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CONSTITUTIONAL CHANGE:

A Framework for Analysis

Richard Simeon

INTRODUCTION

I was asked to introduce our discussion of constitutional design and reform from the perspective of a political scientist and a comparativist. There are indeed important differences among disciplines in the ways they approach the subject. For lawyers, the text is the critical datum, and formal concepts such as sovereignty and jurisdiction are their stock in trade. For political scientists, questions about conflict, power, and influence are central; and we pay attention to the forces and processes that drive demands for constitutional change, that shape how the process unfolds, and that determine outcomes. The two disciplines also differ somewhat in their substantive interests. Legal scholars, especially in North America, tend to focus on legal rights, and see Bills and Charters of Rights and judicial independence as the most fundamental

elements on a constitution. Political scientists tend to concentrate on the organization and distribution of power and influence, and see constitutions as frameworks for governance as well as rights. But it is easy to exaggerate these disciplinary differences. Again, especially in North America, the disciplines have merged in the study of constitutions, as lawyers take more interest in underlying social, economic and political forces, and political scientists have come to give greater weight to the role of institutions and laws in shaping political behavior and policy outcomes.

But in this paper, I will speak as a political scientist. My own primary interest – perhaps belying my Canadian background – is in constitutional design for divided societies, and particularly in the study of federalism. I began my career focused on Canada, then broadened my interest to include other advanced industrial societies, and most recently have become interested in constitution-making in the developing world.

Political science is a broad and diverse discipline. It has no single paradigm, approach, language, or method. Rather it borrows heavily from other disciplines – economics, sociology, history, and of course law. Political scientists approach constitutional politics, then, through a variety of lenses. Some use the case study approach, seeking to understand individual constitutional process in depth; others used paired comparisons, still others prefer 'large-N' comparative studies, seeking to make generalizations and test hypotheses across many cases. In terms of theoretical orientation, three approaches have been dominant in recent years. First is Marxist derived political economy which looks for explanations for constitutional debates and outcomes in economic and class terms. Perhaps the most famous example is Charles Beard's *An Economic Interpretation of the Constitution,* 1913. Second, after years in which

sociological approaches rooted in the study of values, attitudes and preferences was dominant, institutionalist approaches resurfaced, focusing both on explanations for institutional design, and on the impact of those designs on other aspects of politics. The question here is: 'Do institutions matter,' and if so, how? More historical versions of this approach stress 'path dependency'—the extent to which earlier patterns cast a long shadow into the future. Finally, especially in the United States, 'public choice' or 'rational choice' models have gained prominence, focusing especially on political leaders as self-interested actors, and on the incentives and constraints that they face. All three approaches have obvious relevance to the study of constitutions and constitution-making. In this survey I will raise questions drawn from all three.

In this paper I will try to provide a framework for the study of constitutional change and reform. What approaches can be taken, what questions should we be asking, what issues should we be looking at? What hypotheses and predictions might we make? There is of course an enormous literature on constitutional development, together with a great many hypotheses and predictions, both about the determinants or explanations of constitutional change, and about the implications and consequences of constitutional provisions for political behavior, for public policy, for stability, and so on. But the reality is that there are very few clearly established generalizations in this area. The world of constitutional predictions is littered with failed predictions and unanticipated consequences. This is because there are so many variables – political, economic, and social -- that intervene between the wording of constitutional texts and their impact of effect.

Constitution-making is in large part about making bets about the future. But these bets are seldom un-contested. For example: constitutional debate in Canada in recent years has focused on whether or not the status of largely French-speaking Quebec should be recognized, adding a new dimension of asymmetry to Canadian federalism. Defenders of such a change predict that doing so would reconcile Quebecers to the larger union, and thus strengthen the federation. Opponents, to the contrary, predict that such a move would launch Quebec onto a slippery slope to greater powers, the end result of which would be a weakened federation and perhaps secession. The debate about devolution in the UK was similar: defenders predicted it would strengthen the Union; critics argued it would weaken it. There is no obvious way to know who is right.

Despite these difficulties, as constitutional scholars we have two objectives. The first is to explain. And here constitutions have a double aspect. On the one hand, they are dependent variables the product of a broader set of historical, cultural and political factors, so here our task is to understand why they take the form they do in different settings, the circumstances and forces that lead to demands or pressures for reform, and why constitutional reform efforts succeed or fail. On the other hand, constitutions can be seen as independent variables, whose provisions influence the conduct of political actors by allocating authority, and providing them with legally defined constraints, opportunities, and incentives. How do we then explain their impacts and effects?

But constitutions are about much more than simply setting out the rules of the political game. They are also statements of fundamental values about human rights, about the nature of the political community -- exclusive or inclusive – about the meaning and

obligations of citizenship, and the like. To be meaningful, constitutions must be underpinned by principles. Therefore it is critical that scholarly analysis explicitly incorporate normative theory, both in terms of the processes by which they are developed, and in terms of their substantive contents.

Values, too are contested, and one of the major debates in the field is whether specific constitutional regimes should be judged in terms of the particular values in a given society, or whether there are some universal standards or criteria by which we can judge, assess and evaluate constitutional processes and outcomes.

Among these might be criteria associated with

- Human rights
- Democracy, including full inclusion and effective representation of all groups in society, opportunities for citizen participation, transparency and accountability, and the like.
- In divided societies, the recognition, accommodation and management of ethno-cultural differences
- Effective governance: the capacity of political institutions to make and implement public policy decisions. These are both horizontal (the design of legislatures and executives and their relationship) and vertical (the allocation of responsibilities between central and regional governments in federal and decentralized systems.)

All these, of course, are themselves highly complex and contested. Alternative conceptions of democracy –representative, participatory, deliberative -- will yield different constitutional provisions and different criteria for assessment. Similarly there is a long standing debate about the most effective and morally justifiable ways to mange ethno-cultural differences. Is it, following Lijphart, to institutionalize and empower distinct groups in the consociational mode? Or is it, following Horowitz, to build institutions that facilitate the blurring, cross-cutting and transcendence of group differences? With respect to effective governance, is the main focus on empowering governments to act or to constrain and limit government? To leave such debates about the interaction between normative values and institutional arrangements out of our study of constitutions is to render it sterile (and on the other hand, for normative theorists to speculate on the just society without thinking about the institutions and rules that might help bring it about are utopian). Constitutional design, then, becomes the process of structuring institutions and rules in ways that provide incentives for leaders to promote and sustain these underlying values, and limit behavior that undermines them.

As a final preliminary point, we might ask what distinguishes constitutional politics from what we could call 'normal' politics. First, as befits their foundational status, constitutions typically carry considerable symbolic weight. They are not to be tampered with lightly. Constitutions are 'meta-laws, 'the rules about the rules.' They are about political legitimacy and, in divided societies, about establishing the terms under which constituent groups can continue to live together in relative harmony. Constitutions are generally more difficult to change than ordinary laws, and changes, once established, are resistant to further change. For this reason, constitutional change binds future

generations in ways that ordinary laws do not. Hence the need for a longer term approach to the process. The pressures for constitutional change often originate in political crisis. For all these reasons, the stakes in constitutional debates are likely to be high, political mobilization is likely to be greater than in ordinary times, differences are likely to be more profound, and normal political processes are likely to be thought inadequate to meet the challenges.

A constitution, writes James Tully, is a "written document that creates the foundations of government . . . by an act of the sovereign will of the people."(1995, 85) Or, as the *Federalist Papers* put it: "It seems to be reserved to the people of this country to decide whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever forced to depend for their political constitutions and accident and force." These are not the decisions of everyday politics.

But we should not overestimate the extent to which constitutional politics is detached from ordinary politics. As Banting and Simeon point out, "Just as war is the continuation of diplomacy by other means, so constitution-making is a continuation of politics by other means; it involves not a radical break, but an extension and often and intensification of normal processes." Often the same actors and institutions will be involved. (Indeed, as we shall see one of the important issues in designing constitutional amendment processes is whether to utilize or by-pass existing institutions.)

More generally, constitution-making combines elements of what we might call ‘high politics’—the politics of fundamental choices over basic values’—and ‘low politics’ – the politics of self interest and advantage in which each of the players seeks to establish rules that provide them with advantages in the future. Indeed another challenge in the design of procedures for constitutional change is precisely how to insulate them from partisan and short term political considerations. Here again, political theorists have an important role to play. Their strength is that they can provide the normative benchmarks to which even the most self-interested politician must pay at least lip service, and against which his or her work will be tested if it is to have domestic or international legitimacy.

The Importance of Context

Constitutional processes – from the issues that are likely to arise, the discourse in which the debate is conducted, the institutions and processes in which they are discussed, and the processes of ratification – are all deeply influenced by particular national contexts. Hence the enormous variety in all these areas; and hence too the difficulty of making generalizations. The most important of these contextual factors include:

- *Historical legacies.* ‘Path-dependency’ exists in constitutional as well as other matters. The repertoire of tools constitutional designers draw on is likely to be deeply influenced by the experience of earlier constitutions, even when the goal s fundamental change. To take just one small example: constitutional review processes in African countries appear to depend greatly on whether the country’s colonial background was British or French

- *Society and demography*. Is the society homogeneous or diverse? And if it is diverse, what is the nature of the differences, the number of contending groups, their relative size and economic resources, and the extent to which they are or are not territorially concentrated? Again answers to such questions will shape the constitutional agenda and the way political forces are mobilized around it.

- *The geo-political and international environment*. Is the environment benign or hostile? What is the role of international governmental and non-governmental agencies and international experts?

All these and other background factors will influence the agenda and the range of constitutional options.

Constitutional agendas

Despite these contextual differences, constitution-makers have faced a common set of issues in recent decades. They need only be listed and discussed briefly here.

- *Bills and Charters of Rights* are central to all modern constitutions. The most important issues concerning rights in recent constitutions have been whether or not to include economic and social rights, whether or not to include an explicit 'limitations clause,' whether to link the national Charter to international human rights instruments, and whether to permit cultural and religious norms, such as Shania law, into the public realm.

- *Courts* are critical interpreters of the constitution, and so need to be set out in the constitutions. Questions here include: whether to have a separate Constitutional

Court, as in Germany and South Africa; the jurisdiction of courts (including whether to have full-scale judicial review of legislation); and the appointment and tenure of judges, in order to ensure judicial independence.

- *Citizenship and citizenship regimes.* Who may be a member of the political community is a central constitutional issue, reflected in immigration and citizenship laws. While these are frequently found in ordinary legislation, their effect is 'constitutional' in the broadest sense of the term. In light of immigration, these are perhaps the most difficult constitutional matters facing Western Europe and North America.

- *Preambles* which set out the basic foundational values for the polity reflect the symbolic, nation-building educational role of many modern constitutions. A key question is whether these are merely broad statements of principle, or whether have legal force as interpretive clauses that will guide judicial interpretation.

- *Electoral law* is again something that is often left to ordinary legislation, but which is constitutional' in a broader sense and thus should be included in the study of constitutional politics.

- *Concentration versus dispersal of powers at the center: Parliamentary and Presidential regimes.* Whether to unify executives and legislatures through parliamentary governments, or do disperse it through separation of powers in a presidential/congressional regime, is obviously a fundamental choice, as are questions such as the powers of the presidency, term limits, and the like. There

are, I believe, very few cases in which a country has shifted from one of the basic models to another, but there are many variations within them..

- *Territorial concentration versus dispersal of authority.* The basic division is between federal and unitary systems. But if the choice is federalism, or quasi-federalism as in the UK, South Africa and Spain, then a large number of constitutional issues arise: the number, size and composition of states or provinces, the division of powers and competencies, fiscal arrangements, inter-governmental dispute settlement mechanisms, the character of regional representation in central institutions, and so on. Federalism is predicated on some combination of 'shared rule' in the country-wide polity and 'self-rule in the constituent units. Finding a mutually acceptable balance is seldom simple.

- *Amendment procedures.* How to find the right balance between flexibility and rigidity? Virtually all constitutions require some form of 'super-majority' for amendment, but how high to set the bar is a complicated issue. If the bar is set too low, then the constitution can become highly vulnerable to shifting majorities, and thus be much less effective in protecting minorities, a central role for constitutions. Majorities tend to argue for flexible amendment procedures; minorities tend to argue for more rigid ones. Another key question is whose consent is necessary for amendment: representatives through legislatures? Constituent governments in federations? The people through referenda? Yet another issue that arises in federal systems is whether the constitution should provide for the possibility of secession. The Ethiopian constitution contains such

a provision; and the Supreme Court of Canada ‘read in’ to the Canadian constitution a right to secession under certain circumstances in 1998.

As this discussion shows, there is no sharp distinction between what constitutes a constitutional question and what does not. Some questions of clearly constitutional import (such as electoral rules) often are dealt with outside the constitution. Conversely, in some cases, especially in Latin America, there is a tendency for Constitutional Assemblies to supplant the normal legislature, and for substantive policy issues to be decided there. This is also frequently the case with U.S. State constitutions.

Starting Points: Different constitutional moments

The nature and scope of constitutional changes varies enormously. And it is ubiquitous. As Vivien Hart points out, more than one half of the 200 national constitutions in existence have been written or re-written in the past half century. (2003, 2), Another data base summarizes 194 cases of constitution-writing since the 1960s, 108 in the decade of the 90s alone. ((Widner, 9) At one extreme, there is the writing of a new constitution virtually from scratch, starting with a clean sheet, although even in the most dramatic or extreme cases, the legacies and inheritances from previous constitutional experience are likely to play a role. At the other extreme are minor incremental changes that might be little more than constitutional housekeeping.’ The recent German experience is a case in point. It is aimed at alleviating the ‘joint decision trap’ by introducing an element of greater autonomy for the Lander and rendering German

federalism somewhat more competitive. But it is not fundamental change to the system and was much more a concern of political elites than of mass interest.

The most far-ranging, constitutional changes arise from what we might call 'regime change.' There are many examples: the post-war decolonization constitutions in Africa and India; the German and Japanese constitutions after World War II, the wave of constitution-writing following the end of the Soviet regime, and the writing of a democratic constitution for South Africa following the end of Apartheid. These developments occurred at much the same time as constitutional reforms aimed at greater democracy in Spain, Portugal, and Africa and Latin America took place. Thus much of the recent spate of constitution-making had its origin in the 'third wave of democracy, and was aimed at strengthening rights, subjecting executives to greater checks and balances, strengthening the rule of law and the independence of the judiciary, and creating the framework for 'free and fair' elections.

Another major source of initiatives aimed at broad-scale constitutional change is associated with changes in the relationship of majorities and minorities in divided societies. Such demands can come from a variety of sources. Demographic change among various population groups may make previously acceptable accommodations no longer acceptable. Changes in the values and aspirations of minority groups as a result of modernization may lead to demands for new forms of political accommodation, as in Belgium, Scotland or Quebec. The lifting of the heavy hand of authoritarianism, as in the former Yugoslavia and Spain, may give new life to previously suppressed ethnic identities, which then claim recognition and empowerment. Constitutional demands in these cases are likely to be expressed as calls for greater autonomy for minority groups

(as in Catalonia and Quebec), or for restructuring of the state along linguistic-cultural lines, as in Belgium. Hence federalism and other forms of decentralization, including secession, are on the agenda, as is minority representation in central institutions. Since they revolve so heavily around questions of identity, constitution-making in heavily divided societies is especially difficult.

Even more difficult may be constitution-making in situations where the constitution is itself part of a 'pact' that seeks to end periods of protracted conflict. In such cases, for example post-Apartheid South Africa or contemporary Nepal, peace-building and constitutional designs go together. Jennifer Widner points out that over the past thirty five years, nearly 200 constitutions have been drafted in countries at risk of internal violence. (2003, 1) Decision-making processes are likely to be highly contested; the trust essential to compromise may be lacking; and no legitimate established decision-making institutions exist. The provisions necessary to bring about a peace settlement, on the one hand, and to create a long-lasting framework for governance into the future may be in tension with each other. International involvement in these processes is likely to be great. Sudan, Sri Lanka and Iraq are contemporary examples where constitution-making faces extreme challenges. Northern Ireland and South Africa are more positive examples. In Northern Ireland, the Good Friday Agreement of 1998, with its provisions for power-sharing between the two religious communities provided the framework for the eventual ending of sectarian strife, and the creation in 2007 of a new government. In South Africa, the dilemma was that a peace agreement had to be reached before there could be elections; but a constitution could not be finally adopted until elections had been held. The solution was to develop an Interim Constitution, accompanied by a

set of ‘constitutional principles’ that were to govern the work of the Constitutional Assembly elected in 1994. In some cases the combination of peace-building and constitution writing has intensified ethnic conflict and distrust among political elites; in others, is has instilled higher levels of cooperation among elites and established models for resolving problems well after the transition has ended.” (Ibid., 1)

Each of these starting points – from drafting a new constitution, to major change, to amendment of already existing and legitimate constitution – will generate very different political dynamics.

Constitutional Processes

“How the constitution is made, as well as what is says, matters.’ I (Hart 2003, 4)n established constitutional democracies, there are usually well-established and accepted procedures for constitutional amendment. In transitional democracies there are likely to be no such settled arrangements. Deciding who will participate, in what arenas, according to what decision rules, and with what methods of ratification and implementation are themselves constitutional questions that must be decided. For the outcome to be legitimate, so must be the process. As Jon Elster puts it, “To design good institutions, the constituent assembly itself must be well designed.” (1991) And Jennifer Widner (2002, 2) notes that ‘Procedural choices help decide who has a chance to speak, the range of community interests taken into account, feelings of trust and inclusion, the balance between quiet persuasion and grandstanding, and the willingness to compromise.’

Several broad factors will contribute to whether the outcome is successful and legitimate. The first is that the process must be *inclusive*: all politically active groups must have a voice and a place at the table. Again, this is critically important in divided societies. Second, and closely related, constitution-makers must pay attention to how citizens can be given a sense of 'ownership' of both the process and the result. Third, constitutional change usually involves a change in the rules of the political game. Those rules are not neutral, and the most likely beneficiaries are those who hold political office by virtue of the pre-existing rules. They are likely to resist change, and this helps account for the well-known phenomenon of 'constitutional conservatism.' Constitutions are not easy to change, and the default position is most often the status quo.

A basic question, therefore is whether and how to inoculate the process against the self-interests of the dominant participants. How to build incentives that will lead participants to act in some larger public interest, to take account of the views of others, to take into account future generations, and to compromise? As Jon Elster puts it: How to move away from 'bargaining among parties with conflicting short-term interests" to "impartial rational discussion about the common good?" (Elster, 1991). There is no foolproof way to make this happen. But much will depend on who participates, I what institutions, and according to what decision-rules.

1. Who participates in constitution-making?

    First, what is the appropriate role for *citizens?* The necessity for broad involvement of citizens in constitutional processes is central to democratic

politics. According to Vivien Hart, the right to participate in constitutional processes is guaranteed in international law. (2003 1) In a fundamental sense, the constitution belongs to them. Only if they are engaged in the process are they likely to feel committed to the values and objectives embedded in the constitution itself. In new and developing democracies, especially extensive processes of citizen engagement and public education are essential. Excluding citizens by negotiating the constitution among elites, behind closed doors, may well provoke a citizens' revolt, as happened in Canada following negotiation among governments of a constitutional accord in 1987. Without public involvement, constitutional changes are likely to be regarded with suspicion, and hence defeated, or to be ignored and subverted once they are in place.

But fully participatory processes are not without difficulties. Making a constitution, especially in divided societies, warrants careful statecraft; it is likely both to involve delicate compromises and trade-offs, and to require knowledge of comparative theory and experience. These objectives are not necessarily best achieved in public negotiations. A populist majority in a constitutional assembly may disregard minority concerns; or leaders with an eye to their support in different communities may use the occasion to exacerbate differences. In this sense, constitution-making can be a two-dimensional game: on the one hand, negotiators must seek agreement amongst themselves, and on the other they must maintain support in their own communities.

There is disagreement about the effects of open, public processes versus closed processes. On the one hand, as Elster suggests, public processes force the players argue for, defend and justify the positions they take, again helping to limit the influence of direct self interest. Closed processes may be more prone to cynical bargaining and trade-offs. But others argue that in public forums, the players are more likely to 'grand stand' -- to take extreme positions that play to their constituencies, thus hampering the search for consensus and compromise. Hence an effective process must include both elements: arenas where the process will be open, transparent, and consultative, and arenas where compromises can be hammered out behind closed doors. Indeed, we can think of a sequence. Citizen involvement should be widest in the early stages where broad options and alternatives are being discussed: then there may be a more closed process in which technical details and specific proposals are drafted; and finally citizens are re-engaged in the process of ratification.

Second, what is the role of *politicians?* One way to avoid the dominance of incumbent self-interest is to minimize the role of elected officials. National conferences, stressing the role of civil society representatives are one method. Directly elected Constitutional Assemblies are another. One Canadian province, British Columbia, sought to exclude politicians entirely when it established a Citizens Commission' to propose changes to the electoral law. Its members were selected at random from the voters' rolls, the government was barred from commenting before the Commission's proposal was submitted to voters in a

referendum. But such attempts to insulate the process from the politics of self-interest and political gaming may not be appropriate. As Bellamy and Castiglione argue in their critique of Rawls, the "proposed insulation of the political sphere from people's prime concerns is not only impossible but also undesirable. It prevents politics from performing its crucial function of reconciling differences through negotiation and debate, whilst risking excluding important minority issues from the political agenda and thereby de-legitimizing the public sphere" (Bellamy and Castiglione 1997) From that perspective, the main objective of the constitution-making process should not be so much to limit "politics" or "self-interest," but rather to "develop an institutional framework that can promote dialogue and compromise between these different interests."

Third, what is the role of *experts?* Constitution-making is at once highly political and highly technical. Hence virtually all processes involve experts as advisers and drafters. Their work too can help de-politicize the debate. But it must be remembered that all constitutional debate is fundamentally political, and no amount of expert analysis can mask that.

Fourth, what is the role of *international actors*? In almost all the post-communist constitution-making, international bodies – both governmental and non-governmental -- have played a major role. They can bring international norms and standards on such matters as human rights or democracy to bear on domestic processes, and can inject comparative experience, both positive and

negative into the discussion. These are also ways to keep the process honest. But they also have their dangers. International groups and advisers may lack knowledge of and be highly insensitive to the local context, and its norms, values, and traditions. In pushing for enactment of universal standards in constitutions, local, indigenous forms of democracy may well be discounted. Moreover, there is a regrettable tendency for international advisers to have their own preferred constitution in their back pocket, and to tout it as 'have I got a model for you?' Hence the advice may be inappropriate, misleading, or dangerous. Finally, as I have said experts may have an exaggerated view of their own knowledge: as I have argued, there are precious few strong generalizations or firm predictions in this field.

Fifth, the *courts* can play important roles in constitutional politics, in particular by interpreting and defending the procedurals rules for amendment. For example, the Supreme Court of Canada has intervened at several critical constitutional moments in Canada; and the 'certification' of the 1996 South African Constitution by the newly established Constitutional Court was important for legitimizing the outcome.

Clearly all five groups of actors will be involved in particular cases. Finding the right balance among them is again the challenge.

2. In what arenas and with what decision rules?

Typically, constitutional debates take place in a large number of political arenas.

Legislatures play a central role in most cases. In Britain, with no written constitution, laws with constitutional effect, such as devolution, can be passed b ordinary legislative processes. But in most cases there are devices to ensure that simple, perhaps fleeting, majorities cannot easily prevail. These typically include super-majorities for passage of amendments in both houses of the legislature, and separate votes over a period of time to permit wider public debate. In some cases, such as Belgium and Estonia, passage in one legislative session must be followed by dissolution, then re-passage in a newly elected legislature. In Brazil, there must be four rounds of voting on amendments, two in each chamber, separated by periods for debate and reflection..

As in South Africa and in some countries in Eastern Europe, it is common following democratic elections for the newly-elected legislature to constitute itself as a *Constitutional Assembly.* However, again in the search for ways to draw the Rawlsian veil across pure self-interest, Elster (2001) makes a persuasive case for installing a one-time only separately elected Constitutional Assembly that will be responsible for drafting the constitution, and then be dissolved. Thus the constitutional drafters will not be the immediate beneficiaries of their own work. Much will depend, however, on how such Assemblies are elected, and how the results of their work are injected into further ratification processes in legislatures, or through referendum.

An alternative is to create an independent or semi-independent constitutional review commission to develop proposals for constitutional change, as recently in Kenya. This creates the possibility of giving representatives of civil society a much greater role in the process. But again how effective such institutions are depends greatly on who appoints them, how independent they are, and the resources they possess. Civil society views can also be tapped through a wide variety of other mechanisms including national conferences, legislative committee hearings, public meetings, and so on.

In federal countries, sub-national state or provincial governments are also involved. Indeed, preventing central governments from imposing change on constituent units is a fundamental guarantee of federalism. As a result constitutional debates will take place in intergovernmental arenas – in Canada, for example, constitutional review has been conducted almost wholly in bargaining between central and provincial governments, and only recently, and only to a limited extent, has the door been opened to wider parliamentary and public participation.

Typically constitutions or constitutional revisions cannot be passed by simple majorities. In almost every case super-majorities are required, usually between two-thirds and three quarters of both houses of the legislature, for example. Popular ratification by referendum is well-established in countries like Switzerland and Australia. It also common, but by no means universal, in newer democracies. For

example, in Eastern Europe, Croatia, Poland, Romania, Slovenia and Ukraine have provisions for referenda on constitutional change. In some older democracies, there have also been calls for greater use of referenda. For example, in 1992, Canada submitted an accord negotiated by governments to the people, and it was defeated. Some now argue that 'constitutional convention' now requires a referendum on any future major changes. In Europe, there was much debate as to whether the proposed new EU Constitution should be subject to popular ratification. Just less than half the member states planned to hold referenda; others, such as Germany, opposed the idea. The debate illustrated some of the dilemmas about referenda. Voters may vote not on the basis of specific constitutional proposals, but on quite different political issues. An ethnic majority may use its numbers to harm minorities unless provisions are made for ratification by all constituent groups. In multi-level systems, such as the EU for a federation like Canada, voters may reject carefully-crafted intergovernmental agreements, and rejection by one or a few units can unravel the entire process.

The result of these wide variations in process and decision rules is considerable variation in the height of the hurdles to constitutional amendment. Donald Lutz calculated an Index of Difficulty of amendment for 30 countries in 1992. Of the ten least flexible countries, all but one were federal, requiring approval of a majority of States. Six of the ten require referenda for approval. The result, not surprisingly, is that the higher the bar, the fewer the number of constitutional amendments over time. (Lutz, in Levinson, 1995, 260-262) Countries with complex legislative

procedures and referenda had the lowest rate of constitutional changes; those with complex legislative requirements plus state approval were next; and countries with parliamentary supremacy alone were most likely to change their constitutions.

We need to know much more about the relationships between processes and outcomes. We need to understand not only the frequency of change but the direction of change. We need to examine the extent to which the processes are seen as legitimate or not, and, most important to explore how alternatives processes distribute political among actors resources and influence among the political actors, between citizens and governments, and among constituent ethic and cultural groups.

3. Outcomes

4. Implementation

Far too often, the democratic values set out in bright, shiny, new constitutions are indeed worth little more than the paper they are written on. Without a foundation in "constitutionalism," embedded in the minds of citizens and elites alike, these blueprints for society mean little. Moreover, those who implement and abide by the new constitutions may be insufficiently skilled and inexperienced with the arts and crafts of democratic politics. This suggests that attention must be given to embedding both the principles and the detailed procedures of constitutional politics at every stage in the

constitution-making process. Citizens must not only develop a sense of ownership in a new constitution, but also come to understand its meaning. In the South African case, extraordinary measures were taken to keep citizens informed and to engage them in the process. Tabloid newspapers in eleven languages were regularly published. Pamphlets in comic book format explained what a difference the Bill of Rights could make in their lives. Meetings were held in remote villages throughout the country to discuss the constitution. The result, even in a country as poor as South Africa was a remarkable level of knowledge about the constitution and commitment to the values it represented. There must also be a sense among the elites that the adopted constitutional regime secures at least some of their political benefits and victories, and opens, not closes, spaces for debate, influence, and representation.

Conclusion

The politics of constitutional change is an increasingly complex phenomenon. Constitutions are being written and re-written in a huge variety of settings, often in very difficult circumstances. Constitution-making is more and more a matter of international as well as domestic concern. Constitutions have become longer as societies and their associated interests have become more complex. Constitution-making is, as Hart points out, less a matter of a once and for all set of rules. Rather they are ‘living trees’ (Cairns). Hart puts it, the ‘new constitutionalism’ ‘is a conversation conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable. Most important, It also suggests democratic

values now feature much more powerfully than in the past both in the development, the content and the operation of the constitution. We have to learn about participatory constitutionalism.''

And here we return to the central dynamic in political scientists' study of constitutional politics. It is at once empirical, seeking to describe and explain processes and outcomes, and normative, seeking to judge, evaluate, and prescribe based on public values of social justice. It is at once 'realist,' stressing the importance of conflict, self-interest, strategic calculation, negotiating tactics, constraints and incentives; and 'idealist', stressing overarching political norms. It is at once universalist, stressing the importance of international standards, and particularist, stressing the importance of context and specificity. It is not one approach, but many. All this explains how few clear, uncontroversial hypotheses or propositions have emerged from the literature. But it also explains the richness and vitality of the debate.

It also suggests that constitutional engineers should approach their task with humility. There are few, if any, established empirical "laws" of constitutional design. At best we have suggestions, correlations, and associations, whose relevance, feasibility, and effects will vary across time, place, and circumstance. Inevitably, there will be unintended consequences. The workability of any new or revised constitution will depend as much or more on the economic, social, and cultural setting in which it is embedded as on the most carefully calibrated words in the text. No constitution can be separated from its underpinning political values and norms. As Donald Horowitz puts in

a sternly worded critique of constitutional hubris: “The process of constitutional choice is fraught with the prospect of bias and distortion . . . The pitfalls . . . are inappropriate comparison and misinterpreted history” (2002, 31).