

CONSTITUTION MAKING

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The two meanings of « Constitutional Convention »,

- When I received an invitation to this conference, more specifically, when asked to join the panel on **constitutional conventions**, I assumed that this expression referred to the unwritten constitutional norms that have governed British politics for centuries. I later learned that this was not the idea at all. Rather, at this conference constitutional conventions were to be understood as **elected assemblies** which have the task of proposing and sometimes adopting a written constitution. The relations between constitutional conventions in these two senses are quite complex. I shall return to some of them at the end of the presentation.
- First, however, I'd like to point out that constitutional conventions in the second sense can take several different forms.

Two forms of « Constitutional Convention” in the second sense

- First, there are **pure assemblies**, elected with the task of proposing and sometimes adopting a written constitution, and **only with that task**. Moreover, pure assemblies **perform only the task** for which were elected.
- Second, there are **mixed assemblies**, which combine constituent and legislative functions. Some of these are **mandated** to write a constitution. In the election of the first French parliament after 1945, where the voters were asked “Do you want the assembly elected today to be a constituent assembly?” 96 % of the voters answered Yes. Others are **self-created**, elected either as legislatures or as pure conventions, and then assuming the other task. An example of the former was the Hungarian parliament of 1989-1990. It had been created under Communist rule, but took it upon itself to destroy that regime by piecewise constitutional amendments that amounted to a wholly new constitution. An example of the latter is the Frankfurt constituent parliament of 1848, which dissolved the Assembly of the German Confederation and arrogated its legislative powers to itself.

The normative superiority of pure assemblies.

- I have claimed in various writings that from a **normative** point of view, pure assemblies are superior to mixed legislative and constituent assemblies. The main argument is that mixed assemblies tend to write an excessive weight for the legislative branch of government into the constitution. This effect might be produced in two ways. First, if the framers might hope to be elected to the first ordinary legislature, they may rationally want to carve out an important place for themselves. Second, as La Rouchefoucauld would have put it, legislators can be led by their *amour-propre* to think that the legislature must be an important institution **since they are part of it.**

An argument against this claim

- My claim has been subjected to empirical scrutiny, with mixed results. In particular, three scholars from the Comparative Constitution Projects argue that while the participation of the **executive** branch in the making of the constitution may bias the document in its favor, **legislative** participation has no similar effect.
- I would certainly not claim that there is a **law-like connection** between legislative participation and the importance of the legislature in the constitution, only that there is an **intelligible mechanism** that can be observed in many cases, such as Poland in 1921 and France in 1946. I would, argue, however, that the statistical analysis of the scholars from the Comparative Constitution Projects is intrinsically flawed, since they include a large number of **sham constitutions** in their data base. They include, for instance 33 constitutions of the Dominican Republic, 4 of them enacted by the dictator Trujillo.

What form should Britain choose?

- There are not many historical instances of pure assemblies. The Federal Convention and the Bonn constituent assembly of 1949 are perhaps the best-known cases, and there are some others too. To my knowledge, there are no examples of an upstream convener, such as a monarch, making a deliberate choice between the pure and the mixed form.
- In Britain today, however, the debate about creating a constituent assembly should definitely address this issue. It seems obvious to me that Parliament should **not** be the constituent body, given the distorting effects of single-member districts with no run-off. What the alternative should be, is less obvious.

The temporal structure of constitution making

- In what is perhaps the standard case, constituent processes have three temporal parts: upstream, midstream, and downstream. The **upstream** part has two aspects: the convening of the assembly and the election of the delegates. In Britain, I assume the convener would be the government, with the approval of Parliament. Conveners often try to shape the procedures of the body as well as the substance of the document it produces. The assembly may then ignore their instructions, claiming that the *pouvoir constituant* cannot be constrained by the bodies it shall regulate. The framers of the 1787 American constitution implicitly relied on an argument of this kind. Conversely, the failure of the recent constituent process in Iceland occurred because members of Parliament refused to ratify a document that would have taken away many of their powers.

Electing members to the convention

- The choice of electoral procedures is vital. Assuming a pure assembly with no governing functions, there is no need to strive for **governability**, which is often a desideratum in parliamentary elections. Instead, one must strive for **representativeness**.
- An open question is whether elections should be constrained in some way to ensure a substantial presence of women or minority members in the constituent body, or whether its composition should be left to the electorate. I can see arguments for either arrangement.

Midstream

- Historically, the **midstream** part of the process has simply been the deliberations and votes of the assembly. In South Africa and in Iceland, one also allowed the people at large to participate, by making proposals or by crowd-sourcing. In my view, this is undesirable. **The people should speak twice**, when electing framers and when ratifying or rejecting the document. Both the upstream and the downstream process should occur with extensive public debates, but the midstream process should be insulated. In Peter Russell's metaphor, the whole process should be "hour-glass shaped". I believe the insulation is desirable because of the need for intense focus in the deliberations. For the same reason, the proceedings should not be open to the public. One might, however, release verbatim transcripts of the debates after the end of the assembly but before the vote to ratify. Whether the full roll-call votes should also be made public is a difficult question. Doing so would allow the ratifying voters to verify that the framers put their vote where their mouth was. At the same time, the legitimacy of clauses known to have been adopted with a small majority might be undermined, as many feared at the Federal Convention.

Downstream

- The **downstream** process of ratification might or might not be made subject to a **quorum**. 50 % would seem to be a minimum.
- Another possibility is to require that a certain **percentage of the electorate**, e.g. 40 %, approve the proposal.
- One could also go further, to make voting in the referendum **mandatory**, with non-trivial penalties for abstainers.
- Finally, one might require a **qualified majority** of the citizens (and/or, in federal systems, of the states) for adoption of the constitution.
- For the phrase “We, the people” to be meaningful, some constraint of this kind seems desirable.

Conventions may be needed when conventions break down

- I conclude by some brief comments on the relation between the two senses of “constitutional conventions”. An article in *The Economist* from Dec. 18, 2018, deplores the weakening of the unwritten norms that have guided British politics for a long time. Among the half-dozen or more examples that are cited, I shall mention only the breakdown of the “pairing arrangements” in which MPs from opposite parties promise to abstain from a vote if their opposite number can’t make it. In 2018 a Tory MP voted even though his Lib Dem “pair” was on maternity leave. If the “good chap theory of government” that Elliott Bulmer referred to yesterday is in fact coming to an end, as the article claims, the case for a written constitution is strengthened.

Another example

- Another episode may point in the same direction. In January 2019, John Bercow, Speaker of the House of Commons, said that “If we were guided only by precedent, manifestly nothing in our procedures would ever change. **Things do.**” One alternative to being guided **only by precedent** is of course to be guided **only by a written constitution**, with its formal rules for amending itself.

Should the written constitution incorporate some of the unwritten constitutional norms?

- If Britain does go ahead with the project of adopting a written constitution, the question arises to what extent it should **incorporate** unwritten constitutional norms. In an unpublished paper, I have identified 19 such norms in British constitutional history. The following might be candidates for incorporation. (i) A cabinet secretary cannot disclose to a new administration the papers of a previous government of a different party. (ii) The rules of parliamentary procedure require some degree of fair play between the majority and the minority, e.g. in the assignment of committee seats and of speaking time. (iii) The Cabinet cannot instruct the Attorney General. (iv) When outvoted on any vital question a cabinet may appeal once to the country by means of a dissolution. If an appeal to the electors goes against the ministry the government has to resign and cannot dissolve parliament a second time. (v) The Prime Minister must be a member of the House of Commons. These might well be too many, or too few.

Constitutional Conventions Lessons from Latin America?



ROBERTO GARGARELLA

Four issues



- 1) CONTENT OF THE REFORM (What parts of the constitutional framework should be modified? How?)
- 2) REPRESENTATION/COMPOSITION (How to represent «all different viewpoints» in multicultural societies?)
- 3) INTERNAL STRATEGIES (How to write Constitutions in the context of divided societies?)
- 4) POPULAR RATIFICATION (Popular participation through a referendum?)

1) CONTENT OF THE REFORM



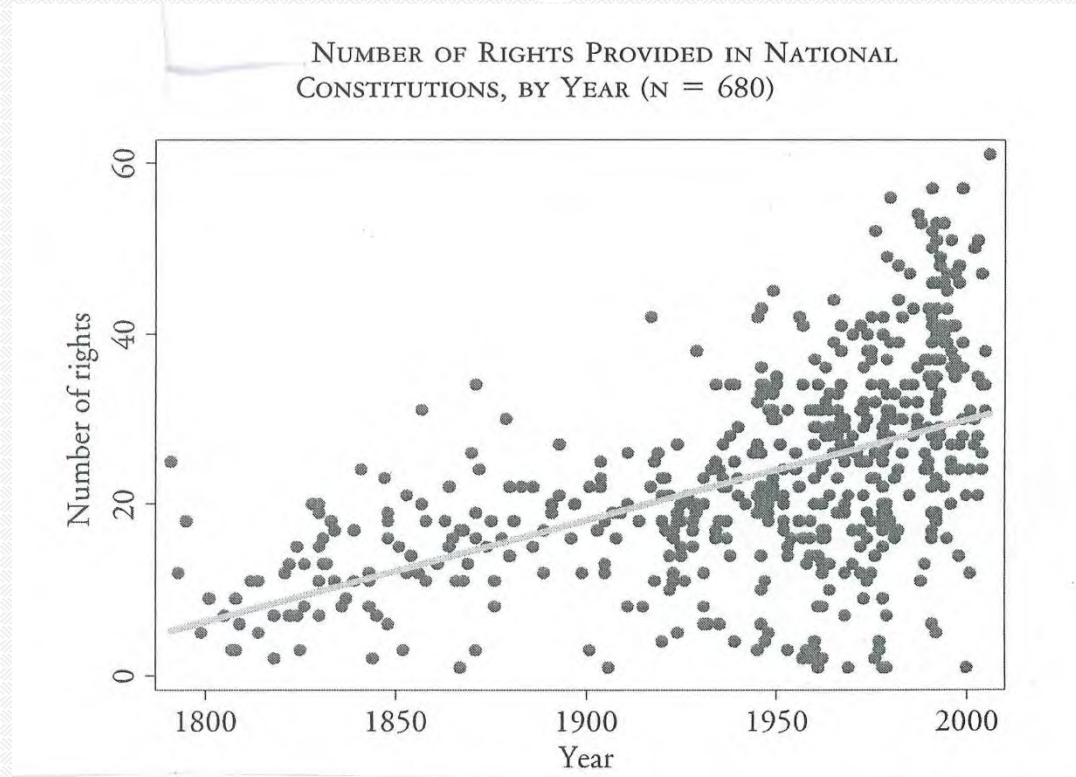
- Juan B. Alberdi (1853): 1A) Constitutions for a limited period of time. 1B) Constitutions should work against the country's worst dramas/traumas. He praised early Constitutions because they were «an expression of the needs that dominated their time»/ US Constitution against the drama of factions. Latin American Constitutions after 1810: concentration of powers against the Spanish re-conquest. Latin American Constitutions mid-1850s: against economic backwardness
- (Similarly, for Cass Sunstein, «Constitutions should work against a nation's most threatening tendencies» Sunstein 1993, 36).
- 1C) Constitution: past and context («with a republican constitutional law and an administrative colonial and monarchial law, South America seizes with one hand that which it promises with the other»)
- 1D) Constitution's internal structure (modify org. power in order to protect rights)
- Latin America 20th Century: Social Rights (responded to the difficulties of their time, but) done in the wrong way: Obsession with rights/ Not sufficient attention to the rest of the Constitution (very particularly: the organization of powers)

Obsession with Rights/ 1917 Mexican Constitution



- Article 27, **Property** (XVIII subtitles): “The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth... necessary measures shall be taken to divide up large landed estates; to develop small landed holdings in operation; to create new agricultural centers, with necessary lands and waters; to encourage agriculture in general and to prevent the destruction of natural resources, and to protect property from damage to the detriment of society. Centers of population which at present either have no lands or water or which do not possess them in sufficient quantities for the needs of their inhabitants, shall be entitled to grants thereof, which shall be taken from adjacent properties” (3655 words).
- Article 123, **Labor** (XIV subtitles), included wide *protections to workers*, and *regulated trade unions*; The clause made reference to the *maximum duration of work*; the use of *labor of minors*; the *rights of pregnant women*; *minimum wage*; the right to *equal wages*; *conditions of labor*; *labor accidents*; the *right to strike and lockout*; *arbitrations*; *dismissal without cause*; *social security*; *right to association*; etc. (2770 words)
- (US Constitution, approx. 4500 words)

New Constitutions and New Rights



- Source: Zachary Elkins, Tom Ginsburg, and Beth Simmons. 2013. “Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice.” *Harvard Journal of International Law*.

New Constitutions and New Rights



- The *Comparative Constitutional Project* survey includes about seventy-four rights. “Very few constitutions included this many rights prior to 1945. We count twelve constitutions –*all in Latin America*- that included more than twenty-five rights prior to this time, with most of these including roughly thirty rights” (Elkins, Ginsburg, Simmons 2013, 71, emphasis added)

An obsession with rights: How not to reform the Constitution



- **Latin American reformers did not pay attention to the connection between the two parts of the Constitution (declaration of rights + organization of powers)**
- **Did not examine the conditions of «reception»/ «resistance»/ Did not examine the «limits imposed by the past upon the present»:**
- Old rights vs. New rights (i.e., property rights vs. communal rights in Bolivia/Ecuador)
- Old powers vs. New powers (i.e., Supreme Court vs. Constitutional Court in Colombia; Magistracy Council vs. Supreme Court in Argentina)
- Old organization of powers vs. New rights («engine room» problem; i.e., concentration of powers vs. participatory initiatives).
- **Changed the declaration of rights without reforming the organization of powers accordingly.** 21st Century Declaration of Rights vs. 19th Century Organization of Powers

2) REPRESENTATION/COMPOSITION



- Extended assumption in The Americas during 18th/19th Centuries:
- Few groups/ Internally homogeneous/ Self-interest/
- (Madison in “Vices of the Political System“ and in *Federalist Paper* n. 10: society is divided between "those who hold, and those who are without property, those who are creditors, and those who are debtors“).
- They assumed that it was then possible to achieve «full representation»
- And now (a problem for contemporary constitutionalism): We keep the ideal, but: how to secure full representation in societies characterized by the «fact of pluralism»/ «the fact of disagreement»? How many groups should be represented? (i.e., Bolivia 36 ethnic groups). How to represent them?
- Correlation input-output (Mexico 1917 and workers' rights; Bolivia 2004, Ecuador 2008 and indigenous rights). Politics of presence

HOW TO REMEDY THE REPRESENTATIVE DEFICIT?



Popular Initiative/ Referendum (Ecuador,Bolivia)

Lottery

Popular Assembly (Chile)

Veto power (language rights/Canada)

Special Representation (Sami Parliament)

Forms of constitutional dialogue

3) INTERNAL STRATEGIES



- How to write Constitutions in the context of divided societies?
- Example of religion:
- Imposition (Chile 1833, article 5: “The religion of the Republic of Chile is the Catholic, Apostolic and Roman religion, to the exclusion of public exercise by any other”)
- Silence (Mexico 1857)
- Ambiguity/Deferral/Accumulation (Argentina 1853: art. 2 vs. art. 14) (Sunstein: «leaving things undecided»; H.Lerner)
- Synthesis (1st Amendment U.S.; overlapping consensus)
- (Lesson: Failure of «accumulation» strategy)

POPULAR PARTICIPATION/RATIFICATION



Ecuador/Bolivia/Venezuela/Colombia/Costa Rica

Bolivian Constitution 2004: 411 articles

(Peace Agreement in Colombia: 297 pages)

Deliberative democracy: Inclusion + Discussion

Constitutional conversation?

Impossible to discriminate/ make distinctions/ have a nuanced approach. Finally: for or against the government (Brexit)