Berghof Conflict Research

The New Constitutionalism: An Approach to Human Rights from a Conflict Transformation Perspective

Eileen F. Babbitt

www.berghof-handbook.net

In Michelle Parlevliet's excellent article, *Rethinking Conflict Transformation from a Human Rights Perspective*, she further develops the argument from her seminal 2002 paper (Parlevliet 2002) that human rights and conflict are intimately related and can be addressed synergistically. In reading this updated and well-written version, I noted that the focus was on how human rights might inform (and improve?) conflict transformation theory and practice. However, what about the reverse? How could human rights work benefit from a more systematic inclusion of conflict transformation principles?[1] In this discussion paper, I will briefly look at how the pursuit of human rights could be enhanced by a more skillful and informed attention to the principles of conflict transformation. To do so, I will focus in on one process in which human rights is of great concern – that of negotiating a constitution in the aftermath of violent intra-state conflict. I am particularly interested in the process as it unfolded in South Africa and is playing out currently in Iraq, and I will be drawing upon data from these countries in my analysis.

1. Conflict Transformation Contributions to Human Rights

Parlevliet's primary point is that "[…] considering human rights and conflict transformation *in conjunction* deepen one's analysis of what is involved in moving from violence to sustainable peace" (in this volume, 16; emphasis in original). She then goes on to elucidate, through her "iceberg" metaphor, the ways in which systemic human rights abuses are underlying causes of violence, stemming from state structures that are dysfunctional and discriminatory (18-21). In her

1 I am following Parlevliet's terminology here, using conflict transformation as the reference point rather than conflict mitigation or settlement. I am not convinced that "conflict transformation" actually means something different from "conflict resolution", but I will nonetheless use her term.

© Berghof Conflict Research/ Berghof Forschungszentrum für konstruktive Konfliktbearbeitung. Berghof Handbook Dialogue No. 9 – First launch June 2010

view, because conflict transformation is concerned about peace with justice, those engaged in its practice should be more actively addressing these inadequacies in state structure – something they have seemed to shrink from doing (26).

The framework Parlevliet offers for how these two disciplines might relate more effectively is in her "holistic approach to human rights". Here she introduces four dimensions of human rights: rules and structures/institutions, which are what is normally equated with pursuing rights; and relationships and process, two elements not usually considered part of rights-based work. Using this more holistic perspective, she posits several ways in which a human rights perspective can strengthen conflict transformation work: by linking causes and symptoms more explicitly, thereby creating a robust response to violence; by acknowledging power asymmetries and designing processes that are more inclusive of the weaker parties; and by recognizing when *increasing* conflict intensity is a necessary step in a structural transformation process, requiring pressure and advocacy in addition to facilitation.

These are all excellent points, and I agree that there is much that conflict transformation approaches can gain from drawing upon human rights principles. However, I think the learning can also go in the other direction. If, indeed, human rights work is concerned with relationships and process as well as with rules and structures, conflict transformation has a lot to offer in both of these domains. However, in my experience, the *way* in which relationships and processes are conceived and carried out in human rights terms are quite different from how conflict transformation would frame them – and may not be as effective as they could be in achieving human rights goals.

In order to explore why, we can begin with a look at how the theory of social change differs in these two fields (Babbitt 2008). In human rights, social change is thought to proceed by defining the end state and then finding effective means to reach that end. The end state, ideally enshrined in domestic law, is a rights-respecting government (the vertical dimension, according to Parlevliet's analysis, involving citizen-state relations) and a rights-respecting polity (the horizontal dimension, including relations between individuals and groups within society) (in this volume, 23). The means are usually through education and empowerment of civil society, so citizens will know about and advocate for their rights with their government and with each other; and through pressure from the international community on the government or sub-national identity groups to abide by international human rights treaties and norms and to translate these into domestic laws. This latter approach is the "naming and shaming" strategy that many human rights groups do so well.

Conflict transformation work relies upon a different theory of social change. Its premise is that the end result of any change process will be fair and sustainable if the means include transformation of behaviour and attitudes as well as structures. The focus is therefore on constructing processes that support such transformation – by understanding the needs and interests of all parties; ensuring fairness, transparency and the inclusion of all stakeholders; and building the capacity of all parties to learn from and listen to each other as well as drawing upon external expertise to supplement that of the parties themselves.

This conflict transformation theory of change, if taken more seriously in pursuing human rights goals, would therefore put much more attention on facilitating change from within a society, rather than relying so extensively on rules and structures imposed from the outside. In Parlevliet's parlance, this is focusing more on getting the "software" right, rather than relying so much on "hardware" to do the job (28).

In order to explore how this conflict transformation view of relationships and process would look in pursuing human rights goals, I have chosen to focus on the writing of constitutions in the aftermath of violent intra-state conflict. As Parlevliet notes, a leading cause of such violence

is the prolonged abuse of one identity group by another, often because one group controls the levers of governance and systematically disenfranchises other groups by denying their political, economic and/or cultural rights (in this volume, 20/21). In the peace agreements negotiated under such circumstances, especially those brokered by an international third party, human rights often figure prominently (Bell 2000). But it is in its constitution that a government emerging from such a conflict explicitly enshrines its ongoing human rights commitments.

Emerging research on political transitions has begun to show that it is not only the documented agreements that promote peaceful and just societies (i.e. the rules and structures), but also the process by which such agreements are negotiated (i.e. relationships and process). For example, Bell's analysis of human rights and peace agreements indicates that there is a "meta-bargain" occurring in peace negotiations that concerns defining the core causes of the conflict. If these are not fully worked out by the parties in the peace negotiations themselves, they will continue to create conflict during the implementation (Bell 2000, 298-299). Since Bell conceives of peace agreements as interim constitutions, we can assume that her reasoning holds for the negotiations over the final constitution itself.

2. Constitution-Writing as Relationship and Process

My interest in the process by which constitutions are written in war-torn societies stems from my many years of work in Bosnia, and more recently from my involvement with UN reconciliation efforts in Iraq. In both cases, the written constitution provides the "hardware" that frames political relationships within the country. But that hardware is not working well in either of these cases, and in fact is holding back both societies from moving forward in their political reconciliation efforts.

This led me to review a growing literature on the "new constitutionalism", also called participatory constitutionalism, referring to approaches to writing a constitution that include widespread civic involvement in the process (Arato 2000; Brown 2006; Hart 2003; Samuels 2006). While the much larger literature on democracy and democratic transitions certainly includes attention to constitutions as a key element of building democracy, the new constitutionalism focuses on the way in which these agreements are struck, rather than on what they substantively contain. Vivien Hart, writing for a 2003 United States Institute of Peace Special Report, explains it this way:

> We used to think of a constitution as a contract, negotiated by appropriate representatives, concluded, signed, and observed. The constitution of new constitutionalism is, in contrast, a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable (Hart 2003, 3).

Kirsti Samuels of the International Peace Institute, reflecting on a review of twelve cases of constitution-making during political transitions from war to peace, also finds that:

> It is increasingly recognized that *how* constitutions are made, particularly following civil conflict or authoritarian rule, impacts the resulting state and its transition to democracy. The process of constitution-building can provide a forum for the negotiation of solutions to the divisive or contested issues that led to violence. It can also lead to the democratic education of the population, begin a process of healing and reconciliation through societal dialogue, and forge a new consensus vision of the future of the state (Samuels 2006, 667).

One study that launched interest in the new constitutionalism, undertaken by Andrew Arato in 2000 to explore the democratic transitions in central Europe after 1989, identified a number of principles that he saw as resulting in a "legitimate" constitution in those cases (Brown 2006):

1) Publicity – allowing for extensive public discussion;
2) Consensus – rather than relying on majority rule for decision-making during the drafting process;
3) Legal Continuity – maintaining some elements of the old legal order to prevent new political leaders from taking unlimited control;
4) Plurality of Democracies – using different forms of democratic participation at different stages of the drafting process, presumably to forestall control by any one group;
5) Veil of Ignorance – introducing some uncertainty in the drafting process so no one interest group can dominate the design;
6) Reflexivity – learning from past and present experience (and from the experience of others) during the drafting process.

From a conflict transformation perspective, three of these principles are very well-known elements of any effective group decision-making process: publicity, consensus and reflexivity. The first, publicity, provides for not only the participation of all stakeholders in the design but also transparency, so no one feels they are being lied to or duped. Consensus means that everyone must feel satisfied enough not to block the agreement – even if they do not get everything they want. And reflexivity allows for the evolution of thinking that is crucial in a transition process, where the intent is that discriminatory attitudes are slowly replaced with more tolerant ones.

It is not enough to simply list these principles as being necessary – it is critical that people involved in the constitution-making process actually know how to create the conditions for these steps to take place. This is where conflict transformation (CT) expertise is imperative. CT practice includes skill in conflict analysis, design of inter- and intra-group dialogue and problem-solving, and strategies to facilitate learning and the overcoming of prejudice – all designed to build relationships and ensure trust in the drafting process.

The other three principles – legal continuity, plurality of democracies, and veil of ignorance – if seen as reflecting the need for both continuity and change, are also familiar to CT processes. The underlying premise of all three is to find ways to bring the "old guard" along into the new regime while at the same time not allowing them – or any one group – to dominate others in the new political structure. A CT perspective would not, however, advise imposing the *form* such protections would take in constitution-making (e.g. not insisting on a veil of ignorance, as it might undermine the need for transparency), but instead would make sure that the process provides these protections in some appropriate way.

2.1 South Africa – A Success Story

The constitution-making process in South Africa "[…] has been hailed as a key part of the successful transition from the oppression of apartheid to a democratic society" (Hart 2003, 7). It took seven years, from 1989 to 1996. According to Vivien Hart, there were several key phases in the process (Hart 2003, 7-8). The first phase, from 1989-1994, was entirely focused on determining *how* the constitution would be negotiated – a process that took five years. The steps included: a 1989 agreement by top leadership, Nelson Mandela and P.W. Botha, that an interim constitution would be put in place while a final document was negotiated; a 1990 agreement to negotiate about how constitutional negotiations would be structured; an agreement on procedure negotiated from 1991-1993; the 1993 agreement on the content of an interim constitution, including principles to be

included in a final document; and in 1994, an election for the parliament, which then convened as the Constitutional Assembly.

Until the elections, all of these initial steps took place at the elite level. But the public participated in huge numbers to elect this first parliament, and after its election in 1994, the Constitutional Assembly itself reached out to the electorate. According to Hart, this included a broad education campaign using all types of media as well as public meetings throughout the country. These reached an estimated 73% of the population, and the Assembly got over 2 million submissions from individuals and groups. The Assembly, taking these submissions into account, worked through several drafts, which were reviewed in turn by the Constitutional Court and finally approved. In December 1996, President Mandela signed the document into law.

In extracting the learning from this process, Hart comments:

> The South African process took time. It was phased. It benefitted from an interim constitution that allowed the dialogue of transition to continue. Participation was invited at a chosen moment rather than throughout and then creativity and resources were committed to facilitating a serious dialogue. Trust that the outcome would be consistent with the 1994 democratic principles was created by the continuation of the conversation between judicial certification and parliamentary confirmation… (G)roups including women and traditional authorities found voice and access and made sure that their interests were taken into account (Hart 2003, 8).

The result has been a constitution universally hailed as a model of rights protection, and an implementation relatively free of violence, several successful national elections and transitions of power, and a protection of civil and political rights along with a strong rule of law. The country is not without its problems, of course – but it is an example nonetheless of how participation in constitution-making can forge a working partnership between former adversaries that is based on trust in government and trust in each other.

2.2 Iraq – A Different Story

The Iraqi constitutional process likewise had an interim constitution and an elected assembly to negotiate the final agreement. However, these superficial similarities belie the significant differences in the way these steps were taken – one expert says that "it is difficult to envision a process more antithetical to the new constitutionalism" (Brown 2006).

The initial constitution drafted after the fall of Saddam Hussein was called the Transitional Administrative Law (TAL), negotiated in March 2004 by a group of three Americans and two Iraqi-Americans, a subcommittee of the Interim Governing Council set up by the Coalition Provisional Authority. According to several analysts, no public discussion of the law ever took place (Arato 2005), and the Sunni perspective was marginalised because of their weak representation on the Council (Brown 2006).

The TAL laid out a procedure for writing the permanent constitution, including plans for public debates in the Assembly as it was being drafted, and a final draft being published and circulated before a final vote was taken. However, none of this occurred. First, the very short time line required by the TAL to complete the draft made it almost impossible for public participation in the process. The drafting committee did not meet until late May 2005, and the TAL deadline for completion was August 15 – giving the group only 2½ months for its task. In the end, the disagreements were still so large as the deadline neared (even after a short extension), that a final draft was only completed through ad hoc negotiations between a very small number of political leaders. The entire Assembly never did take a vote on the document.

Secondly, the Sunni voice (along with other minorities and secular Iraqis) was marginalised throughout the process, reflected even in the procedures for ratification by referendum. Because Sunnis had largely boycotted the 2005 parliamentary elections, they were underrepresented in the Assembly and also on the drafting committee. With significant international pressure, Assembly leaders chose a few additional Sunni participants for the drafting committee (through political deals, not election) but even they did not get seated for negotiations until July 2005, after much of the constitution was already drafted. The TAL stipulated that the constitution would be accepted if (1) a majority of voters nationwide approved it; and (2) two-thirds of the voters in three or more of the 18 governorates did not reject it (Otterman 2005). These provisions were a result of pressure by the Kurdish parties when negotiating the TAL, to give them leverage to use their three governorates as a potential block on passage. Thus it *looked* like consensus was required, but the process actually benefitted some groups more than others.

Finally, the content of the document, like the process, leaves ambiguity about how individual and group rights will be protected. In the final version, an article previously included was deleted, which had provided for individual human rights to be protected in accordance with international treaties.[2] Some experts maintain that this waters down human rights protections and makes it more difficult for individuals to claim these rights in Iraqi courts (Brown 2005).

In conversations with Iraqis in the summer of 2009, I was struck by the polarised views on the constitution and its rights provisions. As a consultant to UNAMI – the United Nations Assistance Mission for Iraq – on reconciliation efforts between Arabs and Kurds, I spoke with political leaders from all factions and parties. Kurdish leaders felt strongly that the constitution must stand in its current form – because of their commitment to its Article 140 and the requirements it stipulates for a future referendum on the status of Kirkuk. Their claim to Kirkuk, while tied in part to oil interests, is more about justice and restitution for the gross human rights violations committed against the Kurds by Saddam Hussein. The Kurds likely believe that any revision of the constitution could weaken Article 140 and jeopardize their claims to Kirkuk and other disputed territories in Iraq. However, many Arabs want to amend the constitution in several ways, as they feel it leaves questions about the structure of the state too ambiguous and gives too much veto power to the Kurds, thereby paralysing the central government. A parliamentary committee has been given the task of constitutional reform, but so far they have been unable to come to any agreements on steps forward.

3. Implications for Conflict Transformation and Human Rights

This very brief and preliminary case comparison shows how important relationships and process are to securing human rights through the writing of a constitution. However, these cases are different in significant ways other than their constitutional process. In Iraq, there was a total collapse of the state and occupation by outside forces, causing both a time pressure to create a working government and a violent reaction to the imposition of Western control; while in South Africa, there was a strong pre-existing and functioning civil society that made public participation not only necessary but viable, and an internal process for negotiation strongly framed by international norms but without international oversight. This raises another set of questions about the new constitutionalism and the establishing of human rights in these instances: how strong can they be when there is no functioning state and no history of civilian participation in governance?

2 In an older draft, Article 44 read: "All individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict with the principles and provisions of this constitution." (Quoted in Brown 2005, 1.)

In these circumstances, the role of building relationships and creating strong participatory processes are even more important. By combining strategies, conflict transformation can contribute significantly to the rule-making and institutional focus traditionally adopted by human rights. Unfortunately, the international political community is not yet convinced of the importance of relationships and process in assisting transitional states. A recent example will illustrate this: in 2008, a colleague of mine who is a lawyer and an expert in international law was asked by the US government to advise on the drafting of a constitution for a country emerging from violence. He suggested to them that the advisory team should include an expert on conflict resolution processes, because the country was still quite fractured and political reconciliation needed to begin with public participation as the constitution was written. The US government sponsors rejected his suggestion, and instead brought in two additional lawyers to complete the team and work only on content. Obviously the lessons from Michelle Parlevliet's analysis, reflected in places like South Africa and Iraq, are still far from being learned.

References and Further Reading

Arato, Andrew 2005. "A Constitution of Trouble." *Foreign Policy in Action*, 12 October 2005. Available at www.fpif.org/articles/a_constitution_of_trouble.

Arato, Andrew 2000. *Civil Society, Constitution, and Legitimacy.* Lanham: Rowman and Littlefield.

Babbitt, Eileen F. 2008. Conflict Resolution and Human Rights: The State of the Art, in: Jacob Bercovitch, I. William Zartman and Victor Kremenyuk (eds.). *The Sage Handbook of Conflict Resolution*. Thousand Oaks, CA: Sage, 613-629.

Babbitt, Eileen F. and Ellen Lutz (eds.) 2009. *Human Rights and Conflict Resolution in Context: Colombia, Sierra Leone, and Northern Ireland.* Syracuse, NY: Syracuse University Press.

Bell, Christine 2000. *Peace Agreements and Human Rights.* Oxford: Oxford University Press.

Brown, Nathan 2006. "Iraq and the New Constitutionalism." Paper presented at the International Studies Association annual meeting, March 2006, San Diego, CA. Available at www.allacademic.com/meta/p_mla_apa_research_citation/0/9/8/3/9/p98398_index.html.

Brown, Nathan 2005. *The Final Draft of the Iraqi Constitution: Analysis and Commentary.* Washington, DC: Carnegie Endowment for International Peace. Available at www.carnegieendowment.org/files/FinalDraftSept16.pdf.

Hart, Vivien 2003. *Democratic Constitution Making*. United States Institute of Peace Special Report 107. Washington, DC: USIP. Available at www.usip.org/resources/democratic-constitution-making.

Otterman, Sharon 2005. "Q and A: Drafting Iraq's Constitution." *New York Times*, 12 May 2005.

Parlevliet, Michelle 2010. *Rethinking Conflict Transformation from a Human Rights Perspective,* in: Véronique Dudouet and Beatrix Schmelzle (eds.). Human Rights and Conflict Transformation: The Challenges of Just Peace. (Berghof Handbook Dialogue No. 9.) Berlin: Berghof Conflict Research, 15-46. Available at www.berghof-handbook.net.

Parlevliet, Michelle 2002. Bridging the Divide – Exploring the Relationship between Human Rights and Conflict Management, in: *Track Two*, 11(1), 8-43.

Samuels, Kirsti 2006. Post-Conflict Peace-Building and Constitution-Making, in: *Chicago Journal of International Law*, 6(2), 663-683.

[All weblinks accessed 1 March 2010.]

About the Author

Dr Eileen F. Babbitt is Professor of International Conflict Management Practice, director of the International Negotiation and Conflict Resolution Program and co-director of the Program on Human Rights and Conflict Resolution at the Fletcher School of Law and Diplomacy, Tufts University, USA. She is also a faculty associate of the Program on Negotiation at the Harvard Law School. Dr Babbitt's latest publications include *Human Rights and Conflict Resolution in Context: Colombia, Sierra Leone, and Northern Ireland* (Syracuse University Press, 2009), co-edited with Ellen Lutz; and *Negotiating Self-Determination* (Lexington Books, 2007), co-edited with Hurst Hannum. She holds a master's degree in Public Policy from the Kennedy School of Government at Harvard University, and a PhD from the Massachusetts Institute of Technology, USA.

See also…

This article has been published as part of
Véronique Dudouet and Beatrix Schmelzle (eds.) 2010. *Human Rights and Conflict Transformation: The Challenges of Just Peace*. Berghof Handbook Dialogue No 9. Berlin: Berghof Conflict Research.

Hardcopies of the complete version, including the following articles, can be ordered at Berghof Conflict Research (order@berghof-conflictresearch.org):

- *Introduction: Towards Peace with Justice* by Beatrix Schmelzle and Véronique Dudouet
- *Rethinking Conflict Transformation from a Human Rights Perspective* by Michelle Parlevliet
- *Conflicts and the Politics of Human Rights Invocations* by Thomas Diez and Emily Pia
- *Conflict Transformation and Human Rights: A Mutual Stalemate?* by Alice Nderitu
- *The New Constitutionalism: An Approach to Human Rights from a Conflict Transformation Perspective* by Eileen F. Babbitt
- *Reflections on Rights and Conflict from Uganda* by Albert Gomes-Mugumya
- *Human Rights and the Imbalance of Power: The Palestinian-Israeli Conflict* by Marwan Darweish
- *Interaction between Conflict Transformation and Human Rights in the Face of Ongoing Armed Conflict in Colombia* by Mauricio García-Durán
- *Holding Concurrent Realities. Reflection on the Responses* by Michelle Parlevliet

As always, both the complete version and all single articles are available for download free of charge on our homepage www.berghof-handbook.net.