

“Remaking Constitutions: International Challenges”

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Thank you. It is a great pleasure for me to join you today as your luncheon speaker at this very timely and important conference.

A constitution is without question the most fundamental foundation document of any organized society – it not only embodies the hopes and dreams of society but it sets forth the rules that we pledge to live by, and is the basis for what we call the rule of law. A constitution creates a community and represents in a democratic society, a grant of limited powers made by the people to an organized government.

Our federal constitution is a document that I interpret every day as a federal judge. Indian Constitutions are no less important, although I have observed that they primarily address governance issues and as a result, they do not make their way into my courtroom.

But I am going to focus today on the topic of the many challenges that are faced in writing constitutions in today’s world. First, I am going to give you a short background on recent events in constitution making. Then, I am going to give you a much more detailed discussion of how we drafted and ratified the Constitution in Kosovo, one of the world’s newest countries. Then I will conclude by summing up what I consider to be the major issues faced in constitution development across the globe.

Many of your tribes and nations will make the decision in the years to come to rewrite constitutions – to focus on forming a more perfect governance system for the people. And you will not be alone.

Since the American Constitution was ratified in 1789, the first real “enlightened” constitution in the world, it is estimated that over 800

new constitutions have been written around the world. Since 1991, a mere twenty years ago, 101 new constitutions have been written and implemented.

They range from places like East Timor, writing a constitution for the first time, to Venezuela, writing its 26th new constitution. They range in size from the world's longest constitution, India's, which has over 450 articles, to the smallest, the United States Constitution with 7 articles and 20 some amendments.

Most constitutions in the world have been amended in some way in the last twenty years. The only countries now lacking some type of formal written constitution are the United Kingdom, Israel and New Zealand. Since World War II, a large number of treaties have been drafted and then ratified by most countries of the world. Many of these treaties function much like a constitution that governs the signatory countries. The International Covenant on Civil and Political Rights is among the most important.

In many countries, the European tradition – since about 1920 – is in place and an independent Constitutional Court interprets the language of the Constitution. The European Court on Human Rights hears challenges to countries' practices and the court can, and does, overrule constitutional rulings. The document this court interprets -- the International Covenant on Human Rights – is a treaty that can supercede a nation's constitution.

Lovely words in a well-written constitution do not always guarantee the rule of law. Constitutions in some countries are routinely ignored. Belarus and Uzbekistan, two countries in which I have worked, come to mind. And, of course, we occasionally have some of our own problems in this area of not following our constitution. And, in some countries, dictators frequently force legislative amendments to constitutions, or force referenda to approve constitutional amendments, usually (and suspiciously) by 98% voter approval.

In America, we rarely amend our constitution because it takes so much to secure an amendment, but we too have some problems with ever-

changing interpretations of our constitutional language. But let's leave our problems to another day.

Let's talk about Kosovo. I think that the process we followed there will be interesting to you.

I have been a close observer and participant in much of the work that has been done since 1999 to develop the rule of law in Kosovo. Although I have worked in many other countries, over 30 to be more precise, and quite often in the Republic of Georgia and in Uzbekistan, I have returned consistently to Kosovo over the last decade. Also, I have also spent many a night here at my desk drafting statutes and codes and training programs for Kosovo professionals.

1. I initially went to Kosovo at the request of the State Department to help the United Nations figure how to start a legal system in the mess that emerged post-crisis – after the NATO bombing drove the Serbs out of their southern-most province.
2. Over the years, I have conducted several detailed judicial assessment missions designed to help both the Kosovar leaders and the internationals focus on what was needed to be done to greatly improve the justice system.
3. I have helped develop criminal procedure codes and I helped Kosovo implement the concept of plea negotiations.
4. I started a system by which American judges worked closely with local judges in improving the system – an international judge system, greatly helped by American judges.
5. I have worked at great length the past several years with the new Kosovo Constitutional Court, helping them understand their constitution and their responsibilities to interpret the document, helping them refine their abilities to write opinions, and writing their rules of procedure.

But the largest, and most important project, was the development of a constitution for what was then just anticipated to be an independent country at some point soon.

On paper, it is simple. A constitution has to contain both guaranteed human rights and a governance structure that will protect the rule of law. In practice, in a territory where the Yugoslav constitution was a document that had been used to discriminate among the peoples, that is a harder task.

I was asked to participate because the American ambassador at the US Mission took the lead to ensure a strong constitution was written, and utilized USAID funds – that brought me back to Kosovo as the principal outside advisor to the process. I had done a lot of work with the Kosovo justice system, and with constitutional issues in other countries. And, of course, interpreting our Constitution is what I do for a living.

I thought it essential that we plan this process to the greatest extent possible before it all began.

So here was my plan and it is a plan I will use if asked to help in other places such as South Sudan:

1. Start with a detailed assessment of goals and problems that must be addressed and needed to be overcome.
2. Consider carefully the setting of where you are in the world: historical, regional and cultural aspects are vitally important to an understanding of the rule of law.
3. Evaluate carefully who needs to be involved in the process.
 - a. Political leadership teams for the “big decisions.”
 - b. Representative individuals who have drafting and legal skills.
 - c. Citizen group and ethnic minority representation.
 - d. International participants.
4. Gather foundational documents to consult and rely upon.
 - a. International covenants.
 - b. Prior post-crisis agreements or negotiations.

- c. Constitutions previously in effect in the territory.
 - d. Regional representative constitutions.
 - e. Expert writings on subjects of primary concern.
5. Design training for the participants to provide a common understanding of options and mandates. Everyone should be on the same playing field and understand the possibilities and limitations of the work.
 6. Design a multitude of options for all issues and make clear where there is no real discretion in writing a modern constitution.
 7. Design a decisionmaking process that can achieve agreement on the most difficult and most political questions.
 8. Prepare a recordkeeping process to document all decision-making and "legislative history."
 9. Plan, to the extent possible, for widespread public input into the drafting process.
 10. Finally, put your Constitutional Commission to work.

All of this is, of course, more easily planned than accomplished. More easily said than done. But it is always important to have a plan.

Every place has its own special needs – remember that. In Kosovo, it was vitally important to try to get all of the ethnic groups to work together on the Constitution and to provide strong evidence to the world of a willingness to protect minority rights. Kosovo had a very long history of ethnic violence, and there existed a persistent and unshakeable concern that Serbian ethnic minorities would never receive a fair shake from the newly empowered ethnic Albanian majorities. That when the internationals left, revenge would happen.

Kosovo had an important goal of broad international acceptance as a new country, with quick recognition. They desperately look to eventual membership in the European Union. They needed to counter claims by

Serbia and by Russia that this is illegitimate and unwarranted, perhaps illegal independence. So they needed close to a perfect constitution.

We also decided to carefully consider in detail the final proposed settlement plan written by the UN mediator who tried without success to achieve an agreement between Serbia and Kosovo. The so-called Attisaari plan incorporated many aspects of the rule of law that would be expected of Kosovo – protecting minority Serbs was a major part of that document. So in a sense, we had a precursor document to start with.

So I went to work, essentially from March to December of 2007 while Kosovo's bid for independence was still pending. Serbia continued to threaten Kosovo and tried with some success to intimidate Kosovo Serbs from participating in the process, Russia forced further fruitless negotiations and successfully announced planned Security Council vetoes, and there was a bit of violence here and there.

Behind the scenes, we were working on a draft constitution, following the plan.

The first two months involved a fairly detailed identification and evaluation of the issues and roadblocks that we faced, many of which I had clearly identified already. We also started the recruitment process for leaders to serve on the Constitution drafting commission.

Who did I look for? Some legislators, with political party balance. Law professors, a practicing lawyer, citizen representatives with reputations as leaders, local government leaders, several ethnic Serbs who would dare participate, an ethnic Turk. The group over time would get larger and smaller, but a small core stayed with the project.

Next came detailed training and followup discussion of the issues. We met in Skopje, Macedonia, outside Kosovo for this – the Serbs would not meet if the meetings were inside Kosovo. We had options memos ready for many of the issues. This was really the first chance I had to see and hear what everyone was thinking – as they discussed and argued these issues.

We divided the Commission into subgroups, and they went off for several months to do their first drafts of a Constitution. That part was a bit scary, but they had to do it.

Here was my proposed outline of a Constitution:

1. General Principles
2. Rights and Liberties with appropriate limitations.
 - a. International agreements.
3. Structure of Government and Powers Granted.
 - a. Parliament
 - b. Presidency
 - c. Judiciary
 - d. Constitutional Court
 - e. Prosecution system
 - f. Local Government
 - g. Economic Regulation
 - h. Emergency Powers
 - i. Security Sector
 - j. Regulatory Powers
 - k. Elections
 - l. Special Oversight
4. Transitional Provisions
5. Amendment Process
6. Ratification Process

By midsummer, it became apparent that certain big issues could not or would not be resolved by the Commission. So this is where we turned to the political leadership, and I returned to put my mediation skills to work. Mostly this had to do with dividing power and responsibilities between a president and a prime minister. I shuttled between the leaders of the two major political parties and negotiated what ultimately became the “power-sharing” agreement.

It made the constitution possible, but in retrospect, some of the decisions made during that “big issues” week were less than ideal. I knew it at the time. When you get to that level, there is simply too much of a filter through the political ambitions of the leaders – despite our

long discussions, it was impossible for them to see beyond how the Constitution would help or hurt them. (give example, the election of the President).

I worked on drafting with some of the subgroups throughout the early fall, and then by the end of October, we forced the smaller documents into one large document. We conducted a lengthy and fruitful, although somewhat tedious, "harmonization" meeting in one of the smaller towns of Kosovo.

During, and following that meeting, I took on the task of rewriting the many areas that needed work – trying to stay true to decisions made by the group.

In December, the final negotiating sessions took place – the tough, get to the final language sessions. This is where you argue at length about words, and worry about whether the different languages could accommodate the intricacies of the legal topics. You notice things that you missed earlier. I think there were about ten of us left at this point. But just before Christmas we had a final draft and we spent enormous time going over every word.

In February, 2008, about an hour after the declaration of independence, the Commission's website went up, with a draft constitution in six languages. Commission members held many public meetings, and comments were taken from within and outside Kosovo. We got as much public input as we could, but I wish this could have been a much more open process. Because of the political standoff with Serbia, the work could not be done openly, as it should have.

In March, the Commission made its last minute changes based on the input, and in April, I returned for the ceremony during which the document was signed and turned over to the President and Prime Minister of Kosovo. It became effective upon ratification in June of 2008, fifteen months after we first met in Pristina to discuss what the plan should be.

All in all, it was a good process, and ultimately, good for Kosovo and its international recognition.

Let's look more broadly at the challenges involved in writing constitutions internationally.

1. Who writes the Constitution? The tendency is, of course, to defer to elected leaders, the politicians. I don't like that approach. Political leadership needs, of course, to be consulted – throughout the process. But, it is the rare politician who looks beyond his or her next election. A constitution writer needs to have a vision that extends out 40 – 50 years. What is good for the future development of the country is more primary than who wins the next election.

I think it is unfair to ask an elected leader to look beyond the prism of his or her own self interest. So I would much prefer senior, wise, experienced moderate leaders, with a variety of backgrounds along with brilliant young people who in many ways can see beyond the crises of the past better than older generations. Ethnic and gender diversity is also a must.

2. Blending the modern international consensus on human rights with local historical and cultural needs. This is a difficult challenge. A modern constitution must reflect, for example, the International Covenant on Human Rights. There is no doubt about this – other international agreements also reflect fundamental consensus in our closely connected world – and a modern country must reflect these understandings. Yet, I also advocate strongly the need to respect unique and important cultural traditions to the extent they are not inconsistent with international understandings. The widespread use of Sharia law in resolving family and minor criminal matters is a good example. There is much conversation that is necessary to get this right and achieve the right blend of the past and the future.

3. Achieving public input into the Constitution. This is vitally important, after all a constitution is the document in which the people establish governance and protect their fundamental human rights. We had relatively minimal public input into Kosovo's constitution, by necessity, but the modern trend is to engage the public in an important discussion of their future. With the internet and communications today,

this is so much easier to accomplish. Avoiding the negative aspects of special interest politics – the pressure – is the more difficult side of this issue. But ultimately, the people need to believe in the Constitution and that requires a fair and transparent process.

4. Anticipate the issues and disputes. An ideal constitution resolves difficult issues and does not leave important issues for later dispute and debate. This is particularly true in the governance sections of a constitution. What mischief can politicians pull off? Can the minority block the majority from acting? Can you avoid a paralyzing fight that creates instability? Looking at the language from a mischievous point of view is very instructive to getting the document worded correctly. Make sure the structure works in good times and in bad times.

5. Creating the foundation for a fair and impartial judiciary. Structural independence is critical. In many parts of the world, there is no history of an independent judiciary. Accountability is fine, control or political influence is not. This is a critical underpinning of the rule of law and a constitution will be ineffective without it.

6. Corruption. Across the world, official governmental corruption, often mixed with organized crime, is a very difficult and systemic problem to address. A constitution that establishes the principles of a strong, independent judiciary and an independent prosecution force with sufficient resources is the best antidote. Transparency in governmental decision-making is also very helpful. It is quite apparent to me that keeping justice systems relatively weak is a favorite tactic for political leaders who are corrupt.

7. War Crimes and Genocide. This is where a deep understanding of what went on before is critical. Post-crisis societies must provide for prosecutions, which is often simpler in the world courts. For lower level crimes, truth commissions can often bring healing. A new constitution cannot ignore the need to resolve the past with fair legal processes. Otherwise the violent disputes will likely continue. Anticipate the revenge factor – and provide a better constitutional alternative.

8. Bringing all to the table. In Kosovo, this was very hard – Kosovo Serbs were targeted by a foreign government, Serbia, and they felt

threatened and were unwilling to participate openly. But we needed their input, and so we developed alternative ways for them to participate. All peoples should feel that they had a voice in the development of the constitution.

9. Religion. This is a challenge everywhere, but religion and fundamentalism and violence has been mixed in many areas of the world. Religious freedom must be protected, but handled delicately. Kosovo lies at the fault line of three great religions – Orthodoxy of the East, Christianity of the West, and Islam of the South. It is an undercurrent that must be considered very carefully.

10. Amendments. How will the constitution be amended? It should not be easy to amend a constitution, unless there is broad consensus on a change. The challenge is to make sure minority populations are approving, as well as majority.

11. Economic Development. A new country, in particular, is desperate for jobs and international investment. How will the constitutional language affect business development? A strong judiciary to fairly resolve disputes is the best answer, as will be a strong anti-corruption effort.

11. Avoiding the Concentration of Power. The concept of checks and balances, or a balancing of powers, so important to our constitutional structure, is not understood so well in other parts of the world. There is little natural balancing of powers in a parliamentary system – except among supporting political parties. I think that building into a constitution a dose of some balancing of powers, of checks and balances, is healthy. It helps combat corruption too.

12. Emergency Powers. This is so delicate, and very hard to anticipate. Obviously, a country needs to function effectively in an emergency, but this raises the clear potential for abuse. I think the key is to provide tools for dealing with the emergency, but require limited periods of emergency rule and ratification within a short period of time. In other words, power to act, but oversight in a relatively short period.

13. Avoid impulse to copy from another Constitution. Other constitutions provide good research materials and in the end, may provide perfect language. But there is an impulse just to copy under the theory that the language has already been vetted and must be good enough. Many of our state constitutions have language simply copied from another state's constitution. (malfeasance, removal example).

These are just some of the challenges internationally in drafting constitutions. Just remember that a constitution is mostly about securing the rule of law – both by protecting rights, limiting power, and establishing fair and transparent governance structures.

And for a golden rule? I would go no farther than the preamble to our own Constitution, now the world's oldest still in effect. It comes from the preamble:

The preamble says that the people of the United States establish the Constitution in order to:

1. form a more perfect union
2. establish justice
3. insure domestic tranquility
4. provide for the common defense
5. promote the general welfare, and
6. secure the blessings of liberty to ourselves and our descendants.

That is a very good and simple, well-stated outline. A good place to start a discussion on the rule of law and a modern constitution.