



SPECIAL FOCUS ROUNDTABLE: CONSTITUTIONAL CHANGE AND THE RULE OF LAW

Pessoptimistic Constitutional Analysis

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Traditionally, comparative constitutional analysis has been anything but truly comparative—or, rather, the comparisons drawn by scholars were limited to a small number of canonical cases, generally in North America and Europe. Older scholarship focused on structure and text; it began to branch out into adjudication as judicial review of the constitutionality of legislation became a global norm rather than an exception in the second half of the twentieth century.

But by the end of the last century analysis began to broaden. South Africa managed to break into the canon of constitutionally interesting cases with global attention focused on the dismantlement of apartheid. That led not only to a geographical but also a thematic broadening: the process of writing a constitution attracted as much attention as the text being produced. With the fall of communist systems in the former Soviet bloc after 1989, still more cases have come into scholarly focus. Nevertheless, that left out much of the world, and interest often seemed to follow perceived success. A few constitutional collapses (most notably of Germany's Weimar constitution) might be probed.

And yet constitutions have deep political and historical roots in a wide variety of societies, many outside of the global North. Older works, when their attention did wander elsewhere, often understood constitutions as transplants from the global North that rarely took root. This makes little historical sense: most of the population of the Middle East came to live in political systems with written constitutions about the same time most Europeans did. Nor is the history of constitution-writing in any region—North or South—best understood when reduced to successes to celebrate and failures to deplore.

This collection of reflections draws from some of those experiences in the Middle East and North Africa. Each contribution is based in the experiences of a single society, but the analysis is written in a way that lends itself to comparative understanding of constitutional evolution. Although the term “evolution” appears only in passing in the group of essays, it is perhaps the underlying theme that not only unites them but also highlights why the experiences they examine are worthy of broader attention.

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For instance, two of the articles—Noori on Iran and Gümrükçü on Turkey—look not at “constitutional moments” as distinctive times that stand outside of (or above) normal politics, but at constitutional amendments (and provisions for amendments) in ways that explore what constitutions mean, how they operate, and how political actors pursue or obstruct change over time.

Students of constitutional processes will be interested in Al-Sakkaf’s presentation of Yemen and Hadad’s of Syria for a related but distinct reason: they focus on constitutional processes that are ongoing and (to date) indeterminate. Although constitution-writing has become part of a global tool kit for post-conflict reconstruction, the assumption that conflicts are over and reconstruction can begin may be optimistic in the best of settings, but has been especially unhelpful in those two societies. Constitution-writing is as much an arena for conflict as it is for managing that conflict.

Taken together, although the four societies examined vary considerably in constitutional evolution, three implicit themes emerge very strongly across the group of essays. First, constitutional analysis is often best approached historically. There is much attention in scholarship on the process of writing a constitution, treating such episodes as “moments” and somehow products of a different kind of politics, as occasions when a political system is designed, revamped, or even invented. These analyses take a longer-term view of constitutional history as unfolding over decades—punctuated, to be sure, by some changes and inflection points, but even those are best understood as revealing their import over time. Noori’s analysis of Iran takes a very long-range view, comparing the 1906 and 1979 constitutions. But even Gümrükçü’s presentation of Turkey, although it covers just a bit more than a decade, probes a process of amendment.

Second, the essays seek to explain shades of differences and variation. Constitutions are not reduced to failures and successes nor even to a single final outcome. History does not end, nor can it be reduced to binaries. Constitutional processes and the documents they produce can change over time; they can have varying effects and play varying roles.

Finally, there is a tone of frustration across the collection based on a generally unvoiced but powerful normative vision of what constitutions should be—documents that are written and operate to serve a broad society. The scholars here do not pretend that constitutions in the region have served that vision. But neither do they dismiss the significance of the four constitutional experiences for their normative failures. Instead, there is a clear suggestion that societies can be better served when constitutions are produced and function in a manner reflecting (and perhaps even producing) broader political consensus. To this end, it is perhaps Al-Sakkaf’s analysis of Yemen and Hadad’s of Syria that might guide not only understandings of the past but also prescriptions for forces within those societies struggling with each other about shaping the future. It is that realism about constitutional evolution combined with the implicit hope of what evolution might take place in the future that lends a “pessoptimistic” tone to the entire collection.