Constituting the State in post-colonial Africa:
50 years of constitution-making towards an African constitutionalism

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Conference on Constitution-Making, University of Pennsylvania, Philadelphia, May 3, 2013

Constitution-making has become a growing practice and increasing focus of academic study since the end of the cold war. While this academic interest spans both empirical and normative approaches the general focus has been on constitutional design, the notion that constitutions are, or at least should be, the product of a rational process of institutional choice. While there was once an assumption that all constitutions were simply reflections of national character and identity, the reemergence of constitutional review post-WW II, as well as the explosion of constitution-making and constitutional revision at the end of the cold war brought a greater comparative focus and global perspective to studies of constitutionalism. From a comparative perspective there has been a focus on the empowerment of the judiciary[1] and the related question of constitutional interpretation.[2] A more global perspective is reflected also in recent works that adopt a transnational approach, often considering broad themes – such as judicial independence[3] or the legitimacy of courts[4] – or questions of convergence and divergence in constitutional decision-making.[5] What is common across

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[1] See, Hirschl, Ran (2004) Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, Harvard University Press.

[2] See, Goldsworthy, Jeffrey (ed.) (2006) Interpreting Constitutions: A Comparative Study, Oxford University Press.

[3] See, Sajo, Andras (ed.) (2004) Judicial Integrity, Martinus Nijhoff Publishers, Lieden/Boston.

[4] See, Huls, Nick, Maurice Adams and Jacco Bomhoff (eds) (2009) The legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond, T.M.C. Asser Press, The Hague.

[5] See, Jackson, Vicki C. (2010) Constitutional Engagement in a Transnational Era, Oxford University Press.

these literatures is a focus on the courts. While this rich literature focuses on the emergence and spread of constitutional review as one of the key elements of post-WW II and post-cold war constitutionalism, there is much less written on the broader question of constitutional orders and the sources of variation in different constitution-building processes.

Another focus in the post-cold war era is on democratization reflected in the discussion of democratic waves, in which constitution-making is seen as the product or maybe the hand maiden of dramatic shifts in global political culture. Part of this focus has been a reversion to a notion of nation-building which I argue needs to be distinguished from state reconstruction and from what I want to describe as a post-cold war conception of constitutional democracy. Constitution-building from this latter perspective envisions a broad process which in most societies may be understood to include the whole range of political and legal struggles and debates that characterize a democratic transition and undergird the emergence of a new constitutional order. A constitutional order Mark Tushnet argues, is "more like the small-c British constitution than it is like the document called the United States Constitution," and may be broadly understood as encompassing "relatively stable political arrangements and guiding principles."[6] While the immediate goal of many of these processes is the staging of a free and fair election to determine the will of the people, there needs to be more of a focus on the nature of democratic representation and the differences between electing a constitution-making body, a legislature or a single executive to rule over a continuing process of democratization. Despite a general assumption that written constitutions somehow mark the climax of these recent processes of democratization, there is little acknowledgment of the role that constitution-making in a broader sense plays in both enabling the transition to democracy and underpinning its sustainability.

The project of nation-building, with its roots in the early formation of the nation-state and so often etched in the blood of those minorities who have resisted its historical trajectory, seems out of place in a post-cold war era in which constitutionalism has become the preferred means of

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6 Tushnet, Mark (2003) The New Constitutional Order, Princeton University Press, p. 1.

maintaining the shared imperatives of multicultural societies. While there continues to be a broad commitment to maintaining the internationally-recognized boundaries of nation-states, despite their often colonial origins, the idea of forging a single national identity as the primary social bond among the inhabitants of most modern states is no longer accepted as a goal whose achievement might justify the suppression of individual rights or even minority interests. Instead, the emphasis in international human rights documents and in the constitutional options that have flowed from them is to guarantee individual rights and to provide different means – from devolution of power to the protection of cultural, language and other minority rights – to accommodate the interests of communities who will not be able to achieve significant or dominant protection of their interests through the regular electoral processes of representative democracy. In this context, the renewed emphasis on nation-building implies either a mistaken reliance on the history of post-WWII reconstruction in Europe and Japan or a simple means of emphasizing the desire to achieve stable governance over a defined nation-state without recognizing the implications for the nature of the democratic goals suggested as the outcome of the process. While this is particularly understandable in the context of failed states and the concern that these areas becoming sources of transnational violence, it is important to resist this impulse if it threatens to shift the aim of these transitional processes towards simply strengthening the nation-state and away from the broader goal of achieving an inclusive democracy that will be responsive to the needs, wishes and concerns of all the country's citizens.

Unlike debates over nation-building, when the focus shifts to constitution-making the tendency is to think in terms of constitutional design, whether from a normative, empirical or comparative perspective.[7] This focus on constitutional design seems to imagine the process of constitution-making as an act of pure rationality,[8] an example of human society's capacity of self-

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7 See, Ginsburg, Tom (ed.) Comparative Constitutional Design (Cambridge University Press, 2012)

8 Rational design here invokes the logic of enlightenment rationality which asks of the present not how it fits into a wider scheme, or what does it say about tomorrow, or even whether it is the beginning of a new world but rather "what difference does today introduce with respect to yesterday"? M. Foucault, What is Enlightenment? in **The Foucault Reader** (ed. P. Rabinow, 1984)

definition. While this is an inherently attractive and uplifting vision of constitution-making it ignores Karl Marx's most enduring insight, that 'men' make their own history but burdened and shaped by what has gone before.[9] It is this vision of agency bounded by constraints, both historical and contextual that leads me to call for an approach to constitution-making that is both grounded in the particular history of each particular society and seeks to identify broader themes through a comparative approach that is rooted in a thick descriptive or granular understanding of particular local and regional contexts. This is particularly important in the case of Africa, a vast continent that is often viewed in the media through a single lens, described by some as afro-pessimism.[10] At the same time, a narrow focus on constitutional design and the new constitutional documents that are the product of different constitution-making processes may produce, particularly in the hands of lawyers and many human rights activists, a countervailing celebration of text without the necessary recognition of institutional limitations and historical contexts that may challenge any newly adopted constitutional vision.

Martin Chanock recently characterized the dominant analysis and practice of constitution-making in Africa as top-down, resulting in "the writing of increasingly complex constitutions, with increasingly sophisticated institutions and rights guarantees, which have, as has been shown time and time again, floated meaninglessly above the societies for which they have been designated, until

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at 33-34. Foucault describes this perspective as part of an attitude of modernity which has continued to be embroiled in "struggles with attitudes of 'countermodernity'." Id. at 39. See generally, P. Hamilton, The Enlightenment and the Birth of Social Science in **Formations of Modernity** (ed. S. Hall & B. Gieben, 1992).

9   See, K. Marx, The Eighteenth Brumaire of Louis Bonaparte (1852) reprinted in, K. Marx, **Surveys from Exile: Political Writings, Vol. 2** (ed. D. Fernbach, 1973). Marx's formulation reads: "Men make their own history, but not of their own free will; not under circumstances they themselves have chosen but under the given and inherited circumstances with which they are directly confronted. The tradition of the dead generations weighs like a nightmare on the minds of the living." Id. at 146.

10 See Mahmood Mamdani (1996) Citizen and Subject.

the bubble bursts in outbreaks of violence."[11] This critical, yet clear eyed, view of Africa's post-colonial constitutional experience poses a direct challenge to us. Whether in our analysis of constitution-making or in the project of constitution-making, how do we bring our commitments to a better future into a more effective engagement with the patterns of historical experience and society in Africa. Chanock himself suggests that "constitutionalism must be based on a rule of law that builds from the bottom up rather than a bill of rights handed down . . . [and that] African constitutionalism must be based on a common law with which people identify." In taking up this challenge I will argue in this paper that an analysis of constitution-making in Africa must be rooted in an understanding of the state in Africa as well as through an embrace of a contextualized and comparative approach to the history of post-colonial constitutionalism in Africa.

Before proceeding however it is necessary to clarify two preliminary issues. First, Africa is a vast and diverse continent and any notion of a singular culture, historical trajectory or constitutional form would, on its face, be a gross and unjustifiable simplification. Even if it is possible to identify a number of broad historical patterns and alternatives etched into the political landscape of Africa by the colonial experience and nationalist struggles that saw the emergence of independent African states from 1957 until the formal end of apartheid in South Africa in 1994, these commonalities overlay vast cultural, economic, ethnic, language and political differences. Furthermore, the emergence of post-colonial independent states spans a period of nearly half a century and while the cold war was a common element through most of this period, it was the end of the cold war in 1989 that both allowed the decolonization of Namibia and the democratic transition from Apartheid, while simultaneously fragmenting the established post-colonial order throughout Africa, leading to a second, more autochthonous, wave of constitution-making in sub-Saharan Africa. While heralded as a wave of democratization in which single-party and military dominated states witnessed multi-party elections and the installation of new democratic governments that could address what the World Bank had identified in 1979 as Africa's governance problem, the subsequent civil and military

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11 Chanock, Martin (2010) Constitutionalism, Democracy and Africa: Constitutionalism Upside Down, Law in Context: For Martin Chanock: Essays on Law and Society (ed. Ellmann, Stephen, Heinz Klug and Penelope Andrews) 126-144.

conflicts as well as state failure, genocide and international interventions, makes it clear that the malaise lies deeper than the simple design of democratic constitutions. The recent Arab spring in north Africa adds yet another dimension to this constitutional foment.

Second, not only did Africans share a variety of colonial experiences – depending on the identity of the colonial power and the extent of colonial settlement – they also shared an important factor in the process of decolonization, a process of constitution-making in which the key element was the transfer of power to those struggling to be free from colonization. Thus the first post-colonial constitutions were largely negotiated instruments in which the nationalist parties were centrally concerned with their ability to exercise power as representatives of a new nation and accepted many specific constitutional formulations largely designed by the retreating colonial authorities. Even if these constitutions sought, in a variety of creative ways to address what their designers thought were the underlying problems facing the newly independent states – such as ethnic diversity and legal pluralism – their foreshortened lives reflect the fact that they were not embraced by either those who were to govern through the institutions and structures they created, or the governed, who often rejoiced at their demise, rather than defending them as reflecting their own social and political aspirations.

Constitution-making in Africa

Chanock's challenge is of course only the latest in a series of analyses that have questioned the place of constitutions and constitution-making in Africa. While H. W. O. Okoth-Ogendo eloquently critiqued the first wave of post-colonial constitutions as producing "constitutions without constitutionalism,"[12] other participants in a conference on "State and Constitutionalism in Africa," held in Harare, Zimbabwe in May 1989, on the verge of the second wave of constitution-making in post-colonial Africa, heralded the possibility of a new, popular democratic constitutionalism,

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12 H. W. O. Okoth-Ogendo (1991) Constitutions Without Constitutionalism: Reflections on an African Political Paradox, in State and Constitutionalism (Shivji ed) pp 3-25.

described by Issa Shivji as a "new concept of constitutionalism [that] should rest on [an] accountable/responsive state and collective rights/freedoms."[13] Other African voices, including Muna Ndulo, who sees constitution-making in Africa as essential to the establishment of good governance necessary for economic development[14] and Yash Ghai, who as both an analyst and practioner of constitution-making in Africa has sought to promote popular participation in the constitution-making process, have seen constitution-making as a means to build effective government and a culture of human rights in Africa. In my own work on South Africa I have reflected on the process of constitution-making and how it took place within a global context which framed the opportunities for local innovation as well as a national history and culture that shaped alternatives and imposed a certain path dependency on the options that were embraced.[15] Despite these and many other contributions to our understanding of constitution-making in Africa I want to take this opportunity to take up Chanock's challenge by suggesting that a deeper analysis of the processes and impacts of constitution-making in Africa requires us to both reorient our understanding of constitutions and to place this perspective within a broader, comparative view of the post-colonial state in Africa.

Constitutions have been classically understood and normatively embraced as reflections of the society they constitute. Muna Ndulo quotes the late Chief Justice of South Africa, Ismail Mohammed describing a constitution as "not simply a statute which mechanically defines the structure of government and the relations between the government and the governed . . . [but as a] 'mirror reflecting the soul', the identification of the ideals and aspirations of a nation."[16] While this popular and symbolic notion of a constitution is central to the legitimating function of

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13 Issa Shivji, State and Constitutionalism: A New Democratic Perspective, in State and Constitutionalism (Shivji ed) pp 39-40).

14 Muna Ndulo, Constitution-Making in Africa: Assessing Both the Process and the Content, 21 Public Administration and Development , 101-117 (2001).

15 Klug, (2000) Constituting Democracy and (2010) Constitution of South Africa.

16 Ndulo, 108.

constitutionalism and is regularly embraced by constitution-makers, judicial interpreters of constitutional meaning and advocates of constitutional patriotism or those who perceive constitutionalism in the United States as civic religion, I want to embrace a more sociological conception of constitutions as social phenomena that serve the essential role of organizing, establishing and conserving public and social power in society. Drawing from Chris Thornhill's recent book, *A Sociology of Constitutions*, in which he concludes "that constitutions are functional preconditions for the positive abstraction of political power and, as such, they are also, over longer periods of time, highly probable preconditions of institutions using power: that is states,"[17] my argument will place processes of constitution-making within a broader context than that framed by a focus on constitutional design, and instead suggest that constitution-makers attempt to understand the process within which they are embedded from a more holistic perspective. In the case of Africa this requires a renewed appreciation of the character of the post-colonial state and specifically its genealogy in colonialism and decolonization.

The puzzle for me is to explain the similarities in Africa's post-colonial constitutional experience – weak administrations, patrimonial forms of leadership and governance, coups and authoritarianism – despite repeated adoptions of formal democratic constitutions. While Martin Chanock's point, that "working constitutionalist democracies are rare," and that "[f]ailure to establish democratic constitutionalist states is not a peculiarly African failure,"[18] is well taken, any attempt to understand constitution-making in Africa must begin by seeking to understand both the sources of commonality as well as possible sources of variation that constitution-makers and observers should be aware of. The remainder of this paper will first seek to explain possible sources of commonality in the particular history and form of the state in Africa, and then turn to a discussion of constitution-making and use the South African example to explore possible sources of variation in constitution-making processes that might provide a basis for imagining an alternative path to democratic constitutionalism in Africa.

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17 Chris Thormhill (2013), A Sociology of Constitutions, p. 372.

18 Chanock (2010) p. 127.

Conceiving the State in Africa

One explanation for the phenomena of thin constitutionalism in Africa, reflected in both the Harare discussions in 1989 and Martin Chanock's characterization of the products of constitution-making "floating meaninglessly above the societies for which they have been designated," is that there is a fundamental incongruence between the new institutional architecture they offer and the institutional legacies that remain dominant within those societies. If constitution-makers fail to address the particular institutional and historical form of governance that dominates a society, it should not be a surprise that past legacies may frustrate the aspirations of new constitutions. In the literature on the state in Africa there are two key perspectives that I believe are of direct significance to the task of identifying and conceptualizing issues important to constitution-making. First, there is the view that the colonial state in Africa has a particular form and that the common features of this form defines patterns of governance despite the vast diversity of African societies. Second, that the history of constitutionalism in post-colonial Africa reflects the continued influence of both this colonial legacy as well as the common history of decolonization, or what Crawford Young describes in his book, *The Postcolonial State in Africa: Fifty Years of Independence, 1960-2010*, as the code of decolonization.

In his earlier book, *The African Colonial States in Comparative Perspective*, Crawford Young argued that although the colonial state in Africa is not unique among colonial states, "when we assemble its traits, examine its trajectory, and weave together the determinants of its structure and behavior, a singular historical personality looms before us" (Young, 1994:281). In his conclusion to this work Young identifies seven key characteristics of what he terms "Bula Matari" (he who crushes rocks) colonialist Henry Stanley's nickname, and a telling metaphor for capturing "the crushing, relentless force of the emerging colonial state in Africa." (1994:1). These characteristics include: the late nineteenth century division of Africa under the emergent international doctrine of 'effective occupation' which compelled an "immediate requirement of confirming propriety title by forcible demonstration of dominance; ruthless extractive action; an active role in forcing rural Africans into labor service; advanced technologies of dominance reflected

in sheer military supremacy; spheres of policy thought permeated by a virulent racism that constructed Africans as savage; unsparing efforts to "monopolize the production of meaning and thus the construction of culture;" and finally, a "syndrome of citizen attitudes and expectations" produced by the particular "sequencing of decolonization and the reliance by the late colonial state on developmentalism and a paternalistic bestowal of state welfare in its attempt to gain legitimacy, while remaining an "alien and predatory other" (1994: 278-280). Similarly, for Mahmood Mamdani the colonial state has a particular essence that lies in its institutional segregation, creating what he terms a "bifurcated state" reflecting the dynamics of direct and indirect rule (1996:16-18). The apartheid state in South Africa is in Mamdani's analysis not exceptional but rather reflects the fundamental logic of the colonial state in Africa.

The second perspective highlights the process of decolonization as a source of explanation of the form taken by the post-colonial state in Africa. For Crawford Young the "code of decolonization" was set by the United Nations General Assembly resolution on the Granting of Independence to Colonial Territories and Peoples in 1960, which produced a focus on territoriality, representative institutions, universal suffrage, the centrality of political parties, sovereignty and "[f]inally speed became of the essence (1996:89-96). As Issa Shivji argued in his conclusion to the edited collection of papers that came out of the 1989 Harare conference, *State and Constitutionalism: An African Debate on Democracy*, "[f]rom civilian to military regimes and from one-party "socialist" to one-party "capitalist" states, the role of constitutions [in Africa] has lain in constituting the sovereignty of the states (Okoth-Ogendo) or in simply effecting the transfer (Nolutshungu) or re-ordering (Hutchful) of political power" (1991:253). Describing the limited notion of constitutionalism that dominated the process of decolonization Sam Nolutshungu argues that the idea of "constitutional function" – what the constitution was supposed to do – was fragmentary and undeveloped, while the idea of "constitutional moment" – focused on the transfer of power, meant that constitutional debate was "dominated by the need for a settlement between parties to a political dispute" (Nolutshungu, 1991:92-93). Summarizing this perspective Issa Shivji concludes that "while we have had great use, if not reverence, for the documents called constitutions there has been little regards for constitutional principles or constitutionalism. Constitutional

documents haave neither been an outcome of a clash of principles nor are they seen as embodying a political commitment to a global societal vision" (1991: 254).

The post-colonial state, from these perspectives, is embedded in the legacies of colonialism and whether it is through the specific process of decolonization or broader processes of path dependency and legal continuity, the impact has produced a fundamental disconnect between the formal constitutional product or process of constitution-making and the nature of the state and institutions of governance that have emerged in the post-colonial period. Evaluating the literature on the post-colonial state in Africa Crawford Young argues that the "postcolonial state was thus a hybrid creature" which took three forms. The first combines "residues of the colonial state . . . [and] practices of ruling group management of power that drew on customary repertoires" (Young, 1996:70). Second, a "neopatrimonial practice permeated the political realm" producing a "predatory extraction of public resources and severely compromising state capacity to function according to normative state precepts" (1996:70-71). Third, is a form of hybridity that "privileges the blend of democratic norms ostensibly embraced by the state and the reality of a range of authoritarian practices that limit their scope (1996:71). In his book Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism, Mahmood Mamdani extends his analysis of the bifurcated nature of the colonial state to argue that the post-colonial state in Africa rests on a specific mode of rule reflected in the continued division between state and traditional authority and the interaction of a rural-urban division which is both geographic and institutional – producing a decentralized despotism in the colonial era and requiring for the project of democratization a transcendence of the "dualism of power around which the bifurcated state is organized" (1996:301).

Legal pluralism, the rule of law and the promise of constitution-making

While the literature on the post-colonial state produces a clear picture of the historical linkages between the colonial period and the history of independent Africa, it also enables us to understand how the joint legacies of colonialism and the process of decolonization effectively displaced the design of constitution-makers in the process of decolonization. There is however

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another literature that views a number of alternative legacies, of the traditional rule of law in the one instance and in more recent judicial biography to argue that judicial independence and the daily operation of the law may provide a basis for the building of the rule of law and respect for constitutionalism in Africa. On the one hand there is Jennifer Widner's book, Building the Rule of Law which explores the biography of Justice Francis Nyalali of Tanzania to detail the construction of a new institutional order through struggles to "establish the separation of powers, the independence of the judiciary, and the rule of law in common law Africa (2001:24). Widner's work provides a valuable perspective on the ways in which the judiciary, in at least one post-colonial state was able to build legal institutions and respect for the formal rule of law despite the structural limitations and politics of the one-party state and legal pluralism.

If Widner's approach emphasizes the slow task of institution building and incremental constitutional change, there are a number of academics who have argued that even if law served the colonial project, its institutional practices provide the basis for constitutionalism in the post-colonial era. Both Stephen Ellmann and Jens Meierhenrich have argued that the tradition of the judiciary as well as the depth of legal tradition in the country since the arrival of settlers at the Cape in 1652 respectively provides a path dependent legacy of legitimacy and law upon which South Africa's post-apartheid rule of law and constitutionalism may be rooted.[19] While Ellmann has acknowledged, based on Chanock's work, that "race was at the heart of the entire enterprise of South African judging," prior to 1994,[20] Meierhenrich's conception of the legacy of law in colonial South Africa and under apartheid providing a basis for a post-apartheid rule of law, stands in contrast to Martin Chanock's more pessimistic view in his book on *The Making of South African Legal Culture*, when he warns that if "Law is seen as the means through which solutions to conflicts, which the political processes may have failed to compromise, are to be found . . . the idealizing language of law conceals not only the ambitions of the State, but also its incapacities, which are the major threat to a

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19 See generally, Jens Meierhenrich, 2008. The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000, Cambridge University Press: Cambridge, UK.

20 Stephen Ellmann (2010) A Bittersweet Heritage: Learning from The Making of South African Legal Culture, Law in Context 28(2) pp. 76-94.

'rule of law'.[21]

The link between the promise of the rule of law and constitutionalism is highlighted in post-colonial Africa by the question of legal pluralism and the accommodation of traditional authority. Muna Ndulo notes that "[i]n a typical African state a large percentage of the people remain outside the formal structures of the state . . . within a traditional social and cultural context" (2001:109) and calls for the incorporation of traditional authority into the new constitutional orders as a means of enhancing the legitimacy of local government. While Mahmood Mamdani warns that this recognition is a basic element of the inherited, bifurcated state, Martin Chanock recognizes that "culture is a dialogue between aspirations and sedimented traditions" and argues that it "is from this dialogue, including a dialogue with the imported individualizing discourse and centralizing ambitions of bills of rights, that we might find the basis for a rule of law, and, ultimately, a constitutional democracy."[22] In South Africa this dialogue between a constitutionally recognized 'customary law' and the post-apartheid legal order is ongoing while the evolution of 'customary law' through processes of development, legislative alteration and incorporation, invalidation and harmonization, is being increasingly documented and recognized.[23]

Given the impact of colonialism and decolonization on the creation and emergence of a post-colonial state, as well as the impact of these legacies on the constitution-making processes that swept Africa after 1989, how might we develop a broad yet contextualized understanding of constitution-making in Africa today. Instead of engaging in detailed description of the different processes, including documenting the varying approaches to constitution-making, from constitutional conventions to constitutional commissions and constitutional assemblies, I want to explore sources of variation in constitution-making processes that might provide alternative pathways through which

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21 Martin Chanock (2001), The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice (Cambridge UP), p. 538.

22 Chanock, 2010 Law in Context, p. 141.

23 See, Julia Sloth-Nielsen and Lea Mwambene (2010) Talking the Talk and Walking the Walk: How Can the Development of African Customary Law be Understood? Law in Context 28(2) pp 27-46.

the post-colonial state may be reconfigured. Through repeated processes of conflict and constitutional reconstruction as well as new commitments at the regional and continental level through regional bodies and the African Union, there is the possibility that an African constitutionalism may be emerging.

Five sources of variation in constitution-making

Building a constitutional democracy encompasses a far broader range of issues than drafting and adopting a new constitution. [24] Yet, it is the process of constitution-making that has become a key element in the political transitions that have followed end of the cold war.[25] At the same time there has been a resuscitation, despite long recognized critiques, of the tendency to propagate and adopt model forms of institutions and rights that experts are convinced address this or that problem of governance or social conflict. While different examples may very well inform participants or serve to shape their own imaginations of the possible, the tendency to promote model solutions rather than to learn and adapt comparative experiences to the richness of each new national, cultural, political and temporal context often undermines the very goal of attempting to reconstruct a particular polity through constitutional change. To understand the place of constitution-making in building a democratic future I believe we need to focus less on this or that successful model and instead consider the different mechanisms and paths that have been employed in achieving at least some degree of sustainability in different democratic and constitutional transitions. From this perspective constitution-drafting may be a central feature of a broader process of constitution-building which includes a variety of different elements. It is the exploration of the specifics of these different elements that will enable us to develop a better understanding of the

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24   See, Yash Ghai and Guido Galli, Constitution Building Processes and Democratization, IDEA, 2006, available at http://www.idea.int/publications/dchs/upload/dchs_vol2_sec6_2.pdf

25   Jamal Benomar, Constitution-making After Conflict: Lessons for Iraq, 15(2) Journal of Democracy 81 (2004).

variations in different processes of constitution-building, enabling us to use different historical examples to inform the decisions facing constitution-builders in Africa and around the globe.

Drawing on the South African experience, we may identify five sources of variation in the process of constitution-building that might help us understand the relevance of different aspects of this particular historical experience. First, there is a temporal dimension, which may be characterized as having two distinct forms – a macro and a micro form. In macro terms, the democratic transition takes place within a specific historical era which holds significant consequences for both its very possibility as well as the particular scope of alternatives that might be available in the international political culture of that era. In micro terms, there are the specific time-frames of the process of constitution-making, which will themselves have clear consequences for the political choices and opportunities available to the parties. Second, there is a question of process, in which the procedures of constitution-making, chosen from a range of historic options, are deployed by the various parties to achieve specific advantages over their opponents but may also be deployed as a means to ensure that the political transition is kept alive. Third, participation in the constitution-building process was an aspect that was important both for those who were active in the actual constitution-making process, from political activists to the legal representatives of the political parties and their political principals, as well as the broader society that was called upon to accept and legitimate the constitutional product as the basis of a future social compact. Fourth, there was the recognition and use of constitutional principles as an essential element of the constitution-making process. While many of the constitutional principles may have been inherent in the contrasting positions of the different political groupings, the decision to explicitly debate and adopt constitutional principles within the context of the constitution-building process had a profound impact on the substance and legitimacy of the outcome. Finally, the substantive dimension, involving constitutional and institutional choices that are required to be made in the constitution-making process involves contestation over alternative institutional designs and the substantive elements of the constitution, all of which had a significant and continuing impact on the overall process of constitution-building.

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The temporal dimension

The timing of a constitution-building process is a significant determinant of the outcome and is best understood as having two distinct dimensions. On the one hand, there is an international dimension which frames the broad environment in which the local political process of state reconstruction is taking place. From the end of the Second World War through to the cold war, the era of decolonization and the post-cold war period, the political opportunities and constraints that affected local political options varied greatly. In the post-cold war era the process of state reconstruction has been framed first by a wave of market oriented democratization and more recently by the shattering effects of 9/11 and the global war on terror. As Said Arjomand has argued, this macro temporal dimension may be understood in terms of the formation and transmission of an international political culture. While he acknowledges the influence of a society's pre-constitutional institutional structure and the increasing syncretism of later constitutions, Arjomand argues that given the impact of the prevalent international political culture on constitution-making the timing of any constitution-making process is more "consequential than the institutional structures of different countries."[26]

The significance of this argument is evident in the consolidation of international political culture since the collapse of state socialism. The ideologically inspired diversity of constitutional alternatives – one-party states, military dictatorships, liberal democracies, people's democracies etc – characteristic of the cold war period and reflected in the increasing syncretism of post-colonial constitutions gave way to an increasing hegemonization. By the early 1990s liberal constitutional principles were hegemonic, with constitutional review by an independent judiciary increasingly becoming a prerequisite for international constitutional respectability.[27] In this sense we may

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26   S. A. Arjomand, Constitutions and the struggle for political order: a study in the modernization of political traditions, XXXIII Arch. europ. sociol. 39, 75 (1992).

27   See D. Beatty, Human Rights and the Rules of Law in **Human Rights and Judicial Review: A Comparative Perspective** (1994) at 1-56. See also, D. Held, Democracy, the Nation-State and

understand constitutions as being "sediments of diverse historical processes, crystalized into a small number of indigenous and borrowed principles."[28] In South Africa the emergence of a hegemonic culture of constitutionalism in the international political culture of the late 1980s had a dramatic impact in shaping the boundaries of constitutional possibility and in reshaping the specific constitutional initiatives and objectives of different social groups and institutions.

However these principles, and the practices associated with them, only "become effective social forces to the extent that they are borne by social groups and institutions,"[29] highlighting the significance of a more local and immediate temporality – the timing of specific aspects of the constitution-making process itself. Even as we acknowledge the significance of the emergence of a hegemonic international political culture it is important to understand that its integration into the political life of any society will be shaped by the specifics of each particular political transition including the degree and nature of public participation in the process.[30] South Africans debating constitutional reform had always drawn freely on the international lexicon of constitutional options. In the 1970s and 1980s the Buthelezi Commission in Natal discussed consociationalism, federalism

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the Global System in **Political Theory Today** (ed. D. Held, 1991) at 197-235.

28   S. A. Arjomand, Constitutions and the struggle for political order: a study in the modernization of political traditions, XXXIII Arch. europ. sociol. 39, 49 (1992).

29   Id.

30   But cf., **Political Culture and Constitutionalism: A Comparative Approach** (ed. D. P. Franklin & M. J. Baun, 1995). (This study acknowledges the existence of international models but concludes that "constitutionalism is largely a cultural phenomenon and not simply the product of properly designed institutions and structures of government," (at 231). The potential success of democratic constitutionalism is ascribed by the authors to "favorable economic conditions and a certain amount of external security," which they consider "important factors supporting the establishment of democratic regimes in postwar West Germany and Japan" (at 232).

and bills of rights,[31] the National Party referred to the Swiss Canton system and consociationalism,[32] and the ANC asserted the right of South Africa's black majority to self-determination.[33] While these were all respectable elements of the international political culture at that time, the ANC's argument, with its emphasis on decolonization, had direct implications for the constitution-making process implying that it would be for the 'people' of South Africa to decide on the specifics of a future political system including the possibility of a one-party state, state socialism or any other form of state recognized in the international system.

The end of the era of decolonization, the unraveling of military dictatorships in Latin America and the collapse of state socialism coincided with an increasing assertion of democratic principles in the international political arena. This was closely associated with the growth of an international human rights movement and the increasing legitimation of bills of rights at both the regional and national level.[34] Tied to this development was the emergence of constitutional review as

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31   See, G. Mare & G. Hamilton, **An Appetite for Power: Buthelezi's Inkatha and South Africa** (1987) at 163-170.

32   See, Chris Rencken, M.P. and spokesman for the National Party, statement to the **Weekly Mail,** Nov. 22, 1985, stating that a constitutional "model tailored specifically for the country's poly-ethnic nature may very well include elements of federalism, confederation, consociationalism, proportionalism, and even elements of the Swiss canton system," quoted in, South African Institute of Race Relations, **Race Relations Survey 1985** (1986).

33   The Principle of self-determination was incorporated into the ANC's 1949 Programme of Action but found its first application to South Africa in a resolution demanding the right of self-determination submitted by ANC President J. T. Gumede, J. A. la Guma and D. Colraine to the inaugural congress of the League Against Imperialism, in Brussels in February 1927, F. Meli, **South Africa Belongs to Us: A History of the ANC** (1980) at 74-75. See generally, H. Klug, Self-determination and the Struggle Against Apartheid, 8 **Wis. Int'l L. J.** 251 (1990).

34   Although the international human rights movement has grown steadily since the second world war the recent hegemony of fundamental rights as a basis for constitutional reconstruction is quite dramatic when compared to the situation in the mid-1970's when it was possible to argue that constitutional bills of rights were increasingly being abandoned. See, B. O. Nwabueze, **Judicialism**

the essential element in the institutionalization of individual human rights and the constitutionalization of bills of rights.[35] These developments within international political culture were reflected in a number of different processes. The adoption of a set of 'constitutional principles' by the Western Contact Group on Namibia[36] – establishing a minimum framework as a precondition for an internationally acceptable resolution of the Namibian conflict – saw the international community's first application of substantive principles, beyond a simple exercise of self-determination through a national plebiscite, in the context of decolonization. These 1982 Constitutional Principles became part and parcel of the U.N. peace plan for Namibia through Security Council Resolution 632 of February 16, 1989,[37] and were subsequently adopted by the Namibian Constituent Assembly. A second process was the development of the Conference on Security and Cooperation in Europe's (CSCE) human rights system, particularly through the follow-up process of intergovernmental conferences provided for in the Helsinki Final Act.[38]

Most significant of these was the Vienna Follow-up Meeting which lasted from 1986 to

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in Commonwealth Africa: The Role of the Courts in Government (1977) at 309.

35   See, M. Rosenfeld, Modern Constitutionalism as Interplay Between Identity and Diversity: an Introduction, 14 **Cardozo L. Rev.** 497 (1993); see generally, D. Beatty, **Human Rights and Judicial Review: A Comparative Perspective** (1994).

36   See, Principles Concerning the Constituent Assembly and the Constitution for an Independent Namibia, transmitted to the Secretary-General of the United Nations on 12 July 1982 (S/15287). But cf., M. Wiechers, Namibia: The 1982 Constitutional Principles and Their Legal Significance in **Namibia: Constitutional and International Law Issues** (ed. D. van Wyk, M. Wiechers & R. Hill, 1991).

37   See, UN Security Council Resolution, S/20412 of January 23, 1989, para 35.

38   See, T. Buergenthal, The CSCE Rights System, 25 **Geo. Wash. J. Int'l L. & Econ.** 333 (1991).

1989. Taking place in the context of transformation within the Soviet Union under Gorbachev, the Vienna Meeting saw a dramatic breakthrough on issues of human rights with agreement on the holding of conferences to address the 'human dimension of the CSCE' and the establishment of the Human Dimension Mechanism to deal directly with allegations of failure by a party to uphold its human dimension commitments.[39] Moving beyond a traditional human rights framework the Copenhagen Meeting of the Conference on the Human Dimension agreed that "pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms."[40] A third and significant development in the African context was the World Bank's 1989 conclusion, following a three year study of Africa's economic malaise, that no economic strategy would reverse Africa's economic decline unless political conditions on the continent improved. This conclusion, placing the blame for economic decline on the lack of public accountability and disrespect for individual rights, pointed directly to a new focus on the rule of law as an essential component of good governance.[41]

Each constitution-building process is thus subject to a variety of temporal influences including the broad international configuration of political power and ideology as well as the particular life cycle of internal leadership and social conditions. It is through this perspective that we can understand the significance of the decision by the ANC to developed its own set of constitutional principles and to seek the adoption of an internationally recognized framework for negotiations in South Africa. As a result the apartheid regime saw the opportunity of gaining international

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39   Id. at 370.

40   Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, 29 I.L.M. 1305 (1990), pmbl., at 1307. See, M. Halberstam, The Copenhagen Document: Intervention in Support of Democracy, 34 Harv. Int'l L. J. 163 (1993).

41   See, I. J. Wani, The Rule of Law and Economic Development in Africa, 1 **East African J. of Peace & Human Rights** 52 (1993).

recognition of even a modified version of its 1983 'tricameral' Constitution collapse with the adoption of the Harare Declaration[42] and the subsequent incorporation of these principles into the U.N. Declaration on Apartheid in December 1989.[43] These developments held important implications for the second, more immediate, temporal dimension in that they set the stage upon which the parties negotiated for a specific constitution-making process. While international political culture provided no determinative process for constitution-making the shift to democratic participation that had occurred through the 1980s made it very difficult for those who wished to confine the process to a limited negotiated solution between the principle parties. It was in this context that the demand for a constituent assembly carried enormous political weight both internally and internationally. But, given the reluctance of the governing minority to accept a process that would limit their influence on the outcome, the compromise of a two-stage process became the only way to avoid stalemate and to ensure the peaceful continuation of the political transition.

A question of Process

Constitution-making must be understood, to a large extent, as a process. This process includes far broader aspects of any particular political transition than merely the negotiation and drafting of a new Constitution. While it is possible to identify a range of different paths and mechanisms including: negotiating the cessation of hostilities; establishing transitional arrangements; arranging and holding a democratic election; negotiating and drafting a new constitution; implementing and sustaining the new democratic order, each of which will have had an important impact on the failure or success of a country's political reconstruction, there are a range of

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42   Declaration of the OAU Ad-hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe, August 21, 1989 reprinted in ANC Department of Political Education, **The Road to Peace: Resource material on negotiations** (June 1990) at 34.

43   Declaration on Apartheid and its Destructive Consequences in Southern Africa, GA Resolution S-16/1, 14 December 1989, reprinted in Secretary-General, Second Report, U.N. Doc. A/45/1052 (1991), Annex III.

specific historically determined constitution-making processes that are regularly proposed or argued for. These alternatives range from acts of simple imposition or legal transplant to different forms of negotiating fora or democratically-elected bodies as well as forms of public involvement in, or endorsement of, the ultimate product. Each of these alternatives hold profound consequences for both the possibility of reaching agreement to embark on a constitution-building process as well as on the likely outcomes, including the degree of legitimacy and durability of the new governing parties and institutions.

Deciding how to achieve a new constitutional framework, including both a future text and related institutions, is determined firstly by the relative power and legitimacy of the different participants in any particular conflict, democratic transition or constitution-building exercise. While holding an election is the recognized means to establish legitimate claims on power, this will also narrow the scope of available compromises as each side recognizes the extent or limits of its own claims. Relying on an expression of democratic will is limited too by the need in many circumstances to address the needs of ethnic or indigenous minorities whose legitimate claims are in tension with the popular demands of the majority. Furthermore, the very means of measuring electoral support, such as proportional or first past-the-post elections, or the appropriate spatial distribution of constituencies or electoral contests, are all matters of intense conflict. These difficulties require recognition of different mechanisms that might be employed in achieving an initial electoral contest that will be inclusive and allow the participation of all the major contestants in the conflict, as well as an understanding that their participation might depend on at least some guarantees that their power as a significant party to the conflict will not be completely erased by the expression of the popular will. This concern is extremely important in contexts in which an ethnic or other minority might hold economic or military power but is likely to be defeated in a simple majority vote election, but is also significant in those situations in which a minority has legitimate claims to some form of autonomy, based on concerns of historic exclusion or cultural vulnerability.

South African history provides a rich example of the different forms of constitution-making processes that have been relied upon at different times. In rough outline we may trace four

alternative processes of constitution-making and adoption that have characterized the history of written constitutions in South Africa. First, there has been a significant history of imposed constitutions, from the 1961 Republic Constitution through the imposition of 'Bantustan' constitutions in the Transkei, Ciskei, Bophuthatswana and Venda, to the contested imposition of the 1983 'tricameral' Constitution. Second, there is a history of negotiated constitutions beginning with the first Constitution of the Union of South Africa in 1910 to the negotiated 1993 'interim' Constitution that provided the basis for the country's democratic transition. Third, there is the single example of a constitution produced by a democratically-elected Constitutional Assembly in 1996. Finally, the South African experience has involved a number of different processes through which these constitutions have been adopted, from the enactment of the Union Constitution by the British Parliament in 1909 to the assertion of sovereignty by the white minority parliament in declaring a Republican Constitution in 1961, and continuing through the adoption of the 'final' Constitution by the Constitutional Assembly in 1996.

Aside from these formal processes of constitutional adoption, a number of significant political and legal processes have been used to facilitate or confirm the legitimacy of these constitutions. While the apartheid government frequently used referendums based on the 'whites only' electoral list to endorse its constitutional goals – from the decision to form a parliamentary Republic in the 1960 referendum to the 1992 'whites only' referendum to decide whether to pursue constitutional negotiations – the threat of turning to a public endorsement by 60% in a national referendum on a 'final' constitution if the 1994-1996 constitution-making process failed, served to ensure a spirit of collaboration in the Constitutional Assembly. Finally, the South African experience has produced a couple of unique legal processes designed to facilitate the constitution-making process or to ensure that the process retains the support of the contesting parties. In the first instance, adoption of the 1993 'interim' constitution involved a dual process in which the Multi-Party Negotiating Forum at Kempton Park first reached agreement on the Constitution and then in accordance with the demand by the government that there be 'legal continuity' the Constitution was formally adopted by the tricameral' Parliament in Cape Town and signed into law by President F. W. De Klerk. In the second instance, the Constitution adopted by the Constitutional Assembly could

not become law until it was certified by the Constitutional Court as being substantially in accordance with the 34 Constitutional Principles contained in Schedule 4 of the 'interim' Constitution.

In addition to the historic processes that have been part of South Africa's experiences in constitution-building, the various parties in South Africa had long advocated a range of alternative constitution-making processes. On the one extreme are those who contested the very sovereignty of the apartheid state[44] leading to the argument that the only legitimate means of adopting a new constitution was to elect a constituent assembly free of any negotiated constraints and to acknowledge that only such a body would have the 'power constituent' to adopt a new constitution. At the other extreme there was an argument that any elected body would be effectively 'undemocratic' since the majority would then bind minorities who would not be in control of their own destinies. The IFP was particularly concerned about this, viewing the very notion of a democratically-elected constituent assembly as inherently undemocratic.[45] Since, from the perspective of the IFP, the very purpose of a justiciable constitution and a Bill of Rights is to protect minorities from the tyranny of the majority, the minorities to be protected must give their prior assent to any constitutional framework. In other words, the IFP and every other minor party at the negotiating table – regardless of the extent of their political support – would have to give their consent before a final constitution could be adopted. Recognizing the practical and political difficulties of obtaining universal consensus, the IFP called for a depoliticized process of constitution-making, with a group of constitutional experts retained to produce a constitution which would then be adopted by all parties and endorsed in a national plebiscite.[46]

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44   See, Mutiti, Mudimuranwa, A. B., South Africa: Is it a Sovereign Independent State? (1985).

45   See, Inkatha Freedom Party, Why the Inkatha Freedom Party Objects to the Idea of the New Constitution Being Written by a Popularly Elected Assembly (Whether called "Constituent Assembly" or called by any other name), undated submission to Codesa Working Group 2 (1992).

46   See, Position Paper of the Inkatha Freedom Party for Submission at the CODESA meeting of February 6, 1992, reprinted in **Constitutions of the World** (eds. A. P. Blaustein & G. H. Flanz),

The apartheid government however insisted that any future dispensation be negotiated and that no democratic election could be held before the adoption of a negotiated constitution provided the legal basis for such an election. This insistence on a negotiating body, what in other contexts may be described as a Constitutional Convention, to determine the content of a future constitution, would enable the white minority to avoid their effective exclusion, which any first-past-the-post election would have entailed. At the same time, the idea of a simple elite-pact held the danger of undermining the legitimacy of a future constitution, particularly in a context in which democratic participation had become a central claim for the liberation movement and its allies as well as an integral part of the global political culture of the late 1980s and early 1990s. It was this tension that led to the compromise of a two-stage process in which an 'interim' constitution was negotiated in a process that was effectively a Constitutional Convention and followed two years later by a 'final' constitution produced by the Constitutional Assembly, comprised of the elected members of both houses of Parliament – effectively an elected constituent assembly. The key 'legal' link between these two processes was the inclusion of a set of constitutional principles in the 'interim' Constitution and the requirement that the newly created Constitutional Court would be required to certify that the product of the Constitutional Assembly adhered to those principles.

Participation as an element of constitution-building

While it is true, as many point out, that South Africa was privileged to have a leadership that had the moral authority and ability to craft compromises as well as a legacy of negotiating skills that had been honed in the labor movement and in exile, this does not explain the popular embrace of constitutional democracy and rights that has been so key to South Africa's success. To understand this it is necessary to reflect on the dialectical relationship between inter-party negotiations and simultaneous processes of popular participation that both highlighted the salience of particular issues

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South African Supplement, Release 92-2 (A. P. Blaustein, March 1992) at 173.

and led to shifts in popular perceptions and demands that ultimately brought the parties closer to mutual understanding. Popular participation in the early part of the transition ranged from mass demonstrations, promoted by the ANC as organized mass action in support of the ANC's demands, as well as a multitude of smaller engagements. A key aspect of this less visible process was a series of conferences on constitutional issues organized by the ANC Constitutional Committee, including members of ANC branches, trade union and other community activists as well as local and international academics brought together to discuss key constitutional issues. These were supplemented by many local meetings to discuss the options being considered both internally among policy-makers in the ANC and in engagements with the government and other parties.

These informal forms of participation were institutionalized in the second-phase of constitution-making through a process of public consultations, education and requests for comments that accompanied the work of the elected Constitutional Assembly under the slogan: "You've made your mark now have your say." The Constitutional Assembly's public participation program included the full range of media and other outreach efforts, including: weekly radio broadcasts that reached 10 million listeners each week; 160,000 copies of the Assembly's newspaper, *Constitutional Talk* which was published twice a month; thirty-seven television programs; thousands of hits on the Assembly's web page; and, hundreds of public meetings and visits to far flung corners of the country. A nation-wide survey conducted in April 1996 concluded that approximately 18 and a half million South Africans, approximately 73 percent of adults, had been reached by this campaign and that 84 percent of the survey respondents had, to varying degrees, become invested in the process.[47]

The ambiguous nature of this participation was however epitomized by a full-page

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47   See, Murray, Christina, Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court in The Post-Apartheid Constitutions (Penelope Andrews and Stephen Ellmann, eds, 2001) p. 107. See also, Ebrahim, Hassan, The Soul of a Nation: Constitution-making in South Africa, Oxford University Press, (1998) pp 239-250.

newspaper advertisement showing Nelson Mandela standing in front of his home talking on his cell-phone with the caption stating that he was phoning in his comments and contribution to the Constitutional Assembly. While the advert was clearly an attempt to encourage members of the public to participate in the Constitutional Assemblies public participation program – which included a dedicated phone-in line for comments and suggestions on the draft constitution – it was manifestly bizarre to suggest that President Nelson Mandela would be making his input to the constitution-making process by leaving a message on an answering machine. For some this only highlighted the fact that while the Constitutional Assembly received over 2 million submissions from the public, including 11,000 that Christina Murray describes as substantive,[48] it is clear that these were not a significant source of ideas for the constitution-making process, even if they were all read. To this extent Murray notes that the posters declaring that "The Constitution is being written by the most important person in the country: You," might be fairly described as misleading.[49] Despite these criticisms Murray points out that the program may be understood as "having broader, less instrumental goals," including that South Africans should feel that the Constitution belongs to them.[50]

Although an ethos of participation pervaded South Africa's extended constitution-making process it may be fairly concluded that the various forms of participation served less as a receptor of popular demand than as a process of integration through which the imagination of all parties steadily evolved toward the embrace of potentially sustainable alternatives. While this interactive process may be demonstrated in various arenas from the conflict over regional powers to the protection of

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[48]   Murray, Christina, Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court in The Post-Apartheid Constitutions (Penelope Andrews and Stephen Ellmann, eds, 2001) p. 107.

[49]   Id. p. 112.

[50]   Id.

minority rights, it is in the debate over property rights that it may be most clearly demonstrated. In the face of massive dispossession the liberation movements had long promised the return of the land to the people. The apartheid government was equally adamant that a future constitution must protect existing property rights. Refusing to accept the constitutionalization of apartheid's spoils the ANC finally accepted the protection of property but only with the guarantee of restitution for people whose land rights were denied or dispossessed under discriminatory laws from 1913 to 1994. Even then it took public demonstrations by land claimants and threats to refuse to include any property clause at all before the 'white' parties accepted the imperative to include a promise of restitution and even the promise of land redistribution in the final Constitution. In each area of major dispute the constitutional outcome was the product of an iterative process in which demands and compromises were combined with threats and public engagements in which principles were appealed to and their content expounded from different and often conflicting perspectives.

Constitutional Principles as an element of Constitution-building

The South African experience demonstrates, I believe, that a focus on constitutional principles and the need to frame a democratic transition within the realm of a set of broadly agreed upon principles provides a potential means of entrapping unnegotiable conflicts into ongoing but manageable constitutional struggles. The key element in this process, drawing participants in and enabling them to sustain their own visions of a viable alternative to the existing situation, is the practice of constitutional imagination in which the different concepts and options are invested with meanings most in accord with the hopes and aspirations of the different parties. Despite often divergent understandings and deliberately open-ended agreements over meaning, the framing of constitutional principles in the South African case, I will argue, both facilitated the progress of the transition to democracy and provided the means of incorporating often inconsistent and conflicting ideas about the parameters of the future, whether in the forms of explicit guarantees or institutional arrangements. It was this principled ambiguity that allowed the conflict to be 'civilized,' despite continuing violence and vociferous, if not fundamental disagreement.

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The constitutional principles that have framed the post-cold war transitions to democracy stem from a range of sources, including local constitutional histories and the evolving international standards reflected in the post-World War II human rights agreements, the Helsinki process and the experience of decolonization. For Southern Africa the first explicit articulation of constitutional principles as a basis for negotiating a democratic transition emerged in the form of the 1982 Principles produced by the Western Contact Group for Namibia. Given the legal status of Namibia, as a former German colony, League of Nations mandate and finally illegally occupied territory – after the United Nations withdrawal of the mandate was recognized as binding by the International Court of Justice – it was often assumed that the idea of constitutional principles would be unique to that conflict. While the implementation of Security Council Resolution 435 led to these principles being adopted as the guiding principles of the Namibian Constitutional Assembly which drew up Namibia's Constitution after the 1990 elections, the idea of constitutional principles as a means of framing a democratic transition would become key to South Africa's surprisingly successful transition to democracy.

Although it is possible to claim that the idea of constitutional principles was foreshadowed in South Africa by the presentation of the African Claims document – demands framed around the promises of the Atlantic Charter – by the African National Congress in 1944, or even by the ANC's adoption of the Freedom Charter in 1955, in fact neither of these documents offered binding promises or institutional assurances to opponents of the ANC. It was only with the publication of the ANC's Constitutional Guidelines in 1988 that there is an attempt to offer a broad framework for a future system of governance and rights. It was the internationalization of these principles through the Harare Declaration of the OAU's liberation sub-committee and in the UN General Assembly's Declaration Against Apartheid in 1989, that created a clear set of parameters within which the process of building a democratic South Africa could begin to be negotiated.

The publication of the ANC Constitutional Guidelines in 1988 can thus be seen as an opening gambit in the process of negotiations as well as an intervention designed to preclude internal options that the Apartheid government was then considering. The 1988 Constitutional Guidelines

served both, as a signal to ANC activists and supporters of the possibility of a negotiated transition, as well as a promise, to those in South Africa who feared the possibility of a future ANC government, of its democratic intentions. Among the principles adopted by the ANC were commitments to democracy, cultural diversity, basic rights and freedoms in a Bill of Rights, as well as a mixed economy – including a private sector. While the Constitutional Guidelines made clear that the ANC's vision of these principles included mechanisms to address the legacies of apartheid, including affirmative action and land reform as features of a "constitutional duty to eradicate race discrimination" and "the economic and social inequalities produced by racial discrimination," the document nevertheless reassured both domestic and international observers whose understanding of the ANC had been shaped by the cold war, that the ANC would embrace a constitutional democracy.[51] In this way it may be argued that the 1988 Constitutional Guidelines initiated the process through which the idea of constitutional principles became central to enabling the transition to democracy.

The Harare Declaration, which began the process of internationalizing the ANC's 1988 principles, took the process a step further, outlining what would be an internationally acceptable process of democratization in South Africa.[52] In addition to the constitutional principles the Declaration included a set of conditions designed to enable a climate of negotiations: the release of political prisoners and detainees; the lifting of prohibitions and restrictions on organizations and individuals; the removal of troops from the black townships; the end of the state of emergency and repeal of legislation that circumscribed political activity; and finally, the ceasing of political executions. It also provided guidelines to the process of negotiations towards a democratic order and

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51 See, ANC, 1988. Constitutional Guidelines for a Democratic South Africa, reprinted in, The Road to Peace: Resource material on negotiations, ANC Department of Political Education: Marshalltown, Johannesburg, June 1990.

52 See, Harare Declaration: Declaration of the OAU Ad-hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe, August 21, 1989, reprinted in, The Road to Peace: Resource material on negotiations, ANC Department of Political Education: Marshalltown, Johannesburg, June 1990.

new Constitution, including the establishment of an interim government to oversee the transition. This latter demand failed to recognize that the Apartheid government would not agree to relinquish political power until there were some guarantees as to the shape a future South Africa would take. This problem pushed the question of the constitution-making process to the top of the political agenda but provided no means to resolve the different visions of who should participate in what form of process to create a new Constitution. It did however make it clear that any resolution of the conflict would need to meet minimum international standards if South Africa was to be accepted back into the world community.

Even then the debate over constitutional principles had only begun. While the parties failed to all agree on the Declaration of Intent, a minimal set of principles adopted at their first formal meeting – the Conference for a Democratic South Africa in December 1991– the debate over principles begun at that time would become central to the negotiations in the Multi-Party Negotiating Forum which convened in early 1993 and led to the adoption of the1993 'interim' Constitution under which South Africa's first democratic elections were held and Nelson Mandela elected President. Even then the role of constitutional principles was not exhausted as an even larger number of constitutional principles had been included in an appendix to the 1993 Constitution for the purpose of providing a framework for the work of the newly elected bicameral-legislature, serving in joint-sitting as a Constitutional Assembly with the mandate to produce a 'final' Constitution within two years.

While agreeing on a list of thirty-four constitutional principles and including them in schedule 4 of the 'interim' constitution was less difficult then first predicted, the key issue remained how they would work to resolve the dual problems of process and substance. Although it could be argued that the principles provided clear substantive criteria to constitution-makers, it was less clear how they would serve to bind the process. It was the decision to require a new Constitutional Court to certify that the final Constitution, produced and adopted by a democratically-elected Constituent Assembly, adhered to the requirements of the constitutional principles in Schedule 4, which created the degree of confidence necessary for the democratic transition to go forward. Thus, in the end the

Constitutional Court, in applying the constitutional principles to determine whether the final constitution could be certified and adopted, served as a last check before President Mandela signed the Constitution into law as the last formal act of the democratic transition. While this was by no means the sole source of mutual confidence between the once warring parties, its importance for creating the atmosphere of trust so important to the political transition cannot be over estimated.

Although the Constitutional Principles negotiated by the South African parties represent a vast and often contradictory range of possibilities, the very process of negotiating and providing justification for their inclusion had a significant impact on the parameters of constitutional imagination in South Africa. Some would claim, however, that the inclusion of some principles provided the basis for continued sectarian claims by ethnic minorities or traditionalists by embracing perspectives that were seemingly in conflict with the broader democratic thrust of the process. Yet, the international frame within which these principles were located, I would argue, gave weight to those who insisted on a democratic interpretation of the overall framework. It was this interaction between local demands and global norms that enabled the constitutional principles to play very different roles at different moments in the political transition. At one moment they enabled parties to feel that their most urgent demands had been included while at other moments the emergence of an internationally-defined interpretation of a particular principle would force an understanding of the principle at odds with the initial claim. In this sense the dimension of constitutional principles clearly embraces an important temporal element in addition to the broader substantive implications of the principles.

The effect of combining the debate over constitutional principles with the requirement that any future constitutional dispensation meet minimum international standards, as defined by international human rights principles, was to frame the parameters of acceptable options. This framing had a powerful impact on the shape of the debate over different constitutional options and the available alternatives. The debate over the claim of self-determination, made in the context of the negotiations by ethnically-defined parties, provides an interesting example of this process. Recognition of a claim of self-determination, particularly in the context of decolonization, provided

significant support for the claimants in the international arena, however the minority groups who claimed the right of self-determination in South Africa in the early 1990s found themselves precluded from asserting this right. Despite the fact that only a few years later the international community would recognize ethnically-based claims to self-determination in the context of the wars in the former Yugoslavia, before this shift in interpretation the right of self-determination had been framed by the process of decolonization. Under this rubric international law required that the right of self-determination be exercised by all inhabitants within the internationally-recognized borders of a former colony.

In this context the ANC was able to assert that the only internationally recognized right of self-determination in South Africa was the right of all South Africans, regardless of race or ethnic origin, to participate in a democratic process to determine the country's future. The effect of this broader norm on the claims of self-determination by Afrikaners and other minorities was to force them to accept reassurances that their 'right of self-determination' would be respected so long as it fell within the democratic norms of the constitution and could be negotiated with a new democratic government. Confining the constitutional imagination of participants in the South African process was not limited to the claims of minority groups. The ANC had long asserted its demand that the land and key industries be nationalized so that the wealth of the country might be redistributed, yet given the domination of market-oriented perspectives after the fall of the Berlin Wall, its was impossible for the ANC to simultaneously embrace the now dominant understanding of international human rights and exclude claims to property rights and free economic activity. Thus, if on the one hand the inclusion of internationally recognized constitutional principles precluded demands for ethnic self-determination or consociationalism, on the other hand it was the very same principles that frustrated popular demands to nationalize the land and key national industries. At the same time gender activists, who formed a cross-party coalition of women demanding that gender equality not be overridden by claims of tradition, were empowered by the inclusion of these broader international norms that favored gender equality over 'traditional authority'.

Adopting a list of constitutional principles does not guarantee the future, but it does provide

a process and a framework within which areas of commonality may be defined and questions of difference may be located. Providing an institutional mechanism through which these principles may be brought to bear on either the debate over constitutional provisions or as a means to evaluate the final product adopted by a democratically-elected constitution-making body provided a zone of comfort for those who did not feel that their central concerns were likely to be adequately reflected in the democratic process -- whether they be past elites or excluded minorities. Another important role that the debate over constitutional principles plays is in postponing or mediating the necessity of making a hard or immediate decision on what might be effectively non-negotiable issues. The adoption of a broad principle allows the conflicting parties to put aside an issue for further debate while working on issues over which there might be greater agreement. This postponement, coupled with continuing engagement between the parties, is an important element in building the basic elements of trust between opposing groups which is central to the ultimate success of a democracy-building project.

Constitutional principles are rarely definitive and contain in most cases a degree of constructive ambiguity which enables all parties to feel that they might be able to live with the outcome of the process. At times the different parties in South Africa held diametrically opposite understandings of the meaning of particular principles but it was precisely this often acknowledged ambiguity that allowed the process to go forward. One of the effects of the process of negotiating constitutional principles is to slowly entrap the political conflict in a process of argumentation and alternative legal propositions. This has the effect of both precluding some outcomes and mediating the differences between what might be considered acceptable alternatives, often influenced as much by international understandings as the particular historical and material parameters of the local conflict. Finally, the commitment to constitutional principles promotes constitutional engagement over exit and the ever present threat of violence this implies.

Institutional design and substantive choices

Last, but not least is the element of institutional design and substantive choices involved in

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the actual construction of a constitutional system. While the ideals of participation and democratic process may provide some guidelines for those embarking on a constitution-building exercise, the scope of institutional and substantive choices is framed to a large extent by a combination of elements including the legacy of existing institutions, the imagination of those pursuing new institutional designs and substantive options, as well as the availability of different alternatives. A good example of this was the debate, in the South African context, over the relationship between the center and periphery, referred to as federalism, regionalism and finally as co-operative government. While the apartheid state had attempted to Balkanize the country into racially and ethnically distinct portions, the different participants in the political transition fought for very different visions of a future country. The ANC sought a unified central authority that could challenge and dismantle the legacies of segregation and geographic apartheid while the NP and the IFP sought different forms of 'federalism' or local autonomy as a means to protect ethnic or local centers of power. The international arena of course provided a vast array of options from the supremacy of central government in the United Kingdom to the relative autonomy of States in the United States or forms of consociationalism and autonomy in Belgium or Switzerland.

The outcome in South Africa is unlike its Indian and Canadian forebears which retained central authority while allocating regional powers. The South African Constitution follows more closely in the footsteps of the German Constitution, placing less emphasis on geographic autonomy and more on the integration of geographic jurisdictions into separate, functionally determined roles, in a continuum of governance over specifically defined issues. While provision is made for some exclusive regional powers these are by and large of minor significance, all important and contested issues being included in the category of concurrent competence. How the constitution-makers came to this compromise provides an interesting insight into the processes that shape the selection of different options. Before describing how this compromise was reached it is important to understand just how far apart the main parties were. First, the apartheid government at first seemed set on guaranteeing some form of minority protection. The government and its negotiators sort this by promoting a version of local autonomy that was advanced by drawing on the Belgium and Swiss experiences. Second, the IFP sort a more geographically-based form of autonomy since their claims

were framed in terms of the original geography of the Zulu Kingdom, however despite their assertions that they wanted a 'federal' solution the degree of autonomy they suggested in their constitutional proposals would have required the creation of a confederation of essentially independent entities. Finally, the ANC equated all these claims for ethnic authority as forms of neo-apartheid and saw the claim for federalism as an attempt to prevent the emergence of a united South Africa – one of the basic premises of the nationalist movement.

The breakthrough in the debate over regionalism flowed directly from a study tour of the parties by invitation of the German government that led the ANC to reconsider its hostility to all forms of regionalism. While the ANC had already accepted the existence of distinct regions in the country, it now began to envision how authority could be shared between the center and the regions. The German model provided a more integrative approach as compared to either the US or Canadian forms of federalism, and allowed the ANC to re-imagine the problem in terms of the allocation of authority between different levels of government according to the needs and capacities of governance at each level. The eventual adoption of the National Council of Provinces, modeled on the *Bundesrat*, and the conception of co-operative government as a uniquely South African form of regionalism provided a means to achieve agreement on what at first seemed a non-negotiable conflict. While the analogy to the German system provided an essential source of legitimacy for this new conception, in fact the final institutional design and substantive distribution of powers remains quite different. Thus the existence of an acceptable alternative approach as well as the ability of the parties to reshape this model to serve as a unique form of 'co-operative government' that includes all levels of government from the national government through the provinces to metropolitan areas, local municipalities and villages, demonstrates how contingent and yet bounded this element of constitution-building is.

Conclusion: Africa in comparative context

Africa's experience may also be placed in comparative context with processes in other parts of the globe and in relation to other countries which have been through a process of constitution-

building in the post-World War II era. While most countries have experienced some form of constitutional change during this historical period, there are a few cases that highlight some of the elements of constitution-building that I believe may provide a useful framework for a comparative discussion of constitution-making. Despite the clear and specific impact of national histories and domestic politics on the particular outcomes of constitution-making exercises in different countries there are a number of broad trajectories that may be identified as a means of exploring the effect these different sources of variation may have on constitution-building. For the purposes of this discussion I will limit this exploration of the significance of these elements or sources of variation to the very brief consideration of just three issues: the relationship between the degree and nature of participation in the constitution-making process and the impact on the constitutions legitimacy or effectiveness; the effect of history and timing on the inclusion or form of particular rights; and finally, the acceptance or rejection of the notion of constitutional supremacy and the role of the courts in defining the meaning of the constitution. Likewise I will choose from a limited number of jurisdictions to highlight these points.

There are a vast range of constitution-making processes yet the immediate source of a constitution and the process from which it emerges seems to be of great significance to its eventual implementation and legitimacy. While both the German and Japanese post-war constitutions, located within the context of civil law legal systems are considered to be generally successful, the status of these constitutions is quite different. On the one hand it is acknowledged that the German Basic Law enjoys enormous legitimacy and plays a central role in the life of the country. On the other hand the Japanese Constitution is, in comparison, rarely invoked, especially in regards to its bill of rights and the Japanese courts play a far less important role in the implementation of the constitution as compared to the German Constitutional Court. In this comparison I would argue that although the Allied occupation forces in both Europe and the Pacific played significant roles in the two constitution-making processes, the fact that the German process was essentially handed over to German participants, with only a general insistence by the Allied powers that the Basic Law include a federal structure of government and a bill of rights, contrasts markedly with the role that General McArthur and his staff played in imposing the constitution on Japan. These examples also stand in

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marked contrast to the Indian and South African experiences where elected constitution-making bodies ensured that their respective constitution-making exercises were to some degree grounded in overtly democratic processes. In fact the stability of the Indian Constitution has been remarkable, despite serious political tensions internally, and an international context in which most of the post-colonial constitutions of the same era have suffered ignoble fates – through military coups or other disruptions.

The effect of the temporal dimension and its interaction with constitutional principles and alternative formulations of rights, may be illustrated by considering how different constitution-making processes reflected claims for self-determination and property rights. While the principle of self-determination had its origins in the recognition of the rights of national minorities in post-WWI Europe and the League of Nations, the evolution of this principle in the post-colonial setting meant that white minorities in Zimbabwe and South Africa could not claim a right to self-government. Instead, the post-independent Zimbabwe Constitution gave the white minority twenty seats in Parliament for a transitional period of ten years. In contrast the claim of self-determination by Afrikaners in South Africa was only given partial recognition and it is an open question whether in a post-Dayton Accord world – in which the global powers returned to a notion of ethnic self-determination, the claims of self-determination by ethnic minorities in Southern Africa might not have had more power. Similarly, when it came to debating whether property rights should be included in the South African bill of rights there seems to have been little alternative then to accept the dominant market-oriented notions of property that marked the immediate post-cold war era. Despite the availability of reasonable alternatives from the Canadian Charter's omission of property rights to the German Basic Law's adoption of a specific notion of the social function of property, making the right to property subject to public need, the insistence that property rights be protected – over the objections of the majority whose property rights had long been denied – reveals the significant influence of both the temporal dimension and the power of international norms. Even when South Africa's constitution-makers adopted a set of clear qualifications based on the historic dispossession of property, including an affirmative duty to pursue land reform and the recognition of those rights previously denied, Nelson Mandela's government committed itself to a policy of

'willing-buyer, willing seller' as a means of distinguishing itself from the controversial land reform policies being adopted at the same time by Robert Mugabe's government in Zimbabwe.

Finally, the idea of constitutional supremacy has become a central tenant of post-cold war constitutionalism. This principle has had implications for both the role of the courts in these new constitutional orders as well as the constitution-making process itself. First, the adoption of constitutional supremacy often confronts a long tradition of parliamentary sovereignty with its claim that the democratic representatives of the people should have the final say. Second, this requires recognition not only of the legal but also the political consequences of a supreme constitution, from the constraining of legislative authority to the empowerment of the courts. Third, these consequences have direct implications for a constitution-building process in which the negotiators have to strike a delicate balance between popular demands and the authority and power of politicians. While the ANC had come to recognize the value of an entrenched bill of rights, this was still compatible with the idea that the elected representatives of the people would be sovereign, yet the idea of constitutional supremacy emerged as a founding provision of the final Constitution. In contrast the Lancaster House Constitution that was passed by the British Parliament granting independence to Zimbabwe in 1980 retained the notion of parliamentary sovereignty.

In Kenya the constitutional commission that drew up the 'Bomas Draft' constitution, with a massive public participation program, failed to get the draft adopted in the face of opposition from the sitting parliamentarians who felt they had lost control of the process. It was only once the politicians were reincorporated into the process and the draft constitution tailored to address some of their concerns, as well as in the face of disastrous post-election violence in 2007, that Kenya was able to produce a constitution that: incorporated a significant majority; gained broad credibility from its acceptance in a nation-wide referendum in August 2010; and enshrined the notion of constitutional supremacy. From these experiences I would conclude that both the acceptance of constitutional supremacy as well as broad legitimacy for the product of constitution-building in South Africa and India can be linked to the nature of their constitution-making processes, in which democratically-elected constituent assemblies, including political participants from across the

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society, felt included and received a degree of assurance from the common acceptance and entrenchment, through the idea of constitutional supremacy, of the rules governing the new order.