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# Reconstituting the Constitution

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The degree of public exposure to the constitution-drafting process was probably without historical precedent anywhere in the world. Hundreds of public meetings were held to advertise the drafting of the Constitution and to invite public participation in the process. In addition the Constitutional Assembly organised a series of conferences through its theme groups that brought together “stake-holders” from different parts of civil society as well as academics and politicians to discuss contentious issues, such as land rights, restitution and the promise of land reform. The Constitutional Assembly published its own monthly newsletter, *Constitutional Talk*, to publicise events relating to the development of the Constitution. There was an extensive television and radio publicity campaign and the genesis of the Constitution from first draft to final product could be followed on a daily basis on the internet site of the Constitutional Assembly.

#### **4.4 Five Sources of Variation Reflected in the History of Constitution-Building in South Africa**

Building a constitutional democracy encompasses a far broader range of issues than drafting and adopting a new constitution.<sup>15</sup> Yet, it is the process of constitution-making that has become a key element in the political transitions that have followed the end of the cold war.<sup>16</sup> At the same time there has been a resuscitation, despite long recognised 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 or constitution-making may be central features 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 variations in different processes of constitution-building, enabling us to use different historical examples to inform the decisions facing constitution-builders around the globe.

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<sup>15</sup> See Ghai and Galli (2006).

<sup>16</sup> Benomar (2004).

Considering 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 particular aspects of this particular historical experience. First, there is a temporal dimension, which may be characterised as having two distinct parts – a macro and a micro. 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-building, 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-building 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 processes had a profound impact on the substance and legitimacy of the outcome. Finally, the substantive aspect, involving constitutional and institutional choices that are required to be made in the constitution-building 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.

#### ***4.4.1 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 decolonisation 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 democratisation 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."<sup>17</sup>

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 and so on – characteristic of the cold war period and reflected in the increasing syncretism of post-colonial constitutions gave way to an increasing hegemonisation. By the early 1990s liberal constitutional principles were hegemonic, with constitutional review by an independent judiciary increasingly becoming a prerequisite for international constitutional respectability.<sup>18</sup> In this sense we may understand constitutions as being "sediments of diverse historical processes, crystalized into a small number of indigenous and borrowed principles."<sup>19</sup> 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,"<sup>20</sup> 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.<sup>21</sup> 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 and bills of rights,<sup>22</sup>

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<sup>17</sup> Arjomand (1992), p. 75.

<sup>18</sup> See Beatty (1994b). See also Held (1991).

<sup>19</sup> Arjomand (1992), p. 49.

<sup>20</sup> *Ibid.*, p. 49.

<sup>21</sup> But cf Franklin and 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," (p. 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" (p. 232).

<sup>22</sup> See Mare and Hamilton (1987), pp. 163–170.

the National Party referred to the Swiss canton system and consociationalism,<sup>23</sup> and the ANC asserted the right of South Africa's black majority to self-determination.<sup>24</sup> While these were all respectable elements of the international political culture at that time, the ANC's argument, with its emphasis on decolonisation, 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 recognised in the international system.

The end of the era of decolonisation, the unravelling 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 legitimisation of bills of rights at both the regional and national level.<sup>25</sup> Tied to this development was the emergence of constitutional review as the essential element in the institutionalisation of individual human rights and the constitutionalisation of bills of rights.<sup>26</sup> 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<sup>27</sup> – 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 decolonisation. These 1982 Constitutional Principles became part and parcel of the United Nations peace plan for Namibia through Security Council Resolution 632 of 16 February 1989,<sup>28</sup> and were subsequently adopted by the Namibian Constituent Assembly. A second process was the development of the Conference on Security and Cooperation in

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<sup>23</sup> See Chris Rencken, MP and spokesman for the National Party, statement to the *Weekly Mail*, 22 November 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 (1986).

<sup>24</sup> 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 JT Gumede, JA la Guma and D Colrairie to the inaugural congress of the League Against Imperialism, in Brussels in February 1927 (Meli 1988, pp. 74–75). See generally, Klug (1990).

<sup>25</sup> 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-1970s when it was possible to argue that constitutional bills of rights were increasingly being abandoned. See Nwabueze (1977), p. 309.

<sup>26</sup> See Rosenfeld (1993); see generally, Beatty (1994a).

<sup>27</sup> 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. Wiechers (1991).

<sup>28</sup> See United Nations Security Council Resolution, S/20412 of 23 January 1989, para 35.

Europe's (CSCE) human rights system, particularly through the follow-up process of intergovernmental conferences provided for in the Helsinki Final Act.<sup>29</sup>

Most significant of these was the Vienna Follow-up Meeting which lasted from 1986 to 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.<sup>30</sup> 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."<sup>31</sup> A third and significant development in the African context was the World Bank's 1989 conclusion, following a 3-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.<sup>32</sup>

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 develop its own set of constitutional principles and to seek the adoption of an internationally recognised framework for negotiations in South Africa. As a result the apartheid regime saw the opportunity of gaining international recognition of even a modified version of its 1983 "tricameral" Constitution collapse with the adoption of the Harare Declaration<sup>33</sup> and the subsequent incorporation of these principles into the United Nations Declaration on Apartheid in December 1989.<sup>34</sup> 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

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<sup>29</sup> See Buergethal (1991).

<sup>30</sup> Ibid, p. 370.

<sup>31</sup> Conference on Security and Co-operation in Europe (1990). See Halberstam (1993).

<sup>32</sup> See Wani (1993).

<sup>33</sup> Declaration of the OAU Ad-hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe, 21 August 1989, reprinted in ANC Department of Political Education (1990), p. 34.

<sup>34</sup> United Nations (1991).

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.

#### **4.4.2 A Question of Process**

Constitution-building 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 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 recognised means to establish legitimate claims on power, this will also narrow the scope of available compromises as each side recognises 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 characterised 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 FW 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<sup>35</sup> 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 Inkatha Freedom Party was particularly concerned about this, viewing the very notion of a democratically-elected constituent assembly as inherently undemocratic.<sup>36</sup> Since, from the perspective of the Inkatha Freedom Party, 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 Inkatha Freedom Party 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. Recognising the practical and political difficulties of obtaining universal consensus, the Inkatha Freedom Party called for a depoliticised 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.<sup>37</sup>

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 2 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.

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<sup>35</sup> See Mutiti (1985).

<sup>36</sup> See Inkatha Freedom Party (1992).

<sup>37</sup> See Position Paper of the Inkatha Freedom Party for Submission at the CODESA meeting of 6 February 1992, reprinted in Blaustein and Flanz (1992), p. 173.

### 4.4.3 *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 labour 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 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 organised 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 organised 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 institutionalised 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 programme included the full range of media and other outreach efforts, including: weekly radio broadcasts that reached ten million listeners each week; 160,000 copies of the Assembly's newspaper, *Constitutional Talk*, which was published twice a month; 37 television programmes; 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 18.5 million South Africans, approximately 73% of adults, had been reached by this campaign and that 84% of the survey respondents had, to varying degrees, become invested in the process.<sup>38</sup>

The ambiguous nature of this participation was however epitomised by a full-page 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 Assembly's public participation program – which included a dedicated phone-in line for comments and suggestions on the draft constitution – it was

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<sup>38</sup> See Murray (2001), p. 107. See also Ebrahim (1998), pp. 239–250.

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 two million submissions from the public, including 11,000 that Christina Murray describes as substantive,<sup>39</sup> 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.<sup>40</sup> Despite these criticisms Murray points out that the programme may be understood as “having broader, less instrumental goals,” including that South Africans should feel that the Constitution belongs to them.<sup>41</sup>

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 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 constitutionalisation 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.

#### ***4.4.4 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

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<sup>39</sup> Ibid, p. 107.

<sup>40</sup> Ibid, p. 112.

<sup>41</sup> Ibid, p. 112.

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 “civilised,” despite continuing violence and vociferous, if not fundamental disagreement.

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 decolonisation. 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 recognised 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 internationalisation of these principles through the Harare Declaration of the OAU’s liberation sub-committee and in the United Nations 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