

ACLS

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COMPARATIVE CONSTITUTIONALISM PROJECT

Briefing Paper

The American Council of Learned Societies (ACLS) has initiated a project on comparative constitutionalism. The project, which is supported by the Ford Foundation, involves convening a series of six international institutes over a two-year period. The purpose is to stimulate and broaden the study of this important problem.

While constitutions and comparative government are venerable academic subjects, scholarly work on comparative constitutionalism - the analysis of the social and cultural contexts of governing political arrangements - has been relatively thin. The ACLS institutes will be comparative across disciplines, cultures, regimes, as well as through time. This focus reflects the premise that an effective discussion of constitutions and constitutionalism should not be the private disciplinary preserve of lawyers and political philosophers, but rather should involve a multilateral discourse informed by a wide range of perspectives and experiences. Equally important, the institutes will involve citizens as well as scholars.

The institutes will be judged successful if they stimulate an ongoing inquiry within which sustained reflections on constitutionalism can take place among scholars, journalists, and public figures from around the world. The ultimate goal of the project is not only to enhance the academic field of comparative constitutionalism, but also to offer theoretical insights that may be of use to writers and users of constitutions.

Work to Date

Work on the project began in February 1987. A distinguished Advisory Panel laid out the main lines of the program, which have since been carried out by the ACLS staff. The most important step in this process was a planning conference held in June, 1987. One object of this conference was to develop a working definition of the problem of constitutionalism. At the planning conference a general consensus emerged that 1) a constitution includes a set of self-conscious rules for making rules, 2) constitutionalism is a set of particular moral ideas which hinge on ideology and culture in ways not always understood, and 3) that any meaningful definition of constitutionalism must take account of problems of legitimacy and consent. The planning conference recommended that the project's institutes focus on the dynamic as well as the structural aspects of the relationship between state and society. Project advisors further agreed that the selection of topics for regional institutes should necessarily involve local consultation. Each institute would thus represent an opportunity for global consideration of regional issues of constitutionalism.

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The project's first institute was an international examination of American constitutionalism. Entitled "Foreign Perspectives on the United States Constitution," it was held at The Johnson Foundation's Wingspread Conference Center September 26-30, 1987. A central theme of the discussions was the durability of the American Constitution. Conference participants considered both the unique aspects of constitutionalism in the United States and the relationship of American constitutional history to other national experiences.

A distinguished group of constitutional scholars, jurists, public officials, journalists, and humanists from around the globe participated in 4 days of discussion and a final public forum. Each day began with a keynote address by an American scholar on a central constitutional question, followed by a group discussion. Those themes were: historical perspectives; provision of justice and human rights; governmental structure; and state and society. In the afternoon, participants divided into two smaller discussion groups for sessions devoted to more specifically focused questions raised in the morning's address.

Future Institutes

In 1988 and 1989 the ACLS will sponsor other institutes in Latin America, Asia, Africa, and Europe, all but the European institute being funded by the Ford Foundation. While these institutes will retain much of the procedural outline of the first, they will depart from the initial focus on the U.S. Constitution and will be explicitly comparative in scope, focusing on constitutional topics of particular regional concern. A final institute, to be held in the United States, will attempt to synthesize and summarize the work of the project as a whole and lay out an agenda for future research.

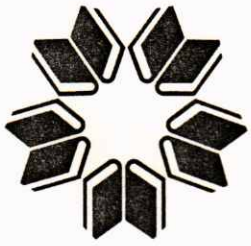
With the help of its Advisory Panel, regional specialists, local contacts, and the Ford Foundation, ACLS is currently preparing agendas for each institute which will focus discussion on topics of interest and relevance to regional constitutional debates. For each event ACLS is cooperating with a local organization for substantive as well as logistical advice. The institutes will each be three to five days in length. Roughly 30-35 participants with a broad range of professional and regional expertise will be invited to attend each institute, with approximately one-half of this number being drawn from the region. Simultaneous translation of the proceedings, where relevant, into at least two languages will allow the fullest participation.

While the designation of specific topics has resulted from discussions with cooperating agencies and local groups, some general outlines are clear. Suggested themes include: patterns of constitutional legitimacy; federalism and the consequences of the geographic distribution of power; constitutions and ethnic diversity; constitutionalism and positive rights; constitutionalism and bureaucracy; empowerment and the limitation of power; and the limits of constitutionalism.

The final institute, to be held in the United States, will attempt to synthesize the results of the previous five meetings. It will be smaller than the other institutes, and all participants will have been engaged in one or more of them. The meeting will be evaluative by nature, but will also consider how the project's inquiry might continue, and examine what sort of publications might issue from the project.

American Council of Learned Societies

Founded in 1919, the ACLS is the principal humanities organization in the United States. The Council is composed of forty-five national scholarly associations. Its core programs provide fellowship and research support for American scholars in the humanities and the humanistic aspects of the social sciences. As the oversight organization for the Council for International Exchange of Scholars (the senior Fulbright program) and the International Research and Exchanges Board, as well as through its own American Studies Program, the ACLS is a leading private sponsor of post-doctoral academic exchange in the United States. In addition to its core programs and international exchange work, the ACLS sponsors a variety of special projects, with the Comparative Constitutionalism Project being one of its more recent undertakings.



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The institutes will be judged successful if they stimulate an ongoing inquiry within which sustained reflections on constitutionalism can take place among scholars, journalists, and public figures from around the world. The ultimate goal of the project is not only to enhance the academic field of comparative constitutionalism, but also to offer theoretical insights that may be of use to writers and users of constitutions.

Phase I

Work on the project began in February 1987. A distinguished Advisory Panel laid out the main lines of the program, which have since been carried out by the ACLS staff. The most important step in this process was a planning conference held in June, 1987. One object of this conference was to develop a working definition of the problem of constitutionalism. At the planning conference a general consensus emerged that 1) a constitution includes a set of self-conscious rules for making rules, 2) constitutionalism is a set of particular moral ideas which hinge on ideology and culture in ways not always understood, and 3) that any meaningful definition of constitutionalism must take account of problems of legitimacy and consent. The planning conference recommended that the project's institutes focus on the dynamic as well as the structural aspects of the relationship between state and society. Project advisors further agreed that the selection of topics for regional institutes should necessarily involve local consultation. Each institute would thus represent an opportunity for global consideration of regional issues of constitutionalism.

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Phase II: Regional Institutes

In 1988 and 1989 the ACLS is sponsoring other institutes in Latin America, Asia, Africa, and Europe, all but the European institute being funded exclusively by the Ford Foundation. While these institutes retain much of the procedural outline of the first, they depart from the initial focus on the U.S. Constitution and are explicitly comparative in scope, focusing on constitutional topics of particular regional concern. A final institute, to be held in the United States, will attempt to synthesize and summarize the work of the project as a whole and lay out an agenda for future research.

With the help of its Regional Steering Committees, area specialists, local contacts, and the Ford Foundation, ACLS has prepared agendas for each institute which focus discussion on topics of interest and relevance to regional constitutional debates. For each event ACLS is cooperating with a local organization for substantive as well as logistical advice. The institutes average between three and five days in length. Roughly 35-40 participants with a broad range of professional and regional expertise are invited to attend each institute, with approximately one-half of this number being drawn from the region. Simultaneous translation of the proceedings is employed where relevant into at least two languages to allow the fullest participation.

While the designation of specific topics has resulted from region-specific discussions, some themes have transcended regional boundaries. These themes include: patterns of constitutional legitimacy; federalism and the consequences of the geographic distribution of power; constitutions and ethnic diversity; constitutionalism and positive rights; constitutionalism and bureaucracy; empowerment and the limitation of power; and the limits of constitutionalism.

The final institute, to be held in the United States at the end of 1989, will attempt to synthesize the results of the previous five meetings. It will be smaller than the other institutes, and all participants will have been engaged in one or more of them. The meeting will be evaluative by nature, but will also consider how the project's inquiry might continue, and examine what sort of publications might issue from the project.

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A PROPOSAL TO THE FORD FOUNDATION FROM THE AMERICAN COUNCIL OF LEARNED SOCIETIES FOR CONTINUED SUPPORT OF A PROJECT STUDYING COMPARATIVE CONSTITUTIONALISM

With the support of the Ford Foundation, the American Council of Learned Societies embarked in February, 1987, on a project concerned with the problem of comparative constitutionalism. The project seeks to stimulate and broaden the study and discussion of constitutionalism through a series of international institutes. The first phase of that project is now nearing completion; we now seek $643,365 to complete the second phase. This proposal describes the problem we seek to address, summarizes the work completed thus far, outlines plans for the second phase, and proposes a budget. The proposal for the first phase is attached as information to the present proposal as Appendix I.

THE PROBLEM

While the bicentennial of the U.S. Constitution was the occasion for initiating the project, the ACLS effort is not celebratory. It is rather, a searching reflection on a problem of great moment in world affairs. Throughout the world, constitutions are being written and re-written. The universality of the constitutional form dramatizes the importance of the phenomenon of constitutionalism. In the early 18th century, the notion of a "constitution" was an obscure and idiosyncratic idea of one small (but influential) school of English political thought. Yet since 1787, many of the major events in Western political history have ultimately expressed themselves in constitution-making: the American and French Revolutions, the democratic outbreaks of 1848, the consolidation of European nation-states before and after World War I, the defeat of the Axis powers in World War II. More recently, de-colonization has helped

globalize the phenomenon. Constitutionalism is so pervasive that even totalitarian regimes have felt the need to justify and rationalize their existence with constitutions. Today, Constitutions of the Countries of the World lists more than 160 entries; constitutions are deemed part of the necessary equipment of new states and changing regimes.

As the 20th century closes, constitutionalism is becoming an even more compelling problem. In recent years, there have been major constitutional changes in Canada and in nations emerging from authoritarian rule such as the Philippines, Argentina, and Brazil. A similar process now appears to have begun in South Korea and Haiti, where popular demands for constitutional changes have provoked recent turmoil. Elsewhere, new constitutions are being contemplated or written.

Moreover, social and political change is currently testing traditional boundaries of constitutional theory. Hong Kong is drafting a basic law to govern the territory after its integration into the People's Republic of China; the goal is to devise a structure that will permit a single state to accommodate two economic systems. In Western Europe, the problem is reversed. The economic integration of the EEC and the increasing activity of the European Court of Justice are producing the institutions of supra-national state with a single economy and a multiplicity of sometimes conflicting cultures.

But the failures of constitutionalism have been at least as important and interesting as it global dispersion; new, non-liberal constitutional forms also command attention. Constitutions which worked national ruin have been common: the German Weimar constitution is the most spectacular example, but the experiences of the French Third Republic and America before the Civil War also underline the sensitivity of constitutional arrangements to social and cultural change. Also, it is by no means certain that the current constitutional systems of the developed countries are settled propositions. The relationship between state and society is in continuous

flux and, as the examples alluded to here suggest, is likely to be reflected in periodic constitutional change, if not wholesale renovation.

At present, constitutional failure in the developing world is a serious problem. In Africa, the uncritical transplantation of the European liberal constitutional tradition has been largely unsuccessful. While there are some interesting and uncertain cases, such as Zimbabwe and Tanzania, their very peculiarity demonstrates that any successful constitutionalism that emerges from the political experimentation and conflict in Africa must reflect indigenous rather than transplanted values. In Iran and elsewhere in the Middle East, western political and constitutional ideals have been increasingly repudiated. But this repudiation has not meant a rejection of the constitutional form per se. Attempts are underway in the region to distill fourteen centuries of Islamic philosophy into political documents and structures. While the outcome of this process challenges our notions of what constitutionalism means, these are serious efforts which cannot, at least initially, be dismissed as "non-constitutional." In Israel, too, a constitutional crisis may be brewing. It is not at all clear how a Jewish State can or will cope with a population which, within a decade, may be predominantly non-Jewish.

Eastern Europe presents yet another interesting set of problems. Discussions are conducted there in a wholly different vocabulary and stark geo-political factors help set national limits and definitions. Nonetheless, there may be emerging in that area new political understandings which function as constitutional systems and from which there may be much to learn. This process is furthest advanced in Hungary and Poland, where an unspoken concordat between the population and the Communist Party has emerged. In return for acceptance by the population of party control of the state (a geo-political fact), the party acknowledges the legitimacy and limited autonomy of sub-national units (the church, the universities, economic enterprises, cultural agencies), explicitly accepts responsibility for improving living standards, and

implicitly pledges to preserve national independence insofar as possible. The "socialist system" is declared inviolate, but definitions of socialism are deconstructed and reconstructed with some meaningful latitude. "Glasnost" may be accelerating this process, but in the entire Soviet bloc it is deeper and more complex than one slogan.

Indeed, the problem of constitutionalism is so large that a careful definition of it is required. The topic is attractive precisely because it bears on so many issues, but without some limits, analytical effort will be diffuse and will spread haphazardly across the entire field of comparative politics. In order to define the questions at issue usefully, therefore, the ACLS convened a Planning Conference to assist in shaping the project. That conference is discussed more fully below. The following definitions emerged from the Planning Conference, and they constitute the starting points for the second phase of this inquiry.

* A constitution includes a set of self-conscious rules, particularly rules for making rules about the function of government and the conduct of politics. Most often these rules involve limitations on power and outline the "architecture" of the state. These rules may be represented by authoritative practice as well as by codified and/or written provisions. Thus, the definition would include "unwritten constitutions," such as those of Britain and Israel. It would also encompass such factors as the structure of party and electoral systems or the culture of bureaucracy and administration.

* Constitutionalism is a profoundly moral idea that hinges upon ideology and culture in ways not always well understood. The values it embodies vary from time to time and place to place. Examples of such value-laden ideas embedded in constitutions include the rule of law, the positive obligations of government, and the sovereignty of God. Tocqueville's great contribution to social science was to show the

importance of the connection between political values (such as equality before the law) and social facts (a democracy of manners), but this reciprocal relationship has become even more complicated in the twentieth century.

The problem is even more subtle when examined comparatively. For example, the rule of law is a principle of both American and Japanese constitutional theory. Yet the public use of law is radically different: Americans are litigious; Japanese are not. The U.S. Supreme Court is a functionally co-equal branch of government; the Japanese Supreme Court (despite a constitutional provision for judicial review) is of subsidiary importance.

* Any meaningful definition of constitutionalism must take account of problems of legitimacy and consent. A constitution, if it is to be more than a sham document, must elicit and structure the consent of the public, and thus transform mere power into legitimate authority. Even so, participants in the Planning Conference recognized that consent can be manufactured and need not be expressed in the electoral forms associated with Western governments.

In many ways, the problem is one of cultural transmission and reception. In no other area of law or politics is imitation so self-conscious as it is in constitution-making. While this fact accounts for some of the baleful history of many wholly transplanted constitutions, it also presents an opportunity for international dialogue and comparative research. To be effective, however, that dialogue must be analytical, interdisciplinary, and genuinely international. While constitutionalism is an important issue in political theory and history, it should also be of concern to anthropologists, economists, sociologists, philosophers, and literary critics, to say nothing of politicians, lawyers, and judges. It is this sort of analysis--an analysis that crosses national, professional and disciplinary boundaries--that this project seeks to advance in the

hope that the result will be not only to establish a new academic field but also to offer practical and theoretical insights that will be of use to writers and users of constitutions. .

THE WORK THUS FAR

We have chosen the mechanism of international institutes to engage scholars and practitioners in deliberation and analysis. We believe that this approach will achieve two basic ends. One is the enrichment of understanding across the academic disciplines: we are convinced that the comparative study of constitutionalism is of broad interest to humanists and social scientists alike, although institutionalized commitment to such study has been lacking heretofore. Also, the knowledge that can be generated by such scholars represents an important resource for policymakers and thus will help strengthen the alliance between the academy and the public sector around the world.

The first phase of the project has had two major components: the planning and the development of an initial institute, "Foreign Perspectives on the U.S. Constitution," scheduled for September 26-30 at the Wingspread Conference Center of the Johnson Foundation, and the Planning Conference held June 18-19 in New York. In addition, an Advisory Panel was appointed. It held an initial meeting in February; most of its members also joined in the Planning Conference and will attend the Wingspread institute. (The Advisory Panel is listed in Appendix II.)

A. The Wingspread Institute

Since the goal of this project is to prompt an authentically international discourse, it seemed appropriate to begin by holding the U.S. Constitution up to international scrutiny. While many of the planned bicentennial celebrations will be didactic and self-congratulatory, we expect this institute to approach both the

Constitution and the bicentennial with a critical eye. The specific format of the Wingspread institute emerged from months of internal evaluation by the ACLS project staff and consultation with our Advisory Panel. Approximately thirty-five foreign scholars, lawyers, journalists, and public figures will be joined by about fifteen American counterparts in an intensive examination of how the United States Constitution is viewed overseas. A single general theme will be emphasized on each of the four principal days of the institute. Daily sessions will begin with a keynote address designed to stimulate thinking on the specified topic. This address will be followed by a moderated discussion among the entire assembly. After a luncheon break, the group will divide into two sub-groups to pursue a more particularly defined range of issues. In mid-afternoon, the groups will switch topics to permit everyone to cover the same intellectual ground. A designated rapporteur from each smaller discussion session will be asked to share a brief summary of the exchanges with the entire conference at the end of the day. The morning of the final day will be devoted to a public forum where the institute's proceedings will be reviewed and synthesized for an audience of invited scholars, public and private citizens, and media representatives.

The attached schedule (Appendix III) provides the daily themes, keynote speakers, and afternoon discussion topics in brief compass. Each day's activity is designed to achieve a focused inquiry, but we also hope to maintain flexibility and to encourage genuinely critical evaluation of the U.S. Constitution.

The institute will have several immediate results. The keynote addresses and subsequent discussion will be recorded on audio tape. This record will provide essential feedback to the presenters to revise their papers for future publication. The Johnson Foundation has a noted radio series: "Conversations from Wingspread", which will tape interviews with several participants for later broadcast in both English and Spanish. But the participants themselves will, in a real way, be the most important

"product" of the institute for, if the institute is successful, they will return to their own countries and institutions with a renewed sense of the potential of comparative constitutionalism for productive research and better policy. In addition to the government officials and university professors who will return to their respective arenas, we have also deliberately included several journalists who we hope will put the proceedings of the institute before a broader audience.

The experience of planning the Wingspread institute will be relevant to the institutes of the second phase of the project. Conference planning involves a mass of detail, and even though many logistical details are being handled by the Johnson Foundation, we realize that more keenly the amount of work involved and the necessity of adequate lead time. The process of isolating, selecting, and inviting institute participants is labor- and information-intensive. However, there are important differences between this first and the planned subsequent institutes. Most important, all the keynote speakers at the Wingspread institute are Americans; while that is appropriate given the focus of the conference, it will be avoided in future institutes. Second, the United States will not be the central focus of the subsequent institutes.

B. The Planning Conference and Objectives of the Second Phase

Our work on the first phase of the project has made several things clear. Discussions of the project with our Advisory Panel, the Planning Conference, those invited to Wingspread, and other colleagues has assured us of the significance of this project. Indeed, the Planning Conference funded by the current grant approached its task with heartening enthusiasm and achieved its proposed goals with considerable success. In addition to the continued participation of the Advisory Panel, we benefited from the expertise of leading scholars in area studies and political science.

The minutes of that meeting, including a list of attendees, accompany this proposal as Appendix IV.

The Planning Conference sharpened our thinking about the shape and process of the work of the second phase. Its recommendations are reflected throughout this proposal. We expect that the participants in the Planning Conference will continue to provide advice and information as the work of the second phase proceeds. We also hope that they will participate in some of the future institutes.

The Planning Conference corroborated our conception of the value of enlisting a varied group of participants. The entire project design is predicated upon the importance of securing diverse expertise, defined professionally as well as geographically. An international collection of scholars across disciplines, public officials from all branches of government, journalists, and other trained observers will ensure that the most well-informed understanding will develop. Such diversity also multiplies the audiences which will ultimately benefit from this knowledge as participants return to their varied pursuits.

This cross-fertilization takes on even greater significance in the regions where the institutes of the second phase will be held. To some degree, people with like concerns within an area have an established means of exchanging ideas. But it is also the case that much work is being done that is not widely shared. Therefore, the local impact these institutes is considerable. They will provide an uncommon opportunity to compare experiences, as well as to introduce alternative research and policy strategies that may not have been considered previously. This feedback is essential for broadening the perspective of those practitioners and scholars now actively engaged in constitutional design and reform.

Beyond this immediate impact, the Planning Conference participants very strongly favored dissemination of institute proceedings via publication. In addition to the steps already proposed -- including journalists among the participants, having

papers prepared in advance, audio taping of presentations and discussions -- the Conference participants emphasized the desirability of an edited volume. We recognize the importance of such a result, but we are also keenly aware of the time and effort needed to produce such a text.

We propose, therefore, that this result of the project be only partially fulfilled under this grant. We will record the discussions of the working papers and distribute them to the authors to aid in the revision of their remarks for future publication. We will remain the clearinghouse for these finished products. The process of editing a collection of articles, however, another undertaking entirely; one which we would be happy to pursue after the completion of the series of planned institutes.

The ACLS is a scholarly organization, and we naturally hope that the project will accomplish scholarly and intellectual objectives. But it is also our working assumption that in regard to the problem of constitutionalism, the distance between scholarship and practical affairs is short. The participants in the Planning Conference agreed with this assumption, especially with reference to the areas of the developing world with which they were familiar. It is not hard to imagine what the practical benefits of this project will be. The identification of participants in the regional institutes can be a prelude to institution-building in public affairs as well as to the formation of a new academic discipline. It has the additional practical benefit of bringing practitioners and theorists together on issues of mutual concern. Just as we hope the publications issuing from this project will refocus and elevate constitutional scholarship, the publicity given to the proceedings may contribute to national and global political debates.

THE WORK OF THE SECOND PHASE

From the beginning, this project has sought to extend its reach beyond the United States. To further that goal, the second phase of the project will concentrate

upon more broadly comparative issues. This phase of the project will consist of five institutes. Four of the institutes will have a setting and focus in one region of the world. Each regional institute will be an international gathering on a theme particularly relevant to that area.

At present, we plan to sponsor one institute in South Asia (most likely India), one in Latin America (possibly Brazil), one in Africa, and one in Europe. The precise venues will be determined by a planning process that will include consultation with Ford Foundation field offices, our Advisory Panel, and others. The fifth and final institute will attempt to synthesize and summarize the work of the project as a whole. This proposal seeks Ford Foundation funding for only four institutes: the final institute and three of the regional institutes. The ACLS will seek funding for the European regional institute from a European source.

The institutes are best described in terms of objectives and process. As noted above, the objective is to create a structure where a disciplined, analytical, open-ended discussion can take place. Procedurally, we envision cooperating with a local organization or consortium of organizations for each of the institutes. That cooperation will include consultation about sites, participants, and program. While we feel it is essential that the ACLS maintain central intellectual responsibility for the project, we hope that the process through which the institutes are shaped will be interactive and informed by local concerns.

A. The Process of Designing the Institutes

The process of designing the institutes will have several steps: the identification of cooperating institutions and the selection of sites (these will be almost simultaneous), selection of themes and determination of programs for the institute, and designation of participants.

Site selection. The establishment of local alliances is the crucial first step in this phase. We will immediately begin to share the substantive and logistical features of our plans for these institutes with our established body of contacts and to ask for their reactions concerning the feasibility various locations.

This network of contacts consists of individuals who have considerable expertise in constitutionalism and area studies. Most have extensive familiarity with this project and have been contributing to its deliberations from the outset. Even before the Advisory Panel was established, the ACLS received invaluable assistance from Ford Field Offices. Requests to the field offices for suggestions of appropriate individuals yielded a wealth of names that enriched the Wingspread list of participants. Representatives from India, the Philippines, Mexico, Nicaragua, Guatemala, Brazil, Egypt, Kenya, and Nigeria came directly through recommendations of field representatives.

Members of the Advisory Panel have also proven themselves invaluable in this regard, and, along with their fellow advisors from the Planning Conference, continue to provide insights on region-specific needs and possibilities.

In addition, the ACLS has its own internal resources to draw upon, not only for prospective participants, but for on-site facilities, and liaison with regional organizations. Our colleagues at the Council for the International Exchange of Scholars (The Senior Fulbright Program) [CIES] possess timely and detailed knowledge of constitutional studies worldwide. The International Research and Exchanges Board (IREX), of which the ACLS is the parent organization, also has broad experience in international exchange. Our alliance with the Social Science Research Council (SSRC) provides another array of area studies expertise, notably in Africa, Latin America, Near and Middle East, China, Japan, Korea, South Asia and Southeast Asia, where project officers regularly coordinate international meetings.

The designation of an Asian site will be especially aided by Laxmi Mall Singhvi, one of our Advisory Panel members and a legal scholar and judge of international distinction, and R. Sudarshan of the Ford Field Office in New Delhi. Both have expressed their interest in helping us plan an institute in India. They have already supplied us with information on potential collaborating institutions and logistical details that make New Dehli a likely candidate. Daniel Lev, a political scientist at the University of Washington, who met with the Planning Conference and is active with human rights and legal aid societies in India and Southeast Asia, is another key resource in this area.

For Latin America, we have already benefited greatly from the insights of Dr. Bolivar Lamounier, a Brazilian political scientist involved with the drafting of his nation's constitution. He, too, has been an active Advisory Panel member and has agreed to serve as a liaison to his country and the rest of South America. He has suggested that either Sao Paulo, Brazil, or Buenos Aires, Argentina hold promise for meeting our criteria. The Ford field officers in Mexico, Christopher Welna and Stephen Cox , as well as Peter Fry in Sao Paulo have already assisted the project during phase I and we expect to rely on them again now.

With regard to Africa, Advisory Panel member Francis Deng, former Ambassador from the Sudan to the United States and to Sweden (among other distinguished credentials), continues to guide our investigation of the region. An active member at the Planning Conference, Samuel O. Gyandoh, who helped draft the constitution of Ghana, continues to place his extensive knowledge at our disposal. We hope to have the advice of the Ford offices in Dakar and Nairobi which have experience with pan-African and other international meetings and can thus be of considerable assistance to our determination of a site. We are particularly eager to consult with Salih Booker of the Nairobi office who has had recently worked with the

African Association of Political Science on a regional meeting. We are considering Dakar, Senegal, Abidjan, Ivory Coast, and Nairobi, Kenya as possible sites.

The selection of a European site is less problematic than those in the developing countries and will also be subject to the influence of whatever funding sources are eventually secured to produce that institute.

The above individuals will be asked for specific recommendations in three key areas. The first is the suitability of an international institute on constitutionalism to the given city and country. The second key area concerns the likelihood of being able to coordinate ours efforts with one or more local institutions to facilitate planning on-site. Third, the financial and logistical feasibility of a given site will necessarily influence the final determination.

Among the questions we need to answer are: Do certain of the proposed topics seem more appropriate than others? Why? Which organizations and individuals come to mind as having particular interest in or expertise on these topics? Must a ceremonial aspect be added to the design to generate local interest and attention? Are there facilities which come to mind to host such an event? Do ready means of local and regional transportation exist? Will there be adequate support in terms of copying machines, electrical capacity for simultaneous translation, and the like? What are the options regarding accommodations in terms of cost and quality?

Within each region, we will select a site that meets the criteria of contextual appropriateness, logistical efficiency, and economic feasibility. Individual visits by ACLS staff will be arranged at the chosen sites to begin the process of entering into agreements with local cooperating agencies. We will designate a liaison (perhaps a Ford Field Officer) within each region to help coordinate planning with such institutions as universities, law faculties, bar associations, and human rights groups. The liaison will provide the feedback necessary to guide the step-by-step planning of the institute. While the ACLS will, of course, continue to direct the overall quality

and character of these institutes, we will rely on the cooperating agencies for guidance as to local interests, personalities, and conditions.

Themes. Each of the regional institutes will focus on a particular theme that will attract the interest of scholars and public citizens in that region and around the world. While the designation of specific topics will be a result of our discussions with cooperating agencies and local groups, some general guidelines are clear.

Although our original proposal contemplated organizing institutes around specific structural topics such as federalism, our Planning Conference suggested that it would also be useful to have discussions of broad developmental issues such as the rise and decay of constitutions. Both approaches are clearly valuable since developmental processes can not be discussed without reference to examples of specific constitutional structures, and any consideration of structures must take into account the more abstract dynamic processes that animate them.

Moreover, we recognize the importance of selecting themes that will have an immediate intellectual resonance in the relevant region. As noted earlier, conversations with representatives of cooperating agencies will help determine locally important themes. It should be emphasized, therefore, that the themes described below are tentative, and are not intended to suggest an ideal model of what a "good" or "stable" constitution or constitutional system is or ought to be. We would simply begin conversations with our regional counterparts with themes like these.

1) Federalism: What are the consequences of the geographic distribution of power?

Federalism was a somewhat untried and unsteady notion at the founding of the American state and remained so throughout the nineteenth century, but it has flourished and expanded over 200 years. We now have the decentralized federalism of Canada, the centralized federalism of India, the monarchical federalism of Malaysia, and the emerging confederalism of Europe. Is federalism a solution to ethnic conflict

(as perhaps in Sri Lanka) or its cause (the cases of Nigeria or Pakistan come to mind)? While federalism is often put forth as a mechanism for the protection of minority interests, for most of U.S. history, it permitted the oppression of regional minorities. The cases of Canada and Western Europe also pose the question of the relationship between federalism and nationalism, a question which also has now emerged recently in the Soviet Union.

Sample Topics : What are the political and cultural relationships between national and regional identities? The answers will vary across cultural and geographic boundaries and become increasingly complex in situations where the two do not coincide. What are the mechanics of federalism? The distribution of power and responsibility, once translated from theory into practice, will be strained by variations in economic and social policies. The ways in which such constitutional arrangements respond to these forces may be the focus for one or more institute sessions.

2) Constitutions and ethnic diversity. Throughout their relatively short histories, constitutionalism and nationalism have been intertwined concepts. Nationalist revolutionaries saw constitutions as the creative act of a united people, prepared by an emergent national consciousness for the experience of self-government. Yet there are very few nation-states today which, as a result of shifting boundaries or immigration, do not contain significant minority "nationalities". Indeed, many nations also harbor diversities of language, religion, and race. It must be said that constitutions have not been conspicuously successful in managing this diversity, especially if the religious or ethnic division corresponds to an unequal distribution of economic and political power. (The U.S. Civil War may fairly be seen as the result of a constitutional failure to deal with racial diversity.) It is therefore essential that the relationship between constitutionalism and ethnic diversity be seriously explored.

Sample Topics : Can the traditional constitutional protections for the political rights of a minority be extended to the social and cultural spheres? This raises questions of language planning and policy, religious freedom and sanction, and recognition of ethnic group membership, among others. Can specific steps be taken to empower minorities politically without doing violence to the juridical equality which is a feature of many constitutions.

3) Constitutionalism and positive rights. Constitutional theory arose out of a desire to restrict arbitrary state power and to structure responsive government. Hence bills of rights and liberties were historically framed in terms of limits on government: not to interfere with religion, with political freedoms, with personal liberty. However, the growth of industrial society produced new conceptions of positive rights, conceptions that are widely shared in both the developed and developing world. These are such principles as the right to health care, the right to a living wage, the right to education and to housing.

Sample Topics: Many of the world's constitutions have codified these newer, more open-ended rights, but obviously their enforcement turns upon a politically charged re-distribution of limited resources. The legal theory, historical experience, and political implications of these issues could be the focus of one institute. Case studies might be incorporated to provide certain insights on the dynamic element of power and can be instructive on how positive rights are protected and neglected. For example, state- subsidized systems of health care might be compared in terms of economic and medical effectiveness. Similarly, the access to education and the role of the state in providing such access might be contrasted.

4. Constitutionalism and bureaucracy. The development and growth of bureaucratic forms of government has posed another set of constitutional issues. While

bureaucracies are formally extensions of executive authority, many analysts have pointed out that in their functioning they are often considerably independent of central political authority and driven by internal dynamics. Yet, one of the major impulses driving constitutionalism has been to control and limit executive authority. Bureaucracies are extremely powerful and perdurable entities, and their members are often drawn from distinct social strata; bureaucracies thus need to be controlled constitutionally from both above and below.

Sample Topics : It might be valuable for an institute to discuss ways of ensuring the accountability of bureaucracies to political authorities as well as ways of safeguarding individual rights from bureaucratic interference without impairing the necessary effectiveness of bureaucratic management.

5) **Empowerment and the limitation of power** Who is to be represented in the state and how that representation is to be determined are central questions in both political philosophy and practical statecraft. The structured representation of privileged minorities, as in the British House of Lords, is now only rarely acceptable politically , but the "scheduling" of legislative seats for racial, ethnic, and religious minorities traditionally discriminated against is a live political issue in many places. Serious arguments are also put forward in this and other countries that rural interests or local governments should be represented in national governments out of proportion to their numbers.

But even the deceptively simple formula of "one person, one vote" requires comparative analysis of how the representatives are chosen. It might be argued that proportional representative systems, where parties receive seats in relation to the the proportion of their votes, are "more representative" than the systems of Britain and the United States, where separate local majorities (or pluralities) select representatives. But the effects of proportional representation vary significantly for one country to

another. These systems seem to permit the relatively easy development of new parties (West Germany), but sometimes also promote governmental instability (Italy) or stalemate . Any discussion of representation must also consider the social and cultural impediments to political mobilization as well as means through which such mobilization can be effected.

Sample Topics : A consideration of empowerment as a function of cultural patterns invites discussion of pre-political behavior derived from folklore, kinship and common law. How these factors interact with the development of political parties offers another critical area of examination.

6) **What are the limits of constitutionalism?** We would be less than faithful to our critical mission if we were not willing to question our basic assumptions. While constitutionalism is clearly a powerful force today, that does not mean that constitutional government is, as the framers of the U.S. Constitution believed, "the new order for ages". Perhaps the challenges of maintaining limited government in face of the technological and organizational power of the modern nation state will overwhelm our constitutional capabilities. Similarly, perhaps the most plausible governments for pluralistic developing countries are not constitutional ones, but yet unevolved systems which may involve consensus, civility, and structured power but no "self-conscious rules for making rules".

Sample Topics : We need to consider the alternatives to constitutionalism in order to understand constitutionalism itself. An examination of the alternatives to constitutionalism demands a definition of constitutionalism . Even the broadest approach, one designed to include a wide variety of structural and moral alternatives, cannot be assured of success. This question dominated much of our discussions at the Planning Conference and suggests that a diagnosis of what works and what does not work, constitutionally, might be a worthy topic for further debate.

Institute format. As noted earlier, we expect that the format of the regional institutes will emphasize disciplined intellectual interchange. While the Wingspread institute provides a useful model, there will undoubtedly be local variations. The Planning Conference agreed that the regional institutes should have significant participation from beyond the region. Thus, the number of participants should be around 36, with at least half invited from around the world. The remainder will be drawn from the region, on the basis of their expertise, national concerns, and credentials. The institutes will probably last 3-5 days. Approximately one third of the participants will be asked to prepare working papers in advance. These papers will constitute the core of the institute's substantive content. The emphasis will again be on structured, but open-ended discussion.

Each institute will be conducted in at least two languages. Simultaneous translation will be employed to facilitate conversation. Our research suggests that trained translators are easier to locate in the United States than abroad, but we hope to solicit more concrete appraisals of that situation once our coordinating networks are in place.

European Institute. The inclusion of an additional regional institute in Europe is an outgrowth of the recommendations of the Planning Conference. The consensus of the participants was that a site in the West among countries with established traditions of constitutionalism was as important as the attention the project gives to the developing world. Clearly, the sorts of questions outlined above are as pertinent to European countries as they are to nations in Africa, Asia, and Latin America. The scheduling of a European institute will demonstrate that we view constitutionalism as more than an artifact of decolonization in the Third World.

The format would remain consistent: an intensive gathering of approximately 36 individuals from diverse professional and geographic backgrounds over a 3-5 day period.

The ACLS will seek funding for this institute from European sources. Possible sponsors include the German Marshall Fund (Germany), Friedrich Ebert Stiftung (Germany), Konrad Adenauer Stiftung (Germany), Friedrich Naumann Stiftung (Germany), Agnelli Foundation (Italy), the European Cultural Foundation (France), Juan Marcel (Spain), and Gulbenkian (Portugal). The prevailing opinion of the Planning Conference participants was that this topic would be of considerable interest to potential funders.

Final Institute. A fifth and final institute is planned to occur after the completion of the four regional meetings. Its objective will be to attempt to synthesize the results of those meetings. It will be held in the United States. It will involve a fewer number of people selected from the entire pool of project participants from Wingspread through the regional conferences. And it will, by nature, be evaluative.

Attention will also be given to what activities will sustain this inquiry into the future. The conference will also take up the question of what sort of publication(s) might issue from the project: their form, content, and distribution. Other methods to stimulate thought and action on constitutional questions will also be solicited from the participants.

PLAN OF WORK

The scheduling and implementation of four regional institutes and a fifth and final meeting over the course of a two-year period that has already begun is a formidable undertaking. The project director and her assistant, as well as the ACLS'

President, Vice President, and Director of American Studies, will be responsible for this project. (Staff curriculum vitae are attached as Appendix V).

The project staff will continue to rely on the counsel of the members of the Advisory Panel and the participants in the Planning Conference. As we described in considerable detail in our original proposal, the American Council of Learned Societies is uniquely qualified to conduct an enterprise of this type. (See Appendix I, pages 19-23). It has been involved in international academic exchange since its inception in 1919. The staff members involved possess professional expertise in comparative legal history, American government, international affairs, cross-cultural analysis, and sociolinguistics. As the oversight organization for the Council for International Exchange of Scholars (the senior Fulbright program) and the International Research and Exchanges Board, as well as through its own American Studies Program, the ACLS is the leading private sponsor of post-doctoral academic exchange in the United States and has a proven capacity to administer international programs with operating budgets in the millions of dollars.

The management of this phase of the project will follow the pattern set during phase one. The project staff – the ACLS President Stanley N. Katz, Vice President Douglas Greenberg, American Studies Program Director Steven C. Wheatley, and Project Director Melanie Beth Oliviero – will continue to formulate substantive and administrative plans. In consultation with the Advisory Panel, this team is responsible for the final determination of sites, of participants, of topics, and the conduct of the institutes themselves. The management of all ACLS activities is regularly reviewed by its Board of Directors, who are identified in Appendix VI.

The Project Director will take the primary responsibility for the implementation of these decisions. She will direct all the administrative and logistical aspects of the project. The experience of coordinating the institute at Wingspread and the Planning Conference under the terms of the current grant has proven that the

original budgeting of a half-time assistant underestimated the scope of work. The volume of correspondence, briefing material, and simultaneous logistical arrangements has made it abundantly clear that the project staff requires a full-time assistant. We have secured the services of Rebecca Nichols in this capacity. She will assume primary responsibility for coordinating communications, preparing biographical materials, making travel arrangements, and responding to inquiries from the media and other interested parties.

A monthly schedule of the proposed plan of work to produce the remaining five institutes follows. This schedule will undoubtedly undergo revision, but even a cursory examination of it suggests the complexity of the task before us. Project activities follow certain patterns. Work begins immediately, in August 1987, with 6 months of extensive research to ascertain the specific sites and local coordinating teams for each of the regional institutes. Each institute will then require a minimum of 10 months work from initial planning to completion. The first step is to designate individuals to present papers. The identification of other participants follows. There will be two months allocated to finalizing the list of attendees. Travel and press arrangements will begin 6 months in advance of each event.

The last five months prior to an event will be devoted to the detailed logistical planning that these foreign institutes demand, including securing facilities, translators, accommodations, equipment, support services, and transportation, as well as covering other contingencies that cannot be anticipated now. Toward the end of this period, the working papers will be distributed to conference participants for advance review. The month prior to each regional institute will be devoted to final preparations, including confirmation of all operational details. These will be conducted both from the project headquarters and on-site.

After an institute, there will be follow-up activities. An audio record of each institute's proceedings will be made at the time and edited in the months immediately

following it. Transcripts will be distributed to the authors of the working papers to aid in the revision of their presentations for publication. This process is scheduled to be completed within 6 months of the end of each institute.

There will also be a series of interim reports issued throughout the duration of this series of institutes. These will not only allow the project staff periodically to assess the progress of the entire effort, but will also allow us to keep past participants informed while the subsequent institutes continue to develop and take place. They will finally form a fundamental part of the agenda of the fifth and final institute. The site of this meeting will be determined approximately 6 months before the project's scheduled end.

The timeline that follows provides a key to the overlapping planning and administration of the individual institutes.

TIMELINE

Aug. 1987 - Share design with regional contacts in Africa, Asia, Latin America and Europe; solicit their comments on specified questions;

Sept. - Compile responses; deliver proposal; convene Wingspread;

Oct. - Evaluate research and consultation to date;

Nov. - Determine proposed sites; initiate on-site coordination, long-distance, and in person; regional planning with cooperating agencies;

Dec. - Continue on-site visits to proposed locations;

Jan. 1988 - Complete on-site visits; determine locations;

Feb. - Approve proposed sites; designate paper-givers and other participants for regional institute #1;

Mar. - Invite all participants for #1; start search for funding for European Institute (#4);

Apr. - Process responses to invitations to #1; designate paper-givers and others for #2; continue search for funds for #4;

May - Initiate travel and press arrangements for #1; invite participants for #2; continue search for funds for #4;

June - Commence detailed logistical planning for #1; process responses to invitations to #2 ; designate paper-givers and others for #3; continue search for funds for #4;

July - Continue logistical planning for #1; initiate travel and press arrangements for #2; invite participants for #3; continue search for funds for #4;

Aug. - Continue logistical planning for #1; commence detailed logistical planning for #2 ; process responses to invitations to #3 ; conclude search for funds for #4 ; designate paper-givers and others for #4;

Sept. - Continue logistical planning for #1; continue logistical planning for #2; initiate travel and press arrangements for #3; invite participants for #4;

Oct. - Final preparation for #1; continue logistical planning for #2; commence detailed logistical planning for #3 ; process responses to invitations for #4;

Nov. - **REGIONAL INSTITUTE** #1;

Dec. - Edit audio record for #1 ; continue logistical planning for #2; continue logistical planning for #3; initiate travel and press arrangements for #4;

Jan. 1989 - Complete compilation of audio record for #1 ; issue Interim Report I ; final preparation for #2; continue logistical planning for #3; commence detailed logistical planning for #4 ;

Feb. - Commence revision of papers from #1 ; **REGIONAL INSTITUTE** #2;

Mar. - Continue revision of papers from #1 ; edit audio record for #2 ; continue logistical planning for #3; continue logistical planning for #4; determination of site for #5;

Apr. - Issue Interim Report II ; continue revision of papers from #1 ; complete compilation of audio record of #2 ; final preparation for #3; continue logistical planning for #4; determination of participants for #5;

May - Complete revision of papers from #1 ; commence revision of papers from #2 ; **REGIONAL INSTITUTE** #3;

June - Continue revision of papers from #2; Edit audio record from #3 ; continue logistical planning for #4; finalize participants for #5;

July - Issue Interim Report III ; continue revision of papers from #2; complete compilation of audio record from #3 ; final preparation for #4; invite participants to #5; commence detailed logistical planning for #3;

Aug. - Complete revision of papers from #2 ; commence revisions of papers from #3 ; **REGIONAL INSTITUTE** #4 (Europe);

Sept. - Continue revision of papers from #3; edit audio record for #4 ; final preparation for #5;

Oct. - Issue Interim Report IV; continue revision of papers from #3; complete compilation of audio record for #4 ; **FINAL INSTITUTE** (#5);

Nov. - Complete revision of papers from #4 ; issue Final Report.

Comparative Constitutionalism Project

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