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The Challenge of Making Democratic Constitutions
in Deeply Divided Societies

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President Silver, members of the faculty and student body, ladies and gentlemen.

It is a real pleasure to be with you and let me thank my good friend Rotimi Suberu for initiating the invitation for me to deliver this year's Ewing lecture. Speaking in Bennington has a special resonance for me, because in 1777 my ancestor Henry Anderson fought on the losing side of the second Battle of Saratoga, 25 miles from here. The defeated Loyalist soldiers were exiled to Canada, being the first Loyalists to go there. I'm glad to say Henry engaged in a few raids on the rebels as the Revolutionary War continued. It's just too bad how things turned out.

Tonight, I'm going to speak about the challenge of making constitutions in deeply divided societies, especially those trying to make the transition to democracy. My initiation to this subject came within a week of starting as President of the Forum of Federation in June 2005, when I found myself wearing a bullet-proof vest and helmet, sitting in an armoured vehicle and, driving down the infamous Route Irish from Baghdad Airport to the Green Zone. A colleague and I had come to provide expertise on federalism to the Iraqis.

It was a sobering first experience. Members of the National Assembly had been assassinated, Sunnis had boycotted the elections, major issues were unresolved, and the Americans had set an impossible deadline for completing a draft constitution. The story of Iraq's democratization was not going to end well.

The Spread of Democracy

In 1991, Sam Huntington wrote a famous book, *The Third Wave: Democratization in the Late Twentieth Century*¹, describing three historic waves of democratization: first, in Western countries from the late 18th century to the early 20th century; then after World War II in the former Axis powers and many newly decolonized countries; and thirdly starting in the 1970s in Latin America, Southern Europe and eventually with the collapse of the Soviet empire. We might distinguish a fourth wave starting in the 1990s and continuing today. The most recent cases have been the Arab Spring in Tunisia, Libya, Egypt and Yemen, as well as the astonishing political opening of Myanmar.

These developments show what John Dunn, in his splendid *Democracy: A History*, sees as democracy's having "come quite recently to dominate the world's political imagination". They also show that it is easier to imagine democracy and even to topple an autocracy than to implement a stable democratic regime. Even so, democracy has spread remarkably in the last 45 years. There were an estimated 40 electoral democracies in 1970, about 70 in 1990 and something over 110 in the mid-

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1990s². Since then, the number has remained quite stable, but with churn, as new countries democratize while others regress.

Virtually all countries that transition to democracy write a new constitution, with 5 to 10 countries engaged in major constitutional processes at any one time.³

I am currently deeply involved in Yemen's constitutional transition and have engaged in perhaps twenty countries that were either in active constitutional processes or had been so recently. These tremendously varied countries are all "deeply divided" in that their politics is largely defined by ethnic, linguistic, religious, or regional cleavages.

Having different ethnicities, languages, religions and so on does not automatically make a society deeply divided. Divisions are more likely if there has been a history of repression of some groups or if elites have not worked out an understanding on getting along together.⁴ In India, relations between Muslims and Hindus in different parts of the country depend significantly on whether there are effective links between local leaders of the two communities.⁵ That some very diverse societies are relatively harmonious actually provides good news to deeply divided societies. Diverse societies often do manage their conflicts and find relative harmony.⁶

A key instrument for this is a country's constitution. Constitutions establish the symbols, rights, and institutional structures that define a political community. My focus tonight is particularly on constitution-making in some deeply divided Fourth Wave democracies.

The Process of Constitution-Making

Countries can become launched into a democratic transition after a popular uprising, a military victory, the death of a dictator or even the complete break-down of the state. An exhausted old regime—communist, military or apartheid—may recognize that it cannot continue. The range of possibilities is limitless, and each country's political and social contextual factors help shape the dynamics of its constitution-making.

Sometimes a government, political party or rebel group has won a clear victory in a civil war or in an election. This can permit what is ironically called "victor's justice", where the victor can decide the constitution with little regard to the defeated. Thus in Sri Lanka, the government made no constitutional changes to accommodate the defeated Tamils after the civil war. In Ethiopia, the rebels wrote a federal

² Diamond

³ Ginsburg

⁴ Bermeo

⁵ Varshney

⁶ Taylor on deep diversity

constitution after winning that civil war. In Bolivia, President Morales, after strong electoral victories, largely decided the new constitution. More recently, in Egypt the Muslim Brotherhood, after winning the elections, imposed a new constitution against opposition protests; President Morsi was then ousted and now the military regime appears to be imposing a constitution despite the protests of the Islamists.

Sometimes victors are enlightened. I would say that was the case in India, when the Congress party effectively controlled the drafting of their constitution after independence. It was true here in the United States, where the victorious Union imposed the 18th Amendment, which emancipated the slaves.

However, too often victors' constitutions do little to reconcile the defeated. The victors may turn instead to oppression or assimilation. Over a long time these can sometimes work, but usually at great cost to democratic values. While working towards mutual accommodation⁷ is always difficult, it is the likeliest way to promote social peace and harmony.

In many deeply-divided societies going through a democratic transition, no one is strong enough to dictate the terms of a new constitution. There must be real negotiations and hard compromises to accommodate one another. Such negotiations are always difficult in a climate of deep mistrust and hostility, but they tend to be easier if the transition is in an orderly environment in which it is clear who are the main actors who must agree and when government—the old government or a transitional one—is functioning and public order is maintained. This permits time for a deliberative process and negotiations.

In such cases, the old regime is strong enough to negotiate some of the terms of its own demise—for example with the military regimes in Argentina, Brazil and Chile. In Kenya, the President hung on after fraudulent elections and communal violence, and was able to force a period of power-sharing with the opposition while a new constitution was written. Similarly, in South Africa, the apartheid government negotiated a transition to majority rule with the African National Congress. The whole process, including three years of “talks about talks” before formal negotiations was protracted, but the interim arrangements permitted time to work out the many tough issues.

However, such orderly transitions are often not possible. An old regime more or less collapses and the country enters a period of weak government and constitutional uncertainty. There may even be anarchy, as in Somalia. Interim governments may be overwhelmed by violence in parts of the country, economic crisis, and other issues. It may be impossible to hold elections. Many different actors of uncertain legitimacy and very contradictory objectives may jockey for advantage. Even with the need for a new constitution, there is little consensus on

⁷ Walzer

what it should be. We are seeing variations of this now in Nepal, Yemen, Libya and Somalia.

In Nepal, after the autocratic monarchy was overthrown, elections produced a very divided parliament and weak governments. The parliament, charged with drafting a constitution, missed repeated deadlines to conclude and eventually, after five years, new elections have been called. The country is deeply divided by language, caste and geography so it is unclear if a new parliament will be able to resolve the future form of the country.

In Somalia, the international community sponsored the creation of an unelected parliament and government in exile. There were unbelievable twists and turns that would have been comic if not so sad—at one stage an attempt to replace the parliament ended up doubling its size. The situation has improved a little in that the government is at least now able to operate out of Mogadishu.

The Gaddafi regime in Libya favoured his tribe and repressed all forms of civil society or independent institutions. When it collapsed, there was an explosion of resentments but little framework for orderly politics. Militias now control many areas, while the interim government struggles to develop the most basic capacity. You can imagine trying to write a constitution in such an environment.

Let me talk in a more detail about Yemen, where I am currently working. Yemen illustrates many difficulties that can arise in deeply divided societies trying to create a new political order. For 33 years, a clever autocrat ran Yemen by playing off tribe against tribe—what he called “dancing on the heads of snakes”⁸. However, the South, became deeply alienated because of its mistreatment after unification with the North in 1990. The Houthis, a traditional tribal group in the northern-most province, suffered through a series of short wars with the central government and had strong grievances. Al-Qaeda was active in several provinces. The economy was badly managed. The Arab Spring provided the impetus for the streets to explode with protests in 2011. The country was on the verge of civil war, when the President was eventually forced to resign under pressure from the states of the Persian Gulf and the international community. An interim President and government were arranged, but some process was needed to try to bring some stability to the country.

But what kind of process? It was impossible to hold real elections, so it was decided to launch a National Dialogue Conference that would address a number of issues, including a new constitution. The Special Representative of the Secretary General, a Moroccan official within the United Nations, assumed a major role as a facilitator and mediator. Working out the process was very complex. It took months to decide the rules of the conference, its purpose and structure, the number of delegates and their method of selection. In the end, the conference was made up of over 500

⁸ Clark

delegates, representing political parties, revolutionary youth, the southern coalition that wants secession, the rebelling Houthis and others. Thirty percent of each delegation had to be women. Al Qaeda was the only major group not represented.

Such a dialogue is quite revolutionary in a country like Yemen. Sheiks and former Ministers were subjected to long harangues by revolutionary youth and women—including some wearing veils, who were by no means deferential. The traditional governing class had its past crimes and cruelties exposed, which was fundamentally important. As cathartic as this was, it took quite a while for the nine working groups to settle into preparing serious recommendations. Amazingly, most of the groups have reached a large degree of consensus on many difficult issues. Some of the most important are non-constitutional measures to address past injustices in the South and with the Houthis.

A very tough issue has been the immunity for past crimes that members of the old regime were given when the President stepped down. Many delegates were concerned that the old elite—even the old President—might come back to power. Members of the old regime, for their part, were fighting hard to protect their interests—with the former President playing a big role in the background. It looks as though this issue might be solved with restrictions on who can hold high office and lead political parties.

As much as the conference has achieved, it has failed to find consensus over the future form of the state. While most groups seem now to accept that the country should become federal, they disagree over the number and character of the new regions and the extent of decentralization. This has been even more difficult because the Southern delegation has split. So while there is pressure to conclude, the conference is not likely to resolve some fundamental questions about the structure of the state.

The so-called “road map” for the transition is clearly not going to be met. The conference missed its deadline to finish in September. It will not give clear guidance to the committee that will be assigned to draft a new constitution, so the target dates for having a constitutional draft, a referendum and elections are all going to be missed. There is a current debate over a new road map. Members of the old regime want early elections, which they think they would win. But elections were meant to come after a constitution was agreed. It could take a long time to agree on a new draft constitution, so what should be done? And if things do go well and the committee does come up with a draft, should the country risk a referendum on the constitution—which the South might largely boycott—or should it adopt the draft on an interim basis for a period? These questions are not simply technical because process decisions can affect substantive outcomes. Outside advisors may advocate a process designed to promote trust and resolve conflicts, but participants are often more focused on playing for their own advantage.

The Substance of Constitutional Design

Let me turn now from process issues, to focus more on some key substantive issues of constitution-making. They relate to three words: rights, probity and powers. Questions about how a constitution should protect rights, ensure probity in government, and limit potential abuses of power have been central to all democratic constitution-making at least since Philadelphia in 1789, but they take on a particular cast in deeply divided societies, where there is so much mistrust.

There are two kinds of mistrust that people want dealt with in constitutions. The first is mistrust of politicians: they are increasingly seen as self-interested and often corrupt, especially in developing countries. The second is the mistrust minorities often have of majorities. Such mistrust inspires constitutional negotiators to put more and more into constitutions so as to tie down executives and legislatures by protecting rights, promoting probity and limiting the power of majorities.

Let us start with rights. Some scholars refer to the “rights revolution” and certainly most modern constitutions now embrace a bill of rights. Moreover, these bills of rights often go well beyond the classic, so called first generation political rights, to include various environmental, housing, educational, health, and social rights.⁹ South Africa’s constitution has fully 32 articles dealing with rights, including the “inherent dignity” of all individuals. Of course some of these newer rights are aspirations, that will take time for a poor society to realize. My observation in Yemen is that a participatory process such as a national dialogue reveals a great appetite for extensive constitutionalized rights. They capture an idealized view of government and somehow just listing them seems a step towards a better society.

The most difficult debate around rights in many Muslim societies has to do with the split between secular and religious groups over the constitutional status of Sharia law: is it to be identified as the source or the principal source of law in the country? And if so, what might this mean for women’s and other rights? In the end, one often finds constitutions that give a central role to Sharia but proclaim all the standard rights, including no gender discrimination, as well.¹⁰

Protection of classic rights, such as freedom of speech, association and religion, can be very important for minorities in deeply divided societies. In addition, minorities may seek constitutional status for particular language, religious, educational or employment rights for their members.

Just as rights provisions are becoming more extensive in many modern constitutions, so we are seeing a proliferation provisions to promote probity—such as independent commissions and detailed rules around financial management. This is a major development because these independent commissions are effectively a

⁹ Choudhry

¹⁰ Lerner

new, fourth pillar of government, in addition to the classic pillars of legislature, executive and courts.

The new Kenyan constitution, for example, has commissions for land, elections, parliamentary service, judicial service, human rights and equality, revenue allocation amongst governments, the civil service, salaries, teachers service, and the police as well as independent offices of the auditor-general and the controller of the budget. Other constitutions have commissions relating to access to information, anti-corruption, oversight of intelligence operations, and official languages. These commissions all have tenure of some kind and powers independent of the government.

Such commissions are mainly designed to promote probity in the conduct of government—reflecting the mistrust of politicians—but certain commissions, such as on human rights or official languages are also designed to protect minorities.

Because of concerns around financial corruption, constitutions also have increasingly detailed provisions about the management of public revenues. In addition, the new Kenyan constitution has created an office of an independent Director of Public Prosecutions, which is totally separate from ministerial oversight

While minority groups in deeply divided societies sometimes seek protections in bills of rights, often their primary objective is empowerment. They seek to win constitution arrangements that empower themselves as groups, so that they will not be subject to rule by a potential unsympathetic majority.

Groups that are minorities nationally but form majorities in particular regions can seek the creation of regional governments for where they form the majority. This can be federalism or asymmetric autonomy arrangements as in Scotland in the United Kingdom or in Aceh in Indonesia. However, sometimes antagonistic populations are territorially intermingled so that territorial autonomy cannot address the concerns of the minority. In such cases, a minority may seek power-sharing through joint decision-making arrangements: this is what finally brought peace to Northern Ireland, where Protestants and Catholics now govern together in a complicated way. Such power-sharing is called “consociational”. Federal and consociational approaches can be combined, as in Bosnia-Herzegovina and in Belgium, where there is both devolution and some joint decision-making.

While such arrangements can be effective in reducing conflict and accommodating differences in divided societies, getting to an agreement on them can be a tremendous challenge. Majorities often see federalism as a first step towards separation. And a majority usually resists agreeing to extensive joint decision-making with a minority.

Even when there is agreement on federalism, there may be disagreement on the number, borders and powers of the regional units. We are wrestling with this issue

in Yemen. What should be the process for deciding? A commission to make recommendations? With what criteria? Should locally elected officials have a voice in the decision? The same challenge exists in Nepal which has decided it wants to federalize, but where the tremendous territorial intermingling of ethnicities, languages and castes makes it difficult to agree on the new provinces. Vermonters might relate to this issue in recalling the struggle of the Green Mountain men for an independent state.

While devolution and joint-decision making are probably the most difficult issues of constitutional design for divided societies, the design of other institutions, such as the executive (presidential versus prime ministerial), the electoral system, the courts, civil service and military can also be important and have major implications for the interests of different groups.

The Role of Outsiders

Jon Elster has observed that reason, passion and interest shape constitutional design¹¹. Constitutions are not products of pure reason, which means that people like me, who provide so-called objective advice, can have only a limited role. We can try to help negotiating parties to understand the implications of options and to open their eyes to possibilities. We can encourage a move to interest-based bargaining, which encourages flexibility, rather than positional bargaining, where parties lock onto a position without exploring what it might mean for their interests.

Outside experts must not be too forceful in their advice. Institutional design is not a science, but an art. Moreover, outsiders should seriously study the local context, both to help find compromises and to consider appropriate institutions. I like to think our UN team in Yemen is an example of good practice, but I have seen instances of great confusion from too many advisors, some of the wrong kind, confusing negotiations.

In discussing how Yemen's previous president was forced from office, I mentioned the role played by the international community. Foreign governments and the UN can take a strong interest in a country's constitutional process, especially if it is a strategically important country in transition. Such interest may be well intentioned and provide substantial material support, often through the United Nations. However, on occasion outside powers—they may be neighbours or major powers—may have a view on what arrangements should emerge within a country that reflects their own interests rather than that of the country in question. Thus a great power may wish a regime of a certain kind. Or a neighbour may have concerns about destabilizing spillover effects on itself if certain arrangements are adopted. Even when the international community is well intentioned, donors may press for unrealistic timetables and deadlines.

¹¹ Elster

Conclusion

I have focused tonight on some challenges deeply divided societies face in trying to write new, democratic constitutions. Wanting and achieving a democracy are very different things. Deeply divided societies are characterized by high levels of mistrust and hostility. Thus they, even more than less divided societies, are likely to seek ambitious and extensive constitutional provisions dealing with rights, probity and power-sharing. Agreeing of these matters can be difficult and time consuming, especially if the old order has more or less collapsed and there is great uncertainty about process and actors.

Even if or when agreement is finally achieved, there are limits to the load that constitutions can bear in protecting democracy or reconciling conflicting groups. Some arrangements may create in-built tensions between a constitution and the political class—especially those in the majority. Many constitutions have a very short life¹². But despite these limitations, constitution-making is intrinsic to democratic transitions and even with all the difficulties, it is a fundamental exercise in governance that can make a great difference to a country's future.

¹² Ginsburg