Postcolonial Collages: Distributions of Power and Constitutional Models

With Special Reference to South Africa

Heinz Klug
University of Wisconsin Law School

abstract: The wave of post-Cold War state reconstruction was marked in its reliance on the adoption of new constitutions as the marker of a state’s transition to a new order. Whether at the beginning or end of the process, or as the central theme, as was the case in South Africa, post-Cold War constitutions came to reflect a common core of principles and institutions, despite the often nationalist tone surrounding their creation. This article argues that these constitutions both reflect a dominant post-Cold War international political culture and yet rely on their own histories and reconstruction processes to create hybrid forms to address local conditions. This process involves a specific politics, in which models – such as the US Constitution – are either used as models or anti-models, and results in the creation of a postcolonial collage of constitutional mechanisms and institutions that might offer an opportunity to achieve the democratic outcomes which have so often eluded postcolonial countries.

keywords: constitutional models ✦ constitution-making ✦ cooperative governance ✦ hybrid ✦ postcolonial

With independence, African states received newly crafted constitutions. In the first wave of decolonization these constitutions were drafted by the colonial powers and were closely modeled on one another. Despite the inclusion of bills of rights, in the case of the formerly British colonies, and other post-Second World War innovations, these documents mostly failed to prevent the re-emergence of a bureaucratic authoritarianism reminiscent of the colonial order – whether in the guise of state socialism, one-party states, or simple military dictatorships.

SAGE (London, Thousand Oaks, CA and New Delhi)
[0268-9580(2003)38:114–131;031434]
In the most recent period of state reconstruction, following the end of the Cold War, new constitutions were once again spreading across Africa; this time, however, there has been a greater emphasis upon democratic forms, including in the South African case, the creation of a democratically elected constitution-making body. While there could be no formal model in this moment of democratic constitution-making, in fact this coincided with the efforts of a major rule of law movement in which legal models have become a source of symbolic currency in the process of state reconstruction.

While I have previously shown how different constitutional models and ideas are deployed by competing internal constituencies to advance their particular goals (Klug, 2000), in this article I want to explore the adoption of particular features of post-Cold War constitutionalism – constitutional courts; devolved forms of state authority; and independent constitutional bodies – created with the purpose of fragmenting and taming state power. While based on the available ‘hegemonic’ models, these constitutional arrangements take on new forms in the postcolonial collage which has emerged from this latest round of state reconstruction.

**Constitutional Models, Constitution-Making and State Reconstruction**

The defining feature of the wave of political reconstruction and constitution-making that has characterized the end of the Cold War is its historical timing (Arjomand, 1992). Not only has the alternative of state socialism and many of its associated forms been at least temporarily discredited but also there has emerged a hegemonic notion of electoral democracy and economic freedom that is rooted in the history of 20th-century struggles for democracy and individual freedom. From the suffragettes to the civil rights and feminist movements, from labour struggles to the struggle for self-determination and decolonization, and on to the struggles for democratization in Latin America, against apartheid in South Africa and state socialism in Eastern Europe, the sum and combination of social movements and struggles that have characterized the 20th century have shaped international political culture.

Apart from this prevailing political culture, it is also possible to define certain trends that may be particularly salient in the context of each episode or wave of state reconstruction. Particular institutions, such as constitutional courts, have for example, reappeared at different times as significant elements of the constitutional structure adopted in the reconstruction of states, yet been completely absent as a viable option at other times. Likewise, each new wave of state reconstruction seems to produce new variations in the division of power, between centre and periphery.
and between different organs of government, as well as new conceptions of the relationship between different branches of government. The latest wave has seen the mass adoption of bills of rights and constitutional courts as well as the creation of a range of new independent institutions designed to both protect democracy on the one hand and simultaneously circumscribe the powers of legislative majorities and democratically elected governments on the other.

If this latest period of political reconstruction has been dominated by an international political culture fashioned out of the political hegemony gained by the collapse of state socialism, this does no more than set the outside parameters to the politics of constitution-making. Furthermore, this does not mean that the new hegemony does not contain within itself a degree of conflict and indeterminacy that allows for a range of alternative responses by those engaged in the constitutional politics of state reconstruction within different national contexts. In fact, even those states who consciously attempted to define themselves as part of the ‘new world order’ exhibit a range of responses. These reflect not only their own particular historical contexts, but also their historical experiences of the social and political struggles that have shaped the now dominant international political culture, that their different processes of reconstruction are addressing.

While reflecting many of the broad trends identified by Said Arjomand (1992), international political culture is characterized in this latest period by a contradictory set of alternatives. On the one hand, there is the emphasis on human rights as the core contribution of 20th-century constitutionalism, while on the other hand, there is a set of institutional arrangements and claims for institutional and economic autonomy that demonstrate the power of the Bretton Woods institutions and transnational capital in this latest wave of state reconstruction. Thus, although bills of rights and constitutional courts empowered to review the constitutionality of legislative enactments are a common feature of post-Cold War constitutions, these constitutions are also marked by broad guarantees for the creation and protection of market economies, independence of national banks controlling the value of a state’s currency, independent oversight of state expenditures and an emphasis on the new state’s recognition and incorporation of international or global norms rather than the nationalist assertion of local identity so common in the rhetoric of state formation.

**Constitutionalizing Power: The Separation of Powers, Regionalism and Independent Institutions**

In the case of South Africa, despite the particularities of its history and democratic transition, the basic features of the new constitutional order –
including a bill of rights, constitutional court and a plethora of independent institutions – conform to the basic elements of the post-Cold War international political culture. However, the constitutional outcomes – the 1993 'interim' and 1996 'final' constitutions – of South Africa's democratic transition also reproduced the post-Cold War international political culture in a particular hybridity. This outcome reflects the specific political struggles and historical legacies which shaped and gave legitimacy to each particular constitutional option. It is this interaction then, between the authority of particular alternatives (Scheppel and Soltan, 1987) and the conflicting demands of local politics, which determines whether particular constitutional options are excluded or adopted. This process of exclusion and adoption then frames the particular constitutional collage which will emerge as the basis of the reconstituted state.

Despite very different agendas and interpretations, the negotiating parties in South Africa came to accept the inclusion of a constitutional court and bill of rights at a very early stage in the transition. In fact, the ANC had issued a list of constitutional principles as early as 1988 which committed the organization to some form of judicial review and the adoption of a bill of rights, while the National Party regime had requested the South African Law Commission – a government-sponsored law reform body – to investigate group and individual rights as part of its own preparations for the reform of apartheid. Thus the central legal development in implementing the 'transitional' 1993 Interim Constitution was the establishment of a constitutional court to give effect to the supremacy of the constitution and the new human rights culture introduced by the commitment to constitutionalism.

Likewise, the inclusion in the 1993 Interim Constitution of a plethora of institutional checks and balances reflected the attempt to fragment state power so common in post-Cold War constitution-making. At one level, these were rooted locally in the difficulties of the political transition. First, in the need for an independent body to oversee the first democratic elections, and second, in the creation of a range of institutions designed to secure a level political playing field and accommodate the de facto exercise of dual power during the period leading up to the first elections. At another level, these institutions were inspired by the existence and practice of independent electoral commissions in a number of foreign jurisdictions.¹

While the dangers of governmental abuse of power was well recognized by the different parties, agreement to include mechanisms designed to disperse and control the exercise of power in the 1993 Interim Constitution was facilitated by the emphasis on accountable and transparent government reflected in the international debate on governance during this period (see World Bank, 1989; Commission on Global Governance,
On the one hand, mechanisms were introduced to distance certain decisions from party political or purely government control and to ensure transparent and clean government, while on the other hand there were various institutions designed to further human rights and to prevent the abuse of government power. The first category included the Independent Electoral Commission, the Judicial Service Commission, the Public Service Commission and the Financial and Fiscal Commission, which serve to insulate the electoral system, judicial and public service appointments, as well as the distribution of financial allocations and resources between the regions, from purely party political dynamics. Provision was also made for the appointment of an ombudsperson called the Public Protector, an Auditor-General and a parliamentary standing committee with powers of parliamentary supervision over the National Defence Force. The procurement of goods and services by government was also to be insulated from political interference by the creation of independent tender boards at every level of government.

The second category of mechanisms established to check abuses of power and to promote human rights includes the Human Rights Commission, with a mandate to develop an awareness of fundamental rights and to investigate any alleged violation of human rights, and the Commission on Gender Equality which was constitutionally charged with the duty to promote gender equality. Apart from an advisory function with respect to proposed legislation and the power to educate and investigate, the Human Rights Commission was empowered to receive complaints and to assist, even financially, those adversely affected by a violation of their fundamental rights to seek redress before a competent court.

Significantly, it was the embrace of independent institutions within the new state structure that permitted the emergence of a new form of independent institution designed to address certain particularities of the South African situation. Given the fact that democratization would most likely preclude the old political elite from political power, institutions were developed to insure the participation of all formal political factions in particular decision-making processes. The Financial and Fiscal Commission, for example, is appointed by the president but is required to include representatives from each provincial executive council. Although designed to render advice and to make recommendations to the relevant legislative authorities on the distribution of financial resources between the different levels of government, the constitutional requirement that the Commission be consulted prior to the allocation of revenue and that its recommendations be taken into account will give significant weight to the Commission’s advice. The parliamentary standing committee to monitor the National Defence Force also provides for the participation of all political parties in the control of a vital state institution.
Another central feature of the post-Cold War process of political reconstruction has been the delinking of the control of currency values and fiscal policy from the government of the day through the creation of constitutionally independent central banks. Both the 1993 Interim Constitution and the 1996 Constitution provide for an independent central bank along with a number of other mechanisms designed to ‘stabilize’ the financial structure of the state by removing political discretion and requiring consultation in the distribution of revenue between different spheres of government – national, provincial and local – as well as an independent commission to recommend levels of remuneration for public officials.

Despite this clear adherence to the dominant post-Cold War paradigm of fragmented power and the insulation of financial powers from the ‘instability’ of democratic politics, the attempt to constitutionalize a particular economic orientation as well as to constitutionalize the relationship between capital and labor – through the inclusion of a right to freely engage in economic activity and a labour relations clause in the 1993 Constitution’s Bill of Rights – proscribed the limits of the post-Cold War paradigm in the context of South Africa’s constitutional politics. First, the broadly crafted right to economic activity clause of the 1993 Constitution – interpreted by its proponents as guaranteeing a free market economy – was replaced by a more limited clause guaranteeing the right of individuals to freely choose their trade, occupation or profession. Second, because the labor movement’s mobilization of working-class support for a non-racial order was central to the ANC’s success, the labor movement was able to make an important claim for recognition beyond the formal management/worker relationship, asserting its right to represent workers as a class and arguing for the explicit recognition of socioeconomic or class interests in the new constitutional order.

Although the new constitutional dispensation on the one hand tracks the post-Cold War paradigm in limiting state power and leaving redistributive issues to the market, on the other hand the South African process of reconstruction also brought forth particular mechanisms designed to address the legacy of apartheid. Significantly, the attempt to follow the dominant post-Cold War paradigm by constitutionalizing economic priorities and existing property relations created political space for the inclusion of a counter-hegemonic trend which was further consolidated in the ‘final’ 1996 Constitution. Thus, the ‘final’ constitution includes various mechanisms designed to address the legacy of apartheid including: constitutional protections for state policies of affirmative action; provisions for the restitution of land as well as specific protections for land reform; and also the introduction of socioeconomic rights as justiciable rights within the Bill of Rights.

Another innovation is the idea of cooperative government which
attempts to constitutionalize an interactive relationship between different levels of government. Declaring that the three spheres of government – national, provincial and local – are ‘distinctive, interdependent and interrelated’, the chapter on cooperative government proceeds to place duties on these respective institutions regulating their interaction. An important aspect of these duties is the requirement to ‘exhaust all other remedies before’ approaching a court to resolve a dispute between different levels of government. While this section secures the prerogatives of the different layers of government it also makes clear that they do not exist in isolation of one another and attempts to regulate the inevitable tensions which will arise. The result is an attempt to both flatten the inevitable hierarchy which exists between these levels of government and to provide a principled scheme for managing their relationship.

Cooperative Government and Regionalism in South Africa

Entering the negotiations the three major political parties held distinct if developing views on federalism, regional government and diversity. For the African National Congress (ANC) a future South Africa would have to be based on a common citizenship and identity which could only be achieved through a collective effort to overcome apartheid’s legacy (ANC, 1994: 1–3). The National Party (NP), on the other hand, conceived of a future South Africa in which local communities would be able to voluntarily choose to pursue their own living arrangements without interference from the state (NP, 1991a; 1991b: 12). Finally, the Inkatha Freedom Party (IFP) advocated complete regional autonomy which it described as ‘federalism’, as a means to ensure the self-determination of particular communities (see IFP, 1993).

Although the protagonists of a federal solution for South Africa advocated a national government of limited powers, the transitional 1993 Constitution reversed the traditional federal division of legislative powers by allocating enumerated powers to the provinces. This allocation of regional powers – according to a set of criteria incorporated into the constitutional guidelines and in those sections of the constitution dealing with the legislative powers of the provinces – was, however, rejected by the IFP on the grounds that the constitution failed to guarantee the autonomy of the provinces. Despite the ANC’s protestations that the provincial powers guaranteed by the constitution could not be withdrawn, the IFP pointed to the fact that the allocated powers were only concurrent powers and that the national legislature could supersede local legislation through the establishment of a national legislative framework covering any subject matter. This tension led to an amendment to the 1993
Constitution before the constitution even came into force. According to the amendment the provinces were granted exclusive powers in enumerated areas of legislative authority. Difficulty arose in distinguishing the exact limits of a region's exclusive powers and the extent to which the national legislature was able to pass general laws affecting rather broad areas of governance. Although the provinces had the power to assign executive control over these matters to the national government if they lacked administrative resources to implement particular laws, the constitution provided that the provinces had executive authority over all matters over which they had legislative authority, as well as matters assigned to the provinces in terms of the transitional clauses of the constitution or delegated to the provinces by national legislation. The net effect of these provisions was continued tension between non-ANC provincial governments and the national government over the extent of regional autonomy and the exact definition of their relative powers.

It is in this context that three particular cases were litigated before the constitutional court in 1996. All three cases involved, among other issues, claims of autonomy or accusations of national infringement of autonomy by the province of KwaZulu-Natal, where the IFP was declared the marginal winner of the regional vote in 1994. As such they also represent three moments in which the constitutional court was called upon to help shape the boundary between contending claims of constitutional authority to govern, unresolved by the negotiated settlement. While two of the cases directly implicated actions of the KwaZulu-Natal legislature and its attempts to assert authority within the province — in one case over traditional leaders and in the other the constitution-making powers of the province — the first case involved a dispute over the National Education Policy Bill, which was then before the National Assembly.

Objections to the National Education Policy Bill focused on the claim that the 'Bill imposed national education policy on the provinces' and thereby 'encroached upon the autonomy of the provinces and their executive authority'. The IFP argued that the 'Bill could have no application in KwaZulu-Natal because it [the province] was in a position to formulate and regulate its own policies'. While all parties accepted that education was defined as a concurrent legislative function under the interim constitution, the contending parties imagined that different consequences should flow from the determination that a subject matter is concurrently assigned to both provincial and national government.

KwaZulu-Natal and the IFP in particular assumed a form of pre-emption doctrine — based on an inverted notion of the US federal pre-emption doctrine — in which the National Assembly and national government would be precluded from acting in an area of concurrent jurisdiction so long as the province was capable of formulating and regulating
its own policies. In rejecting this argument, the constitutional court avoided the notion of pre-emption altogether and instead argued that the ‘legislative competences of the provinces and Parliament to make laws in respect of schedule 6 [concurrent] matters do not depend upon section 126(3)’, which the court argued only comes into operation if it is necessary to resolve a conflict between inconsistent national and provincial laws.21 The court’s rejection of any notion of pre-emption is an interpretation of the constitution which enables both national and provincial legislators to continue to promote and even legislate on their own imagined solutions to issues within their concurrent jurisdiction without foreclosing on their particular options until there is an irreconcilable conflict.

Having avoided siding categorically with either national or provincial authority, the court took a further step arguing that even if a ‘conflict is resolved in favour of either the provincial or national law the other is not invalidated’ it is merely ‘subordinated and to the extent of the conflict rendered inoperative’.22 Supported by the comparative jurisprudence of Canada23 and Australia,24 the court was able to make a distinction between ‘laws that are inconsistent with each other and laws that are inconsistent with the Constitution’,25 and thereby argue that ‘even if the National Education Policy Bill deals with matters in respect of which provincial laws would have paramountcy, it could not for that reason alone be declared unconstitutional’.26

While the constitutional court’s approach clearly aimed to reduce the tensions inherent in the continuing conflict between provincial and national governments, particularly in relation to the continuing violent tensions in KwaZulu-Natal, it also took the opportunity to explicitly preclude an alternative interpretation. Focusing on an argument before the court which relied upon the US Supreme Court’s decision in New York v. United States,27 the court made the point that ‘Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states’.28 Furthermore, the court warned that ‘Decisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution’.29 In effect the court’s approach was to begin to draw a boundary around the outer limits of provincial autonomy while simultaneously allowing concurrent jurisdiction to provide a space in which different legislatures could continue to imagine and assert their own, at times contradictory, solutions to legislative problems within their jurisdiction.

The scope of such a definition of concurrent jurisdiction was immediately tested in a case challenging two bills before the KwaZulu-Natal provincial legislature which purported in part to preclude national action affecting the payment of salaries to traditional authorities in
KwaZulu-Natal. In this case, brought by ANC members of the KwaZulu-Natal legislature, the objectors argued that the bills were unconstitutional as they amounted to an attempt to ‘frustrate the implementation of the [national] Remuneration of Traditional Leaders Act’, by preventing the Ingonyama (Zulu King) and traditional leaders ‘from accepting remuneration and allowances which might become payable to them in terms of the national legislation’. Furthermore, the object of this provincial legislation ‘was to create a relationship of subservience between them [traditional leaders] and the provincial government’, an object outside the scope of the province’s concurrent powers with respect to traditional authorities.

The court’s response was to first lament that the political conflict concerning KwaZulu-Natal had degenerated to a state in which the right to pay traditional authorities, as a means to secure influence over them, should have become an issue. Recalling that traditional leaders ‘occupy positions in the community in which they can best serve the interests of their people if they are not dependent or perceived to be dependent on political parties or on the national or provincial governments’, the court noted that its role is limited to deciding ‘whether the proposed provincial legislation is inconsistent with the Constitution’.

Faced with intractable political conflicts between the IFP and ANC in KwaZulu-Natal, the court reasserted its duty to interpret legislation narrowly so as to avoid constitutional conflicts and upheld the legislative competence of the KwaZulu-Natal legislature and the constitutionality of the two bills. In effect, the court allowed the KwaZulu-Natal legislature to continue to imagine its own authority in this area, merely postponing clear questions of conflict between the national and provincial legislation to a later date. The outer limits of the court’s tolerance for alternative constitutional visions was, however, reached in the third case in which the court was asked to certify the Constitution of the Province of KwaZulu-Natal.

The certification process, of both the national as well as provincial constitutions, is itself a unique aspect of the South African process of reconstruction. Given the nature of the negotiated transition, in which the ruling racial minority would not give up power without some guarantee of the outcome and the opposition’s demand that South Africans be able to exercise national self-determination through a democratic process, the only way forward was a two-stage constitution-making process. The first involved the adoption of a negotiated constitution leading to South Africa’s first democratic election. The second involved the newly elected legislative bodies forming a constitutional assembly for the purpose of adopting a democratically fashioned ‘final’ constitution. In order to get agreement on this process, the parties negotiated a deal in which a set of constitutional principles were included in the negotiated interim constitution and the newly created constitutional court was mandated to certify
that the ‘final’ constitution conformed to these mutually agreed upon principles. While some courts, such as the Indian Supreme Court and the German Constitutional Court have articulated doctrines under which they are prepared to evaluate constitutional amendments against the basic structure and principles of the constitution, this was the first instance in which a court was required to certify that a democratically created constituent body, usually considered the embodiment of popular or national sovereignty, had not exceeded its mandate.

Declaring the new text of the final constitution ‘unconstitutional’, despite its adoption after last-minute political compromises by 86 percent of the democratically elected Constitutional Assembly, was on its face a bold assertion of the power of judicial review. Yet, the constitutional court’s denial of certification was far more measured and subtly crafted than this bold assertion of ‘unconstitutionality’ implies. In fact, the constitutional court was careful to point out in its unanimous, unattributed, opinion, that ‘in general and in respect of the overwhelming majority of its provisions’, the Constitutional Assembly had met the predetermined requirements of the constitutional principles. In effect then, this was a very limited and circumscribed ruling. This analysis was confirmed when the major political parties rejected any attempt to use the denial of certification as a tool to reopen debates, instead the Constitutional Assembly focused solely on the issues raised by the constitutional court (Madlala, 1996: 4, col. 2). This was not to be the case when it came to the provincial constitutions proffered by the two provinces – Western Cape and KwaZulu-Natal – where opposition parties gained power and attempted to use the provincial constitution-making process as a means to further local autonomy.

Although the KwaZulu-Natal draft constitution had been unanimously adopted by the provincial legislature, the constitutional court held that there were ‘fundamental respects in which the provincial Constitution is fatally flawed’, and therefore declined to certify it. The court considered these flaws under three headings. Two sets of problems were essentially procedural in nature and involved attempts by the KwaZulu-Natal legislature: (1) to avoid the court’s determination of the text’s inconsistency with the interim constitution, or (2) to suspend the certification process itself until particular sections could be tested against the final constitution. While the court rejected these devices as being in conflict with the certification process and attempting to circumvent the process respectively, the most significant problem with the text was the KwaZulu-Natal legislature’s usurpation of national powers.

Referring to the court’s decision in the National Education Policy Bill case, in which it made a ‘distinction between the history, structure and language of the United States Constitution which brought together several sovereign states . . . and that of our interim Constitution’, the
court held that parts of the proposed KwaZulu-Natal constitution appeared to have been passed by the KZN Legislature under a misconception that it enjoyed a relationship of co-supremacy with the national Legislature and even the Constitutional Assembly.\footnote{39} Drawing a clear boundary around the permissible constitutional aspirations of the IFP in KwaZulu-Natal, the court rejected the draft text’s attempt to both ‘confer’ legislative and executive authority upon the province\footnote{40} and to ‘recognize’ the authority of the government and ‘competence’ of the national parliament in other respects.\footnote{41} While recognizing the right of the IFP-dominated KwaZulu-Natal legislature to exercise its powers to draft a provincial constitution, even possibly including its own bill of rights, the court clearly rejected the attempt by the IFP to assert its vision of regional autonomy beyond the core meaning of the negotiated compromise represented by the 1993 Constitution. Furthermore, the court clearly silenced the extreme option of provincial sovereignty stating that the assertions of recognition were ‘inconsistent with the interim Constitution because KZN is not a sovereign state and it simply has no power or authority to grant constitutional “recognition” to what the national Government may or may not do’.\footnote{42}

Although the IFP had walked out of the negotiations in which the interim constitution was drafted and refused to participate in the Constitutional Assembly during the making of the 1996 Constitution, it nevertheless proceeded to produce its own provincial constitution and submitted it to the constitutional court in terms of the 1993 Constitution. Even as its vision of regional autonomy became increasingly isolated, the IFP still imagined that it could be achieved within the parameters of the 1993 Constitution. Its rejection by the constitutional court silenced this particular attempt, but did not foreclose on the IFP’s vision of greater regional autonomy.

Instead of suffering defeat, the IFP was able to take solace from the court’s refusal, on the same day, to certify the draft of the final national constitution, and in particular the court’s decision that the draft of the final constitution had failed to grant provinces the degree of autonomy they were guaranteed in the constitutional principles.\footnote{43} However, when the 1996 Constitution was finally certified by the constitutional court\footnote{44} the IFP remained dissatisfied over the limited degree of provincial autonomy recognized in the constitution. However, by then the IFP, as the governing party in KwaZulu-Natal, was not about to exit the system. Instead, they joined the other opposition parties in saying that they would take the opportunity in the following year’s legislative session to review the constitution,\footnote{45} thus keeping their claims alive.

Although traditional notions of federalism assume the coming together of formerly sovereign entities and their retention of certain specified
powers, South Africa's 1996 'final' Constitution represents an increasingly common means of constitutionalizing the relationship between different spacial jurisdictions within the nation-state. South Africa's 'constitutional regionalism' is one in which the constituting act created a structure in which powers are allocated to different levels of government and includes a complex procedure for the resolution of conflicts over governance – between the respective legislative competencies, executive powers and relations with other branches and levels of government. Unlike its German, Indian and Canadian forebears however, South Africa's Constitution places less emphasis on geographic autonomy and more on the integration of geographic jurisdictions into separate functionally determined roles in the 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.

**Conclusion: Constitutional Models and their Hybridization**

The US Constitution was, for almost a century and a half, the essential prototype of a written, single-document constitution. But, it was only in the 20th century that the US Constitution began to emerge as a popular source of constitutional structures and institutions for constitution-makers. Even then, constitution-makers have been very reluctant to incorporate some of the most basic American structural and institutional forms. For example, although notions of federalism and bills of rights were readily taken up, the content was often quite different: very few constitution-making bodies have accepted the notion of a national government of limited powers, instead the subunits – regions and provinces – have been given limited powers; likewise, bills of rights have often been included but the mechanisms of enforcement have remained weak. In the case of judicial review, for example, many constitutions have explicitly adopted the idea of judicial or constitutional review, yet there has been a marked reluctance to accept the corresponding American idea of lifetime judicial appointments. Instead, constitution-makers have tended to favor limiting judicial appointments to a particular term of years, thus keeping the membership of the highest constitutional court more closely tied, through the appointment process, to the broad contours of changing political circumstances. With non-renewable terms of seven to 12 years, constitution-makers have tried to both insure judicial independence while making the court as a whole subject to democratic shifts that produce the changing political forces who control the appointment process.
In more specific ways, US constitutional formulations and their history have been used by constitution-makers as the anti-model. The Indian Constituent Assembly, for example, sent its official constitutional advisor, Sir B. N. Rau, on visits to Ireland, Britain and the US, where he met with scholars, judges and politicians. As a result of discussions Rau had with Justice Felix Frankfurter, India’s constitution-makers specifically rejected the phrase ‘due process of law’ (see Seervai, 1983: 692–3) for fear of replicating the American Lockner era jurisprudence which was understood to have blocked progressive legislative action and thus slowed social change, an outcome antithetical to the goals of social transformation the constitution-makers felt were to be encouraged by India’s postcolonial constitution. Although the Indian Supreme Court would with time, and through the development of the concept of equality in the administrative law arena, produce its own jurisprudence protecting many of the claims considered under the due process clause of the US Constitution, in its first constitutional case, *A. K. Gopalan v. The State of Madras,* the court relied in part on this particular history of the constitution-making process to reject an interpretation based on the US Constitution. As the court recognized, the constitution-makers had with all deliberate intent avoided a simple adoption of the US Constitution’s protection of due process (Seervai, 1983: 692–3).

In the South African case, constitution-makers who were aligned to the ANC – and who, after the elections, were the great majority in the Constitutional Assembly – were concerned that any property clause adopted should clearly distinguish between expropriation, which would require compensation, and diminution in the value of property as a consequence of mere governmental regulation, which would not be considered eligible for compensation. Although the jurisprudence of Commonwealth jurisdictions clearly distinguishes between a taking and loss of value due to regulation, the concern of the South African constitution-makers was roused by the protracted takings jurisprudence of the US Supreme Court. They were concerned to avoid the concept of an inverse condemnation or regulatory taking which threatens to make government regulatory action subject to the ability of the public to pay for the material consequences to individual property owners (Chaskalson, 1995). While the South African Constitutional Court has yet to face this issue squarely, the property provisions of the 1996 Constitution only protect property against arbitrary deprivation and explicitly define the legal process of expropriation so as to exclude governmental regulation, and include a list of factors to be used in determining the amount of compensation due the former owner in the case of an expropriation.

Similar efforts may be seen in the creation of federal arrangements in Canada, India and Nigeria, where despite different political contexts and
origins, the basic geographic distribution of power – emanating from the national government and limited in its distribution to the subunits – inverted the original federal form created in the US. Even in the Federal Republic of Germany, where US influence over the constitution-making process was quite direct, especially on the issue of federalism, the constitution-makers drew on local forms to evolve a completely different structure, one in which the regional units or Lande both participate directly in the creation of national legislation and implement federal policy and legislation within their own jurisdictions. While not necessarily serving as a simple anti-model in these cases, it is clear that even in the field of federalism, in which the US was the originating model, subsequent constitution-makers have sought their own particular forms.

It is in the jurisprudence of supreme courts and constitutional courts around the world that the true use of the anti-model may be witnessed. The highest courts of constitutional review in Canada, India, South Africa, Zimbabwe and even the Privy Council of the House of Lords in reviewing cases from the Commonwealth, all engage in extensive discussion of comparative constitutional jurisprudence and the case law of the US Supreme Court in particular – quite unlike the rather parochial focus of courts in the US. However, despite extensive citation of US cases, and reliance on some of the arguments employed by US Supreme Court justices, by and large the US jurisprudence has been increasingly used as counter-example, as a source of distinction, or merely distinguished as inapposite. In the case of the South African Constitutional Court, for example, despite early predictions and fears that the court might follow US jurisprudence uncritically, differences in ‘constitutional language and structure, as well as history and culture’ has led the court to be fairly circumspect (Blake, 1999: 197).

The outcome of this latest wave of state reconstruction and constitution-making in particular is the creation of a new collage of constitutional mechanisms and principles. While in many cases these have tracked the particular models of governance which have gained dominant symbolic power in the post-Cold War era, in others the engagement of external models and local prerogatives has produced hybrid solutions tailored to address the imperatives of each particular state’s history and process of reconstruction. In South Africa and many other formerly colonial contexts, this latest wave of state reconstruction is producing a new postcolonial collage of governmental institutions and processes that hopefully will begin to address the needs of democratic governance which has proved so difficult to maintain in the postcolonial era.
Notes

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1. The idea of an independent electoral commission was, in fact, introduced at an ANC Constitutional Committee organized conference on electoral systems after the ANC was invited by the National Democratic Institute to send a delegate to join their election observer mission – headed by Bruce Babbitt – to Guatemala in October 1990.


4. Constitution of the Republic of South Africa 1993, section 228(3)


9. Even the UK, which does not have a written constitution, saw the newly elected Labour Party government in 1997, in one of its first official acts, grant independence to the Bank of England.


11. See Constitution of the Republic of South Africa 1996, sections 214(1) and 220


18. Areas deemed of exclusive jurisdiction to provincial legislatures included: agriculture; gambling; cultural affairs; education at all levels except tertiary; environment; health; housing; language policy; local government; nature conservation; police; state media; public transport; regional planning and development; road traffic regulation; roads; tourism; trade and industrial promotion; traditional authorities; urban and rural development; and welfare services.


20. para. 8, NEB Case.

21. para. 16, NEB Case.

22. para. 16, NEB Case.

23. para. 17, NEB Case.

24. para. 18, NEB Case.

25. para. 16, NEB Case.

26. para. 20, NEB Case.

27. 505 US 144 (1992)
28 para. 23, NEB Case.
29 para. 23, NEB Case.
30 Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995, 1996 (4) SA 653 (CC); hereinafter Amakosi Case
31 para. 16, Amakosi Case
32 para. 16, Amakosi Case
33 para. 18, Amakosi Case.
35 para. 13, KZN Constitution Case
36 See para. 36–38, KZN Constitution Case
37 See para. 39–46, KZN Constitution Case.
38 para. 14, KZN Constitution Case
39 para. 15, KZN Constitution Case.
40 para. 32, KZN Constitution Case
41 para. 34, KZN Constitution Case
42 para. 34, KZN Constitution Case.
45 Mail and Guardian, 11 November 1996
46 13 Supreme Court Journal 174 (1950). Gopalan was reconsidered and rejected in RC Cooper v Union, 3 Supreme Court Reports 530 (1970).
47 13 Supreme Court Journal 174 (1950) at 184–185 As Chief Justice Kania argued, ‘Four marked points of distinction between the clause in the American Constitution and Article 21 of the Constitution of India may be noticed. . . . The first is that in the USA Constitution the word “liberty” is used simpliciter while in India it is restricted to personal liberty. (2) In the USA Constitution the same protection is given to property, while in India the fundamental right in respect of property is contained in Article 31 (3) The word “due” is omitted altogether and the expression “due process of law” is not used deliberately. (4) The word “established” is used and is limited to “Procedure” in our Article 21.’

References

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**Biographical Note:** Heinz Klug is associate professor in the Law School at the University of Wisconsin-Madison and is an Honorary Research Associate in the School of Law at the University of the Witwatersrand, Johannesburg, South Africa. He is an Advocate of the High Court of South Africa and a member of the California Bar. Growing up in Durban, South Africa, he participated in the anti-apartheid struggle as a journalist and African National Congress activist. After 11 years in exile, he returned to South Africa in 1990 to teach law at the University of the Witwatersrand. He has worked with various ANC commissions and government ministries on a range of issues including constitutional questions, land affairs and water policy. He has recently published *Constituting Democracy: Law, Globalism, and South Africa’s Political Reconstruction* (Cambridge University Press, 2000).

**Address:** University of Wisconsin Law School, 975 Bascom Mall, Madison, WI 53706, USA. [email: klug@wisc.edu]