CONTESTED SOVEREIGNTIES

Government and Democracy in Middle Eastern and European Perspectives

Edited by
Elisabeth Özdalga and Sune Persson

SWEDISH RESEARCH INSTITUTE IN ISTANBUL

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GOVERNMENT AND DEMOCRACY IN MIDDLE EASTERN AND EUROPEAN PERSPECTIVES

Papers presented at a conference organized by
the Swedish Research Institute in Istanbul
28-31 May 2009

Edited by Elisabeth Özdalga
Sune Persson

SWEDISH RESEARCH INSTITUTE IN ISTANBUL
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Front cover:
"Long live Sultan Abdulhamid Khan II; long live the constitution!"
Postcard celebrating the July 1908 revolution.
Atatürk Library (Istanbul Metropolitan Municipality)

Back cover:
Postcard showing Abdulhamid II on his way to Friday prayers
after the proclamation of the 1908 constitution.

Opposite:
The last page of the Swedish Constitution of 1809, including seal.
Swedish National Archives.

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Elisabeth Özdalga and Sune Persson
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Introduction

ELISABETH ÖZDALGA AND SUNE PERSSON

In 1996, the Swedish Research Institute in Istanbul organized a conference, followed by a publication, on the relationship between civil society and democracy.[1] In the wake of the then recent liberation of Eastern Europe from Soviet Communist rule, the political agenda was largely determined by the question of how civil society would recover after years of totalitarian dictatorship. In other parts of the world where people had experienced long periods of authoritarian rule, such as the Middle East, similar problems were high on the agenda.

The development of civil society will always feature prominently in discussions about democracy. Still, this should not eclipse consideration of the importance of the ruling institutions in a narrower sense. The manner in which basic constitutional and political rules are established, interpreted and applied is certainly an important matter. It is not difficult to find current examples in the Middle East of the significance ascribed to judicial and constitutional arrangements. These include recent developments in Pakistan, where the judges of the supreme court were first dismissed and later, in response to pressure from a major part of the legal profession, reinstated; in Afghanistan, after the fall of the Taliban, and in the efforts to construct a new polity; in Iraq, with the fall of the Ba'ath regime and efforts to devise a system of government that takes account of the complex ethnic composition of that country; and in the ongoing constitutional discussions in Egypt. As a matter of fact, every country discussed in this book offers a unique set of experiences: for instance, Lebanon, where power is distributed along confessional lines; Israel, which lacks a constitution altogether; Egypt, as a highly authoritarian and repressive presidential regime; and Morocco and Jordan, which have reform-oriented monarchies.

In Turkey, the use of the constitution as a tool in the struggle to strengthen the grip of the state elite (especially the military) over civil society has been apparent since the military coup of 1960 and especially since the take-over in 1980. The coup of that year, which "endowed" Turkey with its present 1982 Constitution, was meant to be the intervention to end all interventions, but gave rise instead to be a long drawn-out process of hidden military rule. It is that clandestine rule that democratic forces in Turkey are still trying to get rid of. The question is, what kind of constitutional reforms are needed? The question is also what kind of constitutional reforms are achievable and/or viable.

The task of designing and implementing a form of government that promotes human rights, liberty and democracy within an existing social and political sys-

1 Elisabeth Özdalga and Sune Persson, *Civil Society, Democracy and the Muslim World*, (London: Curzon, 1997).

tem is complex, to say the least. Each country and/or region requires its own analysis and/or solution. The formation of modern polities in most countries in Europe has a fairly long history: those countries have already achieved a kind of *modus operandi*, except, perhaps, in relation to the constitutional framework of the European Union, an issue highlighted at the end of this book.

However, for the countries in the wider Middle East, including North Africa, Iran, Afghanistan and Pakistan, the problems facing constitutional reform are especially urgent. Some problems are of more general or universal character, some of more specific character. It is especially the latter that this book seeks to address.

Explanatory analysis of existing dilemmas and weaknesses is at least as complex as focusing on practical implementation. Social, political and historical analysis is a prerequisite for good advice. However, historical explanatory analysis and policy-oriented analysis represent separate styles: explanatory analysis may be more sweeping and generalizing, while policy-oriented analysis has to be more specific.

The late British sociologist Philip Abrams, best known for his book *Historical Sociology*,[2] reserved a special place for Karl Marx's two long essays *The Class Struggles in France* and *The Eighteenth Brumaire of Louis Bonaparte*. According to Abrams, from the point of view of historical sociology this was Marxist analysis at its best. Abrams especially concentrated on *The Eighteenth Brumaire*. What was laudable about Marx's investigation of the reasons for the failure of the 1848 Revolution was its successful integration of three levels of action and structure: day-to-day political events (speeches, debates, appointment and dismissal of ministers, arrests, proclamations, etc.); the political structure, formalized in the written republican constitution, which simultaneously reflected the interests and power of the liberal ("progressive") bourgeoisie and undermined it; and the social structure as a whole, namely the power balances between the main social classes – the bourgeoisie, or its various fractions, the peasants and the proletariat. Especially the analysis of the French peasants, who were compared to "potatoes in a sack," has gone down in history. Due to their lack of organization, the peasants were incapable of promoting their own class interests.

> They cannot represent themselves, they must be represented. Their representative must at the same time appear as their master, as an authority over them, as an unlimited governmental power that protects them against the other classes and sends them rain and sunshine from above. The political influence of the small-holding peasants, therefore, finds its final expression in the executive power subordinating society to itself.[3]

To be sure, *The Eighteenth Brumaire* contains more than this celebrated class analysis. It also includes an analysis of the 1848 constitution, which is especially noteworthy in the present context. A particularly vulnerable element in this document was the relationship between the legislative assembly, on the one hand, and the president (the executive power) on the other. Montesquieu's famous theory of the separation of powers had here been so exaggerated that it had given rise to an intolerable contradiction.

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2 Philip Abrams, *Historical Sociology,* (London: Open Books, 1981).

3 Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte,* (Moscow: Progress Publishers, [1934] 1972), pp. 105-6.

> On one side … a National Assembly that enjoys legislative omnipotence, decides in the last instance on war, peace and commercial treaties, alone possesses the right of amnesty and, by its permanence, perpetually holds the front of the stage. On the other side is the President, with all the attributes of royal power, with authority to appoint and dismiss his ministers independently of the National Assembly, with all the resources of the executive power in his hands, bestowing all posts and disposing thereby in France of the livelihoods of at least a million and a half officials and officers of every rank. He has the whole of the armed forces behind him. He enjoys the privilege of pardoning individual criminals, of suspending National Guards, of discharging, with the concurrence of the Council of State, general, cantonal and municipal councils elected by the citizens themselves.[4]

The constitution was built on an inconsistency, thereby preparing the way for its own collapse. In Marx's striking imagery: "Such was the Constitution of 1848, which on December 2, 1851 [Louis Bonaparte's *coup d´état*] was not overthrown by a head, but fell down at the touch of a mere hat; this hat, to be sure, was a three-cornered Napoleonic hat."[5]

During the 19th century, France was a rarity in Europe, being organized as a republic. However, it was a regime marked by great instability and plagued by incessant political crises: there have been 16 constitutions since the 1789 Revolution, two of them since the Second World War.

To be sure, the most sophisticated contributions to the establishment of the modern political systems were not made by Marxists. Their focus was – as is well known – on how to overthrow the system, not how to reform it. Consequently, both in theory and in practice, modern democratic systems have their roots in the liberal-conservative (with the emphasis on liberal) tradition. The visionaries in this respect were philosophers and practitioners such as John Locke, Montesquieu, Jean-Jacques Rousseau, Alexis de Tocqueville, Thomas Jefferson, John Stuart Mill and others. When it comes to visualizing and explaining political systems in a socio-historical context, Marx was not the forerunner: in his predecessor Montesquieu and *The Spirit of the Laws* he had a good example to follow.

We may know about the isolated peasants in France, unable to represent themselves, but, how much do we know about the dynamics of tribal relationships in today's Iraq, Afghanistan and Pakistan? Or how much information do we have for the Middle East on income distribution, class antagonisms, political parties, voluntary organizations and other civil society organizations, the role of universities and the media, local governments – in short, all those issues and power groups that shape society and the state? The authors of this book have sought to be mindful of these intricate historical and sociological realities and/or relationships *in tandem* with their analyses of particular political and judicial institutions, regulations and practices. In so doing, they have also accomplished a very important task.

Outline of Book

The main focus of this work is Turkey and the Middle East. To this we have added two contrasting cases, Sweden and the European Union. Sweden is interesting in that it had the second oldest constitution in the world (after the US), in

4 *Ibid.*, p. 24.

5 *Ibid.*, p. 26.

effect between 1809 and 1974. Also noteworthy is the fact that Sweden has remained a monarchy despite long years of social democratic rule. At one level, this volume is a reminder and celebration of the 200th anniversary of the Swedish Constitution of 1809.

The EU is important in that it is heading towards a constitutional transformation that transcends the institutions of the nation-state. With its supranational aspirations and institutions, it represents a new stage in the history of constitutions. This venture is already relevant to Sweden and might soon also be to Turkey.

The first part of this work is made up of four chapters on Turkey. Ergun Özbudun, professor of constitutional law at Bilkent University in Ankara and one of the members of a government-appointed council commissioned to propose a new constitution for Turkey, delineates the basic problems and/or inner contradictions of the present 1982 constitution. The second chapter is by Levent Köker, professor of law at Atılım University in Ankara and also a member of the constitutional council. He discusses the Turkish constitutional crisis by focusing on the concept of sovereignty and the disagreement between political and judicial elites over its meaning. Thirdly, there is the chapter by Vangelis Kechriotis, historian from Boğaziçi University in Istanbul, which focuses on the 1908 Revolution. Constitutional forms of government have been on the Turkish political agenda since 1876. The revolution of 1908 represented a breakthrough in political reform, ushering in a constitution, political parties, elections, freedom of speech and safeguards for civil rights. The author discusses various interpretations of these developments. After years of oblivion, the 1908 Revolution has re-emerged as an important reference point for today's political and constitutional reformers.

In chapter 4, Ilkay Sunar, professor of political science at Bahçeşehir University in Istanbul, considers the significance of cultural differences for EU membership. He then discusses how this issue has been tackled in relation to Turkey's application for admission as a future member.

Chapter 5 is by Olof Petersson, professor of political science at the Centre for Business and Policy Studies in Stockholm, and deals with the already mentioned Swedish constitution of 1809. The author addresses two main issues: the historical roots of the constitution and the impact of the constitution on the development of democracy.

Swedish modern history, known for its relative absence of violent ethnic, religious and/or social conflict, undeniably contrasts with the situation in the post-war Middle East. As part of its sometimes desperate efforts to cope with the predicament posed by weak authoritarian states – states that are even on the brink of becoming failed states – the international community has tended to cling to various legal arrangements. The question raised in the following chapters relates to what has been – or can be – done to transform the process of deep-going political destabilization into some kind of democratic institution-building through constructive legal arrangements.

Dipali Mukhopadhyay, PhD candidate at Fletcher School of Law and Diplomacy, Tufts University, analyzes Afghanistan through the prism of political theories originating in the study of state formation in Western Europe. The social conditions underlying the state-building process in Afghanistan are decidedly different from those in Western Europe, but conceptually and methodologically the model is helpful in structuring a historical process, which is otherwise

difficult to discern. The author starts with an analysis of the early days of the Afghan monarchy and brings the analysis up to the election of 2009.

The following chapter on Pakistan is set within a policy-making context. More exactly, this contribution by Staffan Darnolf, Senior Election Advisor (International Foundation for Electoral Systems, IFES), draws closely on his professional experiences in the field. It is against the background of the author's close connections with state officials and common people that he describes the flawed record of democracy in Pakistan and the recurring and prolonged military interventions. The author describes how these military coups have played a key in the failure of democratic constitutions to permeate Pakistani society.

Chapter 8 compares the two neighbouring adversaries, Iran and Iraq. Sami Zubaida, professor emeritus in the School of Politics and Sociology at Birkbeck College in London, focuses his analysis on the existence of a "constitutional memory," which has played an important part in the political history of Iran. The constitutional revolution of 1906 was an important episode in the emergence of the actors and interests in the history that followed. According to the author, the notion of the constitution also played an important role during the formation of the Islamic Republic after the 1979 Revolution. In Iraq, where this "constitutional memory" has been lacking, the successive constitutions in the 20th century were largely a dead letter, subject to the arbitrary decision of the ruling regimes. The institutions of politics, government and society were regularly bypassed in favour of personal networks. However, constitution-making was given new meaning after the invasion of 2003.

The next chapter deals the Lebanese system, perhaps the regime most thoroughly debated by international scholars and in the media. Elizabeth Picard, professor of political science at CNRS, Aix-en-Provence, analyzes the impasses that have beset this "consociative democracy." Ever since the mid-19th century, administrative and political functions have been divided along sectarian lines. This sensitive balance has been difficult to maintain in the face of the continuous transformations of the Lebanese social and economic structure. The author discusses various solutions to the present predicaments.

Chapter 10 is by Sune Persson, associate professor of political science at Gothenburg University and co-editor of this volume. It contains an analysis of Israel and Palestine, both as two separate cases but also as two fatefully intertwined systems. The State of Israel has no written constitution. The main obstacle has been disagreement over the very fundamentals of the state. Should it be a secular state on the liberal European model, or should it have a *Jewish* character, defined in religious terms and specified in the constitution? The State of Palestine, on the other hand, has never materialized on Palestinian ground. The Palestinian Basic Law has remained a dead letter. The author discusses various explanations for this development. He also describes how Israel as well as Palestine have retained the British Mandate's Emergency Regulations from 1945. These regulations give to Israeli as well as to Palestinian ruling authorities wide powers to circumscribe the human and political rights of their two citizenries.

Because of the refugee situation and the ethnic affinity between Jordanians and Palestinians, Jordan and Palestine can be regarded as sister systems. Jordan has remained a monarchy, but the monarchy has ambitions to modernize by implementing democratic reforms. In Chapter 11, Ann-Kristin Jonasson, political scientist at Gothenburg University, analyzes the pros and cons of this politi-

cal system. Despite various initiatives to promote social and political reform, Jordan remains an authoritarian state. In her analysis of this and other dilemmas, the author places special emphasis on the electoral system.

Chapter 12, on Egypt, is written by Chaymaa Hassabo, PhD candidate at the Institute of Political Science in Grenoble and Researcher at CEDEJ in Cairo. This is a blistering critique of President Hosni Mubarak's initiatives to change the Egyptian constitution. Recent amendments, such as those in 2005 and 2007, have changed the election system to make it more "pluralistic," meaning opening the political field for competition between several candidates. The author argues that this pluralism has not led to progress in the development of democracy, but, rather, the reverse.

Chapter 13 deals with Morocco and is the last on the Middle East. Morocco is interesting in combining a monarchy with reform policies that have some liberal elements. Florian Kohstall, political scientist at Institut de recherches et d'études sur le monde arabe et musulman (IREMAM), Aix-en-Provence questions the idea that King Mohammed VI, who assumed on the throne in 1999, is the main architect of these reforms. The author argues instead that social reforms in Morocco are the result of a complex interplay of social and political factors, including the king.

The last chapter deals with transnational constitutionalism, specifically forms of government encompassing the whole family of EU nation states. Sverker Gustavsson, professor of political science at Uppsala University, compares the notion of constitutionalism in a national and transnational EU context. The author maintains that in the national context *procedures* for choosing a new parliament and an alternative government were politically neutral. National constitutions also contained rules about elementary civil rights such as freedom of organization, religion and information. In the transnational EU context, however, the meaning of constitutionalism has changed. In this case, it also imposes a collective straightjacket on the *content* of public policies. The transnational constitutional framework offers a way to constrain social and economic policies that are not in accordance with the general principle of the market economy. In practice, the constitution of the EU is not as predictable as it should be according to the principle of the rule of law. The author aptly elucidates the meaning of the EU "living" constitution in force and the ways in which this particular system is defended and criticized.

TURKEY

Turkey's Constitutional Problem and the Search for a New Constitution

ERGUN ÖZBUDUN

Most observers, Turkish and foreign alike, acknowledge that Turkey has a constitutional problem. It is paradoxical that Turkey, after more than six decades of competitive multi-party politics, has not been able to consolidate fully its democratic regime, and in this regard lags behind some of the newer, "third wave" democracies such as the three Southern European countries (Spain, Greece, Portugal) and many Eastern European democracies. The immediate blame for this failure may be laid at the feet of the constitution of 1982, the product of the military regime of 1980-83 (the National Security Council, NSC regime). The military rulers of this period blamed what they saw as the excessive liberalism of the 1961 Constitution for the breakdown of law and order in the late 1970s. Consequently, they set out to make a constitution in that would strengthen the authority of the state at the expense of individual liberties and to create a set of tutelary institutions that would exercise strict control over the elected civilian authorities. This meant a considerable narrowing of the legitimate area of democratic politics. It has often been observed that the primary goal of the 1982 Constitution was to protect the state against the actions of its citizens, rather than to protect the citizens against the encroachments of the state, which is what a democratic constitution should do.

It is no wonder that the 1982 Constitution, devised through entirely undemocratic and unrepresentative procedures that left the final say to a five-member military council, led to a constant wave of criticism and demands for change as soon as civilian authority was restored in the fall of 1983. Consequently, the constitution has undergone 15 amendments since 1987, some major, others minor. The general trend of constitutional change has, no doubt, been towards liberalization and democratization, so much so that the EU Commission observed that Turkey "has sufficiently satisfied the Copenhagen political criteria," thus opening the way for accession negotiations to commence at the beginning of 2005. It is commonly admitted, however, that such reforms were not sufficient to completely eradicate the authoritarian, statist and tutelary legacy of NSC rule.[1]

On the other hand, it would be a simplification to blame Turkey's constitutional problems entirely on the NSC legacy. As I have tried to explain elsewhere

1 For details, see Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution-making in Turkey,* (Budapest and London: Central European University Press, 2009); Ergun Özbudun and Serap Yazıcı, *Democratization Reforms in Turkey, 1993-2004,* (Istanbul: TESEV Publications, 2004).

in greater detail, deeper problems can be found in the incompatibility between the requirements of a truly liberal democracy and some of the principles of the founding philosophy of the republic (Kemalism).[2] Notably, three principles (nationalism, populism and secularism as understood during the single-party period) still create obstacles to the development of a genuinely liberal and pluralistic political system. Turkish nationalism, while never racist, nevertheless carried ethnicist overtones. Thus, the Republican People's Party (RPP) programme of the 1930s and 1940s defined the nation as a "body of people united in language, culture, and ideal." The insistence on linguistic and cultural unity and the goal of creating an extremely homogeneous society make it difficult, even today, to recognize a legitimate space for cultural and linguistic diversity, and thus lie at the root of Turkey's Kurdish problem.

Similarly, populism as defined in this period was clearly synonymous with corporatist and solidarist ideologies that rejected class struggle and entrusted the paternalistic state with the duty of harmonizing the diverse but compatible interests of occupational groups. Another ideological principle of the RPP, statism (or *étatisme*), was seen as a method of accomplishing such harmonization.[3] Secularism was understood not as the separation of governmental and religious spheres, as in most Western democracies, but as a total way of life and a totalistic positivist ideology that aimed to consign religion solely to the conscience of individuals and to deny it a legitimate role in the public sphere. As a corollary of this revolution from above, the state elites that spearheaded the Kemalist revolution have maintained a paternalistic and tutelary attitude towards civilian democratic politics, coupled with a deep distrust of civilian political actors. The Kemalist ideology and this tutelary mentality are strongly reflected in the 1982 Constitution, as will be spelled out below.

The 1982 Constitution is full of references to Kemalist ideology, particularly to its three pillars: Turkish nationalism, secularism and a unitary and highly centralized state. Regarding the last, the territorial and national integrity of the state, or "the indivisible unity of the state with its territory and nation" in the words of the constitution, is repeated 16 times in the document. This phrase can be and has been used as a constitutional pretext against the claims for cultural recognition by linguistic, ethnic and religious minorities, as is particularly evident in the Law on Political Parties that prohibited ethnically and religiously based parties. Commitment to secularism is equally strong: Article 24 of the constitution states that "no one shall use and abuse in whatsoever manner religion, or religious sentiments, or things deemed sacred by religion with the aim of even partially basing the fundamental social, economic, political, or legal orders of the State on religious rules or of obtaining political or personal benefit or influence."

The statist philosophy of 1982 Constitution is also observed at a more symbolic, but no less significant, level. The preamble of the constitution idealized the state (always spelled with a capital "S") by describing it as the "sacred Turkish State" (deleted in 1995). Paragraph 2 of the preamble still refers to the "Sublime

2 Ergun Özbudun, "Turkey: Plural Society and Monolithic State." Paper presented to the conference on Democracy, Islam, and Secularism: Turkey in Comparative Perspective, 6-7 March 2009, Columbia University, New York.

3 For a comprehensive study on this point, see Taha Parla and Andrew Davison, *Corporatist Ideology in Kemalist Turkey,* (Syracuse: Syracuse University Press, 2004).

Turkish State." Also reminiscent of the solidarist-corporatist discourse of the 1930s are the terms "societal peace" and "national solidarity" referred to in the unamendable Article 2.

More importantly, the 1982 Constitution's statist-solidarist-tutelary philosophy is not limited to such abstract and philosophical notions, but is supplemented by a carefully designed and elaborate tutelary mechanism. Chief among these is the Office of the Presidency of the Republic. This office was designed to be impartial and above party, controlled by the state elites, with extensive supervisory powers over civilian politics. Through his broad powers of appointment, the president was expected to influence the composition of other tutelary agencies such as the Constitutional Court, other elements of the higher judiciary and the Board of Higher Education (YÖK).

It is pertinent to remember here that General Kenan Evren, leader of the 1980 coup, had himself elected as the president of the republic for a period of seven years (1982-89) through a procedure whose democratic legitimacy was extremely questionable. Thus, the election of the president was combined with the constitutional referendum, and a yes vote for the constitution also meant a yes vote for Evren, the sole candidate. Evren frequently declared himself to be the guardian of the new constitution. Apparently, it was hoped that after his term of office, the new president would also be someone acceptable to the military from the Nationalist Democracy Party created by the NSC and expected to win the transition election of 1983. The unexpected electoral victory of Turgut Özal and his Motherland Party (ANAP) changed this picture somewhat, and the two presidents who succeeded Evren, Turgut Özal (1989-93) and Süleyman Demirel (1993-2000), were civilian politicians and the leaders of their respective parties. However, the tutelary role of the president remained embedded in the constitution, and Ahmet Necdet Sezer (2000-07), the former president of the Constitutional Court and a compromise candidate among political parties, used his tutelary powers even more often and more eagerly than General Evren, thus leading to frequent friction with both the coalition government of Bülent Ecevit and the AKP (Justice and Development Party) governments of Tayyip Erdoğan. The latter was also in constant conflict with the Constitutional Court and the Board of Higher Education, both strongly influenced by Sezer's appointments.

Another important tutelary agency is the National Security Council, first created by the 1961 Constitution but substantially strengthened in its 1982 counterpart. Before the constitutional amendment of 2001, military and civilian members were represented in equal number on the Council, assuming that the president of the republic who presides over the Council is a person of civilian background. Furthermore, under Article 118 of the constitution, the Council of Ministers had to give "priority consideration" to the recommendations of the NSC. The 2001 constitutional amendment gave civilian members a majority and underlined the advisory character of the NSC's recommendations. The amendment was accompanied by changes in other laws, particularly in that on the NSC secretariat. The net effect of these reforms was a significant degree of civilianization of the political system. Yet it is no secret that the military still enjoys much greater power and influence compared to the military in any consolidated democracy and much beyond what the letter of the constitution and the relevant laws suggest.

The experience of other democratizing countries suggests that the removal of such vestiges of military regimes, or "exit guarantees," is not impossible in the

long or even medium run. Two important and interrelated factors affecting the long-term viability of exit guarantees are the probability of a new military coup and the degree of unity or disunity among civilian political forces with regard to the military's role in politics. In this sense, a credible threat of a coup fundamentally alters the expectations and calculations of civilian political actors, leading them to act in ways that detract from democratic consolidation – such as seeking alliances with the military or inviting them to intervene. The second factor is also very important because disunity among civilian political forces over the proper role of the military gives the latter a powerful incentive to intervene in politics and to attempt to maintain or increase its political influence. Commenting on the Latin American experience, Agüero observes that "by failing to display a united front, civilians have shown no common understanding of the obstacles which the military present for the prospects of democratic consolidation. A critical deterrent against the military, which would increase the costs of military domestic assertiveness, is thus given away, opening up civilian fissures for utilization by the military."[4]

This analysis seems to fit the present Turkish case. The complete civilianization of the regime and the elimination of other tutelary features are obstructed by a numerically not so large but politically strong coalition of civilian forces such as the main opposition party, the CHP (Republican People's Party) the Constitutional Court, the higher judiciary, an important part of the mainstream media and academia. The uniting factor is their deep attachment to the Kemalist legacy and their fear that the present governing party, the conservative AKP, may lead the country towards an Islamic regime.

Where such deep societal division exists, it is difficult to expect the normal functioning of democratic institutions. Thus, the AKP government has had to face not only the parliamentary opposition, but the opposition of many state institutions, including the former president, Ahmet Necdet Sezer (until the end of his term in August 2007), the military, the Constitutional Court and the higher judiciary in general, and, until quite recently, YÖK. Of these state institutions, the Constitutional Court deserves special attention since in recent years it has become an active participant in the ongoing political conflict. The Turkish Constitutional Court was established by the constitution of 1961 as one of the earliest and strongest Constitutional Courts in Europe. The court was designed by the architects of the 1961 Constitution (essentially, the state elites and their representatives, the CHP) as a mechanism of self-protection against the unchecked power of elected parliamentary majorities (at that time represented by the Democratic Party). As such, it was viewed as the guardian of the fundamental values and interests of the state elites and their Kemalist ideology.[5] The 1982 Constitution, also the product of the state elites, did not significantly change the powers of the Constitutional Court.

It can be argued that in its practice over close to a half century the Turkish Constitutional Court has behaved essentially consistently with the expectations

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4 Felipe Agüero, "The Military and the Limits to Democratization in South America," in Scott Mainwaring, Guillermo O'Donnell, and J. Samuel Valenzuela (eds), *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective,* (Notre Dame: University of Notre Dame Press, 1992), p. 177.

5 Ergun Özbudun, "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy," *European Public Law* 12, 2 (June 2006): 213-23.

of the state elites that created and empowered it. In other words, it has acted as the guardian of the two basic pillars of the Kemalist ideology, the national and unitary state and the principle of secularism. In contrast with practice in most Western states, fundamental rights and freedoms of the individuals were afforded lesser importance when they seemed in the eyes of the Constitutional Court judges to conflict with these values. A Turkish constitutionalist has described this attitude of the Constitutional Court as representing an "ideology-based" paradigm in contrast to a "rights-based" paradigm.[6]

The state-oriented attitude of the Constitutional Court can most clearly be observed in cases involving the prohibition of political parties. The court has consistently closed down Kurdish ethnic political parties through an extremely rigid interpretation of the constitution and the Law on Political Parties. The court's attitude towards the allegedly Islamist parties has been no more tolerant. So far, the court has closed down five parties on account of their alleged anti-secular activities. These are the National Order Party (20 May 1971), Turkey Peace (Huzur) Party (25 October 1983), Freedom and Democracy Party (23 November 1993), Welfare Party (16 January 1998) and the Virtue Party (22 June 2001). More recently, the Constitutional Court refused to close down the AKP, but ruled that it had become a focal point of anti-secular activities and deprived it of half its state subsidies.[7] In these decisions as well as in others related to secularism, the Constitutional Court defined secularism not as the simple separation of the state and religion but as a total philosophy, a way of life, reminiscent of Comteian positivism and scientifism.

Thus, despite the democratizing reforms of the 1990s and 2000s, Turkey has not been able to raise its democratic and human rights standards to the level required for full EU membership. One of the fundamental deficits concerns the Turkish rules and practice regarding the prohibition of political parties. As recently observed by the Venice Commission of the Council of Europe (the Commission for Democracy through Law)[8] there is still a wide gap between Turkish constitutional and legal rules on party closures and the general (or best) European practice in this regard. The Commission observes that:

> the most striking feature of the Turkish rules on party closure is that they combine a very long list of material criteria for prohibition or dissolution with a very low procedural threshold … The basic problem with the present Turkish rules on party closure is that the general threshold is too low, both for initiating procedures and for prohibiting or dissolving parties. This is in itself *in abstracto* deviating from common European standards, and it leads too easily to action that will be in breach of the ECHR, as demonstrated in the many cases before the European Court of Human Rights. (paras. 30 and 107)

The Commission also observes that because of such low material and procedural thresholds:

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6 Zühtü Arslan, "Conflicting Paradigms: Political Rights in the Turkish Constitutional Court," *Critique: Critical Middle Eastern Studies* 11, 1 (Spring 2002): 9-25.

7 Constitutional Court decision, E. 2008/1, K. 2008/2, 30 July 2008, *Resmi Gazete* (Official Gazette), 24 October 2008, no. 27034.

8 Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, Venice Commission, adopted at its 78th Plenary Session, Venice, 13-14 March 2009, CDL-AD (2009)006.

> ... what should be an exceptional measure functions in fact as a regular one. This reduces the arena for democratic politics and widens the scope for constitutional adjudication on political issues. The scope of democratic politics is further eroded by the constitutional shielding of the first three articles of the Constitution, in such a way as to prevent the emergence of political programmes that question the principles laid down at the origin of the Turkish Republic, even if done in a peaceful and democratic manner. (para. 108)

The report ends with an invitation to Turkey "to make the necessary amendments to the national constitution and legislation" to "raise the general level of party protection in Turkey to that of the ECHR and the European common democratic standards" (paras. 111, 112).

Certainly, Turkish rules on the prohibition of political parties do not exhaust the area of democratic deficit. Restrictions on freedom of expression; reluctance to broaden cultural rights for linguistic minorities; discriminatory practices against the heterodox Alevi minority; over-politicization of the judiciary; and, above all, civil-military relations are other obstacles in the way of full democratic consolidation. It seems difficult to address all these issues by way of piecemeal constitutional amendments, as has been attempted in the past with only moderate success. The total liquidation of this authoritarian legacy will be possible only with the making of a new and truly liberal and democratic constitution that will reflect the democratic aspirations of a large majority of the Turkish people.

Contesting "Sovereignty": Turkey's Constitutional Problem in the Light of New Conceptualizations

LEVENT KÖKER

Since April 2007, Turkey has been experiencing a series of political crises within and about a constitutional-legal system, an outcome of which is a heated public debate over the need for a new constitution. To be sure, not only the need for, but also the characteristics of the new constitution have given rise to deep controversy. The crucial question is whether the existing legislature, the Turkish Grand National Assembly (TGNA), more specifically the TGNA after the July 2007 elections in which the Justice and Development Party (AKP) gained a majority and almost enough seats to change the existing constitution, is capable of drafting a new constitution.

The basic reason for the emergence of this crucial issue has been what one may describe as the judicial activism of the Turkish Constitutional Court (TCC). In a recent decision on the unconstitutionality of amendments to Articles 10 and 42, allegedly intended to lift the ban on women's headscarves in institutions of higher education, the TCC extended its jurisdictional scope beyond any reasonably acceptable understanding of judicial discretion. Despite the explicit clause in the constitution stipulating that the powers of the Constitutional Court in reviewing amendments are restricted to formal procedural rules, TCC decided to assess first the substance of the amendments. Relying on its previous decisions in 1989 and 1991, the court decided that the amendments aimed at lifting the ban on headscarves in higher education would violate the unchangeable principle of secularism and were thus unconstitutional.[1] Less than two months later, the TCC ruled that the AKP had become "the centre of anti-secularist activities," but, instead of closing down the party, decided to cut the state financial support AKP enjoyed.[2] As one can easily discern by reading the indictment, the most powerful

1 According to the Turkish constitution, the competence of the Constitutional Court to decide on the unconstitutionality of constitutional amendments is restricted to only the three procedural rules mentioned in Art. 153. In this case, however, TCC decided first that the amendments, contrary to the wording, aimed at lifting the ban on wearing headscarves in institutions of higher education. Lifting the ban, TCC ruled in 1989 and 1991, violates the principle of "laïcism." On the basis of its own jurisprudence, the TCC therefore decided that the amendments aimed at indirectly changing the unamendable elements of the Turkish Constitution (Art. 4). For the full text of the decision (No. 2008/16, 5 June 2008): http://www.anayasa.gov.tr/eskisite/KARARLAR/IPTALITIRAZ/K2008/K-2008-116.htm.

2 Both the chief prosecutor's allegations and the TCC decision were mostly based on the attempt at amending the constitution to lift the ban on headscarves.

support for the allegations against the AKP arose from its attempt to change the constitution by lifting the ban on headscarves.

So far, it might be argued that the TCC has provided another example of judicial activism[3] and its decision in the closure case is consistent with its previous judgments on related issues. Given, however, the court's very activist involvement in the presidential elections of April 2007 and its halting, in explicit violation of the limits on its powers, of the parliamentary elections then taking place, the political nature of these decisions has to be considered. This decision coincided, not surprisingly, with the social and political polarization resulting from AKP control of the legislature and the executive. The TCC's legally unjustified activism has shown striking parallels with the criticisms not only by the Republican People's Party (*Cumhuriyet Halk Partisi,* CHP), the main opposition party in parliament, but also the views and even the "directives" of the then president and the chief of general staff. At a time when the civilian and military bureaucracy have been expressing their suspicions about AKP's "hidden agenda" to undermine the secularist republic and when social mobilization has been under way in this respect, TCC's judicial activism has come to mean that the court has assumed the role of a "Republican guardian."[4]

All this means that if Turkey needs either to change its constitution or make a new one, this can be accomplished only by bypassing the TCC. One may argue that TCC cannot act at its own discretion, and, in reference to the role of the TCC in the political system, point to the relative significance of the political support behind such judicial processes.[5] Be that as it may, given the reluctance of the main opposition party concerning any constitutional change and the recent congruence in the views of that party and the TCC, the fact that the TCC cannot take action of its own accord becomes insignificant.

In the public debates over the role of the TCC, the heart of the matter is who has the final say in legal and political issues, and it should be evident that the question is directly linked to the notion of sovereignty. AKP and its supporters, reflecting the traditional stance of the Turkish political right in equating national sovereignty with the will of the majority in parliament, emphasized the superiority of the legislature vis-à-vis the judiciary, which, in their opinion, represented the guardianship of the bureaucratic elite (or "state elites"). CHP and its supporters, on the other hand, emphasized their understanding of AKP as a political organization aiming to undermine the republic's secularist foundations. Further support for the anti-AKP view has been provided by an alternative definition of national sovereignty as embodying three different branches of government, the legislative, executive and judiciary. In this view, the judiciary's role is to protect the fundamentals of the republican constitutional order against violations of any sort, including the actions of the TGNA. Against the background of these conflicting views of national sovereignty and the limits and scope of the constitution-making powers of the

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3 For a thorough discussion of judicial activism and the TCC, see Bakır Çağlar, "Parlamentolar ve Anayasa Mahkemeleri, Teori ve Pratikte Anayas Yargısının Sınırları Problemi," *Anayasa Yargısı*, 3 (1986): 137-87.

4 For a discussion of these events and the political role of the TCC in terms of a "judicial coup d'état" see Henry Barkey, "Turkey, Aftermath of the Political Crisis," www.carnegieendowment.org/publications/index.cfm?fa=view&id=20339 (accessed 11 November 2009).

5 See, for example, Andrew Arato, "The Decision of the Turkish Constitutional Court: the Way Ahead" (Frankfurt, 9 August 2008), *Informed Comment: Thoughts on the Middle East, History, and Religion*, http://www.juancole.com/2008/08/arato-decision-of-turkish.html

legislature, a relatively novel argument as to the need for a "constituent assembly" for the specific purpose of making a new constitution has also been voiced.[6]

What the foregoing suggests is that the fervent public debate on constitutional issues in Turkey can be better understood by reference to the theoretical dimensions of the concept of "constituent power," a concept interpreted by many scholars as the modern synonym for "sovereignty." Thus, instead of referring to classic and rather outdated conceptions of sovereignty, my argument will be situated within a current debate over conceptions of constituent power.[7] It needs to be stressed that, while Turkey has had predominantly bureaucratic constitutions, its people have had only brief experience of constitution-making, during 1920-21, a useful historical point of reference for the present search for a democratic constitution.

Three Different Conceptions of Constituent Power

Recent literature distinguishes between three types of constituent power. The first type refers to any kind of supreme power making a new constitution without being restricted by an existing superior norm. This understanding of constituent power does not take into account the bearer or the representative characteristics of that power. Accordingly, and in the context of a crude legal positivism, this definition pays no attention to the "political nature" of the constituent power, let alone the historical circumstances that made possible the emergence of this crucial concept of modern constitutionalism. Thus, constituent power is defined as "the power to make or amend a new constitution." In this definition, the power to make a new constitution is "*originary* constituent power," whereas amending an existing constitution is "*derivative* constituent power."[8] In terms of this idea, the power to make a constitution comes into existence only in exceptional historical circumstances of "revolution" or "coup d'état" and has an extra-legal nature. Since originary constituent power is extra-legal, emerging in a legal vacuum, it is not bound by legal norms. This concept of unrestricted originary constituent power does not, according to Gözler, necessarily belong to the "people" or the "nation," thus it does not have to be used by a collective agency or its representatives.

Although this rather simplistic definition of constituent power, based on unacceptably narrow legal positivism, is flawed methodologically,[9] it is widely evident in most constitutional law textbooks in Turkey and allows us to describe the social and political positions of the constitution-making actors in different historical settings.

A second definition of constituent power has a very different meaning, involving an inherent connection to a collective agency, the people or the nation. Used first in the English Revolution in the clash between the advocates of par-

6 Following the TCC decision, some public figures, including Köksal Toptan, member of the AKP and former speaker of TGNA, expressed the need for a constituent assembly as an alternative way to make a new constitution.

7 For a discussion of these concepts, see Martin Laughlin, *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), especially Chap. 4, "Representation."

8 Kemal Gözler, *Le pouvoir constituant originaire*, Mémoire du D.E.A. de Droit public, Directeur de recherches: Prof. Dmitri Georges Lavroff, Université de Bordeaux I, Faculté de droit, des sciences sociales et politiques, 1992 (www.anayasa.gen.tr/memoire.htm, accessed 25 August 2009).

9 One of the best accounts of the unacceptability of legal positivism in this narrow sense is provided by Gustave Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)," *Oxford Journal of Legal Studies* 26, 1 (2006): 1-11.

liamentary supremacy over the king, constituent power meant to belong to "the people," or later, in the French Revolution, specifically in the work of Sieyès, to "the nation." The concept resulted from the historical necessity of differentiating the "constituted powers" of the States General from the constituent power of the "people," defined by Sieyès as "the nation," and had the function of legitimizing the revolution, that is, overthrowing the existing order and replacing it with a new constitution based on "national sovereignty." In this case, the concept of constituent power is equated with the nation, rendering representative parliamentary government a requirement for its realization: "The people or the nation can only have one voice, that of the national legislature."[10]

Taking this specifically revolutionary characteristic of the concept as a point of departure and pointing to the paradoxes in its relationship with the "constituted power," a third conception was developed in which the people are the only source of legitimacy, with the power to constitute and reconstitute the political-legal order.[11] Against the historical background in which the revolutionary role of the people (or the nation) produced a constitutionally restricted system, this understanding of constituent power suggests that the revolutionary characteristic of the concept (and the collective agency) is not confined within an existing order. In other words, in contrast to "the conservative role of classic constitutionalism," the collective agency that has the power to constitute a supreme law and protection of human rights is now globalized.[12]

In sum, the first conception of constituent power can be called descriptive, the second nationalistic and the third revolutionary-democratic. We turn now to an analysis of the historical background of Turkish constitutionalism.

Constituent Power of the Bureaucracy: The Late Ottoman Empire

The first constitution in Turkey was the Fundamental Law (*Kanun-ı Esasî*) of 1876. This constitution was drawn up by a special council (*Meclis-i Mahsus*) and was the product of negotiation between a group of "constitutionalist" bureaucrats led by Midhat Paşa and Sultan Abdülhamid II. Although this constitution established an Ottoman parliament (*Meclis-i Umumî*) with two chambers, the House of Notables (*Meclis-i Ayan*), whose members were appointed by the sultan, and the House of the Elected (*Meclis-i Mebusan*), whose members were elected by "popular vote," the right to participate in elections was restricted to wealthy male citizens.

Despite the existence of a parliament and provisions regarding the fundamental rights and liberties of Ottoman "subjects," the constitution failed to restrict the sultan's powers. Whether this failure was the result of the rather underdeveloped liberalism of the bureaucratic architects or is better explained by historical determinism is an issue for historians to consider. It must be remembered, however, that the "constitutionalist bureaucrats" were only one group in a divided bureau-

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10 E.-J,Sieyes, "Discours sur le veto royal," *Archives parliamentaires*, 1st series, vol. VIII, p. 595 cited in Lucien Jaume, "Constituent Power in France: The Revolution and its Consequences," in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism. Constituent Power and Constituted Form*, (Oxford: Oxford University Press, 2007), p. 80.

11Paolo Carrozza, "Constitutionalism's Post-Modern Opening," in Loughlin and Walker, *The Paradox of Constitutionalism*, pp. 169-87.

12 *Ibid.*, p. 179.

cracy and had to confront a highly influential "traditionalist" group, which supported the traditionally stronger sultanate. This division within the bureaucracy greatly helped the sultan when he suspended the constitution immediately after the outbreak of war with Russia in 1877.

A kind of despotic rule under Abdülhamid II had thus begun and the only political opposition to this regime was the Young Turk movement, comprising mostly bureaucrats zealous to end the suspension of the constitution. Like their New Ottoman predecessors, who actually played a role in the making the first constitution, prominent members of the Young Turk movement, especially those on the Committee of Union and Progress, yearned for freedom. After a struggle lasting more than three decades, they succeeded in reinstating the constitution, an event celebrated as "the proclamation of freedom" (*İlân-ı Hürriyet*).

The second constitutional period from 1908 began with the establishment of a parliamentary government followed by the dethronement of Abdülhamid II in 1909 and the amendment of the constitution so that the centre of political power was transferred to the "cabinet" controlled by parliament. This seemingly significant move towards what in those days might be termed the establishment of parliamentary government, failed once again, in 1913, and the Committee of Union and Progress established a kind of single-party dictatorship.[13]

Although the failure of these attempts to establish a constitutional monarchy may lie in historical circumstances, it should be admitted that the bearers of constituent power in the formative years of Turkish constitutionalism were members of a bureaucratic intelligentsia with no serious, well thought-out notion of freedom and constitutional government. These founding members elaborated on the idea of freedom within mindsets influenced by Islamic *ummah* and justified parliamentary-constitutional government by reference to a Quranic understanding of *meşveret*, government by consultation. The second generation, on the other hand, were under the influence of a Comtean positivism, which left little, if any, room for individual freedom and democracy. A salient feature of the attitudes of most members of this second generation was "scientism," coupled with treatment of the people as "backward masses" in need of development through the guidance of the intelligentsia.[14]

An interpretation of Young Turk ideology as being that of a movement of bureaucratic intelligentsia aiming at a new form of sovereignty, in which state power was transferred from throne to bureaucracy, seems quite appropriate for this early phase of Turkish constitutionalism. The corollary is that this was a movement that could not elaborate a comprehensive understanding of freedom, democracy and constitutionalism.[15]

A major conclusion to be drawn from this early phase of Turkish constitutionalism is that in Turkey, as in many other latecomer societies in continental Europe, notably Germany, the state "precedes the constitution."[16] In such cases,

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13 Şükrü Hanioğlu, "The Second Constitutional Period," in Resat Kasaba (ed.), *The Cambridge History of Turkey*, Vol. 4, *Turkey in the Modern World*, (Cambridge: Cambridge University Press, 2008), pp. 62-110.

14 Şerif Mardin, *Jön Türklerin Siyasi Fikirleri, 1895-1908*, (İstanbul:İletişim, 1983). Cf., Şükrü Hanioğlu, *Preparation for a Revolution, the Young Turks, 1902-08*, (Oxford: Oxford University Press, 2001), pp. 289-310.

15 For an analysis of the economic reasons for this power struggle, see Carter V. Findley, "Economic Bases of Repression and Revolution in the Ottoman Empire," *Comparative Studies in Society and History* 28 (1986).

16 Arthur J. Jacobson and Bernhard Schlink, "Constitutional Crisis. The German and the American Experience," in Arthur Jacobson and Bernhard Schlink (eds), *Weimar. A Jurisprudence of Crisis,* (Berkeley: University of California Press, 2000), p. 1.

the state should be the bearer of the constituent power in the sense of having a capacity to devise a constitution from scratch. Constituent power in this descriptive sense seems to be identical with sovereignty, often defined as "supreme lawmaking power." This early phase of Turkish constitutionalism entailed a process of change whereby constitutionalism meant the transfer of the powers of the state (traditionally belonging to the Ottoman dynasty) to a centralized military and civilian bureaucracy. Despite relatively significant pluralism, most notably between 1908 and 1913, the people and parliament had virtually no control over the constitution-making processes. In a situation where the state preceded the constitution, the dualism was between the sultan and the bureaucratic intelligentsia, a cleavage that apparently left no room for democracy.[17]

Constituent Power of the Military Bureaucracy: 1961 and 1982 Constitutions

The idea of constituent power as supreme, unrestricted lawmaking power has been retained by the republican bureaucracy, especially by the military during the coups of 1960 and 1980.

Despite major differences between the 1961 and 1982 constitutions produced by the successive military regimes, these constitutions reflect a shift in their understanding of the ultimate source of constituent power. Resulting from the establishment of a republic in 1923 and adherence to the Kemalist blueprint of building a Turkish nation-state, the military bureaucracy had to justify its position as the ultimate decision-maker in the process of constitution-making. In sharp contrast with "the bureaucratic constitutionalism" of the late Ottoman era, where reference was made to the transcendental (religious) source of the power of the state (namely, the Ottoman sultan), the 1961 and 1982 constitutions refer to "the Nation," implying a shift in the understanding of constituent power. The preamble of the 1961 Constitution, for instance, states that "[e]xercising its right to resist against a government which has lost its legitimacy as a consequence of its Unconstitutional and Illegitimate attitudes and actions, the Turkish Nation made the 1960 Revolution."[18] This is a justification of the military coup of 27 May 1960 by reference to the will of the Turkish nation, which is thought to be crystallized in the will of the military: hence, in this view, constituent power is effectively held by the military.

The preamble of the 1982 Constitution – which no longer exists thanks to a fortunate amendment in 1995 – is more explicit:

> As a result of the 12 September 1980 move realized upon the call of the Turkish Nation by Turkish Armed Forces, an integral part of the Turkish Nation, prepared by the legitimate representatives of the Turkish Nation in the Consultative Assembly and finalized by the National Security Council this constitution [is] directly accepted and approved by the Turkish Nation and legislated by its own hand.

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17 For a discussion of this period as witnessing the emergence of a conservative bureaucratic style of thinking and acting, see Levent Köker, *Modernleşme, Kemalizm ve Demokrasi*, (İstanbul: İletişim, 2009).

18 For the text of the 1961 Constitution, http://www.anayasa.gen.tr/1961constitution-text.pdf (accessed 15 August 2009)

In all these texts, the military regimes making the new constitutions seem to be aware that constituent power belongs to the nation, so that their role in this regard could be legitimized by reference to the nation. This is ironic, because neither the coopted Representative Assembly in 1960 nor the military-appointed Consultative Assembly in 1980 had a representative character. The references to the Turkish nation as the bearer of the constituent power represent not only a shift in justifying bureaucratic rule, but also involve a contradiction.

If the constituent power belongs to the nation, then, following Sieyès, it can be used only by the nation's representatives. The constitution, therefore, should be made by them, and this requires the formation of a democratically elected constituent body. The military coups and resulting constitutions made references to the constituent power of the nation but failed to meet the test of a representative constitution-making process. This democratic deficit at the moment of constitution-making has become an established characteristic of the political regimes formed by the 1961 and 1982 constitutions. In spite of major differences in their respective approaches to the level, scope and means of democratic participation, both constitutions ended the parliamentary supremacy in the preceding 1921 and 1924 constitutions and institutionalized civil and military bureaucratic control over democratic procedures. To the central and highly influential, if not dominant role of the National Security Council created by the 1961 Constitution, the 1982 Constitution has added other mechanisms of bureaucratic guardianship, such as the powerful status of the presidency, judiciary and others entities.[19]

The conclusions to be drawn from these two periods (1961-1980 and 1982-present) of Turkish constitutionalism are: (1) The state continues to precede the constitution. (2) The state had to take the form of a nation-state. (3) Civilian and military bureaucracy assumed the role of true guardians of what they deem "the ideal polity" and ideal form of Turkish nation-state, that is the Kemalist republic. (4) The 1961 and 1982 constitutions were created by these guardians to safeguard the republic against threats arising from civil society. (5) Justification of the constitutions by reference to the "Turkish Nation" is intrinsically contradictory, for the very idea of a nation's constitution requires democratic institutions and procedures. (6) All in all, the 1961 and 1982 constitutions represent a transition from openly bureaucratic rule, which can only be meaningful under a descriptive notion of constituent power, to a nationalistic form of bureaucratic guardianship in which the constituent power of the nation has passed into the hands of the civilian and military bureaucratic apparatus.[20]

Constituent Power of the People or "Constitutional Populism:" The Exceptional Moment of 1921 Constitution

As to the third conception of constituent power, it seems useful to begin with a quotation from Möllers's article on the conceptual history of German constitutionalism. Here he defines "constitutional populism" in a manner very similar to what I have tried to explain as the constituent power of the people. According to Möllers:

19 Cf., Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: Central European University, 2009).

20 For a critical account of this non-democratic configuration of Turkish constitutionalism and its state-centred legal culture, see Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey," *Law and Society Review* 40, 3 (2006): 653-92.

> Constitutional populism has to be distinguished from populism as such. We are not talking about every form of political involvement that may claim democratic means or ends: the term constitutional populism designates a democratic practice that is specifically orientated towards constitutional procedures and institutions without formally being part of them. The paradox of constituent power thus expresses itself in this constitutional populism. Constituent power is neither finished with the process of constitution-making, nor is it fully incorporated in the established constitutional procedures; it maintains a permanent presence as the populist aspect of a formal constitutional practice.[21]

The moment of the 1921 Constitution in Turkish history seems to fit this definition of "constitutional populism." This is not only because the 1921 Constitution emerged out of a series of debates over what was then called the "Populism Programme" (*Halkçılık Programı*) or only because one of the most influential political parties of the time was the "Party for Popular Participation" (*Halk İşkirakiyun Fırkası*); but it is also because the constitution was the product of an exceptionally democratic participatory moment of constitution-making in Turkish history. The exceptionality of 1921 lies in the fact that "the First Grand National Assembly [FGNA] has been the first constituent assembly in Turkish political history, elected by the free will of the people."[22] Whether this assembly, as Özbudun further argues, also laid down the bases of the new Turkish state is a claim needing closer examination.

It is certainly true that the FGNA adopted provisions to define its own legal status as an "assembly with extraordinary competences," meaning that the assembly had constituent power. It is also true that FGNA accepted the principle of "national sovereignty." I wish to suggest, however, that these historical facts do not sufficiently support the argument that the FGNA laid down the foundations of the new Turkish state. On the contrary, the definition of national identity and the impact of political (constitutional) populism on the organization of the state administration did not survive after the proclamation of the republic in 1923. Although the 1924 Constitution maintained the principle of parliamentary supremacy, it replaced references to Islam as the central pillar of the national identity with "ethnic Turkishness,"[23] and also eradicated the democratic synthesis between the Islamic notion of *shura* (assembly) and the then very influential Bolshevik idea of "the soviet" that people had sought to achieve.

What is most striking about of the constitutional moment of 1921 was an analysis by Soysallıoğlu İsmail Suphi Bey, spokesperson for the special committee (*Encümen-i Mahsus*) that provided one of the drafts, on class cleavages and their political consequences for Turkish society. In his own words,

> The bureaucratic class in this country has believed it was placed in power by God's will and thus deemed itself to have the right to command the peasants and it has always asserted that without its power, the country would be impossible to govern ... [The Committee] has declared a war against this present form of bureaucratic government and has sworn to tear apart, even in the provinces, the bureaucratic hierarchy and the bureaucratic network.

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21 Christoph Möllers, " 'We are (Afraid of) the People': Constituent Power in German Constitutionalism," in Loughlin and Walker, *The Paradox of Constitutionalism,* pp. 87-8.

22 Ergun Özbudun, *1921 Anayasası*, (Ankara: Atatürk Araştırma Merkezi yay, 1992), p. 49.

23 Cf. especially the parliamentary debates on the definition of national identity in Şeref Gözübüyük and Zekai Sezgin, *1924 Anayasası Hakkındaki Meclis Görüşmeleri*, (Ankara: AÜSBF, 1957), pp. 436-41.

> Accordingly, the Committee has adopted the principle of election of the officials in provinces by the locals, hence the principle of direct popular government.[24]

This understanding of decentralized democratic government was a major part of the final version of the 1921 Constitution, but could never be put into practice. The "new Turkish state," that is the republic, adopted a new constitution in 1924 that was not necessarily non- or anti-democratic. What made the 1924 Constitution undemocratic was the authoritarian ideology and practices of the Kemalist regime. As I have tried to show elsewhere, one of the reasons Kemalism is incompatible with democratic pluralism has been the fact that instead of subscribing to the democratic populism of the 1921 Constitution, Kemalism understood populism as the denial of the class and other cleavages in Turkish society. In the view of Kemalism, such cleavages did not allow for multi-party pluralist democracy. Kemalism, with its homogeneous cultural definition of the nation with explicit ethnic references and its economic and cultural statism,[25] established a single-party rule that has been unable to engender genuinely democratic politics.

Conclusion

The current debate over constitutional amendments or a new constitution must first resolve the issue of constituent power. If the present understanding of the TCC and most Turkish constitutional lawyers prevails that only a derivative constituent power exists within the framework of constituted power, meaning that the legislature can make only constitutional amendments within limits of the prevailing constitutional order, then adopting a new constitution seems virtually impossible. This appears so because the judicial bureaucracy, notably TCC, intends to interpret the unamendable elements of the constitution in indeterminate ways, a jurisprudential approach that helps the court assume the role of guardian of the status quo. At a time when global democratization forces nation-states to fundamentally change their understanding of a homogeneous nation to accommodate multiculturalism, it is likely that TCC will annul every amendment that would bring the Turkish political system closer to contemporary standards of a genuine political democracy.

At this point, I must explain my choice of "guardianship" over "tutelage," a more common academic description of contemporary Turkish politics. Tutelage refers, highly apologetically, to the single party period from 1923 to 1945 and argues that Kemalist authoritarianism was an historical necessity. Based on the theoretical assumptions of modernization, tutelage emphasizes the notion that Kemalist single party rule had the purpose of improving economic and cultural conditions in preparation for the eventual democratization of the political structure.[26] By contrast, guardianship emphasizes the persistence of an intrinsically

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24 Köker, *Modernleşme, Kemalizm ve Demokrasi*, pp. 141-2.

25 Statism (*devletçilik*) has been defined both as the state's involvement in economic development and its duty not to give way to the formation of class cleavages in Turkish society. This latter aspect of Kemalist statism also included the idea that the state should control the ideas in the minds of individual citizens, meaning that the state had to pursue educational and cultural policies to produce new mentalities suitable for the new "republican" regime. See Köker, *ibid.*

26 For an eloquent exposition of this idea, see Ergun Özbudun, "The Nature of the Kemalist Political Regime," in Ergun Özbudun and Ali Kazancıgil (eds), *Atatürk, the Founder of a Modern State*, (London: Hurst, 1981), pp. 79-102.

authoritarian system of rule, which conceives of the Kemalist Republic" as the ideal order needing to be protected against both external enemies and the "wrongs" of the popular masses. The reactions of military and civilian bureaucratic elites to the democratic reform process reflect not a "tutelary" mentality, aiming at eventual democratization, but a Platonic guardianship, whose ultimate aim is protecting the existing order (the Turkish nation-state) against its "foreign and domestic enemies."[27]

Thus, the cleavage between the guardians of the status quo, whose mindset prioritizes the Kemalist nation-state vis-à-vis further democratization, and the societal need for a more decentralized and multicultural democracy cannot be resolved unless a "constitutional populism," in Möllers's sense, can be revived by revivifying the revolutionary moment of the 1921 Constitution in contemporary circumstances. Such revival first requires abandonment of descriptive and nationalistic conceptions of constituent power, followed by configuration of a new collective political agency capable of articulating the democratic-revolutionary potential of "the people." This seems to be the way to break through the impediments imposed by the existing order, and the radicalization of the democratic demands by diverse segments of society seems to be a good starting point.

27 I rely on Robert Dahl's understanding of "guardianship" as an anti-democratic idea or a "perennial alternative to democracy" in his *Democracy and Its Critics*, (New Haven: Yale University Press, 1989).

The Second Constitutional Period of the Ottoman Empire: A Disputed Legacy

VANGELIS KECHRIOTIS

After 33 years of absolutist rule, in July 1908, following a revolt orchestrated by young members of the military and the bureaucracy, Sultan Abdülhamid II was urged to restore the constitution, which he had himself suspended in 1877. The deputies elected to the parliament, which finally opened its doors in December 1908, represented all communities, Muslim and non-Muslim alike. The first period of this parliament (1908-12) represented a new experience in the way Ottoman subjects viewed their relations with the authorities, particularly in the urban centres, the main locus of decision-making and mobilization by the people.

It is important to say a few words about the intellectual and political origins of this episode. A group of bureaucrats and journalists known as Young Ottomans (*Yeni Osmanlılar*), and led by, among others, Namık Kemal and Midhat Pasha, had introduced new ideas into political life as early as the 1860s and 1870s. They opted for liberal ideas, but simultaneously advocated the appropriation of Islamic values, which, they argued, would safeguard the sovereignty of the people. Consequently, they criticized the agents of the *Tanzimat* for introducing reforms, which, in the long run, would undermine both the state and the society.[1] However, these dissident voices were silenced during Sultan Abdülhamid's reign, which witnessed ambivalent state modernization together with ongoing suppression of political opposition. Largely as a product of this ambivalence, new generations, educated in state schools such as *Mülkiye* (Civil Servants' Academy) and *Harbiye* (Military Academy), were inspired by the liberalism, the constitutional ideas and the patriotism of the Young Ottomans. They differed, though, in that they rejected Islamic religion as a means of modernization. From the 1890s onwards, these young officers and officials, generally known as Young Turks (*Jön Türkler),* in contact with Western ideas and modes of social behaviour, could not tolerate what they perceived as the decay of the empire. Thus, the most radical among them in the army and the bureaucracy gradually joined the clandestine *İttihat ve Terakki Cemiyeti* organization (Committee of Union and Progress, CUP). This title had already been in use for more than 15 years among the group of Ottoman dissidents who had found

1 Şerif Mardin, *The Genesis of the Young Ottoman Thought. A Study in the Modernization of Turkish Political Ideas,* (Princeton NJ: Princeton University Press, 1962).

refuge in Paris and who had been working against the Hamidian regime. The exiles' movement, though, was riven by internal division. On the one hand, the more radical faction led by Ahmed Riza, a staunch positivist and adherent of August Comte's ideas, would not tolerate any foreign intervention in the domestic affairs of the empire. On the other, the supporters of Prince Sabahaddin, a nephew of the sultan, were more moderate and would welcome such intervention. The division became apparent during the discussions at the 1902 conference in Paris. It is thus important to remember that not only the authority of the sultan but also the sovereignty of the state were at the core of the debates on the restoration of the constitution.

In June 1908, the Russian tsar and the king of Britain met at Reval (present-day Talinn) on the Baltic coast. Among other issues, they discussed a proposal to resolve the "Macedonian Question" – the decades-long conflict among various ethnic groups in the European provinces of the empire and a threat to Ottoman domination in the region – based on foreign control, which would allow the sultan only formal suzerainty. On 23 July 1908, following these unexpected developments but also as a result of widespread social unrest, an uprising was organized in Rezna and Manastir under the leadership of lower ranking officers. It was, thus, in the face of the threat that the troops would march on Istanbul that the sultan was forced to reinstate the constitution of 1876 and announce elections.

The news was received with enthusiasm throughout the empire by people in every community and all walks of life. Non-Muslims, in particular, were quick to support the new regime, and they had good reason for this. The concept of equality before the law for all the subjects of the sultan, which was re-introduced with the constitution, was part of a political project aimed at bringing all Ottoman subjects under a common political umbrella by implementing equal civic rights irrespective of confession or ethnic origin. This policy had already been initiated in the era of the *Tanzimat.* However, although the policy had permitted limited involvement by non-Muslims in provincial administration through the officially recognized participation of their elites, it can be said to have favoured autonomy rather than to have promoted a common "Ottoman" identity among the public. The re-emergence of this political vision after the Young Turk revolution, would provide, it was initially believed, non-Muslims with a unique opportunity to translate their social and economic affluence into political power. Soon, however, it became clear that the "Ottomanist" vision, at least as conceived by CUP, was incompatible with such ambition.[2]

In terms of Young Turk political ideology, Şükrü Hanioğlu, who in two seminal volumes has studied and documented all the prominent figures of the Young Turk movement and their ideas, has argued that syncretism dominated in the views of the Young Turks, a fact that is also evident in their political vocabulary.[3] It is difficult to explain, for instance, how they could combine their endorsement of Darwinist theory as a guide to understanding social life and Gustave Le Bon's theories on the psychology of the masses, on the one hand, with the motto "liberty, equality and fraternity" on the other. The fact that this slogan had been dis-

2 Vangelis Kechriotis "Greek-Orthodox, Ottoman-Greeks or just Greeks? Theories of Coexistence in the Aftermath of the Young Turks Revolution," *Études Balkaniques* 1 (2005): 51-72.

3 Sükrü Hanioğlu, *Preparation for Revolution. The Young Turks, 1902-1908*, (New York: Oxford University Press, 2001).

carded in the above theories as pre-scientific and obsolete did not prevent the Young Turks from using it. It seems this slogan was used as a powerful weapon against the sultan's regime and also to win over various Ottoman ethno-religious groups to the cause of Ottomanism. Interestingly, a fourth element was used, namely "justice," which derived from Islamic tradition and was thus considered to have greater appeal for the Muslim population. Even more interestingly, "justice" appears as one of the main concepts of the German nationalist movement. It is true that the pro-German sympathies of the Young Turks arose quite late, and the admiration among their ranks for France and Britain set the tone for decades. Yet it is not surprising that officers, whose training curriculum and principles were very much based on the German original and who usually served under German commanders, would not remain unaffected by German ideas, as we will see later.[4]

On the other hand, the propaganda launched by Prince Sabahaddin, the leading figure in what eventually became the opposition known as the *Entente Liberal,* is said to have been inspired by Edmond Demolins's ideas. The opposition leader aspired to create a new society through education and had therefore kept alive the intellectual element from the first period of the CUP in Paris and other places in Europe where its members were exiled. The circle around him focused on "social progress," which they considered as being subject to the same laws as "biological progress." However, unlike the Unionists, instead of "equality," they elaborated on "inequalities." The "decentralization" promoted by the political party founded by Prince Sabahaddin, the *Teşebbüs-ü şahsi ve Adem-i Merkeziyet Cemiyeti* (League of Private Initiative and Decentralization), was a political vulgarization of Demolins's theory. This well-known theoretician had expatiated on the positive results of "decentralization" in the British Empire, which was so different from the Ottoman Empire. The Unionists, for their part, opposed decentralization, since they considered it had been appropriated by non-Turkish elements in a proto-nationalist fashion, and would thus pave the way to separatism. What they advocated, instead, was the elimination of the traditional division of society into ethno-religious groups (*millet*).[5] Since, in the new regime,

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4 Instead of the French parole, it was rather the notions of Unity, Freedom and Justice that played an important role in the 1848 uprising. *Einigkeit, Recht und Freiheit* (Unity, Justice and Freedom) are central themes in the German National Anthem, written by Heinrich Heine around the same time. Martin Hettling, *Totenkult statt Revolution. 1848 und seine Opfer*, (Frankfurt am Main: Fischer 1998). My special thanks to my colleague Georges Khalil for indicating this reference.

5 In the relevant literature, the very meaning of the term *millet* has been questioned. The traditional wisdom was perpetuated in studies such as Roderic H. Davison, *Reform in the Ottoman Empire 1856-76*, (Princeton, NJ: Princeton University Press, 1963) or Kemal H. Karpat: "The Roots of the Incongruity of Nation and State in the post-Ottoman Era," pp. 141-70 and Richard Clogg, "The Greek *Millet* in the Ottoman Empire," pp. 185-207 both in Benjamin Braude and Bernard Lewis (eds), *Christians and Jews in the Ottoman Empire* (New York: Holmes and Meier, 1982), vol. 1. Challenging this wisdom, in the last three decades it has been argued that until the 19th century reforms the term *millet* was not used exclusively and specifically for non-Muslims. Moreover, in earlier centuries the privileges conceded to religious leaders over their congregations were contingent on local necessities and circumstances and did not entail universal domination by one particular prelate over the entire population belonging to that confession. See Benjamin Braude, "Foundations Myths of the *Millet* System," in Braude and Lewis (eds), vol. 1, pp. 69-87 and Paraskevas Konortas, "From *Taife* to *Millet*: Ottoman Terms for the Ottoman Greek Orthodox Community," in Dimitri Gondicas and Charles Issawi (eds), *Ottoman Greeks in the Age of Nationalism,* (Princeton NJ: Princeton University Press, 1999), pp. 169-79; Daniel Goffman, "Ottoman *Millets* in the Early Seventeenth Century," *New Perspectives on Turkey* 11 (1994): 135-58. Distancing himself from the above accounts, Michael Ursinus, while subscribing to the criticism of the essential character of the '*millet* system,' does prove that the term was in use with respect to the non-Muslims earlier than the 19th century. Michael Ursinus, "Zur Diskussion um 'Millet' im Osmanischen Reich," in Michael Ursinus, *Quellen zur Geschichte des Osmanischen Reiches und ihre Interpretation* (İstanbul: Isis Press, 1994), pp. 185-97.

all subjects, Muslim and non-Muslim, would have equal rights, the Unionists claimed there would be no more need for the religious as well as the lay elites that dominated each *millet* and served as intermediaries between state and subjects. Moreover, in order for all citizens to enjoy equal "positive" rights, a unified system of education, justice, taxation and military service should apply to everyone.

The main challenge for non-Muslim communities was the elimination of their autonomy in educational and religious affairs institutionalized by the *Tanzimat,* but long antedating it in various forms. These "privileges" would become a bone of contention between the Young Turks and non-Muslims, especially the Greek Orthodox and Armenians, throughout this period and until the end of the empire. The structuring of Ottoman society on the basis of ethno-religious practice provided different social groups, which might even have diverse internal cultural affiliations, with a potential collective identity. This occurred regardless of whether all the groups participated in decision-making within their communities or not. Even if it was the members of elite groups among the non-Muslims who participated in the state administration and shared power with their Muslim peers, the community institutions (religious courts, schools, charitable foundations) served as a vehicle for social and political contestation of authority by the new middle class groups as well. The efforts of the Ottoman administration to modernize the empire by curtailing opportunities for participation by these middle-class groups was rightly perceived as violating the self-images these populations had developed. This was partly due to the failure by the Ottoman state to consolidate and disseminate its own self-image. However, it was also the result of the process of secularization that transformed these communities from religious into national ones. In this sense, reactions to state-oriented modernization were not limited to only the elite groups. Resentment could also be discerned in the acts of protest and the demonstration that brought together large crowds, particularly in the urban centres.[6]

In fact, the constitutional experience of the Ottoman Empire revealed the tension between the notion of equality before the law and of freedom. *Hürriyet,* which encapsulated the hopes and dreams of Muslims and non-Muslims alike, was perceived very differently depending on expectations and circumstances. For once, the celebration of the collapse of the absolutist regime was universal. Crowds took to the streets in every town of the empire. There were many who even refused to work, as if the new "freedom" automatically released them from all duties. For months following the restoration of the constitution, large segments of the working class went on strike, making life difficult especially in the large urban centres, until these actions were suppressed by the new regime, which, fearing disruption of the social order, gradually grew more autocratic.[7] For non-Muslims in particular, though, *hürriyet* was understood as the full recognition of their autonomous status, and even its enhancement. Instead, implementation of a parliamentary system of representation that provided the new regime legitimacy through the popular verdict, paved the way for an understanding of "freedom" as

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6 Vangelis Kechriotis, "The Modernisation of the Empire and the 'Community Privileges': Greek Responses to the Young Turk Policies," in Touraj Atabaki (ed.), *The State and the Subaltern. Society and Politics in Turkey and Iran*, (London: IB Tauris, 2007), pp. 53-70.

7 Paul Dumont, "A Jewish Socialist and Ottoman Organisation: The Workers' Federation of Thessaloniki," in Mete Tunçay and Erik Jan Zürcher (eds), *Socialism and Nationalism in the Ottoman Empire, 1876-1923*, (London and New York: International Institute of Social History, Amsterdam, 1994), pp. 49-76.

the expression of the will of the majority, a clearly Muslim one though, and at the expense of the non-Muslim minority. It has to be stressed that this was the first time in Ottoman history that the population of the empire was perceived in terms of majority and minority. In other words, the empire had taken a decisive step in its transformation into a national state. This had a twofold result. On the one hand, ethno-religious identity, which had already turned proto-national under the impact of secularization, would now be further politicized. On the other, since, after the *de facto* removal of the traditional communal authorities there were no institutional guarantees for the protection of the minority, the way was open for a new authoritarian regime to impose its agenda, backed by a parliamentary majority. Eventually, the fierce conflicts that took place throughout the period were not only in regard to the "privileges" and the role of traditional elites, but also the various meanings that each side attributed to "Ottomanness" within this context.[8]

For instance, the separate educational system for non-Muslims was preserved, but the authority of the religious leaders was removed. In other words, whereas before, education, whatever its content, was considered "Ottoman," as long as it was subject to the jurisdiction of the religious leader of each community, who acted as the representative of the government, now it would be considered "Ottoman" only if it was under the direct control of the state authorities. The government's argument was that if, in this new era, it accepted as a civic right the claim of every community to a separate education, a right legitimized by the previous "*millet* system," Greek, Armenian or Jewish education would be recognized as "Ottoman" and the state's whole effort to supplant the Ottoman legitimacy of the "*millet* system" would be undermined. Thus, eventually, the debate focused on the content of the term "Ottoman," but also on the question of whether an "Ottoman nation" existed or not.[9]

Historiographical Trajectory of the "Bizarre" Young Turk Revolution

It has been argued by scholars of the era, especially Şükrü Hanioğlu and Erik Jan Zürcher, that nationalist ideology was at the core of the CUP's political vision from the outset. The reason they claimed to be working for the preservation of the Ottoman state was, presumably, the fact that there was no other alternative Turkish state in existence. The other option would be – as soon happened – to start abandoning territories claimed by the non-Muslims living there. Being nationalists, though, the Young Turks opted for the "maximal" solution. Nationalist propaganda was especially successful among minority Turkish groups in the Balkans and also among young Turkish officers who "had learned to admire the nationalist movements against which they were fighting."[10] Yusuf Akçura, the prominent and influential ideologue of this first period, described the predicament of the movement as follows: "It is impossible to create a nation by

8 In this volume, see Elizabeth Picard, "Consensus Democracy at its Limits: Lebanon in Search of Electoral Reform."

9 Sia Anagnostopoulou, Μικρα Ασια *19os* αι-*1919* Οι Ελληνοτητες. Απο το Μιλλετ των Ρωμιων οτο Ελληνικο Εθνος, (Asia Minor, The Greek-Orthodox Communities. From Rum Millet to the Hellenic Nation), (Athina: Ellinika Grammata, 1998).

10 Hanioglu, *Preparation for a Revolution*, p. 295.

uniting and bending various elements of the Empire because of the development of the idea of the nation and because of the great degree of enmity among the various nations and especially between the two religions." As for their official discourse, the Young Turks adopted the ideal of the statesmen of the *Tanzimat,* the concept of *İttihad-ı Anasır* (union of the elements), while actually aiming at the "Ottomanization" of the minorities.[11] Thus Turkism, it is assumed, like Ottomanism or Pan-Islamism, constituted only a means to the success of their supreme political goal, which was the integrity of the empire. This "fluid" propaganda of the CUP, accommodating diverse political views, allowed the Unionists to reach an understanding with various non-Muslim groups. However, I would argue the issue at stake here is whether the Young Turks utilized the concepts in order to deceive the non-Muslim communities, or, on the contrary, whether they actually aspired to secure their cooperation. Ruling out their occasionally conciliatory discourse as opportunistic does not take into account the capacity of the discourse to reshape the ideological expectations of those who heard it. After all, there were many Christians and also non-Turkish Muslims who sided with the Young Turks in the first crucial years of this new era.

Before returning to the non-Muslims, let us consider those Muslims who would not eventually form part of the Turkish nation. Did they also share the vision of modernization and integrity of the empire despite the strongly Muslim-Turkish character of the movement? Recently, a historiographical discourse has arisen that focuses on the loyalty of the non-Turks to the "Ottomanist" ideal. Hasan Kayalı,[12] who has studied the emergence of Arab nationalism in this crucial period, has demonstrated the extent to which local notables played a key role in supporting political prospects that might better serve their interests. Janet Klein, on the other hand,[13] has described the split between the Kurdish leaders in the Kurdish populated areas in Anatolia, who had vested interests in the old regime, and those in Istanbul, who supported the new regime. What is important in these studies is that loyalties in the pre-revolutionary era, as well as socio-political cleavages in the new era, have been used as an analytical tool to allow us to better comprehend the new alliances. In other words, it was not so much ideology as power relations and local social networks that produced new alliances.

The same can be said of the non-Muslims as well, many among whom shared this vision of the reform and integrity of the Ottoman Empire despite the strongly Muslim-Turkish character of the movement. Kemal Karpat,[14] in his seminal article on the Christian Vlach Batzaria, among the founding members of the CUP, has pointed to exactly the same considerations and predicaments. Recently, Reymond Kevorkian and Rober Koptaş,[15] in their studies of the Armenian parlia-

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11 Erik Jan Zürcher, *The Unionist Factor, The Role of the Committee of Union and Progress in the Turkish National Movement*, (Leiden: Brill, 1984).

12 Hasan Kayalı, *Arabs and Young Turks: Ottomanism, Arabism and Islamism in the Ottoman Empire, 1908-1918,* (Berkeley: University of California Press, 1997).

13 Janet Klein, "Power in the Periphery: The Hamidiye Cavalry and the Struggle over Ottoman Kurdistan, 1890-1914," (unpublished PhD thesis, Princeton University, 2002).

14 Kemal Karpat, "The Memoirs of N. Batzaria: The Young Turks and Nationalism," *IJMES* 6, 3 (1975): 276-99.

15 Raymond Kévorkian, "The CUP and the Armenians: Krikor Zohrap, paper presented at the conference *Turkey 1908-14: Biographical Approaches* at the University of Zürich, 13-15 November 2008; Rober Koptaş, "Armenian Political Thinking in the Second Constitutional Period: The Case of Krikor Zohrab," (unpublished MA dissertation, Atatürk Institute, Bogaziçi University, 2005)

mentary deputy Krikor Zohrap, have argued that despite the fact that Zohrap would fiercely criticize many CUP policies, he wholeheartedly endorsed the need for the regeneration and integrity of the Ottoman Empire. In my study of the Greek-Orthodox in Izmir, I have also been able to show the cleavage within the community and the diverse alliances that were formed.[16] Finally, Benjamin Trigona-Harany, in his study of the Süryânî intellectuals and publicists of the period, Naum Faik and Aşur Yusuf, has described the strong impact that the constitutional regime had on that community at least before the collapse of the precarious balance in 1915.[17] What is new in all these studies is the notion that prominent members of non-Turkish communities not only endorsed the "Ottomanist" ideal but also played a prominent role in everyday politics. The most typical example is the Armenian one. In light of the recent resurfacing of the debate on the Armenian genocide as a result of the apology campaign organized by Turkish intellectuals, it is useful to remember that not only the Armenian Revolutionary Federation (*Dashnaksutiun*) joined forces with the CUP both before and after 1908, but also that prominent members of the community beyond the *Dashnaksutiun* played the Ottomanist card shortly before their extermination by their erstwhile Turkish comrades.[18]

On the other hand, the charge of ideological inconsistency among the Young Turks does not take into account the diversity of views and conflict among them but rests solely on the assumption that the core group of the Young Turk movement had already made up their minds about the non-Muslims, even about non-Turks, before 1908. What is at stake here, however, is much wider than the participation or not of non-Turks in the movement and the willingness of the Young Turks to co-opt other ethnicities. The evolving argument around the Turkish nationalist character of the movement is the concomitant not of academic but primarily of political concerns related to efforts by authorities in the Turkish Republic and those intellectuals favouring the official version of history to deny that the extermination of non-Muslims at the end of the empire, particularly the Armenians, can be described in any way as "genocide." A legal element in this discussion concerns the motivation for such action. If one proves that Turkish nationalist ideology was already predominant before 1908, then one can ascribe to the massacres a motivation that undoubtedly leads to "genocide," as has been the case in so many other instances in modern history. This is a logical assumption. The opposite is not necessarily true, though. In other words, even if until the end of the empire the Ottoman bureaucratic and military elite, dominated by the Young Turks, was not inspired by a chauvinist version of nationalism, as some historians claim, this does not prove that the state could not commit "genocide." Such crime can be perpetrated in the name of religion or even state authority, in which case any discussion of the rise of ethnic nationalism becomes irrelevant.

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16 Vangelis Kechriotis, "On the Margins of National Historiography: The Greek İttihatçı Emmanouil Emmanouilidis: Opportunist or Ottoman Patriot?" in Amy Singer, Christoph K. Neumann, and S. Aksin Somel, (eds), *Untold Histories of the Middle East: Recovering Voices from the 19th and 20th Centuries*, (London: Routledge, forthcoming 2010).

17 Benjamin Trigona-Harany, *The Ottoman Süryânî, from 1908 to 1914*, (Piscataway, NJ: Gorgias Press, 2009).

18 Arsen Avagyan and Gaisz F. Minassian, *Ermeniler ve İttihat ve Terakki: işbirliğinden çatışmaya* çev. Ludmilla Denisenko, Mutlucan Şahan, (İstanbul: Aras yayınları, 2005).

Another issue that preoccupies some scholars is whether the Young Turk revolution can be described as a revolution at all.[19] The implications of such a debate for contemporary politics are immense. The most commonly referred to revolution in Turkish historiography is the Kemalist republican revolution. Therefore, the temptation is great to connect the Young Turk revolution to the Kemalist one, thereby predetermining the revolutionary subject, which cannot in the end be other than the Turkish nation. Therefore, an uncritical use of the terminology, based on the assumption of an ambiguous popular support, does not leave much space for reflection on the role and attitudes of the non-Turks.[20] Moreover, others such as Aykut Kansu not only support the idea that it was a revolution, but they ascribe to it a clearly "bourgeois" character. In his view, this was the real revolution, not the Kemalist republican one.

This has a threefold effect. On the one hand, it directly links the Young Turk revolution to the tradition of the French Revolution, which presumably put an end to a similarly pre-modern *ancien regime*. On the other, it delegitimizes the claim that what happened in 1908 was merely a military intervention that foreshadowed the prominent role the army still plays in Turkish society.[21] If the military is perceived as part of the revolting bourgeoisie, then its progressive role and its claim to political hegemony over contemporary Turkish society can be better sustained. Finally, according to the argument on the revolutionary character of the Young Turk movement, 1908 paved the way for an unprecedented opening up of the political arena, a constitution, political parties, elections, freedom of speech and the safeguarding of civic rights. The Kemalist revolution curtailed all these rights. Therefore, it can be argued that liberalism and democracy have their origin in 1908 and not in 1923. This view, put forth by supporters of liberalism such as Aykut Kansu, can, however, be easily reversed and used as ideological ammunition by the Kemalists who wish to clearly distinguish between the Unionists and their policies on the one hand, and Mustafa Kemal and his followers, on the other, disregarding, of course, the fact that the latter was a prominent member of the same movement.[22] It is worth noting that the liberal view described above uses the term "bourgeoisie" in a sloppy manner, if we recall that in the Ottoman context it has been predominantly used to describe the non-Muslim entrepreneurs, who,

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19 Even Şükrü Hanioğlu, despite the fact that he used the term in the title of his well-known book, confessed at the conference *Turkey 1908-14: Biographical Approaches* at the University of Zürich, 13-15 November 2008 that he has second thoughts about the term.

20 In the recent conference on the Young Turk Revolution organized at the Faculty of Social Sciences at the University of Ankara in June 2008, Sina Akşin argued that there are four possible combinations with regard to these two historical moments. Either none of them is a revolution, or only one or the other of them can be described as such, or both of them. He himself, organizer of the conference after all, and a well-known Kemalist ideologue, opts for the last option.

21 It is true that what happened was, at first glance, a military coup. Such terminology, though, presupposes the existence of a democratic polity which such coup would undermine. This was not the case with the Hamidian regime. Therefore, let us keep the term 'revolution.' It was indeed a political movement and it would be inaccurate to describe it only as a fight over the distribution of power. We cannot disregard the fact that it was instigated by, as well as mobilizing both national and social elements. Aykut Kansu, *The Revolution of 1908 in Turkey*, (Leiden: Brill, 1997) and *Politics in Post-revolutionary Turkey, 1908-13*, (Leiden: Brill, 2000).

22 Ergun Aybars, a staunch Kemalist, claimed at the conference at the University of Ankara that what happened with the rise to power of the Democratic Party, in 1950 was the return of Unionist ideas as mirrored in the policies of figures such as Celal Bayar, who was the president of the Republic. These policies presumably undermined the Kemalist reforms and thus the army rightly intervened and put an end to this 'counter-revolution' with the coup of 27 May 1960.

"comprador" or not, were clearly at odds with the bureaucracy, a term that could be used to include the military as well.[23] According to a neo-Marxist approach proposed by the sociologist Çağlar Keyder, both the 1908 and the 1923 revolutions can be described as bureaucratic-military interventions that imposed their programme from above and which were generally speaking not directly related to popular sentiment. These revolutions promoted patterns of authoritarian modernization whose only aim was the creation of a nation state in conditions of imminent (in 1908) or actual (in 1923) collapse of the Ottoman Empire.[24]

The role of the military is indeed an important aspect of the political ideology of the Young Turks that has left a deep mark on Turkish society. Hanioğlu attributes the development of political activism among the Unionists to the recruitment of young officers in great numbers. The role of the army in social and political life was a longstanding tradition in the empire, thus this transition did not encounter considerable resistance. What is novel, however, is the adaptation of German ideas, most prominently of Colmar von der Goltz, who assigned a special role to the military in post-industrial society. His work had been used as a handbook for military cadets, who gradually came to see in the dominance of the army the only solution to the problems of the empire.[25] Thus, the fact that the movement did not derive from all sections of the Ottoman populations but was instead dominated by young officers, overwhelmingly Turkish Muslim, determined its political orientation. Only ethnic groups with no claim to specific lands, such as the Circassians, remained loyal. Thus, it is argued, this Turkish majority saw in the movement not only the means for the defence of the empire but also for the promotion of Turkish Muslim nationalist aspirations.[26]

Relevant to the role of military is the issue of political violence. The Young Turks, for the first time in the history of the Ottoman army and inspired by the example of the perpetrators of ethnic violence in the Balkans, created an underground organization, which they called *Teşkilat-ı Mahsusat* (Special Organization). This organization took upon itself the execution of all the dirty operations on behalf of the CUP. Following the disastrous Balkan wars and in the wake of the First World War, however, it was used against the Christians in the western littoral of Anatolia and Thrace and then the Black Sea (Pontic) Greeks and Armenians. Turkish historians, who accept that the massacres and other persecutions against the Armenians can be described as "genocide," regard the Special Organization as the institution that carried out the operations.[27] However, the condemnation of those crimes and the sentences meted out to their perpetrators after the end of the war by Ottoman courts under allied supervision, run the dan-

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23 Reşat Kasaba, "Was there a Comprador Bourgeoisie in mid-19th Century Western Anatolia?" *Review* XI, 2 (Spring 1988): 215-30.

24 Çağlar Keyder, "Bureaucracy and Bourgeoisie: Reform and Revolution in the Age of Imperialism," *Review* XI, 2 (Spring 1988): 151-65.

25 F.A.K. Yasamee, "Colmar Freiherr von der Goltz and the Rebirth of the Ottoman Empire," *Diplomacy and Statecraft* 9, 2 (1998): 91-128 and Handan Nezir-Akmeşe, *The Birth of Modern Turkey. The Ottoman Military and the March to World War I*, (London: IB Tauris, 2005).

26 Zürcher, *The Unionist Factor*, 21-23.

27 For an insight into one of the first instances that the Armenian genocide and the Special Organization were discussed in the Turkish press, see Halil Berktay's interview of Neşe Düzel in *Radikal*. http://www.radikal.com.tr/2000/10/09/insan/erm.shtml For a well-documented account of the same period and the issue of responsibility, see Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, (New York: Metropolitan Books, 2006).

ger of making a scapegoat of the particular group of Unionists, leading to the dismissal of the entire period and paving the way for recognizing the War of Independence and the Kemalist Revolution of 1923 as blank pages, untarnished by the calamities and the guilts of the past.[28]

Beyond this controversy over the perpetrators of crimes, what needs to be stressed is the attribution to the Young Turks of a form of political violence that is legitimized on the pretext of a crude version of patriotism dictated by the need to protect the state against all presumed enemies. Even before 1908, military officers and civilians took their ceremonial oaths under the watchful eyes of men with covered faces and by extending their hands over a revolver and a Qur'an. The revolver should not surprise of course, but equally meaningful is the Qur'an. In the absence of a strong symbol of Turkishness, the holy book of Islam connected the majority of the members (few of whom were non-Muslims) by reference to the most dominant religion of the empire. It is interesting that although their main target was Sultan Abdülhamid, the Young Turks did not dare to turn on the institutions of the sultanate and the caliphate. In other words, they did not endorse, at least officialy, an anti-monarchical, republican ideology, despite the fact that religion played no significant role in the private lives of most of them. This ceremonial oath-taking, reminiscent of Masonic practices, the determination to sacrifice one's life as well as the life of others in a common aim, take on a different dimension when they are infused in state mechanisms and lead to the "final solution" of a series of issues for which traditional methods would not work. This political culture has been described as *İttihatçılık* from *İttihat* (Union) of the Community for Union and Progress.

One of the instances related by Kemalists to this political culture is the decade 1950-60, when the Democratic Party was in power. The presence at the top of the state apparatus especially of Celal Bayar and others of the old generation of *İttihatçıs* offered a very convenient pretext to those who claimed the legacy of Mustafa Kemal, who cut his ties with the *İttihatçıs* during the War of Independence. Two even more impressive connections relate to the '68 generation and the allegedly conspiratorial organization known as *Ergenekon,* whose trial is ongoing. According to a view expressed recently in the columns of the liberal-leftist newspaper *Taraf*, there is a direct line connecting, on the one hand, the political culture of the Young Turks and of the *Dev Genç* revolutionary group of the late 1960s, whose legendary leader Deniz Gezmiş was put to death in 1971 along with two of his comrades, and, on the other hand, the *Ergenekon* underground organization (an umbrella name to describe a network reminiscent of the Italian Gladio). According to this view, Deniz Gezmiş and his peers had nothing in common with the instigators of May 1968 in Paris or the Prague spring in the same year. In fact, they were leftist nationalists who had trained in camps in Palestine and tried to instigate chaos, so that the Demirel cabinet would step down and the military take over. Contrary to their expectations, the military turned against

28 See Fatma Müge Göçek "What is the Meaning of the 1908 Young Turk Revolution? A Critical Historical Assessment in 2008," paper presented at the conference *Turkey 1908-14: Biographical Approaches,* at the University of Zürich, 13-15 November 2008, and published at Istanbul Üniversitesi, *Sosyal Bilimler Fakultesi Dergisi* 38 (March 2008): 179-214. The author refers to the role of high ranking Young Turks in a series of massacres committed during the First World War, but also relates their legacy to the foundation and the founding figures of the Turkish Republic.

them, and not the cabinet, and Deniz Gezmiş with his comrades Hüseyn Inan and Yusuf Aslan became the scapegoats for the crisis.[29] This argument continues that the members of *Dev Genç* were inspired by the conspiratorial spirit and xenophobia typical of the Young Turks. The fact that they had a fascination with armed violence and described their struggle as the "Second War of Independence" reveals a megalomania similar to that of the Young Turks. Moreover, if the right wing nationalist had not been so paranoid as to believe that a Soviet invasion was imminent, both leftist nationalists and right-wing nationalists could have found common ground. This view does not withstand serious criticism, not only because it equalizes left-wing and right-wing political culture, but mainly because it creates far-fetched analogies without regard to context and the specifics of each period.

I'll refer briefly though to current circumstances. A year ago, when Turkey was facing a challenge by the constitutional court to a government newly elected by an almost absolute majority of votes, images that had circulated in the preceding months of retired army officers taking the oath to protect their country on the revolver and the Qur'an triggered an outcry. In various localities, like-minded organizations, in a farcical crescendo, claimed that a "Second War of Independence" was needed, that the country was under foreign occupation, a discourse that reminded one, at least superficially, both of the late 1960s and the Young Turks. This movement, no matter how marginal it might be, is related at least discursively to the activities of many of the accused in the Ergenekon trial. As a result, it seems that an outcry is triggered by those inspired by what liberals, Kemalists and Islamists describe as the spirit of *Ittıhatçılık.*

Another way to discuss the events of 1908 in the Ottoman Empire would be to compare them with contemporary constitutional movements elsewhere, in particular in Iran in 1906 and Russia in 1905. These are the more relevant analogies, but there are also other contemporaneous movements, ranging from the uprising led by Emiliano Zapata in Mexico to the military coup in Greece only a year after the Young Turk revolution. Such an approach, adopted by scholars such as Nader Sohrabi, can tell us much about the knowledge from parallel cases channelled into Ottoman lands. It can also tell us much about the impact these parallel cases had on the hearts and minds of the protagonists and local agitators. Last but not least, it can reveal the ideological mechanisms that led both to the introduction of larger segments of the population to party politics and the gradual involvement of the military in political life as part of a more general international pattern.[30]

In 2008, the centenary of the Young Turk revolution was commemorated in a series of conferences in Turkey and abroad. All the issues mentioned above were reflected in the debates. Yet the legacy of the Young Turks still divides those who lay claim to it. It is telling that Kemalists, Islamists and liberal leftists organized separate conferences with distinctive agendas in Ankara, Istanbul and Izmir respectively. Other conferences were organized in Paris, Zürich and Thessaloniki, the cradle of the Young Turks. What marked the public debate on

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29 Rasim Ozan Kütahyalı, "Bir İttihatçı olarak Deniz Gezmiş," *Taraf gazetesi,* 14 Eylül 2008, http://www.taraf.com.tr/makale/1906.htm, and idem, "İttihatçı katile hayran bir Deniz Gezmiş," *Derin Düşünce,* 22 Eylül 2008.

30 Nader Sohrabi, "Global Waves, Local Actors: What the Young Turks Knew about Other Revolutions and Why It Mattered," *Society for Comparative Study of Society and History* (2002): 45-79.

the Unionist legacy, however, was the recent use of Young Turk initiation practices and rituals by the clandestine organizations mentioned above that targeted the present pro-Islamist government. Given the fact this government has claimed the Ottoman legacy and, at least occasionally, the policy of the "unity of elements" (*ittihad-i anasır),* as opposed to the unitary character of the nation state, it is inevitable its opponents will resort to the Young Turk discourse. Yet, unlike the preparations for the Young Turk revolution, it seems that recent clandestine activity has also mobilized state resources. Moreover, this recent activity is aimed not at establishing but overthrowing parliamentarism; not at modernizing the society in a Western fashion but at "protecting" it from encroachment by the West. The crucial question, though, of the balance between "equality before the law" and freedom mentioned earlier, which continues to torment our societies in the 21st century, remains unanswered. What kind of citizenship will safeguard the cultural autonomy of minority groups while at the same time allowing the majority to promote its values and its political vision for the society? The Ottomans, trapped in the process of transforming an empire into a nation-state as well as an unfavorable international environment, failed to find the right formula. The experience and sophistication of the administrative apparatus in the pluralist societies of our post-national era allow for greater optimism.

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Turkey, the Cultural Factor and the European Union

İLKAY SUNAR

In discussions of Turkey's eligibility for membership in the European Union, culture appears and reappears as an important point of contention. The question raised in this brief chapter is this: What kind of culture is the standard for judging any nation-state in Europe to be eligible for membership in the Union? Or, to put the question somewhat differently: What is the nature of the culture that modern Europe nation-states have in common that serves as a criterion for admission to the EU?

In an article published by the *Financial Times* on 11 November 2002, Valery Giscard d'Estaing mentioned, among other objections to Turkey's accession to the EU, the obstacle posed by Turkey's cultural and historical legacy. He prefaced his remarks by saying something to the effect that, "As long as European citizens cannot think of themselves as having a single, shared identity, European patriotism cannot come into existence." His point was that given Turkey's historical and cultural background, the citizens of the Republic of Turkey cannot share that single European identity and hence do not qualify to be European citizens. This, of course, raises the question of what it is that the citizens of the European nation-states share that constitutes their common identity.

Let us label d'Estaing's remarks as the "d'Estaing Syndrome," signifying the opposition to Turkey's membership in the EU at the cultural level voiced by some within the Union. It seems that the syndrome conflates and confuses two separate kinds of culture and hence two types of identity: (1) a pre-political conception of culture anchored in the ascriptive aspects of one's identity and collective unity based on common descent, religion, race, ethnicity, etc. and (2) a political conception of culture centred on the civic aspect of one's identity and collective unity based on citizenship. In his remarks about Turkey, d'Estaing conflates the two kinds of culture, and attempts to anchor the European-wide identity that European citizens share at both the ascriptive and civic levels of culture. Among other things, he mentions not only the philosophy of the Enlightenment, rationalism and scientific thinking as the bases of European identity, but also the dominant religion, obviously a reference to Christianity.

The suggestion in this chapter is that, in fact, in the construction of modern Europe, ascriptive culture has been the problem and civic culture the solution. In other words, what is common to the modern Europe of nation-states is precisely a civic culture embedded in a secular, democratic and constitutional concept of citizenship equipped with individual rights and responsibilities. This is the achievement of the European nation-states against the background of a painful

history of wars, massacres and expulsions that were inflamed by differences of religion, sect, race and ethnicity. Whereas ascriptive cultures divide Europe, it is the achievement of civic culture that unites them.

As has been pointed out by Jürgen Habermas, the challenge before the European Union is not to invent anything new but to conserve and build upon the democratic achievements of the European nation-state.[1] These achievements underlie what we may call the "European way of life," a form of life that is based on a civic culture of democratic, secular citizenship bound by the rule of law, resting on active participation and deliberation, and equipped with individual rights and responsibilities, as well as levels of social welfare, education and leisure that are the prerequisites of both private autonomy and democratic citizenship. The European Union, in other words, is neither a mere market nor a primordial cultural unity but a political union that shares a civic democratic culture. It is upon this achievement that the European Union is constructed, and again it is upon this that a possible Europe of citizens will be built based upon a common constitution, a European-wide civil society, a common public sphere of participation and communication and a shared political culture.

The pride of modern Europe derives from its commitment and capacity to overcome the deep conflicts and confrontations of the darker side of its history, to learn from those painful and deadly struggles and to be able to cope with deep cleavages, schisms and rivalries stemming from ascriptive differences of sect, religion, ethnicity and race. In other words, the common European bond is the culture of reconciliation and the politics of inclusion based on a civic understanding of political community. It is this civic solidarity that provides the tie that binds modern Europe. The emergence of civic consciousness and democratic identity involved the painful process of transition from local and dynastic identities to the pluralization of ascriptive loyalties under the common allegiance to an overarching civic polity. The European Union as a project is based on the assumption that such solidarity can be extended beyond the borders of classical nation-states to embrace modern Europe as the nation of citizens. The European Union is based on the premise of a multi-ethnic, multi-religious, multilingual society that is united by its commitment to a civic, secular community of democratic citizens.

The point to be made is this: Turkey as a potential member needs to be judged not by the criterion of ascriptive culture, but by civic standards and by its commitment to the same democratic culture practised by other members of the EU. In short, Turkey, or any other potential member, needs to be judged by its achievements. The way in which history plays a role in judging Turkey for membership is whether the Republic of Turkey has learned from its past just as much as the nation-states of Europe have? Has it established a civic culture of reconciliation and a politics of inclusion as the solution to its equally painful history of conflicts and confrontations? Moreover, has Turkey reflexively appropriated from its history values and norms that facilitate the construction of such a democratic culture? In short, is Turkey a consolidated nation of citizens, a stable civic polity and functioning secular democracy based on the rule of law and individual rights? Does Turkey share with the rest of Europe a way of life based on such values and practices?

In arriving at a democratic society, the different nation-states of the European Union have not necessarily travelled an identical route. Each in its own way, and

1 Jürgen Habermas, "Why Europe Needs a Constitution," *New Left Review* (September-October 2001).

with varying degrees of timing and success, has nevertheless achieved the minimum standards of a functioning political society committed to democratic and civic values. Starting from divergent points of origin, the nation states of Europe have converged in their commitment and practice of democracy, despite their varied histories and ancestral cultures.

The relevant question, therefore, is, can the same be said of Turkey? Starting in mid-19th century, Turkey has persistently pursued its commitment to a civic culture. The establishment of a constitutional parliamentary government, the shift to a community of citizens, the founding of the republican nation-state resting on secularism, the rule of law and territorial citizenship, and finally the transition to democracy in 1950 – surely, none were free of conflict and painful confrontations. Neither was democracy accident-free after 1950, but the commitment has persisted and the Turkish leadership and citizens have not given up on their aspirations to make democracy "the only game in town."

The paradigm shift to a democratic culture of reconciliation and the politics of inclusion has taken place in Turkey. Clearly, all problems have not been solved, but the leadership and citizens of Turkey are committed to resolving their problems and differences within a democratic framework. Islam in Turkey is no longer the opponent of secular democracy, but its friend. It has adapted itself to the logic of democratic institutions and practices. Important steps have been taken towards accommodating sectarian and ethnic differences within the framework of civic solidarity and democratic citizenship. Fundamental measures have been taken to upgrade individual rights. It is not the intention here to judge whether the Republic of Turkey has lived up to the minimum standards that make it eligible for the process of membership. The purpose here is only to point out the confusion that surrounds the concept of culture when it is applied particularly to the case of Turkey.

M. d'Estaing and those who think like him are unfair to Turkey only insofar as they betray the very values, norms and standards that are rightly a source of pride for Europe. It is not so much their underestimation of the achievements of Turkey that is troublesome, but their underestimation of Europe's achievements. No one can ask the members of the European Union to spare Turkey: the rules, norms and standards of a democratic Europe need to be applied, and applied strictly. But the relevant standards should be used. The cultural standards that make modern Europe what it is should be applied: a people committed to building unity out of diversity; a people committed to resolving their differences democratically; and a people aspiring to capitalize on the achievements of the nation-state to construct a cooperative venture beyond the nation-state. The words of one the best minds contemporary Europe has produced are a good place to end. As Jürgen Habermas has pointed out, a Europe of citizens will be built when differentiation occurs "between a common political culture and the branching of national traditions of art and literature, historiography, philosophy, etc." A Europe of citizens will be built when the same universalist rights and constitutional principles "enjoy pride of place in the context of different national histories, and when a common politicocultural self-image will stand out against the cultural orientations of different nationalities."[2]

2 Jürgen Habermas, "The European Nation-State – Its Achievements and its Limits," in Gopal Balakrishan and Benedict Anderson (eds), *Mapping the Nation,* (London: Verso, 1996).

Citizens of Turkey have been committed to building a political culture that is in common with the rest of Europe for the past 150 years. Turkey should therefore be judged by the universalist rights and constitutional principles of such a commitment.

SWEDEN

The Swedish Constitution of 1809

OLOF PETERSSON

Liberty, Absolutism, Crisis, Compromise

The collapse of Sweden's European empire and the death of Charles XII in 1718 marked the end of absolute monarchy and the beginning of an age of liberty. Over half a century, Sweden underwent an early experiment in parliamentary government. The kingdom was governed by parliament and the monarch was reduced to mostly ceremonial and formal functions. Political debates in the parliament took place along partisan lines between two loosely organized party groups called "The Hats" and "The Caps." The link between the legislature and the executive can be described as an embryonic form of parliamentary system, since the Council of the State was politically dependent on the four-estate *Riksdag*. The Freedom of the Press Act of 1766 abolished censorship of non-theological publications and introduced open access to the bulk of official records.

This age of liberty gave rise to an era of Swedish Enlightenment. During these years, public debate, although mostly confined to literate circles in the capital of Stockholm, was very lively and was stimulated by a multitude of leaflets, journals and books. Scientists such as Carl Linnaeus, Nils Rosén von Rosenstein, Anders Celsius and Carl Wilhelm Scheele laid the foundation for modern academic research. An entrepreneurial spirit and agricultural reform led to an economic upswing. The political system had created the institutional framework for this relatively open society, but it would also be the political system that finally caused its demise. Public power was concentrated in an omnipotent legislature, and an unstable, bureaucratic and corrupt regime was the result.

The age of liberty came to an end in 1772, when Gustav III seized power in a *coup d'état* and further strengthened royal supremacy by abolishing the old constitution in 1789. After the assassination of Gustav in 1792, his son took over the throne. Gustav IV Adolf detested the Enlightenment and the French Revolution and put all his effort into preserving the absolutist regime. The king's growing unpopularity reached its peak in 1808 when Russia invaded Finland, which had been an integral part of the Swedish realm since early medieval times. Danish and French troops prepared to invade the southern provinces. The crisis became acute in the early months of 1809 when Sweden finally lost Finland to Russia. Officers opposed to the king started to conspire against him and insurgent troops set off towards Stockholm. In March 1809, the king was arrested by a group of officers. Shortly afterwards, he abdicated and the country found itself in a revolutionary situation.

The *Riksdag* convened and immediately decided to exclude the king and his heirs from succession to the throne. A first draft of a new constitution was drawn

up by a nobleman, Anders af Håkansson, but was rejected. The majority opted to act according the principle of "Constitution first, King later." A special committee was elected and after intense negotiations a compromise was reached within a few weeks. The *Riksdag* unanimously approved the new constitution in June 1809.[1]

The 1809 Constitution: Basic Features

By its own account, the constitutional committee had been driven by a desire to satisfy different demands. The constitution could be seen as a compromise between the two extreme regimes that preceded the dramatic events of 1809. On the one hand, the founding fathers wanted to avoid the excesses of legislative power that characterized the age of liberty. On the other, they maintained that the new constitution must contain safeguards against a return to the excessive form of executive rule that had been the basic feature of absolute monarchy. With the 1809 Constitution, Sweden took a step towards constitutional monarchy, that particular hybrid regime that characterized several European countries during the 19th century.

Four constitutional laws

The revolution of 1809 resulted not in one but in four new constitutions. Sweden already had a system of several parallel constitutions, notably after the Freedom of the Press Act was given the status of a fundamental law in 1766 (which meant that it could be amended only through a special procedure based on identical decisions by two consecutive parliaments). The 1809 Constitution retained the formal name of the basic law that was introduced in Swedish law in 1634, namely *Regeringsformen* ("The Instrument of Government"). This constitutional law contained most elements that could be found in other European constitutions of the time, although large parts of the text dealt with administrative matters concerning the organization of the state. Also, specific details were elaborated in three separate laws.

The *Riksdag* Act of 1810 set out the rules of parliamentary procedure in regard to debates, votes, etc. This act also defined the composition of the four estates, with provisions regarding elections and eligibility. When the four-estate *Riksdag* (nobility, clergy, burghers and peasantry) was replaced by two-chamber representation in 1865-66, the *Riksdag* Act of 1810 was also superseded by a new constitutional act. Today the *Riksdag* Act has only semi-constitutional status.

The Act of Succession of 1810 regulated succession to the throne. It was adopted to confirm the election of French Marshal Bernadotte as the crown prince of Sweden. This act solely concerns the Bernadotte family and is still in

1 Historical overviews of the constitutional development are given by, e.g., Nils Herlitz, *Grunddragen av det svenska statsskickets historia,* (Stockholm: Norstedts, 1964); Michael F. Metcalf et.al., *The Riksdag: A History of the Swedish Parliament,* (New York: St. Martin's Press, 1987); Nils Stjernquist (ed.), *The Swedish Riksdag in an International Perspective: Report from the Stockholm Symposium, 25-27 April 1988,* (Stockholm: Bank of Sweden Tercentenary Foundation, 1988); Nils Stjernquist, "Land skall med lag byggas: Sveriges författningshistoria," in *Sveriges konstitutionella urkunder,* (Stockholm: SNS Förlag, 1999), pp. 9-45. For a recent collection of essays, see Margareta Brundin and Magnus Isberg (eds), *Maktbalans och kontrollmakt: 1809 års händelser, idéer och författningsverk i ett tvåhundraårigt perspektiv*, (Stockholm: Sveriges Riksdag, 2009).

force, although with several amendments. Originally, the successor to the throne could only be one of the male descendants of the dynasty. Since 1980, succession through the female line is also permitted.

The Freedom of the Press Act of 1810 formulated basic principles of freedom of speech and open access to public documents. This act also contained detailed rules defining the legal procedures for the prosecution and trial of press freedom cases. The 1810 act was replaced in 1812 with more severe legislation, which gave the royal power new instruments to intervene against its radical opponents. Sweden still has a separate Freedom of the Press Act, although the present act from 1949 has been amended many times. In 1991, a new constitutional act, The Fundamental Law on Freedom of Expression, was enacted to supplement the Freedom of the Press Act with equivalent rules for radio, television, film, video and electronic media.

Separation of powers

The rationale behind the 1809 Instrument of Government can be viewed as a summation of the18th century separation of powers theory. The constitutional committee declared it had tried to shape an *executive* power acting within fixed forms and united in its decision-making and implementing power. It had also created a *legislative* power, slow to act but strong to resist. Finally, the constitution set up a *judicial* power, independent under the laws but not above them. These three powers had been deliberately structured to check one another, as a form of mutual containment, without being intermixed or restrained in their basic functions.[2] The Instrument of Government of 1809 is certainly marked by a separation of powers, but not completely in accordance with this schematic interpretation of the doctrine.

Executive power was vested in the monarch. The words of the 1809 constitution are clear enough: "The King alone shall govern the realm." However, the rest of the relevant article restrains royal power. The king shall govern "in accordance with the provision of this Instrument of Government," a clause which sets the framework for a constitutional government. Furthermore, the king shall "seek the information and advice of a Council of State, to which the King shall call and appoint capable, experienced, honorable and generally respected native Swedish subjects" (art. 4).[3] Although the formal wording of this article survived until the early 1970s, its interpretation has changed dramatically over the years. During the 19th century, the monarch exercised significant personal power. With the gradual introduction of a parliamentary regime, the focus shifted from the king to the Council of State. This meant the government came to reflect the political opinion of the *Riksdag* rather than the personal wishes of the king. After the democratic breakthrough, "The King" in actual practice became synonymous with the cabinet, responsible to parliament.

Legislative power was divided between king and parliament. General civil laws and criminal laws, as well as constitutional amendments, had to be accepted

2 Konstitutionsutskottets memorial, in *Sveriges konstitutionella urkunder*, p. 184.

3 Unless otherwise indicated, the English translation of the 1809 Constitution is quoted from *The Constitution of Sweden,* transl. Sarah V. Thorelli, with an introduction by Elis Håstad (Stockholm: Documents published by The Royal Ministry for Foreign Affairs, New series II:4, 1954).

by both the parliament and king, giving the executive a legislative veto: "Neither the King without the approval of the Riksdag, nor the Riksdag without the consent of the King, shall have the power to make new laws or to repeal existing laws" (art. 87.1). In addition, the king had exclusive power over certain legislation, whereas parliament was solely responsible for other legislation. Royal prerogatives included statutes concerning public administration. On the other hand, parliament had control over the public purse: "The ancient right of the Swedish people to tax themselves shall be exercised by the Riksdag alone" (art. 57).

Judicial power was not considered as a separate branch of government, but was included in the executive branch: "The judicial power of the King shall be vested in ... the King's Supreme Court" (art. 17). Nevertheless, the courts of law were granted certain independence. Judges could not be removed from their posts without due trial and judgment (art. 36) and the courts were to decide cases in accordance with laws and statutes (art. 47). The general impression is that the courts were given a weak position in the constitutional system of Sweden.[4] Until 1909, the king retained the formal right to cast two votes in the Supreme Court. In 1909, a separate court for administrative appeals was also introduced. Before then, complaints against state authorities were decided by the executive power.

Parliamentary control

As a reaction to the previous period of royal absolutism, the Instrument of Government of 1809 and the *Riksdag* Act of 1810 introduced several mechanisms to safeguard the freedom and independence of parliament. Members of parliament were given a more or less unlimited right to introduce private member's bills. The parliamentary committees increased in number and influence. One of the new bodies was the constitutional committee. This committee was given permanent status and became a key institution in the parliamentary control of government. The constitutional committee was granted authority to scrutinize the minutes of the government. Furthermore, the Central Bank of Sweden, as well as the National Debt Office, remained under parliamentary supervision.

An important innovation in the 1809 Instrument of Government was the establishment of a parliamentary ombudsman. The ombudsman was given the task of supervising the observance of laws and statutes as applied by the courts and by public officials and employees. In accordance with these duties, the ombudsman could act as a procurator and institute proceedings before the courts against those who, in the execution of their official duties, had committed unlawful acts or neglected to perform their duties properly.

The idea of an office with the specific task of supervising the bureaucracy was not completely new. In fact, the parliamentary ombudsman was modelled on the office of the Chancellor of Justice.[5] This office derived from its predecessor, His Majesty's Supreme Ombudsman, a post established by Charles XII in 1713. After his defeat by Russia at Poltava in 1709, Charles fled to Turkey, where he remained for several years. In the long absence of the king, the Swedish administration fell

4 Caroline Taube, "En tredje statsmakt? Domstolarna under 1809 års regeringsform," in Brundin and Isberg, *Maktbalans och kontrollmakt*, pp. 232-372.

5 Bengt Wieslander, *The Parliamentary Ombudsman in Sweden*, (Stockholm: Bank of Sweden Tercentenary Foundation, Gidlunds Förlag, 1994), p. 13.

into disarray and the king set up an ombudsman to ensure that the administrators fulfilled their duties. In 1719, the title was changed to the office of the Chancellor of Justice. This office still exists, which means that the public administration over two centuries has been checked by two parallel control mechanisms: the Chancellor of Justice (*Justitiekanslern*, JK) appointed by the government and the ombudsman (*Justitieombudsmannen,*[6] JO) appointed by parliament.

The office of the ombudsman turned out to be an efficient tool in the hands of parliament. The power to prosecute public officials was used to combat corruption, malfeasance and negligence in the bureaucracy. Over the years, the oversight of the ombudsman changed focus. Today, the primary task of the ombudsman is no longer to prosecute public officials but to encourage the sound application of the law by aiding central and local authorities in learning from their mistakes. The ombudsman, who is politically independent of parliament, receives several thousand individual complaints each year and the ombudsman's annual reports set the standard for good governance in Sweden.[7]

Domestic or Foreign Sources?

The events leading up to the adoption of a new constitution represent one of the most dramatic episodes in Sweden's relatively uneventful history. Consequently, these months in 1809 have become the subject of a large number of academic studies. This particular field of history, law and political science has even generated a meta-field, dealing with historiographical aspects as well as the conceptual history and linguistic discourse of the founding fathers.[8]

One of the major issues in these academic studies is the provenance of the constitution. Crudely stated, the main question is whether the roots of the 1809 Constitution can be traced to domestic or foreign sources. Even though several of the leading actors in 1809 left written documents, the interpretation of these historical sources has proven to be complicated, leaving considerable room for divergent conclusions. One example of scholarly controversy concerns the assessment of the relative importance of the secretary of constitutional committee, Hans Järta. Järta was long seen as the main architect of the constitution, but critical scrutiny of the sources has reduced his importance to one of influence over the stylistic aspects of the constitution rather than its legal content. To complicate matters further, Hans Järta wrote the memorandum explaining the motives behind the constitution, giving the impression that international ideas about the separation of powers served as a major inspiration. Later, Järta became more conservative and he began to stress the continuity of Sweden's constitutional history and, therefore, the domestic sources.

Those scholars who have stressed the foreign sources have primarily referred to the general character of the constitution. The mixture of royal and parliamen-

6 The official title according the Instrument of Government is "riksdagens ombudsman," the Ombudsman of the *Riksdag*.

7 Wieslander, *The Parliamentary Ombudsman in Sweden*, p. 17.

8 Carl Arvid Hessler, "Regeringsformen och den utländska doktrinen: debatten kring en klassisk fråga," *Statsvetenskaplig tidskrift* 62 (1959): 209-25. For two rather recent contributions, including references to previous works, see Emma Rönström, "Forskardebatten kring 1809 års regeringsform: till frågan om grundlagens härkomst," *Statsvetenskaplig tidskrift*, 100 (1997): 448-67; Anders Sundin, *1809. Statskuppen och regeringsformens tillkomst som tolkningsprocess*, (Uppsala: Studia historica Upsaliensia, 227, Acta Universitatis Upsaliensis, Uppsala University, 2006).

tary power was typical of the constitutional monarchy known in other European countries. The principle of separation of powers was perhaps less visible in the constitutional text, particularly since the courts of law were not considered a separate branch. However, the *travaux préparatoires* clearly indicate that the Swedish constitution makers shared the general ideas about government that were prevalent in neighbouring countries at the time.

Arguments for predominantly domestic sources refer to some peculiar traits in the 1809 Constitution, such as the royal prerogatives in legislative and judicial matters. Scholars argue that these and other elements can be traced to older times. The history of Sweden was often interpreted in terms of an alliance between the king and his subjects. For instance, the farmers had long been represented in the legislature and the new constitution retained this peculiar form of four-estate parliament. The 1809 Constitution, it was argued, should be interpreted as "Sweden's history set in constitutional articles," to quote one political science professor and constitutional scholar.[9]

Academic debate with political ramifications

The struggle between these two interpretations became particularly intense at the end of the 19th century and beginning of the 20th century. It was no coincidence that this occurred during a period when Sweden was undergoing a rapid conversion from backward agrarian society to modern export-oriented economy. Industrialization, urbanization and democratization challenged the political establishment and constitutional arguments became an important ideological bulwark against the labour movement and other modernizing forces. Conservative arguments stressed the domestic sources of the constitution, which supposedly was based on national unity and historical continuity.[10] This line of reasoning was similar to the historical school in Germany, underlining the organic growth of a constitution through its adaptations to the particular spirit and history of the nation. By pointing to foreign influences, radical opponents challenged this interpretation and questioned the conservative view of the constitution and its historical roots.[11]

Even after the victory of democracy in about 1920, with the introduction of a general suffrage and a parliamentary system of government, the domestic/foreign debate continued in the academic arena. The major proponent of the domestic interpretation, Fredrik Lagerroth, was professor of political science at Lund University, while the leading advocate of the foreign influence thesis, Axel Brusewitz, held the chair of political science at Uppsala University. At the time, Lund and Uppsala were the two major universities in Sweden and many generations of political science students faced the choice of entering either the "Lund school" or the "Uppsala school" of constitutional history.

It could also be asked whether this domestic/foreign debate itself has domestic or foreign sources. National peculiarities certainly played a role in the specific

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9 Pontus Fahlbeck, *Regeringsformen i historisk belysning*, (Stockholm: Norstedts, 1910), pp. 29ff. This judgment ("Sveriges historia omsatt i lagparagrafer") is quoted with approval by Fredrik Lagerroth, *1809 års regeringsform: Dess ursprung och tolkning*, (Stockholm: Svenska bokförlaget, Norstedts, 1942), p. iii.

10 Rudolf Kjellén, "Den nationella karakteren i 1809 års grundlagsstiftning," *Historisk tidskrift* 13 (1893): 1-22.

11 Axel Brusewitz, *Studier öfver 1809 års författningskris: den idépolitiska motsättningen*, (Uppsala: Skrifter utgivna av K. Humanistiska vetenskapssamfundet i Uppsala, 18:5, 1917).

details, but the general question had already been formulated in other countries. One famous example of a domestic-versus-foreign controversy relates to the origins of the French revolutionary constitution. It was the German constitutional scholar Georg Jellinek who ignited the debate by asserting that the French constitution was not really a domestic product and particularly questioning the importance of Rousseau. According to Jellinek, the French constitution was instead influenced by the constitutional innovations in America, which in turned could be traced back to immigrants from continental Europe, most importantly Germany. Thus, following Jellinek's argument, the French constitution had its roots somewhere in the Saxon forests. French reactions were immediate and vehement. Not only had Germany conquered French territory in the 1870-71 war, now the Germans were trying to appropriate the French constitution as well. Émile Boutmy, founder of Sciences Po in Paris, objected strongly and argued that the Anglo-Saxon and Teutonic concerns about limiting the power of the ruler were quite different from the French idea of freedom.[12] The domestic/foreign controversy is a perfect example of how academic arguments can become crucial ingredients in political turmoil.

An "absurd" debate

Modern scholars are increasingly uncomfortable with being pigeon-holed in either of these two crude categories. Nowadays, it is commonplace to reject the assumption that a constitution necessarily has to be of either domestic or foreign origin. On the other hand, alternative interpretations easily fall into pedestrian platitudes, which more or less state that historical events are caused by a little of everything. Somewhat more interesting are scholars who question some of the implicit assumptions behind the domestic/foreign debate.

A fundamental critique was formulated by political science Professor Gunnar Heckscher.[13] The question of whether national experience or foreign debate lay at the root of the constitution is characterized as "absurd." Regardless of how far back scholars trace the historical roots of the Swedish constitution, they are bound to find connections to general constitutional development in Europe. National boundaries did not matter much within the socially limited circles that dominated public opinion and political government at the time. Education was uniform in countries such as Sweden, France, England and Germany. Educated people referred to the same ideas and the same authors and they followed events in foreign countries just as much as in their own. The whole question of whether Swedish *or* foreign sources determined the constitution is, in Heckscher's opinion, "completely unrealistic."[14]

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12 Duncan Kelly, "Revisiting the Rights of Man: Georg Jellinek on Rights and the State," *Law and History Review* 22 (2004): 493-529.

13 It might also be mentioned that Gunnar Heckscher arrived in Turkey in 1952 to participate in the establishment of the Institute of Public Administration for Turkey and the Middle East in Ankara and he became acting co-director of the institute. Gunnar Heckscher, "Amme İdaresi ve Demokrasi" (Ankara: Ankara Üniversitesi Siyasal Bilgiler, Fakültesi Dergisi, Cilt: IX, No.2, 1954).

14 Gunnar Heckscher, "Nationell och internationell författningsdebatt 1809 och tidigare," in Stefan Björklund (ed.), *Kring 1809: Om regeringsformens tillkomst*, (Stockholm: Wahlström and Widstrand, 1965), pp. 120-31.

Constitutional Transformation after 1809

When the 1809 Instrument of Government was finally replaced by a new basic law on 1 January 1975, it was the second oldest constitution in the world. Although the general constitutional architecture had remained the same, the 1809 Constitution had undergone a number of changes during this long period. These changes consisted of formal amendments to individual articles as well as reinterpretations of the legal text.

Previous constitutions (the Instruments of Government of 1634, 1719, 1720 and 1772) did not contain an amendment clause since they were assumed to have eternal validity. In this sense, the 1809 Constitution marked a break with history. It laid out a formal amendment procedure, which was inspired by the Freedom of the Press Act of 1766. The constitution could be altered or repealed by decision of the king and two consecutive *Riksdag*s (art. 81-82). Interestingly, the constitutional committee explicitly admitted that its proposal for a new constitution was not perfect. That is why the constitution opened up the possibility of being improved "when more than a temporary public opinion had been established."[15]

This amendment clause was employed many times. When the constitution celebrated its 150th birthday in 1959, a legal scholar calculated that only 13 of the 114 articles remained identical to the 1809 wording and most of these articles had only peripheral significance.[16] The text also went through linguistic revision when the orthography of the Swedish language was modernized in the early 1900s.

Just as important as these formal revisions was the constitutional transformation by reinterpretation (*Verfassungswandel*). Some articles and concepts were gradually given new meaning. The most notable example is the concept of "the King," which came to mean "the cabinet." Other paragraphs became obsolete.[17] There are also examples of flagrant conflicts between the constitutional text and the actual practice. For instance, the constitution granted that bank notes, issued by the Bank of Sweden, would be "redeemed, by the Bank, upon demand, in gold at their face value" (art. 72). Such redemption could only be suspended in war or severe crises, but the right to redeem bank notes was in practice suspended forever.

The constitutional history of Sweden over the last two centuries can be divided into three major periods: one century with the 1809 constitution, then a little over half a century with democracy within the framework of the old constitution, and finally a few decades with a new constitution. These three periods are separated by two transformation phases marked by constitutional upheaval. The first transformation phase began in 1906, when general suffrage was extended to most men, and culminated in 1917-21, when women were also granted the right to vote and the parliamentary system of government was finally established. The second transformation phase lasted between 1968, when a partial revision of the constitution was decided, and 1974, when the crucial decisions to replace the 1809 constitution with a new constitution were taken.[18]

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15 Konstitutionsutskottets memorial, in *Sveriges konstitutionella urkunder*, p. 189.

16 Nils Herlitz, "Regeringsformen i nutida författningsliv: erfarenheter från 1939-1955," in Erik Fahlbeck (ed.), *1809 års regeringsform: Minnesskrift till 150-årsdagen den 6 juni 1959*, (Lund: Gleerup), p. 152.

17 Examples of obsolete articles: nobility (art. 37), market rates (art. 75), and impeachment (art. 101, 106).

18 These historical notes, as well as the following sections, are primarily based on Fredrik Sterzel, *Författning i utveckling: Konstitutionella studier*, (Uppsala: Rättsfondens skriftserie, 33, Iustus, 1998).

From separation of powers to parliamentary government: 1809-1917

The first century of the 1809 Constitution was marked by a gradual shift of power from king to parliament. Political opposition during the 1840-41 *Riksdag* initiated the development towards a modern cabinet. The ministries were reorganized, giving the individual ministers a stronger position. The representation reform in 1866-67 meant that the four-estate *Riksdag* was replaced by a two-chamber *Riksdag*, though still based on a very limited suffrage. Towards the end of the 19th century, social cleavages manifested themselves in sharper conflicts along party political lines in the parliament. The conflict between free-traders and protectionists in 1887 led to heated political debates across the country and marked the beginning of modern election campaigns in Sweden. Struggles over the process of cabinet formation lasted several decades. Not until 1917 did the king yield to parliament and finally accept the principle of parliamentary government. The *Riksdag* also advanced its power over legislation and budget issues.

Despite the large number of formal amendments to the written text, the most important rules remained unchanged. It is true that the representation reforms and the cabinet reorganization in the middle of the 19th century were confirmed by significant alterations to the constitutional texts, but most other amendments related to details and technical adjustments.[19] The overall conclusion is that formal changes to the constitution have had very limited importance for the constitutional development of Sweden.[20]

The first transformation phase: democracy

The period between 1917 and 1921 is considered as a milestone in Swedish history. The old social structure was replaced by a new system based on general suffrage, democratically accountable cabinet, popular movements, free mass media and the beginning of a welfare state. The extension of suffrage called for a formal change of the constitutional text, albeit not the Instrument of Government but the *Riksdag* Act. Otherwise, there were only two constitutional amendments of any significance: the introduction of a consultative referendum and the setting up of an advisory council on foreign affairs.

These changes are the rare exceptions to the general rule that formal amendments to the constitution played only a secondary role.[21] The best example of this is that the parliamentary system was introduced without any revision of the constitution whatsoever. While parliament now had control over cabinet formation, and royal power had been reduced to mainly ceremonial functions, the constitution still proclaimed that the king alone ruled the realm.

Half a century without a constitution

An expert on the Swedish constitution, Professor Fredrik Sterzel, has baptized the first half-century of democracy as a "constitution-less" period.[22] The old con-

19 Such as the formal name of the parliament being changed from "riksens ständer" to "riksdagen."

20 Sterzel, *Författning i utveckling*, p. 11.

21 Ibid., p. 13.

22 The Swedish expression used is "det författningslösa halvseklet." Ibid.; Fredrik Sterzel, "Ett kvartssekel efter 'det författningslösa halvseklet': har Sverige nu en författning?," in Eivind Smith (ed.), *Grundlagens makt*, (Stockholm: SNS Förlag, 2002), pp. 77-98.

stitution became increasingly obsolete and did not play a significant role. Important new principles developed outside the constitution, but did not have any formal recognition.

On the occasion of the 150th anniversary of the constitution in 1959, Professor Gunnar Heckscher looked back and concluded that the answer to the question about the influence of the constitution had to be mainly in the negative. The constitution had never received any recognition, even less been revered, in the public mind. Parliament and cabinet had not treated the constitution with any great respect, rather mistreating it instead. In public debate, it had become almost ridiculous to refer to the letter and spirit of the constitution.[23]

It should be added that Sweden could theoretically have moved into a common law system. This would have meant that the written constitution would be replaced by jurisprudence based on court rulings and the establishment of constitutional precedent. However, this development never occurred because Sweden, like its Scandinavian neighbours, lacks a constitutional court and Swedish courts have been reluctant to refer to the constitution in individual cases. The standard classification in comparative law studies, separating formal systems based on Roman law from common law systems, has to be supplemented by a third category. Sweden proved it was possible to install a democratic system of government without a meaningful written constitution or a legal system based on case law.

The second transformation phase: towards a new constitution

In the years following the crisis of European democracy and the trauma of the Second World War, Sweden slowly began to realize that it lacked a properly functioning constitution. As is common when Swedish society faces a new problem, the cabinet set up a parliamentary commission, combining politicians and experts. The commission started its work in 1954 and the directives to it called for a comprehensive review of the problems of democratic governance and, based on this review, a proposal for modernizing the constitution.

Almost ten years later, the commission reported that it had found it increasingly difficult to fit all desirable changes into the 1809 Constitution. Thus, it proposed that a new constitution replace the old one. The main argument against keeping the 1809 version was that it did not meet the requirements of a modern constitution. The 1809 Constitution was based on the doctrine of separation of powers, while the Swedish polity had moved into a unitary system of parliamentary government. Since the mechanisms of the political system had developed outside the written constitution, the legal situation in important areas had become unclear. The commission also stressed that a constitution should be easily accessible, readable by the average citizen and a useful tool in civics education. Furthermore, the technical and stylistic impossibility of introducing new principles and articles into the old text had become obvious. The commission concluded that now was the time to replace the 1809 Constitution with a new one.[24]

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23 Gunnar Heckscher, "Regeringsformen och författningsutvecklingen," in Fahlbeck, *1809 års regeringsform,* p. 135.

24 *Sveriges statsskick*, 1, Lagförslag (Stockholm: Författningsutredningen, VI, Statens offentliga utredningar, SOU 1963:16, 1963), pp. 10ff.

This would be the solution, but it would take another decade before a new constitution was in place. One step in this reform process was the introduction of a unicameral parliament and the formal recognition of the parliamentary system of government. The first election to the new *Riksdag* took place in 1970. For a few years in the early 1970s, Sweden was governed under a partially revised version of the 1809 Constitution. The old article stating that the king alone rules the realm was simply deleted and a new article recognized the possibility for the *Riksdag* to remove the cabinet, or individual ministers, by a vote of no-confidence. These articles also became part of the new constitution, which was formally approved in 1974 and came into force in 1975.

The Legacy of the 1809 Constitution

In some respects, 1975 marked a new era in Swedish constitutional history. Sweden now had a fresh constitution, commonly referred to as the Instrument of Government of 1974, named after the date of the final decision. First of all, the legal text now looked completely different. While the 1809 Constitution began with the king and said nothing about the election system (which was regulated in the *Riksdag* Act), the 1974 constitution starts by formulating the foundations of the political system. The first sentence stresses popular sovereignty as the overarching principle: "All public power in Sweden emanates from the people" (RF 1974, art. 1:1). The new constitution contains separate chapters on fundamental rights and freedoms, the parliament, the head of state, the cabinet, legislation, financial power, international relations, administration of justice and general administration, parliamentary control and, finally, a chapter on war and danger of war.

The constitutional reform period around 1970 did not result in one comprehensive constitution but kept the old system with separate constitutions for the freedom of the press and succession to the throne. The legacy of 1809 is still apparent in this peculiar constitutional design. Although the content has changed over the years, Sweden even today has a system of four separate constitutions, which have equal legal status. The combined text is far longer than most other constitutions. The detailed character of the text has also contributed to a comparative frequency of amendment.[25] Some countries have chosen a short constitution expressing a few basic principles; Sweden has gone in the other direction.

Although the Instrument of Government of 1974 was completely rewritten, the material changes were limited. The explicit aim behind the 1974 Constitution was not to install a new form of government but to formalize constitutional practice. The parliamentary system of government, established half a century earlier, was now written into the constitution with some minor additions. The king was no longer formally responsible for the process of forming the government since this task was transferred to the speaker of the *Riksdag*. Furthermore, the new constitution stated that the proposal for a new government had to be accepted by parliamentary vote. The *Riksdag* also received full legislative power, which meant that new legislation no longer had to be formally approved by the cabinet. The formal role of the king was reduced to strictly ceremonial functions.

25 Bjørn Erik Rasch, "Rigidity in Constitutional Amendment Procedures," in Eivind Smith (ed.), *The Constitution as an Instrument of Change,* (Stockholm: SNS Förlag, 2003), pp. 111-25.

One major innovation of the 1974 Constitution was the introduction of a separate chapter on rights and freedoms. The 1809 Constitution had been more or less silent about individual citizens. The only relevant article contained the old-fashioned words from the medieval contracts between the king and the people, setting some general limits on royal power.[26] The articles regulating rights and freedoms in the initial wording of the 1974 Constitution were, however, rather brief and were generally considered insufficient. The chapter on rights and freedoms has since been amended several times and a constitutional commission in 2008 proposed further revision.[27]

In comparing the original 1809 Constitution with the Swedish polity in 2009, the most glaring difference is that a unitary form of government has supplanted the separation of powers set in place 200 years earlier. In fact, this was the deliberate choice of all the political parties in 1974. No one objected that the new constitution formally marked the end of the separation of powers doctrine. Instead, concentration of democratic power based on parliamentary sovereignty would be the leading principle. The official motive was that the principle of popular rule, which had gradually been established in constitutional practice, should be written into the constitution and that all formal remnants of the separation of powers should be removed.[28]

The question of the legacy of the 1809 Constitution must be answered quite differently depending how the "1809 Constitution" is defined. If this expression refers to the constitutional system implemented in the year of 1809, the similarities with the present system of government are small indeed. But if the "1809 Constitution" refers to constitutional practice during the final years of the constitution's existence, the answer is quite different. The basic features of the Swedish democratic system in 2009 remain more or less the same as in, say, 1969, when Sweden was still governed under the 1809 Constitution. Of course, important transformations have taken place in political life over these four decades (such as increasing electoral volatility, fragmentation of the party system, new modes of political communication, European integration, etc.), but these changes would most likely have occurred with or without the 1974 constitutional reform.

In one basic respect, modern Swedish history is characterized by constitutional continuity. The weak constitutional culture that marked the years between 1922 and 1975, the the "constitution-less" period, has not disappeared.[29] When Sweden joined the European Union in 1995, the constitutional adjustments were kept as minor and technical as possible. The fact that the constitution remains

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26 "The King shall maintain and further justice and truth, prevent and forbid iniquity and injustice; he shall not deprive anyone or allow anyone to be deprived of life, honor, personal liberty or well-being, without legal trial and sentence; he shall not deprive anyone or permit anyone to de deprived of any real or personal property with due trial and judgment in accordance with the provisions of the Swedish law and statutes; he shall not disturb or allow to be disturbed the peace of any person in his home; he shall not banish any person from one place to another; he shall not constrain or allow to be constrained the conscience of any person, but shall protect everyone in the free exercise of his religion, provided that he does not thereby disturb public order or occasion general offence. The King shall cause everyone to be tried by the court to the jurisdiction of which he is legally subject." (Art. 16, 1809 Constitution.)

27 *En reformerad grundlag,* Betänkande av Grundlagutredningen (Stockholm: Statens offentliga utredningar, SOU 2008:125, 2008).

28 Government bill 1973:90, 156.

29 Sterzel, "Ett kvartssekel."

silent on the legal consequences of EU membership has led commentators to conclude that Sweden has entered a new "constitution-less" era.[30]

Sweden certainly has a constitution, but the text of the constitution is primarily viewed as a set of administrative rules. Of course, elections are held every four years and cabinets are formed and resign according to the relevant articles. Abstract constitutional principles, however, still play a quite marginal role in political life and public debate. The courts of law are still reluctant to refer to the constitution – in fact The European Convention on Human Rights has proven more efficient than the 1974 Constitution in protecting the civil rights of Swedish citizens.[31]

The constitutional culture of a country must be seen as an integral part of its general political culture. Swedish political culture can be described as a pragmatic approach to decision-making, stressing utilitarian considerations rather than rights-based arguments. Swedish policy style has been characterized as deliberative, rationalistic, open and consensual.[32] Negotiations and compromise are preferred, rather than legal battles and overt conflicts over principle.

The growth of the Swedish welfare state is intimately bound up in this type of deliberative and pragmatic political culture. Major social reforms were prepared though cooperation among political parties, interest groups, experts and civil servants. Wage negotiations and labour market relations were handled through a smooth system of bargaining between employers and trade unions. In recent years, this corporatist system of governance has been challenged by internationalization, individualization and a more pluralistic structure of interest representation. It is nevertheless a fact that the Swedish welfare state was built on negotiation and practical trade-offs rather than constitutional principles. Citizens rights were largely viewed as social rights granted by the welfare state, rather than inalienable human rights laid down in any abstract constitution or granted by some natural law. The drawback of this "a-constitutional" system is obvious. Minority rights and individual freedoms are secured only as long as they are respected by the political majority. The indigenous Sámi minority suffered long under the oppressive policy of centralized state power. Sweden has not yet ratified the ILO convention on indigenous and tribal peoples.

Constitutional principles or constitutional reform have played a very limited role in the establishment of parliamentary democracy and a democratic welfare state in Sweden. The development towards a modern, democratic society took place outside the constitution. Extra-constitutional factors, such as peace and the absence of violent conflicts along ethnic, religious, regional or social cleavages, more than constitutional principles, explain Sweden's progress towards achieving its position as one of the most democratic and affluent societies in the current world.

A constitution is a piece of paper.[33] The question is what kind of paper a constitution is or should be. In political and legal theory, the text of the constitution

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30 Karl-Göran Algotsson, *Sveriges författning efter EU-anslutningen,* (Stockholm: SNS Förlag, 2000).

31 Caroline Taube, "Regeringsformen: positiv rätt eller redskap för rättshaverister?," in Eivind Smith and Olof Petersson (eds), *Konstitutionell demokrati,* (Stockholm: SNS Förlag, 2004), pp. 42-70; Karin Åhman,. "Rättighetsskyddet i praktiken: skydd på papperet eller verkligt genomslag?," in Eivind Smith and Olof Petersson, *Konstitutionell demokrati*, pp. 172-204.

32 Thomas J. Anton, "Policy-Making and Political Culture in Sweden," *Scandinavian Political Studies* 4 (1969): 89-102.

33 At least, so far. Soon the electronic version of legislative acts will have the same legal status as the printed text. It might be only a question of time before the electronic version will be the basic source for constitutions and other legal documents.

is often seen as a *manual*, a set of instructions about the machinery of government and something to be used in case of malfunction. A constitution can also be regarded as an *insurance policy*, as a method of protecting certain important principles by granting them a supreme position in the hierarchy of legal norms. It has also been argued that a constitution can be seen as a *map*, as a description of the power relations in society. In Sweden, the constitution is often used to formally confirm changes and decisions that have already taken place. Thus, an important function of the Swedish constitution is to serve as a *wrapping* for political reforms.

THE MIDDLE EAST

Ambition and Retreat: State-Building in Afghanistan and the Persistence of Informal Power

DIPALI MUKHOPADHYAY

Much of the sociological and political science literature on state formation stems from the study of states in Western Europe. The relationship, in particular between *de jure* statehood and the informal power-holders that reside on the periphery, tends to be framed in terms that do not provide sufficient analytical purchase in the Afghan case. The consistently challenging conditions within which state-building unfolded over the centuries in Afghanistan necessitate a unique set of governing strategies on the part of successful regimes. Because constitutions represent a conceptualization of state-society relations, they provide valuable insights into these strategies, as well as the gaps between the aspirations of the Afghan state and the realities of the Afghan polity.

A retrospective look at 20th century Afghan history suggests that *successful regimes seem to have prioritized the formation of partnerships with critical informal power-holders and, in so doing, secured their support in the governing endeavour*. Regimes that undertook extraordinarily ambitious agendas without the support of non-state elites found their position and power jeopardized. These experiences resonate with the dilemmas of state (re)building in Afghanistan since 2001 and provide context for the challenges of security, governance and reconstruction that persist to this day.

Western State Formation: A Story of Formalization

Western state formation can be understood as an evolution in the mechanics of interaction between ruler and ruled. Dominant scholars of Western state-building theory present us with a trajectory from feudal indirect rule to institutionalized, regularized state monopoly on governance in its various forms. Mann describes the manner in which states grew their power to legitimately define and implement policy, thereby enabling the centre to assert its hold on the periphery in a permanent and regular fashion.[1] Over time, Western states developed the "autonomy or insulation"[2] to separate themselves from the societies they gov-

1 Michael Mann, *The Sources of Social Power: Volume 2, The Rise of Classes and Nation States, 1760-1914* (Cambridge: Cambridge University Press, 1993), p. 59.

2 *Ibid.*, p. 63.

erned: this transition resulted in the emergence of "the autonomous logic of definite political institutions" that shaped and tamed the behaviour of actors who had otherwise dominated the political landscape.[3]

Chabal and Doloz pointed to a process of "gradual emancipation of established political structure from society" as central to Western state formation.[4] Max Weber's theories described the end product of Western state formation as the "modern state," which involved the rise of "routine, formalized, rationalized institutions" that allowed the state to "penetrate its territories with both law and administration."[5] The modern state achieved a monopoly over the control and governance of the territory within its borders. With time, states in the West cultivated the bureaucratic networks required to interact with their citizens and to enable a reciprocal flow of taxes and troops in exchange for goods and services.

Tilly argued that the European fledgling states' imperative to wage war led to a series of extractive interactions, namely taxation and conscription, that required more direct engagement between the state and its population. He described this process as a shift from "indirect" to "direct" rule, the former involving the use of aligned informal power-holders who mediated the relationship between the centre and periphery as a function of their position as middlemen.[6] European states eventually sought to eliminate intermediate political layers and engage directly with the populace to secure their hold on resources, troops and political support.[7] According to Tilly, the Western state's relationship with its informal competitors unfolded as a function of its comparative access to three critical commodities: coercion, capital and connection.[8]

As the state accumulated and concentrated its hold on these commodities, its capacity to dominate as a governing actor grew. This kind of "accumulation" and "concentration," wrote Tilly, required engagement by the state with competing power-holders, whose grip on these commodities allowed them, at least initially, to rival the weak state. In the case of Western Europe, Tilly described the final outcome as follows: "... all three paths eventually converged on concentrations of capital and of coercion out of all proportion to those that prevailed in AD 990."[9] In other words, the modern states of Western Europe represent the endpoint of various state formation trajectories, all of which enabled the state to capture a dominant and secure hold over revenue, violence and identity politics within its territory.

The modern state emerged not only as a function of the state's initial bargaining with competitors, but also through a prolonged process of bargaining between the state and its citizenry. The exchange of protection for extraction

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3 *Ibid.*, p. 52.

4 Patrick Chabal and Jean-Pierre Doloz, *Africa Works: Disorder as a Political Instrument* (Cambridge: Cambridge University Press, 1999), pp. 5-6.

5 Mann, *Sources of Social Power,* pp. 56-7.

6 Charles Tilly, "War Making and State Making as Organized Crime," in Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol(eds), *Bringing the State Back In*, (Cambridge: Cambridge University Press, 1985) and on *mafiosi* "middlemen" in Sicily, see Anton Blok, *The Mafia of a Sicilian Village, 1860-1960: A Study of Violent Peasant Entrepreneurs,* (New York: Harper and Row, 1974), p. 7.

7 Charles Tilly, *Coercion, Capital and European States, AD 990-1990,* (Oxford: Blackwell, 1990), p. 104.

8 Charles Tilly, "Armed Force, Regimes and Contention in Europe since 1650," in Diane Davis and Anthony Pereira (eds), *Irregular Armed Forces and their Role in Politics and State Formation*, (Cambridge: Cambridge University Press, 2003), pp. 43-8.

9 Charles Tilly, *Coercion, Capital and European States, AD 990-1992,* (Oxford: Blackwell, 1992), p. 31.

came to represent the most fundamental of relations between the Western state and its society, the ultimate yield being accountable and institutionalized governance.[10] As the state required more money and manpower from its population, elites and ordinary citizens alike began to make certain demands on the state. While the mechanisms of political bargaining varied widely across time and space, "all along the continuum bargaining over the state's extractive claims produced rights, privileges, and protective institutions that had not previously existed."[11] The formal political and legal institutions of the state, including constitutional frameworks that defined the state-citizen relationship, took form as an amalgam of these many bargains.

The Afghan State: The Informal Persists

The conventional narrative of Western state formation involves the ultimate absorption or elimination of informal power-holders and their related institutions, but for many countries throughout the world the salience of informal power persisted significantly. Both the academic and policy communities tend to perceive informal political archetypes as largely irrelevant to the official business of governing. In the words of Somalia expert Ken Menkhaus, "they are viewed as short-term coping mechanisms to be replaced by formal state authority once the elusive state-building project succeeds."[12] A closer look at Afghan history suggests that the business of governing has unfolded in a multifaceted form that involves persistent bargaining between the state and a host of informal power-holders and institutions associated with them.

The Afghan state and its people have had a complex relationship during times of peace, one characterized not by aggressive engagement but by careful, even reluctant encounters, often mediated by informal political actors and institutions that represented important partners of the state. It may be impossible to say definitively whether these informal power-holders represented presumptive mechanisms of governance or whether they simply filled gaps that persisted as a result of a deficient state architecture.[13] Either way, their coexistence and even collaboration with the state seems to have represented a critical variable in the equation of successful governance.

Joel Migdal's work provides an important theoretical framework for analyzing the state-building project in Afghanistan, in particular, the degree to which the state and "other" elements have constantly negotiated and renegotiated their mutual relationships. His articulation of the "strong society-weak state" paradigm is an important counterpoint to the aforementioned literature on state formation. The state, while presumed to be dominant in much Western state-building literature, is actually being transformed, inspired, altered and influenced by

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10 Tilly, "War Making and State Making," p.173.

11 Tilly (1990), *Coercion, Capital and European States*, p. 103.

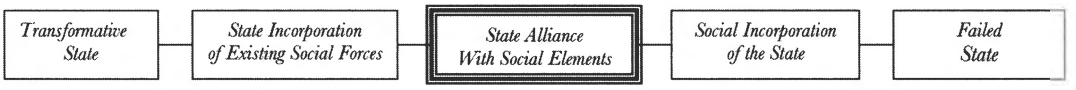
12 Ken Menkhaus, "Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping," *International Security* 31, 3 (2006/2007): 102. See also Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda," *Perspectives on Politics* 2, 4 (2004).

13 "The weaknesses of local administration were disguised because the limits were rarely tested," in Thomas Barfield, "Weak Links in a Rusty Chain: Structural Weaknesses in Afghanistan's Provincial Government Administration," in M. Nazif Shahrani and Robert Canfield (eds), *Revolutions and Rebellions in Afghanistan*, (Berkeley: University of California Press, 1984), p. 183.

the social elements that surround it, says Migdal: "The role of the state is itself an object of the struggle."[14] The outcome of the struggle, according to Migdal, is not predetermined and may shift over time. The interaction between state and social elements takes place in many forms and involves "conflict and complicity, opposition and coalition, corruption and co-optation" with intervening historical moments shifting the trajectory of the struggle as well.[15]

Ultimately, Migdal offers four possible outcomes for the confrontation between state and social elements, each representing a "range" of domination on the part of the state vis-à-vis its society.[16] This paper proposes an amendment to Migdal's model with the addition of a fifth "ideal type" based on empirical analysis of the historical experience of statehood in Afghanistan. Migdal's spectrum provides no space for *coexistence or even partnership between state and social elements*, as each category involves the capture of one, at its expense, by the other.

A Revised Version of Migdal's State-Society Continuum

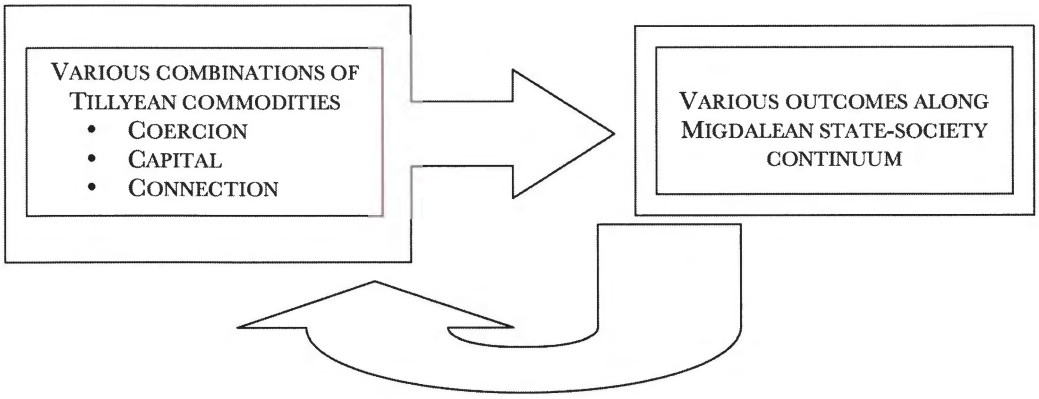


As described above, Tilly argued that the nature of the relationship between the state and other informal power-holders could be understood as a function of the relative capacity of each to capture and consolidate coercion, capital and connection. The revised Migdalian spectrum can be understood, then, as the set of possible relationships between the state and competing informal power-holders at any given moment in the state-formation process. Unlike the linear and final endpoint of formalized, direct rule put forward by Tilly, however, the continuum reflects the dynamism (the "ups and downs") of the state in the case of Afghanistan.

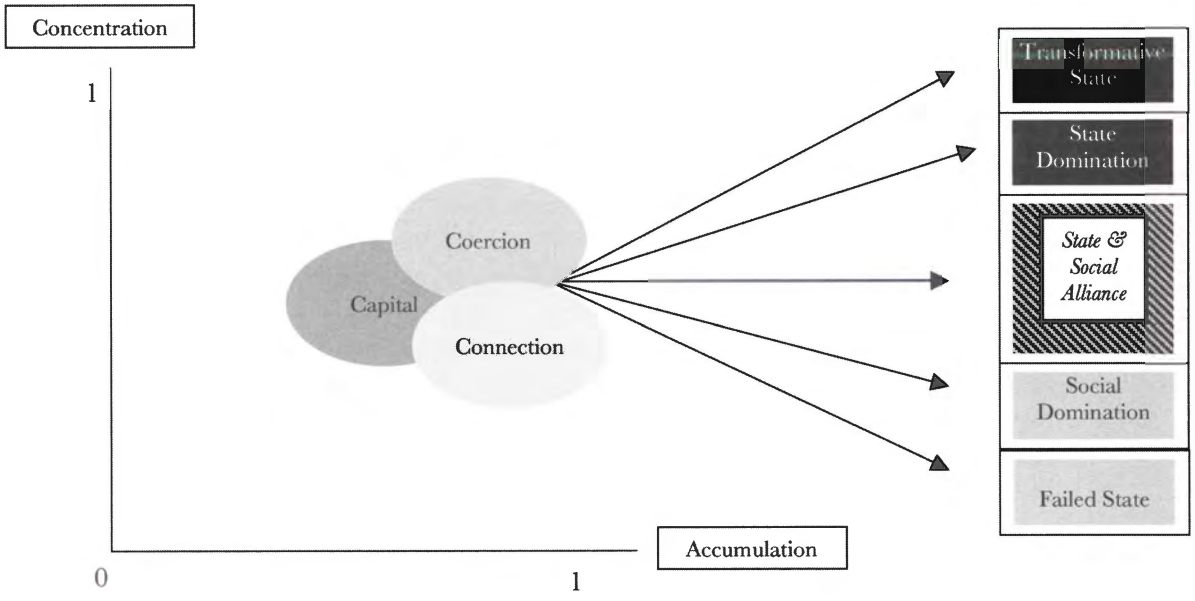
14 Joel Migdal, "The State in Society: an Approach to Struggles for Domination" in Joel S. Migdal, Atul Kohli, and Vivienne Shue(eds), *State Power and Social Forces: Domination and Transformation in the Third World*, (Cambridge: Cambridge University Press, 1994), p. 10.

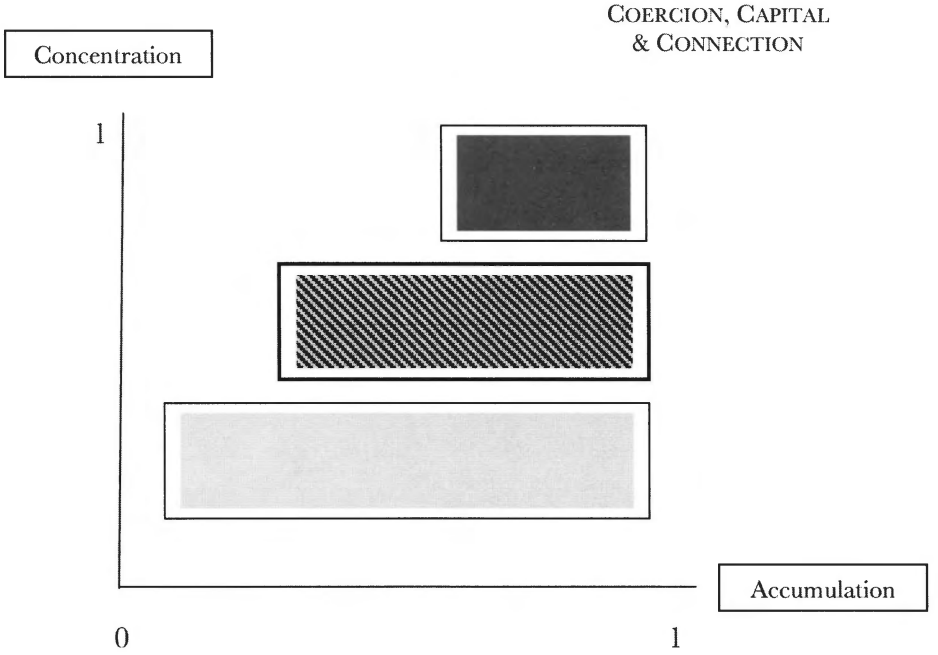
15 *Ibid.*, pp. 23-4.

16 Migdal uses the following phrases to describe his ideal types, which I have modified for the purpose of amending his model: "Total transformation," "state incorporation of existing social forces," "existing social forces' incorporation of the state" and "disengagement." *Ibid.*, pp. 24-6.



TILLYEAN-MIGDALEAN HYBRID MODEL

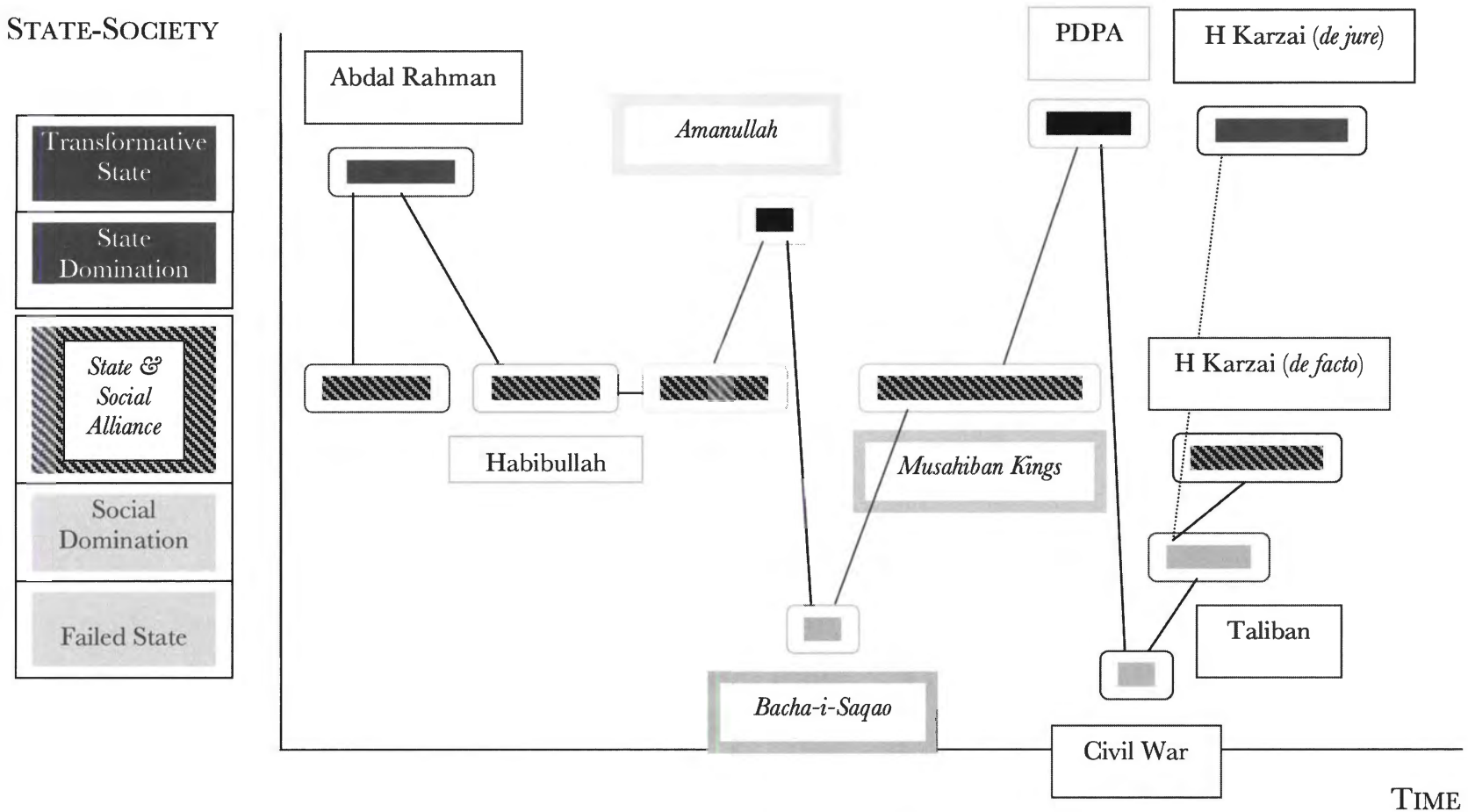




The lower zone of this combined model represents the set of possible outcomes whereby the state has not achieved a significant grasp on coercion, capital or connectivity. Here, the state is likely dominated by or even overwhelmed by informal power-holders. The middle zone of this model represents a set of outcomes whereby the state forges deliberate partnerships with those informal power-holders with which it coexists. With the support of aligned informal power-holders, these regimes govern more decisively and directly, although the more stable regimes often significantly restrict their interference in the lives of ordinary citizens. Those rulers that attempt to expand the parameters of the state fail when the project clashes with the interests of previously aligned informal actors and institutions. On the backs of these alliances, with the help of a significant influx of foreign income, the exceptional ruler achieves a sufficient concentration of coercion, capital and connection to establish direct rule in the terms described by Tilly as the ultimate Western outcome.

The Afghan state's capacity to concentrate its hold on each of Tilly's critical commodities waxed and waned as a function of external imperial interests, internal regime particularities and the ever-present struggle between the state and surrounding social elements. This chapter, in combining the logics of Migdal and Tilly, argues that because the *concentration* of coercion, capital or connection remained fairly limited, the Afghan state was consistently disadvantaged vis-à-vis non-state power-holders. Informal power-holders exercised significant control over coercion, capital or connection at many moments in Afghan history and, as a result, the state coexisted with these actors and constantly renegotiated the terms of this relationship.

Regimes that aligned with informal power-holders survived and even had the opportunity to consolidate state power in meaningful terms. In this sense, the Migdalian relationship fed back into the Tillyean dynamic, enhancing the state's power as a function of vital alliances with critical social elements. Those regimes


STATE-SOCIETY
Transformative State
State Domination
State & Social Alliance
Social Domination
Failed State
Abdal Rahman
Amanullah
PDPA
H Karzai (de jure)
H Karzai (de facto)
Habibullah
Musahiban Kings
Taliban
Bacha-i-Saqao
Civil War
TIME

that advanced the state agenda beyond the parameters of this relationship of mutual coexistence and respect made great headway in expanding the Afghan state in formal, institutional terms. However, they quickly faced profound problems and were eventually forced from power, having failed to forge a viable "bargain" with social elements of import and ordinary citizens alike.

The equilibrium or settling point in the state formation project in Afghanistan, therefore, appears not to be state domination or transformation, nor necessarily social domination or state failure. Instead, successful regimes crafted careful partnerships with social actors, informal power-holders, and governed with their blessing and support. The journey of the Afghan state to its present position, moreover, cannot be understood along a linear trajectory, with an ever-increasing capacity for concentration of the kind found in the West. Instead, those regimes that sought to introduce the state in deeper terms to the society it governed, if unsuccessful, left their successors with a legacy of failure that frequently led to retreat by the state in subsequent years.

This chapter considers two important periods of governance in 20th century Afghanistan, the juxtaposition of which demonstrates the ups and downs of this country's experience with the state. The 20th century state in Afghanistan had consistently suboptimal access to concentrated capital and coercion and, as a result, its rulers forged ties with competing non-state actors who aligned themselves with regimes that pursued agendas compatible with their interests. King Amanullah began his reign in 1919 with precisely this strategy, but abandoned it in favour of an unprecedented aspiration for Afghanistan to achieve Weberian statehood. His tumultuous demise led to the rise of a band of brothers, the Musahibans, whose power was rooted in relationships with traditional elites and whose approach to state-society relations rested on maintaining those relationships and the regime security that derived from them.

A comparative analysis of the successive constitutions promulgated during this period, provides valuable insights into the various strategies of each regime. In particular, each document captured the desired relationship, as conceived by each regime, between formal institutions and informal power-holders. Despite the elaborate formal designs articulated by various sovereigns, ultimately the fate of each regime and its programme rested on the accession of actors with authorities that rested beyond the institutional domain of the state. The lessons of this period can be used to understand the challenges of "post-conflict" state-building in Afghanistan today.

King Amanullah (1919-29)

King Amanullah's decade-long reign in early 20th century Afghanistan receives frequent attention for its dramatic unravelling in the face of popular revolt. Afghan scholar Senzil Nawid exposes, howvever, that his earlier years of rule were marked by a fruitful alliance with important segments of the country's religious elite. However, Amanullah severed these ties in later years, to the detriment of his regime and agenda. With the exception of the Iron Amir, "the rulers of Afghanistan depended on the goodwill of the religious leaders to maintain power."[17] While

17 Senzil K. Nawid, *Religious Response to Social Change in Afghanistan: King Aman-Allah and the Afghan Ulama, 1919-1921*, (Costa Mesa: Mazda Publishers, 1999), p. xviii.

Amanullah's rule ultimately ended in spectacular collapse, the critical successes Amanullah achieved early in his tenure reflect the persistent theme of Afghan state formation: the state's success depends on a symbiotic relationship with non-state, informal power-holders.

Jihadi nationalism: connection and coalition

Early in his rule, Amanullah's strategy to join forces with prominent members of the religious elite unfolded as part of his ambition to untether Afghanistan from the hold of the British Empire. Abdur Rahman, Amanullah's grandfather, had named himself the "Amir of Islam" to signify a degree of authority for himself, but also as part of a larger nation-building strategy to define the contours of the Afghan nation in Islamic terms. Amanullah similarly presented himself as an advocate and defender of Islam, whose central priority it would be to rid his people of foreign interference. The *jihadi* imperative encouraged and reflected a new sense of ethnonationalism[18] that can be likened to a push for self-determination, the ambition "by any group desirous of repudiating foreign rule" with the aim of governing its own affairs independently.[19] Tilly described this kind of political commodity as "connection" and argued that the rise of nationalism in France, for example, represented a "basis for state formation"[20] and, therefore, a critical instrument of the state if wielded effectively.

The roots of nationalism in Afghanistan lay in a variety of ideological traditions that came together at the moment of Amanullah's accession to the throne. The king's intellectual mentor, Amin Tarzi, articulated a quest for modernization inspired by political leaders in Turkey and India and even communist Russia.[21] Tarzi's writing highlighted the compatibilities between modernity and Islam, but laid much of the blame for Muslim society's decay at the feet of its religious leadership.[22] His vision did not preclude, however, a new alliance between a "benevolent ruler" and the *ulama,* and in fact recognized the capacity of Islam to represent "a binding force that could unite Muslims against Western imperialism."[23] For the religious leadership of Afghanistan, no cause had more urgency than freeing the Afghan polity from the oppressive hold of the infidel British Empire. As Nawid explains, the *ulama* conceived of their role as defenders of the faith and nation from foreign interference of the kind the Afghan state faced from the British.[24]

Nationalism in Afghanistan meant *jihad* to some and modernization to others, but on the issue of independence from the British, all factions were aligned behind the new king in the spring of 1919.[25] Amanullah's early years on the throne benefited greatly from this "coincidence of interest,"[26] as he had the

18 *Ibid.*, p. xix.

19 Walker Connor, "Self-Determination: The New Phase", in *idem*, *Ethnonationalism: The Quest for Understanding* (Princeton: Princeton University Press, 1994), originally published in *World Politics* 20 (October 1967): 5.

20 Tilly, "Armed Force, Regimes and Contention in Europe since 1650", p. 54.

21 Nawid, *Religious Response to Social Change,* p. xix.

22 *Ibid.,* pp. 46-7.

23 *Ibid.,* p. 47.

24 *Ibid.,* p. 54.

25 *Ibid.,* pp. 47-8.

26 *Ibid.,* p. xix.

opportunity to lead a new incarnation of the Afghan nation, defined and united by its struggle for independence. While the military conflict between Afghans and British involved only a short bout of fighting in the spring of 1919, it allowed the king to *concentrate* the state's hold on an explosive brand of identity politics that unified the Afghan nation in opposition to a foreign power. This nationalist fervour legitimized Amanullah's regime and ultimately emboldened him to attempt a dramatic redefinition of the relationship between citizen and state. Rather than drive the state to engage immediately in a more direct way with its population and bypass intermediaries à la Tilly, Amanullah's imperative to wage war actually led his regime to draw informal institutions, in this case the religious elite, closer, and in so doing to legitimize their critical role in the push for war. War-making led to nation-building, but nation-building required collaboration with rather than elimination of powerful informal actors.

In examining the king's approach to the clergy as dominant informal power-holders, his strategy of partnership with and even deference towards them becomes very clear. To start with, Amanullah's ascent to the throne in 1919 was not uncontested, but since he immediately declared war against British imperial interference in his land, prominent clerics fell into line behind the crown.[27] Amanullah, once crowned, set about constructing a coalition of tribal and religious partners to support his call for war and lend legitimacy to his new regime. Anthropologist Asta Olesen describes the rallying effect of Amanullah's "*jihad* proclamation" at the Hadda mosque, where religious leaders "who had waited for this situation for years" marshalled those mobilized tribes under their influence to fight.[28] The king's strategy involved outreach to former competitors, as well as deference to religious leaders who might otherwise be subordinate to the wishes of a king. Hajji Abdal Razeq, for example, was a mullah who initially supported Amanullah's competitor in his quest for the throne. Rather than arrest this dissident, Amanullah requested his continuing presence in Bajawur: "A loyal servant of the state and eminent religious scholar such as your holiness will be needed here to attend to matters of great importance to the state and religion."[29] Mullah Razeq went on to help the king assemble a critical tribal coalition in support of his campaign.[30]

The new regime reached out to religious elites in a number of ways, offering them parcels of land and titles while seeking their counsel on matters of import to the state. Amanullah's patronage of prominent spiritual scholars and families represented acknowledgment of the power and influence they held and the degree to which a successful administration in Kabul required their support. In one letter to a religious leader, Amanullah offered him a watch and a compass as gifts and signed himself a "friend and faithful disciple."[31] Amanullah embraced the agenda of his powerful allies with commitment, embodying his role as a leader of his Muslim citizenry to the fullest extent. He led Friday prayers and gave sermons, eventually earning the title of *padar-i-mellat* or "father of the nation."[32] In a larger sense, Amanullah assumed the role of leader in the greater pan-Islamic movement that had generated real zeal among the religious elites of Afghanistan.

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27 *Ibid.*, p. 54.

28 Asta Olesen, *Islam and Politics in Afghanistan,* (Richmond: Curzon Press, 1995), p. 114.

29 Nawid, *Religious Response to Social Change,* p. 55.

30 *Ibid.*

31 *Ibid.*, pp. 58-9.

32 *Ibid.*, p. 57.

A 1921 treaty between Afghanistan and Turkey represented the diplomatic instrument through which the Afghan regime could "acknowledge the Islamic caliphate as the highest religious authority."[33] The king's decision to invite thousands of fleeing Muslims from British India into Afghanistan was a nod to the struggles of Muslims beyond his borders. His gesture went further, however, when he decided, "in compliance with the suggestion of the *ulama*" to personally welcome the incoming immigrants into their new country at Bagram.[34] His regime similarly lent its support, in the form of materiel, to Muslims in Central Asia in their struggle against the Bolsheviks.[35] Amanullah's alignment with the clergy and their global agenda provided his administration with unparalleled legitimacy.[36] It also gave him exposure to the wider population of Muslims around the globe who admired his successful struggle against the British and his support for Islamic causes beyond Afghanistan: "Not only in Afghanistan but also elsewhere in the Muslim world, he was looked upon as a great Muslim leader."[37]

By 1922, King Amanullah found himself in what Tilly might have called a connection-intensive environment. The state's access to capital had fallen because of its separation from the British Empire: the steady influx of revenue Amanullah's grandfather Abdur Rahman had enjoyed through his country's relationship with the British ceased.[38] Despite many attempts to cultivate new patrons, from the United States to the Soviet Union, the Afghan state was without the significant capital previous regimes had enjoyed.[39] Instead, this young regime found itself cultivating, accumulating and concentrating a potent brand of nationalism, which emerged in the face of foreign intrusion but evolved into a deeper connective tissue, bonding the people of the country as Afghan citizens and Muslims. The regime's capacity to harness this connectivity depended on its relationship with the country's most powerful informal actors, its religious elites. Despite its limited access to capital and coercion, the regime found itself in a position of strength through this relationship. Unlike the Tillyean European narrative, whereby the need to wage war led the state to marginalize intermediaries, in Afghanistan the state's strength derived precisely from its proximity to and engagement with the religious leaders amid its population.

The surge ahead: an attempt at state-building and reform

By the early 1920s, King Amanullah had achieved a position of significant strength and legitimacy and, from this position, launched a series of policy initiatives that amounted to a highly ambitious modernization agenda. Afghan scholar Amin Saikal summarizes the agenda as follows:

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33 *Ibid.,* p. 69.

34 *Ibid.,* p. 66.

35 *Ibid.,* p. 69.

36 Vartan Gregorian, *The Emergence of Modern Afghanistan,* (Stanford: Stanford University Press, 1969), pp. 234-7.

37 Olesen, *Islam and Politics in Afghanistan,* p. 114.

38 Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System,* (New Haven: Yale University Press, 1995), p. 55.

39 Amin Saikal, *Modern Afghanistan: a History of Struggle and Survival,* (London, New York: IB Tauris, 2004), pp. 64-72.

> To develop a formal-legal system of constitutional monarchical government; institute an Islamically defensible but liberal process of social-cultural change and economic infrastructural development; build professional and efficient armed forces.[40]

Amanullah undertook a deliberate state-building project in an attempt to create the foundations for a "modern bureaucratic system along what could be described as Weberian lines."[41]

Amanullah's bureaucratic ambitions were paired with an economic development agenda aimed at enhancing the infrastructure, industrial capacity, commercial system and agrarian output of the country.[42] The regime also took on land reform, privatizing land previously held by the crown at prices affordable to poorer Afghan citizens. While a small minority of Afghans previously had the capacity, legal and financial, to own land, the king's policies created new access to private property ownership.[43] At the heart of his development programme was Amanullah's commitment to education, through the provision of mandatory primary education, foreign-inspired secondary schools, administrative training programmes and institutions of higher learning and professionalization.[44] His regime also enabled the cultivation of a number of new media outlets, namely newspapers and magazines, that lent their support to the themes of "independence, nationalism and, above all, modernization."[45]

Most controversially, Amanullah's agenda included programmes that addressed the social sphere of Afghan life, introducing state policies into realms that had hitherto been considered private or, at least, had been engaged by the state through tribal and religious intermediaries. Amanullah and his wife, Queen Soraya, sought to expand education to girls and to introduce secular subject matter into the curriculum.[46] Reforms were also introduced with regard to "the conduct of marriages, funerals, and business transactions."[47] The king and his wife also took on the issue of veiling, "with active encouragement of women to unveil within the bounds permissible in Islam."[48] New inheritance laws and rhetoric opposing polygamy were also part of the regime's explicit confrontation of gender inequality.[49]

As Amanullah's regime went about designing a new relationship between the Afghan state and its citizenry, the imperative to concentrate the means of capital and coercion grew increasingly apparent. In the absence of a significant influx of foreign funds, the king introduced a new tax law in 1920, justified in Islamic terms, but novel in terms of the fiscal demands it placed on citizens, whose income, land, imports and exports now required the delivery of duty to the state.[50] The violent discord that ensued at the end of Amanullah's first round of reforms in 1923, according to Nawid, was largely attributable to this new financial burden.[51]

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40 *Ibid.*, p. 73.
41 *Ibid.*
42 *Ibid.*, p. 74.
43 *Ibid.*, p. 75.
44 Gregorian, *Emergence of Modern Afghanistan,* pp. 239-40.
45 *Ibid.*, p. 245.
46 Saikal, *Modern Afghanistan*, p. 75.
47 Nawid, *Religious Response to Social Change,* pp. 84-5.
48 Saikal, *Modern Afghanistan*, p. 76.
49 *Ibid.*
50 Nawid, *Religious Response to Social Change,* pp. 82-4.
51 *Ibid.*, pp. 84-5.

With respect to coercion, the king's approach was more confused. He ostensibly sought the creation of a leaner, more effective army for Afghanistan, which, as a result of a new universal conscription policy, would be drawn from all quarters of the country. In reality, the army suffered from insufficient funding and corrupt practices that left it largely ill-equipped to deal with foreign or civil unrest.[52]

The 1923 Constitution: a constitution of impositions

The king introduced a legal framework to Afghanistan in 1923 that provided a roadmap for institution-building alongside a new set of rules and regulations. In so doing, he ushered in an unprecedented era of constitutionalism into Afghanistan. The 1923 document was a framework designed by the regime to advance its own agenda. It was imposed on the polity and was not the product of bargaining generated by popular will for a particular set of rights and responsibilities. The introduction of a constitution meant the creation of new political institutions, including an advisory council and two consultative organs, one of which was partly made up of elected representatives. Gregorian explains, however, that the overall effect of the document was to crystallize the power of the monarchy and the authority of the king as the ultimate executive.[53]

The 1923 document reflected a belief by Afghanistan's modernizers that political and legal legitimacy could be derived from a secular source, "popular sovereignty," rather than a divine one: "The nation was the source of legitimacy of power."[54] While the constitution's fourth article acknowledged both the constitution and the principles of sharia as sources of guidance for the king, the 69th article conveyed the document's intent: constitutional provisions would trump sharia provisions in a conflict between the two.[55] The administration sought to appease "the fear of those (the vast majority of the population) for whom the concept of nation had little or no meaning."[56] The constitution embodied a significant departure from the legal status quo obscured by conciliatory language meant to leave relations between the regime and its religious allies intact. The king delivered this document like a sugar-coated pill in the hopes that his society would swallow it and appreciate him later on.

Legal reform meant a new court system modelled on the secular Turkish approach and adapted to reflect the Islamic legal tradition, but in universal terms.[57] The Penal Code of 1924-25 established state jurisdiction over a large range of crimes and punishments, delineated in 308 provisions. While many of the provisions reflected traditional approaches, their articulation by the state represented a desire by the regime to formalize its claim as the ultimate arbiter of law and order. The promulgation of this code meant more direct confrontation between the state and those informal power-holders who had previously held great sway in these matters.[58] Amanullah's etatist approach to the rule of law, as

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52 Saikal, *Modern Afghanistan*, p. 78.

53 Gregorian, *Emergence of Modern Afghanistan*, p. 251.

54 Olesen, *Islam and Politics in Afghanistan,* p. 121

55 *Ibid.*, p. 121.

56 *Ibid.*

57 Nawid, *Religious Response to Social Change,* p. 79.

58 Gregorian, *Emergence of Modern Afghanistan,* p. 250.

articulated in the constitution and the subsequent penal code, enabled a newly expansive reach for formal institutions.

In considering Amanullah's post-independence reforms, the picture that emerges clearly illustrates the reasons for his administration's vulnerability in coming years. Amanullah's reform agenda posed a threat to the very power-holders with whom he had decisively aligned himself in the first year of his rule. Amanullah appeared to be leading the Afghan state along the Tillyean trajectory from indirect to direct rule, "integrating the Afghan microsocieties into a viable sovereign macrosciety and nation-state."[59] Olesen likens Amanullah's project to that of his grandfather, King Abdur Rahman, in that both rulers sought to unify the Afghan nation under their consolidated authority:

> Where Amir Abdur Rahman put forward the religious legitimation of power as an alternative (utilizing the only all-embracing ideology of society) to the predominant 'tribal state model,' King Amanullah tried to surpass even the 'Islamic model' since his goal was not only centralization and unification but much more so, modernization and development along European lines ...[60]

Amanullah's neglect of the state's coercive capacity left him vulnerable, though it must be said that no ruler to date had achieved a sustainable, standing military presence in Afghanistan. In a matter of years, the establishment of a coercive apparatus necessary to advance such an ambitious governing project was simply unachievable. In any case, he was ultimately forced to retreat from his ambitious reforms and re-establish the alignment with the country's critical informal power-holders, the "upper clergy," as Nawid calls them, at least for the time being.

Backlash and retreat

Amanullah's push to institute more substantive, involved and direct rule by the state prompted confrontation with a subset of the informal power-holders: religious and tribal elites who dominated the countryside's political space found their position as middlemen between citizen and state[61] threatened by reforms that sought to redefine this relationship in more direct terms. Village-based mullahs and tribal leaders found their power challenged by reforms that would create a universal legal framework within which localized Pashtun tribal codes and religious judges had little role.[62] Universal conscription eliminated the privilege previously enjoyed by tribal elders to regulate which tribal sons would serve in the army.[63] The newly mandated identity card, the *tazkera*, represented the hand of the government boldly reaching into the lives of all Afghans in uniform terms, prompting the popular phrase, "register for *tazker* and accept death."[64]

The official relationship between citizen and state became preeminent, transcending the previously paramount link between "a man's identity and honour" and his tribe.[65] This new articulation of the citizen-state relationship challenged not only

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59 Saikal, *Modern Afghanistan*, p. 73.

60 Olesen, *Islam and Politics in Afghanistan,* p. 121.

61 This notion of middlemen is borrowed from Blok, *Mafia of a Sicilian Village.*

62 Nawid, *Religious Response to Social Change,* pp. 87, 97-8.

63 *Ibid.,* p. 86.

64 *Ibid.,* p. 85.

65 *Ibid.,* p. 87.

informal power-holders but also the informal customs, codes and rules that governed law and politics for so many Afghans. Olesen describes the king's attempt to eliminate patronage for select tribal leaders as an initiative to institute a new notion of "remuneration ... based on work of value to the nation"[66] rather than as a function of tribal identity.

The notion that patronage, the currency of relational politics, now represented a crime of corruption did not resonate in much of the country:

> The loyalty of the tribal chiefs depended upon their privileged position and they in turn bound their families and clans and tribes in a web of loyalty dependent upon the distribution of largess. To ask them to prove themselves useful to the nation in addition to their service as power brokers was an imposition that violated the terms of Pashtun tribal relationships.[67]

In fact, the king's decision to imprison his mother's stepfather on such charges earned him popular scorn rather than appreciation, given the prisoner's status as a prominent tribal *sardar*.[68]

Opposition to the king's reforms took various forms, the most visible and problematic being the Khost Rebellion of 1924. Mullahs in the eastern countryside framed the king's agenda in heretical terms and, despite attempts by religious elites in the capital to counter their claims, succeeded in fuelling popular resentment well beyond Khost.[69] The regime's response to the rebellion was twofold: to fight it militarily, which took nearly a year, and to repair its tenuous relationships with the "upper clergy," whose reputation had also been slandered by the rebellious mullahs of Khost. The military fight against the tribesmen proved quite difficult in the absence of a strong, well-organized army. In fact, Nader Khan, who had led the army to victory against the British, would not take up the sword against the eastern tribes, leaving the army without its top general.[70] Ultimately, the king had to convince other tribesmen to lend him their militias, as he exploited the tensions (subsequently exacerbated) between them and their rebellious rivals.[71]

On the political front, the king held a *jirga* with the upper clergy in 1924 to corral these informal power-holders into alignment with his agenda, only to find them unprepared to support him on his own terms. The substance of the king's reform on matters such as education was debated in this forum, as was the nature of the state itself and the degree to which it ought to dictate the lives of ordinary Afghans. As Olesen explains, even if the king could have convinced the religious elite of the Islamic integrity of his reform programme, that would not have ensured their acquiescence:

> The Nizamnama in effect was subjecting large areas of personal life, which so far had been governed only by customary law, to state control ... the traditionalist *ulama* chose to be exponents of the tribal outlook in which the inalienable individual rights should be defended against any encroachment from the state and the ruler.[72]

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66 Olesen, *Islam and Politics in Afghanistan,* p. 124.

67 *Ibid.*

68 *Ibid.,* pp. 124-5.

69 Nawid, *Religious Response to Social Change,* pp. 102-3.

70 Olesen, *Islam and Politics in Afghanistan,* p. 138.

71 *Ibid.*

72 *Ibid.,* p. 139.

In exchange for amending the constitution, the king emerged from the *jirga* with the full support of many prominent religious leaders, who were now even prepared to denounce the "rebel clergy" by *fatwa* as enemies of the state and worthy of punishment.[73]

Interestingly, the people of Khost did not receive redress for their concerns, despite the fact that their uprising had been the catalyst for the *jirga*.[74] In exchange for Amanullah's diminished nation-building project, his regime was able to recover some advantage with respect to the concentration of both coercion and connection. As a result, appeasement of ordinary citizens seems to have been unnecessary for the regime's survival. The constitution no longer served as the manifesto for the modernist clique of Kabul: "the introduction of these amendments were clear products of the pressure exerted by orthodox Muslim forces as they were directly contrary to the spirit of the Constitution and the aims of the King."[75] Moreover, while the constitution did not refer to tribal institutions, the king's convening of the *jirga* during this crisis legitimized its de facto function in critical decision-making and crisis management.[76]

While the ultimate changes made to the constitution at this stage were not as dramatic as rumoured,[77] the revised document and the political process that gave birth to it affirmed, once again, the import of powerful informal institutions and actors with the capacity to destabilize and restabilize the Afghan landscape. And, again, the resilience of Amanullah's administration depended on cooperation with, rather than marginalization of, precisely these institutions and actors. The original 1923 Constitution presented the country with a robust architecture of formal institutional statehood, but the revised version demonstrated the dialectic between the formal and informal arenas of politics and the degree to which Afghan state-building has depended on the support, rather than the elimination of the informal in its various forms. While a Western constitutional process might have yielded a strong, formal government at the expense of its informal competitors, the 1923-24 constitutional project renewed the symbiotic relationship between the two.

Amanullah's expansive imaginings on behalf of the Afghan state appear to have been largely incompatible with many popular and elite conceptions within the Afghan centre and periphery. Amanullah's inclination to reform retreated in response to the events of 1924 and he made a number of nods towards the conservative elite to demonstrate his commitment to their interests. During the *jirga*, the regime looked the other way when members of the Qadiani sect became the object of a mass-motivated "witch-hunt" in Kabul.[78] Their alienated status within the Muslim community, particularly the *ulama*, meant the regime's decision to allow their persecution would earn the king political capital with the clerical class.[79] In another striking case, the central government did not stay the execution of a non-Muslim Italian convicted of murdering a Muslim colleague, despite the cost to diplomatic relations with Italy. The gesture reflected the

73 Nawid, *Religious Response to Social Change,* pp. 111-13.
74 Olesen, *Islam and Politics in Afghanistan,* p. 140.
75 *Ibid.,* p. 124.
76 *Ibid.,* pp. 125-6.
77 *Ibid.,* p. 140.
78 *Ibid.,* p. 141.
79 *Ibid.,* p. 142.

king's desire to remain in good stead with religious elites in the wake of recent political turbulence.[80]

Amanullah tries again, fails again[81]

Ultimately, the events of 1923-24 did not permanently temper Amanullah's inclination to push forward with reform. His decision to reinvigorate a modernization programme for Afghanistan again put him in opposition to the clergy. In fact, the years after 1924 involved direct confrontation between the king and his previous allies in the religious establishment. As Nawid explains, Amanullah came to view the *ulama* as "a stumbling block in the way of progress."[82] Amanullah's decision to sever ties with the religious elite did not reflect a fundamental clash between his conception of modernization and his perception of himself as an Islamic leader. Instead, it represented a power politics calculation: Amanullah no longer saw the clergy as a critical ally in advancing his agenda but as an obstacle preventing him from directly engaging his citizenry.[83]

Amanullah's approach to the clergy became one of eliminating competition, much like the "state-making" described by Tilly. Unlike his strategy for achieving independence from the British and his search for compromise at the 1924 *jirga*, by the late 1920s his conception of the Afghan state trajectory involved elimination of the competing power-holders and the informal intermediaries standing between the state and its citizenry. His approach to state-making echoed that of his grandfather Abdur Rahman, though his ultimate goal was modernization, not simply state-building.[84] The king marginalized these actors legally, rhetorically and through a series of policy initiatives that reasserted the regime's modernist perspective with regard to women, education, economic development and the rule of law.[85] His sweeping journey through Europe in 1927 and 1928 further energized his inclination to, in his words, "'bring back to my country everything that is best in European civilization and to show Europe that Afghanistan exists in the map.'"[86]

Amanullah's gaze shifted upward and outward: he returned to big visions of Afghanistan's future and looked beyond his borders for inspiration and support to realize them. His regime embarked, therefore, on a collision course with informal power-holders, whose positions moved increasingly to the margins of Afghanistan's future as conceived by the king. The king's *loya jirga* of 1928, in sharp contrast with the *jirga* of 1924, was a slap in the face for the religious and tribal elite: during this meeting, the king announced a number of initiatives ranging from transportation and communication projects to education and economic

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80 Nawid, *Religious Response to Social Change,* pp. 122-3.

81 Borrowed from Christopher Cramer and Jonathan Goodhand, "Try Again, Fail Again, Fail Better? War, the State, and the 'Post-Conflict' Challenge in Afghanistan," *Development and Change*, Vol. 33, No. 5 November 2002.

82 Nawid, *Religious Response to Social Change,* p. 133.

83 *Ibid.,* p. 124.

84 "Like his grandfather, Amir Abd al-Rahman, Aman-Allah cracked down on the clergy's power. Whereas the clerical policy of Abd al-Rahman aimed at strengthening the power of the state and the position of the monarchy, Aman-Allah's policy aimed at destroying the pervasive influence of the clergy in order to open the way for Afghanistan to progress along modern lines", in *ibid.,* p. 138.

85 *Ibid.,* pp. 124-34.

86 *Ibid.,* p. 136.

reforms. The *jirga's* political process, more importantly, involved the direct election of representatives to a new assembly that effectively circumvented the influence of the mullahs and sheikhs. As the king himself remarked:

> 'This year's jirga was better than previous ones as many useful matters were settled. It is all due to the fact that the representatives had been elected directly by the people and sheikhs, mullahs, and khans had nothing to do with them.'[87]

The king's success at the *jirga* reflected widespread popular support for his leadership and agenda. His decision, however, to cross previously untransgressed boundaries with respect to the informal institutions of tribe and faith proved too much for Afghan society to absorb.[88] And there were others within the king's own administration who did not support their leader's radical approach and remained ready to exploit the growing gap between regime and competing power-holders throughout the country. Even Amanullah's intellectual mentor, Mahmud Tarzi, found himself at odds with the king's dictatorial impatience to force change down the throats of the Afghan population.[89] Nader Khan, the king's war minister, repeatedly urged him to consider "that the existing sociopolitical structure and cultural ethos of Afghanistan did not allow hasty, radical changes."[90] When these views went ignored, the bureaucrats who held them ceased to apply themselves earnestly in support of the regime's ambitions.[91] Nader Khan and his brothers would re-emerge after Amanullah's fall and build a coalition of precisely those religious and tribal elites that had been disenfranchised by their former ruler. In so doing, he would successfully claim the throne.

The year 1928 found the religious elites marginalized in unprecedented ways. In Tillyean terms, these former allies of the state were entirely emasculated by a regime committed to an increasingly secularized brand of politics that necessitated direct rule. Amanullah's previous deference to religious elites turned into scorn and rejection. The king sanctioned the clergy on a number of different fronts, blocking their participation in political and legal arenas, while assuming control of their financial assets and deconstructing their social identities.[92] In one speech, Amanullah declared, "Everyone calls himself a *pir* these days ... It is very difficult to find a genuine *pir*. You should first come to me and ask that you wish to become the *morid* [disciple] of such and such a *pir* and I will tell you all about him."[93] He inserted himself, in effect, into the hitherto private relationship between spiritual leader and his followers and, in so doing, undermined the fundamental authority of Afghanistan's religious elite.

The Amanullah regime even imprisoned and executed members of the clergy as part of a "state-making" campaign to eliminate political elements competing with the state's programmes.[94] Having previously served as partners with the Amanullah regime, the *ulama* now became loci for popular political organization against it. With each arrest and death, popular unrest grew and ultimately the

87 *Ibid.*, p. 139.
88 *Ibid.*
89 *Ibid.*, p. 151.
90 *Ibid.*, pp. 148-9.
91 *Ibid.*, p. 149.
92 *Ibid.*, pp. 144-6.
93 *Ibid.*, p. 146.
94 Olesen, *Islam and Politics in Afghanistan*, p. 147.

ulama issued yet another *fatwa*, but this time describing the king in heretical terms and arguing he was "no longer fit to rule a Muslim nation."[95]

What began as a competition between informal and formal power-holders was transformed into a struggle by the society against an increasingly isolated regime and its surrounding society.[96] The reforms introduced by Amanullah represented an intrusion into a "traditional way of life" without an understanding of the immediate gains involved.[97] "Compulsory military service, now three years; compulsory wearing of suits and hats; the regime's positions on women and family matters,"[98] all represented extraordinary involvement by the state in spheres of Afghan daily life previously regulated privately or in local terms. Government officials indulged in corruption and inefficiencies while state-mandated tax rates soared, undermining the regime's capacity to convince those in the countryside of its value as a dominant agent in their lives.[99] Amanullah's problem was not only popular unrest, buoyed by calls to revolt by the religious leadership. The religious and tribal elites joined forces as the eastern Shinwari tribes began to attack the state's infrastructure under the banner of an Islamic revolutionary campaign against an infidel king on the eve of 1929.[100] The connective tissue of Islam remained strong but beyond the grasp of the state and, eventually, Islam was mobilized against it.

King Amanullah attempted his final retreat in the winter of 1928 by once again promising to undo the latest round of reforms that had prompted the revolutionary fervour against the state. While some members of the *ulama* agreed to stand by the king in exchange for this retreat, many remained steadfastly opposed to the regime and vowed not to be taken in again by this gesture.[101] Amanullah, recognizing the capacity of a pact of informal power-holders to destroy his regime, claimed that he was prepared to deconstruct the vision of a state he had conceived reform by reform.[102] But his efforts rang hollow and, with rebellion erupting in various corners of the country, he found himself relying on a weak national army to defend his capital.[103] When his own troops deserted, Amanullah had little choice but to abandon his palace to the rule of a band of Tajik brigands who had taken the capital from their king. The king's vision of a modern Afghanistan never materialized in the absence of sufficient fiscal, technical and coercive state capacity as well as the support of large swathes of the Afghan population in the face of competing informal elites.

The Musahiban Kings (1929-78)

Nadir Shah and brothers: regime first, reform later

The pendulum swung back in the wake of Amanullah's ousting, and the trajectory of state-building took a dramatic turn with the rise of the Musahiban kings in 1929. The Musahiban period witnessed a fairly significant retreat by the

95 Nawid, *Religious Response to Social Change,* p. 158.
96 *Ibid.*
97 *Ibid.,* p. 159.
98 *Ibid.*
99 *Ibid.*
100 *Ibid.,* pp. 161-2.
101 *Ibid.,* pp. 163-4, 167.
102 *Ibid.,* p. 168.
103 *Ibid.,* p. 169.

state from the society in favour of cultivating an independent centre and a regime shielded from the social backlash experienced by King Amanullah.[104] Rather than transform their society, these rulers sought to negotiate their way through this landscape, all the while protecting themselves.[105] As anthropologist Thomas Barfield explains: "No reforms, modernizations or political actions were to be undertaken if they would destabilize the government."[106]

From their time in his administration, the Musahiban brothers, particularly Nadir Shah, had warned Amanullah against hasty reform. Nadir Shah served as Amanullah's war minister, but maintained his own political agenda in the wings. He cultivated a network of informal power-holders, namely Pashtun tribal leaders, who would become essential allies when he sought the throne later on. Nadir crafted an alternative political vision for Afghanistan, which he articulated in a new newspaper and in his dealings with bureaucratic colleagues and subordinates, including in the military. He approached his role as the head of the war ministry with deliberate caution, all the while expressing his reluctance about "rapid modernisation."[107] Saikal describes this "'go slow'" policy as reflecting Nadir's reluctance to advance the power and vision of King Amanullah. Recognizing the limited support of his war minister, Amanullah sent Nadir Shah to Paris as a diplomatic emissary in 1924, removing him from the immediate political arena.[108]

By 1929, King Amanullah had been deposed and Nadir Shah made his move, returning to Afghanistan with the backing of his brothers and a supporting network of tribal elders. Significant tribal support was manifested in the raising of a militia of 12,000 men to support Nadir Shah's campaign in 1929 to retake Kabul from the Tajik brigands.[109] From the beginning, alliance with critical informal power-holders was central to this state-building strategy. Once in power, Nadir Shah rolled back many of Amanullah's reforms and adopted a politics of patronage that benefited the tribal and religious elites marginalized during Amanullah's tenure. Nadir Shah's philosophy differed significantly from his predecessor's, reflecting "a concept of sober nationalism … a gradual process of change and development, based on peaceful coexistence with conservative forces …"[110]

Nadir Shah met an untimely death in 1933, after which his son, Zahir Shah, assumed the throne. Zahir wore the crown, but his uncles governed as the country's successive prime ministers. Both Mohammad Hashim and Shah Mahmud guided Afghanistan through the next two decades using the "gradualist" approach of their brother Nadir, enhancing and protecting the physical and economic security of the state without significantly expanding its functions or reach.[111] Observers of Afghan history describe a Musahiban agenda that, contrary to conventional state consolidation, actually allowed Kabul to exercise its *independence* of the provinces. Unlike the Western trend of ever thicker ties between centre and periphery, the Musahiban set about building a state that would inoculate itself from conflictual interaction with the surrounding population. This model involved, accord-

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104 Barnett Rubin, "Lineages of the State", *Asian Survey* 28, 11 (1988): 1200.

105 *Ibid.*

106 Barfield, "Weak Links in a Rusty Chain", p. 176.

107 Saikal, *Modern Afghanistan*, p. 85.

108 *Ibid.*

109 *Ibid.*, p. 97.

110 *Ibid.*

111 *Ibid.*, pp. 106, 114.

ing to Barnett Rubin, the cultivation of two pacts by the Musahiban rulers: "While compromising with the traditional forces that brought them to power, they forged links with the international state system and market."[112]

The execution of this dual compact involved a push by the Musahiban leadership to accumulate and concentrate both capital and coercion throughout the middle decades of the 20th century. But this did not necessitate direct rule of the kind detailed in Tilly's description of Western state formation. On the contrary, this dual compact enabled Nadir Shah and his successors to establish and preserve their hold on Kabul without provoking a violent response from social elements that had been dislocated by the ambitions of Amanullah. These regimes made the economic decision to develop their fiscal strength as a city-state might, cultivating an "export enclave" through the nationalization of particular industries (including cotton, textiles and natural gas).[113] Nadir Shah and his brothers generated new fiscal capacity and wealth for the state by encouraging industrial enterprises, as well as establishing a formal banking system. Indeed, the state secured an extraordinary grasp on new capital, "controlling 90 percent of [the first Afghan bank's] capital" in 1931.[114]

Kabul further distanced itself fiscally from rural Afghanistan through changes in tax policy. Income taxation had exposed past regimes to "opposition from the provinces," as might be expected in a relationship of extraction and accountability.[115] The Musahibans turned instead to customs duties on trade as a source of income and shifted tax burdens from rural peasants to urban merchants, who, if disgruntled, did not pose as significant a threat to the regime's legitimacy as rural power-holders might.[116] The de-emphasis on rural taxation led to a dramatic drop in the centre's fiscal dependence on the periphery: by the 1970s, less than 2 per cent of domestic revenue came from land, agrarian and livestock taxation, compared with nearly 63 per cent 50 years earlier.[117]

The Musahiban brothers also concentrated on the state's capacity to wield coercive power. Nadir Shah immediately focused on shoring up the national army, a necessary instrument in state-building and regime protection. Having "scaled down substantially expenditure in the areas of social and cultural reform," he directed those funds towards the security sector instead.[118] He took on political rivals without compunction, marginalizing those who opposed his regime through "physical elimination, deception, discrediting and cooptation" when necessary.[119] His brother Mohammad Hashim similarly sought to ensure the security of his own regime. He appointed his nephew Daoud as the commander of central forces in Kabul, thereby introducing his protégé to the political arena by way of the military.[120] Hashim's resignation in 1946 led his brother Shah Mahmud assuming the prime ministership. Shah Mahmud, too, prioritized regime stability over potentially disruptive structural reforms, so that the

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112 Rubin, "Lineages of the State", p. 1200.

113 *Ibid.*, p. 1201.

114 Saikal, *Modern Afghanistan*, p. 107.

115 Barfield, "Weak Links in a Rusty Chain", p. 177.

116 *Ibid.*

117 Rubin, "Lineages of the State", p. 1201.

118 Saikal, *Modern Afghanistan*, pp. 101-2.

119 *Ibid.*, p. 101.

120 *Ibid.*, p. 113.

political space remained fairly unperturbed. Dupree explains this fairly placid period in Afghan history as one of economic change accompanied by limited political change.[121] Much like other rulers in the Middle East, the Musahiban brothers required little state coercion, beyond the surgically repressive responses to particular threats to the regime. Instead, patronage politics proved to be the most salient currency between the centre and the periphery, meaning that state-building involved cooptation, coexistence and conciliation with holders of informal power.[122] It was only with the rise of Daoud Khan after Shah Mahmud that the Mushiban name became synonymous with radical and expansive change.

In the Musahiban governance equation, lasting nearly three decades, the primacy of partnership between the state and critical social elements remained central to its success. As noted above, need for greater capital for the state did not require a great deal of taxation of ordinary citizens, while major landowners and tribal elites found themselves unburdened financially under the Musahiban. Similarly, despite the inclination to strengthen the national army, Nadir Shah and his brothers stopped short of forcing prominent Pashtun tribes to turn over rank and file.[123] Deference to the discretion of tribal leadership in selecting army rank and file represented a retreat from the universal, lottery-based draft of Amanullah. In Rubin's words, Afghanistan "largely remained a segmentary, inward-looking society" that engaged with its state "primarily through negotiation mediated by local nobles."[124] Informal power-holders once again found themselves strategically located at the interface between sheltered centre and increasingly remote periphery.

As in Amanullah's early rule, the credibility of Musahiban rule rested from its inception on the engagement of informal social institutions and power-holders. The Musahiban brothers, in particular, sought legitimation by instrumentalizing Pashtun identity politics, representing the Tillyean "connection" commodity. Nadir Shah came to power on the backs of thousands of Pashtun tribal militiamen and his successors maintained strong ties with the tribes that had brought them to Kabul in the first place. Mohammed Hashim, for example, introduced an educational policy that replaced Dari language instruction with Pashtu in 1936, just one instance of the "preferential treatment of Pashtu and Pashtun culture [that] remained a salient feature of Hashim's domestic politics and persisted long after him."[125] Musahiban leadership involved, then, explicit favouritism toward Pashtun tribal elites and urban elites, who increasingly found themselves employed throughout the state bureaucracy and military.[126]

The 1931 Constitution: a constitution of accommodations

The early Musahiban conception of the state remained one of strength and centralization but not of a state intent on interfering in and defining all aspects of its citizens' ordinary lives. The vision was not that of Migdal's transformative

121 Louis Dupree as quoted *ibid.*, p. 115.
122 Saikal, *Modern Afghanistan*, p. 169.
123 Barfield, "Weak Links in a Rusty Chain", p. 177.
124 Rubin, "Lineages of the State", p. 1200.
125 Saikal, *Modern Afghanistan*, pp. 112-13.
126 *Ibid.*, p. 113.

state. Much of the business of governance, particularly the rule of law, again became the domain of tribal and religious leaders in the countryside who resumed their role as intermediaries between centre and periphery. The 1931 Constitution promulgated by Nadir Shah reflected his philosophy and that of his brothers. Dupree described the new constitution as a "hotch-potch of unworkable elements."[127] Put more kindly, this constitutional project represented an attempt by the king to blend liberal, formal institutional constructs with traditional, informal markers of legitimacy.

The broad outlines of the document's institutional roadmap mimicked those put forward by Amanullah. Scholars note, however, the degree to which this new political and legal framework subordinated itself to Islam at every turn.[128] Olesen, making reference to the argument of historian Vartan Gregorian, sees the constitution's deference to Islam as representing a decision by the regime to engage with and draw on the political potency and legitimacy of the clerical establishment and thus instrumentalize these informal power-holders on behalf of the state.[129] This analysis again points to the notion that the Musahiban brothers approached potentially competitive social elements as allies rather than antagonists. Coexistence between formal and informal institutions served the needs of the state and the clerics alike.

Nadir Shah's deference to tribal elites was also manifested in this new legal framework. The 1931 Constitution legitimized the role of the tribesmen as representatives with a formal place in government, while a subsequent law guaranteed the assembly of tribal elites in a *loya jirga* that would meet at least once every one to three years. This assembly could veto any major legislation, and had sole authority to amend the constitution.[130] This, in conjunction with the tribal leaders' privileged positions with respect to taxation and conscription, elevated these informal power-holders to a status they had enjoyed before Amanullah's reign. Some tribesmen were even totally exempted from paying taxes or sending troops, even though, as Olesen notes, this informal privilege defied the very text of the 1931 Constitution, which described "equal rights and duties" across the citizenry. These tribes had, however, helped secure Nadir Shah's rise to power and therefore received his special patronage: "As far as the tribes in general were concerned, they were basically left in peace from economic and political pressures from the state during the following twenty years."[131]

Olesen observes more generally that Nadir Shah's constitution was "a showpiece of appeasement of the various power groups in society."[132] To make real this renewed pact between state and informal power-holders, Nadir Shah revoked many of his predecessor's legal reforms and reintroduced conservative policies aligned with the agenda of the clerical and tribal elite.[133] Interestingly, however, the king and his entourage simultaneously introduced items of "modernization," but consistently juxtaposed them with nods to those who might otherwise be dis-

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127 As quoted by Olesen, *Islam and Politics in Afghanistan*, p. 176.

128 Donald N. Wilbur, "Constitution of Afghanistan", *Middle East Journal* 19, 2 (Spring 1965): 215.

129 Olesen, *Islam and Politics in Afghanistan*, p. 179. See also Gregorian, *Emergence of Modern Afghanistan*.

130 Olesen, *Islam and Politics in Afghanistan*, p. 180.

131 *Ibid.*

132 *Ibid., p.* 179.

133 For specific policies, see *ibid.*, pp. 180-1.

turbed by the changes. Consider Article 20 in the constitution, the requirement for all children to receive a primary school education overseen by the state. As Olesen notes, the very next article, number 21, guaranteed "to any citizen the right to impart Islamic religious instruction."[134]

Embedded in the formal document itself, modernization and traditionalism sat side by side. As several scholars note, this kind of politicking ensured that the king remained at the helm in terms of defining the marriage between modernity and tradition, and in so doing ensured the persistence of the monarchy as the ultimate arbiter of state-society relations.[135] Prime Minister Daoud's eventual rise to power within the Musahiban dynasty meant a return in the 1950s to an expansionist vision of Afghan statehood. This was not simply a figment of Daoud's imagination but lived in the minds of many members of the growing urban intelligentsia. However, their ideas did not fit within the "ideological paradigms (tribal and classic Islamic) on which the Constitution of 1931 implicitly rested."[136]

Daoud: Amanullah again?

Daoud's capital accumulation strategy did not rest on an aggressive assault on the countryside by way of bold taxation of the kind Amanullah had attempted. Instead, Daoud's regime crafted a position as the beneficiary of extraordinary Soviet patronage in the form of financial support, as well as institutional capacity-building and policy direction.[137] Rubin estimates that the $100 million Soviet line of credit, in addition to other foreign assistance, covered four-fifths of all development activity undertaken by the Daoud regime.[138] State income did not derive from extractive mechanisms of the kind articulated by Tilly, but the state's capacity to achieve an exceptional concentration of capital grew nonetheless. Moreover, the de-linking of fiscal capacity from the countryside allowed for "national politics and programs largely divorced from rural areas."[139]

With regard to coercive concentration, the centrepiece of Daoud's state-building project was the establishment of a strong national army, largely funded and trained by the Soviet Union. This led to the cultivation of an unprecedented class of military officers, many of whom later emerged as enemies of the state on behalf of the Communist movement. As the Afghan army grew in strength and capacity, the Daoud regime was able to reinstate the universal draft, further enhancing the state's concentration of coercive power.[140] Saikal argues that, as a result of Soviet support, Prime Minister Daoud achieved a degree of coercive concentration that allowed the Afghan state to achieve dominance over its society in unparalleled fashion.[141] The state, more generally, was now capable of implementing a wide range of initiatives and reforms that had not been previously possible, from infrastructure and economic development projects to educa-

134 Olesen, *Islam and Politics in Afghanistan*, p. 181.
135 Ibid., p. 182; Saikal: *Modern Afghanistan*, p. 101.
136 Olesen, *Islam and Politics in Afghanistan*, p. 199.
137 Saikal, *Modern Afghanistan*, pp. 124-6.
138 Rubin, "Lineages of the State", pp. 1203-4.
139 Barfield, "Weak Links in a Rusty Chain", p. 176.
140 Rubin, "Lineages of the State", p. 1204.
141 Saikal, *Modern Afghanistan*, p. 126.

tion and social reforms. All told, the 1950s brought Afghanistan "unprecedented socio-economic progress."[142]

Zahir Shah's liberalism lite

Daoud resigned in 1963, assuming that he would be returned to power in the elections he foresaw in Afghanistan's near future. His decision meant the assumption of full political control by the king, Zahir Shah, who immediately launched a project of political reform, conspicuously marked by the promulgation of a new constitution. The 1964 Constitution provides revealing insights into the complex interactions between the *de jure* and *de facto* realms of law and politics at this point in 20th century Afghanistan. The document was universally heralded as "'possibly the finest Constitution in the Muslim world,'"[143] and included stipulations that promised dramatic change in the legal architecture of Afghanistan's state institutions and, more importantly, in the relationship between state and citizens.

From institutional checks and balances to the consecration of individual rights and freedoms, the constitution reframed the state in terms that resonated more with the Western liberal tradition than the informal institutions of Afghanistan. One of the most striking changes involved subordination of Islamic law to secular legal codes, which effectively made "Afghanistan a secular state."[144] Zahir Shah convened a *loya jirga* to receive the stamp of approval of informal power-holders, including religious and tribal elites. Saikal's description of the proceedings suggests that these social representatives gave their blessing to the constitutional project, despite the threat it ostensibly posed to the institutions they held so dear. This "by no means signified that a satisfactory compromise had been achieved between Islamic, traditional and customary values on the one hand, and modern liberal codes on the other." However, by this point, state institutions had grown stronger and more capable of holding their own against peripheral players. Consequently, the bargaining dynamics between centre and periphery had changed.[145]

The relationship between Zahir Shah's regime and religious and tribal elites was, however, far more amiable than the antagonism evident in the later years of Prime Minister Daoud's first term. National political institutions, namely parliament, proved valuable vessels for delivering patronage from the capital to the provinces, affirming the position of these middlemen.[146] And, at provincial and district level, new formal institutions and codes established in Kabul would ultimately have little meaning and effect. Despite, for example, the elevation of secular law in the new constitution, in reality religious courts would "dominate," and legal analysts would find little evidence of legislative progress by parliament, despite its mandate to establish a new legal framework for the state and its citizenry.[147]

Ultimately, Zahir Shah's constitutional exercise promised (or threatened) much more than it delivered: his monarchy remained largely secure from institu-

142 *Ibid.*, pp. 130-1.

143 *Ibid.*, p. 146.

144 As quoted in *ibid.*, p. 148.

145 *Ibid.*, p. 149.

146 *Ibid.*, p. 157; Rubin, "Lineages of the State", p. 1206.

147 Saikal, *Modern Afghanistan*, p. 149.

tional interference, informal or formal, and he resorted to the politics of patronage at every turn. While agitation for liberal reform had existed, it never bubbled up from the masses and, as such, the king's regime never had to account to the citizenry along the lines of a true democracy.[148] Middlemen continued to locate themselves in the space between state and citizenry, "reaping as many material benefits as possible from their positions as intermediaries between the center and the periphery."[149] The exercise in democratization remained largely theoretical, and barely noticeable, outside the capital.[150]

Daoud returns, rises and falls

The status quo would be shaken, however, with the return of Daoud in 1973. This time, Daoud aligned himself not with traditional elites but with Marxist members of the Parcham party in Kabul. Daoud's approach was now far more authoritarian and included the targeted elimination of Islamist political elements in particular, many of whom would later re-emerge as the *mujahideen.*[151] In the coming years, Daoud sought to "diversify Afghanistan's sources of external assistance" beyond the Soviet Union in order to realize his extraordinarily ambitious vision for Afghanistan's modernization and development. To this end, he disentangled himself from leftist allies and re-engaged former Mohammadzai tribal partners.[152] Daoud's autocratic momentum grew with time, resulting in the drafting of a new constitution in 1977 that crystallized his dictatorial intent and was followed by violent campaigns against allies and competitors alike.[153]

The strength of the state under Daoud's stewardship proved insufficient for (or perhaps irrelevant to) the survival of his regime. His exceptional achievements with respect to military strength, industrial development, infrastructural progress and international support proved inadequate in the face of unsupportive elites. Members of the educated, urban intelligentsia, some of whom had previously supported Daoud, were increasingly frustrated by his autocratic style. Members of the *ulama* found a new voice through the parliament for their grievances with his secular agenda. And segments of the Pashtun tribal elite found themselves marginalized as a function of Daoud's conception of the state. Saikal explains that "his tragedy was that he failed to codify his programme in a way acceptable to the predominantly traditional and Islamic society."[154] So, again, the severance of these important informal alliances,[155] as in the case of Amanullah's fall, represented a critical element in the demise of Prime Minister Daoud and the turmoil experienced by the Afghan state in the coming decades.

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148 *Ibid.*, p. 168.

149 *Ibid.*, p. 157.

150 *Ibid.*, p. 168.

151 *Ibid.*, pp. 174-5.

152 *Ibid.*, pp. 177-8.

153 *Ibid.*, p. 181.

154 *Ibid.*, p. 184.

155 "On the most general level, Daoud repeated Amanullah's mistake of pushing through changes without first building and maintaining a potent reform coalition" in *ibid.*, p. 184.

The 2004 constitutional project

A modern discussion of the Musahiban period prompts reflection on the current situation in Afghanistan, in part because the institutional design of the post-conflict state in the 2004 Constitution is drawn largely from its 1964 predecessor. The 2004 constitutional project resonates with several of the themes unearthed in the above analysis of previous constitutions, but it is also a radical departure because of the modern dynamics at play. The most obvious distinction between all the constitutions of the 20th century and the current document is, of course, the involvement of the international community in shepherding the fledgling post-2001 state through the constitutional process and the larger governing project. From its inception, the Karzai regime has owed its existence and survival to the support of foreign organizations and states.

The Bush administration and its coalition had articulated a direct link between state strength, democratization and the elimination of safe havens for terrorism.[156] International security, as defined by these intervening powers, was now contingent on the success of the democratic project in post-2001 Afghanistan. The US and the UN took an avid interest in the formulation of the constitutional drafting process, as well as the eventual document that emerged. Karzai's constitution and the drafting process reflect a transformative understanding of state-society relations in a number of ways, some of which represented blatantly foreign conceptions of democratic statehood. Others reflected a genuine desire by many elite and ordinary Afghans to close the chapter on the decades-old warlordism and civil strife that had consumed the country. And, yet, both procedural and substantive attempts to create strong and liberal institutions found themselves consistently hindered by the realities of power politics on the ground.

Popular participation or power politics?

One of the major differences between the 2004 framework and those of the past, at least cosmetically, was the extensive public consultation undertaken by the regime in preparation for the document's drafting. For two months during the summer of 2003, ordinary citizens were engaged through questionnaires distributed in provincial capitals across the country. But, ultimately, the participatory dimension of the drafting disappointed many. Despite the accumulation of "nearly 100,000 written opinions and the results of 523 meetings," the conclusions of these consultations remained sealed, "swept under the carpet in last-minute back-room deal-making."[157] Thus, while the theatre of political participation and local expression represented an important part of the pre-drafting process, the final document emerged from a series of compromises struck between powerbrokers, Afghan and foreign alike.

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156 See the text of The "Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions", also known as The Bonn Agreement, 5 December 2001.

157 J. Alexander Thier, "The Making of a Constitution in Afghanistan", *New York Law School Law Review* 51 (2006/07): 569.

In particular, the Karzai government had to contend with a host of informal power-holders, the likes of which had simply not existed before the Soviet occupation of Afghanistan. Warlord commanders, many of whom had been strengthened through their partnership with the US military, assumed positions of power within the formal architecture of the state after 2001. Members of the Northern Alliance, in particular, held important central government portfolios as well as positions of power (formal and informal) in the country's periphery. These actors represented new elites whose power did not derive from tribal or religious legitimacy but from their access to wealth and violence through the surrounding political economy of war. In Tillyean terms, these warlord commanders had accumulated capital, coercion and, in some cases, connection in quantities that threatened the viability of the central government from the start. Unlike Zahir Shah, who enjoyed the benefits of an established regime, President Karzai and his cohorts undertook the constitutional project as part of a larger game of power politics within which the regime represented a new and weak player.

The Constitutional *Loya Jirga* was convened to bestow credibility on the new constitution, invoking the legitimacy of an informal tradition long-used to bless formal institutions of statehood in Afghanistan.[158] This symbolic gesture and the technical logistics provided by the international community in its support "did little to mask the naked politics involved in dealing with Afghanistan's past and mapping Afghanistan's future."[159] Strongmen took on prominent roles during the *jirga* as they "sat in the front rows, were elected the chairs of their working groups, and had access to the VIP tent."[160] Many advocated fiercely for a parliamentary system that would diminish the power of the Pashtun presidency. Others called for devolution of power to the provinces, including elections for provincial governors. They also pushed for official acknowledgment of the multiplicity of ethnicity in Afghanistan, particularly through the recognition of languages.[161]

Informal power-holders of a more traditional kind re-emerged as well, in particular members of the religious elite with a distinct vision for the Afghan polity. Several compromises were struck between the Islamists and other delegations, backed by the international community.[162] Ultimately, "Afghanistan's new constitution is a thoroughly Islamic constitution."[163] Most striking is the wording of Article 3, which tightens the hold of Islamic jurisprudence on the corpus of Afghan law. While the 1964 document held that no law could violate the "basic principles of the sacred religion of Islam and the values of this constitution," the new, circumscribed version identifies the "'beliefs and provisions'" of Islam as the exclusive constraint on law.[164] The supreme court, staffed by religious scholars, can "review the constitutionality of legislation," which foreshadows greater Islamic influence than might otherwise exist.[165]

In a larger sense, as Rubin argues, this new legal framework endows the religious establishment with substantial influence and in effect secures its position

158 Barnett R. Rubin, "Crafting a Constitution for Afghanistan", *Journal of Democracy* 15, 3 (2004): 7.
159 Thier, "Making of a Constitution", p. 570.
160 *Ibid.*
161 Rubin, "Crafting a Constitution", pp. 16-7.
162 *Ibid.*, pp.14-15.
163 Thier, "Making of a Constitution", p. 577.
164 Rubin, "Crafting a Constitution", pp. 14-15.
165 *Ibid.*, p. 15.

as the arbiters of justice in post-2004 Afghanistan. He explains this outcome as arising from the new regime's desire to avoid conflict with this particular set of elites:

> Judgeships form the main source of employment for the *ulama,* and neither the president nor the commission wants to confront them. Given the expanded powers of the Supreme Court and the interest of the *ulama* in keeping a monopoly of the power to interpret Islam, the failure to create more constitutional space for judicial reform could prove a serious barrier against needed change in the future.[166]

Unlike past constitutional projects that deliberately and directly marginalized clerical influence, this document represented an unambiguous accommodation on the part of the state vis-à-vis religious tradition.

The triumph of the centre over the periphery?

Despite their strong presence at the *jirga,* strongmen and mullahs did not fully triumph in the deliberations. In fact, much of the 2004 Constitution represented a victory for "reformists." These Afghans, many of whom had lived in exile for the past several decades, seized upon this extraordinary opportunity to reconceive of the state at this critical juncture. Of equal import, the US and its international partners backed the creation of a strong, centralized government that would be a "unitary, trusted entity" with which they could engage fruitfully.[167] As a result, the institutional design of the 2004 state involved a powerful presidency with a parliament and a supreme court providing ostensible checks and balances to the executive. Politics and administration at the provincial and local levels was to be officially driven by the centre's agenda through presidential appointments to all important sub-national posts. Fiscal authority remained firmly in the hands of the centre as well.

This document offered a blueprint of a central government that could control the political contours of its state. The new constitution also incorporated the host of liberal provisions present in the 1964 version, promising the Afghan citizen a wealth of rights and responsibilities associated with the Western conception of the social contract. The international legal regime made its mark as well in Article 7, whereby the state promised to uphold the provisions of the United Nations Charter, the Universal Declaration of Human Rights and all other treaties to which Afghanistan was party. Finally, this constitution, in keeping with the tradition of the 1964 and 1923 documents, emerged from the drafting process flush with a great deal of substance that can only be described as aspirational: it described a polity as it could or should be rather than as it was.

The state promised its people a basket of goods and services never previously delivered and, to this day, entirely unfulfilled. From universal education to universal healthcare, one article after the other described a government that would capably and transparently deliver a great deal to its citizenry.[168] What is striking about the formal architecture of the post-2001 state is the degree to which it

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166 *Ibid.,* p. 18.

167 Thier, "Making of a Constitution", p. 573.

168 See articles 43, 50 and 52 on education and healthcare in the 2004 Constitution.

appears to reflect the real and expressed beliefs of many ordinary Afghans. Field research quickly unearthed a widespread desire by citizens across the country, "for perhaps the first time in modern Afghan history," for the creation of a strong and capable state that could close the gap between centre and periphery.[169] While past constitutions had met with scorn or indifference, the 2003-04 project captured the imagination of elites and ordinary citizens alike.

The triumph of the de facto over the de jure

Yet, regardless of the legitimacy of strong and centralized statehood, many of the constitution's institutional provisions simply did not reflect the real relationship between the formal state and informal power at this point in history. As Thier comments:

> This constitutional model for power-sharing could not be farther from the reality on the ground in Afghanistan. The territory, resources, and even government apparatus in most provinces remains in the hands of regional power brokers.[170]

In reflecting on the drafting of the constitution and the eventual document that emerged, it is critical to acknowledge that the *de facto* reality of a weak centre and a host of informally powerful actors on the periphery has persisted to this day. Despite long and costly efforts to construct formal institutions, the influence of informal power and institutions has remained pervasive at every level of governance.

As Sarah Lister explains: "Political power … continues to be exercised in a personal and patronage-based manner, but within the overall framework of bureaucratic rules."[171] The Karzai regime has since 2004 continued to bargain with this new elite, doling out positions of political import at national and sub-national levels.[172] The Karzai administration's accommodationist approach can be compared to the strategies of past regimes: the particularly tenuous nature of this fledgling "post-conflict" regime strengthened the imperative to accommodate those who could threaten not only the regime, but the whole state-building endeavour. Thier captures the degree to which this struggle has been a constant in Afghanistan. Despite the dramatic differences in the nature of informal power, it has consistently been a force on the periphery to be reckoned with by the centre:

> The historical reality is that power in Afghanistan has almost always operated through a negotiation between the country's central authority and local power-holders – and tensions between these two levels have existed for as long as there has been a state.[173]

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169 Andrew Wilder and Sarah Lister, "State-Building at the Subnational Level in Afghanistan", Chapter 6 in Wolfgang Danspeckgruber with Robert Finn (eds), *Building State and Security in Afghanistan*, (Princeton: Woodrow Wilson School of Public and International Affairs, 2007), p. 95.

170 Thier, "Making of a Constitution", p. 574.

171 Sarah Lister as quoted in Martine Bijlert, "Between Discipline and Discretion: Policies Surrounding Senior Subnational Appointments", Briefing Paper Series (Kabul: Afghan Research and Evaluation Unit, 2009), p. 3.

172 Bijlert, "Between Discipline and Discretion".

173 Thier, "Making of a Constitution", p. 575.

Conclusion

The ups and downs of state-building in Afghanistan reflect the political reality that every regime faces: the challenge of managing a powerful set of informal elites and institutions. During much of the 20th century, religious and tribal actors were both allies and competitors of the state, given their persistent relevance in Afghanistan's political life. Different rulers approached the informal sector with different strategies. King Amanullah initially embraced the clerical establishment and enhanced his prestige by doing so. With time, his ambition to lead Afghanistan into a new period of modernization prompted him to grow the state in ways that would marginalize clerics and their tribal affiliates. Unwilling to be sidelined, these informal power-holders revolted, first in limited terms that led to their appeasement. But when the king later renewed his efforts to introduce dramatic reform and change, the antagonism between his regime and those elites who had once enthusiastically supported him crystallized. Without their support, his capacity to govern and eventually to remain on the throne fell away.

Amanullah's successors, the Musahiban brothers, learned this lesson in no uncertain terms and set about building a regime in far more conservative terms. They forged close ties with important religious and tribal leaders and tempered the state's edicts on taxation, conscription, education, family law and other aspects of social life. Meanwhile, they found non-obtrusive ways to concentrate the regime's hold on capital, coercion and connectivity while maintaining strong, parallel relationships with power-holders that operated outside the bounds of the state. Consequently, they held control for many decades and governed a fairly peaceful Afghanistan. Prime Minister Daoud, their final representative, eventually fell into a trap similar to Amanullah's, by pushing the boundaries of statehood without the support of those elites that had the power to resist Kabul.

A number of lessons can be learned from the reigns of Amanullah, the Musahiban brothers and Prime Minister Daoud. To start, the Afghan state has not travelled along the conventional path of the Western state, whereby informal actors and rules steadily give way to a robust architecture of formal institutions that monopolize governance. Instead, an ambitious regime that sought to dominate the political space with its vision of social and political modernization failed and was followed by a set of rulers that withdrew from the periphery and found their strength by ceding ground to those with power outside the arena of the state. These regimes were followed by a state leader who once again sought to consolidate state control at the expense of non-state actors and found himself expelled as well. Throughout these ups and downs in the *de facto* game of power politics, the *de jure* design of the state also evolved. Constitutions emerged one after the other, in some cases reflecting the governing vision of the leader, like Amanullah, and in other cases serving as little more than symbols of political reform.

Since 2001, President Karzai and his administration have engaged in their own set of parallel *de facto* and *de jure* state-building exercises,[174] for the fledgling post-conflict state immediately faced its own set of non-state actors, many of whom have the fiscal and military capacity to threaten the state in very real terms. While the 2004 Constitution outlines a highly centralized, formalized and

174 Wilder and Lister point out the contrast between the *de jure* and the *de facto* in *idem.*, "State-Building at the Subnational Level".

accountable institutional design for the Afghan state, the reality of Afghan public affairs is one of brokerage, pact-making and patronage that involves the persistence of informal power in every sphere of politics. This political reality represents a grave disappointment to many in Afghan society, as well as to members of the international community. The parallel coexistence of the state and powerful social elements manifest in the country today can perhaps be better understood if placed in the context of the longer history of state formation in Afghanistan.

Pakistan's Justice Sector: Defending or Diluting the Constitution?

STAFFAN DARNOLF

Interest in constitution-making has intensified in recent decades. One of the main reasons for this is the many countries currently undergoing state-building. For a broader audience, this trend came to the forefront when the guns fell silent in former Yugoslavia in the mid-1990s and the emerging states sought a new political system governed by fundamental democratic principles alien to the old system. Since then, other countries have followed suit and have undergone a more or less complete overhaul of their constitutions. South Africa, Afghanistan, Iraq, Sudan and Nepal are but a few cases in point. Additionally, Kenya and Zimbabwe are expected to embark on constitutional reform in coming years.

To an extent, creating a brand new constitution in a post-conflict environment is relatively uncomplicated, as it is often part of a larger peace agreement involving negotiations between leaders of the former adversarial groups and arbitration by an international party. Hence, constitution-drafting becomes but one tool in the reconciliation process, lumped together with disarmament, demobilization and reintegration of ex-combatants.[1] Practitioners, and to a certain extent scholars, have paid less attention to constitution-making in countries still struggling to establish a stable and functioning pluralistic democracy decades after independence. Pakistan falls squarely into this category. The country's constitution-making efforts warrant closer examination, especially given Pakistan's geopolitical location, the fact that it is a Muslim-dominated state and its importance to the new Obama administration.

To date, in explaining Pakistan's fragile democracy, much attention has either been given to the relationship between the ruling civilian elite and the military, or the inability of civilian administrations to deliver the most basic services to large sections of Pakistani society. In recent times, the Supreme Court of Pakistan in general and its chief justice, Iftikhar Muhammad Chaudhry, in particular have been hailed as the guardians of constitutionalism and democracy in Pakistan. These accolades are extended to the Lawyers' Movement, a civil society organization, albeit one related to the judiciary. It has been widely praised for successfully challenging General Musharraf's military rule by defending the con-

1 This is not to say that implementing a peace agreement and promulgating and enforcing a new constitution are without challenges.

stitution, organizing demonstrations and marches and boycotting the courts, often at great personal risk to its members.[2]

The courts play several key roles in a functioning democracy. One oft-referred to role relates to the separation of powers, with the courts safeguarding against attempts by the executive branch to overstep its mandate. This check-and-balance is pivotal to healthy democratic governance, particularly when changes to the more fundamental aspects of the political system set out in the constitution are promoted by the executive branch itself. If constitutional amendments are made in accordance with legal requirements, such process could accentuate the rule of law and strengthen the democratization process. On the other hand, if amendments are based on extra-constitutional means, the value of the superior law of the land could be eroded, as well as confidence in the superior court itself.

However, it is not only high-profile cases addressed by a supreme court that affect the fundamental democratic principle of rule of law in a country. It can be argued that the more mundane cases in the lower courts are equally important to the core values of a democratic constitution, since it is by this means that large numbers of citizens experience the fundamental democratic principle of justice being blind and cases being heard and adjudicated only on the basis of facts and not of wealth, official status or ethnic belonging. Hence, lower courts can contribute even more to strengthening the notion that every citizen has equal value and rights and that all individuals should have their cases heard in a court of law. The lower court system could also undermine the democratic project, should it prove to be corrupt, inefficient, arbitrary and politicized. In such circumstances, an individual could seek redress by using informal traditional mechanisms, apply extra-legal solutions or become resigned to the fact that no recourse is possible under the current political and constitutional system. None of these courses of action is likely to strengthen the democratization process.

A function sometimes overlooked is the justice sector's public advocacy role as defender of the constitution and rule of law. Advocacy in Western democracies is almost exclusively elite-driven and mass-media based. Senior representatives of justice ministries, courts or bar associations convey messages in op-eds, television talk-shows or think-tank debates streamed over the internet. However, because of high illiteracy rates, underdeveloped infrastructure and poor socioeconomic conditions, advocacy in Pakistan is more often conducted differently. Agitation on the streets, mass rallies and processions are more commonly used as the means to reach a wider audience and to prompt public discourse.

Analyzing the Justice Sector

This chapter analyzes three sets of actions by representatives of the Pakistani justice sector that could impact the upholding of core constitutional elements and values: (1) Supreme Court rulings when fundamental aspects of the constitution are altered; (2) the capacity of lower courts to handle regular court cases, and (3) the advocacy role of lawyers.

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2 See for instance, "Fate of Lawyers' Movement," *The News*, 28 August 2008; "Pakistan: Lawyer's Movement is the 'vanguard of democracy'," Asian Human Rights Commission, 3 March 2008; James Traub, "The Lawyers' Crusade," *New York Times*, 1 June 2008.

Supreme Court decisions include court cases with the potential to alter the fundamental character of the political system enshrined in the constitution, or the constitution itself. Given the limited availability of information on the workings of the lower courts in Pakistan, the analysis here will focus on the 2008 General Election Tribunals. As the Lawyers' Movement is one of the more recent and most visible expressions of public advocacy by the Pakistani legal fraternity, it has been picked as a representative example of lawyer advocacy.

This chapter begins by outlining the key aspects of the political system and describing its fundamental characteristics. This will guide the review of Pakistan's constitutional history and the analysis of actions by the Supreme Court in defence of the constitution. The second part will focus on the Election Tribunals, assessing their ability to fulfil their mandate in a timely and professional manner. The remainder of the paper analyzes the Lawyers' Movement.

Three Key Political Systems: Presidentialism, Parliamentarism, Semi-Presidentialism

The political system comprises the governing institutions and the interaction between these institutions. In most countries, the political system is defined in the constitution and forms the foundation of formal political life in a society. Issues related to the political system are most commonly dealt with and decided on by a supreme court or constitutional court.

Political systems are often divided into two categories, presidentialism and parliamentarism. On the surface, distinguishing presidentialism from parliamentarism should be simple, on the basis of the presence or absence of a president and/or parliament. However, the political system of many countries includes both institutions, so definitions to differentiate the two systems are warranted. Giovanni Sartori (1994) argues that presidentialism is often poorly defined while parliamentarism includes such a large and broad array of parliaments that telling the two systems apart is difficult.[3] To address this shortcoming, Sartori suggests three variables for identifying a purely presidential political system:

1. The president is popularly elected (directly or quasi-directly)
2. Government is neither appointed nor dismissed by parliamentary vote. These powers rest with the head of state; and
3. The president directs the executive

The centre of power in a parliamentary system, on the other hand, lies not with the head of state, but with the legislature. Here there is no separation of power between executive and parliament. The fundamental characteristic of a parliamentary system is that the government is appointed, supported and discharged by parliament.

The above definitions of presidentialism and parliamentarism are by no means exhaustive or mutually exclusive. However, reality as well as the difficulty of defining the two political systems make a third category necessary. Several

3 Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, (Houndmills: Macmillan, 1994), p. 83.

countries have developed political systems that belong neither to the family of presidential systems, although they have strong presidents, nor to a parliamentary system. This hybrid system is often dubbed semi-presidentialism.[4]

Semi-presidentialism is a political system with both a president and a prime minister, although this is not unique to this particular system. Legal barriers safeguard the president's prerogatives from the prime minister. The role and function of the head of state are not just ceremonial: they often include foreign relations or broader policy issues, while the prime minister is in charge of the executive. An important variable distinguishing semi-presidentialism from parliamentarism is the president's popular mandate, which may be secured through a general election mechanism or by indirect election, as long as it's not by the parliament. The prime minister and head of state share executive powers.[5] However, in the case of Pakistan, once the president has been elected by parliament and the four provincial assemblies, he is very powerful and time and again has used his prerogative to dismiss the National Assembly and hence the government. Thus, even though the president of Pakistan does not have a direct mandate from the electorate but the right to dismiss the National Assembly, the political system can be defined as semi-presidentialism.

As Pakistan's modern political history is reviewed below, these three types of political system will be tracked and the actions of the judiciary analyzed.

The Superior Judiciary: Defender of the Constitution or Diluter?[6]

Since the country's inception in 1947, Pakistani citizens have been exposed to a bewildering number of constitutions, constitutional amendments, provisional constitutional orders and even suspended constitutions. The superior judiciary has played an instrumental role in Pakistan's constitutional history. It has on numerous occasions made rulings directly affecting the constitution. In fact, the actions taken by superior courts leading up to Pakistan's first constitution still affect courts today.

Structure of Pakistan's judiciary

Pakistan's judiciary is commonly divided into two categories; the "superior" and "subordinate" judiciary.[7] The former is made up of the Supreme Court and high courts, while the remaining lower courts make up the latter category. At the bottom of this hierarchy are the civil judges and judicial magistrates. In each of the more than 100 districts of Pakistan, these judges are supervised by a district and sessions judge. Appeals from a district and sessions judge are heard by one of the country's four high courts, located in the provincial capitals. At the top of the judicial structure sits the Supreme Court.

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4 Sartori, *Comparative Constitutional Engineering*, p. 121.

5 Ibid., pp. 131-2.

6 This section to a large extent builds on the International Crisis Group's excellent report *Building Judicial Independence in Pakistan*, Asia Report No. 86. (Brussels, 10 November 2004). An additional key source is Jalal Ayesha, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defense*, (Cambridge: Cambridge University Press, 1990).

7 International Crisis Group, *Building Judicial Independence*, p. 2.

Constitution and the Supreme Court

As Pakistan's 1956 Constitution was being drafted by the constituent assembly, a conflict surfaced between the latter and the executive, then Governor-General Ghulam Mohammad. He decided to dissolve the constituent assembly when it tried to reduce his powers by disallowing his right to dismiss ministers. To achieve this objective, the governor-general invoked a state of emergency and issued a decree. The president of the constituent assembly successfully challenged this decision before the Sindh High Court. However, Governor-General Mohammad allegedly met privately with the chief justice of the Federal Court (the Supreme Court of the time) and later the Federal Court struck down the Sindh decision. The Federal Court didn't stop there, but made further rulings effectively giving Governor-General Mohammad the power to make laws, since no constituent assembly existed and the executive institution was the only one in power able to govern the country. This rationale was to be known as the "Doctrine of Necessity."

It was not long before another doctrine was used by the superior judiciary to justify the abrogation of the highest law of the land. In October 1958, only two years after Pakistan's first constitution had come into force, the army chief, General Ayub Khan, orchestrated a military coup. After declaring martial law, he seized power. On this occasion, Chief Justice Muhammad Munir, who had earlier legalized Governor-General Mohammad's coup, used a different rationale to legalize the military coup. Instead of the Doctrine of Necessity, which basically states that when the legislature is non-functional and the military is governing the country, there are no other options to bestowing on the army chief the legal right to run the country, a "Doctrine of Revolutionary Legality" was employed. Arguably, this new doctrine is substantially the same as the first doctrine: the highest court legitimizes the take-over, as the coup was successful, the legislature has been dismissed and the military seems to be more efficient in governing the country than the "bickering" political parties.

General Ayub Khan promulgated a new constitution in 1962 without being challenged by the Supreme Court. It was drastically different from the 1956 constitution, as a new political system was introduced – presidentialism. This constitution not only transferred executive power to the presidency, but actually abolished the position of prime minister.[8]

The 1962 constitution lasted until 1969, when martial law was declared as General Yahya Khan replaced General Ayub Khan. Once again, the Supreme Court remained mute. The 1970 parliamentary election raised further tensions between West Pakistan (today's Pakistan) and East Pakistan (today's Bangladesh). General Yahya Khan cracked down on political parties and party activists, resulting in the 1971 war that engulfed the two Pakistans and resulted in the deaths of millions of people.

Following the humiliating loss of East Pakistan, the people took to the streets demanding accountability. General Yahya Khan decided to hand over power to the leader of the most successful political party in West Pakistan's election of 1970, Pakistan Peoples Party's (PPP) Zulfiqar Ali Bhutto. A year later, President Bhutto recalled parliament and tasked it with drafting a new constitution. Almost

8 Jayshree Bajoria, *Pakistan's Constitution*, (New York: Council on Foreign Relations, 6 March 2008). www.cfr.org/publication/15657.

Table 1. Political Systems in Pakistan

Constitutions of Pakistan	Political System
Independence 1947	Presidential System Governor-General is head of state. Governor-General had the right to appoint and dismiss ministers. Legislative functions performed by constituent assembly
1956 Constitution	Semi-Presidential System Posts of president and prime minister established.
1962 Constitution	Presidential System President has executive powers and the office of the prime minister is abolished.
1973 Constitution	Parliamentary System Executive powers vested in the prime minister, while the president is only the formal head of state and bound to act on the advice of the prime minister. The parliament now consists of two chambers – National Assembly (lower house) and Senate (upper house).
1977 Provisional Constitutional Order (PCO)	Army chief, General Zia ul-Haq, stages a coup, places the 1973 Constitution in abeyance and introduces the PCO.
1973 Constitution reintroduced in 1985, but with the so-called eighth amendment.	Presidential System Executive powers are shifted from the prime minister to the president, who was elected in a controversial referendum. In addition, Art. 58(2b) gives the president the power to dissolve parliament.
1988 Benazir Bhutto and Nawaz Sharif Administrations	Semi-Presidential System From 1988 to 1997, the presidents retained the power to dismiss parliament and the government, but they were not directly elected.
1997 Amendments made to the 1973 Constitution	Parliamentary System Prime Minister Nawaz Sharif abolished Art. 58(2b). The power to dissolve parliament thus rests with the prime minister.
1999 General Musharraf's military coup and introducing a Provisional Constitutional Order	Initially General Musharraf holds the title of Chief Executive.
17th amendment to the constitution	Presidential System Following a seriously flawed referendum in 2002, Musharraf is "elected" president. The same rigged election puts in place the Legal Framework Order (LFO), which *de facto* is a package of amendments to the constitution. Among other things, Art. 58(2b) is reinstated giving President Musharraf the right to dissolve parliament.
2008 Presidential and general elections – Zardari's administration	Semi-Presidentialism In spite of promising to restore the 1973 Constitution, the Zardari administration has yet to revoke the president's power to dissolve parliament. The president is indirectly elected by members of the provincial assemblies and the parliament.

exactly 12 months later, parliament approved the new 1973 constitution and it was signed into law by President Bhutto. The 1973 constitution stipulates that power rests with the prime minister and not the titular presidency. As a result, President Bhutto handed over the presidency in August and assumed the prime ministership after being elected to it by parliament.[9] A parliamentary system had thereby been introduced into Pakistan.

Prime Minister Bhutto embarked on a conciliatory strategy towards Bangladesh, sought closer ties with China and embarked on extensive social and economic reforms, including nationalization of all banks, as well as all flour, rice and cotton mills in the country. Relatively encompassing land reform was also introduced during his tenure. Many of these reforms were far from successful and Bhutto's administration became increasingly unpopular. Growing tension in the provinces of Baluchistan and North West Frontier further strained the administration's relationship with important constituencies, especially after 100,000 troops were deployed in the restive areas. In the end, Bhutto decided to go to the polls in 1977. Even though Pakistani experts often refer to these elections as the freest and fairest in the history of the country, the opposition refused to accept the results. The subsequent local elections were inconclusive, as the opposition boycotted them. Amid growing political tension and unrest, Bhutto struck a deal with the opposition alliance, the Pakistan National Alliance (PNA). A fresh general election was to be held and a government of national unity established, but before the agreement could be implemented the military arrested Bhutto and his entire cabinet in July 1977.

The military coup was led by General Muhammad Zia-ul-Haq, who imposed martial law, suspended the constitution and later hanged former Prime Minister Zulfiqar Ali Bhutto after charging him with murder. The Supreme Court not only validated the coup on the basis of the Doctrine of Necessity, but went one step further by allowing General Muhammad Zia-ul-Haq the right to amend the constitution.[10] Using a widely discredited referendum in 1984, Genera Zia ensured his election to the presidency.[11] The general election that followed in 1985 was party-less and before handing over the head of government functions to the prime minister he had appointed from the new parliament, General Zia introduced Article 58(2b). This gave the president the power to dissolve parliament. Presidentialism was reintroduced once again into Pakistan.

Following the death of President Zia in a plane crash in 1988, the position of head of state was assumed by the chairman of the Senate, Ghulam Ishaq Khan. Even though several parliamentary elections were held, which at different times brought Benazir Bhutto and Nawaz Sharif to power as prime minister and leader of government, President Ghulam Ishaq Khan used his powers to dismiss these governments prematurely, alleging corruption and nepotism. The next president, Farooq Leghari, also chose to exercise his powers under Article 58 2(b) – an unex-

9 Under Prime Minister Bhutto, six amendments were made to the 1973 constitution. The first amendment resulted in Pakistan recognizing Bangladesh; the second declared the Ahmadis to be non-Muslims; the third limited the rights of detained persons; the fourth curtailed the jurisdiction of the courts in providing relief to political opponents; the fifth amendment curtailed certain of the powers and jurisdictions of the judiciary; and the sixth extended the terms of the chief justices of the Supreme Court and the high courts beyond the age of retirement.

10 *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*. PLD 1977 Supreme Court 657.

11 Although General Zia officially received 95 per cent of the votes, only 10 per cent of the electorate participated in a process that violated several laws and regulations.

pected development, since he was elected by the PPP – and used this prerogative to dismiss Benazir Bhutto's PPP government in 1996. Yet again the political system in Pakistan had changed, as the country was now governed under semi-presidentialism.

Back in power following the 1997 general election, Prime Minister Nawaz Sharif had learned one important lesson from his previous tenure – the need to rid the constitution of its eighth amendment and thereby to effectively disarm the presidency by stripping it of its right to dismiss parliament. This objective was achieved by introducing the 13th amendment to the constitution. This abolished Article 58 2(b), and was unanimously supported by government and opposition parties alike. Soon after, the prime minister's control over parliament was further strengthened with the passage of the 14th amendment, which gave party leaders unlimited power to dismiss legislators who failed to vote as directed. This effectively made a vote of no-confidence against a sitting prime minister unimaginable. As a result, the prime minister's role was significantly stronger than that of the head of state, and parliamentarism was in place again.

Less than three years after assuming power a second time, Prime Minister Nawaz Sharif was ousted, but not by a president invoking Art. 58 2(b). Once again it was the military who stepped in, arguing that the destruction of institutional checks and balances and the prevailing corruption in the political leadership warranted a new leadership. And once again it was the chief of army staff who orchestrated the takeover. General Pervez Musharraf's action was initially welcomed by leading Pakistanis, including former Prime Minister Benazir Bhutto.

General Musharraf's playbook as military ruler contained many tested techniques. The more salient of these were placing the 1973 Constitution in abeyance, eventually naming himself president, organizing a presidential referendum to legitimize the title of head of state, promulgating a Provisional Constitutional Order and amending the 1973 Constitution. The latter included reinstating Article 58 2(b) whereby the president could, once again, dismiss parliament at will. The Supreme Court used the by now familiar Doctrine of Necessity to bestow legitimacy on General Musharraf's bloodless military coup and his actions vis-à-vis the constitution, although it set a time-limit on his term in office.[12]

The 2008 general election brought the PPP and Pakistan Muslim League-Nawaz (PML-N) back to power. Both parties ran campaigns criticizing Musharraf's military regime and called for reinstatement of the judges fired by Musharraf and the supremacy of the 1973 Constitution. Following the 2008 parliamentary election, the PPP nominated Yousaf Raza Gilani as prime minister, and was supported by its coalition partners. Prime Minister Gilani took the oath of office in March 2008. Under threat of impeachment, Musharraf resigned and Asif Ali Zardari, PPP's co-chairman and Benazir Bhutto's widower, was subsequently indirectly elected president by the four provincial assemblies and parliament. More than a year after his inauguration, Article 58 2(b) is still in force and the Pakistani political system has yet to revert to the parliamentary system envisaged in the 1973 Constitution, though no doubt Prime Minister Gilani has significantly more power than his predecessor did under General Musharraf. Thus, Pakistan is today still very much governed under the dual-power structure called semi-presidentialism.

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12 The Supreme Court put a three-year limit on his rule, at which point general elections were to be held. For more information, see International Crisis Group, *Building Judicial Independence in Pakistan*, p. 5.

The Workings of the Subordinate Judiciary

Most citizens in a country will never be exposed to the higher courts of the land. However, over the course of a lifespan a surprisingly large number will have some interaction with what, in the case of Pakistan, is called a subordinate court. This could be as a result of a civil dispute regarding property or land or a crime or as a witness. Therefore, the performance of the lower courts will profoundly affect popular perceptions of the rule of law in a country.

One of the cornerstones of a liberal democracy is equal rights and the fact that a court of law should make its rulings based on the facts of the case and irrespective of a person's wealth, social and political connections, religious or tribal affiliation. People's exposure to the courts and its representatives will influence their attitude to and belief in the democratic form of governance manifested in the constitution.

These fundamental principles are clearly spelled out in several international commitments made by a majority of states, including the Islamic Republic of Pakistan. The more salient commitments include:

1. Universal Declaration of Human Rights
2. International Covenant on Civil and Political Rights
3. Convention on the Elimination of All Forms of Racial Discrimination
4. Convention on the Elimination of All Forms of Discrimination against Women.[13]

In assessing the workings of a court system, one cannot focus solely on the professionalism of the judge and of the court's administration; for example, the effectiveness of the case-management system. It is equally important to include the activities of the lawyers, as their actions or inaction will affect how well justice is being served on a daily basis in the courts.

For a country with a very large number of universities, law faculties and a long legal tradition, Pakistan has a dearth of empirical analyses of the actual workings of the court system. In recent times, the International Crisis Group's (ICG) well-regarded Pakistan expert, Samina Ahmed, has written a couple of in-depth reports on the superior judiciary, with some attention also being paid to the lower courts.[14] An additional potential source of information is the Asia Development Bank's (ADB) multi-year $350 million Access to Justice Program, which began in 2002 and is focused on the needs of the justice sector in general and the court system in particular. Indeed, one of the programme's three main objectives is to "help ensure that institutions responsible for the delivery of justice, including subordinate courts ... are provided with sufficient resources over the long term to ensure they function effectively."[15]

At the time ADB's massive support programme to the lower courts was supposed to be completed, ICG issued a report on the state of the justice sector. The

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13 Peter D. Lepsch, Grant Kippen, and Ronan McDermott, *Final Report Post-Election Community-Based Mediation and Adjudication Program: Election Tribunal Monitoring Project, Phases One and Two, February – November 2008*, (Islamabad, International Foundation for Electoral Systems, 2008), p. 19.

14 See in particular International Crisis Group, *Reforming the Judiciary in Pakistan*, Asia Report No. 169 (Islamabad/Brussels, 2008); International Crisis Group, *Building Judicial Independence in Pakistan*.

15 For more details regarding ADB's Access to Justice Program, please see http://www.adb.org/Documents/Others/PRM_Supplement/ADB_PAK_Governance_Reforms.asp?p=prmnews

report paints a very bleak picture. In 2008, the number of pending cases in the civil courts was estimated at 1.5 million. This huge backlog has obvious implications for the timely resolution of court cases. It is currently estimated that ten to 20 years often elapse between the filing of the civil court papers and the rendering of final judgment.[16] This can hardly be in accordance with the right to an effective remedy outlined in the international commitments made by the government of Pakistan.

Criminal cases in Pakistan seem to be dealt with somewhat more expeditiously, as they are often resolved within five years. Even this is a long time to wait for justice to be served. In fact, it can often take two years before even the more common cases are heard in court.[17] Once court hearings begin, on-trial prisoners are regularly unavailable in the court for the simple reason of lack of transportation. The case load of judges is often 15-25 cases per day, but can sometimes be up to 30. Cases not heard on a particular day are simply put on the list for the following day.

The judicial system described above provides ample opportunities for abuse. For instance, an accused can bribe prison staff to ensure transportation to the court on the day of hearings. The same technique can be applied to court clerks to minimize delays in bringing a case before a judge. In some instances, incriminating evidence can disappear after the right "incentive" is provided to members of the police force.

No judicial system is perfect. Even countries favourably positioned on Transparency International's corruption perceptions index experience cases in which justice sector officials and law enforcement personnel are convicted of corruption, abuse of powers and similar offences that undermine the rule of law. However, such cases are generally rare. The current extent of corrupt practices and the distortion of justice within the Pakistani justice sector is very difficult to gauge. This is partly because of the limited availability of credible survey data, but partly also because of the justice system's glacial pace.[18] Consequently, reported convictions are *de facto* a reflection of how the situation looked in Pakistan five to ten years ago, not what it looks like now. Hence, recent efforts to shore-up the justice sector are highly unlikely to be properly captured in any study.

Fortunately, a recent study of the Election Tribunals in Pakistan does provide good insight into the workings of the current court system. It was conducted by the International Foundation for Electoral Systems (IFES), a US-based NGO tasked with strengthening the Election Commission of Pakistan's (ECP) capacity to organize elections. The study analyzes the post-election dispute-resolution process in Pakistan following the 2008 parliamentary election by assessing the administration, processing and adjudication of complaints in accordance with the legal codes governing the electoral complaint process.[19]

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16 International Crisis Group, *Reforming the Judiciary in Pakistan*, p. 15.

17 Within 24 hours of being arrested, an individual should be presented to a court. The judge decides if the accused should be detained. A trial, however, can only start once a *challan*, the case brief, has been produced. This often takes up to two years.

18 The International Republican Institute, a US-based organization, has conducted public opinion polling in Pakistan since 2003. However, only in recent years has such polling become more frequent. These surveys focus primarily on political, electoral and socioeconomic issues, not the judiciary. For more information, see http://www.iri.org/mena/pakistan.asp.

19 The IFES project "Post-Election Community-Based Mediation and Adjudication Program" has produced two studies: Peter D. Lepsch, Grant Kippen, Ronan McDermott, and Staffan Darnolf, *Preliminary Report Post-*

The closer scrutiny of Election Tribunals is relevant to this chapter for several reasons. First, this in-depth study of a key court system provides a relatively current picture of how the justice sector actually functions in Pakistan. Second, Election Tribunals are set-up in all four provinces thereby controlling for geographical factors on a provincial level. Third, given the extreme political importance of the Election Tribunal dispute-resolution mechanism, the most suitable judges were likely selected for the task. Fourth, the international community's interest in the Election Tribunals was significant, something the ECP, all high courts and the ministry of justice were aware of. All these factors could have positively affected resource-allocation and supervision of the tribunals under examination. Hence, analysis of the Election Tribunals is more likely to yield a best-case-scenario than a worst-case-snapshot of Pakistan's judiciary.

It's also important to establish whether the Election Tribunals represent the superior or the subordinate judiciary, as the latter affects a larger cross-section of Pakistani society. One clear indicator of the status of the court is who is allowed to lead its procedures. According to the law, three types of judges would qualify: (1) sitting high court judges, (2) retired high court judges and (3) retired district and sessional court judges who would have been eligible to sit on a high court bench.[20]

The number of Election Tribunals is also an indication of their status in the system. The chief election commissioner of the ECP is responsible for appointing tribunal judges to hear election petitions.[21] In 2008, the commissioner appointed 30 judges in the four provinces. As the hearing of a petition by an Election Tribunal is managed by a single judge, 30 tribunals were established.[22]

Superior courts tend to focus on fewer cases than subordinate courts. These cases are of strategic importance to the country's jurisprudence and courts spend significant time analyzing each case being heard. In recent decades, Election Tribunals have had to rule on from 103 to 265 election petitions.[23] The highest number of petitions was filed during the most recent parliamentary election.[24] For a country with more than 150 million citizens and more than 80 million voters, the number of petitions is relatively modest. This could indicate a credible electoral process and a mature and stable political system with candidates and parties adhering to the campaign rules and regulations. It can also reflect a highly discredited judicial mechanism deemed irrelevant by affected stakeholders, who see no value in legitimizing the exercise by filing complaints with the Tribunals.

Given the Election Tribunal judge's eligibility criteria, the number of tribunals and the number of cases, Election Tribunals belong neither to the superior nor the subordinate category of courts. Even if the appeals mechanism –

Election Community-Based Mediation and Adjudication Program: Election Tribunal Monitoring Project, Phase One, February-June 2008, (Islamabad: International Foundation for Electoral Systems, 2008) and Peter D. Lepsch, Grant Kippen, and Ronan McDermott, *Final Report Post-Election Community-Based Mediation and Adjudication Program: Election Tribunal Monitoring Project, Phases One and Two, February-November 2008*, (Islamabad: International Foundation for Electoral Systems, 2008).

20 Representation of the People Act 1976, §57(2).

21 Representation of the People Act 1976, §57(1).

22 Gazette of Pakistan, Notification No.F.10(1)2008-Law (7 March 2008).

23 Lepsch, Kippen, McDermott, and Darnolf, *Preliminary Report*, p. 13; Lepsch, Kippen, and McDermott, *Final Report*, p. 14.

24 Ninety-four petitions were filed against National Assembly results and an additional 171 against Provincial Assembly results. See Lepsch, Kippen, McDermott, and Darnolf, *Preliminary Report*, p. 28.

Election Tribunal decisions can be appealed to the Supreme Court of Pakistan – is taken into consideration, the definition of Election Tribunals remains elusive[25] In this chapter, Election Tribunals are therefore regarded as a hybrid. Of equal importance is the workings of these tribunals and stakeholder confidence in them.

Election Tribunal Study Methodology[26]

The credibility of a study largely rests on the type of data collected and on how they were collected, processed and ultimately analyzed. The IFES study of Election Tribunals employed a mix of data sources and methodologies, including interviews with legal practitioners and non-judicial stakeholders in the complaints process, direct observation of hearings and documentary reviews.[27]

Obtaining relevant data is not only a function of research methodology, but also of how the data were collected.[28] In some instances, data-collecting can be mechanized, such as for measuring traffic-intensity on a specific road. Obtaining unbiased and reliable data from an Election Tribunals requires a more elaborate and human-resource intensive solution. First, monitoring and obtaining accurate information from Election Tribunal hearings in most cases requires individuals with a good legal understanding, often lawyers. All IFES monitors had court-room experience, mostly as lawyers, but also as prosecutors and judges. Second, the Election Tribunal monitors must be neutral and avoid collecting and filing biased data with the project analysts. IFES tried to ensure this by screening monitors for recent and active party affiliation and for representing political parties before previous Election Tribunals.[29] Third, monitors need to have a sufficient understanding of the specific laws, regulations and procedures governing the election complaint mechanism. The research programme provided two days of mandatory training on how to collect quantitative and qualitative data on the court management system, empirical data on election petitions and on monitoring Election Tribunal proceedings in a structured and unbiased way.[30] Fourth, supervision and quality control of monitors was critical to ensuring good quality data. This is particularly relevant in a research environment like Pakistan's, where distances are vast, infrastructure outside the larger cities rudimentary and communications unreliable. On top of that, the research programme took place in

25 Representation of the People Act 1976, §67(3).

26 For more details, see Lepsch, Kippen, and McDermott, *Final Report*, pp. 8-18.

27 The IFES study collected the following qualitative and quantitative data; (1) timeliness, including administrative and judicial intervals for processing and disposing of election petitions; (2) distribution of petitions nationally by party; (3) distribution of Election Tribunals to ECP-appointed Election Tribunal judges; (4) assessment of administrative processing at ECP and court levels; (5) assessment of lawyers' and judges' professional practice; and (6) assessment of the legal framework and the ability of same to provide effective remedies in relation to the election petitions.

28 The programme was led by Peter D. Lepsch. He was advised by the IFES Complaint Adjudication Advisor, Mr. Grant, who had served as the chief commissioner of Afghanistan's first Electoral Complaints Commission (ECC) in 2005. Mr. Grant was reappointed as the ECC's chief commissioner for the 2009 presidential and provincial council elections in Afghanistan.

29 The research programme also looked into family or law firm connections with political candidates. Additionally, Election Tribunal monitors couldn't accept any other work related to the workings of Election Tribunals during the course of their engagement as monitors.

30 Five data collecting and reporting templates were used to standardize data collection, observation and analysis.

significantly deteriorating security conditions. Although some field visits did take place, the distances and difficulties for internationals to move around parts of the country because of security restrictions at times impeded quality control. To mitigate this, Election Tribunal monitors were brought to Islamabad for debriefing workshops focusing primarily on data collection, but also to solicit the monitors' feedback on analysis and tentative findings.[31]

Performance of the Election Tribunals

Any analysis of the Election Tribunals' work needs to consider the various functions of the tribunal. The more salient of these are administration of the court, leading court hearings (Tribunal judges) and representing the various parties in a case (lawyers).[32]

The work of an Election Tribunal is not only high-profile, since it deals with who will represent a constituency at provincial or national levels, but is also governed by a legally stipulated deadline for the conclusion of hearings and rendering of rulings. Petitions must be dealt with within four months of receipt of the case by the chief electoral commissioner. To enhance the tribunals' ability to meet this deadline, several modifications to the Code of Civil Procedure (1908), which normally governs the work of the courts in Pakistan, were authorized by parliament.[33] However, issuing notice of summons and calling witnesses are still part of the procedures. As noted below, these procedures alone are prone to gross abuse by courts and lawyers.

The major and overriding finding of the IFES Election Monitoring project is disheartening. When the four-month statutory deadline expired, only 1.5 per cent of election petitions had resulted in a ruling.[34] Even in recent historical context, the workings of the Election Tribunals in 2008 were substandard. Over the last fifteen years, 17 per cent to 32 per cent of election petitions were still pending by the time of the next election.[35] The tribunals' historic inability to dispose of cases on time compromised the complaints mechanism and undermined political stakeholders' willingness to resort to this mechanism.[36] Unfortunately, the effectiveness of Election Tribunals in Pakistan is deteriorating, not improving.

The IFES Election Tribunal project was the first of its kind in Pakistan, so no comparative historical data exist to explain why fewer cases were dealt with by tribunals in a timely manner. Still, the project presents a snapshot of the current state of the justice sector.

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31 The lead researchers and administrative staff instead referred to almost daily telephone conversations with monitors. These conversations served two research-related purposes: obtaining information from the field and providing quick feedback on monitors' reports if forms were incomplete or not completed correctly. As the security situation deteriorated, these phone calls also enabled management to share security intelligence with the monitors and reduce their exposure to risk. See Lepsch, Kippen, and McDermott, *Final Report*, pp. 12-13, 15-16.

32 The Election Commission of Pakistan and its provincial offices play an important role in the election petition process, but that's beyond the scope of this study.

33 In some countries, such as Kenya and Nigeria, judges are required to take down in longhand every statement made by prosecuting and defence teams, including all witnesses. In Pakistan, this is not the case.

34 See Lepsch, Kippen, and McDermott, *Final Report*, p. 43.

35 Representation of the People Act 1976, §67(1A).

36 Lepsch, Kippen, McDermott, and Darnolf, *Preliminary Report*, p. 13, Table 2.

Election tribunal administration

Election petitions are filed with secretariat of the Election Commission of Pakistan in Islamabad, which forwards the file to the appropriate Election Tribunal once it has confirmed the petition meets the filing requirements. To the great surprise of IFES researchers, the file channel for election petitions differed substantially from one province to another. It was common practice to have multiple court officials review, approve and forward the file. The most streamlined Election Tribunal, in Baluchistan, had only two officers responsible for intake, processing and scheduling hearings, while others had up to a dozen people. The IFES project concluded that this "often ritualistic and rigid protocol ... is at least partially responsible for the endemic delays [in] the Election Tribunal process."[37]

Excessive bureaucracy was not the only problem with court administration. The way that court administration officers used the system was another. This is particularly true in relation to informing affected individuals about the upcoming hearing. The law requires all respondents to be issued a notice. If, for instance, there were 12 candidates running in a given constituency and one losing candidate wants to file a petition against the results, it's not enough to serve notice only on the winning candidate. The Pakistani system requires that the winner *and* all the other losing candidates must be served notice. These notices are served using a bailiff system. The inefficiency of the notice system means the first scheduled hearing will almost certainly be unsuccessful and another notice will need to be issued to the absent respondents. If the second attempted hearing also fails because of respondent non-attendance, a notice is issued through special registered post of a courier service. Should the third attempt also fail, a notice is served with the relevant police department where the respondents are residing. The final solution is an order of notification in a newspaper. IFES found that it often took months before all parties had been served notice and hearings could begin.

Given the system's unpredictability, it is open to abuse. Although the IFES project is vague on bribery, its monitors heard frequent references to bribes to court officials to slow down the issuance of notices, or speed it up. ICG's report on the courts discusses the problem of the so-called "speed money" required by court clerks.[38] However, it is alleged that not only officers working inside the courts customarily received bribes but also the individuals serving the notice and sometimes police officers too. The latter category allegedly received bribes to misplace evidence.

Election tribunal judges

All the monitors were well known to Election Tribunal representatives, as they were formally introduced to the courts by both IFES and ECP. Despite this, the tribunal-monitoring reports contained surprisingly little data on the actual proceedings of the courts. One might conclude that the monitors, themselves lawyers, former judges and prosecutors, were less inclined to criticize the judges. Not only are they colleagues, but some monitors might have taken into consideration future interactions with these judges once the monitoring project ended. No doubt these could be explanatory factors, but they hardly explain everything. In

37 Lepsch, Kippen, and McDermott, *Final Report*, p. 27.

38 International Crisis Group, *Building Judicial Independence in Pakistan*, pp. 18-19.

fact, deeper analysis of the data revealed that in less than 50 of the 265 cases were the merits of the case even heard, given the sluggish pre-trial process. Thus, data-collecting opportunities were relatively few.[39] Once again, the notice mechanism was the culprit.

Criticism was, however, levelled at the judges for their inability to hear cases uninterruptedly, which is the process to be followed. Instead, Tribunal judges sometimes adjourned cases for lengthy periods. On other occasions, the lack of robust control of the courtroom by judges was noted. The former could be explained by the judges' heavy workload, as the tribunal work was simply added to their normal workload. Judges might therefore be hard-pressed to prepare themselves properly. As the IFES study noted, this workload is unsustainable, especially considering judges have limited access to trained staff, and lack legal research assistants or personal law clerks. In addition, judges receive no training regarding election law and the special procedures governing Election Tribunals.[40]

Still, these judges set the priorities of their courts and their leverage is considerable. In this study, obvious differences in the time required by different courts to process petitions through their internal administrations were noted. The national average was 17.3 days, but the Election Tribunal managing Sindh-related petitions from Karachi took 22.9 days while its counterpart in Baluchistan averaged 9.5 days.[41] This could possibly be explained by the respective judge's case-loads. However, the Sindh-based Election Tribunal had fewer election petitions to process than in Baluchistan.[42]

The sluggishness of courts in processing petitions is not, of course, solely the responsibility of judges, but Pakistani citizens can rarely make the distinction. A slow, confusing and erratic court management system reflects poorly on the justice sector as a whole. The allocation of hearing dates is probably more directly linked to the judges, especially once cases have been brought before the bench. If this assumption holds true, then the judges in the Election Tribunals should shoulder a significant part of the responsibility for the sluggish process. The average time between one hearing and the next was 24 days, and this for a process where judges are supposed to hear petitions "day-to-day."[43] Hence, the expectations of claimants or defendants are higher for this process than for a regular civil or criminal case, as these parties know electoral petitions are supposed to be resolved within four months. When this doesn't occur, the damage to the judicial system will be more serious than for a regular court case.

Lawyers

Studying and analyzing lawyers' actions in a court system is normally relatively uncomplicated. Monitors have access to courtrooms where lawyers discharge their primary function and can study their behaviour and note their arguments. In Pakistan, the situation is slightly more difficult. The complex and

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39 Email communication with the Election Tribunal monitoring lead author, Peter D. Lepsch, 17 May 2009.

40 Lepsch, Kippen and McDermott, *Final Report*, p. 50.

41 Ibid., p. 38.

42 Ibid., p. 48, Graphix IX.

43 This average could be based only on data from Election Tribunals in Baluchistan, NWFP and Punjab, since the Lahore High Court refused IFES full access to its records. Representation of the People Act 1976, §67(1A).

unclear system by which courts process a petition creates opportunities for undue influence over the speed with which a file moves through the system. An additional factor inhibiting monitors in assessing the work of lawyers is the limited number of cases making it from the ECP's bureaucracy to the courts and in front of a judge. A compounding factor is the time lag between hearing dates once a petition comes before a tribunal judge. These factors significantly reduce monitors' exposure to the lawyers.

Nonetheless, the monitors managed to provide qualitative assessments of the lawyers' actions. These assessments can be divided into two broad categories: (1) lawyers' frequent requests for adjournment on the basis of minor formalities, requests the judges seldom refused; (2) Many attorneys allegedly made use of the *de facto* discretionary powers of court personnel to advance or delay the movement of files and scheduling of hearing dates.[44] These findings correspond with ICG's report on Pakistani subordinate courts in the early 2000s.[45]

Based on the findings of the IFES Election Tribunal Monitoring study, it is reasonable to believe that an individual's perception of lawyers after meeting and seeing them in action in the courts will be unfavourable. Instead of defending the rule of law and equal access to the court system, a significant number of lawyers actively undermine the justice system on a daily basis. Maybe that is why Pakistanis often joke that becoming a lawyer is "a last-ditch option for those failing in a first career."[46]

The Lawyers' Movement

When the legal fraternity in Pakistan learned of General Musharraf's attempt to force Chief Justice Iftikhar Muhammad Chaudhry to resign his post, the Lawyers' Movement was taking shape. Over the year leading up to Musharraf's action against Chief Justice Chaudhry on 9 March 2007, the chief justice had used his *suo moto* powers to initiate investigations into several politically delicate issues. One high-profile case involved the release of individuals who had been arrested by security forces and kept in detention without due process. Another was the government's plan to privatize a major steel company.[47]

When General Musharraf moved against the chief justice, Chaudhry refused to resign and consequently faced "charges of misconduct." The chief justice stood his ground and was suspended by General Musharraf. This provoked a swift and sustained reaction from the legal community. Musharraf's rule had over time become increasingly unpopular and there was growing resentment at the militarization of public life in Pakistan. Less than three weeks before General Musharraf declared martial law, his approval rating was 21 per cent, down from 63 per cent a year earlier.[48] Consequently, civil society organizations, as well as political parties, were willing to join forces under the Lawyer's Movement umbrella and take a public and vocal stand against the military regime. As the investigation into Chief Justice Chaudhry unfolded, more and more information on the charges against him was leaked to the press. Many observers were sur-

44 Lepsch, Kippen, and McDermott, *Final Report*, p. 42, 51-2.

45 International Crisis Group, *Building Judicial Independence in Pakistan*, p. 18.

46 Ibid., p. 19.

47 Traub, "The Lawyers' Crusade."

48 See www.iri.org/mena/pakistan/2007-10-11-pakistan.asp.

prised at the allegations, as well as the limited evidence available. The chief justice was accused of, among other things, demanding and receiving personalized licence plates for the official cars of his office.

The meeting between Chief Justice Chaudhry and General Musharraf on 9 March 2007 was not their first. Chaudhry and Musharraf had cooperated well during Musharraf's time at the helm of Pakistani politics. Soon after Musharraf's military coup in 1999, Justice Chaudhry was one of the first judges to take the new oath under the regime's Provisional Constitutional Order (PCO). At the time, Chaudhry was a judge on the Baluchistan High Court, but his action assisted him in obtaining a Supreme Court position, since 11 vacancies arose when the Supreme Court judges refused to validate the PCO. During the ensuing five years on the Supreme Court, Chaudhry took part in validating General Musharraf's deeply flawed 2002 presidential referendum, which allowed him to become president while in uniform, as well as accepting the so-called 17th amendment of the constitution.[49] A few weeks after the 17th amendment was passed, Justice Chaudhry was elevated as chief justice of the Supreme Court.

The individuals at the helm of the Lawyers' Movement came from the bar associations of Pakistan, particularly the Supreme Court Bar Association (SCBA) and the Pakistan Bar Council (PBC). The most prominent representative was SCBA's president, Aitzaz Ahsan. The four major provincial bar councils and the four high court bar associations were also instrumental in mobilizing the lawyers. Following Chaudhry's suspension, the Lawyer's Movement quickly gained momentum and boycotted the courts. More importantly, its members took to the streets wearing what was to become the movement's trademark – a black suit and tie and a white shirt. The proliferation of the mass media in recent years, especially private television stations, was shrewdly seized upon to maximize the movement's impact outside major urban areas. Equally important, it reached the growing middle class and galvanized the support of civil society organizations. Until then, the two major opposition parties, PPP and PML-N, had proven fractured and weak and had largely failed to challenge the military regime. This was partly the result of the regime's harsh treatment of the opposition – detention, threats and intimidation of its members – and of the presence in exile of the leaders of both parties.[50] However, in spite of the parties' existence over decades, the parties' organizational presence in the vast countryside where a majority of Pakistanis live was still very limited. Thus, the Lawyers' Movement filled a vacuum and gained momentum surprisingly fast. The link between the Lawyers' Movement and the Chaudhry case became even more pronounced when SCBA's president, Aitzaz Ahsan, became Chaudhry's defence lawyer.

On 20 July 2007, the Supreme Court decided to reinstate Chief Justice Chaudhry with full authority, thereby partly redeeming its reputation after its subservience to the Musharraf regime over much of the previous eight years. With a presidential election imminent, the power struggle between the Musharraf military regime and the Supreme Court entered a new phase. As noted above, in Pakistan, members of the two houses of parliament and the provincial assemblies

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49 The 17th amendment was based on the Legal Framework Order (LFO) promulgated by Musharraf in 2002 and made changes to 29 articles of the constitution.

50 Following the military coup in 1999, PML-N leader Nawaz Sharif was forced into exile in Saudi Arabia. PPP's Benazir Bhutto was in self-imposed exile following the filing of corruption charges against her in Pakistan.

make up the electorate for the presidency. As all these members were elected in 2002 and the so-called "King's parties" (Musharraf-friendly) dominated, the outcome of the presidential election was not in doubt. The legal hurdle was, however, Musharraf's eligibility. According to the constitution, a president cannot be a member of the armed forces, and Musharraf was still the chief of army staff (the most senior military post in Pakistan). The Supreme Court did allow the election to proceed and Musharraf stood for re-election in October 2007, and easily won. However, the court did reserve the right to rule on the legality of the election. Fearing the outcome of such a ruling, General Musharraf imposed a state of emergency on 3 November 2007, two days before the Supreme Court was supposed to rule. This time the military administration went much further in suppressing the opposition, as the constitution was suspended, the Chief Justice of the Supreme Court fired, six other judges of that court who declared the president's actions illegal were removed and politicians, lawyers and human rights activists were arrested. Independent media were taken off the air and restrictions were imposed on reporting. Internet and mobile phone networks were also blocked temporarily. Musharraf once again resorted to a Provisional Constitutional Order. In the end, 64 of the 97 superior court judges in Pakistan were fired for refusing to accept the legality of Musharraf's actions.[51] The leaders of the Lawyers' Movement were directly affected by these latest developments, as they too were imprisoned.

The movement reacted swiftly. Not only did they refuse to accept Musharraf's actions, they also urged the 116,000-strong community of lawyers to boycott all courts presided over by judges who accepted the PCO, which many lawyers did.[52] As the general election was due in a couple of months, actions by and media interest in the Lawyers' Movement took a backseat to electioneering. Following the February 2008 election, PPP and PML-N became the two largest parties and jointly secured an absolute majority in the new parliament.[53] PML-N had consistently and vocally stated it would reinstate all judges sacked by General Musharraf under the state of emergency. Although PPP promoted the Lawyers' Movement prior to the election and publically supporting the reinstatement of the sacked judges, including the chief justice, no actions were readily apparent following its election victory. The Lawyers' Movement took to the streets again during "black flag" week to keep up the pressure on the new coalition government. The PPP and PML-N struggled to find common ground on their reform agenda in general and on how to deal with the judges removed from the bench in November 2007 and with Musharraf's impeachment in particular. The Lawyers' Movement kept up its public agitation when the PPP failed to honour its commitment to restore all judges within 30 days of forming the government. The protests culminated in the so-called "Long March" from Lahore to Islamabad, which attracted huge crowds.

After PPP and PML-N reached agreement in early August 2008, a formal impeachment process for General Musharraf seemed imminent. Initially the general was defiant, but he decided to resign shortly afterwards when he realized the

51 International Crisis Group, *Winding Back Martial Law in Pakistan*, Policy Briefing, Asia Briefing No 70. (Islamabad/Brussels, 12 November 2007), p. 4.

52 Traub, "The Lawyers' Crusade."

53 For more detailed election results, see http://www2.ecp.gov.pk/vsite/ElectionResult/AllResults.aspx?assemblyid=NA.

threat was real. In spite of this and the selection of Asif Ali Sardari, Benazir Bhutto's widower, as Pakistan's new president, the PPP still didn't agree to reinstate Chaudhry as chief justice.

A few months later, politics in Pakistan boiled-over once again when the Supreme Court decided that PML-N leader Nawaz Sharif and his brother were ineligible to run for public office. This, and the unresolved Chaudhry affair, rejuvenated the Lawyers' Movement, which called for its second "Long March" in less than a year. The PPP-led government's response echoed Musharraf's tactics – the arrest of hundreds of political activists, the banning of rallies in two of the country's provinces and calling out the police to quell street demonstrations. As the "Long March" was coming to a climax in Islamabad in March 2009, the government sealed off the capital with ship containers and deployed thousands of police on the streets. Then the government backed down. Early on 16 March 2009, Prime Minister Yousaf Raza Gilan by executive order restored Chaudhry as chief justice.

Just two months after this reinstatement, Pakistan's Supreme Court reversed its decision on the ineligibility of Nawaz Sharif and his brother to run for office. Although this was a popular decision, it was a remarkable and remarkably quick reversal, especially as, according to media reports, no new information or evidence was presented to the Supreme Court. Clearly, not only military regimes have had a direct impact on how the most senior Pakistani court interprets the law. This development does not bode well for the independence of the judiciary.

Conclusions

Recent actions by Chief Justice Chaudhry and his fellow judges on the Supreme Court have no doubt strengthened the independence of the judiciary in the eyes of many Pakistani stakeholders. The fact that more than 60 senior judges refused to accept Musharraf's state of emergency and the new PCO in late 2007 could indicate a judiciary more willing to defend the constitution in the face of non-democratic forces. The Lawyers' Movement, furthermore, not only successfully campaigned to have Chief Justice Chaudhry reinstated, but also the other judges fired by Musharraf. These actions have probably strengthened the justice sector's standing among the public.

At the same time as these actions are strengthening the rule of law in Pakistan, the very same actors are effectively undermining the fundamental principles governing this concept. The courts' willingness to stand up to Musharraf during his last years in office is a recent phenomenon and was only apparent in a small number of cases. It is probably too early to say whether this indicates more principle-driven superior courts in Pakistan. The Supreme Court's handling of the Sharif case is worrisome, as the court continues to include political considerations in its rulings.

Practising lawyers were widely recognized for their actions in standing up to the military regime and defending the constitution. However, as long as the lower courts in Pakistan fail to offer unbiased, professional and timely services, lawyers and the court system will undermine the recent progress made by the justice sector at the macro level.

Since independence, the Pakistani Supreme Court has generally failed to defend the constitution when its fundamental aspects were altered by extra-judi-

cial means. In addition, the lower courts continue to undermine the democratic project through their inefficiency, arbitrariness and politicization. If this situation persists, people may seek extra-legal solutions or resort to informal traditional redress. Neither approach is likely to strengthen the democratization process in Pakistan.

Role and Strength of Institutions: the Contrasting Cases of Iran and Iraq

SAMI ZUBAIDA

For most countries in the world today, constitutions are a formality. With few exceptions, modern states have constitutions. Many of these were bequeathed by colonial governments: at independence the new states were founded on a constitution specifying the nature of government, its laws and institutions, often with a form of parliament and "democracy." In most cases, certainly in the Middle East and much of Africa, these constitutions became a dead letter, formally bypassed through emergency measures or military coups, or informally bypassed by regimes. The "revolutions" (military coups) of the 1950s and 1960s, notably of Nasser in Egypt, followed by Algeria, and the Ba`athist putsches in Syria and Iraq, abolished the old constitutions and substituted "revolutionary" versions of one-party states and "socialist" programmes. The two exceptions to these processes in the region (excluding the quite distinct case of Israel) were Iran and Turkey. Both these countries developed into modernity without the tutelage of a colonial power; both witnessed protracted struggles for a constitution; and in both, while the constitution and the rule of law were frequently abrogated or subverted, the idea of the constitution continued to have important ideological and political weight.

Iraq followed the pattern of a constitution bequeathed by the colonial regime, then mostly ignored by successive military regimes until it was abolished and replaced. The constitution left no important ideological traces. However, Iraq was on the margins of the two constitutions that affected many aspects of its early modern development: the Ottoman constitution, especially in its 1908 iteration, and the Iranian Constitutional Revolution of 1906. The first charted its early steps to modernity: not only the idea of representation (which did not take deep root), but more importantly the idea of state law (see below) and of institutions of education, law, municipal planning and general civil liberties, all of which had practical consequences. With regard to Iran, the shrine cities of Iraq and its Shi`ite institutions were important breeding grounds for the religious ferment that accompanied the Constitutional Revolution (1906-11). Religious ideas in relation to constitutionalism, for and against, left important traces.

Iran: Constitutional Memory

The Constitutional Revolution was seminal in modern Iranian history. It was protracted, and it involved a multiplicity of conflicts, wars and revers-

es.[1] It was the culmination of widespread protest and agitation by members of the clergy, bazaar merchants and the modern intelligentsia against the absolute and despotic Qajar monarchy. The resulting constitution limited the power of the shah and established a parliament and legal institutions (*Adalet-khaneh*). The constitution and parliament, however, were constantly challenged by the shah, some clerical circles and various interested parties, and there followed a period of protracted conflict and local wars. The revolution also resulted in the intervention of European powers, mostly Britain and Russia, which supported internal surrogates. The ideas of the revolution were novel and were variously understood by the different constituencies. Religious institutions and personnel were drawn in and could be found on opposing sides.

A number of features deserve particular attention. First, the idea of a constitution, *mashruta*, abrogated the traditional notions of government and law in both political and religious realms. Law and government were shared between the sovereign and God. Iran bequeathed to the Middle Eastern and Muslim world the idea of the king as God's shadow on earth, an idea enthusiastically taken up by Muslim dynasties (Ottomans and Mughals appropriated the title *Padishah*). This tradition coexisted uneasily with the idea of the Shari'a as divine law under the guardianship of the *ulama*. The net effect was legal plurality, with parallel jurisdictions of king and imam, not always clearly separated. Law being God-given was not open to legislation by earthly powers (in effect legislation was in *fiqh*), except royal decrees, which theoretically did not contradict or subvert the holy law. Constitutional modernity introduced the idea of systematic legislation by institutions that were neither God nor sovereign, and the ultimate codification of the Shari'a made it subject to these institutional state controls and amendments.[2] These were issues that were little understood and barely formulated by most participants, many of whom viewed matters in terms of narrow and short-term interests.

Second, the interest of many of the clerics who initially supported the constitution was in curtailing the powers of the shah and his foreign partners in matters that affected their status and livelihood. They saw in the constitution and the *adalet-khanah* it specified the means of exerting their control. Few fully understood the implications of the constitution and of political representation and ranged themselves for and against accordingly. The most articulate supporter in this category was Na'ini in his seminal work *Tanbih al-Umma wa Tanzih al-Milla*.[3] In this, he theorized and justified the constitution in the language and concepts of fiqh, a feat that has not been equalled by more recent Islamic apologists. The arch-opponent of the constitution was Fazlallah Nouri, who clearly understood its implications for clerical power and privilege. He preferred traditional Islamic kingship, which left the realm of God's law to the *ulama*. Nouri was ultimately tried and executed by the constitutional forces. He became a martyr for the conservatives, and his stance was subsequently lauded by Khomeini.[4]

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1 On the Constitutional Revolution see: Ervand Abrahamian, *Iran Between Two Revolutions*, (Princeton NJ: Princeton University Press, 1982), pp. 9-92; Vanessa Martin, *Islam and Modernism: The Iranian Revolution of 1906*, (London: IB Tauris, 1989); Janet Afary, *The Iranian Constitutional Revolution 1906-11: Grassroots Democracy, Social Democracy and the Origins of Feminism*, (New York: Columbia University Press, 1996).

2 Sami Zubaida, "Islam in Europe," *Critical Quarterly* 45, No. 1-2 (2003): 88-98.

3 Abdul-Hadi Hairi, *Shi'ism and Constitutionalism in Iran: A Study of the Role Played by the Persian Residents of Iraq in Iranian Politics*, (Leiden: Brill, 1977).

4 Hamid Enayat, *Modern Islamic Political Thought*, (Austin: University of Texas Press, 1982), pp. 164-9; Martin, *Islam and Modernism*, pp. 165-200.

Third, clerical stipulations for the constitution were not that it be an expression of some religious blueprint, only that legislation should not cancel or contradict Shari`a rules. That is to say, unlike more recent demands and slogans, such as "the Quran is our constitution" of the Muslim Brotherhood or Khomeini's insistence that the Quran and the Islamic corpus contained rules for all aspects of life and government, those stipulations posed Islam as a *limit* to legislation, not its content.

Fourth, the many conflicts and arguments after the promulgation of the constitution, between 1906 and 1911 and subsequently, included attempts by clerics to preserve their guardianship of law. When some leading clerics realized the implications of political and legal modernity for their status and power with regard to law, they mounted a rearguard action to preserve their control.[5] The decisive state power that could finally establish the etatization of law and curb *ulama* control came only with the rise of Reza Shah in the 1920s and his forcible and violent control of the state and the law. There followed the forceful centralization and modernization of state institutions, including the law. These moves were, of course, accomplished by the subordination and subversion of the constitution in favour of central powers dominated by the shah.[6] This condition was to prevail under the two shahs until the revolution of 1979. However, the central and dictatorial powers of the shah were interrupted during two episodes: the Allied occupation of Iran during the Second World War and the Mossadeq government (1951-53).

Fifth, while subversion and disregard of constitutions is a common feature in most countries in the region, Iran was perhaps unique in preserving a constitutional memory: the demand for the restoration of the constitution arose as an active ideological ingredient in the episodes of opposition and dissent. This is due to the central significance of the Constitutional Revolution in Iranian history and memory. That revolution left its mark not only in history books but on the very features and monuments of the cities of Tehran and Tabriz, and in the mythologized heroism of its actors. The development of political and cultural modernity in Iran – political ideas, the press, art and literature, the transformations of language and idiom, the formation of institutions, political struggles – occurred within the ambience of that revolution and was marked by it.

The Mossadeq Episode, 1951-53

The occupation of Iran during the Second World War by Britain and Russia and the removal of Reza Shah (perceived as being pro-Axis) paradoxically opened up the political field in the country, introducing a degree of freedom unknown under his dictatorial rule. In particular, the left, in the shape of the Tudeh, the Communist Party, could engage in activity and agitation more freely and was able to organize trade unions, syndicates, students and other constituencies. The succession of Mohammad Reza Shah, the young son, was a weak affair, and there was no immediate return to the iron fist of the father. The free elections that followed brought in nationalist forces, both liberal and leftist, but steadfastly secular, presided over by Mohammad Mossadeq, prime minister from

5 Martin, *Islam and Modernism,* pp. 152-5.

6 Abrahamian, *Iran Between Two Revolutions,* pp. 102-68.

1951-53.[7] It was during this turbulent period that Iranian oil was nationalized, much to the consternation of Western oil companies and their governments, who eventually succeeded in toppling Mossadeq in a military coup and restoring the rule of the shah, which became ever more dictatorial. However, the shah never abolished parliament or the constitution, but manipulated and subverted them.

Mossadeq first entered politics at the time of the Constitutional Revolution when he was elected to the first parliament. He continued as a constitutionalist liberal nationalist and a leading member of the National Front, the coalition that came to power in 1951. The brief rule of the party and its allies was accompanied by turbulent and free politics, with some violence, and with the prominent participation of Tudeh and trade unions. This interlude was another example of the activism and involvement of wide sectors of the Iranian public in political contestation, ranging across ideological lines, in a politics that was dominantly superimposed on the more traditional, primordial politics of community, religion and tribe. Notably, this was civilian politics, unlike the military "revolutions" of Arab neighbours. The military came in only as the defenders of royal and reactionary power.

Religion was secondary in the politics of this episode. Ayatollah Kashani, one of Khomeini's mentors, was prominent in the events, first in support of Mossadeq, then, unhappy about the secular and liberal/leftist thrust, turning against him and becoming a conspirator in the putsch that toppled him.[8] Another religious element was Fedayan Islam, a violent group that engaged in assassinations of public and intellectual figures. Overall, however, the politics of the 1950s was largely secular. Religious opposition was to surface in the early 1960s, when Khomeini first came on the public stage, defying the shah's government and the so-called White Revolution (land reform, votes for women, American immunities). These events were important harbingers of the later revolution, the first major challenge from clerical circles after their suppression by Reza Shah. For our purposes, this history shows the institutional complexity of Iran, where rival centres of power were never eliminated. Also worth mentioning here is the Freedom Movement, which arose after the toppling of Mossadeq as part of the clandestine effort to defend liberties and the constitution. It included among its leadership many lay religious but liberal figures, such as Mehdi Bazargan and Ibrahim Yazdi, who were to play important but fleeting roles in the early days of the 1979 Revolution.

The 1979 Revolution[9]

The first episodes of this revolution took place in 1977 and 1978, with the cautious lifting of the restrictions on free expression under pressure from the Carter administration, with its concern for human rights. At that point, the expression of criticism came mostly from secular liberal and left forces, and took the form of lit-

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7 Homa Katouzian, *Musaddiq and the Struggle for Power in Iran*, (London and New York: IB Tauris, 1990); Abrahamian, *Iran Between Two Revolutions*, pp. 267-80.

8 Abrahamian, *Iran Between Two Revolutions*, pp. 233-80.

9 There is a vast literature on the Iranian Revolution. See Abrahamian, *Iran Between Two Revolutions*, pp. 496-529; Nikki Keddie (2006), *Modern Iran: Roots and Results of Revolution*, (New Haven: Yale University Press, 2006); Said Amir Arjomand (1988), *The Turban and the Crown: The Islamic Revolution in Iran*, (Oxford: Oxford University Press, 1988); Sami Zubaida, *Islam, the People and the State: Political Ideas and Movements in the Middle East*, 3rd ed., (London: IB Tauris, 2009), pp. 1-37.

erary gatherings and poetry readings. It was then that the slogan for the restoration of the constitution and of parliamentary powers was raised. It was submerged, however, by the counter-rhetoric of revolution emanating from the odd combination of Islamists and the left. The liberal nationalist demand for the constitution and civil liberties was considered irrelevant and even reactionary when contrasted with the revolutionary demands for the removal of the shah and ending imperialist (American) domination. The left (communists as well as Fedayin and Mojahidin, two militant movements that developed in the 1960s and 1970s) made common cause with Khomeini and "left" Islamists against the liberals, accused of collaboration with the shah and the Americans. Khomeini, when reflecting on the Constitutional Revolution, declared the anti-constitutionalist Nouri a hero and martyr: his insistence on the supremacy of the Shari'a and renunciation of the constitution was deemed correct and heroic. His pro-monarchy stance was ignored.

Several features of this episode are noteworthy. One was Khomeini's repeated and insistent assertion that the Quran and the *fiqh* corpus contained rules and guidance for all aspects of life, morality, family, society and government, and as such Islam has no need of any extra-Islamic legislation. Yet when revolutionary institutions were established, the Shari'a did not become the constitution of the Islamic Republic, but was enshrined as law by a separate constitution. This constitution proclaimed dual (and uneasily coexisting) powers: the *wilayat-i faqih* authority and institutions, under the Supreme Leader, and a parallel authority of an elected president and an elected parliament, but with the process of election and legislation subject to scrutiny by a clerical body, the Council of Guardians. The cards are stacked in favour of clerical authority, but in the context of an institutional complexity allowing for manoeuvre within the clerical establishment and between it and a secular authority.[10]

Secondly, law had been etatized in the idea of a constitution and in the attempt to put it into action against clerical resistance and prevarication. The coercive regime of Reza Shah finally succeeded in fully including law into state institutions and a modern legal system and judiciary, formally independent but in practice subject to executive interference, as in all despotic regimes. Shari'a provisions were included as family law, but subsequently reformed and modified in the process of state legislation (Family Protection Law of 1967/76). The Islamic Republic, after much debate, continued with state law, supposedly in conformity with the Shari'a, but codified and institutionalized. The judiciary, however, now dominated by the clerics and an ideological organ of the republic, was never quite content with these conditions, and always pulled in the direction of judicial discretion in accordance with *fiqh* and traditions as against codified law and procedure. The office of public prosecutor, for instance, part of a modern court system but alien to Shari`a tradition, was repeatedly relegated or ignored (UN and Amnesty International reports) in favour of the judge acting as prosecutor. Perceived gaps in the law were covered by reference to Khomeini's writings on *fiqh*. Law, then, becomes a field of contention between a powerful judiciary attempting to be independent of the law and various reformists and human rights activists, local and international.[11]

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10 Zubaida, *Islam, the People and the State*, pp. 182-219; Asghar Schirazi, *The Constitution of Iran: Politics and the State in the Islamic Republic*, (London and New York: IB Tauris, 1997).

11 Zubaida, *Islam, the People and the State*, pp. 182-219.

The first prime minister of the republic, appointed by Khomeini, was Mehdi Bazargan, a liberal Muslim and veteran of the constitutional struggle. Although he did not last long in office, the fact of his appointment by Khomeini was a gesture acknowledging constitutional traditions and some form of democracy, despite Khomeini's denunciation of that history. The unfolding of events, the American Embassy hostage episode and then the war with Iraq, brought the clerical actors to the fore and marginalized, then suppressed the liberal nationalists. But the pressure for reform and for constitutional rights continued despite the repression and resurfaced after the end of the war as well as the death of Khomeini (1989), and with the succession of the pragmatic Rafsanjani, then the reformist Khatami (1997). The clerics remained in the ascendant in the institutions of the Leader, the judiciary, the Guardians Council, but always have to deal with reformists, pragmatists and lively cultural and media spheres that were never fully suppressed.

Iraq[12]

Political modernity first touched Iraq after the 1908 Young Turk regime, with traces of the processes of modernity evident in the law, education, media and in ideas of parliamentary representation and of secular nationalism. All of this was soon to be engulfed by the devastation of the First World War. The 1906 Iranian constitutional ideas were partly developed in the Iraqi shrine cities, leaving some traces but having little if any impact on Iraqi political life. The second and more far-reaching wave occurred under the British mandate, which instituted a colonial state, to be followed by an "independent" monarchy in 1932 and the trappings of nation statehood, including a constitution, parliamentary and cabinet government, and, crucially, administrative and educational structures.

Unlike Iran, there were few indigenous elements or sources for the constitution or the nation-state. The first indigenous movement was reactive, against British occupation. This has since been celebrated as a national awakening and dubbed *thawrat al-`ishrin*, the 1920 Revolution. It was a combination of forces and interests, all worried by the transformations brought about by colonial government.[13] It was led for the most part by the Shi`a clerics of the shrines, worried about the encroachments on their autonomy and economy by a centralizing government. The fighting forces were primarily drawn from the Shi`a tribes of the south, equally worried by centralization and taxation, and in any case welcoming the prospect of disorder for traditional looting. The politics, however, was conducted in the nascent language of nationalism and religion, deriving from the different sources of Ottoman modernity and the British-sponsored "Arab Revolt," which brought the Hashemite king to Iraq (after being thrown out of Syria by the French). The revolt was put down by the British, who then proceeded to partly conciliate and appease some of the leaders and forces by incorporating them into the new national entity. Regardless of the causes and springs of the 1920 revolt, it

12 For the history and politics of Iraq in the 20th century, see Charles Tripp, *A History of Iraq*, 3rd ed., (Cambridge: Cambridge University Press, 2007); Hanna Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq,* (Princeton, NJ: Princeton University Press, 1978), is the magisterial source on modern Iraq.

13 See Sami Zubaida, "The Fragments Imagine the Nation: The Case of Iraq," *International Journal of Middle East Studies* 34 (2002): 205-15 for a discussion of the ideological orientations in the formation of the Iraqi state and its nationalism.

did acquire great importance in the subsequent narrative of the nation. This narrative gained substance as a national class developed in the wake of the modern state.

It is often said that Iraq was an artificial entity created by colonial fiat, a claim vehemently rejected by nationalists. Of course, it has some truth: but then Iraq is not unique in this respect, since most modern nations started as artificial entities. The modern state makes the nation. The new class of functionaries, professionals, educators, journalists, artists, modern business personnel, aided by the educational system and the new media, become the national class, who narrate the nation and develop its memory. The state becomes a major employer with qualifications gained in the national educational system. The army and conscription are another mechanism for national formation. This is not to say that this "nation" is a solidary or coherent entity. On the contrary, it becomes a field of contest between different groups and interests. In Iraq, the most important of these continued to be "primordial" entities of region, tribe, religion, family and community, but expressed in national and ideological language. The various groups and interests existed side by side, and were sometimes superimposed on modern parties, ideologies and institutions.[14] The Iraqi Communist Party (ICP) emerged in the 1930s and became the most prominent and rooted national Iraqi party, recruiting from all communities and regions and largely detached from the primordial and sectarian entities. Its rivals in the opposition to the monarchy and its colonial sponsors were various brands of pan-Arab nationalists, many with roots in the Sunni population and with regional affiliations. These nationalists had little of the organization or grassroots support of the communists, but were always well represented in the army, a fact that led to their ultimate ascendancy. The 1958 Revolution (military coup) which displaced the monarchy was a watershed in the development of Iraqi state and politics.

A number of aspects of that history related to constitutionalism and political institutions.

The constitution had little resonance in Iraqi political culture. Under the monarchy, it was one of the artificial props of a heavily manipulated parliamentary system (there were cases where the elected candidate didn't know he was even nominated). Parliament, however, was carefully managed to ensure that different sectors of the power elite and some of the intelligentsia had a voice, often dissenting in favour of their sectoral interests. As such, the system, while not democratic or representative and often heavily repressive of radical opposition, was nevertheless pluralist. This was to end under subsequent republican governments.

The law was instituted as state law, with Shari`a for family matters, and with the usual organization and hierarchy of courts and procedures. However, courts were always subordinate to political and executive powers. Legal institutions were frequently bypassed through emergency and military powers. Under the republic, "revolutionary" courts predominated, and under the Ba`ath (1968-2003) these became ever more arbitrary, ruling in accordance with presidential decrees, which were not limited by any constitutional considerations.

Opposition forces under the monarchy focused on true independence, and were opposed to British influence and Western alliances. These stances were

14 Sami Zubaida, Sami: "Community, Class and Minorities in Iraqi politics," in R.A. Fernea and W.R. Louis (eds), *The Iraqi Revolution of 1958: The Old Social Classes Revisited*, (New York: IB Tauris, 1991).

common to both the communists and the pan-Arab nationalists. Democracy and constitutionalism were only issues in relation to claims for freedom of action by the opposition, but were never a serious aspiration. The pro-Soviet communists spoke of "bourgeois" democracy, and their idea of democracy was Leninist. The nationalists admired first the Nazis and fascists in the 1930s and 1940s, then Nasser, Arab socialism and the Ba`ath in later decades. None of these had much tolerance for democracy or constitutionalism. The only group which held to democratic demands was the National Democratic Party, also known as the Ahali Group (after their newspaper). They were a collection of patrician intellectuals and professionals, whose political weight was due more to their social status than their actual base. Their leader, Kamil al-Chaderchi, was one of the few politicians who persisted in these demands under the Qasim regime (see below), when others were fired by revolutionary enthusiasm into acquiescing in military rule. In the 1970s, the ICP entered into a (disastrous) national front with the Ba`ath and defended its violent repression, only to fall victim to it when Saddam consolidated his power at the end of the decade. Democracy appeared on the agenda only after the demise of world communism after 1989, and the prospect of socialism and revolution became ever fainter. It was only then that sections of the left adopted a human rights agenda (a general trend among reformed leftists).

Many liberals and leftists look back nostalgically to the period of the Qasim regime (1958-63). It removed the monarchy and extricated Iraq from British domination and Western alliances. And while it instituted military rule, it allowed sufficient latitude to open up the fields of political contest. The Communist Party came to almost legality and for a while dominated the street and aroused the Cold War anxiety of Western powers. Qasim, in his conflict with pan-Arab and Nasserist fellow officers, drew on the support of the ICP and the liberal left, appointing many intellectuals and professionals from both to government posts. But when the ICP grew too strong, Qasim turned against it, and at one point encouraged the formation of a rival puppet CP, which he recognized as the official party, sidelining the real communists. This regime was ultimately overturned in 1963 by Ba`ath and nationalist officers, aided by the CIA, with the televised murder of Qasim and a massacre of communists.

The great failure of Qasim was his evasion of any attempt at political institutionalization in favour of managing government and politics through personal networks. This is a common feature of Middle Eastern politics: regimes based on coteries of power bypass institutions and rely on a political calculus of cronyism. By all accounts, Qasim was not guilty of such corrupt practices, yet he continued to bypass or prevent institutions in favour of personal manipulation. While his regime brought about legal and economic reforms, it failed to institute a firm constitution or parliament and a reasonably independent judiciary in favour of revolutionary (military) councils and revolutionary courts. While there was a certain latitude for party activity (along with repression), the regime resisted the formation of official, registered parties. Qasim ultimately fell victim to these manipulations.

The Ba`ath regime was the ultimate in the subordination of the state, the army, associations and institutions, first to the party, but soon to the ruling clique under Saddam based on families and tribes and tinged with communal sectarianism.

Politics of the Iraqi Constitution 2005[15]

Initially, this constitution was drafted by American experts with inputs and pressures from the different sectors represented on the governing council. Subsequently, the amendments and reformulations were the subject of protracted wrangling among the main parties actually in power. These were predominantly the Kurdish parties and the Shi`ite politicians. Both were interested in a loose federation, with powerful regional governments controlling (petroleum) resources in the Kurdish north and the Shi`ite south, where the main oil reserves lie. The Sunni constituencies and Shi`ite radicals (Sadrists) were either excluded or poorly represented, partly due to a widespread boycott of the American-sponsored process. One thorny issue was the status of Kirkuk, the oil-rich northern city claimed by the Kurds, a claim violently contested by the city's Arab and Turkoman populations. Another bone of contention was the religious content of government and law. The secular Kurdish parties acquiesced in the insistence of their Shi`ite partners on privileging the Shari`a as the source of legislation, provided they didn't have to follow this approach in their autonomous region. The Sunni opposition was largely content with the Islamic provisions, especially that family law was left open to religious, communal authority, with weak central provisions. This amounted to a reversal of all the legal reforms of the Qasim and the Ba`ath regimes, which had made family law, based on much diluted Shari`a, a central government codified law not subject to separate religious authorities. In effect, all the fine sounding liberties of free expression, gender equality and so on "guaranteed" by the constitution were made precarious by the central role allocated to the Shari`a.

This "constitution" has since been subject to continuing wrangling and amendment, especially with the shifting balance of power between the different Shi`ite parties, the increasing participation of Sunni constituencies and the mounting opposition by practically all Arab parties to Kurdish power. However, its provisions remain largely theoretical, given that power and government on the ground bypass legal and constitutional provisions and are based on communal and personal networks and large-scale corruption, with ministries serving as resource centres for particular parties and cliques. The constitution, then, becomes the subject of political manoeuvres reflecting balances and shifts of power and interest: it loses all credibility as a guarantee of liberties and rights. This devaluation is being pushed further at the time of writing by the political strategies of current Prime Minister Maliki. He has distanced himself from the sectarian politics of the Shi`a bloc, including his own Da`wa Party, in favour of building networks of personal power by forging alliances with Sunni army officers and various political constituencies, including Sunni and Kurdish factions and secularists. He has used the strengthened army to crush or subordinate local militias. In this strategy, he is helped by his control of state revenues as a means of reward and patronage. Maliki, however, has to contend with individual ministers and ministries that had become resource centres for particular parties, sects and patronage networks through employment, contracts and bribes. It is not yet clear whether Maliki will succeed in his strategy, and indeed whether he will sur-

15 See Ali A. Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace*, (New Haven: Yale University Press, 2007) for a detailed account of the years following the occupation by an author who was a leading actor in the events.

vive the turbulence of Iraq and the region. What is clear is that his strategy of centralization and against sectarian fragmentation is not based on institution-building and constitutional provisions and law (although the title of his political coalition is, ironically, the "Law State"). In Iraq, the new constitution, like its predecessors, is shaped and easily changed by politics, and has no particular ideological weight.

Conclusion

The establishment of "democracy" has been a dominant objective of the US and its allies in their foreign policy and military campaigns, a call that is echoed by most ruling regimes, as well as the opposition, in the various countries of the region. Elections, preferably free, have been the declared hallmarks of progress to democracy, along with some reference to human rights and the "rule of law." It is clear, however, that elections, even when relatively free, as the recent ones in Iraq seem to have been, lead to nothing like what we think of as democracy. In fact, they can sanctify and reinforce factions and networks of patronage and coercion. It is increasingly understood that the basic requirements for democracy are long-term institutional development, including firm constitutional and legal frameworks, and this is precisely what is lacking. In most countries in the region, formal institutions have been largely bypassed by informal and personal networks of power and patronage, involving family and clan, religion and tribe and military factions. The Ba`ath regimes in Iraq and Syria are extreme examples, with dynastic family rule (until disrupted by the invasion of Iraq), supported by concentric circles of clan and sect in strategies of force and security, fostering regime control and crony capitalism in the economy. Constitutions under these circumstances are pieces of paper.

Iran and Turkey, in very different historical trajectories, have been partial exceptions to this pattern. Through native political movements, both acquired constitutions that have become essential elements of their national narrative. Thus, even when constitutions fail and are bypassed, invoking them constitutes a powerful ideological force. We have seen how this "constitutional memory" played an important part at crucial points in the turbulent history of Iran.

This constitutional emphasis is highlighted by its contrast with neighbouring Arab states, where constitutions are mere formalities. This is clearly illustrated in the case of Iraq in the complete disregard by successive regimes, which shaped the "law" in accordance with current interests and coercive needs, and in the post-invasion constitution-making that reflected the contests and power plays among parties and factions.

Iran, in this respect, appears a more hopeful case for institutional development, despite the coercive theocratic elements in its rule. The recent manoeuvres by Ahmadinejad and his clique are attempts to halt this development in an effort to institute a security state ruled by cliques on the model of its neighbours. That is what is at issue in the current struggles in Iran.

Consensus Democracy at its Limits: Lebanon in Search of Electoral Reform

ELIZABETH PICARD

Lebanon's constitutional system has long been considered one of the few extra-European cases to which the concept consensus democracy[1] could be successfully applied. In this respect, the country has been seen as a fortunate exception among other Middle Eastern states, characterized by authoritarian regimes. In the first part of this chapter, the focus is on the sociological context and historical circumstances that favoured the choice of consensus democracy. Relevant considerations here are the ethnic and religious pluralism of the population, coupled with the absence of an ethnic or religious majority group, and the Ottoman tradition of allocating political representation along sectarian divisions.[2] Then the Lebanese constitution of 1926, amended in 1990, is discussed, particularly how it is consistent with the four principles associated with the rule of consensus democracy asserted by its theoreticians.[3]

In the second part, the sustainability of consensus rule for Lebanon is questioned in view of the crises that have shaken the country since independence in 1943, especially the long civil war between 1975 and 1990 that nearly destroyed it, and the crisis that has loomed in the aftermath of that war.

Three dangers threaten the Lebanese polity and weaken its fragile consensus: its susceptibility to external influence, growing demands for regional decentralization, and a structural change in the demographic balance. While the constitution allows for amendments in response to these challenges, as shown in the third part of the chapter a rigid Electoral Law adopted in the 1920s ensures the durability of the sectarian distribution of power and authoritarian rule by communal elites over their populace. Whenever amendments changing the number and size

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1 "Consensus democracy" is the formula promoted by consociational theory, and is the product of the conjunction of a form of political engineering attempting to devise a system of government suitable for segmented societies and of the criticism of the "flawed paradigm" of majority-based democracy. Arend Lijphart, "Majority Rule in Theory and Practice: the Tenacity of a Flawed Paradigm," *International Social Sciences Journal* 129 (1991): 483-93.

2 In this chapter, by *religion,* the three major faiths present in Lebanon: Judaism, Christianity and Islam are referred to. The term *confession* is used to refer to the 11 Christian denominations to be found in Lebanon, Catholic and non-Catholic. A *community* designates a socially organized group sharing the same confession. When referring to such group in the political sphere, we use the term *sect.*

3 See Arend Lijphart, *Democracy in Plural Societies,* (New Haven: Yale University Press, 1977). Arend Lijphart, *Power-Sharing in South Africa,* (Berkeley: University of California Press, 1985). Under the influence of the Konrad Adenauer Stiftung and through the writings of Theodor Hanf, several Lebanese intellectuals refer to *Proportzdemokratie* as theorized in Gerhard Lehmbruch, "Consociational Democracy in the International System," *European Journal of Political Research* 3 (1975): 377-91.

of electoral constituencies are enacted, they only reflect pre-electoral arrangements between dominant sectarian leaders.

To overcome the crisis that has been deepening since the middle of the first decade of the new millennium, Lebanon needs a radical reform of its Electoral Law, namely by introducing proportional rule to make room for alternative societal and political representation and to strengthen the civic link between the individual and the state. The conclusion considers how such reform might be possible and suggests its adoption might secure the demise of the "consensus formula."

The "Lebanese Formula": A Case of "Consensus Democracy"

Long before *consociationalism* became theorized in the mid-20th century based on the Swiss, Dutch and Belgian examples, Mount Lebanon had been granted a specific political regime by the Ottoman Empire that took account of the pluralistic composition of its population. Today, Lebanon is far from being the only pluralistic state in the Middle East. Some Middle Eastern countries include large ethnic minorities, such as the Kurds in Turkey, Iran and Iraq. Others are not religiously homogenous, such as Egypt and Jordan, where Christian groups are important. Yet others are not confessionally homogenous. In Saudi Arabia, for instance, 10 per cent of Muslims are Shi'a. Others, like Israel and Syria, count both ethnic and religious minorities alongside a large majority (Jewish in the former, Sunni Arab in the latter). But no other state is as pluralistic as Lebanon, where 18 confessional communities are officially recognized and 11 represented in parliament.[4] Furthermore, none of these communities ever accounted for more than 35 per cent of the population of the state.[5]

The tradition of granting cultural and juridical autonomy to these confessional communities and allocating administrative and political power to their elites dates back to the mid-19th century. Proportional sectarian representation was first adopted in 1845 and confirmed in 1864 by the international *Règlement organique* that organized the autonomy of the district of Mount Lebanon within the Ottoman Empire.[6] The formula initially provided for power sharing among the leaders of the six main sects in Mount Lebanon (Druze, Maronite, Orthodox, Melkite, Sunni and Shi'a) elected by a limited number of tax payers until universal (male) suffrage was introduced in the late Ottoman period. However, this arrangement was already contested by rising local secular elites, especially at the time of the Ottoman Constitution.[7]

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4 Demographically minor communities such as the Jews, the Copts and the Syrian Orthodox do not have reserved seats.

5 While Maronites were 58.41 per cent of the population of the *mutassarifiyya* (district) of Mount Lebanon in 1911 (Edmond Rabbath, *La Formation historique du Liban politique et constitutionnel* [Beirut: Lebanese University, 1986], p. 4), they were 30.42 per cent in the state of Greater Lebanon according to the 1932 census (*Journal Officiel de la République Libanaise*, 10 October 1932). A study by Yussef Duwayhi published in *Al-Nahâr,* 16 November 2006, based on birth records (*sijilât an-nufûs*) since 1905, estimates Shi'ite and Sunni demographic weights to be virtually equal (29.05 per cent and 29.06 per cent) in 2006.

6 Thomas Scheffler, "Religious Communalism and Democratization: The Development of Electoral Law in Lebanon," *Orient* 44 (March 2003): 15-37.

7 Engin Akarlı, *The Long Peace. Ottoman Lebanon 1861-1920,* (Berkeley: University of California Press, 1993), pp. 163-72.

The "Lebanese formula" *(al-sîgha al-lubnâniyya)* suited the French, who took control of Lebanon after the First World War. On the one hand, it allowed the mandate power to divide the Lebanese populace into several competing sects in order to clientelize them, while claiming to comply with the principles of Wilsonian democracy. On the other hand, the Maronite leadership, which believed the new state had been created for its sake, was only too happy to see Lebanese Muslims divided into Sunni, Shi'a and Druze.

Thus, the Lebanese constitution of 1926 referred to confessional pluralism in articles 9 and 10, and stressed the need to represent confessional communities equally in public posts and in ministerial composition "as a transitory measure" (article 95).

The "National Pact" of 1943 was an unwritten agreement between the leaders at the time of independence, Maronite President Bishara al-Khoury and the Sunni Prime Minister Riyad al-Solh. This arrangement highlighted the tension between two opposing readings of Lebanon's national identity: its belonging to the Arab land *(watan)* and nation *(umma)* on the one hand, and its search for protection from the West, Europe then the US, on the other. In view of Lebanon's segmentation into a plurality of confessional communities, each with its own material and symbolic sub-culture, educational network, judicial rule and view of the world, Lebanon was certainly a suitable candidate for the adoption of consensus democracy, a constitutional system considered successful in several European democracies.

Consensus democracy, as theorized in the cases of Switzerland and the Netherlands, relies for its implementation in segmented societies on four principles. These are: (1) a grand government coalition, (2) considerable autonomy for societal segments, (3) proportionality of representation and (4) a minority veto right. By virtue of the first principle, a limited number of representative leaders are in charge of settling by mutual consensus the conflicts that may arise in the society. In Lebanon, the Council of Ministers gathers together some 20 or 30 members to ensure that every sect has a say in the consensus decision. The second principle allows each social segment or "political sub-culture" the right to legislate on matters such as personal status, education and culture. In the case of Lebanon, these specific rights are an inheritance from the Ottoman *millet* system.[8] The third principle organizes the representation of society in the state either through election (for the legislative assembly) or selection (for the public service). The broadness of the range of possible practical arrangements is attested to by the diversity and variability of voting rules. Lebanon, for instance, has a sophisticated Electoral Law, adopted in 1922, that combines quotas for sectarian representation with inter-sectarian alliances. Finally, the fourth principle offers extra security for countries in which societal segments are demographically unequal. However, this protection also exists in majority democracies through the separation of powers, protecting minorities and requiring extraordinary

8 Benjamin Braude and Bernard Lewis, *Christians and Jews in the Ottoman Empire. The Functioning of a Plural Society,* (New York : Holmes and Meier, 1982); "The *millet* system of the Ottoman Empire enabled Christian, Jewish and Muslim communities to co-exist more or less peacefully, each with their own form of self-government. While the *millet* system was generally human and tolerant of group differences, it was not a liberal society, for it did not tolerate individual dissent within its constituent communities. Rather it was a deeply conservative, theocratic and patriarchal society" (Will Kymlicka, "The Right of Minority Cultures," *Political Theory* 20 (1992): 140-6. Of which p. 143).

majorities. In Lebanon, article 65.5 of the constitution as amended in 1990 stipulates that "basic national issues require the approval of two thirds of the members of the Council of Ministers."[9]

Lijphart insisted, not without good argument, that this formula was more democratic than majority rule, which provides no opportunity for a minority to be in power and allows for its oppression. Indeed, Lebanon could claim to be one of the rare democratic polities in the Middle East – Israel being altogether an ethnic democracy (in the sense of being democratic *only* for its religious-ethnic majority) and highly militarized. However, Lebanon is not the only Middle Eastern state to grant political representation to its ethnic-religious minorities. For example, Jordan has six parliamentary seats reserved for Christians and Circassians, while Iran has special seats for the Armenians, Christians, Jews and Zoroastrians. Even so, Lebanon's constitutional system stands in contrast to those of most Arab countries of the Middle East, including Egypt and some Gulf states.

Laying claim to modernity, the rulers of these states have in principle chosen the path of secularization and national integration, in terms of which citizens equal in rights and duties have the state as partner. In principle, therefore, the political majority of these countries is simply one of numbers. In practice, their secularization is incomplete, since Islam or the *sharî'a* figure under one heading or another in their constitutions. Moreover these regimes, far from ensuring fair competition between individuals and groups, favour the domination of one community (an ethnic or religious segment of the population) over others, even where it represents only a demographic minority (as in the cases of the Alawite community in Syria, Arab Sunnis in Saddam's Iraq or Sunnis in Bahrain) or a political minority (as with Mubarak's party in Egypt).[10] Consequently, the so-called secularization of these states conceals a system of communal preference and exclusion more virulent than institutionalized communalism, because it operates beyond the scope of constitutional regulation.

In the post-bipolar era, and especially during the proactive US intervention in the Middle East after 9/11, the "Lebanese formula" was lauded and advanced as a model for the democratization of other local states. This included the rebuilding of the Iraqi polity after the fall of Saddam (Constitution, 8 October 2005) and the Comprehensive Peace Agreement in Sudan (16 October 2005) and was even recommended as the basis of "regime change" in countries such as Syria. Persuaded by the consensus model and often ignorant of the reality on the ground, international bureaucrats overlook the flaws in Lebanon's post-civil war political reconstruction. Unlike the public policy of memory, justice and reconciliation advocated in post-conflict polities as diverse as Argentina, South Africa and the Balkans, Lebanon combines amnesia and amnesty in dealing with

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9 The Lebanese Constitution amended in 1990 is available in an English translation by Paul Salem at www.servat.unibe.ch/law/icl/le00000_.html (accessed 6 August 2009). The following are considered to be basic national issues: amendment of the constitution, declaration of a state of emergency and its termination, war and peace, general mobilization, international agreements and treaties, annual government budget, comprehensive and long-term development projects, appointment of grade one government employees and their equivalents, review of the administrative map, dissolution of the Chamber of Deputies, electoral laws, nationality laws, personal status laws and dismissal of ministers (article 65.5)

10 In order to do so, sectarian leaders make use of bonds of communal and extended family solidarity (*'asabiyya*) to seize power in the name of national integration. They forbid other communities from doing the same. See Michel Seurat, *L'État de barbarie,* (Paris : Le Seuil, 1989).

its 15 year war.[11] Most of its leaders deny the severity of the domestic tensions and do so with the support of the UN and Western powers, which consistently praise its (fraudulent) electoral operations and finance its bankrupted state.

Lebanon in Strife: The Search for Causes and Remedies

Close observation and the use of social science tools, however, reveal that Lebanon has been living "with a hair trigger" since the end of the civil war.[12] Let us disregard the economic dimension – a national debt twice the GDP, tourist and financial activities benefiting only a minority, the deterioration in public services (especially health and education), and the fact that 28.5 per cent of people live below the upper poverty line ($ 4 a day). Let us also disregard the 270,000 young degree holders who have emigrated since 1991[13] and focus on the political situation.

To begin with, national security remains deeply threatened from without (three major Israeli air strikes in 1993, 1996 and 2006) and within (several attacks on army and police by Islamist insurgents and the Nahr al-Bared insurrection of May-September 2007, which cost 500 lives). Since 2000, the country has witnessed dozens of deadly bombings against members of the political, intellectual and military elite, the best known being the killing of ex-Prime Minister Rafic Hariri in February 2005. Also, political life has been disrupted by months of governmental stalemate, the closure of parliament, vacancy in the state presidency, and the frequent distortion of constitutional rule through temporary arrangements and "exceptional" steps such as the extension of the presidential terms of Elias Hrawi (in 1995) and Emile Lahoud (in 2004). Finally, street politics tends to substitute for the deadlocked political debate, as the opposition challenges the social and strategic choices of the ruling majority. This was the case with the pro-Palestinian demonstrations in the Shi'a suburbs of Beirut in 1993; with the anti-Syrian mobilisation during the summers of 2000 and 2001; and with the massive anti-government demonstrations and sit-in organized after 2006 by Hezbollah and their Christian ally, the Free Patriotic Movement. Eventually, street politics degenerated into local sectarian fighting, such as in February and May 2008, when armed militiamen of all denominations reappeared in Beirut and the country.

Three frequent explanations are provided for a multidimensional crisis apparently so intractable that the current period has recently been described by an excellent connoisseur of Lebanon as possibly only "a parenthesis between two wars."[14] First, the crisis is seen as exogenous; second, it is perceived as being

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11 Elizabeth Picard, *The Demobilization of the Lebanese Militias,* (Oxford: Centre for Lebanese Studies, 1999); Lucia Volk, "When Memory Repeats Itself. The Politics of Heritage in Post-Civil War Lebanon," *International Journal of Middle East Studies* 40 (2008): 291-314.

12 UNDP, *Lebanon 2008-2009 National Human Development Report: Toward a citizen's state,* 2009, www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/SNAA-7TL9QX-full_report.pdf/$File/full_report.pdf (accessed 10 July 2009); Georges Corm, *Le Liban contemporain. Histoire et société,* (Paris: La Découverte, 2003). Personal observations were made over a total of five years in Lebanon since 1991.

13 Of a population of 3,500,000. Choghig Kasparian, *L'entrée des jeunes Libanais dans la vie active et l'émigration. Les Libanais émigrés depuis 1975,* (Beirut : Université Saint Joseph, 2002).

14 Personal communication, April 2009. See also Peter Harling and Sahar Atrash, "Is Lebanon in the Wake of a New Cycle of Violence?" (in Arabic), *Al-Hayât,* 3 April 2009.

linked to excessive state centralism and disregard for the society's cultural diversity; and third, the crisis is considered structural, since state institutions do not reflect the social and demographic balance of the country.

The external factor

An often noted characteristic of Lebanese democracy is that domestic politics are especially submissive to external pressures. This is due both to geopolitical considerations as well as to strong trans-boundary relations that link every Lebanese confessional group to members of the same confession in neighbouring countries as well as to the rulers of these countries. The Lebanese cannot make free and peaceful democratic choices as long as regional stakes and strategies are imposed on them from outside.

It is easy to understand how such a small country (10,400 sq. kms), trapped between Israel and Syria, two powerful militarized states at war since 1948, and the refuge of hundreds of thousands of dispossessed Palestinians, has been dragged into regional conflicts and how its territory has became a regional battlefield, especially after the Israeli invasion of 1982.[15] This situation has been all the more true because Lebanese sectarian leaders are but minor players in the regional arena, and rely heavily on external material and symbolic support in their local struggles for power. Indeed, they purposely introduce foreign actors on to the domestic battlefield: Christian sects claim the attention of Western powers, their diplomatic support and sometimes their military intervention (such as in 1958 and 1982-3); Sunni Muslims are cared for by Saudi Arabia, a regional state that uses Lebanon as a counterweight to Syria in the Levant; and the Shi'a stress their religious links with the Islamic Republic of Iran, whose regime has close military cooperation with Hezbollah.

Lijphartian principles of respect for the dissenting minority and the search for consensus imply that the incumbent majority should not enter into even a defensive alliance with an external actor without minority consent. Rather, it should keep an equal distance from all international and regional powers. The National Pact adopted at the time of independence (1943) was meant to guarantee Christians that Lebanon would not seek unification with other Arab states (specifically Syria) and Muslims that Lebanon would not become a member of the Western and Atlantic pacts. In fact, instead of preventing foreign political meddling and military intervention and offering security to local actors, these reciprocal commitments locked Lebanon within a double bind of external constraints, each foreign camp intervening on behalf of its local protégé. Subsequently, foreign camps imported regional cleavages on to the domestic scene, which in turn fed sectarian strife. The list is long of states and non-state actors (even the UN) that have intervened in Lebanese political life since the late 1960s and during the 1975-1990 war. After the war, Lebanon remained hostage to major regional and international tensions – between Syria and Israel, between Iran and Saudi Arabia and between the West and its detractors.

Many analysts consider that what ails the Lebanese polity is less its domestic sectarian pluralism and the never-ending search for cross-sectarian consensus

15 Yair Evrin, *War and Intervention in Lebanon. The Israeli-Syrian Deterrence Dialogue,* (London: Croom Helm, 1987).

than external meddling in the country's politics to promote foreign interests.[16] Some even argue that everything worked for the best in this small and rich democracy until the 1960s, when external forces, starting with the Palestinian militants and the PLO expelled from Jordan, brought in revolution, chaos and war.[17] History seemed to be repeating the disruptive episodes of European intervention in the 19th century, with the instrumentalization of local actors by foreign powers[18] and the importation of external conflicts, a situation that Ghassan Twaini, a notable publicist and minister, has described as a "war for others."[19]

However, according to Lijphart, external pressure should have reinforced Lebanese consensus democracy, not broken it up.[20] Lijphart acknowledges this was not the case because the pressures took place within a system already weakened by the excessive rigidity of its constitutional arrangements, which fell short of safeguarding consensus. Indeed, the evidence shows that domestic issues were decisive in triggering Lebanon's recurrent and cumulative crises: 1841-3, 1845, 1858-61, 1943, 1952, 1958, 1975-90, 2005-08. All these crises witnessed sectarian tension and conflict precisely over existing institutions and the political communalism institutionalized in the "Lebanese formula." Moreover, in several instances, domestic issues proved more intractable than regional and international problems.

Is federalism more democratic?

Included among the detractors of the Lebanese formula is a group of analysts and political leaders who criticize what they consider to be its unfinished decentralization. According to them, a plural society such as Lebanon cannot content itself with personal federalism organized through a code of personal status and an electoral law whose devices, while relatively functional during periods of civil peace, have proven to be highly inefficient during periods of discord. Thus, a call for regional autonomy in the name of freedom and the defence of "cultural pluralism" was made by the Lebanese Front during the civil war.[21] It was, moreover, revived by Christian political parties such as Kataeb and the Lebanese Forces in the face of renewed sectarian tension in the 2000s. For them, *ta'âyush*, conviviality, requires voluntary choice through real autonomy of the communities – in other words, without physical or legal constraint by the central power over the sectarian elements. The sound working of consensus democracy therefore involves the territorialization of sectarian identities. Not only do these voices

16 Paradoxically, during the years Syria occupied Lebanon after the civil war (1989-2005), its authoritarian rule suppressed domestic sectarian tensions or kept them under cover, since Damascus clientelized each sectarian group and imposed its decisions on all.

17 Farid El-Khazen, *The Breakdown of the State in Lebanon, 1967-76,* (Cambridge MA: Harvard University Press, 2000).

18 Daad Bou Malhab Atallah, *Le Liban, guerre civile ou conflit international? (à partir du 19e siècle)*, (Beirut : s.n, 1980).

19 Ghassan Tuéni, *Une Guerre pour les autres,* (Paris: J.-C. Lattès, 1985).

20 Lijphart, *Democracy in Plural Societies,* p. 154; Michael Hudson, "The Problem of Authoritative Power in Lebanese Politics: Why Consociationalism Failed," in Nadim Shehadi and Diana Haffar Mills (eds), *Lebanon, a History of Consensus and Conflict*, (Oxford: Centre for Lebanese Studies, 1988), pp. 224-40. Of which p. 237.

21 The Lebanese Front was a coalition of the main Christian political parties and forces fighting the "Islamic and Palestinian forces" in 1975. Walid Phares, *Al Ta'addudiyya fi Lubnân [Pluralism in Lebanon],* (Beirut: s.n., 1979); John Entelis, "Ethnic Conflict and the Re-emergence of Radical Christian Nationalism," *Journal of South Asian and Middle Eastern Studies* 2 (1979): 6-25.

strongly recommend monitoring by each community of its educational system and cultural affairs, but even the appropriation and redistribution of local resources, and especially control of its economic cooperation and political relations with foreign countries. This represents a trend towards decentralization that could amount to federalism and include even the right to conclude separate international agreements, as in the example of Switzerland's cantons. In other words, proponents of decentralization in the name of pluralism covet the regal prerogatives of a central state they prefer weak and consider at most as an authority for accommodation.[22] Therefore, based on the examples of the French-speaking community of Belgium or the authorities of Quebec, a secessionist/sovereigntist option looms on the horizon of the federalist programme, contradicting the choice of a unified territorialized political system that would guarantee a stable democracy for a society with a fragmentary culture.[23]

The 1975-90 war saw not only claims for more sectarian and regional autonomy. It also provided the opportunity to put such claims into practice and test their social and political effects. Such was the case in the regions under the control of the Lebanese Forces party, in the Druze canton where Walid Junblatt imposed his "Civil Administration of the Mountain," and in some others.[24] The de facto implementation of territorial federalism seemingly had two major results. One was the local provocation of a durable exclusion of minorities (sectarian and political). The other was the subjection of the population of the homogenous territory to the arbitrary rule of its sectarian leadership.

With a view to putting an end to the sectarian divisions of the war period, the federal formula was firmly rejected by the authors of the Taef compromise of 1989. At most, administrative decentralization "with a view to development"[25] had to be carried out. The spectre of separatism remained so real, and the dissension so hard to manage for a leadership claiming to represent national consensus, that the decentralization provided by the Taef Accord was purposely emptied of its contents. In the name of national unity, the possibility of promoting local democracy and reviving grassroots political life in order to counterbalance the central power was blocked. What was put forward was the improvement of equality between citizens of all regions and all denominations and their equal access to public services and social opportunities in compliance with the constitution.[26] Indeed, given the economic discrepancies between the five main national districts, and especially between the central districts of Beirut and (Christian) Mount Lebanon on the one hand and the northern, southern and eastern districts on the other,[27] there can be little doubt decentralization might have deepened

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22 Joel Migdal, *Strong Societies and Weak States,* (Princeton: Princeton University Press, 1988), pp. 4, 237 and 264.

23 Arend Lijphart, *Typologies of Democratic Systems* (London: Sage, 1968), p. 212.

24 Judith Harik, "Change and Continuity among the Lebanese Druze Community: The Civil Administration of the Mountain, 1983-90," *Middle Eastern Studies* 29, 3 (1993): 377-99. Elizabeth Picard, "The Political Economy of Civil War in Lebanon," in Steven Heydemann (ed.), *War, Institutions and Social Change in the Middle East,* (Berkeley: University of California Press, 2000), pp. 292-322.

25 Taef Accord, General principles and reforms, III A, "Administrative decentralism," www.monde-diplomatique.fr/cahier/proche-orient/region-liban-taef-en (accessed 1 July 2009); President Elias Hrawi, cited in *Al-Hayât*, 13 December 1989.

26 Article 7 of the 1926 and 1990 versions.

27 Heba al-Laithy, Khalil Abu Ismail and Kamal Hamdan, *Poverty, Growth and Income Distribution in Lebanon* (Beirut: UNDP, 2008), ideas.repec.org/p/ipc/cstudy/13.html (accessed 1 July 2009). The (Christian) region seeking greater decentralization was close to Beirut and enjoyed the highest human development index in the country.

already strong centre-periphery inequalities. In the name of democratization, liberty had to be sacrificed for justice.[28]

The pitfalls of majority rule

In Lebanon, as noted earlier, legislative and executive powers as well as the functions of the judiciary and first class civil servants have been distributed along sectarian lines since the mid-19th century. Under the French mandate, parliamentary seats were allotted to each sect in fixed quotas that were supposed to mirror the demographic composition of the country. In 1932, the only general census ever organized in Lebanon was set as the basis for parliamentary representation. However, the 1932 census included emigrants – 85 per cent of whom were Christian – thus giving Christians a clear majority.[29] Since that time, the 1932 representation of the Lebanese population has served as the basis for the ideological definition of Lebanon as "a state for the Christians and those who want to adhere"[30] and Christian supremacy has been epitomized since independence in the traditional allocation of the state presidency to a Maronite.[31]

While no national census has been conducted since 1932, several surveys published by state or private institutes have shown a steady demographic decline (especially among the Christians, due to urbanization, emigration, the education of women and the general pessimism in the wake of the civil war) and the rapid growth of other communities (especially among the Shi'a, due to improved census techniques but also high birth rates, rurality and rapid upward mobility). In November 2006, a thorough study published in the main Lebanese daily put the total percentage of Christians at 35.33 per cent of the Lebanese living in Lebanon and the Shi'a alone at 29.06 per cent.[32]

Accordingly, there is growing suspicion that sectarian differences in demographic trends have accentuated the inequalities in political representation that already existed as a result of the flawed statistics used to grant the quotas at the time of the mandate. Since independence, each domestic-cum-international crisis has elicited never-ending demands to re-balance the sectarian distribution of seats in state institutions either in the name of *takâmul* ("integration," claimed by the Shi'a) or of *mushâraka* ("participation," claimed by the Sunni). In that sense, the successive crises in Lebanon can be dubbed crises of *adjustment* – not of *reform* – of democracy. Testimony to the salience of the numbers issue is the fact that each political upheaval has been followed by the negotiation and rectification of the balance between Christian and Muslim representation: 58.8 per cent for the Christians in 1920; 56.7 per cent when the representatives first met in 1922;

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28 Even so, the political economy of postwar Lebanon had the effect of accentuating regional and social inequalities. See Ghislain Denoeux and Robert Springborg, "Hariri's Lebanon: Singapore of the Middle East or Sanaa of the Levant?" *Middle East Policy* 6, 2 (October 1998): 158-73.

29 Rania Maktabi, "The Lebanese Census of 1932 Revised. Who are the Lebanese?" *British Journal of Middle Eastern Studies* 26, 2 (1999): 219-41. Without the inclusion of the emigrants, Christians would have made up barely 50 per cent instead of 58.5 per cent of the population.

30 A motto appropriated by Lebanese Forces leader and president-elect Bashir Gemayel, 14 September 1982, quoted in Selim Abou, *Béchir Gemayel ou l'esprit d'un people,* (Paris: Anthropos, 1984), p. 301.

31 Ghassan Salamé, "Small is Pluralistic: Democracy as an Instrument of Civil Peace," in Ghassan Salamé (ed.), *Democracy without Democrats? The Renewal of Politics in the Muslim World,* (London: IB Tauris, 1994), pp. 129-62.

32 Duwayhi, *Al-Nahâr,* 15 November 2006.

54.5 per cent in 1932 and at the time of independence in 1943; and 50 per cent according to the constitutional law of 1990, which confirmed the Taef Accord.

Parliamentary representation at the time of independence and after the Taef Accord[33]

	1943		1992	
Sect	**Seats**	**%**	**Seats**	**%**
Maronite	18	32.7	34	26.6
Greek Orthodox	6	11	14	11
Greek Catholic	3	5.5	8	6.25
Armenian Orthodox	2	3.6	5	4
Armenian Catholic			1	0.8
Protestant			1	0.8
Other Christian	1	1.8	1	0.8
Christian	**30**	**54.5**	**64**	**50**
Sunni	11	20	27	21
Shi'a	10	18	27	21
Druze	4	7.2	8	6.25
Alawite			2	1.5
Muslim	**25**	**45.5**	**64**	**50**

Critics of the Lebanese formula are more and more vocal in denouncing the growing discrepancy between the popular vote and political representation.[34] They demand the adoption of majority rule which, rather than reflecting a distorted weighting for each sectarian group, might offer more democratic and egalitarian representation for Lebanese citizens liberated from the sectarian straitjacket.[35] Would this truly be the case? Behind the requests for secularization and the adoption of a majority system emanating from various sectors of the society – Hezbollah's leadership, of course, but also secular intellectuals from various denominations – many fear the ambitions of the representatives of a sociological majority (namely, the Shi'ite community) who might be tempted to impose its system of meaning and law on all Lebanese. The de-confessionalization of the political system and adoption of majority rule could open the way to democratization *only* if accompanied by the secularization of society: in other words, if the personal statuses which codify the inequalities between Lebanese sects were made optional and a secular and egalitarian Lebanese citizenship were adopted. If de-confessionalization of the state and secularization of society are not implemented simultaneously, the first alone would, with the adoption of a majority system, amount to imposing the political views of the demographically predominant group. Such a "resolution" of the imperfections of the Lebanese system would unfailingly lead to a crisis between the predominant community and the others.

33 Scheffler, "Religious Communalism...," p. 30.

34 According to the electoral list produced by the Ministry of Interior in 2000, one Alawite MP was elected per 9,246 Lebanese Alawites and one Maronite MP per 17,840 Maronites, while a Sunni MP represented 24,984 Sunnis and a Shi'a MP 23,641 Shi'a. Eric Verdeil, "Les territoires du vote au Liban," *Mappemonde* 78 (2005) mappemonde.mgm.fr/num6/articles/art05209.html (accessed 2 August 2009).

35 In the wake of the June 2009 legislative election, Sayyed Hasan Nasrallah, secretary general of Hezbollah (the dominant party among the Lebanese Shi'a), noted that the incumbent majority gained 71 of the 128 parliamentary seats (55 per cent) although results showed that the opposition got 865,012 votes (54.9 per cent).

Thus, Lebanese legislators are faced with contradictory imperatives and dread to adopt change that might have unsettling results. Contrary to what is often written, the constitution is open to change, as seen in the article 95 (1926), while the amended Constitution of 1990 even writes (preamble, § h): "the abolition of political confessionalism is a basic national goal and shall be achieved according to a gradual plan." It also specifies the procedure to be followed in the new article 95.[36] Rather than the constitution, it is the Electoral Law, imposed by the French in 1922 and amended since at the time of each legislative election, that is the institutional linchpin for the sectarian division of the polity and political representation of the society. Moreover, the Electoral Law is meant to preserve the hegemony of a coalition of traditional notables and political entrepreneurs of all sects over a divided population. The Lebanese communal consensus rested on normative premises according to which the agreement among elites negotiated since early 19th century reflected the expectations of the grassroots of each sect, and not only of the alliance of powerful families. However, in a strongly hierarchical society, in which the distance between the *khâssa* (the elite) and the *'amma* (the people) is deeply programmed into collective consciousness, the population has constantly been subject to the sectarian framework, with the general interest ignored.

Anticipating the limits imposed by the regional environment and the lopsided effects that decentralization or the adoption of majority rule might have on the Lebanese sectarian consensus, the legislators of the 1920s drafted a sophisticated Electoral Law.[37] Following the custom established in the 1840s, the Lebanese electoral system, confirmed after the adoption of the constitution in 1926, provides for a single electoral body and a majoritarian first-past-the-post system in multiple-member districts. Therefore, each deputy is supposed to represent his (her) constituency *and* sect as his seat is reserved for his confessional community according to fixed quotas.[38] Some constituencies have homogenous populations, such as the southern *cazas* (sub-districts) of Tyre, Nabatiyeh and Bint Jbayl where in 2009 the population had to elect Shi'ite deputies only; or the central sub-district of Kisrawan, which elected five Maronites. But most constituencies are composites, and candidates must depend on votes from outside their own community. For example, in Beirut II (the Ain Mraisseh and Basta districts), in the 1996 legislative election, four Sunnis and a Greek Orthodox were required to be elected. Several lists of up to five candidates were in circulation, from which

36 Which reads: "(1) The first Chamber or Deputies which is elected on the basis of equality between Muslims and Christians takes the appropriate measures to realize the abolition of political confessionalism according to a transitional plan. A National Committee is to be formed, headed by the President of the Republic, including, in addition to the President of the Chamber of Deputies and the Prime Minister, leading political, intellectual, and social figures. (2) The tasks of this Committee are to study and propose the means to ensure the abolition of confessionalism, propose them to the Chamber of Deputies and the Ministers, and supervise the execution of the transitional plan ..." Lebanese Constitution amended in 1990, www.servat.unibe.ch/law/icl/le00000_.html (accessed 6 August 2009).

37 First adopted in the arrêté 1307 taken by the French Haut Commissaire in Lebanon on 10 March 1922 then reformed in 1929. Pierre Rondot, "L'expérience du collège unique dans le système représentatif libanais," *Revue Française de Science Politique* 7, 1 (1957): 69 ; Abdo Baaklini, "Lebanon," in Abdo Baaklini, Ghislain Denoeux, and Robert Springborg (eds), *Legislative Politics in the Arab World,* (Boulder : Lynne Rienner, 1979), pp. 79-109.

38 See note 32 and Farid al-Khazen, Paul Salem, *Al-Intikhbât al-'ûla fî Lubnân mâ ba'd al-harb* [The First Lebanese Post-War Elections], (Beirut: Dar al-Nahar, 1993).

voters, whatever their community, chose a combination of four plus one. The advantage of the single electoral body with mixed constituencies is that the deputy is elected not only by his own community but also by other communities to which he must be acceptable, since article 27 of the constitution stipulates that "a member of the Chamber represents the whole nation." The purpose of this is to secure cooperation between factions and to calm, at least formally, tensions between sects.

In such electoral system, the nexus in the consensus between sectarian groups is the cartel of elites who originally instigated the consensus itself and who are its main beneficiaries. The use of trans-sectarian electoral lists, adopted on the pretext of transcending group boundaries, ensures that the main leaders *(zu'amâ')* retain domination over the local political scene to the detriment of small candidates and newcomers, while guaranteeing the loyalty of their communal base on a countrywide level.[39] From 1925 to 1975, for example, the As'ads, a powerful family of landowners, maintained their electoral monopoly over the whole district of South Lebanon. Acknowledged as the local Shi'ite *zu'amâ',* the As'ads were the chief architects of the election of the members on their cross-sectarian list, colourless individuals who delivered bundles of votes from their community in return for their seats. Rarely could a candidate run for office outside this system of patronage and intense factionalism.

In principle, another advantage of the single electoral body with mixed constituencies is that it elicits intra-sectarian competition reflecting a variety of political options. In the legislative election of 1960, for example, the voters of Beirut I (the Christian neighbourhood of Ashrafiyeh) had to choose between the two leading lights of the Maronite community. One of these was Pierre Eddé, banker, prime mover in the conservative National Bloc and opponent of the regime of acting President Fuad Shihab. The other was the Kataeb party's founder and leader Pierre Gemayel, who was then allied with this regime. However, by playing with the number and size of electoral constituencies, Lebanese notables of all sects manage to organize cross-sectarian alliances and intra-sectarian competition for their exclusive benefit and together perpetuate their rule over the society.

While conditions for eligibility (being a Lebanese over the age of 25 and having resided in the constituency for more than six months) did not change for more than 80 years, state authorities (the president until 1990, then the Council of Ministers) fixed the number of MPs and the number and size of constituencies to ensure the most supportive parliament. For example, Camille Chamoun (president between 1952 and 1958) reduced the number of MPs from 55 to 44 in 1953 with the intention of sidelining his main opponents. After the civil war, the tailoring of constituencies in accordance with the interests of pro-regime leaders became the rule. This practice garnered such consistent Syrian support that the 2000 version of the Electoral Law became known as the "Ghazi Kanaan Law."[40] Each election saw the adoption of an *ad hoc* Electoral Law. For example, Christians complained that in 2005 two-thirds of their 64 deputies were mainly dependent on Muslim votes owing to the adoption of 14 large electoral districts.

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39 Arnold Hottinger, "Zu'ama in Historical Perspective," in Leonard Binder (ed.), *Politics in Lebanon,* (New York: John Wiley, 1966), pp. 85-105.

40 www.mena-electionguide.org/mena_files/mena_file_654_9.pdf (accessed 10 July 2009). General Ghazi Kanaan was head of the Syrian security services in Lebanon from 1992 to 2002.

In 2009, they secured a return to the Electoral Law of 1960, which allowed more sectarian autonomy in 26 smaller constituencies.[41] Some constituencies were accordingly carved out to ensure the absolute domination of a local leader and his list, such as Walid Jumblatt in the Shuf or Sleiman Frangieh in Zghorta, who would have had difficulty in imposing themselves on large constituencies.[42] However, in the entire postwar period other constituencies have continued to include several sub-districts. One such constituency is Baalback-Hermel, where six Shi'a of Hezbollah allegiance could impose their two Christian and two Sunni allies on a sweeping electoral list nicknamed *mihdalla* ("steamroller") by the population.

Beyond the issue of gerrymandering electoral districts, the ever-changing Electoral Law possessed several procedural deficiencies and technical problems that have never been addressed in 80 years.[43] Procedurally, there was no comprehensive system for legal appeal and competencies for adjudicating complaints overlapped. Second, there were virtually no regulations on campaign finance and media. Third, there were uncontrolled abuses of state resources and power by candidates. Technically, Lebanon did not have mandatory secret balloting and, in the absence of pre-printed uniform ballots, candidates had full opportunity to manipulate voters, mainly through rampant vote buying. Also, voter lists were not updated as a result of the administrative disorganization over 15 years of war. Consequently, while young and possibly new voters were not allowed to participate, candidates were able to secure the "votes" of people long dead or living abroad.

This last point is all the more important because Lebanese were bound to vote in their "village of origin," a place fixed at the time of the French mandate when a large proportion had already moved to the cities or emigrated. The result was a growing discrepancy between the "legal country" – the population of all the regions who sent representatives to the national parliament – and the "real country" – the population living and working in Greater Beirut. For example, the eastern district of Beqaa, whose population was estimated at around 574,000 in 2001, counted 536,000 names on the voters' list in 2009 – a one-to-one ratio — and one MP for 25,000 residents. By contrast, in Mount Lebanon (the regions around Beirut) the ratio was 2 inhabitants per 1 voter and one MP for 46,000 residents.[44]

The campaign and the election were the high points of the system. The candidate would make a tour of local personages, particularly clerics with social influence, promising his constituency public funds for roads, telephones, running water

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41 Lebanon, Electoral Law adopted 26 April 1960. See Raymond Sayegh, *Le Parlement libanais,* (Beirut: Lebanese University, 1974).

42 Sleiman Frangieh lost the three Maronite seats of Zghorta in the 2005 election, because Zghorta was at the time part of a larger electoral district including Tripoli, which had a large Sunni electorate. He regained them in the 2009 election, when the *caza* of Zghorta reverted to being a constituency of its own.

43 These deficiencies and problems are discussed by Julie Choucair-Viziso, "Lebanon: the Challenge of Reform in a Weak State," in Marina Ottaway and Julie Choucair-Viziso (eds), *Beyond the Façade,* (Washington DC: Carnegie Endowment for International Peace, 2008), pp. 115-36.

44 Sources: www.moe.gov.lb/NR/rdonlyres/2B3E4CAE-BD18-4106-A6B3-F42DDD72AAC9/0/Chap1Population.pdf (accessed 10 July 2009); and http://blacksmithsoflebanon.blogspot.com/2009/06/official-voter-statistics-bekaa.html (accessed 10 July 2009).

	Population 2001	Voters 2009	Deputies
Mount Lebanon	1,600,000	783,000	35
Beqaa	574,000	536,000	23

While the population of the Beqaa is over-represented, the population living in Mount Lebanon is under-represented in parliament.

and even disgorging largesse in exchange for a pledge of votes.[45] At their boss's side, a squad of henchmen and supporters saw to it that the operation went smoothly, intimidated bothersome rivals, prodded the population to vote "the right way" and made sure the vote count turned out favourably.[46] Due to prior arrangements, even between incumbents and opponents, most electoral results were no surprise. They reinstated a high proportion of members from prominent families or their satellites, while sidelining members of secular parties and proponents of a national programme. They tended to make of parliament a closed club, a microcosm of families, with clans representing local or communal interests and private economic interests falsely claiming popular representativeness. Between 1922 and 1972, 26 families uninterruptedly monopolized 35 per cent of the seats, with a constant increase in the "dynastic" pattern of parliamentary representation.[47]

All this shows that Lebanon's electoral system is the true reflection of a distribution of power negotiated in the early years of the republic. First, the system institutionalized an uneven communal distribution of power. Then, the law helped enhance the power of the political patrons: heads of extended families and clans, rich landowners and real estate investors, joined after the civil war by ex-warlords who had become MPs, ministers and/or entrepreneurs. Each patron acts like a feudal lord over his constituency, where he encounters virtually no opposition. He is able to choose members for his list according to the electoral or financial benefits they can bring. At the government level, the "grand coalition" works thanks to the reproduction of its members and absence of popular control. The voters sanction their elected representatives for the personal services they may or may not have rendered, not for realizing the public objectives that adorn their campaign speeches. Far from reflecting trans-sectarian cooperation at the national level, the system of pluri-communal lists consolidates local sectarian patronage. To sum up, in spite of universal suffrage, the Lebanese consensus system remains a census-based system in which, at best, the populations of each sect can be considered as "secondary beneficiaries."[48]

Power-sharing, Citizenship and the Inaccessible Reform

In the wake of the civil war, Lebanese legislators and their foreign protectors were more than ever aware of the need to change the rules of sectarian power-sharing in order to reconcile the fractured nation. Yet beyond the display of reformist intentions, power practices during the 15 years of Syrian tutelage renewed the usual confessionalism, clientelism and corruption, and even accentuated them, leading the country once again to the brink of disintegration. The serious crisis of 2005-08 had the cathartic effect of forcing the Lebanese leader-

45 The per capita cost of campaigns and running an election has been known since independence as one of the highest in the world. A close aide to Minister of Interior Ziyad Baroud estimated that each of the 2,000,000 potential voters in the legislative elections of June 2009 cost $ 100 on average (personal communication, 14 April 2009). *Newsweek* (9 June 2009) put Saudi spending on the campaign at $ 750 million.

46 As there were no pre-printed lists, each local patron had ballot bulletins printed in a variety of fonts in order to be able to trace the origin of each bulletin.

47 Michael Hudson, *The Precarious Republic. Political Modernization in Lebanon,* (New York: Random House, 1968), p. 268; Samir Khalaf, *Lebanon's Predicament* (New York: Columbia University Press, 1987), pp. 126-35.

48 The term is Ghassan Salamé's in "Small is Pluralistic," 134. I am referring to the critique of the French electoral system by Daniel Gaxie, *Le cens caché: inégalités culturelles et ségrégation politique,* (Paris: Le Seuil, 1978).

ship of all denominations to reopen the dialogue on national reform, this time under pressure from a vibrant civil society. As discussed below, a new Electoral Law is finally on the table, intended to extricate the country from its institutional deadlock. However, the question remains of the will and capacity of the national elite to adopt and implement it.

Between principles and practices

At odds with the legend that conflicts in Lebanon always end "without victor and vanquished," the civil war saw the rise of the Shi'a and the political and military defeat of the Christians. Reflecting the "real" demographic composition of the society was no longer the purpose of the law makers. Rather, "consensus" was now understood as a negotiation between sectarian elites in order to reflect the new balance of power in the regional environment.

In that sense, the legislators gathered in Taef in October 1989 under the patronage of Saudi Arabia and Syria to put an end to the civil war confirmed the rationale of power-sharing and protection of minority rights, which remained the distinct characteristics of Lebanese politics. They even went so far as to accept the principle of awarding the three presidencies (of state, parliament and Council of Ministers) to the Maronites, the Shi'a and the Sunnis respectively. However, they departed from the pretence of reflecting demographic reality and adopted a 50:50 ratio in the distribution of seats between Christians and Muslims in higher state institutions, beginning with parliament. This new ratio was inscribed in the revised constitution and, in order to guarantee minority rights, a two-thirds majority in parliament and government was required for the adoption of "crucial decisions."[49] By adopting these provisions, they made it clear that they viewed inter-sectarian agreement as the basis for democratic government, not demographic balance.

However, between 1990 and 2005 the Syrian military presence blurred the Lebanese political landscape and masked the lopsided effects of the new constitutional power-sharing, namely endless patronage competition between the three presidents. While the Ba'athist power marginalized challengers and promoted its local allies and clients, especially in the legislative elections of 1992, 1996 and 2000, Syrian rule had a double-edged effect on the Lebanese consensus. On the one hand, it suspended the traditional Christian-Muslim dynamics because large sectors of the Christian communities were excluded from the legitimate political scene after their leaders denounced the Syrian occupation and boycotted the election of 1992. On the other, it deprived Lebanese elites of their political responsibilities and weakened the tradition of bargaining for power-sharing. This was brought to light after the sudden Syrian military withdrawal in April 2005 following Rafic Hariri's assassination: sectarian groups were no longer able to uphold a durable deal among themselves without the pressure of a trusteeship power.[50]

In the tragic years following the Syrian retreat (April 2005-May 2008), Lebanese elites – incumbents and opponents alike – underwent a deep crisis of

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49 Amendments to the Lebanese Constitution, 21 September 1990, Article 24/1, article 65/5 and 77. www.servat.unibe.ch/law/icl/le00000_.html (accessed 6 August 2009).

50 Although they concluded several local tactical deals, even between fierce foes such as Hezbollah and the Lebanese Forces in order to ensure their success in the May-June 2005 legislative election.

legitimacy. The political class, divided between a pro-Western, anti-Syrian "14 March" camp and an anti-Israeli, pro-Syrian and Iranian "8 March" camp, were radically opposed on regional and domestic political issues.[51] As noted above,[52] dissension was strong enough to paralyze the government, leave the country without legal institutions for six months and provoke deadly street fighting. Once again, it was only through foreign intervention that a truce could be imposed and formal constitutional life patched up through the temporary return to the 1960 Electoral Law and a mutual commitment to return to the "table of national dialogue" and to promote institutional reform.[53]

What reform should mean

Twenty years after the adoption of the Taef Accord, the new political dispensation has proven powerless to bridge the rift between communities and to reenforce the "common good," which is the foundation of a political project. On the contrary, it has contributed, once again, to upholding the social order and preventing the communal society *(mujtama' ahlî)* from opening itself up and becoming a civil society *(mujtama' madanî)* by delaying and even banning the access of the people (*ahl*) of each community to the political arena.[54] In the meantime, the setbacks associated with political sectarianism have made ever more manifest the need for in-depth reform of the consensus formula.

Overcoming the crisis implies moving on from a democracy with a fragmentary culture to a stable democracy.[55] However, hasty reform could tear a weak social fabric apart, as each proposal might be interpreted as a threat by one community or another, and by clerics of all denominations.[56] Because the margins for the Lebanese democracy are so thin (and all the thinner for being hedged around by foreign constraints), a slight change, even correctly interpreted, is liable to entail great consequences.

Observation of the situation allows for the suggestion that such change may be possible and expected by the society. During the first three decades of independence (1943-75) most of the tensions in the country (except the 1958 crisis) were economic and social.[57] Moreover, in the years prior to the civil war, Lebanese were conceptually and practically straying from the values and hierarchies imposed by

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51 Nadim Shehadi, "Riviera vs Citadel: the Battle for Lebanon," *Open Democracy,* 13 July 2007, www.opendemocracy.net (accessed 8 August 2009). On 14 March 2005, one million people demonstrated against the Syrian military presence in Lebanon. On 8 March, Hezbollah and minor pro-Syrian parties went to the streets to "thank Syria" for its role in Lebanon.

52 Lebanon in Strife: The Search for Causes and Remedies, *supra*.

53 *The Doha Agreement,* 21 May 2008 www.nowlebanon.com/NewsArticleDetails.aspx?ID=44023&MID= 115&PID=2 (accessed 8 August 2009).

54 Ussama Maqdisi, "Reconstructing the Nation-state. The Modernity of Sectarianism in Lebanon," *Middle East Report* 200 (1996), www.merip.org/mer/mer200/makdisi.html (accessed 12 July 2009).

55 Lijphart, *Typologies of Democratic Systems,* p. 211.

56 When President Elias Hrawi suggested permitting civil marriage in 1996 and, two years later, creating an optional civil status in conformity with the Constitution, the assembly of Catholic bishops and the Sunni *muftiyya* joined in organizing popular demonstrations. As a result, the project was shelved in parliament.

57 A survey commissioned by Theodor Hanf revealed that in the thick of the war the majority of interviewees considered the conflict "between rich and poor people" to be more important than the conflict between communities. Theodor Hanf, *Coexistence in Wartime Lebanon. Decline of a State and Rise of a Nation,* (London: IB Tauris, 1993), pp. 495ff. This was still valid between the end of the war and the summer 2001, when almost all the domestic conflicts were serious social conflicts.

sectarianism. This trend was reflected in the increase in trans-sectarian marriages and the development of secularist political parties. The new collective *habitus* favoured trans-sectarian exchange and the working-out of the national interest. Modern citizenship was developing through a tension between two logics, sectarianism and individualism, as indicated by the frequent adoption by political leaders of the term *muwâtin* (citizen) to appeal to communal grassroots.[58] Afterwards, citizenship, which was systematically thwarted by sectarian militias during the civil war, experienced a short-lived but dazzling boost in the pacifist demonstrations in the summer of 1987. In the aftermath of war, it has been re-emerging in conjunction with the boom in development, environment and advocacy NGOs whose ethics and recruitment indicated the inauguration of a dynamic trans-denominational public sphere.[59] Today, this vibrant public sphere is superimposed on the mosaic-like sectarian structure. The network structure and mosaic structure interconnect and interact on crucial occasions, especially during pre-electoral phases. However, cross-sectarian dynamics and nationwide initiatives continue to be systematically thwarted by the constitutional rules of the game.

This is why the sociology which underlies the Lebanese constitutional architecture needs to feed the system with indicators of anything that might take change into account. These indicators include demographic growth, distribution of wealth between and within communal groups, social mobility, individualization of social relations, interest-based mobilization and the formation of programmatic parties. All of these are social, economic and cultural facts buried under the exclusive account of sectarian identities in the legal-constitutional agenda.[60] The state needs to break free from the religious, and the constitutionalist has to free up the areas of subsidiarity mentioned in the constitution, such as the creation of a civil status that might constitute the legal recognition of a trans-denominational public sphere. To begin with, Lebanon has to implement the injunction in article 95 of the constitution, namely to "take the appropriate measures to realize the abolition of political confessionalism according to a transitional plan."[61]

The new Electoral Law: dream and delusion

In August 2005, because the political crisis was becoming more serious, the government set up a special commission, known as Fuad Butros Commission after its president, to work out a draft Electoral Law. The draft presented in 2006 contained several substantial proposals. The most important of these were: (1) replacing the current first-past-the-post voting system with a mixed system combining the majoritarian system (for 77 deputies out of 128) and the proportional system (51 deputies) to prevent skewed results; (2) establishing an Independent Electoral Commission to prepare for the elections; (3) allowing expatriates to vote from their country of residence; (4) lowering the voting age from 21 to 18 years; and (5) introducing a quota of 30 per cent for women's candidates.

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58 Nawaf Salam, *La condition libanaise : des communautés, du citoyen et de l'État,* (Beirut: Dar An-Nahar, 1998).

59 Karam Karam, "Associations civiles, mouvements sociaux et participation politique au Liban dans les années 1990," in Sarah Ben Nefissa (ed.), *ONG et Gouvernance dans les Pays Arabes,* (Paris: UNESCO, 2001), pp. 57-76.

60 Rabbath, *La Formation historique,* pp. 630ff.

61 See *supra* note 36.

The system proposed by the Butros Commission combined aspects of both systems recommended for divided societies, consociationalism and centripetalism.[62] While ensuring stability through consociational elements, such as the formula for representation and the election of a certain number of parliamentarians in small districts *(cazas)* corresponding to their confession, the proposal aimed to promote the formation of multi-sectarian parties through the establishment of multi-sectarian lists necessary for being elected in the *muhâfazât*.

Whereas the new law voted on by parliament on 29 September 2008 drew on several provisions in the Butros Commission's report, the core proposal in the draft was rejected. Majority and opposition leaders who publicly voiced support for democratic reform deliberately failed to address the more important issues and rejected change that might threaten their hold on power. Thus, parliament blocked or postponed key points such as the women's quota, the mixed proportional majority system, the right of Lebanese abroad to vote and lowering the voting age. Finally, the Ministry of Interior was able to impose only minor technical improvements in a (failed) attempt to limit electoral rigging in the legislative election of June 2009.

As many of the proposed reforms were meant to undermine the sectarian leaders' stranglehold on power, level the playing field, make room for new types of alliances, and eventually give rise to new leaders, it is not surprising that the MPs elected in 2005 blocked or delayed them. Moreover, there is little hope that the parliament elected in 2009 (which is sociologically identical) will differ.

The problem is less that sectarian elites are barely democratic, if at all, a fact easily explained by the (clientelist) political economy of the country and the (traditional) mode of access to power. It is more the absence of legal means to urge or even compel these non-democratic elites to make consensual choices that would really be democratic.[63] Together, the ruling sectarian coalition and its sectarian challengers monopolize the centres of power thanks to the reproduction of their members and the absence of independent popular control.

Finally, democratization of the "Lebanese formula" would mean a change in the mode of selecting the national elite. Rather than through an electoral arithmetic balance that is indefinitely argued over, this change might be brought about by diversifying the instances of social reproduction and by favouring the interactions between members of civil society and the political elite, even though the latter can be expected to resist any erosion of their power. In sum, the reform of consensus democracy implies its programmed obsolescence.

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62 Arend Lijphart, "Constitutional Design for Divided Societies," *Journal of Democracy* 15, 2 (April 2004): 96-109.

63 According to transitologists such as Dankwart Rustow and Adam Przeworski. John Waterbury, "Democracy without Democrats? The Potential for Political Liberalization in the Middle East," in Salamé (ed.), *Democracy without Democrats?*, pp. 111 ff. In Przeworski's view, in a situation of insoluble conflict of interests, a pact concluded by some non-democratic elites might entail some democratic practices "out of habit."

Ruling with or without a Constitution: Israel and Palestine

SUNE PERSSON

Almost all states have a constitution that lays down the foundations of their political systems. Constitutions are important attributes of sovereignty and new states usually swiftly promulgate their constitutions as symbols of their independence. But for "constitutionalists" like Americans, a constitution is much more than just a symbol: its political function is to constrain the range of the state's power in both a procedural and substantive way. In this perspective, there is a direct correlation between constitution and democracy: by means of a constitution the state shall be turned into a state founded on legal principles. The state shall be based on the rule of law and not on the capricious decisions of certain individuals or groups.

Over recent decades, in tandem with globalization in general, there has been a "constitutionalization" of many countries, in the sense of new constitutions, new bills of rights and a general transfer of power from representative bodies to judiciaries. Ran Hirschl has labelled this a transition to "juristocracy."[1]

The United Kingdom, plus some small British dependencies, are interesting exceptions to this rule. The British attitude has hitherto been that a political system can survive only by the strength of its support from the people. Constitutions are likely to be changed according to the political circumstances. Just look at, the British would say, the many constitutional changes in France since 1789 and in Germany since the imperial constitution of 1871.

Israel is another interesting case of a state with no constitution, although for entirely different reasons.

The non-Constitution of Israel

The State of Israel was proclaimed on 14 May 1948 by David Ben-Gurion, head of the Provisional State Council. Ben Gurion read the proclamation of the establishment of the State of Israel:

> The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious, and national identity was formed. Here they achieved independence and created a culture of national and universal significance. Here they wrote and gave the Bible to the world.

1 Ron Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism,* (Cambridge MA: Harvard University Press, 2004).

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> The State of Israel will be open to the immigration of Jews from all countries of their dispersion; will promote the development of the country for the benefit of all its inhabitants; will be based on the principles of liberty, justice and peace as conceived by the Prophets of Israel; will uphold the full social and political equality of all its citizens, without distinction of religion, race or sex; will guarantee freedom of religion, conscience, language, education and culture; will safeguard the Holy Places of all religions; and will loyally uphold the principles of the United Nations Charter.[2]

The problem with this lofty proclamation about, among other things, the equality of all citizens of the State of Israel, is that it has no judicial status. To complement the proclamation, the founding fathers of Israel immediately set to work on a written constitution for their new state. This initiative, however, was terminated in 1950 as a result of fundamental disagreement among leading politicians about the very foundations of the state. A great majority of politicians, particularly those from the socialist Labour Party, *Mapai,* wanted a secular state on the model of the liberal European democracies. *Mapai* was by far the strongest political party at the time. Even so, in the first elections in 1949 it failed to achieve a majority in the Israeli parliament, the *Knesset.* From that time on until its fall from power in 1977, *Mapai* needed the support of some of the religious parties in order to be able to form a coalition government with a parliamentary majority. The religious forces in 1950, as today, demanded that the state's Jewish character be anchored in the constitution. Moreover, the ultra-Orthodox *Agudat Yisrael* party opposed a written constitution, arguing that only God was able to make laws. *Mapai* was in close alliance with *Histadrut*, then probably the most powerful trade union in the world. We can take it for granted that the then mighty *Mapai* was not at all interested in delegating some of its political power to the judiciary, or to be constrained by a constitution or bill of rights. The *Mapai-Histadrut* political elite was almost exclusively Ashkenazi (Jews who had mainly immigrated from Europe or to some extent from North America, South Africa and Australia).

The pragmatic way out of this deadlock was simply to cease work on a constitution and leave the whole question to the future. Moreover, Israeli leaders at that time were in the middle of a war that threatened the very existence of the new state. They also had to contend with hundreds of thousands of Jewish immigrants, whom the state had to settle and take care of. In these dramatic circumstances, constitutional matters were regarded as, at most, secondary problems.

Since 1950, there have at long intervals been on-and-off discussions about the need to devise a written constitution for Israel. As late as 2006, the leaders of the three major Israeli political parties, Olmert (*Kadima*), Peretz (Labour) and Netanyahu (*Likud*) declared their support for a written constitution.[3] All these renewed attempts have all run out into the Israeli sand. The fundamental disagreements among the main political parties remain and they are still too wide to be bridged.

The fundamental question now, as in 1950, is the relationship between the State of Israel and the Jewish religion. The pragmatic solution of 1948, that the

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2 Oscar I. Janowsky, *Foundations of Israel*, (New York: Van Nostrand, 1959), pp. 173ff.

3 *Ha-Aretz*, 14 Feb 2006, as quoted by Isabell Schierenbeck, *Det splittrade Israel – politiska och sociala skiljelinjer* [The Split Israel - Political and Social Conflict Lines], (Lund: Studentlitteratur, 2006), p. 78.

status quo not be disturbed, has by and large persisted until today. Religious forces in Israel have, therefore, been able to retain almost all the privileges they have held from the time of the British mandate and, indeed, since the era of Turkish Ottoman rule. The Ottoman commonwealth, including Palestine, was locally governed through the *millet* system. Religious communities, the *millets,* were granted extensive authority, not least in political matters, under the Turkish caliphate.

Israeli strategy since 1950 has been to let parliament make successive so-called Basic Laws to regulate the principles on central political matters. The concept is thus of the step-by-step laying of the foundations of what will become, when this law-making is complete, the *de facto* constitution of the State of Israel. By 2008, 14 Basic Laws had been passed, among them laws on:

- the *Knesset,* 1958, amended in 1985;
- the lands of Israel, 1960;
- the president of the state, 1964;
- the government, 1968, replaced in 1992;
- the state economy, 1975;
- the Israeli army, 1976;
- Jerusalem: The capital of Israel, 1980;
- the judiciary, 1984;
- the State Comptroller 1988;
- freedom of occupation, 1992; and
- human dignity and liberty, 1992.[4]

What is notable is that none of these Basic Laws regulates the relationship between the State of Israel and the Jewish religion, nor is there any such law specifically regulating basic political rights. In 1985, Arian could write that "the lack of a basic law that covers human and civil rights is taken for granted as a political necessity. No bill of rights exists in the Israeli system."[5] Moreover, these Basic Laws can be amended or annulled by ordinary vote of the *Knesset*: the Basic Law on the *Knesset* had already been amended eight times by 1993.[6]

However, Israel today regards the judiciary as the third, independent, arm of the state. The Israeli Supreme Court, like its American counterpart, has over the years gradually established itself as a kind of constitutional court. The decisive year was 1992, with the advent of the Basic Law on human dignity and liberty, which has been regarded as an Israeli bill of rights. Since then, the Supreme Court has issued a number of ruling guaranteeing rights of the Israeli citizens to freedom of speech, freedom of assembly, freedom of religion and equality between the sexes, and has also recognised equal rights for homosexuals. The Supreme Court now also hears petitions from individuals appealing for redress against government bodies. In 1995, the Supreme Court assumed the power of judicial review of *Knesset* laws, in cases where these violate the Basic Laws.

There were obvious demographic, political and economic reasons for the constitutionalization of Israel in the early 1990s. At the time, previously "marginal-

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4 Susan Hattis Rolef (ed.), *Political Dictionary of the State of Israel*, (Jerusalem: Keter Publishing, 1993), pp. 54ff; *Facts about Israel*, (Jerusalem: Israel Information Center, 2008), p. 85.

5 Asher Arian, *Politics in Israel. The Second Generation*, (Chatham, NJ: Chatham House, 1985), p. 77.

6 *Rolef,* Political Dictionary, p. 55.

ized groups in Israel, such as residents of peripheral development towns and poor urban neighborhoods (mainly *Mizrachi* [Oriental],) Jews and blue-collar immigrants from the former Soviet Union), Israeli Arabs from ethnically mixed towns, and lower-income religious groups, [had] steadily gained political power." Hirschl has calculated that these peripheral groups increased their seats in the *Knesset* from 25 in 1981 to 40 in 1992 and to 62 in 1999 (out of a total of 120 seats). By contrast, members of the *Knesset* (MKs) associated with the secular, bourgeois policy agenda (almost all of them Ashkenazi) declined from 95 in 1981 to 80 in 1992 and to a minority of 58 in 1999. Owing to the dramatic demographic changes among Israelis, it was easy for the Ashkenazi political elite to foresee that the Ashkenazi would soon be in a minority and thereby lose their grip on a democratic Israel. A group of 32 MKs consistently advocated for this constitutionalization. This group, comprising 18 Labour MKs, 8 from *Likud* and 6 from *Meretz*, represented a very rare cross-party, left-right coalition, but almost all of them were Ashkenazi. The focus of important political matters was now transferred to an arena that was in theory apolitical, but where the ideology of the secular, urban and Ashkenazi elite predominated. Of the 36 judges serving on the Supreme Court from 1948 to1993, all were Jews, 30 were Ashkenazi and none was Arab.[7]

This empowerment of the judiciary also meant that controversial no-win political issues were "outsourced" to the judiciary. Such matters have included the perennial question of who is a Jew, minority rights inside Israel and Israeli policy in the occupied territories. In 1999, the Supreme Court outlawed the "moderate physical pressure" then used by the Israel General Security Service on Israeli Arab and Palestinian detainees. In 2004, the court approved the building of the Israeli security barrier, but ruled on the need to balance Israeli security interests and the human rights of the Palestinians. In several cases since then, the Supreme Court has ordered the government to move the security barrier to alleviate damage to Palestinian villagers.

As in the United States, the Israeli Supreme Court's self-made arrogation of power as a de facto constitutional court has prompted heavy criticism. In Israel's case, this has been from the religious, Mizrachi and rightist political forces, which often overlap. They argue that the Supreme Court is still dominated by secular and Ashkenazi lawyers and pursues its own political agenda, identifying itself with Israel's secular, liberal, urban and Ashkenazi elements, thus no longer mirroring current demographic and political realities in Israel. For them, the Supreme Court has become a threat to Israeli democracy. This trend became more apparent after 1992, when the Supreme Court began to hand down a series of decisions on controversial political matters. In 1999, some 250,000 people participated in a mass demonstration in Jerusalem against the court. The demonstration was led by Rabbi Ovadia Yosef, the most important Mizrachi religious leader and also mentor of the Shas Orthodox party. Ovadia declared the justices of the Supreme Court to be "wicked, stubborn, and rebellious ... and they are the cause of all the world's torment."[8]

However, secular Israelis and many Israeli Arab citizens view the Supreme Court as the ultimate guarantor of a liberal Israel. In various opinion polls, the

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7 *Hirschl,* Towards Juristocracy, *pp. 50-74, quote on p. 55.*

8 *Ibid., p. 71.*

Supreme Court has been held in high esteem, unlike Israel's political parties and the Knesset. It has been regarded as a professional agency, independent of day-to-day political considerations.

British Mandatory Defence (Emergency) Regulations, 1945

On 21 May 1948, the Provisional State Council of Israel proclaimed a state of emergency in Israel. This state of emergency is still in force. The emergency regulations are based on the *British Mandatory Defence (Emergency) Regulations* issued by the British high commissioner to Palestine on 22 September 1945 to quash Jewish "terrorism" against British rule in Palestine. The regulations were at the time fiercely criticized by Jewish settlers in Palestine. But today, in accordance with them, the Israeli government is empowered to implement emergency measures to provide for "the defense of the state, the security of the public and upholding necessary distribution and services." Any minister can order curfews, censorship and administrative detentions for unlimited periods and without trial. "When [the Jewish leadership] turned from subjects to administrators, [they] accepted the powers afforded by the emergency regulations and often used them to shortcut the parliamentary process."[9] This can be done by decree, without scrutiny by parliament or the courts.

The 1948 regulations have subsequently been amended and complemented by other special laws. In September 1948, after the assassination of the UN mediator on Palestine, Count Folke Bernadotte of Sweden, the provisional government issued a decree on the "Fight against Terrorism," whereby the Jewish underground organizations Irgun (then led by Begin) and LEHY (or the Stern Gang, then led by a triumvirate, among which Yitzhak Yzernitsky, who later changed his name to Shamir), were outlawed as terrorist organizations. After 1948, these emergency laws were strongly criticized by Begin, who saw them as anti-democratic and a "shameful vestige of alien rule." Between 1948 and 1966, the emergency regulations were used to keep Israeli Arabs under military administration. Toubi, an Israeli Arab MK, condemned them as anti-democratic and for being "used to oppress the Arab population of Israel."[10]

Several private members' bills to abolish the emergency regulations have been introduced in the Knesset, but none has passed. By a great irony, Shamir himself, one of the leaders who took the decision to execute Bernadotte in 1948, during his prime ministership of Israel (1983-84, 1986-92) used these regulations to brand the PLO as a terrorist organisation, thus prohibiting Israelis from having contact with it.

The Palestinian Constitution

When Arafat took over the leadership of the Palestinian Authority in 1994, he decreed all Israeli military orders issued from 1967 onward to be no longer valid and declared those laws in force before the Israeli occupation as valid. A legal *status quo ante* June 1967 was established. That implied that the Gaza Strip was

9 Arian, *Politics in Israel*, p. 180.

10 Sune Persson, *Mediation and Assassination: Count Bernadotte's Mission to Palestine in 1948,* (London: Ithaca Press, 1979), pp. 207ff; Rolef, *Political Dictionary*, pp. 99f.

to be ruled according to Anglo-Saxon common law, as applied during the British mandate up to 1948, plus the civil and military law in force during the Egyptian administration between 1948 and 1967. On the West Bank, the legal system was based on British Mandate regulations plus Jordanian laws from the 1950s and 1960s. Among the British Mandate laws were the infamous emergency regulations of 1945 discussed above. In addition, Ottoman laws, such as the Land Code of 1858 and Civil Codes of 1869-76, remained in force. At least one leading Palestinian lawyer argued that Arafat's decree of 1994 in fact restored the Egyptian and Jordanian constitutions over the West Bank and the Gaza Strip. However, the lack of any binding Palestinian constitutional document made it possible for Arafat to duck from Gaza law in one instance to West Bank law in another, or to rely on no legal reference at all.[11]

There is not yet a Palestinian state. However, the PLO adopted a Draft Basic Law for the National Authority in the Transitional Period in 1994. This Basic Law was discussed in the Palestinian Legislative Council (PLC) following its election in 1996. Several PLC deputies regarded this law as a crucial matter since, prior to 1996, the very existence of the council was based upon PLO agreements with Israel and these PLC deputies now wanted to anchor the new institutions in Palestinian law. Many of them wanted a democratic Palestine, founded on a strong constitution, and thus differing from political systems in the rest of the Arab world. These Palestinian constitutionalists were now assisted by the law school at Bir Zeit University, as well as by Palestinian research institutes and foreign experts. Constitutional issues came to be widely and openly discussed in Palestinian society. In 1997, the PLC adopted the Basic Law after its second and third readings. The final draft was probably the most liberal and democratic constitutional document in Arab history.[12]

By 1997, only the approval of President Arafat was needed to bring this Basic Law into force. This endorsement by *al-Ra'is* was not forthcoming until 28 May 2002, when Arafat signed the law. The PLC had by then made further amendments. For the five years between 1997 and 2002, Arafat refused to approve the PLC version of the Palestinian constitution on the grounds that a Basic Law was a matter for Palestinians everywhere and should be dealt with by PLO bodies, representing *all* Palestinians. However, the confrontation since 1997 between the PLC and the president over the constitution for a state of Palestine was never brought to a head by the political opposition to Arafat. The Palestinian opponents did not want to force such an internal feud into the open while the conflict with their main adversary, Israel, continued. PLC had to be content with the fact that there would be no progress on this question until Arafat himself wanted to act.

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11 Yezid Sayigh and Khalil Shikaki, *Strengthening Palestinian Public Institutions.* Independent Task Force Report. Sponsored by the Council on Foreign Relations. Michel Rocard, Chairman, ("The Rocard Report"). Released 28 June 1999, p. 31; Nathan J. Brown, "Constituting Palestine: The Effort to Write a Basic Law for the Palestinian Authority," *Middle East Journal* 54, 1 (Winter 2000): 28-35; Viktoria Wagner, *Palestinian Judiciary and the Rule of Law in the Autonomous Areas. An Introduction,* (Jerusalem: Palestinian Academic Society for the Study of International Affairs, November 2000), pp. 29-55, pp. 95-8.

12 Brown, "Constituting Palestine"; Naseer H. Aruri and John J. Carroll, "A New Palestinian Charter," *Journal of Palestine Studies* XXIII, 4 (Summer 1994):5-17; Adrien Katherine Wing, *Democracy, Constitutionalism and the Future State of Palestine,* (Jerusalem: Palestinian Academic Society for the Study of International Affairs, 1994); Gregory S. Mahler, *Constitutionalism and Palestinian Constitutional Development*, (Jerusalem: Palestinian Academic Society for the Study of International Affairs, 1996).

Only the Israeli reoccupation of the West Bank and US demands for Palestinian reforms during 2002 forced Arafat to accept the Basic Law.[13]

What were the fundamental problems and reasons for the protracted political deadlock over the Palestinian Basic Law? In 1997, a leading Palestinian political scientist, Khalil Shikaki, summarized them thus:

- The clause on Jerusalem as the capital of Palestine;
- The Basic Law would deprive Arafat of the right of veto over certain matters granted in terms of the agreements with Israel;
- The extraordinary powers given to the president in terms of the still valid 1945 British emergency law in Palestine, which under the Palestinian Basic Law would have to be replaced by more specific emergency laws;
- The abolition of the security courts; and
- the succession to Arafat. Art. 54 of the Basic Law specified that the Speaker of the PLC would be the caretaker successor.[14]

On this last matter, Shikaki and other Palestinians were denied the opportunity for public discussion:

> We wanted to establish a forum to discuss [the succession], but we were not allowed to do so. I guess Arafat believes that the minute we start the discussion on [succession] scenarios, they will develop, and Arafat will find himself dispensable. But we did ask some of the security organizations and none of them could mention to whom they should report when Arafat dies; but everyone believes *he* will be in charge! There will be chaos! There are a number of nightmare scenarios![15]

However, in the elections for a new *Ra'is* after the death of Arafat in 2004, the only possible winner was a *Fatah* candidate, and preferably an older leader to embody historical legitimacy. Mahmud Abbas (Abu Mazin), then 67 years old and PLO secretary general, had been one of the drafters of the Oslo accords and remained a driving force in the Palestinian-Israeli-American peace process. On 9 January 2005, Abbas was elected new president with 62.32 per cent of the votes. His drawbacks were his lack of charisma and widespread rumours of corruption on the part of him and his family.

The main clauses of the third draft of the Basic Law of 7 March 2003 as revised on 25 March 2003, now known as the Constitution of the State of Palestine, are:

> (Art.1). The State of Palestine is a sovereign, independent republic. Its territory is an indivisible unit based upon its borders on the eve of June 4, 1967, without prejudice to the rights guaranteed by the international resolutions rel-

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13 Brown, "Constituting Palestine"; Martin Rossen, "A Democratic Palestine? An Analysis of the Struggle between 'Insiders' and Outsiders'," (Master's thesis, Gothenburg University, May 2001), s. 49-57; *Palestine Report,* (Jerusalem: Jerusalem Media and Communications Centre), http://www.jmcc.org/media/reportonline. (accessed 5 May 2002).

14 Author's interview with Khalil Shikaki, Director, Centre for Palestine Research and Studies (CPRS), Nablus, 4 Aug 1997.

15 Ibid.

ative to Palestine. All residents of this territory shall be subject to Palestinian law exclusively.

(Art. 4). Jerusalem is the capital of the State of Palestine and seat of its public authorities.

(Art. 5). Arabic and Islam are the official Palestinian language and religion. Christianity and all other monotheistic religions shall be equally revered and respected. The Constitution guarantees equality in rights and duties to all citizens irrespective of their religious belief.

(Art. 8). The Palestinian political system shall be a parliamentary representative democracy based on political pluralism. The rights and liberties of all citizens shall be respected, including the right to form political parties …

(Art 9). Government shall be based on the principles of the rule of law and justice.

(Art. 11). The independence and immunity of the judiciary are necessary for the protection of rights and liberties.

(Art. 12). Palestinian nationality shall be regulated by law, without prejudice to the rights of those who legally acquired it before May 10, 1948, or the rights of the Palestinians residing in Palestine prior to this date, and who were forced into exile or deported therefrom and denied return thereto. This right passes on from fathers or mothers to their progenitor.

(Art. 18). The State of Palestine shall abide by the Universal Declaration of Human Rights and shall seek to join other international covenants and charters that safeguard human rights.

(Art. 22). Women shall have their own legal personality and independent financial assets. They shall have the same rights, liberties, and duties as men.

(Art. 26). Individuals shall have the right to personal safety. Physical or psychological torture of human beings, as well as their inhuman treatment and subjection to harsh, undignified and humiliating punishment is prohibited.

(Art. 28). A person may not be arrested, searched, imprisoned or restrained in any way, except by order of a competent judge or public prosecutor in accordance with the law.

(Art. 37). Freedom of thought shall be guaranteed.

(Art. 39). Freedom of the press, including print, audio, and visual media, and those working in the media, is guaranteed.

(Art. 55). All citizens shall have the right to partake, individually or collectively, in political activities, including: the right to form political parties and/or to subscribe thereto, and/or withdrawing therefrom in accordance with the law…

(Art. 62). Defending the nation is a sacred duty and serving it is an honor for every citizen. It shall be regulated in law. Individuals and groups may not bring or bear arms, nor may they illegally possess arms in violation of the provisions of the governing law.

(Art. 64). National sovereignty belongs to the people, who are the source of the authorities. They exercise their duties directly through referenda and

general elections or representatives of the electorate, within its three general powers: legislative, executive, and judicial and by its constitutional institutions.

(Art. 65). The relationship between the three public authorities shall be based on equality and independence. They shall exercise their authority on the basis of relative separation with respect to their duties and mutual cooperation and oversight.

(Art. 66). The House of Representatives shall assume legislative power.

(Art. 68). Members of the House of Representatives are elected for five years...

(Art. 69). The seat of the House of Representatives shall be in Jerusalem...

(Art. 110). The Consultative Council composed of 150 independent members is established according to the Constitution. In its formation due consideration shall be given to the ratio of distribution of Palestinians in Palestine and abroad. The law shall regulate their election or appointment according to their countries of residence.

(Art. 113). The President of the State is the President of the Republic. He shall uphold the Constitution and the unity of the people. He shall guarantee the continuity of the existence of the State and its national independence...

(Art. 115). The President shall be elected directly by the people for a five year term renewable once.

(Art. 120). If the office of the President becomes vacant or the House of Representatives decides to charge him in accordance with Art. 132 of the Constitution, the Speaker of the House of Representatives shall assume the presidency of the State for a period not exceeding sixty days, during which time presidential elections are carried out in accordance with electoral laws.

(Art. 122). After consultations with the representative parties, the President shall nominate the Prime Minister from the party that obtained the largest number of seats in the House of Representatives.

(Art. 127). The President of the State is the Supreme Commander of the Palestinian national security forces which is headed by a concerned Minister.

(Art. 129). The President of the State, with the approval of the Prime Minister and [in] consultation with the Speaker of the House of Representatives, may declare a state of emergency if the security of the country is exposed to danger of war or natural disaster or siege threatening the safety of the society and continuity of operation of its constitutional institutions ... for a period not exceeding thirty days, renewable by approval of two-thirds of all members of the House of Representatives, with the exception of state of war.

(Art. 134). The Prime Minister shall form the Cabinet...

(Art. 156). The national defense forces shall be the property of the Palestinian people. They shall assume the task of protection and security of the Palestinians and defense of the State of Palestine ... Formation of armed groups outside the framework of the national defense forces is prohibited ...

(Art. 162). The judicial branch shall be independent. Exceptional courts may not be formed.

(Art. 171). Judges are independent. There shall be no authority over them in their judicial duties except their conscience, and shall not be removed ...

(Art. 175). A military court shall be established and entrusted with deciding military disputes. It shall not decide any case outside the military sphere.

(Art. 188). This Constitution shall be called the "State of Palestine Constitution." It is based on the will of the Palestinian people. It shall be ratified by the Palestinian Central Council and by agreement of a majority of participants in a general popular referendum. This Constitution shall be effective from the date the people agree on it in the referendum.

(Art. 193). The Basic Law, ratified on May 29, 2002, and anything contrary to the provisions of this Constitution are hereby abolished.[16]

As of September 2009, this ultra-democratic constitution had not been brought into force, since no popular referendum on it had been held. This apparently means that the old Basic Law signed by Arafat in 2002 is still in force in the Palestinian territories. If so, two interesting paragraphs are still valid:

> All laws that regulate a state of emergency prevailing in Palestine prior to the implementation of this Basic Law are repealed, including the Mandate Civil Defence (Emergency) Regulations issued in 1945. (Basic Law, Art. 105).
>
> The provisions of this Basic Law shall apply during the transitional period, and may be extended until the new constitution of the Palestinian State takes effect. (Basic Law, Art. 106).[17]

The Palestinian Basic Law of 2002 differed from conventional constitutions by being valid only during the five-year interim period of Palestinian self-government. During this period, the Basic Law covered only *persons* and not a Palestinian territory. No such territory was defined, nor was Palestinian sovereignty proclaimed. Conspicuously lacking were definitions of citizenship and the right to vote. The political system was sketched in a loose way and the provisions were unclear and riddled with inconsistency. On one hand, a parliamentary democracy was proclaimed (Art. 5), while on the other the president was granted enormously wide powers (Arts. 50-64, and 101).[18]

The 2003 constitution attempted to resolve these controversial problems. The territory was defined (Art. 1) as was citizenship (Arts. 12 and 13, although here called "nationality"). In addition, the extraordinarily wide powers of the president, namely Arafat, were diluted through the introduction of a Prime Minister. This provision was implemented in 2003 after intense pressure from the US, EU and Russia. The US and Israel refused to negotiate with Arafat, accusing him of complicity in terrorism.

Regardless of the democratic character of the Palestinian Basic Law of 2002 and the constitution of 2003, Arafat and the Palestinian Authority failed com-

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16 *Constitution of the State of Palestine*, 3rd draft, 7 March 2003, revised 25 March 2003. http://www.jmcc.org (accessed 22 May 2009).

17 As'ad Ghanem, *The Palestinian Regime. A "Partial Democracy,"* (Brighton: Sussex Academic Press, 2001), the Basic Law here at pp. 158-75.

18 Brown, "Constituting Palestine."

pletely and disastrously to build a democratic proto-state in the self-governing Palestinian territories. As in his PLO heyday, Arafat centralized all decision-making in his own hands. The democratically elected legislative council was marginalized and castrated. The judicial system and the courts were ignored by the Authority. They were replaced as guarantors of law and order by various security agencies that were allowed to operate outside all legal rules. The mass media were silenced and reduced to megaphones for *al-Ra'is* himself. Arafat, however, was not able to silence the vibrant Palestinian civil society but he made it much more difficult for them to continue their independent work.[19]

Arafat's successor, Mahmud Abbas, has been too weak to break this mould. The result has been the victory of *Hamas* in the parliamentary elections of January 2006, and its majority since then in the legislative council, as well as deadlock in the PLC between the two antagonistic forces. In 2007, *Hamas* took over control of the whole Gaza Strip by wholly undemocratic means, after open fighting with *Fatah* forces. By January 2009, the PLC had not met for 17 months and had not passed a single piece of legislation for over two years. Abbas has been ruling by presidential decree and under emergency regulations. The validity of his decrees and the Abbas-appointed government's laws and regulations since 2007, passed without legislative approval, has been challenged by many legal experts.[20]

Moreover, Abbas's very legitimacy as Palestinian president has been questioned by *Hamas*. The Basic Law of 2002 limited the president's term to four years. *Hamas* in 2008 declared that it would not recognize Abbas as president of the Palestinian Authority after 9 January 2009. The legitimate successor to Abbas and the new acting president would then be the chairman of the PLC, *Hamas* member 'Aziz al-Dweik, released from Israeli prison in 2009. *Fatah* loyalists point to a 2005 amendment to the Elections Law, stipulating that presidential and parliamentary elections take place simultaneously. Thus, in June 2008, the justice ministry, under *Fatah* control, determined that the president's term would be extended to 25 January 2010. However, as a result of the current Palestinian national dialogue, *Hamas* has agreed to simultaneous presidential and parliamentary (and Palestine National Council) elections before 25 January 2010.[21]

Constitutions – Do They Matter?

Most cases are unique, and in an Orwellian sense that is certainly true of Israel and Palestine. Both political systems have their origins in the same territory, the British mandate of Palestine. In both cases, politics in the proto-states was controlled by small elites in underground movements, *Mapai/Haganah* and *al-Fatah*. None of these organizations was very democratic during its underground existence, nor could it be. Each of them struggled over a territory that for hundreds of years had seen only colonial masters, ruling from afar: Damascus, Baghdad, Cairo, Constantinople and London. When the hunted underground leaders became the political elites out in the open, they were only too happy to

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19 For details, see my report to the Swedish International Development Cooperation Agency (Sida), 12 Nov 2002.

20 Diana Butto, "Laws Made, Amended and Broken," *The Middle East* 396 (London: January 2009): 22-3.

21 *Palestine Report*. http://www.jmcc.org (accessed 24 Apr 2009).

retain the British emergency regulations of 1945, which made it easy for them to circumvent parliamentary or judicial control.

Here, however, the similarities end. The Israelis now have had more than 60 years to build democracy in a free and independent country. The Palestinian Arabs have staggered from one disaster to another. They are still under an oppressive occupation that more and more resembles apartheid.

The result is very different experiences of constitution-making. The Israeli Jewish political culture carried by its Ashkenazi majority elite had its roots in Europe, with its strong democratic ideals. In 1950, Israeli politicians abandoned their attempts to forge a constitution, recognizing that the deep disagreements over the very foundations of the new-born state made this impossible. A gradualist strategy resulted in a number of Basic Laws, all of which are more or less implemented in the real political world. A strong Supreme Court, with the strong support from Israeli citizens, now carefully scrutinizes government bodies and, supported by an ombudsman, reviews other political agencies. This constitutional revolution took place in 1992, when the Ashkenazi elite had a change of heart. Realizing that in the near future they would lose political control over a democratic Israel, the Ashkenazi now favoured constitutionalization. Hirschl sees this as a clear example of "hegemony preservation." With low expectations of remaining in power, Ashkenazi *Knesset* members now became advocates of an independent Israeli Supreme Court known to share their political preferences.[22]

The Palestinian Arabs have their roots firmly planted in an Islamic and Arab milieu, and have always been autocratically ruled by an *imam*, a *khalif/sultan* or a *rais*. They live in a region where the patron-client system, known for thousands of years, is still strong. The very terminology (from the Latin *patronus-clientela*) indicates the system is not derived from the Arab or Islamic roots of Palestinian culture. However, during the Turkish Ottoman era (1517-1917), the British mandate (1917-48), as well as the period of rule by the Egyptians and Jordanians (1948-67), this was the accepted mode of governance. These foreign powers ruled Palestine indirectly by means of local leaders – in the villages through the mayor, *al-Mukhtar*, and through a small number of noble families, *a'yan*, the eyes of the sultan. During the first phase of Israeli occupation (1967-94), the new Israeli overlords tried to use the same method of rule through Palestinian clients.

This type of society is today called "neo-patriarchal" (by Hisham Sharabi, the Palestinian-American social scientist) or "neo-patrimonial" (by Rex Brynen, a Canadian political scientist). A neo-patriarchal society denotes a society in which the state – or here the proto-state of Palestine – has established formal and legal "modern" structures but in which old patron-client relationships still linger. Arafat and his Palestinian Authority (1994-2004) was an almost classic example of neo-patriarchal governance.[23]

In the Palestinian territories, a Basic Law and, at least in principle, a constitution were drafted, both probably the most democratic examples of either in any Arab country. Tragically, they have not been implemented but are ignored by

22 Hirschl, *Towards Juristocracy*, ch. 3, and pp. 173-8.

23 Hisham Sharabi, *Neopatriarchy. A Theory of Distorted Change in Arab Society,* (New York: Oxford UP, 1988); Hisham Sharabi about Arafat/ PA in *Jordan Times* (Amman), 17 May 1998; Glenn E. Robinson, *Building a Palestinian State. The Incomplete Revolution*, (Bloomington: Indiana University Press, 1997), pp. 1-18.

authoritarian rulers. None of the *Fatah* or *Hamas* leaders has been able to make the change from revolutionary to democratic-minded statesman. However, the Palestinian democratic constitution of 2003 will hopefully be the starting point in the future for concrete constitutional arrangements in a Palestinian state.

Is Monarchy Compatible with Democracy? The Constitutional Framework and Royal Initiatives for Democracy in Jordan[1]

ANN-KRISTIN JONASSON

"Democracy is our option"
His Majesty King Abdullah II
Jordan Times, 9 March 2009

In Jordan, the relationship between monarchy and democracy is seemingly paradoxical. At the same time as the king launches one initiative after the other to promote democracy and political reform, Jordan remains an authoritarian state.[2] At the same time as he repeatedly reconfirms his allegiance to democracy, few results are apparent on the ground. Jordan is not generally moving towards democratization. Indeed, it experienced a decline in civil liberties in 2008, with increased restrictions on freedom of expression and assembly.[3]

Jordan is thus an authoritarian state in which the supreme power calls for democracy. This chapter delves deeper into this apparent paradox by discussing the bearing of the Jordanian constitution and different royal initiatives on democracy, in theory and practice. The analysis is made against the backdrop of a theoretical approach outlining strategies in authoritarian states, including employing democratic rhetorics to sustain authoritarian rule.[4] Exposing the

1 I thank Andreas Bågenholm for his comments on an earlier draft of this paper. Helena Rohdén has also provided important insights. I further thank the Centre for European Research at the University of Gothenburg and the Royal Society of Arts and Sciences in Gothenburg for their financial support.

2 The regime in Jordan has been classified in different ways. Some analysts refer to Jordan as a semi-authoritarian state, see Amr Hamzawy and Nathan J. Brown, "A Boon of a Bane for Democracy?," *Journal of Democracy* 19, 3 (2008), whereas Karvonen refers to Jordan as a "half-democracy" (Lauri Karvonen, *Diktatur. Om ofrihetens politiska system.*[Stockholm: SNS Förlag, 2008], p. 81). I refer to Jordan as an authoritarian state, along with among others, Lust-Okar (Ellen Lust-Okar, "Elections under Authoritarianism: Preliminary Lessons from Jordan," *Democratization* 13, 3 [2006]). Jordan is ranked as "partly free" in the 2008 Freedom House ranking, www.freedomhouse.org (accessed 5 May 2009). Democracy is here defined, as it is by Karvonen, as a system with substantial political rights and civil liberties, respect for human rights, impartial and independent judiciary and state institutions and a free and lively civil society (Karvonen, *Diktatur,* p. 16).

3 Freedom House, 2009, www.freedomhouse.org (accessed 5 May 2009).

4 Karvonen, *Diktatur.*

authoritarian logic behind the democratic rhetoric is especially important in a country like Jordan, which is often portrayed as a model of political reform for other Arab states.

This chapter also discusses the election system in Jordan, which is particularly targeted by analysts – Jordanian and Western – as an obstacle to democratization. It ends with a discussion of the important issues relating to democratization in Jordan. The analysis in the chapter is based on source material as well as interviews carried out in Jordan in late 2006.

The evaluation of the relationship between monarchy and democracy starts by looking at the Jordanian constitution in relation to matters of vital importance to democracy.

Democracy in the Jordanian Constitution – and in Royal Initiatives

The Jordanian constitution

According to its constitution, Jordan is a hereditary monarchy with a parliamentary system (art 1). In the parliamentary system, Jordanians are equal before the law (art 6), the state guarantees freedom of opinion and expression within the confines of the law (art 15), and there is freedom of assembly within the law (art 16). Legislative power is vested in the National Assembly and the king (art 25), and the executive power is vested in the king, who exercises his powers through his ministers (art 26). Judicial power is exercised by the courts, with judgments being given in accordance with the law and in the name of the king (art 27). Furthermore, the king ratifies and promulgates the laws (art 31) and declares war, concludes peace and ratifies treaties and agreements (art 33).

In parliamentary matters, the king has considerable powers: he issues orders for the holding of elections for the chamber of deputies; he convenes, inaugurates, adjourns and prorogues the National Assembly; and may dissolve the chamber of deputies and the senate (art 34). The king also appoints and can dismiss the prime minister, or accept his resignation. He has similar powers in relation to ministers, on the recommendation of the prime minister (art 35). Members of the senate and the speaker are also appointed by the king, who, again, accepts their resignation (art 36). The king further exercises his powers by royal decree, to be countersigned by the prime minister and the relevant minister(s) (art 40).

The council of ministers is thus appointed by the king and in this sense they are "his" ministers. This is further emphasized in the ministers' oath before the king prior to their assuming office, in which they swear by God to be loyal to the king (art 43). The king also ratifies decisions by the council of ministers, signed by the prime minister and ministers. Implementation of the decisions rests with the prime minister and ministers (art 48).

As to the relationship between the council of ministers and the National Assembly, the prime minister and ministers are collectively responsible to the chamber of deputies for the public policy of the state (art 51). Further, the chamber of deputies can initiate a motion of no confidence in the council of ministers or any minister. If the motion passes with an absolute majority, the council must resign (art 53). A new council of ministers must, within one month of formation,

place before the chamber of deputies a statement of its policy and seek a vote of confidence on the basis of this statement (art 54).

Members of the chamber of deputies are elected by secret ballot in a direct general election. The electoral law ensures the integrity of the election, the right of candidates to supervise the election process and sets out the penalties for any person who adversely influences the voters (art 67). In the absence of an independent electoral commission, it is the chamber of deputies that determines the validity of the election of its members (art 71): unless two-thirds of the members declare an election invalid, it is not considered so (art 71). Prior to taking their seats, senators and deputies swear an oath of loyalty to king and country (art 80).

The prime minister refers draft laws to the chamber of deputies, which may accept, amend or reject them. However, the chamber must refer all draft laws to the senate. No law may be promulgated unless passed by both senate and chamber of deputies and ratified by the king (art 91). If the king does not ratify a law, he may refer it back to the house together with a statement of the reasons for withholding ratification (art 93). Where a draft law, except the constitution, is referred back and passed a second time by two-thirds of the members of each of the senate and chamber of deputies, it has to be promulgated. If the law is not returned with royal ratification, it is considered promulgated and effective (art 93). In cases when the National Assembly is not convened, the council of ministers can, with the king's approval, issue provisional laws (art 94).

In the exercise of their judicial functions, judges are independent and subject only the law (art 97). Judges of the civil and Shari'a court are appointed and dismissed by royal decree in accordance with the law (art 98).

Finally, the constitution itself can be amended by a two-thirds majority of each of the senate and chamber of deputies, provided the amendment is ratified by the king (art 126). Constitutional amendments affecting the rights of the king may not be passed during a regency (art 127).

The Jordanian constitution and its relationship to democracy

In the Jordanian constitution, there are thus democratic traits and it is regarded as one of the more democratic in the Arab world. For instance, the state guarantees freedom of opinion, expression and assembly within the law. The constitution also stipulates that the chamber of deputies be directly elected by secret ballot in a general election.

Even if the constitution defines the Jordanian system as parliamentary, the system is more like a semi-presidential system, given the prominent position of the king (instead of a president), with the important difference that the head of state is not elected.[5] However, this trait in the Jordanian constitution stands out as being contrary to democracy: the powerful formal role of the king, given that he is unelected. He holds, as we have seen, legislative power, partly together with the National Assembly and partly through royal decree, to be countersigned by the prime minister and relevant minister(s). Indeed, he can veto any legislation, since he must ratify and promulgate all laws. What is more, the king has extensive power over parliament, since he decides on its dissolution and when elec-

5 Cf., Andreas Bågenholm and Marie Demker, *Styrelseskick i elva länder + EU* (Malmö: Liber, 2007), pp. 25-6.

tions are to be held. He further has the ultimate executive power, exercised through ministers appointed by him and sitting at his discretion. The king has the ultimate powers regarding all relations with other countries. His powerful position is further underlined by the fact that ministers, senators and deputies swear by God to be loyal to him before taking office. Thus it can be established that the constitution itself cannot be regarded as democratic. This is contrary to the common understanding in Jordan that the constitution is largely democratic but that its implementation has failed

However, the constitution seems to open up space for disobedience by parliament, as it allows the National Assembly to overrule the king in matters of legislation. If the king refers a draft law, apart from the constitution, back to the house and it is passed a second time by two-thirds of the senators and the deputies, it must be promulgated, even without ratification by the king. Nonetheless, "it does not appear feasible that such an action in opposition to the King could ever be invoked; even if a two-thirds parliamentary majority could be achieved, the King could use other Constitutional powers to dissolve or suspend any parliament that tried to force legislation against his will."[6]

The constitution also enables the chamber of deputies to vote the king's ministers out of office through a confidence motion, and a new council of ministers has also to be approved in a confidence vote. This seems to make the government dependent on at least passive support from the legislative branch, which gives the government democratic legitimacy, even if it is appointed by the king.

In practice, a vote of no confidence in the king's council of ministers is unheard of. Indeed, according to an ex-minister, "because of courtesy and the structure of the political life in Jordan and the cultural part of it," the government has not lost a vote of confidence in 50 years. And if ministers were to lose a vote of confidence, the ministers replacing them would also be appointed.[7] There is, then, in practical terms no room in Jordan for opposition to the king. The democratic shortcomings evident in the constitution are thus even more pronounced in practice, given the king's all-pervading role. In this sense, "(t)he King plays the central and controlling role in all aspects of the exercise of Constitutional authority to a degree that dilutes the concept of separation of powers" envisaged in the constitution.[8]

Furthermore, other structures in the political system, in addition to those laid down in the constitution, form part of royal power – namely the royal court and the security forces. Of these, "(t)he Royal Court plays a key role in defining government policy as well as launching initiatives," while the security forces, especially the Bureau of Intelligence (*Mukhabarat*) "has substantial political influence in determining political and legislative priorities."[9] These two structures are directly subordinated to the king, and organized in ways that are concealed from the public gaze. Thus, "(i)t appears to be widely regarded that Jordan has three competing branches of executive government, all headed by the King: the Cabinet of Ministers, the Royal Court and the *Mukhabarat*."[10]

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6 Democracy Reporting International and Al-Urdun Al-Jadid Research Center (DRI/UJRC), *Assessment of the Electoral Framework*. Final Report. The Hashemite Kingdom of Jordan (2007), p. 6.

7 DRI/UJRC, *Assessment of the Electoral Framework*, p. 5.

8 *Ibid.*

9 *Ibid.*, p. 6.

10 *Ibid.* Cf., Ana Echagüe, "How Serious is the EU about Supporting Democratic and Human Rights in Jordan?," *Democracy Working Papers* 03, (Madrid: FRIDE, 2008), p. 1.

There are other deeply troubling aspects from a democratic point of view. One is the election system, which does not afford the same value to all votes, but favours candidates loyal to the king. Other problem areas are the laws subjecting civil society to extensive state control and those regulating the media, including censorship – which also leads to self-censorship.[11] In Jordan, the king remains the final authority and the arbiter of how far liberalizing reforms to the system may go.

The Jordanian political system is thus lacking key democratic elements. Interestingly – and paradoxically – this deficiency has been acknowledged both by the late King Hussein and the King Abdullah II. Allegedly with the purpose of expanding democracy in the kingdom, both kings launched various initiatives to promote political reform and democracy.

Royal initiatives for democracy

Since the beginning of the 1990s, and particularly in the last decade, several initiatives have been launched to promote political (democratic) reform in Jordan. These include the National Charter (1991), Judicial Reform Initiative (2002), Jordan First (2002), National Agenda (2005) and We are all Jordan (2006).

According to the late King Hussein's website, the National Charter was launched in 1990 "to place Jordan's progress to democracy on a stable foundation." The royal commission appointed by the king was to draft "guidelines for the conduct of political party activity in Jordan."[12] More specifically:

> The National Charter outlines general guidelines for constructive dialogue between the executive and legislative organs, as well as between decision-makers and political and intellectual elites concerning questions of authority, rights and responsibility. It enunciates the terms under which political parties can operate – namely, within the framework of the Constitution and free of foreign funding – and also emphasizes broad agreement on the need for the political reflection of Jordan's cultural pluralism.[13]

Interestingly, the website itself cites as major accomplishments of the National Charter results that do not necessarily ring true to democracy:

> Perhaps most importantly, the Charter has given Jordanian leaders a sense of direction, an insurance policy against outbidding by unrestrained groups, and a degree of predictability in political affairs. It has also eased concerns about the consequences of unbridled freedom of expression. The National Charter, along with the Jordanian Constitution, provides a compass for the national debate on fundamental issues.[14]

Thus, it is the sense of direction that is emphasized, not a sense of popular representation.

However, substantial improvements were made through the National Charter, including expanded political freedom and space for civil society. The charter also

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11 For an extensive analysis of the political situation in Jordan, see Ana Echagüe, "Planting an Olive Tree: The State of Reform in Jordan," *Working Paper* 56. (Madrid: FRIDE, 2008) and Julia Choucair, "Illusive Reform: Jordan's Stubborn Stability," *Carnegie Papers* 76 (Washington: Carnegie Endowment for International Peace, 2006).

12 www.kinghussein.gov.jo/charter-national.html (accessed 5 May 2009).

13 *Ibid.*

14 *Ibid.*

resulted in the lifting of martial law, legalization of political parties, permission for political exiles to return and relaxing the restrictions on demonstrations.[15] The charter was adopted in June 1991 at a national conference attended by 2,000 leading Jordanians. However, infringements of the newly won freedoms were soon observed, such as attempts to silence internal opposition.[16] The 1993 amendment of the electoral law is part of this deliberalization. Indeed, "(b)y the time of Hussein's death in February 1999, it seemed clear that liberalisation has been a temporary means of reducing opposition to unpopular economic policies. Political reform has been initiated, not as an end in itself but rather as a strategy for regime survival."[17]

In 2002, the new king launched his first initiative, Jordan First, to promote, among other things, democracy. According to the king's website, the initiative was launched:

> ... to strengthen the foundations of a pragmatic, democratic state. It is a working plan that seeks to deepen the sense of national identity among citizens where everyone acts as partners in building and developing the Kingdom. Jordan First ... emphasizes the pre-eminence of Jordan's interests above all other considerations and seeks to spread a culture of respect and tolerance and integrate and fortify the concepts of parliamentary democracy, supremacy of the law, public freedom, accountability, transparency, and equal opportunities.[18]

Over a couple of months in autumn 2002, the Jordan First Commission developed the Jordan First programme.[19]

In The Jordan First document, the "Jordan First" motto is specified. Thereafter, the focus is on the government, parliament, the judiciary, political parties, professional associations and non-governmental organizations, press and media, schools, universities and youth and the private sector. In each of these, challenges are defined and actions suggested. For instance, the government is "(t)o address the weakness in relations between individuals and institutions" by, among other measures, implanting "the democratic approach, including raising the ceiling for public freedoms as guaranteed by the Constitution and valid laws."[20]

At times, the reasoning in the document is at odds with democratic principles: for example, it is suggested that "(g)overments should pay special attention to municipalities and seek to consecrate a democratic approach in selecting competent municipal councils."[21] Municipal councils are thus to be selected by government, not elected by the people.[22] Some suggestions are more straightforward in pinpointing deficits in Jordan's political system. One example is the suggestion

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15 Echagüe, "Planting an Olive Tree," p. 2, Choucair, "Illusive Reform," p. 7.

16 Echagüe, "Planting an Olive Tree," p. 2, Choucair, "Illusive Reform," p. 7.

17 Echagüe, "Planting an Olive Tree," p. 2.

18 www.kingabdullah.jo (accessed 5 May 2009).

19 *Ibid.*

20 Jordan First Document, retrieved at www.kingabdullah.jo (accessed 5 May 2009).

21 *Ibid.*

22 In Jordan, mayors and half of the municipal councils were appointed by the government until 2007, the rest of the municipal councils being elected. As from 2007, following the enactment of a change, all mayors and municipal councils are elected, except in the capital Amman, where the king appoints the mayor and half the municipal council (www.landguiden.se, accessed 2 February 2009).

that "(g)overnments should review all legislation related to human rights and the status of women, children and the family in order to comply with those international agreements, which the Kingdom has ratified."[23]

In addition, the recurring suspensions of parliament as well as the lack of political blocs are identified as challenges, as, are "election laws that do not help in electing parliaments that strive towards achieving progress."[24] In relation to the election laws, the Jordan First Commission suggests that "(w)hen enacting election laws, we should strive to guarantee sound representation, equity and the empowerment of all vital powers and competent patriotic personalities to enable them to serve in the House of Parliament." It was further suggested that women be encouraged to elect and be elected and that a temporary and transitional women's quota be instituted.[25] The lack of strong political parties was lamented, as "(t)here can be no democracy without political parties."[26] At the same time, there are detailed requirements about how the parties should be made up and on the basis of what ideologies, in a way that leaves parties limited freedom.[27]

Regarding professional associations and NGOs, the document lauds their work. The main suggestion is that they should work within the law. The press and media are to exercise their "monitoring role in responsible freedom."[28] The youth are to be educated and gender equality and democracy are among the values to be implanted.

Thus, the Jordan First document provides a fairly elaborate analysis of the problems of democracy in Jordan. While democracy is thus to be promoted in certain respects, care is taken to restrict it in others. Structural changes to Jordan's political system are not suggested, and – needless to say – the role of the king is not dealt with.

In the same year, the king also launched his Judicial Reform Initiative, in line with his view that "education and the judiciary are two basic pillars for the future of democracy, political and economic reform and sustainable and comprehensive development."[29] According to his website, "His Majesty King Abdullah has encouraged the formulation of a judicial reform plan that corresponds with his vision for Jordan's development as a country ruled by institutions where justice, equality, transparency and the rule of law prevail."[30]

In 2005, yet another royal initiative was launched to further democracy in Jordan, the National Agenda. Building on the constitution and "the principles enshrined in the National Charter and the Jordan First Committees and upon the strategies and plans developed by state institutions during the past decade," the objectives of the National Agenda are to:

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23 Jordan First Document (accessed 5 May 2009).

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

27 Cf., Janda, who also refers to the Jordanian party law as prescriptive, meaning that it is designed to control the organization and behaviour of parties (Kenneth Janda, *Political Parties and Democracy in Theoretical and Practical Perspectives. Adopting Party Law* [Washington: National Democratic Institute for International Affairs, 2005], pp. 14-18).

28 Jordan First Document (accessed 5 May 2009).

29 Quote by King Abdullah II, directed at the Ministry of Justice, April 2004, www.kingabdullah.jo (accessed 5 May 2009).

30 www.kingabdullah.jo (accessed 5 May 2009).

- Enhance public participation in the decision-making process and strengthen the role of the civil society institutions;
- Guarantee the rule of law and independence of the judiciary;
- Safeguard public safety and national security in accordance with articles of the constitution;
- Build trust between citizens and institutions and adopt principles of transparency, good governance and accountability;
- Strengthen principles of social justice and equal opportunity; and
- Develop human and economic resources, upgrade the production base and expand development benefits.[31]

The work was carried out over nine months by a committee of 26 representatives of government, parliament, civil society, the private sector, media and political parties. It also "brought on board community stakeholders from various sectors of society with the objective of ensuring an even contribution to reform efforts and to ultimately ensure that social, economic and political benefits would be distributed fairly."[32] The end result, the National Agenda document, "has established the guidelines for Jordan's comprehensive development for the next ten years and ... represents a national consensus on the aspirations and ambitions of Jordanians."[33]

The policy initiatives focused on (a) government and policies, (b) basic rights and freedoms, and (c) services, infrastructure and economic sectors. The focus of the first is primarily on "the stimulation of economic development and the improvement of social welfare and security." Under basic rights and freedoms, issues of democratic relevance are targeted, such as "social inclusion, global inclusion, religious freedom, political and cultural development, equality before the law, access to healthcare, freedom of assembly, freedom of speech, citizenship rights and free and responsible media sector."[34] However, it was difficult for the committee to reach consensus on major matters in relation to democracy, such as the election system.

The National Agenda set out a ten-year implementation and monitoring plan, giving the impression it would be the last initiative for some time. But already by the ensuing year a new initiative had been launched, We are All Jordan (2006). Interestingly, this initiative is not presented on the king's website along with the other royal reform initiatives, but in the website's news section. There it is stated that We are all Jordan was started as a forum on the king's initiative to enable Jordanians to define their national priorities. To this end, 700 Jordanians representing government, parliament, the private sector, media, civil society, political parties and youth were convened in the We are all Jordan forum to choose the ten most urgent priorities for the country from a list of 30. The king's motive for this initiative is stated as follows:

> Noting that some earlier efforts to translate his vision for the country's future into workable plans failed, the King said there was now a need for a majority to "agree on an action plan that will guide everyone – government, Parliament, the private sector and civil soci-

31 *Ibid.*
32 *Ibid.*
33 *Ibid.*
34 *Ibid.*

ety organisations – towards a renaissance in Jordan, making the future we aspire to and facing internal and external challenges which you are all aware of."[35]

A We are all Jordan commission was later set up to oversee the implementation of the forum's recommendations. It has the form of a royal advisory body, and was also to organize the forum regularly and present regular reports on the work and its progress.[36] The priorities listed by the forum included the Palestine issue, political reform, external challenges, domestic development, economic reform and social security.[37] The document produced defined a list of draft laws to be prioritized by parliament.[38] In relation to the political process, the election law and municipal election law were prioritized, along with the press and publications law, right to access information law, the draft anti-money laundering law, the financial disclosure law and the law overseeing the work of the National Human Rights Centre.[39] The We are all Jordan document and the National Agenda are reported to have been combined into a three-year national executive programme for 2007-09.[40]

Importantly, it is emphasized that "(t)he working mechanism stipulates that the commission is confined to the Constitution articles and the applied legislations, [and] works through a number of ad hoc committees supported by [a] permanent secretary affiliated to King's Office."[41] Thus, in no way can the constitutional principles – safeguarding the ultimate powers of the king – be transgressed.

In June 2007, the king was reported as saying that "the commission has been able to realize a lot of good results based (on) priorities defined by national consensus during the launch ceremony of We are All Jordan forum last year."[42] Moreover, the EU supports the work of the We are all Jordan, as part of Jordan's national reform process.[43]

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As this survey clearly shows, there is no dearth of initiatives by the king allegedly aimed at furthering democracy in his kingdom. These initiatives are supported by the EU and US.[44] The king repeatedly confirms his allegiance to political reform: "King Abdullah II has made it clear that progress toward democracy, pluralism, economic prosperity and freedom of expression, speech

35 News section, 060712, www.kingabdullah.jo (accessed 13 May 2009).

36 *Jordan Times*, 25 August 2006, as published on www.jordanembassyus.org (accessed 17 September 2008).

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40www.mdgmonitor.org (accessed 13 May 2009).

41 www.pm.gov.jo (accessed 13 May 2009).

42 www.jordanembassy.nl (accessed 13 May 2009). In addition to these initiatives originating exclusively with the king, the government has also identified strategic objectives and has been entrusted by the king with implementing a programme, "Jordan's Vision for the Future: The Reform Agenda" (June 2004), focusing on the political reforms needed to meet them. The Ministry of Political Development and Parliamentary Affairs was charged with implementing the reforms, and "established a clear plan of action that rests on the pillar of promoting democracy through building and strengthening the institutional framework, including the parliament and the judicial system as well as the legislative and regulatory frameworks in which they operate" (www.kingabdullah.jo, accessed 5 May 2009).

43 Memo/09/186, Brussels, 23 April 2009, Press releases Rapid

44 Memo/09/186, Brussels, 23 April 2009, Press releases Rapid,
www.usaid.gov/locations/middle_east/countries/jordan/ (accessed 13 May 2009).

and thought in Jordan is an irreversible process."[45] It is, however, more than obvious that the initiatives are failing to achieve substantial political reform. The pace of reform in Jordan has been slow and implementation of the many reform initiatives largely lacking. Indeed, there have been several reversals in civil and political liberties.[46]

The initiatives have been heavily criticized from different angles. Importantly they largely sideline and do little to strengthen the role of parliament, and aim instead at direct dialogue with various stakeholders. The sheer number of initiatives is also criticized, as is the fact that they lead nowhere. And the actual work of the initiatives is criticized by those involved.

In an interview, a woman activist for women's rights enumerated the different official documents referring to women and their rights in relation to democracy and human rights:

> In Jordan, we have tens of documents that are mentioning women. We have the National Charter, 1991, and we have the Jordan First and we have the National Agenda and now we have We are all Jordan. And we have the Arab League reform documents and we have some regional reform documents and we have the new Middle East document and we have the EU-document.

Of these, she states, "The National Charter was the best for women. At each stage, we have less and less and less." With every new initiative, less focus is put on women, the women activist contends. Whereas it might seem that the We are all Jordan initiative prioritizes women, this was not the case, the activist contends. She points as an indication to the lack of women participating in the initiatives: "In We are all Jordan, there were only 20 women, out of 700 participants." Instead of new initiatives, she argues that "we need to have a stop and bring all these documents [together] and try to know and discuss and specify some recommendations." Thus, while there have been many initiatives by the Jordanian state to promote the position of women in democracy, these initiatives have been diluted over time, according to the activist, and Jordan is far from democratic, especially for women.

Another interviewee is an ex-minister and close advisor of the king, who was directly involved in the National Agenda and the We are all Jordan initiatives. He gives a rather gloomy evaluation of their value to political reform.[47] Even though he was not on the political committee of either initiative, he provides interesting insights into their work. Regarding the National Agenda, he points to the specificity of the political field, stating that "the problem with political reform... [is that] you have to tailor-make it. You cannot carry the ... same experience, or the same laws ... from one country [to another]." Still, the committee examined best practices, and made recommendations, despite serious internal rifts.

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45 www.kingabdullah.jo (accessed 5 May 2009).

46 Echagüe, "Planting an Olive Tree," p. 8, National Centre for Human Rights, *The Situation of Human Rights in the Hashemite Kingdom of Jordan (2007)*, (2008), pp. 9-11.

47 The ex-minister sits on the All Jordan Commission, appointed in July 2006. He was also on the board of the National Agenda Committee, appointed in 2005. The task of the National Agenda was, according to him, "to identify the best practices in the world" in these areas, then "we identify what we have in Jordan now and compare." Thereafter, the committee identified "what are the steps to be taken to get to these best practices," a work that resulted in a set of recommendations to government.

The ex-minister highlights the recommendation on the election law, which is a bone of contention in Jordan. Because of differences of opinion on the committee, the recommendation was a compromise and offered nothing on the exact design of the system. A controversial point, according to the ex-minister, was "the call for a liberal election law," because "liberal is of course another big word." In the final National Agenda, there is no mention of "liberal" in relation to the election law. However, there is a recommendation to establish a new law on political parties and to amend the press law.

Whereas political issues were prominent on the National Agenda committee, political reform was downplayed in the We are all Jordan Commission, which had "a lighter touch on the political reform," according to the ex-minister. As with the National Agenda, "there was a call ... for establishing the political parties and ... the proportional and direct election law." However, "there was a little bit more of postponement," when the many things that would have to be done before the election law could be amended were pointed out. According to the ex-minister, this is due to "the latest development in the region," referring to the fear of fundamentalist Islamists coming to power in the absence of any other substantial opposition. There is thus little incentive for political reform, the ex-minister contends.

After the National Agenda committee finished its work, the government established a committee to execute and monitor its recommendations, even if "not ... every recommendation was taken in." According to the ex-minister, the We are all Jordan Commission "adopted in 60-70 per cent of its recommendations what was on the Agenda." The recommendations for the two initiatives thus seem to largely converge. Despite the difficulties, the ex-minister – unlike the woman activist – is basically optimistic about the process, stating that he is "happy to see certain things developing."

Other evaluations of these initiatives are not as positive. Democracy Reporting International and Al-Urdun Al-Jadid Research Center (DRI/UJRC) state in their report that "the government seems to have chosen not to follow the recommendations of the National Agenda," while the succeeding We are all Jordan initiative "focuses on economic as well as social reform but specifically excludes electoral reform."[48] The analysis of DRI/UJRC emphasizes two important factors in the Jordanian political debate: the king prefers to initiate discussions on policy outside parliament, aiming at direct dialogue with stakeholders; and even if consensus is reached on different reforms, these conclusions are not legally binding.[49]

Interviews with representatives from civil society, the Islamist opposition and independent analysts emphasize the lack of implementation of royal initiatives, along with all other initiatives for democratic reform. Indeed, these representatives seriously question the leadership's political will to implement democracy. One interviewed analyst states that while the king speaks a lot about democracy, he does less in practice, and "(e)verything is put on hold." In this way, the king keeps up the democratic initiative, while obstructing democratic development.

The various initiatives, whatever their democratic emphasis, are not making for political reform, let alone democracy. Interestingly, this is acknowledged by

48 DRI/UJRC, *Assessment of the Electoral Framework,* p. 13.

49 *Ibid.*

the king himself, who notes that "some earlier efforts to translate his vision for the country's future into workable plans failed."[50] Even if some steps in the right direction have been noted, there is no general development towards democratization.[51] Indeed, Jordan shows a general decline in its democracy-ranking in 2008.

How can we understand this? Is there a logic to using a democratic rhetoric, even if democratic reforms are not – or only slowly – being implemented? That is the topic we now turn to.

Arguments for Authoritarian Rule

Thinkers have long expressed their scepticism about rule by the people and instead argued for various forms of authoritarianism. Some of their arguments dismiss democracy altogether, while others relate to democracy in particular ways.

In a recent book, Lauri Karvonen outlines the ways in which rulers have argued for an authoritarian state.[52] His framework is used to expose the authoritarian logic of using democratic rhetoric in Jordan. Karvonen lists and develops the following lines of argument in favour of authoritarian rule. It is seen as:

- God's will
- rule by the best
- rule in the true interests of people
- transitional
- counteracting the divisive character of democracy.[53]

Throughout history, rulers have often used religious beliefs to justify their rule, claiming that their rule is God's will and therefore unquestionable. In this category, Karvonen includes secular ideologies that have taken on a pseudo-religious character, such as fascism and communism. Instead of God, they referred to History and their "historical mission." Appealing to such sublime values has been of great value to authoritarian states.

The argument that the state is to be ruled not by the people but by those who are best suited to the task draws on the legacy of Plato and his aversion to democracy and his endorsement of the deserving elite. This idea is reflected in the communist concept of the revolutionary vanguard, who carry out the revolution in the name of the people. It is also apparent in the notion of the rule of experts: only those who have appropriate knowledge can be involved in decisions.

None of the above arguments relates to the democratic idea of rule by the people, but the next one does. According to this argument, it is authoritarian rule that best represents the will of the people. Proponents of this argument assert that

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50 News section, 060712, www.kingabdullah.jo (accessed 13 May 2009).

51 In its progress report for 2008, the EU points to "(p)rogress … in the fight against corruption with the establishment of the Anti-Corruption Commission in January 2008 and the adoption of an Anti-Corruption Strategy for 2008-2012. Progress was also made on transparency and accountability with the appointment of the first Ombudsman in June 2008 and continued capacity building for the judiciary" (Memo/09/186. Brussels, 23 April 2009, Press releases Rapid). However, the general assessment of the European Commission is that while "Jordan made steady progress in the economic field," it made "limited progress as regards democracy and social policies" (Memo/09/186. Brussels, 23 April 2009, Press releases Rapid).

52 Karvonen, *Diktatur*, pp. 61-70.

53 *Ibid.*, pp. 62-70.

democracy is only a way to mislead the common people, by claiming that they have power, when in fact they are the victims of skilful demagogues. Democracy is a delusion. Authoritarian rule, on the other hand, has the people's interest as its only object and is, as such, true democracy.

The "transitional" argument fully endorses the democratic system as the most legitimate rule, but states that the people are not yet ready for it. Only when certain conditions are in place can rule be safely turned over to the people. Thus, authoritarian rule is transitional. Communism uses this argument: in the transition from capitalism to communism, there is a phase of "dictatorship of the proletariat" when the former ruling classes have to be suppressed. Only when the right conditions materialize under communism, can there be talk of true democracy. This argument has also been used in former colonies to justify one-party rule, in order to address ethnic divisions, consolidation of the state and socioeconomic development. Until the right conditions are in place, democracy cannot be introduced, according to this argument.

The last on Karvonen's list is the idea that democracy is divisive and thus weakens a nation. In a democracy, various groups work only in their own interest, while no one promotes the common good. Indeed, enemies of the state can use democratic rights to undermine the state itself. Consequently, authoritarian rule is vital to ensure the unity of the state.

As we have seen, at least two of these arguments endorse democracy – "true" democracy – as their ultimate goal. The others dismiss democracy on different grounds. This framework is now utilized to analyze the paradoxical usage of a democratic rhetoric in Jordan.

Democratic Rhetoric in an Authoritarian State: The Case of Jordan

Using Karvonen's categories, the transitional argument for authoritarianism seems to match the situation in Jordan, with the king frequently calling for democracy in different royal initiatives, while the constitutional framework stipulates that his supremacy remains in place. Reform towards democracy is to take place within – but not to challenge – the authoritarian framework. This argument is further strengthened by the fact that little democratic change seems to come about, despite all the public calls for democracy. Instead, Jordanian analysts claim that in practice the king and his government drag their feet on democratic reform.

The manoeuvring in relation to the election system lends further weight to the view that an authoritarian logic underlies the democratic rhetoric. In Jordan, the election law in particular is singled out both by Jordanians and by international actors as an obstacle to democratic development. The election law has been a hot issue ever since it was changed in 1993. Numerous shortcomings in the election law have been pointed out, and it is viewed as working against democracy. In their 2007 assessment of Jordan's electoral framework, DRI/UJRC state that "(s)ystematic reform of the electoral framework is needed … as part of Jordan's commitments towards achieving political reform and democratisation."[54] According to DRI/UJRC "(t)he most significant shortcoming of the electoral

54 DRI/UJRC, *Assessment of the Electoral Framework,* p. 1

framework is that it does not guarantee equal suffrage."[55] Not the least of the domestic critics of the new system are the Islamists, who see it as aimed at curbing their success.[56] Thus the electoral framework is addressed from different points of view and, along with other institutions (such as the party system), identified as a core obstacle to democracy in Jordan. If the election system were rectified, democracy could more easily take root, the reasoning goes.

However, an interviewed Jordanian senior government official does not agree. According to him, changing the election system will not make for democracy in the country. Instead, the official lays out an alternative view on how democracy will come about in Jordan, and on the relationship between the election system and democracy. The official advocates a bottom-up approach, focusing on changing society in order for democratic institutions (such as the election system) to be stable. Thus, instead of reforming election laws, the government official argues "this should be delayed ... and focus [should be] on really building and nurturing a general culture of participation." In his opinion, the "question of the shape of electoral laws is the culmination of an entire process and you don't necessarily start consolidating your democratic edifice by amending your electoral laws, while not working on the process itself. That culminates in that exercise." On the question of how democracy is to come about, the official asserts:

> [w]e believe that you have to create the conditions, the proper conditions that allow for a mature exercise of the right to vote, a mature exercise that is completely divorced from the pressures of the freedom conflicts, economic hardships, distorted perceptions that emanate from lack of knowledge of what things are. For us basically this is the essence of where you have to focus.

Thus, sound elections are "a natural end result, but ... cannot come first." Making people ready for true democracy is a long-term process, "there is no quick fix to reform." In adopting this line, the official echoes Karvonen's transitional category of authoritarianism.

Similar reasoning is pursued in a TV documentary on Queen Rania's Youtube channel, which focuses on her appeal to the West. She states:

> The democracy that we want to have in Jordan eventually is one with a Jordanian stamp on it. It is important to build institutions that ... spread the values of democracy, such as religious freedoms, freedom of expression, human rights. We are eventually going to get there, but we are not going to take anything for granted or take any shortcuts. It is a process, [and] we are not moving as fast as we would like to. A part of that has to do with

55 *Ibid.* DRI/UJRC contends that "(a) policy to ensure the over-representation of parliamentary seats from rural areas at the expense of urban areas, where most Jordanians of Palestinian origin live, has led to large discrepancies in the number of voters that each seat represents. The TEL [temporary election law] leaves this sensitive issue entirely in the hands of the cabinet and provides no criteria to be used for districting" (DRI/UJRC, *Assessment of the Electoral Framework,* p. 1). The assessment also lists other shortcomings, such as the lack of proper complaints procedure regarding the validity of election results, the current option of complaining to the newly elected parliament being deemed clearly insufficient; inadequate safeguards for the secrecy of votes by illiterates; and the inadequate framework for campaigning, including possible restriction of fundamental political rights, such as the right of assembly (DRI/UJRC, *Assessment of the Electoral Framework,* p. 2). In general, DRI/UJRC state that "(t)here are limited requirements for the elections to be run in a transparent, inclusive or consultative manner, which is an international best practice for elections" (DRI/UJRC, *Assessment of the Electoral Framework,* p. 2).

56 This led the Islamists to boycott the 1997 elections, as the election law was not changed. However, they participated under this Election Law in the 2003 and 2007 elections.

> the regional situation [in] which we find ourselves. But that is no excuse, because we are going to keep pressing ahead hopefully and we will eventually get there.[57]

It is obvious that the queen does not find the time yet ripe for democracy in Jordan, and that an enlightened leadership must put the necessary institutions in place for democracy to eventuate. However, Rania also underlines the transitional nature of the current rule – democracy is the goal and she expresses regret that it takes time to get there. Thus, it is not the democratic credentials of the leadership that are lacking, but the proper conditions in the country at large.

Other analysts, Jordanian as well as non-Jordanian, also espouse this view. One Jordanian scholar claims that "(i)t is a paradox that the King works for democracy … [but] the King is still ahead of the people" in this regard. An EU-representative agrees: "Beginning with the King, I think that he himself is aware and he believes in reform and in democratisation, with pluralism, slowly … At the same time, there are forces who oppose [this]." These statements, stipulating transitional authoritarian rule before conditions are right for the advent of democracy, also greatly resemble Karvonen's transitional authoritarianism.

Based on this analysis, it can be concluded that the king's appeal to democracy is not paradoxical. Instead, those calls are perfectly in line with the logic of an authoritarian state, which claims authoritarian rule is transitional and that democracy will only eventually triumph if the right conditions are in place. In this process, the elite has to lead the way to ready the people for democracy. Jordan is thus a typical example of an authoritarian state that makes use of a democratic rhetoric while staunchly remaining within the confines of an authoritarian constitution.

The reasons for appealing to democracy may be manifold. According to Karvonen, the use of democratic rhetoric in an allegedly transitional authoritarian system has often proven to be consciously dishonest or an expression of naïve idealism.[58] Use of democratic rhetoric can also be part of an attempt to create legitimacy for the regime, since democratic rights, along with good governance and welfare gains, have been proven to contribute to state legitimacy.[59] In the case of Jordan, democratic conditionality by foreign donors must also be taken into account, given that the country is largely dependent on foreign aid. Also, some claim that palace and government are indeed genuine in their support for democracy, but that all initiatives are aborted because of the regional situation or the lack of support from conservatives.[60]

What then are the prospects for the development of democracy in an authoritarian state like Jordan? Will the much called-for changes to the election system make for democracy?

How Pivotal is the Election System for Democratization in Jordan?

As noted earlier, the present election system is seen as a major obstacle to democratization, even if this view is not shared by the government official interviewed.

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57 *Rania, Queen of Youtube*, TV documentary (BBC World News, 2008).

58 Karvonen, *Diktatur*, p. 68.

59 Bruce Gilley, "The Determinants of State Legitimacy: Results for 72 Countries," *International Political Science Review* 27, 1 (2006).

60 Compare also Echagüe, "Planting an Olive Tree," p. 3.

The election system has been heavily disputed ever since the majoritarian Block Vote system employed in 1989 was replaced in 1993 by the semi-proportional Single Non-Transferable Vote (SNTV) system, or what in Jordan is called "one man-one vote." Despite this, the SNTV-system has remained in effect since then (with modifications).[61] Hourani *et al.* contend that "it is clear that ... amendments introduced to the Electoral Law, particularly the 'one-person, one-vote' amendment, have improved the chances of candidates who depend on local or tribal influence, or wealth, prestige and public office, at the expense of candidates who depend on political programs and ideological affiliations."[62] Ideology, or religion, lose out under this system.[63]

The election law has also been criticized as an obstacle to democracy from non-Jordanian quarters. The 2007 assessment of Jordan's electoral framework by DRI/UJRC is highly critical of the law and argues for its amendment. The EU argues along the same lines,[64] as does International IDEA in its report *Building Democracy in Jordan*.[65]

The focus on institutions like the election system is based on a theoretical argument that institutions in themselves can make for democracy.[66] Indeed, the election system has often been singled out as particularly important in this regard.[67] Another argument is that elections in themselves are conducive to democracy.[68] In the Jordanian context, certain problems with the present election system have been pinpointed, particularly the distortion in the allocation of seats. Thus, the SNTV system "provides benefit to independent candidates with personal or tribal bases of support."[69] These independents "have generally been regarded as providing weak oversight of executive action."[70] Indeed, because "(t)he Trans-Jordanian tribal structures are the key powerbase of Hashemite rule

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61 In the majoritarian Block Vote system, which was employed in the 1989 elections, the voter has as many votes as there are mandates in the constituency. The candidates who win most votes fill the seats, regardless of how many votes they get. The Single Non-Transferable Vote system is, on the other hand, a semi-proportional system. Here, the voter has only one vote, but there are multiple seats to be filled in the constituency. The candidates who win most votes in the constituency, also win the seats in the constituency (Ann-Kristin Jonasson, *At the Command of God. On the Political Linkage of Islamist Parties.* [Gothenburg: Department of Political Science, 2004], p. 204). In 2003, the law was amended, for instance by introducing a women's quota of six indirectly elected seats and lowering the voting age from 19 to 18 years of age.

62 Hani Hourani *et al.*, *Islamic Movements in Jordan,* (Amman: Al-Urdun al-Jadid Research Center, 1997), p. 29.

63 Andrew Reynolds and Jörgen Elklit, "Jordan – Electoral System Design in the Arab World," *International IDEA Handbook of Electoral System Design,* (Stockholm, International IDEA).

64 In evaluating "democracy and rule of law" under the framework of the European Neighbourhood Policy, the lack of change in the electoral framework is the first issue addressed in EU's progress report for 2008 (*Progress Report, Jordan.* Brussels: Commission of the European Communities, 23/04/09. SEC (2009) 517/2), p. 3.

65 Here, three issues are targeted as "interconnected themes seen as entry points to help establish a reform-oriented agenda: electoral system reform, the political participation of women and the development of political parties" (Ibtissam al-Attiyat *et al.*, *Building Democracy in Jordan* [Stockholm: International IDEA, 2005]), p. 5. By focusing on these issues, reform should be effected, the argument goes.

66 Cf., Bo Rothstein, *Vad bör staten göra? Om välfärdsstatens moraliska och politiska logik* (Stockholm: SNS Förlag, 2002), pp. 163-5.

67 Pippa Norris, *Driving Democracy: Do Power-sharing Institutions Work?* (New York/Cambridge: Cambridge University Press, 2008).

68 Jan Teorell and Axel Hadenius, "Elections as Levers of Democracy: A Global Inquiry," *QoG WORKING PAPER SERIES 2008:17* (Quality of Government Institute. Department of Political Science, University of Gothenburg, 2008).

69 DRI/UJRC, *Assessment of the Electoral Framework,* p. 1.

70 *Ibid.,* p. 4.

and their members make up most of the political and administrative elites," it comes as no surprise that "tribal leaders are extremely wary of any reform that may threaten their privileges in access to government or dominance of parliament."[71] Therefore, there is little impetus in parliament to change the election system or press for democratizing reforms.

But would a different election system make for democracy in Jordan? Are elections in themselves necessarily a sign of democracy? I argue that there are numerous risks in this stance. First, focusing on the election system risks distracting attention from the real problem in the authoritarian state of Jordan, the ultimate sovereignty of the king. Instead of dealing with the fundamental problem, only its symptoms are addressed. Further, refraining from voting in elections under an authoritarian system indeed makes sense. Why vote if your vote will only produce a parliament with little or no say? Why vote if your vote has no effect on the make-up of the government? In this situation, electoral reform would not make voting more meaningful – as long as it does not deal with the ultimate powers of the king. In fact, in a system where voting has no real impact, not voting can be an active strategy of resistance to the system itself.[72] Furthermore, if changes to the election system do not correspond with true democratic development, such allegedly democratic reforms risk delegitimizing democracy as a concept. Therefore, reforming the election system and encouraging people to vote without changing the fundamental democratic deficits risks legitimizing the current non-democratic state.

Possibly, change to the election system in Jordan will break the ingrained relationship between tribes and royal court by upgrading the votes of non-tribal sectors of Jordanian society to their proportional worth and correspondingly downgrading the votes of tribal sectors. A less compliant parliament might make considerably stronger calls for increased power and be more difficult to deflect. The pressure for democratization will then increase. But this is a long and risky process, with no positive outcome guaranteed. What is more, the king is still the final arbiter, with constitutionally safeguarded powers. No democratization worth the name will occur unless the king relinquishes these powers.

Until then, the primary role of elections in Jordan will remain – as argued by Lust-Okar – "an important arena for competition, but one over patronage, not policy." Since "policy arenas are off-limits to parliamentarians," what is fought over is "access to state resources."[73] Accordingly, it is only when "state elites' resources decline, making it difficult to maintain the distribution of patronage, that elections are likely to become highly contested battles over the rules of the game."[74] Until then, elections have little to do with democracy in an authoritari-

71 *Ibid.*, p. 10.

72 Cf., Hermet who states that withholding one's vote is a challenge to power (Hermet, Guy, Rose Richard, and Alain Roouquie, *Elections without Choice*. [New York: Wiley, 1978], p. 12). Referring to the Egyptian case, Blaydes states that "(v)oter abstention signals a protest of the political system and opposition newspapers use low turnout figures as evidence of lack of political trust in the regime" (Lisa Blaydes, *Who Votes in Authoritarian Elections and Why?Determinants of Voter Turnout in Contemporary Egypt*, Prepared for delivery at the 2006 Annual Meeting of the American Political Science Association, Philadelphia, 31 August-3 September 2006, p. 19). In relation to Soviet elections, Karklins asserts that "voter abstention in non-competitive balloting can be hypothesized to constitute a significant political act rather than passivity" (Rasma Karklins, "Soviet Elections Revisited: Voter Abstention in Noncompetitive Voting," *American Political Science Review* 80, 2 [Jun. 1986], p. 449).

73 Lust-Okar, "Elections under Authoritarianism," pp. 456, 459.

74 *Ibid.*, p. 468.

an state like Jordan. Thus, "the logic of authoritarian elections should lead us to question the value of pressing for, and applauding, the introduction of elections in authoritarian regimes ... Such elections are more likely to help sustain the authoritarian regime than they are to promote democracy."[75]

Conclusion

Democratization is no easy task, especially not in Jordan, an entrenched authoritarian state trying to survive in a difficult regional context. Here, stability is the priority. Presumably, democratic reform will not happen until the political leadership is convinced by the argument advanced by an EU interviewee that "it is *lack* of democracy that is the greatest risk for instability in Jordan." Thus, democratic reform will take place only once the political elite is convinced that "Jordan's stability is best maintained through a political opening rather than through repression."[76] Such conviction seems far off. Until then, the priority remains stability, not democracy.

In summing up, two issues deserve emphasis. First, using democratic rhetoric is a classic way for authoritarian states to perpetuate their existence. It is important for supporters of such regimes, including the EU and the US, to remember this. Moreover, as Karvonen points out, experience shows that in cases of alleged transitional rule, the regimes have rarely worked for transformation of authoritarian rule into real democracy. Often, development has proceeded in the opposite direction, towards ever more authoritarianism. According to Ottaway, such systems, "are not imperfect democracies struggling toward improvement and consolidation but regimes determined to maintain the appearance of democracy without exposing themselves to the political risks that free competition entails."[77]Similarly, Brumberg refers to liberalized autocracies pursuing "transitions to nowhere":

> This is the biggest problem liberalized autocracy creates: It snares regimes in an 'endless transition' (*marhalla intiqaliyya mustamirra*) that eventually robs each new generation of what little hope it had when a new king or president invariably inaugurated a 'new' era of reconciliation, openness, and reform.[78]

Talk of democracy and limited openings in the political field in authoritarian countries such as Jordan are acts of delusion that must be seen for what they are.

Second, the overwhelming focus on elections and on reform of the election system might be risky in authoritarian states.[79] Such focus might distract attention from the core of the matter, the fundamentally non-democratic structure of the state, and might legitimize elections that only serve to strengthen the regime. Indeed, there is a logic to not voting in a system one finds fundamentally illegitimate.

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75 *Ibid.*

76 Choucair, "Illusive Reform," p. 3.

77 Marina Ottaway, *Democracy Challenged: The Rise of Semi-Authoritarianism* (Washington DC: Carnegie Endowment for International Peace, 2003), p. 3. Ottaway refers to such systems as "ambiguous systems that combine rhetorical acceptance of liberal democracy, the existence of some formal democratic institutions, and respect for a limited sphere of civil and political liberties with essentially illiberal or even authoritarian traits" (p. 3).

78 Daniel Brumberg, "Liberalism versus Democracy. Understanding Arab Political Reform," *Carnegie Endowment Working Papers. Democracy and Rule of Law Project,* no. 37 (2003), p. 13.

79 Cf., Joakim Ekman, "Political Participation and Regime Stability: A Framework for Analysing Hybrid Regimes," *International Political Science Review* 30, 1 (2009).

This is not to say that Jordan's election system should not be dealt with. But the approach must be broader. Strengthening legislative powers is crucial for democracy, as is focusing on other aspects of the political field. As the National Centre for Human Rights in Jordan, which monitors human rights and democracy in the country, observes, "laws governing elections, political parties and public assembly, as well as the social associations and press and publications and other laws governing civil and political rights and public freedoms constitute an interlinked whole."[80] Therefore, they need to be reformed in tandem, and "dealt with in the absence of selectiveness and in accordance with a set of equal priorities."[81] Focusing on the election system is not enough, nor always the most important way, to promote democracy.

In dealing with authoritarian regimes, one must never overlook the basic democratic deficits in the system. Democratization in Jordan can only be a function of reduced royal influence. Absent this, royal initiatives to increase democracy – developed, as they are, within the framework of the constitution – and calls for reformed election laws may only serve to strengthen the status quo. Such measures will have little consequence for democracy as long as the basic democratic deficits are not addressed – the all-powerful role of the king and the tight relationship, based on patronage, between king and tribes in Jordan.

Instead of focusing on just elections, "external pressure should be placed more on pressing for independent economic opportunities, expanding legislative powers, and reducing resources available to the state elites in the centre of power."[82] Indeed, "until state elites' monopoly on rents is limited, real alternance in power is possible, and parliament is a mechanism for policy making ... democracy [will remain] thwarted."[83] Currently, the constitution effectively constrains the legislative power of parliament.

The only way to promote democracy in Jordan is by diminishing the monarch's constitutionally entrenched role, no matter how unstable the political context. In all cases where democracy has been introduced under a monarchy, the monarch has eventually given up his powers in favour of the people. Such examples are readily referred to by Jordanian analysts, one of whom has stated that the king "can find a role in a democracy." Indeed, the ex-minister refers to the "dream for some ... to reach a constitutional monarchy," a dream he shares. "This is where we have to get," even if, as he envisions, the road there will be quite long. The king does not have to be dethroned, but he needs to let go of his powers for democracy to prevail.

This needs to be recognized by all who portray Jordan as a model of reform for the Arab world. As Musa Maaytah, the Political Development Minister, has recently stated, in what seems to be yet another reform initiative, "now is the time to proceed with a political reform agenda based on a 'roadmap.'"[84] In this situation, the king and his government must be held to their rhetoric on democracy. Rhetoric is not enough, real change has to come.

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80 National Centre for Human Rights, *The Situation of Human Rights in the Hashemite Kingdom of Jordan* (2007), p. 10.

81 *Ibid.*

82 Lust-Okar, "Elections under Authoritarianism," p. 468.

83 *Ibid.*, p. 469.

84 *Jordan Times*, 22 April 2009, www.jordantimes.com (accessed 27 May 2009).

When Constitutional Amendments Mean Authoritarian Consolidation: The Case of Egypt

CHAYMAA HASSABO

According to Article 189 of the Egyptian constitution of 1971, the president of the republic can request modification of one or more articles of the constitution.[1] During most of his presidency, Hosni Mubarak[2] has never considered constitutional amendment to be of paramount importance. Consequently, he has rejected calls by the political opposition and independent intellectuals to this effect. Then, unexpectedly, he did decide to use his constitutional right under Article 189. Constitutional amendment took place in two phases. The first and most surprising was announced on 26 February 2005, when the president took the initiative to amend Article 76 so as to abolish the plebiscite system for selecting the president. Consequently, Egyptians now have a "pluralistic" system of election, in that they can choose from a selection of candidates. The president brought forward the second phase for consideration on 26 December 2006. This resulted in a major campaign that has led to the modification of 34 constitutional articles, including Article 76, amended only one and a half years earlier. Despite strong protests by the political opposition, these amendments were passed on 26 March 2007.

The current Egyptian constitution was adopted under former President Anwar al-Sadat in 1971 and ratified in 1980. The most important constitutional amendments made under Sadat were the institution of Islamic jurisprudence as *the* principal source of legislation instead of being just *one* of its principal sources (Article 2), and insistence on the multi-party system, restored by Sadat in 1976 (Article 5). The Shura Council (Consultative Assembly) was also created as a

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1 Article 189 stipulates:

The President of the Republic, as well as the People's Assembly, may request the amendment of one or more of the Constitution articles. The articles to be revised and the reasons justifying such amendment must be mentioned in the request for amendment. In case the request emanates from the People's Assembly, it should be signed by at least one third of the Assembly members. In all cases, the Assembly shall discuss the amendment in principle, and the decision in this respect shall be taken by the majority of the members. If the request is rejected, the amendment of the same article may not be requested again before the expiration of one year from the date of such rejection. If the People's Assembly approves the principle of the revision, the articles requested to be mended shall be discussed after two months from the date of the said approval. If the modification is approved by two-thirds of the members of the Assembly, it must be referred to the people for a plebiscite. If the amendment is approved, it shall be considered in force from the date of the announcement of the result of the plebiscite.

2 Hosni Mubarak came to power in 1981 after the assassination of Anwar al-Sadat.

second chamber of parliament (Chapter 7). Finally, the most-contested article, 77, abolished limits on presidential terms.

In many of its articles, the Egyptian constitution emphasizes the multitude of liberties it offers: freedom of expression, the right to peaceful gatherings and rallies, political plurality, etc. Despite the legal (*de jure*) guarantee of these rights, *de facto* they undergo distortion and serious violation. The simultaneous existence of laws protecting liberties along with their actual violation is a common phenomenon in countries that mix authoritarian and democratic features, such as those in the Arab world. Egypt belongs to this category of ambiguous political regimes that have neither completed democratization nor returned to full-scale authoritarianism.[3] The existence of a "democratic" space, along with the authoritarian application of democratic features are essential to the stability of such regimes and are often considered a "survival strategy" to ensure they remain in power.[4] The changes to the Egyptian constitution in 2005 and 2007 have not led to further democratization. On the contrary, most of the amendments have strengthened authoritarian control over the electoral process (Article 88) and society as a whole (Article 179). Although the political arena has been opened up to "pluralistic election," this has remained a "virtual concept." This is because the conditions imposed through modified Article 76 prevent any "real" political candidate from competing. In this study, I analyze the meaning of constitutional amendments under an authoritarian system. Through empirical analysis of Article 76 and, more briefly, of articles 88 and 179 and the debates they engendered, I will endeavour to answer the following questions: What does constitutional reform mean in an authoritarian regime and how does constitutional reform assist these regimes to consolidate and reorganize their power? However, a brief outline of the background of Egyptian political dynamics is first needed to shed light on the context in which this constitutional reform was conceived.

Historical and Contemporary Political Context

The people of Egypt have lived under two political systems since the establishment of the republic after the successful military coup led by the Free Officers in July 1952. The advent of Anwar al-Sadat in 1970 marked the end of the populist-authoritarian system installed by his predecessor, Gamal Abdal Nasser. Under Nasser's system, the military controlled state functions. His regime was characterized by his charismatic leadership in the implementation of state policies focusing on redistribution of land, nationalization of foreign-controlled industries and companies as well as price controls.[5] During Sadat's presidency, peace was concluded with Israel and the alliances forged by the former regime underwent change. An "open door policy" (*infitâh*) was implemented, inaugurating an era of "crony capitalism" in which private businesses flourished in the shadow of the state, with its consent and support.[6] The regime of Hosni

3 Larry Diamond, "Thinking about Hybrid Regimes," *Journal of Democracy* 13, 2 (2002): 21-35.

4 Daniel Brumberg, "The Trap of Liberalized Autocracy," *Journal of Democracy* 13, 4 (2002): 56-68.

5 Raymond A. Hinnebusch, *Egyptian Politics under Sadat. The Post-Populist Development of an Authoritarian-Modernizing State,* (Cambridge: Cambridge University Press, 1985), pp. 2-3.

6 On "crony capitalism," see Yahya M. Sadwoski, *Political Vegetables? Businessman and Bureaucrat in the Development of Egyptian Agriculture,* (Washington DC: Brookings Institution, 1991).

Mubarak has followed policies very similar to those implemented by Sadat. The multi-party system of sorts initiated by Sadat in 1976 has been further developed by his successor, although the limitations imposed on it have merely led to the emergence of more parties with no real power. Some say that the Mubarak regime is more "democratic" than its two predecessors. In reality, the Mubarak regime is merely less "authoritarian."

A closer look at the dynamics of the Egyptian state clearly reveals that the authoritarianism of the ruling regime is constantly changing form. The door was opened wider for parties to function, for elections to occur and for a more or less "free" press, yet in reality this progress is constrained by the influence of powerful and far-reaching security apparatuses. There is no longer a Nasser-style populist-authoritarian regime or Sadat's post-populist authoritarianism, but rather a limited consolidation of socio-political authoritarianism which has been influenced – through international and/or internal pressure – to adopt a more liberal façade. In essence, Mubarak's regime has been periodically prodded into maintaining some semblance of democracy through its alliances with Western powers and international aid donors.

Since the beginning of 2000, Egypt has witnessed perpetual change, not only in the discourse and strategies of the incumbents, but also in the governed masses' perception of their rulers. These changes have extended to the political opposition. Protest has become much more audible and many critical barriers have been, and continue to be, crossed. Thus, it has become possible to criticize the president directly, a subject which till then had been taboo. For the first time, changes in Egypt have unfolded in parallel with events outside the country, and these events have served as catalysts for local opposition and popular dissatisfaction.

Developments such as the Second *Intifâda* in Palestine in 2000 and the war against Iraq in 2003 have called the credibility of the Egyptian regime into question, while simultaneously casting doubt on Egypt's traditional role as leader of the Arab world. On 19 and 20 March 2003, during the Iraq war, demonstrations took place throughout the country. Demonstrators chanted slogans both against the war and against President Hosni Mubarak himself. During one demonstration, angry protestors tore down a large portrait of Mubarak in the street. Prior to this, it was unheard-of to criticize the president, yet nowadays the opposition and independent newspapers often criticize his policies. This trend has become more evident since the arrival of President Mubarak's son, Gamal, on the political scene in 2002. In that year, the second general congress of the National Democratic Party (NDP) (the first to take place since the 1980s) was held and young Gamal Mubarak was promoted to lead the Higher Policies Committee. Locally and internationally, this move provoked heated debate on hereditary succession to the presidency, and the likelihood of transmission of power from father to son, as had happened in 2000 in Damascus with the Syrian presidential succession.

Since that date, a new guard has emerged within the NDP led by Gamal Mubarak, who present themselves as "reformers" and pledge to change the existing order. "Decorative" changes aimed at modernizing the party have indeed taken place – including convening regular party congresses and the publication of a new party mouthpiece. Other political changes were implemented, notwithstanding their unpopularity, such as the passing of controversial draft laws, ratification of (even more controversial) constitutional amendments and the coun-

try's first presidential elections. Meanwhile, the challenges put forward by a sector of "elite intellectual opponents" grew louder, even though initially they were limited in scope. The emergence of the Egyptian Movement for Change (*Kifâya*) paved the way from the end of 2004 for the emergence of other "specialized" protest movements. The political openings associated with the electoral momentum of 2005 benefited the opposition and protest movements. However, following the parliamentary elections in November and December 2005, and following the departure of foreign observers and the international media the "political openings" were rapidly closed again. Yet, these developments and movements have cleared the way for other non-politicized actors, who are experiencing erosion of their living standards and/or working conditions, to begin protesting.

This new breed of actors has begun to take centre stage in Egypt's confrontations, often exceeding the few hundred "intellectual elite" demonstrators. Repeatedly playing the same role as street protestors in downtown Cairo, this group of politicized actors has succeeded in inspiring a number of spectators into action, but not in inspiring significant numbers of spectators into becoming actors of the same type. The decline of certain actors and success of others may be attributable to the appeal of more developed and socially relevant organizations and to the causes for which these actors protest. The "elite protestor" groups, which directly criticized the person of the Egyptian president and/or his son, were a novel socio-political feature, and inspired some others to follow suit. However, the non-politicized sectors of the working class have raised issues and causes more pertinent and pivotal to the lives of average Egyptians, including the question of what is to be done about low and declining real wages. Working-class actors have championed the cause of poor living standards and deteriorating working conditions, and this has lent them wider popular appeal. Another relevant factor is the fact that these actors suffer double neglect –by both the ruling political system and the opposition parties. Both have grown increasingly unpopular, the former for its authoritarian politics and the latter for having no popular agenda to engage the masses and address their concerns. Both place the average Egyptian citizen at the bottom of their priorities. In this context, constitutional reform came to reinforce the idea that political liberalization does not lead necessarily to democratization. Indeed, the political authorities' control over processes of political liberalization is an obstacle to democratization.[7]

Article 76 Amendments One and Two: Made-to-measure for Mubarak's Son?[8]

On 26 February 2005, in a speech addressed to Egypt's citizens from the University of Munûfiyya, President Hosni Mubarak announced he had sent a letter to Fathî Surûr, Speaker of the People's Assembly (*Maglis al-Sha'b*), and to Safwat al-Sharîf, Speaker of the Shura Council (*Maglis al-Shura*), requesting amendment of Article 76 of the constitution. As noted earlier, this was the first

7 Michel Camau, "Sociétés civiles "réelles" et téléologie de la démocratisation"', *Revue internationale de politique comparée* 9, 2 (2002): 212-32.

8 An analysis of the modified Article 76 was previously published by the author "Moubarak 'sans cravate': Moubarak démocratique"', in Florian Kohstall (ed.), *Egypte dans l'année 2005,* (Le Caire: CEDEJ, 2006), pp. 29-45.

time since 1981 the president had made such a request. More importantly, Article 76 dealt with the way the Republic's president is elected. According to Mubarak, the amendment would establish competition between several candidates in an "open," "free," "pluralistic" presidential election. Thus, the plebiscite system was to be abolished. Prior to amendment, article 76 stipulated:

> The People's Assembly shall nominate the President of the Republic. The nomination shall be referred to the people for a plebiscite. The nomination for the President of the Republic shall be made in the People's Assembly upon the proposal of a least one third of its members. The candidate who obtains two thirds of the votes of the members of the People's Assembly shall be referred to the people for a plebiscite. If he does not obtain the said majority the nomination process shall be repeated two days after the first vote. The candidate obtaining an absolute majority of the votes of the Assembly members shall be referred to the citizens or a plebiscite. The candidate shall be considered President of the Republic when he obtains an absolute majority of votes cast in the plebiscite. If the candidate does not obtain this majority, the Assembly shall propose the nomination of another candidate and the same procedure shall follow concerning his candidature and election.

In terms of this article, a presidential candidate had to meet two principal conditions. First, one-third of members of the People's Assembly had to support the proposal of the candidate, and second, two-thirds of the Assembly's members had to approve him. Under the plebiscite system, only one candidate was actually in a position to gain approval by two-thirds of the People's Assembly: the incumbent. The NDP, since its creation in 1978 under Sadat, has always managed to secure an absolute majority in the People's Assembly. An opposition presidential candidate was inconceivable under such system, especially since the political parties and the Muslim Brotherhood combined had never won one-third of People's Assembly seats. Under the circumstances, the plebiscite was more of a *fiction* to embellish the overall process and involve the Egyptian people in the choice of president without affecting the result. In any event, in Mubarak's four plebiscites, the rate of approval always exceeded 90 per cent.

By amending Article 76, Egypt would choose her president "democratically" through competition among several candidates, who were to disclose their programmes in order to enable Egyptians to compare them and to choose their first "elected" president. The president's announcement in February 2005 was more than welcomed by political opponents. Government, independent and opposition newspapers ran headlines praising the president for his "historic step" that would inaugurate a "Second Republic" in Egypt. That date, 26 February, was to be a "feast of democracy." In fact, the president's announcement greatly embarrassed the political opposition, especially the political parties. During the National Dialogue sessions, 13 of the 15 political parties participating agreed to postpone discussion of constitutional amendments until after the September 2005 plebiscite.[9] The National Dialogue (*Al-Huwâr al-Watanî*) was an exchange between the NDP and all other "legal" political parties on political, economic and social reform in Egypt. In fact, it seemed to be a series of courtesy calls among political public figures rather than a real dialogue on reform.[10]

9 The plebiscite on Mubarak's fifth mandate was due to be held in September of the same year.

10 Benjamin Rey, "Les partis d'opposition égyptiens à l'épreuve de la réforme constitutionnelle"', in Kohstall, *L'Egypte dans l'année 2005,* pp. 55-82.

The amendment of Article 76 confronted the opposition parties with the quandary of how to compete for power when they were virtually unknown to Egypt's citizens. Certainly, the political authorities had hindered the emergence of any real opposition. At the same time, the political parties themselves had no ideological framework and no real political, economic or social programmes. The political parties exploited their victimization, in the sense that the regime left them no room to act, in order to mask their lack of consistent project. A comparison of opponents and incumbents in Egypt would quickly reveal that they are two sides of the same coin. The fact that political opponents lead a struggle for democracy against authoritarian rulers does not necessarily mean that they actually practice democracy. In reality, the calls by opposition parties for a rotation of power are contradicted by the non-application of this principle within their party structures.

Even though the political authorities presented this constitutional amendment as a further step towards Egypt's "democratization," the constitutional and judicial constraints imposed by the new Article 76 leave one to wonder about the real intent of such reform. For some analysts, the pluralist presidential election is nothing more than a "masked referendum"[11] or an "electoral referendum."[12]

In fact, the amended version of Article 76[13] contains many conditions and clauses that make holding a "serious" presidential election difficult. Under these conditions, a very limited number of people could be presidential candidates. The modified Article 76 differentiates between independent candidates and political party candidates. For the first type:

> ... to be accepted as candidate to presidency, he shall be supported by at least 250 elected members of the People's Assembly, the Shura council and local popular councils on governorate levels, provided that those shall include at least 65 members of the People's Assembly, 25 of the Shura council, and ten of every local council in at least 14 governorates. The number of members of the People's Assembly, the Shura council and local popular councils on governorate level supporting [the] candidature shall be raised pro-rata to any increase in the number of any of these councils. In all cases, support may not be given to more than one candidate. Procedures related to this process shall be regulated by the law.

As for the second type:

> Political parties, which have been founded at least five years before the starting date of candidature and have been operating uninterruptedly for this period, and whose members have obtained at least 5% of the elected members of both the People's Assembly and the Shura council, may nominate for presidency a member of their respective upper board, according to their own by-laws, provided he has been member of such board for at least one consecutive year. As an exception to the provisions of the fore-mentioned paragraph, any political party may nominate for the first presidential elections, to be conducted following the enactment of this Article, a member of its higher board, established before May 10, 2005 according to its by-law.

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11 *Al-Tagammu'*, 26 March 2005.

12 *Al-Misri al-Yawm*, 12 May 2005.

13 One of the main criticisms of Article 76 relates to its length, which is unusual for a constitutional article.

Based on observation of the results of parliamentary elections in general, it becomes obvious that the conditions candidates must meet are so restrictive as to leave no room for competition over power. The procedures for nominating independent candidates have been widely criticized. The gathering of the necessary signatures from the People's Assembly, Shura Council and local municipal councils by opposition candidates is impracticable, as all these institutions are dominated by the NDP. In this situation, even a "real" independent candidate is marginalized from the process. However, these procedures could allow a ruse by the ruling party, the presentation of a "virtual" independent candidate, thus legitimating the electoral procedure. The conditions imposed on independent candidates can be seen as a means to hinder attempts by the Muslim Brotherhood to participate in the presidential election process. Even though the Brotherhood succeeded in winning 88 seats in the People's Assembly in the November/December 2005 elections, it will be difficult for them to win a similar number in the next election in 2010. In fact, cadres of the regime have clearly declared the Brotherhood should not have been permitted to participate in the elections. As for the last Shura and municipal elections, the Muslim Brotherhood candidates were shut out of both: it gained no seats in the Shura council elections held in 2007, and was marginalized in the municipal elections in 2008 (which were due to be held in 2006 but were suddenly postponed).

As for the political parties, in view of their very limited success in the parliamentary elections of 2005, it is unthinkable that they will be able to improve their tally in the 2010 elections. Indeed, according to the amended Article 76, political parties must have at least 5 per cent of the seats in each assembly to be able to put forward a candidate for the presidential election. In 2005, no political parties gained even 1 per cent of both assemblies. Furthermore, the electoral failure of nearly all "important" political parties plunged them into a round of splits in late 2005 and early 2006. In addition, those parties still awaiting authorization, such as *Al-Wasat* Party (moderate Islamist) formed by Abû al-'Ilâ Mâdî, a former member of the Muslim Brotherhood, or *al-Karama* (Nasserist, Arab-nationalist), founded by Hamdîn Sabâhî, a former member of the Nasserist Party, will not be allowed to field a candidate in 2011. To be able to put forward a candidate for the next presidential elections, these two parties would have had to be authorized before September 2006. When the president requested the second round of constitutional amendments, including Article 76 (which were eventually passed in 2007), he clearly took the results of the November/ December 2005 parliamentary elections into account. It was necessary to make the conditions imposed on political party candidates less stringent, while other conditions remained unchanged. According to the re-amended Article 76:

> Political parties, founded at least five consecutive years before the starting date of candidature and … operating uninterruptedly for this period, and whose members have obtained at least *3% of the elected members of both the People's Assembly and the Shura Council in the latest elections or an equivalent percentage of such total in one of the two assemblies,* may each nominate for presidency a member of their respective higher board, according to their own by-laws, provided he has been a member of such board for at least one consecutive year. *As an exception to this provision of the afore-mentioned paragraph, the afore-mentioned political parties whose members obtained at least one seat in any of the People's Assembly or the Shura Council in the latest election may nominate in any*

> *presidential elections to be held within ten years starting from May 1, 2007, any member of its higher board according to their own by-laws, provided he has been member of such board for at least one consecutive year.* (author's emphases)

In addition, the amended Article 76 has created a Presidential Elections Committee whose role is to:

1. declare the commencement of an election and supervise procedures for declaring the final list of candidates;
2. supervise balloting and vote-counting procedures;
3. announce election results;
4. decide on all appeals, challenges and all matters related to its own competence, including conflicts of jurisdiction; and
5. draw up by-laws regulating its *modus operandi* and the exercise of its competencies.[14]

In addition to discriminating against independent candidates, the new Article 76 contains unconstitutional procedures, according to independent judges and jurists. These include the fact that the Presidential Elections Committee's decisions are exempt from legal proceedings, and that its decisions are final and enforceable, thereby making this committee illegitimate.[15] In fact, it contravenes Article 68 of the constitution, which stipulates that the

> ... right of litigation is inalienable and guaranteed for all, and every citizen has the right to have access to his natural judge. The state shall guarantee accessibility of judicature for litigants, and rapid decision on cases. *Any provision in the law stipulating immunity of any act or administrative decision from the control of the judicature is prohibited.* (author's emphasis)

Another unconstitutional procedure associated with the amendment concerns the clause in Article 76 indicating that draft law no.174/2005, which regulates presidential elections, should be submitted before its promulgation to the Supreme Constitutional Court to determine its conformity with the constitution. The Supreme Constitutional Court, responsible for verifying the constitutionality of laws and administrative regulations, interpreting laws and statutory orders as well as regulating conflicts in jurisprudence,[16] does not enjoy the prerogative of retroactive control of laws.[17] For Ibrâhîm Darwîsh and Yahia al-Rifâ'î, both eminent jurists, this clause contradicts Article 175 of the Egyptian constitution. This stipulates that:

> The Supreme Constitutional Court shall exclusively undertake the judicial control of the constitutionality of the laws and regulations, and shall undertake in the manner prescribed

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14 *Al-Ahrâm*, 28 May 2005.

15 *Al-Wafd*, 8 July 2005

16 Nathalie Bernard-Maugiron, "Le juge, interprète de la Constitution: la Haute Cour constitutionnelle et les élections parlementaires en Égypte," in Nathalie Bernard-Maugiron et Jean-Noël Ferrié (eds), *Architectures constitutionnelles des régimes politiques arabes. De l'autoritarisme à la démocratisation,* Egypte-monde Arabe (2005: 2-3) (Le Caire: CEDEJ, 2006), pp. 133-58.

17 *Al-'Arabi*, 11 September 2005.

by the law the interpretation of legislative texts. The law shall determine the other competencies of the court, and regulate the procedures to be followed before it.

Yahia al-Rifâ'î explains that law 48/1979, which regulates Article 175, indicates that the Supreme Constitutional Court's role is limited to adjudicating the constitutionality of laws and regulations only *after* their promulgation. He indicates that in applying this law, the Supreme Constitutional Court should have refused to verify the constitutionality of draft law 174/2005 until it was promulgated.[18]

The president's announcement on the amendment of Article 76 certainly astonished all Egyptians, since the president was opening the door to competition for power. However, permitting competition for power does not necessarily mean allowing power to rotate. The first presidential election in September 2005 did not bring to power a president other than the one already in office. The step taken by the president and its timing were curious, especially since on 29 January, less than a month before proposing the amendment of Article 76, he had declared that "the demand for a constitutional amendment is actually unjustified, those who try to compare between the direct election and the plebiscite should bear in mind that the plebiscite is based upon a selection by the People's representatives in Parliament."[19]

In the Egyptian context, this constitutional reform could be analyzed as a phase of political liberalization succeeding or preceding other phases of political deliberalization, and as being similar to what occurred at the beginning of the 1990s.[20] But the political climate since 2000, as well as the emergence of new political actors, lead us to conclude that there are now new stakes beyond the incumbents' quest for legitimacy and persistence in power. Since 2002, Gamal Mubarak has been climbing the ladder of the NDP's internal hierarchy, from the post of Economic Secretary to becoming the head of the newly-created Higher Policies Committee. Today, Mubarak's son is also one of the party's three vice secretaries-general. Gamal Mubarak seems to be the real holder of the cards within the presidential party. His presence in the ruling party apparatus, the media coverage of his activities and his local and international political "recognition" allow Gamal to appear as the potential president of Egypt and reinforce the hypothesis of a hereditary transmission of power or *tawrîth al-sulta*. But *tawrîth al-sulta* is no longer an adequate expression. The possibility of "competition" among candidates for the presidency, through and according to the mechanisms described in the modified Article 76, make it possible for anyone who can meet the legal conditions to run for president. In this scenario, Gamal Mubarak is constitutionally eligible. In this regard, this constitutional reform can be considered a mechanism to legitimate the transition of power and the potential successor of the ruling incumbent.

"Modernizing the Constitution:" Reinforcement of State Control Over Society

With the adoption of the modified Article 76 of the constitution, the first presidential election was held in September 2005. Ten candidates competed, includ-

18 *Al-Ahrâr*, 16 June 2005.

19 *Al-Ahrâm*, 30 January 2005.

20 Eberhard Kienle, *A Grand Delusion. Democracy and Economic Reform in Egypt*, (London: IB Tauris, 2001), p. 4.

ing Hosni Mubarak. Unsurprisingly, Mubarak was re-elected president of the Egyptian republic for a fifth term. During his electoral campaign, Mubarak had promised a programme of "constitutional reform." His vision for this included more balance between the branches of government; enforcement of citizens' rights and civil liberties; support for the party system; empowerment of women; and the development of municipalities (local government). The amendments proposed by Mubarak on 26 December 2006 meant large-scale constitutional reform affecting 34 articles. This second phase of constitutional amendment did not enjoy the same welcome as the first amendment of Article 76 in early 2005. Political opponents feared a repetition of the process whereby the amendments were shorn of all meaning. These amendments were also largely considered a "reversal" (*intikâsa,* literally a relapse) of the democratization process in Egypt.

Political analyst and Professor Hassan Nafaa divided the constitutional amendments into three categories. The first category includes articles dealing with the economic system. They abolished references to the socialist system and replaced them with the more capitalist vision that had been implemented since Sadat's advent power and during the Mubarak era. The second category of amendments, according to Nafaa, are those which "are real amendments in form, and erroneous in content," and deal with the reshaping of relationships between the branches of government. The third and last category of constitutional amendments deals with civil liberties and rights, and include those considered to be truly regressive.[21] This category is of particular relevance to this study. Two of these articles were heavily criticized, as they rolled back civil liberties. Articles 88 and 179 are considered to reflect the political authorities' will to make the electoral process more fraudulent and to reinforce the power of security apparatuses over society.

The amendment of Article 88 of the constitution suppressed direct judicial supervision in the electoral process, in the sense that instead of there being a "judge for each ballot box," a committee will supervise the overall process. Judicial supervision of elections was the subject of a decision by the Supreme Constitutional Court in 2000, which made elections unconstitutional unless they were supervised by a member of a "judicial body" (*hay'a qada'iyya*). Even though there was still controversy over exactly who was a member of a judicial body (the state's lawyers and the administrative prosecutor are considered to be members of such bodies), overall there was seemingly less electoral fraud after judicial supervision began, though this did not necessarily make elections more transparent. The presence of judges in polling stations discouraged traditional means of rigging elections as stuffing ballot boxes, but fraud then shifted outside the polling stations. For example, voters who were not NDP sympathizers were prevented from entering polling stations.[22] According to Article 88 before its amendment, "The necessary conditions stipulated in the members of the People's Assembly shall be defined by law. The rules of elections and referendum shall be determined by law, while the ballot shall be conducted under the supervision of members of a judiciary organ."

The application of this constitutional rule made it imperative for elections to be held in three stages, to allow judges to cover most constituencies: there sim-

21 *Al-Misry al-yawm,* 31 December 2006.

22 Participant observation during the November/December 2005 parliamentary elections.

ply were not enough judges to monitor elections throughout the country simultaneously. Article 88 was modified to read as follows:

> The conditions to be satisfied by members of the People's Assembly and provisions for election and referendum shall be defined by the law. An independent and impartial higher committee shall supervise elections in the manner regulated by the law. The law shall set out functions, method of formation and guarantees for the committee, which shall have among its members current and former members of judicial bodies. This committee shall form general committees to supervise elections in constituencies as well as committees to administer the balloting process and vote tallying and sorting committees. The general committees shall be composed of members of judicial bodies and vote tallying and sorting shall be made under the supervision of the general committees in accordance with the rules and procedures stipulated by the law.

The arguments used for this amendment were directly related to the conduct of the parliamentary elections in November and December 2005. Some "independent" judges publicly criticized the fraud during the electoral process and others were physically threatened by thugs during the election. The amendment of Article 88 was, according to the authorities, to preserve the dignity of the judiciary by preventing judges from being dragged into politics. Furthermore, holding the vote in three phases hampered the judges in exercising their primary and natural role of settling litigation, they said. Political opponents saw this amendment as a return to massive electoral fraud and broader executive control of the electoral process.

Another constitutional amendment strongly criticized as a serious violation of human rights related to Article 179. In terms of the amendment, the post of Socialist Public Prosecutor was abolished, and a new article entitled "Combating Terror" introduced. This will be followed by the elaboration of an anti-terrorism law to replace the state of emergency under which Egypt has lived since 1981. Political opponents and civil society as well as human rights organizations consider this law worse than the emergency law. They fear the definition of "terrorism" will be extremely wide, and could be applied to political activists or to any citizen refusing to submit to state security apparatuses or to the police in general.

According to the amended Article 179:

> The State shall seek to safeguard public security to counter the danger of terror. The law shall, under the supervision of the judiciary, regulate special provisions related to evidence and investigation procedures required to counter those dangers. The procedure stipulated in paragraph 1 of articles 41 and 44 and paragraph 2 of the Article 45 of the Constitution shall in no way preclude such counter-terror action. The President may refer any terror crime to any judiciary body stipulated in the Constitution or the law.

The amendment of Article 179 has an important consequence: reinforcing and, to a certain extent, "legitimizing" the state security services' violations of human rights and judicial procedures. The three constitutional articles contravened by the application of this anti-terror law stipulate:

Article 41:

> Individual freedom is a natural right and safeguarded and inviolable. Save for the case of being caught red-handed, no person may be arrested, inspected, detained or his freedom restricted or prevented from free movement except under an order necessitated by investigations and preservation of the security of the society. Such order shall be given by the competent judge or the Public Prosecution in accordance with the provisions of the law. The law shall determine the period of custody.

Article 44:

> Homes shall have their own sanctity and they may not be entered or inspected except by a causal judicial warrant prescribed by the law.

Article 45:

> The law shall protect the inviolability of the private life of citizens. Correspondence, wires, telephone calls and other means of communication shall have their own sanctity and secrecy and may not be confiscated or monitored except by a causal judicial warrant and for a definite period according to the provisions of the law.

The amendment of Article 179 is contested largely on the grounds that it is a violation of human rights and of judicial independence: as explained by the independent Judge Hishâm al-Bastawîsî, the amended article would allow for the creation of exceptional judicial instances that do not respect the constitution.[23] Article 179 is even considered by Islamist intellectuals such as Muhammad Salîm al-'Awa as being contrary to the principles of Islamic jurisprudence. According to Bahay al-Dîn Hassan, President of the Cairo Institute for Human Rights, the amendment would transform Egypt from an authoritarian regime into a repressive regime controlled by the police.[24] In reality, the state security apparatuses already have unlimited powers: the application of an anti-terror law would completely institutionalize these powers and make them legitimate in the sense that their exercise is designed to preserve "national security."

Egypt's Next Presidential Elections in the Wake of Constitutional Amendments

While civil society considers the modernization of the Egyptian constitution as a reinforcement of authoritarian power in Egypt,[25] the political authorities see it as a turning point in the history of Egypt.[26] In the context of the continuous evolution of authoritarianism in Egypt, one can view these amendments as the arrangement of political and constitutional regulations in order to prevent a crisis over the succession to power. As new electoral momentum for the parliamentary elections in 2010 and the presidential elections in 2011begins to build, nothing seems likely to change in Egypt. The political opposition seems weaker

23 *Al-Ghad,* 10 February 2007.
24 *Al-Wafd,* 6 April 2007.
25 *Al-Ghad,* 10 February 2007.
26 Declaration of the Prime Minister, *Nahdat Misr,* 27 March 2007.

than ever. No political party is keen to put forward a political project as an alternative to the NDP's or is able to present a candidate to compete with the regime's potential candidate. To make up for its political and ideological deficiencies, the political opposition is attempting to instrumentalize the emergent social forces by trying to politicize their demands.

A kind of "*Kifaya 2*" is apparently taking shape to rally all opposition political forces: benefiting from the upcoming election period, they would then stage a media event that would later dissipate along with the electoral momentum. Names of international figures such as Ahmad Zuwail, Muhammad al-Barâdi'î, and Magdî Ya'qûb or independent judges such as Hishâm al-Bastawîsî are being suggested in opposition circles as potential candidates for the presidency. Regardless of the popularity of these figures, their potential candidacy raises the question: what about Egyptian politicians? Is there not one of them who can represent the political opposition? Apparently, the answer is no. The political opposition is divided by personal conflicts that preclude any real coalition from emerging and competing with the regime's candidate. Based on a number of interviews I recently conducted in Cairo (September 2009), it seems the political opposition would be content with a military outcome. Having criticized the power wielded by the military for years, the political opposition is now more inclined to favour a military president rather than a civilian one, if the latter is to be Gamal Mubarak.

To conclude, it can be confirmed that the constitutional amendments adopted in 2005 and 2007 did not fundamentally change the political dynamics, in the sense that they did not change the configuration of power and/or the strategies of the political opposition, but they institutionalized authoritarian control over society. The first phase of constitutional amendment of Article 76 did not permit the hand-over of power or install democracy in Egypt, since the incumbent's continuance in power was guaranteed,[27] even after the opening of the door to "pluralist" presidential elections. The second phase of constitutional amendment consisted of tinkering with the constitution rather than modernizing it, as the political leader and his party claimed.

In a period of growing protest from all sectors and all professional and social categories, it is essential for an authoritarian regime to maintain its power not only over political opponents but also over society as a whole. For example, the new Article 179 did not fundamentally change the state security services' practice of arresting political activists. Instead, the amendment legitimized these practices and legally institutionalized them. To the regime, the use of repression is not inconsistent with democracy. On the contrary, the former protects the latter. The demonstrations organized against the referendums of 25 May 2005 and 26 March 2007 on constitutional reform were met with high levels of repression, in spite of state discourse promoting "the democracy of the Egyptian regime." However, while prior to the constitutional amendments, authoritarianism and its associated syndromes could be contested as constitutional violations, it can now perhaps be said that challenging the authoritarian nature of the regime signifies challenging the constitutional structure itself.

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27 Nathan Brown, "Monarchies constitutionnelles et républiques non constitutionnelles : mécanismes juridiques de succession dans le monde arabe moderne," in Bernard-Maugiron and Ferrié, *Les architectures constitutionnelles des régimes politiques arabes,* pp. 89-104.

Morocco's Monarchical Legacy and its Capacity to Implement Social Reforms

FLORIAN KOHSTALL

Since King Mohammed VI's accession to the throne in July 1999, Morocco has often been cited as an example of reform in the Middle East. While the country's rating in good governance indices is still low, several reform measures highlight Morocco's capacity to adjust to "an international normative order."[1] In April 2000, parliament adopted several laws to reform the education system with the proclaimed objective of integrating Morocco into the worldwide knowledge society. In February 2004, after more than a decade of controversial debate, a new personal status law (*moudawana*) was promulgated. Morocco is also seen as belonging to the family of developing countries that adjust to international standards on the basis of its creation of the Equity and Reconciliation Commission that investigates the human rights abuses that occurred between 1956 and 1999.[2] It is often argued that the king is the only actor in Morocco's political arena capable of pushing through controversial reforms, that he is the "master of all reforms." After his father's death in July 1999, King Mohammed VI initiated his reign with a new promise centred on the rule of law and priority for social reform. Consequently, the aforementioned measures can be viewed as the fulfilment of his initial promises.[3]

This chapter questions the view of the king's supremacy in the policy process. It shows that social reforms in Morocco are subject to a complex process of agenda-setting and decision-making. The different steps in policy-making involve not only the king but also international organizations and various political parties. Moreover, in the last decade, representatives of civil society and businessmen have gained important influence in the policy process. In fact, while the king still acts as an arbiter,[4] he depends heavily on the support of party members and the pluralistic nature of Morocco's political system to push through sensitive policy

1 By "international normative order," I refer to the fact that most of these reforms are built on foreign, mostly Western, policy models. This is not meant as a dismissal of these reforms, but points to the difficulty in critically evaluating them.

2 Frédéric Vairel, "L'instance Équité et Réconciliation au Maroc: lexique international de la réconciliation et situation autoritaire," in Sandrine Lefranc (ed.), *Fabriques de la coexistence*, (Paris: Michel Houdiard, 2006), pp. 229-53.

3 Haim Malka and Jon B. Alterman, *Arab Reform and Foreign Aid: Lessons from Morocco*, (Washington DC: Center for Strategic and International Studies, 2006).

4 John Waterbury, *The Commander of the Faithful: The Moroccan Political Elite – A Study in Segmented Society,* (London: Weidenfeld and Nicolson, 1970).

issues. In other words, Morocco's ability to reform more efficiently than other countries in the Middle East and North African region (MENA) depends not on its monarchical legacy but on its pluralistic nature, a specific configuration that has been built up since the country gained independence in 1956.

Below, recent writings on political economy that link Morocco's reform capacity to its monarchical legacy are reviewed. Education reform and the reform of the personal status law are then reviewed to assess the role of different actors in these policy processes. The role of the reform commission is then considered, a practice that emerges as a new form of governance in the Moroccan context. Finally, the role and singularity of Morocco's pluralism in the context of Middle Eastern regimes is examined.

This chapter aims to draw attention to the fact that the forms of states are often "overstated"[5] in assessments of the policy outcomes of authoritarian regimes in the Middle East. In the literature, a fetishism about leadership persists, and the relatively complex pattern of interaction between rulers and ruled is neglected. An inquiry into specific reform processes illustrates that "sovereignties are contested," even if this contestation does not necessarily induce democratization.

Morocco as a Prototype of a Globalizing Monarchy?

Morocco could be described as the prototype of what Clement Henry and Robert Springborg call the "globalizing monarchies" of the MENA region. The authors distinguish between bully praetorian states (Egypt, Tunisia, the Palestinian Authority), bunkers (Algeria, Saddam Hussein's Iraq, Libya, Yemen), fragmented democracies (Iran, Israel, Lebanon) and globalizing monarchies (Jordan, Kuwait, Morocco, Saudi Arabia) in analyzing the capacity of MENA regimes to respond to the challenges of globalization. As the designation implies, the monarchs in the region are better prepared for globalization than their presidential counterparts. Presidential republics fall mainly into the bunker and bully categories, and are less able to tolerate free entrepreneurship and civil society, two prerequisites for adjusting to globalization as expressed in the various versions of the Washington consensus.[6]

The distinction between monarchies and republics in the Middle East has long piqued the interest of researchers and political analysts, but not always with the same results. In the 1960s, many agreed that republics would be better at building an efficient economy and modernizing society.[7] Inspired by the Turkish model, the new presidents sought legitimacy based on development with either nationalist or socialist ideological underpinnings. The monarchies, by contrast, were perceived as traditionalist states, in which the rulers based their legitimacy on tradition and religion, with little interest in social mobilization.

In the 1980s, this view started to change. In their seminal "A Political Economy of the Middle East," Richards and Waterbury underlined the subtle contrasts between monarchies and republics. These contrasts lie in their distinc-

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5 Nazih Ayubi, *Overstating the Arab State: Politics and Society in the Middle East,* (London: IB Tauris, 1995).

6 Clement Henry and Robert Springborg, *Globalization and the Politics of Development in the Middle East,* (Cambridge: Cambridge University Press, 2001).

7 Samuel Huntington, *Political Order in New Societies*, (New Haven: Yale University Press, 1968).

tive patterns of pluralism. Unlike their republican counterparts, who rely mainly on a hegemonic party to structure power relations, monarchs have fewer problems with political pluralism, as they place themselves above the competition between political factions. Thus, monarchies provide limited political pluralism, of crucial importance for social and economic reform. Competition among political parties and social groups is tolerated as long as the different parties to this pluralism abide by the rules of the game. In the words of Richards and Waterbury, "the monarch's rule is to divide, chastise, and regulate, but not to humiliate or alienate important factions."[8]

Morocco is a case in point for this type of limited pluralism. Competition between parties is accepted, but is subordinated to the exercise of the power concentrated in the king's hands. These obviously contradictory features are manifest in the Moroccan constitution. Article 3 prohibits a one-party system, calling for the representation of citizens by political parties, labour unions, district councils and trade chambers.[9] Article 19, in which the king is designated "commander of the faithful" (*amir al-muminin*) and "guarantor of the State's continuity," places the prerogatives of the head of state beyond the reach of constitutional law to confer upon him the duty of protecting the constitution.[10]

The Moroccan constitution was itself imposed by King Hassan II. Endorsed in a popular referendum in 1962, it was described by the king as the "renewal of the sacred pact between the people and the king."[11] Along with the *bay'a* (act of allegiance), which was reinstituted by Hassan II in 1961 directly after he succeeded Mohammed V, the constitution served as a (modern) instrument to codify the king's supremacy. While the constitution contains articles on the role of political parties and political institutions such as government and parliament, it also contains several articles that preserve the king's immunity.[12]

Every constitution is subject to evolution and the constitution became for Hassan II an important instrument for consolidating his authoritarian power. In the 1960s, article 19 was still interpreted as an arrangement underlining the monarchy's traditional legitimacy and endowing the king with the representative functions of a strong head of state. From the 1970s onwards, Hassan II made frequent use of his role as commander of the faithful to intervene in religious affairs or even to force deputies of the leftist Socialist Union of Popular Forces (USFP) to return to parliament in conformity with the duties arising from their act of allegiance to the king.[13]

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8 Alan Richards and John Waterbury, *A Political Economy of the Middle East: State, Class and Economic Development,* (Cairo: American University in Cairo Press, 1991), 318.

9 Article 3 of the Constitution reads: "Political parties, unions, district councils and trade chambers shall participate in the organisation and representation of the citizens. There shall be no one-party system." See the text of the 1996 constitution on: http://www.al-bab.com/maroc/gov/con96.htm (accessed 11 September 2009).

10 Article 19 reads: "The King, "Amir Al-Muminin"(Commander of the Faithful), shall be the Supreme Representative of the Nation and the Symbol of the unity thereof. He shall be the guarantor of the perpetuation and the continuity of the State. As Defender of the Faith, He shall ensure the respect for the Constitution. He shall be the Protector of the rights and liberties of the citizens, social groups and organisations. The King shall be the guarantor of the independence of the Nation and the territorial integrity of the Kingdom within all its rightful boundaries." Ibid.

11 Hassan II, speech 18 November 1961, *Inbi'ath oumma*, Moroccan Ministry for Information. Cited in Mohammed Tozy, *Monarchie et islam politique au Maroc,* (Paris: Presses de Sciences Po, 1999), p. 89.

12 Article 23 of the constitution reads: "The person of the king shall be sacred and inviolable." See the text of the 1996 constitution on: http://www.al-bab.com/maroc/gov/con96.htm

13 Tozy, *Monarchie et islam politique au Maroc*, pp. 92-3.

Recent amendments underscore the authoritarian character of the Moroccan constitution. After an initial minor amendment in 1992, a second amendment in 1996 instituted a bicameral parliamentary system. A second chamber, the House of Counsellors was created, to allow for direct representation in the first chamber, the House of Representatives. The amendment led in 1998 to the formation of the so-called *Alternance* government, headed by the opposition USFP leader Abderrahmane Youssoufi. In fact, the king was reacting to the claims of the National Movement. The parties unified in the democratic block[14] sought a government that would be formed by the elected majority in parliament. By introducing a second chamber comprising indirectly elected members, the king created a buffer against the directly elected first chamber, while giving the appearance of responding to the National Movement's demands. The process of constitutional amendment underlined the absence of direct dialogue between king and opposition parties and the existence, instead, of an asymmetrical communication process between those who presented their demands in the form of a memorandum and the king as guarantor of the constitution.[15]

Morocco's constitution was and is a constitution of the king. Tozy rightly dubs it a "*constitution octroyée*" ("enforced constitution").[16] The country's political system is more accurately described as a "monarchy with a constitution" than as a "constitutional monarchy." In this constitution, the role of political parties is very limited: they are confined to pure representation and organization without any prerogative to put their demands into practice. The parliament and its deputies are restricted to the role of advisor to the king.[17]

Still, the constitution, the way it is amended and the way its principles evolve, reflects only one aspect of political reality. As with elections, the constitution and its amendment are security matters for the regime, subject to the complete tutelage of king and palace. Other aspects of political life, including the processes of social reform, are open to negotiation and even power-sharing of sorts, so that political parties and civil society actors play a more crucial role. In fact, the constitution cannot capture the relations of power between king and other political actors, since an important political player situates himself – and is situated – above the constitution.

Because of the longstanding confrontation between the king and the parties of the National Movement, Morocco, as most observers agree, is a special case of a monarchy that provides for party pluralism, subservient, though, to the direct exercise of power. When King Hassan II instated the *Alternance* government under Abderrahmane Youssoufi, he reserved to himself the prerogative of nominating directly and without consultation with the chief of government the so-called "ministers of sovereignty" (interior, defence, foreign and religious affairs). He, his son and successor and the palace continue to play a crucial role in all

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14 The democratic block (*kutla demukratiyya*), created in 1992, comprises the USFP, the nationalist *Istiqlal* (Independence Party), the Party of Progress and Socialism (PPS) and the Organization for Democratic and Popular Action (OADP). USFP and *Istiqlal* are the traditional parties of the National Movement, and have suffered many splits over time.

15 Rkia El Mossadeq, *La réforme constitutionnelle et les illusions consensuelles,* (Casablanca, 1998).

16 Tozy, *Monarchie et islam politique au Maroc*, p. 88.

17 Ibid. For an account of the more recent debate on constitutional reform, see also Lise Storm, *Democratization in Morocco: The Political Elite and the Struggle for Power in the Post-independence State* (London: Routledge, 2007).

aspects of political life, relying on their role as arbiter. In Waterbury's terms, political parties and labour unions have replaced the traditional system of concurring tribes, where one tribe was marginalized in favour of another in order to stabilize the *Makhzen*'s control of the country.[18] This interpretation has, however, been widely criticized. It relates the king's crucial role in Morocco's political system to his traditional role as power broker, but neglects the way in which Hassan II built up an authoritarian style government by combining traditional and modern instruments of power.

The question remains, what role do political parties really play, how are they able to accept the supremacy of the king and what difference can they make in the allocation of public goods? A study of the reform of the education system and the personal status law may shed more light on power relations between king, political parties and an emerging civil society (or probably a civil society already saturated with NGOs). A reading of the constitution is not enough to understand Morocco's political process and the limited pluralism that allows for representation and influence in areas isolated from the pure exercise of power.

Especially since the establishment of the *Alternance* government, some sort of power sharing has become evident, which permits political parties and civil society organizations greater influence and responsibility. Education reform and the reform of the personal status law are two outstanding examples of what has been achieved through a new type of governance that tentatively integrates these actors into the decision-making process. While a study of the creation of the *Alternance* government and the subsequent elections only illustrates how far Morocco still is from democratization and how much the monarchy retains control of the political arena, a study of the decision-process in these two reform initiatives produces a more nuanced picture: The king relies on political parties and NGOs to prepare social reforms. These developments don't necessarily mean Morocco is becoming more democratic, but they do illustrate some of the inherent contradictions in an authoritarian system that is adjusting to international norms of good governance by moving away from some of the principles of its authoritarian constitution.

Education Reform

Since the end of the 1990s, Morocco has taken several steps to reform the country's social system. One of the first initiatives concerned the education system, which had long been counted as among the most inefficient in the MENA region. After adopting the National Charter for Education and Training,[19] several steps were taken to combat illiteracy, enhance school enrolment and revise curricula. In 2003, Morocco was the first country in the Maghreb to reform its public universities in compliance with the Bologna process. This reform underlines Morocco's intention to adjust to European and international norms and to become a pioneer in university reform in the region.

While education reform gained momentum only recently, its origin dates back to the reign of Hassan II. When King Mohammed VI presented to parliament the National Charter for Education and Training in October 1999, he had inherited a

18 Waterbury, *Commander of the Faithful.*

19 Commission Speciale Éducation/Formation, *La Charte nationale éducation/formation*, (Rabat, 2000).

reform programme launched by his father, for Hassan II had announced the creation of the Special Commission for Education and Training (COSEF) in February 1999. He charged his advisor Abdelaziz Meziane Belfkih to choose representatives from every political party and from every professional syndicate in the education sector. Moreover, a handful of members were to be chosen from among NGOs, the religious authorities and entrepreneurs. The king's aim was to end decades of debate on the Arabization of Morocco's education system and pave the way for tuition fees. A "consensus" was to be achieved on education reform through "proper representation of the whole political landscape."[20]

The establishment of COSEF occurred at a specific political juncture. It was called into being just one year after the king had charged the USFP leader Youssoufi with forming the *Alternance* government. When Youssoufi agreed to become prime minister, he placed particular emphasis on the social crisis and the opposition's responsibility to reform Morocco's social system. Before the *Alternance* government could begin to draw up its own reform plan, Hassan II decided to institute his royal commission to address the problems in the education sector. By creating COSEF, the king emphasized that he would remain the master of all reform, and by calling members of all political parties to join the commission he gave equal importance to the political factions belonging to the National Movement and the so-called *Makhzen* political parties closely tied to the palace.

The initiation of education reform illustrates how the king tried to exercise his role as arbiter. Still, he did not launch the reform without the support of the World Bank, on one hand, and political parties, on the other. In 1995, when the National Movement parties were still on the opposition benches, they demanded full Arabization and a guarantee of free education. In parliamentary committee, the parties drafted a reform programme that included both principles. The king, who rejected the opposition claims, presented to parliament a World Bank report calling for partial liberalization of the education system and the introduction of tuition fees.[21] Confronted with this report, the parliamentary committee stopped its work. However, the opposition parties also turned to the World Bank report, which called as well for reform of the administration. The parties thus requested the king to end his practice of appointing technocratic governments and to choose the prime minister from the majority party in a directly elected parliament.

It is difficult to assess to what extent the king really had to take into account the opposition's demands. In any case, given that most student and teacher unions were linked to the parties of the National Movement, the king could not achieve consensus on education reform without securing opposition support. In that sense, the creation of the *Alternance* government created momentum for reform. Once the National Movement parties accepted government responsibilities, they also agreed to the creation of COSEF. To increase the commission's appeal, its president granted a special seat to USFP, the leading leftist party. Its representative, Mohammed Guessous, joined the commission without being subject to the king's approval.

After four months of debate and study, the commission reached a consensus on education reform. With the charter adopted, Morocco for the first time had a

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20 Author's interview with the president of COSEF, Rabat, June 2006.

21 "Les rapports de la Banque mondiale: éducation et formation au XXIe siècle ; questions relatives à l'administration marocaine," in *Le Matin du Sahara et du Maghreb,* (15 October 1995), pp. 3-7.

comprehensive reform programme that secured the approval of international organizations: it continues to serve as a guideline for education reform. When King Mohammed VI presented the charter to parliament in October 1999, he asked the government to translate the charter's principles into laws. In April 2000, parliament voted on eight laws related to the reform. All laws were unanimously adopted, for the various political parties were bound by the consensus their representatives had reached behind closed doors. Thereafter, different ministries carried out the reform programme. It took another two years before the reform got under way. A first step was the adoption of a new procedure to select university presidents. Then, in 2003, Morocco began the reform of its university study programmes.

Overall, COSEF has proven to be an efficient instrument for initiating reform of the education sector, reform that for decades had been stalled because of the confrontation between king and National Movement. Certainly, COSEF allowed the king to keep control of the policy process. Still, it illustrated that he could not act unilaterally in the policy arena. He required the support of political parties, and the cooperation of USFP and the smaller leftist parties, with their influence in the education sector, was crucial in this case. The king secured the support of the National Movement parties while balancing their influence by simultaneously harnessing the *Makhzen* parties and civil society organizations.

Consequently, COSEF illustrated that sensitive policy issues are subject to a complex negotiation process. The king needs the support of political parties to achieve a consensus and effectively implement reforms. By discussing these issues within commissions with specific reform mandates, the influence of political parties is limited to those policy issues and Morocco's power equilibrium remains intact.

The Personal Status Law

COSEF is probably the most outstanding example of how the king builds extensive pluralism in a limited and controlled policy arena. However, Morocco's current reform performance in other policy domains underlines the assumption that reform depends on a specific pluralistic configuration and on the actions of political parties in the policy arena.

A lively debate has been under way since the early 1990s to reform Morocco's personal status law, largely unchanged since its promulgation in 1957. It was based on a traditional reading of Islam, whereby women are subordinated to men, without authority over the family. Morocco's emerging civil society placed the issue at the head of the political agenda, with the support of the World Bank. In 1992, the *Union de l'action feminine* (UAF), an organization defending women's rights with close links to leftist parties, wrote an open letter to the Moroccan parliament and launched a public petition to change the *moudawana.*[22] The demands encountered fierce opposition from conservative *ulema* and the Movement for Reform and Renewal, the Islamist party led by Abdelillah Benkirane, later integrated into Morocco's political arena as the Party for Justice and Development (PJD).

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22 Mustapha Al-Ahnaf, "Maroc: Le code du statut personnel," *Monde arabe Maghreb-Machrek* 145 (1994): 3-26.

King Hassan II established a commission in order to bring closure to the debate. However, the commission introduced only minor changes. The issue re-emerged after the *Alternance* government took office in 1998. As with education reform, Abderrahmane Youssoufi made change to the personal status law a top priority and charged his secretary of state, Said Saadi of the Party of Progress and Socialism (PPS), to draw up the "Plan for the Integration of Woman." The publication of this plan in 2000 provoked the largest demonstrations ever seen in Morocco, with 10,000 people taking to the streets of Rabat in support of the plan and 100,000 in Casablanca protesting against it. The government, stunned by the extent of public mobilization, retreated from the project.

For many commentators, the failure of the USFP-led government only illustrated that the Moroccan politics were ripe for arbitrament and the king's intervention.[23] King Mohammed VI subsequently took ownership of the reform by creating a new commission. However, the change to the personal status law only succeeded with the involvement of political parties. King Mohammed VI's first tentative steps to resolve the issue, involving a commission mainly comprising conservative *ulema* and judges, also failed: in 2002, this commission discontinued its work without result. The king then replaced the commission's president, Driss Dahak, a judge in the royal administration, with M'Hammed Boucetta, the prominent former leader of the nationalist *Istiqlal* party. Under his leadership, the commission presented two proposals to the king, one a complete revision of the personal status law, the other adding only minor amendments to the existing law. The king opted for the first proposal and requested parliament to vote on it. As in the case of education reform, the parliamentary vote was preceded by both the achievement of consensus on the commission and the king's approval of the reform. Consequently, the new law was approved unanimously.

The reform of this law again highlights the wide-ranging authority of the king and his control of the political landscape. Still, it is remarkable that the reform occurred only once leadership of the commission passed to the leader of one of the major National Movement parties. The king relied, in fact, on the legitimacy, reputation and 'neutrality' of a former party leader to secure social backing for the reform. Boucetta's nomination was as a person, and was not meant to strengthen the role of the *Istiqlal* party. Even so, his party affiliation played a distinct role in rallying support for the reform. Unlike his predecessor, Boucetta was not part of the royal administration. Nor was he associated with USFP and the other leftist parties held responsible for the failure of the first reform initiative. Boucetta was an ideal choice, since the National Movement parties and conservative circles could accept him as an impartial player in the reform of the personal status law.

Additionally, the reform proceeded at a time when the Islamist opposition party was in a relatively weak position, following the 2003 terrorist attacks in Casablanca. Finally, the two major players in the National Movement, USFP and *Istiqlal*, found themselves in a sort of equilibrium. While Boucetta became president of the commission, USFP member Nouzha Chekrouni replaced Said Saadi as secretary of state. By having people in the right positions, political parties and their leading members became an important tool in the king's promotion of social reform.

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23 Jean-Philippe Bras, "La réforme du code de la famille au Maroc et en Algérie: quelles avancées pour la démocratie?," *Critique internationale* 37 (2007): 93-125.

A New Form of Governance

Commissions and the politics surrounding them, best illustrated by COSEF, but also by the commissions created to reform the personal status law, have in recent years become a common instrument for pushing through social reforms. Commissions are set up to draft reform programmes and build consensus on sensitive policy issues. They are also a way to integrate emerging political actors from opposition parties, civil society and the private sector into the policy process.

In several respects, Morocco's commissions are comparable with reform commissions in democratic countries. Presidents, prime ministers and chancellors all set up study commissions in which experts debate crucial policy issues or compile a blueprint for political decisions. These commissions integrate stakeholders from different levels of society, and in their working methodology draw on expertise to help depoliticize ideologically embedded debates.[24] By building on these examples, Morocco's COSEF assembled documents, statistics and testimony before proceeding to write the draft for education reform. It also sent its members on study tours to explore education reform experiences abroad and to see how similar countries deal with such contentious issues such as Arabization and tuition fees.

Commissions are often presented as an example of good governance, especially in authoritarian regimes, where the role of opposition party members and representatives of social sectors is circumscribed. COSEF is, in fact, a unique example in North Africa of NGO and private sector participation in the policy process, and international organizations have rewarded the country by labelling it a model for reform.[25]

But the significance of commissions lies not simply in the achievement of reform projects. They may also become an instrument in the exercise of power. It is generally the executive that establishes study commissions, in the Moroccan case, the king. As noted earlier, with COSEF the king sought to remain the master of reform, and he deprived ministries in the *Alternance* government of leadership in education reform. Furthermore, by unanimously adopting COSEF's consensus, parliament became a rubber stamp for reform without control over the policy process.

Some observers see commissions as pure window-dressing that endow an authoritarian regime with a democratic façade.[26] But neither the window-dressing nor the democratization argument captures the reality of this dynamic. In an authoritarian regime like Morocco, commissions underscore the fact that the king cannot push through social reform unilaterally. He needs to establish a consensus on the reform project and needs various representatives of political parties and labour unions to do so.

Social reform in authoritarian regimes is not a top-down process: it involves international organizations on one hand and social actors on the other. The former judge the country by its reform efforts and make aid conditional on progress

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24 For the debate on study commissions in the United States, see, for example, Rich Ginsberg and David N. Plank (eds), *Commissions, Reports, Reforms and Educational Policy* (Westport, CT: Praeger, 1995); Amy B. Zegart, "Blue Ribbons, Black Boxes: Towards a Better Understanding of Presidential Commissions," *Presidential Studies Quarterly* 34 (2004): 366-93.

25 UNESCO, *Decentralization in Education: National Policies and Practices*. Education Policies and Strategies 7, (Paris: UNESCO, 2005).

26 Holger Albrecht and Oliver Schlumberger, "'Waiting for Godot': Regime Change without Democratization in the Middle East," *International Political Science Review* 25 (2004): 371-92.

towards good governance. They also provide the country with reform models. Domestic actors depend on international organizations' recommendations to underline the legitimacy and necessity of their own reform claims. Education reform and reform of the personal status law were both closely linked to changes in the international environment, as were the changes to Morocco's human rights policy reflected in the creation of the Equity and Reconciliation Commission and the National Human Development Initiative. In all these cases, political parties and civil society organizations have played a crucial role. One would misjudge the dynamics of the policy process, from agenda-setting to decision-making, if one were to attribute these reforms only to the king and his extensive prerogatives in Morocco's political arena.

Morocco's Specific Pluralism

As early as the 1980s, William Zartman argued that Morocco's opposition parties served as ghost-writers for the king.[27] They channel social demands and place them on the agenda through their presence in parliament. Social reforms do not emerge simply in response to a social crisis, but because political parties and different civil society organizations mobilize and capitalize on the crisis.[28] As noted earlier, education reform was a major source of conflict between the king and the National Movement parties seeking full Arabization and free education. The reform of the *moudawana* had been promoted by civil society organizations like the UAF, an offspring of the USFP. As such, political parties and civil society organizations play a crucial role in agenda-setting.

Political parties are also a catalyst in the process of decision-making. Commissions are composed of political parties and civil society actors, and the king relies on senior representatives of political parties to achieve consensus on sensitive policy reforms. One may highlight the politics of equilibrium in the king's commissions, but one may also question the participation of political parties in this process. In any event, Morocco's recent reform achievements are linked to a polity that allows extensive pluralism and in which political parties, NGOs and the private sector compete to define public goods. The success or failure of reform depends on the willingness of these actors to mediate social demands, place problems on the agenda, and, finally, to join commissions established by the king. While the first and the second elements have always been inherent in the role of the National Movement opposition, the willingness of the National Movement to participate in the king's commissions has considerably increased since the institution of the *Alternance* government and the accession of Mohammed VI.

The "politics of commissions" are not a new phenomenon in Morocco. In the early 1990s, Hassan II tried to integrate the opposition into the policy process through his "politics of councils." The National Council for Youth and Future (CNJA) was established to debate the problem of unemployment and its links to the education system. Hassan II nominated a prominent USFP representative, Habib El Malki, who later became minister of education, as its general secretary.

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27 Ira William Zartman, "Opposition as Support of the State," in Adeed Dawisha and Ira William Zartman (eds), *Beyond Coercion: The Durability of the Arab State,* (London and New York: Croom Helm, 1988), pp. 61-87.

28 Daniel Cefaï, "La construction des problèmes publics. Définitions de situations dans des arènes publiques," *Réseaux* 75 (1996): 43-66.

But CNJA remained a council, producing reports, not devising concrete policy steps. Only when the National Movement agreed to join the government did cooperation of sorts on specific policy issues become possible in commissions and lead to the development of comprehensive reform programmes.

Alternance acted as a catalyst for Morocco's reform. The change on the throne, by replacing an old regime and its guardians, opened up new spaces for participation by different social strata. Many social and political actors, unable or unwilling to cooperate with the old regime, now stepped forward.[29] In terms of continuity, probably one of King Hassan's greatest "achievements" was his full integration of the National Movement into the political institutions of the old regime. Thus his son was able to continue the change, instead of having to initiate it. As COSEF demonstrates, Mohammed VI generalized the politics of commissions and a new form of governance that his father had already initiated.

Despite the new dynamics that may by unleashed by a process of succession, one should not overestimate these moments of change. The politics of commissions are an old technique in new clothes, ritualizing the principle of divide and rule. In looking at the composition of these commissions, we see persistent patterns of pluralism. These round tables are a "faithful reconstitution of Morocco's political landscape," placing the representatives of the National Movement parties alongside those of the *Makhzen* parties. With the integration of representatives of the emerging civil society, the pluralism of such commissions may even favour further political fragmentation.

In a nutshell, it is less Morocco's monarchical structure that accounts for the country's record on social policy than a specific type of pluralism. The latter embraces a wide range of political parties and civil society organizations, many of them created as offspring of the political parties. Unlike many of the presidential systems in the region that still depend on a hegemonic party, despite the introduction of a multiparty system, Morocco's political pluralism favours partisanship, in that it allows for political representation and political mobilization by political parties. Morocco's capacity to accommodate this form of pluralism is certainly derived from its monarch's legitimacy, but the country is a unique political setting, with little in common with monarchical systems in the region that do not allow such extensive pluralism.

A comparison with similar techniques of governance in MENA's presidential regimes highlights the distinctiveness of Morocco's political pluralism. In 1998, Egypt's minister of higher education set up a similar commission to initiate reform of Egypt's public universities. In doing so, he was following the World Bank's recommendation to widen participation in the reform process. Unlike Morocco's COSEF, party representatives were absent in the Egyptian case. The commission was made up of university professors and private sector representatives without reference to their political affiliations. The president's National Democratic Party, which has dominated Egypt's political scene since the institution of a multiparty system in 1976, does not tolerate competition with opposition parties and marginalizes them in the definition of policy.[30]

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29 Author's interview with a Moroccan reform leader, Aix-en-Provence, June 2007.

30 Florian Kohstall, "'La démocratie renversée': sur l'usage de la 'bonne gouvernance' en Égypte et au Maroc: le cas des réformes de l'enseignement supérieur," in Michel Camau and Gilles Massardier (eds), *Démocraties et autoritarismes. Fragmentation et hybridation des régimes*, (Paris: Karthala, 2009), pp. 241-59.

Morocco's pluralism is also unique in comparison with other monarchies in the Middle East. In Jordan, whose situation probably most closely resembles Morocco's pluralism, the creation of political parties dates only to 1992, with the first multiparty elections held a year later. In Saudi Arabia, elections took place for the first time in 2005 and only at municipal level. Kuwait established the first elected parliament in the Persian Gulf in 1963, but prohibits political parties, only allowing the formation of informal parliamentary groups.

In Morocco, party pluralism dates back to independence. The confrontation between monarchy and National Movement parties over policy issues is a constant. This conflict has been partly addressed through the creation of the *Alternance* government. By affording USFP and *Istiqlal* government responsibilities, the king opened the way to incorporating their members into commissions. This in turn proved to be an effective tool for embarking on social reform initiatives. Party pluralism is certainly not the only precondition for efficient reform, but may facilitate it. Especially in conditions where a participatory approach is a core element of international organizations' good governance agendas, Morocco's capacity to pluralize the political arena is useful. Other regimes, like the presidential republics, lack such inclusiveness, especially with regard to Islamist political organizations. So far, Morocco has been able to achieve this inclusiveness, which in turn seems to be an important element in its ability to channel social demands.

Underscoring the importance of party pluralism in Morocco sheds new light on prospects for democratization and constitutional development. Commissions such as COSEF are neither anti-constitutional nor should they be considered as a step towards greater democracy. They may best be described as a system of power-sharing sheltered from daily political life. Commissions are established to address specific policy issues. Consequently, their purpose is limited. Still they allow for lively debate behind closed doors, a rather atypical circumstance in an authoritarian regime. In this regard, Morocco's pluralism could one day evolve into the type of pluralism seen in a country such Turkey, where party pluralism allows for debate on social and economic issues and real changes in government are possible, albeit under the watchful eyes of the military. One wonders how long institutions that primarily base their legitimacy on the need for national unity, be they the monarchy or the military, are able to keep this pluralism under their tutelage.

EUROPE
THE EUROPEAN UNION

European Transnational Constitutionalism: End of History, or a Role for Legitimate Opposition?

SVERKER GUSTAVSSON

Historically, constitutionalism was a national and politically neutral matter. "We the people" organized ourselves in such a way that the procedure was plain by which we could acquire a new parliament, an alternative government and a different head of state. In addition, the constitution laid down rules for safeguarding civil rights, e.g., freedom of association, freedom of religion and freedom of speech. In some countries, there were also constitutional provisions for the protection of ethnic and cultural minorities.

But in the transnational context of the European Union, as it manifested itself from the 1950s onwards, the concept of constitutionalism took on a further meaning. Now it came to mean that governments of member states imposed a collective straitjacket on themselves as to the *content* of public policy. The effect of this collective straitjacket is to hamper the pursuit of social and economic policies that are not in accordance with the general clause on freedom of movement for capital, goods, services and labour.

The governments of member states did not, however, change their national constitutions to accord with the general clause on freedom of movement. As a result, the EU is only able to implement Community law sporadically, and in spheres where national resistance is moderate or nonexistent. Consequently, the impact of the living constitution of the Union is less predictable than it ought to be. Indeed, it is notoriously difficult to know whether Community law is applicable in a given case or not.

What we got, in practice, was a constitutionalism that is transnational *and* biased in favour of market liberalism. During the 20th century, national constitutionalism was considered to be the politically neutral rules of the game. In the case of European transnational constitutionalism, however, neutrality does not apply. Political content and constitutional procedure are looked upon as two sides of the same coin. Or, to put it differently, the distinction between ordinary politics and constitutional politics is blurred.

Without simplifying too much, I think we can say there is fundamental agreement on how to describe and explain the actual workings of the European transnational constitutionalism. The debate is not so much empirical as normative. Is the present order preferable to its alternatives? Or do the best arguments

point in the direction of constitutional reform? And if the latter, in what way and in what direction should the system as a whole be changed?

In this paper, I start by first describing the living constitution of the European Union from the standpoint of the difference between national and transnational constitutionalism. I then proceed to clarify the meaning of the three major recommendations given in the normative debate. Finally, I pose what I consider to be the core normative question, namely why is legitimate opposition more desirable than avoidance of accountability?

National and Transnational Constitutionalism – What is the Difference?

Most political scientists are in basic agreement about how the European Union actually works, and about what factors give life and history to the real (as opposed to the formal) European constitution. The empirical aspect is certainly worth discussing. However, it is far less controversial than the normative aspect. People who are very far apart on what to recommend are often in virtually complete agreement on the empirical aspects of the subject.

As a purely descriptive matter, there are two sorts of tension at work here. We might refer to the first as the *horizontal* tension, the one between left and right. All member states consider themselves to be mixed economies or welfare states. Within each member state, moreover, the fundamental pattern is the same. As voters, citizens decide who is to represent them in parliament and to exercise legislative and executive power on their behalf. As consumers of goods and services (including media services), they decide for themselves. As investors and trade-union members, they decide on the distribution of market powers – a distribution that functions in a countervailing fashion vis-à-vis the preferences expressed in general elections based on universal suffrage and freedom of information.

The optimal mix between left and right is neither written in the formal constitution nor laid down by God or history. It is the concrete result of the continual struggle between different political forces. The real constitution is "living" in the sense that citizens are never entirely satisfied in any of their roles: not as voters, not as consumers, not as investors. They accept the actual outcome as something second-best – as the striking of an acceptable balance.

Citizens on the left do not find all of their preferences fulfilled. Nor do citizens on the right. Irrespective of where they stand on the spectrum, however, they feel they can live for the time being with the equilibrium that has emerged. They accept the constitution as something given, and continue pushing for a different real balance – by lobbying persons in power, by seeking to influence public opinion and by working for a different result in the next election.

The second basic tension in the living transnational constitution is the *vertical* one. This is the tension between the suprastatist principle of freedom of movement for capital, goods, services and labour, on the one hand, and the principle of national self-determination and popular democracy on the other. In theory, the suprastatist principle has precedence: it could be used to trump every conceivable piece of national legislation and every single instance of fiscal redistribution. In practice, however, the European Union does not work that way.

It is true that most markets for capital and goods have been made European, in the sense set out in the formal treaties. The markets for services and labour,

however, have not been treated in the same way. In practice, the suprastatist principle is applied to them only partially. This is because the markets for services and labour are much closer to the individual needs and preferences of citizens and families. The legislation promulgated by member states is based on universal suffrage. Accordingly, freedom of information and freedom of organization cannot be suppressed by the free-trade doctrine as easily as various regimes for capital and goods can be. In obvious defiance of the suprastatist free-trade regime, member states have licence-financed public-service media, tax-subsidized public housing, tax-subsidized public and private hospitals, public selling of liquor and pharmaceuticals, public control of rents and national policies for the production of nuclear energy. The four freedoms have only been adopted up to a point. In areas where Community law is unable to reproduce its own legitimacy, they yield to other considerations.

In other words, what we have is a two-dimensional living European constitution, within which actors constantly try to strike a reasonable balance between left and right, on the one hand, and between national self-determination and a constitutionalized free-trade regime for capital, goods, services and labour, on the other. They act and argue in terms of what jurists call proportionality. That is, the question is whether a certain piece of national legislation – when it is contrary to the general clause on freedom of movement – stands in reasonable proportion to what is to be achieved in terms of social protection and citizenship.

In its vertical dimension, the living constitution of the European Union is ruled by what I call "a constitutional balance of terror."[1] The European Court of Justice, and EU legislators too, realize perfectly well they can destroy the trust of citizens in the Union by too rigorously applying the precedence of freedom of movement for capital, goods, services and labour. Electorates and governments of member states can only be expected to acquiesce in the precedence of Community law if the suprastatist regime respects the principle of national self-determination in areas that are politically sensitive.

The practical and everyday import of the constitutional balance of terror is that ordinary politics are mostly handled in terms of *proportionality*. A wide range of political issues – whether central laws or secondary legislation – are discussed in terms of what counts as a reasonable and proportionate national interest capable of balancing the general clause on freedom of movement. In practice, it is this kind of semi-political and semi-juridical contestation that gives life and history to the actual constitution of the European Union.

According to this standard interpretation, the general clause on freedom of movement is not to be implemented within a sphere larger than that within which it can reproduce its own legitimacy.[2] Its application is restricted by an informal pact of mutual confidence, or, put differently, by a constitutional balance of terror. One cannot predict Community law simply by studying treaties and constitutions. In practice, the law's interpretation depends on a delicate and shifting political balance. I am referring to the historically developing equilibrium bet-

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1 Sverker Gustavsson "The Living Constitution of the EU," in Beate Kohler-Koch and Fabrice Larat (eds), *Efficient and Democratic Governance in the European Union*, (Mannheim: Mannheim Centre for European Social Research, 2008), p. 332.

2 Sverker Gustavsson, "Putting Limits on Accountability Avoidance," in Sverker Gustavsson, Christer Karlsson, and Thomas Persson (eds), *The Illusion of Accountability in the European Union*, (London: Routledge, 2009), pp. 41-5.

ween loyalty towards the Union on the one hand, and respect for national autonomy and democracy on the other.

What distinguishes the national from the transnational living constitution is how ordinary politics is related to constitutional politics. At the national level, left and right agree on procedure and disagree on the substance of policy. The transnational living constitution, by contrast, is a system in which the horizontal issue of left and right is not kept separate from the vertical issue of where Community rather than national law is to apply. At the transnational level, then, the procedural and substantive aspects of politics are debated within a single intellectual and political context. Consequently, the living constitution of the Union – as compared to those of its member states – tends to develop in a way that is much less self-reinforcing.

Three Normative Recommendations

Within the broad menu of conceivable normative recommendations regarding the living transnational constitution of the European Union, there are two theoretically pure – and in a pragmatic sense, extreme – positions. The first is federalism and the second is confederalism. According to both, the fundamental structure of the Union is unstable and, in the long run, unsustainable.

The proponents of these two pure positions are highly critical of the constitutional balance of terror that characterizes the living constitution. They take particular aim at what we may call the double asymmetry of the Union. The first asymmetry is the procedural democratic deficit: that is, the fact that the power to legislate is centralized while electoral accountability is not (at least not to the same extent). The second asymmetry, which is intertwined with the first, relates to political content: policies for the market and the currency are centralized, while those for positive integration are not. Positive policies are those aimed at mitigating the social consequences arising from the free movement of capital, goods, services and labour. The four freedoms form part of the basic treaties, social policies do not. The latter are much more difficult to handle at the European level than are regulatory policies for a negative integration marked by deregulation and the creation of a single market.

In the view of fully fledged federalists, social and fiscal policies should be made suprastatist too, and the European Parliament should be given the same constitutional status as the German *Bundestag*. Consistent confederalists, for their part, make the same analysis, and stake out an equally pure position. The suprastatist parts of the living constitution, as they see it, must be re-nationalized, thus making the Union symmetrical through movement in the opposite direction. In other words, fully fledged federalists and consistent confederalists are in full agreement that democratic accountability and actual decision-making ought to take place on the same constitutional tier – either at the national level or at the federal level. One might call this the either/or criterion.

As judged by the either/or criterion, EU decision-makers are not held to account on the appropriate level. Exponents of the two purist critiques take aim, from both ends, at defenders of the constitutional status quo in the middle. These defenders make a wide variety of policy recommendations. However, they have one thing in common. In practice, that is, they favour retaining the established asymmetrical solution to the problem of how national self-determination is to be

combined with partial federalism. Within this broad middle camp, three schools of thought can be fruitfully distinguished on the question of what is to be done about today's living constitution – with its double asymmetry, monetary union without fiscal union and constitutional balance of terror. In a compressed and stylized way, the core assumptions of these three schools may be described as follows:

This is the end of history!

According to this view, our founding fathers created something admirable and there is nothing to be worried about. Such is the basic attitude of neo-liberal champions of the living transnational constitution of today. The tension built into the constitution does not cause these scholars to lose any sleep. On the contrary, they consider it to be a real hit, historically and globally.

According to Giandomenico Majone[3] and Andrew Moravcsik,[4] we should emphasize the fact that, historically speaking, Europe has been highly innovative. In the course of 100 years, Europe has produced two political innovations of great historical importance. The one is the mixed economy, in the horizontal dimension. The other is the mixed polity, in the vertical one.

The mixed economy enabled us to avoid totalitarianism, and the mixed polity made it possible to combine a truly free market with democratic arrangements in respect of social legislation and fiscal redistribution within each member state. The mixed economy, furthermore, works best when it is paired with a mixed polity. And the mixed polity finds supreme expression within the doubly asymmetrical living constitution of the EU today, with its Europe-wide constitutionalization of the free market. From the standpoint of market liberalism, the protections afforded the free market by the Union offer a much better solution than does the risky business of a mixed economy country by country.

In other words, double asymmetry, monetary union without fiscal union and a constitutional balance of terror are not to be considered problematic. Instead, we should be happy to have found such a well-functioning constitutional settlement. The only risk over the long run is the one posed by the tendency of European intellectuals and politicians to discuss the issue in terms of a democratic deficit.

By global and historical standards, the status quo works wonderfully. It should not be disturbed by theoretical and philosophical considerations pointing in another direction. We should rather concentrate on understanding our own system with an eye to making it work even better and to demonstrating its advantages to the rest of the world. In practice, this means that we should not believe in the possibility of transferring the welfare state to the European level. That is a "mirage"[5] to be avoided.

We must politicize!

Alternatively, our founding fathers made an historic mistake. Two distinct positions can be found among political scientists who do not buy the mixed

3 Giandomenico Majone, *Dilemmas of European Integration,* (Cambridge: Cambridge University Press, 2005); idem, *Europe as the Would-be World Power,* (Cambridge: Cambridge University Press, 2009).

4 Andrew Moravcsik, "The European Constitutional Settlement," *The World Economy* 31 (2008): 157-82; idem, "The Myth of Europe's 'Democratic Deficit'," *Intereconomics* 6 (2008): 331-40.

5 Majone, *Europe as the Would-be World Power*, pp. 128-50.

government idea that present constitutional arrangements represent the end of history.

According to the first of these, the solution to a wide range of social, economic and cultural tensions is politicization. Cleavages based on religion, class, culture and ethnicity can only be overcome by recognizing them as legitimate, and by allowing the intellectual and political differences associated with them to be fought out in left/right terms. Due to the weak political contours of European institutions, however, it is far from obvious where Community law applies. Nor is it clear in what areas member states can decide for themselves. Unless Community legislation is adopted after a regular confrontation along party lines at the European level – in the same way as now takes place nationally – citizens will be unable to trust it. Left/right thinking is suppressed at present, but under the political surface it does indeed exist. It should be brought out into the open.[6]

In his book, *What's Wrong with the European Union and How to Fix It*, Simon Hix presents a programme for encouraging a "limited democratic politics" at the Union level. His main points include a "winner-takes-more" model in the European Parliament, with the president of the parliament being chosen on a full-time basis for five years, and the purely proportional system for the allocation of committee chairs being replaced by a system giving larger political groups a greater number of chairs.

Similarly, the European Council should be transformed into a proper and fully transparent legislature. There should also be an open contest for the Commission presidency, with candidates declaring their political affiliation in terms of left and right. Taken together, Hix argues, such changes would have a dynamic effect and be followed by a trend over the long run towards a totally politicized European Union. If the "life" component of its living constitution came to resemble that of national-level politics more closely, the system as a whole would work much better.

Take every conceivable precaution in order to avoid a constitutional meltdown!

According to proponents of this view, the assertion that our founding fathers made an historic mistake is a reasonable value judgment. The appropriate response, however, is neither enthusiasm nor democratic activism, but rather extreme constitutional caution. Such an attitude is necessary if devastating outbreaks of right-wing nationalism and populism are to be avoided. This is the second main position among researchers who are critical of the end-of-history thesis. Unlike their counterparts immediately above, however, they do not think politicization at all levels is the way to go. Experiences with fascism and right-wing populism in Italy and Germany form the special historical backdrop for some of the most prominent representatives of this school.[7]

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6 Jürgen Habermas, "Europapolitik in der Sackgasse," in Jürgen Habermas, *Ach, Europa,* (Frankfurt am Main: Suhrkamp, 2008); Simon Hix, *What's Wrong with the European Union and How to Fix It,* (Cambridge: Polity Press, 2008).

7 Stefano Bartolini, *Restructuring Europe*, (Oxford: Oxford University Press, 2005); idem, "Should the Union be 'Politicised'? – Prospects and Risks," (Paris: Notre Europe, Policy Paper 19, 2006); idem, "Taking 'Constitutionalism' and 'Legitimacy' Seriously," (Florence: European Governance Papers. Discussion Paper 2008/1); Fritz W. Scharpf, *Governing in Europe,* (Oxford: Oxford University Press, 1999); idem, "Politische

When Stefano Bartolini and Fritz Scharpf defend the constitutional status quo, they do so on the basis of an analysis diametrically opposed to that of the neo-liberals and the democratic activists. The combination of double asymmetry, monetary union without fiscal union and a constitutional balance of terror does not fill their hearts with joy. However, they see no feasible alternative to this unstable constitutional equilibrium. Nothing else is available that is better or as good. One could say that these scholars argue in a way familiar from environmental policy. That is, they plead a precautionary principle of a sort designed for the vertical aspect of the transnational living constitution. We should not think only in terms of costs and benefits, they argue. We must also keep a worst-case scenario in mind.

In the national-level living constitution, to be sure, left and right vie for mastery. In practice, however, both sides benefit from an element of mutual trust that – within the historically given borders and the commonly accepted rules of the game – is self-reinforcing. But, Bartolini and Scharpf caution us, politicization of the vertical dimension will probably not work that way. The chances are more likely that, as soon as a common European solution to a problem cannot be presented as Pareto-optimal, citizens will start asking a politically sensitive and potentially explosive question: why, and on what grounds, are people living in other countries entitled to legislate on "our" behalf?

Politicians will find it hard to provide a good answer to that question. It is for this reason, Bartolini and Scharpf argue, that European legislation and European adjudication should remain apolitical. Horizontally (that is, within each member state), citizens are prepared to accept majority rule, because the minority took part in the preceding legislative preparations, and it can imagine becoming a majority after the next election. Vertically, however, citizens cannot be active in the preparation of legislation in the same way. Since the most important legislative issues – especially the trumping principle of freedom of movement – are constitutional ones, citizens will not so readily consider majority decisions to be legitimate.

This is why Bartolini and Scharpf are so afraid that a system of European majority rule will provoke outbreaks of devastating right-wing populism among the electorate. Such tendencies will arise, in their view, if the suprastate goes too far towards legislating and adjudicating in a way that is detrimental to feelings of national self-respect. It is therefore critical, in connection with vertical European legislation and adjudication, that we never lose sight of the underlying informal principle that vertical loyalty upwards is bought at the price of respect for national self-determination downwards.[8]

Why is Legitimate Opposition Preferable to Accountability Avoidance?

In my view, there are basically two lessons to be drawn from comparing these three positions in the debate on the future of the transnational living constitution. One lesson is that our understanding of the living constitution of the

Optionen im vollendeten Binnenmarkt," in Markus Jachtenfuchs and Beate Kohler-Koch (eds), *Europäische Integration*. 2 Auflage, (Opladen: Leske + Budrich, 2003); idem, "Legitimacy in the Multilevel European Polity," *European Political Science Review* 1 (2009): 173-204.

8 Fritz W. Scharpf, "Autonomieschonend und gemeinschaftsverträglich," in Fritz W. Scharpf, *Optionen des Föderalismus in Deutschland und Europa,* (Frankfurt am Main: Campus Verlag, 1994).

European Union is enhanced if we interpret the question as a *two dimensional* issue.

Considering the elements of life and history in the constitution both vertically and horizontally enables us to see the main options in the debate more clearly. The assumption that the juxtaposition of Community law and national self-determination is of the same kind as the traditional confrontation between left and right within each member state cannot be taken for granted. The horizontal dimension bears on the tension between capitalism and democracy – a matter over which a balance can be struck without the losers becoming negative towards the system as such. The vertical power struggle, on the other hand, refers to the tension between national self-determination and the suprastatist regime of free movement for capital, goods, services and labour. The losers in this conflict might easily, as Bartolini and Scharpf argue, turn their opposition to particular outcomes into opposition to the system as a whole.

An even more important lesson, I think, is that the concept of *opposition* has a different meaning in the living transnational constitution of the EU from what it has within the established liberal-democratic context of member states. Vertically, opposition does not have the same within-the-system confrontational meaning as it does within a national constitution. At the national level, the confrontation between left and right proceeds without undermining support for the constitution. Opposition is regarded as legitimate. By contrast, the suprastatist principle of free movement (which is only partially applied) leaves citizens with an extremely unclear perception of who is ultimately in charge. This is why there are greater obstacles to instituting democratic accountability in the vertical dimension than there are to instituting it horizontally within each member state.

Horizontally and within each country, opposition takes a classical form, in the sense identified long ago by Otto Kirchheimer. That is, it expresses the *legitimate* "right of the defeated group to publicly maintain its principles after they were rejected by the majority to be the foundation of the opposition's functioning," provided that "the participants in the political game consist of moderate elements."[9] Vertically, the debate between Hix on the one hand and Bartolini and Scharpf on the other – about the legitimacy of federal rulings by the institutions of the European Union – calls into question the classical premises that Hix takes for granted. Instead, Bartolini and Scharpf warn us, politicization in the vertical dimension will bring about Kirchheimer's two alternative types of opposition: at first an opposition of principle, which then calls cartel arrangements into being aimed at the waning of opposition.[10]

Majone and Moravcsik, for their part, see no difference between controversy in the vertical dimension and what takes place in the horizontal dimension within each country. A mixed polity, in their view, is basically the same thing as a mixed economy. Hix, by contrast, concedes there is a difference between the dimensions. He believes, however, it can be overcome by European party politics. If left/right controversies are let loose in the vertical dimension as well, he argues, confrontational activities of a moderate kind will flourish.

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9 Otto Kirchheimer, "The Waning of Opposition in Parliamentary Regimes," *Social Research* 24 (1957): 128ff.

10 Ibid., pp. 134-6.

Bartolini and Scharpf take an entirely different view. Instead of pointing to the possibility of ignoring or overcoming the difference, they *emphasize* it. They see a fundamental difference between classical debate, opposition and power struggles in the horizontal dimension within each country and the likely result if the vertical dimension is politicized. Within each country, they argue, parties and people can fight each other in a moderate way, because their mutual opposition is considered legitimate. It takes place within the same borders and in accordance with the same national constitution.

Vertically, however, the question is not just of politics but of *constitutional* politics. People of various views have to answer a harder question, namely, "why should people living in other countries be entitled to legislate in our country?" When the living constitution is flexible and unclear (as it is in the vertical dimension), striking a reasonable balance is likely to be trickier and more explosive than it is when the task is to balance political forces within a single mixed economy or welfare state.

This leaves us with the puzzling question Peter Mair has posed in a recent article on political opposition in the European Union.[11] Why are EU affairs outsourced from national politics into special referendums and elections to the European Parliament? Why are these matters not part – as ideally they should be – of the regular public debate and regular national election campaigns in member states?

Mair's explanation is that national politicians think intuitively along the same lines as Bartolini and Scharpf. It is too explosive to let constitutional politics loose in national political affairs. Majone and Moravcsik, for their part, would say there is no need for outsourcing. There is nothing to fear, they would likely argue, from mixing regular politics with constitutional politics.

Hix would probably give a similar answer. He believes very strongly in the ability of European political parties to overcome the tension between left and right and the tension between national self-determination and the precedence of Community law. Indeed, he seems to believe such tensions can be overcome even when the policy is implemented from above and no room is left for legitimate opposition or disobedience. This brings me to what I consider to be the core issue. After all, *why* is legitimate opposition more desirable than constitutionally guaranteed avoidance of accountability?

On the general question of accountability avoidance versus accountability promotion, I take the side of those who stress the importance of legitimizing opposition and holding power to account. Politics shorn of disagreement will undermine our belief in democracy, which is a system of choosing between different policies and office-holders. From this point of view, the two positions at the extremes of the spectrum – fully fledged federalism and consistent confederalism – are both unproblematic. By definition, their proponents solve the problem through symmetry. In the first case, power and accountability are both situated at the European level, while in the second, both are lodged at the national level.

One could say, however, that federalists and confederalists are only successful because the situation addressed by their arguments is not the one found "on the open sea," but rather the one that obtains in various "dry docks."[12] Nothing

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11 Peter Mair, "Political Opposition and the European Union," *Government and Opposition* 42 (2007): 1-17.

12 Sverker Gustavsson, "Designing European Federalism," *Swedish Economic Policy Review* 13 (2006): 163-83.

unforeseen can happen, because the ideal union is being modelled from scratch and according to principles that are theoretically sound by definition.

The problem in the real world is usually of a different kind. Politicians have no choice but to rebuild our ship on the open sea. Our founding fathers made their mistakes long ago. Their followers have refrained for generations from adopting a stringently federal or confederal point of view. On account of this lack of clear principles, the Union is marked today by the above-mentioned combination of double asymmetry, monetary union without fiscal union and a constitutional balance of terror. This particular status quo is seen positively by end-of-history theorists; it is viewed as a potential powder-keg by informal-pact-of-confidence theorists; and it is regarded by democratic activists with a rather hopeful eye.

My own preference – given that I take my point of departure in the really existing Union – is for the informal-pact-of-confidence approach. For one thing, I think the approach taken by the end-of-history theorists is too cynical and will have the effect of undermining popular belief in democracy. For another, I believe the democratic activists underestimate the potentially negative consequences of dynamically mixing up the politicization of left/right issues within the member states with the constitutional issue of why the Union should be entitled to legislate and adjudicate in controversial matters. Only the proponents of the informal-pact-of-confidence position are sufficiently sensitive, I would say, to the obvious risk of letting aggressive nationalism loose in Europe. They are realists who do *not* – and I consider this the heart of the matter – lose sight of the element of deliberate choice and historical responsibility. In my view, their specific combination of realism and normative sensitivity is exemplary.

The Union's institutional set-up does not fill the heart of an informal-pact-of-confidence theorist with joy. However, I see no feasible alternative in the short term. There is nothing better immediately to hand. My argument here is familiar from the field of environmental policy. That is, I plead the precautionary principle. We should not just consider what would be ideal; the worst-case scenario must be kept in mind as well. Constitutionalism and legitimacy must indeed be taken seriously.[13] But accountability and opposition deserve serious consideration too.

As an informal-pact-of-confidence theorist, I need to clarify why legitimate opposition is preferable to accountability avoidance. Why should the basic freedoms of religion, speech and organization be defended? Why must equal rights to take part in elections be upheld? Why do I consider it to be mistaken policy to let opposition *wane* and to allow it become an *opposition of principle*, as Otto Kichheimer would have said? This is done constantly in the European transnational context by ostracizing opposition through naming and shaming it under the rubric of "Euroscepticism." It is done in order to defend the long-term political stability and sustainability of the transnational constitution defended by end-of-history theorists. Nevertheless, I see this as mistaken policy. Based on what rational argument can I *simultaneously* defend the precautionary principle and that of legitimate opposition?

In the comparative-government literature more broadly defined – that is, not dealing specifically with the problem of European transnational constitutionalism – there are mainly two arguments in favour of *not* letting loose legitimate opposition, majority rule and democratic accountability.

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13 Bartolini, *Taking 'Constitutionalism' and Legitimacy' Seriously.*

One of these fastens on the widely recognized need to facilitate *cleavage management*. Political procedure is the key, according to this argument. This idea applies not just to the EU, but to every conceivable system. It is founded on the notion that the fundamental purpose of political institutions is to achieve cleavage management and internal pacification. From that viewpoint, the avoidance of democratic accountability and legitimate opposition offers the best available solution to the problem of deep-seated cleavages arising from class, religion and ethnicity. Social fissures of that kind get politicized too easily. If we fear too much politics in a political system, we can use consociational, limited-government, devolutionary and arbitral mechanisms in order "to resist decisions demanded by political majorities that would oppress minority rights, especially if [such mechanisms] enjoy widespread legitimacy."[14]

The other basic argument for avoiding democratic accountability and legitimate opposition emphasizes what procedure means in terms of political content. This argument takes as its point of departure the widely recognized need for policies that accord more closely with the *public interest* than do those often resulting from majoritarian political systems. The idea is that policies should be in the real and long-term interest of those affected. Voters do not always have the capacity to judge what is best for them.

Therefore, a broad and ill-informed popular majority should not be allowed – at least not in any effective way – to affect the functioning of the executive, legislative, judicial or monetary authorities. As the end-of-history theorists see it, the public interest is better served by a market-preserving and asymmetrical order than by one in which a parliamentary majority is held to account in symmetrical fashion – whether at the national *or* the European level. As democracy undergoes its second transformation, a market-preserving federalism based on transnational constitutionalism serves as a necessary straitjacket. The substantive policies thereby promoted accord with the precepts of neo-liberalism, which seems to be synonymous with the public interest in today's end-of-history discourse.[15]

Both of these arguments for *not* letting democratic accountability and legitimate opposition loose have to be taken seriously. In practice, moreover, both of them – whether singly or in combination – are highly influential. That is not to say, however, that the reasons adduced for their tenability are convincing. From a political-science point of view, it cannot and should not be taken for granted that a thesis is true just because it is widely embraced in the real world of power politics. If we inspect the literature more closely, we can easily turn up impressive counter-arguments. These focus on the same major points as their counterparts. What they have to say about effective cleavage management and the promotion of the public interest, therefore, deserves to be taken just as seriously.

In relation to the public-interest argument, it can and should be objected that what history teaches us is the impossibility of knowing with certainty and in advance what is a correct analysis of goals, means and consequences in the real world. The idea of trial and error, as well as the need to be open to future intellectual improvements, would seem rather to restrain us from positing any substantive public interest other than that upon which a political majority can agree on the basis of democratic accountability.

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14 R. Kent Weaver, "Political Institutions and Canada's Constitutional Crisis," in R. Kent Weaver (ed.), *The Collapse of Canada?,* (Washington DC: Brookings Institution, 1992), p. 15.

15 Gustavsson, "Putting Limits on Accountability Avoidance," pp. 41-5.

In other words, it is one thing to say we should seek out the best available expertise for advice and implementation. It is quite another to think it advisable to institutionalize the decision-making of judges, economists and other experts as built-in elements of a "mixed polity."[16] I find the latter idea dubious. We have great need, to be sure, of administrative and juridical expertise. Guardianship, however, is quite another thing. It cannot and should not be taken for granted that the rule of law – as opposed to that of force, caprice, fancy or whim – is best implemented in a system based on the rule of jurists, economists and generals. It should remain an open question – to be settled by empirical experience – whether predictability is best achieved in a system founded basically on guardianship, or in one based essentially on universal suffrage and political freedom.[17]

As for cleavage management as an argument against letting politics loose, there is a strong counter-argument here too. If there are deep cleavages – and there are in most political systems – there is also a vast political-science literature holding that majoritarianism, legitimate opposition and accountability promotion (rather than accountability avoidance) are more effective in fostering tolerance and moderation. An approach of this kind is not only functional for avoiding stalemate, it also helps to ensure unity because it gives politicians "incentives to make appeals to voters across cleavage lines in order to build a majority or plurality of support."[18]

In systems based on universal suffrage and political freedom, and within which many different religious, class, regional and ethnic cleavages are found, politicization serves to promote the emergence and maintenance of cross-cutting cleavages.[19] In such a society, parties cannot gain a majority by appealing only to their own group. They need to become *Allerweltparteien*, the pregnant German term for the important 20th century phenomenon of catch-all parties.[20] Such parties must appeal to many different groups. They accordingly create an institutionalized system of self-reinforcing cleavage management – a system which, be it noted, is the opposite of and contrary to the idea of *not* making opposition legitimate.

From an exclusively utilitarian point of view, then, the arguments for legitimizing opposition are at least as strong as those against the idea of letting politics loose. In addition, however, we should not forget that there is an issue of elementary historical identity at the very core of the matter. Two world wars and a Cold War were fought in defence of things that most citizens see as fundamental: the right to vote, the right to express oneself publicly, the right of free association and the right to disagree without being considered disloyal.

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16 Majone, *Dilemmas of European Integration*, pp. 46-9.

17 Richard Bellamy, *Political Constitutionalism,* (Cambridge: Cambridge University Press, 2007), pp. 143-263.

18 Weaver, "Political Institutions and Canada's Constitutional Crisis," p. 11.

19 Stein Rokkan, *State Formation, Nation-building and Mass Politics in Europe,* (Oxford: Oxford University Press, 1999), pp. 275-302.

20 Otto Kirchheimer, "Der Wandel des westeuropäischen Parteiensystems," *Politische Vierteljahresschrift* 6 (1965): 27-33.

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