Review

Constituent assemblies

Jon Elster,

Roberto Gargarella, Vatsal Naresh, Bjørn Erik Rasch (eds) Cambridge,
Cambridge University Press, 2018, viii+252 pp., ISBN: 9781316998748

Contemporary Political Theory (2022) **21**, S80–S85. <https://doi.org/10.1057/s41296-021-00488-8>; published online 19 April 2021

The central purpose of this edited collection is to provide in-depth assessment of several cases of constitution-making across the world. Its chapters contribute to this aim from a variety of comparative and theoretical perspectives. The overall focus is on modern constitution-making, with cases from North and South America, Asia, Europe, and North Africa. Given the number of authors involved, edited volumes might run the risk of producing a cacophony of voices. But not in this case, where the different voices are well-orchestrated to produce harmony. Some solo pieces stand out, such as Elster's final chapter set up in lieu of a conclusion. Some chapters take a comparative approach (chapter 2 by Negretto on Latin American democracies; chapter 4 by Malagodi on Nepal and Pakistan; chapter 8 by Bucur, Cheibub, Martin and Rasch on European countries with particular focus on France, Romania, and Ireland); other chapters work as historical reconstructions (chapter 5 by Bathia on India and chapter 6 by Elster on Norway); others yet have a generalist, synthetic flair (chapter 1 by Gargarella; chapter 7 by Gylfason on Iceland; and the final chapter by Elster). The broad array of examples gives readers insight into different kinds of constituent assemblies, which vary in function of when 'the people' speak (upstream by selecting the representatives, or downstream by ratifying the output); in the relationship with legislative assemblies; in size; or in duration of deliberation. The book even discusses instances of unsuccessful constituent assemblies in which an assembly was called but failed to produce a text (chapter 4 by Malagodi on Pakistan and Nepal).

Normatively, the book examines what a good constitutional assembly should look like. Consider the questions prompting the first chapters: how should delegates properly consider the demands of rival groups? Should there be an assembly especially commissioned to write a constitution? How to ensure that the assembly does not fail? And how to incorporate special competences of groups of people by framers of a constitution?

The most impressive feature of the volume is the large number of causal mechanisms that explain the choices of drafters of constitutions. In a very general manner, it may be stated that how natural or social scientists seek to approximate true knowledge is by providing explanations. The best kind of science provides reductionist explanations to make sense of a fact or event by reference to a different, usually lower, level. Achieving what only the best historical writings do, taken collectively, the chapters of *Constituent Assemblies* follow this approach to suggest a reduction of some political behaviours to psychological mechanisms. While a mix of anger and enthusiasm led the framers of the 1814 Norwegian constitution to be risk-prone in hopes of an independent Norway, the strong emotions of the night of 4 August 1789, when the French National Assembly abolished feudal privileges, may have led many deputies to irrational beliefs and wishful thinking. The reduction is elegant and the collective fruit of the prowess of the authors. To be sure, then, this fine work demands admiration. We can nevertheless raise questions about its normative message, as well as on its account of causality and the fusion of psychology and history in constitutional assemblies.

How should a constituent assembly be designed? The normative answer of the volume is to pick the least bad outcome. This means drawing up an assembly with such constraints that certain interests or emotions ('temporary or partial considerations', in the words of Madison, 1788, p. 10) cannot taint the final text. This is a normatively thin but procedurally robust statement, a Benthamite idea for institutional design already explored at length by Elster in *Securities Against Misrule* (2013). It is probably easier to have an enlightened king write a constitution (the book refers to Plutarch's examples of Solon and Lycurgus for Athens and Sparta), but what, to take up Aristotle's objection, if the king is drunk – literally or figuratively with a passion for the military or for himself?

Equally rational would be to design rules to convene a constitutional assembly that could write the best possible text, as opposed to aiming for the least bad. But this runs into problems of substance: what is the best possible text? What counts as a good constitution? Because of these insurmountable difficulties in answering this question, the suggestion offered in *Constituent Assemblies* is convincing.

The volume also adds to a classic question of modern politics: why limit decision-making to a representative constituent assembly (or, more generally, representative government)? Eighteenth-century authors drew quite a stark distinction between democratic and republican, or representative, government (Manin, 1995, p. 12). Their reasons for representative government had to do with representatives' skills and motivations. The Abbé Sieyès, for instance, deemed representative government a form of division of labour: it is in the common interest that some people specialise and become expert in the craft of governing (Sieyes, 1789a). Similarly, for Madison, a 'republic' consisted of government 'through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least

likely to sacrifice it to temporary or partial considerations' (1788, p. 10). The question of representatives' skills also motivates Udit Bathia and Jon Elster, who take up this question with reference to the Indian and Norwegian constitutions. Bathia analyses the nuances of discussions about universal suffrage in the Indian constituent assembly. The choice of universal suffrage with the new constitution was far from uncontroversial: the framers worried about citizens' 'political incompetence' (p. 114) or downright illiteracy. Further, through indirect elections, nominations, and graduate constituencies – that is, constituents with a university degree—the Indian constitution conferred 'greater political power on persons deemed more competent' (p. 126): it relied on techniques for 'epistocracy' drawn from the U.S., British, and Irish constitutions. Bathia does not explicitly criticise these choices, but the decision to assign special political weight to university-educated elites may appear curious because, as Tocqueville remarked, '[t]rue information is mainly derived from experience; and if the Americans had not been gradually accustomed to govern themselves, their book-learning would not assist them much at the present day' (Tocqueville, 1835, p. 349). In the case of the Norwegian constitution, too, (political) illiteracy did not seem fatal. Elster shows how, in Norway in 1814, the framers' unfamiliarity with the working of political assemblies led to a brief period of deliberation. By luck more than by design, this turned out to favour their interests.

When it comes to causal mechanisms for constitution-making, in chapter 1, Roberto Gargarella sketches four ways in which drafters of a constitution may reckon with the demands of rival groups. These are imposition, silence, synthesis, and accumulation. The chapter focuses on accumulation, by which Gargarella means cases in which the framers cannot reach common agreement but refuse to remain silent on an issue. 'In those cases, the convention's members may decide to simply sum or put together (one on top of the other) their different claims' (p. 18). The result is an inconsistent text, and the chapter details possible forms of internal inconsistency. Interestingly, Gargarella not only shows *that* framers may choose a strategy of accumulation but shows *why* they might do so, suggesting hypocrisy as a key reason.

The four mechanisms also have implications for constitutional interpretation. For example, accumulation not only shows the limits of textualism but also challenges systematic interpretation, at least in cases where the system itself does not provide criteria for solving ambiguity. Gargarella gives the example of the 1853 Argentinian constitution, whose Article 2 gives special status to the Catholic Church, following conservative demands, and Article 14 adopts religious tolerance, following liberal demands. I believe that lawyers will find a way to square the circle, but this suggests that they have recourse to a hermeneutical principle which is not provided by the constitution itself. Something similar happens in European Union law, in which Common Foreign and Security Policy (CFSP), albeit part of a unitary legal order, retains 'distinctive rules and procedures' as a form of

compromise between diverging positions of the most influential member states in security and defence (Lonardo, 2020). The compromise was reached between pro-integrationist countries (such as Germany) and countries who preferred to retain control over foreign policy choices (such as the UK) and assigned the EU some competence in foreign security and defence policy at the ‘price’ of making this a curtailed competence. This result may be construed as accumulation as it effectively entails ‘leaving tensions or even contradictions, totally or almost totally intact’ (p. 18).

Must we live with a legal system with a contradictory constitutional text, or is there need for a meta-criterion that solves ambiguity? And if the latter, as is almost always the case in the real world where courts are entrusted with finding legal solutions to concrete disputes, where is the meta-criterion to be taken from? There are cases, such as Argentina, in which the new constitution and perhaps the legal system as a whole) simply does not offer criteria for the solution of constitutional controversy. This is the classic example of a ‘difficult case’. Judges may have recourse to some general principle of interpretation or substance and will have an incentive to affirm that the principle they choose is, in fact, part of the legal system. (I believe this is trivially or definitionally true, because whatever judges pronounce to be part of a legal system is in fact part of it). But external observers, who do not face the same constraints as judges, need not stick to the position that considerations to solve constitutional ambiguities need to be contained in the legal system.

The chapter by Gargarella thus invites more abstract reflection on the relationship between constituent power and the (resulting) legal system. On pain of circularity, no system can determine the rules for its own validity. In this sense, it is clear that the constituent assembly, if it is to establish a new system, cannot be bound by that system – a position that dates back to Sieyes (1789b). In reality, however, there are examples of constituent assemblies which are constrained by some other power: the Icelandic parliament obstructing the implementation of the new constitution, as Gylfason shows in chapter 7, is a case in point. Of a different kind – but leading to the same conclusion – are cases in which the constituent assembly is in itself bound and abides by prior instructions.

Chapter 6, by Jon Elster, focusses on the constitutional assembly which produced the Norwegian Constitution in 1814. Despite its rather didactic tone, and even though the subject matter is little more than a footnote in constitutional history, Elster’s chapter is a masterpiece of scholarship because it joins psychology and history in an analysis reminiscent of Sallust, Tacitus, Plutarch, Alexis de Tocqueville, or Paul Veyne. Edward Gibbon also comes to mind, but Elster’s style is drier and less ambiguous. Like Elster, and with the exception of Gibbon and Veyne, these writers are not professional historians. Nevertheless, they all crafted exquisite historical narratives by uniting political acumen and deep knowledge of human nature with (more or less biased) attention to the psychology of their

characters. Elster's chapter evinces erudition and sophistication. It shows how enthusiasm led the framers to make possible what, to a sober mind, would have looked impossible. Their strong emotions, a mixture of enthusiasm and anger, diminished their risk aversion and resulted in a constitution for an independent Norway. This, the chapter argues, would not have happened if the framers had been 'in their right mind', because the international context strongly loaded the dice against Norwegian independence. As a matter of fact, after the constitution was adopted, Norway joined a union with Sweden.

Even though he certainly attends to the role of individuals (such as the 'massive wishful thinking' of prince regent Christian Frederik, p. 141), Elster assigns special weight to the collective enthusiasm of the framers. One may reasonably question how several dozen people were, for several weeks, under the sway of such an enthusiasm that would justify their choices: for example, they overlooked an obvious stumbling block to Norway's independence, namely Britain's opposition (p. 148). In light of the lack of political intelligence this decision suggests, Elster is right to point to luck as a central ingredient of constitution-making.

Overall, the wealth of concrete examples allows the chapters, collectively, to reveal the telling details that enable even the non-specialist reader to get a robust idea of the processes of constitution-making. The reader is left to work out such mechanisms, which can be extrapolated to cases not covered in the volume, but in the last chapters Elster spells out more fine-grained psychological mechanisms of constitution-making. The abundance of examples, attention to detail, enjoyable style, and focus on the psychological mechanisms of constitution-making make *Constituent Assemblies* a seminal contribution to the field. As with many great pieces of scholarship, the book provides general insights by focusing on narrow claims and reaffirms the lesson that social science should not hunt for 'all-encompassing explanations but for illuminating insights' (Kitromilides, 2020, p. 167).

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