QUESTIONS AND COMMENTS

1. Does a constitution require a " demos," that is, a people who share some common interests or culture prior to the creation of the constitution? The issue has been discussed in connection with the possible evolution of the European Union from a treaty-based organization to one that is more of a constitution-like structure. See, e.g., J.H.H. Weiler, Does Europe Need a Constitution? Democracy, Toleration and the German Monarchist Decision, 1 European J. 219 (1990). It arises as well in connection with the creation of "cultural" federal states in the aftermath of severe ethnic conflicts, and with questions about the desirability of provisions for secession in the constitutions of federal nations. For discussion of "coming together" federalism and secession, see Chapter IX below. In the absence of some pre-constitutional shared interests or culture, how can the rules for creating a constitution be established (other than, perhaps, by external force)?

2. Franklin and Bann state that "constitutionalism is the governmental component of a democratic culture." Does this suggest that "constitutionalism" may exist even if the only checks on government are those of regular elections? Should the term "constitutionalism" refer only to modes of political organization associated with liberal democracies (with "liberal democracy" understood generously to include a wide range of political systems that rely on reasonably free and fair elections to select national leadership and that secure to their citizens and residents a reasonable level of traditional civil rights and civil liberties)? If so, what is the best way to characterize systems that have reasonably free and fair elections that regularly produce large majorities for a single party (sometimes referred to as "dominant party states"), which then governs in a way that does not secure the level of civil rights and civil liberties associated with liberal democracies? Are there such systems? Candidates might include Singapore and Malaysia, and some might suggest South Africa in the 2010s as well. If there are such systems, are they less stable than liberal democracies? Can we understand such systems to be forms of "liberal" or authoritarian constitutionalism? For discussion, see, e.g., L. Ann Thon, Constitutionalism in Bilateral Politics, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, supra at 136 ("Bilateral politics do not lack limiting constitutional norms [but] may not primarily rely on individual rights but resort to methods such as federalism or separated powers to constrain public power. The state is expressly non-neutral, privileging a substantive vision of the good, informed by ethnicity, religion, or communal morality.")

3. On constitutionalism in Muslim-majority states, see Noah Feldman, Islamic Constitutionalism in Context: A Typology and a Warning, 7 U. St. Thomas L.J. 459, 459-50 (2019): "Political science textbooks from roughly 1820 to roughly 1930 often presented it as an inevitable fact of philosophy and institutional design that only northwestern European, i.e., Protestant, countries could generate democratic institutions, and that Catholic countries could not...[The] natural reaction to a claim like that should be that it is literally absurd. But it is an important reminder to us that something can be deeply believed for centuries and then turn out to simply have been false. The claim of incompatibility of Islam and democracy, in my view, was of a comparable type to the claim of incompatibility of Catholicism and democracy...just as false." See also Kristin A. Stull,

4. Both the "liberal veto" of the 1791 Polish constitution and the unanimity rule for voting in the Continental Congress under the U.S. Articles of Confederation have been condemned as making effective governance impossible. Consider whether some idea of workability is related to constitutionalism: Can a constitutional system long survive in a democracy if government and society are not organized in such a way as to meet at least minimum social expectations? Can limitations on government be expected to constrain if basic social needs—e.g., for maintaining some degree of order, modes of transport, availability of food, shelter, clothing, education—are unmet by governance under that constitutional system?

B. CONSTITUTIONS WITHOUT CONSTITUTIONALISM

Constitutions are often linked with ideas of constitutionalism—the rule of law applied to both people and government officers, judicial independence, and existence of basic human rights. Sunstein's article, moreover, assumes that a "constitutional" is a kind of basic law more deeply entrenched—that is, more difficult to change—than other forms of law. Many countries which have adopted written constitutions, however, do not have much in the way of "constitutionalism" in the sense described above. Why are constitutions adopted if not to promote constitutionalism? The readings below suggest some reasons.

Consider the argument by Okoth-Ogendo that constitutions serve "constitutive" functions both internally, by establishing the structure for the exercise of government power, and externally, by establishing a country's sovereignty in presence to other nations. Does his argument in favor of "autochthonous" constitutions suggest that some African constitutions were "shams" because they relied on forms of governance associated with external colonial powers and did not draw from indigenous traditions?

A number of perspectives have contributed to a distressing lack of interest in African constitutions. The first is primarily ideological and argues that the primary function of a constitution is to limit governmental authority and to regulate political processes in the state. This view, whose origin lies in the liberal democratic tradition, forms the backdrop of many arguments among politicians and academics about the "correct" exercise of power in Africa. According to this view, there can be no "constitutional" government unless it exist within the constitution for the supervision of these functions; further, such mechanisms must be erected on the doctrine of the separation of powers and the principle of limited government, both of which must conform to the theory that government itself ought, at all times, to conform to the rule of law.

A more important factor alluded to by Ghai and McEwan is analytical; a totally inadequate conception of law and its relationship to power in Africa. To many scholars, the idea of law still connotes the existence of a determinate rule, founded on some perspective of value (whether individualist or communalist), that provides a basis for predicting and evaluating authoritative decisions in specified circumstances. Constitutional law, concerned entirely (or so it is thought) with decisions that lie in the public domain, is, more than any other body of law, expected to be basic, rational, even fundamental, and therefore capable of withstanding pressures generated by the vicissitudes of political life.

Political developments in Africa since Ghana's independence in 1957 have demonstrated repeatedly, however, that not only have constitutions "failed" to regulate the exercise of power, but, devastatingly, they have not become as basic as the analytical tradition scholars predicted: "few African governments have valued them other than as rhetoric."

This situation has led to both a dilemma and a paradox. The dilemma is whether to abandon the study of constitutions altogether or to seek to find constitutions that work and eventually internalize and live by them. The paradox lies in the simultaneous existence of what appears to be a clear commitment by African political elites to the idea of the constitution and an equally emphatic rejection of the classical or at any rate liberal democratic notion of constitutionalism.

The dilemma is, in my view, inequivalent, even false: the paradox, however, is both self-evident and intriguing to merit an examination to explain the contemporary patterns of constitutional development in Africa (or lack of them). Such an examination is all the more necessary since the paradox is essentially political, and not evidence as others think, of deliberate disregard of legal or "constitutional" processes stricto sensu. . . .

Constitutions as Organized Power

The analysis of the paradox begins with a simple but important assertion: all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of power; it matters not whether that power lies with the state or in some other organized entity. From this perspective, therefore, the very idea of law, hence of a constitution and its "body of law," entails commitment or adherence to a theory of organized power, as appears evident in the historical experience and shared aspirations of all societies. The fact that in some societies the meaning of power has become more predictable, and even legal-rational in Weberian sense, merely records the complexity of the relationship between power and law in different contexts.

A useful model for the analysis of any constitution, therefore, is to regard it as a "power map" on which framers may delineate a wide range of concerns: an application of the Hobbesian concept of "covenant" as in the American constitution; a basic constitutive process, as in the Malawi constitution; a code of conduct to which public behavior should conform, as in the Liberian or French constitutions; a program of social, economic, and political transformations, as in the Ethiopian or Soviet constitutions; an authoritative affirmation of the basis of social, moral, political, or cultural existence, including the ideals toward which the polity is expected to strive, as in the Libyan constitution. The process of constitution making, which involves, inter alia, making choices as to which concerns should appear on that map, cannot be regarded as a simple reproduction of some basic principles that particular societies may have found operational. It is, as D. Blozar has noted, an "entirely political act," which must draw on past experiences and future aspirations. An analysis of the African constitutional paradox must start, therefore, with an examination of the political origins of the idea of the constitution in the continent.

The Nature of the Paradox

The precise form in which that paradox, commitment to the idea of the constitution and rejection of the classical [notion] of constitutionalism, has emerged over the last three decades requires a description.

The idea of and the necessity for a constitution appear fully established in the minds of state elites in Africa in at least two important senses. First, the constitution is an act without which the polity can have no legitimate or sovereign existence; it is of no small significance, for example, that the very first article of most African constitutions declare that each respective country is sovereign. In Africa, the idea that the constitution is "a means to demonstrate the sovereignty of the state" appears quite strong; in that sense, the constitutive value of some forms of a constitution remains prominent. It is notable that very few European and American constitutions make such declaration; sovereignty is assumed as the basis of constitution making.

Second, the idea of the constitution is firmly established as the basic law of the state. Since all African independence constitutions provide for some method of change, fundamental alteration, or even total abrogation (e.g., in the constitution of Swaziland 1968), the notion of a basic law in the African context entails no element of sanctity. What it does entail is minimum, and perhaps popular observance of the rules contained in the constitution.
The notion that a constitution is important as a basic law in the above sense underlies the amendments, the revisions, and the experimentation with non-Westminster models by civilian governments. When King Sobhuza II of Swaziland abrogated the constitution in 1973, he said that he had come to the conclusion inter alia, that the [independence] constitution has failed to provide the machinery for good government and for the maintenance of law and order, [and] that I and my people heartily desire to march forward progressively under our own constitutional guaranteeing peace, order and good government. (emphasis added)

Sobhuza was seeking a basic law more relevant to traditional Swazi values than was the Westminster constitution that brought his country into sovereign status. In 1986, the Sotho King, faced with a military insurrection, proclaimed the need for basic law (Lesotho order 1986)
to provide for the peace, order and good Government of Lesotho until such time as a new constitution better suited to the needs of the Basotho Nation shall have been agreed.

That law formally repealed the organs of civilian government and substituted for them bodies under the nominal supervision of the King but controlled by the military.

The essence of commitment in the second sense, then, is to an autochthonous (or socially relevant) basic law. Nyerere formulated this essential forcefully as follows:

"We refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a straitjacket of constitutional devices—
even of our own making. The constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania should serve the constitution."

This search for autochthony involves not only the rejection of external (specifically "western") institutions and constitutional "devices," but, more emphatically, the abandonment of the classical notion that the purposes of constitutions are to limit and control state power, not to facilitate it. A purely instrumental view of the purposes of constitutions, such as Nyerere's, has guided state elites' search for the formal means by which to preserve the integrity of the "constituted polity" without being embroiled in a maze of constitutional law whose function, in classical theory, is to control and supervise constitutionality....

The Nature of the Constitutional State and Power Realities

The origin of the paradox also lies in the nature of the state as "constituted" by the independence constitution, which was fundamentally different from anything the colonists themselves had devised. This was particularly obvious in English-speaking Africa, where the constituted state was based on a remarkable distrust of centralized power... based almost entirely on the need to exclude the state (as a centralized entity) from functions it had exercised before independence.

Two aspects of the constituted state were particularly disturbing. First, the first was the distribution of power in these constitutions; the second was the clear tension between that distribution and the rest of the legal order,...

In the case of English-speaking Africa, that "power map" was based on a severely modified version of the Westminster model, complete with bicameral legislatures, separation of powers, judicial review, legislative and executive action, and a Bill of Rights distilled from the Magna Carta. In the case of French-speaking Africa, that map was based on the principle of constitutional tripartism as developed in the eighteenth century by Montesquieu and incorporated the provisions of the French Revolution of the Rights of Man and the Citizen of 1789.

Provisions were made in Mauritius, Kenya, Nigeria, Swaziland, and Zimbabwe, for the separation of powers between the head of State (the President) and the head of government (the Prime Minister), but this arrangement quickly gave way to a hybrid form of presidentialism unknown to western constitutional jurisprudence. Further, it was assumed, even though this was not expressly stated, that the constituted state would operate on a multiparty style of "democracy," an assumption derived from provisions of the Bill of Rights guaranteeing freedom of association.

What was disturbing about the power maps described above was not that they were not "democratic": it was the western liberal sense of the word. It was, first, the rationale for them that was the problem. Whereas institutions such as federalism (Nigeria and Uganda), regionalism (Kenya), constitutional monarchy (Swaziland and Lesotho), chieftaincy (Zambia and Zimbabwe), and of course Bills of Rights have been used throughout history in appropriate contexts as the primary media for the socialization of politics and power, no such value-specific function was the reason for their presence in independent constitutions. For at least a decade after independence, these institutions essentially were operated as mechanisms for the entrenchment of interest that had accrued by reason of the exploitative nature of the colonial process itself.

Having seen the efficiency with which control of state institutions had enabled the colonial elite to convert the "national" economy into some kind of private estate, the African elites regarded as sabotage any suggestion that there should be any "withering away" of state power in the domain of public (including economic) affairs. For some of these elites, control of the instrumentalities of state power was the key to development in the postcolonial state.

Another disturbing aspect of the new constitutions was their relation to the rest of the legal order.... Invariably the first or second Article of the Independence Constitution declared the former the supreme law of the land and stated that "if any other law is inconsistent with [the] constitution, that other law shall, to the extent of inconsistency, be void." The intriguing thing is that it was the rest of the legal order, not the constitutional order, that offered African elites...
real power and the bureaucratic machinery with which to exercise it effectively.

In these circumstances it was always tempting to "opt out" of the constitutional order, the more effectively to manipulate the legal order whenever exigencies demanded it. Indeed, the constitutional order often appeared precariously perched on the legal order and the actual power structure, without the creative and rationalizing normativity that Kelsenian positivism would have expected. The potential for subverting the constitutional order through "legitimate" exercise of bureaucratic power was present, ab initio, and almost limitless. (It is not in the least surprising that not a single African military regime has forgotten to provide for the continuance "with full force and effect" of the legal order even as the constitution was being abrogated.)

**The Development of the Paradox**

The actual process of "subverting" the constitutional order in the sense suggested above took a number of forms. The most notorious was the coup d'état. ... The more interesting for our analysis was the move by state elites in a number of African countries to politicize the constitution, initially by declaring it a liability, and subsequently by converting it into an instrument of political warfare.

**The Constitution as a Liability**

The argument that the independence constitutional order was the state's most serious liability was carried to the public in the rhetoric of the need for rapid economic development. It was argued that a fragmented power structure would pose severe drawbacks to central planning, financial coordination, and the formulation of policies on important matters such as health, education, and agriculture. It was also argued that the constitutional order sought to frustrate the goals of equity and faster delivery of services which the fact of independence, per se, was [supposed to] facilitate; by focusing mainly on the loci of power, it had failed to resolve the important ideological issue of how to locate people's expectations and aspirations within its compass and permitted the importation of "undesirable political practices alien to and incompatible with the [African] way of life."

The last of these arguments, although made most explicitly and forcefully by King Sobhuza II of Swaziland, has been echoed in Tanzania, Zambia, Zimbabwe, Lesotho, Kenya, and the Central African Republic over the last quarter of a century.

But prosecuting that argument under the new constitutions was difficult, not least because of the severe restrictions placed on mechanisms for reconstitution. Much rhetoric was spent on exposing the absurdity of the constitutional order; for example, it was often stated, with some justification, that structuring the apparatuses of the state around minority protection rather than majority expectations was inherently absurd. In Kenya and Zimbabwe, state elites succeeded in convincing "minorities" that the popular will was by no means a convincing fact. In Zaire, Malawi, and Zambia, minorities, including opposition parties, were simply harassed into submission. Once that happened, as it did in Kenya in 1964 and more recently in Zimbabwe, those elites moved swiftly toward the creation of a titer political and administrative landscape by removing all restrictions placed on the ability of the center to change the constitution (amendment procedures etc.) and by making prolific use of the resulting flexibility.

**The Constitution as a Political Instrument**

With a tidy landscape before them, state elites then proceeded to insert new devices whose purpose was to recenterize power as it had been under colonial rule. Four main devices were used; the first was the extension of appontive and dismissial authority of the chief executive to all offices in the public service: civil, military, and "constitutional," such as those of judges and attorneys-general. The second was the subject of political recruitment at all levels (local, national, and parliamentary) to strict party sponsorship, the more effectively to monitor commitment to regime values. In a large number of countries including Kenya, Tanzania, Malawi, Zaire, and Zimbabwe, this particular device has led to a rapid transition toward the dominant or one-party state.

The third device was the expansion of the coercive powers of the state by allowing extensive derogation from Bills of Rights wherever these were justiciable. This expansion was usually accomplished by the removal (or weakening) of parliamentary supervision of emergency powers, and then, by so subjective a redefinition of the conditions under which those powers could be invoked that any meaningful inquiry into the bona fides of any particular action was excluded. The fourth, and perhaps most interesting device, was to ensure that the constitutional order conformed to the inherited legal order; this device was often preferred whenever conflicts arose between the provisions of the constitution and those of specific legislation. The most recent use of this device took place in Kenya, where the constitution (as amended inter alia to reflect the full complement of powers already being exercised by the police under penal and public security legislations).

As these and other devices found their places within the "constitutional" framework, so did the view that the constitutional arena, if properly controlled by the state elite, offered a more efficient and effective environment for the resolution of political conflicts than even the party and certainly the electorate at large. Indeed, by translating a political option or decision into a constitutional device or norm, state elites gained the added advantage of sharing the problem of enforcement or supervision ultimately to the judicial arm of government. A run to amend the constitution to deal with a political crisis became increasingly attractive as a method of reestablishing equilibrium within the body politic.

No doubt the original intent behind the desire to "subvert" the constitutional order in any of these ways (at least in the 1960s) was substantially above board. This intent was to redesign the state to a form appropriate to the social conditions of independent Africa. In the event, however, it was not the state that was redesigned; it was the political power map that was reconstituted. In the course of that reconstitution, the constitutional order became not an arbiter in the power process, but a crucial element in political warfare, an instrument of and from the appropriation of power. The Constitution lost most of its power to being the basic law of the land, that arbiter in the power process. State elites then revised the domain of administrative law so as
to reserve to themselves full and unfettered discretion over public affairs; this was done, inter alia, by strengthening all aspects of public order law: security, meetings, police powers, processions and marches, and aspects of licensing. Thus, the coercive administrative law of the legal order continued to be strengthened even as the essence of constitutionalism was being drained from the reconstitution.

Reconstituted States

Three aspects of the reconstitutions of most African states stand out as the clearest evidence of that result. The first is the emergence and predominance of a form of imperial presidentialism, the second is a perceptible shrinkage of the political arena, and the third is the preeminence of discretion as the basis of "constitutional" power.

The Rise of the Imperial Presidency

The fusion of executive power in a single individual was perhaps inevitable in the historical process of redesigning the state in Africa. ... Unlike the medieval monarchs of Europe, the African presidents do not claim any divine right to rule, do not demand obsequiousness from the public at large, and are, at least in point of theory, constitutionally subject to popular accreditation. However, the indices of imperium, the exclusive constitutional right to direct the affairs of state, are quite clear.

The first of these is the supremacy of the office of the President over all organs of government. The semblance of separation of powers that remains is, at best, of administrative significance only. Although supremacy of the presidency over the legislature is usually indirect (the latter is not constituted by the former), its effectiveness is exercised through the (dominant) political party.

The second index is the immunity of the President from the legal process, civil and criminal, as long as he remains in office. The purpose ... is the protection of the dignity of the office rather than of the holder per se. What is interesting, however, is the political interpretation that state elites in Africa have placed on this immunity: a President is "above" the law. He cannot be sued, nor can his decisions be challenged, in court or elsewhere. The second consequence is the protection of the President against abuse, slander, and other forms of disarrayment. ... [The ordinary law of libel and slander is irrelevant. The practice is to "criminalize" any utterance or conduct deemed to be disparaging to the reputation of the presidency or to its occupant; for this purpose most liberal use has been made of public order law, especially the inherited penal codes. Thus, the immunity of a President is safeguarded, and all criticism, whether legitimate or not, is censored.

The third index of imperium is the indefinite eligibility of a President for reelection; the reasons for it are several. The first has to do with the mystique and sanctity surrounding the public image of the "founder" president; although such figures are now few and far between, this attitude seems to have passed on to second or even third generation civilian and military leaders. The second reason involves perceptions of public expectations of leadership; as early as 1966, for example, the office of the President in Kenya was arguing that to be understood by the people, government must be personalized in one individual who is easily accessible, sympathetic, understanding, and authoritative. An essential element of that personalization was the individual's continuity in office.

The third reason inheres in the argument that political and economic stability requires continuity in leadership at the top.

The fourth index of imperium is the high degree of paranoia that tends to surround the exercise of executive power in Africa, a special characteristic of military regimes, but not limited to them. This paranoia is perhaps most visible in the high attrition rate found among political functionaries and public service bureaucrats in many governments. This potential for attrition, a technique usually orchestrated from the presidency, has several important consequences: it creates tremendous uncertainty within the channels through which presidential power is exercised; it generates a concern for survival within those channels that translates easily into psychopathic behavior toward the presidency; and it identifies the presidency as the only source of final redress even for the simplest of problems. ... [Thus, the presidency in Africa usually tends to "overreach" itself, both in political decisions and in public utterances.

The Shrinking Political Arena

The arena of politics in any country ought, at least in theory, to be open to any citizen, especially if qualified, under the law, to vote. The mechanism for participation in that arena may vary, but it is generally accepted in all known political systems that the most important is the political party. ... In Africa, however, the reconstitutions have recast the political parties into different kinds of instruments; instead of expanding the arena of politics in any or all of the above ways, political parties have been used to shrink it ... [primarily] through constitutional and other legal instruments that confer supremacy in managing public policy on a single political party; the most comprehensive statement is found in Article 3 of the constitution of the United Republic of Tanzania, 1977. Seventeen Article 3 of the 1984 Constitution appears to have relaxed somewhat this comprehensive submission of the Constitution to the Party by providing, inter alia, that the party exercises its jurisdiction in accordance also, with the state constitution.

When, as often happens in one-party presidencies, the Chief Executive is also the de jure (or de facto) leader of the Party, the political arena may shrink even further. Skillful manipulation of the Party machinery can easily shift its entire mandate to the presidency.

This power of the Party excludes the citizenship at large from any meaningful control over the conduct of government; with respect to the legislature, that shrinkage means that the electorate may be totally excluded from the determination of parliamentary (or similar assembly) membership or be subjected to a carefully orchestrated routine for that purpose. In the one-party presidencies, party membership has become essential for entry into and for maintenance of legislative roles at local and national levels; these roles can be terminated through simple expulsion from the Party. The electorate is then faced with the task, under the supervision of the Party, of finding a replacement. This is clearly a contest the electorate cannot win.
**Constitutions and Constitutionalism**  

CHAPTER III

**Discretion as the Basis of Power**

The most liberal of jurists will concede that though the essence of constitutionalism may lie in the limitation of arbitrary power, "the limiting of government is not the weakening of it. The problem is to maintain a proper balance between power and law."

The rise of an imperial presidency and the shrinking of the political arena as a result of the entry of political parties in the constitutional process both point to the fact that in Africa, the issue of power and law has been resolved, for the time at least, in favor of power. Therefore the legal basis of executive power (if this must be found) is to be sought in the domain of administrative law, which it is worth recalling, was and remains a complex maze of highly structured and coercive instruments. What the reconstruction added to this complex was a degree of discretion that even courts sometimes found difficult to circumcribe: Discretion as a basis of power is most visible in the ideology and operation of national or public security legislation.

The operative concept of national or public security was kept deliberately fuzzy. Such fuzziness is not only an African problem; what is peculiar to Africa is the breadth of that concept in security laws. A typical definition is to be found in Kenya's Preservation of Public Security Act (Cap. 57), which is so generous that one could say that the definition says no more than that "the preservation of public security means whatever the authority to invoke security powers says it is." Indeed, courts in some African countries have so decided. . .

The most important point is that in an ever-increasing number of African countries, security powers can be and are exercised without recourse to a declaration of emergency. All that is required in Kenya and Malawi, for example, is for the relevant authority to indicate by notice that in his own subjective judgment, sufficient grounds exist for the exercise of those powers. As long as such a notice is in effect, a whole set of measures ranging from indefinite detention without trial, restriction of movement including the imposition of curfews, press censorship, to suspension of any legislation (other than the Constitution and the enabling Act itself), may be taken: in practice, gazette notices are never withdrawn. As a result, security powers are permanently available and exercisable. An important consequence of this is that the boundaries between security powers, stricto sensu, and ordinary criminal law are often blurred.

Two main grounds have been used to defend this widespread use of discretionary power. The first is symbolic: the national or public security claim has a respectable history. . . . The second defense argues that the constitution expressly permits the exercise of security powers, elites can regard that exercise as legitimate, . . .

The formality with which the need for security powers is argued to the public accords well with their primary function: the strengthening of the presidency at the expense of other organs of government. . . .

**The Military and the Idea of Constitutionalism**

The preceding analysis suggests that in many parts of Africa, the idea of the constitution clearly excludes the notion of a basic (or fundamental) law other than in a purely "constitutive" sense. Civilian regimes have reached that position in fact or in law,. . .

There can be [little] doubt that the immediate reason for the vast majority of military coups in Africa has been the failure of constitutional government and the desire "to wipe the political and constitutional slate clear." Some African scholars have [even] hailed military intervention as a "necessary tonic to docile constitutionalism." The record of military government in Africa in the last three decades with the occurrences of more than seventy coups d'état, does not, in my view, disclose any ground for that optimism. That record indicates only that military regimes consider [the constitutive value of constitutions important]. Virtually every announcement of suspension or abrogation of a constitution after a coup d'état in the 1960s was accompanied by commitment to the drawing up of a new one; these commitments were kept in some countries (Ghana, Nigeria, Sierra Leone). In the 1970s and 1980s, military rulers became even more organized: they began to suspend or abrogate only those constitutional provisions that formed the basis of their power: legislative, executive, and judicial powers, and provisions dealing with the protection of fundamental rights. The "constitutive" provisions remained virtually unaltered and survived many of changes in military and civilian government; in Uganda the 1967 document is still recognized as the constitution of the state.

The military attitude to governance appears to be no different from the civilian attitude described above... In short, far from wiping the political and constitutional slate clean, the military have only reproduced the basic power structures operated by civilian regimes. While clinging to some notion of the constitution, they have advanced the issue of constitutionalism no further than civilian regimes have.

Some Reflections

[In Africa... only the idea of the constitution has survived. The most fundamental of the functions of a constitution, at least in liberal democratic theory, to regulate the use of executive power, is clearly not one that African constitutions that have survived military intervention now perform. It is important therefore that we conclude with some reflections on what that condition means for governance in the next century.

*Do Constitutions Matter?*

Perhaps the first issue one should reflect on is whether constitutions really matter? In the Preface to his study of a number of Western and Eastern constitutions, R.E. Finer warns that no one constitution is an entirely realistic description of what actually happens and precious few are one hundred percent unrealistic fictions bearing no relationship whatsoever to what goes on. His message is that even when constitutions are being violated, subverted, or otherwise ignored, it is important for scientists to examine them and practitioners to maintain faith in them. Constitutions therefore do matter. It is interesting in this respect that Swaziland, which abrogated its Independence Constitution in 1973, has had to reinstate a number of important provisions of that document over the years.
This issue becomes not whether constitutions matter, but what constitutional regime best fits the needs of particular societies? Here again Foner’s observation is most apt. He says “Different historical contexts have generated different preoccupations: different preoccupations have generated different emphases.”

Constitutional arrangements look both to the past and to the future. Hence, although certain basic and cross-cultural functions are and should be expected of any constitution, one cannot say that a single model is good for all societies at all times. The falsity of that assumption has clearly been demonstrated in the historical experience of sub-Saharan Africa over the past 50 years. Autocracy is therefore an indispensable part of constitutional development. What appears to have gone drastically wrong in Africa is not the search for autocracy but rather the extreme disregard of constitutionalism that this process has assumed.

QUESTIONS AND COMMENTS ON OKOTH-OGENDO

1. Consider why, according to Okoth-Ogendo, many African nations have adopted constitutions. Do they serve as symbols or aspirations? Are they intended to establish legal norms? Consider the proposition that Okoth-Ogendo’s arguments support Frankenberg’s concerns about identifying the proper subjects of comparison. If the African constitutions discussed by Okoth-Ogendo are units comparable to those Sunstein discusses, Sunstein’s arguments seem plainly incomplete, if not wrong. A defender of Sunstein might reply that he was discussing the functions of “true” constitutions. Consider the predominance of (and/or English-speaking) greater familiarity with scholars from the United States, the United Kingdom, Germany, and other “western” constitutional states as an explanation for why constitutions are considered to be at the core of the concept of constitutions. See also Nathan J. Brown, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT, 5, 198 (2002) (arguing that Arab constitutions “have been designed primarily to render the political authority of the state more effective and secondarily to underscore state sovereignty and establish general ideological orientations” and concluding that “the path to constitutionalism in the Arab world lies in insulating potentially autonomous state structures from the nominally democratic procedures effectively dominated by the executive”).

2. Consider also whether Okoth-Ogendo is at once critiquing liberal democratic understandings of constitutions as inadequate to describe and analyze the functions of African constitutions and, at the same time, critiquing African failures to, e.g., constrain and harness presidential power (the subject of chapters five and six). Does his critique raise questions of “legitimacy”—that is, whether the responses to the problem he identifies should be sought in law or elsewhere?

3. Okoth-Ogendo wrote with a broad brush about African constitutionalism in the 1990s. How recent are his arguments? Do any of the challenges he identified persist, but also suggest that there are significant variations among different countries. See Charles Fombad & Nathaniel A. Ingeboden, Presidential Term Limits and their Impact on Political Development in Africa, in POSTERING CONSTITUTIONALISM IN AFRICA 1–29 (Charles Fombad & Christina Murray eds. 2010) (discussing trends to try to limit terms linked to post-1990s rights revolution, noting three powerful presidents (Chibuba of Zambis, Muvdi of Malawi, and Obasanjo of Nigeria) who recently were unsuccessful in trying to extend their terms, and several others (in Namibia, Chad, and Cameroon) were able to overcome term limits, and arguing for considering generous retirements and immunity from politically motivated prosecutions as further inducement to compliance with term limits); Charles Manga Pangub, Some Perspectives on Durability and Change under Modern African Constitutions, 11 INT’L J. CONST. L. (I-CO N) 382 (2013) (noting that since 1990 many African constitutions were modified to make amendment more difficult and thereby “prevent the arbitrary and frequent changes” that had obstructed prospects for constitutionalism, the rule of law, and good governance, but exploring how amendment rules can be understood only in light of the political makeup of legislatures).

4. As Okoth-Ogendo’s essay suggests, particular colonial histories may influence post-independence forms of constitutionalism. For discussion of the possibility that Botswana’s status as a British protectorate, a relationship allowing greater degrees of self-governance than more direct forms of colonialism, may have contributed to its success in maintaining civilian government in accord with its 1960 independence constitution, see Amelia Cook & Jeremy Sarkin, Is Botswana The Miracle Of African Democracy, The Rule Of Law, And Human Rights Versus Economic Development, 19 TRANS. L. & CONTEMP. PROBS. 453 (2010). Its traditions include relatively formal tribal assemblies, called lopta, began in the 19th century and continued through colonialism; they are still used at the village level and above as forms of communicative self-governance (e.g., with respect to public works projects), was well as local courts. As Professor Fombad notes, Freedom House’s 2012-2013 study of “Freedom in the World” identifies Botswana as the only African country consistently ranked “free,” though some have raised concerns that in recent years its protection of civil and political rights have declined. Consider the role of pre-constitutional history and tradition in other polities (including the
United States) in shaping constitutional experience with self-governance and rights protection.

The following excerpt describes how many African countries around and after 1990 enacted constitutional changes to move towards democratic constitutionalism, but face persistent challenges.


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For a start, the assumption that the constitutional entrenchment of fundamental rights, especially the legalization of multi-partyism, would provide a solid foundation on which constitutional democracy, a culture of tolerance, transparency, and accountability, as well as political stability, and would discourage dictatorship and military adventurism has not turned out to be true. Patrick McGowan, in a 2001 study, suggests that although the period from 1966 to 1979 had the highest rate of successful coups, the onset of the democratization process has not seen any significant reduction in their incidence. In fact, the increase in the incidence of coups between 1991 and 2001 clearly contradicts the assumption that democratization would bring about a more stable political and socioeconomic environment that would discourage military adventurism.

In many respects, the main basis on which many African countries can claim to be democracies, the regular holding of parliamentary and presidential elections, is paradoxically one of the main sources of democratic paralysis on the continent. Most of these elections have, in the words of Andreas Schodder, provided "little more than a theatrical setting for the self-representation and self-reproduction of power." Both the old guard "born-again" democrats and the post-1990 democrats have used numerous sophisticated tactics to pre-empt and frustrate any potential threats emanating from popular elections. A common strategy has been for ruling parties to tailor electoral codes to favor them and exclude their opponents from electoral competition. An example of this is the nationality clauses that were used by the incumbents in Cote d'Ivoire and Zamb to exclude serious competitors from the presidential race. It has almost become an unbreakable rule that the party that writes the electoral code always wins the elections. This is aggravated by electoral malpractices and other irregularities such as the disenfranchisement of voters in opposition strongholds, forged identification cards, vote stuffing, and placing the conduct of elections in the hands of electoral bodies controlled and managed by supporters of the ruling parties.

Since the founding elections at the start of the democratization process from 1989 to 1995, the prospects of opposition parties winning elections have progressively diminished as more and more sophisticated means of rigging elections have been devised by ruling parties.

One of the major problems that was not addressed by the post-1990 constitutional reforms was the issue of African absolutism, caused by the concentration and centralization of power in one man, the president, and in one institution, the presidency, and the abuses of powers that go with this. Many of the new constitutions merely paid lip service to separation of powers. Under most constitutions, especially in Francophone Africa, an overbearing and imperial president reigns and dominates the legislature as well as controls the judiciary. This has been compounded by the fact that the traditional checks and balances are either absent or too weak and ineffective. The problem of executive dominance is not only true of highly centralized and manifestly illiberal constitutions such as that of Cameroon, but also under quite liberal constitutions such as those of Ghana, Namibia, and South Africa. The imbalance in power among the three branches of government means that the judiciary is not as independent as it should be and therefore cannot freely rule against the government, especially in closely contested election disputes. Executive lawlessness has become very common in countries such as Cameroon, Ethiopia, Eritrea, and Zimbabwe. Executive dominance is often aggravated by the hegemonic influence of the dominant parties, which are usually effectively controlled by the president and a small inner circle of courtiers. As a result, the one-party dominated parliaments merely rubber stamp laws.

A glaring example of executive lawlessness has been manifested by the actions in which one of the hallmarks of the 1990s constitutional rights revolution—constitutional provisions imposing term limits on the tenure of presidents—have rapidly been removed in many countries. Corruption, misuse of state funds, and clientelism has intensified and flourished during this multi-party period as incumbents do everything to stay in power. There is often no clear distinction between the party and the state or between state funds and ruling party funds. This is particularly acute in Francophone and Lusophone African countries where the system of horizontal and vertical accountability is usually weak.

[Data show] that there has been some improvement in the quality of freedom enjoyed by Africans, generally speaking. For the period 1998–2000, an average of 2.7 (5.2%) countries were classified as free, 18.6 (32.6%) as partly free, and 58.7 (92.1%) were classified as not free. By contrast, for the period 1990–1999, the number of free countries had almost trebled to 9.1 (15.2%), while the number of partly free countries had decreased to 9.7 (16%), and there was a fairy significant drop in the number of countries classified as not free, 53.1 (45%). Perhaps the most interesting finding from the survey is that there are a number of countries which throughout the entire period studied have the dubious distinction of being classified as not free. The nine countries in this category are Chad, the Democratic Republic of the Congo, Equatorial Guinea, Libya, Rwanda, Senegal, Somalia, Cameroon, and Mauritania. By contrast, Botswana is the only country that has been classified as free throughout this period.

Freedom House, in its 2000 report on the annual survey of global political rights and civil liberties, noted that "2000 marked the third
consecutive year in which global freedom suffered a decline," and pointed out that "this setback was most pronounced in Sub-Saharan Africa and the non-Baltic former Soviet Union." In its 2008 ranking of 150 countries, World Audit Democracy grouped each country into one of four divisions based on their rank in democracy, press freedom, and corruption. No African countries appear in the first division, consisting of twenty-nine countries, and only Mauritius appears in the second group of eight countries in division two. A number of other African countries, led by Botswana, South Africa, and Namibia, appear in the third division, while the rest appear in the fourth division.

Concern about the expansive authority of presidents is similarly an important theme in discussions of Latin American constitutionalism. See, e.g., Claudio Grossman, States of Emergency: Latin America and the United States, in CONSTITUTIONALISM AND HUMAN RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 185 (Louis Henkin & Albert J. Rosenthal eds., 1990) ("Presidential domination, supported by the political, cultural, and socioeconomic structure of Latin American societies, is a general feature that has permeated Latin American systems since their inception.") (For additional materials on presidentialism as compared to parliamentary systems, see Chapter VII below.) This state of presidential dominance has constitutional support. In many Latin American constitutions, the president has substantial powers to declare emergencies which, in turn, authorize substantial increases in presidential governance powers. Such limits as are provided for in constitutions have often been abused. For an overview of constitutionalism in Latin America, see Roberto Gargarella, Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution (2013).

While writers like Grossman suggest that Latin American constitutions' recognition of a distinction between a state of peace and state of emergency contributes to human rights abuses and should be abolished or mitigated, Nino argues that the presidential form of governance itself should be abandoned because it stands in the way of the increased political participation he sees as essential to eliminate the deleterious effects of "corporatism" in Latin America. "Corporatism," as he describes it, is a condition in which powerful elite institutions, including but not limited to business corporations, control and penetrate the government, while the government itself, through interconnections with powerful elites, affects and strengthens the power of these elites.

Although not explicitly framed in constitutional terms, his argument, like Grossman's, suggests that a change in constitutional structure is needed to facilitate what other writers would call the possibility that a written constitution can actually obstruct constitutionalism.

Carlos Santiago-Nino, Transition to Democracy, Corporatism and Presidentalism with Special Reference to Latin America, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg, Stanley N. Katz, Melanie Beth Olivier, & Steven C. Wheatley, eds., 1993)

This chapter seeks to connect the movement toward revision of the presidentialist system of government, perceptible in several Latin American countries, with some socioeconomic variables with considerable impact on the process of consolidation of democracy. In particular, I intend to show that as the main threats to that consolidation of democracy are the pressures of so-called "corporate groups"—the military, the Church, the trade unions, and entrepreneurial conglomerates—it is necessary to develop mechanisms for wider popular participation and stronger political parties to counteract those pressures . . . (and) . . . to modify the presidential system of government to allow for the operation of mechanisms to contain the pressures of corporations, thus amplifying the space of the democratic process.

Transition to Democracy and Corporatism

As we all know, in the past decade a wave of democratization began to move in most of Latin America, finally reaching some islands of authoritarianism such as Chile. This process is often called "transition to democracy." . . .

I want to argue that whatever their origins or modes, the main challenge faced by processes of transition in consolidating democratic institutions is the containment of the network of de facto power relationships that corporations weave, as they take advantage of the vacuum left by representatives of populare sovereignty. . . .

For our purpose, it is . . . important to mention how corporatism is linked with populist and authoritarian experiences in the context of Latin American political cycles. As James M. Malloy[2] says,

It is now evident that populism was and is based on an implicit corporatist image of sociopolitical organization. With the exception of Vargas, the populist preference for a corporatist solution to the pressure of modernization was seldom stated explicitly, but there seems little gainsaying that populism has always shown a high affinity for corporatist principles of organizing the relations between state and society.

He adds that populism in its first phases emphasized mobilization in an "inclusionary" way, trying to broaden the set of actors in the political process while controlling them through organizations "formed, in sectoral, and functional criteria thereby fragmenting their support. These parallel primary organizational structures joined at the top by interlocking sectoral elites." . . . Corporation is a way of controlling and containing the social strata that populism seeks to promote, thus avoiding social conflicts. . . . Corporation is not exclusively tied to populism but is a structural element of Latin American politics with different manifestations and cultural roots in the Spanish attitude toward hierarchical status, patronages, clientelism, etc.
The interlude between this connection between corporatism and populism and that between the corporation and the bureaucratic-authoritarian State is the social situation that Samuel Huntington called "praetorianism." This is a system that combines a low degree of institutionalization with a high degree of participation of mobile social forces that penetrate the public spheres, resulting in confrontations between new active social forces and between them and the traditional establishment. Malloy describes the process in several countries of Latin America in the late 1960s and from the mid-1960s until the early 1970s.

An important aspect of the praetorianization of Latin American politics during this period was the fact that although the formal state apparatuses [sic] in the region grew markedly, this was accompanied not by an increase in the power and efficiency of the State but rather by the reverse. The continuing reality of dependence was a critical factor in the development of states that were formally large and powerful but in practice weak. Another factor was a kind of \textit{de facto} disaggregation of the state as various particularist interest blocs in a sense captured relevant pieces of the state which they manipulated to their own benefit.

Of course, at its extreme, this process of disaggregation of the State affects also its monopoly of coercion, so that violence accompanies social confrontations.

... [This praetorianization of Latin American politics has led to a social "impasse" in which no sector has stable domination. The way out of this impasse [according to Guillermo O'Donnell] has been "the bureaucratic-authoritarian State, which is a system of political and economic exclusion of the popular sector and which emerges after a substantial degree of industrialization has been achieved, and also after and to a large extent as a consequence of substantial political activation of the popular sector." The popular sector is excluded by abolishing its channels of participation by controlling its participation. The bureaucratic-authoritarian state is open to other corporations, the military, in some cases the Church, and an entrepreneurial bourgeoisie, partly connected with international capital and partly protected by it by its association with the state and its enjoyment of a system of privileges and shields.]

Of course, when these bureaucratic-authoritarian regimes are founded and replaced by liberal democracies, as is happening in the present processes of transition to democracy in Latin America, the previously favored groups struggle to remain as much as possible of their privileges, competing hard with the popular sector as it reclaims the state. The popular sector's return to the practical field of course overcomes its illegitimate exclusion, but often organizations claiming the privileges that the populist ideology ascribe to them reactivate corporatism.

Corporatism, Popular Participation, and Political Parties

A Conception of a Deliberate Democracy... [The first premise of my argument is] that the main obstacle to be overcome by the process of transition to a consolidated democracy in Latin American countries is the institutionalization of corporate power relations, remnants of previous populist and authoritarian stages, within the political structure of a liberal democracy.

My second premise... conceives of democracy as an organization of the process of collective discussion about the right standards on which to organize public life. It assumes that the democratic process so conceived, insofar as it respects some structural requirements of the process of deliberation and decision making, enjoys some epistemological robustness, its internal mechanisms generating an inherent tendency toward impartiality that is the mark of moral validity in intersubjective issues. The premise asserts that the strengthening of the working of democracy against corporative powers requires the broadening of direct popular participation in decision making and control of governmental action, perfecting the mechanisms of representation, and strengthening political parties, which are themselves internally democratic and open, disciplined, and ideologically defined.

This view of democracy presupposes that individuals—who are basically moral persons—are its natural agents and that the freedom and quality of their intervention in the democratic process should be preserved and expanded, which is not the case when corporations intervene. Besides, this conception of democracy as a regimentation of moral discourse presupposes that the primary objects of decision in the democratic process are, not \textit{crude interests}, but principles that legitimize a certain balance of interests impartially. Therefore, corporations that bring people together around common interests rather than around moral views about how to deal with interests cannot be the protagonists of the democratic process...

Popular Participation. Therefore, to strengthen the democratic power of common citizens against of corporations, it is crucial to broaden and to deepen popular participation in discussion and decision. I believe that even the imposition of obligatory voting is justified as a piece of legitimate paternalism, given the problem that exists when many individuals in some sectors of society fail to vote because they are unaware of like-minded others, are not organized, and believe most individuals votes are of no account. Another factor to consider is that the mechanisms of representation necessary in large and complex societies are prone to subversion by corporative power because representatives are subject to corruption. Therefore, it is essential to widen the ways of direct participation of the people whose interests are at stake, by general procedures such as plebiscites or popular consultations, or by decentralizing decisions into smaller units in which the people concerned can affect them. ...
can only be called Fascistic. And liberal democracy is too vulnerable—its citizens too passive and its ideas of freedom and individualism too illusory—to recognize, let alone to battle, the mammoth modern corporation that has assumed the identity and ideology of the traditional family firm. Strong democracy (that is, participative democracy) has no illusions about inventing and transforming society in the name of a democratically achieved vision and it may be able to engage the multinational corporation in a meaningful struggle. Yet the corporate society and the corporate mentality stand in the way of the idea of active citizenship that is indispensable to strong democracy.

Additionally direct participation of the population in the decisions that affect them may tend to diminish the social tensions associated with the so-called "crisis of democracy" and corporative struggles. In opposition to the recommendation of the Tripartite Commission that such crises should be countered by restraint of discussion and participation, and faithful to the idea of the "more democracy," I think that the evils of democracy are cured with more democracy. I think that the broadening of direct participation operates as an escape valve for social pressures and helps limit them, no more as people acquire consciousness of the scarcity of the resources available to satisfy competing demands.

The Role of Political Parties. ... [Organizations that bring together people, not on the basis of crude interests, but of principles, ideologies, and moral values, ... are political parties when they are conceived of as the bearers of programs about the organization of society based on fundamental principles of political morality. They are indispensable to a modern and large society, not only because they train professional politicians who profess these principles and purport to put them in practice if duly elected, but because they exempt people from the fear that their vote before each other on the basis of principles; it is a vote for a party that organizes its proposals on the basis of public and general principles.

Political parties are the main antibodies protecting democratic health against corporative poison. Their reasons for being are exactly the same as of Aristotle to represent some particular interests in the form of corporations that seek to control certain compositions of interest. In the case of political parties, therefore, an inverse relation exists between their respective strengths.

The Centrality of Parliament. The deterioration of the role of political parties in favor of corporations also involves the erosion of the importance of the natural scene of those parties: parliament. Corporations naturally prefer to operate in the public domain than in the noisy pluralistic and more public parliamentary corridors. Of course, the administration tends to follow suit, preserving some of the practices inherited from authoritarian governments (for instance, [as of 1963] the Argentine Central Bank has powers equivalent to those that the Constituting country grants to the National Congress, e.g., the power to concide special lines of credit, which amount to subsidies).

However, even though the fortifying of political parties and of the parliamentary institutions contributes to protecting the democratic system from corporative power, this remains true only insofar as political parties and parliamentary bodies do not transform themselves into other corporations, developing clienteles with distinctive interests and power compromises with those of traditional corporative groups. This change occurs when parties weaken their ideological commitment, do not promote debates on essential questions of political morality, block channels of participation, operate through methods of patronage and clientelism, and resort to personalism and "caudillismo." This situation is then reflected in parliament, by a lack of representativeness, by a discourse both ideologically vacuous and detached from the experiences and interests of the people represented, and by a general appearance of opacity and self-service.

For that reason, the strengthening of the political parties and parliament to contain corporative power requires the opening of parties to broad popular participation, the promotion of permanent political debates within them, the perfection of the internal democratic mechanism for choosing party authorities and candidates, and the openness of the management of funds. ... Strong Democracy and Presidentialism

Methodological Remarks. After stating my first premise, that corporative political power is one of the greatest obstacles to the consolidation of democracy in Latin America, and the second, that two of the most important contributive factors to the containment of corporatism are the broadening and deepening of popular participation in decisions and control, and the strengthening of participative and ideologically committed political parties and parliamentary bodies, I am ready to defend my last two-fold premise: that strong democracy is functionally incompatible with the extreme forms of presidentialism typical of Latin American constitutions, and that when presidentialism is not accompanied by limited or conditioned forms of democracy, tensions are generated that often lead to the breakdown of the institutional system.

Before arguing for this premise, I must comment on a methodological point of great importance. There is a longstanding disagreement about the capacity of law and institutional design to influence social changes. ... In the field of law this disagreement can be illustrated with the paradigmatic position of two great jurists: Friedrich Karl von Savigny and Jeremy Bentham. Savigny professed a historical conception of law, according to which the true law is found and not made; it is found in the spirit of the people and in social customs. Legislation and institutional design should be extremely cautious and follow, not promote social development. Bentham, a fervent believer in law as an instrument of social engineering, devoted his life to the writing of codes for different nations; his preaching influenced the modern conception of Parliament as an active body through which legislation can achieve social reform. ... Truth seems to lie between the extremes, since it is undeniable both that the law and institutional design have on many occasions considerable impact on social developments, and that society is not a malleable material that
adapt plastically to deliberate legislation, subject as it is to causal factors other than the legal. . .

... Even when true that strong democracy is contributive to the containment of corporative power, a limited democracy does not always lead to corporatism and hence to constituted democracy in the Latin American way (this is obviously true in the case of the United States where the power of corporations is a complex phenomenon not assimilable to Latin American corporatism). On the other hand, the adoption of the presidentialist system of government is undoubtedly correlated, when combined with some conditions to be studied, with the recurrence of specific social effects that lead to institutional disruptions.

In this respect a study by Prof. Fred W. Riggs, prefaced by the following remark, is extremely revealing:

One starting point for analysis might be in the proposition that some 33 Third World countries (but none in the First or Second) have adopted presidentialist constitutions. Almost universally these policies have endured disruptive catastrophes usually in the form of one or more coups d'état, whereby conspiratorial groups of military officers seize power, suspend the constitution, displace elected officials, impose martial law and promote authoritarian rule; recent examples in Korea, South Vietnam, Liberia, and many Latin American countries come to mind. . . . By contrast, almost two-thirds of the Third World countries which have adopted parliamentary constitutions, usually based upon British and French models, have maintained their regimes and avoided the disruptions typical of all American-type systems.

Proconditions of Stable Presidential System. . . . [Several problems of a presidentialist regime—executive-legislative confrontations, paralysis of the assembly, weakness of the party system, and the politics of the court—. . . have led to collapse in more than 30 such regimes outside the United States. . . .

... For the presidential system to work smoothly . . . parties . . . must try to form coalitions prior to the elections in order to have some chance of forming a majority; in a parliamentary system parties can go to elections supporting well-defined programs and try to form coalitions in parliament itself after the elections are over. A second factor (which allows presidentialism to work in the United States and involves a weakening of parties) is the lack of party discipline, which, according to Riggs, may be "a necessary condition for the success of a presidentialist regime, whereas if party discipline were enforced, the capacity of government to govern would be severely impaired whenever the president belonged to one party and the opposition party had a congressional majority."

Another factor that weakens political parties within a presidentialist system is the effect on them of defeat in elections; many of the nonpolitical functions that parties perform in a parliamentary system cannot be carried out in a presidentialist one because parties are not tied to a more or less stable representational basis. . . .

Because parties in a presidential system cannot be ideologically committed but must present broad stances and make many compromises to win support for their presidential candidates from many social sectors, they awaken little enthusiasm in voters, most of whom do not identify themselves with any party but just choose the lesser evil. In sum, the presidential system faces the following dilemma with regard to political parties. Either the parties become weaker and weaker as a result of the nature of political competition under this system—which, given some other social and cultural conditions, may make ample room for the corporations' exercise of their political muscle; or else, if some other factors operate to preserve the parties' strength, as in Argentina, they help create the tensions that are typical of the presidentialist system, blockages between the powers, exhaustion of the figure of the president, etc., which will be commented on below.

The other variable that marks the U.S. system is directly connected with the above characterization of a strong democracy: that is popular participation, particularly with the propensity to vote. Riggs is explicit about this point:

One of the limitations of a presidentialist system of government appears to be voter apathy. Despite its long history and the apparent commitment of Americans to representative democracy, voting turnout is notably less in the United States than in virtually all parliamentary governments. We normally assume, of course, that popular participation in elections is necessary for the health of democratic institutions. However, sad to say, a low voter turnout seems to be a cost entailed by various political aspects of a presidential system. In addition, it could even be a para-constitutional feature. . . . The higher the level of popular participation in voting, the greater would be the relationship between the interests of the voting majority and the presidentialist system, therefore, works most smoothly when voting participation remains fairly low. . . . A conspicuous reason for the skewed distribution of voters can be found in the substance of a party platform. In order to secure the support of a majority of voters, a majority required by the arithmetic of a winner-take-all presidential competition—these platforms have to take ambiguous stands on many issues that divide public opinion. But such issues are also likely to attract the greatest interest especially of poor people. . . . The price for high voter turnout is lively and divisive political controversy—whereas low voter turnout is linked to apathy and indifference. . . . To put the negative case, mass participation is less threatening to the survival of parliamentary than of presidentialist regimes.

This document underscores a point of great importance to the comparative study of the United States' presidential system and some unsuccessful ones, such as the Argentine. In the United States the low voting turnout has a feedback effect; presidential candidates address themselves to potential voters. . . . By contrast, in Argentina, for instance, a 1912 law introduced obligatory voting, which since 1916 has more than trebled the voting turnout in comparison with elections held under voluntary voting. This indicates that the middle class, mainly through Peronism, participated actively in the electoral process; those
parties were at different times the only winners of free elections, permanently displacing the conservative parties that held power before 1916. Although candidates tend to be vague in their proposals and to compromise to get wider bases of support, a varying interest and even enthusiasm are preserved due to part to emotional factors, such as those involved in the Peronist-Peronist controversy. Riggs's suggestion about the threatening aspect of high levels of participation in a presidentialist system seems to be confirmed by the considerable political stability in Argentina prior to 1916 and the extreme instability afterward. Obviously, those displaced by the results of massive voting sought other ways of access to power.

The Dysfunctionalities of Presidentialism

In other words, the two features characteristic of democracy that serve to defend it against the phenomenon of corporatism (that has arisen in Latin America due to different and complex factors) are absent in the most successful presidentialist systems in the world and there are reasons to connect their absence with its success.

The presidential system divides the expression of popular sovereignty between the president and parliament, each of whom has a sort of veto power over some decisions of the other. When different political parties control the parliament and the presidency (a situation usually reflecting majorities that varied through time) the parties' dynamics of confrontation is mirrored in the relation between the powers of the state, leading to fights and stalemates. The United States avoids this danger as a result, as I said, to the weakness of the parties and the electoral system; the President is able to collect majorities outside the limits of his own party and to govern even when his party is the minority one in either or both of Houses of Congress. The situation is quite different in countries such as Argentina in which the traditional strength of the parties is enhanced by the discipline promoted by proportional representation. In that country several important initiatives of the present national government of the Radical Party were blocked or delayed by the opposition parties, not always by a majoritarian vote, but by parliamentary maneuvers, such as withholding a "quorum" for a session, which are sometimes addressed to obtaining unrelated advantages. Of course, these confrontations between political parties and Parliament are dangerous because in a presidentialist system the latter has no direct or indirect power to influence the course of the administration, thus the antagonism leads to conflict and stalemate.

In the third place, even when the parties are not seriously antagonistic, the presidential system makes it very difficult for them to collaborate in the same government, as is sometimes required in a national crisis, by an internal or external war, or by the threats of corporative power.

In the fourth place, the confrontation between the parties often leads to the political exhaustion of the President’s popularity long before the expiration of his term, which usually coincides with the point of retraction of the economic cycles ... to which Latin American countries have long been subject. The rigidity of the government in the Presidential system means the political crisis cannot be vented through an escape valve. The President often reaches a point at which, though he still has an enormous set of formal powers, he has lost credibility, popularity, and parliamentary support. The only way to replace him, other than through his voluntary resignation, would be through impeachment. Impeachments are all but impossible to carry out; they require an accusation of misconduct and a qualified majority, which implies the support of the President’s party, not usually willing to commit suicide. The President himself is not generally inclined to resign, for he feels that he has a mandate for the whole period and does not want to become a historical failure. In Argentina this situation occurred in 1978; several people thought that the coup could have been avoided, or at least delayed, if Isabel Peron had been removed by resignation or impeachment, or if there had been another system of government, under which she could have been confined as head of state to more circumscribed functions and an acceptable head of government appointed.

[Thus] the elements that may make democracy strong against corporatist pressures—wide popular participation and ideologically defined, disciplined, and broadly participative political parties—are ill suited to a presidentialist system because they generate tensions difficult to handle within it and they aggravate its inherent difficulties.

Conclusion: Toward a More Parliamentary System of Government for Latin America

My reasoning has had the following course: one of the main challenges facing the process of transition to a full consolidated democracy in Latin America is the need to overcome the entrenched network of power relations and privileges established by different corporations during earlier periods; corporations seek to preserve these power relations and privileges in the transition, generating distortions and crises, such as those provoked by inflation, that create pressures on the presidential system.

The best means to counter this corporative power is to recover a sense of a polity governed by universal and impersonal principles chosen in a process of public justification and dialogue by individual citizens, who, unidentified with any particular interests, preserve the capacity of adopting different ones. In practical terms, this requires the promotion of broad popular participation in voting, discussion, and direct decisions, and political parties organized on the basis of principles and programs, with active and participative members and with an internal democracy whose results are enforced in a disciplined way. But this kind of a strong democracy is functionally incompatible with a presidentialist system of government, which tends to weaken political parties; further, even if this weakening does not occur for diverse historical and cultural factors, the difficulties inherent in the presidentialist system—the erosion of the presidential figure, blockages between powers, the difficulties of forming coalitions—are serious and dangerous threats to the stability of the system.

This reasoning leads to an obvious conclusion: the presidentialist system of government, in Latin American conditions that include the phenomenon of corporatism, is an obstacle to the consolidation of democratic institutions. The transition to democracy would be considerably facilitated by constitutional reforms that incorporate parliamentary mechanisms.
do in Chile, he is liable to be confronted by powerful forces of the opposition and conservative groups. As Arend Lijphart has argued, a parliamentary system is more suited to govern societies in which no definite majorities exist in support of a program and a consensus has to be worked out. I envisage that, for instance, in Argentina no program of deep structural transformation could be carried out without the support of the two majority parties that confront the corporative pressures maintaining the status quo, and that combined support is impossible to obtain within a presidential system. On the other hand, the progressive sector of both parties may well reach an agreement in Parliament to support a program of transformation through a collaborative government, if the struggle for the Presidency ceased.

The crucial advantage of a more parliamentary system would be to make the formation itself of government as responsive as possible to the consensus of society. This consensus is better reflected in parliamentary elections than in presidential ones; the former are more frequent, more sensitive to the differing hues of public opinion, and more adaptable to the needs of the people to express themselves in situations of crisis. Of course, the mixed system of government allows both parliamentary and presidential elections to influence the formation of the government. That the government reflects flexibly the consensus of society enhances most of the values in the light of which a political system may be appraised. That coincidence between a government and its measures and general consensus deepens the objective legitimacy of the political system, under a deliberate conception of democracy; I have elaborated this topic elsewhere. The fact that the government is necessarily backed by popular consensus also strengthens the stability of the democratic system; as we have seen, the mixed system allows for the structural transformations necessary to contain corporate power, and provides a more direct barrier against that power, constituted by a more cohesive democratic front. Finally, the correlation between the formation of government and consensus contributes to the efficacy of the political system; the lack of political and popular support for a government (evidenced by the last period of Raúl Ricardo Alfonsín's government in Argentina) makes it incapable of effective measures, stymied as it is by blockages, criticisms, and lack of observance of its enactments, which are the consequences of the absence of the consensus.

Of course, the inability of the presidential system of government to allow for the expression of a wider consensus than that represented by the party occupying the presidency is itself the main obstacle, in many countries of Latin America, to reaching the broad agreement between the parties necessary to move away from the presidential system.

NOTE ON CONSTITUTIONS AS OBSTACLES TO CONSTITUTIONALISM

1. The Ongaro-Ongeno and Santiago Nuño essays draw heavily on experiences in Africa and Latin America in the 1960s and 1970s, and some of the information they present is outdated. They are best taken as descriptions of structural features and incentives that operated during the 196430s with which they are concerned, and as illustrating a way of
thinking about constitutional design and implementation that takes account of the ways in which structures and incentives generate outcomes.

2. Nino refers to Von Savigny and Bentham. Their views represent two different conceptions of the relationship of law, including constitutional law, to society: For Von Savigny, law must flow out of and reflect society; for Bentham, law can be an instrument to change society. Is this distinction useful in thinking about the role(s) of constitutions?

3. Santiago Nino’s essay ends on a deeply pessimistic note, suggesting that the existing constitutional and social structures will prevent transition to the structure he has argued will improve constitutional government. But if presidentialism is a “constitutive” feature of constitutions in Latin America, does it harm a more moderate approach to change, such as the elimination or curtailment of emergency powers provisions, argued for by Grossman?

4. How can presidentialism be an obstacle to constitutionalism? Has presidentialism “succeeded” in the United States? What are the criteria for answering that question? For a view contrary to Santiago Nino’s about presidentialism in Latin America, see José Antonio Chocobar, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY (2007) (arguing that the difficulties Santiago Nino describes arose in nations with a history of military coups that would make any constitutional democracy difficult to sustain).

5. Santiago Nino observes that political parties can “transform themselves into other corporations” (meaning, organizations that pursue the self-interest of their members) through use of patronage and the specific conception of what political parties generally, and might not be true everywhere, consider the possibility that parties organized at the subnational level might serve some of the same functions that Santiago Nino seeks from political parties generally, but might be less susceptible to the transformation he is concerned about, given the possibility of more homogeneity in popular views at the subnational level? Might they be more subject to such transformation if, given the structure of the media, monitoring is easier at the national than subnational levels?


[Particularly recently, tribal conflict has been extant in Ethiopia. From 1936 to 1941, Mussolini’s Fascists attempted to divide the Ethiopian people along ethnic lines to facilitate their rule of the country. In the 1970’s, the Communist regime in Ethiopia, known as the Derg, meaning committee in Amharic, reinvigorated the same tribal weapon to the same end. Later, liberation movements based on ethnic groups in the country expelled the Derg and established themselves as the government of Ethiopia. The consequences of these events were the intensification of tribal hostility throughout the country and the accession of Eritrea. These events should have impelled the drafters of the new Ethiopian Constitution to endeavor to lessen the problem of tribalism in the country. However, the makers of the constitution have entrenched and glorified ethnicity by establishing a “federal government” based on tribal affiliation and by granting to the subunits, styled as “states,” such a disproportionate share of power as to make them almost sovereign entities. This nonsequitur of curing tribalism with even more institutionalized tribalism, repeal the culmination of efforts of the internal and external enemies of the Ethiopians, stretching over a millennium, to undermine the unity of the nation.

By dividing the country into 9 states whose boundaries are determined by the locations of the major tribal groups, authorizing each tribal state to determine the language it will use, devolving substantial power to the states and providing for rights of secession for “every nation, nationality and people in Ethiopia,” he argues, the Constitution has “juridically extinguished” Ethiopia as a sovereign entity. Haile attributes to the Constitution a force destructive of sovereignty, unity and rule of law. See id. at 49–50 (arguing that constitution’s authorization to ministers to suspend political and civil rights makes most human rights derogable). For additional materials on Ethiopia, and federalism’s risks when subnational units reflect existing lines of linguistic or ethnic division, see Chapter IX (4) below.

7. Consider whether there are any provisions in the U.S. Constitution that could be seen as obstacles to what you understand “constitutionalism” to be one’s possibilities: the provisions in the 1787 Constitution prohibiting Congress until 1808 from prohibiting the “Importation of . . . Persons,” the “Three-Fifths” clause for counting slaves in determining the apportionment of the House of Representatives originally found in Article I, the provisions of Article I (retained by Amendment XVII) that each State have two Senators, regardless of population and of Article V that no state can be deprived of its equal representation in the Senate, even by constitutional amendment, without the consent of the state involved; the Second Amendment. Are there any omissions from the U.S. Constitution that are obstacles to constitutionalism? For a collection of short essays bearing on these questions, see William N. Eskridge, Jr. & Sanford Levinson eds., CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (1996).

NOTE ON THE PEOPLE’S REPUBLIC OF CHINA

Between 1948 and the present the PRC has had at least 5 Constitutions. The present Constitution, dating from 1982, enumerates such rights as “Freedom of speech, of the press, [and] of assembly.” The


* Art. 35, 1982 Constitution.
exercise of all rights under the Constitution is limited by article 51, which provides that

the exercise by citizens . . . of their freedoms and rights may not infringe upon the interest of the state, of society and the collective, or upon the lawful freedoms and rights of other citizens . . .

As scholars of China and its law have observed, these provisions make it possible that any exercise of free speech or assembly rights could be deemed prohibited by other articles of the constitution, and the history of the PRC since 1982 reveals frequent persecution of those who exercised rights of speech in ways disapproved of by the government.

The Chinese constitutions assume that the purpose of rights is to enable citizens to support the broader interests of the community. Historically, the government’s powers were not to be limited by the people’s, but the people were supposed to be served by the exercise of government power. According to one group of scholars writing in the 1980s, the Chinese Constitution is a

manifesto, by the leaders to the people, describing the society that exists and its institutions, and proclaiming its values, goals and aspirations . . . As regards individual rights . . . the constitution appears not to prescribe the rights that government must observe but rather sets forth rights which the government claims to be providing and promises to provide.

Consider the possibility that there is an account of constitutional legality that is both (a) more collectivist than those of western nations, and (b) consistent with “rule of law” ideals. If so, how would one assess whether a particular constitution conformed to the requirements of that account?

The 1982 Constitution goes further than its predecessors in identifying the Constitution as superior to other laws or decrees, i.e., in asserting the supremacy of the constitution. In addition, it provides, as had the 1949 constitution, for the “independence” of the people’s courts (the judiciary) and the procuratorates. But the 1982 Constitution, unlike the 1949, explicitly declared that the Supreme People’s Court was the highest court of the People’s Republic of China. 9 The Court is supreme as to matters of constitutional interpretation, and has the power to "interpret the Constitution and supervise its enforcement." 10

Cai Jingzhang, Constitutional Supervision and Interpretation in the People’s Republic of China, 9 Journal of Chinese Law 219 (1998). Cai Jingzhang emphasizes use of the term “constitutional supervision” instead of “constitutional review” because of “vast differences between the organizing political principles of China and West, and concludes that “in practice, constitutional supervision and interpretation has not effectively been carried out.”


9 Events surrounding the so-called “right of abode” case in Hong Kong arguably involved constitutional interpretation by the NPC Standing Committee of the provisions in the Basic Law for the Hong Kong Special Administrative Region. When the British returned Hong Kong to China, a Basic Law for Hong Kong was adopted by China. In the “right of abode” case, the Hong Kong Court of Final Appeals had initially ruled on that Basic Law to hold unconstitutional certain ordinances restricting the rights of mainland Chinese to live in Hong Kong. The interpretation sought and given by the Standing Committee effectively overruled that decision. For discussion, see Committee on International Human Rights, Association of the Bar of the City of New York, One Country, Two Legal Systems? The Rule of Law, Democracy and the Protection of Fundamental Rights in Post-Harborc Hong Kong, 56 The Record 325 (1999); Committee on International Human Rights, Association of the Bar of the City of New York, Interim Report on the Rule of Law, Democracy and the Protection of Fundamental Rights in Hong Kong, June 1999 to July 2002, 87 The Record 397 (2002). In 2004, the Standing Committee again adopted what has been viewed as a significant reinterpretation of the Hong Kong Basic Law relating to procedures for selecting Hong Kong’s chief executive and legislative council and for voting on bills. See M. Ulen, Killian, Post WTO China: (and Independent Judicial Review, 26 The Journal of the International Law Association 27 (1999). Killian distinguishes the power of the Standing Committee to interpret the constitution from the Supreme People’s Court’s more limited power to interpret laws and rules in actual cases, id. at 285.

10 But see Cai Jingzhang, at 283 (noting “one expert[s]” view that article 41 of the Constitution can be interpreted to mean that citizens have the right to make accusations of unconstitutional, and that China therefore should establish a system of constitutional litigation. Since 1989 there has been a procedure to challenge the validity of certain administrative acts. See Yang Sengnan, China’s Administrative Procedure System, China Law &政, at 81-83. Although a 2003 decision of the Supreme People’s Court was limited by virtue as a potential benchmark establishing a right to education (and a right to judicial review administrative government behavior), see Randal Packham, CHINA LAW & POLICY GUIDE RULES OF LAW 129 n. 119 (2002); Chris X. Lin, A Quiet Revolution: An Overview of China’s Judicial Reform, 4 Asian-Pacific Law & Pol’y J. 180, 197 (2003) (noting commentary that the decision was “China’s Machinery”), the Supreme People’s Court repudiated this interpretation in late 2008, see Donald Clarke, Supreme People’s Court withdraws Q Yueling Interrogation, (Jan. 13, 2009), at http://lawyersforce.typepad.com/china_law_prof/blog2009/01/supreme-people.html, illustrating the role of history in defining contested constitutional events.

In 2004, the 1982 Constitution was again amended; language was added concerning, inter alia, human rights, protection of private property, and supervision under law of repudiable sectors of the economy. See O’Malley & Myers LLP, CHINA LAW & POLICY, amending to the PRC Constitution (Mar. 28, 2004); ICL China Constitution, arts. 10, 11, 12 (effective amendments through March 14, 2004).
Zhu Suli, who was Dean of the Peking Law School at the time he wrote the following, asserts: "Sometimes [Chinese Communist Party] interference [with judicial decisions] represents and promotes a local population's particular understandings of what justice and fairness demand in the handling of a particular case... This kind of interference might actually be beneficial for a majority of Chinese who... seek justice and social solidarity... [From a] political perspective, it is hard to see why legal control over a case is always and necessarily more morally just or reasonable than political control. Why should a technocratic judicial determination always be superior to a political one?" Zhu Suli, The Party and the Courts, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 57 (Randall Peerenboom ed. 2010).

At least in its early years, the Chinese Constitution bore little relationship to the "rule of law" aspects of constitutionalism discussed previously. Why, then, was it adopted? Consider the following observation by a law professor at Peking University:

For several reasons, an unenforced constitution can still serve useful purposes in protecting the people's rights and interests. First and fundamentally, most governments care about their own image, and authoritarian governments are no exception. In fact, the outward image is all the more important to an authoritarian government, precisely because it lacks—and knows it lacks—democratic legitimacy as a basis for the confident exercise of power; this is especially the case where democracy is, purportedly, a vital part of its own ideology....

Non-compliance with the Constitution and the excessive abuse of unchecked power will cause hardships and tragedies for the common people, thus inciting massive social dissatisfaction and resentment and, eventually, tarnishing the government image. Unless, of course, the government is powerful enough to prevent any unfavorable news from becoming widespread. The government in China, like its totalitarian neighbor in North Korea, used to wield omnipotent power and took away virtually every freedom from its people; however, matters have dramatically changed over since it embarked on "reform and opening" (gaige kaifang) over three decades ago. During this time the media have undergone considerable liberalization, especially as China is interacting, now, with a world where national geographical barriers are effectively transcended by the internet. It is true that the Chinese government has never ceased in its effort to maintain a tight grip over the traditional media and upgrade its ability to control internet communications.... Still, few could gainsay that China's new media, as a whole, display a world of difference from the party's mouthpieces in the 1960s and 1970s; China today, is, undeniably, an information-rich, albeit content-biased society. Even though the local government has tried, consistently (occasionally at the behest of the central government), to conceal negative incidents of official corruption, social conflicts, and such calamities as mine explosions, environmental disasters, and scandals relating to poisonous food or adulterated drugs, for which the local officials will be held responsible due to their dereliction of duty, it has become increasingly more difficult to hide these truths from the people. In fact, almost on a daily basis, one easily can find on the internet reports of new incidents where fault is imputed to government officials. These frequent episodes cannot fail to pressure the central government to take some actions to restore its damaged image.

Second, it is not entirely accurate to picture an authoritarian regime as a narrowly selfish, purely self-preserving, and perpetuation. Although government officials are not elected, in any meaningful sense, neither are they completely isolated from the people, since every regime needs to replenish itself with new blood through certain mechanisms. [In China today, the government absorbs talent from academic, business, and professional elites. Additionally, virtually all important laws and regulations are the products of collaboration between the various governments and academics, and the latter are more familiar than ordinary people with Western models of governance. It is not to be denied, for example, that the central government and the social elites have been the active moving force behind most of the legal and constitutional achievements so far.]

Finally, although it is true that the government becomes more grousing when it comes to implementing these benevolent laws and the Constitution it enacted, this does not mean that those laws are utterly useless, only that their practical effects are largely offset by various quiriting factors that would be found unacceptable in a state committed to rule of law. Still, they do produce some beneficial effects, however small. If legally made claims are not effectively enforced, the presence of these laws, at least, lends moral force to the people whose interests they are supposed to protect and helps to illustrate to society at large that the government is acting in a wrongful manner. Particularly, in recent years, as the popular consciousness of the rule-of-law concept and constitutionalism has risen to the point where ordinary people begin to see the connection between the norms defined in these documents and their practical interests, they are learning to apply the Constitution and laws, consciously, for their own protection....

When the central government promulgates progressive laws and constitutional amendments, it comes under some degree of popular pressure to enforce the new norms. It is as if these new norms formed a compact between the government and the citizens, the breach of which would be viewed, widely, as wrong and treacherous. A new law may not come equipped with an effective implementation mechanism; still, it represents the normative consensus of Chinese society, insofar as this is reflected in the media, and against which the clock cannot be turned back. Once it enacts a new, benevolent law, the government enters a one-way street, as it were. It cannot repeal human rights, private
property, rule of law, or any other highly popular provisions of the Constitution without inciting major protests from the intellectuals, media correspondents, and other public commentators; it cannot repeal administrative litigation, information disclosure, procedural justice, or any other of the principles or mechanisms commonly seen as vital to the legal protection of citizens. Its only option is to enforce these provisions and mechanisms to its best capacity and, to the extent they are not enforced, the government is to be blamed.


Was the Chinese constitution a “sham”? Is it now? If it is based on a theory of constitutional loyalty more collectivist than those of western nations, can it nonetheless be a “rule of law” constitution? How would one judge its success? (Note that here, as elsewhere in this book, answering some of these questions requires a deeper knowledge of the country, its history, and legal system, than a coursebook can provide.)

Zhu Siqi asserts that the Chinese Communist Party “is a kind of alternative source of Chinese constitutionism.” Zhu, supra, at 57. If so, are the analytic tools of political science and organizational sociology more suitable than those of law for studying Chinese constitutionalism? And if they are, does that identify a difference in kind or only in degree between studying Chinese constitutionalism and studying constitutionalism in, for example, the United States or Great Britain?

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**NOTE ON THE ROLE OF INTERNATIONAL (OR EXTRA-NATIONAL) INFLUENCES ON DOMESTIC CONSTITUTION-MAKING OR INTERPRETATION**

While the focus of these materials is on constitutions and constitutionalism within nations, we have already referred to several situations (some occurring in other countries) in which extranational events strongly influence domestic constitutional matters:

i. Direct intervention by other nations to require adoption of particular forms of constitutions, as occurred in Germany and Japan following World War II;

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2) Many scholars are more cautious or skeptical. See, e.g., Preusswink, supra; Choo, supra; Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* (1999); see James V. Pickering, *The Rule of Law Impasse from the Outside China’s Foreign-Oriented Legal Regime since 1979*, in THE LIMITS OF THE RULE OF LAW IN CHINA (Karin G. Torret, James V. Pickering & K. Rent Gey eda, 2000) (noting “continued expression of domestic and human rights” and importance of developing a “law abiding government”).

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Section B

**CONSTITUTIONS WITHOUT CONSTITUTIONALISM**

ii. Adoption of constitutions as part of independence movements away from colonial status but under the influence of the prior occupying power’s legal regimes;

iii. Requirements of particular forms or aspects of constitutionalism as conditions for coveted membership in international bodies (as was arguably the case in some eastern European nations), or for receipt of international aid;

iv. Adoption of constitutional provisions, or stances on particular constitutional matters, to achieve specific international goals, as was arguably the case in Ireland’s response to “X” at the time the Mauntricht Treaty ratification was pending;

v. Adoption of constitutions, or constitutional provisions, to enhance national stature in the eyes of other nations (a) by demonstrating progress towards internationally acceptable legal norms and/or (b) by manifesting the full attributes of sovereignty;

vi. Direct application as law of international or extranational norms that constrain a domestic government’s powers, both by domestic organs of government and in international tribunals (as in the Irish dispute over prohibiting information about abortion services elsewhere);

vii. Incorporation of international treaties as of constitutional stature, within a domestic constitution, to help prevent human rights abuses, as in Argentina and Colombia.

viii. Creation of a constitution as part of a peace settlement following civil conflicts, substantially aided by international bodies;

ix. Efforts by other countries or international organizations to influence the domestic interpretation of an existing national constitution.

These phenomena raise several questions: Is the category of domestic, national constitutions an appropriate category for comparative study? Should the focus instead be on international norms and/or interventions in domestic constitution-formation? At a minimum, what we have encountered suggests the need to attend to international and extranational influences and incentives as part of the multiple realities in which constitutions and legal systems are situated, created and recreated. More specifically, how does the idea of entrenchment—a common theme in U.S. constitutionalism—relate to the idea that constitutional development may itself need to respond to international pressures? For additional discussion,

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CHAPTER IV

CREATING CONSTITUTIONS: CONSTITUTIONAL MOMENTS AND TRANSITIONS

Constitutions are "higher" law. In addition to creating the institutions of government, constitutions limit what those governments can do. In constitutional democracies, constitutions can preclude today's majority from doing what it prefers. Why today's majority should accept limitations placed on its power by yesterday's majority is a difficult question of political and legal theory, on which we touch only briefly in these materials. Assuming for present purposes that the answer lies in some concept of legitimacy, we explore here how constitutions gain legitimacy. We begin by describing a number of the processes by which constitutions have been adopted. Some of the questions these materials raise are: What is the relationship between crisis, extralegal behavior, and constitution-making? What is the relationship between coercive power and consent in establishing a constitution? And how is "consent" manifested, or determined? We then place the descriptive materials in more theoretical context. How do the different processes reflect or express popular consent (at the time of adoption, and afterwards) to constitutions? Are there some regularities in the processes that aid or impede a constitution's ability to become legitimate? The Chapter concludes with a note on problems associated with constitutional transitions as such—mainly, questions of restorative justice—and their relation to the establishment of constitutional legitimacy.

A. CONSTITUTIONAL LEGITIMACY: PROCESSES AND SUBSTANCE

Constitutions almost universally create procedures by which they can be amended. If the constitution itself is accepted by the public, amendments produced by the constitution's amendment procedures will almost inevitably be accepted as well. A constitution's amendment procedures can—at least in theory—be used to replace the constitution in toto. Typically, though, the amendment procedures are used to make discrete changes that leave most of the constitution's provisions in place. Why might the constitutional amendment processes in place be favored when large-scale constitutional transformations occur? Sometimes those processes seem too cumbersome to be used in the circumstances, which can include domestic crisis, military occupation,