Book Review

Democratic Commitment as Marker of Successful Constitution-Making: Donald L Horowitz, *Constitutional Processes and Democratic Commitment* (Yale University Press 2021)

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The new volume by Donald L Horowitz¹ could not be better attuned to the *zeitgeist* of the century, as constitutions and constitutionalism dominate the scholarly discourse in multi-faceted dimensions. To mention only one example of many, the current debate regarding the desired transition of Belarus from an authoritarian regime to democracy is inseparably linked with, and centers around, the deliberations among the opposition leaders as well as constitutional scholars on the new, democratic constitution for Belarus.²

The scholarly discourse on constitutions leans heavily towards discussing the legal power, the content and the enforcement of the constitution. A myriad of different aspects moves thereby into the focus: Be it the favored method of constitutional interpretation, as illustrated by the debate revolving around the politically charged dichotomy of originalism/textualism versus purposive interpretation in the US;³ the contemporary dispute on the primacy of a supranational

1 Donald L Horowitz, *Constitutional Processes and Democratic Commitment* (Yale University Press 2021).

2 See eg William Partlett, 'The Importance of Constitutional Law for Belarusian Democracy: An Analysis of the Amended 1994 Constitution and Considerations for Democratic Reform' (International IDEA Interim Analysis, 2020) <<https://constitutionnet.org/sites/default/files/2020-12/the-importance-of-constitutional-law-for-belarusian-democracy.pdf>> accessed 23 November 2021.

3 For a comparative take on the two theories, see eg Richard H Fallon Jr, 'Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation – and the Irreducible Roles of Values and Judgment Within Both' (2014) 4 Cornell Law Review 685–734. The reference in this regard would be incomplete without mentioning the most prominent advocate of originalism/textualism – the late US Supreme Court Justice Antonin Scalia (see eg Antonin Scalia and Bryan A Garner, *Reading Law. The Interpretation of Legal Texts* [Thomson/West 2012]).

constitutional framework over national constitutions dominating constitutional populism in Poland and, more broadly, in Central and Eastern Europe;⁴ equally, one may point to the tensions between a constitution and the international human-rights framework that prevail in Russia's stance towards the European Convention on Human Rights, as it seeks to reinvigorate the notion of sovereignty and thus become largely immune to verdicts of Strasbourg.⁵ Otherwise being miles apart, what these vastly differing contexts have in common is the existence of the constitution to be debated.

However, a constitution is, in a way, a snapshot – a final result that emerges after a long and complex process of drafting. And much of the success or failure of this particular 'end product' may be predicted, and better understood, by looking at the process by which it has been created – as argued by Donald L Horowitz, the James B Duke Professor Emeritus of Law and Political Science at Duke University in his volume *Constitutional Processes and Democratic Commitment*.

Rather than scrutinizing the outcomes of constitutional reforms, ie the particular institutional arrangements established in constitutional documents, Horowitz plunges into a debate on the very making thereof, with regard to, in the parlance of the author himself, severely divided societies.⁶ These are perceived as societies suffering from deep rifts such as ethnic and religious conflict. Horowitz draws the reader's attention to the idea that while special institutional designs are perceived as indispensable for divided societies, the very process by which these designs may be institutionalized is often left aside.⁷

Guided by the underlying approach of unpacking the nuts and bolts of the process rather than the result, this ambitious work explores constitutional processes taking place across the geographical *smorgasbord* ranging from South Africa, Malaysia to Nepal or Sri Lanka, to Iraq but also Poland and others. The scope of this book is, however, in no way restricted to the Global South or to societies described as severely divided. Aspiring to identify processes equipped with providing lasting democratic effect, this book is as timely as it is relevant in today's nearly universal landscape of societal divisions, although they may not necessarily be limited to ethnic, religious, or sectarian conflict. Indeed, we live in a time of great societal fault lines: if there is a single common denominator defining

4 Dimitry Kochenov and Barbara Grabowska-Moroz, 'Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined' (2021) RECONNECT Working Paper [Leuven] 16/2021 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3880717> accessed 23 November 2021.

5 Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights. The Strasbourg Effect* (Cambridge University Press 2017).

6 Horowitz (n 1) ix.

7 Horowitz (n 1) ix, xiii.O.

such dominant themes of today's world as America in the Trump and post-Trump Era, the attitudes towards measures against Covid-19 or the migration and asylum crisis in the European Union, it is the presence of divisions. Divided societies, which find themselves in a seemingly perpetual crisis are, by definition, short of consensus on a common set of values and rules to reflect and to guide their social contract. At a time like this, this work, which focuses on constitution-making, that is, on the very processes that result in a constitutional reform and which are apt to make or break a constitution, is a highly welcome addition to the fields of political science and comparative constitutional studies.

In this volume, a successful, or desired, constitutional process is understood as one which is capable of creating and maintaining democracy, stability and peaceful conflict resolution. Horowitz makes it clear that a constitution alone is insufficient to achieve these goals; that notwithstanding, he draws the reader's attention to the advantages of agreed-upon basic rules of conduct in facilitating commitment to democracy in a country. Throughout the book, which is partly based on Horowitz's lectures in the *Castle Lectures in Ethics, Politics, and Economics* at Yale University, an argument is advanced that it is the constitutional process characterized by a high degree of inclusivity and consensus which is most likely to yield a lasting democratic commitment by the stakeholders. The general argument that one may be inclined to draw is that inclusivity breeds long-term stability. Conversely, failed constitutional processes are portrayed as falling short of the attributes of inclusion and consensus-based arrangements.

While recognizing the sea of diverse recommendations on constitution-making, the book thus makes a case for processes which, through elections and broad-scale deliberations, are designed to achieve the greatest democratic commitment.⁸ Pointing to the necessity for finding 'a balance between arguing and bargaining'⁹ in the drafting process, the author aptly draws the reader's attention to the fine line between consensus, compromise and deliberation – all of which are concepts as imperative for constitution-making as much as they are open-ended and multi-faceted, perhaps even elusive in their meanings. Showing awareness of the open-ended and context-dependent nature of these concepts, Horowitz remains agnostic in respect to the particular arrangements arrived at in one country or the other. Short of favoring particular constitutions, he thus considers a broad number of case studies to highlight approaches which are apt to strengthen the chances of an outcome evoking commitment in all political actors involved.

This argument is set out and comprehensively structured in 10 chapters. *Chapter 1* considers the objectives of constitutional processes, putting forward an

⁸ Horowitz (n 1) 4.

⁹ Horowitz (n 1) 87.

argument that especially in divided societies, the constitution reform ought to be conducted so as to prevent domination by one group (ethnic or religious) over the others, by means of inclusion and consensus-building. Insightfully, *Chapter 2* recognizes the constraints to which constitution-making is exposed, in particular those dictated by the historic legacy, knowledge (or lack thereof) and trust as well as visibility, or transparency, in respect to the interests of the constitution drafters.

For a reader curious about the potential of foreign expertise in constitution-making, it will be stimulating to read Horowitz's account on why involvement of foreign experts in a constitutional reform can contribute to a durable commitment to democracy but also how, in some cases, it may prove less fruitful than might be expected considering the frequently impressive credentials of the said experts.¹⁰ The legal and political space of Eastern Europe gives compelling evidence of this argument: while renowned experts had been providing expertise during the transition period in the 1990s, the end result today – as Russia and other countries show – is blurred at best. Building on this analysis, in *Chapter 7* Horowitz draws on the Dayton Peace Agreement as an example of conflicting advice by international experts. The book thus offers valuable insight as to why the originally lauded constitutional design of Bosnia and Herzegovina remains fiercely debated a quarter of a century after the Dayton Accords had been signed (p 162).¹¹

Speaking of an interplay between peace agreements and constitutional designs, the analysis of the starting conditions and the fora for constitution-making in *Chapters 3* and *4* reveal that it is usually a war or a similar broad-scale crisis that will trigger constitutional reforms: on p 52 Horowitz aptly notes that '[n]ew constitutions are not usually made when things are going very well'. Antagonism is thus portrayed as a typical background to such reforms, which implies, accordingly, the inherent lack of societal agreement at the initial stages of any constitutional process.

One of the centerpieces of this book is *Chapter 5* on inclusion and consensus. Whether the drafters of a constitution belong to a severely divided or a relatively consolidated society, they are bound to encounter conflicting interests. The integration of these interests into a coherent constitutional design may occur through consensus and compromise achieved by a broad inclusion of actors. Horowitz reveals the relative advantage of consensus over compromise in achieving a durable democratic commitment: As compromise involves mutual tradeoffs and, thus, necessarily requires both sides to relinquish some interests, the lasting effect

¹⁰ Horowitz (n 1) 39 ff, also Chapter 7.

¹¹ For a recent analysis on, among other questions, the role of constitutional adjudication in divided societies with Bosnia and Herzegovina as a case study, see eg Joseph Marko, 'Bosnia-Herzegovina: The Role of the Judiciary in a Divided Society' (2019) 5 Constitutional Review 195–221.

of such an arrangement depends on the reciprocity and the commitment of the actors engaged in a tit-for-tat to actually make concessions – a daunting task in a society plagued by ethnic or religious conflict. Consensus is, on the other hand, portrayed in this volume as a concept that is focused less on conceding one's interests and more on adopting a common ground, which would be acceptable for a broad range of actors. Importantly, however, in his analysis Horowitz places emphasis on a major source of tension relating to consensus-building, namely the extent of inclusion: the more actors are involved, the more difficult it is to find common ground and yet, at the same time, a constitutional process that omits an important group may damage its democratic credentials or even prove to be fatal for any durable arrangement (p 92).

Confronted with this structural weakness or, as one might put it, 'flipside of inclusivity', the author explores the mutual influences of inclusion, of consensus and compromise across *Chapters 6 to 8*. *Chapter 8* captures the reader's attention with the case study of Sri Lanka, whose constitutional reform is invoked to illustrate the costs or rather risks tied to a particularly broad scope of inclusion as well as an exceedingly long timeline. *Chapters 9 and 10*, finally, offer further empirical observations to emphasize the factors, such as the right timing, which, when neglected, are likely to frustrate even the most conscientious attempts at institutionalizing a robust democracy.

Drawing on a premise that no two countries or sets of conditions – historical, political or otherwise – are the same, Horowitz does not conclude this work with a neatly packaged recipe for a successful constitutional process. The mosaic of case studies and the underlying empirical observations offered by the author make a convincing point that, few general principles like participation or deliberation notwithstanding, there is no single 'one-size-fits-all' recipe for conducting a constitutional reform. In fact, precisely this agnostic approach towards the processes designed to create the basic rules of conduct in a divided society – a characteristic that increasingly applies even to relatively uneventful liberal democracies – presents the main contribution of this rich volume to the fields of comparative constitutional law and political science.