This book is based on the annual conference

FROM PEACE TO JUSTICE

"The Dynamics of Constitutionalism in the Age of Globalisation"

held on 15 and 16 May 2008 in The Hague, The Netherlands

organized by

THE HAGUE
ACADEMIC COALITION

For other titles in the Series see p. 205

FROM PEACE TO JUSTICE SERIES

THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALISATION

Edited by
Morly Frishman and Sam Muller

Hague Academic Press
An Imprint of T·M·C·ASSER PRESS

- International Institute of Social Studies of Erasmus University Rotterdam, ISS
- Leiden University - Campus The Hague / Grotius Centre
- Netherlands Institute of International Relations, Clingendael
- The Hague Academy of International Law
- The Hague University of Applied Sciences / Haagse Hogeschool
- T.M.C. Asser Instituut

For further information, you may consult www.haguejusticeportal.net.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
All ER	All England Law Reports
ANC	African National Congress
AUMF	Authorization for Use of Military Force
BVerfG	Bundesverfassungsgericht
BverfGE	Bundesverfassungsgerichtsentscheidungen
BYIL	British Yearbook of International Law
CAT	Convention Against Torture
CFI	Court of First Instance
CIDT	Cruel, Inhuman, Degrading Treatment or Punishment
CLJ	Criminal Law Journal
CMLR	Common Market Law Reports
CSRT	Combatant Status Review Tribunal
CTC	Counter-Terrorism Committee
DTA	Detainee Treatment Act (2005)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EU	European Union
GA Res.	General Assembly Resolutions
GAOR	General Assembly Official Records
GSS	General Security Services (Israel)

CULTURES OF CONSTITUTIONALISM: AN INTRODUCTION

Karin Arts and Jeff Handmaker*

1. Overview

Depending on context and purpose, the term constitutionalism is interpreted differently by many actors. The great variety of ideas about the meaning and roles of constitutions and constitutionalism is especially influenced by context and by legal-historical precedent. As a consequence, it is not easy, and maybe not even possible or desirable, to provide an adequate general definition of constitutionalism, let alone of 'cultures of constitutionalism'. Nevertheless, according to the *Stanford Encyclopaedia of Philosophy*:

> 'Constitutionalism is the idea, often associated with the political theories of John Locke and the "founders" of the American republic, that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the state.'[1]

In addition, '[i]n some minimal sense of the term, a "constitution" consists of a set of rules or norms creating, structuring and defining the limits of,

* The authors of this introductory chapter edited the next three chapters (by Barbara Oomen, Surya Subedi and Susan Akram) that together constitute the section on 'Cultures of Constitutionalism'. They are, respectively, Professor of International Law and Development and Lecturer in Law, Human Rights and Development at Erasmus University's International Institute of Social Studies (ISS), The Hague, the Netherlands.

[1] See first lines of the entry on constitutionalism, available at: <http://plato.stanford.edu/entries/constitutionalism/>.

M. Frishman & S. Muller (eds.), The Dynamics of Constitutionalism in the Age of Globalisation

government power or authority. Understood in this way, all states have constitutions and all states are constitutional states.'[2] In a fuller understanding though, constitutionalism means:

> 'not only that there are rules creating legislative, executive and judicial powers, but that these rules impose limits on those powers. [...] Constitutionalism in this richer sense of the term is the idea that government can/should be limited in its powers and that its authority depends on its observing these limitations.'[3]

An even broader conception of constitutionalism explores the processes that lead to the codification – or other formal expression – of norms and values; the practices of claiming rights that emerge from, or are guaranteed by, such constitutional frameworks; and overall experiences at different levels of governance and from the perspective of all the main actors involved.

Emerging cultures of constitutionalism in developing countries, countries in conflict and countries in transition tend to reflect a more pluralistic spectrum of legal cultures than is the case in many established legal systems. The development of national legal systems and processes of legal transformation in these countries draw on colonial inheritance, post-independence countercurrents and, particularly in the last decade, international law.

This section of the book critically analyses the role of constitutions and constitutionalism, in the broadest sense of the term. All three contributions that make up the section provide especially interesting material for comparing the manner in which international law relates to, and is incorporated into, the national legal systems of so-called developing, conflict and post-conflict countries, also as compared to what are regarded as more 'established' democracies. Case studies from South Africa, Nepal, Israel and the United States illustrate whether, and to what extent, human rights have been protected and codified, which could be seen as contributing to a 'culture of constitutionalism' that tends to respect the primacy of international law (and by extension human rights) over domestic/national interests. Alternatively, the case studies illustrate how overly restrictive interpretations of international obligations may lead to a 'culture of exceptionalism', which tends to adopt an opposite perspective and does not respect the primacy of international law, where it clashes with domestic/national interests.

[2] Ibid., first lines of section 1.

[3] Ibid., second paragraph of section 1.

The case studies reflect on the manner and degree to which the supreme courts in the countries involved have interpreted international law in their domestic legal systems, with particular regard to human rights issues. South Africa and Nepal have both recently experienced profound legal transformations, including constitutional reform, relating directly to conflict, post-conflict and/or transitional situations. Of further comparative interest is that all four of these countries can trace their respective processes of constitutionalism and corresponding human rights obligations to significant events that took place sixty years ago, in 1948. While this is coincidental, it nevertheless is a striking fact.

The three chapters that follow in this section are authored by noted scholars of legal pluralism, international law and legal practice. Each assesses the extent to which international law has influenced the direction of these countries' domestic legal systems and critiques the extent to which this transformation has enhanced a culture of constitutionalism on the basis of universal legal principles.

2. Significant Events of 1948

The year 1948 marked a significant turning point in efforts to entrench or reject human rights at the global level and in the national legal cultures of states. It was, famously, the year in which the Universal Declaration of Human Rights was adopted by the United Nations General Assembly at the Palais de Chaillot in Paris.[4] If not a critical juncture for all UN member states that signed this historic declaration, it can certainly be regarded as a significant moment in the history of global political discourse or the launch of what Michael Ignatieff has termed a global human rights 'revolution'.[5] It is in any event an important marker in the global codification process of human rights norms.

In the wake of Britain's formal recognition of Nepalese independence in 1947, Nepal promulgated its first Constitution, which entered into force on 1 April 1948. While the first Constitution was short-lived, it established an

[4] UNGA Res. 217 (LXIII), 10 December 1948. The Universal Declaration of Human Rights is reputed to be the most translated document in the world.

[5] Michael Ignatieff, ed., *Whose Universal Values? The Crisis in Human Rights* (Amsterdam, Stichting Praemium Erasmianum 1999).

important basis for the country's constitutional order, which built upon this 1948 instrument throughout the many decades of inter-communal violence and outright civil war that followed. More recent events in 2005 that called for the overthrow of the monarchy have been strongly articulated in constitutional language against the language of aristocratic rule.[6] Surya Subedi's chapter develops the notion that Nepal's pro-democracy and social struggles have been strongly infused with constitutional language, often expressed in highly creative ways.

Unfortunately, the human rights revolution marked by the Universal Declaration of Human Rights, as highlighted above, did not benefit everyone at the time, and still does not today. The year 1948 also became synonymous with policies of containment, exclusion, large-scale dispossession and domination. Following the failed efforts of the United Nations to partition the territory of Palestine into two national entities, the state of Israel, led by the Zionist leader David Ben Gurion, came into being after the formal termination of the British mandate on 15 May 1948 and a unilateral declaration of independence, which was recognised by most member states of the United Nations. In the period leading up to and following this declaration, hundreds of thousands of Palestinians became forcibly displaced in refugee camps in Jordan, Syria, Lebanon and Egypt. They were prevented from returning to Israel.[7] Four years later, their exile became permanent; according to the Israeli Nationality Law of 1952, only those 'who remained in Israel from the establishment of the State in 1948 until the enactment of the Nationality Law of 1952, became Israeli citizens'[8] but were denied a nationality. What became known as a day of 'independence' for Jewish-Israelis and other Jews

[6] See, e.g., Kara Wong, 'Nepal: A Country Silenced – The Potential and Limitations of Community Radio as a Tool for Strengthening Government Accountability. Lessons from Nepal's Save Independent Radio Movement', Masters Thesis (The Hague, Institute of Social Studies 2007).

[7] This has been well-documented, especially by Israeli and Palestinian scholars, including: Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge, Cambridge University Press 1987); Ilan Pappe, *The Ethnic Cleansing of Palestine* (Oxford, Oneworld 2006); Walid Khalidi, *All that Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington, D.C., Institute for Palestine Studies 1992) and Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem* (London, Pluto Press 2003).

[8] See: <http://www.mfa.gov.il/MFA/Facts+About+Israel/State/Acquisition+of+Israeli+Nationality.htm>.

around the world became known to Palestinians as the 'catastrophe' or *Nakba* of 1948. The chapter by Susan Akram explains how the consequences of this divided situation had a profound impact on Israel's non-Jewish population, on Palestinians living in the territories occupied by Israel and on Palestinians living in exile elsewhere in the world.

On 26 May 1948, the Reunited National Party of D.F. Malan came to power in South Africa, ushering in a more institutionalised form of racial segregation, known around the world as apartheid. Internationally, the South African government justified its position on the grounds of domestic interests. While many within the minority Afrikaans-speaking white population saw these developments as liberating the country from British colonial rule, it took another forty-five years before the majority of black South Africans were able to liberate themselves from apartheid-style colonialism and racist domination through a negotiated interim Constitution in 1993, which was followed the next year by democratic elections. The interim Constitution marked the beginning of the country's embracing of a constitutional legal culture, a significant event in a long-fought struggle for justice.[9] As Barbara Oomen argues in her chapter, the Constitution included a wide-ranging bill of rights and a truly revolutionary equality clause that prohibited many forms of discrimination. As she explains, based on examinations of the inception, interpretation and influence of South Africa's Constitution, the building of this constitutional culture, although more in-depth than in many other countries in the world, has to a large extent been characterised by a reframing of existing claims in the context of the newly-minted constitutional discourse.

In a further significant moment for constitutionalism in the United States of America, Truman was elected to the presidency by the narrowest of margins on 2 November 1948. This allowed for the development of Truman's policy of containment, which became the most important institutional underpinning of the ideological cold war between the United States and its allies, on the one side, and the Soviet Union and its allies, on the other. What became known as the 'Truman Doctrine' permitted the United States and its allies to invade any country on the grounds that to do so would prevent the spread of Communism. This doctrine also became closely tied to another of Truman's preoccupations and a cornerstone of American foreign policy,

[9] Albie Sachs, *Promoting Human Rights in a New South Africa* (Cape Town, Oxford University Press 1990) and Albie Sachs, *Advancing Human Rights in South Africa* (Cape Town, Oxford University Press 1992).

namely its policy of exceptionalism.[10] The long-term consequences of these policies are explored further by Susan Akram in the context of more recent efforts to curtail civil and human rights, justified by the US government's ideological 'war on terror'.

3. Constitutionalism and Legal Pluralism

As all four case studies illustrate, constitutionalism has historically had to contend with the countervailing forces of exceptionalism. The dynamics at play in advancing constitutionalism in developing countries, countries in conflict and countries in transition reveal confrontations between different legal cultures, whether in relation to customary/traditional and Western or 'imposed'[11] legal cultures or in relation to international legal norms and their diverse, national expressions.

As Sally Merry argues, in the area of human rights, many different actors play key roles in 'translating' global human rights norms into their local 'vernacular' context.[12] These translations often rely on public law institutions at the national level to enforce global human rights obligations adopted by a state. In translating these global rules to a national context, lawyers are not always helped even by robust cultures of constitutionalism, as explained by Susan Akram in her critique of the rolling back of civil rights in the United States in its ongoing and highly ideological 'war on terrorism'.

Even the lack of a constitutional culture may open up possibilities, as explained by Barbara Oomen in her chapter on the emergence of constitutionalism in South Africa, which has been driven by a deliberate break with the country's history of racism and colonial domination. However, in countries that lack a constitution altogether, such as Israel, there is the danger of human rights playing second fiddle to nationalist tendencies and other interests, as Susan Akram explains.

[10] Jan Nederveen Pieterse, 'Hyperpower Exceptionalism: Globalisation the American Way', in Ulrich Beck, et al., eds., *Global America? The Cultural Consequences of Globalization* (Liverpool, Liverpool University Press 2003) pp. 299-319.

[11] Robert L. Kidder, 'Towards an Integrated Theory of Imposed Law', in Sandra Burman, et al., eds., *The Imposition of Law* (New York, Academic Press 1979) pp. 289-305.

[12] Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', 108(1) *American Anthropologist* (2006) pp. 38-51.

However, the picture is not entirely depressing. The chapter by Surya Subedi illustrates that, despite a long period of turmoil, the intellectual discussion over the future of Nepal has frequently been characterised by constitutional claims. Where claims have been articulated in the language of international human rights and have clashed with local traditions, the process of translation in Nepal has taken creative forms as well. Surya Subedi vividly explained this in his 2008 HAC conference presentation, when he referred to how Nepalese women protested against the cultural prohibition on the remarrying of widows and the customary and often forced wearing of black saris; in protest, some women instead chose to wear red saris, which are an expression of passion and womanhood.

In one way or another, all cases presented in the three subsequent chapters provide material that underpins the idea that cultural contestations between different legal cultures, religious values, traditional obligations and other norms can – and should – be resolved through a culture of constitutionalism and that the role that courts play in this process is potentially vital.