

## **II. National Self-determination of Peoples**

Some groups have their own countries, and other do not. Before the great transportation revolution of the 20<sup>th</sup> Century, enclaves of ethnically distinctive people were the rule (Schlesinger, 1998). People lived in communities that were racially, linguistically, and culturally *homogeneous* i.e., composed of a single ethnic, religious people. And such places are not unheard of today. The Irish know who they are as a people, as do the Palestinians and the Zulu. Each group has its own language, customs, and arts. Most aspire to own and politically control their traditional *homelands*, the places that are significant to enjoying their unique language, customs, and arts. Some like the Swedes and the Japanese are lucky in having their own place. Others such as the Palestinians of the Middle East and the Tamil peoples of south Asia are not so lucky; they still seek their national self-determination and with it, control over their respective homelands.

### **A. Wars of National Liberation**

Unfortunately, most national states are born in blood. The United States suffered a traumatic revolution that was in fact a horrible civil war in which neighbors and even family members were pitted against each other. Colonial powers and their sympathizers have not usually been eager to give up their exploitative control over nations of people and their lands. Nationalism has seen more than its share of political violence ranging from riots in the street to civil

war to terrorist sabotage. Fortunately, nonviolent social change movements like that led by Mahatmas Gandhi in India in the 1940s have eased the transition in some places. Nevertheless, even the more peaceful transitions like India's and that recently experienced in South Africa have been mixed with periods of armed resistance to colonial rule.

Wars of national liberation end when the occupying force and its loyalists concede that they can no longer hold onto the disputed territory. The colonial power goes home. The surviving members of the revolution's leadership cadre take control of the country. There are celebrations and the recognition of heroes. But all too often, the jubilation is short lived. The country is left in a shambles, expatriates - colonial sympathizers among them -- still live in the country, and the new political leaders must move to establish order and provide for the public's welfare. The context for this birth of national statehood is the body of folkways and traditional law that is indigenous to the country, or its *political culture*. The native people want to live in a way that is consistent with their longstanding cultural values.

In the United States, the early political culture emphasized religious liberty, economic self-reliance, and minimalist government. Some countries have expressed their revolutionary values as communal security (China), Islamic discipline (Iran), or racial equality (South Africa). Every society is unique. Yet the logic of the political culture is internally consistent for each country; it makes sense to the people who live there. If a society is homogeneous then the process

of translating culture into structure is straightforward. However, many countries are larger, *heterogeneous* societies composed of several groups. People with different ethnicity, language, religions, and traditions all want to be accommodated. In these cases, a more generic approach is needed. A way must be found to become a multicultural state.

## **B. Declarations of Independence**

By treaty or by edict, the revolutionary elite declares the *national state* to exist. They assert its boundaries, declare its official language, and unveil its special symbols. The boundaries are of course necessary to distinguish the territory of one national people from another. They will hold if other countries respect them or if the new nation can defend them. An official language is needed because everyone within the new boundaries may not speak the same native tongue. It may be practically necessary to adopt the language of the former colonial power if this is the tongue shared by members of the governing elite, merchants, and others who do not share a common native culture. Common symbols may be simple things like a flag or a military uniform. The symbols often seem novel when initially presented, but they take on patriotic meaning as generations of children are socialized to respect and defend them.

This type of rudimentary, generic definition of a nation state can only take our inquiry so far. It takes more than a map, a language, and a flag to make a national state. There is a great deal of work required to establish a legal

framework for the national life that is to come. Having achieved independence, the new nation state must engineer the framework for an autonomous country.

### **C. Constitution Writing**

Once the war of national liberation is won and elites ink a treaty, a new national government can be constituted. A group of politically active or traditional leaders assemble to create a national government. This assembly is commonly called a *constitutional convention*. The act of writing a constitution is an initial and profound act of sovereignty, an assertion of legal control over the land and its inhabitants. It reflects the political culture of the people who write it, and in that respect each national constitution is unique. However, they do share some common characteristics.

Constitutions assert the sovereignty claim of the nation state. As basic law, they describe the representative process whereby popular sovereignty is legitimized. Elections are proscribed, citizenship is defined, structures of government are detailed, and the means of altering basic law are laid out. The *national constitution* is a comprehensive blueprint for government. It is a rational plan for reasonable people, truly the legacy of self-government promoted during The Enlightenment.

Written constitutions force compromise and commitment. Representatives have to be explicit about their goals, and various interests are represented at the constitutional convention. Small farmers want land reform,

merchants want easy credit, civil servants want respectful employment, and traditional leaders want to be afforded their due deference. No faction will get all of what it wants all of the time. Be that as it may, everyone feels compelled to come away committed to the compromise blueprint. The very future of the national state depends upon respect for constitutional government.

There are some controversial provisions of written constitutions. At various times in various countries, they have made free, representative government difficult or impossible. *Property requirements* for citizenship and office holding were common in early written constitutions. Founders reasoned that only those people with a material stake in the country's future should be allowed to determine its course. Some Latin American constitutions have *State of Siege* provisions. Such a provision allows the government to suspend civil liberties in times of national emergencies. Unfortunately, executives and their military backers have used such clauses to disband legislatures and repress popular dissent. *Loyalty oaths* that suggest limits on dissent are another problematic clause of some written constitutions. Unless properly sworn, citizens are not allowed to vote or seek public office. Absence of a *constitutional court* can limit judicial review of government actions. The ability to declare a law or edict unconstitutional provides important safeguards for civil liberties and minority rights.

These problematic inclusions or omissions in constitutions are only illustrative of the legitimate concerns that surround national constitutions in our

time. Without careful crafting and diligent observance of the constitution as basic law, tyranny can flourish. Those of us who live under stable constitutional governments – the so-called Western democracies -- should not take our constitutions for granted. We are the envy of many repressed people throughout the world.

**Box 2.1 Using “national state” as a Technical Term**

Since the expression “nation state” has homogeneous ethnic connotations, we have settled upon the term “national state” to describe today’s dominant fashion in governing. We employ the noun “country” casually as in everyday usage.

**D. The U.S. Constitution of 1787**

The United States Constitution is the oldest and in many ways the parent of modern national charters. This document was woven together piece by piece in the protracted deliberations of representatives of the 13 original American states. Working without a fixed agenda, these public trustees relied upon their Anglo-Saxon sensibilities, Enlightenment educations, and revolutionary momentum to craft a blueprint for self-government (Rakove, 1996: 13). The result was a practical document that the Founders thought to be consistent with the much-heralded Declaration of Independence that had preceded it.

Several important principles are either included in the architecture of the 1787 document or have been judged by our Supreme Court to be implicit in it.

1. Negation of privilege. The U.S. Constitution explicitly prohibits some of the feudal European customs that favored a political elite. The Founders considered many carryovers from the European experience to be philosophically and politically unenlightened.

a. *Corruption of blood.* The criminal offenses of a parent cannot be held against a child. The government cannot withdraw property, inheritance, and other rights from the offspring of convicted criminal, even traitors (Article III, section 3). This remedies the threat associated with breaking the fealty bond.

b. *Bill of attainder.* Such an act is a legislative declaration of individual guilt without a proper judicial trial. Laws must apply to all residents equally (Article I, section 9). An independent judiciary with a constitutional court at its summit is a revolutionary creation, a nail in the coffin of feudal privilege.

c. *Ex post facto* law. Such a law provides that an individual action cannot be declared illegal after its commission. If the nation's law is neutral and applied equally to all (Article I, section 9), there is no need for singling out individuals for executive or legislative persecution. The courts are not a tool to be used to advance a monarch's or parliament's agenda.

2. Separation of powers. The U.S. Constitution limits the power of government by officially parceling out its powers among different institutions.

a. Distinctive branches of government. The legislative, executive, and judicial functions are each given specific institutional powers (Articles I, II, and III). Unlike parliamentary systems, the regime in power is selected in national elections and not created out of legislative majorities. A separate, stand-alone judicial branch resolves questions of law concerning individuals and governments, thereby protecting both individuals and the constitution from undue political interference.

b. Different *bases of representation*. Popular representation in the selection of officials differs for each chamber of the congress, the president, and federal judges (Articles I, II, and III). This provides opportunities for different regional, political, and economic constituencies to be heard. For example, the (subnational) states' interests are represented in the Senate while the House of Representatives represents citizens more directly.

c. *Checks and balances*. The powers of each branch include the limited ability to reverse the decisions of the others. Congress and the president must approve many of each other's acts, and the federal courts can review the actions of either of them.

3. Substantive Citizenship. In noting a shift from subject to citizen, the U.S. Constitution self-consciously defines and protects individual citizenship. Such detail added credibility to the assertion that the era of monarchs had passed.

a. Citizenship as inviolate right. Once born or naturalized a citizen of the United States, your citizenship cannot be revoked. You may be convicted of treason and executed, but you will die a citizen.

b. A bill of rights. A list of explicit civil liberties and political rights is enumerated as amendments to the Constitution (Amendments 1-8). In fact, their inclusion was the price demanded by some states for ratifying the Constitution itself.

c. Implied rights. The powers not given to the national government, or *enumerated powers*, belong to the states and to private citizens as *reserved powers* (Amendments 9 and 10). Although this principle has yielded to practical demands on government, it has at least periodically sheltered state and local governments from federal domination.

Other countries have found these ideas helpful in designing their national constitutions. Writing at the time of independence, many countries in Latin American modeled their congress, presidency, and courts on those created earlier in the United States. African and Asian countries have found aspects of the civil liberties and political rights content to be germane to their experience.

For relatively homogeneous peoples at revolutionary moments in their self-determination, the U.S. Constitution has proven instructive. Alas, we increasingly live in heterogeneous, not homogeneous countries. The consensus that was possible among our culturally similar and often like-minded Founders is absent in many countries today, including our own. Immigrants and newly enfranchised people cannot trust in a common democratic heritage like that America enjoyed when we initially constituted our government. Unable to appeal to shared tradition or effective protection from clan or connections, the immigrant or the newly enfranchised citizen is wholly dependent upon the rule of law. Without the equal protection of the law, newcomers are helpless “strangers in a strange land.”

