

2015

Introduction: Constitutional Conflict and Development: Perspectives from South Asia and Africa

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Recommended Citation

Sudha Setty & Matthew H. Charity, Symposium, Introduction: Constitutional Conflict and Development: Perspectives from South Asia and Africa, 28 TEMPLE INT'L & COMP. L.J. 179 (2015).

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INTRODUCTION

CONSTITUTIONAL CONFLICT AND DEVELOPMENT: PERSPECTIVES FROM SOUTH ASIA AND AFRICA

*Sudha Setty & Matthew H. Charity**

On January 4, 2014, two sections of the Association of American Law Schools (AALS)—the Section on Africa and the Section on Law & South Asian Studies—hosted a joint program entitled *Constitutional Conflict and Development: Perspectives from South Asia and Africa*. The ambitious goal of these sections in hosting this joint program was to bring together a diverse group of scholars to discuss their research on constitutional development, conflict, transition, and evolution in nations across South Asia and Africa. Recent revolutions in Tunisia and Egypt; constitutional reform efforts in Myanmar (Burma), Kenya, and Morocco; and continued constitutional evolution in South Africa, India, and Pakistan provide just a few examples of vast and profound constitutional changes occurring throughout these regions. We hoped the panel presentations at the AALS annual meeting would not only offer new research and insight, but also provoke serious discussion among the panelists and audience members as to the commonalities and differences among the nations and experiences discussed, as well as the processes and the actors represented in the context of defining—constituting—the nation. We were delighted to find that our goal had been met by this group of scholars, who presented work that ranged from advocating for federalism-based constitutional reform in nations with transitional governments to discussing the importance of charismatic and dedicated law reformers toward constitutionalism. Through the presentations, we gained a sense of the profound differences in the constitutional situations, goals, and prospects in each nation examined. Further, we began to understand commonalities in the struggle toward the rule of law and a separation of powers that would be tolerated by the various political and other stakeholders, adequately satisfy the polity, and meet at least some of the constitutionalist goals of reformers.

Gedion Hessebon, in *The Fourth Constitution-Making Wave of Africa: Constitutions 4.0?*, considers the current constitutional reform process being undertaken in Kenya as part of the fourth wave of constitution-making in parts of sub-Saharan Africa.¹ Hessebon grounds his argument in the history of constitution

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1. Gedion T. Hessebon, *The Fourth Constitution-Making Wave of Africa: Constitutions*

making and reform in several post-colonial sub-Saharan countries and considers how the fourth wave of constitution-making accounts for political, social, religious, and other fissures in Kenya. Hessebon starts off with the historical context of a 1960s post-colonial environment in which the political map of Africa was redrawn and constitutions were developed quickly for practical and symbolic sovereignty reasons. In this first wave of constitution-making, much like in India and Pakistan in the late 1940s after the end of British colonial rule, the form and tenor of new sub-Saharan constitutions mimicked in many ways those of the withdrawing colonial powers. These constitutions proved to be unstable, giving way to military coups d'état and a second wave of reform that consisted largely of amending, repealing, and suspending the initial post-colonial constitutions. The late post-Cold War era ushered in the third wave of constitution-making to accommodate shifting geopolitical alignment and provide formal acknowledgement of human rights obligations, the same era in which South Africa broke with its apartheid government and moved toward progressive constitutional design. In the fourth wave, Hessebon sees the potential for more sophisticated reform to improve controls over the executive branch, establish better institutional elements of horizontal accountability, and allow for some regional autonomy through a federalism structure that may reflect ethnic, linguistic, and cultural differences in a manner that combats marginalization of minority groups.

David Mednicoff also grapples with questions of constitutional overhaul and design in his paper, *A Tale of Three Constitutions: Common Drives and Diverse Outcomes in Post-2010 Arab Legal Politics*.² Mednicoff's analysis focuses on the legal and constitutional reforms in Tunisia, Egypt, and Morocco in the wake of the Arab Spring of 2011. These developments took place in systems that previously had weak horizontal checks and balances on autocratic leaders, and Mednicoff argues that the post-Arab Spring legal reforms were used to both legitimize and constrain the power of these leaders. He poses a series of important questions, some of which resonate among the other symposium papers. How is power decentralized? Does constitutional reform entail a different, more democratic sociopolitical order? To what extent should a reformed constitution reflect Islam, the religious majority in these nations? At the same time, are constitutions reformed in a manner that improves rights protection for those historically marginalized, including religious minorities, women, and less powerful social groups? Mednicoff concludes that all three nations he surveys have decentralized power to some extent, although sometimes in ways that legitimize the core of an autocratic order; he also finds that little changed with regard to the constitutional treatment of Islam and protection for historically marginalized groups, although he sees some potential improvement in the protection of historically marginalized groups. Central to the reform process in Tunisia was the willingness—albeit reluctant at times—of parties to compromise on numerous fronts, including the strength of checks on the executive, the explicit inclusion of Islamic law and

4.0?, 28 TEMP. INT'L & COMP. L.J. 185 (2014).

2. David M. Mednicoff, *A Tale of Three Constitutions: Common Drives and Diverse Outcomes in Post-2010 Arab Legal Politics*, 28 TEMP. INT'L & COMP. L.J. 215 (2014).

values, and the protections for religious freedom. In Egypt, Mednicoff argues that debate over the role of Islam in the constitutional order overtook the political process in ways that ultimately led to the restoration of authoritarian politics at the hands of the military. In Morocco, the 2011 constitutional redrafting was a proactive measure initiated by the monarch to stave off a popular groundswell of democratization. Mednicoff contextualizes these reforms in the history of independent Morocco, in which new constitutions have been promulgated regularly not only as a means to meet public demands, but also to reify the power of the monarchy. As a result, some federalism-oriented reforms were initiated, formal recognition was granted to the indigenous Berber language, women's rights were articulated, and, in an unprecedented move, Morocco's Supreme Court was authorized to engage in judicial review of executive actions. Whether this power will allow for adjudicated contestation of constitutional interpretation is yet to be seen.

Janelle Saffin and Nathan Willis, like Hessebon in his piece, focus on federalism-oriented constitutional reform in *Need for a Constitutional Settlement to Further the Reform Process in Myanmar (Burma)*.³ The authors consider the unworkability of Myanmar's current constitutional order, which has engendered political instability and deep mistrust among political stakeholders. The authors consider efforts over the last sixty years—from the 1947, 1974, and 2008 constitutions to the debates of today—to create a durable constitutional system. Past efforts, in Saffin and Willis's view, have failed because of structural weakness that led to military coups d'état, a lack of engagement by less powerful constituencies, and the wariness of ethnic minorities fearing abuse by the central government. The current question, then, is how the Burmese government can effectively manage the process of reform to achieve constitutional settlement that engages the populace, satisfies military stakeholders, and accounts for ethnic and religious minorities. As in Stephen Ellmann's reflection on the importance of individuals committed to constitutional reform in South Africa, discussed *infra*, Saffin and Willis note the importance of leaders such as Daw Aung San Suu Kyi in generating pressure toward constitutional reform, both as an outside political protester and as a member of government. The authors, seeing some of the same potential benefits and potential pitfalls that Hessebon identified in Kenya, encourage the Burmese government toward a political settlement that embraces federalism as a possible structural solution that can engage minority populations, protect against central government overreach, reduce political manipulation, and, hopefully, set the foundation for a shared constitutional identity that would make Myanmar more stable and peaceful.

Maryam Khan, in *Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization*, considers the role of a supreme court and the judiciary more generally in

3. Janelle Saffin & Nathan Willis, *The Need for a Constitutional Settlement to Further the Reform Process in Myanmar (Burma)*, 28 TEMP. INT'L & COMP. L.J. 253 (2014).

constitutional development and political constraint.⁴ Khan considers the rise of public interest litigation (PIL), in which third parties, such as non-governmental organizations, can file a lawsuit that may be taken up by the court as a matter of public interest. Such litigation has been an important means by which matters of social justice have been brought before the Pakistani courts and has allowed Pakistan's Supreme Court to take a more activist role vis-à-vis executive decision-making than might otherwise be the case. Khan looks at PIL as part of the longer history of judicialization in Pakistan, a process that she sees as dynamic and ongoing in relation to political development and turmoil. She offers quantitative and qualitative data from 1988 to 2013 to categorize the use of PIL by the Pakistani Supreme Court during particular periods of time, thereby allowing us to better understand the process of judicialization in the broader context of political contestation and interest group mobilization. Khan notes that although the court's activism ebbs and flows, the types of PIL cases that the court decides to hear are similar over time. Khan argues that the court has characterized certain cases as dealing with fundamental rights so as to allow it to exercise its jurisdiction, despite the cost of being perceived as anti-democratic, overreaching, or paternalistic toward the political branches of government. She concludes from the court's PIL record that its judicial activism is dynamic and is based on perceptions of its own legitimacy, the level of political turmoil, and the shifting interests of the court and its justices, as well as the perceived strength of political stakeholders and the populace.

Manoj Mate's paper, *Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India*,⁵ touches on some themes similar to those in Khan's article, particularly in the use of PIL as part of the Indian Supreme Court's development of its own constitutional role. Mate draws on field research, including interviews with former Supreme Court justices, high court judges, Supreme Court advocates, and other legal elites to understand the individual influences that helped motivate the Indian Supreme Court's development of its own PIL jurisprudence. Mate contextualizes this research in the historical and political turmoil of the post-Emergency period through the more politically stable 1990s and beyond. He finds that, particularly in the years immediately after the Emergency, justices looked to involve the court in cases involving fundamental rights as a means by which to increase the legitimacy and institutional heft of the court as a powerful counterweight to an executive branch perceived of gross overreaching and abuse. In later years, Mate sees the court as reacting to public and elite opinion on a number of issues and confronting the political branches more on matters of fundamental rights, free speech, and the right to information, all of which are areas in which the populace and Indian elites expected more protection from the court. On matters of economic policy, development, and national security, Mate sees

4. Maryam S. Khan, *Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization*, 28 TEMP. INT'L & COMP. L.J. 285 (2014).

5. Manoj Mate, *Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India*, 28 TEMP. INT'L & COMP. L.J. 361 (2014).

judicial reticence as a result of genuine concern over the nation's economic future and national security, as well as the elite support for neoliberal policies in the 1990s and beyond. Mate offers the theory of elite institutionalism as a way of understanding the selective activism of the court. By considering the justices' exposure to a variety of intellectual and professional influences and their concern over the institutional development of the court itself, Mate gives us insight as to the motivations of individuals in building an institution and developing the constitutional path of the nation.

This brings us to the celebration of Nelson Mandela and Arthur Chaskalson's work toward South African constitutionalism in Stephen Ellmann's *Two South African Men of the Law*.⁶ Ellmann offers us a close look at the work, motivations, and aspirations of two leaders in the South African civil rights and constitutional movements. Ellmann begins with a look at multiple aspects of Nelson Mandela's life and his engagement with the law as a practicing lawyer, a leader of a revolutionary movement, and as a constitutional designer and president. He first looks at Mandela's work in the 1950s as a cause lawyer representing Africans where few others would. He then considers Mandela's outlook as a political prisoner tried and convicted by a profoundly structurally-flawed legal system. Ellmann emphasizes that even through these experiences, Mandela's belief in the possibility of a South Africa governed by a rule of law that was fundamentally fair was clear. Ellmann then considers Mandela's work in helping to design and implement a progressive, inclusive constitution that embedded the rule of law as a guiding principle. Ellmann next gives us insight into the life and work of Arthur Chaskalson, a contemporary and friend of Mandela who worked within the legal system of apartheid-era South Africa toward establishing a more just system of government and law. Chaskalson, a vocal opponent of apartheid, was one of Mandela's lawyers in the early 1960s and continued to challenge apartheid through his legal practice for decades. He was deeply involved in the crafting of the post-apartheid constitution, looking to provide a platform for the construction of a stable, inclusive constitutional democracy. Chaskalson served as a president of South Africa's Constitutional Court (later called the chief justice of South Africa) in an era in which the court asserted itself as a protector of individual rights, using international and comparative human rights standards to create a progressive jurisprudence on issues including LGBT rights, socioeconomic rights, and the unconstitutionality of the death penalty. In some ways, looking at the lives and goals of these rather different men helps us understand the very human element at the heart of constitutional reform efforts everywhere. Certainly we can see parallels in the motivations and aspirations between Mandela and Chaskalson in South Africa and Daw Aung San Suu Kyi's influence as both a political outsider and insider in Myanmar, or the individual judges in Pakistan and India debating and considering their constitutional role and responsibility in their nations' development.

6. Stephen Ellmann, *Two South African Men of the Law*, 28 TEMP. INT'L & COMP. L.J. 431 (2014).

We thank the authors of this symposium issue for giving us the opportunity to revisit their dynamic scholarship; they offer us deep insight into individual issues of constitutional conflict, evolution, and reform in each of the different nations they study. In presenting their work as a group, they also helped attendees at the 2014 AALS joint program and readers here to better understand some of the commonalities of these very different nations and regions with regard to constitutional development, the role of the judiciary and law reformers, the challenges of constitutional bargaining and compromise, and the work in each nation toward a stable constitutional order premised on the rule of law.