

**CONTRASTING APPROACHES TO POLITICAL ENGINEERING:
CONSTITUTIONALIZATION & DEMOCRATIZATION**

Philippe C. Schmitter

European University Institute

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The attempt to democratize or, more often, to re-democratize over fifty countries in the past twenty-five years has promoted a new interest in ‘political engineering,’ i.e. in purposive efforts to design political institutions in such a way as to ensure the subsequent persistence – if not the flourishing – of democracy. Scholars in Western democracies from various disciplines who previously had dedicated their acumen exclusively to explaining why existing laws and practices were (and should remain) stable, suddenly found themselves in contexts that demanded change. Having taken their own institutions and, especially, the diverse origins and trajectories of these institutions for granted, it seems fair to say that most of these political scientists, lawyers, economists and sociologists were unprepared to meet the challenge. The theories they had elaborated and the paradigms they had settled into told them precious little in generic terms about how democracy, the rule of law, systems of representation, independent judiciaries, civilian control over the military, a supportive political culture, ‘popular’ or ‘parliamentary’ sovereignty, national identity, and so forth had come about. Regional specialists had literally made their living explaining why their respective ‘turfs’ were unique and could not

be expected to follow the trajectory of early ‘political developers’ in North America and Western Europe – whether for reasons of cultural “mind-set” or “world systemic” economic dependence.

Of course, for individual countries there exist learned and detailed historical accounts, but these tend to emphasize national peculiarities. Even grouping them together – say, into cases in which the state preceded the nation and vice-versa, or those in which the rule of law and civilian control over the military were established prior to democracy and vice versa – was not likely to produce very reliable generalizations since the conditions under which contemporary efforts at democratization have been occurring are manifestly different. Not only has much of the technology of politics and the purpose of policy changed, but so also has the meaning of democracy itself. Just imagine telling someone trying to democratize, say, Albania, that his or her country does not fulfill the requisites that were previously needed and that he or she should tolerate autocracy for fifty or a hundred more years and then only try to introduce democracy partially and gradually!

And yet Western scholars from well-established democracies have not hesitated to offer abundant advice concerning the design of political institutions in these neo-democracies. One of the ironies of our times is that countries that have just managed to free themselves from the tentacles of tyrants and empires should so immediately turn to another set of foreigners for advice and aid. Sometimes, they do so voluntarily out of need or admiration; oftentimes, they do so out of “conditionality” imposed by external suppliers of scarce credit, access to markets or membership in coveted regional arrangements. Never in the history of politics – at

least, never since the sovereign territorial state became the dominant form of authority – has the “market” for supposedly autonomous national institutions been so open and so seemingly ripe for the engineering of its products.

As one of those who has tried to understand this context of regime change and not gotten involved in the proffering of advice, I think that I can observe the machinations of my fellow scholars-*cum*-political engineers with some detachment. Very few people have managed to fill the gap between the theorists of “transitology” and “consolidology,” and the practitioners of “democracy assistance” and “good governance.” Thomas Carothers is one of the few who is thoroughly familiar with both and he has remarked with regard to the latter that “little systematic learning has been added to the field from outside the circle of practitioners. Academic specialists ... have not devoted much attention to (democracy assistance-PCS). ... To the extent they are aware of it, they tend to see it as a practical domain that poses few theoretical issues of the sort that motivates scholarly inquiry. Moreover, some American academics still automatically assume, as they learned to do during the cold war, that U.S. aid to promote democracy is little more than a way of forcing the American system on other countries or sugar-coating self-interested interventions in the internal politics of weaker nations.”¹

Grosso modo, it seems possible to distinguish two “schools” of advice-givers. The first is composed largely of political scientists and sociologists and they seem to be saying: “**Get the Parties Right!**” – and all the rest will fall into place once citizens are periodically offered a choice between alternative candidates running under familiar labels. In accordance with the familiar “Schumpeterian”

definition of democracy, once they have voted for a vague package of promises, these citizens will bestow legitimacy on whoever wins and conform obediently to their decisions.²

The second is composed primarily of lawyers and more institutionally than behaviorally minded political scientists and their slogan seems to be: “**Get the Constitution Right**” – especially, get those rules that deal with the relations between executive and legislative power right. Here, the prevailing message is slightly less familiar, even counter-intuitive for Americans: namely, that it is not presidentialism but parliamentarism, (and not plurality but proportional electoral systems) that produces the greater likelihood of consolidating democracy.

Elsewhere, I have commented critically on the former school.³ In this short essay, I will concentrate on the latter – all the more since this volume is dedicated to exploring the relation between constitutionalism and democratization.

My general theme is, however, the same for both: **no particular political configuration – either of parties or executive power – is likely to have an identical or generic impact upon the consolidation of democracy**. It is a mistake to focus so exclusively on the **product** of political engineering and to presume that it will have the same effect – positive or negative – upon the outcome in all democratizing polities regardless of the pattern of social cleavages, level of economic development, size of country, insertion into the international economy, previous form of autocracy, geo-strategic location and, as Terry Karl and I have stressed elsewhere, the mode of transition.⁴ What is more important and will have a

more predictable impact than the specific nature of institutions a particular country chooses is the **process** whereby it does so.

To put it simply: **What counts is when and how these collective decisions about meta-rules are made, debated, ratified and implemented – more than what is in them.** Provided actors reach a mutually agreeable solution on the rules for holding elections, recognizing political parties, distributing seats in the legislature, forming governments, checking and balancing different institutions, and so forth, their substance is less important than the overriding fact that agreement on them has been reached at a particular moment, in a particular sequence and by a particular process. Choosing the same rules in two different countries by two different means is more likely to produce different results than if they were to choose different rules by the same means. If there is one message that is clear from the 25 years of recent experience with democratization, it is that there is a lot of “equifinality” out there, i.e. of countries ending up more or less in the same place – not because they have the same institutions (they haven’t), but because they followed roughly similar processes of choosing those institutions.

The Constitutional ‘Moment’

The most obvious means for choosing the “core procedures and rights” of a country’s polity and, hence, for consolidating a specific type of democracy is by constitutionalizing it, i.e. by drafting and approving a single document that purports to contain a coherent set of “rules about rules” **and** that purports to bind future generations to obeying those rules. Not only does such a document lay out an explicit matrix of institutions and a formal distribution of their competencies, but

they presumably do so by means of comprehensive and consistent norms that govern behaviour (and establish legitimacy) for an even wider range of political transactions. In virtually all contemporary cases, these “founding” documents are openly debated and formally drafted although, as we shall see, there are many different contexts and ways of ratifying and implementing them.

But it is first important to remember that **modern democracy should be conceptualized, not as “a single regime”, but as a composite of “partial regimes.”** **If and when the consolidation of democracy progresses, each of these partial regimes becomes institutionalized in a particular sequence, according to distinctive principles, at a variety of sites, occupied by different kinds of actors – all, however, having to do with the representation of social groups and the resolution of their ensuing conflicts.** Parties, associations, movements, localities and various clientele compete and coalesce around these different sites in efforts to capture office and influence policy. Their structured activity has the effect of channelling conflicts toward the public arena, thereby, diminishing recourse to such private means as settling disputes by violence or by imposing one’s will by authoritarian fiat. Authorities with different functions and at different levels of aggregation would interact with these representatives, base their legitimacy upon their accountability to different citizen interests (and passions), and reproduce that special form of authority that stems from exercising an effective monopoly over the use of violence.

Constitutions are efforts to establish a single, overarching set of “meta-rules” that would render these partial regimes coherent, assign specific tasks to each

and enforce some hierarchical relation among them. But it is very important to recall that such formal and unique documents are rarely successful in delineating and controlling all these relations. The process of convoking a constituent assembly, producing an acceptable draft and ratifying it by vote and/or referendum undoubtedly represents a significant moment in the process of consolidation, but some partial regimes may already in place de facto before this process gets under way and, even after it is over, many partial regimes have been left undefined de jure.

For it is precisely in the interstices between different types of representatives that constitutional norms are most vague and least prescriptive⁵. Imagine trying to deduce from even the most detailed of institutions (and they are becoming more detailed) how parties, associations and movements will interact to influence policies. Or trying to discern how capital and labour will bargain over income shares under the new meta-rules. Or trying to understand how civilian authorities assert control over “their” much better armed and organized military forces.

[PLACE FIGURE ONE HERE]

According to the liberal ideal of the 19th Century, constitutions are supposed to be neutral with regard to the interests of any specific group in the population. Contemporary analysts would probably admit that this is an illusory quest. All possible institutional configurations will benefit some more than others and, therefore, are likely to be contested at their inception. Hopefully, popular support will be sufficient to get them initially implemented and, eventually they may come to be accepted out of habit – despite their inevitable “mobilization of bias.”

Two other general features of “constitutionalism” are particularly relevant for regime consolidation. First, it may seek to define the future **substance** as well as the **form** of politics by placing certain social and economic rights (and privileges) beyond the reach of “normal” democratic uncertainty. Present-day constitutions tend to condition absolute guarantees of the sanctity of private property with clauses referring to “social utility” or the “public good,” but the use of such documents (plus affiliated codes and statutes) to reassure powerful minorities that their vital interests will not be violated by the change in regime is still a commonplace. Second, to make such reassurances more credible, the new constitutions must effectively bind not just their **present** drafters but also **future** generations. They must resound with eternal (“self-evident”) principles, be difficult to amend, and empower specific institutions (i.e., a Supreme Court or a Council of State) with an independent capacity to ensure that they are interpreted and applied.

The “Panacea” of Constitutionalism

If “electoralism” was the panacea of the transition stage,⁶ “constitutionalism” is likely to be the one for consolidation. In both cases, the basic idea is the same: giving a particular form to the resolution of political conflicts will per se modify the substance of political demands and alter the strategies of political actors. While such formalisms are not without their independent significance, it would be very hazardous – not to say foolish – to centre attention exclusively on the definition of a comprehensive legal framework delimiting the power of institutions and the rights of citizens as **the** hallmark of consolidation.

For one thing, not all countries undergoing regime change even engage in constitutionalism. A few very well-established democracies operate without such a formal document (e.g. Great Britain and Israel). Some, virtually without deliberation, simply reach back into their (usually recent) democratic past, resuscitate or revise slightly a previous document (e.g. Argentina, Bolivia, Greece and Uruguay). In Eastern Europe, one common pattern has been to keep the “phony” constitution from the ancien régime soviétique with some minor revisions (e.g. Poland) or virtually none at all (e.g. the former USSR and some of its former republics).⁷ Most neo-democracies, however, do elect representatives for the explicit purpose of deliberating publicly about these matters and some will eventually produce a brand new constitution. These constituent assemblies are especially compelling under the following circumstances:

1. If the country has little or no tradition of constitutional governance;
2. If the country has altered its physical boundaries or the definition of its identity;
3. If the previous constitution was made at a time when the role of public authorities was dramatically different;
4. If significant ethnic minority groups have emerged and asserted their demand for new collective rights and greater political autonomy;
5. If major segments of the population have been enfranchised since the previous constitution and define their rights and obligations in novel ways.

Since the above “bill of specifications” fits a large number of neo-democracies, it is hard to avoid the conclusion that – from the perspective of **process** – this is by far the most desirable and enduring way of going about choosing a country’s institutions.

Merely convoking such an event is not, however, enough. Not only must it produce an agreed-upon document without too much manifest discord or too lengthy deliberation, but it should do so by respecting a set of generic norms. Experience suggests that “the constituent power” is more likely to contribute to the consolidation of democracy if:

1. An assembly is convoked for the explicit purpose of drafting a constitutional document;
2. The members of this assembly are elected, not selected, but not automatically empowered to convert themselves into a regular parliament;⁸
3. The decisions of this body are taken by the largest possible margin and not by some “minimal winning majority” according to the short-term, ahistorical logic of individualistic rational choice;
4. Its product is widely publicized and ratified by the citizenry as a whole, usually in a referendum;
5. Once it has been popularly ratified, the constitution is ceremonially promulgated, placed on public display and subject to periodic interpretation by a specialized juridical process.

These norms of prudence seem obvious (to me) although they have rarely all been practiced by neo-democracies. They are designed to associate the constitution with the “founding” of a new regime in ways that distinguish it both from whatever remains of the legality of the ancien régime and from the immediate perpetrators of the transition itself. The object is to give this document a distinctive status that is associated not just with its substance but also with its form.

The Matter of Timing and Sequence

As I have suggested in Figure Two, the timing and sequence of such an occurrence can also be a crucial variable. **“The sooner the better”** should be the motto. The longer actors hesitate in this effort, the more they will be capable of evaluating how specific institutional arrangements can affect them and the greater the difficulty they will have in coming up with “fair” rules that all can agree to. If they wait until after various “partial regimes” are up and running – say, under a new electoral law and set of party statutes – those who have benefitted by these provisional measures will be increasingly inclined to attempt to institutionalize their recently acquired advantages.

[PLACE FIGURE TWO HERE]

It is, therefore, possible that **when** a constitution is drafted and approved may be at least as important as **what** it contains.

* ENDNOTES *

¹ Thomas Carothers, *Aiding Democracy Abroad. The Learning Curve* (Washington D.C.: Carnegie Endowment for International Peace, 1999), p. 349 –see also pp. 93-94.

² “The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”, in Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (London: George Allen and Unwin, 1976 – orig. ed. 1943), p. 269.

³ “Critical Reflections on the ‘Functions’ of Political Parties and their Performance in Neo-Democracies,” in W. Merkel and A. Busch (eds.), *Demokratie in Ost und West* (Frankfurt: Suhrkamp, 1999), pp. 475-495.

⁴ Terry Karl and Philippe Schmitter, “Modes of transition in Latin America, Southern and Eastern Europe”, *International Social Science Journal*, Vol. 43, No. 128 (May 1991), pp. 269-84.

⁵ For a fascinating argument that it is often the “silences” and “abeyances” of constitutions – their unwritten components – that are most significant, see Michael Foley, *The Silence of Constitutions*.

Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government (London: Routledge, 1989).

⁶ Terry Karl, "Imposing Consent? Electoralism Versus Democratization in El Salvador," in Paul Drake and Eduardo Silva, Elections and Democratization in Latin America 1980-1985, (San Diego: Center for Iberian and Latin American Studies, Center of U.S. – Mexican Studies, University of California, San Diego, 1986).

⁷ For six types of "constitution-making environments," see Juan J. Linz and Alfred Stepan, Problems of Democratic Transition and Consolidation (Baltimore & London: Johns Hopkins University Press, 1996), pp. 81-3.

⁸ The intent of this stricture is to ensure that the drafters of this document will not be its immediate beneficiaries, i.e. that the members of the constituent assembly will not be distributing powers and establishing privileges that they themselves know that they will subsequently enjoy as members of the legislative assembly. For example, it has been suggested that the recent constitutions and constitutional revisions in Eastern Europe have produced an institutional format which is excessive in its attribution of powers to the legislature because they were all drafted by representatives who knew that they would be occupying roles in that legislature. Jan Zielonka, "New Institutions in the Old East Bloc", Journal of Democracy, Vol. 5, No. 2 (April 1994), pp. 87-104.

The danger, however, of enforcing too great a separation between the two assemblies is that the constituents may be tempted to come up with rules that they themselves would not be willing to live by as parliamentarians. Normally, the problem is resolved by the rapid emergence of a subset of professional politicians who expect, one way or another, to follow a career defined by the rules of the new constitution.