

CONSTITUTIONALISM AND DEVELOPMENT IN SOUTH ASIA

By Erum Sattar, SAI Intern; SJD Candidate, Harvard Law School

Mark Tushnet, William Nelson Cromwell Professor of Law, Harvard Law School opened the panel as moderator and explained that the study of the constitutions of South Asian countries involved a focus on their design as well as implementation and was in that way a comparative project. He explained that as a field of study, comparative constitutional law is overwhelmingly a Eurocentric project and the project has to expand beyond its traditional geographical focus. He also emphasized that the current project has a focus on issues of law and is explicitly not a project of comparative politics. It is meant to focus on law as a way of thinking about institutional design without approaching institutional design solely as an exercise of power relations as studied in political science. The motivating question for the group is, what does the law say versus a study of the society's power relations.

Mahendra Lawoti, Professor, Department of Political Science; Western Michigan University; Associate Fellow, the Asia Society began the panel with a presentation on the history of constitutional design efforts in Nepal to date. He said that a Constituent Assembly was formed in 2008 to draft a new Nepali constitution (Nepal has had six constitutions to date) but then as issues of identity politics had moved front and center during the time the Assembly was working, it was dissolved in 2012 when it was unable to present a new constitution for the country.

Madhav Khosla, PhD. Candidate, Political Theory, Harvard University started by setting the themes for the conference. He spoke of the vast demographic change and economic pressures that countries across the region faced. These have led to dramatic legal changes but the last big set of legal changes was in the 1950s and 1970s. One has been the growth of the rights based architecture such as the right to food. Now that these have been enshrined, the final shape they take will take time to emerge. The other shift has been the high degree of specificity in constitutional amendments. The speaker flagged that it may be that in 30-40 years Benthamite fears may rear their head that rights can be illiberal or will produce a welfare state. At the same time, there is the rising trend of legal activism and new roles of all participants are being developed. At the same time, because of economic change the state is no longer the center of public life and this gives rise to very different types of claims. For academics, it will be of particular interest how these changes will mold constitutions and whether traditions of serious legal activism will take hold in the region's countries like they have developed over time in the United States. While legal controversies occupy a central place in public life in countries across South Asia for example the role of the Supreme Court in Pakistan in public life over the last 5-6 years has become particularly prominent, the countries are not facing the same problems. While there may not be anything exceptional about South Asian constitutionalism as issues of democracy are mediated everywhere, but people in the region's countries are finding innovative ways to negotiate the same questions. How they play out will determine and illuminate western constitutionalism.

Sujit Choudhry, Cecelia Goetz Professor of Law, New York University School of Law said that South Asia has been ignored in comparative constitutional law literature and the focus has been on the rights revolution of socioeconomic rights and institutional arrangements with a primary focus on South Africa and Israel while jurisdictionally South Asia has been ignored. When South Asia has been studied, the primary focus has been on India. And then too, the source material

has mostly been court judgments while the large and vibrant literature for example of comparative politics is less represented. When scholars from the region write, they focus on single countries and there is not much regional work. The regional writing focuses on economic and security issues and in legal writing, the agendas of the courts are not covered and details are glossed over. We need to bridge the silos. On the question of topics, other jurisdictions should not set the agenda for South Asia. What have been the South Asian issues from the inside? It is time to put South Asia in the center of global discussions for example with the lead the region's countries have taken with mediating linguistic politics which has been ignored internationally. There has also been a fierce debate about constitutional processes – so we need to study South Asian materials on their own terms as if we cant agree process then we cant get any agreement on substance. The Indian constitution itself has been an agenda-setting device so the blending work of law and politics and a non-court centric project can be genuinely South Asian.