'The Age of Constitutions'?
Reflecting on the new faith in federal constitutions

Lessons for the EU, Iraq, Afghanistan from Australian and other experience – as well as lessons for Australia's own constitutional development.

J Ford, Lecturer, ANU Faculty of Law

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'The Age of Constitutions'

Ours has been called 'the age of constitutions' (Fleiner). Nearly 60 percent of UN members have made 'major' amendments to their constitutions in the decade 1989 – 1999, and 70 percent of these adopted entirely new constitutions (Klug, 2000, 12). Renewed faith has been placed in constitutions as essential to peaceful and stable national political and economic development. Equally, if less obviously, there is also a renewed faith in the political/legal constitution-making process itself (that is, not the constitution as a document or institution) as a means of national reconciliation and of providing a focusing, structured arena for political settlement and negotiation in transitional and post-conflict societies.

It is possible to identify waves of constitution-making, of which we are witnessing the latest. After 1848, Europe witnessed a deal of constitution making as newly-defined countries codified their rules of government. After the First and Second World Wars, further waves followed, as the boundaries of Europe were redrawn. Decolonisation in Africa, Asia and Latin America led to new written constitutions, many modeled on the Westminster system. Some accounts describe the decolonisation period as both novel and banal, illustrated by intense constitution-making for new political and geographical national entities, and yet marked by something more banal, a matter continuity rather than change, especially in the institutions emerging post-decolonisation, which often bore stark resemblance to those of the mother country (Go). This institutional modeling or isomorphism was the result of a combination or direct colonial imposition of institutions (such as constitutions), and of mother-country imitation by the colonised (typically, members of the local elite).[1] Then after the collapse of the Soviet Bloc, eastern Europe became in the 1990s 'a major laboratory of constitutional works' (Ludwikowski). The phenomenon can be identified in the 1990s in some parts of South East Asia, and in UN-designed constitutions for Namibia, Bosnia-Herzegovina, East Timor and others.

When Vanuatu applied for membership of the United Nations, it was required to submit a written constitution in order to obtain admission (Fleiner). And today, federal constitutional structures are central to plans for peaceful, modern nations in Afghanistan and Iraq. EU members are in the process of deciding on whether (and how) to formalise Europe's future in constitutional form. A feature common to these waves of constitution-making is the combination of local and external influence on the process and the resulting document, and the degree to which foreign constitutional and institutional models are used in local contexts. Another feature common to them is *faith* in the transplanted of constitutional models to deliver political stability and the platform for economic growth.

The background to this renewed faith is the connection between political reform and governance issues, and economic development, in particular the attraction of international investment, as reflected in the 'Monterrey Consensus' of the March 2002 UN Conference on Financing for Development, New York. Drawing on theory of institutional role and change, studies positing a relationship between weak institution and poor growth (eg North), many macro-studies of development explicitly tie institution building to development, both economic and market development (World Bank 2002) and wider human development (UNDP 2002). This reflects the dogma that good governance is 'perhaps the single most important factor in promoting development' (UNDP, ch 2). Constitutions themselves can be considered institutions. Effective constitutions are seen as an antidote to instability, as they afford (from the perspective of the investor) transparency and reliability and a framework for orderly predictable processes of decision-making.

A function of the wider political dynamic of this 'age' is a changing conception of what constitutionalism entails, and what 'counts' as a constitution. This renewed interest in the possibilities of constitutions has reached the point where some observers argue that the idea of a constitution now has a substantive content: only some constitutions 'count', depending on how democratic their content and the process by which they came

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[1] Dr. Go has challenged the prevailing view that newly independent countries merely imitated the constitutional form of the mother country; instead, the mimicry was neither universal nor whole scale.

about. If a 'constitution' is simply a document or unwritten tradition or convention and practice that prescribes the governance of a society, it is arguable that all societies already have a constitution, written or not. However, an interesting question arises whether there are now threshold and internationally-determined necessary conditions for a constitution (and for its adoption processes). If all regimes have a 'constitution' (defined broadly), it is not evident that all have a constitutionalism that suffices for those who would attribute normative content to the term. For example, Joseph Raz has spoken of the 'thick sense' of the term 'constitution' in its contemporary use, with seven features including justiciability (Raz).[2] For Currie *et al* the word 'constitution' has acquired an additional substantive normative sense beyond simply describing the legal foundational document that structures systems and relationships of governance in society. This substantive content includes many features of liberal market democracies, in particular conceptions of the rule of law, democratic participation, and human rights. Many newly-drafted constitutions contain elements of this culture.[3] Related to this is the practice of introducing *de jure* recognition of the primacy of international law in new constitutions (Vereshchetin).[4] It has recently been argued at this Centre that the existing European 'constitution' (an aggregate of treaties and case law and political convention) does not meet the criteria for a modern constitution (Puig 2003).

These accounts maintain that the ideologically-inspired diversity of constitutional alternatives of the Cold War has given way to increasing uniformity modeled on liberal constitutional principles incorporating judicial review as a prerequisite for 'international constitutional respectability' (Currie *et al*, 24). It is thus possible, says Klug, to identify 'a thin, yet significant, international political culture, which is shaping the outer parameters of feasible modes of government' (Klug 2000, 6).

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[2] The seven features are: it is onstitutive of the legal system, stable, written, superior law, justiciable, entrenched, and expressing a common ideology.

[3] The inclusion of multiple references to human rights protections does not necessarily guarantee their protection, without a strong culture of judicial independence and a culture of constitutionalism.

[4] For example, the post war constitutions of the Federal Republic of Germany, Italy, and Japan: Article 25 of the Basic Law of the Federal Republic of Germany 1949; Article 10(1) of the Italian Constitution 1947; Preamble and Article 98 of the Japanese Constitution 1947 (Vereschetin, 2 n 4). Of course, these were constitutions imposed, in effect, by the Allied occupiers of these three countries.

It is against this background that I examine some general lessons for entities facing constitution-making, before questioning whether the 'faith' in constitutions needs to be qualified in some respects.

Lessons for the new disciples

In Europe, which may be seen to already have an operating 'constitution', negative constitution-related debate has centred around the *need* for a constitution (given risks that the process of articulating fundamental values might provoke latent identity issues in politics), and on the form of entity that may result (against the Eurosceptic fear that constitutionalisation might lead to further centralisation of remote technocratic power). In Afghanistan, where a new constitution entered into force on 4 January 2004, the main concern is that, in a country perhaps lacking a culture or history of strong constitutionalism, the process of drafting and adoption (commencing with the Bonn Agreement in December 2001) occurred too quickly for the idea and institutions of a new constitutional democracy to take root in the local public mind. There too, as in Iraq, an overwhelming concern is the criteria used for geographical and administrative divisions, accounting for the ethnic basis of regional power without unnecessarily entrenching this, and accommodating religious and ethnic differences. While it is largely too early to comment on the Iraq question, at present an interim 'constitution' (the Transitional Administrative Law, March 2004) is in place, pending a handover to transitional authorities, who it is intended will foresee elections, from where a final constitution can be produced.

There are a number of generalised lessons that can be drawn from the experience of other federal constitutional democracies, including Australia and South Africa.

First, the process of constitution-making is as important as the legal document that results: no matter how democratic its content or the institutions it establishes, a constitution will not acquire the legitimacy crucial for ongoing operation and survival without a carefully staged process of drafting and adoption, and without proper account

for local histories, traditions, cultures. A constitution-making process can itself be transformational, provide political open space, and serve to constitute a nation. Interim, transitional measures work well and allow sufficient visible change from a previous order (see also USIP 2003). The process of creating a constitution can become a vehicle for national dialogue and reconciliation, allowing competing perspectives and claims within the post-war society to be aired and incorporated. The South African example shows that constitutional debate kept political space open, structured the parameters of possible political action during the transformation, and provided a site to receive the 'incompatible constitutional imaginations of local contestants' (Klug).

Negotiators of new order in South Africa were not themselves elected by any free and fair elections. Thus, instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government would be established and function under an interim constitution agreed to by the negotiating parties, to govern the country on a coalition basis while a final constitution was drafted. After universal adult suffrage elections, the national legislature established by the interim constitution would act as the constitution-making body and draft the new constitution within a given time. It was agreed at the outset that the text of the final constitution would have to comply with certain guidelines ('Constitutional Principles') agreed upon in advance by the negotiating parties; an independent arbiter (the Constitutional Court) would declare whether the new constitution complied with the guidelines initially agreed upon. African constitution-making has shown that most successful transitional legitimacy strategy is when principles are agreed at outset, and where these emphasise process over content. Constitution-making can be viewed as similar to the process of a Truth and Reconciliation Commission: it can be cathartic, and help to promote a changed perception about legal institutions (often implicated in the problems of the previous regime).

Secondly, while constitutions are often modeled on other countries, constitutionalisation is an inherently inward-looking idea: for longer-term constitutional legitimacy, new constitutions need to be locally fashioned and embedded by local

(representative) actors, to locally-determined timeframes. Constitutions today may become standardised documents, but local variation is an essential feature of constitutionalism and constitutional indigenisation will ensure that the constitutional order takes root in the new society and enables the phenomenon to reach and be reached by the grassroots level (Davis, 145). The new constitution must become part of the shared history of the people in order for constitutionalism to become a tradition there, for political debate to take place in constitutional terms and vocabulary, and for people to sufficiently identify with the constitution and its institutions. The World Bank's study on 'Building Institutions for Markets' notes that reforms and innovations to institutional (constitutional) design[5] have been most effective, unsurprisingly, when they meet needs 'in ways compatible with country conditions' (World Bank 2002). The report noted that learning from other countries' experience in institutional design can provide valuable guidance, but cautioned against mere copying or an approach based on transplanting 'best practice' on the bald assumption that 'one size fits all'. 'Best practice' says the World Bank, 'is a flawed concept' in that sense, and 'there is no unique institutional structure guaranteed to lead to economic growth'. Significantly, the study notes that 'supplying' institutions is not enough: demand for these needs to be created, 'people must want to use them too'. In the constitutional sense, this means ensuring that people identify with and accept as legitimate the new constitutional framework and desire that it endure and prevail.

The hallmarks of the South African process were consultation, participation and compromise, whereby people identified with the whole project of constitution-making and so with the resulting system, even if their preferences did not appear in the document. Three stages were discernable and consciously pursued: empowerment and education, engagement and maximum participation, and finally popular endorsement (albeit indirectly, by election of the Constitutional Assembly, the CA, that produced the document, rather than by referendum and direct ratification). Public and private sessions were held and experts consulted; an intensive country-wide information campaign was

[5] By 'institutions' are meant 'rules, enforcement mechanisms and organizations supporting market transactions' (within the institution of the constitution; cf policy).

pursued. Throughout the drafting process, the CA issued interim reports and progressive drafts of the text and of alternative proposals on outstanding provisions, so that political parties and other interested persons had ample time to consider possible grounds for objecting to certification. The CA received 2.5 million written submissions, many from civil society on behalf of disadvantaged or minority groups. The CA radio programme reached 10 million listeners, and 73% of South Africans reported that they felt they had been reached and consulted on the constitution-making process.[6]

In this vein, Davis argues that one must 'look beyond the mere structure of formal institutions to appreciate the dynamic processes of representation and empowerment':

> 'Constitutionalism must take on indigenous institutional elements and practices that better attach it to local social conditions and concerns. It is not enough to simply copy liberal institutions. For a society to make constitutionalism work, the society must understand how these institutions work in the local conditions and how they may contribute to economic development and its consolidation' (Davis, 128).

Dezalay and Garth confirm (6):

> 'Internationally-generated imports succeed only where the local situation allows them to be nationalised – made part of the indigenous structures and practices. Local histories determine what can be assimilated into local settings and how what is assimilated will affect long-standing local practices…while we tend to think of the rule of law as an international concept, law must be produced at the national level to make national sense' (326).

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[6] Of course it is arguable that for efficiency and cost reasons, public participation should not extend to the constitution-making process, but only to electing representatives and to ratification of the document resulting from this process. In a sense this is what happened in South Africa: the (elected) drafters worked alongside legal experts, and the final document was never approved by referendum. However, there was sufficient perception of participation (combined with the democratic credibility of the drafters) to deliver legitimacy.

Thirdly, the Australian example is a useful comparator for the EU, where it is questioned whether there is an existing pan-European *demos* (community), in terms of whether a sense of belonging is a precondition to constituting a new entity, or whether it is the process of constituting and thereafter that leads to this identity. How does one foster 'constitutional patriotism' (Viroli) but not divisive nationalism, while not glossing over important localized identities? Europe faces more difficult challenges than did Australia in this regard. There is a lot more work to be done in this area. For example, what are the longer term implications of constitutional change that results organically (from national reflection or choice) as opposed to deliberately creating a constitution to solve a political crisis, in the presence of an internal / external threat? Arguably, a sense of 'Australian-ness' was a result, and not a cause, of the federation process. Weiler has argued that the primary driver of European unity post-war has been the desire to avoid conflict and to unite Europeans in shared ideals, but that the means to accomplish that end have been predominantly economic (Weiler). If the primary driver of 'ever closer union' is economic, and a sense of *demos* is only a product of this, how does this fact affect the longevity and quality of the constitutional entity that results?

Fourthly, European scholars can draw on the Australian experience in examining the 'centrifugal tendency' in federations. How does one guard against inevitable centralisation of power? How is the tension between the need to decentralise (and accommodate localised power in Iraq and Afghanistan) to be balanced with the need for efficient, centrally-ordered government on limited resources? One similarity of the South African process with the European (and this it will be interesting to monitor developments in Iraq) is that very term 'federal' was avoided throughout the process of constitution-making in South Africa. Although there was a need for devolved government of some sort (given the size of the country, ethnic and linguistic units, and historical geographic units based on the Union (federation) of South Africa 1910), there was a fear of that the label 'federal' might imply too great a deal of independence or autonomy, against the fairly proximate possibility of attempted secession in KwaZulu-Natal. The dilemma in Iraq and Afghanistan is that of whether acknowledging localised

forces and accommodating them (by decentralizing), but without establishling a constitution that by naming and labeling areas thus in part creates or stimulates or entrenches an unworkable regionalism. In Europe, on the other hand, the conscious avoidance of the use of label of 'federation' of States is to placate those who see a federal entity not as a system for devolution but as likely to centralize power. Of course, the nature of federations (using the term broadly) is to both devolve and centralise power, and the question is the extent of devolution / centralisation.

Questioning the new faith in constitutions

Despite the possibilities that constitution-making holds, it is also possible to question the renewed faith in constitutions, or at least be alert to a number of problems that the faith might obscure.

First, constitutions and constitutional instruments are not themselves a guarantee of economic growth, sustainable democracy or observance of human rights, nor does a new constitution guarantee any degree of depth of constitutionalism.

Secondly, it is not obvious that the conception of constitutions in Western democracies is translatable, without more, to reconstructing societies. Davis has noted that while in the West we mostly focus on the 'constraining aspects' and vocabulary of constitutionalism, and we think of constitutions as *limiting* State power, in reconstructing societies the appropriate dominant conception might be that they are intended to *enable* the State to deliver services (while simultaneously limiting the State's power) (Davis).

Thirdly, new constitutions do not simply arrive; they are constructed at particular times, by particular actors with particular agenda. Who drives this change, externally and internally, and what effect does their perspective and identity have on the legitimacy of the process and outcome? Attention needs to be given to how particular local elites shape the reception of constitutionalism to achieve their own particular aims. How do particular legal actors shape the reception of constitutionalism to achieve their own particular aims? It is naïve to think of the constitution as providing a neutral arena for political interaction, when it may be that the framework has been established by

particular political forces at a particular time with a discernable political preference. An idealist view of constitutions is that they are foundational and provide the basis for change, while a more realist view accepts that (new) constitutions may merely reflect the prevailing balance of political power (Klug 2000, 6). One can therefore understand constitutional reform in transitional settings as a complex form of reception, where local actors draw on international models and resources to pursue essentially localized agendas (Klug 2000, 5). A new constitution is unlikely to be perceived as legitimate, and so cater for future crisis, if it is manifestly the legal capturing of an unpopular status quo rather than an attempt at reconstituting society. Susan Marks, writing on international legal renewalism, has observed that 'much of what passes for political and economic reconstruction offers little real prospect of change', or masks continuity as change (Marks). In emphasising the need for 'local processes', it must be acknowledged that the wider populace may well prefer the idea of an imposed external model, since 'local process' often means process driven by and for local elites.

Fourthly, (and while part of this paper has been premised on a positive role for constitution-making in wider nation-building), we should question the continued legalisation of political conflict: we may have to look beyond legal institutions and reforms, and beyond lawyers. In the urge to constitutionalise, which perhaps reflects a trend of juridification or legalization, it should be borne in mind that (even if a new constitution does not seek to reflect the soul and entire being of a nation), not everything can be captured in legal forms, structures, legal vocabulary. While the constitution-making process can itself be a political arena, one must pause to question whether any debate about constitutions and constitutionalisation can assist in resolving very real political problems. A South Asian observer has argued strongly that constitutionalism might have failed (in South Asia) because of the subordination of political accommodation to constitutional process and legalism (Samaddar). One commentator, reflecting on the EU constitution-making process and some of the limits of resolving political problems solely within legal argument and doctrine, has questioned the urge to categorise, name and predict the future in documentary form. She has asked:

> 'Do such debates not risk dangerously privileging law over politics, diverting constructive polity-building energies into blind alleys of discussion among technicians and experts about constitutional authority, sovereignty and legal rights which fail to illuminate…fundamental questions of political acceptance and legitimacy' (Shaw).

Shaw adds that a constitution cannot provide answers to everything, and should be seen as a 'set of interlocking processes rather than a single one-off event or document' so that a constitution should be 'the subject of continuous critical reflection'. For Shaw the metaphor of constitutional 'architecture' suggests a singularly-directed, top-down model of constitution building, as well as a static object rather than a conception of constitutionalism as a dynamic process 'the definition and redefinition of community as the process of constitutional settlement continues'. This reflects the idea of a political arena resembling a market, a constitutional tradition built on the outcome of ongoing bargaining, for which constitutionalism provides a space or forum (Poggi). Although these comments carry with them a spectre of indecisiveness (whatever the warm notions of inclusiveness), as a conception informing our view of constitutionalism, they offer valuable insights into ensuring a non-brittle, vibrant constitutionalism that can underlie future progress.

Finally, one might question the link between constitution-making and peace, notwithstanding what I have noted above about the potential for the constitution-making process to provide a forum for peaceful political contestation. That civil forum can instead be a boxing ring. Because of its foundational, relatively rigid nature, the imposition or hurried adoption of a constitution is itself likely to trigger crisis, since it declares itself the only arena for political dialogue, but has structured the arena in an exclusive way. In this sense constitutionalisation, if unconsidered, can itself lead to conflict. A single text written constitution (and its making) may in fact foster division rather than cohesion, conflict rather than harmony (of course, the tensions may be existing political ones and the document or constitution-making process may be merely a site for these to manifest.). Despite the faith in constitutions, the process of codification

can threaten as much as it can reassure (USIP); the freezing of the political into the legal can be threatening to some groups.

What Lessons for Australia's Constitutional Development?

The Centenary of federation has provided a national moment for reflection on the character, evolution and development of our constitutional system. There are, for various reasons, calls of varying intensity for constitutional reform: does a century-old constitution adequately serve our modern market democracy? Should the constitution more clearly provide for State – Federal cooperative schemes? Should it more clearly reflect the political facts about the relationship between the executive? Should it include a Bill of Rights (where at present it hardly mentions the relationship between the levels of governments and citizens)?

It is true that Australia has a relatively stable federal history and our federation has not yet suffered any 'seismic convulsions'.[7] However, it is important to reflect on the capacity of our institutions to cope with profound challenges. Rather than drastic challenges, the future threat to constitutionalism in Australia is more likely to be a mass inability to understand, identify with, and care about the Constitution and the Court, and so an inability to make reasonably informed and rational decisions about proposed changes, or to have a longer-term, institution-affirming perspective in hard case political judgments of the *Bush v Gore* (Florida vote count)[8] variety. The primary danger, then, is not of precipitous change (as might result from weak constitutional legitimacy in a new democracy), but rather that the Constitution's uncertainty and obscurity precludes the prospect of significant constitutional reform. Aside from the increased public engagement around the time of the centenary of federation, there is probably a lack of ongoing public discussion or 'sustained dialogue' about our constitutional development. That is to say, the 'inaccessibility of the Australian Constitution is a serious defect in our

[7] The Hon. Chief Justice Murray Gleeson, 'The High Court of Australia: Challenges for its New Century' unpublished address to the 2004 Constitutional Law Conference, Parliament House, Sydney, (Gilbert & Tobin Centre for Public Law, University of New South Wales), 20 February 2004, 13.
[8] *Bush v Gore* 531 US 98 (2000).

constitutional arrangements'.[9] A conscious effort of the sort described in relation to constitution-making efforts abroad would be necessary to enable rational participatory discourse on the future shape of our federation and democracy, including decisions on whether constitutional change is needed. On the other hand, focus on the Constitution as a document, rather than on constitutionalism manifested in the institutions we already have, would perhaps be unfortunate: a great deal of scope exists to improve the quality of the democratic experience within the vibrant and resilient institutions as currently set up under the written and unwritten Constitution.

[9] The Hon. Justice Ronald Sackville, 'The 2003 Term: the Inaccessible Constitution' unpublished address, 2004 Constitutional Law Conference, above n 7 above, 2, 27.

Conclusion

Countries have always borrowed ideas from each other, and have fashioned institutions and even cultures on foreign models. Klug has demonstrated how the construction of new rules, including new constitutions, is nowadays 'both unique and ubiquitous', since these processes involve attempts both to address particular localized problems, and to reflect comparative experiences in a globalised world (and respond to the perceived demands of these) (Klug 2002).

The challenge of modern constitutionalism is to gain sufficient weight in local politics (Davies, 151) and in coping with the reality of existing diversity (Fleiner, 240), both of which direct attention to inclusive processes leading to a better prospect of legitimacy. Constitutionalism must not become a technical debate among elites, and not everything of national value and political importance can be represented in legal forms and vocabulary. Development is as much about people as it is about legal frameworks for their interaction. In the urge to constitutionalise, we might overlook that within existing, unreformed constitutional frameworks there might be much room for improvement and opportunities for rich national self-reflection. Constitutionalism is as important as constitutions, and not necessarily advanced by re-written documents. As we in Australia reflect on a century of federation, and watch or assist younger federal constitutional democracies, we should also ask how we can improve and enrich our own constitutionalism, and so ensure a more demanding, less apathetic, more inclusive and participatory national life.

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