

# TAB 15

## **BUILDING BLOCKS FOR A CONSTITUTION**

By Herman Schwartz

Noted author and constitutional scholar, Herman Schwartz, examines the challenges facing drafters of the world's newest constitutions. Schwartz elaborates on key building blocks to be considered by drafters of constitutions such as who should draft the document, length, and the makeup of courts and legislative bodies.

Those who write constitutions for emerging democracies face daunting challenges. First, they must write a document that enables the society to decide difficult and divisive questions peacefully, often under grave circumstances. At the same time they must establish effective protections for human rights, including the right of the minority to disagree. Legislative minority becomes majority?

Secondly, divisions and conflicts usually begin quickly and resolving these can create long-term problems. When the transformation is negotiated, as in much of the former Soviet bloc, the losers will try to hold on to as much power as they can. If the change involves the complete ouster of a regime, as in Iraq, then the winners will vie for power. The compromises resolving these disputes are often incorporated into the constitution, which can be troublesome in the long run. For example, compromises over slavery in the U.S. Constitution made it possible to get that Constitution adopted but were ultimately not good for the nation.

Moreover, a constitution is written at a specific point in time, usually when the society faces very difficult economic, social and other problems. There is a temptation and often a necessity to deal with these problems quickly. But provisions designed to quickly deal with immediate problems may not be appropriate solutions for the long term.

Overhanging all documents written at a specific time and place is the fact that it is impossible to foretell the future. - And the future will always be different from what is anticipated. Thus, drafters of constitutions must give future governments the flexibility to meet unpredictable and unforeseeable challenges.

One lesson from near-universal experience is that human rights must be effectively protected immediately. When an authoritarian regime is ousted, the society inevitably experiences a sense of liberation and a yearning for freedom. But that sense of excitement does not last very long. Experience in new democracies and old demonstrates that if human rights are not adequately protected initially, it will be difficult to do so later.

## **PRELIMINARY CONSIDERATIONS**

First, should the constitution be written by an ordinary legislative body or by a special constituent assembly? If the decision is to go with the former, incumbent legislators can write a constitution that keeps themselves in office. A special constituent assembly representing as many elements in society as possible is preferable, even though it is more cumbersome and expensive.

Another preliminary decision is about changing or amending the constitution after it is adopted., -It should not be easy to do this. The document should reflect the deepest values of the society and the basic ground rules for the democratic process. These should be stable. On the other hand, since some of the provisions produced by the immediate pressures, conflicts and expectations of the initial period may be ill-suited for the long term, making changes difficult may prevent future governments from dealing adequately with unforeseen problems.

For this reason, it would be wise to review the structural aspects of the constitution after a given period of time. One way is to provide for an expert commission at ten or twenty-year intervals to determine whether structural changes need to be made. This could be particularly useful after the first ten years, when at least some of the problems created by the constitution will become apparent.

This review should not, however, include a weakening of the human rights provisions even though there may be a temptation to do this. As the initial euphoria wears off and expected quick improvements to living standards are not felt, there is less concern for human rights. Leaders and even peoples may be tempted to see human

rights as a luxury, secondary to matters such as economic stability, even though experience shows that human rights rarely impede an effective response to these challenges.

A related preliminary question is whether the constitution should be short or long. Many in the United States believe that because our short Constitution has lasted for more than 200 years, short constitutions are the best, even for nascent democracies. I do not share that view. U.S. constitutional law cannot be found within the texts of the thirty-four original and amending articles. It can only be found in the almost 540 volumes of decisions that a powerful and solidly established U.S. Supreme Court has issued over some 215 years. These decisions have established our most fundamental constitutional principles and rights, few of which can be discerned from the bare text of the U.S. Constitution. Democracies that are new, however, do not have the luxury of either the 215 years to develop these rights and few, if any, start out with a powerful judiciary. They can and should build on American and other experience, and write these fundamental rights and principles into their constitutions without having to wait for the courts.

This does not of course mean that the constitution should be very detailed. Constitutions that include too much can block the necessary flexibility. Deciding what should go into a constitution, what should be left to the legislature, and what should not be regulated at all, is one of the most basic and difficult initial questions.

## **THE BUILDING BLOCKS**

So-called horizontal and vertical structural issues are the most difficult issues for they involve the distribution of power. They are almost always resolved amid political controversy, with short-term goals, particularly how to get and keep power, often dominant.

An initial issue is whether to have a presidential or a parliamentary system. Although each has many varieties, they fall into two groups. The presidential system, of which the American version is the best known, usually involves the election of a chief executive by the people either directly or, as in the United States indirectly for a set period of years. The president, who is both head of state and head of the government, sets both domestic and foreign policy and picks ministers to implement these policies. Ministers are often subject to confirmation by the legislature, but ultimately subject to direction and control by the president.

The legislature is independently elected, also for a set period of years. Neither the president nor the legislature is normally subject to dismissal by the other. This produces a system of dual legitimacy and clearly separated powers.

The presidential system offers stability and, in the hands of a strong president, can provide vigorous leadership. The stability can, however, turn into rigidity, for an unpopular or ineffective president cannot be easily removed until his term expires. Moreover, legislative stalemate and gridlock may result if the legislature is controlled by

a different political party. If this division continues, the government may not be able to function efficiently for many years .

In a parliamentary system, the parliament is the only source of electoral legitimacy. There is no separation of powers between the legislature and the executive - the judiciary of course is independent but it stands outside the legislative sphere -- for the executive branch, usually called the government and headed by a prime minister, is chosen by the party that has a majority in the parliament or from a coalition reflecting a majority of the legislators. The head of state is a president with little power, and is usually chosen by the parliament. The prime minister and the government are accountable to the parliament and can be dismissed by it. Elections can be called at any time, providing flexibility. Since there is no formal separation of powers between legislative and executive, there is little chance of an impasse since a government or prime minister who loses the confidence of the parliament can be dismissed by it.

The parliamentary system can, however, produce a frequent turnover of governments and great instability. It can also produce sudden drastic changes of policy when an opposition gains a majority, which can create a different kind of instability.

There is no obvious answer to which system is better. The choice will often depend on history, the needs of the moment, and other factors. All the countries of the former Soviet bloc outside the Soviet Union, as well as the Baltic nations, adopted parliamentary regimes, in large part because they wanted to become a part of Western Europe which is almost entirely parliamentary. All the former non-Baltic components of the Soviet Union however, have adopted presidential systems.

It must also be decided whether to have a unicameral (single house) or a bicameral (upper and lower house) legislature. If the state is to be a federal state with relatively autonomous components, such as the United States or Germany, it may be desirable to have a second (usually upper house such as the U.S. Senate) legislative chamber that represents the interests of the components. The second chamber is sometimes limited to certain decisions such as those affecting taxes and judicial or other appointments, or to matters directly affecting the components themselves.

Whether to have a second chamber raises an additional question: how centralized is the state to be? How much authority and autonomy should be allocated to lower levels of government like regions or national units? How much independent authority should be allocated to cities, towns, and villages? The range of possibilities is wide, from highly autonomous units to total central control. There is good reason to allow as much autonomy to regional and local units as they can efficiently manage since a central administration is often unfamiliar with local conditions and needs. Also, participation in local government offers people a chance to participate directly in making many of the key decisions that affect their lives, and can be an important part of democratic self-governance.

## THE JUDICIARY

History has established the need for an independent judiciary that can keep the other branches from transgressing constitutional limits, and particularly where basic human rights are concerned. This can be either the regular judicial system, as in the United States, or a special tribunal, a constitutional court, limited to deciding constitutional questions and a few other matters, as in Germany. In the former case, the ultimate authority is a supreme court composed of regular court judges who are appointed for life and normally handle appeals from lower courts; they decide constitutional questions only if necessary to settle the dispute at issue. Most constitutional court members, however, are law professors and others not drawn from the regular court system and usually serve one, and occasionally more, 8-12 year terms. They decide constitutional questions if requested by high government officials, courts and in many countries, by private citizens who claim that their rights have been violated. Most emerging democracies have chosen to create constitutional courts, partly because judicial review by ordinary judges is not in their tradition, and partly because they mistrust the existing judiciary.

Whatever system is chosen, the constitution must explicitly establish the courts' authority to annul laws and other norms and acts inconsistent with the constitution. If there is a special constitutional court, it must not be burdened with extraneous responsibilities. Much of its work will be controversial, for one of its major responsibilities, particularly in the early years, is to establish the constitutional

boundaries among governing authorities. Also, it will sometimes have to rule against the government in human rights cases. In all these instances, it will often be severely criticized by the losers. The constitution should not multiply the occasions for such attacks by giving the constitutional tribunals non-judicial or non-constitutional tasks, for at least in their early years they will lack the prestige and public support on which they depend for effectiveness.

Bolstering an independent judiciary is another reason why a constitution should not be too brief. The more specific a constitution, the easier it will be for the courts to point to relevant language in the document to support their more controversial decisions, and the less they will be seen as having acted according to the judges' own subjective beliefs.

Because the courts' decisions will often be politically sensitive, their independence and impartiality must be constitutionally guaranteed. The judiciary must be an independent branch of government and not be under the Ministry of Justice. The judiciary should control its financial and administrative affairs, free from executive involvement, though necessarily subject to the legislature's ultimate control over the budget.

The constitution must also provide that the lower court judges apply the constitution in their decision-making. In many of the new democracies, all too often those judges ignore constitutional issues when making decisions.

## **PROTECTION OF HUMAN RIGHTS**

It is now established that the constitution must protect human rights and that the courts, particularly the special constitutional tribunals, should play a major role in providing that protection. The U.S. Supreme Court pioneered this development, but tribunals throughout the world now recognize this responsibility. Where international human rights agreements ratified by their governments are at issue, judges have considered themselves bound to observe these treaties. They have often looked to the courts of other nations for guidance on common problems. The result has been the creation of an international constitutional law of human rights.

Every new constitution now contains a statement of basic human rights. This is not enough. The constitution must create institutions to make those rights enforceable. The constitution must specifically provide that persons who claim that their rights have been violated have ready access to a court, and that if a violation has occurred, the victim can obtain an adequate remedy for that violation. Many nations have found that an ombudsman (often an investigator or mediator of complaints) is useful in this regard. A special office in the state prosecutor's office can also be helpful.

Of vital importance to democracy is that the citizenry be able to learn whether the government is doing its job properly and acting in the best interests of the people. The constitution should contain provisions allowing citizens inexpensive and prompt access to all materials in government files, except those the exposure of which can be shown to endanger national security, personal privacy, law enforcement or some other vital

national interest. Leaving to the legislature the matter of whether to adopt a measure like this is unwise, for many governments resist such measures or try to weaken them substantially. Few public officials are eager to expose their activities to public scrutiny.

## **ADOPTING THE CONSTITUTION**

The final question is how should the constitution be adopted? By the special constituent assembly discussed earlier? By the regular parliament, as in many European countries? By the general public? Should the public's involvement take place before or after the constitution is drafted? If the latter, how should the public's participation be obtained? These and other questions have been answered in different ways, and though many political scientists believe that the approval of a constitution should be by the people, that has not been the universal approach.

Writing a constitution is an experiment, the results of which will always be significantly different from what was intended and anticipated. Moreover, the success of a constitution is usually the result of external factors -- the economy, the social forces at work within the society, the nation's foreign relations, natural disasters and many other factors over which constitutional drafters have no control.

Despite these difficulties, new constitutions for emerging democracies can make a difference. They offer a rare opportunity to create a society in which human beings can live in peace and freedom. History does not offer a nation many such moments, and when they occur, the challenges must be met, for the nation's future is at stake.

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