SPECIAL ISSUE:
The South African Constitution in Transition
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PARTICIPATING IN THE DESIGN:
CONSTITUTION-MAKING IN SOUTH AFRICA

Heinz Klug

Constitution-making has typically been an elite driven process. The nature of this process and its outcome — the fettering of the will of the majority — has led to assertions that constitutionalism is anti-democratic. The author here concedes that these assertions are valid, but argues that the process leading up to the adoption of the interim South African Constitution tended to minimize elite domination and, indeed, was relatively inclusive. Professor Klug suggests that the confluence of a variety of forces, both domestic and international, necessitated an open and inclusive process of constitution-making in South Africa. As a result, groups based on shared characteristics, such as ethnicity, gender or class formed, and with varying degrees of success, were able to influence the outcome of constitutional negotiations. Indeed, South Africa’s history is such that an elite dominated constitution-making process, particularly a process involving the National Party, would be widely perceived as profoundly illegitimate. The stage thus was set for the adoption of a final constitution by an inclusive, democratically elected South African Constitutional Assembly.

La rédaction d’une constitution a toujours été un processus influencé par l’élite. La nature de ce processus et son résultat — le bâillonnement de la voix de la majorité — a conduit à affirmer que le constitutionnalisme est anti-démocratique. L’auteur reconnaît ici la validité de ces assertions, mais démontre qu’en Afrique du Sud, le processus d’adoption de la Constitution provisoire a tendu à minimiser la domination de l’élite et qu’il s’est en fait avéré relativement inclusif. Le Pr Klug suggère que la confluence de diverses forces, domestiques et internationales, a imposé le caractère ouvert et inclusif de ce processus en Afrique du Sud. Il s’ensuit que certains groupes aux caractéristiques communes (ethnicité, genre ou classe) se sont formés et, avec un succès mitigé, ont influencé le résultat des négociations constitutionnelles. Compte tenu de l’histoire sud-africaine, il est évident qu’un processus d’élaboration de la constitution dominé par l’élite, et impliquant de surcroît le National Party, avait de quoi être largement perçu comme profondément illégitime. Tout semble indiquer que le texte définitif sera donc adopté par une Assemblée constitutionnelle sud-africaine démocratiquement élue et inclusive.

1. INTRODUCTION

The act of constitution-making lies at the center of the tension between rational design,¹ which views the act as the supreme case of human societies'...
self-definition and Karl Marx’s most enduring insight, that ‘men’ make their own history but are burdened and shaped by what has gone before. The two poles of this tension may be juxtaposed as agency and structure, with each emphasis having surprisingly counter-intuitive implications for the issue of participation. At one extreme, the practice of constitution-making through normatively framed deliberations of institutional design for good government is dominated by elite interventions or, at best, public debate. The other extreme is a constrained outcome of mobilization and contestation within structural limitations, yet it is often characterized by mass participation and democratic processes rather than elite consensus.

Most studies of constitution-making and constitutionalism emphasize the pole of deliberative rationality through their focus on institutional design and control over the exercise of political power. But the creation of South Africa’s first post-apartheid constitution seems to represent, simultaneously, both polar extremities. While bilateral bosberaads (secret retreats) between the negotiating parties seemed consistent with an analysis of the process as elite-pacting


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

Constrained by structural limits imposed by the local balance of power and international imperatives, the record of the multi-party negotiations and the public debate reveals a process of deliberation and persuasion in negotiations over the 1993 Constitution.5

As the transition progressed, South Africans discovered that political participation is built on a far more complex, fluid set of identities and interests than those privileged by apartheid. Instead of remaining bound by the racial divisions which formed the primary political identity of most South Africans under apartheid, the process of constitution-making unleashed a range of claims for the recognition of specific social identities and conflicts. This mobilization of claims of difference and for specific recognition seemed, when based on race and ethnicity, to envelop the negotiations in the burdens of apartheid’s past. However, in other respects, when it reflected claims based on gender, class, religious or cultural recognition, it generated public debate and activity aimed at resolving previously marginalized or excluded issues.

These observations confirm Daniel Elazar’s argument that constitution-making “is an eminently political act.”6 Elazar, however, rejects the formal

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5 This process of deliberation goes beyond negotiations over the 1993 Constitution and includes a constitutional discussion/debate that has been going on at varying degrees of intensity since the all-white National Convention which formulated a united South Africa’s first constitution in 1910. For an overview of South Africa’s constitutional discourse see generally J. A. Benyon, ed., Constitutional Change in South Africa (Pietermaritzburg: University of Natal Press, 1978); L. J. Boule, South Africa and the Consociational Option A Constitutional Analysis (Kenwyn: Juta, 1984); R. Suttner & J. Cronin, eds., 30 Years of the Freedom Charter (Johannesburg: Ravan Press, 1986); J. A. Polley, ed., The Freedom Charter and the Future (Mowbray, SA: IDASA, 1988); A. Sachs, Protecting Human Rights in a New South Africa (Cape Town: Oxford University Press, 1990); D. L. Horowitz, A Democratic South Africa?: Constitutional Engineering in a Divided Society (Berkeley: University of California Press, 1991); A. Sachs, Advancing Human Rights in South Africa (Cape Town: Oxford University Press, 1992); and R. A. Licht & B. de Villiers, eds., South Africa’s Crisis of Constitutional Democracy Can the U.S. Constitution Help? (Kenwyn: Juta, 1994)


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comparative approach of an earlier generation of political scientists who withdrew from the study of constitutional politics. He proceeds by constructing a formal classification of constitutional models. Analyzing constitutions as “power-maps,” Elazar argues that “processes for constitutional change are shaped by the fundamental form or character of the polity.” He identifies three basic models of constitution-making: hierarchical, organic and covenantal, which traverse different degrees of participation, from the strictly hierarchical model to the more formal and participatory processes characteristic of constitutional pacts among equals. Despite the descriptive power of such formal schema, this approach to constitution-making fails to recognize the centrality of the articulation of different forms and degrees of participation with the historical availability of particular constitutional norms and institutions.

While repudiating the privileging of concerns over the abuse of political power, the advocates of a “new constitutionalism” insist on a constructivist approach, which retains the focus on institutional design and with it modernist assumptions of a universalistic rationality. This approach does, however, adopt a more normative analysis, sharing many of the concerns of legal and political philosophy, compared to traditional political science approaches to constitution-making — which fluctuate between generalized descriptive analysis and the specificities of particular national experiences. But even the more socio-legal and political economy approaches to constitution-making, which emphasize the structural impact of context by focusing on the relative strengths of opposing political forces and the consequences of elite pact ing on the process of constitution-making, tend to overlook external influences — structural, political and cultural.

Through an examination of the different degrees and forms of participation in South Africa’s constitution-making process, I intend to explore the

7 Ibid.
8 Ibid at 242.
9 Ibid at 243.
10 Ibid at 242-246.
12 See S. L. Elkin, “Constitutionalism’s Successor” in New Constitutionalism, ibid. at 70-95.
13 See generally, Redesigning The State, supra note 6.
14 See Davis, supra note 4.
relationship inherent in democratic constitution-making between processes of deliberative rationality and the structural, political and cultural influences which shape the boundaries of institutional design and participation. First, I will discuss the transmission of global political culture and its consequences for the constitution-making process. The impact of these influences will be reflected in a comparison of the practices and substantive goals of the main political actors in their formulation of alternative constitution-making proposals. Second, I will focus on the specific constraints associated with South Africa's democratic transition away from apartheid. This will be reflected in a discussion of the impact of the different factors — international pressures, political struggles, popular participation and negotiations — on the formulation of the two-stage constitution-making process adopted by the parties. Third, I will examine the different forms of political mobilization and popular 'participation' and their impact on the shaping of the 'interim' constitution, in particular, the provisions for the next round of constitution-making as defined by the 1993 Constitution. In conclusion, I will consider the relationship between different understandings of democratic constitution-making — as an act of self-binding, representation or elite pacting — and the aspirations and limits of popular participation in the creation of a constitutionalist order.

II. BURDENS OF THE PAST AND PRESENT: THE TRANSMISSION OF INTERNATIONAL POLITICAL CULTURE

Although even comparative discussions of constitutions and constitution-making tend to emphasize the historical uniqueness of individual national constitutions and the futility of the imposition of 'foreign' constitutional formulations, it is acknowledged that the vast majority of the world's constitutions reflect the appropriation of a heterogeneous range of constitutional principles from the "prevalent international political culture." Some analysts dismiss the significance of the normative impact of the constitutionalist tradition, arguing that in many cases constitutions — in the Third World and Africa in particular — are merely symbolic and bear no relation to reality within the particular polity. Said Amir Arjomand, however, argues that constitutions are

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15 See K.G. Ban ting and R. Simeon, "Introduction: The Politics of Constitutional Change" in Redesigning the State, supra note 6 at 1.

16 S. A. Arjomand, "Constitutions and the struggle for political order: a study in the modernization of political traditions" (1992) XXXIII Arch. Europ. Sociol. 39, 73.

17 See A. W. O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in D. Greenberg et al., eds., Constitutionalism and

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important social realities and even when suspended or breached in practice “they
delegitimize governments and constitute normative assets for the opposition.”

The international revival of constitutionalism in the last quarter of the 20th
century provides the grounding for Arjomand’s argument, yet it remains
necessary to trace both the general parameters of this international political
culture and to examine its engagement within the specific contours of South
Africa’s constitution-making process.

Arguing that internal factors are less important to the outcome of processes
of political reconstruction than the availability of constitutional models,
Arjomand traces the historical emergence of the core principles of the
international constitutionalist tradition. His analysis begins by identifying a
number of processes, including: 1) the “idea of the impersonal rule of man-made
law” which survived the Roman empire; 2) the gradual conversion within the
Christian tradition of the power of finding the law into the power to legislate
assumed by the Popes by the thirteenth century; 3) the medieval fragmentation
of authority which led to the separation of the definition of right from the
administrative order; 4) Montesquieu’s idea of the separation of powers and his
assertion of popular sovereignty in the argument that a prerequisite of individual
freedom is that the people as a body must have legislative power; and 5) the
emergence of specific procedures for constitution-making by a collective
representative body and through ratification of draft constitutions by popular


Democracy Transitions in the Contemporary World (New York: Oxford University
Press, 1993) at 65-82; Y. Ghai, “The Theory of the State in the Third World and the
Problematics of Constitutionalism” in Constitutionalism and Democracy, ibid. at 186-
196; R. B. Seidman, “Perspectives on Constitution Making: Independence
Constitutions for Namibia and South Africa” (1987) 3 Lesotho L. J. 45; R. H. Green,
“Participatory Pluralism and Persuasive Poverty: Some Reflections” (1989) Third
World Legal Stud 21; and A. K. Wing, “Communitarianism vs Individualism:
Constitutionalism in Namibia and South Africa” (1993) 11 Wis. Int’l L. J. 295 at 316-
320. For the debate on Constitutionalism in Africa see, generally, I G. Shivji, “State
and Constitutionalism: A New Democratic Perspective” in I G. Shivji, ed., State and
Constitutionalism: An African Debate on Democracy (Harare: SAPE’s Trust, 1991) at
27-54; B. Barry, “The One-Party System, Multiple Parties and Constitutionalism in
Africa” in State and Constitutionalism, ibid. at 151-168; and Z. Motala, Constitutional
Options for a Democratic South Africa: A Comparative Perspective (Washington,

Arjomand, supra note 16 at 40.

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vote in Virginia and Massachusetts, respectively. To this list I would add what Robert Dahl terms the “Strong Principle of Equality,” which he reduces to the idea “that all members of the association are adequately qualified to participate on an equal footing with the others in the process of governing the association,” and which Dahl understands as producing a logic of political equality.

While Arjomand acknowledges the influence of a society’s pre-constitutional institutional structure and the increasing syncretism of later constitutions, he argues that, given the impact of the prevalent international political culture on constitution-making, the timing of constitution-making is more “consequential than the institutional structures of different countries.” The significance of this point is evident in the consolidation of international political culture since the collapse of state socialism. The ideologically inspired diversity of constitutional alternatives — one-party states, military dictatorships, liberal democracies, people’s democracies, etc. — characteristic of the cold war period and reflected in the increasing syncretism of post-colonial constitutions gave way to an increasing hegemonization. By the early 1990s liberal constitutional principles were hegemonic, with constitutional review by an independent judiciary increasingly becoming a prerequisite for international constitutional respectability.

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19 Ibid. at 41-45. But see K. Pennington, The Prince And The Law 1200-1600 Sovereignty and Rights in the Western Legal Tradition (Berkeley: University of California Press, 1993)


21 Arjomand, supra note 16 at 75.

22 Post-colonial constitutions before the end of the cold war often reflected attempts to incorporate different aspects of international political culture, borrowing simultaneously from the socialist, social-democratic, and capitalist models, often resulting in an awkward syncretism in which some aspects were truly incorporated and meshed with local processes while others were simply ignored or abandoned as inappropriate. In the post-cold war period the hegemonic status of western models and in particular a United States-style constitutionalism was reflected in the quick adoption of bills of rights and justiciable constitutions across the globe.


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According to Arjomand, "constitutions are sediments of diverse historical processes, crystallized into a small number of indigenous and borrowed principles." 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." Thus even if the significance of the emergence of a hegemonic international political culture is acknowledged, its integration into the political life of a society will be shaped by the specifics of the particular political transition including the degree and nature of public participation in the process. 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. To this extent then, it is uncontroversial to state that South Africa's new constitutional order was shaped by and reflects the post-cold war hegemony of an American-style constitutionalism.

South Africans debating constitutional reform have 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, the National Party referred to the Swiss Canton system and consociationalism, and the ANC asserted the right of South Africa's black

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24 Arjomand, supra note 16 at 49.
25 But see D. P. Franklin & M. J. Baun, eds., Political Culture and Constitutionalism: A Comparative Approach (Armonk, N Y : M.E. Sharpe, 1995). This study acknowledges the existence of international models but concludes that "constitutionalism is largely a cultural phenomenon and not simply the product of properly designed institutions and structures of government" (at 231). The potential success of democratic constitutionalism is ascribed by the authors to "favorable economic conditions and a certain amount of external security," which they consider "important factors supporting the establishment of democratic regimes in postwar West Germany and Japan" (at 232).
27 See Chris Rencken, M.P. 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, Race Relations Survey 1985 (1986).
majority to self-determination. While these were all respectable elements of the international political culture at that time, the ANC's argument, with its emphasis on decolonization, had direct implications for the constitution-making process. The claim of self-determination implied that it would be for the "people" of South Africa to decide on the specifics of a future political system including the possibility of a one-party state, state socialism or any other form of state recognized in the international system.

The end of the era of decolonization, the 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 democratic resurgence was closely associated with the growth of an international human rights movement and the increasing legitimation of bills of rights at both the regional and national level. Tied to this development was the emergence of constitutional review as the essential element in the institutionalization of individual human rights and the constitutionalization of bills of rights.

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29 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 B. O. Nwabueze, Judicialism in Commonwealth Africa: The Role of the Courts in Government (New York: St. Martin's Press, 1977) at 309. Indeed, after completing an extensive survey of the role of the judiciary under the constitutions of African Commonwealth countries Nwabueze was able to state that, at that time, not a single statute had been declared unconstitutional by the courts of Zambia, Kenya, Tanzania or Botswana, despite the existence of fundamental rights in their constitutions (ibid) at 308). Although Nwabueze points to a heritage of legal positivism, the statutory exclusion of the courts' jurisdiction, expatriate judges and English legal education as causes of the judiciary's failure to creatively protect fundamental rights, he does not consider the impact of the international environment in which the imperatives of cold war alliances were often more significant to a country's international standing than its internal human rights record.

30 See M. Rosenfeld, "Modern Constitutionalism as Interplay Between Identity and Diversity: an Introduction" (1993) 14 Cardozo L. Rev. 497; see generally Beatty, supra

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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, establishing a minimum framework as a precondition for an internationally acceptable resolution of the Namibian conflict, saw the international community's first application of substantive principles, beyond a simple exercise of self-determination through a national plebiscite, in the context of decolonization. A second process was the development of the Conference on Security and Cooperation in Europe's (CSCE) human rights system, particularly through the follow-up process of intergovernmental conferences provided for in the Helsinki Final Act. 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. 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." A third and significant development in the African

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33 Ibid. at 370.


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context was the World Bank’s 1989 conclusion following a three year study of Africa’s economic malaise, that no economic strategy would reverse Africa’s economic decline unless political conditions in 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.35

While these new international commitments to human rights and democratic governance cover a divergent range of opinion as to the specific content of these commitments, the idea of protecting individual rights through a system of constitutional review gained commanding authority in the transitions to democracy which marked the last part of the 1980s and the early 1990s. It is within this general context that the ANC constitutional principles were developed and in which the ANC sought the adoption of an internationally recognized framework for negotiations in South Africa. Likewise, the apartheid regime saw the opportunity of gaining international recognition of even a modified version of its 1983 Constitution collapse with the adoption of the Harare Declaration36 and its subsequent incorporation into the UN Declaration on Apartheid in 1989.37

For the ANC the shift from a rhetoric of people’s power, democratic centralism and state socialist models,38 to an embracing of constitutional democracy and a bill of rights was grounded in the movement’s ability to draw on its own rights-based tradition. Implicit in both the African Claims document, which was modelled on the Atlantic Charter, the expression of allied war aims in World War II, and the Freedom Charter, which, despite its emphasis on social and economic rights, was essentially a rights-based document, were claims to rights. The existence of this rights-based tradition within the ANC facilitated the


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


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transition towards constitutionalism and a convergence of ANC and international models for an internationally acceptable post-apartheid order.

Having accepted the inevitability of an inclusive democratic transition, the apartheid government continued to insist that the white minority (increasingly described by the National Party government in ways consistent with the international protection of national minorities) had a right to veto any majority decision on the constitutional future of South Africa. Indeed, the National Party’s demand for entrenched power-sharing and a seventy-five per cent majority for the adoption of a new constitution led to the break-down of the Codesa round of negotiations in May 1992.

Despite the National Party government’s rejection of international interference, and even initial tacit agreement by the major parties to avoid international participation, South Africans on both sides of the apartheid divide found their options constrained by an increasing international consensus on the characteristics of an internationally acceptable democratic transition in South Africa. Furthermore, South Africans found the boundaries of their debates and available options for future constitutional arrangements shaped by an international political culture increasingly dominated by a consolidating conception of democratic constitutionalism which held important implications for both the substantive content of a future constitution and the constitution-making process itself.

III. THE LIMITATIONS OF CONTEXT: CONSTITUTION-MAKING IN A DEMOCRATIC TRANSITION

In order to understand the resolution of conflicts over participation in the South African constitution-making process it is necessary to contextualise possible alternatives by identifying a number of relevant factors which framed the possible choices and, then, discussing these issues in the context of alternative constitution-making processes. Relevant factors related to South Africa’s democratic transition would include first, the timing of the process; second, the domestic balance of forces between the negotiating parties; third, the range of acceptable options; and fourth, external influences on the choice of options.

The end of the cold war and the recognition by international agencies such as the World Bank that a country’s economic success may be in part related to
the state of governance,\textsuperscript{39} provide important markers in the changing international environment. The prevailing international situation may not only have made the democratic transition possible, as F. W. de Klerk argued in 1990,\textsuperscript{40} but the timing also reinforced particular political options, including options in the constitution-making process.

Given the range of internationally recognized options for constitution-making in the post-World War II period, the South African parties would appear to have faced an unrestricted menu of examples. These ranged from General McArthur's imposition of a draft constitution on the Japanese legislature or the supervised post-war constitution-making bodies in Germany and Italy, to the unfettered drawing up of India's new constitution by a democratically elected Constituent Assembly. But the vast majority of new constitutions adopted since World War II, particularly in the context of decolonization, involved the negotiated transfer of political power from a foreign state to local bodies. Characteristic of these constitution-making processes was the role of the colonial power in formally passing new post-colonial constitutions. For the respective political elites — both colonial and indigenous — the issue of constitution-making generally took second place to the transfer of political power, particularly where the post-colonial constitution granted sovereign powers to the new legislature, ensuring easy passage of constitutional amendments.\textsuperscript{41}

During most of the cold war era, the outgoing colonial power could actively frame the terms of the independence constitution before holding a national plebiscite in newly independent countries. Indeed, in former British colonies, the Westminster Parliament would formally produce each post-independence constitution. Although the process of constitution-making in these cases often involved prior negotiations between the colonial power and representatives of


\textsuperscript{40} State President F W de Klerk argued in his speech announcing South Africa's political opening on February 2, 1990 that the removal of the threat of communism, following its collapse in eastern Europe, allowed the government the opportunity to open up the political process in South Africa.

\textsuperscript{41} Even where the post-colonial constitution gave the judiciary the power of constitutional review and a justiciable bill of rights, as in Kenya, the impact of constitutionalism was limited by both positivist traditions within the judiciary and the political dominance of the legislature which allowed the 65% required for constitutional amendment to be easily attained. See J. B. Ojwang, \textit{Constitutional Development in Kenya: Institutional Adaptation and Social Change} (1990)

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the nationalist movement (and in the case of Zimbabwe, even with representatives of opposing political factions within the colony), the former colonial power retained the initiative of framing the first post-independence constitution.

If Zimbabwe’s new constitution reflected the legacy of decolonization, the Namibian and South African constitutional processes, by contrast, reflect a new international moment. This moment has seen a new wave of constitutionalism—reflected in the proliferation of new constitutional orders since the end of the cold war—and is marked, even in existing constitutional democracies, by the increasing politicization of constitutional change accompanied by demands for greater participation. In Canada, for example, the First Minister’s Conference, which brings together the political leaders of the federal government and the ten provincial governments, assumed a right in the 1970s to negotiate constitutional change. But increasing mobilization shaped and changed the constitution-making process: women’s groups, Indian organizations and calls for broader public participation in hearings, in the Quebec referendum and as an audience to whom politicians turned for support, opened up the process. Demands emanating from different sources and the establishment of different arenas had significant impacts on the contents of the constitutional agenda and changed the composition of participants in the process. This expansion of participation in the constitution-making processes of established democracies provided a source of legitimacy to those in the midst of democratic transitions who were claiming the heritage of participation inherent in the promise of democratic constitutionalism. In Africa, Namibia’s process in 1990 marked the reemergence of a democratically elected constituent assembly as the source of a democratic constitution.

IV. PROCEDURE AND SUBSTANCE IN CONSTITUTION-MAKING PROCESSES: THE PRACTICES AND PROPOSALS OF THE NEGOTIATING PARTIES

While each of the three major parties negotiating South Africa’s transition to democracy—the ANC, NP government and the IFP—preferred a particular process of constitution-making. These preferences were intimately bound up with the party’s substantive goals—goals that were premised on each party’s particular conception of South Africa’s future constitutional identity. For the

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ANC, a future South Africa should be based on a common citizenship and identity which could only be achieved through a collective effort to overcome apartheid’s legacy.\textsuperscript{43} The National Party conceived of a future South Africa in which local communities may voluntarily choose to pursue their own living arrangements without interference from the state.\textsuperscript{44} To this end the National Party advocated a government of limited powers and the devolution of power to local communities. These local communities should, according to the proposal, be able to veto legislative action, if not directly at the national level then indirectly at the local level through self-government based on local property rights and through the erection of a fire-wall between public and private activity.\textsuperscript{45} The IFP advocated complete regional autonomy which it described as ‘federalism,’ as a means to ensure the self-determination of particular communities. The IFP’s federalism would require a national government of limited, enumerated powers, and a national constitution which would remain subject to the constitutions of the individual states of the federation.\textsuperscript{46} Although labelled federalism, the essence of the IFP proposal is a system of confederation similar to the European Union.

These substantive goals shaped in large measure the practices and procedural preferences of the major players in the making of South Africa’s transitional constitution. Significantly, the extent and nature of the participation, by either party members and allies or the general public, allowed or conceded by each party in the formulation of its own proposals, seems related to the character of the party’s substantive goals and had a profound impact on its procedural preferences.

The ANC, under pressure from its membership and the democratic movement, campaigned for an open democratic process in which a constitution was ideally to be drawn up by an unfettered, democratically elected, constituent assembly. However, confronted with escalating violence, endless talks-about-talks and a national party government committed to a lengthy transition —

\textsuperscript{43} See ANC, \textit{The Reconstruction and Development Programme} (1994) at 1-3
\textsuperscript{45} \textit{Ibid} at 15-18.

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including some form of power-sharing in which the white minority would continue to have a veto over power exercised by the black majority — the democratic movement launched a campaign for an interim government and a democratically elected constituent assembly.

Despite its preference for a democratically controlled constituent assembly, the ANC recognized that the white minority would refuse to negotiate a transition without some guarantees of the outcome. Given the framework established by the international ‘Contact Group’ on Namibia, the ANC also recognized the importance of providing an internationally acceptable framework, and worked to promote the international adoption of its framework. In 1988 the ANC adopted a set of constitutional principles which it then promoted through the Organization of African Unity until they were included in United Nations resolutions as conditions that any future South African constitution would have to meet to gain acceptability by the international community. The key benefit to linking ANC strategy to the recognition of an explicitly democratic and internationally recognizable framework was that this step undermined the possibility that any “limited democratization” process — in which the apartheid regime would bring the black majority into the 1983 Constitutional framework without including the ANC and other banned political groupings —

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47 This was recognized by the ANC from before it initiated the process of negotiations in 1987; see “Statement of the National Executive Committee of the African National Congress on the Question of Negotiations,” Lusaka, October 9, 1987.


49 See Harare Declaration, Declaration of the OAU Ad-hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe, August 21, 1989 reprinted in The Road to Peace, supra note 36 at 34.


51 For example, the attempt by the Smith Regime in Rhodesia to promote an internal settlement with the hope of achieving international acceptability while continuing to exclude particular groups or parties from the democratic process. While the Muzorewa government in Zimbabwe-Rhodesia (a coalition of moderate African nationalists and Rhodesian whites) managed to obtain some degree of recognition it was unable to resist a further process of democratization which led to the Lancaster House negotiations, fully democratic elections and the emergence of Zimbabwe.
could receive international support.\textsuperscript{52}

Although consistent with internationally recognized constitutional norms, the constitutional guidelines adopted by the ANC\textsuperscript{53} were not consistent with ANC rhetoric of a “peoples’ war,” “peoples’ power” and “ungovernability” which dominated the struggle in South Africa in the late 1980s.\textsuperscript{54} The ANC Constitutional Committee’s decision to launch a public debate on the ANC’s constitutional proposals and proposed bill of rights in 1990 was therefore important both in engaging the ANC’s own constituency and in reaching out to a broader South African and international audience. To this end the ANC Constitutional Committee engaged in a series of broadly inclusive conferences to formulate and discuss the detail of these proposals.\textsuperscript{55} This series of about ten

\textsuperscript{52} The apartheid government had in fact appointed a Special Cabinet Committee (SCC) in 1983 to investigate the constitutional position of Africans. The expansion of the SCC into a larger informal negotiating forum in mid-1985 was clear evidence of the regimes efforts to seek an “internal” solution. The SCC would, in the words of State President P. W. Botha, “enter into negotiations with black leaders who reject violence as a political solution,” [\textit{The Citizen} (20 April, 1985)] an implied exclusion of the banned political organizations including the ANC. See South African Institute of Race Relations, \textit{Race Relations Survey 1985} (1986) at 62. See generally Samuel P. Huntington, “Reform and Stability in a Modernizing, Multi-ethnic Society” (1981) 8(2) Politikon 8 at 8-26.

\textsuperscript{53} The 1988 constitutional principles were ostensibly based on an elucidation of the Freedom Charter.

\textsuperscript{54} For a critical discussion of the introduction of a constitutionalist discourse into the National Liberation Movements perspective see Firoz Cachalia, “Constitutionalism and the Transition to Democracy” (draft) December 1992.

\textsuperscript{55} These included the following conferences: “Towards a non-racial, non-sexist Judiciary in South Africa,” Constitutional Committee of the ANC and the Community Law Center, University of the Western Cape, Cape Town, March 26-28, 1993; “Structures of Government for a United Democratic South Africa,” the Community Law Center, University of the Western Cape, ANC Constitutional Committee, Center for Development Studies, University of the Western Cape, Cape Town, March 26-28, 1992; “National Conference on Affirmative Action,” University of the Western Cape, ANC Constitutional Committee and Community Law Center, Port Elizabeth, October 10-12, 1991; “Conference on a Bill of Rights for a Democratic South Africa,” Constitutional Committee of the ANC and the Center for Socio-Legal Studies, University of Natal, Durban, Salt Rock, Natal, May 10-12, 1991; “Constitutional Court for a Future South Africa,” ANC/CALS/Lawyers for Human Rights, Magaliesberg, February 1-3, 1991; and “Seminar on Electoral Systems,” Center for Development Studies (CDS)/ANC Constitutional Department, Stellenbosch, November 2-4, 1990.

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conferences between 1990 and 1993 focused on the elucidation of substantive constitutional issues, yet their format reveals a degree of participation, by both ANC aligned and independent (including foreign) participants, unique in the South African process. This was achieved first by the linkages between the ANC Constitutional Committee and a number of university-based legal institutes, allowing the co-hosting of these events. Second, invitations to different ANC regions, political structures, and members of the tripartite democratic alliance (the ANC, SACP and Cosatu) ensured the participation of a range of activists from the trade unions, non-government organizations and community-based organizations. Third, international participants and local academics were involved in most of these conferences.56

The ANC Constitutional Committee was at times criticized by ANC membership for not bringing the constitutional debates down to the grass roots, since the distribution of documents and proposals was haphazard and unreliable at the branch level.57 Nevertheless, the impact of the Constitutional Committee’s work profoundly reshaped the ANC’s constitutional posture.58 Although the 1988 Constitutional Principles were ostensibly based on the ANC’s political manifesto, the 1955 Freedom Charter, their elucidation by the Constitutional

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56 The proceedings of a number of these conferences were subsequently published including: CDS/CLC/ANC, Electoral Systems - A Discussion Document (1990); ANC Constitutional Committee, A Bill of Rights for a Democratic South Africa Papers and Report of a Conferences Convened by the ANC Constitutional Committee (Center for development Studies, 1991) and Affirmative Action in a New South Africa: The Apartheid Legacy and Comparative International Experiences and Mechanisms of Enforcement (Center for Development Studies, 1992).

57 Although many ANC branches in the cities held discussions or political education sessions around many of the Constitutional Committee’s documents there is little evidence that these processes were characteristic of ANC branches in either the rural areas or for that matter in the urban 'townships' where violence and basic organizing consumed the available resources.

58 This shift is reflected in the “Declaration of the 48th National Conference of the African National Congress” July 6, 1991 which summarized the results of the ANC’s first national conference after its unbanning held in Durban in July 1991. Section 10 of the declaration states that: “We reiterate our adherence to the principles of a united, non-racial, non-sexist and democratic South Africa as enshrined in the Freedom Charter. These include the guarantee of the fundamental human rights of all South Africans, reinforced by an entrenched Bill of Rights, a multi-party system of government, a representative and independent judiciary and regular elections...”. reprinted in South African History Archive, History in the Making: Documents reflecting a changing South Africa Vol. 1, No 6 (July 1991) at 41.

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Committee clearly went well beyond it and in retrospect involved a significant shift in the ultimate vision. This shift was made possible by the participation and engagement of activists, regional representatives, and the ANC leadership itself in the discussions and debates initiated by the Constitutional Committee.\(^{59}\)

In stark contrast, the National Party government at first resisted calls for a democratically elected constituent assembly, envisaging instead a long transition period in which a future constitution could be negotiated between the parties. As the holder of state power, the National Party was determined not to relinquish control before securing effective safeguards against the future exercise of state power by the black majority. This aim was, however, coupled with an understanding of political participation based on the relatively unrestrained exercise of executive power and the achievement of political change through the negotiation of elite interests.

ANC analysts tended to view the National Party’s insistence that all ‘recognized’ political entities — including the minuscule political parties of respective self-governing bantustan governments, and the governments of ‘independent’ bantustans — be equal participants in the negotiations as an attempt to stack the table in the regimes’ favor. In fact, however, this demand accurately reflected the National Party’s understanding of participation, based on a notion of how competing political elites form a compact to govern. This type of elite decision-making reflected the National Party’s own internal policymaking processes — which historically involved secret caucuses based on Broederbond membership and negotiations between the provincial leaderships of the party — and the apartheid state’s tradition of investigating constitutional options through appointed government commissions. The government’s constitutional proposals were substantially informed by two reports issued by the South African Law Commission in 1991.\(^{60}\)

\(^{59}\) The shift from constitutional debate to negotiations was accompanied within the ANC by the demand for participation by the membership in the negotiations process where many felt the negotiators were becoming increasingly distanced from their democratic base. Again the ANC responded by attempting to establish negotiations fora at a regional and local level so as to keep a link between the negotiations process and membership. These too stretched the limits of resources and the representative capacities of local leaderships.

From the outset, the structure of formal participation in the negotiation process was premised on a notion of consensus building between contending elites. The Conference for a Democratic South Africa (Codesa), formed to negotiate the transition to a new constitutional order, thus reflected Nationalist Party demands for an elite pact-making process. Nevertheless, the National Party government still refused to permit Codesa to exercise legal powers, insisting that legal continuity required the approval of any new constitution by the National Party-dominated tricameral Parliament. This assertion of the need for legal continuity carried the additional advantage for the National Party of precluding a democratically elected constitution-making body and requiring that any future constitution be negotiated between the parties. In fact, the apartheid government argued that there could not even be a non-racial election until a new constitution allowed a legal basis for universal adult franchise. For the National Party government, any suggestion that there should be a legal break with the apartheid past raised issues of the sovereignty of the South African state and the legitimacy of its position as a de jure government and was thus non-negotiable. As holder of state power for over forty years, the National Party was determined to project its power into the future, if not to control the outcome, at least to ensure certain basic property and social interests through the insulation of private power in the post-apartheid order. This project was threatened by claims asserting the right to immediate participation regardless of the provisions of the existing 1983 tricameral constitution.

The Inkatha Freedom Party adopted an even more non-participatory position, viewing the very notion of a democratically elected constituent assembly as inherently undemocratic. In an astounding exercise of formal logic, the IFP argued that since the 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 assent to the particular framework. This requires that all parties which are going to live under this framework give their prior consent. In other words, the IFP and every other minority party at the negotiating table,

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61 This was given clear, if realistic, expression in the notion of sufficient consensus, i.e. agreement between the National Party government and the ANC.
64 See, Inkatha Freedom Party, “Why the Inkatha Freedom Party Objects to the Idea of the New Constitution Being Written by a Popularly Elected Assembly (Whether called “Constituent Assembly” or called by any other name)”, undated submission to Codesa Working Group 2 (1992)
regardless of the extent of their support, must reach consensus on the final constitution,\textsuperscript{65} or else the result would, by definition, be anti-democratic.\textsuperscript{66}

Recognizing the difficulties of obtaining universal consensus,\textsuperscript{67} the IFP called for a depoliticized process of constitution-making, with a group of constitutional experts retained to produce a constitution which could then be adopted by parties and endorsed in a national plebiscite.\textsuperscript{68} The assumption that a constitutional framework can be inherently neutral and that its neutrality can be ensured by the appointment of constitutional experts is itself questionable; but the IFP’s proposal for a national referendum to confirm a negotiated constitution reflects a Machiavellian conception of democracy. If all the parties were to reach official consensus on a constitution, a national plebiscite to endorse the result would

\textsuperscript{65} See Comments of IFP on document of Working Group 2 [Codesa] Steering Committee proposal on CMB [Constitution-making Body] 27 April 1992. The “Inkatha Freedom Party has on numerous occasions made clear its objection to any majoritarian approach to the drafting of the fundamental law of the land. Therefore IFP would insist that even in such interim parliament the rule of consensus should be applied instead of special majority whether such special majority be two-thirds as proposed by the ANC or seventy-five per cent as proposed by the government” (ibid).

\textsuperscript{66} See The Long Journey, supra note 63 at 71. While virtually all systems of constitutional rule-making require super-majorities or even unanimity among particular constitutionally defined institutions such as the provincial governments under Canadian federalism, the IFP’s demand for universal consensus among political participants whose electoral support was completely untested and whose constitutional standing was equally unspecified was indeed a unique attempt to subject constitution-making to the veto of any group who by past association with apartheid, violent intervention or vociferous politicking could claim a place at the negotiating table.

\textsuperscript{67} Interestingly, the IFP has reversed its position, at least with respect to the making of Provincial constutions, insisting that as the majority party — with less than 50 percent of the vote — in KwaZulu/Natal they have the right as the majority to determine the contents of the Provincial constitution despite the Constitutional requirement of a two-thirds majority. Frustrated at their inability to get their own way in the KwaZulu/Natal legislature the IFP threatened new elections claiming that they would secure a two-thirds majority so that they can pass their own constitution — a far cry from the demand for consensus which they continue to maintain at the national level. Unhappy with the direction of the Constitutional Assembly at the national level the IFP boycotted Constitutional Assembly proceedings from late 1994.

involve only the shadow of formal democracy.69

The IFP itself failed to invite any other significant political formations to participate in drafting a KwaZulu/Natal constitution. However, it was consistent in its commitment to an expert-led process. IFP constitutional proposals were produced by a group of experts, dominated by two American constitutional lawyers, Professors Blaustein and Ambrosini, and, in the case of the KwaZulu/Natal constitution, endorsed without discussion by the IFP dominated KwaZulu legislature. While this first attempt was still-born, the IFP continued to demand that its version of a provincial constitution be adopted under the interim constitution. In mid-1996 this latest version went before the Constitutional Court for certification in terms of the 1993 Constitution.

After nearly two-and-a-half years of slow progress, South Africa’s democratic transition ground to a halt in mid-1992. While the collapse of the Codesa negotiations marked the outer-limits of the National Party government’s ability to assert a purely elite constitution-making process, the gunning down of ANC protestors outside Bisho marked the ANC’s inability to insist upon an unfettered constituent assembly. Although overcoming this stalemate would require concessions from both sides, it was the post-cold war international consensus on the parameters of democratic transitions which enabled the ANC to overcome both the National Party’s and IFP’s determination to avoid an elected constituent assembly.

V. CONSTRUCTING AN HISTORIC COMPROMISE: SUNSET CLAUSES AND A TWO-STAGE CONSTITUTION-MAKING PROCESS

ANC leader Joe Slovo’s “sunset clauses” proposals, adopted by the ANC

69 Cf. the Charlottetown constitutional proposals which were finally agreed to by all the official parties in Canada but rejected in a national plebiscite. While this provides an interesting example of the weakness of political parties in the constitutional politics of developed democracies, this situation may be easily distinguished from that prevailing in newly emerging post-colonial democracies such as South Africa. In these circumstances the anti-colonial political movements usually carry a significant degree of legitimacy in the immediate post-colonial situation, such that, the possibility of public rejection of a consensus including the major anti-colonial party or parties would be very remote.
National Executive Committee in February 1993,\textsuperscript{70} seemed to represent the epitome of an elite pact. The essential feature of the “sunset” proposal was the acceptance of a constitutionally entrenched system of executive power-sharing for five years after the first democratic election. During this period, the democratically elected parliament would be empowered to write a new constitution which could exclude these entrenched provisions, whose sun would thus set. In accepting the National Party’s continued participation in government and the establishment of bilateral agreements which each party would respect in a future constituent assembly, the proposals seemed to grant the National Party’s key demands: a negotiated constitution and future power-sharing.\textsuperscript{71} While initially criticized within the ANC\textsuperscript{72} and rejected by other parties such as the Pan Africanist Congress,\textsuperscript{73} these proposals provided the linchpin enabling the political transition to continue.

In fact, the notion of a government of national unity was clearly distinct from the National Party’s or other consociational power-sharing models.\textsuperscript{74} Most importantly, where the National Party had called for a compulsory coalition government with a cabinet drawn equally from the three major parties and a rotating presidency,\textsuperscript{75} Slovo proposed an election to determine proportional participation in executive government, a less static and more representative

\textsuperscript{70} Bill Keller, “Mandela’s Group Accepts 5 Years of Power-Sharing” \textit{N Y Times} (19 February 1993) A1, col. 1 Slovo’s article proposing the compromise first appeared in the \textit{African Communist}.

\textsuperscript{71} For an example of this misunderstanding of the proposals see Stanley Uys, “Four rites of passage” \textit{The Star} (16 January 1993) 9, col. 1.


\textsuperscript{73} Barney Desai, “Proposed agreement can lead only to conflict” \textit{The Star} (13 October 1992) 12, col. 1.

\textsuperscript{74} See S. Ellmann, “The New South African Constitution and Ethnic Division” (1994) 26 Columbia Human Rights L. Rev. 5 at 16. Ellmann notes that in “Lijphart’s terms, the new South African Constitution provides for a measure of ‘executive power-sharing,’ but does not, in general, offer a binding ‘minority veto’ even on important issues” (ibid. at fn. 38).

\textsuperscript{75} Allister Sparks, “Clever footwork as FW redefines ‘power-sharing’” \textit{The Star} (10 February 1993) 12, col. 2
By conceding a government of national unity in November 1992, the ANC was responding to a more fundamental set of concessions implied in the National Party government’s acceptance of an elected constituent assembly to write a final constitution, in the wake of the Bisho killings in mid-1992. In a Cabinet bosberaad on July 23 and 24, 1992, the National Party and government leadership found itself caught between the urgency of restarting the negotiation process and increasing international concern and criticism of the government. International frustration over the break-down of Codesa and the continuing violence began to be reflected in a growing irritation with the National Party’s proposals for the transition. Reflecting the sea-change in international consensus on democracy, Herman Cohen, United States Assistant Secretary of State for the Bureau of African Affairs in the Bush Administration, told the Africa subcommittee of the U.S. House of Representatives Foreign Affairs Committee on July 23, 1992, that “[a]ll sides must recognize the right of the majority to govern, while assuring that all South Africans have a stake in their government,” and rejected the right of any party to insist on “overly complex arrangements intended to guarantee a share of power to particular groups which will frustrate effective governance.” Laying out a set of principles acceptable to the Bush Administration, he insisted that although “[m]inorities have the right to safeguards; they cannot expect a veto.”

Indeed this implicit rejection of the

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76 Shaun Johnson & Ester Waugh, “‘Sunset clause’ offer as Slovo seeks harmony” The Star (1 October 1992) 1, col. 7.
77 On September 26, Mandela and de Klerk signed the Record of Understanding in which the government first accepted the notion of a democratically elected constitution-making body. See The Long Journey, supra note 63 at 160.
78 See ibid. at 156-160.
79 Testimony of Assistant Secretary of State for African Affairs, Mr. Herman J. Cohen before the House Foreign Affairs Subcommittee on Africa, “Violence in South Africa and its Effect on the Convention for a Democratic South Africa (CODESA): Hearing and Markup before the Subcommittee on Africa of the Committee on Foreign Affairs” H. Res. 497, H. R., 102nd Cong., 2d Sess., July 23, 1992. Assistant Secretary Cohen laid down the following points he considered “basic to a genuine democratic solution:

— that solution should include all relevant parties and promote tolerance in a country of great diversity

— it should acknowledge the right of the majority to govern while assuring that all South Africans have a stake in their government

— it should ensure that government functions within an agreed framework which includes protection of the fundamental rights of all citizens, but it should avoid
National Party’s notion of power-sharing may have been a decisive element in the Cabinet’s decision to accept an elected constituent assembly.

The National Party’s concession of an elected constituent assembly and the ANC’s acceptance of a government of national unity under a transitional constitution provided the key elements of agreement in South Africa’s democratic transition. By accepting a democratic constitution-making process, the National Party made it possible for the ANC to agree to the adoption of a negotiated interim constitution which would entrench a government of national unity for five years and ensure the legal continuity the National Party government required. The architecture of this agreement, reflecting continuity and change, negotiation and participation, allowed the multi-party negotiations to resume at the World Trade Center outside Johannesburg, concluding with the adoption of an interim constitution by the South African Parliament in December 1993.

VI. PARTICIPATING FROM THE OUTSIDE: MOBILIZATION AND POPULAR PRESSURES ON THE MAKERS OF THE INTERIM CONSTITUTION

If Slovo’s sunset clauses appeared to provide an example of elite pacting, mass action, demonstrations, and petitions provided simultaneous illustrations of popular participation. Mass action played an important part in the ANC-alliance’s campaign to shape the transition, and various forms of public display of claims, outrage, and strength continued to be employed by groups on all sides, trying to ensure that their concerns or demands be placed on the agenda at the multi-party talks. These claims for the recognition of different identities and social interests took on new urgency, both as a consequence of, and in the context of, highly charged circumstances. Although subject to continuing contestation, many of these claims were ultimately accommodated in the overly complex arrangements intended to guarantee a share of power to particular groups which will frustrate effective governance. Minorities have the right to safeguards; they cannot expect a veto” (ibid. at 49-50).

80 See Yash Ghai, “Legal Responses to Ethnicity in South and South East Asia” (mimeo) at 6, who argues that, “when the survival of a group and the stability of the state may appear as alternatives, ... [the] choices (and the scope of compromise) are limited by the pressures on the negotiators.”

81 For example, traditional leaders continued to demand that their recognition and powers be increased under the interim constitution. See “Power to the chiefs” Weekly Mail & Guardian (15-22 December 1994) 2, col. 5.

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interim constitution.

Marked by protests, demonstrations, campaigns and even an invasion of the World Trade Center in Kempton Park, the site of the multi-party negotiations, mass participation in the constitution-making process exhibited both a diversity of claims and a degree of popular frustration with an undemocratic negotiating process. A plethora of organizations and alliances gave voice to this diversity. For example, representatives of communities who were forcibly removed under apartheid marched on the World Trade Center protesting the proposed constitutional protection of property, which they saw as an entrenchment of the apartheid distribution of property, and demanding constitutional recognition of their right to return to their land. From a completely different perspective, the Inkatha Freedom Party joined with two other bantustan governments and ultraright wing white racists to demand a halt to the negotiations and the cancellation of the April 24, 1994 elections in order that the “self-determination” of different ethnic groups be recognized.

While many different interests worked to influence the negotiations towards an interim constitution, the three most important areas of mobilization and

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82 A march on the World Trade Center in June 1993 in which a land rights memorandum was delivered to the negotiators, was followed by a march in central Pretoria in September 1993 in which about 600 people from 25 rural communities threatened to reoccupy land from which they had been removed by the apartheid government as a way of highlighting their demands for the unconditional restitution of land, the establishment of a land claims court, and guaranteed security of tenure for farm workers and labor tenants. The Transvaal Rural Action Committee which organized the march also called for the rejection of the proposed property clause in the constitution. See Adrian Hadland, “Demonstrators hand gov’t land ultimatum” Business Day (2 September 1993).

83 Examples of non-party political interventions in the constitutional debate include the publication of a range of books, pamphlets and newspaper articles offering specific constitutional alternatives or contributions to the constitution-making process. Some of these include: B. Godsell, Shaping a Future South Africa: A citizens’ guide to constitution-making (Cape Town: Human & Rousseau, 1990) the copyright of which is held by the Anglo American Corporation of South Africa Limited, South Africa’s single largest corporate enterprise; H. Corder, S. Kahanovitz, J. Murphy, C. Murray, K. O’Regan, J. Sarkin, H. Smith and N. Steytler, A Charter for Social Justice: A Contribution to the South African Bill of Rights debate (Cape Town: Department of Public Law, University of Cape Town, 1992), produced by a prominent group of progressive lawyers and law teachers; I. Semenya and M. Motimele, Constitution for a Democratic South Africa: A Draft (Braamfontein: Skotaville, 1993), produced by two

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contestation involved issues of gender, ethnicity and labor. The assertion and relative success of gender claims in the making of the interim constitution, through the multi-party Women’s National Coalition and within different political groups, provides an example of a successful multi-faceted strategy.

The ANC’s Women’s League staged a sit-in at the negotiations and won the requirement that each delegation at the negotiations have a woman as one of its two negotiating council representatives. South Africa is the first case where a constitution-making body was formally constituted by an equal number of men and women. At the same time the Women’s League continued to press for greater participation within the ANC, winning a recommendation from the ANC’s national working committee that one third of all ANC candidates in the April 1994 elections be women.

Gender equality is, as a consequence, formally recognized in the interim bill of rights, and the interim constitution includes specific provisions for the establishment of a Commission on Gender Equality “to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women.” In addition, as part of a general attempt to preempt negotiations, the de Klerk government ratified the International Convention on the Elimination of All Forms of Discrimination against Women in January 1993, binding the South African state to particular international obligations in this area. This successful inclusion of the principle of gender equality into the interim constitution was the product of the interaction of local women’s mobilization against gender discrimination and the increased recognition of gender equality as an internationally accepted norm of human rights and constitutionalism.

These gains were not unilinear. Despite these breakthroughs in an otherwise deeply sexist society, and despite the popular repetition of the democratic movement’s vision of a “non-racial and non-sexist” South Africa, women active

South African Advocates who had taken part in drafting Swapo’s draft constitution which was placed before the constituent assembly in Namibia; and “Constitution for a new South Africa . . . cribbed from the United States constitution” Sunday Times (22 August 1993) 23, a Sunday Times editorial presentation modelling its proposal for South Africa on the United States Constitution.

Unfortunately this is not the case in the elected Constitutional Assembly.

Saturday Star (16 October 1993) 6, col.1.

in the negotiations process had to fend off a challenge resulting from the interim constitution’s recognition of indigenous law. Traditional leaders’ claims for the recognition of indigenous culture led to an attempt to include provisions in the interim bill of rights recognizing “customary law” and regulating the contradictions between indigenous law and other “fundamental rights.” Although it was rejected, one proposed interim bill of rights granted “any court applying a system of customary law” the power to determine the extent to which customary law undermines the equality provision and to decide when and to what extent these rules, even where they discriminated against women, should be brought into conformity with the constitutional requirement of equality.\(^7\) In the end the interim Constitution came down in favor of gender equality, making indigenous law “subject to regulation by law,” implying its subordination to the fundamental rights contained in the constitution, and gender equality in particular.\(^8\)

Claims for the recognition of ethnicity posed the greatest threat to the democratic transition. While all the parties at the negotiating table said they wished to respect South African cultural diversity, contestation over the nature of that diversity forced negotiators to confront claims made by the ruling party and its allies that, since the early 1970s, the policy of separate development was based on the protection of different cultures. Although this justification ignored the reality of ethnic and racial hierarchies and of racist domination of the black majority, it remained a significant source of many separatist claims during the negotiations.

While ANC negotiators remained committed to building a non-racial South Africa, the power and fear generated by a history of ethnic identification could not be ignored. Through the past forty years at least, South African ethnic diversity has been recreated through government sponsorship of separate ethnic administrations and separate language radio and television stations which, although controlled by apartheid propagandists, purported to serve the needs of cultural diversity. The reproduction of this “diversity” in the creation of bantustan elites and the preservation and promotion of ethnic “tribalism” has created an apartheid legacy which will continue to effect debates and political struggles over issues of national development and democracy. In contrast, the

\(^7\) See Section 32(2) of the proposed chapter on fundamental rights, Technical Committee on Fundamental Rights During the Transition, Tenth Progress Report (1 October 1993)

African National Congress was premised at its founding in 1912 on the desire among African leaders to create a single nation, unifying Africans against colonial domination regardless of ethnic affiliation. Over the century, the quest for national liberation witnessed numerous reformulations aimed at extending the category of oppressed in ethnic and class terms while simultaneously presenting an alternative vision of a single non-racial South African nation, free of ethnic domination.

Despite the non-racial project’s success in creating a united front against apartheid, most visibly in the Congress Alliance and later the United Democratic Front, questions of cultural diversity and language and education policies have continued to plague the democratic movement. This tension between a commitment to non-racialism and the recognition of cultural and other group-based differences has mediated the ANC’s communitarian traditions and led to an embracing, in part, of individualism, constitutionalism and preferential policies. These proposals have not, however, placated those whose political standing remains tied to distinct group or ethnic identities and difference.

Although opinion polls revealed limited popular support for any ethnic-based party, ethnic assertions began to resonate across the political spectrum both during negotiations and the election campaign. Addressing a 20,000 strong Inkatha rally on April 5, 1994, an Inkatha regional secretary threatened that “if our demands cannot be addressed, then there is no election on the 27th of April . . . We will do everything in our power to destroy any attempt by any state organ used by the ANC to divide the Zulu nation.”\(^89\) Like Buthelezi’s Inkatha, hardline white separatists continued to insist on ethnic diversity. Faced with the conclusion of negotiations for the transition to a democratic order, in October 1993 an odd assortment of parties, including Inkatha and right wing white segregationists, formed the “Freedom Alliance” demanding that the new constitution enshrine ethnic identities. This trend led to the appearance of new and as yet unsupported claims, the most flamboyant being made by a “coloured separatist movement” demanding an independent state stretching across the Southern and Western Cape with Cape Town as its capital.\(^90\) Even the ANC was forced to respond by challenging Buthelezi’s claim to speak for South Africa’s eight million Zulu-speakers as it did when Nelson Mandela celebrated Zulu history as part of the struggle to build a nation, telling 60,000 supporters at an


\(^90\) *The Weekly Mail & Guardian* (1-7 October 1993) 9, col. 4.

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ANC rally in Durban that "it is impossible to separate the threads that make the weave of our South African nation."91 Although not overtly addressed in the interim constitution, the impact of mobilized ethnic claims on this first round of constitution-making is reflected in a range of constitutional provisions — including the structuring of a government of national unity — designed to ensure minority participation in governance.92

The interim Constitution contains a variety of provisions which are designed to reflect and offer protection to South Africa’s acknowledged cultural diversity, yet it also lays the foundation stones for continued ethnic claims and divisions. Claims of cultural diversity and difference have come to reflect a complex interaction between real cultural and ethnic identities on the one hand and the claims of political leaders on the other. These leaders’ assertions of cultural and ethnic particularities are intertwined with their own attempts to either preserve existing power or to seek future political advantage. It is this continuing ambiguity which is reflected in the interim Constitution’s recognition of cultural diversity and the special accommodations made to Zulu and Afrikaner nationalists in the weeks prior to the April 1994 elections.

Cultural diversity is constitutionally recognized in a number of ways. First, eleven official South African languages93 are recognized and their equal use and enjoyment shall be promoted. A Pan South African Language Board is to be created to promote the official languages as well as “other languages used by communities in South Africa,” of which a further eleven are recognized in the Constitution.94

Second, an individual’s right to “use the language and to participate in the cultural life of his or her choice” is guaranteed as a fundamental right95 along with an individual right to instruction in the language of choice “where this is reasonably practicable.”96 Furthermore, the Constitution guarantees the right to “establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on

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92 See generally Ellmann, supra note 74.
the ground of race.”97

Third, while language and cultural rights are expressed in individual terms, the Constitution's recognition of traditional authorities and indigenous law98 and the establishment of a Volkstaat Council99 are phrased in the terminology of collective rights. The recognition of "the right to self-determination by any community sharing a common cultural and language heritage," introduces a notion of collective rights on the basis of cultural identity and even cultural self-determination100 which strengthens the hand of those claiming power on the grounds of ethnic particularity.

The proletarianization of South Africa's workforce and the impact of class politics has provided a significant countervailing influence and source of identity for those who may otherwise place more weight on other social linkages — including language, family, clan, and ethnicity. As a countervailing source of identity, the labor movement's mobilization of working class support for a non-racial order was central to the ANC's success. However, the labor movement also launched 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 socio-economic or class interests in the new constitutional order.

Labor's claim has received a significant degree of recognition in South Africa's democratic transition. Given apartheid's effective amalgamation of race and class, advocates and representatives of the working class, both in the South African Communist Party and the Congress of South African Trade Unions, are clearly influential in the democratic movement. Moreover, the trade union movement — as the most tightly organized segment of the democratic movement — has already won significant recognition in the constitution-making process. Although the unions were refused direct representation in the constitutional negotiations, the ANC included extensive constitutional protections for workers in its proposed bill of rights and supported Cosatu's call for a National Economic Forum for negotiating South Africa's economic and development priorities. Despite these gains, the interim bill of rights coupled workers' and employers' rights and tied the right to strike to an employers' right

99 S. Afr: Const. 1993, sections 184A-B.
100 S. Afr: Const. 1993, Schedule 4, Constitutional Principle XXXIV.

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to lock workers out. The trade unions have also complained that in the interim constitution the right to strike,\textsuperscript{101} which is protected for the ‘purpose of collective bargaining,’ is unduly circumscribed as it appears to exclude strikes on social and economic issues. Correspondingly, unionists argue that the inclusion of employers’ right to impose a lock-out fails to recognize the fundamental disparity between the power of individual workers and individual employers in the labor market. Thus labor argued that while the right to strike is fundamental, “the issue of lock-outs is at best a matter left to statutory regulation.”\textsuperscript{102} The alliance between Cosatu and the ANC ensured that this issue was reopened in the Constitutional Assembly, and the lock-out clause struck from the new Constitution passed on May 8, 1996.

VII. A NEW PROCESS, A NEW CONSTITUTION: THE 1993 CONSTITUTION AND PROVISIONS FOR THE NEXT ROUND OF CONSTITUTION-MAKING

The first phase of South Africa’s democratic transition was premised on a two-stage process of constitution-making. The first round, while buffeted by popular participation and strengthened by elements of internal participation within the ANC alliance, was ultimately under the negotiating parties’ control. In contrast, although the second round is formally constrained by a complex set of constitutional principles contained in the interim constitution,\textsuperscript{103} it is to be

\textsuperscript{101} S. Afr. Const. 1993, section 27(4).
\textsuperscript{102} E. Patel, “Ditch the lock-out clause!” (1994) Work in Progress 95 at 18.
\textsuperscript{103} See, S. Afr. Const. 1993, Fourth Schedule The Constitutional Principles in the Fourth Schedule contain an amalgam of broad democratic principles consistent with the new international post-cold war consensus on constitutionalism and a host of detail specific to the needs of the negotiating parties. Most dramatic of these specific provisions were those requiring the recognition of “traditional leadership, according to indigenous law,” (XIII) and “collective rights of self-determination” (XII). In addition recognition of the Zulu King and the provision of a Volkstaat Council were added by amendment to the main body of the constitution just prior to the April 1994 elections as a way to include parts of the Freedom Alliance, particularly the IFP and the Afrikaner right-wing led by ex-SADF head General Constant Viljoen. Finally, the constitutional principles were amended to provide that provincial recognition of a traditional monarch would be protected in a final Constitution (XIII(2)) and that any territorial entity established through the assertion of a right to self-determination by “any community sharing a common culture and language heritage” (XXXIV(1)) shall be entrenched in the new Constitution (XXXIV(3)).

The inclusion of a plethora of constitutional principles and provisions enabled the
driven by an elected Constitutional Assembly made up by a joint sitting of the
National Assembly and the Senate of South Africa's first democratic
Parliament.\textsuperscript{104}

The sections of the interim Constitution providing for the creation of a final
constitution clearly influence the distribution of power in the Constitutional
Assembly. While requiring that a new constitution be passed within two years
from the first sitting of the National Assembly,\textsuperscript{105} Chapter 5 of the interim
Constitution requires that at least two-thirds of all the members of the
Constitutional Assembly vote for the new constitution.\textsuperscript{106} In addition, sections
of a final constitution dealing with the boundaries, powers and functions of the
provinces must be adopted by two-thirds of all the members of the regionally
constituted Senate, giving the provinces established under the interim
Constitution an important lever of influence in the Constitutional Assembly.\textsuperscript{107}
It was these pressures that led to the retention of certain exclusive provincial
powers in the new draft constitution.

Given the possibility that the Constitutional Assembly could fail to obtain the
necessary two-thirds agreement on either a new constitution or on the provincial
elections to go forward and the democratic transition to proceed, but they also served
to defer a range of substantive issues into the next phase of constitution-making.
Although the individual constitutional principles are open to differing interpretations,
the interaction of the different principles will revive many of the conflicts their
inclusion was designed to lay to rest. A significant difference, however, is that these
conflicts will now be played out in a completely different arena. It is here that the
impact of a democratically elected constitutional assembly is likely to dramatically shift
the terms of the debate and to lead to the inclusion of a range of new issues. Despite
this change, however, there is the danger that the assertion of different interpretations
of the constitutional principles may lead to open conflict between the Constitutional
Assembly, particular political parties, regional entities, and the Constitutional Court.
These potential conflicts are likely to embroil a newly established Constitutional Court
in direct political conflict with the consequent danger of undermining the court's ability
to establish its own credibility as a mediating institution.

\textsuperscript{104} S. Afr. Const. 1993, section 68.
\textsuperscript{105} S. Afr. Const. 1993, section 73(1)
\textsuperscript{106} S. Afr. Const. 1993, section 73(2). The acceptance of a two-thirds threshold involved
an important shift in position for the National Party which had attempted to require a
seventy-five percent majority to pass a neconstitution within the constitution-making
body. This demand led to the collapse of negotiations within the Codesa framework.
\textsuperscript{107} See \textit{The Long Journey}, supra note 63 at 31.
\textit{Ibid.}

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arrangements, the interim Constitution provides elaborate dead-lock breaking mechanisms. First, a panel of constitutional experts\textsuperscript{108} appointed by two-thirds of the Constitutional Assembly (or alternatively, by each party holding forty seats in the Constitutional Assembly)\textsuperscript{109} is required to seek amendments to resolve deadlocks within thirty days.\textsuperscript{110} Second, if the draft text unanimously agreed upon by the panel of experts is not adopted by a two-thirds majority then the Constitutional Assembly may approve any draft text by a simple majority of its members.\textsuperscript{111} However, in this latter case, the new text would have to be first certified by the Constitutional Court, then submitted to a national referendum, requiring ratification by at least sixty per cent of all votes cast.\textsuperscript{112} Failure to obtain a sixty percent ratification would force the President to dissolve Parliament and call a general election for a new Constitutional Assembly.\textsuperscript{113} The new Constitutional Assembly would then have one year to pass a new constitution;\textsuperscript{114} however, the majority required for passage of the constitution would be reduced from two-thirds to sixty percent.\textsuperscript{115} Failure to obtain consensus in early 1996 seemed at one point to bring the ANC close to calling for a referendum, however this possibility was averted with the adoption of the new Constitution on May 8, 1996.

Although the interim Constitution allowed any of these requirements to be amended by a two-thirds majority of a joint sitting of the National Assembly and Senate,\textsuperscript{116} section 74 prohibited the repeal or amendment of both the Constitutional Principles contained in Schedule 4 of the 1993 Constitution and the requirement that the Constitutional Court certify that the new constitutional text complies with those principles. The possibility of amending the constitution-making procedures thus effectively reduced the interim Constitution's framework for producing the new constitution to three key elements. First, any amendment of the constitution-making procedures required a two-thirds majority of all the members of the National Assembly and Senate, requiring agreement between at least the ANC and the National Party or IFP. Second, under all circumstances the Constitutional Assembly was bound by the Constitutional

\textsuperscript{108} S. Afr. Const. 1993, section 72(2).
\textsuperscript{109} S. Afr. Const. 1993, section 72(3).
\textsuperscript{110} S. Afr. Const. 1993, section 73(3) and (4).
\textsuperscript{111} S. Afr. Const. 1993, section 73(5).
\textsuperscript{112} S. Afr. Const. 1993, sections 73(6)-(8).
\textsuperscript{113} S. Afr. Const. 1993, section 73(9).
\textsuperscript{114} S. Afr. Const. 1993, section 73(10).
\textsuperscript{115} S. Afr. Const. 1993, section 73(11).
\textsuperscript{116} S. Afr. Const. 1993, section 62(1).
Principles agreed to by the parties at the multi-party talks and included in Schedule 4 of the interim Constitution. And third, the Constitutional Court must declare that the new constitutional text complies with the Constitutional Principles.

The tension between adherence to constitutional principles and the unfettered powers of a democratic constitution-making body was explicitly addressed in the negotiations and was reflected in the 1993 Constitution. Invoking the need for legal continuity and minority guarantees, the National Party government always insisted on entrenching basic constitutional principles agreed upon through negotiations.\textsuperscript{117} Although this stance was at odds with the ANC's demand for a democratic constituent assembly with unlimited freedom to draft the final constitution, the ANC nevertheless accepted the need to provide certain assurances as to the future constitutional framework. To this end the ANC had published its own constitutional guidelines in 1988 and had lobbied for their international endorsement. Conversely, while the National Party government eventually accepted that a new constitution would fail to gain popular acceptance unless it was adopted by an elected constitution-making body, it attempted to ensure that the constitutional assembly would be bound to produce a constitution within a framework acceptable to the national party.

Once the parties reached a compromise requiring the Constitutional Court to certify that the final constitution be consistent with the Constitutional Principles,\textsuperscript{118} the different parties focused their attention on the content of the constitutional principles as a way of continuing their struggles for particular outcomes with respect to regional powers and racially or ethnically-defined governance. Similarly, the crucial role of the future Constitutional Court brought increased attention to bear on the process of appointment for the Constitutional Court. In fact the conflict over this process brought the multi-party negotiations, once again, perilously close to deadlock.

Initially, little political attention was paid to the technical committee's proposal that Constitutional Court Judges be nominated by an all-party parliamentary committee and be appointed by a seventy-five percent majority of both houses of Parliament. However, as the significance of the Constitutional

\textsuperscript{117} See \textit{The Long Journey}, supra note 63 at 62
\textsuperscript{118} S. Afr. Const. 1993, section 71(2)
Court became increasingly clear, a major political conflict exploded. The resolution involved an elaborate compromise in which the executive appoints various members of the Constitutional Court for a non-renewable period of seven years following three distinct processes. First, the President appoints a president of the Constitutional Court in consultation with the Cabinet and Chief Justice. Second, four members of the court are appointed from among the existing judges of the Supreme Court after consultation between the President, Cabinet and the Chief Justice. Finally, the President, in consultation with the Cabinet and the President of the Constitutional Court, appoints six members from a list submitted by the Judicial Service Commission, which is dominated two-to-one by members of the legal profession.

VIII. CONSTITUTIONALISM, SELF-BINDING, REPRESENTATION, AND THE LIMITS OF PARTICIPATION

Ultimately the most important issue resolved in the first round of constitution-making was how South Africa would adopt a new constitution as the final marker of the democratic transition. The centrality of this decision must not however distract us from acknowledging that the interim Constitution marked a dramatic, substantive revolution in South African law. This revolution is represented by the triumph of constitutionalism over parliamentary sovereignty and while its impact is yet to fully work its way through the labyrinth of South African law, its basic premise—a justiciable constitution—was fully guaranteed in the constitutional principles which guided the Constitutional Assembly.

Constitutionalism is commonly understood as a “commitment to limitations on ordinary political power,” and, therefore, an essentially anti-democratic strategy or, as Robert Dahl terms it, quasi-guardianship. In a context of vast


126 Democracy and its Critics, supra note 20 at 188.
inequalities where economic dislocation and social marginalization has an uneven racial impact — which still defines the fate of the majority of South Africans — the notion of a restricted democracy is inherently delegitimizing. Concern that South Africa’s new constitutional order may face a crisis of legitimacy seemed to be borne out by initial public response to the Constitutional Court’s first major decision declaring the death penalty unconstitutional. The Court’s decision was initially assailed as out of step with public opinion and the National Party called in Parliament for the reimplementation of the death penalty. An escalating and brutal crime wave subsequently intensified demands for the Constitutional Assembly to provide a constitutional basis for the death penalty in the final constitution. Even senior ANC leaders who initially supported the Court’s decision began to suggest that a referendum could be held to determine the view of the population, knowing full-well that there is significant public support for the reimplementation of the death penalty. While President Mandela expressed support for the Court’s decision and the ANC has continued to take a stand against the death penalty, the first draft of the final Constitution released by the Constitutional Assembly for public comment in November 1995 included an optional formulation of the right to life which would have permitted the reintroduction of the death penalty. Thus the circumstance of a two-stage constitution-making process has exposed the tension between the will of a temporary majority (in this case the founding majority) and constitutional commitments to the upholding of human rights. The debate over the death penalty implicitly became a debate over constitutionalism and the right of the judiciary to interpret the constitution in the face of popular sentiment.

An alternative understanding of constitutionalism argues that democracy “is never simply the rule of the people but always the rule of the people within certain predetermined channels, according to certain prearranged procedures”¹²⁸ — for example, representative democracy is always bounded by franchise rules and the division of electoral districts. From this perspective the precommitments inherent in constitutionalism make democracy stronger not weaker,¹²⁹ and the “idea of ‘possibility-generating restraints’ helps explain the contribution of constitutionalism to democracy.”¹³⁰ Applying this understanding of constitutionalism as precommitment to the South African case, Tribe and

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¹³⁰ Holmes, supra note 128 at 235.

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Landry present constitution-making as an opportunity to structure the future. Out of crisis and compromise, they argue, comes the opportunity to design institutions, to lay the framework for building a new nation and "to compose the atmosphere in which the politics of the future will be conducted." This understanding of constitutionalism as "possibility-generating" is implicit in the shifting understanding of the power of abstract review. In making the interim Constitution it was argued that giving the Constitutional Court the power of abstract review — allowing a minority of the members of a legislature to send a bill directly to the Court for constitutional review before it is enacted into law — would enhance the democratic participation of legislative minorities. Furthermore, it would bolster constitutionalism by avoiding the counter-majoritarian dilemma, by giving the legislature a chance to respond to judicial determinations of unconstitutionality prior to the enactment of a law. In that way the Court would not be required to strike down a law but merely review a bill before it became law. The impact of abstract review has, however, been quite different. Minority parties in the provincial legislatures have threatened or actually referred bills to the Constitutional Court as a way of procedurally blocking or slowing legislation designed to effect social change. This practice heightened conflict and tension among the legislative majority who felt that constitutional review was being employed to frustrate movement away from apartheid. In the case of the Gauteng Education Bill, the whole legislative session was briefly suspended when it was felt that no further business could be conducted until the matter was resolved by the Constitutional Court. This led to a debate over abstract review in the Constitutional Assembly. Instead of seeing abstract review as an enabling mechanism conducive to the promotion of democratic rights and participation, there was concern that abstract review may function as a mere restraint. In the new draft constitution, jurisdiction to exercise abstract constitutional review has been limited to the Constitutional Court in circumstances explicitly provided in the Constitution. Provision is made for the President to refer bills to the Constitutional Court for abstract review as a weak form of executive veto or delaying mechanism, and the provincial Premiers have a similar power to submit a bill to the Constitutional Court in the event that the provincial legislature insists on passing a bill a Premier considers unconstitutional. The right of a minority within the national or provincial legislatures to demand abstract review of a bill, which was contained in section 98(9) of the interim Constitution was, however, removed. After protest by opposition parties, abstract review on an application by at least one third of the

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members of the National Assembly was restored. It is, however limited to Acts already passed by the Assembly and not merely bills before the legislature.\textsuperscript{132}

Precommitment and design indeed capture the essence of constitution-making in the tradition of democratic constitutionalism but ignore the issue of participation. If earlier constitutions were “presented as an exchange of promises between separate parties,”\textsuperscript{133} who entered into a compact in order to secure social stability, “modern constitutions are typically styled as frameworks which ‘we the people’ give ourselves.”\textsuperscript{134} As such, the precommitments entered into in the constitution-making process are presented as a form of self-binding, implying democratic participation in the constitution-making process. This is not, however, just an issue of future generations,\textsuperscript{135} but also a question of incorporating all the eligible members of the present generation. It is this logic that calls for a democratically elected and representative constitution-making body, which, if created on the basis of proportional representation, provides the greatest opportunity for including the voices of all those willing to enter into a compact of future self-restraint. South Africa’s democratically elected Constitutional Assembly (CA) has taken these concerns to a new extreme. The CA has engaged in a range of activities designed to encourage participation in the constitution-making exercise. These have included a vast publicity exercise, public meetings held around the country and a series of workshops, run by the CA’s theme committees and designed to engage the relevant “stakeholders” in debate on controversial issues. There also has been a massive attempt to engage the public in an interactive discussion on constitutional issues. This has taken the form of a dedicated weekly television programme focusing on particular constitutional issues as well as a regular newsprint publication from the CA, both entitled “Constitutional Talk.” Even before the publication of the first draft of the new constitution for public comment, the CA had received over two-million submissions from the public.\textsuperscript{136} These included both written submissions as well as a range of electronic submissions. A toll-free, interactive, telephone service both provided prerecorded information as well as recorded comments while a world-wide web site provided access to the CA’s documentation as well

\textsuperscript{132} Section 80 of the Const. of the R.S.A. Bill, 6 May 1996).
\textsuperscript{133} Holmes, \textit{supra} note 128 at 209.
\textsuperscript{134} \textit{Ibid}.
\textsuperscript{135} See Holmes, \textit{ibid}, discussing the question of precommitment in relation to the binding of future generations.
\textsuperscript{136} See, Writing for the Future, Special Focus on the Constitutional Assembly, A supplement to the \textit{Mail & Guardian} (30 June - 6 July 1995).

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as an e-mail service for the submission of comments. While the CA continues to welcome submissions and proudly publishes a running tally on the number of submissions, promising to ensure that all opinions are digested and forwarded to decision-makers, there has been a certain amount of scepticism about the capacity of the CA to in fact digest this volume of submissions. There is also concern that the submissions are being used more as a means of generating legitimacy in the process than as a way to garner public opinion or comment on specific constitutional issues.

The context of constitution-making in South Africa is now fundamentally changed. Unlike the drafting of the interim Constitution, this second phase of constitution-making was controlled by a democratically elected Constitutional Assembly. This shift, from a non-elected negotiations forum to an elected body, had at least two major consequences for participation. First, it shifted the emphasis of participation away from mass action or public demonstrations towards a more individualistic, yet equally active, form of participation in the attendance of discussion-meetings and the making of formal submissions to the CA. The only visible protest action in late 1995 was by groups who felt that they were not adequately represented, including: traditional leaders from both the IFP and the ANC who joined in protest outside the Union buildings in Pretoria; anti-abortion activists who were holding a vigil outside Parliament in Cape Town; and residents of the small KwaZulu/Natal hamlet of Hillcrest who displayed placards demanding the reimposition of the death penalty following the brutal murder of an elderly woman in a day-time car hijacking in the centre of the village. The national strike called by the trade unions in support of their demand to remove the lock-out clause from the new Constitution in late April 1996 was, however, a dramatic revision to the politics of mass participation in the final moments of the constitution-making process. Second, with the failure of ethnically-based parties to make a significant impact in the national elections, less attention was given to ethnically-framed demands and instead claims focussing on issues of material and individual equality, class and gender, received greater attention from the constitution-makers. This included a refocusing of attention onto questions of how to introduce social and economic rights\(^{137}\) and away from the recognition of cultural and ethnic demands. As a result, the new draft constitution includes new clauses in the Bill of Rights creating new rights to “reasonable and progressive legislative measures” for the provision of housing, land, health, food, water and social assistance, but reduces


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the status of traditional leaders from that granted in the interim constitution. Instead of being guaranteed a national and provincial role in the legislative process, traditional leadership and law is now subject to both the Constitution and legislation. While local, pre-existing, traditional authorities are recognized and the courts are required to apply indigenous law, subject to the Constitution, and when that law is applicable, the constitutional status of the councils of traditional authorities provided for in the interim constitution has been demoted to an enabling clause allowing national or provincial legislatures to provide for such councils.

Finally, the Constitutional Court rejected attempts to use the constitutional principles to frustrate the will of the majority. When, for example, the National Party (whose relative influence in the constitution-making process diminished as a result of the electoral process) in the Western Cape asserted that any national interference in the province's restructuring of local government is a violation of the principle of provincial autonomy, the Constitutional Court argued that the principles are only relevant as a guide to the Constitutional Assembly and cannot be used to interpret the interim constitution. Thus while some members of the Constitutional Assembly may have been tempted to question South Africa's newly adopted constitutionalism as the product of an undemocratic negotiating process, this second-round of constitution-making has entrenched an essential feeling of belonging. Despite their origins, constitutional rights and their protection under a system of constitutionalism have been remade in the process of constitution-making as a product of South African participation.

IX. CONCLUSION

South Africa's new found constitutionalism was not just the product of an elite pact but was in many ways also a precondition to an internationally acceptable democratic transition. It also flows directly from the claim to equal rights which characterized the anti-apartheid struggle and which motivated popular participation in the constitution-making process. While a democratically elected Constitutional Assembly may have revolted against attempts to frustrate land reform or to exclude other socio-economic programmes in the first round of negotiated constitution-making, the question of whether the Constitutional Assembly could reject constitutionalism must be understood in a wider international context. Although the constitutional principles contained in the 1993 Constitution represent a compact of internal pre-commitments between the parties designed to facilitate the democratic transition, they also represent local

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acceptance of a broader international consensus on democratic governance.\textsuperscript{138} The emergence of this supra-national commitment to democratic constitutionalism seems, in turn, to impose a prior obligation to democratic governance in national constitution-making processes. It is the hybrid\textsuperscript{139} created by the interaction of local participation, context, and history with international influences and conditionalities that will produce a particular South African constitutional culture.
