

CONSTITUTION-MAKING: A PROCESS FILLED WITH CONSTRAINT

Donald L. Horowitz*

Constitutions are generally made by people with no previous experience in constitution making. The assistance they receive from outsiders is often less useful than it may appear. The most pertinent foreign experience may reside in distant countries, whose lessons are unknown or inaccessible. Moreover, although constitutions are intended to endure, they are often products of the particular crisis that forced their creation. Drafters are usually heavily affected by a desire to avoid repeating unpleasant historical experiences or to emulate what seem to be successful constitutional models. Theirs is a heavily constrained environment, made even more so by distrust and dissensus if the constitution follows a protracted period of internal conflict. Given all these conditions, drafting a constitution that is apt for the problems faced by the drafters is difficult, and prospects are not enhanced by advice that drafters follow a uniform constitutional process that emphasizes openness and public participation above all other values.

Les constitutions sont généralement rédigées par des personnes sans expérience préalable dans la préparation de constitutions. L'aide reçue de l'extérieur est souvent moins utile que l'on croit. L'expérience étrangère la plus pertinente peut provenir de pays lointains où les leçons ne sont ni connues ni accessibles. De plus, bien que le but des constitutions soit de durer, elles sont souvent le résultat d'une crise précise qui en a forcé la création. Les rédacteurs cherchent alors à éviter de répéter des expériences historiques désagréables ou à imiter des modèles constitutionnels ayant réussi. Leur environnement est alors très restreint et la situation est aggravée par la méfiance et la dissension si la constitution fait suite à une période prolongée de conflit interne. Compte tenu de ces conditions, il est difficile de rédiger une constitution convenant aux problèmes auxquels les rédacteurs font face et les perspectives ne sont pas meilleures si les rédacteurs suivent un processus constitutionnel uniforme soulignant l'ouverture et la participation du public sur toutes les autres valeurs.

I. THE KNOWLEDGE PROBLEM

There is a great deal of experience in the world in the making of new constitutions, but also a formidable problem of lost knowledge. Most people

* James B. Duke Professor of Law and Political Science, Duke University. This article is based on the 17th Annual McDonald Lecture, "Three Ways to Make a Constitution," delivered at the Centre for Constitutional Studies, University of Alberta, 6 October 2005. The author is grateful to the University of Alberta Faculty of Law, and particularly to Richard Bauman and Judy Garber of the Centre for Constitutional Studies, for their hospitality on the occasion of the lecture. The author also acknowledges gratefully the assistance of the Eugene T. Bost, Jr., Research Professorship of the Cannon Charitable Trust No. 3 at Duke Law School, which facilitated the preparation of this article and the lecture.

who make constitutions have never performed the task before and will not perform it again. Most of the time, their experience will not be recorded or utilized, and their successors will go on to make the same mistakes and some new ones as well.

The task is a bit like choosing a university president. In the United States, search committees consisting of faculty members, university trustees, administrators, alumni, and sometimes students are appointed to search for a new president. This is an inherently difficult task, because it is hard to specify the precise qualities needed in the office and even harder to predict whether a candidate who has not been a university president before will possess those qualities when the time comes for exercising them. Furthermore, a new president is chosen only every five or ten years, and in some cases even less frequently, so that, having performed the task once, the members of the search committee will never choose another president. Hence the committee's experience and the knowledge it has gained are lost.

Contrast with this the job of a personnel office in choosing an employee whose tasks are purely routine — a mail sorter or a janitor. The personnel office knows with considerable specificity what a janitor's job is and what qualifications a good janitor needs. When the appropriate applicant walks through the door, it does not take much time to decide that the candidate has the requisite credentials. The personnel office has hired many such people before. Unlike the presidential search committee, the personnel office has no problem of lost knowledge. It has a memory.

Constitutional choice is like presidential choice in a university. The exigencies of the task are somewhat indeterminate, subject to a variety of interpretations, and at the same time context-specific. Those who perform the task will not have made it their profession, and no two people engaged in it at the same time and place will necessarily have a clear idea or the same idea of what institutions need to be chosen.

Of course, in recent decades, constitution-making has become an international and comparative exercise in ways it was not previously. There is an emerging literature that is accessible, there are foreign advisers and foreign advice (sometimes unwanted foreign advice¹), there are conferences

1 It is worth recalling a story told to me by the chair of an African constitutional commission. As soon as he was appointed, he was approached by an American consulting firm that offered to run the entire constitutional process for him, assuring him that there would be no cost involved, as a grant could be obtained to cover all costs incurred. The offer was declined.

on constitution-making, and there are many ways to learn something from the experience of other states that have been through a constitutional process. There are strong trends in institutional adoption, such as constitutional courts² and certain electoral systems,³ and there are also advocates of certain modalities of constitution-making (some of which I shall discuss shortly). While Ruritarians making a constitution for Ruritania may be starting from scratch, there are purveyors of foreign experience ready to help, just as there are search firms ready to help a university committee find the right president.

Yet the impact of these changed conditions is not entirely benign. In some cases, international involvement is window dressing to demonstrate the open, democratic character of the process of constitutional choice, but the real decisions are the same as would have been made without that involvement. In other cases, the expanded literature and the ubiquitous foreign experts add only noise to the process, as unpromising leads are chased down. On one side, some foreign experts have a standard repertoire of recommendations that they bring with them. Often these recommendations are biased toward the institutions of their home country, as in the case of the Norwegian electoral consultant in a Balkan country who kept coming back to the superiority of a proposed system that turned out to be the Norwegian electoral system. Very often such experts simply want to sell their pet provisions — for parliamentary regimes, or runoff elections, or (in the case of Americans) a due process clause, or whatever.⁴ I refer to such people as “provision merchants.” On the other side, even when foreign experts bring good, useful comparative knowledge — and it does not need to be foreign experts who bring that kind of knowledge — constitutional planners and drafters may ignore it, or fail to recognize its significance, or misconstrue it, or misuse it.

Why does this happen? It is not merely that we are all prisoners of our own culture and parochial experience. It is, rather, that to decide which comparative models might be pertinent requires a considerable degree of abstraction. If a constitution-maker in, let us say, Romania is advised that the most relevant constitutional design to deal with a particular problem is to

2 See Tom Ginsburg, “The Global Spread of Constitutional Review” in Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira, eds., *Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, forthcoming). See also Donald L. Horowitz, “Constitutional Courts: A Concise Introduction” (2006) 17:4 *J. of Democracy* 125.

3 Andrew Reynolds, Ben Reilly & Andrew Ellis, *Electoral System Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2005).

4 I have met American judges who, in the 1990s, had to consult an atlas to locate the East European country that they had agreed to help in its constitutional deliberations. What they had was an understanding of their own country’s constitution.

be found in Senegal, it will require a very sophisticated diagnosis of Romania's problem at a somewhat abstract level and an equally sophisticated assessment of Senegal's problem and the impact of the Senegalese design on that problem to convince the Romanian planner even to take a closer look, much less to be persuaded. Most people prefer to analyze what they already know or respect, and they have defenses against what is foreign and unfamiliar. Not surprisingly, the borrowing that takes place in a constitutional design process is typically biased toward institutions drawn from countries with which the borrower has cultural affinity (in ex-colonies, usually the institutions of the former metropole), countries that are the most conspicuously successful democracies, or, in divided societies, countries that are the most conspicuously successful democracies in divided societies, such as Switzerland.⁵

There is another species of outsider who turns up in constitutional deliberations, or sometimes before they are begun, and not always with felicitous results. This is the expert on negotiation, rather than on constitutional design. The negotiation expert typically possesses (and professes) no knowledge of constitutions or of the intergroup conflict constitutions need to ameliorate. Rather, the negotiation expert is a "facilitator," a process person who urges the parties, above all, to "get to yes," to reach agreement. The thrust of the efforts of negotiation experts is to push toward narrowing differences during discussions and to emphasize areas of agreement, so as to facilitate conclusion of the deal.

As we shall see shortly, it is sometimes better not to reach agreement. This is particularly so if the agreement threatens to worsen relations among the contenders or if the process of reaching agreement independently sours relations among stronger and weaker parties. But there is another issue hidden beneath the rhetoric of those who think bargaining to produce agreement is always the way to proceed. Bargaining involves exchange, but the quid pro quo is not always best for divided societies. They need coherent institutions to reduce their conflict. Compromise and coherence are often at odds. Something approximating a planning process might be preferable for constitution-making, so that attention can be paid to the fit of the parts in the final product.

I have spoken so far of a single constitution-maker or constitutional planner, but convincing one planner is not enough. Constitution-making is a collective enterprise, with all the perils that we know attend collective decisions

5 For a fuller discussion of model bias, see Donald L. Horowitz, "Constitutional Design: Proposals versus Processes" in Andrew Reynolds, ed., *The Architecture of Democracy* (Oxford: Oxford University Press, 2002) 15 at 31-32.

in which the preferences of the important actors diverge. In a society making the transition from authoritarianism, the actors who must choose among competing democratic designs are likely to be people with little experience living under any of the contending democratic designs. Theirs is an abstract collective choice. If, on the other hand, they have had an experience of living under a certain set of constitutional arrangements, then they are likely to be attached to those institutions — electoral systems, for example — that seem to have worked successfully. For all of these reasons and more, the constitution that is perfectly apt for the situation of the state that adopts it is at best elusive.

II. CRITERIA OF SUCCESS AND FAILURE

I do, however, want to enter one caveat here. It is important not to exaggerate the extent to which constitutions are inapt. Often it is claimed that the constitution of a certain country “failed” or that a certain institutional innovation, say a particular electoral system, “did not work,” because the regime was overthrown by a military coup or succumbed to a civil war. Exactly this sort of judgment was pronounced for Lebanon, whose institutions to accommodate sectarian conflict were adopted in the so-called National Pact of 1943.⁶ When Lebanon lapsed into civil war in 1976, it was said that the institutions of the National Pact, which included its ethnically reserved offices, its ethnic quotas in government service, and its electoral system, had “failed”— and failed in an undifferentiated way. In fact, however, all these institutions did not fail. The quota system failed, because the 6:5 ratio of Christians to Muslims was fixed and permanent, based as it was on the sectarian proportions of the census of 1932, and unable to be revised in the light of demographic changes favoring Muslims.⁷ Lebanese institutions also collapsed under the weight of external forces, especially the influx of armed Palestinians in 1970, which, as other groups saw it, required each community to have its own militia. Among the institutions that did not fail was the electoral system, which was conducive to intergroup accommodation and was reconstituted along essentially the same lines after the conclusion of the civil war and again after the withdrawal of Syrian forces in 2005. The electoral system utilized a combination of reserved seats, multimember constituencies, and common-roll elections, which fostered mixed tickets, encouraged intragroup competition, and softened intergroup conflict.

6 Leonard Binder, ed., *Politics in Lebanon* (New York: John Wiley & Sons, 1966).

7 For the hazards of fixed quotas, see Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley & Los Angeles: University of California Press, 2000) at 586-87.

So the argument that, because a constitutional order collapses, every component of that order must be deemed to have failed is suffused with fallacy. Military coups may be exogenous events that can bring down regimes; they may have occurred no matter what constitution was in force. Alternatively, an institutional arrangement might have softened a certain conflict had it been adopted soon enough. If the conflict overwhelms the constitutional order under these conditions, that is no evidence that the arrangement was inadequate. We know enough about political planning to understand that it nearly always comes after the fact and so is not really planning at all.

If I am correct that constitutional orders fail for all sorts of reasons unrelated to their appropriateness, then it is incumbent on us to be more careful to avoid facile and mistaken causal attribution. It is preferable to ask about an institutional device whether the mechanism it was supposed to activate was in fact activated, not whether the overall design “succeeded” or “failed.” Success or failure of an institution cannot be measured by the survival of the regime of whose constitution the institutional device was a part, but only a part.

Despite the obstacles, it is possible to enhance the chance that a reasonably apt constitution will be adopted. Many constitutions drafted in the period after 1989 have had to deal with the problems of severely divided societies, such as Northern Ireland, Bosnia, Cyprus, Fiji, or Sri Lanka. There is a debate in the scholarly literature on this subject between, on the one hand, those who think it best to entrench consociational guarantees of group vetoes, proportional representation of groups in the legislature and cabinet, cultural autonomy, and proportional financial allocations to groups and, on the other, those who think these guarantees provide no reason for politicians to moderate the conflicts the consociational approach is intended to ameliorate. And so these others (myself included) wish to concentrate instead on providing politicians with incentives — including, prominently, electoral incentives — to behave moderately.⁸

I leave aside the contested matter of the effectiveness of the two approaches, because here I wish to discuss the matter of process. Process can affect outcomes, benign or otherwise. My theme is that process cannot be discussed in the abstract, from *a priori* premises. The process of constitution-making should depend on the class of problems faced by the constitution-makers.

8 See, e.g., Horowitz, *supra* note 5 at 19-25. Compare Arend Lijphart, *Democracy in Plural Societies* (New Haven, CT: Yale University Press, 1977).

III. THE CONSTITUTION-MAKING ENVIRONMENT

It is best to begin at the beginning, with the constitution itself. All constitutions worthy of the name have two sets of features, which we may refer to crudely as the “mechanical” and the “ideological-aspirational.” By mechanical, I mean that constitutions need to set out, at least in general terms, how government will work, where particular competences reside, how power will be divided or shared, what exercises of power are prohibited or limited, and how abuses of power will be redressed. By ideological-aspirational, I mean that proper constitutions embody some statement about the sort of common life the body politic aims to establish. Sometimes this statement is explicit, and sometimes it must be derived from the provisions of the document, but it is usually there. Hence the semi-sacred character of some constitutions. People tend to get invested in constitutions by virtue of their connection to collective aspirations.

The fact that such a statement is embedded in the constitution provides an important caution in constitution-making: In societies in which sharply divergent aspirations are present and a common life cannot be assumed, constitution-making is a difficult task at best. It cannot be supposed that clever drafting can solve the problem by merely writing around it. It may be preferable not to make a constitution in these conditions, or to make it in steps, if consensus on fundamentals of this kind cannot be found. More on this as we proceed.

The mechanical and ideological-aspirational features of a constitution are related, in that a statement of common purposes facilitates acceptance of difficult decisions concerning apportionment of power and redress for its abuse. For example, the United States Constitution, in various ways, indicates that it aims to establish a republic of equal citizens living under a government of limited or checked powers, in which territorial affiliation has some fairly strong significance — through federalism, a Senate of equal state representation, and the Electoral College. Since interstate mobility has greatly undermined state-level allegiances, some parts of this aspirational statement are now looking slightly shopworn.

Constitutions are supposed to be forward-looking instruments; they are plans. For this reason, Jon Elster counsels that they should not be

made by those who could benefit from their operation.⁹ Legislators, he says, should not be entrusted with the task. Rather, specially convened, transitory bodies should be assigned the job. This advice, however, is often difficult to follow, because of the fraught nature of the occasions for constitution-making.

A constitution is intended to serve for the ages, to be able to respond to conditions other than those that called it into existence. But let us confront some uncomfortable facts about constitution-making that bear on the sense of a constitution as a forward-looking, durable design for living together. Constitutions are almost always made in times of crisis. The literature on legislative agenda-setting makes it rather clear that the issue of a new constitution cannot even be put on the table without a crisis.¹⁰ The constitutions produced in Afghanistan in 2004 and Iraq in 2005 after wars that overthrew sitting regimes may be extreme in this respect, but they are not wholly atypical. But crisis may be a condition that arises without a cataclysmic event such as a war. By crisis, I mean a time when the existing arrangements have been shown to be illegitimate, as in Eastern Europe after 1989, or ineffective, as in the United States after 1786, or both, as in Indonesia after 1998.

It needs to be borne in mind that a problem arises if a constitution that is ineffective nevertheless possesses legitimacy for significant segments of a heterogeneous population, as Indonesia's did for secular nationalists. The nationalists saw the ineffective and undemocratic 1945 constitution as the very embodiment of their history, not because it was ineffective and undemocratic but because it was the product of a time when they were ascendant. The constitution, drafted by an academic named Supomo, was associated with Indonesia's first president, Sukarno, who revived it in 1959, after it had been superseded for some years by a parliamentary constitution. By 1999, the secular nationalist camp was no longer ascendant, but it was still the largest camp in a divided society, having won a third of the votes in the parliamentary elections of that year. The camp was led by Sukarno's daughter, Megawati Sukarnoputri, who was most reluctant to tamper with her father's handwork. In such cases — and there are more of these than might be thought — constitutional design is synonymous with walking on eggs. With great skill and discretion, it can be done, but only with great skill and discretion.

9 Jon Elster, "Forces and Mechanisms in the Constitution-Making Process" (1995) 45 *Duke Law J.* 364.

10 John Kingdon, *Agendas, Alternatives, and Public Policies*, 2d ed. (New York: Harper Collins, 1995).

Constitutions are forward-looking documents, but they are made by people who are deeply affected by their view of their own history, sometimes blindingly so. More often than not, that history consists of experience the drafters would prefer to avoid. And, insofar as they associate particular governing institutions with unpleasant history, that history — or, rather, their sense of that history — constrains their institutional choices. It is no accident that constitution-drafters in Iraq, a most centralized state until the fall of Saddam Hussein in 2003, opted to create one of the most decentralized federations in the world. The history to which constitutional drafters advert also includes the history of the events that have brought about the transitional moment in which they are doing their work, and so the document they produce is very likely to be tailored to redress the deficiencies that have been most recently apparent. In almost every way, constitutions are forward-looking instruments crafted by people who are looking backward.

Success in constitution-making, therefore, inevitably involves not just creating a good plan but being able to achieve the goals of the moment and to deal well with history — and by deal well with, I mean not permit history to bias and limit the available choices so as to produce inapt results — for history is the unseen framer at the table. The American framers very nearly fell into this trap in 1787, when, having had unpleasant experience with the Crown, they were inclined to create a constitution with a very weak collective executive and were only saved from this course by the actions of two delegates to the constitutional convention, Gouverneur Morris and James Wilson, who were knowledgeable about a more recent and satisfactory experience with a single executive, the governor of New York.¹¹ It was the ability of the framers to provide a more differentiated view of the possible choices that avoided a choice that might have replicated some of the deficiencies of the Articles of Confederation.

Constitution-making is a matter of choosing from an array of institutions in an environment that usually narrows and closes the plausible options, if it does not actually prevent many serious possibilities from being considered at all. It is a story of decision-making under severe conditions of constraint, and this constraint is not just due to idiosyncracies of history and historical recollection. As I have said, a constitution is a timeless document made in a timebound way — for a long time horizon by people with short time horizons, for the future by people bound to the past. But it is also a document that reflects choices from a smaller menu of choices than ought to be available to

11 Charles C. Thach, Jr., *The Creation of the Presidency, 1775-1789*, 2d ed. (Baltimore: Johns Hopkins University Press, 1969).

the framers, who are typically knowledgeable about (at best) a few countries and a few possibilities.

Sometimes choices are not merely made from a limited menu but are not even on the menu, because they are foreordained. In Northern Ireland at the time of the Good Friday Agreement in 1998, the choice of electoral system was not disputed, because it was not seen as a choice. Northern Ireland had used the single transferable vote (STV) during an earlier period of devolved democracy, and the Irish Republic also used that system. The choice of electoral system was barely on the table.¹² Yet, years later, after several elections had shown that STV did not encourage voters to cast ballots for candidates of groups other than their own, despite abundant opportunity to do so in six-member constituencies, the question began to be asked “whether an electoral system which maximises communal choice and ensures so little dependence on the other community for success fits the current needs in Northern Ireland.”¹³ Perhaps the electoral system should have been on the table at the outset.

I have not yet referred to time constraints, but these are often severe. There may be a deadline for a constitutional commission to issue its report or for elections to be held. In general, deadlines constrict options, and especially limit consideration of unfamiliar options, thus channeling decisions toward proposals with historical or cultural resonance or with support among external advisors who can certify the international respectability of particular choices currently in vogue. In short, the prevalence of deadlines and the crisis atmosphere in which constitutions are made both inhibit deliberation.

So does the fact that the staff is usually assembled for the task in a rushed fashion and ad hoc. Lines of authority are not always clear, and the ability of outside experts to connect with staff is subject to vagaries of personality and prior experience. The infrastructure that supports the constitution-makers often suffers from the same disabilities as the constitution-makers themselves do.

12 For the making of the Good Friday Agreement, see Donald L. Horowitz, “Explaining the Northern Ireland Agreement: The Sources of an Unlikely Constitutional Consensus” (2002) 32 *British J. of Political Science* 193. For STV, see *ibid.* at 212-13.

13 Sydney Elliott, “North vote sees over 80 percent of transfers stay within main parties” *Irish Times* (1 December 2003) 16.

IV. DIVERGENT VISIONS

Up to this point, what I have been saying is that constitution-making, like many other processes of public choice, is suffused with constraint, and that it is also vexed by some additional constraints that inhere in constitutional decision more than in some other processes. There may be — but need not be — a need to make constitutional decisions in times not merely of crisis but of turmoil. Relations among the actors may be permeated by distrust, particularly if the document is to be negotiated between an outgoing authoritarian or semi-democratic regime and pro-democracy insurgents, and even more if the two sides are ethnically differentiated. The process is by no means habitual; ground rules are unspecified; participants are inexperienced in the task at hand; and external expertise may be unreliable, biased, or difficult to screen. I have yet to discuss divergent constitutional visions.

A new constitution is often necessary because an authoritarian regime has been weakened or overthrown or because a protracted armed conflict has reached a stalemate or been terminated by a peace agreement. The fact of a decisive turn from formerly ascendant political forces does not necessarily mean there is a new consensus. On the contrary, a new balance of power may simply mean that open political dissensus has come to supplant a previous forced consensus or a military conflict. This dissensus is very likely to extend to constitutional fundamentals.

The constitution of Iraq is a perfect, if extreme, illustration.¹⁴ The regime of Saddam Hussein was supported almost exclusively by the Sunni minority. The Shia majority and the large Kurdish minority, both oppressed by Saddam, were understandably wary of central power and sought a constitution that would provide for a very weak central government. They produced, in the end, one of the loosest federations in the world. The central government has relatively few powers. All powers not explicitly conferred on the central government are to be held by provinces and, if provinces choose to amalgamate into regions, by regions. Regional powers are entrenched. No amendment may be enacted to reduce the powers of regions without their consent. The constitution is congenial to Kurds who wish to create a single Kurdish region in the north and to those Shia who wish to create a large Shia region in the south. It is deeply at odds with the preferences of Sunni, who are firmly attached to a single Iraq with a strong central government and an indissoluble attachment to the Arab world.

14 *Permanent Constitution of the Republic of Iraq*, 2005.

The process by which this constitution was produced deepened the chasm between Sunni and Kurdish-Shia views of the appropriate dispensation for Iraq.¹⁵ Drafted under a deadline, as many constitutions are, the Iraq constitution was also created under conditions that biased the deliberations against Sunni voices. In January 2005, there had been an election to the Transitional National Assembly (TNA), which appointed the Constitutional Committee. Unfortunately, the TNA had been elected under national list-system proportional representation. For this reason, when Sunni voters boycotted those elections, there were no territorial constituencies that in Sunni areas would inevitably have elected Sunni legislators even in the face of very low turnout resulting from the boycott. Sunni were therefore dramatically underrepresented in the TNA. The formation of a government consumed three months, and the creation of the drafting committee used another month, leaving only three months to produce the finished document. Because Sunni were not prominent in the TNA, the committee was disproportionately composed of Shia and Kurds.

Six months after the election, fifteen Sunni Arabs were added to the committee, but for the most part they did not affect the outcome, because Shia and Kurds met informally outside the committee to produce a constitution that reflected Kurdish and Shia preferences that were, as I have suggested, thoroughly at odds with Sunni constitutional ideals. Sunni protested the process and the product, but to no avail. The draft was approved in a referendum. Assurances were given that amendments would follow, in order to make the document more acceptable to Sunni, and provisions for an amendment period were written into the constitution that was ratified. But when the time came for amendments to be negotiated, Kurdish and Shia leaders made it clear that no significant redesign was contemplated.

The constitutional process in Iraq did not merely fail to bridge the gap among the groups and their views of the future; it exacerbated the differences greatly and helped fuel violence in Sunni areas. While the Iraqi case is a particularly egregious instance of an ethnic carve-up, it needs to be underscored that group differences about the future, informed by their respective understandings of the past, are common. As Iraq shows, a poorly conceived, rushed process can impair the ability of participants to see past such differences and find ways to avoid hardening them.

15 International Crisis Group, *Unmaking Iraq: A Constitutional Process Gone Awry*, Crisis Group Middle East Briefing No. 19 (Amman and Brussels: ICG, 26 September 2005).

If Iraq is a cautionary tale, what course does it counsel? One radical thought, not to be dismissed lightly, is that it is sometimes preferable to make no new constitution than to attempt to do so in conditions of deep dissensus. For Iraq, this possibility ought to have held considerable attraction, because the Transitional Administrative Law (TAL) had reaffirmed the Kurds' autonomy and provided the framework for democratic rule in the country, at least on an interim basis. The urgency of moving to a wholly new order was mitigated by the existence of the TAL. With an insurgency in progress in Sunni areas, it might have been better to do nothing to inflame Sunni opinion but to begin a quiet process of discussions among all the significant actors about the ultimate framework that might be appropriate for Iraq.

Of course, to commend such a possibility after the fact is hardly to assume that the relevant players, including the United States, which pressed Iraqis to meet the deadline in the TAL (rather than amend the TAL on this point), could have foreseen the consequences of their action. But the fact remains that they acted recklessly, risking civil war, in proceeding as they did, with Kurdish and Shia representatives pursuing nothing but parochial self-interest.

In an important article,¹⁶ Allison Stanger has challenged the connection between new constitutions and the consolidation of democracy. After 1989, she points out, Poland, Hungary, and Czechoslovakia did not make new constitutions the first order of business. In Poland, a new constitution was finally ratified in 1997. In Hungary, no new constitution was produced. And none was produced in Czechoslovakia before the division of that country was agreed upon in 1992. Yet, in all three cases, democracy was being practised. In former Yugoslavia, on the other hand, successor republics adopted constitutions, but they tended to be ethnically exclusive in their presuppositions and their provisions — “constitutional-nationalist,” in Robert Hayden’s terms¹⁷ — and their adoption made minorities disadvantaged by them think they might need to fight rather than accede to them. In Eastern Europe and the former Soviet Union as a whole, Stanger points out that there was no correlation between rapid constitution-making and attainment of stable democracy.

Stanger is writing in explicit opposition to American thinking about “constitutional moments,”¹⁸ in which, it is hypothesized, there is a chance for

16 Allison Stanger, “How Important are New Constitutions for Democratic Consolidation? Lessons from the Post-Communist States,” (2004) 11:3 *Democratization* 1 [Stanger].

17 Robert M. Hayden, *Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflicts* (Ann Arbor: University of Michigan Press, 1999).

18 Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992) at 3.

an early legal break with the past that opens the opportunity to found a new democratic order. If the moment passes, it may be impossible to recapture it, and it should be seized. For one thing, public-regarding behavior is rare; for another, those who create new constitutions will presumably act to protect what they have created. For both reasons, early action can create durable foundations.

What we have glimpsed in Iraq and could glimpse elsewhere is that there are times immediately after the overthrow of the authoritarians that should *not* be seized; that accommodation can take time to develop, as may habits of give-and-take among people more used to ordering and being ordered; and that abstaining for a time may be better than doing.

V. CONSTITUTIONAL COURSES

There may be constitutional moments, but they do not necessarily arrive on a timetable. Sometimes the period immediately following a major regime change is not optimal for new constitution-making. If so, temporary abstention needs to be contemplated, especially if there is a tolerable preexisting legal framework available.

When the moment arrives, there is no one course that is optimal either, particularly for severely divided societies. If majorities want majority rule, as they usually do, it is difficult to dislodge them from this position. Unfortunately, it often takes violence by minorities to move them. If risk-averse minorities want guarantees, a greater-than-expected tolerance for uncertain political outcomes will be required to induce them to abandon insistence on an elaborate set of guarantees that, if adopted, might provoke majority resentment and even an effort to overthrow such a regime of guarantees. There is historical experience of this kind in, for example, Angola in 1994 and Cyprus in 1963. In both, guarantees were overthrown, and a resumption of violence followed.¹⁹ In other cases, such as Rwanda in 1992 and Sudan in 2005, majorities have abrogated guarantees, but minorities were unable to resist forcibly.

It is worthwhile viewing proposed processes in the light of these incompatible demands, as well as of the other constraints highlighted earlier. One set of procedural prescriptions increasingly floated concerns the openness of the constitution-making process. The hallmark of an adequate process,

19 Alexander B. Downes, "The Problem with Negotiated Settlements to Ethnic Civil Wars" (2004) 13 *Security Studies* 203 at 246; and Thomas Ehrlich, *Cyprus, 1958-1967* (London: Oxford University Press, 1974) at 36-60.

on these premises, is one that is transparent and participatory. A democratic constitution cannot be written for a people but must be, in some active sense, written by the people. Participatory constitution-making implies an open process, a “people-driven” process that will produce a “people-owned constitution.”²⁰ On this view, public participation ought to be “initiated even before a constitutional text [is] drafted,”²¹ and participation is more authentic if it is “not simply structured on existing party lines.”²²

There is reason to doubt the wisdom of this prescribed process where dissensus prevails. In severely divided societies, where claims are often zero-sum and constitutional demands are incommensurable, a public conversation of this kind, especially before a draft is available for criticism, is unlikely to be fruitful. Moreover, constitutional arrangements for such a society are likely to be complex, and most citizens have few, if any, incentives to invest in acquiring the requisite information to deal with issues that confound experts in the field. If there is a belief in representative government, the constitution ought not to be exempt from it. Party politicians, who will have to operate the institutions that emerge from the process, ought to have a role in creating those institutions. It would not be good if they turned against the new institutions immediately after adoption. Furthermore, in a divided society, in which ethnic parties are regarded as guardians of group interests, pushing party politicians to one side is likely to increase insecurity, rather than decrease it.

Proponents of participation above all other virtues do not confront the trade-off between wide participation and transparency, on the one hand, and expertise, on the other. Some goals can only be achieved if experts are deployed to think clearly, bring comparative experience to bear, and draft carefully. These are not tasks best performed in the light of day, with large numbers of participants. Constitutions need to be subject to public deliberation and need to gain public approval, but that deliberation and approval, the latter by referendum and/or legislative action, are more likely to be informed — and less likely to be treated as a sham — if they are preceded by a design.

It is often said, too, that a *democratic* constitution should be a negotiated document. Yet there is also a trade-off between negotiation and coherence. Bargained outcomes have much to commend them — everyone gets something

20 Vivien Hart, *Democratic Constitution Making*, United States Institute of Peace Special Report No. 107 (Washington, D.C.: USIP, July 2003) at 7, quoting the Kenya Constitution Commission.

21 *Ibid.* at 9.

22 *Ibid.*

— but the parts may not fit together. In Fiji, for example, a new constitution provided an electoral system intended to produce a government of the broad moderate middle, but a provision was then added that allowed any party with a mere 10 percent of the seats to join the cabinet.²³ Under the conditions then prevailing, a 10-percent party was very likely to be an extremist party, and its presence in the cabinet would cause problems for the overall design.

Some societies need a strong, coherent set of institutions to deal with their problems. For such societies, an expert draft, possibly presented to a constitutional commission or produced by that commission and its staff and consultants, seems essential. Neither a wholly negotiated process nor a wholly public, participatory process is likely to produce an appropriate array of conflict-reducing institutions. It is often useful to place the matter of constitutional design in the first instance in the hands of a commission and implicitly to allow its draft a starting advantage.

In short, decision on the appropriate constitutional process ought to follow an assessment of particular needs. If the problem is simply the public acceptability of an agreement and there is indifference among the particular institutions chosen — after all, many countries can live with some standard version of parliamentary or presidential institutions²⁴ — then elected politicians or an elected constitutional assembly can work out the arrangements more or less in the open, and the draft can be ratified by the public in a referendum. The process can be open, public, and more or less transparent. This is a course especially recommended when the main problem of the transition is distrust, particularly distrust that the former authoritarians will somehow find a way to steal the process and work themselves back into power. Sunlight is an effective antiseptic for this sort of distrust, and just this sort of distrust prevailed in several Eastern European countries after 1989.

If, however, the problem is to craft a set of arrangements that will facilitate reconciliation in a scarred society and enable groups in conflict to share power in a country that desperately needs both conflict reduction and vigorous but scrupulously democratic government, then a heavy dose of expertise is called for. Expertise can be deployed in various ways, to be sure — a commission is not the only way — but it will need to be deployed in quiet, so that it can produce a consistent plan that has a fighting chance

23 See Yash P. Ghai, “The Implementation of the Fiji Islands Constitution” in A. H. Akram-Lodhi, ed., *Confronting Fiji Futures* (Canberra: Asia Pacific Press, 2000) 21.

24 A point also made by Stanger, *supra* note 16.

of creating institutions that will not produce zero-sum outcomes among the groups. Public input can be solicited and submissions sought, but the task is inherently, at this stage, a decidedly unpublic one. Once proposals emerge, there should then be plenty of time for public reaction, and inevitably there will be modification of the proposals after that.

There are, in other words, several options available for constitutional processes. They range from doing everything in the light of day, to providing space for experts to produce a draft quietly, to merely amending the existing constitution, to delaying major changes while consensus is being built where dissensus currently prevails, to doing nothing. Some countries, after all, can get along for long periods with constitutions that are less than optimal for their needs. Indeed, the usual provisions that make constitutional amendments very difficult are premised on the ability of states to manage with constitutional arrangements that are stale or imperfect.

Given all that I have said about the constraints that inhere in constitution-making and the possibility that a constitutional process can go wrong or can produce inapt arrangements, it seems clear that uniform prescriptions for the correct process are misguided. The best constitutional process is the one that flows from a sober understanding of the exact problems faced by the state contemplating a new constitution. Is the problem distrust that can be ameliorated, is it the existence of severe intergroup divisions and a fear of domination, is it attachment by a sector of the population to the old institutions and a resulting divergence in views of the future, or is it more than one of these? Once this question is answered, the appropriate process (or the current undesirability of any process) may be glimpsed. And once this question is answered, it may even be possible to see the general direction that constitutional forms should take. Process should follow problems, or else problems will surely follow the process.

