

## 1

## Assessing constitutional performance

Tom Ginsburg and Aziz Z. Huq

How should we evaluate constitutional performance? What should count as “success” in constitutional design? Is there a universal benchmark against which all constitutions, regardless of local circumstance, can be evaluated? Or is constitutional design as idiosyncratic as a person’s choice in neckties? These questions, which are the focus of this volume, are necessarily raised by the emergent transnational practice of constitutional advice-giving and criticism. They are implicated every time a scholar, consultant, human-rights activist, or international organization expresses a position on a proposed constitution, whether in Somalia, Tunisia, Nepal, or the United Kingdom. They are thus necessarily questions for the governments and international organizations that fund such practices. And they are equally questions for the national publics engaged in the act of constitutional creation, who are often on the receiving end of international advice about what they should be doing. Finally, they ought to be puzzles for the growing coterie of scholars and jurists engaged in the comparative analysis and critique of new constitutions, a scholarly literature that often employs explicitly normative criteria in evaluating constitutional design. If we wanted to err on the side of grandiosity, we might even say they are questions implicated every time one decides that a constitution, as a going concern, merits our continued fidelity.

The contributors to this conference have been asked to respond, from a variety of perspectives, to the seemingly simple question of what counts as constitutional success (a term we will use interchangeably with constitutional performance here). By posing this concededly naïve question, we hope to draw attention to a normative terrain that has received surprisingly little attention from scholars and practitioners who assume, often implicitly, that there is a convergent consensus on what counts as “success” in constitutional design, and that therefore it is meaningful to praise or to blame a constitution for meeting or falling short of this desideratum. In so doing, we hope to provoke

more careful debate among legal and political theorists about the plural possible meanings of constitutional success or quality. The chapters assembled in this book, we think, provide a series of important landmarks and provocations in that debate rather than a singular, definitive answer to our threshold question. We thus make no pretense of consensus. The contributors sharply disagree with each other (and us) about the meaning of the question, and the method suitable to its resolution. Their ensuing approaches range across normative criteria in ways that illuminate the plurality of potential criteria of constitutional success. Yet in their myriad approaches they also advance a collective agenda by focusing attention on the issue.

The normative pluralism evidenced in this volume does not mean that accounts of constitutional performance will simply collapse into first-order normative theorizing. We are cognizant that much work in political theory can be described as an effort to clarify the legitimate foundations and goals of political society, and thus to evaluate “small-c” constitutional success. In the classical world, Aristotle offered both taxonomy and evaluation of constitutional families, while Plato sketched an ideal-type set of political arrangements. Historians from Herodotus and Thucydides to Polybius, Livy, and beyond provided further data and evaluative criteria. Perhaps the most influential modern tradition has been the use of the social contract as a heuristic, first by Locke, Hobbes, and Rousseau, and most recently by Rawls, to identify normatively defensible terms of social cooperation. This political theory literature offers a rich array of potential normative frameworks for approaching very general questions about the functions and boundaries of the state as an institution. It does not, however, focus on the specific role of a written constitution in a way that yields straightforward normative criteria of *constitutional* success or performance. Moreover, to simply assume that any one account of political society or the necessary role of the state, whether drawn from Aristotle, Rousseau, or Rawls, resolves the question of constitutional success would hardly be a sufficient answer for most participants in contemporary constitution-making. These actors need to make decisions on real-world questions of constitutional design under less-than-ideal circumstances of time pressure and political constraint (Horowitz 2002).

Instead of trying to reason directly from first principles ourselves, we hope that by framing a relatively naïve question, and then eliciting views from a heterogeneous range of scholars immersed in distinct disciplines, as well as regional and country-level experts with specific experience of recent constitution-making, we can clarify the contemporary framing and analyzing of “constitutional success” in a systematic way. We hope, that is, to elicit a deeper understanding of how that concept – which is implicitly at stake in

many practical and scholarly projects today – is in fact understood. Just as important, we hope to grapple with the open questions as to whether it even has a single referent when applied to constitution-making contexts, whether it is more or less informed by certain normative commitments, and whether it is a coherent ambition at all.

In this Introduction, we begin at a high level of generality by giving an overview of several different perspectives that might be brought to bear in constitutional evaluation. We also identify as potentially useful one possible distinction of general application between internal and external criteria. This is the distinction between evaluative benchmarks that those within a constitution-making process bring to bear, as opposed to criteria that outsiders apply. Drawing attention to this distinction underscores the possibility that constitutional success is a relative matter: One's criteria depend on where one stands in relation to the relevant polity. We then go on to offer an answer of our own to the question of what counts as constitutional success. This comprises a set of four evaluative criteria that are intended to be applicable across a broad range of constitutional regimes and constitution-making circumstances (for an initial specification and discussion of this framework, see Ginsburg & Huq 2014). More specifically, we suggest that a plausible set of external criteria might include the following four goals: (1) the creation of public legitimacy; (2) the channeling of conflict into political venues rather than violence; (3) the reduction of the agency costs associated with government; and (4) the facilitation of public goods. We further suggest that these criteria are not by their terms limited to democratic systems. The observed set of constitutional regimes is broader than the set of democratic ones, and there is no reason to equate constitutionalism with democracy. Some authoritarian regimes seek to realize the very real benefits that can be obtained from constitutional governance (see Tushnet 2014; Ginsburg & Simpser 2014). In our view, there is no reason to define constitutional success in terms that arbitrarily foreclose the possibility of evaluation in nondemocratic contexts, even if some of our criteria (particularly the channeling of political conflict) are likely best realized in democratic rather than authoritarian contexts. After considering the general questions in this Introduction, we offer what we hope is a reasonably provocative analysis of the performance of a number of familiar and unfamiliar founding documents, including the 1787 American Constitution, the 2004 Afghan constitution, and the 1996 South African constitution, using our framework.

## I METHODOLOGICAL CONSIDERATIONS

At a very minimum, any tractable method for evaluating constitutional success must be sufficiently sensitive to political, social, and geopolitical

context. This means that one should assess the overall objectives of the drafting situation (which may have been several), and realistically evaluate progress toward them. One cannot impose fixed universal standards that are not plausibly achievable. Juba will not be Geneva anytime soon, and no constitutional scheme could make it so. Still, it is feasible to evaluate what *was* in fact within reach in South Sudan in 2011, given the goals of the drafters and the prevailing circumstances. This requires that we articulate with a reasonable level of specificity what major issues are to be resolved in constitutional drafting, and what that project set out to achieve in a particular case. It further involves taking seriously not only what constitutions can do but what they cannot do.

Stated in this fashion, the task of evaluating constitutional success still faces important theoretical and practical challenges. We highlight here what we believe to be the two main methodological difficulties hedging this task: the problem of determining what perspective to use, and the difficulty of conceptualizing and analyzing “gaps” between constitutional text and observed practice.

#### *A Internal v. external criteria*

The evaluation of whether constitutions “work” or “succeed” is a surprisingly complex task (Pozas-Loyos 2012). Constitutions are (usually) written texts (although Erin Delaney’s chapter (Chapter 14) analyzes the success of the United Kingdom’s unwritten constitution) that were adopted in quite varied social, political, and geopolitical circumstances. A polity can reach for the instrument of a written constitution, indeed, with a wide range of purposes in view: Constitutions can be transformative, preservative, or even revolutionary. Some constitutions are designed to end civil wars. Others mark independence from a colonial power. Yet others make adjustments to ongoing institutions of governance, democratic or otherwise. These myriad purposes render the task of constitutional evaluation very complex, even pitched as a descriptive rather than a normative enterprise. In some cases, such as in South Africa in 1996, the purpose of a constitution may be relatively easy to describe (as we do later). But in other instances, for example Sweden’s consolidation of its constitution in 1974, that description may be much more difficult. There is, moreover, no reason to suppose that all members of a polity will converge on the same aspirations for a constitution. To the contrary, endogenous disagreement and conflict over normative priors and ends may be endemic to the observed circumstances of constitution-making. As a result, there may not even be a shared “goal” or a single “intent” behind any particular piece of constitutional

text (although this may also hold in respect to any legislated product of collective decision-making).

We can begin to discipline this complexity by observing that approaches to the task of constitutional assessment can roughly be divided by the perspective of the person engaged in evaluation, whether internal or external. First, on an *internal* view one asks whether the constitution has succeeded on the terms of the community to be regulated by that instrument. This species of stocktaking takes the objectives of the constitution as given, either by the document itself or by the relevant political community. It does not attempt to evaluate those goals from any independent vantage point. Instead, it relies upon self-declared or self-identified principles and goals, which might be defined in terms of institutional creation (e.g., has the constitution created a functioning election system? Has it led to the formation of a legislature or a government?), or in terms of desired policy goals (e.g., has the constitution allowed the unification of a geographic space, or fostered economic growth?).

Such an exercise at a minimum requires us to be able to discern relevant goals in the text of a constitution, derive such goals from the circumstances of its adoption, or deduce them from the writings of a specific constitutional framer. This is no simple task. It assumes that the relevant preferences of constitution-makers have been legibly expressed in constitutional text or can otherwise be inferred. When analyzing a joint product of multiple drafters, it assumes that their preferences can be cogently aggregated, notwithstanding the stability and coherence-related difficulties of collective choice mechanisms that have been identified by social choice theorists from Arrow onward (Arrow 1951; Huq Forthcoming 2016). Even in the absence of social choice problematics, it may not be possible to identify a coherent set of constitutional ambitions. Complicating matters yet further, constitution-making often unfolds against the backdrop of internal division and sharp, even violent, controversy within the relevant national polity. Under these conditions, it may well be doubted that stable internal criteria that are uniformly attractive to all contemporaneous participants in constitution-making are even available. What we take as such internal criteria after the fact may simply be the criteria most conducive to subsequent generations of political victors.

The identification and application of internal criteria, in short, raises a host of challenging normative and analytic questions. Several of the chapters that follow, including Martha Nussbaum's and Roberto Gargarella's, tackle these challenges head-on from the perspective of national or regional experiences. These chapters provide alternative, nationally inflected accounts of what it means to take seriously the internal perspective on constitutional success. In a similar vein, Ozan Varol shows that even if we focus on a specific

constitutional task – the management of civilian-military relations – internal criteria can vary dramatically even in respect to a single constitution, while Hanna Lerner illuminates the plurality of potential benchmarks that might be salient in respect to the single task of managing religious diversity.

Alternatively, the exercise of constitutional evaluation can adopt an external vantage-point. This means considering the question of constitutional success not from the perspective of a constitution's designers, a founding generation, or some other participant within the relevant polity. Instead, it means assessing constitutional performance against a benchmark derived independently of local circumstances and contingent preferences within the relevant polity. It means asking, that is, not what renders *this* constitution a success but rather what makes a constitution *in general* a success. To frame the problem in this manner is to derive a definition of constitutional success from rather different materials from an internal perspective, but not necessarily to reach a different answer from internally oriented analyses. An external observer might converge on the same benchmark or standard as an internal observer, but he or she will likely do so for quite different reasons.

One set of external benchmarks proceeds from a normative account of desirable features or products of a constitutional order. For example, to many today, obvious and normatively attractive external benchmarks may include a constitution's success *vel non* in facilitating democratic rule, racial and gender equality, individual liberty (e.g., from torture or cruel, inhuman and degrading treatment), economic growth, or aggregate national welfare defined in other terms. Another might focus on the constitution as a device for generating an engaged and self-critical citizenry (Barber 2014). Among the chapters here, Rosalind Dixon and David Landau's contribution endorses democracy as a goal, while Aziz Huq advocates a minimalist benchmark of state stability. Their difference can be glossed, from one perspective, as reflecting the divergent accounts offered by Locke and Hobbes of the initial circumstances of social cooperation and contracting. While the Lockean perspective evaluates the quality of the social contract (at least for property holders), the minimalist Hobbesian view looks only at its (narrowly defined) efficacy.

External criteria can also be plural in character. H el ene Landemore's chapter on recent constitution-making efforts in Iceland in the wake of the financial crisis develops a rich, multicriterial account of constitutional success that usefully blends several strands of liberal democratic theory. Landemore weaves these strands into a mid-level account that offers traction in the assessment of specific constitutions. She incorporates both formal criteria such as clarity and coherence, as well as functional qualities such as whether

a constitution helps resolve conflicts, expresses values, and protects rights. Hers is not the only such plural account available. Offering another set of external benchmarks that might provide traction in practice for evaluating constitutional drafts on the ground (so to speak), Yash Ghai (2014) has developed the following enumeration of benchmarks for a successful constitution: to ensure that power resides in state offices rather than individuals (i.e., the depersonalization of political authority); to create socially grounded structures through which the state can function; to separate the economy from the state so as to prevent corruption and monopolies; and to engender respect for human rights and the rule of law in the people.<sup>1</sup> The possibility of a pluralist external benchmark of the kind that both Landemore and Ghai have proposed raises interesting questions of how to aggregate and prioritize different goals, and in particular how to handle conflicts between a constitution's different aspirations.

Each of these two basic kinds of approach, internal and external, has its merits as well as its limitations. Each, we think, might play a role under appropriate conditions. On the one hand, an internal method takes serious account of the values, intentions, and aspirations of drafters and local political actors. As a consequence, it will often draw attention to matters directly within their control. For example, government officials can pass laws and hold elections more easily than they can in fact eliminate corruption and build democracy. Drafters may hence reasonably focus on the former rather than the latter. In addition, an internal approach may allow for more precise metrics tailored to the specific context and baseline condition of a polity at the time a constitution is adopted. At the same time, however, an internal perspective may fail to grapple with the *quality* of the constitution's contents in any meaningfully objective way. It is hardly worth celebrating the perfect implementation of a constitution when *all* those external to that project would condemn it as harmful and perverse. Nor is a constitution plainly commendable if its drafters intend it to have no colorable effect on the world. After all, it is not clear that

<sup>1</sup> From these general evaluative criteria, Ghai derives ten more specific mechanisms by which a constitution contributes to democracy and the rule of law: (a) affirming common values and identities without which there cannot be a political community; (b) prescribing rules to determine membership of that community; (c) promising physical and emotional security by state monopolization, for legitimate purposes, of the use of force; (d) agreeing on the ways in which and the institutions through which state power is to be exercised; (e) providing for the participation of citizens in affairs of the state, particularly through elections, and other forms of social action; (f) protecting rights (which empower citizens as well as limit state action); (g) establishing rules for peaceful changes in government; (h) ensuring predictability of state action and security of private transactions through the legal system; (i) establishing procedures for dispute settlement; and (j) providing clear and consensual procedures for change of these fundamental arrangements.

celebrating the enactment of laws to reduce corruption or promote democracy is sensible if those enactments have no impact on the ground.

An external perspective, on the other hand, might be able to bear a greater normative weight by appealing to more general normative criteria distinct from the parochial interests and limitations of a particular class of constitution-makers. It might also overweight contextual factors that cannot plausibly be within the control of constitutional actors. That is, external criteria are more likely to have serious identification problems that preclude their serious application in explaining outcomes. This may well be especially the case with welfarist criteria, a point that Huq's chapter develops. External criteria also necessarily assume that certain goals are categorically more important than others without regard to drafters' or a polity's aspirations. They thus embed at their inception an assumption that the distinctive ambitions and aspirations of a given polity are irrelevant. This might seem in some instances anti-democratic, and perhaps even redolent of the colonial past of many nations now engaged in constitution-making. More theoretically, the invocation of external criteria might be taken as inconsistent with the national-identity-shaping purposes of a new constitution.

The chapters that follow, as we have noted, alternatively take internal and external perspectives on the problem of assessing constitutional success. We think that this mixed approach represented by the volume as a whole points toward a basic fact about criteria of constitutional performance: Those benchmarks are perspectival insofar as they are necessarily embedded in specific attitudes and positions in regard to a given polity. Rather than reducing to a singular understanding, in short, constitutional success may be inevitably plural in character.

### *B Measuring the “gap” between text and performance*

Whether an external or an internal perspective is adapted, an additional level of complication must be considered. This arises from the necessary multiplicity of analytic levels and purposes in play within any constitutional regime.

It is easy to assume that the assessment of constitutional performance would simply involve a comparison between written provisions with observed political practice at a given point in time. If constitutions are effective, the gap between textual aspiration and performance will be small; if the gap is large, the constitution should be deemed ineffectual.<sup>2</sup> But this simple evaluative strategy runs directly into a problem engendered by the multiplicity of

<sup>2</sup> Or a “sham” constitution, to quote Walter Murphy's phrase recently revived by Law and Versteeg (Law & Versteeg 2013).

provisions contained in most constitutions. Let us say that it is possible to aggregate the complex intentions (short and long term) of all relevant participants in constitution-making to formulate a singular “intent.” Even then, not all provisions of constitution may be amenable to the same strategies of implementation. To begin with, different provisions require different time periods to effectuate. On the one hand, Bisarya’s chapter identifies “transitional” constitutional provisions that are designed to mediate the transition between old and new constitutional dispensations within defined time periods. On the other hand, Lerner’s chapter on religious liberty explores how durable constitutional arrangements can influence the formation of religious social life, reinforcing some identities while undermining others, over a long time frame.

Constitutional provisions might also interact in complex ways with the trajectory of other state institutions or exogenous shocks in ways that make simple analysis of the gap between text and performance misleading. This is most plainly the case, as the chapter by Tom Ginsburg, Zachary Elkins, and James Melton explores at length, with the rights provisions of constitutions. As they demonstrate, simply measuring the degree of rights protection (to take one example) is clearly inadequate. Some rights (e.g., a criminal procedure right such as the right to counsel or a right to health) may be beyond reach without major transformations of state bureaucracies; others (e.g., a right to form political associations) may be easy to implement without delay through simple changes in statutory text.

Yet a further complication arises when a constitution simply codifies already existing behavior, and so presents no “gap” between text and practice. On the one hand, the fact that it successfully describes extant political realities does not mean that the constitution itself has done any work. Perhaps it promotes the continued existence of those political conditions, but ideally, we want to know that the constitution has made a *difference* in political life (for example, by parrying some process of secular decline). On the other hand, when is it safe to assume that the function of a constitution is transformative as opposed to preservative? Positive theories of constitutional creation (Hirschl 2004) have underscored their “hegemonic preservation” function. That is, the reason some constitutions may be adopted in the first place is that they preserve and entrench the authority of existing power holders sufficiently to mute their resistance to change. It may well be that a specific provision of a constitution “succeeds” (at least from an internal perspective) if it operates as an effective friction on social or political changes. The elements of the 1787 US Constitution that preserved slavery and that undercut the ability of national institutions to confront head-on the moral iniquity of the “peculiar

institution” provide a useful reminder that such preservative elements of a constitutional text can play important roles in practice.

Because of this complexity, the most intuitive approach to evaluating constitutional performance – that is, taking snapshots at a given point in time – is likely to be inadequate, or even in some instances misleading. Rather, one needs to consider issues of trajectories of different institutions over time, and the difficulty of changing deep-rooted patterns of political and social behavior, when evaluating a constitution. Moreover, even a piecemeal evaluation of given provisions demands a theoretical framework to identify the *ex ante* desired direction of social, political, or institutional change.

### C Summary

The evaluation of constitutional success cannot proceed without making certain theoretical choices. To begin with, it is necessary to choose between an external and an internal perspective. Criteria generated endogenously to a constitution-making polity may overlap with those developed for general, transnational, and trans-temporal application, but they will have different origins and different justifications. Having established a perspective from which to view constitutional performance, the person engaged in evaluation must then decide how to analyze the “gaps” between text and observed performance. With those problems under control, we proceed to set forth some threshold considerations about how to think about internal criteria, and then identify an exemplary set of external criteria. In both cases, our immediate ambition is relatively modest: To show that an approach based on either internal or external criteria is at least plausible, and thereby to demonstrate that the task of thinking hard about what counts as constitutional success is not without its rewards.

## II THE DOMAIN OF PLAUSIBLE INTERNAL CRITERIA

Necessarily, the world of internal criteria will be large and heterogeneous. But is there anything at the threshold to say about how we can identify plausible internal criteria against which to assess implementation? At the most concrete level, they comprise the specific steps or policy goals articulated by the explicit terms of a constitution. Varol’s chapter on transitions from military rule provides useful examples of specific steps related to a quite particular, discrete goal. Rather more abstractly, Zaid Al-Ali uses the construct of “the people” as mobilized in specific contexts, as a source of internal criteria, in his chapter on constitutionalism during the Arab Spring. More concretely, we might instead