

For the better part of the past decade, US policymakers have touted the ameliorative properties of procedural democracy for a host of problems typically associated with state and nation-building. Indeed, the current administration's policy of employing preemptive force in the face of perceived security threats is at least partially predicated on the principle that democratic states are more politically moderate than countries where authoritarian leaders can use extremist appeals to mobilize support. In some respects, there may be some merit to this argument. The ideal of a free and fair press that provides a variety of perspectives on issues and their implications, the presence of multiple secular social organizations unencumbered by an encroaching state and/or religious organizations, and the expectation of an organized and loyal political opposition free to oppose government policies form the basis of moderate and open democratic societies. Social scientists working in the areas of comparative politics/economics/sociology are nearly unanimous in the view that it is these more nebulous dynamics that govern the long-term success of democratizing states. At the same time, there remains considerable optimism in the minds of policymakers and the public at large that democratic reform can proceed apace in a number of states where these dynamics are either lacking or wholly absent. Countries such as India and post-authoritarian South Korea are often put forward as examples of states that initially lacked the qualities presumed to provide the foundation for successful democracy yet managed to build stable polities built on widespread political participation.

Despite extant skepticism about the applicability of democracy in post-conflict scenarios, the failure of democratic institutions is a deeply troubling phenomenon. Frustration with failed democracy is often heightened by *post-hoc* assessments that suggest that if only constitutional designers had 'engineered' the procedural aspects of the democratic system in a different way it would be possible to avoid the violence and bloodshed that so often accompany state failures. At root, the three panel sessions for the Constitutionalism and Rule of Law section are intimately concerned with the difficulties associated with the procedural mechanisms that underlie democracy-building initiatives. We accept, *prima facie*, that constitutional democracy requires some form of public participation, yet key concepts such as the rule of law are often assumed to simply develop once a successful election takes place. Beyond this, issues related to post-authoritarian reconciliation, inter-communal relations among different groups, questions related to gender equity, and issues associated with economic growth are all reflective of the types of dilemmas that straddle both the purely procedural arenas of constitutionalism and the more ephemeral areas of politics that are difficult to legislate.

Given the understanding that constitutional design is critical to laying the institutional foundations of a well-functioning democratic society, the members of the Constitutionalism and Rule of Law section debated the utility of democratic elections and the deficiencies associated with purely procedural democratic reforms. The role of elections in post-conflict states provided the framework for discussion in Session One with panelists asking what the appropriate role of elections are in formerly authoritarian countries. Specifically, the discussion was organized around the idea that the international community should seek to develop a "Democracy Readiness Index" to help determine when countries are ready for elections. The Index should measure certain traits

in the citizenry—such as literacy, income, and civic involvement—as well as patterns in the history of the country—such as ethnic peace and experience with good (even if unelected) government. The principle guiding such an index suggests that many countries are simply not ready for elections and that procedural democracy represents a recipe for disaster in many post-conflict states, particularly in the immediate term.

Surprisingly, there was minimal disagreement about the claim that post-conflict states would do well to avoid the pitfalls of immediate democratic elections. Despite the generally accepted idea that fully-formed democratic institutions were more likely to produce the long-term economic and political conditions necessary for good governance and moderation, the overwhelming majority of session participants agreed that the prerequisites of good democracy were simply too difficult to produce in sufficient measure to ensure stable governance.

Discussion of procedural democracy tended to revolve around two key positions. First, a number of panelists critiqued the ‘elections-at-all-costs’ position that has tended to dominate US foreign policy making. One observer noted that the holding of premature elections in Iraq virtually ensured significant ethno-communal strife since the outcome of any election in post-Hussein Iraq was viewed as an ethnic census and as a means to legitimate one ethnic party over others. Another panelist agreed with this assessment, adding that the deep ethno-religious element we see in Iraq causes elections to be seen in very zero-sum terms. Voters see electoral victory in terms of ethnic survival.

This last point leads into the second key position; the critical role of trust and mutual expectations. Specifically, two panelists noted that the definition of a functioning democracy is not so much the holding of regular elections, but rather the principle of a loyal opposition central to the process of democratic discourse. Democracy, in this regard, can only happen when political factions can accept, *ex-ante*, that the election will be fair and that they will not be subject to sanctions should their party lose. In at least two key respects, this position is worth analyzing further. Initially, several political scientists, perhaps not least Stephanie Lawson and Andre Blais, have argued that efforts to study procedural democracy in the developing world have paid scant attention to the role of opposition parties. As the primary organ of developing viable counter-legislation, keeping checks on the sitting government, and serving as the representatives of those citizens whose interests are not manifest in the winning side’s policy platform, a viable opposition plays an indispensable role in any democracy, but most especially in states where previous conflicts have raised the stakes of political participation. One panelist noted that this was precisely the dilemma he observed in Ghana where concerns about the appropriate role of opposition parties made it difficult for voters to cast ballots for minority parties that had little chance of victory. Second, the notion that democracy is perhaps less about representative government and more about the *ex-ante* principle that groups will not use an electoral victory to punish, browbeat, hound, and otherwise politically marginalize losing parties deserves our deep reflection. On both counts the al-Maliki government in Iraq has clearly failed. More disturbingly, however, is the failure to understand precisely *why* this has happened.

In an effort to address this question, one panelist suggested that the concept of democratic trust has been rather vulgarly miscast. According to this perspective, if trust were widely distributed then democracy would be largely unnecessary since the more capricious aspects of collective life might be solved through interpersonal relationships. Other panelists disagreed with this assessment, however, suggesting that on one hand, interpersonal trust cannot be directly exchanged with inter-group trust owing to the tendency of personal and collective identities to radically differ. Put simply, my ability to trust a person from another communal group does not translate with equal currency to my ability to trust a political party designed to represent an entire communal group. Another perspective held that trust between social groups needs to be viewed through a lens of negotiation and communication that stresses the discursive role of democratic politics in post-conflict states. According to this position, post-conflict states are qualitatively different from more established democratic societies in that they are demographically more diverse, economically disadvantaged, and tend to lack secular social organizations that can minimize the primacy of ethno-communal linkages. At least one panelist suggested that the post-colonial status of many states in the global south must be considered an important variable informing these persistent conditions, a critical point that was not addressed until later sessions.

This discussion was particularly important owing to the more nuanced notions of trust and expectation that emerged through debate. Critically, conventional notions of interpersonal trust are no bromide for the deep problems of ethnic conflict that plague most post-conflict states. Put bluntly, mob mentalities of inter-ethnic relations will quickly override most stable personal relationships when political elites cast democratic politics as a question of ethnic survival. What is needed is less a model of interpersonal trust building and more of an institutional mechanism that is less likely to raise communal fears or to imperil notions of ethnic dignity. Panelists disagreed about the specific structure of such institutions, but generally found two key pillars upon which to begin discussion. First, one discussant stressed the key role of rational interdependence of citizens. Citizens need to understand that their best interests are encapsulated in sustained communal peace. For this to occur it is critical that issues not be cast purely in zero-sum terms. Second, it is important that political elites from different communal groups be able to communicate with each other in an institutional context that does not reward extremism. Most importantly, panelists noted that these two dynamics cannot happen independently of one another. If elites are left to their own devices, unconstrained by their own constituents, it is likely that they will cast issues in purely contrarian terms, thereby increasing the likelihood of interethnic violence. Such ethnic instrumentalism was pointed out by panelists whose personal experiences in Southeast Asia, Africa and the Middle East spoke to the highly volatile capacities of communal elites in mobilizing citizens for violence. Equally important, panelists noted that citizens themselves can mobilize for conflict when formal institutions cannot credibly protect them. In such cases, elites will have little avenue for cooperation with other communal leaders.

The upshot of this discussion, and the key point that virtually all panelists accepted, is that elections are often held too early and with far too optimistic expectations. Moreover, in terms of establishing some set of indices to measure precisely when a country might be

best prepared for elections, few panelists felt capable of providing a framework that might shed some light on a post-conflict state's electoral readiness. Indeed, one panelist noted that there is no extant sage with the ability to decide when a country is able to vote for its own leaders. This dilemma reflects a deep democratic paradox: the decision to choose when a state is sufficiently prepared to hold elections is, at root, a democratic question that cannot be answered without some degree of public discourse. One panelist with significant experience in the process of elite-training noted that most 'workshops' aimed at improving governance in post-conflict states are more oriented to 'leadership building' and fail to recognize that participants are keenly aware of the core issues affecting democracy building in their states. What they lack is a way to make each community and its respective leaders recognize mutual interdependence and the institutional mechanisms best suited to inculcating these notions.

The dilemma of trust, and more abstractly the dilemma of establishing a set of socio-cultural prerequisites for elections, formed the core of the second panel session. In this session, discussants tackled the issue of justice and retribution for past grievances. It is no revelation that many post-conflict states emerge from periods of communal violence and bloodshed marked by gross violations of human rights and dignity. These past crimes represent a powerful obstacle to inter-communal trust and impede the process of democratic elections to the extent that political issues become all the more zero-sum in nature owing to the intense polarization engendered by historical animosities. Moreover, some communal groups fear that the crimes of previous regimes can compel groups to use the ballot-box to elect leaders who promise to punish those who may have taken part in past violations. To address these problems, some states have instituted truth and reconciliation commissions whose primary function is to expose the most egregious violations of past regimes in a public forum. Victims and perpetrators are given an opportunity to present their stories in an effort to lay bare the crimes of the previous regime as well as to seek public atonement for the actions they may have taken as agents of authoritarian governments. Significantly, perpetrators are not subjected to criminal prosecution for past crimes, often as a consequence of pre-negotiated rules that grant legal pardons in exchange for cooperation on the part of rights violators.

While some observers have rightly noted the successes of such truth commissions, especially in post-apartheid South Africa, there remains the critical issue of whether justice is being served. This was the critical questions that guided discussion in the second panel session. Thematically, two key lines of discourse emerged over the degree to which national reconciliation is possible and, perhaps more importantly, what it implies for future efforts at democratization.

The first key theme that emerged from discussion related to the actual function of truth and reconciliation commissions. Significantly, two panelists with direct experience in addressing historical grievances in post-conflict states expressed different views on the subject. One panelist argued forcefully that commissions were critical to 'clear the air' in any post-authoritarian scenario since future participatory democracy requires that citizens be capable of trusting that their government can credibly commit to protecting them. In this regard, commissions are less about the pursuit of justice and more closely related to

making citizens out of those who might not otherwise have enjoyed the benefits of political membership. Other panelists agreed with this position, suggesting that commissions serve a valuable role prior to the implementation of procedural democracy as they provide an opportunity to “perform politics” in a way that neither incorporates the zero-sum nature of elections in post-conflict states nor compels violent reprisals on the part of victims. Significantly, this argument builds on previous discussions about the prerequisites of democracy by suggesting that only when the history of state-sponsored criminality is addressed can citizens find ways to collectively govern themselves without resorting to preemptive extremism.

At the same time, at least two panelists expressed skepticism about the utility of truth and reconciliation commissions. Specifically, one panelist argued that unless victims walked away from commissions feeling that justice had been served there is little chance that the truth and reconciliation process will provide any long-term benefit. It is important to note that, at least partially, empirical evidence provided by social scientists studying South Africa supports this claim. Research by Gibson (2004) and Gibson and Gouws (2003) tend to suggest that the South African commission satisfied many of its goals, although their findings also demonstrate that many Africans harbor anger against whites for the abuses perpetrated during apartheid. While truth and reconciliation tend to be correlated for whites, the authors find that blacks are considerably less likely to associate truth with reconciliation. Significantly, however, Gibson (2003) notes that truth is not correlated with irreconciliation, an important foundation for future ethnic relations given the severity of apartheid’s human rights violations.<sup>1</sup>

This points to a key thematic debate between panelists; the difference between the pursuit of truth and the pursuit of reconciliation. According to this perspective, the pursuit of truth is an effort for victims to establish a historical record. Reconciliation, on the other hand, is a specific attempt to seek absolution for past crimes. While some panelists argued that these goals were, in fact, one in the same, others suggested that there exist stark differences between them. This difference leads to the second main theme that emerged in the discussion. Specifically, what can truth and reconciliation commissions contribute to the process of democracy-building? One panelist argued that commissions were perhaps most important in terms of humanizing victims who had no recourse to rule of law under the previous regime. According to this perspective, truth and reconciliation commissions provide victims with the opportunity to reclaim their status as citizens through the public performance of their testimony. Perhaps more critically, commissions serve an important role in the nation-building process by recognizing victims of past abuses as a legitimate part of society. This, perhaps as much as any other argument, claims a central part in the panel’s discussion of how we link constitutionalism to the state and nation-building process.

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<sup>1</sup> Gibson, James and Amanda Gouws. 2003. *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion*. Cambridge: Cambridge University Press.; Gibson, James. 2004. “Does Truth Lead to Reconciliation? Testing the Causal Assumptions of South Africa’s Truth and Reconciliation Commission.” *American Journal of Political Science* 48(2): 201-217.

Related to the nation-building properties of commissions, another panelist noted that they can serve an important role through ‘de-mythologizing’ the past. According to this panelist, the nation building process is not merely about sorting out the past in an effort to provide a rudimentary notion of what constitutes a people’s common history, but perhaps more importantly, also requires that we address the past with an eye to the normative goals we hope to inculcate in the future. In this regard, truth and reconciliation commissions reflect a performance of how citizens might want the future nation to look like.

The primary difficulty that panelists noted with this position concerned the role of past violators in the new government. Specifically, the truth and reconciliation process requires not merely that commissions include and cooperate with “nasty players” but also requires that many violators be included in the future democratic government. Not surprisingly, some panelists questioned whether this allowed for justice to be achieved. Further, it begs the question of whether victims of state-sponsored crime under previous regimes can credibly trust a government that might include the very people who historically abused them. One argument put forward suggested that the scope of the previous crimes are simply too great to allow for true justice and that efforts to indict any one person fail to capture the overarching systemic injustices embodied by past regimes. This discussion is emblematic of the transitory nature of democracy-building and helps to more fully address the dilemmas of immediate elections put forward in the initial panel session. Clearly, post-conflict states face substantial barriers to democratic reform, not least because of the ways that historic abuses clearly demarcated different levels of political belonging and citizenship. Perhaps the first and most important step is to remake citizens such that they can participate as equals.

The capacity of citizens in a newly democratizing state to participate as full citizens is not merely a function of seeking justice or recognition for past violations. In many respects, it is also determined by newly empowered citizens’ expectations about what political participation can provide them. In post-apartheid South Africa, for example, newly unfettered political parties campaigned for votes by arguing that democracy would provide a fount of economic benefits ranging from government subsidized housing to plentiful jobs. Disappointment has continued to mount on the part of many blacks who remain economically marginalized despite their political dominance. The South African experience, despite its unique set of circumstances, is reflective of the strong tensions that exist between the imperatives of economic growth and the tendency of voters to make decisions predicated on their expectations of democratic government.

This tension is not new. Indeed, the Federalist Papers document how the American founders struggled with the question of how to best protect propertied interests against a mobilized political movement bent on radical redistribution. In key respects, however, post-conflict states face a fundamentally more complex problem, not least because of international pressure that compels free and open markets that can quickly destabilize local economies. The second half of the afternoon panel session addressed this issue through the lens of ascertaining the connection between the rule of law and economic liberalism. There is little doubt that current US policy tends to see a quasi-mercantilist

bent of capitalism as central to their democracy-building efforts in the broader Middle-East. At the same time, there is considerable debate about whether this model is capable of delivering the democratic stability the US professes to seek.

At root, panelists were divided between a largely procedural notion of rule of law that views capitalism as inherently based on a well-functioning legal system on one hand and a definition of rule of law that eschews purely pecuniary interests in favor of social civility on the other. Critically in the former case, the issue of economic liberalism is tied to future economic growth and the subsequent development of stable economic cleavages in post-conflict states. Ideally, this requires a judiciary capable of protecting property rights and a political culture that adheres to a principle of minimal economic redistribution. For some panelists the long-term economic benefits associated with liberal economic policy were argued to lead to the socio-economic prerequisites of stable democracies. According to this perspective, economic growth protected by the legal system can help to ensure the provision of other social welfare goods, such as education and a well developed infrastructure.

At the same time, however, other panelists suggested that these goods can be developed through alternative models of capitalism. Indeed, one panelist noted that the Bremer model implemented in Iraq has achieved precisely the opposite of its stated economic objectives. Moreover, while socio-economic status is often correlated with stable democratic societies, there exist a small number of cases, most notably India, where high levels of poverty do not seem to have hindered democratic reforms.

The final session of the day addressed the issue of gender equality, a cornerstone of many international development agencies, yet a topic that remains particularly contentious owing to the potency of neo-traditional social institutions in many post-conflict states. Afghanistan and Iraq have both, with considerable pressure from international actors, provided opportunities for women to increase formal political participation. In both countries, constitutional provisions afforded 25% of parliamentary seats to women in an effort to change the ostensibly patriarchal nature of political decision-making. While many in the West perceive these requirements as a positive step, both in terms of gender equality and as a necessary prerequisite for democracy-building, the fact that they are generally imposed by Western interests reeks of neo-colonialism. Does the rule-of-law require some degree of organic development, or as the example of gender politics illustrates, is it possible to externally promote particular values in an effort to bolster future democracy?

Panelists were particularly divided over the implications presented by couching gender equality with issues pertinent to the domestic formation of rule of law. Two primary themes quickly emerged. The first position, while recognizing the potential limits of externally mandated democracy-building, saw constitutional mandates aimed at gender empowerment as positive. According to this perspective, criticisms that female parliamentarians would be little more than puppets for male party leaders were irrelevant since most party backbenchers, male or female, are subject to the directives of party leadership in parliamentary systems. What is significant is the fact that such rules open

up opportunities for future change. Implicitly, this position accepts that ostensibly primordial social institutions, including those that prevent women from equal political participation, are subject to change over time. The erosion of such social norms is reflective less of the pressures of neo-colonialism and more of the generational ephemerality of things like cultural values and traditions. This position suggests that many of the social norms and rules that we accept as ‘givens’ are in fact very recent constructs that may have little connection to a past we collectively accept. The key implication of this for democracy-building, and a point stressed by two panelists, is that legally mandated equality of opportunity is not the critical issue. Rather, what such regulations do is create a juridical basis for participation from which long-term social equality can follow.

In contrast, other panelists saw legislative quotas for women as potentially harmful. According to this viewpoint, efforts to promote women’s participation had little chance of achieving the goal of promoting gender equality issues since most female parliamentarians would be subject to strong patriarchal pressures. Moreover, two panelists noted that other successful democracies, including those with high rates of gender equality, had no constitutional provisions requiring quotas. This suggests that efforts to increase the social and gender diversity of legislatures are likely to be more successful when they develop from within a country’s political culture and are organically developed into formal political institutions. Panelists sympathetic to this perspective noted that there are myriad examples of countries with highly tolerant constitutions but where true equality is lacking.

Closely linked to these specific questions of gender equality are questions about the appropriate role of foreign advisors. At least three panelists openly derided the efforts of outside actors to impose specific constitutional provisions, suggesting that these actively hurt the professed goals of democracy-building. In some cases, panelists argued that many of the less appealing social institutions were the direct result of previous colonial efforts aimed at changing local political institutions, particularly in colonial West Africa. These colonial practices and the social institutions they helped build are now the direct targets of western advisors who, ignorant of their own countries’ colonial legacies, demand that post-conflict states recast their formal and informal social institutions. Another argument consistent with this theme is that formal constitutional requirements aimed at improving gender equality (and minority representation more generally) merely gloss over the overriding problem and do little to address the underlying social and political dynamics that enable exclusivist practices. According to this perspective, formal rules do not constitute the foundations of true rule of law. Rather, what matters is the degree to which individual citizens see value in rules and institutions. To the extent that rules cohere with generally accepted social norms it is likely that individuals will accept them. Interestingly, this perspective sees rule of law as something that is unlikely to be constitutionally created and more closely aligned with dense social networks.