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Introduction

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Introduction

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This symposium issue marks the fourth year of the New York Law School Comparative Law and Politics Workshop Series, together with the fifth annual conference of the U.S. Association of Constitutional Law, which co-sponsored the instant conference on Perspectives on Post-Conflict Constitutionalism.

In recent years, the New York Law School Comparative Law and Politics Workshop has been exploring globalism, conflict, and the rule of law from a comparative and interdisciplinary law and politics perspective. At present, there is hardly a more pressing topic than the democratization project and its relationship to the rule of law. In recent years, an important dimension of this inquiry is the potential for constitutionalism and constitution-making in the advancement of the rule of law in post-conflict situations. It is in this context that we convened the instant conference on post-conflict constitutionalism, giving rise to this issue.

This symposium appears at a critical juncture in Iraq. Will the current spiral of violence escalate to civil war and doom this experiment in democratization? Or, might the violence subside long enough to allow the forces of constitutionalism and rule of law to gain the upper hand?

Given the last half century's legacies of transitional justice, one might expect that fundamental political change would take some time, particularly given the general absence of democratization in the region. Indeed, we were digging our heels in for a long path of political development — the gradualism that characterizes transition, and the building and longstanding consolidation of democracy.

In this scholarly exchange on post-conflict constitutionalism, we had the benefit of some of the finest minds in the areas of transitional democracy building, comparative constitutionalism, and comparative politics. Each of the contributions to this symposium has a distinctive take on the risks and opportunities implied in post-conflict constitutionalism. The real question, one might say, is whether the very notion of “post-conflict” can plausibly be applied to Iraq, in light of what has happened on the ground since the convening of the conference. This in turn leads to reflection on what one might call the continuum of conflict — the sense that in contemporary conditions of conflict the classic threshold of war and peace is becoming unstable and problematized. Nevertheless, the constitutional context was couched in the prevailing frameworks, while attempting also to bring these to bear upon the current political realities both in the Middle East and elsewhere.

The authors' contributions explore the potential of the constitutional projects launched in Afghanistan and Iraq through the diverse lenses of the authors' particular interdisciplinary perspectives and expertise. A common ground lies in the recognition of the immense daunting project that is underway, and all question the direction of the road ahead, as well as the challenge posed for both politics and law. The evaluation of Afghanistan may well be somewhat more optimistic at the moment, given the security situation and riven state of Iraq.

The problem of legitimacy is pervasive: How does this play out for democratization in the Middle East? For Ulrich Preuss and Jean Cohen, the initial act of coercive force taints legitimacy from the very start, while other authors, J.

Alexander Thier and Andrew Arato, propose that other dimensions could confer elements of legitimacy.

Preuss' paper, *Perspectives on Post-Conflict Constitutionalism*, looks at the potential and costs of regime change through "external constitutionalism." By this, he means: Constitutional processes imposed, or sponsored from the outside of the country, are a form of interventionism of which he is highly skeptical.

Preuss gives historical, cultural, and political reasons of varying persuasiveness for his opposition to this constitutional project. Beginning with the historical analogues that have been invoked in support of the contemporary project, Preuss characterizes what he sees as a growing development, a paradigm of "constitutional interventionism," that he associates with globalizing politics. Perhaps, not surprisingly, the arguments for the constitutional reform of the Middle East often recur to the post-World War II period and its related wave of constitutionalism as the closest analogue.¹ However, Preuss argues these are distinguishable from the postwar precedents.

It would not be until the present moment, with the end of the Cold War and the freeing of its hard political constraints, that political space has been liberated for bold political projects, such as the democratization and constitutionalism in the Middle East. Nevertheless, despite that space, Preuss offers reasons for why the post-World War constitutions worked out; and, explores why, by the same token, these may well fail to offer a basis for similar reform today in the Middle East.

Preuss asks: What exactly is it that gives the German constitution, concededly initiated by occupation powers following a war and full defeat, its long lasting legitimacy?² What were the legitimacy-engendering processes? The answer, he puts forth, was, in great part, the involvement of the local populace in the constitution-making processes.³ Then Preuss raises the objection of "culture": He asks whether the constitutionalism associated with the last century is largely a "Euro-Atlantic" idea, which may not be apt to the contemporary project of harmonizing Islam with democratization.⁴ This said, he concludes by emphasizing globalization as a continued trend; and the extent to which the growing interconnectedness of states puts pressure on constitutionalism and the constitution-making process.

Preuss ends by proposing an alternative to unilateral coercive action: the involvement of the international community in post-conflict situations. For Preuss, international participation offers a better space for the evolution of constitutional development in the new globalizing realm.

1. See generally LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

2. Ulrich K. Preuss, *Perspectives on Post-Conflict Constitutionalism*, 51 N.Y.L. SCH. L. REV. 467 (2006-2007).

3. See, e.g., PETER MERKL, *ORIGINS OF THE WEST GERMAN REPUBLIC* (1963).

4. See NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (forthcoming 2007).

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The question is why? What gives these processes their legitimacy? Is it their multilateralism? Does this adequately compensate for other flaws?

This turn to internationalism and its principles resonates with the approach in this symposium pursued by Jean Cohen. Her paper, *The Role of International Law in Post-Conflict Constitution-Making*, raises the provocative question of whether, at the current post-Cold War moment, the relevant paradigm might well draw, not from domestic constitutional law, and comparative law and politics, but rather, from international law and, in particular, relate to the post-conflict and occupation status and related law. To what extent might the current political moment be characterized by the paradigm: from occupation to imperial law?

This goes right to the heart of international law's privileging of "preservation," i.e., *non*-transformation, and, to what extent the current project of political and constitutional reform, under occupation as in Iraq, may well be at odds with this non-transformation status quo-preserving view.

Indeed, the postwar period resulted in conventions that sought to commit to international stability and, accordingly, resulted in norms that sought to guarantee the protection of the status quo. Therefore, it is not surprising that, with the end of the Cold War and the lifting of its constraints, there has been a vital revisiting of these norms. The last decade's lifting of the hard political constraints associated with the Cold War opened a space not merely for liberalization, but also for ambitious political reform, and even forceful interventions, challenging the normative commitments entrenched in the postwar conventions.

As a result, the contemporary constitutional projects in the Middle East and Central Asia that are the subject of the symposium put pressure on the prevailing normative and legal assumptions. For these projects appear to be predicated on occupations that necessitate transformation, rather than the preservation of the status quo, and, therefore, risk collision with prevailing presumptions on the legality and legitimacy of the initiation of forced change.

These two directions — of political preservation versus transformation — appear normatively irreconcilable. Indeed, Cohen is critical of the project from the get-go. Going further than Preuss or Arato, it appears she would argue that these developments constitute a return to the imperialist project, and consequently favors retaining the prevailing "conservation" principle to regulate contemporary regime occupation.

Cohen's view seems to be premised on the notion that nothing of any relevant significance has changed; accordingly, she would support retaining the current legal system. Her essay exhorts for perpetuating the postwar international legal order.⁵

5. Jean Cohen, *The Role of International Law in Post-Conflict Constitution-Making*, 51 N.Y.L. SCH. L. REV. 497, 521 & n.119 (2006–2007).

My own view is that it is not at all clear that the legal norms can or ought to remain the same. Adhering to the preservationist view tends to idealize the postwar institutions and principles of the prior century, though these, too, are historically contingent, and reflect the political vicissitudes of their time. Moreover, in this regard, it is worth remembering that, even at the time, the norms generated more than one commitment; beyond the state system, the postwar period also gave birth to a new recognition of international human rights. Accordingly, insofar as the postwar period generated diverse institutions and processes devoted to the protection of these rights, this means that there is potential for collision of these norms: of protection of state sovereignty on the one hand versus the protection of individual rights.

Today's challenges, then, are different from those of the postwar period. In the present context, the protection of state sovereignty often vies with the protection of human and humanity rights. Deployed earlier in Kosovo and Rwanda, the humanitarian logic may seem to break down once we get to the engagements in Afghanistan and Iraq. Nevertheless, while the humanitarian intervention argument seems thin, in its application to contemporary situations, that does not make it illusory or irrelevant as a general matter. For it seems clear that, in the present, where post-Cold War politics are characterized by the potential for greater engagement and even forceful interventionism, it may well not be an answer to insist doggedly on adherence to state sovereignty as the preeminent norm in international affairs. To what extent can insistence on this principle adequately deal with the current contemporary phase of global politics?

Should there be a shift in the norm here, and to what extent? Will maintaining the "preservation principle" be less harmonious with current developments, particularly, given increasing emphasis in protecting individual human rights as well as people's humanity rights. For Cohen, changes in this direction are simply conceived as at cross purposes — in her view, meaningful political transformation must be initiated — not from outside the state — but by the people themselves.⁶

Moreover, the further problem down the road is, to whatever extent the prevailing principle of state sovereignty is changed, might that run the risk of sending a green light to the project of occupation and transformation, that is, of inviting a risky return to imperialism?

But isn't this arguably just an instance of a much more common dilemma associated with the complex meaning of rule of law during periods of political flux, and the related difficulty of adherence to it in present circumstances. Wherever legal processes are tinkered with, this would reflect procedural irregularities, but, would not per se render this bad law. The perception of legality would

6. *Id.* at 525 & n.137.

depend on whether there were other rule of law values being advanced at the time, and the extent to which these on balance advance transitional rule of law.⁷

Turning now to Andrew Arato's paper, *Post-Sovereign Constitution-Making and its Pathologies in Iraq*. Like Preuss, Andrew Arato's contribution to this symposium focuses on the issues raised by the role of constitution-making in Iraq. As someone involved with theorizing constitutionalism as well with the process on the ground, he lends a unique perspective on what went wrong.

Arato's view of the project does not just depend on the politics of occupation and the related coercion of the constitutional intervention, and so here he differs from Preuss. For Arato, the mere fact of the externalization of the constitutional impetus is not dispositive of the legitimacy of the constitutional project. Indeed, he suggests that there are a number of successful examples of what he characterizes as "a post-sovereign paradigm," a paradigm, as he defines it, characterized by the absence of any one body that can authoritatively speak for the people.

Here, Arato makes a distinct proposal for a "post-sovereign" paradigm of constitution-making, which includes: a multiple stage process, an interim constitution, and a freely elected, but non-sovereign constitutional assembly. These are the elements, which in his view could lay the basis necessary for legitimacy.

One might say that Arato's view reflects a liberal view of constitutionalism where hopes are vested in the establishment of political processes and constitutional procedures.⁸ It is expected that constitutional processes are the path to garnering legitimacy.

The notion of a "two-stage" process, which entails the disaggregating of different dimensions of constitution-making, is a child of the postwar experience, where initial constitution drafting processes were not open to the public while the subsequent stage was opened to a broader population, which became critical to the legitimation of the constitution.

What might the above offer regarding Iraq, and the democratic project in the Middle East? Not lessons — because of its political context — nor real analogies. Iraq raises squarely the question of to what extent can there be external imposition or jumpstarting of democracy: normatively — what is the legitimacy of this project? The problem arises out of the utter lack of the usual sources of legitimacy: for the constitution could not draw its legitimacy from the occupation. While the analogies are often made to postwar Germany and Japan, these post-conflict constitutional projects stood in a different historical light. Consider the postwar constitutions', in Japan, known as the MacArthur constitution, relation to military force. Like the postwar trials, these were forms of "victor's justice," yet the term implies a certain relationship of law to power and an implied authority. Iraq even lacks the authority of victor's justice and associated legitimacy.

7. RUTI TEITEL, TRANSITIONAL JUSTICE 11–26 (2000).

8. For this view regarding constitutionalism, see generally Frank Michelman, *The Supreme Court, 1985 Term: Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 75–77 (1986).

The Iraqi occupation reflects a different relation to military power — very little sense of consent — and in this regard it is distinguishable from the postwar constitutional project in Afghanistan.

Just when is the right time for a new constitution? Iraq raises the ongoing problem of “sequencing.” That is, in situations of diminished legitimacy — which ought to come first: constitutions or elections? Pursuant to the proposed multistage model, as was to be exemplified in Iraq, the idea was that there ought to be a two-stage process, first, involving the imposition of constitution drafting, followed by a freely elected constitutional assembly.

Yet, ultimately, for Arato, beyond the theory, the “operationalization” of this model in Iraq had its flaws. In its next part, Arato’s contribution goes on to identify what he characterizes as “pathologies.”

In his paper, Arato begins first and foremost with the role and ongoing dominance of the occupying power. That is, the absence of legality in the invasion, put pressure on the sense of legitimacy in the post-conflict period. Moreover, and related, is the destructive influence of the United States-occupying regime, particularly, through the harsh sanctions applied against the Iraqi state structures, and the extreme of de-Baathification, involving dissolution of the Iraqi army, and police which would end up tragically destroying the very entities that might have contributed some needed stability and legitimacy at the time of the country’s constitutional processes.⁹

The tragic loss of legitimation through needless destruction of state entities reflects the many errors of the occupation, and, in particular, the missteps as they relate to transitional justice. The miscarriage of transitional justice, particularly concerning the military, the police, and the civil service intersect and impact here, negatively, with developments in transitional constitutionalism.¹⁰

Other errors involved the illegitimacy of processes excluding important minorities, such as the Sunni, from the “second phase” constitutional assembly, which also contributed to the sense of domination from above, and a related lack of legitimacy. All of which put pressure on the constitutional project.

Arato’s account in this issue of the multistage constitutional process in Iraq illustrates just how difficult legitimacy is to achieve; while, conversely, just how easy to lose. Vivid construction of transition is necessary to draw a clear line distinguishing the past from the present. Yet, Iraq is also the symbol of a project. It may well be too soon to tell whether dimensions of these processes may ultimately have any long-range positive democratizing influence. And, of course, any evaluation might well depend on the parameters of the lens, and looking to the country within the region as opposed to questions of change in one or other

9. For elaboration upon this point, see Ruti Teitel, *Milosevic and Hussein on Trial: The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INTL. L.J. 837 (2005).

10. For the relation of administrative transitional justice and constitutional justice in political transition, see TEITEL, *supra* note 7, at 149–50, 185–89.

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country. While the contributors to this issue emphasized the many different issues implied in jumpstarting constitutionalism in regions where this would not have been otherwise on the agenda, Alexander Thier's contribution takes up yet another layer of issues which goes to the substantive role of constitutionalism in Central Asia. Afghanistan's in particular raises the substantive next-level set of issues relating to constitutionalism and constitution-making.

Thier's paper concedes the positive benefits of the process of constitution-making in Afghanistan. After all, just getting the representatives of such diverse groups into one room constituted an enormous achievement and a landmark in the country's political life. Nevertheless, probing beyond the process, Thier highlights the fault lines in the constitution itself, in particular, issues concerning functionality and accountability. In this regard, Thier suggests the constitution presents the potential for ramifications threatening to the rule of law. He highlights problems relating to the separation of powers that relate both to the judiciary and to the executive. Here, the Supreme Court's independence is of particular importance given the new authority that it has been given to interpret Islam.

An added troubling issue goes to the establishment of a presidential system in Afghanistan and its consequences for the rule of law. As experiences in Latin America over the last century reflect, presidentialist systems have, as a rule, presented challenges for checks and balances in states with weak democratic systems and therefore have been vulnerable to corruption. Therefore, in weak democracies, establishing a presidential system can create significant problems for political consolidation, as well as for the ultimate establishment of a rule of law system.

Moreover, there are also issues presented by the concentration of power in unstable systems, reflected in the new constitution's attempt to centralize power, against the backdrop of the provinces. This constitutional structure risks subverting processes of power sharing and negotiation.

Last, but not least, are questions regarding the contemplated role for Islam in the new constitution. More than before, Islam has been, in Thier's view, "thoroughly incorporated" into the new Afghani constitution which requires that laws not conflict with the "beliefs" and "provisions" of Islam.¹¹ Of even more concern, the power to interpret what this means lies with the Supreme Court, an unelected and therefore politically unaccountable body. The risks this structure raises are not only of assigning too great a power to the religious, and destabilizing the country along sectarian lines; but, also of fomenting a lack of accountability in an already unstable political system. This could threaten the processes necessary to consolidate democratization and the rule of law. The project raises

11. J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 556 (2006-2007).

issues which are currently a matter of substantial scholarly speculation about the nature of the potential for democracy and Islam throughout the Middle East.¹²

The authors bring to this pressing subject their considerable expertise and diverse perspectives, they critically assess the purposes and processes surrounding the post-conflict constitutionalism project. They also draw upon the significant country experiences in this latest wave of political and constitutional development. While the contingency of politics will doubtlessly shape the course of events in Iraq, the cautionary tale that emerges out of this symposium reflects the need for more systematic thinking about the grounds for the legitimacy of constitutional projects in contemporary global politics.

12. *See, e.g.*, Council on Foreign Relations Study Group: Islam and Democratization: Where Are We Headed?, http://www.cfr.org/project/1283/study_group.html (last visited Mar. 15, 2007).