Jon Elster and the Challenges of the Constitution-Making Process: A Critical Review

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In the early 1990s as the third wave of democratization was in full swing, Jon Elster began a series of scholarly inquiries into the processes of constitution-making. Noting that "there is no body of literature that deals with the constitution-making process in a positive, explanatory perspective," Elster sought to take "a few steps towards remedying that deficiency" (1995: 364-365). His comparative historical approach to the subject led him to consider the constitution-making process in the American Constitutional Convention and the French Constituent Assembly (Elster 2000)[1] along with the post-communist states in Eastern Europe (Elster 1993;[2] Elster 1995[3]). Elster's approach does not offer a grand theory of constitution-making; rather, he invokes his influential "plea for mechanisms," which he defines as "frequently occurring and easily recognizable causal patterns that are triggered under generally unknown conditions or with indeterminate consequences" (Elster 1998: 45).[4] Indeed, it would appear that the context of constitution-making – a process inherently plagued by uncertainty – is exceptionally well suited to a mechanism-driven analytic approach.

This essay seeks to surface nine mechanisms that Elster highlights in the constitution-making process. In so doing, I reframe these as "paradoxes" or "dilemmas" facing constitution-makers. Indeed, these are not individual mechanisms as much as bundles of opposing mechanisms (Elster 1998: 70) – and it is the very fact that they are in binary opposition to one another that produces an *ex ante* indeterminacy. I conclude by offering a plea of my own, namely for Elster to propose what I term "answer-generating mechanisms" for constitution-makers as they seek to resolve the following dilemmas of constitution-making.

Crisis as Catalyst

Periods of relatively minimal political turmoil, economic stability, and no exogenous threat from within the international arena rarely spur substantial constitution-making. Instead, "the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making" (Elster 1995: 394). Specifically, the problem is that "constitutions ought to be adopted in maximally calm and undisturbed conditions. [Yet] the public will to make major constitutional change is unlikely to

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[1] Elster, Jon. 2000. "Arguing and Bargaining in Two Constituent Assemblies." *University of Pennsylvania Journal of Constitutional Law* 2: 345-421.
[2] Elster, Jon. 1993. "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea." *Public Administration* 71(1-2): 169-217.
[3] Elster, Jon. 1995. "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal* 45(2): 364-396.
[4] Elster, Jon. 1998. "A plea for mechanisms." In *Social mechanisms: An analytical approach to social theory* (Hedstrom & Swedberg, eds.). New York, NY: Cambridge University Press.

be present unless a crisis is impending" (Elster 1995: 394). The diversity in social, political, and economic upheaval that prompted the drafting of the constitutions that Elster studies is mesmerizing, ranging from socioeconomic crisis (USA (1787)/France (1789)) to revolution (Germany (1848)) to regime collapse (Greece/Spain (1970s)) to fear of regime collapse (France (1958)/Poland (1791)) to defeat in war (Germany/Italy/Japan (1940s)) to reconstruction after war (France (1946)) to the emergence of a new state (Poland/Czechoslovakia (1918)) to the tumultuous period following liberation from colonial rule (USA (1776)/African states (1950s-1960s)) (Elster 1995: 371). Cooler heads may well draft better constitutions, but a calm disposition is seldom possible in the midst of chaos.

The Creator-Createe Paradox

Constituent Assemblies – the collective bodies charged with drafting the constitution – do not emerge out of nowhere. Rather, the constituent assembly is usually charged, and endowed with authority, by an actor or set of actors constituting the soon-to-be *ancien* regime. As Elster notes, "the tension [is] between the assemblies and their conveners – between the creature and its creator […] if X brings Y into being, then X has an authority superior to Y. On the other hand, if Y is brought into being to regulate, among other things, the activities of X, Y would seem to be the superior instance" (Ester 2000: 359). Indeed, "[a]lmost by definition, the old regime is part of the problem that a constituent assembly has to solve" (Elster 1993: 179). The creator-createe problem may be particularly pronounced if the assembly is driven to draft a transformative constitution – i.e. a constitution that does not seek to preserve the status quo but that instead aims to overhaul the existing political order. In the case of the American Constitutional Convention and the French Constituent Assembly, createe prevailed over creator. In the former case, "[t]he delegates at the Federal Convention succeeded in replacing the state legislatures with special conventions as the ratifying bodies" (Elster 2000: 360); in the latter, "[t]he French delegates turned the King's veto in the constitution into a mere formality" (ibid).

Deciding How to Decide

The constitution is a blueprint for democratic decision-making. But how is a constitutional framer supposed to decide how to aggregate preferences over the drafting of the constitution itself? Here, the competing interests of the parties to the constituting assembly come into play. In general, the "smaller of these [parties] will then tend to claim equal voting power in the assembly, whereas the larger will insist on a voting system that reflects the numerical strength of their constituencies" (Elster 1993: 179). In France, the dilemma of whether to vote by heads (i.e. by the number of individuals constituting each of the three Estates General) or by block (or "order") was a major preliminary issue requiring resolution:

"The French framers of 1789 faced […] the division of the Estates General in three orders of different size (300 delegates for each of the Nobility and Clergy, 600 for the Third Estate). When the Estates first met in May, they spent six weeks debating whether they should vote by order or by head [...] In the end, the advocates of voting per head won out" (Elster 1993: 180). Recognizing that preference aggregation mechanisms fundamentally shape the resulting substantive outcomes, the dilemma of 'deciding how to decide' casts a long shadow over the constitutional document and its subsequent political effects.

Upstream vs. Downstream Constraints

While constitution-making may, in the annals of history, appear be no more than a mere "moment" – a speck in time – constitution-makers are nonetheless tangled in cross-temporal webs that bind them to political actors in the past as well as the future, thereby 'stretching' the constitutional moment. In this light, Elster distinguishes between upstream and downstream constraints: "Upstream constraints are imposed on the assembly before it starts to deliberate. Downstream constraints are created by the need for ratification of the document the assembly produces" (Elster 1995: 373). In the case of the French Constituent Assembly, the King was the source of both upstream and downstream constraint. Similarly, for the German constitution-makers drafting the German Basic Law in 1949, the source of both upstream and downstream constraints came from the Allied Powers. In the case of the American Constitutional Convention, the downstream constraint was the preferences of the states themselves, whereas the upstream constraint was the expected preferences of the special conventions held within each state that would ultimately determine the Constitution's fate. Upstream and downstream constraints reveal the constitution-making process to be more prolonged than appears *prima facie*.

Public vs. Private Proceedings

If a Constitution is to "constitute" a people, one would assume that the greater the amount of participation in the constitution-making process, the greater the legitimacy of the resulting outcome and its prospect of engendering a *demos*. Nevertheless, public deliberations have distinct disadvantages vis-à-vis private proceedings. The dilemma is a difficult one to resolve: "On the one hand, a public setting makes it less likely that the delegates will resort to open logrolling and horsetrading. Instead, they have to argue in terms of the common good. On the other hand, publicity encourages the delegates to adopt rigid, inflexible positions as a precommitment device. It is also more difficult to back down from publicly stated views than from those expressed in a smaller circle" (Elster 1993: 181). Ultimately, Elster appears to prefer the sophisticated private deliberations of the American Constitutional Convention over the public hearings in the French Constituent Assembly, where popular passions and

disorder often interrupted proceedings and mitigated intelligent, reasoned argumentation.

The Vicissitudes of Institutional/Group Interest

If formal governmental institutions (such as pre-existing legislatures) or political groups (such as political parties) participate in the constituent assembly, it is likely that their collective interest will inject itself into the constitutional document. Here, "[i]nstitutional [or group] interest in the constitution-making process operates when a body that participates in that process writes an important role for itself into the constitution" (Elster 1995: 380). This phenomena was on full display in Poland (1921) and France (1946), where "[in] both cases, the parliament that wrote the constitution did its best to reduce the role of the executive and to promote the role of parliament" (Elster 1995: 380). Similarly, in post-communist Poland and Czechoslovakia, "the small Communist or ex-Communist parties […] insisted on proportional elections" (Elster 1995: 378). The implications are clear: the institutions or political groups participating in the constituent assembly will seek to embed their interests within the constitution. Protecting against this occurrence is a critical challenge for constitution-makers.

The Vicissitudes of Personal Interest

Elster generally thinks highly of constitution-makers and assumes that they are altruistic and disinterested individuals whose purpose is to maximize the public good. Nevertheless, despite the fact that "the personal interest of constitution- makers in specific constitutional clauses is a relatively marginal factor," Elster acknowledges that "it does play a certain role in some cases" (1995: 377). The most egregious example is that of the Czech Constitution drafted in 1992: "The decision by the Czech Parliament to create a bicameral parliament in the new constitution was widely seen as an incentive offered to the Czech deputies in the Federal Assembly to pass a constitutional law abolishing the federation in exchange for a place in the new Senate" (Elster 1995: 377). Elster does not discuss means of systematically verifying the integrity of the constitution-makers themselves and mitigating conflicts of interest – yet this is an immense problem that most organizations, from universities to bureaucracies, must equally face.

Self-Interest vs. Reason

Assume that every individual member of a constituent assembly is of indisputably high character, is committed to reason-giving, and is disinterested. Does this mean that the constitution-makers can craft a document that ignores the vicissitudes of self-interest? Not so, for Elster argues that "even the most impartial framer had to take account of the need for the final document to be ratified in the respective

states, and that a text strongly against the interest of their constituents stood no chance of being adopted" (1993: 181). This reminds one of James Madison's famous claim in *The Federalist No. 51* that "[i]f men were angels, no government would be necessary." In other words, no matter how reasonable the constitution-makers may be, they must deal with the empirical fact that their constitution will create an incentive structure for fundamentally self-interested individuals. Indeed, in the American Constitutional Convention, "the framers [tried] to control and harness the self-interest of future legislators. Public choice theory was well represented at the Federal Convention, where the Framers constantly based their arguments on the incentive effects of various schemes" (Elster 2000: 382). Nevertheless, it is unclear to what degree constitutions must take account of individual self-interest, particularly for transformative constitutions that seek to endow society with a new ethos and, to some degree, to transform the very self-conception of its constitutive members.

The Clash of Threats and Warnings

Constitution-makers often argue and bargain in the shadow of existential threats, and on occasion they expend significant energy leveraging threats and warnings both against internal actors (i.e. fellow constituent convention attendees) and against external actors (such as a monarch). In the case of the French Constituent Assembly, "[w]hen, in the first days of July, [the King] reinforced the presence of troops near Versailles, the implied threat to the assembly escaped nobody" (Elster 2000: 396). One member of the Assembly, Mirabeau, eventually retorted with his own threat: "Passionate movements are contagious: we are only men, *nous ne sommes que des homes*, our fear of appearing to be weak may carry us too far in the opposite direction," so much so that even the King's own troops "may forget that they are soldiers by contract, and remember that by nature they are men" (Elster 2000: 397). Of course, the line between threat and warning, where the latter merely seeks to communicate the presence of a perceived danger, is a fine one. And when two threats or warnings clash, it is their relative credibility that often decides which one prevails (Elster 2000: 384).

A Plea For Answer-Generating Mechanisms

Elster's attempt to provide us with a positive, mechanism-driven account of arguing and bargaining in constituent assemblies is both laudable and extremely successful. But one may ask whether Elster is short-changing his own ability to propose answers or, better yet, to propose answer-generating mechanisms (i.e. a decision-making heuristics) to resolve the dilemmas that he surfaces. True, Elster does provide cursory normative suggestions, as when he argues in favor of proportional electoral systems, unicameral constituent assemblies, deliberating over the constitution away from the capital, and

minimizing the influence of lawyers and experts in the constitution-making process (1995: 395-396). But he nonetheless fails to offer a comprehensive and persuasive logic for his conclusions. What normative judgment led him to favor unicameral constituent assemblies over bicamerial ones? Why should the assembly so easily forego the symbolic appeal of drafting the state's new constitution from within the national capital? Why is it inherently desirable to expedite the constitution-making process by excluding lawyers and experts, even if their expertise may contribute to a better document? These are, ultimately, the types of questions that constitution-makers have faced and will continue to face. While they may resent an ivy-league academic dictating the requisite answers, they may well appreciate an attempt to interpose one's friendly hand by proposing an answer-generating mechanism.