

ENTHUSIASM AND ACQUIESCENCE IN CONSTITUTION-MAKING

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“Europe, where nations exist which are not peoples.”¹

This paper first considers the normative values of transformative constitutions, and secondly, looks at the problem of empirical constitution-making and amendment, where the fundamental conditions of transformative constitutions are absent, namely popular participation is replaced by elite activities; and therefore constitutional enthusiasm is missing. These considerations are based primarily on European and American empirical materials; as such the paper intends to offer falsifiable frames of understanding for other regions.

I. The Normative Implications of Transformative Constitutions

The Romantic picture of constitution-making is this: ‘People’, with a capital P, gives itself a lasting fundamental political and even social order. The constitution is transformative. Such a constitution is above ordinary law and politics. Technically speaking, its fundamentals cannot be amended.² A solemn commitment to People itself is given. Any reversal of the original commitment to foundational principles requires return to the People.³

In the Romantic myth, constitutions are the fruit of a blessed ‘constitutional moment’. The concept of ‘constitutional moment’ focuses on lasting constitutional arrangements that result from specific, emotionally shared responses to shared fundamental political experiences. The constitutional moment is a period that reflects a certain moral fervor that pervades (and perhaps divides) the society. The US around 1787, (perhaps)

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1. Joseph Roth, *The Spider's Web*, p. 70. (unfinished).
2. The theory of unamendable provisions is relatively new, however, the concept that constitutions cannot be amended goes back to Greek antiquity. The change of the constitution of the polis means loss of identity for the polis and its citizens and it equals a new foundation of the polity.
3. I do not consider politically fundamental or fully operative the legally and technically legitimate distinction between constitution-making and amendment. The French Constituent Assembly was convened for a constitutional amendment in 1789, that is the King determined under the existing unwritten constitution who could make the amendments under the then existing (obscure) constitutional arrangement. The revolution turned this into constitution-making by defining a new constitutional subject (the Nation) that was going to give itself a new constitution.

Belgium in 1830 and post-Apartheid South Africa are close to this ideal among the countries that have created a lasting constitution under such inspiration.⁴ There was a constitutional moment in France in 1789, and the French experience contributes to the Romantic version, but it did not result in a lasting institutional design that indicates that there are other important constituent elements of constitution-making (both ordinary and revolutionary). It is argued that the 16th Constitution of Thailand (in 1997) is the result of a popular movement for constitutional change resulting in a mass-scale participatory process in the constitution-making, at least in the sense of public hearings.

In a less romantic way of presentation, the 'People' (or anyone else) as the master of the constitution (if master it is) commits itself to the constitution to counter its own ordinary fallible wishes. Such self-binding is an act of mistrust and self-doubt. The blessed constitutional moment will end soon. At this point the moment for the cunning reason emerges. The cunning reason dictates that constitutions should have rules of pre-commitment. Pre-commitment cannot prevent other constitutional moments (i.e. revolutions); they may even force such revolutions because of their rigidity, but in 'normal' circumstances the prohibitive rules of amendment serve the goals of such pre-commitment, however limited this power of the constitutional text regarding the amendment process is.

The message of constitutional pre-commitment has normative implications. 'People' are fallible; Ulysses bound himself to the mast, knowing how weak he might be when it comes to temptations, in particular to temptations of neglect and indifference. The same people who were ready to sacrifice their well-being to have a constitution are generally indifferent when the judiciary or executive practice deprives them of the same rights they have solemnly vindicated. This is not a matter of public ignorance. Permanent vigilance is unsustainable even with a Committee of *Salut Public*.

The Romantic vision of constitution-making provides us an important founding myth. Indeed, it is hard to conceptualize constitutionalism without this Romantic assumption. The theories and ideologies of incremental and organic development represented in traditional English constitutional theory, and to a considerable extent the process oriented understanding of the emerging European Constitution, offer a much less imagination-captivating vision. The Romantic vision serves as the normative reference to

4. The most eloquent contemporary theory of the constituent moment is Bruce Ackerman. See, BRUCE ACKERMAN, *WE THE PEOPLE*, (Harvard University Press, 1998).

constitutional design: it offers the belief that a good political system can be *created* through participation and consent.

At ground level, there are only a few instances that come close to the Romantic vision. Empirical evidence regarding the process of constitution-making indicates that the process itself is not decisive with regard to the long-term legitimacy of a constitution, although the actual creation process may leave its mark on what has been created. The bulk of constitution-making and revision is piggy-backing on these few historic mythical foundations which occurred with constitutional popular enthusiasm at a constitutional, i.e. transformative socio-political, moment. In other words, the Romantic vision has normative implications: it shapes the normative expectations as to what would amount to constitution-making.⁵ It also contributes to democratic self-confidence - after all, the American Revolutionaries, and to a lesser extent the French, were the first to admit that constitution-making was the inherent power of people: People are sovereign to use that power at their will and whim.⁶ As demonstrated below, most constitutions do not fit into the Romantic vision of transformative constitutions. However such empirical 'inconsistencies' are not decisive regarding the normative value of the Romantic vision, although constitutional Romanticism has an intellectual and practical price to pay.

From a normative perspective the constitutional process is conditional on the answer to the question: Who has the right to create or put forward a constitution? And in whose name? To whom does the constituent power pertain? Or, taking a different track, whose constitution will be adopted? According to classical constitutionalism, reaching back beyond Rousseau's social - contract, the constitution is differentiated from an ordinary statute by the fact that it has the backing and agreement of a *whole people*, and it is actually, or at least in theory, an acceptable arrangement for all the people constituting a society.⁷ The one power known to the Constitution which is not limited by it is that which ordains it - in other words, the original,

5. It was, among others, for this reason that proponents of the European Constitution tried quite desperately to find popular enthusiasm for the project. See András Sajó, *Constitution without the constitutional moment: A view from the new member states*, 3 INT'L J. CONST. LAW 243-261 (2005).

6. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment outside Article V*, 94 COLUM. L. REV. 457 (1994) makes this excellent point: The long list of grievances in the Declaration of Independence was needed because the assumption was that people or free citizens have the right to shape their institutions only when the existing compact was broken. However, by 1787, it was accepted that people have the right to shape their institutions even in the absence of fundamental abuse.

7. In ordinary legislation the general popular will may be enforced via the representative system, but in practice this will is indirect, and, due to the majority decision, it is usually the expression of a

inalienable power of the people of the United States to determine their own political institutions.⁸

The normativity of the Romantic grand narrative creates both advantages and difficulties in constitution-making. Given the normative assumptions, constitution makers would like to follow the recipe of constitution-making offered in the grand narrative. People have to participate in the process, which on the one hand has salutary effects by imposing procedures on amendment or constitution-making processes that make such ventures more difficult and more transparent. On the other hand the hypocrisy dictated by the normative expectations results in manipulations (for instance, plebiscites), easy concessions (say imperfect textual compromises, conflicts left unresolved, false assurances etc.). But there is beauty in the hypocrisy originating in the myth of popular constitution-making.

The Romantic version, at least in the version offered by Bruce Ackerman, is inherently linked to revolutionary transformation. This "... is the product neither of elite management nor community adaptation. The scene is dominated by mass movements mobilizing on behalf of grand ideals, and elites struggling for authority to speak in the name of their mobilized fellow citizens."⁹ This is to be understood "as a self-conscious effort to mobilize the relevant community to reject currently dominant beliefs and practices in one or another area of social life. Such revolutions succeed when they reorganize dominant beliefs and practices in a fundamental way within a relatively short period of time. Radical reorganization in one domain may, but need not, lead to similar transformations in others."¹⁰

group interest, or an incidental part interest, even though the points of view of other groups are taken into consideration in the utmost degree. The constitution, however, meets with everyone's approval. In practice such a constitution does not exist, and the theory was actually popular when no constitution had to be created but could be considered as granted. It was possible to say of this constitution that it was backed by general consensus or consent. The problems began when efforts were made to legitimize the actual constitution in a truly democratic manner.

A further problem with the general consensus concerns the date of the actual agreement. Should such agreement exist at the moment of acceptance or continuously throughout the time the constitution is in force? It is possible to defend the latter viewpoint too, without seriously violating legal security, provided it is presumed that the constitution is generally accepted and that this presumption can be rebutted only by a popular referendum amending the constitution. Whenever a radically new interpretation is given to the norms of the constitution via constitutional review by courts, this is also frequently perceived as an expression of a new social consensus.

8. EDWARD CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY*, (Princeton University Press, 1946), p. 141.

9. See Bruce Ackerman, *Revolution on a Human Scale*, 108 *YALE L. J.* 2279 (1999).

10. Ackerman, *id.* at 2283.

The empirical majority of constitution-making instances, revisions and amendments that we know in the world are lacking in the characteristics attributed to constitution-making in the Romantic version. The overwhelming majority of the constitutions that we know do not show the above characteristics, i.e. they are not related to revolutions, or are related to revolutions that fail. One of the typical situations resulting in a new constitution is described, in the context of the Weimar Constitution in the following terms: "The doors burst open, the wardens ran away, the captives stood in the courtyard, blinded and unable to move. Had it been a real revolution, the forces and ideas that had brought it into being would have continued to exert their influence. All the people wanted was peace and quiet, ... which was to be expected: after all, we are a nation that loves order."¹¹ This situation is paradigmatic for many post-totalitarian scenarios.

Other constitutions are related to dramatic transformations like state-creation, but this is not necessarily a matter of revolution, sometimes not even a war of independence predates it. Constitutions often only serve to reaffirm what was achieved through revolution in other societies. Constitutions serve other more technical goals that cannot be considered as fundamental choices regarding the political destiny of a country, although these documents intend to determine important, even fundamental, governance issues. They lack the future-shaping capacity, the qualities of a new, polity shaping arrangement. The promise of a future-shaping capacity might turn sour notwithstanding the presence of the will to become transformative, even where that seems to be supported by much constitutional enthusiasm. The transformative character of the constitution is often missing, where the constitutions are a hope for end of transformative upheavals, or return to pre-revolutionary, or simply unrelated to transformation. From the perspective of 'ordinary' constitution-making, the transformative power of the constitutional moment is conjectural or accidental, or a matter of spurious correlation.

As will be discussed below, most actual constitutions are created and amended with little 'genuine' popular participation and cannot be deemed to be the work of popular genius and will. By 'genuine' popular creation, I mean that the constitutional design is shaped by actual mass movements and resonates with and shapes popular sentiment and identity. This is different from a situation where the constitution, to some extent, expresses shared

11. Walther Rathenau – quoted in STEPHEN REINHARDT, (ED.), *DIE SCHRIFSTELLER UND DIE WEIMARER REPUBLIK; EIN LESEBUCH*, (Berlin: Wagenbach 1992), p. 65; AMOS ELON, *THE PITY OF IT ALL: A PORTRAIT OF THE GERMAN-JEWISH EPOCH 1743-1933*, (New York: Henry Holt and Company, 2002), p. 367.

popular sentiments or expectations of co-existence as discovered and shaped by elites. Moreover, constitutions are adopted mostly without popular mobilization and without entering into the dangerous public discussion that could concern the *constitutional subject*.¹² Such discussions might be fundamentally divisive because the discussion would require the explicit definition of who (which groups) is included and who is excluded from the constituent power.

The lack of 'genuine' participation and the resulting lack of constitutional enthusiasm causes serious legitimacy problems and shapes the impact of the constitution on society.¹³ Given that most constitutions were created without much 'genuine' popular participation, there is little or no popular enthusiasm towards constitutions.

Lack of the blessing of a constitutional moment results in serious problems, among others the difficulty realized in devising an alternate mechanism to create union and identity. In principle, constitutions are not supposed to constitutionalize ordinary politics; however, this is what happens all the time. Because of the normative assumptions resulting from the Romantic vision, 'People' are asked to participate until and unless the desire of the elite is reached. That elite attitude is best captured in Bertolt Brecht's poem 'The Solution':

“[Finding] that the people
Had forfeited the confidence of the government
And could win it back only
By redoubled efforts. Would it not be easier
In that case for the government
To dissolve the people
And elect another?”¹⁴

There are additional shortcomings with constitutions of recent stamp. Matters determined in the constitution are not principle-related, and may

12. For example, in the case of Hungary, a country that lost about one-third of its ethnic Hungarian population and two-thirds of its territory after World War One in the Trianon Peace Treaty, it is a most sensitive international and domestic political matter how transborder Hungarians are part of the nation as defined by the Constitution.

13. One obvious consequence is noticeable in constitutional interpretation. In countries where constitutions are admittedly elitist creations, like in Germany and Hungary, originalism plays very little role in interpretation.

14. JOHN WILLETT AND RALPH MANHEIM (EDS.) BERTOLT BRECHT, POEMS 1913-1956, (London: Methuen, 1976), p. 440.

represent concerns of the day, or cheap compromises and privileges of the concerned. Constitutions increasingly became detailed administrative codes of inter-state competences and wish lists of rights to all who have a complaint.

II. Constitution-making in the Absence of People

Contrary to the Romantic vision, most new constitutions, as well as constitutional revisions and amendments are, in the majority of cases, a routine step of political consolidation rooted in the status quo, but may also set up other open-ended processes. In such cases, the return to 'People' even in the most fundamental matters of constitutional design is only formal.

How can one answer such an empirical absence of people in constitution-making? One possibility is that, contrary to the normative assumptions of the Romantic vision, constitutions presuppose 'People' not in the sense that they should enthusiastically create or support the Constitution, but in the sense of being sufficiently homogenous, or if not, presupposing that the constitution should provide a *modus vivendi* for all. Here the 'People' refers not to a community acting together but groups of people who do not have to assume that one or the other will not allow the rest to live under acceptable conditions.

There is a second, principled objection to the fundamental 'We, the People' assumption of the Romantic vision of constitution-making. According to Robert Dahl, it is a shadow theory of democracy where the theory is based on the assumption that a 'people' exists.¹⁵

I would argue that the constitutional compact is primarily a governmental arrangement that provides a stable governmental structure and one that enables a society to satisfy certain general requirements, including among them 'equality', 'the guarantee of subsistence-level existence', and 'freedom'. In this instance, it is not necessary to have the actual approval of all the citizens - it is enough to prove that the original arrangement of the regime is not to anyone's (any important social actor's) serious disadvantage. In the creation of actual constitutions, both approaches did play a role.

Russell Hardin argues that there is no need for actual confirmation - most constitutions are accepted by acquiescence and this is satisfactory both at the pragmatic and normative levels.¹⁶ The German (1948) and Hungarian (1989) examples corroborate this position.

15. ROBERT DAHL, *DEMOCRACY AND ITS CRITICS*, (Yale University Press, 1989), p. 4.

16. RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY*, (Oxford University Press, 1999), p. 182.

It follows that not only do we have constitutions without the constitutional moment, we can have constitutions without the 'People', at least without people who are enthusiastic about the constitution. If acquiescence is empirically sufficient for constitutional legitimacy, then what is the relevance of constitutional enthusiasm? Constitutional enthusiasm allows for the popular assumption that there is indeed a possibility for value oriented public action where decisions and considerations are not only the dictates of interest politics and graft.

But is there a place for constitutional enthusiasm? The emotionally grounded identification with the constitution serves for its unconditional binding. Binding force here would be the result of an emotionally supported and unquestionable socio-cultural fact.¹⁷ Of course, it is possible that the constitution and the practices around the constitution are perceived as unquestionable socio-cultural fact. This is Hardin's point. Max Weber argued that legitimacy is simply the 'prestige of being exemplary or binding' (*das Prestige der Vorbildlichkeit oder Verbindlichkeit*).¹⁸ But being exemplary is not the same as being emotionally attractive. Beyond the taken-for-granted socio-cultural fact, all other forms of acceptance of constitutions require more problematic, easier to challenge justifications. Other grounds of acceptance include various rational arguments: that the institutional design guaranteed by the constitution serves material interests efficiently; or that the given arrangement among powers and nations provides enough guarantees that none of them will become oppressively strong. The two foundations might be interrelated: people might find the constitution to be an uncontested socio-cultural fact as it intuitively corresponds with the cherished values of people (e.g. the constitution provides for the free exercise of religion or freedom, which is a generally asked for value). Intuitiveness matters: if the constitution is a fact it will not be questioned; in fact, it will be assumed that it does indeed provide for the self-same cherished values. In other words, once a constitution is a fact, this will preclude the consequentialist analysis of its performance. A constitution does not require justification based on supposed or perceived performance.

On the other hand there is an element of rationality in the factual acceptance of any constitution as a constant; the revision of arrangements in

17. This is what Michelman calls "existential". See Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605 (1999): "bindingness of a matter of how things are (what I see that we in this country just happen to find ourselves doing)."

18. MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE*, (Tuebingen: Mohr, 1980), p. 16.

terms of their rationality (goal, purposiveness, etc.) is extremely costly and is very often based on irrational assumptions anyway. Constitutions as value judgments economize on the cost of decision in matters of extreme uncertainty.¹⁹

For a number of political and historic reasons, and partly because of the way the political elites treat the constitution, there is little chance in many societies that people would recognize in such constitutions their “feelings and judgments about what is required and permitted in the conduct of political affairs”.²⁰ Certain negative rules like political tolerance, in the sense that the political has to leave private life intact and non-exclusion of the citizens (in the sense that in principle, at least in the formal sense, they all are entitled to participate in the fundamental decisions affecting the community) are important exceptions to the above ‘constitutional alienation’.²¹ Hence the lack of enthusiasm from the very beginning.

III. Processes of Constitutional Acceptance

A. Popular participation?

Of course, the level of actual public participation even in the noblest constitution making is quite problematic. There was intense public involvement in the American ratification process but that public was limited to a tiny elite. In France in 1789 public involvement was also limited, though street level participation was certainly high. The French Constitution of 1946 was adopted by about one-third of the French citizens, while President Lukashenko’s constitutional amendments in Belarus during the last fifteen years always gained support from more than 90 per cent of the franchised. As to amendments, it is possible that an amendment be ratified by less than three-fifth of a house of parliament, a situation that could easily be translated into less than half of the national constituency. The Slovak Constitution can be amended with 60 per cent of the vote of a single Chamber. At the other end of the amendment continuum, we know of very elaborate procedures of constitutional amendment that require confirmation by repeat

19. It would be very costly to let parliamentarism or presidentialism prevail alternatively according to the predictions of a given political moment, under the assumption that one or the other form will serve the country better. Fujimori’s presidentialism served Peru for a while quite well, ending in disaster.

20. Michelman, *Constitutional Authorship*, *supra* n.17 at 1609.

21. The plebiscites were relevant in this regard. They were felt necessary to indicate that the principle of popular authorship is still respected by the elite. On the other hand, the tribal understanding of the national community is problematic exactly in the following regard: it denies the possibility of participation. It is for this reason that references to division into good and bad (or ‘illoyal’) citizens results in strong divisions.

supermajorities (Parliament has to be dissolved after the first vote in the Dutch-Norwegian system and the newly elected Parliament has to vote again). This politically cumbersome process might be combined or countered by a referendum or plebiscite.

On the basis of comparative empirical data D.P. Baron and John Ferejohn claim that "the requirement of special majorities or separate majorities in different legislative sessions or bicameralism is the key variable to explaining amendment rates."²² In other words, if your concern is pre-commitment, you need procedure, not people to protect the constitution. Jon Elster differentiates between absolute entrenchment, parliamentary supermajority, a higher-than-ordinary quorum in Parliament, delays, state ratification in federal systems, and referenda.²³ One may add popular initiative to this list, specifically elected constituent bodies, and the combination of all the above. It is only in a small minority of the known solutions that the 'People' are the initiator of the constitutional amendment or new constitution; exceptionally it is seen as the defender of the constitution (as in Poland). Supranational formations (like the European Union) also tend to deprive the people of its constituent role.

Whatever may be the authorization and mandate of the framers of a constitution, people can legitimize the framers' work subsequently.²⁴ One such popular legitimization of new constitutions is the consolidating referendum. In 1958, under pressure, General De Gaulle was given a mandate to form a government. He accepted it on the condition that his government be allowed to write a new constitution that would then be put to referendum. The procedure was not in conformity with the amendment procedures of the Constitution of 1946. De Gaulle was given a conditional mandate on July 1, subject to his respecting certain principles. On September 28, 80 percent of the voters—two-thirds of the voting population—voted in favour of this text.

In the age of popular sovereignty, the absence of formal legitimacy, i.e., the illegitimate origins of the constitution, does not cause any significant problems. For purposes of legitimacy, it is sufficient to declare that whatever happened was done in the name of the people and, subsequently, to bring

22. D. P. Baron and John A. Ferejohn, *Bargaining in Legislatures*, 83 *AMERICAN POLITICAL SCIENCE REVIEW* 1181-1206 (1989).

23. See, Jon Elster, *Forces and Mechanisms in Constitution Making Process*, 45 (2) *DUKE L. J.* 364 (1995).

24. This was the viewpoint adopted, among others, by the French Constitutional Council when De Gaulle had the Constitution amended by irregularly putting up the issue of direct presidential election for referendum. The referendum affirmed De Gaulle's proposal, and the Constitutional Council found this sufficient proof of constitutionality.

proof of this when the people in some form or other, usually by referendum, confirm the constitution. The birth of revolutionary constitutions is 'irregular'. Those who create constitutions in revolutionary times often do so without official authorization. It happens even in non-revolutionary situations that a completely new constitution is written in disregard of the prescriptions of the old one, i.e., a new one is legitimately created under the old one's authority. The drafting of the U.S. Constitution was an 'irregularity'; it was written by a group of men who were authorized to complete a different task. The delegates in Philadelphia were called by the Continental Congress to prepare the reform of the Articles of Confederation, and this is what they were authorized to do by the member states delegating them. In a procedure that violated the prescriptions of the Articles of Confederation, the delegates decided in secret to formulate a new constitution that was never officially adopted by the delegating Congress but that, through its unconstitutional consent, did not obstruct the document's prescribed democratic ratification procedure. What made the new constitution credible was that the democratically elected representative bodies of the member states of the future Union and the special state-ratification congresses had adopted it.²⁵

According to the classical theory, as illustrated in the Massachusetts Constitution of 1780, full popular (substantive and direct) legitimacy is technically granted when a *constituent assembly*, elected specifically for this purpose, formulates and perhaps adopts the constitution. The Massachusetts plan became the normative standard in the process of making the French Constitution of 1791.²⁶ Likewise, a constituent assembly was convened in France in 1945 in order to formulate the constitution of the Fourth Republic. As a result of its election, the constituent body received its legitimacy directly from the people. Occasionally a special constituent assembly is authorized to amend the very constitution that mandates the formation of the constituent assembly for this purpose, or it allows the assembly to formulate a proposition for its amendment that is put to a referendum.

However, neither constituent assemblies nor referenda necessarily coincide with the popular will. They are not an absolute safeguard for popular acceptance, and even less for constitutional enthusiasm. A constitution that is accepted by a referendum is not of a "higher order" than the one adopted

25. The U.S. Constitution was enacted in the name of [all] the people, the only problem being that 95 percent of the inhabitants of the United States were barred from participating in the ratification process.

26. The French National Assembly of 1789 did not fulfill the theoretical requirements of a constitutional body. The assembly was not elected for constituent purposes, and it was the assembly's own idea to delegate a constitution-making mandate to itself.

by a constitutional assembly. Both can be exposed to the small-mindedness of party politics and institutions, especially after revolutionary or nation-founding enthusiasm wears off.²⁷ In the name of national sovereignty, both majority and minority parties are able to infuse parochialism into the people's will, hence squandering the opportunity to codify a social compact that will be acceptable for generations. The resolutions of the Constituent Assembly might not attract the nation's will at the ratifying referendum, though it is an open question whether the majority in a referendum is in fact the best expression of the sovereign will. During the constitution making process in France, in 1945–46, the framers sought to win the strongest possible public confirmation. Hence the Constituent Assembly prepared only a draft on which a referendum was taken; the proposition was rejected. The proposition of a second assembly received a relative majority, however, an absolute one was not achieved since, *de facto*, nearly two-thirds of the French population did not support it, 31 percent abstained. Still, however, the new constitution was the legitimate expression of national sovereignty. But was this what the nation really wanted? After the collapse of the constitutional order in 1958, the French public decidedly turned against their sovereign's 12-year-old product. People might be unhappy with their creature and people can still live in a democracy under a constitution that seems forced upon them.

B. New states

New constitutions might be products of state formation. Newly formed modern states need a constitution in order to affirm their existence internationally and domestically. At least the assumption that such constitution exists seems to be required, as the case of Israel documents: the Declaration of Independence presupposed the immediate crafting of a constitution, however, the project was delayed and has not been fully accomplished in the sense of a fully written document in 50 years time.

There is a special problem with many 'independence' constitutions. These constitutions are created at a time when state sovereignty is still restricted, and in such cases the constitution can serve the purpose of making sovereignty complete. Here legitimacy may come from the authority exercising sovereignty, from following certain procedures and from giving ultimate transparent popular approval to the procedure. The German Basic Law was created in this manner. It was first initiated by the authorities of the Allied forces, while approval had to come from the institutions authorized

27. See, for instance, the result of the referendum of 1994 in Switzerland, when entry into the European Union was rejected.

by the military occupants, after they themselves found the Basic Law acceptable. The document adopted by the parliamentary assembly was approved by the democratically elected parliaments of the individual member states; so democratic legitimization was present. Similarly, the constitutions of a number of former colonies, such as Ceylon (Sri Lanka), were formulated under restricted sovereignty. However this process later on became a source of doubt and had delegitimizing effects. Further, the affirmation of statehood through constitutional proclamations does not necessarily satisfy the substantive criteria of constitution-making in the sense Rousseau considered the problem. There might well be the case that the constitution that was intended to unite the people of an arbitrarily carved out territory suffers from the defects that the people cannot live together, do not constitute 'People' with a capital P and therefore what originally seemed to be a creation of the People is inefficient, irrelevant, or perhaps a recipe for disaster. This is a typical neocolonialist predicament (see the civil wars in Africa, or the problems of state-formation in the post-communist area, especially in the post-Yugoslav context.)

Even if the institutional arrangements that generally serve separation of powers are in place they might turn to be unsustainable because of lack of solution for ethnic problems, or the total alienation of the people from state power. Similar problems emerge where the constitutional institutions preserve military predominance, or the military is considered to be the ultimate guarantor of the constitutional arrangement,²⁸ which means that the sustainability of the constitutional regime is dependent of an external organization and, therefore not self-sustaining by a balance of the institutions and people behind the institutions.

C. Democratic or elitist constitution-making?

In view of the historical experiences and the contradictory theoretical requirements, to what extent should the constitution-making process be democratic? Since democratic processes expose drafting to everyday politics, to what extent does the need for democracy count if it endangers the success of the process?

The combination of an immaculately conceived constituent assembly with popular democracy's requirements is rare. The text that both society

28. It is quite telling that notwithstanding the massive popular involvement in the making of the 1987 Constitution of the Philippines, Article II, Section 3: "The Armed Forces of the Philippines is the protector of the people and the State" was inserted. In 2005 the Consultative Commission appointed by President Arroyo proposed the abolition of the provision.

accepts and that offers a workable framework for efficient government is often formulated at secret meetings of a small number of elites (for instance, the United States, 1787; Germany, 1918 and 1948; France, 1958; Spain, 1978; Hungary, 1989 and 1990; and Russia, 1993).

The objection that later became commonplace came immediately to the fore when the first elite, national constitution that of the United States, was ratified: the constitution reflected the values and objectives of an aristocratic elite. Patrick Henry, the self-proclaimed “guardian” of the “people’s rights”, had every right to ask at the ratifying convention in Virginia: “What right had they to say, ‘We, the people’? Who authorized them to speak the language of, ‘We, the people’, instead of ‘We, the states’?...The people gave them no power to use their name.”²⁹

In all likelihood the American framing process was not the only one in which the objections to the absence of democracy proved somewhat parochial. With the acceptance of the constitution it was not the democratic, petty-minded, sparring, and local considerations that determined history. Constitutions, at least the ones that have made history, have risen above everyday common beliefs and misconceptions of ordinary public thought. No matter how much the majority insists on its misconceptions, the parochialism, bigotry, and conservatism of the democratic majority are characteristically not the voice of the people. Rather, it is the voice of the mediocre politician who is a slave to election and re-election and thinks he cannot advocate any values that the voters will not celebrate as their own on election day.

Perhaps this opposition coming from parochialism is the reason why, in the constitutions that made history, the drafters resisted detailing rights. The fundamental question in a constitution is the structure it defines for the state and the principles of freedom.

There is nothing to hide or be ashamed of if attempts are made to isolate the constitution to a certain degree from the will of the majority, even if the majority has been democratically confirmed. Modern constitutional ratification is usually a compromise among party elites; it is a unique elite product that is painted with a democratic glaze. But the constitution of a modern constitutional and democratic state claims to have power and authority deriving from the sovereignty of the people, provided that the constitution is not against the people, provided it leaves open the means for

29. PAGE SMITH, *THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY*, (New York: William Morrow, 1978), p. 248.

the people (the individual voter) to determine their own everyday affairs, and provided it gives them the opportunity to block the acceptance of the constitution or amend it if they strongly disagree with it.

It is hardly if ever written, but there is no politician who would not admit to another one in the secluded corridors of parliament that the public does not know what they are voting for or against in a referendum. Where public opinion is free and unencumbered from distortions, a government that deprives its people of their right to vote and the guarantee of their personal safety, for instance by making one-man rule possible, will not pass muster in a referendum. Hitler's oppressive rule was accepted in a referendum not only because an economic crisis and the aroused instincts of the masses ensured broad support, but also because, by the time of the elections, public opinion was taken over by terror, exclusion, and mass psychosis.

As to elitism, what matters is the authenticity of the process. Authenticity comes from making the drafting process open and from the personal credibility of those involved in the preparation of the draft, and from the fact that the draftsmen are individuals who are not influenced by biased personal and group interests and whose personal integrity is respected.