

Book Review: Odile Ammann on “Constituent Assemblies” (Jon Elster et al., eds.)

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Odile Ammann

[Editor’s Note: In this installment of I•CONnect’s Book Review Series, Odile Ammann reviews Constituent Assemblies (Jon Elster, Roberto Gargarella, Vatsal Naresh & Bjorn Erik Rasch, eds., Cambridge 2018)

–Odile Ammann, University of Zurich

In the legal history of a State (or, for that matter, of any political entity), the drafting of a new constitution is an exceptional occurrence. Given the important consequences of their work, as well as their significance for political, legal, and especially constitutional theory, constituent assemblies should not escape academic scrutiny.

It is precisely this challenging topic which this edited volume proposes to explore, in response to “a wave of studies of constitution-making that has gathered momentum over the last decades” (1). Most of the twelve contributors are political scientists; two are lawyers, and one (Thorvaldur Gylfason) is an economist who has been part of a constituent assembly.

In the introduction, the editors explain the scope and purpose of the book. Amongst other things, they exclude single-authored constitutions and “sham” assemblies, which are biased in favor of the government and do not actually intend to limit its powers (2). The editors stress that the size of constituent assemblies and the duration of their debates vary widely, and that discrepancies between the procedural rules governing the election and functioning of the assembly and the rules drafted by the framers (the members of the assembly) may damage the assembly’s credibility. A further issue is how and when to involve ordinary citizens in the drafting process. While the book mainly adopts an explanatory approach, it also addresses normative issues, such as the question of the “optimal design of a constituent assembly” (10). One obstacle the editors highlight is the lack of data on constituent assemblies. This makes it hard to reconstruct some drafting processes.

The introduction is followed by nine chapters devoted to constituent assemblies in various States (including non-Western ones) and historical periods, studied from different analytical and methodological perspectives.

In Chapter 1, Roberto Gargarella examines how framers can respond to the conflicting demands typically arising in pluralist societies (e.g., the claims of liberals vs. conservatives in the Americas). He discusses four possible responses: imposition, silence (or deferral), synthesis, and accumulation, which consists in letting different contradictory claims become part of the constitution. Through the accumulation strategy, the framers entrench a tension that is left unresolved.

Chapter 2 is devoted, amongst other topics, to “the problem of a legally limited convention” and to constitutional conventions in Latin America. Gabriel Negretto argues that the success of a constituent assembly is largely determined by “institutional rules unrelated to the nature of [the assembly’s] task” (31). He discusses the respective characteristics and merits of constitutional conventions (whose activity ends after the constitution has been adopted, and which are relatively uncommon) and constitutional legislatures (i.e., permanent legislative bodies), the two most common constitution-making bodies. Negretto finds no compelling empirical or theoretical evidence for the superiority of the former over the latter.

In Chapter 3, Hanna Lerner sheds light on constitution-making in deeply divided societies by studying constituent assemblies in Egypt, India, Indonesia, Sri Lanka, and Tunisia. She argues that in such fractured States, the constitution’s inclusiveness and democratic character – but also its very enactment – hinge on exogenous political factors such as pre-drafting agreements rather than on internal procedures. Lerner also discusses the advantages and drawbacks of incrementalist constitutional formulations, which shift contentious questions to the political arena.

Chapter 4 offers a detailed account of constituent assembly failure in Pakistan and Nepal. Mara Malagodi highlights the causes and constitutional and political implications of these two failed experiments, arguing that the process and outcome of constitution-making are intertwined. Constitutional assemblies carry high expectations, which complicates their task even more. Another difficulty results from the dual function of some assemblies acting as both constitution-making bodies and ordinary legislatures. Finally, Malagodi observes that given the extraordinary legitimacy enjoyed by the assembly, the decision to dissolve such an assembly must appear just as legitimate.

In Chapter 5, Udit Bhatia provides a fine-grained analysis of the Indian constituent assembly, which voted for the introduction of universal adult suffrage, yet harbored concerns about citizens’ incapacity to govern themselves. These concerns have been ignored by mainstream analyses, which prefer to emphasize that the assembly moved away from India’s colonial past. They prefigure contemporary advocates of government by experts (epistocracy). Bhatia mentions two epistocratic approaches, namely competence as a prerequisite for political power, and competence as an advantage (i.e., as a case for superior political power), and convincingly shows that both approaches loomed large in the assembly’s deliberations.

Chapter 6, written by Jon Elster, focuses on the Norwegian Constitution of 1814, the oldest after the US constitution. Elster describes the assembly’s composition, which – in accordance with the rules of election, and likely based on strategic considerations on the part of the convener of the assembly, Christian Frederik – counted numerous military men and farmers. The members rapidly coalesced around two camps: the independentists (calling for Norway’s full national independence) and the unionists (demanding union with Sweden). Elster highlights the emotions – enthusiasm, anger, and, according to some, fear – which animated the framers, and the impact this had on the drafting process. He assumes that the framers voted more often by roll call (i.e.,

publicly) than by secret ballot. He also highlights the importance of having a rule on how to break tied votes: the Norwegian assembly had to adopt such a rule on the spot, in the context of the crucial vote by which Norway was eventually declared to be a kingdom independent from Sweden. After Sweden won the (short) war against Norway in the summer of 1814, however, the two monarchies entered into a personal union which only ended in 1905.

In Chapter 7, Thorvaldur Gylfason argues that in Iceland, the parliament is close to breaking the chain of legitimacy, a concept which hinges on both procedural rules and substantive outcomes. Gylfason describes this small State as “marred with a third-world political culture characterized by patrimonialism, personalization, and politicization” (163). After the financial crash of 2008, a constituent assembly established on the initiative of the newly formed government drafted a revised constitution, which the Icelandic voters accepted in 2012. Yet the parliament ignored this referendum: the three bills which it eventually ratified consisted in a watered-down version of the proposal which the people had supported. Once again, according to Gylfason, special interests prevailed.

Chapter 8, co-authored by Cristina Bucur, José Antonio Cheibub, Shane Martin, and Bjørn Erik Rasch, researches the formal role of parliaments in government formation, focusing on constitutional systems where the executive is responsible to the legislature, and more specifically on parliamentary investiture procedures (votes by which parliaments show their support for the government). The authors’ hypotheses are that constitution-making influences investiture procedures, and – following Jon Elster’s concept of institutional interest – that institutions involved in constitution-making will give themselves a prominent role in government formation. After explaining what constitutes weak vs strong investiture rules and what influences the variable design of such rules, the authors examine the cases of France, Romania, and Ireland. They also gather cross-national evidence and conclude that the theory of institutional interest finds empirical support.

In Chapter 9, Jon Elster investigates the framers’ individual motivations and beliefs, focusing on North American and European States. Elster argues that the framer’s main motivations are reason (i.e., “the rational pursuit of the long-term public interest” (209)), interest (be it personal, group, or institutional interest), and, importantly, passion (Elster discusses anger, fear, enthusiasm, and pridefulness, four temporary emotions he distinguishes from prejudice, considered less volatile). Finally, he analyzes the often precarious process of belief formation in constitution-making. Choices are not merely based on emotions; they are also based on beliefs, be they rational or not, about the process of constitution-making and future political developments, motivations, and beliefs (i.e., “beliefs about beliefs”). Elster concludes that contrary to a widely held view, constituent assemblies are frequently driven by passion.

The contributors have succeeded in delivering a rigorous, nuanced account of constituent assemblies and the drafting process in which these bodies are involved. The fact that each chapter follows an idiosyncratic approach, and the lack of a concluding chapter, do not diminish the book’s analytical value and great contribution to constitutional theory. One insight gained from reading this volume is that

constitution-making cannot be studied by focusing on constituent assemblies alone: all three branches of government may interfere with the drafting process and, in some cases, defeat it. The book also confirms that some groups considered inferior (e.g., due to their gender, race, ethnic background, or level of education) have been excluded by and from constitution-making throughout history.

Of course, the book cannot address the myriad issues connected to constitution-making. Future work could study the work of constituent assemblies in other Asian and especially African States, deal with so-called “sham” constituent assemblies, and analyze past and still ongoing drafting processes at the supranational and subnational levels. Future research could also further explore the conditions under which constituent assemblies enjoy (and cease to enjoy) democratic legitimacy.

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