PART I

CONCEPTUALISING THE INVISIBLE CONSTITUTION

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The Invisible Constitution in Comparative Perspective

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In the 'Invisible Constitution', Laurence Tribe invites us to reflect on the idea of the 'invisible' Constitution as 'the ocean of ideas propositions, recovered memories and imagined experience' in which the text of the United States Constitution floats or operates.[1] The idea is a rich and captivating one which has commanded the attention of readers worldwide. But what do we mean when we refer to constitutional 'invisibility'? Invisibility, as Larry Solum notes in his chapter, is an evocative concept; yet it is also an ambiguous one.

1.1. CONCEPTUAL UNDERSTANDINGS: EXTRA-TEXTUAL CONSTITUTIONAL SOURCES AND INFLUENCES

One understanding of constitutional 'invisibility' (the 'unwritten' understanding) is closely connected to ideas about small 'c' or unwritten constitutionalism: invisible constitutions might be understood to be those that lack canonical legal status or formal status as an instrument labelled 'constitutional' in character. In this sense, the idea of the invisible constitution could also be understood as linked to traditions of political rather than legal constitutionalism.[2]

Another, related approach to the idea of 'invisibility', however, is more closely connected to written constitutional traditions (the 'extra-constitutional'

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[1] Laurence H. Tribe, *The Invisible Constitution* (Oxford: Oxford University Press, 2008), 9.

[2] Janet McLean, 'The Unwritten Political Constitution and Its Enemies' (2016) 14 *International Journal of Constitutional Law* 119; J. A. G. Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1.

understanding). Any written constitution must be interpreted – or 'implemented'[3] – by government officials in ways that mean that the actual constitutional *law* of a particular jurisdiction is made up of what Tribe describes as 'a complex superstructure of rules, doctrines, standards, legal tests, judicial precedents, legislative and executive practices, and cultural and social traditions' or values.[4] Similarly, Larry Solum, in his contribution to this book, identifies six categories of extra-textual sources that can and do regularly influence the actual constitutional law of various countries – i.e., other foundational documents outside the scope of the capital 'C' constitution, documents and records relating to the framing and ratification of the constitution, moral and political philosophical understandings or values, social norms and values, institutional practices (including judicial decisions, statutes and executive actions) and various discretionary decisions by different constitutional actors.

In this sense, all constitutions comprise a mix of visible and invisible elements or elements that are, more or less, explicitly *reflected* in the text of a written constitution. This understanding of the term constitutional 'invisibility' more readily lends itself to broad comparative inquiry than notions of the 'unwritten' constitution.[5]

The sphere of 'invisibility' in this context is, of course, inevitably bound up with what the text of a particular constitution actually says and how we understand notions of constitutional meaning and interpretation. In some constitutions, how courts structure and approach the balancing of competing constitutional and legislative demands necessarily involves the development and application of extra-textual or 'common law'-style constitutional principles, whereas in others the text itself spells out a quite explicit constitutional framework within which the process of balancing must take place.[6] In many constitutional systems, the text of the constitution is likewise quite sparse when it comes to articulating a country's basic constitutional identity, or core constitutional 'values'. Any reliance by a court on such values will thus necessarily involve some form of resort to extra-constitutional sources. In other constitutional systems, however, the text of the constitution itself is quite explicit in stating the country's founding commitments and values. The resort to such

[3] Richard H. Fallon, Jr., 'The Rule of Law as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1.

[4] Tribe, Supra note 1, 10.

[5] We are indebted to Dr Lulu Weis her insightful commentary delivered at the IACL–AIDC Roundtable, *The I nvisible Constitution in Comparative Perspective* at Melbourne Law School in May 2016, framing the distinction in these terms.

[6] Compare e.g., South African Constitution s 36; Canadian Charter of Rights and Freedoms s 1; Hong Kong Bill of Rights Ordinance Arts 8, 10, 15–18; Macau Basic Law Art 32.

values by courts will thus itself involve a form of express *textual* rather than extra-textual constitutional influence.[7]

Similarly, how we understand the sphere of invisibility, in this context, will be connected to long-standing debates about the proper approach to ascertaining the *meaning* of particular provisions of a constitutional text. Larry Solum and Jeffrey Goldsworthy, for instance, in their contributions to the volume argue that constitutional meaning is a matter of 'communicative meaning' fixed at the time the text was framed and ratified. For both Solum and Goldsworthy, this means that resort to *certain* non-textual constitutional sources (e.g., sources that go to historical understandings of language or elucidate certain logical assumptions on the part of drafters) will be a legitimate part of the process of constitutional construction itself, whereas most such sources will be truly external or extrinsic to such a process.

Other theories of constitutional interpretation, in contrast, take an approach to constitutional meaning that is more accommodating of non-textual sources. Johannes Chan, in Chapter 7, describes constitutional interpretation as 'guided by various fundamental values in our constitutional system … shaped by the social, political and historical contexts of the society in which the constitution operates'. Patrick Emerton, in Chapter 5, suggests that the best understanding of constitutional 'meaning' necessarily invites – indeed requires – attention to broader social and political context. In this view, many fewer sources will also properly be understood as extra-textual in nature: they will be embedded within practices of textual interpretation and thus logically *internal* rather than external or outside of the text itself. Similarly, many adherents to a 'dynamic' or living approach to constitutional interpretation will see attention to various non-textual sources (such as evolving community values) as *internal* to the process of constitutional interpretation, where more 'originalist' scholars would see such a process as entirely external to a proper approach to constitutional construction.[8]

The basic idea of various legal sources as *non*-explicit in the text of a written constitution, however, is still one that is readily understandable and has

[7] See e.g., South African Constitution s 1. Reliance on section 1 for interpretation of other provisions of the SA Constitution, as Kate O'Regan has noted, involves a form of triangulation by the Constitutional Court of South Africa among different express textual constitutional sources: Kate O'Regan, *IACL–AIDC Roundtable, Melbourne Law School*, 2–3 May 2016.

[8] Compare e.g., Lawrence B. Solum, 'Originalism and the Unwritten Constitution' (2013) *University of Illinois Law Review* 1935; Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677; Richard H. Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1987) 100 *Harvard Law Review* 1189; Vicki C. Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' (2006) 75 *Fordham Law Review* 921; Jack M. Balkin, 'The Roots of the Living Constitution' (2012) 92 *Boston University Law Review* 1129.

intuitive appeal. The outer boundaries of such an understanding will inevitably be contested – in part because of differences in constitutional interpretive methodology and in part due to important and largely unanswered questions about what is necessary for a practice to count as sufficiently legal to amount to an invisible constitutional rather than non- or even anti-constitutional influence. (Carolan, in Chapter 15, provides an important acknowledgement of the centrality of such questions, but does not attempt to provide any complete answer to them.) But the basic idea of the invisible constitution as the *extra-textual* constitution nonetheless retains broad conceptual and comparative utility.

1.1.1. *Sociological Understandings – or the 'Hidden' Constitution*

A second understanding of 'invisibility' is largely sociological in nature: it refers to ordinary notions of what is obvious or apparent to the 'naked' eye. Invisibility, in this view, does not denote any stable conceptual category or set of categories. Rather, it corresponds to what is hidden or non-observable to ordinary readers of a constitution – i.e., aspects of a constitutional tradition that are sufficiently deep or outside the confines of what is understood as constitutional within a given system, that they are often overlooked as elements of actual constitutional practice. If constitutions, for instance, ultimately depend on a set of social practices for their authority as constitutional documents, then these practices themselves are in some sense a critical – but largely invisible – part of a constitutional system.

Similarly, some forms of constitutional practice may be so far removed from any deliberate or conscious set of institutional actions or choices that they are often invisible to those who study the constitutional role of particular institutions. Constitutional invisibility in this sense could be understood as similar to Adam Smith,[9] or Frederik Hayek's notion,[10] of the invisible hand or role of price-signals and markets in the achievement of allocative efficiency in markets: no visible human agent or agency, is involved in the overall workings of the market in this context and yet markets perform an extremely wide-ranging role in aggregating information and resources.[11] While often focused on the far more visible role of individual agents – i.e., courts, legislators or executive actors, constitutional law could also be understood to have a similar set of invisible

[9] Adam Smith, *The Theory of Moral Sentiments* (London: A. Milar, 1759); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Methuen & Co., 1776).
[10] F. A. Hayek, *The Road to Serfdom* (Chicago, IL: University of Chicago Press, 1944).
[11] Compare also Humean understandings: David Hume, *A Treatise of Human Nature* (Oxford: Oxford University Press, 1739); David Hume, *Essays: Moral, Political, and Literary* (Indianapolis, IN: Liberty Fund, rev. edn 1985).

elements. It often depends on political dynamics and interactions over which no individual actor is fully master or in control, or even fully cognisant of.[12]

What is the relationship between sociological understandings of invisibility of this kind and more conceptual understandings of the role of extra-constitutional sources or practices? In large part the answer depends on the particular constitutional context. In some countries, the extra-textual nature of particular constitutional influences will mean they are overlooked as aspects of actual constitutional practice: in the United States, for example, scholars such as Amar,[13] Ackerman,[14] Strauss[15] and Tribe[16] have argued that a range of extra-textual constitutional sources play a crucial but *under-appreciated* role in American constitutional practice – i.e., they point to the important but previously under-theorised role of intra-textual relationships, informal constitutional 'moments' or change, common law interpretive influences and structural and political values in actual constitutional practice in the United States. In other jurisdictions, in contrast, the mere fact that particular constitutional sources are unwritten or extra-textual in origin will not necessarily render them 'invisible' to an ordinary observer. In countries such as the United Kingdom and New Zealand, constitutions are broadly understood to be unwritten in nature and thus the unwritten constitution is quite clearly visible to most legal audiences and informed citizens. Thus, in countries of this kind something more will generally be required for unwritten or extra-textual sources to be truly 'hidden' in nature: such influences must be so deep, strategic or implicit rather than explicit, in nature, to make them non-observable to ordinary constitutional actors.

Invisibility in this more sociological sense is also inherently *time*-sensitive: the very process of scholars identifying various legal practices as part of constitutional practice in a particular jurisdiction tends to render those practices more visible, in ways that ultimately reduce the claim that they have to be included in any definition of 'the invisible constitution'. Indeed, this is one of the values of comparative constitutional scholarship on the invisible constitution: it offers the potential to render more visible constitutional practices in various countries in ways that then allow constitutional 'insiders' and 'outsiders' better to appreciate their centrality to a particular country's legal and constitutional arrangements, and insiders in particular to more critically engage

[12] See e.g., Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford: Oxford University Press, 2008).

[13] Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York, NY: Basic Books, 2012).

[14] Bruce Ackerman, *We the People, Volume 1: Foundations* (Cambridge: Harvard University Press, 1993).

[15] David A. Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877.

[16] Tribe, Supra note 1.

with those practices.[17] Invisibility in this sense, however, is also inevitably an ever-decreasing phenomenon in a world of increasingly rich comparative constitutional scholarship. The more we, as scholars, identify particular constitutional norms as part of the invisible constitution, the more visible they become in ways that progressively render them outside the scope of our inquiry on the invisible constitution.

1.2. CONTRIBUTORS' UNDERSTANDINGS

Contributors to the volume also, at various points, take both of these approaches to the idea of indivisibility. Iddo Porat, in Chapter 9 on Israel, identifies the Israeli constitution as engaging two distinct notions of invisibility – the idea of constitutions as in large part unwritten or found outside a canonical capital 'C' constitutional document *and* the idea of constitutions as hidden to a range of actors. It is a fundamental matter of political disagreement within Israel, he suggests, as to whether the thirteen Basic Laws enacted by the Knesset in fact amount to a constitution. The argument that there is a constitution in Israel critically depends on contested ideas about what it means for a court to create a constitution, via the interpretation of 'ordinary' statutes. Given that controversy, if one does believe that Israel has a constitution, one might also argue that the Israeli constitution is one that is largely invisible to many observers – both within the polity and elsewhere.

A number of chapters understand the idea of invisibility as more directly connected to written constitutional traditions or as referring to a variety of extra-constitutional influences on the practice of written constitutions, or practices not directly bounded by constitutional text. Simon Butt, in writing about the Indonesian Constitution (Chapter 10), focuses on extra-textual constitutional sources in the broad sense – i.e., the making of certain rights-based 'implications'; as well as the legislative practices underpinning those judicial decisions. In the Korean context (Chapter 11), Jongcheol Kim examines both a range of judicial doctrines and longstanding executive practices, which have helped create the idea of a 'customary constitution' in Korea. In Australia, Rosalind Dixon and Gabrielle Appleby focus on various judicial doctrines, involving the 'implication' of various principles under the Australian Constitution as the basis for analysing the Australian constitutional experience. And in Italy (Chapter 16), Irene Spigno likewise focuses on certain forms of judicial doctrine which involve the reading in of statutory language

[17] Cf Rosalind Dixon and Vicki Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48 *Wake Forest Law Review* 149.

or forms of 'additive remedy' as implicitly creating an extra-textual dimension to constitutional practice in Italy.

Albert Chen and P. Y. Lo (Chapter 8) focus on proportionality doctrine and its variable application across cases, as an important extra-textual – or common law aspect – of constitutional practice in Hong Kong and Macau. Yvonne Tew (Chapter 13) also focuses specifically in this context on the competition between Islamic constitutional ideals and more secular constitutional principles, while Kim analyses doctrines of proportionality as devices for mediating conflicts within the invisible constitution in Korea: he notes doctrines of proportionality have allowed the Korean Constitutional Court both to sanction wrongdoing by President Roh *and* prevent disruption to the democratic process, by preventing relatively minor wrongdoing providing grounds for impeachment.[18]

Russell Miller (Chapter 17) also focuses on legal traditions, or 'families' or systems, as an aspect of extra-textual constitutional influence or practice in Germany; while Iddo Porat focuses on various substantive normative ideals both of constitutional and political morality and the judges' own role in realising that moral vision, as potentially implicit in the kind of progressive judicial expansion of the scope and entrenchment of the rights guaranteed by the 1992 Basic Laws in Israel. Eoin Carolan also takes a similar deep view of extra-textual constitutional influence and considers the role of natural law traditions and ideas as a potential source of extra-textual influence on the interpretation of the Irish Constitution.

A smaller number of chapters adopt a more distinctly sociological understanding of the invisible constitution or focus on various 'hidden' aspects of constitutional practice in a particular jurisdiction. Emerton, for instance, focuses on the ultimate rule of recognition for a constitution, *qua* constitution, as an important aspect of the invisible constitution in this 'deep' or sociological sense. This is also an understanding that might be associated with the contribution of Chen and Lo: one important aspect of the difference between Hong Kong and Macau they analyse in this context concerns the degree to which the Basic Law in each jurisdiction is understood to authorise weaker versus stronger levels of judicial scrutiny. In China, Han Zhai (Chapter 14) likewise suggests that a variety of localised practices and political dynamics contribute to a far more complex, decentralised system of government in China than is suggested by the formal text of the 1982 Constitution of China.

Other chapters focus on aspects of constitutional practice that are more invisible in the Smithian sense – or 'self-realising'. Caitlin Goss (Chapter 6),

[18] Kim (Chapter 11) at 26–7.

for example, examines the role of prior constitutions – specifically constitutions explicitly styled as 'interim' in nature – in the drafting and interpretation of later, more 'final' constitutions. She also suggests that while some aspects of this form of invisible constitutional overhang might be understood as quite deliberate and self-conscious on the part of drafters and judges, others might be more unconscious psychological pressures or influence or systemic pressures emanating from particular regional political or institutional forces (e.g., in Europe) or domestic political sources.

David Schneiderman (Chapter 18) and Johannes Chan also both take a distinctly sociological view of the invisible constitution in Canada and Hong Kong. In the Canadian context, Schneiderman focuses on various 'unwritten' or extra-textual constitutional principles that are a well-known part of Canadian constitutional practice. But he also goes on to analyse the deeper *strategic* judicial calculus that he sees as underlying the development of these unwritten principles, as a potentially under-appreciated or hidden aspect of well-known Canadian constitutional decisions such as the *Reference Re Secession of Quebec Case*.[19] In analysing the jurisprudence of the Hong Kong Court of Final Appeal (CFA), Chan likewise identifies potential strategic, and thus also largely non-observable, dynamics underpinning decisions such as the *Congo Case*, in which the Hong Kong CFA decided to refer a question for interpretation to the Standing Committee of the National Peoples' Congress (NPCSC) in Beijing.[20] Schneiderman, in this context, also provides a useful methodological contribution for scholars seeking to identify this more strategic dimension to the invisible constitution: he suggests that by a form of 'Occam's razor' logic that strategic explanations are most persuasive where reliance on unwritten constitutional principles seems unnecessary to justify the result reached by a court, because textual sources are sufficient to justify a similar result.[21]

Gabor Toth's contribution (Chapter 19) on Hungary is in this vein as well. He shows how the retention in form of the pre-1989 *Constitution* and the subsequent development of a rich jurisprudence based on 'invisible' commitments to 'equality' and 'dignity' ultimately failed to secure liberal democracy and progressive constitutionalism in Hungary. This failure he attributes, in part, to the deeper underlying sociological facts of Hungarian politics and culture attention which reveals that the constitutionalism of the Constitutional Court could not prevent the emergence of a new form of authoritarianism.

[19] [1998] 2 SCR 217.

[20] *Democratic Republic of the Congo* v. *FG Hemisphere Associates LLC*, FACV No 5/2010, 8 June 2011.

[21] Compare Rosalind Dixon, 'Toward a Realistic Comparative Constitutional Studies? (2016) 64 *American Journal of Comparative Law* 193.