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Constitutional Advice and Transnational Legal Order

Tom Ginsburg*

This article surveys the history and practice of providing constitutional advice. It first examines antecedents, then looks at the contemporary political economy of the process, drawing on the transnational legal order (TLO) framework to evaluate whether or not it can be characterized as a TLO. The answer is a partial yes. We focus on one feature of the modern situation, the presence of corporate actors—including the United Nations, NGOs, and international organizations—in an increasingly dense social field. This development has laid bare tensions and competition among actors, moving the field toward a nascent TLO that is nevertheless unlikely to fully consolidate or institutionalize. We conclude that the field evidences aspects of a transnational legal order but also serves as an arena in which other TLOs contest over outcomes.

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From Bangkok to Barcelona, from Juba to Johannesburg, and from Sana'a to Santiago, the process of making national constitutions has garnered a good deal of attention from the academic and policy communities in recent years.¹ The ubiquity of constitution-making processes—and the belief that constitutions can help advance myriad goals, from economic revitalization to post-conflict reconstruction—has generated demand for new forms of expertise as well as efforts to supply it. In this article, we consider the field of constitution-making as a transnational legal order (TLO).² We argue that the TLO framework is fruitful in that it illuminates aspects of the process, but also that this prominent field of legal activity brings into relief aspects of the framework that may need further elaboration. In that sense, the exercise is a recursive one, in which I juxtapose TLO theory and the constitution-making field to say something about each.³

Constitution-making is a description for an activity occurs in a vastly diverse set of contexts, attacking an array of very different problems. Some constitutions are made in situations after violent conflict; others are designed to prevent conflict from ever emerging; yet others involve minor revisions to political bargains in otherwise stable orders. One could easily and fairly refine these subcategories to discuss different kind of problem-driven approaches. It is also the case that constitution-making exercises are highly contested. Notwithstanding the persistent dualist imagery in which “higher” interests align,⁴ constitutional politics are intense, high stakes, and occasionally violent.⁵

This article begins with a brief history of constitution-making to describe the setting, then turns to the specific topic of transnational constitutional-advice giving. It then turns to a mapping of the contemporary terrain, with an informal accounting of the assets and capacities various repeat actors bring to the endeavor. Constitution-building has become a nascent form of expertise, with its own programs and experts. When one visits myriad constitution-making sites, one runs

1. TODD A. EISENSTADT, ET AL, CONSTITUENTS BEFORE ASSEMBLY: PARTICIPATION, DELIBERATION, AND REPRESENTATION IN THE WORLDWIDE CRAFTING OF NEW CONSTITUTIONS, (forthcoming 2017); GABRIEL NEGRETTO, MAKING CONSTITUTIONS: PRESIDENTS, PARTIES, AND INSTITUTIONAL CHOICE IN LATIN AMERICA (2013); Kevin L. Cope, *The Intermestic Constitution: Lessons From the World's Newest Nation*, 53 VA. J. INT'L L. 667 (2013); Tom Ginsburg, Zachary Elkins, & Justin Blount, *Does the Process of Constitution-Making Matter?* 5 ANN. REV. L. SOC. SCI. 201 (2009).

2. See generally, TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., Cambridge Univ. Press 2015).

3. This is a bit of a pun. See TERENCE C. HALLIDAY & BRUCE C. CARUTHERS, BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS (2009) (developing recursivity idea at length).

4. BRUCE ACKERMAN, WE THE PEOPLE (1992); see also NEGRETTO, *supra* note 1 (focusing on mixed game of conflict and cooperation).

5. David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923 (2013).

into a relatively limited set of repeat actors. Clearly, the field, and the world, have become more institutionalized since the end of the Cold War.

Does this make constitution-making a TLO? Halliday and Shaffer define a TLO as a set of “formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”⁶ While there is no central institution that authoritatively structures the practice of constitution-making, there is a loose network of institutions and actors that work in the field in multiple contexts, and the United Nations (UN) often seeks (sometimes unsuccessfully) to assert its dominance.⁷ Some institutions attempt to promote substantive norms, while others focus on the process of constitution-making. However, all of this is relatively under-institutionalized at the moment, and there is not, nor will there be, a transnational legal instrument or binding legal text on constitution-making.⁸

Indeed, it might be best to think about constitution-making as a field in which *other* TLOs come to engage in contests over outcomes. A contemporary constitution-making situation in a developing country might involve: various internal groups seeking a stake in power; several different units within the UN pushing for various sets of norms that might even be inconsistent with each other; the human rights community; a “transitional justice” legal order; a group pushing for federalism; a gender audit group; international financial institutions; bilateral donors arguing over religion clauses and oil rights; and various others. These different legal groups will have different agendas and not be aligned with each other. The result is a bounded set of contests that takes place in a temporally and geographically defined field. The article concludes with speculation on the implications of this analysis for the TLO framework.

THE SETTING

National constitutions have become one of the key components of a modern nation-state. Despite our imagery of a constitution as the quintessential expression of the values of a particular political community, constitutions are—and always have been—embedded in a transnational context. Written constitutions in the modern sense are a particular form that emerged in the 18th century, borrowing upon earlier ideas and institutions.⁹ The form, which crystallized with the adoption of revolutionary constitutions in the United States, Poland, and France at the end of the 18th century, spread transnationally, partly because of the influence of

6. HALLIDAY & SHAFFER, *supra* note 2, at 5.

7. See, e.g., Afyare Abdi Elmi, *Revisiting the UN-Controlled Constitution-Making Process for Somalia*, E-International Relations, Sept. 2, 2012, <http://www.e-ir.info/2012/09/02/revisiting-the-un-controlled-constitution-making-process-for-somalia/> [last accessed Jan. 11, 2017].

8. The United Nations Secretary General’s note described below in note 132 is the closest thing there is. But this is in essence an internal administrative order, articulated as a vague set of principles, to the vast bureaucracy of the UN, not purporting to bind outsiders.

9. ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS*, 41-42 (2009).

revolutionary and liberal thought in Latin America.¹⁰ New nation states began to adopt constitutions as one of their first acts in existence.¹¹ The documents play both symbolic and functional roles, defining a government and regulating the relationship between a government and its citizens. They also serve, in theory, to bind together the people. And importantly, they also serve as a signal to the international community that the government is a legitimate one.

Constitutional drafting is often undertaken in less than ideal conditions. Constitutions are often produced in situations of political uncertainty and under great time pressures, and the task is exacerbated by the fact that few constitutional drafters have any experience in the field. Repeat players are rare, even in countries in which constitutions do not last very long.¹² This means that drafters often look for shortcuts.

This leads to two dynamics. First, constitutions tend to adopt a common set of core institutions.¹³ Look at the tables of contents of national constitutions and one will see a good deal of similarity. Virtually all constitutions have a separate section on a bill of rights, as well as sections on government, the judiciary, the legislature, local government, and, increasingly, accountability institutions.¹⁴ There are core institutions, found in almost every constitution, and also peripheral institutions which are found in relatively few. For example, 98% of constitutions stipulate how the head of state is to be selected, while something like 2% provide for a right to bear arms.¹⁵ The former is a core provision, the latter a peripheral one. One might think of these core elements as the settled component of the transnational legal order of constitution-making.

The second dynamic is in part related to the first. Because constitutions are in part directed outside the nation-state, drafters often pay attention to the perceived demands of the international community. This leads drafters to adopt norms embodied in *other* constitutions written around the same time. Indeed, along with my co-authors in the Comparative Constitutions Project, I have shown that the best predictors of constitutional form are the era and region in which the constitution was drafted, as well as the contents of previous constitutions in the country's history.¹⁶ But the transnational nature of the process also means that countries frequently turn to outsiders to provide substantive advice.

10. ROBERTO GARGARELLA, *THE CONSTITUTION OF INEQUALITY. CONSTITUTIONALISM IN THE AMERICAS 1776-1860* (2010).

11. ELKINS, ET AL. *supra* note 9, at 41-42 (2009) (showing fast adoption by post-1789 states).

12. ELKINS, ET AL. *supra* note 9, at 123; *See also* Donald Horowitz, "Constitutional Design and the Problem of adoption: Proposals versus Processes", in *THE ARCHITECTURE OF DEMOCRACY* 21 (Andrew Reynolds ed., 2002).

13. *See* Horowitz, *supra* note 12.

14. *See* Zachary Elkins, Tom Ginsburg and James Melton, *Writing Rights* (Mar. 2017) (unpublished manuscript) (on file with the authors).

15. *Id.*

16. *Id.*

A BRIEF HISTORY OF TRANSNATIONAL CONSTITUTIONAL ADVICE

This section provides a thumbnail history of transnational advice-giving through the experiences of several prominent practitioners. The idea here is not by any means to be comprehensive, but to be suggestive of some of the enduring themes and debates. As can be seen, the practice of constitutional advice engages a kind of dialectic between universal forms, of which written constitutions are themselves an embodiment, and local context. The major point of this section is that before 1990, most of the efforts involved one-off engagements with particular individuals and institutions, rather than a discrete social field. But since then the field is becoming more densely populated and institutionalized.

1. Antecedents

Constitutional advice has a long and distinguished history in the modern period. No less a figure than Jean-Jacques Rousseau was called on to advise constitution-making processes in Corsica and Poland in the late 18th century. Each of these proto-countries was struggling for independence, and thought that a constitution would help to cement its claim to nationhood.¹⁷ Who could be better than the leading political theorist of the day to help in the process? By inclination, Rousseau was prone to abstraction, and he did not focus much on concrete institutions. Indeed, he was unable to finish his “Plan for a Constitution for Corsica” before the French Government took over the island.¹⁸ Rousseau had a bit more influence in Poland, where his essay on *Considerations on the Government of Poland* apparently had some impact on the nobles who negotiated the short-lived Constitution of 1791.¹⁹ His advice was modest, noting that “institutions for Poland can only be the work of Poles,” such that a “foreigner can hardly do more than offer some general observations for the enlightenment, but not for the guidance, of the law-reformer.”²⁰ Rousseau emphasized the importance of cultural activities like sports in building a common identity as a nation.²¹ It was hardly his fault that Poland was eliminated as an independent state within a few years: no constitutional arrangement could change the country’s unfortunate location between the expanding empires of Prussia and Russia.

17. MADS QVORTRUP, *THE POLITICAL PHILOSOPHY OF JEAN-JACQUES ROUSSEAU: THE IMPOSSIBILITY OF REASON* at 75 (Manchester Univ. Press, 2003).

18. LEO DAMROSCH, *JEAN JACQUES ROUSSEAU: RESTLESS GENIUS* 386-88 (2005).

19. Jean-Jacques Rousseau, *Considerations on the Government of Poland and on its Proposed Reformation* (1772), <http://www.constitution.org/jjr/poland.htm>.

20. *Id.*

21. *Id.*

2. *Goodnow and China*

As more and more countries became independent in the 19th century, demand for advice grew, and Western experts were well situated to provide it.²² One early story of constitutional advice illustrates the potential pitfalls. Frank Goodnow, Columbia professor and the first president of the American Political Science Association, was asked by the Carnegie Endowment for International Peace in October 1912 to advise the Chinese Government on constitutional reform.²³ On paper, Goodnow seemed to embody just the kind of interdisciplinary approach that should have been ideal. His area of expertise was administrative law, the area of law that deals with government organization and communication with citizens, and he took an explicitly political approach.²⁴ He had studied in France and Germany as well as the United States.²⁵ A believer in the power of technocratic expertise, he was known as a powerful figure in progressive thought.²⁶

As a comparative scholar, Goodnow knew better than to simply promote American style institutions for China. Indeed, his scholarly work had posited that the United States had much to learn from constitutional and administrative models in other countries, especially Britain. Systems of government, he concluded, “are matters which must very largely be governed by the history and political needs of the particular country, and any attempt to impose on a country any hard and fast rule derived either from *a priori* reasoning or from any inductive generalization, based upon the experience of other countries, is rather more apt to meet with failure than success.”²⁷

As a believer in technocracy, Goodnow did not pay much attention to local politics, and by his own account was not deeply informed about China. He quickly became a proponent of executive power in the Chinese context, believing that the complexity of the country required strong central authority, and was amenable to a parliamentary system.²⁸ This view fit the interests of the warlord Yuan Shikai, who had taken over as president in 1914 after a struggle with Sun Yat-Sen’s new Kuomintang Party. Yuan adopted a new constitution that was heavily influenced by

22. For example, Harvard Law Professor Simon Greenleaf drafted the Constitution of Liberia in 1847. See GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD 1787-1989* at 483 (2009). (Interestingly, it is one of the few constitutions outside the United States which included a right to bear arms!)

23. JEDIDIAH KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* 135-40 (2016).

24. *Id.* at 133-36.

25. *Id.*

26. *Id.* at 133-35.

27. Noel Pugach, *Embarrassed Monarchist: Frank J. Goodnow and Constitutional Development in China, 1913-1915*, 42 PAC. HIST. REV. 499, 501 (1973). See also JEDIDIAH KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW*, 132-57 (2016).

28. Noel Pugach, *Embarrassed Monarchist: Frank J. Goodnow and Constitutional Development in China, 1913-1915*, 42 PAC. HIST. REV. 499, 503 (1973).

Goodnow's draft.²⁹ It included several western style concepts like equality and privacy, but also featured strongly centralized power.

Still, Goodnow was frustrated. In one letter he noted, somewhat patronizingly, "as I look at it these Chinese have hardly the faintest idea of what a constitution is. They do not, I think, even know what law is."³⁰ He grew increasingly frustrated by the unwillingness of Chinese to engage his advice: "My feeling was and is that the Chinese, the experience of all the advisers here would seem to show, have really no serious intention of following the advice of their advisers, unless that advice agrees with their own conclusions. Indeed, they regard their advisers as almost entirely ornamental in character and seldom let us know what is really going on. All we do is to write essays which are translated into Chinese and then what happens to them Heaven only knows."³¹

But this was not to be the case with his final essay. In 1915, after having returned to the US to become president of Johns Hopkins University, Goodnow drafted a short memo for Yuan entitled "Monarchy or Republic?", answering the rhetorical question in favor of the former.³² Monarchy, after all, was consistent with Chinese tradition and resolved problems of executive succession. Noting that the Chinese context was more similar to that of the troubled republics of Latin America than to the United States or England, Goodnow noted that "[i]t is not susceptible of doubt, that a monarchy is better suited than a republic to China."³³

Goodnow's views meshed perfectly with those of Yuan, who had been toying with establishing himself as a new emperor. His faction used Goodnow's endorsement to push forward a new draft of a monarchical constitution. Yuan's proposal could not have been further from the views of prominent Chinese intellectuals like Liang Qichao and Kang Youwei, who had been writing about the optimal form of Chinese government for decades. As a prominent Chinese intellectual said in the pages of the *New York Times*, "Dr. Goodnow was used simply as a tool. He is a great scholar, a professor, a citizen of a great republic, but he was duped by the monarchist faction, because he did not have a real insight into the situation."³⁴ Goodnow's friend Paul Reinsch wrote that "Advisors had been so generally treated as academic ornaments . . . that Doctor Goodnow did not suspect that in this case his memorandum would be made the starting point and basis of positive action."³⁵ Yuan Shi'kai ultimately decided to try to ascend the throne as a new emperor. However, he died before he could be enthroned, and China's long period of chaos, civil war, and failed governments continued for several more decades. Goodnow's constitutional project failed, and his return home was marked

29. *Id.* at 504.

30. Jedidiah Kroncke, *An Early Tragedy Of Comparative Constitutionalism: Frank Goodnow And The Chinese Republic*, 21 PAC. RIM L. & POL'Y J. 533, 560 (2011).

31. *Id.* at 563.

32. *Id.* at 570-71.

33. Kroncke, *supra* note 30, at 571.

34. *Id.* at 574.

35. *Id.* at 500.

by criticism over his endorsement of monarchy. Goodnow's story illustrates the pitfalls and politics of advice-giving. While he sought to tailor his advice to local conditions, he was unaware of the uses to which it would be put. Expertise, we are reminded, is always political, but the experts may sometimes not be able to deploy it effectively or intentionally.³⁶ Additionally, clients seeking expertise have their own interests and tools that they bring to the game.

3. *Biting the Hand that Feeds? Ivor Jennings and the End of Empire*

Sir Ivor Jennings was a British academic and already a star constitutional lawyer when he was asked to take an appointment as Principal of Ceylon College.³⁷ He then moved to Sri Lanka and presided over the creation of the University of Peradeniya.³⁸ Upon arriving in Sri Lanka, he confronted an educational system in high colonial mode. Students were given standard textbooks from England, in which geography lessons stopped at the Suez Canal.³⁹ They were asked to memorize lists of plants and animals they would never see.⁴⁰ Jennings recalled an English lesson in British Malaya in which the students were being asked to memorize the lines "O fair daffodils we weep to see you haste away so soon."⁴¹ When the students asked what daffodils were, they were told not to worry about it, as it would not be on the exam.⁴² Jennings was shocked by such imperialist modes of education, and from the beginning, he sought to develop education that would be locally useful in Sri Lanka.⁴³

Constitutions, of course, are a bit like educational systems—they need to include common elements with the rest of the world, but also to be tailored to local conditions. With this view in mind, Jennings became a key constitutional advisor for the Sri Lankans, serving from 1942-1948.⁴⁴ His closest interlocutor was D. S. Senanayake, who eventually became the first prime minister of Ceylon in 1947. With his intimate knowledge of British political culture, Jennings would prep Senanayake and other leaders as to how to make their case to the colonial office. He analogized the process to a game of bridge, in which the British would obey the rules.⁴⁵ With Jennings advising them, the analogy suggested, Sri Lankans could play the right

36. Cf. DAVID KENNEDY, *A WORLD OF STRUGGLE* (2015).

37. See SIR WILLIAM IVOR JENNINGS, *THE ROAD TO PERADENIYA* 83 (Henry Alfred Ian Goonetilleke ed., 2005); see generally H. KUMARASINGHAM, *CONSTITUTION-MAKER: SELECTED WRITINGS OF SIR IVOR JENNINGS* (2015).

38. See SIR WILLIAM IVOR JENNINGS, *THE ROAD TO PERADENIYA* 83 (Henry Alfred Ian Goonetilleke ed., 2005).

39. *Id.* at 101.

40. *Id.*

41. *Id.* at 100.

42. JENNINGS, *supra* note 38, at 100-01.

43. See *id.* at 95-102.

44. See *id.* at 162-77.

45. See *id.* at 175-76.

cards, but Jennings's role was not appreciated by the British Foreign Office, which sought to control the negotiations.⁴⁶

The basic constitutional problem Jennings confronted was that the Ceylonese wished for independence immediately, while the colonial authorities thought they were still unfit for self-governance. Jennings came down on the side of the locals, and targeted the British idea of Dominion status, applicable to countries like Australia, Canada, and New Zealand, allowing for independent statehood within the British Empire, while retaining the British Crown as head of state.⁴⁷ Senanayake's political powers of persuasion helped convince the Colonial Office to support this view. Jennings was later involved in constitution-making in Pakistan, Malaysia, Singapore, Malta, the Maldives, Ghana, Guyana, Eritrea, and Nepal.⁴⁸ He continued, on occasion, to bite the hand that fed him, siding with the king in Nepal against the foreign office.⁴⁹ A relentless workaholic, he noted that "what troubles me is that there is so much to be done and so little time to do it."⁵⁰

4. *The New Americans*

The period after World War II was one of American dominance in international affairs, and this was reflected in constitutional design as in other fields. It was most apparent in cases of military occupations. Carl Friedrich, a Harvard political scientist, worked on the postwar German Constitution;⁵¹ the more famous case of the postwar Constitution of Japan reflected the direct influence of the American drafters working for the Supreme Commander of the Allied Powers (SCAP).⁵² Unsurprisingly, some of the draft language made little sense in the local idiom. The description of rights as the "fruit of mankind's age-old struggle to be free"—included at the insistence of MacArthur's aide General Whitney—is almost unintelligible in Japanese, and clearly a tip-off for the foreign origin of the

46. See CHARLES PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION* 80 (Alfred William Brian Simpson ed., 2007).

47. JENNINGS, *supra* note 38 at 174.

48. PARKINSON, *supra* note 46, at 29; see also H. Kumarasingham, *A Transnational Actor on a Dramatic Stage – Sir Ivor Jennings and the Manipulation of Westminster Style Democracy in Pakistan*, 2 U.C. IRVINE J. INT'L TRANSNAT'L AND COMP. L. 33 (2017).

49. Mara Malagodi, *Constitution Drafting as Cold War Realpolitik: Sir Ivor Jennings and Nepal's 1959 Constitution*, in *CONSTITUTION-MAKING IN ASIA - DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE* 154, 154-72 (H. Kumarasingham, ed., 2016)

50. JENNINGS, *supra* note 38, at 83.

51. Joseph Berger, *Carl Friedrich Dies at 83: Influential Harvard Professor*, NY TIMES, Sept. 22, 1984, <http://www.nytimes.com/1984/09/22/obituaries/carl-j-friedrich-dies-at-83-influential-harvard-professor.html> [last accessed Jan. 11, 2017].

52. RAY A. MOORE AND DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY* (2004); Zachary Elkins, Tom Ginsburg and James Melton, *Baghdad, Tokyo, Kabul: Constitution-making in Occupied States*, 49 WM & MARY L. REV. 1139-78 (2008); David Law, *The Myth of the Imposed Constitution*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 239, 239-68 (Denis J. Galligan and Mila Versteeg eds., 2010).

document.⁵³ To be sure, the Japanese Government pretended to have written the text.⁵⁴ For several months over the summer of 1946, the Japanese Diet debated the draft, making a few amendments, but preserving the basic core.⁵⁵ The charade that Japanese had drafted the text is itself telling. Even if foreigners did write constitutions, it would undermine the legitimacy and probability of adoption of the resulting document to talk about it. Since local ownership is required to make constitutions work, foreign bragging tends to be counterproductive.

The immediate postwar period saw the writing of dozens of new constitutions as former colonial empires broke up. The United States played a role in some of these, but in other cases, the political dominance of the United States led some to *avoid* the American model.⁵⁶ The drafters of the Constitution of India, in particular, were intent on avoiding American approaches.⁵⁷ Their decision to opt for a parliamentary rather than presidential form of government and their commitment to using the constitution for social transformation reflect this inclination. The drafters of India's constitution included a plethora of British-trained lawyers: indeed, one account suggests that 2/3 of the important players were lawyers.⁵⁸ Yet even in this case, foreigners had some indirect influence. B.N. Rau, the constitutional advisor to the Indian Constituent Assembly, discussed the draft with several American professors as well as members of the United States Supreme Court.⁵⁹ (He also visited England, Ireland, and Canada in his research, and looked at dozens of other countries' constitutions in formulating his recommendations.)⁶⁰ Justice Felix Frankfurter successfully encouraged Rau to eliminate the general phrase "due process of law" from the Indian Constitution, informed by his dislike of judicial activism involving so-called "substantive" due process.⁶¹ The Indians instead borrowed the phrase "except according to procedure established by law," from the just-adopted 1946 Japanese Constitution.⁶² But that, of course, was itself an American product.

Later-Justice Thurgood Marshall played a role advising Kenya on its independence constitution in 1960, borrowing extensively from the Universal Declaration of Human Rights, and the constitutions of two newly independent

53. Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul: Constitution-making in Occupied States*, 49 WM & MARY L. REV. 1139, 1161 (2008).

54. *See id.* at 1162.

55. *Id.*

56. *See* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296, 302 (2003) (discussing aversive constitutionalism).

57. *See* GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 27-39 (1966).

58. *See id.* at 337-44.

59. *Id.* at 103.

60. *Id.*

61. *Id.*

62. AUSTIN, *supra* note 57, at 104.

countries, Nigeria and Malaya.⁶³ Other American advisors played similar roles in various parts of Africa and Asia, but the much more prevalent model was a negotiated constitutional exit managed by the British or French colonial authorities.⁶⁴ Constitutions in many countries were simply colonial gifts, a *quid pro quo* in exchange for granting independence, and they sometimes reflected colonial interests.⁶⁵

In the early years of the Eastern European constitution-making exercises after 1990, some American lawyers became highly sought after. One was A.E. Dick Howard, a professor at the University of Virginia Law School who had played a major role in re-drafting his state constitution in 1971. Howard traveled to many of the countries in Eastern Europe on behalf of USAID, and worked on the constitutions of ten countries.⁶⁶ “The great ideals of American freedom,” he wrote, “travel well”⁶⁷ and so, it seems, did he. Another peripatetic figure during this period was Albert Blaustein, a law librarian from Rutgers Law School. His first involvement in this kind of work came in the 1960s when he was asked to help build a law library for a new law school being created in Liberia.⁶⁸ He later compiled a large collection of constitutional texts.⁶⁹ He parlayed this experience into a second career as a constitutional advisor, including in his résumé advisory roles in Bangladesh, Brazil, Mozambique, Namibia, Cambodia, Liberia, Niger, Peru, Fiji, Uganda, and Zimbabwe.⁷⁰ He also contributed to processes in Romania, Poland, Slovenia, Eritrea, Ethiopia, and Lithuania.⁷¹ Blaustein later produced a “checklist” for constitutional designers, and some assert that he used “cut-and-paste” techniques from the compendium of other texts in dispensing his advice.⁷² When a reporter called him “The Johnny Appleseed of Constitutions”, Blaustein immodestly replied, “I prefer the Jewish James Madison.”⁷³

5. *Localism and Universalism*

In some cases, advisors bring their own political biases and concerns to bear on supposedly national texts. Take the Constitution of Malaya (now known as

63. PARKINSON, *supra* note 46, at 221-25.

64. *Id.*

65. See Zachary Elkins, Tom Ginsburg and James Melton, *Writing Rights* (Mar. 2017) (unpublished manuscript) (on file with the authors).

66. See Barbara Perry, *Constitutional Johnny Appleseeds*, 55 ALB. L. REV. 767, 768 (1991) (discussing the historical contribution of the United States to foreign constitutions).

67. A.E. DICK HOWARD, *DEMOCRACY’S DAWN: A DIRECTORY OF AMERICAN INITIATIVES ON CONSTITUTIONALISM, DEMOCRACY, AND THE RULE OF LAW IN CENTRAL AND EASTERN EUROPE* 8 (1991).

68. Perry, *supra* note 66, at 778.

69. *Id.*

70. *Id.*

71. *Id.*

72. Perry, *supra* note 66, at 782-83.

73. Ron Avery, *A Man of Strong Constitution Law Prof Helps Ex-Reds Rewrite Framework of Government*, PHILA. DAILY NEWS, Sept. 17, 1990, http://articles.philly.com/1990-09-17/news/25877043_1_new-constitution-oleg-g-rumyantsev-law-professor.

Malaysia). As the country was preparing for independence from Britain in 1956, British and Malaysian politicians agreed to form a drafting commission for a new constitution.⁷⁴ Headed by Sir William Reid, a distinguished British jurist, it included Ivor Jennings along with a former governor-general of Australia and judges from India and Pakistan.⁷⁵ No Malaysian was included in the Reid Commission, but it was understood that the local rulers and politicians would have to sign off on its product.

Malaysia is a complicated place, with a majority of its population Muslim Malays but also substantial minorities of people of Chinese and Indian descent who moved there during the colonial period. Relations among these groups have varied over time, and the British established a system of privileges for the “indigenous” Malays, who were seen as economically backward relative to the other groups.⁷⁶ Much like a contemporary affirmative action program, these privileges included land reservations, and quotas for public sector jobs, business licenses and university scholarships.⁷⁷ The challenge for the Reid Commission was to reconcile these privileges with principles of equality, and it proposed that the privileges be temporarily extended for fifteen years. In this case, the drafters were trying to preserve a set of local institutions that were themselves of colonial origin. The consequences were significant, as Malaysia largely retains the affirmative action scheme more than five decades later, arguably a major factor in keeping it in the “Middle-Income Trap.”⁷⁸

In recognition of the multi-ethnic nature of Malaysian society, the first draft of the constitution did not mention an official religion, and the various princes of the component states supported this position. However, the Pakistani delegate, a judge named Abdul Hamid, who had served as a drafter on his own country’s constituent assembly, strongly insisted that Islam had to be the official religion.⁷⁹ Hamid’s motives may have had more to do with the justification for the creation of Pakistan a decade earlier than his views as to what was appropriate for Malaya, which was less than 60% Muslim at the time. Whatever the motive, Hamid’s insistence had significant consequences for Malaysia down the road. Today, all ethnic Malays are defined as Muslim, and until recently could not convert out of the

74. Joseph M. Fernando, *Constitutionalism and the Politics of Constitution-making in Malaya, in CONSTITUTION-MAKING IN ASIA - DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE* 137, 141-42 (Harshan Kumarasingham, ed., 2016).

75. *Id.* at 142.

76. *Id.* at 144.

77. K.S. Jomo, *Whither Malaysia’s New Economic Policy?* 63 PAC. AFF. 469 (1990-1991).

78. Tom Ginsburg, *The Politics of Law and Development in Middle-Income Countries*, in *LAW AND DEVELOPMENT IN MIDDLE INCOME COUNTRIES* 21, 26 (Randall Peerenboom & Tom Ginsburg eds., Cambridge Univ. Press 2014).

79. Joseph Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 J. SOUTHEAST ASIAN STUD. 249, 256 (2006).

religion.⁸⁰ This position was confirmed in an important legal case 2007 when a young Malay woman, Lina Joy, sought to have the state recognize her conversion to Christianity.⁸¹ The courts refused to allow this.⁸² Malaysia remains an ethnically and religiously polarized place. Might it have been different if the status of religion had been left to the locals?⁸³

6. *The People are the Client: Yash Ghai*

The world's leading constitutional drafter today is Professor Yash Ghai, a Kenyan of East Indian origin who taught at the University of Hong Kong for many years. This cosmopolitan background and a deep knowledge, from both personal and academic experience, of situations of ethnic diversity have rendered him the leading person in the field. Frequently working with his wife, the distinguished law professor Jill Cottrell, Ghai has been involved in constitutions in Kenya, Papua New Guinea, Nepal, Libya, Somalia, Fiji and many others.⁸⁴ He has taken an admirable and rare interest in the constitutions of small developing countries. Such countries may be more open to outside assistance in formulating their constitutions, and Ghai has frequently been asked to chair drafting commissions in quite public circumstances. This sometimes gets him into trouble.

In 2012, Ghai travelled to Fiji, where strongman Voreqe Bainimarama sought to legitimate his rule with a transition to a new constitution.⁸⁵ (He had overthrown the previous constitution in a coup and had been appointed prime minister in 2009 after a constitutional suspension.) Ghai's good friend and former student Aiyaz Sayed-Khaiyum was a senior Indo-Fijian politician, and suggested that Ghai become involved in the Constitutional Commission that was to draft a new document.⁸⁶ What better way for the Fijians to legitimate the transition to democracy than having the world's leading constitution-maker at the head of the process? At the same time, the presidential decrees promised a restoration of true democracy, and mandated

80. Ida Lim, *Path to Leave Islam Simple, but Far from Easy*. MALAY MAIL ONLINE, July 12, 2014, <http://www.themalaymailonline.com/malaysia/article/path-to-leave-islam-simple-but-far-from-easy> [last accessed Jan. 12, 2017].

81. *Lina Joy v. Majlis Agama Islam Wilayah Persekutan and Ors.* [2004] 2 MLJ 219.

82. *Id.*

83. If Abdul Hamid's views on religion seem to privilege one of Malaysia's groups over others, he also brought with him a prescient awareness of the dangers of emergency rule. He argued for strictly limited emergency powers, though this suggestion was rejected. Emergency powers were abused for many years thereafter in Malaysia (and in Pakistan as well).

84. In a 2005 paper, he lists Seychelles, Papua New Guinea, Solomon Islands, Vanuatu, Fiji, East Timor, Afghanistan and reviews in Tanzania, Kiribati, Cook Islands, Maldives, Zambia and Kenya. Yash Ghai, "A Journey Around Constitutions: Reflections on Contemporary Constitutions" 122 S. AFR. L. J. 804, 804 n.1 (2005).

85. Yash Ghai Speaks on *Fiji Constitution Plan*, RADIO N.Z. NEWS, 13 Mar. 2012, <http://www.radionz.co.nz/international/pacific-news/203189/yash-ghai-speaks-on-fiji-constitution-plan>.

86. Graham Davis, *Yash Ghai: Emotion Before Reason*, GRUBSHEET FEEJEE, Jan. 8, 2013, http://www.grubsheet.com.au/yash-ghai-emotion-before-reason/?doing_wp_cron=1484250188.1356310844421386718750.

that the constitution protect human rights and be built through popular participation. It seemed a good gamble.

The formal mandate of the Constitutional Commission was to produce a draft which would be submitted to a constituent assembly, and to engage in wide consultations.⁸⁷ The government insisted that the drafting process would give “every Fijian a voice.”⁸⁸ There were a few red lines given to the commission by the government: these included the need to grant immunity for the coup-makers in previous governments, a one-person one-vote electoral scheme, and human rights protections.⁸⁹ The immunity requirement, along with prime ministerial control of the review process, and gag orders on the constituent assembly that was to approve the draft, generated some international controversy, as it seemed to provide for veto points for the current power holders.⁹⁰

This assignment obviously posed some risks for Ghai, but, perhaps out of a deep optimism, he went ahead and agreed to participate in the drafting process. Foreign donors, including Australia, New Zealand, and Britain, provided funding, which helped ensure that at least some degree of independence could be maintained.⁹¹ Joining Ghai on the commission was Christina Murray, who had worked on the South African Constitution and the Constitution of Kenya 2010, as well as three Fijians picked by the government.⁹² Ghai’s spouse Jill Cottrell was a researcher. The group proceeded to engage with a broad range of civil society actors, and to organize training sessions in the basic approaches to institutional design. It received over 7000 submissions from the public with ideas for the constitution, a remarkable number in a semi-literate country.⁹³

Things began to go south when Ghai sought to push in a democratic direction and to appeal directly to the people over the government.⁹⁴ This meant that he stepped out of the role of being a mere advisor, to become a political actor in his own right. In part this reflects Ghai’s view of the constitution-making mission. Whereas a practicing lawyer might see the client as the government or funding agency that hired him or her, Ghai’s view has always been that constitutions are written for the people, and should be written on their behalf to the extent possible.⁹⁵ In other words, the people, not the government, are the client.

87. INT’L SENIOR LAWYERS PROJECT, ANALYSIS OF THE DRAFT CONSTITUTION OF FIJI RELEASED BY THE INTERIM GOVERNMENT OF FIJI ON 21 MAR. 2013, 1.

88. *Id.*

89. *Id.* at 2.

90. See e.g. Human Rights Watch, *Fiji: Revise Draft Constitution to Protect Rights*, Sept. 4, 2013 <https://www.hrw.org/news/2013/09/04/fiji-revise-draft-constitution-protect-rights>

91. Draft Constitution: The Explanatory Report, http://www.fijileaks.com/uploads/1/3/7/5/13759434/thursday_the_explanatory_report_two-4.pdf, at 4.

92. *Id.* at ii.

93. INT’L SENIOR LAWYERS PROJECT, *supra* note 87.

94. Wadan Narsey, *Trashing the Ghai Constitution: The Positives*, Jan. 14, 2013, <https://narseyonfiji.wordpress.com/2013/01/14/trashing-the-ghai-constitution-the-positives-14-january-2013/>

95. Personal communication.

The government's view differed. It saw the Constitutional Commission as merely advisory to the government. It threatened Ghai with expulsion, and although the commission then took a lower profile, things never got back on track.⁹⁶ By December 2012, the commission had produced a document with plenty of democratic protections.⁹⁷ This was surely a heroic achievement accomplished in a very short period of time, but all the work went to naught. The commission's draft deviated from the instructions put to it on immunity.⁹⁸ It only offered immunity for coup participants who took an oath renouncing their support of illegal regimes and, crucially, offered no immunity at all for those who had committed human rights violations.⁹⁹ Furthermore, the proposals on land and transitional provisions generated controversy. As a result, the draft never saw the light of day. The Constitutional Commission ordered some copies of the draft printed, but as it waited for the books to come back from the printers, the government burned the printers' proofs.¹⁰⁰ There was significant controversy over the precise sequence of events, but some asserted that one of Ghai's fellow commissioners had not known about the printing. Political and media attacks followed. Bainimarama spuriously accused the commission, especially Professor Ghai, of consorting with individuals interested in making Fiji a Christian state.¹⁰¹ Ghai was also accused of working with the political opposition.¹⁰² On March 21, 2013, Bainimarama's government published its own draft constitution, which had largely been written by Ghai's former student, the attorney general.¹⁰³

This was hardly Ghai's only experience with failure, yet many of his projects have had an afterlife even beyond the death of the formal draft. He was extensively involved in producing a draft for his native Kenya in 2004-2005, a project that ultimately was rejected by politicians who had much to lose.¹⁰⁴ The process involved a huge constituent assembly of 600 people, and extensive efforts to educate the public. Reflecting on the situation in 2005, he asked, "[m]ight it have been wiser to have opted for less radical change and carried the politicians with use, even if it meant ignoring the people?"¹⁰⁵ However, in the aftermath of electoral violence and a significant international effort to get the country back on track, many of his ideas made it into the 2010 constitution, which was a watershed in Kenyan history.

96. Narsey, *supra* note 94.

97. Draft Constitution: The Explanatory Report, *supra* note 91, at 61.

98. Narsey, *supra* note 94.

99. Draft Constitution: The Explanatory Report, *supra* note 91, at 101.

100. Fiji Regime Breaks Silence over Constitution Draft Burning, RADIO N.Z. NEWS, Jan. 10, 2013, <http://www.radionz.co.nz/international/pacific-news/209542/fiji-regime-breaks-silence-over-constitution-draft-burning>.

101. *PMs Attack is Unfair, says Fiji's Constitution Chair Prof. Ghai*, PAC. ISLANDS NEWS ASS'N, Nov. 5, 2012, <http://www.pina.com.fj/?p=pacnews&m=read&o=2245903325096d7e5e1052d7ee593d>.

102. *Id.*

103. Constitutionnet, *Constitutional History of Fiji*, <http://www.constitutionnet.org/country/constitutional-history-fiji>.

104. Ghai, *supra* note 84, at 828.

105. *Id.*

Ghai is noteworthy for recognizing an evolution in the role for constitutional advisors. Whereas someone like Jennings saw himself as primarily a technician trying to tailor a text to a particular set of local circumstances, Ghai sees the role of the modern constitutional advisor as much more complex. The advisor, in his view, must sometimes be an educator, sometimes be a negotiator, and sometimes play the role of facilitating broader participation beyond a narrow set of elites.¹⁰⁶ As an educator, the advisor must help to explain what has and has not worked to the political forces negotiating the constitution. As a negotiator, the advisor must sometimes engage in conflict resolution to help discover shared interests. And as a facilitator, the advisor must remember that the people are the ultimate source of sovereignty, whose participation can help to ensure that the constitution is successful.

7. *The Lefties*

Constitutional advice is a subsidy of information and ideas, and so it is perhaps unsurprising that the providers will have motives of their own. An important source of ideas for recent constitution-makers in Latin America has been a Spanish think-tank, the Centro de Estudios Políticos y Sociales (CEPS), based in Valencia and dedicated to critique of capitalism and encouraging processes of social transformation. These include Professor Roberto Viciano Pastor, a prolific scholar who had a role in advising constitution-makers in Ecuador in 1998, Venezuela in 1999, Ecuador in 2008, and Bolivia in 2008, and his colleague Rubén Martínez Dalmau, who worked on the latter three constitutions. Their involvement led to controversy in both Spain and Latin America. One Spanish newspaper described Viciano as the “gray matter” for controversial president Hugo Chavez of Venezuela.¹⁰⁷ While the advisors tended to focus more on abstract ideas, on occasion they had significant impact. For example, they successfully argued for a unicameral legislature in Venezuela, though Chávez initially wanted a bicameral legislature.¹⁰⁸

The advisors portrayed their role as more technical than substantive. But concerns over Viciano’s role in advising the president of Ecuador’s constitutional assembly led him to deny that the Spaniards played a role.¹⁰⁹ Kinnto Lucas, who later had his 15 minutes of fame as the deputy foreign minister to grant asylum to Wikileaks founder and accused rapist Julian Assange, noted, “I always disagreed with their presence, because I believed that they truly didn’t know the country.”¹¹⁰

Indeed, Viciano criticized the final Bolivian Constitution as involving too many concessions to the rightist political opposition. “This is what those who call

106. *Id.* at 805.

107. Joshua Partlow, *Latin America’s Document-Driven Revolutions*, WASH. POST (Feb. 17, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/16/AR2009021601468_2.html.

108. *Id.*

109. *Id.*

110. Partlow, *supra* note 107.

themselves revolutionary sometimes don't understand: In the revolution, you can't always reach consensus," Viciano was quoted as saying, "[y]ou either have revolution or you don't. But you can't force consensus."¹¹¹ The point is that even governments that decry the role of transnational empire are customers for transnational constitutional advice, in this case from ideological allies in the country of the conquistadores, who were purer than the pope. So much for a neat division of the world into south and north.

8. *Agents and Structure*

The above vignettes identify individual advisors and their influence, but one must also consider the role of structure in the selection and empowerment of advisors. No doubt the selection of individuals is not random but responds to the conditions of the situation. Frank Goodnow spoke patronizingly of his Chinese interlocutors, but it is also clear that they were using him to legitimate their own goals in the eyes of outside constituencies. Foreigners can both provide and signal genuine disinterest, a real virtue in constitutional design.¹¹² In that sense, constitutional advice giving should be understood not just as transnational transplant of ideas from outside, but also as a version of "palace wars" involving internal and external struggles among different groups.¹¹³ The TLO framework highlights such struggles, which might involve transnational coalitions of those involved in transitional justice, economic liberalization and human rights.

Notwithstanding these structural determinants, it also seems to be the case that individuals do have consequential impact. Had a Pakistani Sikh rather than a Muslim been brought in to advise on Malaysia's Constitution, the product might have been profoundly different. But there are real and genuine constraints on what is possible in any given situation. Our focus on the agent should not distract from the structures that drive outcomes, and here there may be room for further elaboration within the TLO framework.¹¹⁴

TOWARD TRANSNATIONAL INSTITUTIONALIZATION

The pace and intensity of transnational involvement in constitution-making has intensified since 1990. That year saw the end of the Cold War and the beginning of a set of major overhauls of constitutions in many countries. It coincided with the "rule of law revival" in which foreign development agencies were increasingly concerned with the role of law in fostering economic development and political

111. *Id.*

112. Adriaan Lanni & Adrian Vermuele, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 932-34 (2012).

113. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS* 7 (2010) (elaborating on palace wars metaphor).

114. See HALLIDAY & SHAFFER, *supra* note 2.

stability.¹¹⁵ Two key features of the new era are first, that it is institutions rather than individuals that are the primary vehicles for advice, and second, that the field is increasingly crowded and competitive.

In the early years after 1990, American organizations like The Asia Foundation and the newly established National Endowment for Democracy engaged in constitutional support in multiple countries.¹¹⁶ Bilateral donors too sought to get involved. Both the American military and USAID have had a bias toward constitutions, while other donors have focused on institutions like the civil code or judicial reform. In situations like post-conflict Cambodia or East Timor, where the UN has an official role in transitional administration, the UN plays an active role to be described in a bit more depth below. In major instances of invasion and occupation, as in Afghanistan and Iraq, the UN and United States are major players in some tension with each other, while myriad other actors are also involved.¹¹⁷

To give one example of how these forces interact, the Comprehensive Peace Agreement between the warring Sudan and South Sudanese factions in 2005 featured an extensive bill of rights reportedly drafted by an American legal advisor to the Intergovernmental Authority on Development (IGAD) Secretariat for Peace in Sudan, sponsored by the US State Department.¹¹⁸ IGAD is a regional organization, primarily funded by outside countries, which among other tasks served to facilitate the peace negotiations between the north and south regions of Sudan.¹¹⁹ The Comprehensive Peace Agreement in turn led to an interim constitution, and then a transitional constitution that still governs the young nation of South Sudan today.¹²⁰ Several organizations, including an American law firm, the National Democratic Institute, and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, claimed to have influenced the rights provisions in the Interim Constitution.¹²¹ Later, the Transitional Constitution of South Sudan 2011 was drafted with the assistance of the Public Interest Law and Policy Group (PILPG) based in Washington DC, as well as other international organizations like the Max Planck Institute for Comparative Public Law and International Law, the US Institute of Peace, and the International Development Law Organization.¹²² The involvement of all these players meant that the South

115. See THOMAS CAROTHERS, PROMOTING THE RULE OF LAW: IN SEARCH OF KNOWLEDGE (2006); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999).

116. Author's disclosure: I worked for the Asia Foundation on constitutions during this period.

117. VIJAYASHRI SRIPATI, UN CONSTITUTIONAL ASSISTANCE: AN EMERGENT POLICY INSTITUTION, Paper 5 (York Centre for Public Policy & Law 2009), <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1004&context=ycppl>.

118. Cope, *supra* note 1, at 692.

119. *Id.*

120. Kevin Cope, *South Sudan's Dualistic Constitution, in THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 295, 302-03 (Denis J. Galligan & Mila Versteeg eds., Cambridge Univ. Press 2013).

121. *Id.* at 304.

122. *Id.* at 307-08.

Sudanese drafters had to spend a good deal of time coordinating with the donors, while trying to soak up the myriad and sometimes conflicting advice they received. It is not surprising that they found the drafting process challenging at times.

Similarly, the recent wave of constitution-making in the aftermath of the Arab Spring generated demand for outside assistance. Constitutional exercises in Libya, Tunisia, and Yemen featured an array of foreign actors. International IDEA, German NGO Democracy Reporting International, the UN, and the American party organizations—the National Democratic Institute and the International Republican Institute, were all involved in various countries. In Tunisia, various German foundations, such as the Konrad Adenauer and Hans Siedel Foundation, were also involved, as were French institutions, and the Max Planck Institute for Public Comparative Law and Public International Law, Heidelberg.

Only in Egypt were foreign organizations shut out. As the Muslim Brotherhood-dominated constituent assembly sought to produce a draft in 2012, it made quite clear that it was not interested in foreign advice. No doubt their culture of distrust toward Western states that had supported the Mubarak regime for three decades was part of the motive. The broader conspiracy theories that inform Egyptian political life did not help. But ultimately, they may have been afraid of the message that international actors might have delivered: to be more inclusive.¹²³ Had foreign advisors been involved, they would have likely argued what has become a standard line: constitutions should be produced in an open process with participation from as broad a swath of the population as possible. Constitutions that are produced in open processes are likely to be more legitimate, it is often asserted. What is surprising is that this message is often delivered by the ultimate international actor, the UN, which has become an important player in the world of constitutional advice, and to which we now turn.

SPEAKING FROM ABOVE FOR THOSE BELOW: THE UNITED NATIONS AND CONSTITUTIONS

The end of the Cold War has seen the re-invigoration of the UN as a central actor in state building. Frequently called on to help countries transition out of civil war and conflict, the UN has set up missions in countries as diverse as Kosovo, East Timor, Somalia, Yemen, Iraq, Afghanistan, and Cambodia.¹²⁴ In the course of

123. Perhaps this attitude explains the extraordinarily short life of their product, which was suspended in mid-2013, just seven months after coming into effect. After all, with few international actors invested in the process, the military may have thought little of suspending the Egyptian Constitution in June 2013.

124. An incomplete list includes Afghanistan, Angola, Benin, Burundi, Cambodia, Congo, East-Timor, Eritrea, Guatemala, Kosovo, Mozambique, Namibia, Liberia, Sierra Leone, Sudan, and Yemen. Support in Afghanistan, Iraq, Libya, Nepal, Somalia, and Yemen has come through UN special political missions and to the Central African Republic, Guinea-Bissau, and Cote d'Ivoire through the UN's Peace-building Support Offices and Mediation Support Unit. The UNDP (the United Nations Development Program), has supported constitution-making in Burundi, Democratic Republic of Congo (DRC), Ecuador, Eritrea, Gambia, Guyana, Malawi, the Maldives, Nauru, Solomon Islands,

these interventions, the UN has accumulated considerable experience in constitutional design, though its internal efforts (and their external legitimacy) vary from context to context. Cambodia's 1993 Constitution, for example, was formally produced by an elected constituent assembly, but was organized by the United National Transitional Authority for Cambodia (UNTAC), which was charged for conducting elections and organizing a process of state transformation.¹²⁵ Similarly, in 1990 Namibia was midwifed by the UN, and its constituent assembly used the 1992 Constitutional Principles contained in a report from the secretary-general and endorsed by UN Security Council Resolution 435.¹²⁶ Many of these situations involve countries emerging from violent conflict, leading to an emerging field of "peace-building."

Beyond knowledge, foreign institutions in general, and the UN in particular, can play a role in encouraging agreement among local factions that are often at the verge of violent conflict. The UN is a large, often-dysfunctional bureaucracy, but it does bring special resources to bear in terms of international legitimacy that, say, a bilateral donor may not have.¹²⁷ Many members of its staff have extensive negotiating experience.¹²⁸

This is not to say that it is a truly neutral actor, whatever that might mean. The UN claims to respect national ownership of sovereign processes, and on the ground it emphasizes the role of public participation.¹²⁹ But the UN is also bound by its charter to promote adherence to international human rights and the rule of law.¹³⁰ There is an obvious tension here—global standards will sometimes conflict with local cultural norms.

In 2006, in recognition of this increasing demand for involvement in constitution-building, a high-level committee in the UN endorsed a program to review its constitution-making assistance and prepare further guidance.¹³¹ This culminated in 2009 in the release of a Guidance Note from the Secretary General on United Nations Assistance to Constitution-Making Processes.¹³² This in turn

Tokelau, and Zambia. See VIJAYASHRI SRIPATI, UN CONSTITUTIONAL ASSISTANCE: AN EMERGENT POLICY INSTITUTION, Paper 5 (York Centre for Public Policy & Law 2009), <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1004&context=ycppl>.

125. Stephen P. Marks, *The Process of Creating a Constitution for Cambodia*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 207, 234 (Laurel Miller ed., 2009).

126. Marinus Wiechers, *Namibia's Long Walk to Freedom: The Role of Constitution Making in the Creation of an Independent Namibia*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 81, 91 (Laurel Miller ed., 2009).

127. Since 2008, many experts are located in the Mediation Support Unit of the Department of Political Affairs, which as a team of "Standby Experts" who deploy to different places.

128. Nancee Oku Bright, *Negotiating to Save Lives*, 48 UN CHRON., July 2011.

129. SRIPATI, *supra* note, 117.

130. *Id.*

131. *Id.*

132. See U.N. Secretary-General, *Guidance Note of the Secretary General: United Nations Assistance to Constitution-Making Processes* (Apr. 2009), https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf.

reiterates that constitution-making is “a sovereign national process, which, to be legitimate and successful, must be nationally owned and led.”¹³³ Yet it also requires its agents to promote particular values:

The UN should consistently promote compliance of constitutions with international human rights and other norms and standards. Thus, it should speak out when a draft constitution does not comply with these standards, especially as they relate to the administration of justice, transitional justice, electoral systems and a range of other constitutional issues The UN should address the rights that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, including women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons. For example, the principle of equality between men and women should be embedded in constitutions, and states should be encouraged to consider special provisions on children recognizing their status as subjects of human rights.¹³⁴

All this seems unobjectionable from an international perspective, but in some societies may be deeply resisted by conservative social and religious forces. There is an irony that an international organization which is itself involved in imposing certain ideas is also the body that urges local participation in the process, and safeguards participation as a key process value.

Notwithstanding its internal tensions, the secretary general’s note is a kind of soft law guidance, with actual regulatory effect for internal UN actors. These are myriad, and the internecine UN politics in any given situation can be intense. Beyond whatever country mission has been established, the UN Entity for Gender Equality and the Empowerment of Women will seek to ensure compliance with global gender norms, the Mediation Support Unit will seek to provide technical advice, and the United Nations Development Program (UNDP) will often be involved as the lead agency in-country. This has led to the creation of a Constitutional Focal Point within the UN.¹³⁵ Institutionalization is proceeding; but there are many drafting situations in which the UN is not a preferred partner, after having antagonized locals with its heavy-handed normative biases, its bureaucratism, and its alliance with particular actors.

NORMATIVE ASSESSMENT: A QUALIFIED DEFENSE OF ADVICE

The ideal role of the constitutional advisor might seem to be to provide information to local decision-makers. The locals represent “we the people” who will make the final choices about what institutions are appropriate for the local context. But all constitutional drafters bring their own perspectives and backgrounds, and these may sometimes affect the advice they are giving.

133. U.N. Secretary-General, *supra* note 132, at 2.

134. *Id.* at 4.

135. DPA Constitutional Focal Point Fact Sheet, http://peacemaker.un.org/sites/peacemaker.un.org/files/ConstitutionMaking_Factsheet_May2016.pdf.

One need not dig far to find those who style themselves constitutional advisors. In a recent interview, a law school applicant claimed to have played a major role in drafting the proposed constitution of Tunisia on the basis of a student project at Cambridge University.¹³⁶ Harvard law professor Noah Feldman is regularly asserted to have drafted the Constitution of Iraq,¹³⁷ notwithstanding the fact that he was nowhere near the country during the period when all the crucial provisions were negotiated.¹³⁸

To judge from these and many others, foreigners play a major role in constitutional design. What are we to make of these claims? They are yet another indicator of our Twitter-laden era of self-promotion. They also reflect the natural interest of the public and the media in constitutions, which have an appeal as the highest legal acts of the state. In the case of academics and foreign donors, showing policy impact can be important professionally, and there is no higher-impact enterprise than constitution-making. But fundamentally these claims reflect a complete misunderstanding of the way constitutions are—and always have been—written. Constitutions are collective products, not written by single individuals. And while outsiders have always played an important role, the ultimate acts of adoption must, by definition, be done by insiders with the requisite political authority. We the people always trumps Me the People.

The need to balance between local and international norms has been a constant theme in constitution-making. The reason for seeking outside expertise is simple. Writing a constitution is a tough task, even at a purely technical level. Trying to figure out the myriad tradeoffs involved among different institutions, and the likely effects of particular provisions, is a complex matter, requiring a sense of both local context but also what is sometimes called “social science knowledge.”¹³⁹ Even if interests of the main stakeholders can be aligned, they need to be able to estimate the likely effects of their institutional choices. To do the job requires knowing a lot about the local context, about different institutional designs, and about what is politically possible to achieve. Surely it is a project that takes a proverbial village.

136. Subhabrata Guhal, *Indian Helped Draft Tunisia's Constitution*, TIMES OF INDIA, Feb. 9, 2014 <http://timesofindia.indiatimes.com/nri/other-news/Indian-helped-draft-Tunisias-constitution/articleshow/30079524.cms> (discussing Riddhi Dasgupta).

137. See *After You* (Review of *Cool War: The Future of Global Competition*, Noah Feldman), THE ECONOMIST (July 15, 2013), <http://www.economist.com/news/books-and-arts/21579430-will-bipolar-world-be-peaceful-after-you>.

138. Feldman served as a senior advisor to the Coalition Provisional Authority from April to July 2003, LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* 49 (2007), but does not seem to have been involved in the actual process of drafting either the Transitional Administrative Law of 2004 or the Constitution of 2005, PAUL BREMER, *MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE* 288, 293 (Simon and Schuster, 2006), and none of the major accounts mention him. See Ashley S. Deeks & Mathew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J., 1-87 (2007).

139. DONALD W. FISKE AND RICHARD A. SHWEDER, *METATHEORY IN SOCIAL SCIENCE: PLURALISMS AND SUBJECTIVITIES VII* (Donald W. Fiske and Richard A. Shweder eds., 1986) (discussing social science knowledge).

In such a context, outsiders have a role to play. Local constitution-makers could, in theory, adopt the view that their situation is unique and that there is little to be learned from other countries. Some drafters do create innovative institutions from local tradition. But the very categories used in government tend to be similar across countries: most countries will adopt a legislature and an executive headed by a president or prime minister; most will promise their citizens “rights”; and most will consider how the national government interacts with those from lower levels. We might put local names on these institutions: the Mongolian legislature, for example, is called a “hural” after the traditional Mongolian assemblies.¹⁴⁰ The first modern government of the country used the term in the 1920s and so it stuck.¹⁴¹ In societies with Persian influence the legislature is called a majlis.¹⁴² But regardless of the name, it is still a legislature.

Once it is recognized that institutions have been used in other countries, it would be quite irrational to ignore prior experience, even if it is foreign. Furthermore, unlike normal “products,” there is little incentive for innovation. Unlike producers who seek to maximize profits in a competitive marketplace, drafters of constitutions do not acquire a property right in any new ideas they come up with. Nor can they easily sell their ideas to other countries. Once embedded in a new constitution, ideas and institutions are publicly available for all to see.

One way to think the role of foreign advisors is that they offer a *subsidy* of knowledge. The international community can quickly bring a lot of relevant information to bear, not to dictate choices but to help lay out options for local drafters. Subsidizing the gathering of information can save a local drafter a lot of time and effort. Consider the alternative option for drafters. They could sit down with the myriad texts that have been produced by other countries. They could study comparative law and politics. But surely it makes far more sense to bring in an outsider or two who has some comparative knowledge.

If one danger is imposing an overly rigid archetype without tailoring to the local conditions, there may be another danger in being too sensitive to the interests of those currently in power. After all, the drafters of a constitution have enormous opportunities for enhancing their own authority and power. The advisor is usually hired by someone. Who is the client? Is it the nation as a whole, or the particular individual who hires the advisor? There has been very little attention to the ethics of advice giving, and occasionally, as in the case with Peter Galbraith in Iraq, unethical behavior occurs.¹⁴³ One might expect that if constitutional advice is to emerge as a full-blown field of expertise, akin to other TLOs, it might be accompanied by pressures to adopt professional ethics.

140. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 162 (2003).

141. Const. Mongolia art. 4 (1924).

142. See, e.g., Const. Iran art. 89 (1989); Const. Azerbaijan art. 81 (1995).

143. In a slightly different context, see Carrie Menkel-Meadow, *Are there Systemic Ethics Issues in Dispute Settlement System Design? And What We Should [Not] Do About it: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 195-232 (2009).

COMPETITION FOR CONSTITUTIONS

In a contemporary drafting situation, many different actors—states, academics, international organizations, advocacy groups—are in some sense competing with each other to influence the final shape of the constitutional document, just as local political forces compete for advantage in negotiating the outcome. Each outside actor brings particular strengths and weaknesses. Whereas the UN brings a particular form of international legitimacy, and the weight to negotiate with powerful actors like the United States, bilateral donors may bring greater speed and flexibility. Norway, for example has established an expertise in international conflict resolution that has allowed it to play outsized roles in constitutional-conundra like Israel/Palestine and Sri Lanka.¹⁴⁴ However, bilateral donors are also constrained by their own national interests, which naturally weigh heavily on the choice of content and the local partners who are favored.

In Europe, the European Union has played a role in constraining constitution-making, especially in recent years when Article 2 of the treaty has come into play in the rightward turn in Central and Eastern Europe.¹⁴⁵ The Venice Commission on Democracy through Law, part of the Council of Europe, has played an active role in formulating advice to constitutional reform efforts in Europe and beyond.¹⁴⁶ It has expanded its role since allowing the extension of membership by countries from outside the region, and now has nearly 60 member states.¹⁴⁷ The Venice Commission has no binding power, but has the advantage of an association with Europe, giving it implicitly the pull of the European Union, and perhaps an implicit threat of collateral consequences from European governments.¹⁴⁸ The downside is that its composition is overwhelmingly composed of senior academics and constitutional court judges; there is no social science expertise, and few have any

144. Statement by Mr. Jan Petersen, Foreign Minister of Norway: Announcement of Sri Lanka Ceasefire, Feb. 22, 2002, U.S. Institute of Peace, Peace Agreements Collection <http://www.usip.org/publications/peace-agreements-sri-lanka>; See also Robert Freedman, *The Middle East and the Peace Process: The Impact of the Oslo Accords*, 6 ARAB STUD. J. 144 (1998).

145. Kim L. Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions*, EUROPEAN COMMISSION (Nov. 2013), http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf; Bojan Bugarič, *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge*, (LONDON SCH. OF ECON. EUR. IN QUESTION DISCUSSION PAPER SERIES, LEQS Paper No. 79/2014, July 2014). <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper79.pdf>.

146. Maartje de Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 AM. J. COMP. L. 963, 964 (2015); see also Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, 2 U.C. IRVINE J. INT'L TRANSNAT'L AND COMP. L. 57 (2017).

147. *Id.* at 969-70.

148. *Id.* at 991.

experience drafting constitutions.¹⁴⁹ Furthermore the membership is overwhelmingly male.¹⁵⁰

Smaller international organizations like International IDEA also have developed specialized programs in constitution-making.¹⁵¹ The IDEA program focuses on knowledge products, including a series of primers on constitutional issues, as well as tailored constitutional advice to particular drafting situations. Interpeace, a non-governmental organization based in Stockholm, has a program focusing on constitutional processes.¹⁵² Region-specific organizations are also involved. In addition, there are organizations that focus on substantive issues. Besides the crowded human right space, there is the Forum on Federations, based in Canada, which promotes federal governance.¹⁵³

The point is that constitution-making is no longer as simple as gathering representatives into a New England town hall to deliberate fundamental principles. It involves a much more complex, transnational process. One way to think about this process is that it is not only a competition among different actors, but a competition among *different forms of expertise*.¹⁵⁴ Law competes with political science, economics and other disciplines; technocrats compete with interest groups to articulate their positions. Myriad international organizations, both governmental and intergovernmental, want to play a role in supporting constitution-making. A national constitution is in some sense the ultimate achievement—it allows the donor organization to claim credit, and show a track record of success. So there is a good deal of supply-side pressure for constitutional advice, and subsidies for the constitution-making process.

Constitution-making in this sense is part of a much broader movement that has occurred over the last three decades, sometimes called the “rule-of-law” movement or the “law and development” movement.¹⁵⁵ Building on earlier efforts, Western agencies, lawyers, and universities sought to transfer legal knowledge to the developing world. As time has gone on, this movement has seen a gradual empowerment of the “recipients” of legal knowledge. “Local ownership” is the holy grail for donors, as they rightly understand that nothing can work if simply imposed from outside. As more and more “suppliers” entered the field, the “buyers” of information have more to choose from and are in a stronger position to negotiate

149. *Members of the Venice Commission*, VENICE COMMISSION (Nov. 11, 2016, 2:22 PM), <http://www.venice.coe.int/WebForms/members/default.aspx?lang=EN>

150. *Id.* Twenty-nine out of 128 members listed on the website appear to be female.

151. Disclosure: I serve as a Senior Advisor to the Constitution-Building Program of International IDEA. *Constitution-Building*, INTERNATIONAL IDEA (Dec. 14, 2016, 10:03PM), <http://www.idea.int/our-work/what-we-do/constitution-building>.

152. *Constitution-Making*, INTERPEACE (Dec. 14, 2016, 10:03PM), <http://www.interpeace.org/what-we-do/constitution-making-for-peace/>.

153. *Who We Are*, FORUM OF FEDERATIONS (Dec. 14, 2016, 10:04PM), <http://www.forumfed.org/who-we-are/>.

154. ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (Univ. of Chicago Press, 1998).

155. CAROTHERS, *supra* note 115.

the terms of assistance. The availability of electronic tools and the growth of human capital in some developing countries mean that elites and drafters are also able to become more sophisticated consumers.

All this competition to influence constitutional language should make it abundantly clear that individuals do not draft these documents at all, and the individual advisor is embedded in larger structural and institutional frameworks. Of course, an individual drafter could conceivably do a better job than committee of political representatives who often foist incoherent compromises in to constitutional documents. The Ancient Greeks used to regularly appoint single individuals to draft laws, including constitutions.¹⁵⁶ Coming from outside of the political structure, and usually being drawn from the middle class, these were the ancestors of modern technocrats. But in the modern era, it is hard to imagine a single individual having the wisdom and expertise to do so. There are, to put it bluntly, no more Solons.¹⁵⁷ Me, the People is always less legitimate than We, the People. Constitutions must garner the consent of the people who are to live under them, and this increasingly is seen to require a healthy dose of public participation.

As an aside, I cannot resist pointing out that the claims of foreign individuals to have drafted particular documents are particularly ironic in the case of Iraq. The Constitution of Iraq reflected a set of compromises achieved without the participation of one of the major political forces of the country. Pushing a constitution before there was a political agreement led directly to the horrific violence and civil war of 2005-2009.¹⁵⁸ Furthermore, the constitution is objectively an incomplete document.¹⁵⁹ It postpones major issues—the federal system, the distribution of oil, the nature of the upper house of parliament—to future laws which in many cases have never been passed.¹⁶⁰ It is, at a technical level, a bad piece of work. Why anyone would want to take credit for it is unclear. To use a medical analogy, anyone who claims to have produced that document ought to be sued for institutional malpractice. Far better to admit that the process is a collective one, in which the credit—and blame—is shared.

Constitutions are always drafted in collective processes—and have to be. The process involves various kinds of expertise—legal, political, technical. It requires knowledge of international factors, including the different institutional options that have been tried in foreign countries, and their performance. It also requires local knowledge about what is politically and culturally possible. And it ultimately requires

156. Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 918 (2012).

157. *Id.* at 909.

158. The Internal Displacement Monitoring Centre, *IRAQ: A Profile of The Internal Displacement Situation 25* (Norwegian Refugee Council, 2010).

159. Ersin Kalaycioglu, *Iraq's Constitution Is Incomplete*, GLOBAL POL'Y F. (Oct. 29, 2005), <https://www.globalpolicy.org/component/content/article/168/36254.html>; see also Abrak Saati, *Participatory Constitution-Making as a Transnational Legal Norm: Why Does It "Stick" in Some Contexts and Not in Others?*, 2 U.C. IRVINE J. INT'L TRANSNAT'L AND COMP. L. 113 (2017).

160. *Id.*

bringing all these things together, to make informed choices about the likely outcomes of institutions in a particular local context. It then requires a process of soliciting local input into the design process, and a process of negotiating with powerful stakeholders.

IS CONSTITUTION-MAKING A TRANSNATIONAL LEGAL ORDER?

We have described an increasingly institutionalized social field, in which constitution-building has become its own field of expertise. Let us now turn to the question posted at the outset: does it qualify as a transnational legal order? To answer this we should isolate each element of the definition of the TLO. We have, I think, demonstrated that the field is an inherently transnational one, and that it is becoming increasingly institutionalized as transnational. But is constitution-making a *legal* process? It clearly involves law, but the process is not itself governed by transnational law. This exposes that the Halliday-Shaffer framework is a bit fuzzy on the legal. Their definition characterizes something as legal if it involves a transnational legal organization or network, directly engages multiple national legal institutions, and assumes a recognizable legal form.¹⁶¹ This is a somewhat circular definition in that it includes legal concepts in the elements that constitute something as legal. Clearly the constitution-making network does act on law in multiple countries, but does it “assume legal form?”

There is very little law that governs the constitution-making process itself. To be sure, some norm entrepreneurs and the UN itself have sought to assert that there is a *right* to public participation in the constitution-making process.¹⁶² Yet no one would really question the idea that a constitution, made without participation but universally recognized by its own subjects as in force, was in fact a constitution. Normatively, the international community would surely prefer such a constitution that was perfectly congruent with international substantive norms to one that was highly defective but adopted in a participatory fashion. Even at a purely national level, we do not always observe legal continuity in the sense that new constitutions are produced under the rules set out in prior documents.¹⁶³ In short, applying the framework to constitution-making seems to call into question some aspects of the definition, but the authors of the framework might respond, fairly enough, that the legal nature of constitutions means that the TLO definition is satisfied on this point.

Third, is it a transnational legal *order*? Constitution-making as a field is highly fragmented, with different organizations and individuals competing to provide advice and to influence the process. There is intense competition in the process,

161. HALLIDAY & SHAFFER, *supra* note 2, at 11-12.

162. Vivian Hart, *Democratic Constitution Making* 1 (U.S. INST. OF PEACE, Special Report 107, July 2003), <https://www.usip.org/sites/default/files/sr107.pdf>.

163. Andrew Arato, *Conventions, Constituent Assemblies, and Round Tables: Models, principles and elements of democratic constitution-making*, 1 GLOB. CONSTITUTIONALISM 173, 178 (2012).

and many of the actors are themselves TLOs.¹⁶⁴ For this reason, we prefer to treat constitution-making as a field which serves as an arena for *other* TLOs to engage. The forces at play in the arena are by no means limited to TLOs, for the major political players are by their nature intensely local. But the constitution-making world is one in which all these actors compete, with some gaining advantage and others losing out.

Yet at the same time, we do see an increasingly dense network of specialists emerging in the field. These actors seek to create a kind of epistemic field, and to provide order to the messy world of constitution-making. We might thus say without exaggeration that constitution-making is a field in which order is emerging. But there are also, by nature of the policy problem being confronted, elements of disorder at play. Constitution-making exercises regularly fail; there is no guarantee of success, and there is no agreed upon set of norms, discrete from other TLOs that one could identify as being exclusive to constitution-making. We hope that trying to use the TLO framework to understand constitution-making has also illuminated aspects of the very concept of the TLO itself.

164. For example, Transnational Legal Orders for human trafficking or human rights accountability are identified in the Halliday and Shaffer book. *See also* Paulette Lloyd and Beth A. Simmons, *Framing for a New Transnational Legal Order: The Case of Human Trafficking*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 2, at 400; Leigh A. Payne, *The Justice Paradox? Transnational Legal Orders and Accountability for Past Human Rights Violations*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 2, at 439.