

CONSTITUTIONALISM
and DEMOCRACY

Transitions in the
Contemporary World

*The American Council of Learned Societies
Comparative Constitutionalism Papers*

EDITORS

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Introduction

The essays in this volume were originally written for presentation and discussion at a series of international conferences organized by The American Council of Learned Societies (ACLS). These conferences, which took place in Punta del Este, Uruguay; Chiangmai, Thailand; Harare, Zimbabwe; Berlin, Germany; Pecs, Hungary; and Princeton, New Jersey, were the main activities of the ACLS Comparative Constitutionalism project.

The ACLS initiated its project on comparative constitutionalism in 1987. Supported principally by the Ford Foundation, the primary goal of the project was to stimulate and broaden the study of this timely and important subject as an expression of the Council's commitment to promoting the interdisciplinary exploration of significant scholarly questions.

When the project began, it was intended to be a unique commemoration of the bicentennial of the American constitution, which was then being celebrated. The original idea was to avoid the self-congratulatory and triumphal character of so much of the Bicentennial and focus instead on the underlying ideas that have animated constitutions and their creation throughout the world. As the project proceeded, moreover, the wisdom of this initial intention was borne out by events, which eroded authoritarian regimes throughout the world with startling speed, if not finality. Indeed, the conference in Berlin occurred only a month before the opening of the Wall.

As the project developed, it became immediately clear that although the study of constitutional law and comparative government was a venerable academic subject, scholarly work on comparative constitutionalism had been both thin and superficial. The ACLS conferences thus were comparative across disciplines, cultures, and regimes, as well as through time. This focus reflected an initial premise that an effective discussion of constitutions and constitutionalism should not be the exclusive disciplinary preserve of lawyers and political scientists, but rather should involve multidisciplinary research informed by a wide range of perspectives and experiences.

The organizers of the project were especially sensitive to the need to depart from the common scholarly practice of concentrating on the American experience in constitutional study. They hoped, if it seemed appropriate in other parts of the world, to regard constitutional change as a subject that might be investigated anthropologically in its own terms and not judged by the yardstick of American

experience. The goal of this project was to see constitutionalism, not just as a formal state structure, but also as a dynamic process. In this view, it is the crossroads of law and society, culture and history, economics and politics.

To accomplish this goal effectively, the project staff convened committees of advisors in each region of the world that was to be a venue for one of the conferences (Latin America, Africa, South and Southeast Asia, western Europe, and central Europe.) These committees advised ACLS in identifying the issues with the greatest significance in each region. Each committee met twice before the full conference to refine the conference agenda and suggest participants. The result was five distinct programs that focused discussion on topics of specific regional interest and relevance.

In addition, the ACLS also cooperated for each event with local organizations for substantive as well as logistic advice. In the case of Latin America, the partner organization was the Centro de Informaciones y Estudios del Uruguay (CIESU). The two cooperating institutions in Asia were the Law and Society Trust of Sri Lanka, and the Institute for Public Policy Studies of Thailand. In Africa, the local coordinator was the office of the Southern Africa Political and Economic Series/African Association of Political Science, Southern Africa Chapter (SAPES/AAPS). The John F. Kennedy Institute for North American Studies of the Free University of Berlin was the co-hosting organization for the European Regional Institute. In organizing the Pecs, Hungary institute, the Council cooperated with the Department of Sociology of Law of Eötvös Loránd University, Budapest.

Each conference was between 3 and 5 days in length. The number of participants was deliberately kept low; roughly 35–40 conferees with a broad range of professional and regional expertise were invited to attend each institute. Approximately half were drawn from the region; the rest came from other parts of the world.

Although the substantive themes of the meetings varied, the basic design was uniform. Working papers were commissioned in advance to explore each of several topics designated by the regional steering committee. These papers were then distributed to all participants weeks prior to the meeting itself, so that when the group convened, its members would have a common core of information and analysis from which to begin the deliberations. The papers were not read at the conferences, but served instead as the basis of wide-ranging discussions. It is from among these papers, subsequently revised, that the contributions to this volume were drawn.

Some themes were common to each institute, and they appear in the pages that follow. These included the nature of constitutional legitimacy; federalism and the consequences of the geographic distribution of power; religious and ethnic diversity; constitutionalism and positive rights; civil rule and bureaucracy; the role of the military in constitutional government; and the potential tension between constitutionalism and democracy.

A summary institute, held at the Woodrow Wilson School of International and Public Affairs of Princeton University, November 15–17, 1989, sought to synthesize the results of the regional meetings. It was smaller than the other conferences, and each of the participants had attended at least one or more of

the earlier meetings. The meeting papers produced for it proved

The diverse expertise of intellectual depth required to academics, journalists, and conference included representative participants from other parts mixture of analytical perspectives more than 60 papers prepared information and such a broad view

The papers that appear intellectual richness of the project available for some time both presented in this volume, all original drafting, are intended accomplishments of the ACLS to further in another way the group, they raise most of the methodologies, and deal with

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Wilson School of International Studies, Cambridge, Massachusetts, December 15-17, 1989, sought to be smaller than the other conferences. It ended at least one or more of

the earlier meetings. The meeting was primarily evaluative, but a number of the papers produced for it proved to be so provocative that they are included here.

The diverse expertise of participants in the ACLS institutes provided the intellectual depth required to stimulate exchanges on constitutionalism among academics, journalists, and public figures from around the world. Each conference included representatives of the countries in the region as well as other participants from other parts of the world. The result was an unusually rich mixture of analytical perspectives and approaches to the problem. Similarly, the more than 60 papers prepared for the conferences contained a wealth of information and such a broad view of the subject absent from the existing literature.

The papers that appear in this volume cannot begin to transmit the intellectual richness of the project. Complete sets of the working papers have been available for some time both in this country and in each region. The essays presented in this volume, all of which have been extensively revised since their original drafting, are intended instead to present a distillation of the intellectual accomplishments of the ACLS Comparative Constitutionalism project and thus to further in another way the goals that the project sought to achieve. As a group, they raise most of the important issues, utilize many of the relevant methodologies, and deal with every major region of the world.

The principles of selection applied by the editors were both simple to devise and difficult to apply. On the one hand, it seemed important to reflect the diversity of the contributions made to the ACLS project and thereby to illuminate the germane intellectual promise of comparative constitutionalism as a field of inquiry. On the other hand, an unfocused smattering of material from each of the conferences would lack analytical coherence and persuasive power.

As a result, the editors sought to steer between these two extremes by discarding the conferences themselves as an organizing principle for this volume, choosing instead to focus on a set of issues that arose everywhere and that proved to be especially compelling. The organization of this book therefore does not accord with the organization of the project from which the essays originally arose, but rather aims to recapitulate the most salient issues in a fashion that insists first on the primacy of the comparative method and second on the distinctive cultural integrity of individual polities. In the remaining pages of this introduction we have sought to highlight some of these issues and to add our own analytical gloss to them as they appeared to four American scholars whose participation in the project was among the most stimulating intellectual experiences of their careers.

Over the course of the project, it became clear that there were two dramatically differing thrusts in defining constitutionalism. The first led toward a highly formalistic view that relied principally on the structural features of constitutional documents. The second tended to regard the constitutionalism of a particular society as a dynamic process, rooted in underlying, local social realities. Despite the fundamental incompatibility of these two approaches, they repeatedly intersected analytically.

The distinction between constitutions and constitutionalism was central to the definitional problem. All of the participants understood that the questions

at issue involved more than analyzing constitutional structures or texts, although several argued that in contemporary society the legitimacy of the state rests primarily on the government's adherence to the rule of law. In this definition, constitutionalism necessarily included institutions such as judicial review, due process of law, and separation of powers.

While legality and legitimacy emerged as central concepts in attempts to construct a theory of constitutionalism, the ambiguous relationship of constitutionalism to democracy was always an underlying theme. To what degree are democratic principles preconditions for constitutionalism—or necessary consequences of it? If constitutionalism is inevitably democratic, is it thus bound by the cultural and political values of western liberal capitalism?

The question of fundamental rights preoccupied all the institutes. The debates mirrored the conferees' conflicting preferences for legal formalism or sociopolitical analysis. On the subject of human rights, in particular, this took the form of a universalist argument contending with more relativistic claims. Several participants argued that there could be a single, universal standard of rights and that their protection is best ensured by means of the formal rule of law. Relativism about rights, according to this argument, is analytically indefensible and politically dangerous.

The alternative position argued that the cultural and economic diversity of everyday life makes it effectively impossible either to identify a sufficiently comprehensive core of universal human rights, or to adopt uniform sanctions that are appropriate and enforceable across cultures. Rights, like all legal concepts, are embedded in particular historical and cultural circumstances. They cannot be easily transferred from one society to another. Moreover, the relativists argued, even the most ardent advocate of a universal standard of human rights will agree that not *all* rights are universal. Analytically, therefore, it is difficult to distinguish universal rights from culturally contingent ones.

The adequacy of "the rule of law" to define constitutionalism also came in for criticism. More than one participant pointed out that the rule of law is meaningless unless one knows who makes the rules and enforces them. Underlying a commitment to the rule of law is a powerful impulse toward stability at all costs. As a result, several of the institutes focused on alternative sources of political stability, such as those that might derive from class structure and hegemonic social processes or the threat of direct and violent intervention by the military.

Most institute participants agreed that constitutional rule following, generally, and democratic order, in particular, presuppose the existence of a state and its organization of power. Thus, any understanding of constitutionalism must inevitably involve not only the "rules for making rules" but also local processes of institution building and value formation.

The question of institution building inspired discussions of democratic structures and the alternatives to them. This gave rise to a more general examination of the variety of institutional forms that constitutions establish: democratic frameworks such as parliamentarism and presidentialism, more authoritarian models such as military regimes and one-party states, as well as others derived

from oligarchical and monarch Asia, there was insistence that be restricted to the analysis of de

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from oligarchical and monarchical traditions. Especially in Africa and Southeast Asia, there was insistence that the study of constitutionalism could not be restricted to the analysis of democratic institutions.

The limitations of theoretical models for a comparative understanding of constitutionalism became clearest in attempts to account for the inherently political nature of constitutionalism. Precisely because of our focus on nations in political transition, whether in the developing or more developed regions of the world, the widely shared conclusion was that constitutionalism is a dynamic, political process, rather than a fixed mode of distributing power, rights, and duties. As a result, mere structural comparisons of constitutional legal documents tend falsely to postulate a unitary phenomenon, whose actual contours are beyond the ordinary analytical tools of comparative constitutional law and comparative government, the methodological settings for most previous studies of constitutionalism.

Constitutional legitimacy thus is more often validated by political and social realities than by formal legal criteria. The general acceptance of this view prompted careful consideration of the historical and cultural forces that underlie the creation, maintenance, and decay of a variety of constitutional orders. In the developing world, ethnicity and nationhood have posed especially powerful challenges to modern U.S. and European liberal constitutionalism, which owes its existence to an historical experience quite alien, even antagonistic, to the cultures and societies of Asia and Africa, as well as some of those in Latin America. Throughout the regional institutes, individual nations and their political structures were presented as case studies, but there were very few examples of nations sufficiently homogeneous that a popular consensus on constitutional values and institutions has been easily formed. The global reality is that most societies are characterized by a pluralism that takes geographic, linguistic, religious, ethnic, and economic forms, and are finding the introduction of liberal constitutionalism a formidable challenge.

The discussions returned repeatedly to the question of whether nonliberal forms of constitutionalism, arising from local historical experience, might be sketched or imagined. Abstractly, this was not an unreasonable notion; in practice, however, it proved difficult to describe the precise form that such a constitutionalism would take. Nonetheless, the evidence from Asia and Africa, particularly, demanded consideration of complex models that organize power and create rules that are not always "democratic." The western assumption that constitutionalism and democracy are *necessarily* linked was thus repeatedly challenged almost everywhere outside the newly reforming nations of east central Europe. Yet the colonial legacies of western institutions and bureaucracies have made wholesale constitutional restructuring virtually impossible in most Third World nations. Simultaneously, however, monarchical traditions and indigenous systems of social organization continue to influence popular perceptions of governance and civic responsibility.

Many participants suggested that broad-based political socialization, generally expressed as the creation of civil society, is a prerequisite to stable constitutionalism. A theory of constitutional literacy emerged that contends that

the polity must be educated about the idea of limited government before such a government can succeed. This view is based, in part, on the principle that constitutionalism imposed from above, rather than being allowed to develop from below, is actually authoritarianism, and has insufficient basis in civil society to be considered a "genuine" constitutionalism.

The form of political arrangements that might emerge from such a popular process could then coexist with traditional values, and the developing constitutionalism would not be bound by or defined by western culture. Yet even those who pursued this line of reasoning most thoroughly sometimes argued for appropriating local cultural beliefs and practices to introduce or validate concepts borrowed from the west, such as revising the doctrines of Islamic shari'ah as a way of "constitutionalizing" rights in the Islamic world. Ample evidence was cited of the same mechanism being employed in the reverse: usurping cultural values to avoid constitutional accountability. From Senegal, India, and Botswana came reports of how traditional institutions have been used to legitimize one-party states.

This led back to the question of what values one considers "constitutional": Are there preconditions for constitutionalism? Must there be a tradition of legalism? Why reform a culture at all if it is so distant from those values? In some analyses, constitutionalism may be, by definition, an imposition of western political culture on other, nonwestern societies and polities. These are exactly the questions at the center of many ongoing political struggles throughout the world. There was widespread recognition among the discussants that constitutionalism, if it is to emerge, must arise out of such indigenous political controversies, and that its final form was not necessarily predictable. As western liberal constitutionalism has developed organically over centuries from the conditions that existed in Europe and the Americas, so may other, quite different, organic forms emerge from contemporary conditions.

Attempts to manipulate this process, balancing aspirations for greater popular participation against an uncritical impulse toward governmental stability, also were analyzed. The accommodation of military elements as separate political parties, with civilian institutions regulating their budgets, as in the case of Venezuela, was cited as one such example. It is widely agreed that the power of the executive, whatever form it takes, must be limited. This, too, requires political socialization. The system of autonomous regions within a federated framework, such as the one in place in the Catalanian and Basque regions of Spain, was considered as an alternative to the situation in certain African countries where internal conflicts are frustrating the process of state formation and nation building.

The impact of both external events and geopolitical conditions on internal conditions also required extensive discussion. Imperial pressures, regional wars, and, increasingly, the demands of international funding agencies have all had a decisive impact on the course of otherwise local events. At the same time, state building and the development of new national identities are critical and self-conscious activities in many Third World countries. The pace of national development has, moreover, varied markedly. In some cases, the transition from

feudalism, monarchy, and colonial self-government has been tel centuries over which such cha

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feudalism, monarchy, and colonialism to industrialization, social diversity, and self-government has been telescoped into mere decades in comparison to the centuries over which such change occurred elsewhere.

One of the effects of this accelerated political process and intensified inter- national economic involvement in it has been for emerging states to concentrate on economic development, frequently at the expense of the creation of organic political liberalization. The subordination of civil and human rights to the quest for economic growth is all too familiar. Guaranteeing civil and political rights may be the function of modern states in theory, but social and economic rights are more common aspirations for states in the Third World. Ruling regimes in the developing world, many of them nominally constitutional, have presented the problem as an either/or proposition: one can have food, or one can have the right to complain about the food, but one cannot have both. Sadly, in too many cases, one can have neither.

The omnipresence of externally driven change reinforces the notion of consti- tutionalism as a dynamic process. It also echoes repeated assertions that the essential features of the process itself are not constants. As political culture is transformed, the direction of institution building and value formation may fluctuate. Competition within and among social groups can and does erode constitutionalism, even when the formal constitutional arrangements of a particu- lar society are designed to account for such competition.

The distillation of these varied and energetic discussions suggests an ap- proximate definition of constitutionalism: it is a commitment to limitations on ordinary political power; it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it draws on particular cultural and historical contexts from which it emanates; and it resides in public consciousness.

The work of the project isolated questions that demand further study. Throughout the meetings clear directions for further interdisciplinary investi- gation emerged. There is a profound need for more rigorous assessment of the historical traditions that underlie modern states, for example, since contemporary political alliances and antipathies are very often rooted in the social history of preceding generations. Here the situation of the new-old states of what used to be called eastern Europe provides a crucial case study of the persistence of earlier constitutionalist and anticonstitutionalist beliefs and behaviors.

Closely allied with this line of inquiry is one that focuses on cultural analysis. There is an organic relationship between culture and constitutionalism, one to which anthropological and sociological approaches can and should be applied. Such analyses can also contribute measurably to developing a typology of consti- tutional cultures, a suggestion explicitly made during the institutes.

The relationship of constitutionalism to social and economic structure was a recurrent subject to discussion. What are the economic foundations of political democracy? The repeated pattern of mass poverty and underdevelopment giving rise to authoritarian rule was frequently noted, but only partially analyzed. We need also to understand better the roles of the international economy and international institutions in both stabilizing and destabilizing constitutional governments. The

same may be said for the significance of regional political and economic arrangements.

Project participants also cited the need to broaden theoretical discussion of constitutionalism. In philosophy, anthropology, sociology, and history, in particular, there are theories and methodologies, as well as accumulated knowledge, that can contribute significantly to developing a constitutional theory that responds to the sociopolitical realities of modern states. The confounding question of alternative constitutional visions can perhaps best be addressed through such a more nuanced, multidisciplinary comparative theoretical approach.

The moral values that underlie both the construction of a constitutional framework and the development of a public consciousness of constitutionalism represent another area for interdisciplinary research. Given the dichotomy revealed in the course of the project between the universalist and relativist positions, pivotal questions, such as whether there are ethical preconditions for constitutionalism, and whether international human rights law has a future, may fruitfully be addressed through this sort of analysis.

A parallel line of inquiry revolves around the related issues of state formation and nation building. Indigenous patterns of culture, along with socioeconomic stratification, distinguish the boundaries of a political map of constitutionalism. How critical is the variable of a strong and independent middle class to the development of constitutionalism? What sort of state is compatible (or incompatible) with constitutionalism? Must some specific sorts of state formation precede constitutionalism?

There were also questions raised from more practical perspectives. The role of public education in the development of political legitimacy and constitutional literacy of a pluralistic society needs to be much better understood. The evidence is already overwhelming that grass roots social movements play critical roles in the creation and stability of constitutional governments. A more careful evaluation of popular struggles can suggest ways of understanding and directing the momentum of these movements. The civic action of human rights groups, social organizations, and NGOs, as well as economic initiatives they produce, also merit study.

Several approaches are proposed in these papers to facilitate further research and its application. There are a variety of educational methods that might be developed to promote the indigenization of constitutionalism. Several observe that the knowledge gained from this sort of comparative approach has implications for the development of constructive activism involving the scholar as political actor. Some argue that comparative constitutionalism has great significance for assisting the process of adapting Western "constitutional" values, as opposed to cloning them. The dynamics of the comparative methodology itself are considered, with recommendations made that there remains a pressing need for both country-specific and multidisciplinary analyses.

A volume such as this, arising as it did from a series of conferences, incurs more debts than most. We first acknowledge the financial support of the Ford Foundation, whose generosity made the Comparative Constitutionalism Project possible. In particular, Shepard Forman, who then headed the Foundation's

Program on Human Rights a of advice and encouragement Walker. We also received fine Fritz Thyssen and Volkswa Jubiläumfond, for which we

Our colleagues, Walter M the overview essays but attention knowledge, and effervescent Nichols, now an Assistant P as the administrative assistant project to which she did not c to have had her as a colleague editing the revised papers into are grateful for her perseverance multilingual authors to produce and spirit of these issues.

In addition, our cooperation in Uruguay, Thailand, Zimbabwe logistical and intellectual support. We know as well that we speak when we say that the more they traveled many miles to discuss constitutionalism, improved and indispensable.

Finally, no volume that depends be away from home for long completed, without the forbearance Molly, and Gracie made this despite absences and listening patiently which we remain deeply engaged known on four continents, let

Program on Human Rights and Governance, was a steady and consistent source of advice and encouragement, as were his colleagues David Arnold and Lynn Walker. We also received financial assistance from the Johnson Foundation, the Fritz Thyssen and Volkswagen Foundations, and the Swedish Riksbanken Jubileumsfond, for which we are also grateful.

Our colleagues, Walter Murphy and H. W. O. Okoth-Ogendo, not only wrote the overview essays but attended all the conferences, contributing their wisdom, knowledge, and effervescent personalities in many unexpected ways. Rebecca Nichols, now an Assistant Program Officer with the Ford Foundation, served as the administrative assistant for the project. There was not an aspect of the project to which she did not contribute. We count ourselves unusually fortunate to have had her as a colleague and friend. Susan Glassman took on the task of editing the revised papers into the polished form in which they appear here. We are grateful for her perseverance in collaborating with the peripatetic and multilingual authors to produce a volume that so vitally captures the substance and spirit of these issues.

In addition, our cooperating institutions (identified above) and their staffs in Uruguay, Thailand, Zimbabwe, Germany, and Hungary assisted both the logistical and intellectual progress of the project in a thousand important ways. We know as well that we speak for each of the contributors to this volume when we say that the more than 200 participants in the ACLS conferences, who traveled many miles to discuss the compelling issues associated with comparative constitutionalism, improved this book in ways simultaneously incalculable and indispensable.

Finally, no volume that depended so fundamentally on the editors' ability to be away from home for long periods could have been contemplated, no less completed, without the forbearance of our families. Adria, Linda-Marie, Margee, Molly, and Gracie made this entire project possible by tolerating our too frequent absences and listening patiently to our endless ruminations on a subject with which we remain deeply engaged. And with us on the road, "Mama," as she is known on four continents, lent a spirit and perspective that enlightened us all.