



STOP LOOKING AT THE MOON: FOR A DEMOCRATIC CONSTITUTION-MAKING PROCESS IN CYPRUS

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Abstract

This essay expounds some thoughts on the need to consider proposing a more democratic constitution-making process (including an elected constituent assembly, direct citizen participation in the deliberations, and reconciliation committees) as part of the way towards a solution to the Cyprus problem.

An impressive feature of the Cyprus problem is the almost complete lack of attention to the procedures that are followed, and to the ones that might as well replace them, to reach a solution. A remarkable exception was the conference on a “Constitutional Convention for Cyprus”, organized by the Centre of Research on Direct Democracy in Switzerland in April 2008, in the aftermath of the failure of the Annan plan.¹ Andreas Auer proposed a procedure whose first step would be the drafting of a Charter for a Constitutional Convention in Cyprus (i.e., a document governing the process to be followed) by an international expert panel. The Charter would then have to be approved by the Greek and Turkish Cypriot communities in separate referenda. A Constitutional Convention would be elected, comprising representatives of the two communities on a ratio that would have been agreed upon beforehand. The new constitution would have to be adopted by separate majorities in the Convention, and it would then be put to two referenda. Obviously, there are many thorny issues concerning the design of such a process. And, of course, procedural choices cannot easily be separated from the contents of a solution, and from the differing positions of the two sides thereon, as many of the participants in that conference had observed. Be that as it may, this was a fruitful discussion on the procedural aspects of the Cyprus problem. But other than the excellent papers of that conference I am not aware of any serious

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¹ A. Auer, V. Triga (eds), *A Constitutional Convention for Cyprus* (Wissenschaftlicher Verlag, 2009).

effort to tackle the problem of the procedure whereby the people(s) of Cyprus might create (or fail to create) a polity for themselves, by themselves.

I used the term “impressive” to characterize the lack of interest for the procedural aspects of the Cyprus problem not only on account of the developments regarding democratic constitution making which I am going to expose below, but also because the main complaint of Greek Cypriots after Independence (featuring prominently in the first sentences of Makarios’ Thirteen Proposals) was, and still is, that their constitution had not been drafted in a democratic way but had been imposed by the three external powers (UK, Greece and Turkey). The same allegation, coupled with the complaint that the people of Cyprus were deprived of their democratic right to amend their constitution (which apart from imposed was also allegedly unworkable) was used to justify the doctrine of necessity in *Ibrahim*², i.e., the constitutional foundation for the survival of the Republic of Cyprus after the withdrawal of Turkish Cypriots from state organs in 1964.³ The inexistence of serious discussion on the democratic, or not democratic, character of the procedure that has since then been followed casts doubt on whether the criticism of the Constitution of 1960 on the grounds that it had been imposed has ever been genuine. At the very least, indifference for the procedure brings to the fore an impressive inconsistency in the constitutional narrative of the Greek Cypriot community and their leaders.

Arguably, the method of (secret) bicomunal negotiations under the auspices of the UN Secretary-General, followed by summit meetings, and in case of success (i.e., agreement on the constitutional essentials of a solution), by two referenda, as happened in 2004, was tolerable, according to democratic standards, when it was first put into motion in 1964. And one may provide various *explanations* why this method has survived until today. However, after more than half a century full of constitution-making episodes, many in deeply divided societies, the drafting of constitutions by representative bodies has become a *sine qua non* feature of constitution making⁴ (with the constitution of Bosnia-Herzegovina becoming a notorious exception in this regard). According to the data of the project “Constitution Writing & Conflict Resolution”, which examined 194 constitution-making episodes between 1975 and 2003, “in most countries an elected or indirectly elected assembly ha[d] primary responsibility for debating, amending, and adopting the draft”.⁵ In 42% of the cases this

² *The Attorney-General of the Republic v. Mustafa Ibrahim and others* (1964) CLR 195, especially at 219-223 (Triantafyllides, J.).

³ See, *inter alia*, P. G. Polyviou, *The Case of Ibrahim, the Doctrine of Necessity and the Republic of Cyprus* (Chryssafinis & Polyviou, 2015).

⁴ See, *inter alia*, Y. Ghai, “The Role of Constituent Assemblies in Constitution Making”, Paper commissioned by the International Institute for Democracy and Electoral Assistance, 2006, available at:

http://constitutionnet.org/sites/default/files/the_role_of_constituent_assemblies_-_final_yg_-_200606.pdf

⁵ Constitution Writing & Conflict Resolution: Drafting Process, 2005, Princeton University, at: <http://pcwcr.princeton.edu/drafting/index.html>. See also J. Widner, ‘Constitution Writing in Post-Conflict Settings: An Overview’ (2008) 49 William and Mary Law Review 1513.

responsibility fell upon a legislative body, in 17% upon a constituent assembly elected with the sole aim to draft a constitution (i.e., a constituent or constitutional *convention*), in 9% upon commissions appointed by the legislature, in 10% upon the executive, or upon committees appointed by the Executive, in 6% upon an appointed transitional legislature, in 5% upon a party central committee", in 3% upon a national conference, in 2% upon round tables, whereas 6% of the cases are classified under the heading "Peace Negotiations / Decolonization". The tendency to have constitutions drafted by representative bodies has more recently been confirmed by the constitution-making episodes in Nepal, in the Arab Spring and in various countries of Latin America, among others.⁶

Besides an elected constituent assembly, whereby citizens may participate in the drafting of their constitutions only indirectly, present day standards also dictate some sort of *direct* public participation in the constitution-making process⁷, be it public hearings and consultations, citizen education programmes, deliberative assemblies whose members are randomly selected (*vide* Ireland and Iceland⁸, or earlier, the British Columbia Citizens' Assembly⁹), or even "constitutional crowdsourcing".¹⁰ Scholars have been discussing an emerging norm of international law requiring participatory constitution making, based mainly on Art. 25 of the International Covenant on Civil and Political Rights¹¹,

⁶ For overviews see, *inter alia*, D. Landau, H. Lerner (eds), *Comparative Constitution Making* (Edward Elgar Publishing, 2019); J. Elster, R. Gargarella, V. Naresh, B. E. Rasch (eds), *Constituent Assemblies* (Cambridge University Press, 2018); L. E. Miller, L. Aucoin, (eds), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace Press, 2010). For the Arab Spring, see *inter alia*, N. Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, 2017).

⁷ United Nations, Guidance Note of the Secretary-General "United Nations Assistance to Constitution-making Processes", April 2009, 4; A. Hudson, *The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes* (Cambridge University Press, 2021), 5-6; L. E. Miller, "Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future", in Miller and Aucoin (eds), *Framing the State*, 601, at 627-638; T. A. Eisenstadt, A. C. Levan, T. Maboudi, *Constituents before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (Cambridge University Press, 2017), 26-39; M. Brandt, J. Cottrell, Y. Ghai, A. Regan, *Constitution-making and Reform: Options for the Process* (Interpeace, 2011) 9-10, 80-148; T. Ginsburg, Z. Elkins, Z. J. Blount "Does the Process of Constitution-Making Matter?" (2009) 5 *Annual Review of Law and Social Science* 201, at 204-210; A. Banks, "Expanding Participation in Constitution Making: Challenges and Opportunities" (2008) 49 *William and Mary Law Review* 1043; M. Crouch, "Constitution making and public participation in Southeast Asia" in Landau and Lerner (eds), *Comparative Constitution Making*, 488 at 489-491.

⁸ H. Landemore, "Inclusive Constitution-Making: The Icelandic Experiment" (2015) 23 *The Journal of Political Philosophy* 166; E. Carolan, "Ireland's Constitutional Convention: Behind the hype about citizen-led constitutional change", (2015) 13 *International Journal of Constitutional Law* 733.

⁹ M. E. Warren, H. Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2007).

¹⁰ C. Bernal, "How constitutional crowdsourcing can enhance legitimacy in constitution making", in Landau and Lerner (eds), *Comparative Constitution Making*, 235.

¹¹ V. Hart, "Constitution Making and the Right to Take Part in a Public Affair", in Miller and Aucoin (eds), *Framing the State*, 20, at 27-32; Banks, "Expanding Participation", 1051-1055;

since not only regular politics but also the making of constitutions fall within the purview of the fundamental right to participate in public affairs.¹²

Of course, even under a widely recognized norm demanding participatory constitution making, what this norm may precisely entail cannot so easily be determined –even more so since “the norm of participatory constitution-making for some reason, or for some reasons, ‘sticks’ better in some contexts than in others”.¹³ Furthermore, as a recent study has showed, the effect of public participation in constitution making depends upon the strength of the political parties: stronger parties are prone to recognize only nominally the significance of citizens’ views, which become more effective when parties are weaker.¹⁴ Besides, public participation is not always beneficial, all things considered. As Widner has noticed, in some cases (Solomon Islands, Iraq, Chad, and the Republic of Congo) the constitution writing process “inflamed passions and sparked violence”.¹⁵ According to the findings of a research on constitution making in Uganda, the participatory nature of the process “increased democratic attitudes and raised civic knowledge”, but this had a neutral impact on citizens’ support for the constitution in the aftermath, because their high expectations did not meet reality, with the result being disillusionment, “distrusting democrats”.¹⁶ Other case studies also show that public participation does not always have positive effects¹⁷, and that elite cooperation matters more for the efficient implementation of liberal constitutions.¹⁸

On the other hand, there is evidence suggesting that “the more representative and more inclusive constitution building resulted in constitutions favoring free and fair elections, greater political equality, more social justice provisions,

A. Saati, “Participatory Constitution-Making as Transnational Legal Norm: Why Does It Stick in Some Contexts and Not in Others” (2017) 2 UC Irvine Journal of International, Transnational, and Comparative Law 113, at 114-123; T. M. Franck, A. K. Thiruvengadam, “Norms of International Law Relating to the Constitution-Making Process”, in Miller and Aucoin (eds), *Framing the State*, 3, at 14-15.

¹² United Nations, Human Rights Committee General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25), para. 6.

¹³ Saati, “Participatory”, at 115. See also UN Human Rights Committee, *Marshall v. Canada* (1991) para. 5.6: “Although prior consultations, such as public hearings or consultations with the more interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs”.

¹⁴ Hudson, *The Veil of Participation*.

¹⁵ Widner, “Constitution Writing”, 1514.

¹⁶ D.C. Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making* (The University of Michigan Press, 2008) 6-7.

¹⁷ A. Saati, *The Participation Myth: Outcomes of participatory constitution building processes on democracy* (Umeå University, 2015).

¹⁸ G. L. Negretto, “Constitution-making and liberal democracy: The role of citizens and representative elites” (2020) 18 International Journal of Constitutional Law 206; but see also H. Landemore, “When public participation matters: The 2010–2013 Icelandic constitutional process” (2020) 18 International Journal of Constitutional Law 179.

human rights protections, and stronger accountability mechanisms”.¹⁹ According to another study, public participation matters, and it does so much more when it makes its appearance at the earlier stages of the process.²⁰ Bottom-up popular processes “yield democratic openings”, though only “under particular circumstances”, including public advocacy for the election of a constituent assembly, and the ability of “strong social movements and interest groups” to exploit elite divisions or to diminish elite control so as “to participate as full deliberators in the convening stage of new constitutions”.²¹ Another scholar has aptly pointed to the phenomenon of “internal exclusion”, which occurs when the decision-makers, although they invite public participation, are not willing, prepared or obliged to engage seriously with the views of the citizens and to potentially “reconsider their preexisting preferences”.²²

Whatever the shortcomings of public participation in constitution-making processes are, the current process of negotiations-plus-referenda in Cyprus looks obsolete when assessed in terms of the foregoing developments. Two crucial *desideranda* are missing: *meaningful* public deliberation (given that deliberation itself is anyway very difficult in divided societies when it comes to issues of identity²³); and the creation of a sense of ownership of the new constitution (given that such a sense is closely connected with the aim to avoid constitutional imposition²⁴, and thus not to enable political elites and/or citizens to disavow their responsibility for the effective implementation of the compromise in the aftermath of the referenda, as Greek Cypriot politicians did after 1960). Constitutional referenda *can* initiate processes of public deliberation even in divided societies²⁵, and they may thus become instruments for the democratic legitimacy of the constitution. However, presenting citizens with a crude “take it or leave it” dilemma after the constitutional essentials have been formed, constitutional referenda leave open the space for the sceptics to rehearse their criticism again and again in the years to come, claiming that this or that problem could have been avoided if a better agreement had been achieved. If, on the other hand, the sceptics are given the opportunity to voice their concerns in (or during) the process whereby the contents of the constitution are being decided, it will be more difficult for them to repeat their criticism after the decision is taken, since they participated in the process –and there is always the possibility that some of their concerns would

¹⁹ K. Samuels, “Post-Conflict Peace-Building and Constitution-Making” (2006) 6 *Chicago Journal of International Law* 663, at 668.

²⁰ Eisenstadt et al., *Constituents before Assembly*, 39-41.

²¹ *Ibid.*, 117, 130-131.

²² Banks, “Expanding Participation”, 1043-1046.

²³ See on this J. S. Dryzek, “Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia” (2005) 33 *Political Theory* 218.

²⁴ See on this Z. Elkins, T. Ginsburg, J. Melton, “Baghdad, Tokyo, Kabul ...: Constitution Making in Occupied States” (2008) 49 *Williams & Mary Law Review* 1139; C. Stratilatis, “Avoidance of Constitutional Imposition and Democratic Constituent Power in Divided, Conflict-Ridden Societies” (2018) 38 *The Cyprus Review* 163.

²⁵ For an argument to that effect see S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012), 242-259, 296-298.

have been met with an adequate answer, whereas other concerns could have contributed to the amelioration of the agreement. Most importantly, the deliberation before the referenda, short as it will most probably be, will not be sufficient to trigger the learning processes that are indispensable for a successful transition, including a therapeutic confrontation with the mistakes of the past and the readjustment of constitutional narratives. A lengthier process, including the election of a constituent assembly and reconciliation committees which may work out new narratives, can certainly decrease passions and create new understandings, nuances, compromises, affection, and trust, all necessary for the forging of a constitutional contract.

Of course, these are just probabilities. And, certainly, the constituent dilemma will be present in every scenario: either accept a necessarily imperfect, even disastrous in our eyes, constitution, or take up the responsibility for the “no”, with all its consequences. It is neither an easy nor an escapable dilemma. And it may function both as a motivation to work out differences and as a reason for anger and frustration. Be that as it may, it seems that the time is ripe for brave decisions, one among them being to stop imagining new nuances in our proposals for the contents of a solution, and to start proposing a wholly different procedure in order to arrive at whichever solution may be feasible.

An old Buddha’s saying exhorts us not to miss the moon (our True Mind) by focusing on the finger pointing to it (the various teachings aspiring to lead us to the truth). This advise is very useful in various contexts, but it is misleading when it comes to the resolution of conflicts like the Cyprus problem. Here, as in many other similar cases, the process is the only key that we have. Sticking our minds to a moon on which we will never be able to land is no more useful. In fact, dreaming the moon may be nothing more or less than an alibi for our apraxia.