PART I

Introduction

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Unstable Constitutionalism

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One of the most significant developments in the study of constitutional law in recent years has been the comparative turn in the field. Although debates continue over whether and how domestic courts should rely on (or even refer to) foreign law in domestic legal disputes, the appropriate methodology for comparative analyses, and the potential and limits of comparative constitutional studies, many scholars and practitioners – including well-known judges – no longer believe that the task of constitutional law is solely domestic in nature.[1] Yet, despite the enthusiasm for comparative constitutional law and the emerging systematization of comparative work, the field has developed unevenly. A few countries figure in numerous studies: the United States; the United Kingdom and other Commonwealth jurisdictions, such as Australia and Canada; Germany; France; Israel; and South Africa. Other nations and even regions are neglected – and not merely because they are small in population or have little significance for international relations. This is neither entirely unexpected nor unintentional. Some countries invariably will inform comparative queries more than others, and the jurisdictional imagination adopted by scholars and practitioners will turn on the curiosities that animate their work.

The uneven development of comparative constitutional law has rendered the field only modestly comparative – focusing on a few select jurisdictions – rather than truly global. In particular, Asia has received less attention than we might expect. Moreover, in Asia, whereas there have been notable contributions on East Asia, rather little attention has been devoted to South Asia. In that region, India is the only country to appear in comparative discussions,

[1] For an exploration of methodological questions and concerns, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (New York: Oxford University Press, 2014).

but the attention here is also less than we would expect, focusing primarily on questions that are of immediate interest to the West, such as the recognition and adjudication of social rights. This lack of attention is unfortunate because South Asia is a region of vibrant if rambunctious constitutionalism. Many South Asian nations face profound social and political challenges that they seek to address within their specific constitutional traditions.

A major motivation for this volume, therefore, is to include South Asia in the comparative discussion. This attempt expands the countries that currently constitute the field, and it also broadens the field's inquiries and the terms on which it is conducted.[2] Other than a recent valuable collection of essays – to a large extent, focused on religion's place in South Asian constitutionalism – there have been few attempts to bring together South Asia's different nations and grapple with their constitutional predicaments.[3] One reason may be that many of the issues now arising in South Asia implicate questions of basic constitutional design in nations where design choices are self-evidently bound up with political contention. As a result, scholars may think that the tools of comparative politics, with an emphasis on power, are more appropriate for those studying the region than the tools of comparative constitutional law, with an emphasis on law as sufficiently distinct from power to warrant separate consideration.

This volume considers five South Asian nations – Bangladesh, India, Nepal, Pakistan, and Sri Lanka – in an attempt to understand the region as a whole. These nations are dissimilar in important respects, and each has been subject to varying degrees of interest among comparative constitutional lawyers. Having survived as the world's largest democracy and with an active and politically significant Supreme Court, India is the best-known country in the region. Pakistan and Sri Lanka have invited some degree of interest: Pakistan in part because of its geopolitical importance and Sri Lanka because of its violent civil conflict. Both seem to be nations with long-term constitutional crises. In Pakistan, this is represented most starkly by tensions between military and civilian rule, which in many ways has defined the nation's history. In Sri Lanka, the crisis was the civil war between the Sinhalese majority and the Tamil minority populations. The other two countries examined herein – Nepal and Bangladesh – generate very little interest, despite the fact that the former is

[2] For instance, a recent contribution on linguistic nationalism and constitutional design in South Asia is a fine example of this. See Sujit Choudhry (2009), "Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia," 7 *International Journal of Constitutional Law* 577.

[3] Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds.), *Comparative Constitutionalism in South Asia* (New Delhi: Oxford University Press, 2013).

involved in one of the most intense constitution-making processes in the world and the latter has been under democratic rule for more than two decades.

Despite the important differences that characterize their history and politics, the five South Asian countries explored in this volume share more than geography. In particular, in one form or another, constitutional developments in these countries represent recurring tensions that lie at the intersection of law and politics. Such tensions are part of any constitutional democracy, but what makes the South Asian experience different and, in this respect, unique is a far greater degree of conflict between substantive normative formulations of the law and the social and political realities to which it is required to conform. In some nations, this tension is managed successfully and less so in others.

The character of South Asian constitutionalism is best described, we believe, by the term *unstable constitutionalism*. This refers to a phenomenon in which all participants in national politics appear to be sincerely committed to the idea of constitutionalism – if not always a fully liberal constitutionalism, then certainly one that hopes to establish reasonably permanent institutions with the capacity to address issues of daily governance – yet they struggle to settle on a stable institutional structure embodying a form of constitutionalism appropriate to their nation. The design issues are significant: a unitary national government, symmetrical or asymmetrical federalism, confederation, and more; multiculturalism, plurinationalism, or the dominance of minorities by majorities, and more. The instabilities can be described as arising from an inability to achieve stable agreement on any single design choice because each is a plausible option.

The theoretical commitments thought to define constitutionalism share an uneasy relationship with on-the-ground pressures that the politics of these regions generates. The term *unstable constitutionalism* aims to capture the difficulties that the law faces in mediating between legal norms and sociopolitical facts, as well as the pressing challenges involved in giving constitutionalism a character that can move a nation from civil disorder to stability, thereby importantly transforming persistent features of the nation's experience. We recognize that constitutional instability can be thought of as a difference of degree rather than of type. Nevertheless, it illustrates a different point of emphasis and concern for constitutional discussions than those familiar in the West. The central concern for the countries under study, for example, is not interpretive debates about a constitution's text or the appropriate role of Constitutional Courts in well-functioning democracies; rather, it is questions of constitutional design and negotiation that can address and resolve pressures on the overall system and the domestic risks to which it is exposed. Although constitutional instability often takes place under conditions of ethnic conflict,

social disorder, and profound diversity, the parties involved nonetheless are committed to the idea of a single state. They want to arrive at some type of constitutional contract rather than simply secede and not contract at all; the tensions exist because of disagreement about the terms of the contract.

We explore the theme of unstable constitutionalism in two ways: by studying the *forms* and *sources* of instability and the *reactions* and *responses* to instability. Constitutional instability can be revealed in several ways and can occur for various reasons. It may involve recurring extra-constitutional pressures on a constitutional system and extra-legal sites of power that challenge the system. On other occasions, institutions within the formal legal framework exercise powers in ways that begin to threaten the overall stability of the system. Forms of instability can persist and prevent the very construction of an institutional framework – that is, process-based and substantive disagreements impede constitution making. Similarly, there can be many responses – both intentional and inadvertent – to constitutional instability. A constitutional system may have the stresses that typically engender instability but develop institutional innovations – sometimes successfully and less so at other times – to absorb and tackle this instability. On other occasions, there might be attempts to develop responses to unstable constitutionalism, but they might be locked in unproductive debates and struggle to be implemented. This volume explores these responses and related ways in which unstable constitutionalism manifests. After reading the nation-specific studies, one observation is forced on us: in one way or another, the Indian experience looms large over constitutional discussions throughout the region, similar to the U.S. experience in connection with discussions of Canada's constitutional arrangements.

We emphasize that whereas politics is central to the creation of many of the tensions explored in this volume and equally central to any actual or potential response to such tensions, law is of great significance to a proper appreciation of the phenomenon under study. The conflicts and mechanisms explored involve disagreement over *legal* arrangements; innovations through *legal* design; and, ultimately, problems and solutions that are articulated in *legal* terms. Law, in these jurisdictions, is not merely epiphenomenal or inconsequential with respect to some larger force at work. Implicit is an understanding that legal norms and institutions also have the potential to shape sociopolitical realities in their own distinct fashion; for that reason, legal design matters. The precise phenomenon of unstable constitutionalism exists because law is brought into discussion with politics.

This volume begins by considering the methodological ways of studying South Asian constitutionalism. Sujit Choudhry's chapter reflects on two

important themes in India's constitutional experience – the basic-structure doctrine and reservations – to show how the study of constitutional law *and* politics could be performed. Standard analyses of these themes, Choudhry demonstrates, are incomplete, and they give insufficient attention to how the legal and political landscapes integrate. Both the basic-structure doctrine and reservations are – albeit in different ways – techniques through which the instability of India's constitutional order has been preserved. This opening contribution allows us to better appreciate the political and legal logic behind the development of these techniques.

FORMS AND SOURCES OF INSTABILITY

Constitutional instability can take numerous forms. Disagreement might be so intense that countries find it difficult to even draft a constitution in the first place, despite widespread support among different political actors for establishing a constitutional framework. Once established, the constitutional framework might be subject to various types of instability. Institutions may cross their demarcated boundaries to such an extent that they threaten the division of labor on which the constitution rests and then attempt to usurp power from other institutions and relocate sovereignty. Here, the obvious example is the military; a less obvious example might be institutions of civil society, especially religion, that are protected by constitutional rights. A constitution also might be threatened by extra-constitutional forces, such as paramilitary or radical ethnic and religious groups, that seek to construct an entirely different constitutional order.

Nepal, which in recent years has struggled to write a constitution, is the first country under study in Part II. Two chapters explore the reasons why Nepal's constitution-making process, currently underway, has been locked in stalemate and why attempts at nation-building in Nepal thus far have failed. Mara Malagodi's chapter conducts the novel experiment of juxtaposing the idea of sovereignty with the physical architectural forms of Nepal's state institutions. Drawing on a wide range of work in cultural studies – which emphasize the physical manner in which political aspirations are articulated – and combining this with historical institutionalism, Malagodi studies six periods in Nepal's constitutional history, from the Shah period beginning in 1769 to the present. She reveals how the various *capitol* structures in Kathmandu have physically represented the articulation of sovereignty throughout Nepalese history. For Malagodi, the instability in Nepal's constitutional order and the historical failure to arrive at a stable constitutional regime stems from an inability to entrench the doctrine of popular sovereignty and to secularize political

authority. The failure of Nepal's various constitutional arrangements to give due importance to the representative arm of government, reining in monarchical and executive power, and to respond to calls for an inclusive democratic state have been notable features in its recent history. By exploring these features, Malagodi's chapter reveals how tensions between political actors over the location of sovereignty have manifested.

Mahendra Lawoti's chapter on Nepal has a different point of emphasis, focusing on the relationships among constitutional instability, identity politics, and diversity. Studying how Nepal's various constitutional arrangements have addressed the question of diversity and the degree of participation they have granted toward different groups, Lawoti argues that differences over the accommodative character of the nation-state comprise the reason behind unstable constitutionalism in Nepal. Exploring the transition from earlier constitutional arrangements to the Interim Constitution of 2007, Lawoti considers responses to diversity over time and why the traditional nation-state model was initially challenged. In doing so, his chapter highlights the struggle among different groups and multiple interests in Nepal throughout its constitutional history, as well as the nation's inability to construct a constitutional order that can unify without imposing the character of a single identity. Nepal's recent peace process and its nation-building attempts after the Maoist insurgency have drawn considerable attention.[4] Together, the chapters by Malagodi and Lawoti capture the constitution-making feature of this transition and bring to light the reasons why constitution making in Nepal has been such a troubled affair.

Pakistan, the next country considered, is in many ways an ideal candidate for the study of constitutional instability. For much of its history, Pakistan has oscillated between military and civilian rule and has been a country defined by extra-constitutional pressures on its formal constitutional system. Mohammad Waseem's chapter explores three forms of instability that have threatened Pakistan's constitutional order. The first form consists of challenges to parliamentary sovereignty by the bureaucracy and – later and most notably – by the military.[5] These challenges often placed the judiciary at the center of action – called to adjudicate the legality of such pressures – and the institution played a key role in legitimizing various extra-constitutional challenges. Second,

[4] See Sebastian von Einsiedel, David M. Malone, and Suman Pradhan (eds.), *Nepal in Transition from People's War to Fragile Peace* (New York: Cambridge University Press, 2012); Prashant Jha, *Battles of the New Republic: A Contemporary History of Nepal* (London: Hurst Publishers, 2014).

[5] For a recent study of the military in Pakistan's history, see Aqil Shah, *The Army and Democracy: Military Politics in Pakistan* (Cambridge, MA: Harvard University Press, 2014).

Pakistan has witnessed claims for decentralization and provincial autonomy by ethno-regional forces that have sought to restructure the relationship between the Pakistani state and its constituent units.[6] Although significant devolution was undertaken by the 18th Amendment to the Constitution in 2010, the appropriate sharing of power remains a matter of intense political contestation. The third source of instability explored by Waseem is religion, which manifests through attempts at *shariatization* of the state and the steady increase in the religious character of Pakistani constitutionalism. Waseem's chapter brings into sharp focus the need to understand the role of radical Islamic groups, ethnic forces, and actors such as the bureaucracy and military if the character of Pakistan's constitutional order and the power dynamics within which it operates is to be understood.

Osama Siddique emphasizes a different institutional actor in Pakistan – the judiciary – and examines its role in contributing to unstable constitutionalism. The judicialization of politics is one of the most important developments in constitutional democracies around the world.[7] The literature on judicialization typically emphasizes the *political* circumstances, including the acceptability of strong judicial power by different political actors, under which courts expand their ambit of operation. Siddique acknowledges the role of political factors in Pakistan but contributes to the burgeoning scholarship on judicialization by highlighting instead the major role that individual judges – and their personal ambitions and efforts – can play in this process. Appreciating the strategic interventions by judges, the particular features of their behavior, and the qualitative nature of judgments is central, Siddique suggests, to understanding why Pakistan's judiciary is such a powerful institution. In addition to intervening in the literature on the judicialization of politics, Siddique's chapter supplements previous studies on the influential role of the judiciary in shaping Pakistan's constitutional trajectory,[8] as well as more recent reflections on judicial independence and accountability in Pakistan.[9] Siddique's specific focus is on the Supreme Court after the Lawyers' Movement – a protest movement in 2007 following President Pervez Musharraf's removal

[6] See, generally, Maryam S. Khan (2014), "Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-Linguistic Identity and Group Conflict," 30 *Harvard Journal on Racial & Ethnic Justice* 77.

[7] See Ran Hirschl (2006), "The New Constitutionalism and the Judicialization of Pure Politics Worldwide," 75 *Fordham Law Review* 721; Ran Hirschl (2008), "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* 93.

[8] See Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995).

[9] See Anil Kalhan (2013), "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," *Vanderbilt Journal of Transnational Law* 46: 1.

of Chief Justice Iftikhar Muhammad Chaudhry – and his analysis covers the Chaudhry Court's expansion of power after its reinstatement. Regarding the Pakistani Supreme Court as the most activist in the region, Siddique explores the implications of its dramatic rise and the instability that it has brought to Pakistan's constitutional system.

The final chapter in Part II considers Bangladesh's remarkable experiment in conducting elections. Given that free and fair elections are at the heart of any democracy, constitutional arrangements in this regard assume great significance. New democracies often have given special attention to elections; India is a notable example with its unique Election Commission – a body that is often credited with conducting uncontroversial elections in an otherwise corrupt nation.[10] Since Bangladesh's emergence from military rule two decades ago, few issues have dominated its constitutional discourse as much as the electoral process. In 1996, the 13th Amendment to the Constitution of 1972 introduced a system of "caretaker governments" that gave the judiciary an extraordinary role in overseeing elections. M. Jashim Ali Chowdhury's chapter is a study of this caretaker-government system that explains the historical and legal circumstances in which it arose and highlights its adverse impact on the Election Commission, the judiciary, and the democratic politics in Bangladesh more generally until it was scrapped by the 15th Amendment in 2011. The Bangladeshi experience vividly illustrates the challenges involved in making constitutions perform in unsupportive political climates and the institutional damage that can occur by being insensitive to formal standards and conventions. Bangladesh's political actors lack agreement on the central democratic exercise of policing elections, which has been a profound source of constitutional instability in the country.

REACTIONS AND RESPONSES TO INSTABILITY

How can countries respond to these and other forms of instability? This is an important question for constitutional scholars and actors in South Asia, and the chapters in Part III explore either real-world attempts to meet unstable constitutionalism or theoretical possibilities that might hold this promise. Part III begins with India, a country that appears (at first glance) to exhibit a reasonably stable constitutional regime – despite the regularity with which important amendments have been made to the Constitution – and thus seems

[10] See Bruce Ackerman (2000), "The New Separation of Powers," 113 *Harvard Law Review* 633; Lloyd I. Rudolph and Susanne Hoeber Rudolph, "Redoing the Constitutional Design: From an Interventionist to a Regulatory State," in Atul Kohli (ed.), *The Success of India's Democracy* (Cambridge: Cambridge University Press, 2001).