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Introduction

Building a democracy encompasses a far broader range of issues than drafting and adopting a new constitution.[1] Yet, it is the process of constitution-making that has become a key element in the political transitions that have followed the end of the cold war.[2] At the same time there has been a resuscitation, despite long recognized critiques, of the tendency to propagate and adopt model forms of institutions and rights that experts are convinced address this or that problem of governance or social conflict. While different examples may very well inform participants or serve to shape their own imaginations of the possible, the tendency to promote model solutions rather than to learn and adapt comparative experiences to the richness of each new national, cultural, political and temporal context often undermines the very goal of attempting to reconstruct a particular polity through constitutional change. To understand the place of constitution-making in building a democratic future we need to focus less on this or that successful model and instead consider the different mechanisms and paths that have been employed in achieving at least some degree of sustainability in different democratic and constitutional transitions.

Constitution-building, I will assert, must be understood as a process. This process includes

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

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

far broader aspects of any particular political transition than merely the negotiation and drafting of a new Constitution. With hindsight we may identify a range of different paths and mechanisms including: negotiating the cessation of hostilities; establishing transitional arrangements; arranging and holding a democratic election; negotiating and drafting a new constitution; implementing and sustaining the new democratic order, each of which will have had an important impact on either the failure or success of each countries experience of political reconstruction. Each process is also subject to a variety of temporal aspects including the broad international configuration of political power and ideology as well as the particular life cycle of internal leadership and social conditions. In the post-cold war era the process of state reconstruction has been framed first by a wave of market oriented democratization and more recently by the shattering effects of 9/11 and the global war on terror.

Deciding how to achieve a new constitutional framework, including both a future text and related institutions, is determined by the relative power and legitimacy of the different participants in any particular conflict or democratic transition. While holding an election is the recognized means to establish legitimate claims of power, this will also narrow the scope of available compromises as each side recognizes the extent or limits of its own claims. Furthermore, the very means of measuring electoral support, such as proportional or first past-the-post elections, or the appropriate spacial distribution of constituencies or electoral contests, are all matters of intense conflict. These difficulties require recognition of different mechanisms that might be employed in achieving an initial electoral contest that will be inclusive and allow the participation of all the major contestants in the conflict, as well as an understanding that their participation might depend on at least some guarantees that their power as a significant party to the conflict will not be completely erased by the expression of the popular will. This is extremely important in contexts in which an ethnic or other minority might hold economic or military power but is likely to be defeated in a simple majority vote election. It is in response to these complexities that it is important to recognize and investigate the role that might be played by the adoption of different transitional mechanisms and constitutional principles.

In order to demonstrate both my empirical claim that these elements are important to successful constitution-building as well as my methodological claim that learning from deeply textured examples is more useful than the rigid application of models that may exacerbate existing conflicts, I will focus my discussion on the example of South Africa's democratic and constitutional transition. By discussing and evaluating a deeply textured example I want to demonstrate how participants in different constitution-building efforts may be offered the ability to make informed choices as opposed to being simply encouraged to adopt one or other specific model propagated by experts who will have their own conceptions and interests in offering this or that model process, constitutional clause or arrangement. Even here the advisor or informed participant must be constantly aware of the danger that they or other participants in any particular transitional process will transform a context-laden example into a model they wish to advance in order to achieve a specific advantage or strategic goal in the inevitably difficult process of negotiating a new dispensation.

The South African process

South Africa's democratic transition was achieved through a two-stage process of constitution-making. The first stage, from approximately February 1990 to April 1994 was buffeted by ongoing violence and protests, yet it remained ultimately under the control of the main negotiating parties.[3] In contrast the second stage, from the time of the elections until the adoption of the 'final' Constitution at the end of 1996, was formally constrained by a complex set of constitutional principles contained in the 'interim' Constitution,[4] yet driven by an elected Constitutional Assembly made up of a joint sitting of the National Assembly and the Senate of

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[3] See, Heinz Klug, "Participating in constitution-making: South African aspirations and realities, in **The Post-Apartheid Constitutions: perspectives on South Africa's basic law** (Penny Andrews and Stephen Ellmann eds,) University of the Witwatersrand Press (2001). See also, Heinz Klug, **Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction** (2000).

[4] See, S. Afr. Const. 1993, Fourth Schedule.

South Africa's first democratic parliament.[5] While South Africa's first national elections in April 1994 marked the end of apartheid and the coming into force of the 1993 'interim' Constitution, it would take a further five years before the 1999 elections swept away the last transitional arrangements at the local level, replacing them with the first democratically-elected local governments under the 'final' 1996 Constitution. The 1999 election also marked the setting of the sunset clauses which had provided numerous guarantees to the old order — including a five-year government of national unity and job security for apartheid-era government officials — which facilitated the democratic transition. Even then it would take another three years before the amnesty process initiated by the Promotion of National Unity and Reconciliation Act would be formally concluded in March 2002.

Before focusing on the different mechanisms that were employed in the South African transition it is useful to reflect for a moment on the specific political history of the years immediately before the parties reached agreement on the process to hold a democratic election and adopt a constitution. These years, from the unbanning of the ANC until the agreement on the date of an election and on an "interim" constitution, were dominated by uncertainty and violence. From the moment State President F. W. de Klerk announced the unbanning of the ANC and other political parties on February 2, 1990, the negotiations process was torn between the demand by the liberation movements that the political playing field be leveled and the National Party government's refusal to dismantle the apartheid "bantustans" and its insistence on remaining in control of the transition process. Even as the negotiations continued the armed wing of the Pan African Congress launched a series of terror attacks on white civilians – including a Church in Cape Town and a golf course clubhouse in the Eastern Cape – while attacks against ANC members and between ANC and IFP supporters continued unabated in parts of the country.

In the early stage of the negotiations the ANC relied upon the Harare Declaration, an internationally adopted statement which required the apartheid regime to: release all political

[5] S. Afr. Const. 1993. Section 68.

prisoners; unban political organizations; remove military personnel from the black townships; cease political executions; end the state of emergency and repeal all legislation designed to circumscribe political activity. In a series of talks about talks beginning with the Groote Schuur meeting in May 1990 the ANC engaged in direct talks with the government to secure the implementation of the Harare preconditions. These agreements enabled the ANC to begin to reestablish a legal presence in the country as part of the process towards the normalization of political activity. However, by December 1990 -- when the ANC held its first legal consultative conference in South Africa in over thirty years -- its fast expanding legal membership reacted sharply to the rising violence directed by clandestine government forces and IFP hostel dwellers against black township communities.

At first it seemed that the ANC leadership would respond to the pressure from its membership and demand an end to the violence as an added precondition to negotiations. But it soon became clear from the pattern of violence – particularly the manner in which it intensified to coincide with ANC political initiatives – that if an end to violence was to be an additional precondition to negotiations, the apartheid state would be in a stronger position to exert control over the transition. As a result the ANC decided to take the initiative, advancing its own plan for the transition to democracy including: calling for an all party conference; calling for the establishment of an interim government; and calling for the holding of elections for a constituent assembly to draw up a new constitution. This plan envisaged a separate election for a democratic government once a new constitution was adopted. At the same time, debate over the nature of the transition began to take place within the ANC where some began to ask whether we wanted to see Nelson Mandela and other senior ANC leaders made responsible for administering the apartheid state with no ability to make substantive changes, while negotiations continued without a clear timetable or end point. In response the National Party government argued that legal continuity was essential and that any negotiated agreements had to be legally adopted by the undemocratic tricameral Parliament as required by the existing 1983 Constitution.

With the convening of multiparty talks, at the Convention for a Democratic South Africa

(Codesa) in late 1991, it seemed as if the process of transition was well under way. In fact there seemed to be a convergence of opinions as the major parties -- the ANC and the Government -- agreed on a number of fundamental issues including the establishment of a multi-party democracy in a united South Africa with an entrenched bill of rights to be adjudicated by a special constitutional tribunal. Substantive negotiations began with the convening of Codesa's five working groups in February 1992. Their terms of reference included: the reincorporation of the four bantustans given independence under apartheid -- the Transkei, Bophuthatswana, Ciskei and Venda; the creation of a transitional government to lead the country to democracy; the establishment of a set of constitutional principles; a method for drafting and adopting a new constitution; and the creation of a climate for free political activity.

However, it soon became clear that the convergence in language masked deep differences and a clear strategy on the government's side to retain control of the process of transition and thus to project the power of the ruling National Party and its allies into the future through constitutional jerry-mandering. Although Codesa's founding declaration included a commitment to a united South Africa the government soon interpreted this to mean merely the maintenance of South Africa's internationally recognized 1910 borders. As a prerequisite to agreement on the nature of a future constitution-making body the government began to insist there be prior agreement that any future constitution be premised on a strictly federal system of government based on the balkinisation of the country into a number of all-but-independent regions. It was this insistence on "federalism" as a precondition to the creation of a democratically-elected constituent assembly and the demand that a new constitution be adopted by seventy-five percent of the proportionally elected constitution-making body, as well as seventy-five percent of the regionally elected delegates, that led to the failure of the second plenary session of Codesa in May 1992.

The response of the ANC and its allies in the labor movement and the South African Communist Party was to mobilize their supporters in a campaign of mass action in demand of a democratically-elected constituent assembly. However, as had occurred so many times before, the ANC initiative was met with an upsurge of violent attacks on communities culminating in the

Boipatong Massacre. In response the ANC announced a formal suspension of multi-party negotiations and demanded that the government take action to halt the escalating violence. Among its demands the ANC noted that the government was still holding over 300 political prisoners in contravention of earlier agreements and had made no effort to ban the carrying of lethal weapons by its allied parties -- particularly Inkatha, which insisted that its members had a right to carry "traditional" Zulu weapons and whose supporters were regularly implicated in attacks on ANC supporting communities – including the Biopatong killings..

After the two day general strike in early August 1992 it seemed that the state was ready to make concessions in order to encourage the ANC to reopen negotiations, including accepting international observers and an expansion of the Peace Accord structures which were designed to address violent conflict within individual communities. Despite these concessions the government still refused to accept a democratically controlled constitution-making body and as evidence began emerging of the government's role in political assassinations the government demanded the acceptance of a general amnesty -- without the need to document or accept specific responsibility for particular acts. Rejecting the government's response the ANC committed itself to intensifying its mass action campaign so as to ensure free political activity in those areas -- bantustans and right-wing white towns -- where local administrations continued to suppress ANC organization. This situation revealed two continuing sources of opposition to the negotiated settlement internal to the main negotiating parties. First, the government's duplicity in insisting that apartheid had been abolished while continuing to sustain apartheid's bantustan system and to deny responsibility for the lack of free political activity in those areas controlled by the government's allies. Second, an element within the ANC who believed that free political activity would create conditions for a more direct revolution modeled on what had occurred in East Germany – termed the Leipzig option.

Demanding the adoption of an amendment to the 1983 Constitution in the form of it's proposed "Transition to Democracy Act," which presented a detailed scheme to establish an interim government and a democratically-elected constitution-making body, the ANC mass action

campaign gained momentum. Participation of over four million workers in a two-day general strike in early August 1992, encouraged the ANC to focus on those areas of the country in which bantustan administrations -- the puppet regimes established by the South African government as part of its apartheid policy -- were engaging in widespread repression of ANC organization. Designed to ensure free political activity this part of the campaign focused first on the military administration in the nominally-independent Ciskei bantustan. On September 7, 1992 over 20 000 ANC members marched into the deadly machine-gun fire of the Ciskei security forces -- leaving 28 dead and nearly 200 injured. The massacre of African National Congress (ANC) demonstrators at Bisho was the final nail in the coffin of the first round of multiparty negotiations. At the same time the international response made it clear that the government could no longer deny responsibility for the violence its allies wrought and within the ANC the voices who suggested that mass action could lead to a non-violent insurrection and takeover as occurred with the fall of the Berlin wall went silent.

With the negotiations yet again on the brink of collapse, the ANC and National Party government were pushed to reach agreement in the Record of Understanding on September 26, 1992, setting the scene for the creation of a new negotiating process. 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 this agreement. 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, allowed the multi-party negotiations – which eventually became known as the Multi-Party Negotiating Forum – to resume at the World Trade Center outside Johannesburg in early 1993. The assassination of ANC and Communist Party leader Chris Hani by a white right-winger in April 1993 put the country again on the edge of the abyss and in many ways marked the moment when de Klerk's government realized that they could no longer assert control over the transition but needed to build a working relationship with Nelson Mandela and the ANC.

The process of negotiations which followed led to the adoption in December 1993 of an "interim" constitution which went into force with the country's first democratic election in April 1994. This 'interim' 1993 Constitution provided in turn for the creation of a 'final' constitution within two years from the first sitting of the newly elected National Assembly. Chapter 5 of the 'interim' constitution required that at least two-thirds of all the members of the Constitutional Assembly vote for the new constitution. In addition, sections of a final constitution dealing with the boundaries, powers and functions of the provinces had to be adopted by two-thirds of all the members of the regionally-constituted Senate. Once the new legislature, with both houses sitting together as a Constitutional Assembly, agreed on a draft it would then have to be submitted to the Constitutional Court for certification. This required the Constitutional Court to certify that the provisions of the final constitution were substantially in accordance with the constitutional principles agreed upon during the multi-party negotiations and enshrined in Schedule Four of the 'interim' constitution. Only then would the final Constitution be promulgated into law. In fact the Constitutional Court at first declined to certify the text of the draft constitution and only once the Constitutional Assembly amended the draft was it finally certified. Although the 'interim' Constitution had made elaborate provision, through a series of deadlock breaking devices, for the possibility that the Constitutional Assembly would fail to achieve sufficient consensus to reach the required two-thirds vote, the threat these provisions held, in terms of delay and an eventual reduction of the threshold from two-thirds to sixty percent, helped ensure that a spirit of eventual compromise endured.

Getting to democracy: the role of law and the adoption of transitional mechanisms

In addition to the debate over a future constitutional system and how it is to be achieved, there is also a more immediate set of concerns over how to create the conditions for a democratic election. It is important to recognize that the holding of an election is both a necessary step towards the creation of a legitimate constitution-making process as well as a determination of the relative support of the different parties. This event will tend to ossify the demands of those who

will now feel that they have a democratic right to their particular vision of the future or those who feel that they will loose all significant influence over the future dispensation when democratic institutions take power. Thus the period of most negotiating flexibility is probably in the period before the vote is caste but it is also the period in which the legitimacy of the whole process is most likely to be determined. As a result there is a combined need to create a level political playing field to ensure free and fair elections as well as a means to assure the potential losers that they will earn a legitimate and sustainable place in the future democracy through their participation in the process. While various interim or transitional mechanisms may be adopted to serve the first of these goals it is the creation and mutual acceptance of a set of common principles that might pave the way towards the overall legitimacy needed to sustain the newly emergent democracy.

In the case of South Africa there were two distinct levels to the first stage of the transition. First, there was the adoption of a number of transitional mechanisms, such as the independent electoral commission and the transitional executive council that were geared to achieving a level political playing field and the holding of the first democratic elections. Second, there was the agreement to adopt an 'interim' constitution under which a government of national unity would rule the country while a 'final' constitution was negotiated and democracy extended through the reorganization of regional government and the democratization of local government. Even then, the 'final' constitution, to be produced by the democratically-elected parliament sitting in joint session as a Constitutional Assembly, would have to conform to a set of constitutional principles agreed upon in the pre-election negotiations. Agreement on the principles and the terms of the transition was achieved in turn by adopting the notion of "sufficient consensus" which meant that hold out positions by smaller parties were overcome by agreement among the major opposing parties – in this case, the apartheid government and the ANC.

It was the legal adoption and institutional embodiment of each of these agreements and mechanisms that provided both the stepping stones towards each point in the process of democratization as well as a sense of security among the different participants. On the one hand

the majority was assured that the transition to democracy was becoming irreversable, and on the other hand those who felt they were losing power began to recognize that the emerging legal framework was designed to guarantee the fundamental rights of all and therefore held out the hope that they could sustain their own visions for achieving viable communal and individual goals. Crowning this process was agreement on an "interim" constitution at the negotiating forum which led to the adoption of the Constitution of the Republic of South Africa Act 200 of 1993 on December 22, 1993, which after being amended in March and April 1994 so as to guarantee the inclusion of the Inkatha Freedom Party, came into effect at one minute past midnight on election day, April 27, 1994. Although it was intended to be an 'interim' Constitution with a life-span of only five years, it effectively secured the final demise of the apartheid legal order and provided the basis for South Africa's first democratic elections.

Transitional law

The legal transition was initiated with the adoption of four pieces of legislation establishing transitional institutions to guarantee a level political playing field. While they were initially approved by the Negotiating Council, these statutes were enacted by a special sitting of the existing tricameral parliament in October 1993, thus guaranteeing the legal continuity demanded by the old regime. Although the unraveling of the apartheid constitutional framework had begun with the abolition of the President's Council[6] (which had given the apartheid President effective legislative authority) and the amendment of the Self-Governing Territories Constitution Act,[7] (which provided for the balkanization of the country into ethnic "homelands"), the formal shifting of legal authority away from the apartheid government only began with the passage of the Transitional Executive Council Act.[8] Together with the three other statutes passed at the same

[6] In terms of the Constitution Amendment Act 82 of 1993.

[7] Revocation and Assignment of Powers of Self-Governing Territories Act 107 of 1993 and the Self-Governing Territories Constitutional Amendment Act 152 of 1993.

[8] 151 of 1993.

time -- the Independent Electoral Commission Act,[9] Independent Media Commission Act,[10] and the Independent Broadcasting Authority Act,[11] – the Transitional Executive Council Act provided the basis for a pre-constitutional order directed towards the holding of a democratic election and establishment of the 'interim' Constitution.

Of these statutes only the Independent Broadcasting Authority Act (IBA) was designed to outlive the pre-constitutional transitional period by providing a system, independent of government or political party domination, for allocating and controlling the distribution and use of the broadcast and telecommunications frequency spectrum. Designed to reverse a history of government controlled media, maintain a diversity of views and expanding the participation of those historically denied access to and control over broadcasting, the statute explicitly furthers policies of local control, cultural diversity and the promotion of South African cultural products. The Authority is to achieve these goals through its control over the assignment and renewal of licenses. It is also empowered to issue a series of orders to licensees: to desist from particular actions; to take remedial action; and even to prohibit a licensee from broadcasting for a period up to 30 days.[12] Finally, the statute further strengthens the enforcement capacity of this new institution by providing for significant civil penalties.[13]

In contrast to the Independent Broadcasting Authority Act, the Independent Media Commission Act (IMC) was a specifically transitional device, designed to ensure equal treatment of the different political parties taking part in the first nonracial democratic elections in order "to promote and contribute towards the creation of a climate favorable to free political participation

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[9] 150 of 1993.

[10] 148 of 1993.

[11] 153 of 1993.

[12] Section 66(1) of the Independent Broadcasting Authority Act 153 of 1993.

[13] Id. Section 67.

and a free and fair election."[14] In order to achieve this goal the Commission was directed to monitor two forms of media, the state-licensed or controlled broadcasting services and state-financed publications and information services. Appointed by the State President on the advice of the Transitional Executive Council,[15] the Commission was required to hear and adjudicate on complaints by a political party against any broadcasting licensee, publisher of a state-financed publication or state information service. After adjudicating a complaint the commission had the power to order a specific response -- including the broadcast of a particular political advertisement or party election broadcast or alternative version of a contentious program -- as well as the power to fine or suspend a broadcasting licensee. Unlike the Independent Broadcasting Authority, the commission had a limited life and dissolved at the completion and certification of the "founding" election.

Although the ANC's demand for an interim government was rejected by the National Party government, the agreement to establish a Transitional Executive Council constituted recognition of the fact that the government could not retain sole control over the transitional process. Providing for formal power-sharing over specific areas of governmental activity and outright authority over issues affecting the transition to a democratic order, the Transitional Executive Council Act allowed the negotiating parties access to the governing process without making them responsible for apartheid policies and programs which would be beyond their power to change.

Constituted in terms of section 4 of the Transitional Executive Council Act of all participants -- governments, administrations and political groupings -- in the multi-party negotiating process which wished to be represented, the TEC was directed to facilitate and promote the transition to democracy through the achievement of two primary goals, the creation and promotion of a climate of free political participation and the creation and promotion of conditions conducive to the holding of free and fair elections. Reflecting the significant

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[14] Section 3.

[15] Section 4(2)(a).

contribution and success of women in the negotiating process, the Act[16] specifically directed the TEC to have as one of its objects to "ensure the full participation of women in the transitional and electoral structures and processes."

The TEC mirrored, through its seven subcouncils, the most important government ministries and functions, thus enabling it to formally monitor and intervene to the extent of its mandate in all the vital aspects of governance. Among the TEC's specific powers and duties was the power to order any government or administration under its jurisdiction not to proceed with proposed legislation if it determined that such legislation would have an adverse effect on the TEC's objects. This power to issue 'desist orders' extended to any decision or action of any government, administration, political party or organization which was a party to the TEC. Although the IFP refused to take part in the TEC, s21(1) of the Act made the Act applicable to all self-governing territories regardless of the Self-Governing Territories Constitution Act 21 of 1971, thus making KwaZulu formally subject to TEC oversight despite the KwaZulu administration's and IFP's rejection of the TEC.

In addition to its monitoring and overseeing functions the TEC was granted specific powers to achieve particular transitional objectives. Section 16(10)(a) empowered the TEC to establish and maintain a National Peacekeeping Force. Envisioned as the nucleus of a future integrated defense force the National Peacekeeping Force was to bring together elements of all the military formations under the control of the parties participating in the TEC with the purpose of furthering peace and public order in South Africa. Furthermore, section 23 of the Act provided that any dispute between the TEC or one of its sub-councils and any government, administration, political party or organization is to be referred to the Special Electoral Court whose findings are to be final and binding and not subject to further appeal.[17]

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[16] Section 3(a)(iv).

[17] Section 23(5).

Preparing for democratic elections

Apart from the power-sharing devices designed to achieve a level playing field in the political process leading up to the elections, the pre-constitutional framework centered on two laws designed to manage the election itself. The first of these was the Independent Electoral Commission Act which sought to remove the electoral process and authority for the verification of the elections away from the sitting government. The basis for this approach was the fear among those who had been historically excluded from the vote that government officials might attempt to interfere with the democratic process, or that government control of the process might bring suspicion upon its veracity.

The second facet of the framework established for the election was the Electoral Act 202 of 1993 which dealt with the conduct of the electoral process itself and the technical minutia of the election, including the form of the ballot paper, the identification of voters, the procedures at the polling stations, and the exact formula for counting the ballots and calculating the proportional distribution of legislative seats between the parties. The most significant departure from past electoral law, apart from the adoption of a universal franchise was the move away from a constituency based electoral system to the adoption of proportional representation in accordance with Schedule 2 of the 1993 “interim” Constitution. The Electoral Act proceeded to establish an Independent Electoral Commission (IEC) with responsibility for ensuring a fair electoral process and verifying the result as "substantially free and fair." Appointed by the State President on the advice of the TEC, the IEC was to comprise "impartial, respected and suitably qualified men and women" representing a cross-section of the population.[18] Provision was also made for the inclusion of five non-South Africans drawn 'from the international community.' The Commission as a whole was to be "independent and separate" from all existing bearers of political authority or power. It was to continue in existence until, in terms of s9 of the Act, it was dissolved upon the completion of its mandate.

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[18] Section5(1).

In addition to having complete responsibility and control over the electoral process[19] the IEC was to be responsible for voter education and was required to "take such measures as it may consider necessary for the prevention of intimidation of voters, candidates and parties." Administratively, the IEC consisted of three branches provided for in the Act: the Election Administration Directorate to administer the electoral process; an Election Monitoring Directorate to co-ordinate and administer the oversight process including monitoring by the IEC itself and the coordination of local and foreign election observers; and an Election Adjudication Secretariat to provide the necessary support and coordination for the handling of complaints and challenges to the electoral process through the Election Tribunals, Electoral Appeal Tribunals and the Special Electoral Court established in terms of sections 28-33 of the Act.

Established in terms of s32 of the Independent Electoral Commission Act, the Special Electoral Court (SEC) held a unique position in the pre-constitutional transitional process in that it was empowered to act for a limited period as a court standing above the existing judicial system. Appointed by the TEC in terms of s32(2) of the IEC Act, the SEC consisted of a Chairperson, a judge of the Appellate Division of the Supreme Court; two judges of the Supreme Court designated by the Chief Justice; one member chosen from among the ranks of attorneys, advocates, magistrates or academic lawyers; and one person who may or may not be legally qualified or experienced. The court's powers over the transitional process included the power to review any decision of the IEC; to hear complaints and appeals against decisions of the IEC or the Electoral Appeal Tribunals established to adjudicate and decide on alleged electoral irregularities and infringements of the Electoral Code of Conduct; and to resolve conflicts between the state and other parties or organizations arising out of the functioning of the TEC.

[19] Section13(2)(a).

The Practice of Transitional Law

While it would be foolhardy to argue that these transitional laws functioned in an orderly and mechanistic way, it would be equally unrealistic to ignore the vital role these laws and the institutions they created played at key moments in the democratic transition. In fact there were two specific moments of the transition in which these transitional mechanisms made the difference in managing crisis that could very well have derailed the transition to democracy and led to the escalation of violent conflict, if not to a complete reversal of the whole process. The first of these moments came when Lucas Mangope, President of the Bophuthatswana "homeland" that had been given nominal independence by the apartheid regime announced in March 1994 that he would not participate in the upcoming election and thus the people of that region of South Africa would not have the opportunity to participate. Another of these moments arose during the elections themselves when the process of ballot counting and verification, particularly in KwaZulu-Natal, was suspended and the outcome of the elections agreed upon through the reaching of sufficient consensus within the IEC in order to avoid damaging accusations of fraud and other conduct that undermined the claim of a free and fair election in the country. Without the existence of these transitional mechanisms it is very doubtful that the outcome of the process would have been as miraculous as it was.

Both of these transitional bodies, the TEC and the IEC contributed in their own ways to the crisis that unfolded. In the case of the TEC, the body's main activity was to ensure an even political playing field by among other things blocking government plans to "buy votes" through increased government expenditures on social projects in the months leading up to the elections. In one case the TEC objected to the announcement of a comprehensive housing policy by the government and only allowed the program to proceed once it was endorsed by the National Housing Forum a social movement aligned with the ANC. At another moment in January 1994 the TEC vetoed a decision by the Development Bank of South Africa to grant a loan of R216 million to Bophuthatswana on the grounds that the regime there was not allowing free political activity, thus setting the stage for the subsequent crisis in the Bophuthatswana civil service. The

IEC on the other hand prepared for the elections by creating highly sophisticated and technologically advanced systems, such as the computerized Results Control Center at the IEC headquarters which was supposed to "receive and verify the vote tallies,"[20] yet through no fault of its own it had no idea how many people were eligible to vote and during the election as many as five times and in one case eight times the number of voters expected turned up at the polls. These difficulties were only compounded: by the ongoing political tensions; the last minute agreement by the IFP to participate, requiring the addition of stickers to the already printed ballots; and finally, the fact that this body had only four months to create a new institution with over 300,000 employees, most of whom had no electoral experience.

After Mangope announced that there would be no election in Bophuthatswana, the "homeland's" 22,000 strong civil service went on strike demanding that their pensions and wages be paid out before April 27th when the administration was expected to be disbanded and the area incorporated into the new provinces under the 'interim' Constitution. As the region dissolved into anarchy – with the looting of businesses etc – white right-wing paramilitaries attempted to come to Mangope's aid and through their own racist behavior ignited a mutiny by the "homelands" 5,000-strong army which took up arms against their erstwhile "liberators" and left Mangope holed-up in his palace with no authority over the region. Since the TEC law had been enacted by the South African Parliament and Bophuthatswana was still considered an independent state by the apartheid government, it was argued that legally the TEC had no authority over this region of the country. However, in response to this crisis the ANC felt that Mangope should be removed from office so as to allow the election to go ahead in that region of the country while at the same time de Klerk was being pressed by conservative members of his government to use the South African Defense Force to intervene and reinstate Mangope's authority. While frantic bilateral negotiations continued between the government and the ANC in an attempt to resolve these differences, the TEC sent two representatives, Mac Maharaj a senior member of the ANC and

[20] Steven Friedman and Louise Stack, 1994. The Magic Moment: The 1994 Election in South African Review 7: The Small Miracle – South African's Negotiated Settlement (eds. Steven Friedman and Doren Atkinson, Ravan Press: Johannesburg) p. 321.

Fanie van der Merwe, a senior government civil servant, accompanied by senior government security officers, a General and the Commissioner of Police, as well as the director-general of foreign affairs, to evaluate the situation.

What is significant about the events that ensued is that despite the existence of a right-wing alliance – Concerned South Africans Group (COSAG) – between the white Conservative Party, the Inkatha Freedom Party and the Bophuthatswana and Ciskei "homeland" governments, that opposed the democratic transition and had significant sympathy among the security forces, the officially powerless TEC was able to prevent the reinstatement of Mangope and facilitate the collapse of these two holdout regimes. Requiring intervention from the South African Defense Force to reestablish control the conservative alliance and their forces attempted to deal directly with the Generals and to insist that law and order had to be established and Mangope reinstated. While it seemed at first as if the security forces would accept this task, the TEC representatives insisted that the security forces had to take their orders from de Klerk, who in turn had to inform the TEC, and thus effectively negotiate with Mandela before taking such a momentous decision. Once apprised of the matter the TEC decided that the fact that government authority had broken down in the territory and that South African citizens were at risk allowed the South African Defense Force to reestablish order and for the appointment of interim administrators to ensure the reincorporation of the "homeland" and its participation in the forthcoming election. Ten days later the civil service in the Ciskei "homeland" took the lead from their colleagues in Bophuthatswana and went on strike demanding their pensions be paid out before the April elections. Within the day Brigadier Oupa Gqozo, the military ruler of the Ciskei stepped down and asked the TEC to appoint an "interim administration" thus accepting the reincorporation of his nominally independent "homeland." In effect the TEC reflected, in these last months of minority rule, that the old regime could no longer make unilateral decisions about the future of the country and was now bound to accept a form of shared governance until the elections and coming into force of the "interim" Constitution on April 27, 1994.

The role of constitutional principles and principled ambiguity

While principles of democracy, human rights and the rule of law are considered central to legitimate processes of state reconstruction, it must be recognized that there is neither universal agreement on the content of these principles or on the practical implications for institution building. These principles include a variety of forms of government, a range of different individual and even group rights as well as quite different notions of what the balance should be between judicial authority and democratically-elected or responsible institutions at different levels of government.

Adopting a list of constitutional principles does not guarantee the future but it does provide a process and a framework within which areas of commonality may be defined and questions of difference may be located. Providing an institutional mechanism through which these principles may be brought to bear on either the debate over constitutional provisions or as a means to evaluate the final product adopted by a democratically-elected constitution-making body provides a zone of comfort for those who do not feel that their central concerns are likely to be adequately reflected in the democratic process – whether they be past elites or excluded minorities.

Another important role that the debate over constitutional principles plays is in postponing or mediating the necessity of making a hard or immediate decision on what might be effectively non-negotiable issues. The adoption of a broad principle allows the conflicting parties to put aside an issue for further debate while working on issues over which there might be greater agreement. This postponement with continuing engagement between the parties is an important element in building the basic elements of trust between opposing groups which is central to the ultimate success of a democracy-building project. Constitutional principles are rarely definitive and contain in most cases a degree of constructive ambiguity which enables all parties to feel that they might be able to live with the outcome of the process. At times the different parties in South Africa held diametrically opposite understandings of the meaning of particular principles but it was precisely

this often acknowledged ambiguity the allowed the process to go forward.

One of the effects of the process of negotiating constitutional principles is to slowly entrap the constitutional conflict in a process of argumentation and alternative legal propositions. This has the result of both precluding some outcomes and mediating the differences between what might be considered acceptable alternatives, often influenced as much by international understandings as the particular historical and material parameters of the local conflict. Finally, the commitment to constitutional principles promotes constitutional engagement over exit and the ever present threat of violence this implies.

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

Sources and history of constitutional principles

The constitutional principles that have framed the post-cold war transitions to democracy stem from a range of sources, including local constitutional histories and the evolving international standards reflected in the post-World War II human rights agreements, the Helsinki

process and the experience of decolonization. For Southern Africa the first explicit articulation of constitutional principles as a basis for negotiating a democratic transition emerged in the form of the 1982 Principles produced by the Western Contact Group for Namibia. Given the legal status of Namibia, as a former German colony, League of Nations mandate and finally illegally occupied territory – after the United Nations withdrawal of the mandate was recognized as binding by the International Court of Justice – it was often assumed that the idea of constitutional principles would be unique to that conflict. While the implementation of Security Council Resolution 435 led to these principles being adopted as the guiding principles of the Namibian Constitutional Assembly which drew up Namibia's Constitution after the 1990 elections, the idea of constitutional principles as a means of framing a democratic transition would become key to South Africa's surprisingly successful transition to democracy.

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

Even then the debate over constitutional principles had only begun. While the parties failed to all agree on the Declaration of Intent, a minimal set of principles adopted at their first formal meeting – the Conference for a Democratic South Africa in December 1991 – the debate over principles begun at that time would become central to the negotiations in the Multiparty Negotiating Forum which convened in early 1993 and led to the adoption of the "1993 Interim

Constitution" under which South Africa's first democratic elections were held and Nelson Mandela elected President. Even then the role of constitutional principles was not exhausted as an even larger number of constitutional principles had been included in an appendix to the 1993 Constitution for the purpose of providing a framework for the work of the newly elected bicameral-legislature, serving in joint sitting as a Constitutional Assembly with the mandate to produce a final Constitution within two years. In the end the Constitutional Court was called upon to apply them in determining whether the final constitution could be certified and adopted as the last formal act of the democratic transition. Building South Africa's democracy is however an ongoing project.

Role of constitutional principles

While the Constitutional Principles negotiated by the South African parties represented a vast and often contradictory range of possibilities, the very process of negotiating and providing justification for their inclusion had a significant impact on the parameters of constitutional imagination in South Africa. Some would claim they provided the basis for continued sectarian claims by particular ethnic minorities or traditionalists and embraced principles that were seemingly in conflict with the broader democratic thrust of the process. Yet, I will argue, the international frame within which they were located gave weight to those who insisted on a democratic interpretation of the overall framework. At the same time it is important to note that the idea of constitutional principles played very different roles at different moments in South Africa's process of democratization. In this sense the idea of constitutional principles clearly embraces an important temporal element in addition to the broader substantive implications of the principles.

The publication of the ANC Constitutional Principles in 1988 can be seen as an opening gambit in the process of negotiations as well as an intervention designed to preclude internal options that the Apartheid government was then considering. The 1988 Principles served both, as a signal to ANC activists and supporters of the possibility of a negotiated transition, as well as a

promise, to those South African's who feared the possibility of a future ANC government, of its democratic intentions. In this way it may be argued that the 1988 principles initiated the process in which the idea of constitutional principles became central to enabling the transition to democracy.

The Harare Declaration which began the process of internationalizing the ANC's 1988 principles took a step further outlining what would be an internationally acceptable process of democratization, including the establishment of an interim government to oversee the transition. This latter demand failed to recognize that the Apartheid government would not agree to relinquish political power until there were some guarantees as to the shape a future South Africa would take. This problem pushed the question of the constitution-making process to the top of the political agenda but provided no means to resolve the different visions of who should participate in what form of process to create a new Constitution. It did however make it clear that any resolution of the conflict would need to meet minimum international standards if South Africa was to be accepted back into the world community.

The effect of combining the debate over constitutional principles with the requirement that any future constitutional dispensation meet minimum international standards as defined by international human rights principles was to frame the parameters of acceptable options. This framing had a powerful impact on the shape of the debate over different constitutional options and the available alternatives. If on the one hand it precluded the demand for nationalizing the land and key national industries, it also precluded demands for ethnic self-determination and empowered the cross-party coalition of women demanding that gender equality not be overridden by claims of tradition.

While agreeing on a list of thirty-four constitutional principles and including them in schedule 4 of the interim constitution was less difficult then first predicted, the key issue remained how they would work to resolve the dual problems of process and substance. Although it could be argued that the principles provided clear substantive criteria to constitution-makers, it was less clear how they would serve to bind the process. It was the decision to require a new

Constitutional Court to certify that the final constitution produced and adopted by a democratically-elected Constituent Assembly adhere to the requirements of the constitutional principles that created the degree of confidence necessary for the democratic transition to go forward. While this was by no means the only issue, its importance for creating the atmosphere of trust so important to political transitions cannot be over estimated.

Constitutional principles in practice

The outcome, in the case of South Africa was the adoption locally of a globally bounded notion of democratic constitutionalism enabling political reconstruction or the democratic transition to proceed and testing the institutional capacity of the new system of governance to address the conflicts arising from often irreconcilable political demands. This realm of bounded possibilities, created by the introduction of constitutionalism, was constantly infused with the incompatible constitutional imaginations of local contestants. In order to demonstrate this process I will focus on a specific set of struggles over traditional leadership and regional autonomy that had been waged alternatively in the name of indigenous culture, Zulu tradition, federalism and limited government and were most intense in KwaZulu-Natal where they had been the political source of violent conflict between the Inkatha Freedom Party and the African National Congress. The Constitutional Court's engagement with these two sets of political conflicts in the first years of the new democracy, and in particular the enforced dialogue of the judicial process, demonstrates how the adoption of constitutional principles and a constitutionalist discourse made available "legitimate" rules and practices for the "civilizing" of local difference. The result was to provide a means to, in effect, civilize the political conflicts which until then had tended to degenerate into violent confrontation.

In the process of negotiating the 1993 Constitution there were significant changes in the positions of the three major players as well as important continuities which became cobbled together in the interim constitution. Most fundamentally, the ANC's initial demand for a unitary state came to be interpreted in the sense of national sovereignty over the 1910 boundaries of

South Africa rather than in its initial meaning of a central government with preemptive power over regional authorities. Unlike the ANC however the IFP refused to concede its central claim to regional autonomy and in its alliance with white pro-apartheid parties continued to threaten to disrupt the transitional process. Although factions of the IFP seemed ready to contest the elections for the KwaZulu-Natal regional government, the party's leader Chief Gatsha Buthelezi interpreted his parties poor showing in pre-election polls as cause to promote an even more autonomous position encouraging and supporting King Goodwill Zwelethini in his demand for the restoration of the nineteenth century Zulu monarchy with territorial claims beyond even the borders of present-day KwaZulu-Natal.

Although the protagonists of a federal solution for South Africa had advocated a national government of limited powers the 1993 Constitution reversed the traditional federal division of legislative powers by allocating enumerated powers to the provinces. This allocation of regional powers -- according to a set of criteria incorporated into the constitutional principles and in those sections of the constitution dealing with the legislative powers of the provinces -- was however rejected by the IFP on the grounds that the constitution failed to guarantee the autonomy of the provinces. Despite the ANC's protestations that the provincial powers guaranteed by the constitution could not be withdrawn the IFP pointed to the fact that the allocated powers were only concurrent powers and that the national legislature could supersede local legislation through the establishment of a national legislative framework covering any subject matter. This tension between provincial autonomy and the ANC's assertion of the need to establish national frameworks guaranteeing minimum standards and certain basic equalities led to an amendment to the 1993 Constitution before the constitution even came into force. According to the amendment the provinces were granted exclusive powers in those enumerated areas of legislative authority. Areas deemed of exclusive jurisdiction to provincial legislatures included: agriculture; gambling; cultural affairs; education at all levels except tertiary; environment; health; housing; language policy; local government; nature conservation; police; state media; public transport; regional planning and development; road traffic regulation; roads; tourism; trade and industrial promotion; traditional authorities; urban and rural development and welfare services. Difficulty arose in

distinguishing the exact limits of a regions exclusive powers and the extent to which the national legislature was able to pass general laws effecting rather broad areas of governance.

Although the provinces had the power to assign executive control over these matters to the national government if they lacked administrative resources to implement particular laws, the "interim" Constitution provided that the provinces had executive authority over all matters over which they had legislative authority as well as matters assigned to the provinces in terms of the transitional clauses of the constitution or delegated to the provinces by national legislation. The net effect of these provisions was continued tension between non-ANC provincial governments and the national government over the extent of regional autonomy and the exact definition of their relative powers. It is in this context that three particular cases arose before the Constitutional Court in 1996 in which we may trace the role of the Court in both silencing and enabling the constitutional imaginations of the contending parties. All three cases involved, among other issues, claims of autonomy or accusations of national infringement of autonomy by the province of KwaZulu-Natal. As such they represent three moments, in which the court was called upon to help shape the boundary between contending claims of constitutional authority to govern, unresolved by the negotiated settlement. While two of the cases directly implicated actions of the KwaZulu-Natal legislature and its attempts to assert authority within the province -- in one case over traditional leaders and in the other the constitution-making powers of the province -- the first case involved a dispute over the National Education Policy Bill which was then before the National Assembly.[21]

Objections to the National Education Policy Bill focused on the claim that the "Bill imposed national education policy on the provinces" and thereby "encroached upon the autonomy of the provinces and their executive authority." The IFP made the further claim that the "Bill

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[21] *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995*, 1996 (3) SA 165 (CC) [hereinafter *National Education Bill Case*].

could have no application in KwaZulu-Natal because it [the province] was in a position to formulate and regulate its own policies" (*National Education Bill Case* 1995:para. 8). While all parties accepted that education was defined as a concurrent legislative function under the interim Constitution, the contending parties imagined that different consequences should flow from the determination that a subject matter is concurrently assigned to both provincial and national government.

KwaZulu-Natal and the IFP in particular assumed a form of preemption doctrine in which the National Assembly and national government would be precluded from acting in an area of concurrent jurisdiction so long as the province was capable of formulating and regulating its own policies. In rejecting this argument the Constitutional Court avoided the notion of preemption altogether and instead argued that the "legislative competences of the provinces and Parliament to make laws in respect of schedule 6 [concurrent] matters do not depend upon section 126(3)," which the Court argued only comes into operation if it is necessary to resolve a conflict between inconsistent national and provincial laws (*National Education Bill Case* 1995:para. 16). The Court's rejection of any notion of preemption is an interpretation of the Constitution which enables both national and provincial legislators to continue to promote and even legislate on their own imagined solutions to issues within their concurrent jurisdiction without foreclosing on their particular options until there is an irreconcilable conflict.

Having avoided siding categorically with either national or provincial authority the Court took a further step arguing that even if a "conflict is resolved in favour of either the provincial or national law the other is not invalidated" it is merely "subordinated and to the extent of the conflict rendered inoperative."[22] Supported by the comparative jurisprudence of Canada[23] and Australia,[24] the Court was able to make a distinction between "laws that are inconsistent with each

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[22] *National Education Bill Case* 1995:para. 16.

[23] *National Education Bill Case* 1995:para. 17.

[24] *National Education Bill Case* 1995:para. 18.

other and laws that are inconsistent with the Constitution"[25] and thereby argue that "even if the National Education Policy Bill deals with matters in respect of which provincial laws would have paramountcy, it could not for that reason alone be declared unconstitutional."[26]

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

The scope of such a definition of concurrent jurisdiction was immediately tested in a case challenging two bills before the KwaZulu-Natal provincial legislature which purported in part to preclude national action effecting the payment of salaries to traditional authorities in KwaZulu-Natal.[29] In this case, brought by ANC members of the KwaZulu-Natal legislature, the objectors

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[25] *National Education Bill Case* 1995:para. 16.

[26] *National Education Bill Case* 1995:para. 20.

[27] *National Education Bill Case* 1995:para. 23.

[28] *National Education Bill Case* 1995:para. 23.

[29] *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal*

argued that the bills were unconstitutional as they amounted to an attempt to "frustrate the implementation of the [national] Renumeration of Traditional Leaders Act," by preventing the Ingonyama (Zulu King) and traditional leaders "from accepting remuneration and allowances which might become payable to them in terms of the national legislation."[30] Furthermore, the object of this provincial legislation "was to create a relationship of subservience between them [traditional leaders] and the provincial government," an object outside the scope of the provinces concurrent powers with respect to traditional authorities.[31]

The Court's response was to first lament that the political conflict concerning KwaZulu-Natal had degenerated to a state in which the right to pay traditional authorities, as a means to secure influence over them, should have become an issue. Recalling that traditional leaders "occupy positions in the community in which they can best serve the interests of their people if they are not dependent or perceived to be dependent on political parties or on the national or provincial governments," the Court noted that its role is limited to deciding "whether the proposed provincial legislation is inconsistent with the Constitution."[32] However faced with continuing and seemingly intractable political conflict between the IFP and ANC in KwaZulu-Natal the Court reasserted its duty to interpret legislation narrowly so as to avoid constitutional conflicts and upheld the legislative competence of the KwaZulu-Natal legislature and the Constitutionality of the two Bills. In effect the Court allowed the KwaZulu-Natal legislature to continue to imagine its own authority in this area, merely postponing clear questions of conflict between the national and provincial legislation to a later date.

Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995, 1996 (4) SA 653 (CC) [hereinafter *KwaZulu-Natal Amakosi/Ingonyama Case*].

[30] *KwaZulu-Natal Amakosi/Ingonyama Case* 1996:para. 16.

[31] *KwaZulu-Natal Amakosi/Ingonyama Case* 1996:para. 16.

[32] *KwaZulu-Natal Amakosi/Ingonyama Case* 1996: para. 18.

The outer limits of the Court's tolerance for alternative constitutional visions was however reached in the third case in which the Court was asked to certify the Constitution of the Province of KwaZulu-Natal.[33] Although the KwaZulu-Natal draft constitution had been unanimously adopted by the provincial legislature the Constitutional Court held that there are "fundamental respects in which the provincial Constitution is fatally flawed,"[34] and therefore declined to certify it. The Court considered these flaws under three headings. Two sets of problems were essentially procedural in nature and involved attempts by the KwaZulu-Natal legislature: (1) to avoid the Constitutional Court's determination of the text's inconsistency with the interim Constitution;[35] or (2) to suspend the certification process itself until particular sections could be tested against the final constitution.[36] While the Court rejected these devices as being in conflict with the certification process and as attempting to circumvent the process, the most significant problem with the text was the KwaZulu-Natal legislature's usurpation of national powers.

Referring to the Court's decision in *The National Education Policy Bill Case*, in which it made a "distinction between the history, structure and language of the United States Constitution which brought together several sovereign states . . . and that of our interim Constitution,"[37] the Court held that parts of the proposed KwaZulu-Natal constitution appeared to have "been passed by the KZN Legislature under a misapprehension that it enjoyed a relationship of co-supremacy with the national Legislature and even the Constitutional Assembly."[38] Drawing a clear boundary around the permissible constitutional aspirations of the IFP in KwaZulu-Natal the Court rejected

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[33] *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996*, 1996 (4) SA 1098 (CC) [hereinafter *KwaZulu-Natal Constitution Certification Case*].

[34] *KwaZulu-Natal Constitution Certification Case* 1996:para. 13.

[35] See,, *KwaZulu-Natal Constitution Certification Case* 1996:para. 36-38.

[36] See, *KwaZulu-Natal Constitution Certification Case* 1996:para. 39-46.

[37] *KwaZulu-Natal Constitution Certification Case* 1996:para. 14.

[38] *KwaZulu-Natal Constitution Certification Case* 1996:para. 15.

the draft text's attempt to both "confer" legislative and executive authority upon the province[39] and to "recognize" the authority of the government and "competence" of the national Parliament in other respects.[40] While recognizing the right of the IFP-dominated KwaZulu-Natal legislature to exercise its powers to draft a provincial constitution, even possibly including its own bill of rights, the Court clearly rejected the attempt by the IFP to assert its vision of regional autonomy beyond the core meaning of the negotiated compromise represented by the 1993 Constitution. Furthermore, the Court clearly silenced the extreme option of provincial sovereignty stating that the assertions of recognition were "inconsistent with the interim Constitution because KZN is not a sovereign state and it simply has no power or authority to grant constitutional 'recognition' to what the national Government may or may not do."[41]

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

Instead of suffering complete defeat, the IFP was able to take solace from the Court's refusal, on the same day, to certify the draft of the final constitution, and in particular the Court's decision that the draft of the final constitution had failed to grant provinces the degree of autonomy they were guaranteed in the Constitutional Principles.[42] However, when the 1996

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[39] *KwaZulu-Natal Constitution Certification Case* 1996:para. 32.

[40] *KwaZulu-Natal Constitution Certification Case* 1996:para. 34.

[41] *KwaZulu-Natal Constitution Certification Case* 1996:para. 34.

[42] See, *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SA 744. [hereinafter *1st*

Constitution was finally certified by the Constitutional Court[43] the IFP remained dissatisfied over the limited degree of provincial autonomy recognized in the Constitution. But by that time the IFP, as the governing party in KwaZulu-Natal, was not about to exit the system, instead they joined the other opposition parties in saying that they would take the opportunity in the following year's legislative session to review the Constitution,[44] thus keeping their vision alive.

Conclusion: certainty, ambiguity and the importance of context

Focusing on South Africa's democratic outcome is a wonderful way to highlight the dramatic possibilities inherent in a successful transition from conflict to democracy, but let us be careful not to forget just how conflicted and bloody the birth of the South African miracle was. To learn from past experience we must be careful to pay attention to both the specific history and context of the particular case. Only then will it be possible to gauge the limits and possibilities of different strategies and mechanisms. Adopting and applying models, such as transitional laws, transitional justice, denazification or lustration, may in different contexts prove as destabilizing as they were stabilizing in their original applications.

Context is thus clearly central to the process of building democracy, yet the importance of understanding the interaction between local context and global imperatives must also not be overlooked. Local context, including the history of the country and region, the different parties and even individual participants in a conflict often defines the parameters of what seems possible but it is also important to understand the impact of the particular global imperatives dominating the international arena at the time of a particular transition as this often provides the space in which local parameters may shift. In this essay I have used my description of the South African

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Certification Case].

[43] See, *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, 1997 (2) SA 97 (CC). [hereinafter *2nd Certification Case*].

[44] Mail and Guardian, Nov. 11, 1996.

transition to explore the role of two particular transitional strategies – the deployment of transitional mechanisms such as electoral commissions and other transitional institutions or laws, on the one hand, and the formulation and adoption of constitutional principles on the other hand – in getting to democracy.

Both these strategies, involving transitional mechanisms and the formulation of constitutional principles address the two issues that are key to the process of state reconstruction. First, there is the question of how a future constitution will be produced and who will participate in the constitution-making process. Second, is the question of what substantive provisions the new constitution will contain. While often conceived of as simply the procedural and substantive aspects of a single process of constitution-building, I have tried to show that it is through separate and distinctive approaches to each of these two questions that parties will be able to increase both the likelihood of making a successful transition to a stable and legitimate government as well as the parameters of the new democratic order. The ways in which these issues are addressed and the balance between them will have an important impact on the success or failure of any democracy-building project in the post-cold war era.

While an evaluation of these transitional mechanisms indicates that they might play a key part in moving away from violent confrontation and getting to democracy it would be a mistake to assume that they in fact function in simple accordance with their explicit legal provisions. As with all law but even more so in the case of transitional law, the implementation of these mechanisms becomes a site of contestation with as much negotiation and gap fulling as any rule implementing process. On the one hand neither the IEC nor the TEC was able to function exactly as planned but the key role these particular mechanisms played lay in their capacity to both create the necessary space for the experience of shared governance and the confidence building this entailed. The constitutional principles, on the other hand, provided an inherent ambiguity within which all sides could imagine that their goals were both compatible with the transition to democracy and not indefinitely precluded by the shift in power or the necessary compromises entailed to a negotiated deal. Ambiguity and certainty are thus both inherent in law and essential to the management of

"irreconcilable" differences.

Although I have focused in this essay on two particular ways in which law may enable a political transition – the use of transitional laws as well as the adoption of constitutional principles – it must be recognized that these mechanisms functioned within a broader process of negotiation and social dialogue. In addition to the official political negotiations in South Africa there existed an increasing number of points of contact between the opposing sides in which a social dialogue was initiated. These began before the democratic transition in the context of local consumer boycotts and extended into the transition through the emergence of the peace accord structures which in many cases went all the way down to the community level as well as direct contacts between the intelligence and armed forces of the major antagonists. All of these contacts serve to both humanize the other side as well as create an increasingly dense institutional network which over time was reflected in the institutional structures of the negotiating process itself.

While ambiguity and certainty would continue to bracket the claims of different participants well into their mutual engagement – whether it was over the terms of the amnesty that was being offered or the consequences of recognizing the role of traditional authority and the Zulu King – in the end it was the context of each specific engagement and the lessons of power that the different sides took away from these engagements that enabled the democratic transition to proceed to a successful conclusion in the implementation of democratic processes at all levels of government by the end of 1999.