

Caroline Morris · Jonathan Boston  
Petra Butler *Editors*

# Reconstituting the Constitution

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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

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.<sup>42</sup> 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 internationalising the ANC's 1988 principles, took the process a step further, outlining what would be an internationally acceptable process of democratisation in South Africa.<sup>43</sup> 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 organisations 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 new Constitution, including the establishment of an interim government to oversee the transition. This latter demand failed to recognise 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

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<sup>42</sup> See ANC, 1990. *Constitutional Guidelines for a Democratic South Africa* (1988), reprinted in ANC Department of Political Education (1990).

<sup>43</sup> See Harare Declaration: 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).

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 the 1993 “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 2 years.

While agreeing on a list of 34 constitutional principles and including them in Schedule 4 of the “interim” Constitution was less difficult than 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 decolonisation, 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 recognise 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 decolonisation. Under this rubric international law required that the right of self-determination be exercised by all inhabitants within the internationally-recognised borders of a former colony.

In this context the ANC was able to assert that the only internationally-recognised 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 "rights 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 nationalised 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, it 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-recognised 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 nationalise 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.

#### ***4.4.5 Institutional Design and Substantive Choices***

Last, but not least is the element of institutional design and substantive choices involved in 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 Balkanise 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 National Party and the Inkatha Freedom Party 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 sought this by promoting a version of local autonomy that was advanced by drawing on the Belgium and Swiss experiences. Second, the Inkatha Freedom Party sought 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 centre and the regions. The German model provided a more integrative approach as compared to either the United States 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.

## 4.5 Conclusion

There was once an assumption that all constitutions are simply reflections of national character and identity, but the re-emergence of constitutional review post-World War II, as well as the explosion of constitution-making and 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<sup>44</sup> and the related question of constitutional interpretation.<sup>45</sup> A more global perspective is reflected in the recent works that adopt a transnational approach, often considering broad themes – such as judicial independence<sup>46</sup> or the legitimacy of courts<sup>47</sup> – or questions of convergence and divergence in constitutional decision-making.<sup>48</sup> What is common across 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-World War 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. Constitution-building from this 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 undergird the 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 it “encompasses relatively stable political arrangements and guiding principles.”<sup>49</sup> By identifying different sources of variation and exploring these as aspects of a broader process of constitution-building this project seeks to use textured description of a particular historical experience, in the form of a “constitutional ethnography” to enhance our understanding of how constitutional democracies are created and sustained.

Although this approach focuses on a particular case, here South Africa, I believe our understanding of this experience might be usefully deepened by briefly comparing and contrasting aspects of this experience with this case with aspects of these processes in 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 have focused upon in the South African experience. Despite the clear and specific impact of national histories and domestic politics on the particular outcomes of constitution-making

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<sup>44</sup> Hirschl (2004).

<sup>45</sup> Goldsworthy (2006).

<sup>46</sup> Sajo (2004).

<sup>47</sup> Huls et al. (2009).

<sup>48</sup> Jackson (2010).

<sup>49</sup> Tushnet (2003), p. 1.



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 constitution's 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 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-World War I 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 20 seats in Parliament for a transitional period of 10 years. In contrast the claim of self-determination by Afrikaners in South Africa was given

partial recognition and it is an open question of 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 recognise 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 programme, 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 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.

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