be more flexible than it had been with respect to the mandatory marital leaves, to better accommodate the reality of women. The court recognized the wife's right to readmission after she separated from her husband in 1988, hence way past the three-year prescription period, explicitly stating that the lower courts' refusal to apply the same prescription regime to voluntary as to mandatory marital leaves did not constitute a violation of the principle of equality as the cases were different in nature.[14] However, in a final case in 1993 the constitutional court interpreted that the same prescription doctrine was indeed applicable to cases of voluntary leaves. They too were discriminatory, and they too became void when the constitution came into force, and that again had to be taken as the starting moment from which to count the prescription time. So, applying this doctrine, the court denied the claim of a woman who had taken a 'voluntary' leave when she married in 1951 and was trying to recover her employment in 1987, after the death of her husband.

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[12] See STC 241/1988.
[13] See STC 317/1994 (my translation).
[14] See STC 235/1992.

From a critical stand, it may well be true that being more accommodating of the needs of those women who had 'voluntarily' relinquished their employment than of those who had not even had that option seemed inconsistent. But how to restore that inconsistency (whether by explicitly departing from its prior doctrine, as the dissent of Justice González Campos suggested,[15] or by applying it to the new cases of voluntary leaves as well) was the option at stake. Finally, the court chose the second of these options and restored consistency, once and for all, in my view, treating all the claims in a consistently unfair manner.

The Grievances

From women's perspective, the overall way of resolving the constitutional question was rather disappointing. After all, the issue was a purely transitional one. Nobody really disputed the fact that the regime of mandatory and voluntary leaves at marriage, reserved for women only, amounted to a discrimination against women and thus, that it became void and could no longer be applied for future situations after the constitution came into force, whether individual women liked it or not. The important question was how to address the claims of the generation of those women who had already lost their employment under a discriminatory pre-constitutional regime. In my view, the court failed to set a clear and consistent ad hoc doctrine, a doctrine that would both create a forward-looking emancipatory doctrine for future generations of women (making explicit that under the new constitutional order measures of this sort would no longer be accepted), while at the same time maximizing the protection of the rights of the 'generation caught in-between'.

In order to ensure the conditions for the effective enjoyment of the right not to be discriminated against on the basis of sex—a maxim with constitutional grounding in Article 9.2 that the court itself has recognized as guiding its hermeneutic task—the court should have recognized two options for those women. First, the court should have acknowledged, as it did, that women had a right to recover their employment as soon as the constitution came into force and regardless of their husbands' health or life, whatever the nature, voluntary or mandatory, of the leaves applied to them. As for the time limit to exercise the

[15] See SSTC 59/1993 and 70/1993.

constitutional action for repairing the discrimination, absent specific constitutional or ordinary legislation, minimal requirements of legal certainty—another constitutionally enshrined value (Art. 9.3)—should have guided its interpretation and required that it not start counting *before* the constitutional doctrine which for the first time made it explicit was set, so, in our case, not before February 1983. It was unreasonable to expect that anybody could have anticipated the elaborate and doubtful conclusion that the court reached.[16] In one of its early decisions, the court explicitly mentioned legal certainty as the interest underlying the need for such a statute of limitations.[17] But I take it that this should include everyone's interest in legal certainty and not just that of the prevailingly male employers. Phrasing the interests involved in terms of a general interest in legal certainty simply hides the question of whose interests are really at stake and how they have to be pondered to reach a fair solution (Fernández López, 1982: 104).

Second, the court should have also acknowledged that those women who wanted to, could however stick to the terms of the old regulations, having the right to be readmitted when and if their husbands died, or, for some other reason stopped being a reliable source of financial support. For those women who did not long to go back to an employment that they had been obliged or encouraged to abandon years and maybe decades before, being forced to make the option between requesting their employment right after the constitution came into force and forfeiting the possibility of doing so in the future and in the case of absolute need, the constitutional doctrine that foreclosed this second option really amounted to the restriction of a consolidated right. For them the constitution was applied retroactively to limit their rights for the sake of maximizing their employers' interest in certainty.

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[16] Notice that the 1944 Statute on Employment Contracts that the court relied upon referred to a three-year statute of limitations that should start counting after the end of the contractual relation. Since the contractual relation in these cases was not technically extinguished but only suspended, relying on this statutory source to regulate the prescription time of the constitutional action was quite a sophisticated and arguably flawed exercise of constitutional engineering. That the solution adopted was clearly ad hoc is shown by the fact that in a later case, completely unrelated to the question of maternity leave, but which also raised the issue of the statute of limitations of constitutional actions, the court made no reference to this prior doctrine and came up with a completely different, and in my view equally flawed, criterion which never became a consolidated doctrine either. See STC 35/1987.

[17] See STC 13/1983.

Now, the constitution prohibits in general the retroactive application of norms that restrict consolidated rights (Art. 9.3) but again, given its purpose of establishing a new order, there may well be a justified need for retroactivity in some cases. The problem here is not so much the frustration of expectations that this retroactivity implied as the fact that, as a result, the rights of women, which should have been enhanced in the new constitutional order, ended up being restricted. Let me explain. The constitution invalidates all those pre-constitutional norms that are against it and continue to produce effects after it. Thus, there are bound to be a whole set of expectations created according to the, at the time, valid regulations that are not lived up to. Think, for instance, of those employers who were hoping that most of these women with outdated skills would never become head of their families and claim their employment back and yet were forced to readmit them, regardless of their husbands, as soon as the constitution came into force and they exercised their legal right. The oddity here, though, is that it is women who see their expectations frustrated and their rights restricted, and that this happens as a result of a constitutional reparation of pre-constitutional discriminations on the basis of sex.

In short, although it seems radically unfair that precisely the women who had already been oppressed under Franco would be the ones asked to pay the price for a forward-looking emancipating sex equality doctrine with a further curtailment of *their* legal status, for many this is what actually happened. Many lost the right to recover their employment in case they ceased to be able to rely on their husband's income, for not reacting immediately after the constitution came into force, and doing so within a time limit that the court only made explicit once it had passed. From a gender perspective it is simply not very realistic to think that, the very day a constitution comes into force, those women who, for all of their lives had been indoctrinated to believe that 'their proper role' was in the home, with the children and the husband, would now go out on the streets to recover an employment that they had relinquished or, in theory, been 'liberated from' in many cases years, even decades before.

Concluding Remarks: In Search of a Rich Agenda of 'Transitional Constitutionalism'

Much of the literature discussing the Spanish Constitution in the framework of Spain's transition to democracy reproduces a narrative

which celebrates the enacting of the constitution as epitomizing the conclusion of the transitional process. The constitution becomes, as it were, the legal expression of the successful transition. Much of the literature discussing transitions to democracy in other countries as well as in Spain describes the process of rupture with the prior political regime, the alliance of social, political and economic forces that united to trigger the rupture, the specificities of the constitution-making process, and the process of constitutional 'normalization' of the country whereby the new democratic institutions, which often include a new constitutional court, come to replace the old structure of powers. Little is generally written about the interplay between transition to democracy and constitutionalism in a more strict sense.

As we accumulate 'transitional experiences' which are facilitated by constitutional changes, applying the necessary degree of abstraction, we should be able to identify issues that reoccur in different national experiences and that are strictly connected with the fact that constitutions, as legal norms with the ambition of installing a new political order, will always apply to societies which have been moulded by norms, institutions and, to a large extent, cultural understandings of the previous regime. Identifying those issues that are inherent to the phenomenology of political transitions and analysing the responses given to them by constitutions and, later on, by the courts which enforce the constitutions, could thus help us build an agenda of 'transitional constitutionalism' or 'constitutions in transitions', inviting both constitutionalists and political scientists to assess the relationship between constitutionalism and transitional processes in a more dynamic way.

The degree to which the transitional dimension of constitutions is made explicit in constitutional documents varies greatly. It is most evident when a given constitution has a time-limited mandate with the specific task of facilitating the transitional process that should then end with the enactment of a permanent constitution.[18] Many but not all constitutions include provisions, typically, in the end of the document and under different headings (including those of transitional, derogatory, or final provisions) which specifically address aspects of the transitional process. The issues covered by such provisions are quite diverse and include things such as the date of coming into force of the constitution;[19] the relationship between the constitution and the legal or constitutional

[18] See, for instance, the chapter by Heinz Klug on South Africa above (Chapter 6).
[19] See, for instance, Article 100 of the 1946 Japanese Constitution.

norms of the previous regime;[20] rules to facilitate the transition to a regime of greater political decentralization contemplated in the new constitution;[21] start-up rules for the creation and functioning of the new democratic institutions and rules on the temporary or indefinite validity of the existing powers;[22] the concession of amnesty to public authorities of the prior regime;[23] or the temporary validity of military courts.[24] Other times, the constitution explicitly provides that such transitional issues will be the object of specific legislation.[25]

The theme that underlies this article is clearly another key transitional issue, namely the distribution of the costs entailed by the process of structural social transformations under a new democratic regime which claims legitimacy on the grounds of the greater inclusion of formerly oppressed groups. Here, I have sustained the thesis that however such costs are distributed, tools of transitional constitutionalism should be devised to ensure that they are not mainly borne precisely by the current members of the oppressed groups. I have focused on women in the Spanish setting but the same could apply to other oppressed groups purportedly blessed by the emancipating promises of the new constitutions. Without a doubt, a higher degree of theorizing of issues such as these could guide constitutional courts and make them more aware of their historically situated and dynamic task in the process of consolidating the constitutional order. Such 'constitutionalism' could be helpful to countries facing structurally similar issues about the proper role of constitutions and constitutional courts in the transitional process.

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CHAPTER FIFTEEN

DISSOLUTION OF POLITICAL PARTIES BY THE CONSTITUTIONAL COURT IN TURKEY

JUDICIAL DELIMITATION OF THE POLITICAL DOMAIN*

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> . . . there is no original Kurdish language. (Constitutional Court Decision on the Halkin Emek Partisi [HEP] case)
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> The homeland of the people that by becoming a single body have won the war of independence is the Turkish homeland, its nation Turkish nation, its state is the Turkish state. . . . This situation does not mean blindness to different ethnic groups that live in the unity of the nation. These groups have lived together and shared the common destiny of the Turkish people. . . . Like any othernation, the Turkish nation's shared identity and culture cannot be left defenseless. This is a right and duty also supported by international legal documents. Yet in the last years the Turkish Republic is under the threat of armed separatist terror activities that are supported by external forces. . . . In the activitiesof the HEP that are the basis of this case the real desires and theses of the terrorists are represented in a different way. Their agitative and separatist acts are trying to create a feeling of minority within some citizens. Attempts to give up the union-creating and unitary foundation of the Turkish Republic cannot be seen as a necessity of democracy or of the contemporary age. (Constitutional Court Decision on the HEP case: 190)
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> Dark clouds are running over our country in ways unprecedented since the founding of the Turkish Republic . . . external and wealthy forces, who don't want a strong and independent Turkey in the Middle East, who supported first ASALA, and then PKK but yet who saw the Turkish people with the help of its army overcoming these threats, are this time trying to reinstate the *Sharià*. And because they know they cannot do this alone they are joining hands like they did when they were able to remove Articles 141, 142 and 163 of the Turkish Criminal Code. In order to realize their aim of dividing our country and building a state based on

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> religion they are now arguing that in democracies you cannot close down political parties. (Indictment against the Refah Party)

The preceding excerpts are quotations from constitutional cases against two political parties: Halkin Emek Partisi (People's Labor Party [HEP]) and Refah (Well-Being/Welfare Party). Both cases ended with orders of dissolution, effectively excluding these parties from the political domain. HEP was a leftist, pro-Kurdish party. In the 1991 elections, HEP joined forces with the center-left party Sosyal Demokrat Halkci Parti[1] [SHP] and managed to secure a few parliamentary seats. The case against HEP started in July 1993, culminating in its dissolution on grounds of 'separatism', namely threatening the unity of the nation-state.[2]

The Refah Party was a center-right Islamist party. In 1994, it scored victories in local government elections. In 1995, it gained sufficient power to join the national coalition. It remained in power until 28 February 1997, the date of the so-called 'postmodern coup', where the army issued a declaration on the urgent need to protect the laicity[3] principle of the republic. The case against Refah Party was opened only three months later, in May 1997. It was dissolved on the grounds of its alleged unconstitutional 'work against the laicity principle of the nation-state'.[4]

The dissolutions led to the creation of new parties that advocated similar causes under new names (Fazilet and DEP respectively). These parties were dissolved as well. At present, legal action is being prepared against yet new political parties that seem to voice and advocate the same views on said issues. The HEP and Refah decisions, analyzed in this article, were the first substantive judicial steps into the ongoing struggle between Kemalism[5] and the perceived threats of politically

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[1] Social Democrat People's Party.

[2] Case number: 1992/1 (Political Party Dissolution), Decision number: 1993/1, Decision date: 14 July 1993.

[3] The idea of laicity (*laiklik*) here signifies the supremacy and control of state over religion in the political sphere. It should be clearly distinguished from the idea of separation between state and religion commonly associated with secularism.

[4] Case number: 1997/1 (Political Party Dissolution), Decision number: 1998/1, Decision date: 16 January 1998.

[5] I do not mean to suggest a unitary, singular or monolitihic ideology in my deployment of such terms as 'Kemalism' or 'Kemalist ideology'. On the contrary, in relation especially to economic globalization and the socio-political developments of the last two decades, one can speak of a multiplicity of Kemalisms. My aim here is to examine precisely the ways in which social agents—such as the judiciary of the constitutional court—act in the name of Kemalism,and how they relate these actions to other sociopolitical phenomena.

engaged Islamists and Kurds in the post-1980 era. These two decisions set constitutional milestones that not only affected later similar cases, but more generally also portrayed the constitutional trajectory of Turkey. Interestingly, the HEP and Refah cases have not been studied yet as important milestones. This lack of interest may be partially related to the nature of the 1982 Constitution that enshrined the consequences of the 1980 coup d'etat. The 1982 Constitution, considered an epitome of Kemalist ideology, clearly demarcates the boundaries of legitimate social change through westernization and modernization. Moreover, general principles of legality and rule of law are conceived as subservient to the substantive concerns of nationhood drawn by Kemalism (Parla, 1991). For example, the constitution determines in its preamble that:

> No protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey as an indivisible entity with its state and territory, Turkish historical and moral values, or the nationalism, principles, and reforms of Atatürk and his embracement of values of modern civilization; and as required by the principle of secularism, there shall be no interference whatsoever of sacred religious feelings in state affairs and politics.[6]

It may thus be argued that the dissolution of HEP and Refah was a result of an inevitable judicial application of the constitution to the religious and separatist threats these parties represented. However, I argue that these cases do offer an opportunity to reflect upon constitutionalism in Turkey and cannot be reduced to mere reflections of the constitution's Kemalist imperatives. As Arjomand (1992) notes, a single element rarely exhausts a constitution in its entirety. Contemporary constitutions are often an amalgam of different elements that draw on different tensions between the domains of law and politics. As I show, the 1982 Constitution offers a number of venues for judicial interpretation upon which the HEP and Refah parties relied in the hope of securing their constitutional legitimacy. My reading of the decisions thus shows that the dissolution decisions in both cases were not simply a reflex of the constitution per se but rather a dialogical process of contesting political power in Turkey. In this respect, I read the decisions as in themselves constitutive of the discourse and practice of constitutionalism in Turkey.

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[6] Article 2 of the constitution establishes that the preamble defines the basic characteristics of the Turkish state.

In other words, I offer here an analytic approach that treats the constitution not merely as text but as a hub of multiple themes, multiple venues for action, deployed by multiple actors for multiple ends. I try to show how various venues of action and interpretation respond to a larger framework consisting of an unstable thematic assortment of Kemalist ideology, international treaties and the legacy of the 1980 military intervention. By following the ways in which the constitutional court responded to such venues of interpretation,[7] I hope to establish the crucial coordinates of the intricate relation between the domains of law and politics as it has been played out on the constitutional level.

Procedural Foundations

In both the HEP and Refah cases, procedural issues became an important site of contestation. First among these was the status of temporary Article 15 of the constitution. This article stipulates that interim laws passed between the 1980 military intervention and the general elections of 7 December 1983 cannot be challenged on constitutional grounds.

The HEP case was based on the party's alleged violations of the Law of Political Parties (hereinafter LPP) that forbids activities that threaten the unity of the Turkish state by compromising the integrity of the Turkish language, flag, national anthem and other symbols of nationhood. According to the LPP, a political party cannot organize and mobilize support on the basis of race, family and community, religious or sectarian affiliation, as these types of organization compromise the unity of the nation. It further stipulates that assertions of minority status in Turkey on the basis of national, religious, racial or language differences also violate the unity principle.[8] HEP had also been charged with engaging in such unlawful practices. It is noteworthy that although HEP could be evaluated by the court in light of relevant articles of the constitution,[9] the court opted to consider HEP's alleged

[7] See Scheppele (1999) and Peled (1992) for a comparative view on the Hungarian Consitutional Court and the Israeli Supreme Court.

[8] LPP sections a, b of Article 78, Article 80 and sections a, b of Article 81.

[9] The prosecutor claims that HEP has breached the constitution by suggesting changes in the inseparability of the Turkish state with its nation and homeland, the protection of Ataturk nationalism and Ataturk principles, revolutions and civilization and Turkish as the official language of the Turkish state. These are constitutional prin-

violations in light of the LPP. This seemingly technical choice was in fact highly meaningful because the LPP enjoyed immunity from constitutional review—under the provision of temporary Article 15 of the constitution.

However, HEP challenged the constitutionality of the LPP and brought up international treaties such as the Helsinki and Paris treaties to which Turkey is a signatory, argued that these treaties were part of Turkish law, and suggested that the LPP violated the principles embodied in these treaties. Specifically, HEP argued that Article 78 of the LPP that forbade organizing on the basis of race, language and religion violated the freedom of expression protected by the constitution and those treaties. HEP argued that by relying on such constitutional and international norms, the court acquired jurisdiction to override temporary Article 15 in general and to test the constitutionality of the LPP in particular. In its decision, the court declined to accept HEP's contention, and upheld the immunity of the LPP from constitutional review.

In the Refah case the issue of temporary Article 15 resurfaced with an interesting twist. The case was based on charges that Refah became a center of activities undermining the laicity principle enshrined in the constitution.[10] However, this time the constitution itself (Arts 68 and 69), rather than the LPP, served the basis for the legal action. This line of action was chosen because the LPP detailed the grounds for

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ciples of the Turkish Republic. A suggestion to change them is unconstitutional. The HEP is in such a violation because it has used constitutional rights and liberties for destroying the inseparable unity of the Turkish state with its nation and country. The HEP has also violated the constitutional principle that everybody who is connected to the Turkish state with the tie of citizenship is Turkish (Arts 2, 3, 4, 14, 68).

[10] According to Article 103 of the LPP a political party is to be closed if it is established that this party has become a focal point of 'intensive' activities that are in violation of Articles 78, 88 and 97 of the same law. Article 78 of the LPP forbids political parties from engaging in all actions directed against the unity of the Turkish state and its language, its Ataturkist principles, flag, national anthem, etc. The second section of the same article states that political parties cannot be based on race, group, family, cast, community, religious group or tariqa basis. Article 88 of the LPP forbids political parties from engaging in any kind of religious ceremony or ritual. Political parties cannot turn religious holidays/festivities, religious rituals or funerals into party demonstration or propaganda. Article 97 of the LPP states that political parties—due to reasons mentioned in the preamble of the constitution—cannot hold any attitude, expression or behavior countering the 12 September 1980 intervention that the Turkish armed forces have established 'on the call of the nation'. (The term 'on the call of the nation' signifies a framework commonly used regarding the 1980 intervention. The intervention is constructed as based on a need supposedly shared and registered by all members of Turkish society at the time. According to this framework, the army 'felt' this need and acted upon it.)

dissolving a party in ways that made it more complicated to apply to Refah. Specifically, an amendment[11] to the LPP that was introduced *after* the end of the interim period established that the activities that would have given reason for dissolving a party should be undertaken by a given party's general congress, central decision-making body or executive committee. This latter stipulation could not be easily applied to Refah and the state prosecution, therefore, opted to rely directly on the constitution. Refah, for its part, hoped that these limiting conditions would make it difficult to implicate it in unconstitutional activities.

The interesting twist was that around this time it was Refah that alleged that its activities had to be evaluated in light of the LPP. Specifically, Refah argued that absent a clear contradiction between a law and the general principles of the constitution, the specific relevant law (LPP) had to be applied. Refah also relied on international treaties, asserting that a fair application of the law required a strict adherence to formal procedural rules. Thus Refah in fact tried to defend itself by pushing for a judicial formalist approach to be applied to the case, in line with the court's reasoning in the HEP trial.

In response to the defensive line suggested by Refah, the court decided to review Article 103 of the LPP (that delineated the terms that had to be established in order to dissolve a party). The court established that in light of temporary Article 15 of the constitution, the original articles of the LPP indeed enjoyed immunity from constitutional review, yet later amendments that were introduced after the passing of the interim period could be scrutinized. Thus, the court distinguished among different parts of the LPP and reviewed Article 103. On the merits, the court found Article 103 to be unconstitutional because it compromised the general principles of the constitution through its conditioning of the grounds for party dissolution.[12] Once Article 103 was declared unconstitutional, Refah lost its central line of defense. The court evaluated the case in line with both the constitution and the LPP.

Thus a selective deployment of the constitution and the LPP allowed for the dissolution of the two parties respectively. In the case of HEP, the LPP gained center stage while the constitution remained in the background. In the case of Refah, the constitution gained center stage, while the LPP had been broken down to its elements in order to avoid

[11] Dated 28 March 1986.

[12] Case number: 1998/2, Decision number: 1998/1, Decision date: 9 January 1998.

its unequivocal application as a whole. This type of formalistic maneuvering and the subsequent substantive review of Article 103 have had implications for the court's own jurisdictional space. Article 103 was quite unique because it provided the court with detailed guidelines to follow in dissolution cases. By striking down Article 103, the court seems to have also dissolved formal limitations upon its own ability to dissolve political parties. As a result, the court at once opened for itself a less restrictive interpretive space and a less restricted space for politically motivated legal actions against political parties. In other words, the dissolution Article 103 of the LPP thereby potentially wedded a conservative approach to a non-formalistic judicial approach.

Finally, another by product of these cases was that the court re-established the legitimacy of temporary Article 15 of the constitution. In this, the court acted to preserve the immunity of the laws that were introduced during the interim period that followed the 1980 coup d'etat. It may therefore be argued that in spite of the changes that took place in and around Turkish politics since the 1980s, the anti-democratic measures that were introduced into the political sphere as a result of the 1980 military intervention are still firmly institutionalized, insisted upon, and adhered to by the Turkish Constitutional Court as well.

Threats Posed by the Parties

In this section I examine the construction of the threats HEP and Refah allegedly posed, the substantive defense put forward by these parties, and the way they are portrayed in the final decisions. I first consider the case of HEP and the allegations of separatism brought against it. Next I consider the case of Refah and the allegations brought against it. Finally, I point at a number of interesting parallels between the two cases.

HEP and Separatism

The crux of the prosecution's case against HEP was that it cultivated social differences with the aim of destroying the 'inseparable unity' existing between the Turkish state and the Turkish people.[13]

[13] Evidence is based on the following: 16 speeches delivered by the president, vice president and general secretary of HEP; 23 speeches delivered by other members of the party; allegations against various members of the party in ongoing trials; and a report

The indictment was based on speeches made by party members and on allegations brought against individual members of the party in separate trials.[14] The prosecution argued that the question of minorities in Turkey had been settled by the 1922 Lausanne Treaty. According to that treaty, only non-Muslim groups (i.e. Greeks and Armenians) were recognized as minorities and Kurds, therefore, could not make claims to a minority status. In trying to suggest otherwise, HEP promoted a 'nonentity' with the aim of establishing a separate nation for the Kurds, thereby undermining the unity of the nation.

The prosecution also raised more general arguments concerning the Kurdish question. It argued that Kurds were full citizens who took part in the nation-building struggle that led to the establishment of the Turkish Republic. As such, they were not a minority but part of the Turkish nation's 'flesh and blood'. The prosecution also noted that Kurds could freely speak Kurdish, but that attempts to institutionalize the use of Kurdish would amount to attempts to replace the Turkish language as the language of the nation, thereby also amounting to separatism.

In its defense, HEP challenged the idea that assertions of cultural and linguistic distinctions represented an attempt to 'create' a minority with separatist tendencies. HEP argued that minorities are sociological

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prepared by the police on the terrorist activities of PKK. This last piece of evidence is interesting. The prosecution placed it in the indictment in order to show the parallels between HEP's 'line of expression' and PKK's line of action. In the absence of any suggestion of relations between PKK and HEP the court dismissed it as evidence.

[14] The prosecution cited at length the speeches of party representatives and other members underlining the parts considered problematic. One allegedly problematic statement repeated by many speakers was: 'They give many names to us. They say this party is the party of the Kurds. Here I call to Kurds, Arabs, Circassians, Albanians, Pomaks. I call to everybody who is oppressed, repressed, and exploited. This party is the party of those who are exploited, oppressed and repressed. This party is the party of those who are exploited, oppressed and repressed the most. Now from here I ask the state, I ask the parties of the order [system] who is the most exploited, who is the most oppressed? If they say it is the Kurds that are oppressed and exploited the most, then they are confessing their crimes. And we are proud to be the party of the Kurds.' Other examples of statements considered problematic are: 'we claim that Kurdish people exist in unbearable conditions'; 'we demand that a democratic context where the Kurdish national problem and its resolution can be discussed freely with all its dimensions'; 'The Kurdish problem exists since the foundation of the Turkish Republic. Turkish and Kurdish people established the Republic together. But after the founding of the new state The Kurdish people have been excluded absolutely'; '[regarding PPK] instead of discussing the rightness or wrongness of the act we say that the act is the result of the state's policies of violence'; 'it is clear that the unitary state has not been able to solve the problems of Turkey so far'.

facts of social life that cannot be predefined or circumscribed by treaties and laws. Kurds being such a sociological fact, HEP only claimed to represent an already existing minority and not to create a new one. However this line of defense had carried its own risks because the mere claim of representation on grounds on national or ethnic grounds could amount to separatism as well. Thus HEP had to claim representation of that 'reality' without claiming to represent a separate, specific category of the 'people'. HEP thus argued it supported and advocated the cause of oppressed people in general, the Kurdish population—economically, politically and culturally deprived—among them (Decision 1993/1, 14 July 1993: 116). From this point of view, HEP argued that it had been legitimate for a political party to openly discuss the country's most pressing issues.

A second defensive strategy that the HEP used was one of normalization. HEP tried to convince the court that times had changed, that Turkey had become sufficiently democratic to openly discuss those issues that HEP brought to the fore. HEP cited speeches by Suleyman Demirel (former prime minister) stating that the Kurdish population was a social reality and that the Kurdish problem had to be solved through democratic means. HEP argued that Demirel's speech was essentially similar in content and spirit to the ideas expressed by members of HEP.

Another defensive strategy centered on what may be termed reappropriation. HEP argued that the rights of Kurds had to be acknowledged precisely because they fought shoulder to shoulder with Turks for securing the Turkish Republic. Thus, the demands of Kurds should not be interpreted as separatist tendencies but to the contrary, as a desire for running local affairs as equal partners in Turkish society. Finally, HEP also tried to counter-attack. HEP argued that the indivisible unity of the Turkish state with its homeland and nation had become a slogan that denied the social reality and thereby the rights of minorities to enjoy basic rights. It accused the prosecution for employing bygone methods and of invoking the constitution as an ideological-political device. And it further argued that while being accused of 'racism', it was the prosecution that displayed racism by emphasizing the idea of a single Turkish race.

In its decision, the court singled out elements of the speeches that served as evidence against HEP and found them to incite separatism. The court found that HEP expressed a 'desire to establish a Kurdish and Turkish new social order excluding other minorities', that HEP asserted that 'state forces in the Middle East are not fighting against

terrorists but against the Kurdish people who are trying to claim their national rights', and that it considered the PKK to be a party 'in an international war' (Decision 1993/1, 14 July 1993: 201).

In more general terms, the court offered an extended discussion about the unity of the Turkish state as a core principle. In the course of this discussion, the court develops a clear distinction between culture and politics. The court finds that there are many groups in Turkey that freely follow their distinct 'traditions'. Yet different traditions, according to the court, cannot become a basis for claiming minority status and an amalgam of derivative rights. Such claims, the court argues, cannot but amount to separatism. Thus the court develops a conceptual distinction between the realm of everyday life (i.e. culture) where 'following a tradition' is legitimate and the domain of politics where the making of tradition into a political claim is illegitimate. The court concludes that since HEP leveled such claims at the political domain, its dissolution is the state's lawful right to protect its unity and the public order.

Within this distinction between everyday life and politics, the court refers to the question of language. It is here that the distinction comes potently alive as a way to demarcate culture from politics. The court reiterates the fact that Turkish is the official language of the Turkish state and the only one that is allowed in education and communication. Interestingly, the ideological argument is corroborated by pragmatic considerations. The court states that Turkish is the most widespread language in Turkey and that the number of people who do not use or know Turkish is very small.[15] However, the court acknowledges the existence of 'local languages' that are used in everyday life and affirms their legitimate use at home and work, public and private domains and even in the printed press and the arts. Kurdish, according to the court, is but one such local language that cannot be regarded as a distinct 'original' language (Decision 1993/1, 14 July 1993: 189). At the same time, the court justifies the idea that such local languages are banned in public education and in the media. Drawing a quite arbitrary line, well hidden in the decision, the court sees education and electronic media as domains of 'politics' and the use of languages other than Turkish there as displays of separatism.

On the basis of the aforementioned distinction, the court moved to celebrate the unity of the nation and Ataturk's legacy of grounding

[15] This point is highly debated not only politically but also factually. To this day no official statistics are collected that gather data on 'native language'.

Turkish indivisible nationalism as the foundation of the 1924, 1961 and 1982 constitutions. Drawing on Ataturk's writings and personal notes, the court evoked Ataturk's reminder that there have been attempts to inflict ideas of Kurdishness, Circussianness, Bosnianness on the people of Anatolia in the past, but these were attempts by foreign forces who capitalized on the repression of the Ottoman Empire. Hence the court ruled that in the modern Turkish Republic the granting of minority status on the basis of lingual or racial differences was incompatible with the unity of the homeland and the nation. The state is unitary, the nation is a whole, and counter-arguments can only be seen as unwarranted foreign influences intensified by a rhetoric of human rights and freedoms (Decision 1993/1, 14 July 1993: 196). In sum, the court emphasized that the nation was established on the basis of living together and that instead of separation, nationalism called for bonding within the body of the nation. The court reiterated the 'factual point' that minorities in Turkey were only recognized in the Lausanne Treaty, and that this status was given—once and for all—only to the non-Muslim communities of Armenians and Greeks. On these grounds, HEP stood for unaccepted principles and had to be dissolved.

Refah and Shari'a[16]

The Refah Party was accused of being a center of activities against the laicity principle of the Turkish state by trying to replace the democratic political system with one based on *Shari'a*.[17] The charges were based on a number of activities and positions undertaken by the party and its leaders. First, it was alleged that Refah supported the struggle of female students and civil servants to wear a headscarf although this struggle ran against the decisions of the national security council and conflicted with the law establishing the unity of education. Second, the prosecution targeted Necmettin Erbakan, Refah's leader and a former prime minister. Erbakan was accused of hosting a dinner party for some leaders of the *tariqas* (*sufi* orders) at the prime minister's official residence, thus conveying the impression that the state welcomed people 'who were well known for their activities against laicity.' Third, Refah

[16] *Shari'a* in this context refers to a system of government based on Islamic principles. In this sense this usage of the term is different from its use as *Shari'a* law in the scholarship, which signifies a culturally specific mode of lawmaking and law-finding.

[17] For a discussion of this case by a self-defined 'Islamic reformer', see Yuksel (1999).

was accused of struggling against the shutting down of high schools for the training of religious functionaries, despite the 'fact' that there was no need for such schools and in defiance of the decisions to that effect by the national security council. Fourth, Refah was accused on the basis of public speeches by Erbakan and other party members indicating Refah's commitment to bringing a *Shari'a* order to Turkey.[18]

The prosecution strategy was to flatten out the vast differences in tone and orientation existing among Islamists and to collapse them all into a single threat represented by a *Shari'a* state. Refah, in turn, was depicted as a unitary representative of this threat. Part of the evidence against Refah was based on a compilation of newspaper articles in which the Islam in general and Refah in particular were described as working against women's rights and against progress and development. And yet another part of the indictment simply rests on citing anti-Islamic statements to the effect that the Koran's essential premises are not compatible with democratic principles. The prosecution then asserted that the principles advocated by Refah ran against the Turkish state's commitment to a progressive secular order where state administration is not handled according to religious laws but according to rational and scientific evaluations. Yet again, Ataturk is extensively cited, relying on talks where Islamic identity was posed as a threat to the Turkish nationalist identity.[19]

The charges against Refah were therefore constructed around a stark contrast between *Shari'a* law and the Turkish constitutional political order: Divine laws are superior according to *Shari'a*, whereas the Turkish Constitution constitutes itself as the foundational text. According to *Shari'a* law nationalism should not be embraced. According to the

[18] The most important ones of these are: (1) a speech made by the leader of the party, Necmettin Erbakan, supporting legal pluralism on the basis of the idea of the 'Constitution of Medina' of the prophet's talk, where he states that 'the just order will be established.... Now Turkey has to decide one thing. The Refah Party will bring about just order. The 60 million will decide whether the period of transformation is soft or hard, sweet or bloody.' (2) In another speech he frames service to the Refah Party as a service to God and portrays Refah as an army and the headquarters of the fight for Islam. (3) A series of video tapes of talks given by other members of the Refah Party.

[19] An example of such speeches is one where Ataturk states that: 'In the past before accepting Islam the Turks used to be a great nation, but Islam has weakened their national ties and especially because the Koran was not translated to Turkish, this language difference gradually led to a nation remaining in the dark, remaining ignorant, being led by greedy people.'

Turkish Constitution, Ataturk's nationalism is the foundational building block. According to *Shari'a* law, all Muslims must follow Koranic principles in private and public life, whereas according to the Turkish Constitution 'no protection shall be afforded to thoughts or opinions contrary to . . . the nationalism, principles, and reforms of Atatürk and his embracement of values of modern civilization'. The final part of the indictment cited different kinds of question and answer sessions from the Islamist mainstream newspaper *Akit* on issues like music and urination. The readers asked the columnists about the role of music in Islam or about different kinds of urination according to Islam. The prosecutor noted that it was the right of the Turkish people to ask how a fundamentalist mentality that tried to establish norms of urination would deal with the contemporary problems of a democratic society.

Defending against the charges leveled at it, Refah argued that there were no clear statements prohibiting veiling in statutes that regulated the dress codes in state institutions. Refah also cited the relevant statute which stated that dressing was free in institutions of higher learning. In respect to high schools for the training of religious functionaries, Refah claimed that there was a need for such schools in a country where 99 percent of the population were Muslims. Refah also cited Ataturk's speeches where he observed that everybody needed to learn about their religion. Refah also claimed that the speeches of Erbakan and others—allegedly running against the laicity principle—not only enjoyed a principled parliamentary immunity, but also had to be understood in context and not as purposeful statements of religious fundamentalism. All in all, Refah insisted that it had to be protected under general norms of individual freedom of conscience, enjoyed through the constitutional guarantees of human rights and freedoms.

More concretely, Refah argued that the constitution distinguished laicity and atheism. Refah's defense here was based on reappropriating the prosecution terms and reframing them in an alternative way. Refah thus offered its own definition of laicity, describing it as the capacity to adhere to any religion and practicing it in ways that do not destroy the public order. Thus framed, Refah in fact argued that its policies were based on the defense of the laicity principle and cited speeches given by the party's leadership in which they stated that they adhered to laic principles because laicity implied neither enmity with religion nor an atheist position.

Refah further intensified its reappropriation strategy by questioning the adherence of the prosecutor himself to laicity. Refah argued that

laicity had implications also in the realm of adequate procedures and appropriate rational and scientific fact-finding methods. Accordingly, Refah argued that while adjudication had to be based on scientific methods in both evidence and procedure, the prosecutor relied on flimsy evidence such as newspaper articles discussing Islam in a most general and unscientific way. Finally, Refah also reappropriated the idea of 'progress'. Against charges that it represented an obstacle on the road to progress, Refah argued that its relentless fight against corruption positioned it as a flag bearer of progress and development along the lines of contemporary western civilization.

In its decision, the court found Refah to be a threat to the unity of the nation and therefore established that it violated the constitution. The court mainly focused on the laicity principle referred to in the preamble of the Turkish Constitution. The court found that laicity was an inherent part of Ataturk's principles and accordingly defined it as follows: 'a way of life that has destroyed the medieval scholastic dogmatism and has become the basis of the vision of democracy that develops with the enlightenment of science, nation, independence, national sovereignty and the ideal of humanity'. With such a definition in mind, the court invoked a dichotomy (already stated in the indictment) between countries where religious thoughts and regulations dominated, and countries relying on the laic order, where religion 'is saved from politicization, taken out of being a tool of administration and is kept in its real, respectable place which is the conscience of the people'. Finally, the court noted that in Turkey, 'as a mark of modernity, [laicity] became the basic building block of transforming the people from an *ummah* [religious community] to a nation'.

In parallel with the imagery the court developed while dealing with HEP, the distinction between everyday life and politics underlies the court's rationale. In the case of Refah, this distinction played a crucial role on two separate plains. On one level, religion was depicted as a private concern, a matter of 'conscience', and hence as a realm of the 'private'. This depiction allowed the court to portray its decision as one that saved religious life from the contamination of politics. In fact, for the purpose at hand, the court suggested that by excluding religion from the political domain the court protected the dignity of religious life. Culture and everyday life were thus portrayed as 'pure' domains that had to be protected from politics. Yet it is easy to see that this move was inherently political in its implications as it insisted on a fundamental rupture between culture and politics and, consequently,

insisted on the court's ability to simultaneously define where culture ended and politics began. In turn, this also meant that the court also assumed the authority to exclude certain social aspirations from the political domain.

On yet another level, the distinction between culture and politics allowed the court to reiterate its adherence to the principle of unity and to justify the dissolution of Refah on grounds that the latter threatened that unity. Note how the court understands laicity as a principle of social transformation from an *ummah* to a nation. An *ummah* was depicted as a social configuration that by definition lacked unity because religious life could not evolve into a modern, coherent political structure. It always remained—according to the logic based on distinguishing culture from politics—as a dispersed form, binding people through a shared culture and shared everyday practices. It was only when religion was excluded from political life that a nation in a modern sense could be developed. In other words, a nation became here a product of safeguarding politics from religion. And, finally, it was the emergence of a nation that could give rise to unity. Hence, the distinction between culture and politics served the court not only to justify the exclusion of religion from political life but further to explain how unity could be preserved. Like in the case of HEP, it was in the last instance the imagery of unity that guided the court.

International References

Both decisions substantively engaged the relevance of the context of international law to the cases at hand. In particular, the court heeds attention to the Lausanne Treaty, the European Convention of Human Rights and to the European Court of Human Rights (ECHR).

The Lausanne Treaty is a constitutive international event that is referred to at length in HEP's indictment, defense and decision. In both the indictment and the decision, the treaty seems to play a symbolic role exceeding in importance its being a binding legal text. Among other issues, Lausanne affirmed Turkish national independence, established the recognized borders of the republic, and announced who were to enjoy minority status under Turkish sovereignty. Yet the treaty seems to play a crucial role as a symbolic representation of the Republic's foundation on the principles of westernization and modernization. The treaty, in other words, becomes a text constitutive of the Turkish

national identity in general. It is the importance of the treaty as such a constitutive representation of identity that allows the court to depict it as a text that cannot be adapted to social change. The treaty is beyond time, and its moment of birth sets fundamental principles once and for all. Thus frozen in time, the court finds that the treaty's recognition of minorities in Turkey is the only possible foundation for asserting minority status. New minorities could not exist, simply because they were not recognized as such at the time the treaty had been ratified. The court found further proof for this conclusion in the circumstances leading to the ratification of the treaty. It relied on historical materials showing that Lord Curzon on the British side invested considerable efforts in trying to include the Kurds as a minority for the recognition of the Kurdish minority. However the Turkish delegation, 'knowing that from the bottom of their hearts the Kurds wanted to share the Turkish destiny', persuaded Curzon to drop this demand.

In its defense, HEP argued that the very idea that minorities could only be recognized by laws and treaties, and further that treaties could fix who was a minority for all time to come, in itself violated international treaties such as the Helsinki Treaty and the European Convention of Human Rights. In its decision, the court chose to highlight other aspects.

Like HEP, Refah also relied on international treaties such as the European Convention of Human Rights and the Universal Declaration of Human Rights, citing Turkey's obligations to respect the freedoms of association, conscience and expression. In its decision, the court affirmed these obligations but highlighted other aspects of those treaties as well. In its decision concerning HEP, the court found that the Helsinki Treaty also underlined the need to respect the stability of the national borders of sovereign states and to respect the principle of non-interference with sovereign states' internal affairs (Decision 1993/1, 14 July 1993: 201). On the basis of these principles, the court ruled that rights such as the freedom of speech and association were always to be evaluated in light of a country's legitimate interest in maintaining stability and public order. The court also cited the European Convention of Human Rights in support of that latter position. All in all, the court invested considerable efforts establishing that its decisions did not infringe upon international treaties and that the dissolutions had been in line with international norms. While HEP and Refah tried to invoke international norms in order to establish the need to adhere to civil and human rights, the court invoked international norms in order

to establish its emphasis on the need to secure the public order and to respect broad national considerations.

International treaties were also cited by HEP and Refah as a background against which to interpret the constitution. In his minority opinion,[20] Justice Yılmaz Aliefendioglu also emphasized that international norms should aid the court in interpreting the constitution and other laws in line with present-day circumstances and conditions (Decision 1993/1, 14 July 1993: 214). Relying on international treaties and conventions, the judge argued that the constitution should have been interpreted in a way that would have secured the rights to various groups to associate and to express their opinions. Offering such an interpretation of the constitution, the judge also read the evidence against HEP as insufficient to prove it to have been separatist. He thus concluded that HEP, and other parties, should be legally protected unless they turned to repression and terror, conspired a revolution or engaged in separatism.

The international context is brought into the decision through other means as well. For example, the HEP decision ends with a comparative note. The court argued that political parties were also dissolved in countries such as Germany and France and elaborated on the French treatment of Corsican separatists. In the Refah case, one of the main components of the indictment was a lengthy critique of the idea that the dissolution of a political party was incompatible with democratic principles. Instances of party dissolutions in Germany, as well as the actions undertaken by the Committee for Un-American Activities in the US, were cited as relevant comparable instances.

Another referral to the international context had been brought about by the court's reliance on decisions of the ECHR. In Refah, the court cited the decision of the European Commission of Human Rights on students wearing headscarves.[21] This decision established that a student who chose to pursue higher education in a laic institution should be regarded as one who tacitly agreed to comply with the regulations governing that institution.

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[20] Two judges did not side with the majority opinion of the other nine justices.

[21] 3 May 1993, Decision No. 00016278/90. The two-tiered European System of Human Rights, composed of the European Commission of Human Rights and the European Court of Human Rights, was replaced by a single court in November 1998.

Overall, the HEP and Refah cases showed that the ECHR has been important as a reference point for all parties involved. The political parties under fire, the prosecution and the court looked up to the ECHR as a legal and social source of legitimacy.

Following their respective dissolutions, both HEP and Refah brought their cases to the ECHR. The ECHR ruled that the dissolution of HEP violated the right of free association (Art. 11) and subsequently fined the Turkish government. The ECHR refrained from adjudicating the case on other grounds, arguing that the freedom of association principle subsumed all other aspects of the case.[22] However, the ECHR upheld the Turkish court's decision in the matter of Refah.[23] In that case, the ECHR found that article of the European Convention on Human Rights had not been violated. The court also ruled that no separate issues vindicating Refah rose under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1.[24] At present, and upon the request of Refah, the case is currently reviewed by the Grand Chamber of the European Court of Human Rights.[25]

Conclusion

The basic challenge posed by HEP and Refah was that they both tried to legitimize social differences by introducing them to the political domain. The challenge faced by the constitutional court, in turn, was how to demarcate the legitimate boundaries of the political domain without overtly infringing on democratic principles and international norms that it aspired to follow. The strategy of the court, as I tried to show, was to affirm the existence of 'differences' but to relegate them to the domain of 'everyday life' and 'culture'. When HEP and Refah challenged the distinction between culture and politics and noted the arbitrariness of this distinction, the court cast their positions as a threat

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[22] Decision date: 9 April 2002, Application number: 00022723/93; 00022724/93; 00022725/93.

[23] For a discussion of the ECHR's handling of the Refah case, see Lehnhof (2002).

[24] Decision date: 31 July 2001, Application number: 00041340/98; 00041342/98; 00041343/98; 00041344/98.

[25] 'On 30 October 2001 the applicants requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 12 December 2001 the panel of the Grand Chamber accepted that request' from ECHR webpage; available at: www.echr.coe.int/

to the foundations of the Turkish nation-state. Thus, the court seems to have reproduced the assimilationist tendencies of Kemalist ideology and to further consolidate its constitutional foundation.

Once framed as a threat to national unity, both parties were accused of abusing the democratic system in order to subvert or destroy the existing political order. Thus in both indictments effort was made to create a full identification of HEP and Refah, respectively, with Kurdish identity or Islam in general. Referring to HEP and Refah as full political embodiments of such a 'meta' Islamic and Kurdish presence did create a sense of imminent threat to the republic. Once these parties were cast as such, the issue could be framed as dealing with the embedded right of a democracy to defend itself against an assault brought upon it through democratic means. From this point onwards, the road to dissolution had been short, because the court could then rely on many judicial sources establishing the idea that a democracy should not be used as a recipe for self-destruction. Once the political issues brought forward by these parties had thus been reframed, it therefore looked only 'natural' for the court to 'protect' the Turkish democracy.

In sum, the HEP and Refah cases had remarkable effects on Turkey's political landscape. Politically engaged Islam and Kurdish nationalism have become Turkey's two foremost national and international challenges in the last two decades. Both issues became a viable part of the political agenda and gained visibility and clout in the aftermath of the 1980 military coup. The dissolution cases and the political exclusions that followed brought this viability process to a halt and delimited the political domain. The court's decisions were pivotal in the closure of the spaces that were opened up for the recognition of religious and ethnic/national differences as legitimate political issues that can be openly debated in the public sphere.[26] In these decisions, the court firmly established itself as a defender of the Turkish unity principle, while offering a constitutional reading that established a fundamental identity between unity and democracy. While these two aspirations may be treated as inherently in tension, the constitutional reading offered by the court denies any such possibility. Rather, in these decisions, adherence to unity becomes means of defending democracy and adherence to democratic

[26] For a discussion of past Ottoman and Turkish constitutions in terms of the openings they provided for legitimate political spaces, see Aydin Dogan Vakfi (1997), Kili (1982), Parla (1991) and Soysal and Saglam (1983).

means becomes means for asserting unity. As such, the boundaries of the Turkish political domain are judicially marked in a way that to a large extent prevents substantial social concerns and aspirations from being translated into forms of legitimate political action.

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Postscript

After 1997 the Constitutional Court continued to dissolve political parties. It is possible to detect a few tendencies in the dissolution decisions of the court. First, the two themes outlined in this article namely Kurdish nationalism and Islamism, remain the two main perceived threats to the unity, progress and democracy of the Turkish nation and state. Amongst other smaller parties the Court dissolved Fazilet Partisi (Virtue Party) in 2001 for reasons associated with actions against the 'laicité' feature of the Turkish nation-state. The year 2003 saw the dissolution of Halkin Demokrasi Partisi (HADEP, People's Democracy Party) for reasons associated with 'separatism'. Fazilet Party brought its case to the European Court of Human Rights but then pulled back its appeal and the case was struck down in 2006.

The dissolutions of Fazilet and HADEP also happen to be the two last actual dissolutions by the court. While there were—especially around the year 2003—many petitions for other smaller political parties to be dissolved the Court rejected these demands. The absence of any serious political party dissolution may indicate a change in the Court's pattern when it comes to dissolving political parties. It may have become more tolerant of the kind of thoughts that can be expressed in the political space. It is on the other hand significant that these years cover the period where the Islamist Justice and Development Party has been able to hold a majoritarian presence in the parliament. This may indicate a shift in power. While it does not seem so likely that the Constitutional Court will give up its self-defined mission of guarding the Turkish democracy, its methods for doing so might be changing.

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