

CONSTITUTIONAL LAW IN ACTION AND THE CAPABILITIES APPROACH TO DEVELOPMENT:

LESSONS FROM PERU, ISRAEL AND AUSTRALIA

This article asks us to consider the relationship between constitutional law and social development in terms of two particular ways of thinking. First, the article proposes that social and economic development should be thought about in terms of the «capabilities approach» that measures «development» in terms of the expansion of opportunities for individuals in the society to realize their potentials. Second, the article asks us to think about constitutional law in terms of «law in action», meaning the way law works in social and economic practice to structure relationships. Constitutional law in action describes the way constitutional legal arguments and categories of thinking affect social and economic development. The question being addressed can therefore be phrased as «what can we learn from looking at foreign examples about the role of constitutional-law-in-action in furthering citizens' capabilities and opportunities for self-realization?». Drawing on examples from Peru, Israel, and Australia, the article argues that constitutional law in action is a critical element in the development of capabilities, and needs to be a primary focus for any nation that attempts to pursue the goal of social modernization.

Keywords: Law, constitution, development, capabilities, comparative politics, society, modernization, democratization, opportunity, economics.

Here are two concepts in the description of today's topic that are potentially problematic. The first is "social modernization." What does it mean to be more or less "modern" in this context? Here I turn to an economist and a legal philosopher for inspiration. The economist is Nobel laureate Amartya Sen. For decades, economists have wrestled with the question of how to measure development. Total GDP is singularly uninformative, as it does not distinguish among levels of income distribution, resource wealth versus human capital. GINI coefficients and other measures of distributive inequality do not do much to expand the picture, as they tell us little if anything about the social dimensions, such as barriers to women's economic participation, levels of social and economic mobility, and distribution of opportunities rather than resources. Sen has pioneered the now widely-accepted approach of talking about development in terms of "capabilities," most notably in *Development as Freedom* (2000). Sen's argument is that we should look for Economic development of a form that enhances individuals' capabilities produce genuinely meaningful "freedom" — in classical terms, not merely the freedom from want



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or oppression but genuine freedom for each individual to realize his or her potential. Economic development that enhances individual capabilities, in turn, results in changes in attitudes that have political consequences as a result of transforming social attitudes.

Sen's ideas have been further developed by the legal philosopher Martha Nussbaum, who has helped develop the "human development and capabilities approach" to assessing social and economic development. This is an approach to measuring development not in terms of aggregate GDP, but rather in terms of the range of opportunities for transformative self-improvement available to a country's residents. (*Creating Capabilities: the Human Development Approach* (2011)). This is not merely a philosophical speculation: elements of the capabilities approach to measuring development are today employed by the World Bank, the International Monetary Fund, and the United Nations Development Programme, among others. So when I talk about the role of constitutional law in social modernization, I am making a very value-laden assumption that what we mean is the role of constitutional law in expanding the range of opportunities for self-realization by individuals.

The second potentially difficult term is "constitutional law." When we talk about constitutional law, we tend to focus on large, structural elements of government or grand statements of principle. But that misses the dimensions of what might be called "constitutional-law-in-action." After all, any number of constitutions contain declarations of rights such as free expression or security of property, but exist in regimes that provide neither. In Giovanni Sartori's phrase these are "sham constitutions," because they are not associated with subordinate institutions and texts and legal and social practices that would suffice to make them real. "Constitutional law in action" might refer to the web of laws and regulations that implement (or fail to implement) constitutional principles, the ways in which constitutional language is deployed in political debate to challenge existing arrangements, the effectiveness with which jurists are able to extrapolate from broad constitutional principles to craft meaningful protections for individuals or communities, and the way popular constitutional understandings strengthen aspects of national identity.

So the question can now be reformulated in a somewhat more precise way: what can we learn from looking at foreign examples about the role of constitutional-law-in-action in furthering citizens' capabilities and opportunities for self-realization?

It is not possible to explore all the dimensions of that question in

a short time, but three cases point to three different elements that should be considered.

1. PERU: THE FAILURE OF CAPITALISM

In his landmark study, *The Mystery of Capital: Why Capitalism Succeeds in the West and Fails Everywhere Else* (2003), Hernando de Soto looked at Peru as well as data from around the world to ask what was missing in societies attempted to develop market economies and failed. The answers were quite clearly not lack of resources, or lack of effort by the people, or an absence of a desire to make money, or even lack of skills. DeSoto found the network of laws that convert assets into actual capital. In Latin America, three key examples are land reform, excessive bureaucracy, and corruption. Land is a valuable asset — but only if it is owned so that it can be bought and sold, rented to others, or developed in order to produce a source of capital. Even where capital exists in forms that permit its exploitation, excessive bureaucracy can make it impossible for those who are not already wealthy to get started: De Soto documents the number of transactions required to open a business in different countries. In the U.S. the number averages something like 9; in Peru it is closer to 40. And there is corruption. Corruption does not just weaken confidence in markets, it makes a mockery of the idea that all citizens have an equal opportunity to pursue economic success on equal terms.

What all three of these phenomena have in common is that they represent the "constitution in action" element of constitutional law. Peru along with the other states de Soto studied in which capitalism failed to expand, has a constitution that provides the same kinds of guarantees of rights to property ownership, security of contract, and protection against government interference that occur in the constitutions of Western European states or the U.S. What is missing is a set of implementing laws that make those guarantees meaningful. Most crucially, as deSoto documents, the burdens do not fall equally. It is the poor or the young who are starting out who are most harmed by the impossibility of owning land outright, cumbersome bureaucratic systems, and corruption. The trends all meet in a phenomenon called "the rich get richer." Those in whose hands land ownership is concentrated rent out their property, producing wealth for themselves and at the same time preventing a new generation of potential entrepreneurs from ever amassing capital or having an incentive to improve property. Bureaucracies can be navigated by those with the resources to hire experts — resulting in an ever-greater concentration of licenses, government permits, benefits, and other legal prerogative in the hands of those who already have the most. And the role of corruption in maintaining inequality and preventing socioeconomic mobility is obvious and well-documented.

Economically, then, we can look to Latin America and take away the lesson that if it is true that social modernization depends on the possibility of socioeconomic mobility, constitutional law must be translated into constitutional-law-in-action in the form of reforms to legislation, business practices, and legal protections for property rights before guarantees of "equality" will be made meaningful.

2. ISRAEL: THE CASE OF THE MISSING CONSTITUTION

The State of Israel was founded in 1948. One of the first tasks undertaken by the new State's Parliament was the drafting of a Constitution. That project failed because of the inability of the participants to resolve disagreements over the role of the Jewish religion in the new state. Instead, under the leadership of Justice YizharHarari, the Israeli Parliament agreed to adopt a series of Basic Laws with the intention that eventually

these would be brought together to form a written constitution. More than 60 years later, that project has still not been accomplished, and indeed most observers agree that it is less likely than ever.

In the meantime, the "Knesset" (Israeli Parliament) has adopted a number of Basic Laws, which have been treated as having constitutional force by the Israel Supreme Court. Moreover, during the period of the 1980s and 1990s in particular, the Israel Supreme Court was very aggressive in interpreting these Basic Laws and other texts such as the Declaration of Independence of the State to find constitutional principles of law (including, for example, substantive judicial review) despite the absence of a written text. In particular, economic liberties are well defined in the system of Israeli constitutional jurisprudence. Nonetheless, a focus on social modernization in the Israeli experience demonstrates the futility of attempting to achieve constitution-like outcomes without a well-developed system of constitutional-law-in-action.

First, the same issue that caused the failure of the constitutional project in 1948 persists today. There is no clear understanding of the relationship between religious and civil authorities, with the result that the religious authorities have great power over the lives of individuals. Girls and women, in particular, are denied access to education and kept from participating in the economy. Patriarchal social attitudes cannot be challenged by appeals to constitutional principles, because there are no such principles to which appeal can be made. That is, it is not only the case that the civil authorities will not intervene to compel religious authorities to provide access to education for girls, for example, it is also the case that there is no vocabulary of constitutional principles favoring the development of individual capabilities that is available in political or public discourse to challenge these practices. This lack points to one of the key roles that constitutional-law-in-action plays in social modernization. In traditional societies, it is often the case that political and legal principles are more "modern" (in the sense I have used the term here) than prevalent social practices, particularly in rural areas or in poor communities, or among religiously observant groups. But unless these principles are expressed in constitutional terms, they are not available to challenge the legitimacy of customary practices. One of the most powerful ways in which constitutional legal principles enable social modernization is in the criticism of the gaps between constitutional principles and social practices; that critical vocabulary is absent in the Israeli case. Similarly, without a constitutional foundation there is no authority on the basis of which laws and regulations can be created to push traditional societies toward modernization, such as compulsory education laws or reforms of marriage and divorce laws administered by religious courts.

Conversely, of course, the existence of formal constitutional guarantees of equal opportunity would be meaningless without accompanying political attitudes and implementing laws. This is an enormous issue for developing economies. The World Economic Forum Global Gender Gap Report of 2012, for example, tracks the continuing strong correlation between national economic competitiveness and women's participation in the economy. The reason, simply, is that human capital is not being developed. A report by the UN Economic and Social Commission for Asia and the Pacific Countries, for example, found that limited opportunities for women cost the region \$45 billion (US) in economic development every year. (See <http://www.weforum.org/reports/global-gender-gap-report-2012>; Kazakhstan's national ranking falls somewhere between 30th and 50th in the world between 2006 and 2012, depending on the year.) In other words, social modernization understood in terms of maximizing opportunities for the development of human capabilities is

an economic as well as a political imperative — but achieving that goal against the opposition of entrenched traditions requires a powerful lever. That lever is provided by a Constitution supported by meaningful constitutional-law-in-action — indeed, no other mechanism has yet been discovered that has the capacity to transform a political vision into a reconception of social roles.

3. AUSTRALIA: CONSTITUTIONAL LAW-IN-ACTION WITHOUT CONSTITUTIONAL LAW

The State of Australia has had a written Constitution since its founding at the beginning of the 20th Century. What makes the Australian Constitution an unusual case, however, is that it contains no Bill of Rights and indeed barely guarantees any rights at all. Nonetheless, the Australian High Court has historically been able to draw on shared understandings of what democratic government requires to draw out rights guarantees by implication. So, for example, a clause referring to “representative government” has become the basis for a guarantee of freedom of political speech and the right to organize political parties. Most importantly, in 1992 in *Mabo v. Queensland* the High Court drew on broad political concepts of justice and fairness to establish legal authority for Aboriginal title claims for the first time. The High Court’s actions did not occur in a vacuum. There was broad popular political support for finally granting some recognition to the injustices that the Aborigines had suffered, a ruling political party whose ideology favored extension of recognition to minority populations, and an existing system of property law that could readily accommodate the challenges of resolving challenges to legal title that would result in a sufficiently fair and transparent manner that all the parties would accept the legitimacy of the outcome.

In other words, *Mabo* was possible because although Australia had no constitutional law on the matter, there was a sufficiently developed system of constitutional-law-in-action. The significance of this decision and its consequences for social modernization cannot be overstated. Australia’s historical mistreatment of the Aborigines, and its continuing dispossession of their claims to land ownership right up to the 1990s have always been the dark underside of Australian history. The resulting empowerment of Aboriginal citizens of Australia is thus both a classic example of capabilities-oriented development and a powerful if long-overdue statement of the possibility of providing meaningful equality, both driven by the power of constitutional law-in-action.

These three cases offer valuable lessons for understanding the relationship between constitutional law and social modernization, whether in Kazakhstan or elsewhere. First, constitutional legal principles are a necessary but not a sufficient resource to achieve social development. Second, it is the way constitutional legal principles are

realized in ordinary law, political discourse, and popular understandings that determines the degree to which they will have the power to drive social change. It is rather easy to sit in a conference room or a library and draft constitutional provisions; the hard work comes in translating those provisions into practices and attitudes among citizens and government officials.

Х. Швебер: Конституционное право в действии и возможные подходы к развитию: уроки Перу, Израиля и Австралии.

В статье показана взаимосвязь конституционного права и социального развития. Автор полагает, что социально-экономическое развитие должно рассматриваться: 1) с учетом термина «возможности подхода», определяющего «развитие» с точки зрения расширения возможностей для людей, реализации ими своего потенциала, самореализации; 2) с точки зрения «закона в действии» как средства формирования отношений. Действующий конституционный закон, считает автор, описывает способ влияния конституционно-правовых аргументов и некоторых категорий мышления на социальное и экономическое развитие. На примерах Перу, Израиля и Австралии показывается, что действующий конституционный закон — важный элемент развития возможностей и социальной модернизации.

Ключевые слова: право, конституция, развитие, способности, сравнительная политика, общество, модернизация, демократизация, возможность, экономика.

Х. Швебер: «Конституциялық құқық-әрекетте және дамытуға мүмкін тұғырлар: Перу, Израиль мен Австралия тағылымы».

Осы мақалада конституциялық құқық пен әлеуметтік даму арасындағы өзара арақатынасы қарастырылады. Автор әлеуметтік-экономикалық дамуды екі ойлау тәсілі жағдайында талдайды: 1) мақала әлеуметтік-экономикалық дамуды «тәсілдеме мүмкіндігі» термині шеңберінде қарастырылуы жөн екендігін болжамдайды, ол «дамуды» өз әлеуетін іске асыру мақсатымен адамдар үшін қоғамда мүмкіндіктерді кеңейту жағынан анықтайды; 2) мақала конституциялық құқықты «қолданыстағы заң» жағынан, яғни осы заңды әлеуметтік пен экономикалық қызметте қатынастарды қалыптастыру мақсатымен қолдану жолымен зерттейді. Қолданыстағы конституциялық заң конституциялық-құқықтық дәлелдердің мен бірнеше ойлау санаттардың әлеуметтік пен экономикалық дамуға ықпал тәсілін бейнелейді. Перу, Израиль мен Австралия үлгілерін негізге ала отырып, қолданыстағы конституциялық заң — мүмкіндіктің және әлеуметтік жаңғыртуды дамуының маңызды элементі деп көрсетіледі.

Түйінді сөздер: құқық, конституция, даму, қабілеттілік, салыстырмалы саясат, қоғам, жаңғырту, демократизация, мүмкіндік, экономика.