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Constitutionalism and Emerging Democracies

From the Editors

THE SENSE OF anticipation is palpable among delegates to the constitutional assembly. Dignitaries, average citizens, academics, religious scholars and community leaders—many elected by their respective constituencies to represent them—gathered for what is an historic occasion. Consensus is reached on the structure of government and a constitution guaranteeing, among other things, rights for all, freedom of religion, and an independent judiciary. Pen is put to paper, signatures are collected, and a simple document becomes a beacon of hope in a land once tyrannized. The setting is not Philadelphia 1788 or Warsaw 1791; this is Afghanistan 2003 as Pashtuns, Tajiks, Hazaras, Uzbeks, and others representing the breadth of Afghanistan's diverse society, convene a Loya Jirga to agree on a new constitution.

But even this watershed in constitutionalism is not the most recent. When members of the Iraqi Governing Council signed the Transitional Administrative Law, establishing a legal framework for Iraq's transition to a democratically elected sovereign government, their country rejoined the family of nations ruled by law. The interim constitution—unprecedented for Iraq—guarantees basic rights to all Iraqis—including women—and enshrines freedoms long treasured by the world's democracies.

We have attempted in this journal to present the reader with several perspectives on constitutionalism, key components of a successful constitution, and the experiences of various nations throughout history in crafting constitutions uniquely their own. Among our contributing authors are some of America's leading authorities on constitutional law. We are particularly honored to include remarks by a sitting justice of the United States Supreme Court. Because the U.S. Constitution has served as a source of inspiration for drafters of constitutions around the globe, we begin with an essay that explains why it has become what contributing author Albert Blaustein calls "America's most important export."

Associate Supreme Court Justice Sandra Day O'Connor, in remarks to the Arab Judicial Forum, elaborates on the importance of an independent judiciary to the strength of democratic rule and efforts in the Arab world to ensure such judicial independence. Constitutional scholars A.E. Dick Howard and Herman Schwartz bring their own experiences as advisers to drafters of constitutions the world over to their essays on the basic building blocks of constitutions and the influential role the U.S. Constitution continues to play. Scholar Vivien Hart relates the experience of South Africa and how its constitution building process became a unifying force in a country once sharply divided along racial lines. We end with a conversation with noted legal scholar Noah Feldman as he relates his personal experiences with newly established constitutional documents in Iraq and Afghanistan, including an assessment of the compatibility of Islam and constitutional democracy.

As democracy spreads throughout the world, future drafters will look to existing constitutions for guidance. They must keep in mind that there is no simple model and no one framework is necessarily entirely applicable to all countries. We invite readers to continue their exploration of this dynamic subject by visiting the links included in the resources section. We hope that this journal will provoke discussion among our readers on the nature of democracy and the role of constitutions within it.

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e:mail: ejdemos@state.gov

The U.S. Constitution

America's Most Important Export

by Albert P. Blaustein

America's Founding Fathers drafted the world's first written constitution more than 200 years ago. The legacy of that historical document is evident today in the constitutions of most of the world's democracies, and it continues to influence drafters of the very newest constitutions. Celebrating this important document, a distinguished constitutional scholar discusses how the Philadelphia model helped to change the world and how it continues to be a model for democratic governance.

THE U.S. CONSTITUTION is America's most important export. From its very inception, its influence has been felt throughout the world. And even where that influence has not resulted in democracy and freedom, it has still brought hope—in President Abraham Lincoln's words—of government of, by, and for the people.

The story of that influence is a tale worth telling. America's Founding Fathers[1] fashioned a constitution that was a unique breakthrough in the continuing struggle for human freedom. They believed in the principle of constitutional government, which they hoped might have relevance beyond America. Thomas Jefferson looked upon the Constitution as a standing monument and a permanent example for other peoples. 'It is impossible,' he wrote, 'not to [sense] that we are acting for all mankind.' President John Adams was convinced that American political ideas would profoundly affect other countries. Alexander Hamilton thought that it had been reserved to the American people to decide the question whether societies themselves are really capable of establishing good government.

Jan Matejko's The Constitution of May 3rd, 1791 *shows the new Polish constitution held aloft by King Stanislaw August Poniatowski. He is carried triumphantly from the Royal Castle, seen in the background and where it hangs today, to Warsaw's St. John's Cathedral.*

James Madison, president and contributor to the Federalist Papers, believed that posterity would be indebted to the Founding Fathers for their political achievement and for the sound governing principles provided for in the U.S. Constitution.

Thus it was the Founding Fathers who became the teachers of why and (more importantly) how constitutions should be written. Their principal students were the French. The Marquis de Lafayette, for example, admired Jefferson, as did other critics of the old regime in France. (There exists a draft of the 1789 French Declaration of the Rights of Man and Citizen—generally considered one of the most important human rights document ever drafted—with Jefferson's handwritten editing in the margins.) French scholars likewise clustered about Gouverneur Morris, a principal architect of the U.S. Constitution [who is credited with penning the preamble 'We the People of the United States, in order to form a more perfect Union...'] when he visited Paris.

But it was not only Frenchmen who praised the Founding Fathers. The Polish Constitution, adopted May 3, 1791, preceded the French document by four months. Any perusal of the Polish charter—starting with the preamble itself—confirms the study of the American model. In addition, there are records of American constitutional consultations with German, Austrian, Belgian, Dutch, Spanish, and Portuguese scholars and with leaders from the New World. One of the leaders of the Brazilian revolutionary movement, Mason Jose Joaquim da Maia, met with Jefferson in France for such discussions.

The Spread of Constitutionalism

Since that seventeenth day of September 1787, a one-document constitution has been deemed an essential characteristic of nationhood. Today, of the 192 independent nations of the world, all but a very few have such a constitution or are

committed to having one. Among the exceptions are the United Kingdom, New Zealand, and Israel—democratic nations with sophisticated constitutional jurisprudence but no one specific document that can be called a constitution. Committed to the principle of parliamentary supremacy, the constitutions of these nations consist of numerous legislative enactments specifically designated as 'basic laws' (in the case of Israel) or legal scholarship that has been classified as fundamental or organic.

American Constitutionalism Before 1787

Historians generally agree that the first constitution to include language creating a governing, political entity was the Fundamental Orders of Connecticut in 1639; it is known that the first constitution that used the word 'constitution' was Virginia's Constitution of 1776.

Immediately after the Declaration of Independence in 1776, the thirteen former British colonies began writing a new series of constitutions. Fifteen were published between 1776 and 1787, six of the most significant in 1776. These included the constitutions of Pennsylvania and Virginia. Both of these documents created interest abroad and were being translated into other languages—notably French—within weeks of their being made public. Other copies, whether in English, French, or in another language, were soon in the hands of scholars from Poland, Germany, Austria, Switzerland, and Spain, as well as from Mexico, Venezuela, Argentina, and Brazil.

Upon the signing of the alliance between France and the United States in 1778, these state constitutional texts, by then known as the *Code de la Nature,* were published in Paris. In 1783, the American minister in Paris, Benjamin Franklin, obtained from the French minister for foreign affairs official authorization for a Paris printing of *Constitutions des Treize Etats de l'Amerique.* In 1786, a year before the drafting of the American Constitution, French philosopher and mathematician, the Marquis de Condorcet, outlining his ideas for a French declaration of rights, authored a study of the role of American political ideas entitled *De l'influence de la Revolution d'Amerique sur l'opinion et la legislation de l'Europe.*

The American Precedent

It was the Philadelphia Constitution, however, that set the irreversible precedent for constitutionalism. At the time of its drafting and even before its ratification, a course on the U.S. Constitution was being taught by lawyer Jacques Vincent Delacroix at the Lycee de Paris, an institution of free higher education. The number of foreigners who attended that course is unknown. However, it is known that the course attracted a large following and that it was the subject of substantial articles in *Le Moniteur,* the most important newspaper in France. Paris was then the intellectual capital of Europe and the center for studies on revolutions and their aftermath.

Certainly, the Belgians were among the first to feel the impact of new constitutional ideas, as can be seen by looking at the Belgian revolution of 1789. The Belgian Democratic Party, which existed for a short time in 1790, looked to American state constitutions for examples of what it advocated.

The first influences of the American Constitution on national constitutions was felt in the 1791 documents of Poland and France. The Polish Constitution was short-lived. It disappeared in a series of partitions that, in 1795, ended the existence of Poland as a separate nation until after World War I.

This is not the case with the 1791 French Constitution. While it lasted only briefly and was replaced by the French constitutions of 1793 and 1795, its greatest resource was felt in Spain. The American-inspired French charter was used as the basis of the Cadiz Constitution of 1812, Spain's first constitution. This, in turn, formed the basis of the first Portuguese Constitution in 1822. These Iberian constitutions were known to Simon Bolivar and to other heroes of Latin American liberation and were also critical for the preparation of the constitutions of the new nations of the Americas.

As early as 1784, Francisco de Miranda was developing a 'project for the liberty and independence of the entire Spanish American continent' and sought the aid of leading North American constitutionalists in his quest. Failing to get sufficient support, he went to London and pursued a business career for more than two decades. He returned to Venezuela in 1810 to work with Bolivar to establish a Latin American government based on the U.S. Constitution. History tells us that Venezuela, Argentina, and Chile formed their first constitutions in 1811, one year before Spain's Cadiz Constitution. All were based, in part, on the Philadelphia model.

The American Constitution also affected the development of Latin American federalism. Venezuela and Argentina are federal states as are Mexico and Brazil, both of whose national charters were established in 1824.

The American Constitution also found admirers in Africa. Liberia, which had been settled by freed slaves from the United States, adopted a constitution in 1847, which was writ ten in major part by a professor from the Harvard Law School.

The U.S. precedent became an inspiration as well as a model for the European constitutions that followed the revolutions of 1848. In this year, the first important constitutional developments occurred in Austria and Italy, and new constitutions were enacted in France and Switzerland. It was also the year that the never-to-be implemented Frankfurt Constitution was drawn up. It was used in a modified from for later German constitutions, such as the one drafted for imperial Germany and the one that established the Weimar Republic in 1919.

American colonialism led to further constitutional development at the turn of the century. Cuba, Panama, and the Philippines were all to adopt American-style national charters. Such colonialism is also apparent in the pre-World War I constitution of Haiti, reputedly written by then Assistant Secretary of the Navy Franklin D. Roosevelt.

By far the most important constitution of the World War I period was that of Mexico, which was adopted in 1917. Still in existence, although frequently amended, this ranks as one of the most historic constitutions ever drafted. This was the first constitution to recognize economic and cultural as well as political rights. Its inner structure and much of its language is taken directly from the Philadelphia Constitution. Also between the world wars many Latin American nations rewrote their constitutions, and the Philadelphia model is apparent in all of them. The constitutions of Chile and Uruguay provide excellent examples.

With the end of World War II, American influence was dominant in the preparation of the new basic charters of West Germany and Japan. Less publicized, but equally significant, was the adherence to the Philadelphia model in India's 1949 Constitution. Copies of the U.S. Supreme Court reports are available to the

justices of the Supreme Court of India, where they are not only read but frequently cited.

The study of American constitutionalism after World War II led to a near-universal interest in the role of the U.S. Supreme Court in determining the constitutionality of legislation. This function was likewise performed by the Supreme Court of India and the Supreme Court of Australia as well as by other common-law countries. Constitutional review could not be exercised by the Latin American nations because their judicial structures were based on the civil law system. However, these nations wanted to include the process of judicial review. The solution was the establishment of constitutional courts. The first of these were in Germany and Italy, and they have since proliferated throughout the world. The Constitutional Court of Poland [established in the 1980s] was the first in the communist world. Brazil, which drafted a new constitution in 1988, reexamined its judicial system to determine whether it should place judicial review within the province of its supreme court or create a constitutional court.

The effect of the Philadelphia Constitution continues to be seen. Nigeria, the most populous country of Africa, has discarded the parliamentary system, which it inherited from Britain and which was incorporated into its Independence Constitution. In 1999, it adopted a new constitution embodying presidential government and ending years of military rule. American influence was likewise evident in the constitutions adopted by Canada and Honduras in 1982, El Salvador in 1983, Liberia in 1984, Guatemala in 1985, and the Philippines in 1987.

Understanding the American Influence

All this leads to the question: Why has the American Constitution been so influential? To begin with, it was the first constitution and thus the obvious precedent for all subsequent constitution-makers. Most constitution-writers are lawyers, and lawyers inevitably seek precedents. From the beginning, commentaries on the American Constitution were published—and studied and discussed by fellow lawyers throughout the world.

America's Founding Fathers believed in a constitutionally limited republic and they succeeded in constructing a regime that balanced order and liberty. This has led a large number of foreigners to our shores to study American-style government and to return home advocating selected features of it. In many instances, this has been made possible by scholarships provided by the American foundations and universities and by grants from the U.S. government. To this category must be added the foreigners who came here for other purposes and were likewise inspired by American constitutionalism. This started with France's Lafayette and Poland's Tadeusz Kosciuszko, both officers in George Washington's army who later became leaders in the struggles for freedom in their own countries.

Conversely, the influence of the U.S. Constitution has been carried abroad by Americans who have been called upon to serve as advisers in the writing of other constitutions. Americans have helped draft the Liberian, Mexican, German, Japanese, and Zimbabwean constitutions. American scholars also provided ideas for constitutional reform in the Philippines [and more recently in Central and Eastern Europe and the Middle East].

The principal reason for the influence of the Philadelphia Constitution abroad, however,

can be summed up in one word—success. America is the richest, freest, and most powerful country in the world, with the longest-lived constitution. The second oldest is Belgium's, from 1831, followed by Norway's, from 1841. There are only four other countries that have constitutions written before the twentieth century: Argentina in 1853, Luxembourg in 1868, Switzerland in 1878, and Columbia in 1886. Seven other constitutions were created before World War II.

The U.S. Constitution has withstood the test of time. U.S. constitutional research is a major project in at least a dozen countries, as its value is being analyzed with a view to the writing of new constitutions.

Albert P. Blaustein was professor of law at Rutgers (The State University of New Jersey) School of Law. He authored numerous scholarly works on the subject of constitutionalism including a six—volume work on the U.S. Constitution entitled Constitution of Dependencies and Special Sovereignties. *Blaustein helped draft more than 40 constitutions worldwide and visited many of those countries. In 1991, he helped to write the constitution for the Russian Republic. Professor Blaustein died in 1994.*

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1. Those individuals whose contributions to critical documents (Federalist Papers, Declaration of Independence, the Articles of Confederation, and the U.S. Constitution) resulted in the creation of a United States of America based on ideals of liberty and freedom.

Photograph, page 7: Maciej Bronarski photographer, courtesy of The Royal Castle in Warsaw.

The opinions expressed in this article are those of the author and do not necessarily reflect the views or policies of the U.S. government.

Building Blocks for a Constitution

by Herman Schwartz

Noted author and constitutional scholar Herman Schwartz examines the challenges facing drafters of the world's newest constitutions. Schwartz elaborates on key building blocks to be considered by drafters of constitutions such as government structure, human rights protection, and procedures for amendment.

THOSE WHO WRITE constitutions for emerging democracies face daunting challenges. First, they must write a document that enables the society to decide difficult and divisive questions peacefully, often under grave circumstances. At the same time they must establish effective protections for human rights, including the right of the minority to disagree.

Secondly, divisions and conflicts usually begin quickly and resolving these can create long-term problems. When the transformation is negotiated, as in much of the former Soviet bloc, the losers will try to hold on to as much power as they can. If the change involves the complete ouster of a regime, as in Iraq, then the winners will vie for power. The compromises resolving these disputes are often incorporated into the constitution, which can be troublesome in the long run. For example, compromises over slavery in the U.S. Constitution made it possible to get that Constitution adopted but were ultimately not good for the nation.

Moreover, a constitution is written at a specific point in time, usually when the society faces very difficult economic, social, and other problems. There is a temptation and often a necessity to deal with these problems quickly. But provisions designed to quickly deal with immediate problems may not be appropriate solutions for the long term.

Overhanging all documents written at a specific time and place is the fact that it is impossible to foretell the future—and the future will always be different from what is anticipated. Thus, drafters of constitutions must give future governments the flexibility to meet unpredictable and unforeseeable challenges.

One lesson from near-universal experience is that human rights must be effectively protected immediately. When an authoritarian regime is ousted, the society inevitably experiences a sense of liberation and a yearning for freedom. But that sense of excitement does not last very long. Experience in new democracies and old demonstrates that if human rights are not adequately protected initially, it will be difficult to do so later.

Preliminary Considerations

First, should the constitution be written by an ordinary legislative body or by a special constituent assembly? If the decision is to go with the former, incumbent legislators can write a constitution that keeps themselves in office. A special constituent assembly representing as many elements in society as possible is preferable, even though it is more cumbersome and expensive.

Another preliminary decision is about changing or amending the constitution after it is adopted. It should not be easy to do this. The document should reflect the deepest values of the society and the basic ground rules for the democratic process. These should be stable. On the other hand, since some of the provisions produced by the immediate pressures, conflicts, and expectations of the initial period may be ill-suited for the long term, making changes difficult may prevent future governments from dealing adequately with unforeseen problems.

For this reason, it would be wise to review the structural aspects of the constitution after a given period of time. One way is to provide for an expert commission at ten or twenty-year intervals to determine whether structural changes need to be made. This could be particularly useful after the first ten years, when at least some of the problems created by the constitution will become apparent.

This review should not, however, include a weakening of the human rights provisions even though there may be a temptation to do this. As the initial euphoria wears off and expected quick improvements to living standards are not felt, there is less concern for human rights. Leaders and even peoples may be tempted to see human rights as a luxury, secondary to matters such as economic stability, even though experience shows that human rights rarely impede an effective response to these challenges.

A related preliminary question is whether the constitution should be short or long. Many in the United States believe that because our short Constitution has lasted for more than 200 years, short constitutions are the best, even for nascent democracies. I do not share that view. U.S. constitutional law cannot be found within the texts of the thirty-four original and amending articles. It can only be found in the almost 540 volumes of decisions that a powerful and

solidly established U.S. Supreme Court has issued over some 215 years. These decisions have established our most fundamental constitutional principles and rights, few of which can be discerned from the bare text of the U.S. Constitution. Democracies that are new, however, do not have the luxury of either the 215 years to develop these rights and few, if any, start out with a powerful judiciary. They can and should build on American and other experience, and write these fundamental rights and principles into their constitutions without having to wait for the courts.

This does not of course mean that the constitution should be very detailed. Constitutions that include too much can block the necessary flexibility. Deciding what should go into a constitution, what should be left to the legislature, and what should not be regulated at all, is one of the most basic and difficult initial questions.

The Building Blocks

So-called horizontal and vertical structural issues are the most difficult issues for they involve the distribution of power. They are almost always resolved amid political controversy, with short-term goals, particularly how to get and keep power, often dominant.

An initial issue is whether to have a presidential or a parliamentary system. Although each has many varieties, they fall into two groups. The presidential system, of which the American version is the best known, usually involves the election of a chief executive by the people either directly or, as in the United States indirectly, for a set period of years. In the American model, the president, who is both head of state and head of the government, sets both domestic and foreign policy and picks ministers to implement these policies. Ministers are often subject to confirmation by the legislature, but ultimately subject to direction and control by the president.

The legislature is independently elected, also for a set period of years. Neither the president nor the legislature is normally subject to dismissal by the other. This produces a system of dual legitimacy and clearly separated powers.

The presidential system offers stability and, in the hands of a strong president, can provide vigorous leadership. The stability can, however, turn into rigidity, for an unpopular or ineffective president cannot be easily removed until his or her term expires. Moreover, legislative stalemate and gridlock may result if the legislature is controlled by a different political party. If this division continues, the government may not be able to function efficiently for many years.

In a parliamentary system, the parliament is the only source of electoral legitimacy. There is no separation of powers between the legislature and the executive—the judiciary of course is independent but it stands outside the legislative sphere—for the executive branch, usually called the government and headed by a prime minister, is chosen by the party that has a majority in the parliament or from a coalition reflecting a majority of the legislators. The head of state is a president with little power, and is usually chosen by the parliament. The prime minister and the government are accountable to the parliament and can be dismissed by it. Elections can be called at any time, providing flexibility. Since there is no formal separation of powers between legislative and executive, there is little chance of an impasse since a government or prime minister who loses the confidence of the parliament can be dismissed by it.

The parliamentary system can, however, produce a frequent turnover of governments and great instability. It can also produce sudden drastic changes of policy when an opposition gains a majority, which can create a different kind of instability.

There is no obvious answer to which system is better. The choice will often depend on history, the needs of the moment, and other factors. All the countries of the former Soviet bloc outside the Soviet Union, as well as the Baltic nations, adopted parliamentary regimes, in large part because they wanted to become a part of Western Europe which is almost entirely parliamentary. All the former non-Baltic components of the Soviet Union however, have adopted presidential systems.

It must also be decided whether to have a unicameral (single house) or a bicameral (upper and lower house) legislature. If the state is to be a federal state with relatively autonomous components, such as the United States or Germany, it may be desirable to have a second (usually upper house such as the U.S. Senate) legislative chamber that represents the interests of the components. The second chamber is sometimes limited to certain decisions such as those affecting taxes and judicial or other appointments, or to matters directly affecting the components themselves.

Whether to have a second chamber raises an additional question: how centralized is the state to be? How much authority and autonomy should be allocated to lower levels of government like regions or national units? How much independent authority should be allocated to cities, towns, and villages? The range of possibilities is wide, from highly autonomous units to total central control. There is good reason to allow as much autonomy to regional and local units as they can efficiently manage since a central administration is often unfamiliar with local conditions and needs. Also, participation in local government offers people a chance to participate directly in making many of the key decisions that affect their lives, and can be an important part of democratic self-governance.

The Judiciary

History has established the need for an independent judiciary that can keep the other branches from transgressing constitutional limits, and particularly where basic human rights are concerned. This can be either the regular judicial system, as in the United States, or a special tribunal, a constitutional court, limited to deciding constitutional questions and a few other matters, as in Germany. In the former case, the ultimate authority is a supreme court composed of regular court judges who are appointed for life and normally handle appeals from lower courts; they decide constitutional questions only if necessary to settle the dispute at issue. Most constitutional court members, however, are law professors and others not drawn from the regular court system and usually serve one, and occasionally more, 8–12 year terms. They decide constitutional questions if requested by high government officials, courts and in many countries, by private citizens who claim that their rights have been violated. Most emerging democracies have chosen to create constitutional courts, partly because judicial review by ordinary judges is not in their tradition, and partly because they mistrust the existing judiciary.

Whatever system is chosen, the constitution must explicitly establish the courts' authority to annul laws and other norms and acts inconsistent with the constitution. If there is a

special constitutional court, it must not be burdened with extraneous responsibilities. Much of its work will be controversial, for one of its major responsibilities, particularly in the early years, is to establish the constitutional boundaries among governing authorities. Also, it will sometimes have to rule against the government in human rights cases. In all these instances, it will often be severely criticized by the losers. The constitution should not multiply the occasions for such attacks by giving the constitutional tribunals non-judicial or non-constitutional tasks, for at least in their early years they will lack the prestige and public support on which they depend for effectiveness.

Bolstering an independent judiciary is another reason why a constitution should not be too brief. The more specific a constitution, the easier it will be for the courts to point to relevant language in the document to support their more controversial decisions, and the less they will be seen as having acted according to the judges' own subjective beliefs.

Because the courts' decisions will often be politically sensitive, their independence and impartiality must be constitutionally guaranteed. The judiciary must be an independent branch of government and not be under the Ministry of Justice. The judiciary should control its financial and administrative affairs, free from executive involvement, though necessarily subject to the legislature's ultimate control over the budget.

The constitution must also provide that the lower court judges apply the constitution in their decision-making. In many of the new democracies, all too often those judges ignore constitutional issues when making decisions.

Protection of Human Rights

It is now established that the constitution must protect human rights and that the courts, particularly the special constitutional tribunals, should play a major role in providing that protection. The U.S. Supreme Court pioneered this development, but tribunals throughout the world now recognize this responsibility. Where international human rights agreements ratified by their governments are at issue, judges have considered themselves bound to observe these treaties. They have often looked to the courts of other nations for guidance on common problems. The result has been the creation of an international constitutional law of human rights.

Every new constitution now contains a statement of basic human rights. This is not enough. The constitution must create institutions to make those rights enforceable. The constitution must specifically provide that persons who claim that their rights have been violated have ready access to a court, and that if a violation has occurred, the victim can obtain an adequate remedy for that violation. Many nations have found that an ombudsman (often an investigator or mediator of complaints) is useful in this regard. A special office in the state prosecutor's office can also be helpful.

Of vital importance to democracy is that the citizenry be able to learn whether the government is doing its job properly and acting in the best interests of the people. The constitution should contain provisions allowing citizens inexpensive and prompt access to all materials in government files, except those the exposure of which can be shown to endanger national security, personal privacy, law enforcement, or some other vital national interest. Leaving to the legislature the matter of whether to adopt a

measure like this is unwise, for many governments resist such measures or try to weaken them substantially. Few public officials are eager to expose their activities to public scrutiny.

Adopting the Constitution

The final question is how should the constitution be adopted? By the special constituent assembly discussed earlier? By the regular parliament, as in many European countries? By the general public? Should the public's involvement take place before or after the constitution is drafted? If the latter, how should the public's participation be obtained? These and other questions have been answered in different ways, and though many political scientists believe that the approval of a constitution should be by the people, that has not been the universal approach.

Writing a constitution is an experiment, the results of which will always be significantly different from what was intended and anticipated. Moreover, the success of a constitution is usually the result of external factors—the economy, the social forces at work within the society, the nation's foreign relations, natural disasters, and many other factors over which constitutional drafters have no control.

Despite these difficulties, new constitutions for emerging democracies can make a difference. They offer a rare opportunity to create a society in which human beings can live in peace and freedom. History does not offer a nation many such moments, and when they occur, the challenges must be met, for the nation's future is at stake.

Herman Schwartz is a professor of law at American University, Washington College of Law in Washington, D.C., where he specializes in constitutional law, civil rights, and antitrust and utility regulation. He was a member of the U.S. Delegation to the 50th and 51st Sessions of the U.N. Human Rights Commission, in 1994 and 1995. He is the author of numerous scholarly works including the book The Struggle for Constitutional Justice in Post-Communist Europe, *(University of Chicago Press, 2000).*

The opinions expressed in this article are those of the author and do not necessarily reflect the views or policies of the U.S. government.

Toward Constitutional Democracy Around the World

An American Perspective

by A. E. Dick Howard

Professor of law and public affairs A.E. Dick Howard delivered remarks on "Constitutionalism, Human Rights, and the Rule of Law in Iraq" before a joint hearing of the U.S. Senate committees on the judiciary and foreign relations on June 25, 2003. In his testimony, Professor Howard examines the complexities of developing constitutional governance in newly emerging democracies and the influence America's constitution has had. As the people of Iraq move toward self-rule, questions of how to institutionalize the principles of democracy enshrined in a written constitution are paramount.

IN RECENT YEARS I have had the privilege of sitting with constitution makers in countries seeking to lay the foundations of constitutional liberal democracy. Some years earlier, I gained experience in the art of constitution making when I was involved in the drafting of Virginia's present state constitution. But no experience has been so instructive as watching constitutions take shape in other lands and cultures.

This experience in comparative constitutionalism has drawn me to ask questions about the extent to which one country can assist in, or make judgments about, another country's constitutional journey. How well do constitutional ideas travel, especially across the boundaries of different cultures or legal systems? Are there universal values by which the relative success of a constitutional system may be measured? Or, as some people argue, must constitutions ultimately be grounded in a country's culture, history, traditions, and circumstances? For Americans, there is the specific question: what

relevance does the American constitutional experience have for other countries?

The Experience of Central and Eastern Europe

To sharpen these questions, consider the experience of the countries of Central and Eastern Europe. After the collapse of communism, each of those countries set out to write new constitutions and to design institutions thought to promote constitutional liberal democracy. Drafters in those countries had several sources on which they could draw in devising new constitutions.

In some cases they could look back to their own experience. For example, Poles recall the traditions of constitutionalism associated with the memorable Constitution of May 3, 1791. Hungarians have a strong tradition of the rule of law, having its roots as early as the "Golden Bull"[1] of 1222. But such traditions are often fragmentary and remote. Few countries in Central and Eastern Europe had any extended experience with constitutionalism, democracy, or the rule of law before 1989 (Czechoslovakia's vibrant democracy between the world wars was a notable exception).

Countries in Central and Eastern Europe have looked to the experience of Western Europe. Western Europe is the seat of much of the core of modern constitutional democracy, such as the teachings of the Enlightenment (an 18th century European movement based on the primacy of human reason), and also the sources of many of our basic constitutional principles (such as the separation of powers). Moreover, constitutionalism, democracy, and the rule of law have taken hold in manifest ways in Western Europe since World War II. Germany, rising from the ashes of the war, has become an admirable example of constitutional democracy. Spain, moving beyond the legacy of the dictator General Franco, has become in every respect a modern European state. With these and other examples to study, drafters in Central and Eastern Europe have fashioned constitutional systems which in many obvious ways are modeled upon Western Europe. For example, Germany's Constitutional Court has proved the inspiration for the creation of constitutional courts throughout Central and Eastern Europe.

International norms and documents are an important source for constitution-makers in post-communist Europe, just as they are in other parts of the world. This is especially true in giving shape and protection to human rights. Thus drafters look to such international documents as United Nations conventions and to regional arrangements such as the European Convention on Human Rights and the Organization for Cooperation and Security in Europe's Helsinki and Copenhagen documents. Also, it is common for post-communist constitutions to state that international law and agreements shall be domestic law within a country.

One would suppose that constitution-makers in Central and Eastern Europe would study the experience of their closest neighbors in the region. This seems especially helpful when these countries have shared many of the problems of the post-communist world, such as the destruction of civil society during the communist era, the stultifying effects of command economies, and the cynicism about public life which was spawned by those years. It is my impression, however, that drafters in the region have not cared much to study their nearest neighbors' experiences. This may partly be a consequence of historic enmities in the region. But it may also underscore the powerful pull of western models, especially in light of the pervasive wish of countries in Central and Eastern

Europe to "rejoin" the family of Europe, in particular, to become members of the European Union.

Has the post-communist world looked to the American experience and to American ideas and models? A superficial look at new constitutions in the region might suggest that American influence has been slight. Throughout Central and Eastern Europe, one sees, for example, parliamentary systems rather than an American-style congressional system, presidential systems that look more to Western Europe (such as France) rather than to the United States, and constitutional courts resembling that of Germany rather than an American-style Supreme Court. The question of American influence, whether in post-communist Europe or in other countries (such as Iraq), requires, however, a deeper enquiry than this superficial survey might suggest.

The Influence of American Constitutionalism: A Historical Perspective

The American revolutionary period was a time of remarkable innovation and accomplishment. Aware of their special place in history, America's founders shaped such ideas as federalism, separation of powers, judicial review, and other concepts which have proved to be among the core principles of modern constitutionalism, not only in the United States, but in many other countries as well. American society differed in important ways from that of Europe; there was, for example, no monarchy and no legally entrenched social order. Even so, Europeans followed with fascination the evolution of American constitutionalism from the Revolutionary War, through the making of the Constitution, and beyond.

For two centuries and more, there has been intense traffic in constitutional ideas between America and other lands. Highlights of those exchanges include the following.

The founding era in France and America. The French Revolution, in 1789, brought close French attention to American ideas. American statesman Benjamin Franklin, immensely popular in Paris, undertook to spread news of what was happening in America, as did his successor, (future President) Thomas Jefferson. The Virginia Declaration of Rights (1776) influenced the drafting of France's Declaration of Rights of Man and the Citizen (1789). When the French National Assembly debated France's first constitution, moderate and radical factions invoked examples drawn from the experience with American state constitutions, especially Massachusetts and Pennsylvania.

Liberalism in the nineteenth century. In the early decades of the nineteenth century, liberal reformers in Europe and in South America invoked the United States as proof that liberal democracy could survive and flourish. When the revolutions of 1848 broke out in Europe, conventions meeting in France and Germany frequently dissected American institutions in deciding what a liberal constitution might look like in Europe. By this time, French philosopher and historian Alexis de Tocqueville's *Democracy in America* had heightened interest in the American experience, especially federalism and judicial review. Germany's 1849 Paulskirche Constitution, drafted in Frankfurt, was not in fact implemented, but its principles, building in part on American ideas (e.g., federalism and constitutional review), reappeared in Germany's Basic Law of 1949. In South America, the age of Simon Bolivar brought constitutions which were often modeled heavily on the United States Constitution.

Political evangelism in the early twentieth century. The most famous effort to export American ideas in the early 20th century was, of course, President Woodrow Wilson's aim, with the allied victory in World War I, to "make the world safe for democracy." Wilson did not expect other countries to adopt an American-style constitution, but he did emphasize self-determination, free elections, the rule of law, individual rights, and an independent judiciary. The most successful democracy to rise from the ashes of World War I was Czechoslovakia, whose leading founder, Thomas Masaryk, had spent part of the war in the United States, working hard to influence American policy, by reminding American audiences of their own Declaration of Independence.

Japan and Germany after World War II. After the Japanese surrender in 1945, General Douglas MacArthur moved promptly to secure the drafting of a new constitution. Concerned that the Japanese elite, left to their own devices, would make little substantial change from the status quo, MacArthur instructed his military government to draft a constitution, which they did in a matter of days.

By the time drafting got underway on what became Germany's Basic Law of 1949, the Cold War was beginning to dominate American foreign policy. The occupying allied powers had a say, of course, in shaping German post-war policy. But, with the Americans and their allies seeing the Soviet Union as the greater threat, the Germans had a freer hand in the Basic Law's drafting. There are important ways in which the Basic Law has principles familiar to Americans, such as federalism and judicial review. But the 1949 document owes much to Germany's own constitutional tradition, including the Paulskirche Constitution.

Waves of democratization in the latter decades of the twentieth century. The spread of constitutionalism, democracy, and the rule of law came in waves in the closing decades of the twentieth century. The 1970s saw autocratic governments yield to democracy in the Mediterranean countries of Greece, Portugal, and Spain. Spain's 1978 Constitution is especially important as a model for other post-authoritarian countries. Attention shifted to South America in the 1980s, notably to Argentina and Chile. The great year was 1989, the year the Berlin Wall came down and communism collapsed all over Central and Eastern Europe. The shock waves also hit South Africa, where the apartheid regime fell, and a new constitution came into effect in 1997.

American assistance to constitution making and democratization in such places as post-communist countries has been undertaken both by public and private bodies. Typically the aid has taken the form of technical assistance, such as helping parliaments to update their processes, nurturing an independent judiciary, and assisting in the drafting of new constitutions and laws. An especially effective program is the American Bar Association's Central European and Eurasian Law Initiative, which has sent hundreds of legal experts to work in scores of countries.

The Place and Relevance of the American Constitutional Experience

Constitutionalism must be understood as an expression of culture. Few would argue with this proposal if it is advanced as a caveat, namely, that one should always take culture into account in thinking about constitutions and constitutionalism. But some observers take the

Members of the Iraqi Governing Council look on as Hachim al-Hasani, the representative of member Mushin Abdul Hamid, signs Iraq's new interim constitution in Baghdad, Monday, March 8, 2004.

argument further, contending that there are no "universal" elements of constitutionalism. For example, by this view, community or group rights could be valued above individual rights.

American constitutionalism was the result of Enlightenment assumptions, steeped in British constitutionalism, and shaped in the historical settings of America. Some argue, therefore, that the teachings of American constitutionalism cannot be exported to other cultures. Such arguments often cite the failure of past Latin American constitutions based on the U.S. model and more recent problems in places such as the Philippines.

Even those who think the American experience is relevant and useful find limits in the United States Constitution as a model for foreign drafters. The document was written in the 18th century, reflects the insights of that era, and has required formal amendment (notably the post-Civil War amendments) and extensive judicial interpretation. Also, the United States Constitution is, in a sense, an incomplete document, in the sense that its framers assumed the existence and function of the states and therefore of state constitutions (documents which in many ways are rather more like constitutions in other countries).

All of these observations ought to be taken into account, especially before assuming that what has worked well in America must surely work for other peoples as well. But the problems of comparative constitutionalism ought not to be turned into categorical barriers. The usefulness of the American experience does not lie in the formal text of the United States Constitution. It is to be found in the general principles which are reflected in American constitutionalism and, further, in the practical experience of making constitutional democracy work.

Factors Bearing on the Prospects for Constitutional Liberal Democracy

It is not enough that a society be democratic. It must also be liberal and constitutional. Democracy seeks to assure that government is based upon the consent of the governed and is accountable to the people. But democracies should also be liberal, that is, committed to individual rights and freedoms, to the principles espoused by English philosopher John Locke that the state depends on the individual, not the other way around. And democracies must also be constitutional, that is, there must be means to assure the enforcement of constitutional norms, even when that means negating a majoritarian judgment. The following factors are critical to the success of constitutional liberal democracy.

A country should have sufficient military strength, as well as social and economic stability, to counter foreign aggression and to guard against internal subversion or unrest. Strength need not come, of course, solely from its own resources, a country may properly look to its allies for assistance.

A vibrant constitutional culture often goes hand in hand with a healthy economy. I do not contend that, because countries are rich, they will necessarily be constitutional democracies. But it does seem fair to say that poor economic conditions often work to undermine any hope for constitutional democracy.

There should be a political culture—I would call it a constitutional culture—that encourages the values of constitutionalism, liberalism, democracy, and the rule of law. This implies a high level of literacy. But it also implies circumstances in which citizens have practiced the norms of cooperation and tolerance associated with the rising and falling fortunes of social and political causes, candidates, and parties. It means that those who lose an election turn the reigns of power over to the winners. It means that those who find that a victory in the legislative process is overturned on constitutional grounds by a court accept the principle of constitutional limits on government.

An open society, including free and responsible press and media, goes hand in hand with constitutionalism and democracy. There should be the means for open and effective communication among the people and between them and their government.

Civil society should flourish. Private organizations—political parties, trade unions, interest groups, clubs, etc.—create an important buffer between the individual and the state. Such organizations offer a place of refuge for those who think that the politics of the moment are not in their favor. They offer training grounds for the qualities that make for effective citizenship and make possible the kind of collective voice and action that precludes the state's monopoly of power.

States should be based on the civic, rather than ethnic or national, principle. That is, all citizens should have equal standing in the society. There should not be "insiders" and "outsiders." If the state is not largely homogeneous in terms of religion, language, ethnicity, or culture, then there needs to be a widely felt commitment to the rights of minority groups. To make constitutional liberal democracy work, the people must have a level of mutual trust, and ability to cooperate, rather than fragmenting into camps of hate and hostility.

Ultimately, history, culture, and circumstance will tell us much about the prospects for

constitutionalism, democracy, and the rule of law in any country. Those who hope to see these values prosper in newly established democracies must understand those countries, their peoples, histories, and cultures. An example is the argument over the extent to which Islam is, or is not, ultimately compatible with constitutional liberal democracy in a country such as Iraq. Iraq's own history, for example, raises the question whether the parliamentary experience of the Hashemite rule in the years before 1958 has any useful legacy, or whether the middle class has been sturdy enough to survive the years of Saddam's repressions. Experts on Iraq will help inform these judgments. But those who would shape events in Iraq should also consult the lessons to be learned from transitions from totalitarian or authoritarian regimes elsewhere. The road to constitutionalism, democracy, and the rule of law takes one through many lands.

A. E. Dick Howard is White Burkett Miller Professor of Law and Public Affairs and Roy L. and Rosamond Woodruff Morgan Research Professor of Law at the University of Virginia. He is widely acknowledged as an expert in the fields of constitutional law, comparative constitutionalism, and the U.S. Supreme Court. Before coming to Virginia, Professor Howard served for two years as law clerk to U.S. Supreme Court Justice Hugo L. Black. Howard has briefed and argued cases before state and federal courts, including the Supreme Court of the United States. Often consulted by constitutional draftsmen in other U.S. states and abroad, Professor Howard has compared notes with revisors at work on new constitutions in such places as Brazil, the Philippines, Hungary, Poland, and South Africa.

Note:

1. Refers to a charter granted by King Andrew II of Hungary in 1222, which stated the basic rights and privileges of the Hungarian nobility and clergymen and the limits of the monarch's powers.

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Photograph page 22: AP/WWP, Brennan Linsley

The Importance of Judicial Independence

Remarks by Sandra Day O'Connor
Associate Justice, Supreme Court of the United States
Before the Arab Judicial Forum, Manama, Bahrain
September 15, 2003

ALEXANDER HAMILTON, one of the Framers of the United States Constitution, wrote in *The Federalist* No. 78 to defend the role of the judiciary in the constitutional structure. He emphasized that "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'… [L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." Hamilton's insight transcends the differences between nations' judicial systems. For only with independence can the reality and the appearance of zealous adherence to the Rule of Law be guaranteed to the people. As former U. S. President Woodrow Wilson wrote, government "keeps its promises, or does not keep them, in its courts. For the individual, therefore,…the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts." Let us keep in mind the importance of independence to the effective functioning of the judicial branch.

The principle that an independent judiciary is essential to the proper administration of justice is deeply embedded in Arab legal institutions. Virtually every Arab constitution guarantees judicial independence. For example, the Constitution of the Kingdom of Bahrain provides, in article 104, that "The honor of the judiciary, and the probity and impartiality of judges, is the basis of government and the guarantee of rights and freedoms. No authority shall prevail over the judgment of a judge, and under no circumstances may the course of justice be interfered with. The law guarantees the independence of the judiciary…." Article 65 of the Egyptian Constitution provides: "the independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties." Jordan's Constitution, in article 97, proclaims that "Judges are independent, and in the

exercise of their judicial functions they are subject to no authority other than that of the law."

We see the same fine notions embodied in the six Bangalore Principles of Judicial Conduct, developed under the auspices of the United Nations to further the prospects of strengthening judicial integrity. The very first principle reads: "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects." The Cairo Declaration on Judicial Independence, formulated in the Second Arab Justice Conference in February 2003, "agree[d] that an independent judiciary is the main pillar supporting civil liberties, human rights, comprehensive development processes, reforms in trade and investment regimes, regional and international economic cooperation, and the building of democratic institutions."

This principle also undergirds the place of the judiciary in the United States. The Founders of the United States recognized that it is essential to the effective functioning of the judiciary that it not be subject to domination by other parts of the government. To accomplish this goal, the United States Constitution established an independent federal judiciary by separating the law-making function of the legislative branch from the law-applying role of the judicial branch. This separation of the legislative and judicial powers has proven essential in maintaining the Rule of Law. When the roles of lawmaker and judge are played by different state actors, the danger of government arbitrariness is greatly diminished. When the power to make laws is separated from the power to interpret and apply them, the very foundation of the Rule of Law—that controversies are adjudicated on the basis of previously established rules—is strengthened.

An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent, its sphere of authority protected from the influence, overt or insidious, of other government actors. In the words of the Bangalore principles, judicial independence has both "individual and institutional aspects."

Addressing first the independence of individual judges, two avenues for securing that independence reveal themselves: First, judges must be protected from the threat of reprisals, so that fear does not direct their decision-making. Second, the method by which judges are selected, and the ethical principles imposed upon them, must be constructed so as to minimize the risk of corruption and outside influence.

In the United States, protection from reprisals is achieved primarily by keeping the positions and salaries of judges beyond the reach of external forces. The U.S. Constitution provides that federal judges hold office "during good behavior." This is understood to mean for life, absent the most serious misconduct. The Constitution also assures that the compensation of federal judges may not be reduced while they are in office. Together, these provisions ensure that judges will not be afraid to enforce the law as they see it. Security in pay and position frees judges to exercise their best legal judgment in applying the law fairly and impartially to the parties before them. The Kingdom of Bahrain has taken a similar approach to ensuring that the members of the new Constitutional Court will be secure in their positions, by providing in Article 106 of the Constitution that the Court's

members "are not liable to dismissal" during the period of their service.

Steps must also be taken to ensure that judges exercise their powers impartially and not according to any personal interest or outside influence. Judges must not be influenced by bias toward or against particular litigants, nor by having a personal stake in the outcome of a particular case. Judges will never win the respect and trust of the citizens if they succumb to corrupting influences. Whenever a judge makes a decision for personal gain, or to curry favor, or to indulge a personal preference, that act denigrates the rule of law. The selection of judges and the ethical principles guiding their conduct must be managed with these concerns at the fore.

Selection of judges according to the candidates' merit is, naturally, key to ensuring that a judge will act impartially. Considerations other than merit motivating a political actor to appoint a judge (or voters to elect a judge) are likely to be the very considerations that will prevent a judge from deciding cases fairly and without bias. Recognizing that these interests are served by drawing from the largest possible pool of meritorious candidates, the Beirut Declaration of the First Arab Conference on Justice recommends that "[t]he election of judges shall be free of discrimination on basis of race, color, sex, faith, language, national origin, social status, birth, property, political belonging, or any other consideration. Particularly when electing judges, the principle of equal opportunity must be followed to guarantee that all applicants for a judicial position are objectively assessed." In addition, the Declaration recommends that "[n]o discrimination is permitted between men and women with respect to assuming the judicial responsibility." Heeding these recommendations will serve not only the need to choose each candidate on merit, but will temper any institutional bias that might arise if the judiciary were entirely homogenous.

Adherence to the principles of judicial independence is not without difficulties. A particularly troubling issue is the tension that arises, once a judge is appointed, between independence from political pressure and independence from the taint of personal interest. Protection from influence exerted by other branches of government, and even by other judicial bodies, such as through life tenure and salary protection, entails to a large degree protection from discipline. Certainly, if a judge fails to adhere to the most fundamental requirements of independence—by taking bribes, for example—removal will be warranted. But short of such acts, discipline is difficult.

In the United States, maintaining a fair and independent judiciary has been accomplished with remarkable success through self-administered ethical norms. In the words of former Chief Justice Harlan Stone, "the only check upon our own exercise of power is our own self restraint." Every U.S. state and the federal judiciary has a code of conduct that promotes adherence to the highest ethical norms. The very first canon of the Code of Conduct for federal judges admonishes judges to "uphold the integrity and independence of the judiciary." As the Code of Conduct explains, "[a]n independent and honorable judiciary is indispensable to justice in our society."

In addition to placing tangible restrictions on judges' conduct, such as by prohibiting judges from deciding a case in which he or she has a personal interest, the Code of Conduct recognizes the importance of perceptions of the judiciary. A perception of corruption, bias, or

other unethical traits can be almost as harmful to society's confidence in its legal system and its respect for the rule of law as the reality of those traits. Judges must not only avoid impropriety, but also the appearance of impropriety, if public confidence in the judiciary is to be maintained. Thus, the Code of Conduct for federal judges provides that judges should refrain from conduct that would create a perception that the judge's ability to carry out his or her judicial responsibilities with integrity, impartiality, and competence is impaired. By insisting that judges establish, maintain and enforce the highest standards of conduct, judicial codes of ethics are designed to ensure impartiality and that every case receives a fair hearing.

The Cairo Declaration urged governments in the Arab region to "[a]dopt a professional code of ethics consistent with the noble mission of the judiciary." A simple and attractive way to do so is to adopt the Bangalore Principles, which are a well-considered set of ethical norms. They are organized around six core values: independence, impartiality, integrity, propriety, equality, and competence. Concrete and detailed instructions give practical content to each of the values. I believe that the Principles, where adopted, will play as effective a role as the various Codes of Conduct have done in the United States.

I have so far been discussing mechanisms to ensure that individual judges will be able to perform their work free from outside influence. But an independent judiciary also requires protection from more systemic influence from other parts of government. A fundamental aspect of this institutional independence is ensuring that the judiciary receives adequate funding. Just as salary protection is necessary to individual judges' independence, overall financing issues can influence the work of the judiciary as a whole. The Beirut Declaration recommends that "[t]he state shall guarantee an independent budget for the judiciary, including all its branches and institutions. This budget shall be included as one item into the state budget, and shall be determined upon the advice of the higher judicial councils within the judicial bodies." The Cairo Declaration urged governments to "guarantee the financial independence of judiciaries." Ensuring adequate and unconditional financing, in accordance with these Declarations' recommendations, is a crucial step in insulating the judiciary from improper influence.

A more complicated issue is that of the interplay between executive officials and the judiciary. I mentioned earlier the tension that exists between independence from other government actors on the one hand and, on the other, ensuring that judges do not compromise their own independence by succumbing to personal bias or corrupting influences. In the United States, we are more solicitous of the former concern, and leave the latter mostly up to the judiciary's self-regulating ethical principles. Different circumstances might of course require that the balance between the two be struck elsewhere. Care must always be taken to ensure, however, that the independence of the judiciary not be compromised by acts taken under the guise of disciplining wayward judges.

Judicial independence is not an end in itself, but a means to an end. It is the kernel of the rule of law, giving the citizenry confidence that the laws will be fairly and equally applied. Nowhere is this interest more keenly exposed than in the judicial protection of human rights. Judicial independence allows judges to make unpopular decisions. Federal judges in the

United States have at times been called upon to stand firm against the will of the majority. For instance, the 1954 Supreme Court decision in Brown v. Board of Education, which declared that separate educational facilities for children of different races are inherently unequal, provoked a firestorm of criticism in much of the country. The decision, however, was a crucial moment in the recognition of civil and political rights in the United States.

Judicial independence also allows judges to make decisions that may be contrary to the interests of the other branches of government. Presidents, ministers and legislators at times rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted. Independence is the wellspring of the courage needed to serve this rule of law function.

Every country will place its own distinct stamp on the legal system it creates, but some principles transcend national differences. The importance of a strong and independent judiciary is one such principle. But, while it is easy enough to agree that judicial independence is essential in order to uphold the rule of law, more challenging by far is the task of putting these precepts into practice.

Sandra Day O'Connor was nominated to serve on the U.S. Supreme Court by President Ronald Reagan. She took her seat September 25, 1981.

Democratic Constitution Making

The South African Experience

by Vivien Hart

South Africa's constitutional process was one of its first truly national endeavors, encouraging participation from all sectors of the country's once-divided society. The author pays special attention to the methods and procedures by which participation was encouraged and the time required to reach agreement on a new constitution. This article has been excerpted from Special Report: Democratic Constitution Making, *a publication of the United States Institute of Peace*

DEVELOPING NATIONS in Africa and elsewhere are experimenting with new structures and forms of participation in an attempt to develop an open process that places initiative in the hands of citizens and creates a constitutional conversation. In many cases, rather than working within the framework of an existing body of procedures and precedents, these nations are starting with a clean slate.

The South African Constitution of 1996, for example, is widely regarded as a model constitutional text. Likewise, the process by which it was made has been hailed as a key part of the successful transition from the oppression of apartheid to a democratic society. The following features of the South African process illustrate the context and challenges of democratic constitution making and set the context for evaluating its general potential and problems.

Negotiations on Process

In all, it took seven years, from 1989 to 1996, to achieve the final constitution. Almost five years elapsed between the first meeting

between African National Congress leader Nelson Mandela and Prime Minister P. W. Botha in 1989 and agreement on an interim constitution and the first non-racial election in 1994. Throughout these years, outbreaks of violence threatened the process.

In a key phase from 1990 to 1994, agreements on process were negotiated in private and public sessions between former adversaries. These included an agreement to negotiate about constitutional negotiations; prolonged arguments about the form the constitution-making process should take; and 1993 agreements on procedures and, ultimately, agreement on an interim constitution including principles and procedures binding on the final constitution-making process.

In April 1994, the first non-racial election for parliament was held with a voter turnout of about 86 percent. The following month, the new parliament met for the first time as the Constitutional Assembly.

In the mid 1990s, the South African process became a full-scale demonstration of participatory constitution making. Until that time, the public had had no direct role in constitution making. Now their elected representatives in the assembly reached out to educate them and invite their views. The educational effort included a media and advertising campaign using newspapers, radio and television, billboards, and the sides of buses; an assembly newspaper with a circulation of 160,000; cartoons; a Web site; and public meetings; together these efforts reached an estimated 73 percent of the population. From 1994 through 1996, the Constitutional Assembly received two million submissions from individuals, advocacy groups, professional associations, and other interests.

In the final phase, in tandem with the participatory campaign, committees of the assembly drafted a new constitution within the parameters attached to the 1994 interim constitution; a first working draft was published in November 1995, leaving aside 68 issues for further work; a revised draft was produced the following year; and a final text in May 1996. From July through September 1996, the Constitutional Court reviewed the text; the court then returned the text to the assembly for amendments, which were made in October. In November, the court gave its final certification and in December, President Mandela signed the constitution into law.

Establishing Dialogue and Trust

The South African process took time. It was phased. It benefited from an interim constitution that allowed the dialogue of transition to continue. Participation was invited at a chosen moment rather than throughout and then creativity and resources were committed to facilitating a serious dialogue. Trust that the outcome would be consistent with the 1994 democratic principles was created by the continuation of the conversation between judicial certification and parliamentary confirmation. Groups including women and traditional authorities found voice and access and made sure that their interests were taken into account. Also important was the fact that South Africa had a preexisting civil society that could be drawn in as a counterweight to the entrenched racial and partisan divisions of politics. Other important factors that sustained the formal process include patience, especially in the face of violence; a willingness by all concerned to take some bold steps; and a combination of negotiation in private over some of the most difficult issues and unprecedented public involvement.

Only a considerable commitment of time and resources makes genuine public participation possible. Even if we count South Africa's starting point as the moment of agreement in 1991 to negotiate the process, constitution making in that highly successful case took at

South African President Nelson Mandela, center, and deputy presidents, Thabo Mbeki, left and F. W. de Klerk, right, celebrate the new constitution, May 8, 1996.

least five years. Many would argue that the process was underway at least two years before that, from the moment leaders began tentative approaches across the racial divide; clearly, part of the process is the building of an adequate level of trust between elites and among the general public to enable a constitutional conversation to take place at all.

Modes of participation vary considerably —there is no one model appropriate to all nations. South Africa elected a parliament that acted as the Constitutional Assembly. South Africa sought out public opinion through a variety of channels, used media imaginatively, and devised materials to make constitutional issues accessible in multiple languages.

But the public was not involved equally at all stages of the South African and other processes. While South Africans could follow the progress of public negotiations up to 1994, some absolutely critical deadlocks along the way were resolved in secret meetings. The entire public was first invited to take part in the 1994 election, the most conventional form of participation. But in the South African context, where most of the population had previously been excluded on racial grounds, this was a momentous act. Approximately 86 percent of the population voted. The number of voters, as well as the number of submissions to the Constitutional Assembly, confirm that the public will participate where they see the issues and outcomes as important.

Vivien Hart is a research professor at the University of Sussex, where she previously served as the director of the University's Cunliffe Centre for the Study of Constitutionalism and National Identity, an international research network involving scholars and activists from the United Kingdom, Europe, United States, Canada, South Africa, Sri Lanka, and Fiji. Her book, Women Making Constitutions, *edited with Alexandra Dobrowolsky, was released in November, 2003. Hart was a senior fellow in the U.S. Institute of Peace's Jennings Randolph Program for International Peace in 2002–2003.*

The opinions expressed in this article are those of the author and do not necessarily reflect the views or policies of the U.S. government.

Photograph above: AP/WWP, B. K. Bangash

Constitutionalism in the Muslim World

A Conversation with Noah Feldman

In this interview, law professor and Islam expert Noah Feldman reflects on his experiences with two of the world's newest constitutional processes. He was an advisor to the State Department on religious liberty issues in the drafting of the Afghan constitution. In Iraq, he was a senior constitution advisor to the Coalition Provisional Authority from April to July 2003. He continues to advise various members of the Iraqi Governing Council, and he consulted in the drafting of some of the interim constitutional documents.

IN YOUR BOOK, *After Jihad, America and the Struggle for Islamic Democracy,* you argue that Islam and democracy are not incompatible and that Islamic values and democratic ideals can co-exist in a successful society. What led you to that conclusion?

Dr. Feldman: There are several issues at stake here. First is that many, many people in the Muslim world say publicly they believe that democracy and Islam can work together well. Of course, there are Islamic countries that are democratic and relatively successful at democracy. Turkey is the most obvious example, but one could also look to Indonesia or Bangladesh as democracies that are finding their feet. In addition, there have been recent democratic reforms in a range of other Muslim countries—the new constitution in Bahrain, to give one striking example.

At a practical level, we see that Islamic democracies can and do exist, and at a theoretical level, a growing number of scholars and ordinary people in the Muslim world argue that the traditions of Islam and democracy aren't incompatible and can be made to work together.

Participants of the Afghan Loya Jirga, or grand council, listen to delegates on the second day of meeting, December, 2003 in Kabul, Afghanistan. Afghan elders gathered in Kabul to draft the country's constitution.

Question: When it comes time to develop a democratic constitution in an Islamic country, what are some of the special considerations and specific challenges?

Dr. Feldman: Well, the first is at the theoretical level. People have to come to see the general approaches of the two as not incompatible. Some people think that because God is sovereign in Islam, the people can't be the ultimate decisionmakers in their governance. There might be a difficulty in resolving the political power of the people and the sovereignty of God.

But at the theoretical level, I think it's possible to respond that in Islam, although God is sovereign, God's laws are still interpreted by humans, and day-to-day governance happens by people, not by God. What's more, in democracy we believe there are some fundamental rights that transcend what the people might or might not think was right at a given point, like the right to life and liberty.

Then there is the practical process of figuring out institutions within the constitution that will mediate between Islamic and democratic values when they might appear to outside observers to be in contention with each other.

Afghanistan

Question: In Afghanistan, what kinds of structural issues did the drafters face?

Dr. Feldman: Those kinds of issues are important in any constitution writing process. They don't specifically relate to the Islam-democracy question. You could have a strong executive branch of government in Islamic democracy or a weak executive. Those are very important questions for any constitution across the board.

What they had to deal with in Afghanistan was the fact that the constitution declares Islam to be the official religion of the state. But it also declares the Afghan state to be one in which there are elections and democratic values.

They had to deal with the structural question of when to apply Islamic law. They came up with a provision in the constitution, which originally appeared in the 1906 Iranian draft constitution, stating that no law made by the people shall be contrary to Islam.

They also created a constitutional court that presumably has the power to adjudicate whether a given law violates the values of Islam. Here we see an example of a place where they identified a potential conflict, and they adjudicated it. To be more precise, they created an institution to adjudicate the conflict.

Question: I understand that the high court is going to be a combination of secular law judges and Islamic judges. Are you optimistic that will work?

Dr. Feldman: It's an experiment. It has the possibility of working, but there are certainly no guarantees. It's an experiment with a body that will be able to mediate between those two different sets of values, and do it in a way that is perceived as legitimate by the rest of the Afghan people.

Question: Does Shariah play any other role under the constitution, besides in the high court and in the part you just referred to stating that no law shall be made that goes against Islam?

Dr. Feldman: There is a guarantee that where Shariah is applied, the particular school of Shariah that a given person belongs to will be respected, so no one will be obligated to follow a branch of Shariah that is not their own branch.

This provision is guaranteed in the constitution. That is probably the most prominent place where Shariah plays a role. Interestingly, there is no provision saying specifically that Shariah is a source of legislation or the source of legislation in that constitution.

Question: Are there deliberate ambiguities or gaps in the Afghan constitution? For example, issues that couldn't be decided on or for which consensus and agreement couldn't be reached that are to be left to the future somehow?

Dr. Feldman: The constitution guarantees the equality of women, but doesn't address the question of what would happen if some particular provisions of Islamic law were seen to be incompatible with their equality.

Maybe the court will just interpret the Shariah to be egalitarian, and that would be one possible outcome. That issue isn't explicitly addressed. So, yes, there is a sort of gap, if you will, left there. It will be up to this constitutional court to deal with it.

Question: Women's groups have expressed a concern that the guarantee for women's rights in the constitution is not as clearly stated or as strong as they would have preferred.

Dr. Feldman: There is a specific [number of delegates] set aside for women in the legislature, and an express guarantee of equality for women in the constitution. There's also a guarantee that Afghanistan will abide by international treaty obligations, which include the [U.N.] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Those are three pretty strong guarantees, notably none of which are noted in the U.S. Constitution. We don't have a set aside for women in the legislature. We don't have an expressed mention of women as equal in our Constitution, nor have we ever ratified the CEDAW. It could always be better, but that's a good start by Afghanistan, I think.

IRAQ

Question: Let's move on to Iraq. The Iraqi Governing Council adopted a so-called "interim constitution" on March 8. What does this do, and how long will it be in effect?

Dr. Feldman: What it does in principle is that it creates a framework for government, first during the transitional period prior to national elections in January 2005, and also it provides a framework for what the government will look like once those elections take place. In reality, it still remains to be seen whether the constitution will go into effect as written, or whether it will be changed. As of right now, the Governing Council members have agreed to abide by it after June 30.

Question: Are there indications that there will be a lot of pressure to change the interim constitution?

Dr. Feldman: There is already pressure to change it. The very day that it was signed, Shia leader Ayatollah al Sistani said that he had issues with it. Other Shia leaders seemed to have echoed those concerns. The concern that Ayatollah al Sistani has spoken of expressly in a recent letter to the United Nations Special Representative, Lakhdar Brahimi was that the three-man presidency created by the transitional constitution is insufficiently majoritarian. His letter states that he hopes the U.N. Security Council resolution will not endorse the entire document as it stands, but will recognize that the National Assembly has the authority to amend this document. He specifically implied that he would like to see an amendment to the three-man presidency.

Question: So the structure of the government is a presidential rather than a parliamentary system?

Dr. Feldman: No, it actually is a parliamentary system with a prime minister, and then a three-man presidency which has some real powers, some veto powers, but which is not the primary executive.

Question: What does the interim constitution have to say about human rights and religious freedom?

Dr. Feldman: It guarantees freedom of religion, freedom of conscience, freedom of thought in language that is borrowed from the Universal Declaration of Human Rights. It also specifies a whole list of basic human rights familiar from international human rights documents: rights against torture, rights to equal protection of a citizen, rights to due process of law, and so forth.

Question: So it's close to being a complete Bill of Human Rights?

Dr. Feldman: I would describe it as an exhaustive bill of human rights. It guarantees equality for all Iraqis whether they are men or women, regardless of their religion or their ethnicity or national origin. It is very comprehensive list of rights, a remarkable document in that respect.

Question: Does it have provisions for women in government?

Dr. Feldman: It does. The Transitional Administrative Law states "The National Assembly shall be constructed in such a way as to ensure that 25 percent of the representatives to the National Assembly are women." Now, there is some debate over whether that is a strict quota or whether that is a target to aspire to. The language is somewhere in between, but I would say closer to an express requirement that the National Assembly be made of at least 25 percent women.

Question: Do you expect that there will be a wide public debate on the document?

Dr. Feldman: I do. The document was drafted without major public participation. That is a defect understood by all. There will now be a debate, first of all, about the character of the transitional law itself. I expect there to be a robust debate about that. And then, I expect there to be a further debate on the question of what aspects of this document should be altered or should remain the same in a subsequent permanent constitution which is to be both drafted and ratified by the National Assembly.

Question: In terms of political activity, does the transitional constitution prohibit, as the Afghan constitution does, political parties organized around regional or ethnic groups?

Dr. Feldman: It does not, nor could it have done so and remain consistent with the political organizations associated with Kurdish parties. The Kurdish Democratic Party and the Patriotic Union are both organized around Kurdish identity and come out of Kurdistan.

Question: If the constitutions in Iraq (eventually) and in Afghanistan enjoy some success and foster

stability and new freedoms for their citizens, what impact do you think this will have on the rest of the region?

Dr. Feldman: I think it will throw into relief the lack of freedom and democracy in some of the neighboring countries. Iran had some very promising democratic developments which now seem to be short-circuited, and if you see Shiah Clerics in Iraq calling for open, free elections, and Shiah Clerics in Iran calling for limited election, it will have an influence on Iran, because Iranians will see even more clearly than they already do just how failed their system has become.

Similarly, in Saudi Arabia, people will see on satellite television, public debate over important constitutional issues, and they will see that those kinds of debates don't "bring the house down" necessarily, and that will increase pressure for opening and liberalization there.

In Syria as well, I think there will be an increased sense of the necessity of greater reform than has happened heretofore. I think it is going to have a positive effect everywhere in the region.

If democracy fails in Iraq, it's going to have a negative effect everywhere in the region. People who are advocates of liberalization and democratization will increasingly come to see and think that democracy is not a viable governmental structure in majority-Muslim countries. That would be a terrible, terrible shame.

Question: The question a lot of people ask is: "What happens if Islamic extremists are elected democratically?" You give a disturbing example of Algeria in your book.

Dr. Feldman: I think one thing to be clear about Algeria, despite what many people recall, is that it wasn't in fact the Islamists who drove the country into civil war. The Islamists didn't say they were going to abolish democracy. To the contrary, they said they were willing to participate democratically. They never got the chance to prove that one way or the other, though, because the military government called off the elections, and they are the ones who really brought about a loss of freedom in the country.

I do think that elections everywhere in the Muslim world, where they have been somewhat free in recent years, have led to Islamic parties doing very well. I would expect the same thing to happen in Iraq, and indeed in Afghanistan.

That's the general trend that one sees. That doesn't mean that those parties are necessarily going to act undemocratically. Turkey is an example where the party that is in power is a moderately Islamic party, but they don't go by that name. Turkey's official secularism dictates they can't, but they are. They have been governing very democratically.

Question: So, once they came to power, they kind of moderated themselves?

Dr. Feldman: In Turkey, they were relatively moderate when they were running for office. I think the reality of being in a democracy is you have to get re-elected. As long as you have to get re-elected, you can't govern in a way that is going to alienate large segments of the population. In Iran, by contrast, where the rulers came to power by revolution, they are able to get away with oppressive measures, even though the people profoundly reject them. There is obviously a significant difference between coming to power in a legitimate way and coming to power by force.

Noah Feldman is a professor at the New York University School of Law in New York City. A former Supreme Court clerk, he earned a doctorate in Islamic thought from Oxford University in England as a Rhodes Scholar. He is the author of After Jihad: America and the Struggle for Islamic Democracy. *He was interviewed by Leslie High.*

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Internet resources were active as of March, 2003. The U.S. Department of State does not take responsibility for those websites whose addresses have changed and/or websites now displaying inappropriate material.

ABA: Central European and Eurasian Law Initiative

http://www.abanet.org/ceeli/home.html

American Bar Association public service project to advance rule of law by supporting the legal reform process in Eastern Europe and the New Independent States of the former Soviet Union.

Charters of Freedom

http://www.archives.gov/national_archives_experience/constitution.html

Online exhibit of the U.S. Constitution, presented by the U.S. National Archives.

Comparative Constitutional Law Guide

http://www.ll.georgetown.edu/intl/guides/compcon/print.html

Created by the Georgetown University Law Library.

Comparing Constitutions and International Constitutional Law, A Primer

http://www.oefre.unibe.ch/law/icl/compcons.html

The Constitution Finder

http://confinder.richmond.edu/

Links to the constitutions of most nations, in a variety of languages and in English.

The Constitution of the United States

http://www.law.emory.edu/FEDERAL/usconst.html
http://www.thisnation.com/constitution.html

Constitutional Law: An Overview

http://www.law.cornell.edu/topics/constitutional.html

Descriptive essay of constitutional law with links to U.S. laws and other sources.

Constitutional & Legal Policy Institute (COLPI)
http://www.osi.hu/colpi/indexe.htm

COLPI supports democratic legal reform in the countries of Eastern Europe, Central Asia, and Mongolia.

International Journal of Constitutional Law
http://www3.oup.co.uk/jnls/list/ijclaw/default.html

Established in 2003, presents current legal scholarship from the international community.

The National Constitution Center in Philadelphia
http://www.constitutioncenter.org

A new museum in Philadelphia explaining the Constitution, encouraging citizen participation and providing educational resources.

Researching Constitutional Law on the Internet
http://www.lib.uchicago.edu/~llou/conlaw.html

A comprehensive Web-based bibliography

U.S. Constitution Online
http://www.usconstitution.net/

Designed for use by high school debate students.

U. S. Institute of Peace: Constitution-Making Web Links
http://www.usip.org/library/topics/constitution.html

These links complement the Institute's Rule of Law Program and its project on Constitution-Making, Peacebuilding, and National Reconciliation.

Selected U.S. Law Schools

Columbia University
http://www.lawschool.columbia.edu

Cornell University
http://www.lawschool.cornell.edu

Harvard University
http://www.law.harvard.edu

New York University
http://www.law.nyu.edu

Stanford University
http://www.law.stanford.edu

University of Chicago
http://www.law.uchicago.edu

University of Michigan—Ann Arbor
http://www.law.umich.edu

University of Pennsylvania
http://www.law. upenn.edu

University of Virginia
http://www.law.virginia.edu

Yale University
http://www.law.yale.edu

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