

Introductory Remarks

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Scarcely a decade ago, a conference of this sort would have been more than an anomaly; it would have been presumptuous. If it took place at all, the speakers would have solemnly examined the grotesque crypto-constitutions of an assortment of totalitarianisms and authoritarianisms with a mixture of scientific detachment and juridical respect owed to sovereign efforts at political and economic self-determination. Consider how radically things have changed. In the contemporary international arena, citizens of one national community may concern themselves with, appraise, and even intervene in the crafting and maintenance of constitutions in other communities. The core constitutional principles of national communities are now legitimate matters of international concern.

A growing body of evidence indicates that elites who are free from the internal restraints of constitutional order are more prone to engage in foreign mischief (quite apart from their wicked activities at home) than are elites subject to democratic constitutional controls. Constitutional democracies, as Professor Russett has shown,¹ do not initiate wars against one another. International peace will always be in jeopardy in a world in which some states do not have effective democratic constitutions. Civil and political rights may be proclaimed in international fora, but such proclamations are meaningless if they are not implemented at the national level. Constitutionally protected civil and political rights within states, although usually thought of as quintessentially domestic concerns, serve a critical role in the maintenance of international peace.

Constitutional principles also ensure a flourishing economy. Modern democracies need vigorous and productive economies, as well as a system of free trade among those economies in which all benefit from diverse competitive advantages. This system, however, requires a level playing field. The international economic system cannot operate efficiently when economic and social rights are available in some economies and not in others. Economic, social, and cultural rights can be proclaimed at the international level. Like civil and political rights, however, they are meaningless if they are not implemented at the national level. Constitutionally protected economic and social rights are also critical to the maintenance of a stable international order.

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1. See generally BRUCE RUSSETT, *ESOTERIC EVIDENCE ON THE "DEMOCRACIES RARELY FIGHT EACH OTHER?" PHENOMENON* (1992); BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993).

These developments have far-reaching implications. It is not simply that certain human rights have become, as Professor Thomas Franck has written, international entitlements.² We have unwittingly reached the point where international legal standards require states to have appropriate national constitutions. The Universal Declaration of Human Rights³ and the International Covenants⁴ necessarily imply a right to an appropriate constitution. In some parts of the world, elites still resist this development. With the economic decline and political disintegration of many totalitarian and authoritarian governments, however, many new elites have identified what is often referred to as "constitution building" as a critical, and sometimes even primary, part of the task of national reconstruction. Many scholars and policymakers in the United States concur. Yet we are not always speaking about the same things.

The term "constitution building" is somewhat misleading. At every level of social organization, there exists a constitutive process through which elites establish, maintain, and change the institutions indispensable for the performance of all of society's critical decision functions.⁵ One can no more escape this process than one can build a house while ignoring the most basic laws of physics.

Modern constitution building is an internationally inspired part of national constitutive processes. It aspires to adapt particular domestic constitutive processes in ways that balance effectiveness with the internationally demanded principles of human rights associated with advanced democracies. It seeks to incorporate into critical phases of the constitutive process those compacts between the governed and the governors that establish how power is to be used. It focuses on the use of power, not simply in formal arenas, but in every sector of society, from the market to relations between genders and among generations. And, by incorporating various control mechanisms, it seeks to ensure the effectiveness of those compacts that establish how and for what purposes power is to be used.

Experience has alerted those involved in this process to numerous caveats. Let me select from them ten working principles for review.

1. Those assisting in the development of constitutions cannot simply cathect to a "favorite" constitution and try to replicate it elsewhere. Functions can be adjusted to different contexts, but constitutions, as a whole, do not travel.

2. In crossing boundaries, framers must emphasize functions and not specific institutional implementations of functions. For example, control

2. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

3. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810 (1948).

4. *International Covenant on Civil and Political Rights*, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3.

5. Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, in MYRES S. McDOUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* 191 (1981).

mechanisms are critical in constitutional regimes; no constitution can be conceived without them. Judicial review is one institutional implementation of a control mechanism. It may be cogent in one constitutional context, the United States, but make no sense at all in another, the United Nations.

3. In designing constitutions, framers must account for the actual distribution of power.

4. Framers must design a constitution to reflect a community's particular historical and political context.

5. The experiences of nineteenth-century Latin America and twentieth-century Africa demonstrate that the great constitutions of the eighteenth-century cannot simply be copied on the assumption that they will miraculously transform a political system into a constitutional democracy. Designing constitutions is more than a paper exercise.

6. It is also more than a narrow political exercise. Framers of constitutions cannot simply focus on political institutions. Nor is it enough to add the market. They must consider all value processes in constitutional design and revision.

7. Effective and operational constitutions require what Professor Lung-chu Chen calls the development of "constitutional cultures."⁶ These must be propagated in revised law school curricula, in the media, and in miranda and folklore.

8. Because constitutions must create institutions, framers cannot simply focus on the classic branches or organs of government (i.e., the legislature, the executive, and the judiciary). They must consider and plan for all seven decision functions: intelligence, recommendation, prescription, invocation, application, appraisal, and termination.⁷ In each context, the operative question is how well a particular constitutional arrangement can facilitate the performance of those functions.

9. Framers cannot simply focus on a single community. Democratic constitutions in one state require provisions for the maintenance of regional stability, which, in turn, requires international stability.

10. Where the internal balance of forces is unstable and undermines indigenous efforts to install a constitutional regime, outside intervention may be required. But who can trust intervenors? Happily, a range of regional and international institutions, applying the great human rights instruments, can now provide some of the important external controls that modern democratic constitutions need.

These working principles indicate that building or revising constitutions means orchestrating comprehensive social change. It is a daunting task, but

6. Lung-chu Chen, *Toward a Constitutional Culture for Taiwan*, Paper Presented at the Yale Law School Constitutional Conference on Taiwan (Mar. 14, 1992) (on file with author).

7. See HAROLD D. LASSWELL, *THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS* (1956).

it can be accomplished. This Symposium promises to cover most of these matters. As an internationalist, I might be permitted to quarrel gently with the organizers on one point. They have focused only on the explicitly national dimensions of current constitutional challenges. Curiously, they overlook certain critical transnational constitutional crises in Western Europe after the Maastricht Summit,⁸ and in the United Nations, as the Permanent Members of the Security Council confront more than 180 other governments who yearn, at the international level, for some of the guarantees of a *Rechtsstaat*.⁹ In an integrated and interdependent world, such transnational constitutional developments cannot but affect national constitution building.

I congratulate the students who have organized this timely and important conference and am grateful for the invitation to introduce it.

8. Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247.

9. See generally W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993).