

Imposed Constitutions, Imposed Constitutionalism, and Ownership

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I. RELEVANT FACTORS INCLUDING THE WILL OF THE PEOPLE

In 1944, Judge Learned Hand spoke at a ceremony in Central Park, New York, to swear in 150,000 naturalized citizens. “Liberty lies in the hearts of men and women,” he observed, “when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”¹ Building or rebuilding faith in the idea of the state requires a similar transformation in mentality as much as it does in the formal laws that govern political relations. Any effort to generate a rigid template for constructing the institutions of law and order in a post-conflict environment is therefore likely to fail. As Judge Hand recognized, the major transformation required is in the hearts of the general population; any foreign involvement must therefore be sensitive to the particularities of that population both at the level of form and of substance.

Reconciling this need for sensitivity with the circumstances in which international actors have assumed responsibility for constitutional processes in post-conflict territories has led to difficulties. Two types of problem have arisen. First, the rationale for international engagement is typically the malevolence or incapacity of existing governance structures: intervention is premised precisely on the need to transform or build those structures, rather than to maintain them. Second, the limited timeframe within which resources tend to be available to post-conflict territories leads to problems in sequencing. In the absence of ongoing strategic interest, such as the European Union’s ties to the Balkans, the window of opportunity for sustained attention by international actors and large scale reconstruction efforts appears to range from about one to three years. By the end

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¹ LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (3d ed. 1960).

of this period, control of the territory will have passed to national hands and the time for “sensitivity” will have elapsed.

How to use that window—and the significant leverage it gives an occupying power, the United Nations and its agencies, the international financial institutions, donors, and non-governmental organizations—is the subject of an increasingly voluminous literature.² Noah Feldman’s thoughtful essay, which begins with a walk just a few miles south of where Judge Hand delivered his remarks, challenges some of the dominant themes in that literature and in the practice of imposed constitutionalism. In particular, he rejects the extreme view that a population can be saved from itself through the crafting of a perfect document³—a view curiously embraced both by neoconservatives eager to institutionalize friendly governments and by human-rights activists keen to formalize proper restrictions on the powers such governments may exercise.⁴ At the same time, however, Professor Feldman has little time for demands by the protesters on West Third Street that average Iraqis, Afghans, or Timorese should have a meaningful say in the drafting of their respective constitutions: a new constitution must be “*understood* as locally produced to acquire legitimacy,”⁵ but that production is essentially the work of local elites. The trite response to this claim would be that “local ownership” demands that all have a voice in the constitutional process. Yet that would miss the context within which such constitutions are normally drafted. Given the nature of the foreign intervention that typically provides the impetus for this process, ownership through democratic institutions and processes may well be the end of the intervention, but by definition it is not the means.

Having passed up one trite comment, however, I will linger on another: the difference between imposing a constitution and imposing constitutionalism. One of the key insights of Professor Feldman’s essay is the distinction he draws between formal and substantive change in the institutions of governance. Much as it is frequently assumed that the staging of periodic elections is an indicator of the embrace of democracy, he shows the rhetorical slide that is commonly made to assume that democracy in turn “really means liberal democracy.”⁶

Recent history warns us against such easy assumptions. In 1995, at the

² See, e.g., RICHARD CAPLAN, *INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION* (2005); SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* (2004); FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* (2004); KIMBERLY ZISK MARTEN, *ENFORCING THE PEACE: LEARNING FROM THE IMPERIAL PAST* (2004); ROLAND PARIS, *AT WAR’S END: BUILDING PEACE AFTER CIVIL CONFLICT* (2004).

³ See Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 882 (2005).

⁴ *Id.* at 865–69.

⁵ *Id.* at 859 (emphasis added).

⁶ *Id.* at 865.

conclusion of the bloody war in Bosnia and Herzegovina, elections were promised in the Dayton Peace Agreement six to nine months after the end of hostilities,⁷ with a further promise that American troops would be home in a year.⁸ In an effort to bolster psephology with idolatry, the Dayton Agreement also incorporated no less than sixteen human rights treaties listed in an appendix.⁹ As was soon discovered, staging elections so soon after conflict may turn von Clausewitz's dictum on its head, with politics becoming the continuation of war by other means. The political process in Bosnia led not to the emergence of a mature political elite but to election campaigning along the same ethnic fault lines of the prior military campaigns; elections have been held almost annually in Bosnia and yet they remain little more than a census on ethnicity.

Democracy requires more than the periodic casting of ballots. And, as Paddy Ashdown, now the fourth High Representative in Bosnia, later recognized, flawed democracy may sometimes be worse than no democracy at all:

[W]e thought that democracy was the highest priority, and we measured it by the number of elections we could organize. The result seven years later is that the people of Bosnia have grown weary of voting. In addition, the focus on elections slowed our efforts to tackle organized crime and corruption, which have jeopardized quality of life and scared off foreign investment.¹⁰

Professor Feldman's central point is analogous: A constitution incorporating rights that are not respected may be worse than having no such rights at all. At its most extreme, he implies, including extensive human rights provisions that are routinely disregarded may undermine the most basic purpose of a constitution: to provide for the peaceful exercise of power in accordance with the rule of law.¹¹ But here the distinction between an imposed constitution and imposed constitutionalism becomes important. Constitutions are and should be notoriously difficult to change; constitutionalism denotes a process—indeed, a way of thinking politically—that develops over time. The moment of drafting a constitution is therefore a

⁷ General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Bosn. & Herz.-Croat.-Fed. Rep. Yugoslavia, Annex 3, art II(4), U.N. Doc. S/1995/999, available at <http://www.yale.edu/lawweb/avalon/intdip/bosnia/daymenu.htm> [hereinafter Dayton Peace Agreement].

⁸ See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. at para. 21, U.N. Doc S/RES/1031 (1995).

⁹ See Dayton Peace Agreement, *supra* note 7, Annex 6, App. Cf. MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (2001) (arguing for limitations on the scope of international human rights to preserve their legitimacy).

¹⁰ Paddy Ashdown, *What I Learned in Bosnia*, N.Y. TIMES, Oct. 28, 2002, at A25.

¹¹ See Feldman, *supra* note 3, at 872.

unique opportunity not merely to strike bargains between different political elites in a territory, but to establish the language and grammar of political discourse in a territory for the years and decades to come.

In a post-conflict constitutional process, emphasis will necessarily be placed on the former dynamic—ensuring, for example, that the Iraqi constitutional process is shaped so that the Kurds have an effective veto (a provision that may, ironically, end up being used by the once-dominant Sunnis). But giving civil society actors the language with which to challenge how power is exercised over time should not be dismissed as simply the ideological fervor of an international human rights elite. Indeed, representatives of human rights organizations would, I am sure, be amused to see themselves included on a par with occupying powers as “entities doing the imposing.”¹²

Cambodia provides an instructive case study of how that language and grammar may be the most important legacy of a foreign intervention. Though the United Nations-led intervention and elections in 1992–93 did not displace Prime Minister Hun Sen from power, or prevent a coup in 1997 and flawed elections in 1998, the period of foreign engagement laid the foundations of a relatively free press, took some halting steps in the direction of democracy, and introduced the language of human rights to Cambodia.¹³ In a different context, the Conference on Security and Cooperation in Europe’s Final Act of the Helsinki Conference in 1975 included human rights provisions that were, at the time, derided as laughably unenforceable.¹⁴ Nonetheless, dissidents in Eastern Europe were later able to co-opt the language of such documents to call for union rights in Poland, glasnost in Russia, and, after 1989, multi-party elections.¹⁵

This is not to suggest that human rights provisions should only be included as a kind of rhetorical gloss on the real political deal being done. Rather, it is the more modest suggestion that rhetoric in such contexts is important. It is also intended to suggest that, just as Professor Feldman is right to criticize those who regard a post-conflict territory as a blank slate upon which ideal institutions of governance may be inscribed, the indigent solutions to basic questions such as state religion do not exist as passive truths to be discerned through a plebiscite. On the question of state religion in Iraq, for example, it seems clear that the attraction of a theocracy for many Iraqis waxed and waned in the months following occupation. And, to put it provocatively, it would be disingenuous to suggest that the

¹² *Id.* at 883.

¹³ See CHESTERMAN, *supra* note 2, at 224–25; MICHAEL W. DOYLE, UN PEACEKEEPING IN CAMBODIA: UNTAC’S CIVIL MANDATE 74 (1995).

¹⁴ DANIEL C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM 244–55 (2001).

¹⁵ *Id.*; Michael Ignatieff, *Human Rights, Power, and the State*, in MAKING STATES WORK: STATE FAILURE AND THE CRISIS OF GOVERNANCE 59, 62 (Simon Chesterman et al. eds., 2005).

United States should not act to suppress the establishment of Shiite government of Iraq when Iran appears to be supporting precisely that.

Nevertheless, for reasons connected to the nature of secular left politics, freedom of religion is no longer as important to the human rights movement as it used to be.¹⁶ Not so for the position of women, another example that Professor Feldman raises in passing. Here efforts have frequently been made to do far more than ensure the adoption and implementation of international conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).¹⁷ In Kosovo, when elections were being held for the province’s Provisional Institutions of Self-Government, quotas mandated by international civil servants led to the election of approximately twenty-eight percent female delegates.¹⁸ This is more than double the level of female representation in the United States Congress or Senate, and some Kosovars complained that they were being held to standards of political correctness that went beyond what human rights elites could achieve in their own countries. I do not mean to say that “local ownership” requires cultural relativism. Clearly, higher representation of women might better reflect the desires and aspirations of women in a territory such as Kosovo. But it is also clear that such decisions are being made with a view not simply to being responsive to local expectations.¹⁹

In addition to the tensions created by the juxtaposition of necessary local legitimacy and the motivations for foreign intervention at the level of substance, a second set of tensions arise due to the supply-driven nature of foreign engagement. Typically, that will put a constitutional process on a timeline that is geared less to the political realities in Dili, Pristina, Kabul,

¹⁶ Cf. NORBERTO BOBBIO, *THE AGE OF RIGHTS* 67–68 (Allan Cameron trans., 1996) (discussing the evolution of the concept of rights from religious freedom to the modern human rights doctrine).

¹⁷ See Feldman, *supra* note 3, at 869–70, 881. The Afghan constitutional process was, in fact, criticized for endorsing the country’s 1964 constitution (as opposed to the seven other constitutions since 1931) because it is the document “least favourable to gender equality,” disregarding the fact that this was the only constitution in living memory that had been accompanied by anything resembling stability in the war-torn country. See CRISIS GROUP, *ASIA REPORT NO. 48, AFGHANISTAN: WOMEN AND RECONSTRUCTION* 18–19 (Mar. 14, 2003), at <http://www.icg.org/home/index.cfm?id=1637&1=1> (last visited May 19, 2005) (on file with the Connecticut Law Review).

¹⁸ United Nations Development Fund for Women, *Gender Profile of the Conflict in Kosovo*, at www.womenwarpeace.org/kosovo/docs/kosovo_pfv.pdf (last visited Mar. 15, 2005) (on file with the Connecticut Law Review).

¹⁹ Indeed, moves to include significant numbers of women in the Kosovo Police Service (KPS) were openly intended to lower the “testosterone level.” WILLIAM G. O’NEILL, *KOSOVO: AN UNFINISHED PEACE* 112–13 (2002). At the same time, it is far from clear that inclusion of women on the basis that they are more caring and community-oriented than men does more than reinforce gender stereotypes about the respective roles of each in society. For further discussion, see CYNTHIA H. ENLOE, *BANANAS, BEACHES, AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS* (Univ. of Cal. Press 1990) (1989); DYAN E. MAZURANA & SUSAN R. MCKAY, *WOMEN AND PEACE-BUILDING* (1999); BARNETT R. RUBIN, *BLOOD ON THE DOORSTEP: THE POLITICS OF PREVENTIVE ACTION* 180 (2002).

and Baghdad than it is to the political realities in Washington, D.C., Paris, London, and other capitals.

In East Timor, limitations on time meant that much of the necessary civic education to have meaningful consultation with much of the population on the constitutional process did not happen. In addition, the election of a constituent assembly to draft the constitution *and* serve as a provisional legislature assumed the answers to two of the most contentious questions for any constitution: (i) how the legislature is elected and (ii) what powers it holds vis-à-vis the other organs of government. The process followed in East Timor presumed the existence of a consensus on at least the voting method before the assembly could be elected, and mandated that legislature-in-waiting to define the scope of its own powers. Not surprisingly, the constituent assembly-cum-legislature endorsed the method by which it had been elected and gave itself broad powers.²⁰

In Kosovo the uncertain final status of the territory²¹ introduced precisely the opposite problem. Since there is no clear exit strategy for international actors, senior staff are required to profess to have no opinion on the central political question that underlies all constitutional developments: whether Kosovo is to become independent. In negotiations for the “Constitutional Framework for Provisional Self-Government,” UN staff could not accept text that stated that the purpose of the Provisional Institutions was to facilitate “the determination of Kosovo’s future status in conformity with

²⁰ The test of a constitution is not the perfection of its contents but the legitimacy with which it is viewed. As the Timorese engaged in public consultations on their own constitutional process in January 2001, the United States was just recovering from a constitutional crisis that saw George W. Bush defeat Al Gore in contentious circumstances, including an apparently partisan vote by the Supreme Court. Zimbabwe, among others, offered to send electoral observers to oversee a recount in the United States. See *Election 2000: Foreigners Chide and Poke Fun at US After Years of Lectures on Fair Elections*, WALL ST. J., Nov. 10, 2000, at A8, available at 2000 WL-WSJ 26616473. A senior U.S. official then working for the United Nations advised the Timorese to learn from the United States: in some people’s eyes the wrong person had been appointed president in a flawed process, but the population accepted the result because they believed that, however flawed, that process—the Electoral College system and the role of the Supreme Court as final arbiter in disputes about election laws—was itself legitimate. Cultivating legitimacy, therefore, was at least as important as achieving a good text. A cynic might add that apathy on the part of much of the population helps also.

²¹ UN Security Council Resolution 1244 provides that Kosovo technically remained part of the Federal Republic of Yugoslavia (now Serbia and Montenegro) but that the UN should develop “substantial autonomy” in the province. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. at para. 10, U.N. Doc. S/Res/1244 (1999). The vast majority of Kosovar Albanians favor independence. See John Reed, *History, Demographics Fuel Kosovo War*, WALL ST. J., Mar. 25, 1999, at A17, available at 1999 WL-WSJ 5445838.

the express will of the people.”²² Even a guarded reference to the possibility of a referendum was regarded as unacceptable; the preamble as adopted states that Kosovo’s future status will be determined “through a process at an appropriate future stage which shall, in accordance with [Security Council resolution] 1244 (1999), take full account of relevant factors including the will of the people.”²³ These aren’t quite truths that one would hold to be self-evident.

II. DEMOCRACY CALLS FOR TIME

To the many criticisms of the United States’s conduct towards the end of major combat operations in Iraq in April and May 2003, Professor Feldman adds the extraordinary anecdote that the Bush Administration found space for two dozen veterans of Eastern European democracy movements to travel to Iraq in the hope of, presumably, inspiring peaceful constitutionalists through a process of osmosis.²⁴

Iraq stands now as a cautionary tale of military and constitutional adventurism. Indeed, there is a very real danger that an invasion premised on, among other things, Iraq’s alleged connections with Islamist terrorism has transformed the country into two things it never was: Islamist and an incubator of terrorism. It is easy to criticize the failure to plan for post-conflict disorder, and the decisions to disband the army and to engage in blanket de-Baathification. But the greatest mistake on the part of those urging the United States to violence was the assumption that transformation into something else was not only possible but straightforward. In an interesting twist on the usual use of the rhetoric of ownership, this was implicit even in the warning that Secretary of State Colin Powell is said to have given President George W. Bush: “You are going to be the proud owner of 25 million people. . . . You will own all their hopes, aspirations and problems. You’ll own it all.”²⁵ Powell and Armitage are said to have “[p]rivately . . . called this the Pottery Barn Rule: You break it, you own it.”²⁶

To pursue the metaphor (later disavowed by anxious representatives from Pottery Barn²⁷), you might have to pay for it, but that doesn’t mean that you can use it.

Noah Feldman’s account of imposed constitutionalism captures the one

²² CHESTERMAN, *supra* note 2, at 228 (quoting Legal Framework for the Provisional Institutions of Self-Government in Kosovo/Provisional Constitution of Kosovo (provisional draft of Apr. 17, 2001), pmb1.).

²³ *Constitutional Framework for Provisional Self-Government*, UNMIK Regulation 2001/9 (May 15, 2001), available at <http://www.unmikonline.org/constframework.htm>.

²⁴ Feldman, *supra* note 3, at 865.

²⁵ BOB WOODWARD, *PLAN OF ATTACK* 150 (2004) (internal quotations omitted).

²⁶ *Id.*

²⁷ Al Kamen, *Pottery Barn Gets a Break*, WASH. POST, Apr. 28, 2004, at A19, available at LEXIS, News Library, Wpost File.

lesson that can confidently be derived from the state-building projects of the late twentieth and early twenty-first century: modesty. Speaking at the beginning of the end of the cold war in Eastern Europe, Karl Popper warned against assuming that the move to an open society was an easy one: “It is more difficult to pass over from totalitarianism to democracy than from democracy to totalitarianism,” he warned. “Democracy calls for deep-going, value-oriented changes in the public mentality—it calls for time.”²⁸ Parachuting in those who have experienced constitutional change in Eastern Europe (or, indeed, a professor of constitutional law with a D.Phil. in Islamic thought) is an uncertain foundation for drafting an adequate constitution in theory and may actively undermine the development of constitutionalism in practice. For while a constitution is a text easily drafted—just visit www.constitution.org and pick your favorite—constitutionalism requires a transformation in how a population conceives of the exercise of political power.

International actors have leverage in such situations, but whether liberty will grow in the hearts of men and women is a question that will be answered long after the streets of Baghdad have moved off the front pages of the *New York Times*. The job, then, of those international actors must be to create not just a constitutional space but a political space in which a population can begin a conversation about what kind of country they want theirs to be.

²⁸ CHESTERMAN, *supra* note 2, at 204 (quoting *Interview with K.R. Popper*, MOSCOW NEWS, Nov. 25-Dec. 2, 1990).