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Constitutionalism and Democratic Transitions: Lessons from South Africa

edited by
Veronica Federico
Carlo Fusaro

Firenze University Press
2006

Constitutionalism and democratic transitions : lessons from South Africa / edited by Veronica Federico, Carlo Fusaro. – Firenze : Firenze university press, 2006.
(Monografie. Scienze Sociali, 13)
http://digital.casalini.it/8884534003
Stampa a richiesta disponibile su http://epress.unifi.it

ISBN-10: 88-8453-400-3 (online)
ISBN-13: 978-88-8453-400-2 (online)

ISBN-10: 88-8453-401-1 (print)
ISBN-13: 978-88-8453-401-9 (print)

342.68 (ed. 20)
Diritto costituzionale-Sud Africa

The volume is published with the financial support of the United States Institute of Peace (USIP) and the Department of Public Law of the University of Florence

Il volume è stato pubblicato con il contributo finanziario dell'United States Institute of Peace (USIP) e del Dipartimento di Diritto Pubblico dell'Università di Firenze.

Università degli Studi di Firenze
Firenze University Press
Borgo Albizi, 28, 50122 Firenze, Italy
http://epress.unifi.it/

Printed in Italy

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Acknowledgements

This intellectual project owes a great debt to all the people in South Africa that have agreed to spend their time with us, being interviewed, explaining their points of view, sharing with us their thoughts, their hopes and their fears for the future. Without their crucial contribution our intellectual hypothesis would have remained nothing but theoretical speculations.

In particular, we want to thank again the School of Social Sciences of the University of the Witwatersrand for having welcomed once again Dr Veronica Federico, and having provided her with the logistic support she needed in order to carry out her field work researches. There, Veronica has benefited a lot from the interaction with colleagues and students, as well as from the active participation in the School's activities.

As we will mention in the Introduction, the research project underlying the study presented here is co-financed by the United States Institute of Peace (USIP) and the University of Florence. The opinions, findings and conclusions expressed in this publication are those of the authors and do not necessarily reflect the views of the USIP. Our gratitude goes first to Dr Judy Barsalou, USIP program officer responsible for the project, who has followed the research since its very beginning. Our thanks are also due to the Department of Public Law of the University of Florence for having hosted the project and supported it with its efficient administrative staff. In particular, we thank Fabrizio Parissi for his precious contribution in the final paging of the volume.

Florence, 30 January 2006

Preface

This book represents the final product of a two year research project titling "Beyond constitutionalism: importance and limits of a culture of human rights in conflict prevention during and after democratic transitions. Lessons from South Africa" which has been carried out within the Department of Public Law of the University of Florence by Carlo Fusaro and Veronica Federico, with the support of a conspicuous grant awarded by the United States Institute of Peace (USIP).

At the core of this research lies the analysis of the complex role of constitutionalism, of constitution-making, of participation and inclusiveness in the achievement of the South African peaceful transition. The two central hypotheses the research is based on are:

- that in the South African political transition the role of constitutionalism has been crucial for the "civilisation" of non-negotiable and apparently irresolvable political conflicts;
- that constitutionalism in itself is not enough, and probably neither the presence of a widespread culture of human rights (which is still to be proved in South Africa!) is sufficient in assuring that democratic transitions remain peaceful at least in a medium-term perspective. We assume real and relevant participation and political representation being crucial elements to make democratic transitions durable and sustainable. Inclusiveness being the second important element of this delicate chemistry assuring that diversity becomes richness and not a disruptive phenomenon.

Corollary purposes of the research are:

- to question the "human rights ideology" and the "cascade effect" of the new values that from the constitution should permeate into society, through a specific case-study in South Africa, the post-transition period in the East Rand region;
- to question the delicate balance between global and globalising international constitutional models and local legal and cultural traditions and institutes. We suspect that just a constant dialogue between the two poles and their reciprocal "hybridisation" can guarantee the sustainability of post-conflict constitutions;
- to question critically the "exportability" of the South African model of negotiated transition, with special attention to Southern African and to the Great Lakes Region.

The research followed two main tracks: a consistent analysis of the large literature on constitutionalism, democratic transitions, South Africa and Africa, and on critical approaches to human rights; a relevant field work research period in South Africa, where 24 in depth interviews and three focus groups have been carried out, and secondary sources, such as press cuttings, NGOs reports, Parliamentary debates, policy statements, etc., have been collected. The research findings emerging from the combined analysis of the two main pillars of the projects have been integrated by the contribution of four experts, Devon Curtis, Dirk Kotzé, David Monyae and Sally Sealey-Kyambadde in order to develop and analyse more in depth some crucial aspects of the research hypothesis.

A peculiar character of the study is its multi-disciplinary approach, aiming at combining typical notions of political science with juridical concepts and sociological analysis at the theoretical and empirical levels. The purpose has been to overcome the typical discipline borders while remaining scientifically significant. Methodologically, the most sensitive phase has been the field work. The interviews have been carried out on a semi-structured interview grid, organised in macro-areas (i.e., personal involvement, the constitution-making process, the role of law during apartheid, transition and post-apartheid period, human rights culture, the Constitutional Court, citizenship, South African model). Three interview schedules have been elaborated, pre-tested and used: for delegates to the Convention for a Democratic South Africa (Codesa) I and II, Multi-Party Negotiating Process (MPNP) and members of the Constitutional Assembly; for experts; and for ordinary citizens. Concerning secondary sources, during the field-work period in South Africa, in addition to specific literature, we had access to the documentation centres and the archives of both governmental institutions and non governmental relevant actors of the transition process, and we gave peculiar attention to the analysis of the press.

As it will be underlined in almost every chapter of the book, the constitutional mechanisms and provisions, the constitution-making processes and the social and political models inspired to constitutionalism should neither be considered in isolation to the social, economic, political and cultural context, in Africa as elsewhere, nor assumed to be sufficient, by themselves, for assuring peace, justice and stability. A relatively little attention given to socio-economic aspects in the study of South African reality is rather due to the need of narrowing as much as possible our object of analysis than to the underestimation of those elements. Still, by focusing on constitutional/legal aspects, the project sought to take a realistic yet visionary view of the practical opportunities and

theoretical perspectives constitutionalism may provide to find non violent solutions to conflicts during democratic transitions.

The underlying rationale of this approach is that, despite its intrinsic limitations, constitution-making and law-making are one of the crucial instruments to try and change social and political problems contemporary societies are experiencing.

This book does not claim to cover the broad picture and every aspects of the implications of constitutionalism and constitution-making in the South African transition, let alone other aspects of South African politics and legal system. Nonetheless, we hope it will constitute an interesting instrument for analysing and understanding contemporary globalising world and it will provide useful constitutional, political and cultural tools to think of alternative possible peaceful solutions for the political and constitutional crisis the world is experiencing.

Veronica Federico, Carlo Fusaro

Introduction

Veronica Federico[1]

Up until the early 1990s, it was common opinion that constitutionalism, the rule of law and constitutions in general had very little, if no impact at all on African states. The State in Africa was in question by itself, due to its permanent crisis, its inadequacy and its inappropriateness to suite African political settings. The 1990 transition in Benin, with Matihieu Kérékou compelled to accept a sovereign national conference that dissolved the existing order and opted for a democratic constitution, has marked an important shift from this "tradition", and "constitutionalism in Africa has entered a phase of intense activity. … Constitutionalism has become an important element of the political life in Africa, that can not be neglected any more. It performs its functions of prevention and regulation of conflicts" (du Bois de Gaudusson, 1996: 251). Of course, we should not overestimate the intrinsic strength and the implications constitutionalism can have in the political space. And yet, the simple assumption that the solution of political conflicts can be settled through other means than violence, that is through the "constitutionalisation" and "legalisation" of the rules governing the public space, is in itself revolutionary.

World-wide, a part few remarkable exceptions, in the last decades every politician, scholar or analyst has proclaimed herself or himself a supporter of some model, type or kind of democracy. The same enthusiasm seems to apply to constitutionalism. Partially due to this enthusiasm, partially to the intrinsic vagueness of the two ideas, both of them have undergone the process that Sartori names "conceptual stretching" (Sartori, 1970). In order to balance denotation and connotation of the two concepts, an effort of both theoretical and empirical redefinition would be required. However, the aim of this book is neither the analysis of the long and complex history of these notions, nor the attempt to forge new definitions. More modestly, the hypothesis is to verify the role of constitutionalism in the South African political transition for the

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"civilization" of non-negotiable and apparently irresolvable political conflicts, and to discuss the contribution the new constitutional model elaborated can offer to the so called "globalizing constitutionalism". Moreover, we intend to question the idea of a culture of human rights as being the panacea for any social-conflict prevention, to analyse the dialogue between global models and local legal traditions, crucial to assure the sustainability of the new democratic order, and to question the exportability of the South African model, if a South African model exists.

In contemporary liberal democracies, the ideas of constitution and constitutionalism are almost fused, that is constitutions reflect the principles of constitutionalism. And constitution-making is a process of building political consensus around constitutionalism, putting it in the context of the country and the historical moment, adapting its principles to the needs of functional institutions and peaceful coexistence among the different segments constituting the specific social fabric. Unfortunately, that has not been the case in the African political and constitutional experience, during and after the colonial period, as it has probably not been the case in other regions of the planet. "In the African condition, the constitution is primarily a power map than an embodiment of consensus around constitutionalism" (Shivji, 1998: 24). Constitutionalism itself, in a distorted and nominal meaning of the term, has been used in order to legitimise the configuration and use of state power, in its three manifestations: legislative, executive and judiciary.

In fact, as it was the case in the majority of sub-Saharan African countries, the first independent constitutions were simply superimposed to the previous despotic colonial order. Those constitutions were the important symbols of the newly acquired sovereignty in the international arena, they marked the end of the formal political colonial power and the end of colonialism as an ideology and as a form of government. Nevertheless, they were often more a compromise between the colonial ruler and the new national/nationalistic élite than the embodiment of a sort of social pact between the new leaders and their people. No major efforts were made to build consensus around the principles the new constitutions stated, and no major efforts were made to transform previous colonial subjects into competent citizens, using Mamdani's terms. Moreover, the impetus of modernisation all African leaders perceived as a sort of *passpartout* and *conditio sine qua non* to be accepted as legitimate rulers by the international élite pushed them to adopt "imported" constitutional models as such, without trying to integrate them with the legal background and the traditional political setting of the country. The result was a sort of refusal of acknowledging the existence of traditional (or indigenous) ideas and practices of liberty, justi-

ce and good governance. The underlying ideas were, on the one hand, to make the country and its social, political, and economic fabric jump directly from a pre-modern to a post-modern power structure; and, on the other, to make of their modern, democratic and liberal (or socialist) constitutions the passports to get into the international, "civilized" community.

As noted by Oloka-Onyango, such attitudes "reinforce one of the pervasive critiques of the phenomenon of constitutionalism in Africa, namely that it is too closely dictated by forces external to the continent" (2001: 3). Indeed, we should notice that the constitutional tools the African leadership inherited at the independence were not particularly rich. Very few efforts had been made by the colonial powers or by the intellectual community to give constitutional legitimisation to the African legal tradition; little research was made to explore different notions of constitutionalism that could suite more the political and social structure of African societies; the slogans of independence were freedom, sovereignty and development more than rule of law, separation of powers and independence of the judiciary. Finally, the notions of negritude, *authenticité*, or African socialism, elaborated in the quest for more genuine African forms of governance and for solutions better accommodating the existent African reality ended up being inspiring intellectual speculations rather than useful instruments to solve the independence imperatives. But what is more relevant for our discourse here, "the early constitutional instruments in Africa had very little to do either with creating democratic space or in promoting notions of enhanced participation and inclusion on the ground" (Oloka-Onyango, 2001: 5).

It is in this context that Okoth-Ogendo elaborates on the paradox of "constitutions without constitutionalism" (1991). Moreover, for quite a long time after independence, in many sub-Saharan African countries constitutionalism and the related issues were not at the centre of the political agenda. They were not the terrain for any further debate, as more critical questions of development, governance, state-building and consolidation, peace-keeping and enforcing, and finally independence occupied the very heart of the public space in the continent. As it has been noticed for the Namibian case, the liberation movements, SWAPO in this case, had decolonisation on their agenda, not directly democratisation. "From a liberationist perspective, this is understandable, since there can by definition be no democracy under colonialism. Only a decolonisation process provides the necessary framework for democratisation. Even so, liberation and democratisation are neither identical nor necessarily congruent" (Melber, 2003: 268).

Still, towards the end of the twentieth century, we have witnessed a new wave of democratisation processes, almost all characterised by the acknowle-

dgment of the crucial role of a new kind of constitution-making as main pillar to build consensus and stability. The central role of constitution-making in the democratisation processes, in South Africa as in Namibia, in Mozambique as in Benin, in Eritrea as in Burundi, shows the fact that all the actors playing a role in the political space of the given country recognise that only the peaceful settlement of the constitutional struggle can provide the appropriate political climate, the legitimacy and the practical instruments to address all other levels of conflict present in the society. Clear signals of this are, first of all, the fact that constitutional negotiations are no more held abroad, no difference if it was in the Lancaster House or in Lisbon. They are internal processes, direct product of the existing political forces and of the political struggles. Secondly, more and more often constitutional changes become the instruments used by different stakeholders to induce some forms of change in their country. Thirdly, there is a growing confidence of civil society organisations in demanding to open the political debates and in claiming more inclusive and participatory constitution-making or constitution-changing processes. Some Afro-optimists, and also "constitutional enthusiasts" even maintain that "it is a triumph for constitutionalism that those rulers that are no longer able to rule as they wish have to seek some form of constitutional cloak in order to legitimise their claims to power" (Raheem, 2001: 59). Indeed, a part from these paradoxical situations, several experiences have shown how the constitutional space becomes a point of confrontation, a place where power relations are negotiated, given shape and legitimisation (Diaw, 2001).

Another important element of African constitutionalism is revealed when we look at the definition or re-definition of state in the continent. In arguing that the state in Africa can not be defined any more as post-colonial, C. Young maintains that "whatever the divergent forms taken by African states, most have long ceased to resemble the colonial state" (Young, 2004: 48). The complex interaction between the pressure of globalization, the contradictory processes of state-rebuilding that several countries have experienced since the 1990s, and the new social forces, especially civil society organisations, may well be producing some new equilibrium, that can not but be influenced by norms of constitutionalism and respect for the rule of law. Developing further Young's arguments, we are tempted to affirm that the recent African constitution-making wave, despite all its ambiguities, is one of the fundamental features of the new state in Africa, which should be considered no more "post-colonial".

Hence, the reasons for choosing Africa to verify the hypothesis lying at the centre of our interrogations are multiple. It is exactly through the experience of the African continent that we can question constitutions in the light

of constitutionalism, and question constitutionalism in the light of the real conditions and aspirations of the peoples whom constitutions are supposed to govern. Indeed, we argue it is just when constitutionalism, and constitutions, are permeated by local models, and acknowledge the aspirations of people that the hypothesis of constitutionalism as means to civilize bitter political conflicts becomes pertinent. And the South African case is an extremely pertinent case study for all this.

Why South Africa matters

Since its negotiated transition, South Africa seems to have become "the model"; the country has been considered a sort of laboratory for peaceful transition from authoritarian rule to democracy. Its difficult, but still relatively successful, complex system of governing differences is one of the most courageous social, political, constitutional, and cultural experiment in the last decade of the twentieth century. South Africa's transition and new constitutional dispensation began not only a political, but also a legal revolution. The concomitant of the two revolutions is of crucial interest.

To the question "why South Africa matters" raised by several scholars in the past ten years, the answer is on a triple track. First of all, South Africa does matter in the geopolitical arena of the African continent, not only as an attempt to make democracy a reality in a general context where democracy itself still scarcely exists today. But, and above all, because of the role South Africa is claiming as active agent for democracy throughout the continent and, progressively, in a global perspective. Indeed, after the hopes of a new democratisation trend fostered by the democratic openings in Southern Africa in the early 1990s, at the beginning of the new millennium there are some worrying indicators that the region might be about to embark upon a "reverse wave", as some analysts maintain (one for all, Southall, 2001). Just limiting the sight to the Southern part of the continent, democracy seems to be under acute pressure in Zimbabwe, in considerable trouble in countries such as Namibia and Lesotho, and democratisation processes appear to have stalled in Swaziland[2] and war-torn Angola.

2. On the 26th of July 2005, Africa's last absolute monarch, King Mswati III, signed Swaziland's first constitution, which still preserves his sweeping powers. The constitution took eight years to be drafted, will come into force in six months and entail fresh elections. The constitution still bans political parties and does not allow the courts to preside over cases that have a bearing on the monarchy and Swazi traditional issues. Mali & Guardian, 27 July 2005.

On the second track, South Africa does matter *vis-à-vis* the international theoretical debate on the importance of human rights and constitutionalism discourses in the transformation of undemocratic and repressive regimes and in the enforcement and consolidation of the principle of the rule of law world-wide. As noted by G. Seidman, "with the end of legal apartheid, South Africa is poised to move into a new position in the annals of social science. From being an outlier, it is increasingly used as an exemplar in discussions of democratic transitions, development strategies and globalization" (Seidman, 1999: 419). Thus, South Africa may serve as a prism, in part because of the extreme character of both its past and its democratic transition, and in part because of its highly complex socio-economic and political reality. Moreover, South Africa, being in between the so-called developing countries and the developed ones, and above all, being one of the most successful experiment of democratic transition where constitutionalism played a fundamental role, constitutes the most appropriate case-study to analyse in depth the complex dynamics and the reciprocal contaminations between transnational, national and local in the field of constitutionalism.

On a third track, the long history of the struggle against apartheid has contributed fostering a very varied, vibrant and relatively solid civil society fabric. For the purpose of the paper, this element is crucial in a double perspective: on the one hand because where civil society is highly structured into organisations, movements, associations, groups of interests, churches, etc., participation and involvement in the process of constitution-making becomes simpler, civil society's claims get better support, it is more probable for people's voice to get heard[3] and to have influence in the process of elaboration of the project of society underlying the new constitution, and in its enforcement. On the other hand, since the very beginning of the struggle, the anti-apartheid organisations and movements have not just been opposing the regime, but they have been proposing alternative models of society, with opposite philosophical foundations, characterised by other economic systems and build upon different legal principles and constitutional systems. It was not a simple common law versus civil law system, which indeed was really not the case, as the South African system already integrated in itself principles and practices of both common and civil law systems. Neither was it a rigid constitution, with sovereignty lying in the constitution itself, versus a flexible one, with the supremacy of Parliament.

3. Typical example of the strength civil society's claims get if they are channelled through some form of organisation is the campaign the Treatment Action Campaign (TAC) held to prevent mother-to-child infection of HIV, which ended up in a case in front of the Constitutional Court.

And it was not even a cultural clash between the oral tradition and a written, codified system. The project of society elaborated by the anti-apartheid movements, that we consider as having one voice in an effort of simplification, but that does not necessary match reality, was based on multiple sources. The legitimisation strength given to the movement by the struggle, on both a political and moral plan, a relatively consistent number of highly educated leaders, the support given to the movement by the international community, across the West/East and the North/South cleavages, allowed the movement to draw freely its constitutional principles and its political pillars from both the African indigenous tradition and the different constitutional models: from the classical liberal democracies, to the socialist systems, to the "new" democracies like India. But, above all, in our perspective of constitutionalism as embodiment of the spirit of the constitution by society, the most important foundation of the constitutional basis for a new democratic South Africa was the legal background already present in the country.

Thus, the issues South African society is raising *vis-à-vis* contemporary debates concerning the role of law in complex realities as well as the hybridization processes of international political traditions can be extremely revealing. It is our opinion that the challenge consists in a search for a system capable of governing a plural society, as well as managing the richness of diversity, while voicing a common and collective responsibility for the future of the whole national community.

Much has been written on the South African democratic transition, but once the country has been considered "normalized", the attention for this crucial country has drastically diminished, from a political as well as an intellectual point of view. On the contrary, we consider the "miracle" of the transition lying in its sustainability and durability. A part rare interesting exceptions, since the coming into force of the final constitution in 1996, little consideration has been given to the degree of ordinary people's satisfaction and, in turn, of wiliness to engage in the consolidation of the political and social fabric of that society, which the constitution sets the fundamental principles and the legal basis of.

Moreover, the large majority of analysis of political transitions do not acknowledge the role of law in the process of reconstruction of the state, of its legitimacy, and of reconciliation of the country's society. And in the few cases in which attention has been given to the role of law, two are the themes explored and analysed. On the one hand the focus is "the constitution-making in the context of the post-cold war transitions, [and] the emphasis has been on the way in which this process represents a new beginning, a foundation act of the new state, or on the nature of the rights these constitutions should protect in or-

der to facilitate their political and economical transitions" (Klug, 2000: 5). On the other hand, the attention is given to what we can resume with "transitional justice" (Teitel, 1997), that is the role of courts, the presence of other forms of justice, such as Truth Commissions, and/or amnesty and impunity. With no pretension of filling the analytical vacuum concerning other conceivable roles of constitutionalism in democratic transitions, through the analysis of the South African transition and of the constitutional "model" elaborated, this study seeks to demonstrate the capacity of constitutional law of integrating competing forces while setting boundaries on the range of viable political options in post cold-war democratic transitions, and to demonstrate that constitution-making processes can never superficially impose international constitutional standards, if they want to be successful. On the contrary, it is in the process of a permanent dialogue between local and global that the values of the given histories of the country, its cultures and its eventual political struggles shape the choices of the legal models available in the globalising political/constitutional tradition.

South Africa in Africa: which lesson?

The analysis of the South African case is integrated by the study of the country's influence in two crucial regions of the African continent: Southern Africa and the Great Lakes region. The choice of these two areas is not due to an arbitrary decision, but is rooted in the recent and past history of South African engagement in Africa. In Southern Africa, "geography is politic as politic has always constituted the basis for the organisation of space, and as geography has been a political instruments for the racists ideologies" (Gervais-Lambony, 1997: 10). Indeed, geographical contiguity and geopolitical interests have played a dominant role in shaping South African attitude *vis-à-vis* the other Southern African countries. The region has been the chess-board where the interests of the cold-war and the South African economic and political ones have been interweaving until the early 1990s. Since 1990, Southern Africa has experienced dramatic changes, which impose new ways of conceiving the geopolitical and economic equilibrium of the region. South Africa has become a legitimate regional power and the success of its transition goes further beyond the boards of Southern Africa, to assume a global relevance. The strategic instruments employed by South Africa to structure its international relations, to pursue its economic interests, to affirm and stabilize its political dominance have changed with the democratic transition. It is of great interest to look at this change in the pattern of international relations and to analyse whether constitutionalism has been employed as "soft power", as argued by David

Monyae in his chapter, and if it has been successful. South Africa political and economic attitude towards Southern African countries is extremely revealing. As it is its commitment in the Great Lakes Region, and especially in Burundi. Why should South Africa get involved in such a little and far away country, why should it expose its army and overburden its already overstretched Treasury, engaging the country in a very difficult peace process? The South African involvement in the solution of the war that has been ravaging Burundi since 1993, claiming more that 350,000 lives out of a population of six millions, is an interesting test to analyse on the one hand the "exportability" of the South African model and, on the other, whether constitutionalism provides viable mechanisms contributing to the solution of very complex situations. Indeed, "it is fundamentally important that South Africa and the moral and material interests of its people become deeply engaged by the difficult quest for peace throughout the entire continent...Democracy and development in South Africa are both inextricably linked to progress towards those goals throughout Africa as a whole... and peace in Burundi id one vital piece of a Central African jigsaw, relating to a much wider peace process that South Africa is busily engaged in constructing" (Bentley, Southall, 2005: 2-3). Indeed, as Devon Curtis will show in her chapter, there are no easy recipes, extrapolated from the South African experience, that can be directly enforceable. This does not mean, *ipso facto*, that we can not draw any lesson from South Africa. Rather, the Burundi case shows the importance of the local rooting of viable solutions. It shows that it is absurd to make broad generalisations on African constitutionalism. Even if there are recognisable trends and similar legal and constitutional patterns, we have to recognise that every country in Africa has its own history, its own social and economic fabric, its own legal traditions, as elsewhere in the world.

Constitutionalism in Africa and Constitutional Trends: Brief Notes from a European Perspective[1]

Carlo Fusaro[2]

Abstract*: Legal experiences have been transplanted in one direction only unto now. By reading the documents and the literature produced within the frame of the most recent constitutional efforts in Africa, and in South Africa in particular, I have been persuaded that the time has come to restore some balance in the process of constitutional circulation. In fact, constitutionalism appears to have become an integral part of the African political reform process and it has started playing a role which appears strikingly similar to the role which constitutionalism played in Europe when it became the claim, the demand of the bourgeois revolutionaries struggling against tyrants and absolute monarchs two hundreds years ago and after. Within the frame of this recent trend, the South African case is truly outstanding by all means. The main conclusion of the paper is that by moving in this direction African constitutionalism has fully joined the mainstream of constitutionalism world wide and it has started offering a genuine and original contribution to its development. Starting from an Italian-European point of view, I will try to show some of the similarities which assimilate the African experiences to what has occurred in consolidated democracies and in Italy, for instance: by doing so I feel the readers from abroad and from Africa in particular might derive some reason for confidence in spite of the great difficulties they are facing. Finally I will try to point out some of the lessons which could be derived from them and might prove useful to those who act in very different contexts both in post-conflict societies (like*

1. I would like to thank Ms Connie Ford Swanson whose suggestions were very precious and helped me in making the English of this text of mine a little better than it would have been otherwise. I'm the only one to be blamed if the outcome remains mediocre despite her courageous efforts.

2. Carlo Fusaro is Professor of Public and Public Comparative Law and Government at the University of Florence, Italy. Present Director of the Department of Public Law. Co-author of one of the most popular textbooks in Public Law, his main fields of expertise are the political institutions and the electoral laws in Italy and abroad. He has lectured in about twenty universities in Europe and abroad, has been a visiting professor at the University College of London and at the Shudo University in Hiroshima, Japan and has been a consultant for the Italian Government and various Regional and Local governments.

Iraq or Afghanistan) and in societies which generally are not regarded as conflictual but which might prove to be in unconscious pre-conflict stage.

1. A collegue from Israel, whose name is Daphne Barak-Erez, about a year ago, gave a presentation centered on the issue of the so-called *legal transplants*[3]. At the end of her talk, she remarked that in most instances what is referred to as the *dialogue* between legal experts from different countries mostly proves to be nothing else than a *monologue*. In fact, she observed, those countries which adopt as models the legal products – so to say – conceived and elaborated in other countries very rarely end up producing themselves law which becomes a model good for export, and expecially apt to be exported towards the consolidated democracies having longer legal traditions. Shortly: legal experiences have been transplanted in one direction only unto now.

By reading many of the documents and some of the literature produced within the frame of the most recent constitutional efforts in Africa, and in South Africa in particular, I have been persuaded that the time has come to restore some balance in the process of constitutional circulation.

There is little doubt that at first in Africa and in other non-Western nations many if not most constitutional arrangements have been imported and imposed upon as a direct or indirect consequence of the colonial occupation by one of the major European powers. Both African and non-African authors clearly describe the developments of those post-colonial arrangements until no more than 10-15 years ago in stages. In the first stage, *facade constitutions* closely resembling those of the previously occupying powers are practically super-imposed upon societies characterized by particularly weak polities; during the second stage, governance evolves towards an extremely high level of concentration of power in the hands of very small elites, mostly symbolized by one boss. Julius Jhonvbere defined the emergence of this élite as the "big man"[4], even though at times it was clu-

3. It took place on the occasion of a conference on "Legislatures and Constitutionalism", Banff, July 2004. The presentation was titled "An International Community of Legislators?" and it has now been published in Italy (see Barak-Erez 2005: 82). About the concept of "legal transplants", see among others Watson, Kahn-Freund, Stein, Teubner, Schauer, all quoted in Barak-Erez, 2005. In fact in comparative law the concept of "reception" is widely employed: it's obviously meant to give the idea of "receiving" by a specific juridical order from external sources within the frame of one direction only transplants. For a good general introduction to it, especially in the rich German literature, and on the various examples and ways of "receiving", see Fedtke, 2000: 15-57.

4. An exceptionally vivid and effective description of the "big man" at the head of many African states up to 20-25 years ago and less can be read in Ihonvbere, 2001.

msily hidden beneath a "sole political party"[5]; some countries pass through a the third stage characterized by the mimicker of socialist constitutional arrangements. Finally, beginning in the late 1980s and early 1990s, stage four emerged, featured by New Constitutionalism: the effort, one might say, to *apply constitutionalism* in the African context in general and more specifically to apply it in the context of some selected African nations (most authors identify Namibia and South Africa among the first).

In fact, constitutionalism appears to have become an integral part of the African political reform process and it has started playing a role which appears strikingly similar to the role which constitutionalism played in Europe when it became *the* claim, *the* demand of the bourgeois revolutionaries struggling against tyrants and absolute monarchs (about that later).

Within the frame of this trend the South African case is truly outstanding by all means and for a variety of reasons which I will recall ahead.

My main conclusion here will be that by moving in this direction African constitutionalism has fully joined the mainstream of constitutionalism world wide and it has started offering a genuine and original contribution to its development. Of course I don't underesitmate the spectacular contextual differences between most of the consolidated democracies and most of the young African democracies not yet or just barely and recently consolidated; I don't forget the deep and large gap between some solemn and sincere legal provisions and their implementation; neither do I ignore how difficult it is and how long to achieve the development of the cultural and societal background needed in order to make many constitutional arrangements based upon the principles of constitutionalism work at their best.

Nonetheless, for authoritative and well articulated that they might be, I don't share those opinions according to which differences between the Northern and the Southern part of the world are so great that their constitutional arrangements belong to different orders and must be measured applying different scales: so that in the end they may not be compared. A similar assumption would imply that it would not be possible to think in

5. As a striking example one could quote the 1977 Constitution of Tanzania in which it is clearly written that a "sole political party" can «exercise final authority in respect of all matters» and furthermore, that «all the provisions of the constitution shall be pursued subject at all times to the jurisdiction of the party ...»: Eastern European socialist constitutions and the USSR constitutions themselves (1936 and 1977) implied the very same, but never in such an explicit and brutal wording.

terms of constitutionalism as a shared and common prescriptive theory of the constitution[6].

Quite obviously, no one dealing with comparative studies in whichever field of science could ever afford ignoring the set of facts and circumstances which surround the object of his/her observation: these must be evaluated and taken into careful consideration while comparing. At the same time, however, one should also be aware of the hazards run by those who indulge in an *excess of contextualism*. First, to overestimate contextual factors makes comparison impossible; and second, it might even bring close to the verge of however unconscious but implicit discrimination, if not racism (along the line: «this is good for us, but it can't be good for them»). To indirectly use R. Dworkin's words, constitutionalism must be taken seriously and this necessarily implies the recognition of its universal relevance (which doesn't mean that its principles however universal must be or can be translated into the very same constitutional provisions, of course, nor still that they can only be legally recognized and resorted to where, when and if their implementation is guaranteed[7]). Authors like D. Beatty and B. Ackerman seem to share this view about the trans-national value of constitutionalism[8].

To sum it up constitutionalism in Africa is interesting precisely because in the various different national contexts of the continent it meets some of the most demanding challenges; precisely because the fact that many African elites and many African nations resort to constitutionalism is a striking demonstration of the universal value I was mentioning; and finally because only a parochial point of view might explain a refusal to appraise some of the novelties produced within this trend and to acknowledge that there are experiences and developments to learn from; altogether constitutionalism in Africa can contribute to the cross-fertilization processes emphasized and accelerated by globalisation, certainly affecting constitution making and constitutional issues and solutions everywhere[9].

Starting from an Italian-European point of view, in this paper I will try to argue in favor of the world wide relevance of the recent African experiences

6. See, for instance, Kamrava 1995; and in Italy Pegoraro and Rinella 1997; de Vergottini 1998; Rinella 1999. Possibly some of these authors have reviewed their beliefs more recently.

7. I hardly could name a country where such demanding standards can be fully and thoroughly ensured!

8. The first conceives constitutionalism as the adoption of the universal principle of a commitment to limitations to political power, the latter has made reference to «the rise of world constitutionalism» (both quoted in Klug, 2000: 2).

9. There are authors who have started speaking of *global* and of *globalising constitutionalism* in regard to the phenomenon I'm talking about here. See Klug, 2000 and Federico, 2005.

in constitutionalism (a); within this frame step by step I'll try to show some of the similarities which assimilate those experiences to what has occurred in consolidated democracies and in Italy, for instance: by doing so I feel the readers from abroad and from Africa in particular might derive some reason for confidence in spite of the great difficulties they are facing (b); finally I will try to point out some of the lessons which could be derived from them and might prove useful to those who act in different contexts (c).

2. To begin with, let me propose some brief stipulations (rather: formal statements of meaning) concerning concepts, terms and definitions I am going to use in this paper. Nothing new under the sun, of course; however the discussion about constitutionalism might profit of some prior clarification as it is still often blurred by the fog of some misunderstandings[10].

First of all, let me remark that constitutionalism is about constitutions and constitution-making but it doesn't identify with either one. By *constitution* I mean that system of basic principles, rules and organizational arrangements according to which a polity is run (or runs itself, better). By definition every organized community has a constitution as just defined. You cannot have an *organized* community without a constitution: more specifically, one can say it cannot exist a *sovereign organized community* or a *state* without a constitution, for the simple reason that a community in order to be organized needs a set of *constitutional arrangements*.

On the other side not all organized communities have *written constitutions*, as everyone knows (think of the United Kingdom or Israel or New Zealand, nations which lack an organic and formalized single text containing all the most significant constitutional arrangements).

Often identified with the variety of specific constitutional arrangements set up within the various states, *constitutionalism* is something different than a catalogue or a classification of them and it has to do with the *criteria* according to which those constitutional arrangements (and therefore the written constitutions) are engineered. *Constitutionalism* can be defined as a set of prescriptions, a series of principles and values meant to shape and mould the constitutional arrangements of a polity in a way to comply with them. In other words constitutionalism is the most influential and at the same time the most demanding normative theory of how constitutions should be written. This

10. As recently as in 1976, constitutionalism was regarded a "recent" term. For the basic concepts discussed in this par. see McIlwain, 1939; Wormuth, 1949; Vile, 1967 and Matteucci, 1976.

explains why not all organized communities have constitutional arrangements and constitutions (whether written or not) consistent with the mentioned theory of constitutionalism. It is not a paradox, although it may seem one, to affirm that there are several *constitutions without constitutionalism*: constitutional arrangements significantly incongruous with and not aligned to constitutionalism's basic prescriptions.

3. Still nowadays art. 16 of the French *Declaration of the rights of man and of the citizen* of Aug. 26, 1789 is very often quoted: and in fact that text is a short, simple but basically complete summary of constitutionalism as it was meant at the time. It states that «a society in which the observance of the law is not assured nor the separation of powers defined, has no constitution at all». Technically incorrect from the standpoint of the positivist constitutional lawyer, this solemn provision was *de facto* a short *manifesto* of constitutionalism: and it proved to be an extraordinary and potent instrument of political change, able to foster a spectacular process of transformation bound to impact the main political institutions in the entire European continent for many years to come. Distribution of power was at stake in those days, about two hundred years ago; those revolutionaries who where demonstrating in the streets of all European capitals in the never forgotten year 1848 (the "year of revolutions" in our mythology) where all vociferously submitting the same request: «we want, we demand *a constitution*»; they wanted to negotiate it; in many instances the monarchs just conceded it in order to avoid and anticipate any negotiation (*octroyée* or *octrayed constitutions*). In any case, the revolutionaries were not asking for *any* constitutional arrangement, they were asking for a new, a different constitutional arrangement compared to the existing one; and they demanded a constitutional arrangement shaped according to the principle and values of constitutionalism as expressed in the quoted art. 16 of the French 1789 *Declaration* and in the entire of the *Declaration*.

Therefore, although at that time there wasn't full consciousness of this, if we go back to the origins of constitutionalism, we can trace a clear distinction between the *descriptive* analysis of constitutional arrangements and the *prescriptive* theory of the content those arrangements ought to have. This theory had philosophical and political foundations which could be easily identified and which were directly connected with the social structure of the time.

The *Declaration* belonged to a powerful movement which was going to impose representative government in France and in most of Europe, along the lines of the British precedent of one hundred years before. To establish that

constitutionalism meant "observance of the law", implied that all public institutions but first of all the monarch and its cabinet and administration were bound to comply to the political decisions in the shape of law adopted by the representative assembly; there, in the assembly, was to be found the sovereign not in the monarchy anymore. The king himself was king not for the sake of god but because the representative assembly had decided so. The "separation of powers", on the other side, was just a fundamental arrangement instrumental to pursue the very same end: not only in observance with an abstract theory which the Baron of Montesquieu had exposed in his *Esprit des lois*, but for the substantial and solid reason that on the European continent, contrary to the progressive conventional developments in Great Britain, the revolutionaries didn't want a King in Parliament, as they feared the potentially disruptive monarchical interferences in the free determination of the assembly. Of course, for over a century the national assembly was bound to be *the* representative assembly of the bourgeoisie, the hegemonic social force of the time.

Already then, the laying down of constitutional arrangements, or *constitution-making*, was a matter of distribution of power along with the exchange of reciprocal guarantees among the struggling social forces: for dozens of years between the monarchy and the aristocracy on one side, the middle and middle upper class on the other. The recognition and the protection of political and property rights were main part of the deal; and – just as an example – the constitutional role of the Upper Chambers was another element of it (the old regime hoped in vain to keep concurring to legislation through them).

Marbury v. Madison[11] was virtually contemporary: it actually even anticipated the rise and the acceptance of the main values of constitutionalism in Europe. For over one hundred years, the idea of the supremacy of the constitution was totally absent from the heritage of European constitutionalism both British and continental. Parliamentary sovereignty was the fundamental principle to be applied, consistent with the main political and social structure of the nation state in Europe in the Nineteenth century, which a well known Italian scholar called the *one-class state*[12], that is to say the organized political community in which all the power was in control of one single relatively homogenous class, the bourgeoisie, whose grip on the representative assembly was granted by the restrictions on enfranchisement. To make a long story short, the development of the social and economic structure of society and at the same time the fun-

11. 5 U.S. (1 Cranch) 137 (1803).

12. In Italian the term reads *stato monoclasse* and the author I refer to is M. S. Giannini (see Giannini, 1986: 35-68).

damental protection of civil rights (and especially the freedom of opinion and the freedom of association) at the end of the Nineteenth and at the beginning of the Twentieth century brought about general male enfranchisement and the birth and spectacular fast rise of the modern political parties.

It is not surprising that the combination of universal suffrage and the organization of the unto then subaltern masses produced what was felt as the irruption of new and potentially hostile forces within the previously more homogenous representative assemblies: the state was becoming, it had already become a more modern pluralistic state, a state in which sooner or later the whole of society would be represented. This of course meant that the needs and interests of those who had been excluded were also bound to be taken into higher and eventually prior consideration.

Of course this major development was not easily accepted by those who had been in charge before. To many the very unity of the main and most powerful political institution which has ever been set up, the nation state, appeared at stake. Again, a new and more dangerous struggle for power distribution had begun. There's no need to sum up here and now the history of Europe and of the World in the first half of last century: the carnages caused by the competing European nation states, the progressive colonisation of a large part of the rest of the world, the two World wars, the search of opposite roads to cope with the rising expectations within polities in which all where recognized the right and the means to ask for their share (fascism, communism, social-democracy, the abandonment of the principle of no public intervention in the economy). We are interested in how all this was reflected by constitutionalism and constitutions.

4. Two main novelties I would like to remind: both have a lot to do with the more recent constitutional developments in South Africa and in several other countries in Africa as well.

The first refers to the tendency to recognize those who have been be called *second generation rights*, that is to say the *social* rights; the other is the contextual progressive spreading and acceptance of the idea that parliamentary sovereignty was not unlimited and that it had to meet the constraints of *a higher law*, constitutional law. Furthermore, the idea that the supremacy of this higher law would have to be guaranteed through the judicial review of some *supreme* court. Europe had had to wait until the kelsenian Austrian Constitution of 1920 to see the first constitutional provisions establishing this revolutionary constitutional conception. What we now call the *constitutional state* was born, a step forward if compared with those systems where only the *rule of law* was granted. According to the constitutional principles of the Nineteenth century

rule of law meant that all state bodies were bound to conform to the law (in England conventions and parliamentary acts); according to later and more recent constitutionalism *all* state bodies (Parliament in the first place) must also to comply to a law which by definition is higher than ordinary parliamentary law and therefore limits the parliamentary majority.

Why did the rigidity of constitutional law become one of the main features of constitutionalism during the Twentieth century? It was not an accident, nor it was the neutral acceptance of some academic or abstract theorization. To simplify a more complex story, it can be said that the urgency to determine a set of strong legal constraints which could limit the legislative power of the representative assemblies came about as a consequence of the transformation of these assemblies from assemblies were one single class was represented into assemblies were all parts of society were represented[13]. These included the working class and the parties which organized it. Some of those parties had notoriously started claiming the abolishment or at least severe limitations to property rights, and/or a system of increasing taxation meant to finance welfare and meet the needs of the poor: and eventually they even fostered limits to the protection of first generation rights in order to pursue the social revolution they were struggling for more effectively.

Some further protection had to be granted to first generation rights put at stake by these developments. To put it in another words: the very moment democracy was establishing itself and the state from liberal was becoming democratic, the issue had arisen of how to avoid the risks of a radical democracy. This is not the only justification for constitutional review systems in Europe, but certainly one of the most significant until World War II. Once more: a new distribution of power was undergoing and the social forces involved and their representatives within the institutions had to exchange some mutual assurances in order to avoid more risky conflicts. Universal suffrage and majority rule were never to be disputed again as the standards decision making criteria: but if civil war was to be avoided a set of matters had to be subtracted and precluded from blunt majority rule.

In fact, according to contemporary constitutionalism the democratic principle meets some specific and not marginal constraints which must be accep-

13. It's not a case that this was also the time that proportional electoral law was becoming more and more popular and increasingly adopted. The link between the birth and the growth of the modern political party according to the German social democratic model and proportional representation is one of the main features in the development of the European political systems in the Twentieth century.

ted in order to reconciliate potentially conflicting ends. The very same development is what has occurred in South Africa in the early Nineties, and this is one of the factual circumstances that prompt me to say that the constitutional history of South Africa after *apartheid* clearly and entirely belongs to the mainstream history of contemporary constitutionalism.

5. What I have just elaborated upon should be sufficient to demonstrate another feature of the general theory of constitutionalism: its content in terms of principles, values (and basic solutions instrumental to pursue them) does change in time as any product of society. In fact it tends to change incrementally: the original principles and values are kept but step by step they are integrated according to the new values which establish themselves in society. It is even more so for what the institutional solutions instrumental to the advancement of those principles and values is concerned (they are understandably more closely connected to each specific context).

Therefore the features of constitutionalism (its content) today are different than what it was the case during the previous phases of its history, in the course of the last two hundred years (save for the legal recognition of human rights and of the need to protect them effectively, possibly). If I would summarize briefly this content, I would recall:

(a) the protection and the advancement of human rights, inclusive of social rights or citizenship rights, as the undisputed priority: they come before any other value and all public institutions and bodies are bound to foster them; equality among all human beings and in particular the prohibition of all discriminations on grounds of race, colour, sex, social status, ethnic origin, and all unjust and prejudicial distinction is part of human rights, as well as the establishment of a thoroughly independent judiciary;

(b) the recognition of the principle of people's sovereignty as the base for the establishment and the actions of all collective institutions, which includes majority rule as the main decision making technique and forms of both representative and direct democracy (through referendums for instance);

(c) the guaranteed subtraction from the supremacy of majority rule of those matters whose regulation may eventually infringe the protection of human rights in general and of some minority rights, as well as of other matters which in each specific social context are regarded as particularly sensitive so that they may be regulated only on the

ground of a particularly high level of consensus, or may even not be regulated at all;

(d) the full autonomy of the civil and political sphere from the religious sphere in the sense that the public authorities are not allowed to grant privileges to any denomination (even if largely majoritarian);

(e) a set of institutional arrangements which allows a guaranteed minimum of reciprocal checks and balances so that no institution may concentrate all the public functions or, to say it in other words, strict limitations to the exercise of political power (these arrangements can include a territorial distribution of power along the lines of *federal* solutions[14]);

(f) all the previously listed features are established and entrenched in a source of law recognized as higher to any ordinary law and subject to amendment according to specific and extraordinary procedures only; furthermore, the enforcement of this supreme law must necessarily be ensured by some effective system of judicial review;

(g) the just mentioned higher law itself must be the product of an all inclusive and negotiated process which may grant the opportunity to participate to all members of the community it is going to insist upon; however the application of the democratic principle in the constitution-making procedures may be tuned in a way to be reconciled with the pursuit of peace among the members of society as a pre-condition of both the acceptance of the final arrangements and the effective protection of fundamental human rights[15];

(h) the permanent maintenance of the constitutional arrangements must be granted as a main function of the political entities: poor maintenance or no maintanance of the constitution (the fundamental rules and values which govern a community) may otherwise bring sooner or later to a break down of the constitutional order[16].

14. Federalism is anti-majoritarian by definition and it's a powerful limit to traditional parliamentary sovereignty.

15. Therefore not only the content of the constitutional arrangements but the method according to which they are translated into legally binding provisions have become essential part of contemporary constitutionalism. By the way negotiated constitutional arrangements produce *written* constitutions and most often very detailed texts and therefore typically *long* constitutions.

16. A tentative list of the main features of contemporary constitutionalism in Barbera-Fusaro, 2004: 40. About the risks of poor or belated constitutional maintenance, see Watts 1999.

6. The list reported above is the product of over two hundred years of constitutionalism and constitutional developments which have witnessed a process of acceleration and which can be classified in various stages: each of these stages tends to identify with political and social events of great impact which urged not a single but a number of states to entirely revise their set of constitutional arrangements or to establish a new constitution (a more rare event nowadays).

If I limit myself to the constitutional developments after WWII, I can basically list:

- The first generation of post-WWII constitutions (France, Japan, Italy, India, Germany) [Late Forties].
- The post-colonial new constitutions [Sixties].
- The post-authoritarian new Mediterranean constitutions (Greece, Portugal and Spain[17])[Seventies].
- The post-communist new or totally revised constitutions of the Eastern European nations and the constitutional recovery in Latin America [Nineties].
- The post-internal conflict constitutions in Africa and Asia [from the Nineties to present times][18].

Through its peculiarities each of these stages marked an era in the development of constitutionalism. Each of them built upon the previous constitution making experience concurring to the refining and expanding of the principles and values of constitutionalism and to the strengthening of the specific arrangements meant to foster a more effective implementation of them.

In particular the 1974-1978 Mediterranean transitions from military and/or authoritarian regimes, in all three cases, featured substantially peaceful processes based upon negotiations between the representatives of the old and the new order. This pattern of thorough constitutional change, as the follow up of a radical subversion of the balance of power in society, was confirmed first in Eastern Europe, later in Africa and in most other similar situations all over the

17. In the same period the relatively influential new Swedish constitution of 1974 came into force: it certainly belongs to the same stage – and it does confirm the choice for a single chamber Parliament for instance: but obviously it was of a totally different kind of constitutional change.

18. More accurate and complete classifications might be found in the works of several authors. See de Vergottini, 1998 and Ceccherini, 2002.

world, not without dramatic exceptions[19]. The Spanish formula of the so called *transición pactada* (negotiated transition) has become a welcome peculiarity of most regime changes: and constitutional-making in the respect of the rules of contemporary constitutionalism has become a major instrument to resort to in order to pursue a negotiation based approach[20]. More so: a negotiated constitution-making process has become itself a component of constitutionalism and it is regarded a necessary requirement of a legitimate final constitutional arrangement.

This is a crucial point which deserves some expansion. First of all we should distinguish between (a) constitutional negotiations *strictu sensu* and (b) *social inclusion and participation* to the process: both are recommended, but while the first is not new to constitutional history at least since WWII, the latter is much more recent. It is to be noted that the constitutional developments in South Africa have been characterized by both features.

Constitutional negotiations imply at least two parties involved, and generally more than two. Mainly it is a matter of getting together and attempting to reach a mutual agreement among organized political forces representing the various interests existing in society: as I already pointed out both the representatives of the previous regime and their opponents sit at the negotiation table; however this does not mean that *all potentially* interested political forces are allowed to or are interested in taking part to the constitution-making process. Some at least partial exclusion, in fact, is rather common and full inclusion relatively rare. Of course the list of the participating forces and of those left out depends on the factual circumstances which originated the entire process. In some instances – especially in the past – no representative of the previous regime was allowed to participate, generally *after* a bloody conflict (a *civil* war or an *international* war) had already taken place and made its victims. Take the Italian case: our 1948 Constitution was laid down by an elected Constitutional Assembly and based upon some limited *interim* provisions for both content and process in part dictated by the United

19. In Europe a partial exception were Rumania (1992) and of course the entire process which dissolved former Yugoslavia in the Balkans (where neither constitutionalism nor external diplomacy proved able to prevent a bloody conflict; there was and there is an attempt to resort to constitutionalism *afterwards*, in order to prevent more potentially disruptive confrontations). Exceptions in Africa might be regarded among other cases, Eritrea, Rwanda and the Democratic Republic of Congo.

20. On these matters see Ceccherini, 2002, and especially the first chapter of her book ("a new phase of constitutionalism"): 3-26.

Nations[21] and in part negotiated between the anti-fascist political parties and the monarchy (until the people repealed it by referendum on June 2, 1946). The significant part of society which identified itself with Mussolini's regime certainly was not included[22]. But an international war had been fought and lost, and a civil war had divided the country with part of the citizenry on the Germans side to the end and part of the citizenry and after Sept. 8, 1943 the King's government and its administration on the side of the United Nations. To the contrary, starting with the *transición pactadas* of the Seventies a major accomplishment pursued by constitutionalism is to allow for radical regime changes through negotiations which may at least avoid major conflicts of the dimension of a civil war and possibly prevent *any* conflict which might endanger basic human rights. This is the pattern successfully followed by most Eastern European countries in the Nineties[23]; and this is the pattern also successfully followed by South Africa in much more difficult conditions[24, 25] (about this later).

21. This was the name of the alliance among the Western powers and the USSR which defeated Italy, Germany and Japan and their allied in 1945.

22. This (exclusion/inclusion) still makes the difference between constitution-making processes which intervene *before* or *after* major conflicts, although no rule can be traced, as the outcome may also depend on the nature and the human cost of the conflict.

23. In Eastern Europe the informal but substantially binding negotiations took place within special un-elected and self appointed bodies which were recognized as representative of most of society, some inheriting the name of the model of the organizations which had been active in the advancement of human rights where their protection had been severely constrained ("forums" or "round tables", the latter to emphasize the equal standing of all participants). The link between the protection of human rights, transition and constitution-making was emblematic of constitutionalism by itself.

24. The conflict was much more deeply rooted than in other situations: in the Eastern European nations for instance the process was relatively and unsurprisingly smooth because one of the two sides had suddenly lost both any societal and all external support, so it really was a conflict between most of the people against a discredited and de-legitimated elite; less so in Greece, Portugal and Spain but still the cleavage was less profound than in South Africa. In South Africa one could reasonably assume that the cleavage was one of the deepest that could be envisaged: furthermore the conflict was between a large majority, but not *all* the people, and an economically powerful minority with its militarily strong administration (however weakened by the loss of international legitimisation). See among the other the decisive testimony of Hassen Ebrahim in Andrews, Ellmann, 2001.

25. Similar although often less successful examples have been the *national conferences* peculiar of the French speaking Africa, also to be regarded as attempts to build an all inclusive process of juridification of political conflicts (see du Bois de Gaudussuon, 1996; de Vergottini, 1998: 192).

In all instances one thing is to be active part of the negotiation process and quite another is to be informed and somehow consulted, involved and possibly allowed to submit alternative proposals or objections for consideration by the truly active actors of the process. In the first case organizations are necessarily involved[26], in the second it can be both a matter of organizations *and* of citizenry at large. The first procedure is by far the most significant while the second can be useful in order to strengthen the social support in favour of the process on one side and in support of its outcome on the other. Both however (inclusion at the negotiating table where the constitutional arrangements are decided and popular participation), contribute in the long run to grant the needed legitimisation of the constitutional arrangements established and their being recognized as a common ground for encounter by the largest part of society possible. Even in more consolidated polities (take the Italian case) the original exclusion – however justified – of part of the societal base may in the long term concurs to the slow de-legitimisation of the constitution. The risk is however more relevant in the short term when influential social forces are kept out or keep themselves out of the negotiations on the constitution[27].

It must be added that in the long term all constitutional arrangements if not maintained and updated in such a way to take into account the unavoidable social changes occurred may become totally or partially obsolete and run the risk of de-legitimisation. This is one of the reason why some scholars advance the idea that at the heart of new constitutionalism is *process*: this concept attempts to go beyond the security and stability granted by the traditional ideal of constitutions as covenants signed forever in order to allow for the flexibility needed by new circumstances. But it also reflects the fact that all constitutional texts, aside from amendments or revisions, still always require some sort of more or less intensive legislative implementation: by no means the constitution-making process ends with the enactment of the Constitution. The struggle among the various social and political actors tends to realign along different lines and to be fought with different and differently distributed legal weaponries, but it really never terminates (although it might experience particularly quiet phases). In a country like Italy it is widely accepted that the implementation of the 1948 Constitution could be considered completed

26. Although the role of the leaders is pivotal (see again Ebrahim in Andrews, Ellmann, 2001).

27. Julius Ihonvbere (cit. in V. Hart, 2003) put it in effective words: a democratic constitution-making process is «critical to the strength, acceptability, and legitimacy of the final product».

around the early Seventies (at least in relation to the organizational parts of the constitutional arrangements contained in the constitution): this means implementation took no less than 25 years; ever since the process of reviewing the 1948 text began and it hasn't been brought to an end yet[28].

The so-called *conversational constitutionalism* has been recently theorized by Vivien Hart (Hart, 2003): it refers on one side to the idea that a constitution is not a contract, a deal struck once and for all, but a process which permits continuous maintenance and step by step incremental accommodations; on the other side to the idea that nowadays constitutions may gain the needed legitimisation only if they are non elite-made but participatory constitutions[29]. This because the nature of many conflicts makes a final resolution of them very difficult to reach: no final act of closure is to be pursued but an effective way to live together *within major disagreement*. This position goes along well with Cass Sunstein's definition of what constitutionalism should be: the constitutional pursuit of *deliberative democracy* (where the most delicate choices are not left in the hands of occasional majorities but are the fruit of an inclusive process of discussion, mutual re-assurance, reason-giving and persuasion before any decision is taken, up to the point that, the above lacking, in many instances no decision is taken[30]). To say in Sunstein's own words: constitutionalism is «... what makes it possible for diverse people to reach agreement where agreement is necessary, and make it unnecessary for people to reach agreement when agreement is impossible»[31]. Let me stress that another way of expressing the same concept could be that "constitutionalism is the process of subtracting

28. Constitution-making processes are extremely slow by definition under ordinary circumstances. This should alway be taken into consideration. It is an important warning against any impatience and against hurried conclusions (a frequent temptation among those who have invested a lot in negotiating a constitutional arrangement and tend to expect it to be implemented thoroughly or at least significantly in a short time frame).

29. However V. Hart herself does warn not to "romanticize" the achievements of participatory constitution-making: the chance always exists that a strong elite might offer participation as a charade. She regards the case of Zimbabwe (1997-2000) a sample of fake participation, for instance (Hart, 2003).

30. *Deliberate* in the sense that it is referred to what is not done hastily, but with full realization of what one is doing, etc… A "deliberate decision" is a decision which is taken after thoughtful examination. The idea that «a functioning democracy requires a continuous process of discussion» has been formulated in a deservedly well known decision by the Canada Supreme Court in 1998, which also refers to the duty to «engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change ...» (*Reference re Secession of Quebec*, file no. 25506).

31. Sunstein, 2001: 243.

items or issues from majority rule". Who could doubt that this was precisely one of the main features of the South African constitutional outcome of 1993?

There is a very important corollary, an immediate inference, which derives from the criteria of negotiation based and inclusive constitution-making: this is a demanding exercise in terms of time. Constitution making as a *deliberative* task requires adequate time: unfortunately time is a precious resource not always available in the quantity which could be regarded as optimal; this scarcity might depend from a variety of reasons with consequences which can only be appreciated within the frame of each specific context. In particular the most difficult task is to evaluate where is to be found the best balance between the need to put an at least temporary end to the process or, more correctly, how to identify the end of *one stage* of the process before proceeding to the next, and the need to grant a sufficient level of inclusiveness and participation. This is particularly difficult when external forces supporting the process are in the position to have a say and interfere in the definition and implementation of the constitution-making timetable: easily a contrast might develop between the need to allow enough time to pursue a sound inclusive process and the urgency to limit the costs and the sacrifices a broader time span will imply. This is precisely what has occurred and is occurring in Afghanistan and in Iraq: while it has not been the case in South Africa where the main negotiating forces certainly were subject to external and international pressures, but not to the point to have to abide to external *diktats* imposed on the ground of primary security reasons[32].

When the transition requires (or is the effect of) foreign involvement of any kind (UN, unilateral, etc.) a tension might arise between the need to make the foreign effort as short as possible in order to appease the public opinion of the participating countries and the need for the civil society directly involved to "take its time": there is a great deal of difference between countries where the process is autonomously managed and those where it is not and it depends from external intervention.

32. In relation to Afghanistan see Schneider, 2005, where the concept that process matters as much as substance is linked to what has happened since 2001 and where the too tight timeline is criticized; in relation to Iraq see Usip Peace Briefing, 2005, based upon a report by J. Morrow where the «rushed constitutional process» is also severely criticized (not only in absolute abstract terms: one month for drafting a constitution is a «plainly inadequate period of time»; but because the need to respect the very short timing entrenched in the transitory provisions, has brought about the non inclusion of one of the three main communities, the Sunnis). About "quick plumbing" in constitutional matters with reference to Iraq speaks Fedtke, 2005.

In any instance all this speaks convincingly in favour of stressing the procedural and processual nature of constitution-making in post-conflict societies, not only because, but also because it can be one way to force the time scarcity constraint, if needed[33].

7. Another particularly relevant feature of the most recent trend in constitutionalism concerns the (re-)discovery and the affirmation, within the broader reference to human rights in general, of the strict link between political and social rights.

Let me put it like that. I belong to a generation for which when we were young, it was a mantra that you couldn't possibly have democracy and freedom (and the enjoyment of liberty) without economical development: due to the influence of the Marxist interpretation of society based upon dialectical materialism (production relations are what counts, political institutions, culture and law – including constitutional law and civil rights – are just superstructures), the conclusion was that first generation rights didn't really matter, as long as the material and economical bases of development wouldn't be granted. Even today, of course, no one would question that the full enjoyment of political and civil rights is hampered by misery: but now we tend to admit that freedom (and political freedoms in particular) are values which cannot be forgotten and ignored for the sake of development. More: the United Nations Development Program itself in its report on the Middleast has recently recognized that lack of human rights, political rights and an extreme level of gender discrimination are to be regarded key factors *undermining* economic development.

In other words: on one side the entrenchment of socio-economic rights is pivotal for the success of constitutionalism, on the other side this must necessarily be reconciled with the full protection of human rights starting from

33. J. Jhonvbere, 2001 and even more V. Hart 2003 both stress the importance to conceive constitution-making as a process. In fact in Iraq the Sunnis have been brought back to a negotiating position thanks to the deal struck on Oct. 12, 2005: accordingly the new Constitution would have been voted upon (either accepting or refusing it, but avoiding the risk that the referendum might be null for not having reached the minimum requested consent *and* participation) by (most) Sunnis as well, on the base of an open commitment by the Kurds and the Shiites to allow for some of the amendments requested by the Sunnis, immediately after the entering into force of the new constitution. This deal strikingly resembles the one which made the ratification of the United States Constitution possible over 200 years ago: the federalists committment to ratify it and to immediately approve the amendments of the so called *Bill of Rights*, amend. I to X (1791). From this standpoint, the establishment of the American Constitution can also be regarded not as a punctual exercise but as a four years long process.

civil and political rights. The latter guarantee the first in a sort of biunivocal process. Constitutional arrangements must therefore allow for a more equitable redistribution of economic as well as social and cultural resources, they must allow even large-scale social change when and where the need for it is felt by a majority of the citizens, but this has to take place through non-violent political processes ground in law only, and respecting those rights which also entrenched in the constitution (the balance being ensured by judicial interpretation by an independent supreme court)[34]. This is what has been called *transformative (or transformational) constitutionalism* according to which each constitution more than the expression of a fixed balance is or may become a program for change. By saying this we come back to the core of early Twentieth century constitutional developments (see par. 3). In fact, especially where like in Europe at the beginning of the last century or in South Africa at its end and still today, previous developments have produced a massive economic and social gap between components of the same nation, peaceful coexistence can only be granted ensuring the have-nots that they may struggle for a more even share of wealth, and ensuring the haves that their fundamental rights including the core of property rights will be legally and effectively protected as well. In this regard constitutions prove to be at the same time instruments for change or instruments to preserve: they are instrumental to preserve a set of agreed values and principles and at the same time to allow for legally regulated and therefore peaceful change.

If the haves would risk expropriation and if their rights would be endangered, or if the have-nots would risk the perpetuation of their inferior standard of living, there wouldn't be ground for coexistence and peace would be at stake. This was one of the main deals between conflicting social forces entrenched in many a contemporary constitution (including the Italian and the German constitutions for instance) and certainly was one of the main issues the South African post-*apartheid* transitional constitutional negotiators had to deal with (see Ebrahim in Andrews, Ellmann, 2001 and in Federico, 2005; Kotzé, 2005). Contemporary *constitutionalism is at the same time liberal and social, or it is not*[35]. It is also democratic, of course, as we saw (par. 5), but only

34. Klare quoted in Federico, 2005.

35. I like the way a Japanese scholar recently put it: «unless a community is rooted in respect for the individual the legal system for constitutionalism cannot be established» in Higuchi, 2001: 6 (a contemporary paraphrase of the 1789 Declaration, art. 16, to think about it). The same author significantly adds: «an essential precondition for Japanese society to embrace respect for the individual was the liberation of the weak from poverty and oppression ...» (ibid.).

to the point that the application of the principle of people's sovereignty doesn't endanger peace and full enjoyment of human rights in the sense I just emphasized[36].

8. The emergence of a sort of supra-national commitment to constitutionalism is the last major development in contemporary international relations.

In fact it is not just the matter of the step by step but steady assertion of the idea that *national* constitution-making processes ought to comply to the basic requirements of constitutionalism as defined here: more broadly since WWII and symbolically since the United Nations Universal *Universal Declaration of Human Rights* (1948), the international juridical system has lost its traditional feature of a system in which states were the only equally sovereign actors. Peoples and individuals have started to be taken into consideration as relevant juridical subjects; the system is nowadays fully committed to the protection of human rights and provides the means to pursue it even *within* the single states. Even more so after the sunset of the Soviet Union and the events which followed in Eastern Europe and in another parts of the world as well, an entire network of international organizations and a variety of international legal instruments has been either established or more effectively applied in order to impose the protection of human rights and the acceptance of the core features of constitutionalism to a number of states. From the United Nations sanctions against the *apartheid* regime in South Africa to the softer incentives of the Council of Europe or the jurisprudence of the European Court for the protection of Human Rights or the financial incentives of the World Bank until the extreme of the *humanitarian intervention* in the Balkans (Kossovo, in 1999) passing through the Helsinki Conference for Security and Cooperation in Europe, the following establishment of OSCE and its ODHIR, to the most recent establishment of regional organizations like SADC[37] and to the sanctions decided by single states against Zimbabwe, the establishment of the international tribunals to

36. About *democratic constitutionalism*, for instance, speaks H. Klug in Andrew, Ellmann, 2001: 152. On the other side, it was none less than Immanuel Kant who distinguished the *republican* from the *democratic* "civil constitution": the first being characterized by the consensus and the separation of executive and legislative power, the latter being regarded as another potential form of despotism (in *Perpetual Peace: a Philophical Sketch*).

37. At the SADC Mauritius Summit in 2004, a protocol was signed by participating countries which commits its governments to the rule of law and to democratic government.

prosecute the crimes committed in former Yugsolavia and in Rwanda: a complete list would be too long.

What is dramatically evident is the trend. Mine is not optimism, and I'm perfectly aware of the limits of the process of expanding the protection of human rights and its setbacks; I'm also aware of how large is that part of the world where enforcement is still seriously endangered and how many are those countries where even some of the core principles of constitutionalism are questioned if not rejected. In international law the relevance of brutal power is still decisive in many instances: no international organization and not even the most powerful alliance of single states acting in the name of the most sacred humanitarian values may ever enforce the application of the protection of human rights or other constitutional requirements to China, just to mention the most striking example that comes to my mind. In this regard, however, I would like to observe that (a) even from the perspective of legal realism who takes into account effectiveness as a main requirement to recognize a norm as legally binding, cases of non compliance must be balanced with cases of compliance; furthermore as I said the trend must be also considered; on this base it would be hazardous to assume that if the protection of human rights is not granted in the entire world this affects its juridical status as recognized international law; I would say more: there are all the elements to consider the obligation to protect human rights *general international law* and not simply an obligation deriving from treaties which each state might or might not have signed and ratified; (b) in any case it is not a paradox, in the end, that save for extraordinarily exceptional instances whose urgency must be shared and consented by a large majority of the members of the international community, even the protection of human rights cannot be enforced through violent means which might largely endanger the very same values which would in ordinary circumstances justify and even suggest the intervention. Just as in a domestic police operation no one would ever endanger the life of dozens or hundreds of people in order to save a single human life for excruciating that such a choice would unavoidably be.

The role of regional organizations can be particularly useful in order to foster the peaceful expansion of the protection of human rights and constitutionalism: what has occurred in Europe in the last 15 years strikingly demonstrates it. In particular it proves how attractive can be a context which might at the same time promise more stability, more international security and better chances of economic development. In fact, the Euro-

pean Union (and to a more limited extent the already mentioned Council of Europe[38]) have proven to have a spectacular capacity of attracting states at their borders and as a consequence to be able to directly and indirectly influence the acceptance and effective enforcement of human rights and constitutionalism by the countries interested to become candidates for accession or even just to be granted special commercial and financial rights. No one could reasonably put in question that the expansion of those values would have been much more limited and much slower, and in some cases might not have taken place at all, in more than one state if the Council of Europe and the European Union would have not existed. The case of Turkey is probably the most extraordinary example of them all, although in this case the process is far from completion[39,40].

In all instances the internationalization of constitutionalism in terms of the relevance of the role of external (international) pressure in favour of its application in national constitution-making processes has increasingly become a major factor to be taken into consideration: its impact in the constitutionalization of many post-conflict countries has been very significant and this applies to the South African case as well. The international de-legitimisation of the *apartheid* regime had reached a level which could

38. The European Union gathers 25 European states today; the Council of Europe 44, including Russia and Turkey. However while the Union is much more than a confederation and it can be regarded as a federal arrangement in the making, the Council of Europe has the more limited although fundamental aim to foster the protection of the rights recognized by the *European Charter for the protection of Human Rights* of 1950. Its peculiarity is that inviduals can directly appeal to its Court if they believe a right protected by the Charter has been violated and the national courts (to which it is mandatory to appeal at first) have not granted reparation.

39. It goes by itself that constitutionalism can become instrumental in a way in the expansion of a single nation's or an alliance's influence in a certain region: about this and about the role of the Republic of South Africa in promoting constitutionalism in its area of primary influence, see Monyae, 2005 and Curtis, 2005. I would be very reluctant to judge a similar development negatively at least in the short term and as long as the influence in favour of constitutionalism is exerted through peaceful and legal means.

40. Furthermore, the European Union has since 1995 systematically inserted a clause on respecting human rights and democratic principles in accords negotiated with other countries. Although this might have placed the EU «in the vanguard of international community's endeavours in this field» as the Eu Commission claimed, ten years of practice doesn't generate the same optimism according to a recent report discussed by the European Parliament foreign affairs committee (see *European Voice*, 24-30 November 2005).

hardly be sustained in the long term, and this certainly influenced the NP leaders and made them accept the idea all they could do was to negotiate their strategic retreat, that is to say to negotiate a rather different distribution of power based upon totally alternative moral, ethical, political, legal postulates. A revolution was going to take place in a way or another: the only thing they could possibly do was to see if they could gain the right to be a legitimate part of a future polity based upon the very same principles they had so grossly violated. The greatness of the two opposing leaderships was to understand that to negotiate such an outcome was the only thin path which could avoid a bloodshed of major proportions which would have inflicted unspeakable sufferings to so many. The constitutionalist principle according to which constitution-making must be based upon all inclusive negotiations *had* to be applied (and tested, about this later).

9. The South African constitutional developments prompted by the first secret talks between the *apartheid* government representatives and the jailed Nelson Mandela at the end of the Eighties truly appear a spectacular demonstration of constitutionalism at work; after having studied the process as described by some of the numerous authoritative literature on the subject and as confirmed by the available documentation, the widespread recognition that process gained seems to me well deserved. Let me elaborate on that and on some of the features of those developments which I think should be emphasized because they make the South African most recent constitutional history a most interesting exercise in constitutionalism[41].

A) Quite evidently the long term struggle of the African National Congress (Anc) and the other freedom fighters had always been a struggle in the name of the most basic values and principles of constitutionalism as affirmed since the late Eighteenth century: one can just read art. 1 of the 1789 already quoted *Declaration* («Men are born and remain free and equal in rights ...») and compare the entire Declaration with the content of the *Freedom Charter* of June 26, 1956 (taking into account the

41. Entirely devoted to the process of constitution-making in South Africa conceived as a major case of "reception" of constitutional law is Fedtke, 2000. The book is mostly concerned with the reception of constitutional law rather that of constitutionalism; the author speaks of *Rechtsstaatsprinzip* rather than of *constitutionalism* and carefully follows how German constitutional law has been transplanted to South Africa, as he says «in varying degrees of success» (451).

150 years of constitutionalist developments in between, as well)[42]; by natural consequence the freedom fighters were also struggling for majority rule, or government by the people. The Pretoria authorities were resisting and imposing opposite values. The very moment that the balance started shifting (*de facto* it had already shifted when negotiations begun) it become the turn of the representatives of the decaying regime and its organized political forces, National Party (Np) with the Inkatha Freedom Party (Ifp) on its side on this issue, to appeal to constitutionalism this time (rightfully) interpreting it as a global system of protection of minorities from the potential excesses of majority rule.

B) From the beginning to the end the very heart of the constitutional process has been the decision to negotiate. Of course the outcome of negotiations could not be known in advance: but no one negotiates unless there is an at least implicit agreement on the fact that the outcome would guarantee – at least to a significant extent – the core of the not negotiable expectations and interests of each of the involved parties. Equality, freedom, majority rule, the right to keep struggling for a more balanced distribution of wealth were the stakes Anc could not give up; some degree of territorial autonomy and most of all the freezing and subtracting from majority rule of some entitlements and fundamental rights including, those linked to property, were the stakes that in a different measure Np and Ifp could not entirely give up. This was calling for a compromise based upon a limited application of the democratic principles, according to the rules of constitutionalism. A peaceful transition required that the core constitutional agreements would imply that a social revolution would prove to be possible but within the constraints allowed by the protection of first generation fundamental rights and postponed to future constitutionally limited majority rule[43]. As Hassen Ebrahim has written, the true key issue of

42. In part the importance of the Charter and the other documents of the anti-*apartheid* movement lays in the fact that they allowed first generation rights not to be perceived as "Western rights" or as Shivji wrote, as one of the main elements of the ideological armoury of imperialism, quoted in Federico, 2005.

43. This pattern is not unusual: actually it resembles what occurred in Italy after WWII when as a famous Italian constitutional lawyer and member of the Constituent Assembly wrote «a missed revolution was compensated by a promised one»: the 1948 Constitution was considered to be the product of this compromise. And exactly as some parts of Anc have resented their "missed" revolution, so for dozens of year following the enforcement of the constitution strong leftist minorities resented the postponement of a revolution that was bound to never take place, in the way they had imagined. The compromise between State redistributive capacity and the protection of property finally entrenched in the 1996 South African constitution has been noted by Fedtke, 2005.

the negotiations until 1993 was how to reconcile majority rule with its limitations[44]: and this is what constitutionalism is all about.

C) The importance of the 1993 *interim* Constitution has been underlined by many scholars[45]. On my part I regard it as a truly extraordinary specimen of contemporary constitutionalism and I assume it is the very core of the present South African constitutional arrangements. This is the reason why its importance could hardly be over emphasized.

(i) The *interim* Constitution was the certification that a totally new constitutional phase had started and it reflected the new base of the constitution, the new roots from which the future constitutional arrangements were going to be developed: a new order was rising.

(ii) The way it entered into force was the re-affirmation of a process meant to be legal, in formal respect of the previous arrangements as typical of constitution-making in peaceful transitions.

(iii) It was integrated by a series of reciprocal political guarantees: the establishment of an all inclusive Transitional Executive Authority[46], of

44. In his fundamental testimony published in Andrews, Ellmann, 2001. In this essay he also rightfully stresses the important role of the opposite leaderships and, as he puts it in traditional Marxist terms, their "political maturity" (which I would translate with the ability to perceive where the true balance of power was without either fear or illusion: where this capacity lacks and extremely sensitive issues are at stake, and of course this was the case, trouble invariably follows).

45. For instance De Villiers 1994; Andrews, Ellmann themselves in Andrews, Ellmann, 2001; Hart, 2003; Kotzé, 2005.

46. A broad-based national unity government involving the conflicting parties is typical of recent transitions, along with the agreement on the procedure and timetable for the drafting of permanent constitutional arrangements, see Curtis, 2005. It certainly was not the case in previous transitions, for instance those after WW II: as they occurred *after* an external and/or internal war had already been fought to its very end, the unconditional surrender of one of the two parts in conflict. In the Italian case, for instance, teh part of the Italian society more directly involved in Fascism had no part in the transitional period management from 1943 through 1946, although it found some sort of representation when the Constitutional Assembly was elected. "Epuration", the attempt to clean the institutions and the administration from all the persons involved in Fascism, was for several years a crucial issue which deeply divided the anti-Fascist political forces. In fact it was soon abandoned and limited to relatively few cases of heavily responsible individuals. When the – so to say – defeated party had been in power for a long time and had mastered extensive support, a integral "epuration" proves practically impossible: the Iraq case seems to confirm this. It's a practical matter, not to mention that to up-root conflict a unitarian approach is always to be recommended (setting aside the need to punish those who personally committed major crimes: although even in this case experience teaches that pragmatic approaches are the only ones which work, however unpleasant and morally embarrassing this might be to admit).

an Independent Electoral Commission and of an Independent Media Commission: all crucial in view of a fair implementation of the entire process.

(iv) Most of all, its main feature was the regulation of the constitution making process which would have followed, inclusive of the election of a Constitutional Assembly by universal suffrage (with proportional representation[47]) and by the contextual laying down of 34 constitutional principles, meant to limit the Assembly: the future "final" Constitution would have to comply to those principles and in order to ensure this, the task to verify the compliance was handed to a higher tribunal, the Constitutional Court.

(v) The Constitutional Assembly had been correctly called by this name: it was bound to draft the Constitution in the respect of a variety of principles and directives which had already been agreed upon and could not be changed. Section 74 of the *interim* Constitution *expressly* prohibited the repeal or the amendment of any of the 34 Constitutional Principles of Schedule 4: as de Villiers wrote in 1994 «it may … rightly be said that not only is the 1993 Constitution the act of conception of the final Constitution but it already programmes the genetics of that Constitution» (De Villiers, 1994: 51). In technical terms, we can say that the CA was bound to exercise not *constituent* powers, but *constituted* powers; in other words it was by no means unlimited. This truly was a triumph of constitutionalism over parliamentary sovereignty and over majority rule (something totally unknown to the previous constitutional traditions of the country, by the way). This is the reason why I would challenge the definition of the *interim* Constitution as a *transitional* or a *temporary* constitution (such as the Italian one of 1944-1946 or the Iraqi one of 2004-2005, for instance). It didn't include a set of constitutional provisions bound to remain in force for a limited amount of time only; neither it was meant to rule a constitutional arrangement bound to be replaced. To the contrary, its Schedule 4 and the mechanism which was going to and then actually did guarantee its enforcement should be interpreted in the sense that the deal beneath

47. The adoption of proportional representation abandoning the better known and traditional plurality was the result of another effort by the ANC to meet the demands of the other political parties and especially those who represented the old regime. The same can be said about the *quasi*-federal approach to the design of the centre-local relations which was bound to be reflected by the final Constitution.

the *interim* Constitution and the social and political forces beneath it were the *material* (the effective and substantial) base of the South African constitutional arrangements, somehow *the veritable constitution*[48]. In fact at the heart of South African constitution-making was a deal struck by the un-elected representatives of the old regime and the political parties of those who had fought for freedom and equality, granted by the conscious containment of majority rule and democracy[49]. In the end it was no less than a sort of peace-treaty what had been negotiated upon and no one, not even a representative and elected assembly – the very first truly representative of the citizens of South Africa, could put its implementation at stake. In this sense it is correct to stress that the *interim* Constitution was an expression of constitutionalism at its best, and that it proved how constitutionalism can be instrumental to funnel potentially dangerous conflicts[50].

(vi) No popular referendum was planned before the full enactment of the "final" Constitution (like in many post-conflict constitution-making processes: Italy, Japan, Germany among many others), in order to avoid the inevitably confrontational format of decision making processes based upon direct suffrage (apt to take so called *zero sum* choices; by definition the opposite of a deliberative procedure) and of course mostly in order to avoid anything which could endanger the preserving

48. The *material* constitution lives somehow under the formal or written one, but it is stronger than the latter, as it is the source of it. The deal I refer to, could be grossly summarized as follows: you give me an elected assembly representative of all South Africans finally legally recognized as equals, I grant the protection of some basic rights particularly dear to you and your participation to a government of national unity (to take part of which your votes would not and will never again be sufficient). In other words it provided for the basic requirements and the only hope of a peaceful transition. Several authors speak of a constitutional process in two stages (for instance Kotzé, 2005, Federico, 2005): which is certainly true but I maintain that step one was the most significant and the most relevant constitutionally speaking..

49. It must also be said that the identification of democracy with the sole majority rule could and should be questioned: it rather is rule by the people according to specific predetermined provisions, in respect of certain prearranged procedures and without the power to infringe certain predefined and enshrined values. This also is constitutionalism: according to which even the people is a sovereign which meets constraints and limitations in exercising its legitimate powers.

50. Other examples of a process of the same kind have been the constitution-making processes in Poland and Hungary. A sort of guided process had also taken place in Namibia where eight Constitutional Principles, binding for the constitution makers, had been negotiated under the United Nations auspices, (Kotzé, 2005).

and the implementation of the peace-treaty at the base of the constitutional developments in progress[51].

(vii) The role of the Constitutional Court in view of the *certification* of the draft Constitution voted by the Constitutional Assembly has already been mentioned. Some scholars have referred to it as «perhaps the first constitutional court anywhere in the world to be granted the power to hold a constitution unconstitutional»[52]. In fact it might appear an oddity the instance that a constitution may be called into question by a court however supreme: the basic function of constitutional judicial review is to grant that *law* shall be in full compliance with the constitution; when new constitutional provisions are enacted in full compliance with the existing provisions regulating the power to amend the constitution, a constitutional court should be simply expected to apply it in place of the previous dissimilar constitutional provisions. Instead there is a recent and expanding principle of constitutionalism which goes exactly in the direction marked by the Codesa negotiators in 1993: so far back as in 1973, the Supreme Court of India (in *Kesavananda Bharati*) ruled that Parliament, which holds the power to amend the Constitution, cannot distort, damage or alter the basic features of the Constitution under the pretext of amending it. Ever since that Court has become the arbiter of all amendments approved by Parliament[53]. A similar principle has been affirmed by the Italian Constitutional Court in its ruling no. 1146/1988, with reference to what the Court defined as the «supreme principles of the Constitution» which not even a constitutional amendment or a constitutional revision may infringe. The reasoning of the Italian Court is interesting to report. The Court said: if our role is to protect the Constitution it would a paradox if a formalistic interpretation of some constitutional provision would prevent us from protecting the Constitution itself from major and particularly dangerous infringements of its most basic principles. As one can understand, this is another major step in the direction of an integral system of checks and balances wherein no authority or institution can ever act without some sort of legal control: "pure" constitutionalism, so to say.

51. The role of referendums in constitution-making is a particularly difficult issue to evaluate: for an interesting discussion see Watts, 1999.

52. Andrews and Ellmann (Andrews, Ellmann, 2001) define the Court a «counter-majoritarian institution», but they also regard it a «nation building institution», which holds the ultimate responsibility to reconcile the various Constitution's competing commitments.

53. See Nayak, 2005.

D) The Constitutional Assembly set up a variety of instruments meant to foster individual and collective participation to the drafting of the Constitution. The end was to enlarge popular support to the process and to strengthen the legitimisation of its ultimate outcome by making as many citizens as possible feel the Constitution as their own. The existence of a striving civil society turned this participation into something effectively although only marginally influential: for instance for what gender issues was concerned. These were issues not quite central to the parties agenda, to say the least, and had been previously carefully set aside by them, before being brought to general attention thanks to civil society's active involvement[54].

10. Some final reflections are meant to offer a set of possible reasons peculiar of the South African constitution-making process which allowed it to turn into a success which has rightfully made of it a model for other African nations and other post-conflict countries as well.

First of all, demographics were such that in the long run there was little room left for the white minority to remain the hegemonic force in society. A less short-sighted leadership was bound to emerge sooner or later, which would have had the courage to face the problem and act consequentially for the sake of the future generations.

Second: *apartheid* was simply "too much", in the sense that it had too bluntly defied fundamental and growingly accepted human rights. *Apartheid* never had had any legitimisation and step by step it lost even the residual open or behind the scene international support. It was too embarrassing to be tolerated. Undoubtedly the end of the Cold War precipitated the events and turned into a catalyst for change: but the outcome wouldn't have been different, at most postponed in time. In the minds of billions of men and women all over the world *apartheid* had become an infamous, internationally known and strongly evocative word (like *pogrom* or *gulag* or *mafia*), the only contemporary phenomenon to be compared with the Shoah (the holocaust, the attempt to exterminate the Jews during WWII in Europe). The enormity of the crime against humanity perpetrated still in the second half of the Twentieth century by the regime of Pretoria was such that in the end weakened it severely. At the same time the struggle against *apartheid* fostered a culture of human rights and helped in building a vibrant civil society (Federico, 2005).

54. The role of civil society is stressed by H. Ebrahim in Andrews, Ellmann, 2001: 94-98 and in Federico, 2005.

Third: the fact that the executive authorities were still in control of overwhelming military power (Ebrahim, 2001) was a heavy factual element which had to be taken into consideration by the black leadership: the old regime new that sooner or later it was bound to loose and it preferred to negotiate its retreat in order not to loose everything; Anc knew that without a deal it either would have had to wait for a long time or risk a bloodshed.

Fourth: South Africa at the end of the *apartheid* regime – in spite of the blunt violations of human rights (and in part because of them, as we just saw) – was a country were legal culture was and is very developed, where a basic institutional infrastructure was in place however distorted (because of the ends it was pursuing on behalf of the white minority), where a civil society did exist and was actively present in all communities. In no way South Africa could be equalled to most less developed nations. From a broadly cultural perspective South Africa resembled more India than any other Sub-Saharan country. Furthermore as it has been stressed by more than one author due to its history South African legal culture shows close ties with both the common law system and the Roman one[55].

Fifth: many if not most black leaders at different levels had been forced to emigrate and had had a chance to acquire international experience and to see the advantages of constitutional arrangements based upon the prescriptive norms of constitutionalism. For what constitutional values is concerned Anc basically embraced the protection of *individual* human rights as its policy as a consequence of the fight against *apartheid*: *apartheid* had notoriously exploited and even fostered the values of ethnicity which are so difficult to reconcile with the protection of human rights within the frame of constitutionalism[56].

Sixth: the influence of the international community, of what has been called the *global legal and constitutional culture* and the very same idea that political conditions affected the chances of development, were felt strongly in such a way that ... «South Africans on both sides,… found their options constrained by an increasing international consensus on the characteristics of an internationally acceptable democratic transition ...» (Klug, 2000).

55. Interestingly enough Jörg Fedtke forecasts that German constitutional law shall not exert long-term influence in the South African legal order because of the language barrier and the limited access to German case law (Fedtke, 2000: 449).

56. This is a major issue of the present time. Only pragmatic solution are feasible to my knowledge: conceptually speaking it is not possible to fully protect human rights (which are individual rights) if you have to grant protection to ethnical and community interests (rights) whose very existence may interfere with the protection of individual rights.

Seventh: the two leaderships of the two major parties (Anc, Np) played a decisive role, as they were both capable to gather most of their followers in support of their choices. The Anc, in particular, proved to be a well organized and modern political party, sufficiently disciplined and apt to vehiculate and defend even the less popular decisions taken at the negotiating table[57].

Eight: the timetable was in direct control of the main negotiating parties; security basically was also in their hands, although far from fully. The explosion of violence during the negotiations has been proven: in fact it was the phase with the highest numbers of attacks and victims[58]. However these outbursts of violence were more means to indirectly influence the outcome of the negotiations than an attempt to derail them (Ebrahim 2001). Main negotiating parties, in the end, were able to "take their time".

Ninth: most of all, both sides shared the political will and the determination to strike a deal which would avoid further damages and sufferings to their communities and to the nation as a whole. At the end of the day, this is what made possible to manage a huge conflict through a constitution-making process based upon constitutionalism, the latter perceived (also) as a set of criteria instrumental to the exchange of reciprocal guarantees[59].

11. There are several fundamental lessons to be taken from the African, and the South African experience, in particular, which I would like to finally point out briefly:

(i) Inclusiveness (mainly referred to groups and communities) is a first major requirement in contemporary constitutional constitution-making;

(ii) Participation (mainly referred to individuals) is a second primary requirement;

(iii) The need to reconciliate majority rule with the prior urgency to negotiate is often a must: majority rule is not everything; it cannot be

57. Besides, the level of trust which developed among a relatively small number of negotiators was decisive, as it has been emphasized by Ebrahim in Andrews, Ellmann, 2001 and Kotzé, 2005.

58. Timothy Sisk spoke about a «beyond the table tactic to influence negotiation» and a instrumental to be included and not marginalized in the negotiation process (Sisk, 1993 (b) and 2004).

59. The concept of "conflict" itself might deserve further discussion. Both the nature, the quality and the proportion of the conflict influence the process. No one could doubt that there had been a deeply rooted conflict in South Africa and still it really never turned into a full scale civil war. This was what made negotiations among relatively "equal" parties conceivable in the first place and avoided a *zero sum* outcome.

set aside, but at the same time it's a value in itself only up to a certain point, especially when a societal body is not characterized by an high degree of uniformity and the outcome of the decision making and especially the constitution-making effort must necessarily be based upon a compromise among deeply conflicting interests;

(iv) Specific technical solutions have been elaborated and laid down in many a recent African constitution which can be regarded as setting new standards in constitutional arrangements. Such an evaluation doesn't change even if in many instances a large gap remains between proclamation and implementation of constitutional principles and rules.

Consolidated democracies – precisely because they are such, or more accurately, because the believe … they are such, tend to underestimate the significance of items (i), (ii) and (iii). At the same time they often forget how difficult, long and uncertain the process of implementing their own constitutional proclamations has been (iv).

Consolidated democracies tend to give for granted that the shared background (in terms of values and interests) of their constitutional arrangements makes them unnecessary to be pursued. This often proves to be a great mistake: because the grade of sharing tends to be overestimated by the elites in charge and because even if truly this has been the case in previous times, society changes faster than it is often perceived up to the point that this might not be true anymore, after a certain amount of time: in fact, generally a continuous process of detachment of a constitutional arrangement from reality begins the day a specific constitutional arrangement enters into force.

More broadly my assumption is that in Europe we have a tendency to overlook this evidence. There are parts of our societies which never were included in the constitutional decision making process, there are parts of our societies which do not share the same values and interests they used to share and – most of all – there are newcomers we should take care of in order to accommodate their values and interests. A long way is there to go in order to allow for the needed inclusiveness and participation: conflict in fact is behind the corner everywhere or it smoulders beneath the ashes, as we say in Italy.

As an example of what may happen, I would like to mention the recent *Convention on the Future of Europe* and the following *Treaty establishing a Constitution for Europe*, now facing a rather uncertain destiny: in this case we have witnessed a quite evident and resounding lack of communication between political leaders and people; on one side people's involvement in the constitution (or treaty)-making process wasn't effectively and actively promoted, on the

other side in several major European countries citizen were asked to say "yes or nay" in referendums which followed the signing of the constitutional treaty. As a consequence two rules of modern constitutionalism were ignored at the same time: in the first stage there was no pursuit of participation (one); in a second stage there was no selective resort to majority rule (and therefore the decision was taken to resort to referendums without any ability to appraise the context)[60]. The outcome has been that people were called to vote ignoring the true content of the "constitution" (most certainly a content in full accordance with all the basic rules of constitutionalism[61]) and voted "nay" for reasons which had very little or nothing to do with that content; as most observers noted many voted in order to protest against their governments and their present policies in the first place, and against that *unidentified political object*[62] (and therefore threateningly mysterious object) that the UE appears today in the second place.

A further example I will not elaborate upon could well be the recent process of constitutional revision which climaxed in Italy in the parliamentary adoption of a rather extensive constitutional amendment of the Constitution of 1948 at the end of this year 2005: bound to be finally submitted to popular referendum in 2006 the extremely limited debate upon its content will most likely turn it into a plebiscite in favour or against the present Italian political leadership and doom it to fatal rejection.

Some products of the new African constitutionalism also deserve attention for their specific and technical content. I will submit three examples only: two taken from the Constitution of South Africa and one taken from the very recent Proposed New Constitution of Kenya[63].

The first example I would like to mention is art. 39 SA Const. which concerns the interpretation of the Bill of Rights (articles from 7 to 39) and in particular the first paragraph where the Constitution establishes that courts "must consider international law" (a statement in line with several after WWII Constitutions[64]), but also states that they "may consider foreign law" (a praxis

60. In fact, the ratification of the constitutional treaty establishing a Constitution for Europe is now frozen after the peoples of France and Netherlands have voted against it.

61. The problem has been the process, not the content.

62. The expression was invented several years ago by former Chairman of the EU Commission Jacques Delors.

63. It has been published in the *Kenya Gazette Supplement No. 63* the 22nd August, 2005. It includes relative novelties as quotas for disabled persons within the representative institutions and constitutional protection of the rights of citizens within the political parties (Articles 13 and 54).

64. See for instance art. 10 of the Italian Constitution (1948).

which has become frequent among several Constitutional courts in Europe, but has never been expressly established in any constitutional text before, at least to my knowledge).

A second interesting example is the attempt to specify and textualize the so-called *cooperative federalism* by the Constitution of South Africa (1996) which was recognizably inspired by the German model: chapter 6 (sections from 103 to 150) can be regarded as a clever and sophisticated effort to "translate" and "specify" the model according to original South African needs.

A third example is the brand new Constitution of Kenya laid down by the Commission led by Prof. Yash Ghai which still waits to be adopted. Of course we all know that Kenya is one of the worlds poorest nations. And still the text drafted pursuant Section 27 of the Constitution of Kenya Review Act is a significant product of modern constitutionalism which includes the constitutionalization of very progressive principles as the full participation of persons with disabilities in the political life of the nation (Art. 13.1.i and k.) or as the right of every citizen not only to form or participate in forming a political party, but the right to be registered as a voter and vote by secret ballot in any elections, *including* the election of office bearers of any political party of which the citizen is a member (another novelty: see Art. 54). The recognition of the full participation of persons with disabilities does include a quota system in order to implement their presence in all elective political bodies (no less than 5%: articles 13.1.k and art. 101.c.).

12. Few final remarks about the traditional and debated relationship between constitutionalism and effectiveness cannot be avoided. The very quotations of parts of some African constitutions and the fact of referring to them as examples of modern constitutionalism might lead more than one reader to object that there is an extraordinarily long way between the however solemn proclamation of more than a sacred and valued principle and its true implementation. I certainly could not deny the truthfulness of a similar objection. However I can also offer some counter-objections in my turn.

First of all as I have already emphasized above, I am not aware of any constitutional text or constitutional proclamation of principles and values which has been matched by immediate, complete and integral implementation: in fact this applies to all normative processes, although by definition it is even more so in the case of constitutional norms. Law is nothing else than the most sophisticated and complex system of social regulation which has been invented as yet: as such law is procedural and ignores any automatism. It is a very naive way of thinking to believe that to adopt a law is equivalent to have changed

social behaviour or to say in other words that to pass a law is sufficient to produce an immediate change in social behaviour: it can happen, but mostly it simply does not. The passing of a law is a step, a phase and it only implies that the included rules have gained a specific form of recognition which tentatively should eventually produce their progressive implementation.

Second, as a consequence of what I have just said, effectiveness meant as actual application of the established rules is important but it is not, as mentioned above, the *only* criteria which allows to identify *legal* norms and distinguish them from other kinds of norms (ethical, moral, of etiquette and so on). Even less so if we talk in terms of constitutionalism as a prescriptive theory concerning constitution-making and constitutional arrangements.

As constitutional lawyers, when we speak about constitutionalism we may have to choose between the *normative force of facts* and the *factual force of norms*. The answer of those who believe in constitutionalism, I think, should be obvious and easy to predict and hopefully share: for the simple reason that although legal norms do not come from nowhere and mostly reflect true conflicts of interests existing in society, they still do not identify with simple facts because they tend to be the product of a more transparent and potentially transformative process, the only one which allows for a more extensive participation and some levelling of the inequalities inherent to all human polities.

Democratic transitions and constitution-making processes

The role of constitutionalism as mechanism of building consensus. The South African case

Veronica Federico

Abstract: *The aim of the chapter is to discuss the role of constitutionalism as effective mechanism of reducing political and social violence during democratic transitions and building consensus in constitution-making processes. While arguing that inclusive constitution-making processes are critical elements of democratic transitions, the central hypothesis of the paper is that constitutionalism provides a means to civilize bitter political conflicts that otherwise tend to degenerate into violent confrontations. Through the critical analysis of the South African case, we maintain that participation and inclusiveness in the process of constitution-making become crucial elements in granting peaceful settlements of potentially disruptive civil wars, assuring democratic consolidation and sustainability. The chapter seeks to demonstrate how the constant dialogue between local realities and global constitutional models in democratic negotiation processes contributes to reduce the level of conflict. Even though we do not pretend to demonstrate the viability of the peace through law/constitution theories, we build on the assumption that "constitution-making challenges people into talking about their fears and concerns, and into talking about what kind of country they would like their children to live in"[1]. In the African continent, constitutions without constitutionalism have been highly criticised and have proved being unsuccessful mechanisms of protecting peace and democracy (Okoth Ogendo, 1991). The chapter questions whether the South African experience can open the way to a new constitutionalism, integral element of peaceful political reform processes in Africa and worldwide.*

Indeed, in addition to its successful democratic transition, the justification for South Africa as case-study lies in both its increasing role as democratic agent in the African continent and its exemplar model in the international theoretical debate on human rights, political transitions, participation and representative politics.

1. H. Ebrahim, Chief Executive of the South African Constitutional Assembly, interview carried out in Pretoria, 10 Feb. 2005.

Constitutionalism and democratic transitions: some clarifications

Constitutionalism has become the ideal of almost every constitution-maker world-wide during the second half of the past century. Indeed, the tradition of constitutionalism, in its essential distinction and balance between *iurisdictio* and *gubernaculum*, dates back centuries ago, and in its very nature it consists in a *iurisdictio* protected by an independent judiciary, and in a *gubernaculum* strong enough to be able to perform its essential duties, but responsible in front of the people for its loyalty to its own program (McIlwain, 1947, 1990).

In the long history of the concept, several are the definitions of constitutionalism, and different the theoretical as well as the practical uses of this notion[2]. Constitutionalism is a complex and rich theory of political organization. In a broad sense, it is both a political doctrine and the process that leads a legal system to adopt a justiciable constitution, granting the separation of powers, a bill of rights, the supremacy of the constitution and the rule of law. In this second understanding, constitutionalism entails singling out several issues that are withdrawn from the decision-making competence of the people (or of their representatives) and defined once forever in the text of the constitution. This singling out and regulation are not neutral in themselves. Under this perspective, constitutionalism is not a simple set of formal proceedings or an aseptic separation and balance of opposing powers and interests. Indeed, it is a direct expression of a specific and principled vision of the world. Strong is the connection between liberal or liberal-democratic values and constitutionalism, as paradigmatically summarized in article 16 of the *Déclaration des droits de l'homme et du citoyen,* approved on August, 26, 1789, stating that: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution".

For the purpose of this study we assume that in its normative meaning, constitutionalism is characterized by the following basic features:

- that the government to be instituted shall be characterized by the separation of powers and a system of checks and balances in order to limit abuse of power (one for all: Montesquieu);
- that the government to be instituted shall be a government of laws and not of men, that is there are limitations upon governmental power that cannot be altered by ordinary means of legislation (Bobbio,

2. Constitutionalism has been mainly identified with the theory of the limitation of power (i.e. the principles of the separation of powers, the institutions of checks and balances, etc..) (inter alia, Friedrich, 1937; Matteucci, 1983); with the rule of law or with the Rechtsstaat (inter alia; Hayek, 1960),

1991), in other words, that the government shall be constrained by the Constitution;
- that constitutionalism itself shall find its justification in certain normative principles, and is not merely formalistic. Concerning what these normative principles are, there are diverse options, from the public welfare or public goods to human rights, from moral believes to the principle of deliberation amongst the citizenry, principle that presupposes, however, a framework of individual rights, which grants private autonomy and allows each citizen the capacity to exercise his or her equal right of political participation (Habermas, 1996).

To this basic features, the literature on African constitutionalism adds an important element, that is the interdependence between constitutionalism and the broader process of human development. Granting fundamental rights, protecting peoples from tyranny (even from the tyranny of majorities), promoting human dignity, providing interesting instruments for conflict solution and thus reducing the high level of violence, which has been considered almost endemic in African fragmented societies, constitutionalism contributes in enlarging people's choices, by freeing them from those forces that obstacle human development. We are not maintaining that constitutionalism in itself can grant better living standards, but it contributes liberating those capacities necessary to have access to resources (material, cultural and political) from other kinds of constraint.

About fifteen years ago, in a well-known comparative study of democracy in developing countries, Diamond, Linz and Lipset employed a minimal conception of democracy, embracing non violent competition for power at regular intervals, inclusion of all major social groups in the selection of leaders and policies, and maintenance of basic civil and political liberties (1988). Using that standard, out of the approximately 36 African countries below the belt of North Africa, only six countries were classified as democracies.

In our analysis, however, we cannot avoid enlarging this minimal notion of democracy, enclosing al least the factor "civil society." In fact, a robust civil society can support democratic transitions to start, help resist eventual reversals, contribute sensibly in pushing transitions to their completion, and finally help consolidate and deepen democracy (Linz, Stepan, 1996). As noted by D. Nelson, the directions post-authoritarian transitions take is not a matter of political fate. "The corner will be turned toward stable democracy only to the degree that an enlarged public political sphere is created and the norms of a participatory culture are firmly and generally accepted" (Nelson, 1996: 351).

In addition, according to F. Van Zyl Slabbert, at the beginning of the 1990s, two fundamental operational principles emerged in the processes of transition to democracy as norms to be enforced if a country wishes to be recognized as democratic:

- contingent consensus, i.e. the party or the coalition that secures electoral victory will not use this victory to permanently deny the losers an opportunity to win, and the losers accept the right of the winning party/coalition to take binding decisions over the whole country for the time being;
- bounded uncertainty, i.e. the fact that some fundamental aspects of civil rights (ex freedom of association, property rights, etc.) are removed from political competition or the "capricious will" of a majority or a minority (Slabbert, 1992: 6).

Clearly, Van Zyl Slabbert's definition provides the theoretical connection between democratisation theories and constitutionalism. Indeed, as argued by Sunstein, the close relation between the two concepts and processes lies in the fact that constitutionalism makes it "possible for diverse people to reach agreement where agreement is necessary, and makes it unnecessary for people to reach agreement when agreement is impossible. The results is a significant victory for both mutual respect and social stability", as we will try to demonstrate in the case study (Sunstein, 2001: 243). In this perspective, constitutionalism is a sort of mechanism of conflict prevention in democratic transitions and consolidation. Again, Sunstein maintains that democratic constitutions are not mere paper but pragmatic instruments, designed to solve concrete problems and to make political life work better. They operate as sort of pre-commitment strategies, in which countries, aware of the problems that may arise, adopt preventive measures to ensure that those problems either will not arise or, if they do, that they will produce minimal damage (Sunstein, 2001).

In fact, in the South African context, Justice A. Sachs of the Constitutional Court explains that "the constitution making for us was more than just giving a basic law to the country. It was a peace treaty, it put to an end more that 50 years of armed struggle, it was an independence document bringing the African people into sovereignty for the first time. It was a social pact out of people who had been trying to kill each other, now trying to live together in one country on a secure basis. The solution lied in the way the problems were solved, the way the two sides tried to accommodate the other. I always draw a distinction between a compromise and an accommodation: accommodation is a principled attempt to create a space, a country, a territory, a set of values that people can share. It requires understanding the other, looking into the eyes of

the other, and appreciating all sorts of things that make them fearful, anxious. So the majority looking into the eyes of the minority could see not just the fact that they had contributed enormously to the atrocities of the past, but that they were people, they were part of the nation, and the question was how to bring them in, into a shared common society. The minority had to accept that the majority were tired to be dominated, tired to be told what was good for them and what was bad for them, and the very principle of self-determination meant that your views had to be listen to and taken in account. So we had very, very bitter struggles conducted ideologically, intellectually over the basic contents of the constitution. But the way was to accommodate each-other, to create a new political space where people could dialogue"[3].

However, constitutionalism and constitution-making, even if characterized by a high degree of participation and involvement of civil society, are not a panacea. Unfortunately, they do not guarantee by themselves peaceful, successful and durable democratic transitions, as we will see in the following chapters. The guiding principles of the new social and constitutional orders can not simply be guaranteed by a constitution, in the attempt to make them effective. They have to be already present in the culture of civil society even if just *in nuce*. In fact, a constitution can reflect and reinforce a commitment that does exist in society, but it is very difficult to create it *ex novo* if it is not already present somewhere, somehow. Indeed, through the critical analysis of the South African case, we maintain that participation and inclusiveness in the process of constitution-making become crucial elements in granting peaceful settlements of potentially disruptive civil wars, assuring democratic consolidation and sustainability. Moreover, we argue that the presence of a vibrant civil society, conscious of the challenges of the future, but proud of its own history, is one of the fundamental elements for a dialogue between local realities and global constitutional models in democratic negotiation processes. And we think this dialogue highly contributes to reduce the level of conflict and to assure stability in the future, avoiding the paradox of "constitutions without constitutionalism".

Constitutional history and constitutionalism in South Africa

In Africa, written constitutions are a feature of the twentieth century. However we should not overlap the concept of written constitution with the

3. Interview carried out in Johannesburg, 28 Feb. 2005.

principle of constitutionalism. Constitutionalism is an old phenomenon, if conceived as a process of constant dialogue between rulers and ruled, aimed at the limitation of power of the former, but definitely binding even the latter. Many African societies endeavoured to limit and balance the power of their rulers well before colonialism. Needless to specify that as power was exercised according to different logics of governance, limitation and balancing of powers took "non-conventional" forms, for Western parameters.

Thus, if we consider for example the crucial issue of the separation and limitation of powers, in Southern Africa the powers were not differentiated into legislative, executive and judiciary, but generally speaking, they were divided into different levels of authority. Chief, wardhead and familyhead exercised similar type of powers, but at different tiers: the "tribe", a specific geographic unit that we can name ward, and the household. Still, "the most significant limitation of power of traditional leaders came from the reality of day-to-day policies. … A certain degree of political insecurity explains why an African ruler's power could not, in the past, have been absolute. Anyone who attempted tyrannical rule would soon face revolt or secession. … A common say has it that *kgosi ke kgosi ka batho* (a chief is a chief through his people)" (Bennett, 2004: 104-105). The popular assemblies (*imbizo* in isiZulu/isiXhosa and *pitso* in siSotho/Tswana) were very important. All fundamental decisions were discussed there: from the imposition of new legislation to the organisation of collective labour and the distribution of communal land. For what it concerns a second element of contemporary constitutionalism, that is whether rulers were subject to the law, we should notice that they were not subject to the scrutiny of an independent judiciary, and generally the rules of oral regimes are porous and malleable. Despite all this, a chief to be a chief "was expected to judge disputes fairly, to govern wisely and to provide for the needy and to tend to the welfare of his people" (Bennett, 2004: 103), which are, in the end, quite binding rules.

We would avoid here the discussion of cultural and legal relativism, as it is an highly debated issue and it is not the aim of this chapter to deal with this delicate question. We just underline that concepts and practices such as human rights, good governance, accountability, transparency, and, in a way, even constitutionalism are not neutral, but deeply embedded in a given social, political and economic background. Moreover, we can not avoid noticing that the majority of African countries, and their constitutional culture, are still struggling themselves to acknowledge the existence of ancestral constitutions and to give them legitimacy.

Despite the intrinsic importance of traditional indigenous legal cultures and institutions, what is generally understood as constitutional law is the law

of the modern state, so that the history of constitutional law in South Africa is the history of the creation and consolidation of state power. "Through the first major shifts of population and settlement in the region now known as South Africa date from at least the late Stone Age, the origins of the constitutional state are far more recent. They lie in a barely two hundred year-old process of conquest of the land and consolidation of political power in the hands of white settlers" (Currie, De Waal, 2001: 41).

This is not the appropriate place where to discuss the constitutional history of South Africa; however, it is important to notice that from 1909, when the Union constitution was adopted by an act of British Parliament, as it used to be for all the colonies and the dominions of the British Empire, up to April 1994 some basic features characterised the constitutions that followed one another. The constitutions of the Boers Republics, in operation only for few years, drew inspiration from the constitutional models of France, the Netherlands and the Unites States, but they had no lasting influence in South Africa constitutional development. The model inspiring South Africa since the Union constitution was the British Westminster pattern, whose dominant feature consisted in the Parliamentary supremacy. According to the British doctrine, Parliamentary supremacy meant that Parliament could "do everything that is not naturally impossible"[4]. The direct implication of this principle was that the constitution could be amended by ordinary procedures. Section 152 of the Union constitution provided that "Parliament may by law repeal or alter any of the provisions of this Act". There were just few entrenched sections, which required a special procedure, one protecting the non-racial franchise in the provinces of the Cape and in Natal, and a second protecting the equality of the two official languages, English and Afrikaans.

If in Britain the doctrine of the supremacy of Parliament was the product of the century long battle to limit the monarch power, in South Africa the very same doctrine became the instrument to legalise the subjection of the black majority in the name of a principle of formal democracy. "It was parliamentary supremacy that gave constitutional form to South Africa's racially exclusive democracy and the bureaucratic authoritarianism that characterised the governance of the African majority during the colonial and apartheid periods" (Currie, De Waal, 2001: 45). Once again, South African history shows the danger of the import and application of external models, which in the translation from system to system change nature in a substantial way, while keeping intact their juridical form.

4. Blackstone's *Commentaries on the Laws of England,* 4 ed., 1876, vol. I, p.129.

A second important feature of the South African system was the construction of a racially divided state, where franchise, and citizenship itself, were build on the principle of racial exclusion. Formally the 1909 constitution had united the four previous colonies under a unitary state, but in effect it created a divided state. On the one side the constitution granted the "civilised" white minority a parliamentary democracy, whereas, on the other side, the majority of black South Africans, citizens without rights, were subject of an authoritarian administrative rule. Two different forms of governance developed: parliamentary democracy for the "citizens", and an authoritarian system of tribal authorities carried out by bureaucrats for the "subjects" (Mamdani, 1996).

The idea of the supremacy of the constitution, pillar of every theory of modern constitutionalism, was absent from the constitutional doctrine of the South African government. However, at the eve of the transition, the establishment of a new order characterized by the rule of law and by the supremacy of the constitution seemed the best way of granting the interests of the government's supporters, as it guaranteed the removal of some very sensitive subjects (such as the protection of minorities and of property rights) from the "tyranny" of whatever majority could emerge from free and democratic elections.

In opposition to the "mainstream" South African constitutional doctrine, the liberation movements elaborated different models of society, based on radically different constitutional basis, drew on the one hand from the African indigenous tradition and, on the other, from various models: from classical liberal democracies such as France and Germany, to socialist models and new constitutional patterns, such as the Indian one. The main pillar of this opposition doctrine was the principle of "one man one vote", i.e. the abolition of the apartheid regime.

Since its very creation in 1912, the African National Congress had been struggling first against segregation and, after the entering into power of the Afrikaner Nationalists in 1948, against apartheid. Several are the documents, the declarations of principles and the political agendas stating the core values and guidelines of the liberation movement. Among these values, the notion of inalienable human rights as building blocks of any possible democratic system has always occupied a key position. Two are the documents that best define the ANC policy and strategy with regard to the entrenchment of a culture of human rights: the *African Claims in South Africa* of 1945 and the famous *Freedom Charter* of 1955. Quite astonishingly, however, even if these two pillars of the ANC constitutional doctrine are formulated in the language of rights, they do not include any claim for whatever sort of constitutional protection of rights. And they do not even mention the possibility of the constitutional

empowerment of the judiciary as the guardian of those rights. The first[5] claim for a constitution entrenching a bill of rights was presented in the "Statement on negotiations", in October 1987 and better specified in the *Constitutional Guidelines* of 1988, with the commitment towards the adoption of a bill of rights justiciable, i.e. enforceable through the courts, which implied the ANC acceptance of the principle of judicial review and the supremacy of the constitution. So, until the late 1980s, because of multiple reasons, among which we just mention the international climate and the crossing influences of liberal-democratic and socialist constitutional doctrines on the ANC élite, the idea of a constitutional state in contemporary terms, characterized by the supremacy of the constitution, the constitutional recognition and enforcement of human rights and the constitutional empowerment of judiciary, was not part of the ANC political agenda. On the contrary, pillar of the ANC doctrine has always been the equation of democracy (and universal suffrage) with majority rule, together with a wide recognition of social and economic rights, aimed at redressing the inequalities of the past. Still, a more in depth analysis is required in this respect.

Milestone in the history of the struggle against apartheid is the Freedom Charter, adopted by the Congress of the people in Kliptown, a suburb of Soweto, on the 26th of June 1955. Conceived as the "blueprint for the free South Africa of the future" (Suttner, Cronin, 1986: 3), the Charter is one of the first documents giving voice to the aspirations of South Africans for a different society. The main principles entrenched in the Freedom Charter are: non-racial franchise, equality before the law between people and "national groups", redistribution of the land, nationalisation of natural resources, the right to work and security, the right to education, and several other socio-economic rights. Its opening, and leading, claim was "the people shall govern". It is a programmatic document, where the rights just proclaimed by the Universal Declaration of Human Rights get contaminated by the need of the struggle against apartheid and the need for a substantial social justice. If we adopt a restrictive definition of constitution according to the Kelsen vision, as those principles ruling on the production of laws, we could hardly give the Freedom Charter a constitutional status. The same, if we follow the already quoted section 16 of the *Déclaration des droits de l'homme et du citoyen* of 1789. The crucial issue at the time was neither the promotion of the rule of law, which should be assured by the very idea of "the people shall govern", nor the separation of powers in

5. Indeed, quite surprisingly, the first claim for a justiciable bill of rights came from the Bantustan system, and the first constitutions adopting and enforcing a bill of rights, even if in a rather confusing way, were the constitutions of Ciskei and Bophuthatswana.

a Western perspective, but the entrenchment of the principles of equality and social justice, which constituted those normative principles Habermas maintains constitutionalism should carry about.

In fact, for what it concerns the principle of the supremacy of the constitution it is interesting to note that it was alien to the juridical culture of the liberation movements, as we have mentioned. On the contrary, the separation of powers has always been a fundamental feature of the African tradition, even if it was not conceived in the Western way of separation between legislative, executive and judiciary. From the point of view of effectiveness, this system of horizontal separation of powers assured a good system of checks and balances, and it accomplished the purpose of avoiding the concentration of excessive power into the hand on one single person or group. Again, if we limit our notion of constitutionalism to the separation between *iurisdictio* and *gubernaculum* we should deny the Freedom Charter its nature of constitution, reducing its value to a simple declaration of principles. On the contrary, we maintain that the Charter has an intrinsic constitutional nature, deeply embedded in the constitutionalism principles and culture of the time, establishing the guidelines for the future constitutional development of the country. Indeed, it is exactly due to the Charter and to its constitutional principles that the ideas of a justiciable bill of rights, the supremacy of the constitution, the limitation and balance of powers were not considered alien to the South African tradition, once introduced into the mainstream culture. As H. Ebrahim, Chief Executive of the South African Constitutional Assembly, maintained : "I think the legitimacy of the law comes about with the concept of ownership. People wanted to own the problem as much as they wanted to be part of the solution. And people recognised that part of the solution was replacing an apartheid and undemocratic state with a democratic and a constitutional state. And so they have to respect what they have fought for. Now: while opposing apartheid, people were developing visions of what they wanted. So we draw the Freedom Charter, and that is where our constitutional culture comes from. People did not just want to stop apartheid, but they tried to say what is that they wanted instead. And this challenged people to see which type of democracy they wanted. That is where the passion for human rights and supremacy of the constitution come from"[6].

Thus, constitutionalism, human rights and the rule of law were not perceived as imposed from outside in both a cultural and legal perspective. The fact of considering the Freedom Charter as one of the crucial element of the constitutional history of the country allows us to have a better understanding on

6. Interview carried out in Pretoria, 10 Feb. 2005.

how global constitutional models were accepted and integrated into the local tradition. It is not just a question of integration and reciprocal hybridisation of constitutional cultures, models and single institutes and mechanisms. It is as well a matter of "negotiating power" of the different legal traditions that faced each other during the democratic transition. The strength of the constitutional tradition of the liberation movements gave them an additional legitimacy, beside the moral and political one. And it was that legitimacy that allowed the dialogue being carried out on an equal basis, and the process of mutual understanding and interpenetration of interests, models and solutions being successful[7]. Moreover, due to the importance of the Charter and of the following constitutional documents of the anti-apartheid movements, the rights recognised and entrenched in the South Africa democratic constitutions[8] could not be accused of being "western rights" or, as Shivji has maintained "one of the main elements in the ideological armoury of imperialism" (Shivji, 1989: vii).

Apparently, South African constitutionalism could be taxed with being contradictory in its very nature under two perspective. On the one hand, in the eve of the transition there was no agreement on what constitutionalism meant. For the one side it consisted in the principle of Parliamentary supremacy and protection of minorities. The regime's theorists of constitutional reforms denounced the "erroneous equation of democracy with majority rule", and underlined how it was inappropriate to heterogeneous societies like South Africa (Horowitz, 1991: 91-107). For the other side, constitutionalism meant majority rule and the full enjoyment of rights, protected by the principle of "the people shall govern" (the Freedom Charter, 1995) more than by the limitation of powers, the judicial review and the rule of law. Given this general picture, it is clear that the very essence of contemporary constitutionalism was absent from the constitutional traditions and cultures of the two[9] principal

7. "We have to bear in mind that the work that was done in 1955 with the Freedom Charter contributed in a significant manner towards people viewing the ANC as the movement that would be able to meet their expectations. This granted the ANC legitimacy" E. Makue, director of the South African Council of Churches, interview carried out in Johannesburg, 16 Feb. 2005.

8. That is in the 1993 interim constitution and in the 1996 final one.

9. Indeed, 19 were the entities (from political parties and liberation movements, to political and cultural organisations) taking part to the negotiations in Codesa, and we have to admit that it is definitely reducing discussing just of the two principal actors, as their positions do not summarise the whole spectrum of political perspectives and socio-juridical proposals for the new constitutional order. For a broader discussion of the different standing points, ideologies and negotiating strategies, see., inter alia, Ebrahim, 1998.

and opposing protagonists of the South African transition. It is quite surprising, than, to note that:

1. one of the few proposals, shared by both parties, was exactly the creation of a constitutional state, with a rigid constitution protecting and entrenching a bill of rights;
2. both parties agreed in making of the constitution-making process the core of the whole democratic transition.

The rights to be included in the bill of rights (property rights *vs* socio-economic rights; equality and non sexist rights Vs recognition of traditional values, etc.), as well as the kind of rights to be recognized and enforced (individual rights Vs group rights); the form of the state to adopt (unitary state Vs federal/regional state); the kind of government to establish (power sharing structures Vs majority rule) remained to be negotiated. Still, the appeal of constitutionalism in such a delicate and potentially explosive transition consisted in the multiple role it could play in the reconstruction of South African political space and society. Indeed, during the negotiations, constitutionalism emerged as the only political language that could bridge the abyss between the political traditions, the contemporary agendas and the future envisioned models of society of the different parties. And the two writing moments of the constitutions functioned as a sort of cement, holding the main actors of the negotiations, and with them the whole South African society, together. "There were differences, there were hardliners, ... everyone eventually agreed in the beginning of December 1993 the interim constitution that was adopted at Codesa and should be endorsed by the tricameral Parliament to assure legality. This was an agreement that nobody was against of. So this worked through and this gave legitimacy in the eyes of the Nationalists and their constituencies. It was not easy, hard work. The fact that there was no alternative was the bottom line" as advocate G. Bizos, one of the most popular anti-apartheid lawyer, ANC expert at the negotiating table, and at present head of the Legal Resources Centre, maintained[10]. Thus, "constitutionalism became the compromise arrangement upon which the ANC and the NP could agree a sufficient consensus" (Wilson, 2001: 6).

On the second hand, as we have already underlined, a certain version of constitutionalism embodies a sort of distrust of democracy, in particularly of majority rule, when it removes certain themes from the free choices of the

10. Interview carried out in Johannesburg, 9 Feb. 2005.

representatives of the people, establishing them once forever in the constitutional texts. On the contrary, the struggle against apartheid was dominated by a radical or popular notion of democracy, emphasizing on participation and stressing on civic as well as political direct engagement of every single citizen[11]. A part the rhetoric of the struggle, the issue of compatibility between a liberal democrat vision of constitutionalism and a radical democratic approach has been long debated in South Africa in the early 1990.

This question has been solved in a typical compromise spirit, exactly that compromise that imbues the all post-apartheid era. It involves, on the one hand, the introduction of the notion of transformative constitutionalism, that defines an expansion of the basis of popular participation in political decision-making and that argues that a right-based strategy does contribute to the construction and the consolidation of a democratic society characterized by a fairly equitable redistribution of economic as well as social and cultural resources. Transformative constitutionalism can be described as the "enterprise of inducing large-scale social change through non-violent political processes grounded in law" (Klare, 1998: 150). Indeed, as argued by Davis, "the constitution holds out the hope of a transformative constitutional jurisprudence, one which seeks to alter fundamentally the country's political, social and legal institutions, so as to promote an open participatory form of democracy" (Davis, 1999: 24). On the other, it entails the substitution of the notion of radical democracy with the notion of "deliberative democracy, an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason-giving" (Sustein, 2001: 7). This is not to diminish the value of majority rule. Rather, majority rule is even strengthened by the intrinsic morality of the constitution, morality that lies in the values of universal franchise, as expression of the maximum respect for human dignity, as well as in the protection of individual rights, some typical of the liberal tradition, others suited to redress the specific inequalities of the South African past.

Indeed, it is quite interesting to notice that for those who participated directly in the constitution-making process, having fought for a democratic South Africa for decades, "constitutionalism is no more or no less than people. The constitution is the soul of the nation. For me it is a reflection of the hopes

11. Indeed, as asserted by M. Marobe of the United Democratic Front, the struggled aimed at "direct as opposed to indirect political representation, mass participation rather than passive docility and ignorance, a momentum where ordinary people feel free that they can do the job themselves, rather than waiting for their local Member of Parliament to intercede on their behalf" (1987), quoted in Shivij, 1998.

and the aspirations of ordinary people. It is a vision for a nation to say what we aspire to. It is a mixture of what it has been achieved and the path laying forward. Constitution-making challenges people into talking about their fears and concerns and talking what is that they would like to see, what kind of a country they would like to live. And posing that question basically allows dealing with critical elements of democracy because it, then, helps people understanding how the democratisation process should be. We cannot separate the democratisation process from constitution-making. The two are one. Because democracy is all about the engagements and interactions among different people, constitution-making allows the establishment of those engagements and interactions"[12].

The constitution-making process in South Africa

"Given the history of the country, it seems remarkable that it took only slightly more than four years from F.W. De Klerk mould-breaking speech in February 1990 until the democratic state was ushered into existence" (Davis, 1999: 1). Indeed, the road to democracy, or, according to N. Mandela, "the long walk to freedom", was neither a smooth nor an easy one. From the Groote Schuur talks to the final record of understanding reached in 1993 and the beginning of the Multiparty Negotiating Process, passing through the several minutes and the Convention for a Democratic South Africa (better known as CODESA) I and II, the democratisation process was subject to a number of different stages, certain raising deep enthusiasm both inside and outside South Africa, others absolutely unsuccessful. For the purpose of our discussion, the interest of the South African constitution-making experience lies in both the process itself and some of the contents of the constitutional negotiations. In fact, both of the elements were crucial in the exercise of building consensus around the new South Africa, and of reducing the level of violence during the transition.

The process

The importance of the two-stage process is underlined by Advocate G. Bizos: "if you have broad principles to negotiate upon, you will never reach an agreement. The reason to have an interim constitution was that, although some of the parties, particularly the Nationalists and KwaZulu Natal, wanted a final constitution to be created in Codesa, the ANC had the idea that only

12. H. Ebrahim, interview carried out in Pretoria, 10 Feb. 2005.

a democratically elected Constituent assembly could pass a democratic constitution. We needed an interim constitution in order to have an election and to establish a democratic constitutional assembly"[13].

In fact, there were two stages in the constitution making process, preceded by a sort of pre-negotiation phase characterized by preliminary, but substantial, contacts between the African National Congress, still banned at the time, and the South African government. In the words of P. Camay, director of the Co-operative for Research and Education: "there were several processes that took place before the negotiations, some of which helped to bring people closet to each-other. First of all, according to the National Peace Accord different parties came together and met at local, provincial and national level. Second: in the Transitional Committees people were obliged to be together and to find ways of establishing a dialogue. Third: meetings abroad between white business men and ANC leaders. Thus, when they met in the constitution-making process, they were groups of people that had already known each-other. They had different political positions and constitutional views, but they came together. Previous meetings were very helpful in building relationships which made people arguing intellectually rather then by their hearts"[14].

The first phase, during which the agreement on an interim constitution was taken, involved all political groups, organizations and entities with a relevant support. It was an inclusive negotiation, whose product was not only a general agreement on a two-phase process of constitution-making (that is a technical agreement on constitution-making mechanisms). It produced a substantial agreement on the text of the interim constitution as well as on the thirty-four constitutional principles that should play the role of both guiding-"backbone"-principles for the Constitutional Assembly and constitutional paradigms for the Constitutional Court's constitutional certification of the final constitution (that is an agreements on the core values of the future South African constitutional and social order). This step was concluded with the first democratic election of 1994 and with the coming into force of the Interim Constitution. The second phase consisted in the constitution-making process in the Constitutional Assembly, and the proceedings of confirmation of the final constitution by the Constitutional Court. The final act of this long and complex process was the signature of the final Constitution by President Nelson Mandela, in Sharpeville, township symbol of the struggle against apartheid, on the occasion of the international human rights day, 10 December 1996.

13. Interview carried out in Johannesburg, 9 Feb. 2005.
14. Interview carried out in Johannesburg, 15 Feb. 2005.

In order to facilitate the whole process, a number of technical advisers were drawn into it. They were nominated by the participating actors, but their mandate was to act as impartial technicians and not as negotiators. From the political sphere, the conflict was translated to the legal one, and compromise solutions were easier to be found. "What we did was to allow the constitution-makers who were the politicians to engage in a dialogue and we managed a process where we provided them with support, that was to draw the technical provisions for them. *I think that helped a great deal in terms of diffusing the problems.* We helped politicians to find out how to engage with each other on very sensitive issues such as property clauses, education languages, all very very controversial issues. We offered them an opportunity to deal with difficult issues in a manner in which it is much more easier to deal with and above all to resolve"[15]. Despite its evident success, the underlying danger of this approach is to adopt very vague provisions, postponing the real political choice later in time, and quite often transferring the burden of it to the judiciary, in particular, for the South African case and for all the systems characterized by the presence of this body, to the Constitutional Court[16].

From our perspective, the importance of the formal process of the constitutional change lies also in the fact that it provided both legal continuity and the legitimisation of the constitutional power. The question was from where would the constitutional dispensation derive an unquestionable legitimacy. The Interim Constitution, drawing its legitimacy from the political pact reached in Kempton Park (CODESA I), provided for a short term governmental and constitution-making set-up. It represented the central link between the act of the constituted power (the apartheid government) in dissolving the existing constitutional order and the act of an elected constitution-making assembly, with the necessary legitimacy (exactly because it had been democratically voted and elected) to write and adopt a final constitution. The constitution-making "was done in two phases: the first phase gave us a democratic Parliament which then finalised the constitution keeping in line with the 34 principles. That was the way of ensuring that the basic principles would prevail, and that majority rule will ultimately decide. In the end we had that the constitution was not just accepted by the ¾ majority, but by a 90%majority. And the Parliament was very inclusive, even a group with 0.5% could vote and be represented. The

15. H. Ebrahim, interview carried out in Pretoria, 10 Feb. 2005.

16. Indeed, as it will be discussed further on, in South Africa some crucial decision, such as the real meaning and the enforcement of socio-economic rights or the unconstitutionality of death penalty, were demanded to the Constitutional Court.

elections themselves proved to be enormously important in providing the sense of security and tranquillity, and people stood actually amazingly a couple of days in long lines. It was democracy at work. It was much more powerful than just democracy as an idea. It was basically peacefully conducted, and the rules of democracy were followed. The final constitution then took other two years to be drafted. It was submitted to the Constitutional Court, we struck it down, it is the only case I have heard of a constitution being judged unconstitutional. But it gained much more legitimacy to the final text"[17].

The Constitutional Court intervention in the constitution-making process "was part of the accommodation between the groups at Codesa. They were self-appointed groups, and the ANC position was «we are self-appointed, we have no mandate from the people, we have no legitimacy and the constitution has to be adopted by a constituent assembly elected by the whole population ». Then the government said «no, if that happens the majority will wrap us out». Some maintained the majority wanted a revenge. A constitution is designed precisely to prevent that from happening, a constitution is designed to protect minorities, because ordinary Parliamentary system can protect majority. So the ANC response was to say «all right, we will agree on some fundamental principles in advance. And then the new constitution requires a high majority, which no single party will have, and while adopting the constitution, those principles are respected». But then people said «if you allow Parliament to decide for itself there are no guarantees, so we need an independent body to guarantee the principles had been agreed upon»"[18]. And this independent body had to be the Constitutional Court.

Indeed, the certification of compliance of the text of the final constitution with the thirty-four constitutional principles was an important part of the constitution-making process. As it emerged from the discourse of Justice A. Sachs, the intervention of a Constitutional Court in the process was first proposed by the ANC and was then assumed as a crucial guarantee by the National Party and the other minority political parties. The compliance with the negotiated principles constituted the political assurance that the interests of all the parties, especially those with minority support that in the Constitutional Assembly could play a reduced role, would have been respected. On the other side, for

17. Justice A. Sachs, interview carried out in Johannesburg, 28 Feb. 2005. In the same direction: Deon Rudman, leading negotiator for the government, at present with the Dpt of Justice and Constitutional development, Interview carried out in Pretoria, 16 Feb. 2005; Ebrahim Ebrahim, leading negotiator of the ANC, interview carried out in Johannesburg, 27 Feb. 2005.

18. Justice A. Sachs, interview carried out in Johannesburg, 28 Feb. 2005.

what it concerned the Court, the question was delicate. In fact, the Court was given a very active and, in a way, a "quasi-legislative" role which was not unproblematic. On the practical level, this could revive the tensions between an unelected body, the court, and the legitimate elected one, the assembly (given also the fact that the text of the constitution was adopted by an overwhelming majority); on the theoretical level, this could entail even the doctrine of the separation of powers. Moreover, "the constitutional principles were essentially political agreements between parties bringing an end to conflict, ..., and a fair number of these principles could be interpreted in various ways" (Ebrahim, 1998: 223-224).

The first judgment of the Court, delivered on 6 September 1996, found that the constitution did not comply with the principles in eight respects[19]. The Constitutional Assembly was called back to work. The revised text of the constitution was passed before the Court as soon as it was approved. The second certification judgment was positive. Instead of sparking any controversy, the role played by the Constitutional Court was hailed as a "victory for constitutional democracy"[20].

Still, as H. Ebrahim maintained, the crucial issue of the whole constitution-making process was to "have a fair understanding of the fears and concerns of society, so that we managed the process based on that. While we were dealing with the consulting process, we were consulting people in the right way. And the fortunate thing is that we will move soon in the ten years from the adoption of the constitution, and nobody contexts the legitimacy of the constitution. From communists to the right wing, nobody says the constitution is not legitimate, everybody accepts it. This is for me the greatest success. We were able to engage people, to consult them in a way which nobody could say that they were excluded"[21].

The whole constitution-making process was strengthened by the relatively spontaneous formation of more that 400 negotiating fora around the country, since the very beginning of the negotiation. "There were debates about the death penalty; about individual/group rights; language issues taking place outside in the country. And those debates also informed the constitution-makers. … The outside pressure was very important to put new issues on the negotiating table. Until the landless people and the rural people did not come and marched in the premises of Kempton Park itself, the whole issue of land was not put on the table. There was outside pressing and a sort of internal «digestion» of issues and claims"[22]. Addressing virtually every significant issue of

19. Mainly concerning the powers and competences of provincial and local government.
20. Mail & Guardian, 10 September 1996.
21. Interview carried out in Pretoria, 10 Feb. 2005.
22. P. Camay, interview carried out in Johannesburg, 15 Feb. 2005.

the transition (from education to housing, from the economy to local government), they convened at all levels, from local to national. Indeed, citizens participation during the whole process was very high. C. Ramaphosa, chair of the Constitutional Assembly, acknowledged people's participation as being a crucial element of the whole constitution-making process in his final speech: "in the end this constitution is also a product of this Assembly, but this is not all. Participation in this process by interest parties, role-players, experts, and, above all, the people of our country, has been facilitated, witnessed and encouraged. ... Over two million people responded to the call of the Constitutional Assembly to participate in the constitution-making process. People participated by attending meetings arranged by the Constitutional Assembly; they participated by writing letters, by making submissions and even by making phone calls to the Constitutional Assembly"[23].

First of all, the importance of this broad and "felt" participation is relevant for the empowerment of many black South Africans, who previously had no vehicle of making their voice being heard and of their opinions and needs been acknowledged. But it has been crucial, as well, for the legitimisation of the whole process. This is clear in the words of E. Makue, director of the South African Council of Churches (SACC), very active and outspoken during the struggle and the constitution-making process: the consultation program was "creating opportunities for members of civil society to have an insight into initial drafts of the constitution and to provide opinions. Those opinions were taken very seriously. We know that when we as SACC made some representations on clauses of the constitution, we received feeds back from the Constitutional assembly either to clarify or to comment on us. If you have developed a constitution in that way, you already begin to gain a lot of respect"[24].

The "South African" model, then, is not simply a two-step transition to a democracy built around the constitution-making process, where the very political act of constitution-making operated as a valuable conflict prevention and consensus stimulator. Rather, it is a two-step democratisation process characterized by a strong and vocal public participation, opposing the paradigm of top-down imposition of "democratic" decisions.

Without any doubt, this popular involvement in the constitutional change of the country has strongly contributed to "the sense of being shaped, as a country, by the values of the constitutions. Indeed, we are the people who are seeking equality" maintained B. Pityana, at the time of the interview chair of

23. Debates of the Constitutional Assembly, Tuesday, 23 April, 1996.

24. Interview carried out in Johannesburg, 16 Feb. 2005.

the South African Human Rights Commission[25]. Still, the issue of the real impact of this participation in the very process of conceptualising and writing the constitution should be better analysed, but unfortunately we lack both primary sources, time and space to discuss this crucial question in the paper.

Some key contents.

As the literature and the experience of other African countries has clearly shown, the danger of an imposed globalising legal and political culture, and constitutional tradition, with the adoption of institutes and values having little to do with local traditions, lies in the possible reciprocal incomprehension between local and global. In South Africa, the problem was raised and highly discussed. At stake there was, first of all, a possible discrepancy between a Western, individualistic right-oriented approach and the traditional African concepts of law, communal obligations and responsibility. Indeed, harsh discussions took place during the negotiations between the supporters of an individual rights approach and the supporters of a group right philosophy. But more that legal traditions, the opposing arguments involved memories of the past regime of apartheid and political, social and economic worries for the protection of minorities. In fact, the ANC strongly opposed the idea of group rights, whereas the Inkatha Freedom Party backed the government in the request for group rights in the name of the protection of traditional rights, but indeed wanting to preserve some form of privilege and power in certain regions. "There are only few dictators who try to justify African deviation away from the rule of law, the independent judiciary, and fundamental human rights saying that these are Eurocentric rights and institutions. Fundamental rights are universal and I think it is a mistake to try and classify them continentally, regionally or geographically"[26].

On the contrary, definitely more delicate, and still under discussion and definition, is the constitutional tension between cultural rights, and the constitutional acknowledgment of traditional authorities, and protection for sex equality. Indeed, the constitution, while inexorably affirming the right to equality and explicitly mentioning gender (and even sexual orientation!) amongst the grounds generating possible unfairly discriminations, protects traditional cultural groups, cultural groups whose traditions may result in denial of equality rights for women in fields such as land property, heritage rights, etc. Chapter 12

25. Interview carried out in Johannesburg, 13 Mar. 2001.
26. Advocate G. Bizos, Interview carried out in Johannesburg, 9 Feb. 2005.

of the constitution recognises "the institution, status and role of traditional leadership", even if it specifies "subject to the Constitution". In the same section, constitutional relevance is given to customary law: "the courts must apply customary law when that law is applicable, subject to the constitution and any legislation that specifically deals with customary law" [art. 211(3)]. On the issue, there is a broad consensus of the scholars asserting that the 1996 constitution attributes greater weight to equality provisions than to the right to culture, underlining that the latter should be limited by the former. In this field, the interests at stake were not simply international human rights standards and rules *vs* indigenous traditions. At the negotiating table the claims for recognition of traditional leadership, customary law and cultural rights were strongly supported by different parties, first of all the Inkatha Freedom Party. The issue of traditional leaders and customary law was particularly sensitive and important waves of violence were fostered in its name, especially in the KwaZulu Natal province. Indeed, while discussing about the civilising role of conflict by constitutionalism and constitution-making process and their role in reducing violence during the transition, we can not forget that in South Africa between 1990 and 1994 more people died than during the 1980s, that is during the harshest time of apartheid. Quite interestingly, the colour of the victims was by an extremely large majority black. Nevertheless, the transition could have been even more sanguinary and violent, so that the expression "the South African miracle" is often used to describe the transition.

Very important, the initial interpretations of the courts, in particular of the Constitutional court, seem to go in the direction of interpreting and, in a way, updating, customary law according to the new principles of the Constitution. In the Bhe case, the Court stated that it "would be desirable for courts to develop new rules of African customary law to reflect the living customary law and bringing customary law in line with the Constitution"[27]. This is a way for establishing a fruitful dialogue between local traditions and international, globalised standards, it accommodates the differences, creating space for the principles of the constitution to reach everyday life of people. In a partially dissenting judgement, it was even held that the principle of primogeniture, which according to the judge dose not discriminate unfairly against younger children[28], should not be struck down but "instead should be developed so as

27. Bhe V, Magistrate, Khayelitsha and others, Constitutional Court CCT 49/03.

28. Indeed, the judge stressed the fact that one of the primary purposes of the primogeniture principle is to determine someone who will take over the responsibilities of the deceased head of the family, and these responsibilities include the obligation to maintain and support the minor children and other dependants of the deceased.

to be brought in line with the right to equality, by allowing women to succeed to the deceased as well".

"The most difficult provisions we had to agree upon at the negotiating table were without any doubt property clauses, languages, and the form of the state. I think we learnt a lot from different constitutional landscapes in order to accommodate those issues. What was a major issue at the time (early 1990s) was the choice between unitary or federal state. The question was how to find an organisation that suited our demography and that allowed smaller parties also to feature. So the issue of one unity state as opposed to federal state became a major debate. For that reason we looked at all possible countries, we looked at federal states as well as unitary states. We were looking at Germany. We visited Germany, we met Chancellor Kohl and a number of the premiers of the federate states, which gave us a fairly good understanding of what the first and the second chamber (that is now the National House of Provinces) should be, and the powers to give to the different levels of government"[29]. We lack time and space to analyse in depth how those very sensitive issues were negotiated in details, and how, once again, the fact of discussing about constitutional provisions and not in ideological terms helped reaching a compromise. Still, we should mention that the constitution recognises 11 official languages, each with the very same status; and that the promotion of language difference is protected in the right to equality, to education, to have a fair trail, just to quote few of them, in addition to the specific right "to use the language and to participate in the cultural life of their choice" (art. 30). Article 25 protects property rights, while allowing expropriation under certain conditions. However, the issue of land reform and land redistribution remains one of the more controversial in contemporary South Africa. For what it concerns the form of the state, it will be discussed in the paragraph dealing with the limitation and separation of powers.

The democratic constitutions.

As we have already mentioned, the widespread adoption of justiciable constitutions and bills of rights in the 1990s worldwide has led several scholars to forge the idea of globalising constitutionalism. The South African constitution-making process could and would not avoid making reference to and use of these globalized theories and instruments of constitutionalism and human rights.

29. E. Ebrahim, interview carried out in Johannesburg, 27 Feb. 2005.

Still, they were highly "contaminated" by the local concepts of law, law making and participation in the process of constitution-making. In fact, according to A. Habib, project director of the Human Sciences Research Council, "what the SA constitutions did was to put the models in context. It borrowed the articulation of principles, rights and structures, and then re-conceptualised them to fit to the African reality"[30]. Indeed, as Advocate G. Bizos maintained concerning the models inspiring the South African democratic constitutions: "we were eclectic! We looked at everything. We studied the constitutions of the world. We travelled widely through Europe to visit France, Germany, Switzerland, we had regard to the Canadian constitution, to a certain extent to the USA constitution, we borrowed from the Westminster system the general characters of British democracy. So we chose what we considered to be best. The important parts of the constitution, as the Chapter 9 institutions, are all there. We established this in the hope that there will be structures through which conflicts can be channelled. We had regard particularly to labour law, the developed jurisprudence in relation to labour in the European Union. We tried to choose the best"[31].

The discussion that follows will try to see how the three main features of constitutionalism (that is that is limitations and separation of powers; government of laws and not of men; the normative/moral justification of the new order) from globalised ideals have become indigenous South African.

Government of laws and not of men.

The supremacy of the constitution is the key to the new constitutional dispensation, and it constitutes the very essence of the constitutional character of the South African state. As already mentioned, since the first South African constitution in 1909, government was *per leges* and not *sub lege*. This means that, despite the fact that there was a constitution and that Parliament ruled through laws, that were enforced in courts and tribunals, supremacy lied in the Parliament. No guarantees existed, in government ruling exclusively *per leges*, against any power abuse by Parliament (Bobbio, 1991: 176)[32]. In the light of the constitutional history of the country, the supremacy of the constitution could be perceived as alien to local traditions. On the contrary it became one of the most important features of the new constitutional system. Not because

30. A. Habib, interview carried out in Johannesburg, 5 Feb. 2005.

31. Interview carried out in Johannesburg, 9 Feb. 2005.

32. And this has serious consequences, the most serious of which consisted in the disenfranchisement of the few black and coloured voters, as we have already mentioned.

it was imposed by the international models, but because it answered to local necessities. It granted the former ruling minority from any fear of revenge by the majority, and it assured the majority the protection and enforcement of those equality measures necessary to balance the inequalities of the past. This is one of the most interesting examples of how external models, alien to local traditions, can be re-conceptualised and adapted to the local context, once they are perceived appropriate to fit the reality and to provide good solutions for real problems. And in this way they become effective. For the first time in the South African constitutional history, the constitution is recognized as supreme law of the republic, and any "law or conduct inconsistent with it is invalid" (art. 2). The interim constitution explicitly stated that "the Constitution binds all legislative, executive and judiciary organs of states, at all levels of government" (Section 4(2)), whereas in the 1996 text this is condensed in the formula "the obligations imposed by it must be fulfilled" (art. 2). However, the fact that the constitution bounds all state organs is constantly repeated in the specific provisions concerning the executive (art. 41 (1b,f)), the legislative (44(4)), the judiciary (165(2)); state institutions supporting constitutional democracy (181(2)); public administration (195 (1)), etc.

Clearly, constitutional supremacy and entrenchment are closely connected. The 1996 constitution is entrenched with different methods and majorities, as established in article 74. Most of the provisions may be amended by a two-thirds majority in the National Assembly, but any eventual amendment to the bill of rights, to the National Council of Provinces or any amendment altering the boundaries, powers, functions or institutions of the provinces, in addition to the two-thirds majority of the National Assembly, requires the support of at least six provinces represented in the National Council of Provinces. Moreover, the founding provisions of article 1 enjoy even stricter enforcement. Needless to stress the ratio of this stricter enforcement. In the first ten years of democracy, the supremacy of the constitution has never been questioned; rather it has strengthened its significance.

Limitation and separation of powers.

It is well known that the division of state powers between legislative, executive and judiciary is the classical guarantee against any arbitrary exercise of power. This entails, on the one hand the autonomy of every branch of government, and, on the other, a system of checks and balances, so that abuse of power and/or unreasonable conduct can be limited. Chapters 4, 5 and 8 of the final constitution deal respectively with Parliament, the Presi-

dent and national executive, and the courts. Without going in depth in the analysis of these chapters, it is important to note that the system of separation of powers and of checks and balances has worked pretty well in the first years of democratic political system. There is a parliamentary system of government, with a State President who is both the head of the state and the head of government. Indeed, the national executive authority is vested in the President, who shares this authority with the members of cabinets. Parliament consists of two houses, the National Assembly, directly elected on a national base, and the National Council of Provinces, which represents the provinces in the national decision-making process. Concerning the judiciary, the constitution is explicit about the status and the role of the courts. They are independent and subject only to constitution and law. The independence of the judiciary is ensured, inter alia, by the processes of appointing the judges. A Judicial Service Commission, representative of all the different stakeholders in the administration of justice (art. 178), is established and it plays an important role in the appointment, condition of service and dismissal of all judicial officers.

Another crucial aspect of new constitutional system is the quasi-federal form of state. Technically, the form of state is not counted in the system of separation of powers and of checks and balances. However, given the specific South African reality, it becomes a crucial aspect, relevant for both the compromise character of the new constitutional order and the preservation of South African diversity. During the negotiations, the debate about the distribution of power among national, provincial and local levels of government was one of the most inflamed. The disagreement that saw federalists[33] vs unitarians[34] was solved with a compromise creating a hybrid state, that the scholars named quasi-federal. Once reincorporated the bantustans into the state, the constitution provides for the creation of nine provinces, each with some exclusive powers and a large number of concurrent powers shared with the national government (listed respectively in Schedule 4 and 5). The courts are formally charged to solve any eventual dispute between the different spheres of government. Typical example of the South African interpretation of the federal model and of the consensus spirit of the negotiated transition is the principle of co-operative government, established by chapter 3 of the constitution. According to it, "national, provincial, and local spheres of government which are distinct,

33. That is, in different ways and with different reasons: National Party, Inkatha Freedom Party and Democratic Party.

34. ANC and Pan Africanist Congress.

interdependent and interrelated" (art. 40(1)). Without questioning the system of countering the arbitrary exercise of power, the overwhelming majority the ANC won in the elections since 1994, in a way "aggravated" by its victory in all the nine provinces in the April 2004 elections, can however endanger the autonomy of the different braches of government.

The normative/moral justification of the new order.

The third, interesting features of constitutionalism is represented by the values necessary for constitutionalism to actually get rooted in the legal culture of the country and gain effectiveness. Indeed, this field is one of the most interesting for the study of the South African hybridisation of globalising constitutional standards[35]. To have any legitimacy, constitutionalism requires not only procedural fairness but a minimal framework of basic shared values. Indeed, as Habermas has noted, many of the traditional concept characterizing constitutional democracy, as sovereignty, citizenship or representation, which have depended for their meaning upon the idea of pretty homogeneous nation states made up of individuals with a substantially equal stake in them, have been serious under attack in the 1990s (Habermas, 1992). It is one of the most interesting aspects of the South African transition the fact of establishing a legitimate and democratic constitutional state out of a deeply divided society, with a bitterly divided past. The social and political cement holding South Africa together could neither be a common past nor the ideal of a homogeneous political community. Rather, the effort has been to build the legitimacy of the new state upon, if not yet a real "culture of human rights", at least a consensus on the moral demarcation line between tolerable and intolerable.

In contrast with the previous ones, both the interim and the final South African constitutions do not limit themselves in creating and regulating the institutions of government of the state. They are not merely formalistic. They

35. Indeed, several others are the interesting fields for the analysis of the dialogue between global and local. Constitutionalism in South Africa, as in many other countries, poses the question of the compatibility between a "liberal" notion of constitution and traditional culture, especially in very delicate field, like gender, as we mentioned. In a different perspective, very interesting is to study how the complex ideological backgrounds of the constitution-making process, together with the specific needs to redress the inequalities of the past, combine in a constitutional text that tries to conciliate the claims for universal social and economic rights with the international pressure for the adoption of a liberal, or neo-liberal vision of state and society.

do regulate all the different state institutions in details[36], but they also contain normative and moral principles, they express the "soul of the nation" (Ebrahim, 1998). The 1993 and 1996 constitutions introduce a new set of norms for the South African legal system. Equality, freedom, non racialism and human dignity have replaced racism, arbitrariness and inequality as guiding principles of the very structure of the legal order. This is made clear from the very beginning of the 1996 constitution[37]. Indeed, the Preamble states the need to create a new order, based on moral pillars[38]. The founding provisions enforce these new values mentioned in the Preamble, ruling that:

"The Republic of South Africa is one, sovereign, democratic state, founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;

(b) Non-racialism and non-sexism;

(c) Supremacy of the constitution;

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." (art. 1).

These principles are deeply rooted in every constitutional provision. From the constitution, these values should permeate the whole social fabric for the new order to make really the difference in people's life. Whether this is taking place or not is a complex issue to be analysed, and certainly more than one simple decade is necessary to induce substantial social changes. After the first years of enthusiasm, quite critical voices are raising. The poorest communities start questioning the system. There are interesting cases of ordinary people claiming their constitutional rights through the remedies offered by the con-

36. With respectively 252 articles and 7 Schedules, and 243 articles and 7 Schedules, they can be defined long constitutions, typical of the newly democratised states.

37. The very same applies for the interim constitution.

38. "We, the people of South Africa, recognise the injustices of our past, ...,

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and ..."

stitution, that is mainly through courts[39]. But the cases of people taking justice into their hands and using violence to claim their rights, from the right to education and housing to freedom of expression, are still very frequent. "We are singing old songs, and it will take more than a decade to induce any significant change" affirmed D. Nkosi, major of the Metropolitan Area of Ekurhuleni[40]. However, for our discourse on hybridisation and local/global dialogue in the field of constitutionalism, it becomes interesting to approach the issue in a slightly different perspective. That is on the perspective of "the morals" that are the pre-conditions for the popular legitimisation of the values of the new constitutional order. The almost obvious underlying idea is that the more these morals are perceived legitimate by ordinary people, the easiest any eventual "permeation" of the new constitutional values in the society will be.

It is in the name of the respect of internationalised human rights that constitutionalism has been "imposed" as the model for democratic transitions world-wide, and as a pre-requisite for the new democracies for being accepted in the international community. According to the South African constitution, the bill of rights "is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the values of human dignity, equality and freedom" (art. 7(1)). Indeed, the bill of rights is one of the most powerful instrument in the hands of legislators, of governants and of the judiciary, especially the Constitutional Court, to induce social change. Chapter 2 recognizes and enforces an extremely wide spectrum of rights, from the classical civil and political rights (which, despite their classicism, still sound revolutionary in the South African context), to socio-economic and cultural rights. It is quite interesting to note how the liberal tradition combined with the social democrat one, giving birth, in the typical South African compromise way, to a bill of rights protecting equality, freedom and security of the person, the right to privacy, freedom of religion, belief and opinion, political and citizenship rights, right to property as well as labour rights, access to housing, food, health care, water and social security, the right to a healthy environment, language and cultural rights. Here again the issue concerning the impact of the bill of rights on social change re-emerges and we can not avoid making few considerations.

39. S. Wilson, lawyer with the Centre for Applied Legal Studies of the University of the Witwatersrand. Interview carried out in Johannesburg, 11 Feb. 2005. In the same direction: H. De Klerk, director of the Wits Law Clinic. Interview carried out in Johannesburg, 26 Mar. 2001.

40. Interview carried out in Johannesburg, 14 Feb. 2005.

First of all, article 8 establishes the horizontal application of every single provision of the bill of rights. This means than the bill of rights binds not only all the organs of the state, but every single citizen. This entails that every South African is recognized responsible for the social change of his or her country. This creates, in a way, a sort of obligation to an active citizenship and implies substantial changes in the notion of the South African political community. But, most importantly, this is intended to involve as extensively as possible all South Africans in the establishment of what scholars, politicians, representatives of civil society, associations, journalists name a "culture of human rights". With this respect, South Africa has a long way ahead. "People are very vocal about their rights, but very seldom they want to acknowledge they have duties as well towards the community", as a local councillor of a small township in the East Rand maintained in 2002[41].

Second, the role of the courts in the process of, first, defining the exact outline of the rights in question (quite often formulated in a vague language, proof of the difficulty of the negotiations on the specific subject[42]), and, second, of determining the real impact of the new legislation on the everyday life of the people. As noted by D. Davis, scholar and judge of the Supreme Court, "the nature and the role of law has been the top of the South African jurisprudential hit parade for a long time. During the darkest periods of apartheid, vigorous debate took place over the role of law in a representative state and whether there was any room for progressive lawyering in such a context. After the normalization of politics activity in 1990, these debates continued, albeit within the context of the role of the bill of rights as an instrument for transformation" (Davis, 1999: IV). And the use people are doing of courts, as already mentioned, is very important. On the one hand for the very protection and enforcement of the rights, on the other for the process of ownership people are developing on the constitution. The rights recognised in the constitution, already made South African by the history of the struggle and by the constitution-making process, get more and more legitimacy and become "indigenous" by the fact of being claimed by the people.

41. L. Sibeko. Interview carried out in Thokoza, 19 Mar 2002.

42. Quite interesting, for example, is the judgment of the Constitutional court in the case *South Africa v. Grootboom* (2000), where the Court set out a new interpretation of the judicial protection of socio-economic rights, stating that the constitution binds the government not by ensuring that everyone receives a house, but by requiring government to implement a program aiming at obtaining what the constitution requires. So that socio-economic rights are violated if there is a government inaction.

The third, and most important, question is the legitimacy recognized to the new South Africa by the people. Indeed, in the majority of South African township, where being recognized citizens for the first time in history still does not mean having proper housing, access to water, enjoy the freedom of trade and occupation, the discourse on the establishment of a culture of human rights may appear "either a pre-electoral or a moralistic rhetoric"[43]. Thus, it is necessary, and urgent, to find a common ground, a sort of moral platform where to anchor the very normative base of the constitution, and shared by the entire mosaic of the South African population. Where to look for a South African legitimisation of a culture of human rights (that otherwise will remain a simple expression of formal conformation to the international standards on human rights and democracy)? Not yet in the rights themselves, the majority of which still remain a dream for the large majority especially of the African population[44]. Neither in a common past, which still does not exist, despite the effort of the post-apartheid intellectual community to re-conceptualise the past and to forge a new collective memory through museums, national holidays, etc., nor, finally, in a strong notion of the national community, whose construction, on the contrary, depends on the success of the nation-building potential of the constitution.

Some scholars argue that "human dignity is the key, also in South Africa. ... Human dignity provides South Africans with the firm foundation, as well as the flexibility and scope, that they require for the development of their unique interpretation and application of a system of justiciable and enforceable human rights" (Malherbe, 2000: 57). Others, like bishop D. Tutu, find it in the concept of *ubuntu*, a fundamental notion of African philosophy, affirming that "people are the people through other people" (Tutu, 2000). As explained by Judge Mokgoro of the Constitutional Court: "in its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*[45] describing the significance of group solidarity on issues so central to the survival of communities. While it envelops the key

43. Interview realised in Thokoza, on 9 Mar. 2001.

44. Of course, this does not mean that being South African does mean nothing, even in one of the poorest and more violent African township. On the contrary, as argued somewhere else (Federico 2001 and 2003), it is evident that legitimate participation in the political life of a neighbourhood, of a town, of a Province, and of course at the national level, is perceived as an essential part, if not the core, of the privileges and obligations of being a citizen. In the interviews carried out in Thokoza, several people affirmed they go to vote, they participate in public rallies and they get involved, for example, in school management teams, not just to obtain specific ameliorations in their everyday life.

45. Exactly "people are the people through other people".

values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality"[46]. From an interesting perspective, some others maintain that the common ground, with a strong, effective and South African ethical value lies in the moral line established by the Truth and Reconciliation Commission, in a "consensus concerning the intolerable". In fact, "the moral accounting of apartheid by the TRC contributed to a wider attempt of post-apartheid governance to integrate respect for human rights into the everyday beliefs and practices of ordinary South Africans, and engendered a respect for, and identification with, state legality" (Wilson, 2001: 56).

Final considerations

Indeed, in a society so seriously divided and ravaged by conflicts and conflicts about the conflicts (Horowits, 1991), the legitimisation of the state and of law can not be simply entrusted to the formal functioning of the state apparatus, even if characterized by the respect of the most advanced rights and operating through the most appropriate constitutional engineering.

Before, during and just after the transition, the debate was whether democracy in South Africa would have survived. Almost a decade has passed from the first democratic elections, South Africa has been accepted in the international community and in the regional organizations (most importantly in OAU – now Africa Union – AU). The European Union has established a free trade agreement with the country, and the South African army has been serving as peace-keeper in different African crisis. The question is no more about the survival of democracy, rather it is about the quality of that democracy. As we have argued, constitutionalism has played a significant role in the transition, in civilizing apparently irreconcilable conflicts and in offering the opposing parties a political order in which they can find their contending faiths in the constitution, and retain a belief that their understanding may in time be proved of being correct (Klug, 2001). The challenge constitutionalism has to undertake for the future is to contribute legitimising the new order and, as a consequence, to facilitate social change in the country. In fact, in this perspective, constitutionalism seems to provide a link between the globalised notions of democracy and human rights and the specific South African political, economic and social circumstances, and it contributes defining how the ideals of

46. Constitutional Court, *S. v. Makwanyane*, 1995.

globalising constitutionalism get "digested" locally and assume meaning for the South African people.

Constitutionalism has become on the one hand a natural way for the élites to think and conceive, at least from a formal point of view, from Afghanistan to Timor Est, and, on the other hand, it has become a sort of passport for the new democracies to be accepted by the international community. Still, as we have demonstrated, constitutionalism in itself is not sufficient in assuring that democratic transitions are successful and remain peaceful at least in a medium-term perspective. Inclusiveness being another important element of the delicate chemistry assuring that diversity becomes richness and not a disruptive phenomenon. In addition, we could question whether a too relaxed discourse on the role and the importance of constitutional law does not hide the purpose of doing politics by other means, and does not delegate to "technicians" and judges duties and responsibilities that are typical of people's elected representatives. Typical, and at the same time, contested example, was the declaration of unconstitutionality of the death penalty by the Constitutional Court because it violated human dignity, the right to life, the right not to be treated or punished cruelly or inhuman, and the right to equal protection of the law[47]. Of course, we mostly welcomed the decision of the South African Constitutional Court declaring the death penalty unconstitutional, and, in general, and progressive jurisprudence of constitutional courts. However, as the issue of the death penalty was at stake at the negotiation table as well, a proper political choice, made by politicians, and with a political purpose would have been more effective, even if more difficult to adopt, in the purpose of stimulating changes in people's minds and attitudes.

We have tried to demonstrate how constitutionalism played an active role in the democratic transition, as the process of constitution-making provided the political space for accommodating the different views of all the parties at the negotiating table. And the specific historical and constitutional background of the country, in addition to its economic strength, gave the constitution-makers enough confidence and enough local models to integrate the international globalising constitutional standards with indigenous traditional legal culture. So that the process is perceived "all internal"[48]. Still, it remains to discuss the real effectiveness of constitutionali-

47. Constitutional Court, *S. v. Makwanyane*, 1995.

48. P. Camay, interview carried out in Johannesburg, 15 Feb. 2005, H. Abib, interview carried out in Johannesburg, 22 Feb. 2005, F. Shabodien, Policy and research manager, South African NGO Coalition, interview carried out in Johannesburg, 14 Feb. 2005, D. Rudman, interview carried out in Pretoria, 16 Feb. 2005..

sm, constitutions, and of law in general, to induce social change. In the same way, we may debate whether constitutional reforms merely reflect new social patterns. Nevertheless, we should not forget that legislation is the primary means available to a democratic state to intervene in society, and the South African case best illustrate it. It is probably improper to refer to South African reality what Habermas calls "constitutional patriotism". Still we agree on the South African Constitutional Court vision of the role of the Constitution in the transition to democracy:

"All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspiration of a nation, the values which bind its people, and which discipline its government and its national institutions, the basic premises upon which judicial, legislative and executive power is wielded, the constitutional limits and the conditions upon which that power is to be exercised, the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future"[49].

49 *S v. Makawanyane*, 1995.

Constitutionalism and democratic transitions: lessons from south africa

Dirk Kotzé[1]

Abstract: *The chapter is mainly concerned with the South African experience in constitutionalism as a means to address deep-rooted conflict in society. The final Constitution (1996) employed the concept of 'constitutional democracy', which immediately established a direct linkage between the constitution and democracy. From the onset the Constitution proclaims that South Africa* ***is*** *a democratic state, which implies a procedural and institutional understanding of democracy, as opposed to one dependent on the dynamics, institutional behaviour and adherence to democratic values. Constitutional democracy in South Africa can be summarised as a combination of values (Article 1), constitutional institutions and rights (especially Chapter 2 human rights). Human rights should be considered in the context of 'national liberation' as a concept. National liberation reaches beyond constitutionalism and therefore structural democracy as determined by the Constitution, does not meet the general expectation of national liberation. Opinion surveys by Afrobarometer and others confirm this. The relationship between constitutionalism and conflict resolution is discussed in the context of four schools of thought, which can be summarised in two approaches, namely a behavioural and an institutionalist/structuralist approach. The latter looks at conflict as a failure of institutions and societal structures, and therefore constitutionalism can serve the purpose of restructuring the state. The South African experience emphasises the importance of transitional institutions as instruments of confidence-building and managing a transition. The Transitional Executive Council, the Government of National Unity and the Truth and Reconciliation Commission deserve special attention in this regard. A wide range of non-constitutional negotiating fora, such as the National Economic Forum and transitional local government fora, also ensured the success of the transition. Public participation is generally considered as a key requirement to remove any notion of political discrimination or marginalisation, which is often at the core of a conflict, and to legitimise the products of constitutionalism. The transition in South Africa was structured in two phases (before 1994, and 1994-1999) and the first*

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phase lacked any significant public participation. It is often described as negotiations by elite pacts. The second phase in the form of the Constitutional Assembly involved significantly more public participation. General perceptions about democracy, reconciliation and land reform (as key indicators of redressing the causes and affects of apartheid conflict) are less positive tan expected. Constitutionalism, accordingly, plays an indispensable role in democratisation and conflict resolution, but examples like Cyprus and Lebanon, and the South African public perception warn against too much reliance on it, without concomitant policy initiatives.

Introduction

The Preamble in the Constitution of the Republic of South Africa, Act 108 of 1996, makes the following pronouncement:

> We, the people of South Africa,
> Recognise the injustices of our past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> Improve the quality of life of all citizens and free the potential of each person.

If one looks at constitutionalism as one of the most prominent articulations of a democratic transition, and as arguably the most appropriate form of conflict resolution, and prevention of conflict in future, this Preamble appears to be compliant with such a view.

The Preamble involves a number of key propositions in the South African conflict and notions of national liberation. By recognising them as the Constitution's point of departure, the Constitution is automatically positioned in the centre of conflict resolution. The fact that the Constitution explicitly recognises the injustices of apartheid in the past, and honour and respect those who

fought against them, and commit itself to address these injustices, provides a contextual articulation of its main purpose. It is not merely a constitution to institutionalise and regulate state power in the form of a social contract, but it has a historical motivation to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". The Constitution therefore clearly visualises itself as a transitional and transformational instrument; one involved in political and social engineering.

The South African transition has been researched from numerous perspectives. The focus in this chapter is on constitutionalism and human rights. Research done in this field and related areas include Lijphart (1985), Horowitz (1991), Slabbert (1992), Sisk (1993) Licht, De Villiers (1994), Sisk (1995), Newitt, Bennum (1995), Faure, Lane (1996), Klaaren (1997), Simeon (1998) and Guelke (1999). Most of these works did not raise the question whether constitutionalism is the most appropriate means as the first option in managing a transition consisting of many dimensions. A transition is a complex phenomenon and assumes different meanings: for some it is essentially a transfer of power (regime change); for others it is about a new state (state-building); other focus on democratisation and redistributing of political power; while others are concerned about a new value system and state-society relations, of which human rights are a definitive element. How did constitutionalism in South Africa manage to navigate between these different expectations and meanings?

The question directing this chapter is whether the authors of the Constitution have made a valid analysis of the role it could and still can play in the transition and in the future of South Africa. Albie Sachs made the following observation: "Democracy and human rights do not in themselves solve our problems, but they give us the framework in which we can solve our problems" (1998: 6). Can a constitution embedded in a prominent human rights culture be the main instrument for conflict resolution and – prevention in South Africa? These questions use the premise that democracy is a necessary (but maybe not sufficient) systemic or structural prerequisite for peace-making and conflict prevention. Therefore it is important to look briefly at the democratic paradigm incorporated in the Constitution.

1. Constitutional Democracy in South Africa

Article 1 in the "Founding Provisions" of the final Constitution (1996) states that the "Republic of South Africa is one, sovereign, democratic state founded on the following values": human dignity, the achievements of human

rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of government.

In this construct democracy is presented as a statement of fact: South Africa is a democratic state (in 1996 already). Its democratic nature is hence not dependent on establishing a new value system and practices such as respect for human rights, free and fair elections, political tolerance or democratic decision-making. A structural or procedural notion of democracy integrated into a premise that a constitution which encapsulates certain elements automatically constitute a democracy, most probably informs the South African view. Clear indication of this correlation is found in the Constitution's Chapter 9 – "State institutions supporting constitutional democracy". If we accept that democracy is defined in the first instance by the constitution itself – which in itself constitutes a tautology – then constitutional democracy can be captured in three elements, namely values (Article 1), institutions (and not necessarily democratic dynamics and practices) and rights (especially human rights).

Article 1 states that the South African state is one, sovereign and democratic, which suggests a symbiosis between the three. Democracy therefore depends also on the unified nature of the state. As a product of the negotiation process and as a means to address the conflicts of apartheid, it encapsulates much more than its ostensible and literal meaning. Oneness is the direct antithesis of the apartheid model of a fragmented or balkanised state with ten homelands destined for independence. It is also the direct antithesis of the call for a separate 'volkstaat' for conservative white persons. And it is also a direct response against calls for a Zulu kingdom. The Constitution's Preamble confirms that "South Africa belongs to all who live in it, united in diversity". This is a direct reference to the Freedom Charter's (1955) "South Africa belongs to all who live in it, black and white". The Charter was adopted by the Congress movement including the African National Congress (ANC), South African Communist Party (SACP) and later also the Congress of South African Trade Unions (COSATU). As a philosophical construct it was rejected by the Africanists in the Pan-Africanist Congress (PAC) and the Black Consciousness movement. Therefore it does not represent all the dimensions of national liberation but mainly the dominant view of the ANC.

Unity of the state was also a contentious issue in the constitutional negotiations. It emerged for the first time as a dividing factor in the Declaration of Intention agreed to by the multiparty CODESA I (Convention for a Democratic South Africa) in December 1991. It stated *inter alia* that "South Africa will be a united, democratic, nonracial and nonsexist state in which sovereign

authority is exercised over the whole of its territory" (Ebrahim 1998: 529). The Bophuthatswana administration and Inkatha political party (with its main constituency in KwaZulu homeland) interpreted it as acceptance of the principle of an undivided, unitary state, and the exclusion of federal and confederal constitutional options. The white right-wing also rejected it, because it would exclude the principle of territorially-based self-determination. Inkatha (since 1991 known as the Inkatha Freedom Party – IFP) in particular acted as a staunch opponent of the unitary state paradigm, which was one of the motivations for its violent clashes with the ANC in KwaZulu/Natal and some townships in Gauteng. This difference also polarised the negotiation process into the mainstream multiparty negotiations and alongside it, parallel negotiations with COSAG (Concerned South Africans Group) and the Freedom Alliance (FA). Its net result was that the right to self-determination was included at the last minute as an additional Constitutional Principle in the interim Constitution (1993), while the National Party (NP), ANC and IFP agreed to international mediation to be conducted after the April 1994 general election in respect of the constitutional powers of provinces and the constitutional status of the Zulu monarchy (Kotzé, 1996: 145-154). By 2005 this mediation is still pending and one of the reasons for the deteriorated relationship between the ANC and IFP.

Human rights are a key component of constitutional democracy in South Africa. In Article 7(1) the Constitution proclaims: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". In its process of certifying the final Constitution (1996) the Constitutional Court was directed by the Constitutional Principles (CP) entrenched in the interim Constitution (1993). CP II reads as follows:

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 in this Constitution [interim Constitution].

The constitutional judges interpreted this Principle as follows: "What the drafters had in mind were those rights and freedoms recognised in open and democratic societies as being the alienable entitlements of human beings" (Constitutional Court 1996: paragraph 50). This interpretation is consciously establishing a linkage between internally-accepted norms of human rights and democracy, and assuming that if the South African Constitution embraces them, it will logically embrace democracy.

A critical view of this argument is derived from the following logic: democracy in South Africa is almost axiomatically defined as the antithesis of apartheid; as the negation of apartheid. What is post-apartheid or anti-apartheid therefore? The wide-ranging liberal-radical (or race-class) debate during the 1960s to 1980s (see for example, Posel, 1983: 50-66; Lipton, 1986; Wolpe, 1988) proposed different visions, but the dominant view of the ANC is captured in the notion of 'national liberation' and a 'national democracy'. It is important to note that the ANC was not in essence a civil rights or human rights movement, and therefore post-apartheid or democracy is only about recognition and protection of human rights. It is worth investigating what is meant by its broader notion of 'national liberation'.

The Freedom Charter was mentioned already as a milestone in the evolution of a new constitutional philosophy for South Africa. It is also imperative to understand it as one of the earliest articulations of national liberation. In June 1956 Nelson Mandela explained the Charter as follows (in Bunting, 1975: 215):

"The Charter is more than a mere list of demands for democratic reforms. It is a revolutionary document precisely because the changes it envisages cannot be won without breaking up the economic and political set-up of present South Africa."

At its Morogoro conference in 1969 the ANC adopted the 'Strategy and Tactics of the South African Revolution' in which it stated (La Guma, 1972: 202):

In our country … it is inconceivable for liberation to have meaning without a return of the wealth of the land to the people as a whole. It is therefore a fundamental feature of our strategy that victory must embrace more than formal political democracy. To allow the existing economic forces to retain their interests intact is to feed the root of racial supremacy and does not represent even the shadow of liberation.

Thirty years later with the ANC in power the question is how much these sentiments have guided it in cultivating a democratic environment. Opinion surveys conducted by Afrobarometer (Mattes et al.. 2000) reveal a direct correlation between the historical notion of national liberation and the post-1994 popular notion of democracy. At this early stage in the discussion it already suggests that constitutionalism in a structuralist and institutionalist sense, and human rights (mainly first- and second-generation rights) will not sufficiently encapsulate a post-apartheid (democratic) expectation. Third-generation rights combined with transformative and affirmative action policies are suggested as additional elements to remove deep-rooted causes of the conflict in South Africa associated with apartheid.

In order to fully appreciate the correlation between constitutionalism, human rights and conflict resolution in South Africa, it is first necessary to look briefly at the main contemporary paradigms in conflict resolution which are relevant for this topic.

2. Constitutionalism and Conflict Resolution

Perspectives on, and approaches towards, conflict and conflict resolution can be summarised in the following four categories or schools of thought (Kotzé, 2005):

1) One school of thought looks at conflict at the individual and societal/national levels, and assumes that the individual is in both instances the unit of analysis. Biological and physiological conceptions about human nature are complemented by notions of social learning (socialisation and cost/benefit calculations regarding conflict). Perceptions of expectations/rewards dissonance (including relative deprivation) are another psychological dimension of conflict. All of these are perceptions, psychological constructs and individual experiences. Its logical implication is that conflict resolution should respond by changing these perceptions and addressing their causes (Sandole, Van der Merwe, 1993: 7-16).
2) Traditionally, conflict has been treated as competition for interest realisation, often individual interests or interests influenced by natural resources (Humphreys, 2005). Conflict resolution therefore manifested itself in the form of compromises. Power and coercion were often applied to deliver the compromises. In this context the task of a mediator was to present a compromise which the less powerful party had to accept (Burton, 1987: 7-8).
3) During the Cold War period conflict was not resolved but suppressed or contained. Coercion and crisis management were often used. The emphasis was therefore on short-term stability and not on longer-term sustainability (Harris, Reilly, 1998: 13).
4) The latest school of thought concentrates on human needs and systemic (state) failure as the main causes of conflict. Identity needs receive most attention as an ontological human need (Burton, 1987: 16; Harris, Reilly 1998: 9-10). Stephen John Stedman (in Deng, Zartman, 1991: 367-369, 373) identified also resource needs, dignity needs, power needs and value needs as basic human needs. When persons are involved in

conflict, they develop also security and survival needs. These needs are exacerbated by crises in national governance or systemic failure. This is used as an explanation why intra-state conflicts have become more prevalent than inter-state conflicts. Therefore, the emphasis also moved from solving conflictual relations between states, to resolving relations within states. As a result of the focus on internal, systemic failure, the emphasis in conflict resolution shifted to an institutional approach; in other words, to finding the most appropriate state institutions to resolve the failure. In this respect the International Institute for Democracy and Electoral Assistance (IDEA) presents democracy as a normative, instrumentalist framework (Harris, Reilly, 1998: 16-17). The Swedish International Development Coordination Agency (SIDA,1999) has a more structuralist approach, and focuses on a combination of development and political structures. Vivian Hart (2003) developed the nation of "conversational constitutionalism" in a publication for the United States Institute for Peace, which can be considered a third variation. Its emphasis is on democratic processes of constitution-making as a conflict resolution approach.

At present conflict resolution appears to be accommodated within two schools of thought, namely a behavioural approach and an institutionalist/ structuralist approach.

The preferred outcomes of the two approaches do not necessarily overlap. In the behavioural approach, conflict resolution focuses on individuals and their roles in society – especially for the purpose of establishing social harmony amongst them and their societies at a behavioural level. The structuralist approach emphasizes conflict resolution as restructuring of the political environment but does not prescribe democratic structures as the only option. For Burton it is important to find long-term, sustainable solutions acceptable for all. Though his focus is on political structures, the fact that he identified problems of communal identity superimposed on unequal distribution, as even more troublesome, means that the structures should also promote fair socio-economic distribution (i.e. another form of structural change). SIDA is quite explicit about such an objective.

The institutionalist approach of IDEA (Harris, Reilly, 1998) is less concerned about distribution matters, and concentrates on the range of options of democratic institutions available to negotiators and mediators. For them, conflict resolution is about finding the *most appropriate* of these institutions. Harris, Reilly (1998: 16) used Angola as an illustration of this point: the 1991

Bicesse peace agreement focused on elections (i.e. a democratic practice and institution) which were to lead to a power-sharing government. Thomas Ohlson (1998: 74) disputed the idea that it provided for power-sharing. According to him, both parties preferred a winner-takes-all system. The Angola constitution was unsuitable for power-sharing, because most of the executive powers were concentrated in a single-person President. Therefore the loser in the September 1992 presidential election, Jonas Savimbi, went back to the bush. In defiance of Savimbi twelve Unita elected members of Parliament took up their seats. In December 1992 a government of national unity was sworn in, with Unita being allotted four of the 27 ministerial/vice-ministerial posts (Ohlson 1998: 76). Conflict continued because of the zero-sum nature of the executive Presidency, and the power-sharing government as a democratic institution could not counter it.

A permutation on the institutionalist approach is Vivian Hart's (2003) of an institutionalist (constitutionalist) approach and democratic dynamics. According to her, constitution-making "has become a part of many peace processes. New nations and radically new regimes, seeking the democratic credentials that are often a condition for recognition by other nations and by international political, financial, aid, and trade organizations, make writing a constitution a priority".

Hart's notion of "conversational constitutionalism" is, however, a deviation from traditional and classic constitution-making as represented by the oldest constitutions such as the American Constitution (1787). According to her, such an approach views constitution-making as concluding a conflict and as a codification of a conflict settlement in order to produce permanence and stability. It constitutes therefore an act of completion; a final settlement or a social contract in which basic political definitions, principles and processes are encapsulated. In her view, such a process should not be an act of final closure, because it will entrench the post-conflict distribution of power and will exclude new participants. Her insistence on a democratic and flexible process of constitution-making makes a moral claim for participation.

This combined approach appears to be tailor-made for conflict resolution, but relies too much on only one historical example, namely South Africa. Hart's ideas are also only applicable to a relatively short transitional period. In the case of South Africa they applied to the period between the interim Constitution (1993) and finalisation of the 1996 Constitution. The process after 1996 reverted back to IDEA's institutional approach, or democratic consolidation in the form of institution-building. The 1996 Constitution closed the constitutional phase of conflict resolution, but provided an enabling fra-

mework for other processes such as affirmative action, land reform, black economic empowerment and reconciliation.

A second permutation is the structuralist approach underpinning SIDA's approach. It ventures beyond institutions and includes changes to the social, political and economic structural or systemic configurations in a society. It entails redistributions of power, status or wealth, and new class associations. The mentioned processes of affirmative action, land reform or black economic empowerment are structuralist in approach. Insofar as they have been institutionalised, the structuralist and instrumentalist approaches complement each other.

In summary: present-day scholarship and practices in conflict resolution do not focus exclusively on democracy and socio-economic development. An important school of thought (that also includes peace education studies) has a strong behavioural orientation. However, the structuralist and institutionalist approaches are endorsed (maybe even preferred) by many decision-makers. For example, Kofi Annan (in Harris, Reilly, 1998: vii) wrote that more complex conflicts have "obliged the international community to develop new instruments of conflict resolution, many of which relate to the electoral process and, more generally, to the entrenchment of a democratic culture in war-torn societies, with a view to making peace sustainable". Another example is the Brookings Institution's Africa Program which set as its goal "to elucidate what institutions can be devised that will produce enduring peace" (Deng, Zartman, 1991: 369).

2.1 Democratic peace

Democracy and conflict resolution are also linked in the form of the 'democratic peace' debate. Chernoff summarized it as follows: "democratic states are more peaceful than non-democratic states (the monadic hypothesis) and that democracies are more peaceful with respect to one another than others are (the dyadic hypothesis)" (Chernoff, 2004: 52). The debate is traced to Immanuel Kant but reached prominence in the 1980s.

The debate constitutes a continuum of support for the theory. Spencer R. Weart argues that genuine democracies almost always avoid war with each other, but they also never have and never will fight other democracies. Other more probabilistic claims assume that democratic dyads have lower propensities to engage in war, and democratic norms and structures reduce the likelihood of their using military force against each other (Elman, 1999: 88).

The relevance of the 'democratic peace' debate for this discussion is the

presumed role of democracy in preventing conflict amongst states. It does not present any assumption about conflict prevention within states. However, although the debate is fierce and inconclusive in academic circles, most political actors accept its validity and incorporate it in their peace-building models. (The American doctrine of democratization in the Middle East, and democracy as a remedy for 'failed states', demonstrate this point.) South Africa is often used as a powerful example of how its democratization contributed to peace-making in the whole of southern Africa.

3. Understanding the Nature of Conflict in South Africa

The constitutional negotiations before 1994 in the form of the Convention for a Democratic South Africa (CODESA) and the Multiparty Negotiating Process (MPNP), and between 1994 and 1996 in the Constitutional Assembly were the most visible expressions of the transition process. It is therefore logical to assume that constitutionalism was the main instrument used in the transition to arrest apartheid and overturn its effects on society. Negotiations about a transition can assume various forms. It can be procedural to address the symptoms of the conflict and to determine the procedure of future decision-making about resolving the conflict. The Sudanese peace process is an example of such a procedural arrangement when after six years a referendum will determine the future of the south. Negotiations can also be substantive in the sense that the essence of the conflict is addressed by means of new constitutional agreements. The South African process was characterized by numerous proposals made public before or during the negotiations. Some of them were the following:

By the ANC:
"Constitutional Guidelines for a Democratic South Africa" (1986-1988)
"Discussion document on Structures and Principles of a Constitution for a Democratic South Africa" (1991)
ANC Policy Guidelines: "Section B – A Democratic Constitution for South Africa" (May 1992)
National Constitutional Policy Conference: "Building a united nation" (1995).

By the National Party:
"Constitutional Rule in a Participatory Democracy" (1991)
"Appendix H" drafted by Prof Francois Venter (1992)
"Government's Proposals on a Charter of Fundamental Rights" (1993)

By the IFP:
"The Constitution of the State of KwaZulu/Natal" (December 1992)
"Draft Constitution for the Republic of South Africa" (no date).

Therefore, it is not illogical to argue that the nature of the conflict in South Africa was defined mainly in structural-systemic or constitutional terms. In this respect it is worth returning to the liberal-radical (or race-class) debate mentioned earlier as a contestation of the nature of the conflict.

For those who saw the conflict as primarily racial, the emphasis would be on eradicating racial discrimination, on human rights and reconciliation. For those who saw it as a class conflict, conflict resolution would entail a restructuring of the state in economic, social and political terms. An indication of how the ANC and its allies interpreted it, is found in their construct of 'colonialism of a special type' (CST). CST is a complex combination of race and class and identified two states (or 'levels') within one state: 'White South Africa' which was typical of an advanced capitalist society, and 'Black South Africa' which was typical of a colony. The relationship between the two levels was similar to a colonial environment, though its unique nature was that the two levels shared on territory or state (ANC, 1985: 4). Therefore, there is no quest for independence and a colonial withdrawal. Such an understanding of apartheid and the South African situation allows for a wide range of conflict analyses and conflict resolution approaches. Initially the ANC and its allies preferred a revolution or an overthrow of the state (i.e. a conclusive an unilateral victory); in the absence of it, the next option was to create a permanent crisis ("to make the country ungovernable") and finally constitutional negotiations. The question, however, is whether the constitutional restructuring can encompass all the dimensions of the conflict. The ANC's chief negotiator, Cyril Ramaphosa articulated their mode of thinking as follows:

All South African agreed that there needed to be a way out. What they couldn't agree on was which way to go. And so we entered multi-party negotiations to bring together the divergent interest groups in this country to try and find a common solution.

The result was the interim Constitution, … When formulating the interim Constitution we focused on the need to resolve the apartheid "problem" and to promote national unity. We recognized that these two imperatives were essential stepping stones to a dispensation in which the priority was to build democracy at all levels of society.

The interim Constitution was in many senses a peace treaty (1996: 12).

In its first 'Constitutional Guidelines for a Democratic South Africa' (1986-88) the ANC justified negotiations as follows (ANC Department of Political Education, 1990: 29-30):

The immediate aim is to create a just and democratic society that will sweep away the centuries-old legacy of colonial conquest and white domination, and abolish all the laws imposing racial oppression and discrimination. The removal of discriminatory laws and eradication of all vestiges of the illegitimate regime are, however, not enough: the structures and the institutions of apartheid must be dismantled and be replaced by democratic ones. …

In addition, the effect of centuries of racial domination and inequality must be overcome by constitutional provisions for corrective action which guarantees a rapid and irreversible redistribution of wealth and opening up of facilities to all. The Constitution must also be such as to promote the habits of non-racial and non-sexist thinking, the practice of anti-racist behavior and the acquisition of genuinely-shared patriotic consciousness.

The choice of negotiation as a means to change the regime carried within itself certain limitations. It did not allow for a radical transfer of power and for a *tabula rasa* to redesign a new state. Negotiated agreements had to be implemented which invariably were compromises. Hence, the nature of the conflict as defined by CST could not be addressed head-on and expeditiously. Concurrently with addressing the social impact of apartheid, the ANC also had to manage the transition – not only white fears and their loss of power, but also black fears of political marginalization, especially the IFP's. In this regard, referring to the TRC, one of the ANC's main negotiators, M. Maharaj recalled later that the ANC agreed to it "at the 11th hour to persuade the security forces, and also the extreme right wing, to participate in the elections. It was used, to put it bluntly, to avoid the ever-threatening possibility of armed counter-revolution. The amnesty clause was combined with the so-called 'sunset clause' which guaranteed civil servants – including the police and army – their jobs for the next five years" (Maharaj, 1997: 3).

The South African experience is important as an example of a negotiated transition which reconstituted the state within a new value framework, taking a long period of almost ten years and forging a social compact between the two former adversaries. In such a situation conflict resolution is accordingly not possible to pay exclusively attention to the root causes of the conflict, but also to address needs for trust and confidence in the future. The whites, who have lost political power, were asking for confidence-generating guarantees.

Roelf Meyer, the NP's chief negotiator, emphasized the importance of this need in the negotiation dynamics. According to him, the NP initially designed their negotiation strategy on the basis of calling for constutionally-entrenched group rights. However, the deep deadlock after CODESA II and his interaction with the ANC's Cyril Ramaphosa convinced him of the need for a 'paradigm shift' towards individual human rights (Personal interview with Meyer, November 2004). Meyer summarized his understanding of the new paradigm as follows:

This vision, this totally new paradigm, enabled the negotiators to resume negotiations and establish the new constitutional framework on which a different and better South Africa could be built. It made it possible to establish a state in which the constitution, as opposed to parliament, would be supreme; to establish a state in which there would be a full Bill of Rights to protect the individual, as opposed to group or minority protection; and to set up a constitutional court to adjudicate the constitution instead of these powers lying with parliament. This paradigm shift diverged monumentally from the mindset espousing the majority/minority syndrome in that it embraced a structure where the emphasis would be on individual, equal rights and opportunities for all (Meyer, no date: 17 - 18).

The importance of constitutionalism for confidence-building from the NP's and other small parties' perspective is the following: constitutionalism in the form of imposing limitations on government power, has a strong libertarian tradition. Constitutionalism, in other words, is mainly the checks and balances on government, separation of powers, the rule of law, constitutional sovereignty and justiciable human rights. Realizing that they cannot compete politically with the ANC, constitutionally-entrenched procedural democracy provides a safe haven for smaller parties. It is therefore not a surprise that persons who identify themselves as minorities migrate towards liberalism as witnessed by parties like the Democratic Party/Alliance in the 1999 general election. As a consequence, constitutionalism has been unable to directly address the socio-economic components of apartheid conflict. On the positive side, it provides to a large extent a guarantee against a recurrence of arbitrary government and violations of human rights, which constituted significant symptoms of apartheid conflict.

As already mentioned, constitutionalism in South Africa, as a means of managing the transition, should not be treated on its own, because other transitional institutions played an indispensable role in supporting constitutionalism during this period. This is the focus of the next section.

4. Transitional Institutions and Conflict Resolution

The transition between 1991 and 1999 involved numerous persons, organizations, governments and institutions, and all of them made in their own right a valuable contribution. For example, the National Peace Accord (1991) (Marks, 2000) and the Goldstone Commission (Goldstone, 2000: chapter 2) played an invaluable role to address political violence. German think-tanks played an equally important role to expose the negotiators to alternative constitutional concepts. Prof. Washington Okumu and Braam Viljoen were indispensable mediators to pull the IFP and the conservative Freedom Front into the 1994 general election and avoid a right-wing backlash. And the Cyril Ramaphosa-Roelf Meyer and Mac Maharaj-Fanie van der Merwe 'negotiation channels' ensured that negotiation deadlocks could be resolved (Personal interviews with Van der Merwe and Maharaj, 27 December 2004 and 26 January 2005).

This observation does not deny the importance of transitional institutions. Only a select number of them will be discussed here, namely the Transitional Executive Council (TEC) and the Government of National Unity (GNU). In addition, some aspects of the interim Constitution (1993) should be mentioned.

4.1 Interim Constitution (1993)

The interim Constitution (1993) and the final Constitution (1996) represent the most tangible products of the two phases in the transition. The transition and the role played by the Constitution should be assessed in terms of both *form* (process) and *content* (substance). Form is imperative for legitimization and content is important for structuralisation. The fact that two constitutions were drafted during the transition is important for the *form* of the transition. The Constitutional Court succinctly summarized the considerations in this regard as follows:

One of the deadlocks, a crucial one on which the negotiations all but foundered, related to the formulation of a new constitution for the country. ... Those who negotiated this commitment were confronted, however, with two problems. The first arose from the fact that they were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage. The second problem was the fear in some quarters that the constitution eventually favored by such a body of elected representatives might not sufficiently address the anxieties and

the insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement. The government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposite side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution (1996: paragraph 12).

The Court observed that the different views were reconciled in the form of a two-stage transition. An interim, coalition government functioning under an interim constitution, negotiated in the first phase by non-elected party representatives, would govern the country for five years while a final constitution were to be drafted by elected representatives in the second phase. "But – and herein lies the key to the resolution of the deadlock – that text would have to comply with certain guidelines [Constitutional Principles] agreed upon in advance by the negotiating parties. What is more, an independent arbiter [Constitutional Court] would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it come into force" (Constitutional Court, 1996: paragraph 13).

The Constitutional Principles mentioned by the Court were included in Schedule 4 in the interim Constitution. They were fully entrenched and therefore could not be changed or amended by any parliamentary majority. Their function was to serve as a 'conduit' between the two transitional stages. This is an example of a *sui generis* form of constitutionalism designed specifically for the transition. It borrowed the concept from the eight Constitutional Principles negotiated under the UN's auspices and binding on the first Namibian constitution (1990), (ANC Constitutional Committee, 1991: 5-6). Albie Sachs, a member of the Constitutional Committee, claims that he propagated the idea of similar Principles for the South African transition and that he was also influenced by the Namibian example and a visit to the Nicaraguan parliament where he learnt that the anti-Somoza opposition had agreed on five basic constitutional principles for a democratic Nicaragua (E-mail from Sachs, 9 November 2005). The 34 South African principles can be summarized under the following themes:

(1) The transition period: they entrenched the principle and composition of the national and provincial executives and legislatures for a five-year period until 1999.
(2) The status of the Constitution: the principles determined that the Constitution has to be the supreme law of the land.
(3) Fundamental rights: the principles entrenched a number of fundamental human rights, including a provision in CP II that universally accep-

ted fundamental rights, freedoms and civil liberties must be entrenched and justiciable.

(4) Democratic principles: the principles included representative government, a multiparty system, regular elections, universal adult suffrage, a common voters roll, proportional representation and participation by minority parties in the legislative process.

(5) The form of the state and government: South Africa must be one, sovereign state, with one common citizenship and a democratic system of government. It accommodated the right to self-determination, separation of powers and checks and balances.

The manner in which these Principles created a symbiotic linkage between the first stage of the transition and the second stage constituted in itself an important mechanism of trust-building and acceptance of the transition. This point is illustrated by the fact that when the IFP and Freedom Front finally agreed to participate in the 1994 general election, it was only after agreement with the ANC and NNP to add a 34th Constitutional Principle on self-determination. The interim Constitution was preceded by the Transitional Executive Council, which paved the way for a peaceful transfer of power in the executive sphere.

4.2 Transitional Executive Council (TEC)

The TEC was an institutional mechanism of short duration, between December 1993 and April 1994. It functioned at a period of uncertainty, growing tension immediately before the first election and high levels of political violence in KwaZulu-Natal and the Johannesburg region.

As a transitional institution established by parliamentary legislation but not as part of the interim Constitution, the TEC has so far received scant scholarly attention (Sarakinsky, 1994 is an exception), but has arguably played an indispensable role at a critical moment in the transition.

The TEC's origin can be traced to the ANC's call in the Harare Declaration (1989) for an elected interim government in the transition. By 1992 it had already realized that it will not be possible to materialize and therefore Thabo Mbeki tabled a proposal at CODESA on 24 February 1992 which included an 'interim government council' to oversee the Parliament of the time, the NP government and the administrations of the Transkei, Ciskei, Venda, Bophuthatswana and other homelands. This council would consist of the parties at CODESA and would be able to veto and initiate legislation (SWB, 26 February 1992).

A few months later at CODESA II (May 1992), Working Group 3 prepared a report for the plenary session in which the concept of a TEC had been developed in considerable detail. It proposed a number of sub-councils for the TEC, entrusted with executive powers to prepare for an elected parliament under an interim constitution. Two paragraphs in the report summarized the envisioned TEC (Working Group 3 CODESA, 1992: paragraph 28, 29):

(28) In the defined areas of responsibility of sub-councils of the TEC, ministerial powers and discretions [of the NP government] in so far as they affect the leveling of the playing fields, the creation of a climate conducive to free and fair elections or free political participation will be exercised in consultation with the TEC, or a sub-council to which this function is delegated by the TEC. …

(29) The decision of the TEC made within its terms of reference and its powers as set out above will be binding on all and will be implemented by all participants including governments/administrations.

These envisaged functions were eventually implemented as part of the TEC's overall responsibility to ensure a 'leveling of the playing field' for the April 1994 general election. The TEC was supported in that task by three other commissions agreed to by the negotiators, namely the Independent Electoral Commission, the Independent Media Commission and the Independent Broadcasting Authority. 'Leveling of the playing field' meant a highly sensitive process of managing power away from the NP government without them losing their status as constitutional government. This process continuously faced the ambivalence and tension between legality and legitimacy, which is characteristic of many transitions.

The Transitional Executive Council Act, No. 151 of 1993, identified mainly two objects for the Council (Article 3). Firstly, it should create and promote a climate for free political participation and secondly, it should create and promote conditions conducive for a free and fair election. Regarding the first object, the following goals were specified:

(i) to eliminate any impediments to legitimate political activities,
(ii) to eliminate any form of political intimidation,
(iii) to ensure that all political parties are free to canvass support from voters,
(iv) to ensure the full participation of women in the transition and election,
(v) to ensure that no government or administration exercises any of its powers in such a way as to advantage or prejudice any political party.

The last point in particular is significant from an institutional and even quasi-constitutional point of view, because it curtails constitutional powers in the name of transitional legitimacy. It also justified the name of the Council as an executive body.

The TEC's composition is significant because it determined its monopoly on transitional authority and possible challenges by some political formations. Nineteen of the 26 negotiating parties served on the TEC. The parties not involved were the IFP, the Pan-Africanist Congress (PAC), the Azanian People's Organisation (AZAPO), the administrations of the Ciskei, KwaZulu and Bophuthatswana and the conservative whites.

In September 1993 the Conservative Party threatened that the birth of the TEC would be regarded as a 'declaration of war'. Its leader, Ferdi Hartzenberg, said: "We've been peaceful up to now, but if the TEC comes into being, we can only regard it as a declaration of war and do nothing but accept that declaration. … We will establish our own government, parliament and security forces" (Sunday Times, 5 September 1993: 4).

This situation suggested that transitional institutions cannot stand independent of the processes which produced them. Therefore, if the process was challenged by some participants, the legitimacy of its institutions will be equally much compromised. In the case of the TEC, it could not manage the violence between the ANC and the IFP, because of the IFP's boycotting of the TEC, and because of its status as a main party in the process. It could also not address rightwing violence before the 1994 election until the Freedom Front decided to join the election. However, it did intervene in the Bophuthatswana violence without its permission or participation in the TEC.

The powers of the TEC are worth investigating. Seven sub-councils were formed, namely in the areas of (Article 8) –

- Regional and Local Government and Traditional Authorities
- Law and Order, Stability and Security
- Defence
- Finance
- Foreign Affairs
- Status of Women
- Intelligence.

These areas of government provide a good indication of the areas considered most vital for limiting NP government powers and for the gradual transfer of power. The TEC's powers entailed that if the Council or a sub-council believed

that any proposed legislation or decision were likely to have an adverse effect on the transition, the government or administration had to make representations to the Council and the TEC could direct the executive not to proceed with the legislation or decision. The TEC could also request information from any government or administration regarding any decision or intended action.

Two examples of challenges to these powers were the KwaZulu Police (KZP) and Bophuthatswana. In January 1994 the TEC adopted resolutions calling on the Commissioner of the KZP to provide a full report on alleged hit squads within the KZP as identified by the Goldstone Commission. Commissioner During refused and therefore the TEC proceeded with a court application in the Durban Supreme Court to enforce its legislated powers (TEC Report, 1994). The IPF's attitude was summarized in the following statement by During: "The KwaZulu Government did not participate in the decision nor was it consulted regarding the establishment of the TEC and hence recognizes no obligation to provide it with information" (TEC Report, 1994: paragraph 22).

The conflict in Bophuthatswana emerged from its refusal to allow the Independent Electoral Commission to prepare for the April 1994 general elections. As a nominally independent homeland, its leader President Lucas Mangope, clung to a semblance of autonomy for as long as possible but at the same time feared for the future of his administration. Popular resistance against this stance caused serious crises and even violence in the area. By 10 March 1994 the Mangope regime had completely collapsed and therefore two days later an emergency meeting of the TEC's management was convened. They decided to intervene and instructed the Chief of the SA Defence Force, the TEC's two joint secretaries and the Minister of Foreign Affairs to inform Mangope that the South African Government did not recognize him anymore. Two joint administrators were appointed in consultation with Nelson Mandela and President FW de Klerk to manage the region up to the election (Interviews with SS van der Merwe, 27 December 2004 and Mac Maharaj, 26 January 2005).

These case studies demonstrated that the TEC's ability to enforce its powers as part of the transitional architecture was not identical everywhere. In respect of the IFP it could not make much progress, while in Bophuthatswana its direct intervention stabilized the situation and resolved most of the conflict.

4.3 Government of National Unity

A pivotal element of the transitional package in South Africa was the Government of National Unity (GNU). Constitutionally it was entrenched for the period 1994-1999 but in reality it continued until 2004. In comparative

terms, a GNU or power-sharing in general is seen as one of the means to end civil wars and get a negotiated settlement (Harris, Reilly, 1998: 140). It is based on the assumption that appropriate political (or constitutional) engineering can help to construct a democratic political system capable of withstanding centrifugal pressures. The more general assumption is that when a government is democratic and inclusive, conflicts will be prevented, because minorities will not feel marginalized and therefore will not use conflict to advance their interests (Sisk, 1996: 77; Harris, Reilly, 1998: 139).

Timothy Sisk raised the important point about the minimum conditions necessary for establishing a power-sharing arrangement. Instead of insisting on a common political culture and common set of values, he identified two minimum conditions for power-sharing: 1) a realization by groups in conflict of a shared, common destiny or an awareness of the reality that the antagonists will have to live together in future and 2) pragmatic intergroup perceptions which leads to collaborative problem-solving through negotiation (Sisk, 1996: 77-78).

Power-sharing or a GNU is always confronted by the perceived dichotomy between consensus and majoritarianism. According to Luc Reychler, in power-sharing systems decision-making ideally occurs by consensus. But decision-making depends on the type of power-sharing in operation. Reychler referred to two types, namely the group building bloc or consociational approach, and the integrative approach. Bosnia was an example of the first and South Africa of the second (Reychler, 1999: 80).

GNUs do not all serve the same purpose and they can be classified as follows:

1) As a protection or consolidation against a perceived external threat (examples are the UK in both World Wars, Sweden in World War II, and Israel in March 2001).
2) As part of a negotiated agreement in the post-conflict but pre-election period, to secure political consolidation (example Macedonia May 2001, Afghanistan December 2001, Rwanda 1994-2000, Burundi November 2001).
3) As part of a negotiated agreement in the post-conflict period and after an election to secure a political consolidation (examples were South Africa 1994, East Timor Constitutional Assembly 2001, Northern Ireland 1998 and 2001, Angola 1997).
4) To address political instability caused by an economic/budgetary crisis (example West Germany 1966-1969).
5) GNU as a result of a "failed government" or "electoral deficiency" (examples Israel Likud and Labour 1984, West Germany 1966-1969, and Germany 2005).

6) GNU to enforce the peace agreement or peace-building (examples are Macedonia May 2001, Afghanistan December 2001, South Africa 1994, Rwanda 1994, Burundi November 2001, Northern Ireland 1998 and 2001, Angola 1994 and East Timor 1999 and 2001 (Kotzé, 2002: 4-5).

In the South African context a GNU served two purposes of enforcing the negotiated agreement and at the same time stabilizing the transition and building confidence in the democratization process. Joe Slovo, leader of the South African Communist Party (SACP), is credited for introducing this concept in the ANC. He identified in 1992 a number of "retreats from previously held positions which would create the possibility of a major positive breakthrough in the negotiating process without permanently hampering real democratic advance". One such retreat he proposed, was a "a 'sunset' clause in the new constitution which would provide for compulsory power-sharing for a fixed number of years in the period immediately following the adoption of the constitution. This would be subject to proportional representation in the executive combined with decision-making procedures which would not paralyse its functioning" (Slovo, 1992: 40).

The controversial part of this proposal was the use of the concept 'power-sharing', because it had been associated with the NP constitutional models premised on the assumptions of consociationalism. Even Lijphart (1985) made suggestions in this respect. The fact that the NP embraced 'power-sharing' discredited the notion in the eyes of the Left insofar as it resembled minority protection, constitutional restrictions on the majority and constitutional entrenchment of ethnicity. Slovo's proposal was therefore a brave step, and its acceptance indicated the extent of his influence in the constitutional negotiations.

In the process of negotiating the GNU three issues emerged as the most controversial. According to Hassen Ebrahim they were the majority required for decision-making, the powers of the Deputy President (referring to the NNP leader) and who would represent the largest minority party in the cabinet (Ebrahim, 1998: 164). The ANC's consideration was that the internal dynamics of the GNU had to allow for effective government. The NP, on the other hand, insisted on a form of special majority for decision-making, and significant independent powers for the Deputy President. Throughout the first two years of the GNU they remained bones of contention. For example, the second Deputy Executive President and NNP leader, FW de Klerk observed later that the ANC did not want to follow the practice of coalition governments to first negotiate the details of a joint or common policy approach (Ebrahim, 1998: 365-366). Instead, the ANC used its majority in determining policy

positions, which the IFP and NNP did not always agree with. In response the two parties insisted to express their own positions in public which might differ from a Cabinet decision. For the NNP it resulted in an untenable situation of being part of government, but also criticizing it in public.

The GNU applied the principles of proportionality and minimum thresholds in its composition. Each party with more than 80 seats in the National Assembly could appoint an Executive Deputy President. In the end two qualified: ANC (Thabo Mbeki) and the NNP (FW de Klerk). The Cabinet consisted of 27 ministers proportionally allocated from the parties with at least 20 seats in the National Assembly: ANC 18, NNP 6 and IFP 3.

The minority parties' difference with the ANC about majority versus consensus as the basis of the GNU, was arguably the most contentious aspect of this institution and deserves more attention. Article 89(2) in the interim Constitution (1993) stated in this regard: "The Cabinet shall function in a manner which gives consideration to the consensus-seeking spirit underlying the concept of a government of national unity as well as the need for effective government". In this formulation *consensus* is therefore emphasized. In article 92 the dilemma of a minister from a minority party is addressed: "A Minister shall be accountable individually both to the President and to Parliament for the administration of the portfolio entrusted to him or her, and all members of the Cabinet shall correspondingly be accountable collectively for the performance of the functions of the national government and for its policies".

The matter was raised in a Cabinet decision which "noted the general agreement that while members of the Cabinet also have legitimate responsibilities to advance the cause of their respective parties, the spirit of consensus underlying the concept of a Government of National Unity should as far as possible also be protected in the public interaction amongst members of the Cabinet. The convention should be established of members of the Cabinet consulting one another about potentially controversial issues before making public statements in response to one another" (Secretary of the Cabinet 1995: 5).

This issue became more significant in view of the local government elections scheduled for 1995, and in KwaZulu-Natal for 1996. The elections meant that the parties will be publicly in competition with each other while being involved in an unconventional and delicate partnership in government. At the same time these parties were also the main participants in the Constitutional Assembly negotiating the final Constitution. The GNU's centripetal forces were therefore tested to their extreme. The main trust-building force under these conditions was that fact that the GNU's term was constitutionally guaranteed up to 1999.

A characteristic of the GNU was that the two Deputy Presidents chaired the Cabinet on a rotational basis. Mbeki also chaired the cabinet committee on economic affairs while De Klerk chaired the one on security and information affairs and social and administrative affairs. According to De Klerk it worked well and the ANC and IFP ministers accepted his authority; sometimes even resolving differences between ANC ministers (De Klerk, 1998: 361-362). At the same time it created healthy competition between the two Deputies for delivering the best results (Roelf Meyer – interview 25 November 1996).

The GNU's most serious challenge arose in 1996 when the NNP decided to withdraw from it. The main difference between the ANC and the NNP was that the latter wanted a continuation of power-sharing in the final Constitution, while the ANC wanted a return to majoritarian government. The NNP proposed a consultative council consisting of all parties with more than 5% electoral support. However, the IFP and Democratic Party did not support the proposal (Roelf 2005). In a speech on 3 June 1996 in Parliament FW de Klerk explained his views as follows:

Participation in the GNU had a negative impact on the democratic process. Efforts to strike a balance between co-operation and opposition, often led to tension and sometimes to undignified disputes [between him and Mandela].

The new Constitution contained no provision in respect of any form of power sharing at the level of Governmental decision making. This was equivalent to a death sentence for even the broadest and mildest concept of Government based on consensus. Continued participation would be equivalent to detention on a kind of political death row (De Klerk, 1996: 2).

The ANC's chief negotiator, Cyril Ramaphosa, continued with the debate on power-sharing and presented an argument that the concept should include more than an enforced coalition. "The power sharing that I'm talking about involves the recognition that power resides in a number of centres in society, and that it is important, if you are to empower all citizens equally, to maintain a balance between these different centres of power" (Ramaphosa, 1996: 13). He referred specifically to the separation of powers, which Giovanni Sartori calls a 'division of power' (Sartori, 1994: 86-87). From this discussion it is clear that De Klerk and Ramaphosa maintained fundamentally different philosophical understandings about where power should be located in the South African society: in a diversity of constitutional institutions as well as in civil society, while the majority party is in control of the executive versus power located in a diversity of centres within the executive, thereby institutionalizing a power relationship based on the demographic mosaic.

Both De Klerk and Ramaphosa were of the opinion that the GNU contributed toward reconciliation. According to De Klerk, the GNU also managed to a adopt sensible economic and development policies, that it facilitated interaction between the parties which often led to better policy formulation, and it enabled parties to hammer out consensus agreements on a number of potentially divisive issues (De Klerk, 1996: 1; Ramaphosa, 1996: 13).

Though the GNU was meant to be operational between 1994 and 1999, after the 1999 general election the ANC invited the IFP to continue in a coalition government and its leader Mangosuthu Buthelezi to be the Deputy President, in spite of its 66.6% electoral majority. The AZAPO leader also joined the coalition. This arrangement came to an end in 2004 when the IFP joined the DA in their 'Coalition for Change' as an electoral alliance against the ANC.

The South African GNU set an important precedent for the use of transitional institutions. Firstly, a clear choice exists between a permanent constitutional coalition and a temporary arrangement. For how long is power-sharing necessary to address the fears of political marginalization by the majority? Or, are there additional constitutional institutions and arrangements which can address these fears after the GNU has disappeared? Secondly, the South African example highlighted the importance of the question: is there a clear understanding in the coalition how minority/opposition parties can maintain their own party identities and at the same time take collective responsibility for government policies? Thirdly, in addition to the guiding principle of proportionality, how are the GNU seats distributed – in particular, who controls the security portfolios? The South African example has become an 'export product' and several peace agreements have duplicated it: the DRC, Burundi, Sudan and Côte d'Ivoire are few examples. However, much more attention and research is required to determined its value for transitions.

The success of the transitional institutions in South Africa depended to a large degree on the level of trust which developed between a relatively small group of negotiators. While in the early period of CODESA institutional mechanisms such as 'sufficient consensus' and rotating chairpersons were necessary to manage the negotiating process, in the latter part of the transition the institutions in themselves played a lesser role (Personal interview with Zam Titus, Co-chairperson of the TEC, 23 November 2005). In the instance of the IFP, their inclusion in the GNU played a different role, because they did not participate in the earlier transitional institutions. The dramatic decline in political violence in KwaZulu-Natal after 1994 can be partly ascribed to their participation in the GNU.

5. A South African 'Export Model'?

In view of the various lessons learnt in the South African transition, the question is whether the South African experience constitutes a model to be emulated in other peace processes and transitions. The general response from South African leaders is that South Africa has no intention to consciously 'export' its experience to other situations, but only to share its experience with others. However, a strong indication that in some instances South African involvement becomes prescriptive, is the similarities in several peace processes. It is, for example, common knowledge that the South African mediator, Sydney Mufamadi, insisted on including a truth commission in the Congolese peace agreement. Fink Haysom also identified 41 lessons from the South African negotiations as guidelines for other countries (Haysom, 2002: 35-44).

Despite the denials, what are the components of a possible South African 'model'? The following seven components are arguably relevant: 1) a relatively long transition period (at least five years), 2) power-sharing or a Government of National Unity, 3) reconciliation and justice in the form of a truth commission and not tribunals, 4) an election relatively early in the transition, 5) integration of the armed forces, 6) an interim and later a final Constitution, and 7) insistence on territorial unity.

The peace processes in Burundi, Lesotho, DRC and Côte d'Ivoire were directly affected by South African facilitation. The Sudanese peace process was mainly facilitated by Kenya but significantly influenced by the South African experience. Concerned parties in Northern Ireland, Sri Lanka and Israel/Palestine were also interested in learning from the South Africans. On the other hand, Côte d'Ivoire had become the real test case of the approach adopted by South African facilitators. Two elements in this approach deserve more attention. The first is that peace negotiations appear to be more concerned about procedural aspects of peace while it postpones the substantive resolution of the deep-seated causes of the conflict to a future process. Haysom identified as a lesson learnt by South Africans: find a process solution to a substantive impasse (Haysom, 2002: 42). Process solutions were proposed for the land question and human rights violations (truth commission). Regarding the Ivorian situation, Deputy Minister of Foreign Affairs, Aziz Pahadwas clearly aware of the potential danger of such an approach:

All this signifies that the understandable concern to address immediate issues, which might be symptoms of more fundamental problems, should not result in short-term solutions that make it more difficult to arrive at solutions that address the more long-term and therefore more fundamental problems of Ivorian society.

Though this is the Government's sentiment, when the Pretoria Agreement was signed a few weeks later, it exclusively addressed procedural matters: cessation of hostilities, disarmament, demobilization and reintegration (DDR), an election and Article 35 about presidential candidates. The issues of Ivoirité, identity, political rights, the land question, and coexistence in a multi-cultural, multi-ethnic and multi-religious society were not addressed. The South African process did not commit a similar mistake. Initially the negotiations were mainly procedural, but the Constitutional Principles introduced the substantive dimension, which was continued in the Constitutional Assembly after 1994. Next to the formal constitutional negotiations other forums were also established in areas such as housing, local government, the economy, tourism, land issues, electrification and many more to negotiate a new dispensation.

The second element of the South African approach is to facilitate an agreement in which the incumbent President is bound into a power-sharing arrangement with his opponents. The power relationship between the main antagonists is therefore 'frozen' for the transition period into a transitional executive. Though serving a necessary stabilizing and trust-building function in South Africa, it was highly unpopular in Côte d'Ivoire. Some argued that President Mbeki saved Laurent Gbagbo from a certain defeat. This approach stands in stark contrast with the French approach, which favours a resolution without Gbagbo. The difference between the South African and Ivorian experiences is that in South Africa there was power-sharing but only after a change in government. The ANC became the new, dominant partner in government. In Côte d'Ivoire or the DRC the incumbent President continued as the dominant partner, and therefore power-sharing appeared more like entrenching the status quo.

Two other implications of the South African experience for other peace processes and transitions were the emphasis on a united state and the moral claim of the majority.

The South African negotiator's insistence on the inviolability of the unity of the state already expressed in CODESA I's Declaration of Intent (1991), has made any constitutional option of separation or secession in other peace processes unpopular for South African officials. A striking example is the South African Government's campaign to solicit support for the unity option in the Sudan, against the majority view in the SPLM.

Given the nature of the ANC's national liberation philosophy, the notion of government by the majority is treated as synonymous with democracy. Special constitutional arrangements for minorities were seen as a hidden form of entrenching minority privileges. In Burundi this predisposition posed a pro-

blem. A political analyst made the following observation about Jacob Zuma's role as a mediator:

Zuma has been among the most stubborn proponents of Arusha's inviolability. He draws parallels between the tough tactics used to forge South Africa's Convention for a Democratic South Africa agreements and the struggle to negotiate a Burundi settlement. Many South Africans see Burundi in terms of a Hutu majority trying to wrest power from a privileged Tutsi minority. It is becoming increasingly clear, however, that the South African template cannot be applied to Burundi (Bentley, Southall, 2005: 111-112).

The South African experience utilized lessons learnt from other transitions, notably in Latin America, and with constitutional inputs from Germany and Canada. At the same time it provides a basis for other transitions. The mere fact that so many parties have sought the advice of South African negotiators vindicates this point. Moreover, the fact that the South African Government assists in several peace processes on the African continent places a huge responsibility on them to develop a sound approach to conflict resolution and 'best practices' both in terms of procedure and constitutional substance. The South African dynamics are, however, not typical of most conflicts in Africa. A notable difference is the presence of armed rebel movements, which pose arguably the most serious head-ache for peace-making by constitutional means. A bilateral peace process (like in Sudan) appears to be more sustainable than a multilateral one (like the DRC, Burundi and Côte d'Ivoire).

"Everything has changed, but nothing has changed"[1]

Sally Sealey[2]

Abstract: *Key triggers to the pacification of the political violence that swept through the East Rand in the early 1990s have been identified, some more long term than others. However, it is important to point out that although peace has returned to the area the legacy of violence still remains. This plays itself out in every facet of community life. Restoring peace to a community where neighbours turned on neighbours is a victory in itself and numerous lessons can be learned from the East Rand experience.*

Pacification of the East Rand cannot be placed at any one door. The combination of factors that came together in a unique fabric of cooperation, mutual understanding and respect is what finally brought peace.

South Africa's miracle is that despite the best efforts of the apartheid state and its ally's peace has prevailed.

Introduction

Much is made of the importance of human rights and constitutionalism as tools of peaceful transition. In South Africa, the constitution and the established human rights institutions give the semblance of a human rights culture, yet we should not lose sight of the fact that human rights enshrined in the Constitution are unrealisable by the majority of South Africa's impoverished citizens. One cannot lose sight of the fact that South Africa's transition was a negotiated one – fraught with compromise. The Truth and Reconciliation Commission (TRC) is seen by many as South Africa's panacea of the past. Nation building through the TRC became the new order - justice the victim. Thokoza, is perhaps unique in that the TRC was seen by self defence units as a chance to clear the slate- for a new beginning and not an acknowledgement of guilt or remorse. TRC amnesty hearings were seen as a chance to set the record

1. David Goodman, Fault Lines, Journeys into the new South Africa, (1999).

2. Sally Sealey was amnesty investigator with the Truth and Reconciliation Commission and human rights activist. She was senior researcher with the Independent Board of Inquiry during the period of the township war, and later research manager with the Human Rights Committee.

straight. Hence, Thokoza, on the East Rand is a good place to critically assess the importance of constitutionalism and a human rights culture as "mechanisms" of conflict prevention in democratic transitions both in the African continent and worldwide (infra, Fusaro, Federico).

Nobody said the transition to a non-racial democratic South Africa was going to be easy, and yet few people anticipated the scale of the political violence, which engulfed the country during the 1990s (Hayes, 1991: 1). The violence that accompanied the politics of transformation saw the deaths of 14,000 (Coleman, 1998: 226) people of which, at least 5,000 were on the East Rand.

"The negotiated settlement in 1994 which brought an end to Apartheid and white minority rule in South Africa is seen as representing nothing short of a 'negotiated revolution' something rarely witnessed in world history." (Lansberg, 2000: 1).

The East Rand and the violence

There is no question that the first democratic elections and the entire country's participation throughout 1995-1996 in the writing of a new constitution impacted on the ongoing conflict in the East Rand particularly Thokoza and Katlehong. It is also true that the negotiation process led to a realisation by the National Party government and its surrogate the Inkatha Freedom (IFP) that, despite their best efforts to undermine the African National Congress support for the ANC remained and strengthened. While taking into account events at the macro level there were a number of initiatives at the micro level particularly the role of civil society, which finally brought peace to the East Rand. The deployment of the South African Defence Force (SADF) in place of the Internal Stability Unit (ISU)[3] and the integration of ANC aligned self defence unit (SDU) members and IFP aligned self protection unit (SPU) members into the police service were significant factors in ending the conflict. Other factors which impacted on the peace process, was the important role played by the leadership, the full cooperation with the Truth and Reconciliation Commission (TRC) – unique to Thokoza, the role of human rights activists, local peace committees and the determination of the people of the East Rand to seek justice.

3. The ISU was the new name given to the old riot squad and was perceived to be actively involved in the violence.

It is important to place the conflict which engulfed the East Rand in the broader context of political transition. The wider political context also gives an insight into the importance of local initiatives in finally securing peace in the area.

During the 1990s outbreaks of violence accompanied major political developments in the negotiation process between the National Party government and the African National Congress (ANC) and its allies. As early as August 1990, when the ANC and the National Party government signed the Pretoria Minute suspending the armed struggle the violence peaked with over 600 deaths. The levels of violence remained consistent through September 1990. Suddenly, in October 1990 when the former State President, FW de Klerk visited Denmark and Ireland, two of the strongest advocates of sanctions, the level of violence declined and 50 deaths were recorded.

Shortly after the peace pact was signed by the ANC and the IFP in January 1991 there was a significant drop in the number of deaths. However, a week after the Accord was signed violence flared. The level of violence again climaxed with the leader of the Inkatha Freedom Party (IFP) Mangosutho Buthelezi's call for a 'troika' consisting of himself, FW de Klerk and Mandela to resolve the conflict as well as to pave the way for negotiations.

While the white electorate was engulfed in referendum fever on the question of negotiations, 308 people lost their lives and 631 were injured in the 25 days following De Klerk's referendum announcement in parliament[4]. During De Klerk's closing referendum speech, he urged the white electorate to vote yes, saying that attacks on soft targets were now a thing of the past. He made no mention of the thousands of unarmed black civilians targeted by violence everyday in trains, taxis, night vigils or in many cases in the comfort of their own homes. (Coleman, 1998: 198).

The Apartheid state's support for the IFP during this period has been well documented suffice to say that the various revelations in the press undermined their strength at the negotiation table and forced on them rather belatedly the realisation that the ANC would lead the first democratic government despite their best efforts to thwart it.

While much of what was happening in the national arena mirrored the violence taking place on the East Rand it is worth giving a brief overview of the conflict to put subsequent peace initiatives and pacification programmes in context.

4. President FW de Klerk announced at the opening of Parliament in March 1992 the holding of a 'whites only' referendum to gauge support for negotiations -70% of whites voted in favour of change.

August 1990 saw the beginnings of the conflict in Thokoza, Katlehong and Vosloorus, three East Rand townships in South Africa's industrial heartland. The violence coincided with the Inkatha cultural movement's announcement of its intention to become a fully fledged political party. It was also the start of an intensive recruitment campaign on the East Rand. The hostels[5] were targeted as ideal areas for recruitment and the initial clashes in Thokoza were between hostel residents from the Khalanyoni Hostel and the Phola Park squatter camp. Several inmates of the Khalanyoni Hostel refused to join the IFP and were attacked. This led to scores of hostel residents seeking refuge in Phola Park. When these refugees attempted to retrieve their belongings inside the hostel they were attacked again. Subsequently attack and counter attack became the norm. The SAP were perceived by the residents of Phola Park and Thokoza's Beirut section[6] to be partial to the hostel residents. The violence was characterised by mass impi[7] attacks on Phola Park and the surrounding area. Counter attacks from ANC aligned Phola Park residents followed a similar pattern and it was soon impossible to determine whether attacks were of a defensive or an aggressive nature. The violence soon spread to Katlehong along similar patterns. The battle for control of territory was central to the conflict on the East Rand. Squatter camps were hardest hit and became increasingly polarised. Camps became aligned to either IFP or ANC. This led to a major migration of people from one camp to another depending on which party gained the upper hand. Eventually in late 1990 – the Khalanyoni Hostel was pulled down brick-by-brick by the residents of Phola Park. Remaining hostel residents fled to the hostels in the Phenduka section of Thokoza. The flight of hostel residents and the destruction of Khalanyoni entrenched opinions within East Rand hostels that they were fighting for their survival.

Following the "traditional" lull in violence over the Christmas period in the East Rand, attacks began again in 1991. It should be noted that attackers on both sides of the political spectrum began to use more sophisticated methods.

5. Hostels were created by the Apartheid government to house workers who they saw as temporary sojourners in the industrial areas. Hostels were also created to house the thousands of people from across southern Africa who worked in South Africa's mining industry. The Hostels were single sex and overcrowded and in the early 1990a used as launch pads by the IFP to attack surrounding townships often perceived to be ANC aligned.

6. During the conflict sections of Thokoza were renamed. For example Vergenoeg (Far Enough) was renamed Beruit.

7. 'Impi, is a Zulu word meaning army. During the initial conflict on the East Rand, they were identified by the red headbands they wore around their heads and the carrying of traditional weapons.

Attackers now operated in smaller groups, often using cars and combis[8] which improved their mobility. Traditional weapons were increasingly replaced by the use of firearms. Attacks on taxi's, trains, night vigils, funerals and stokvels[9] became the order of the day. These attacks were aimed at the heart of community life and instilled a psychosis of fear and mistrust in the community.

In order to understand the conflict between hostel and township, it is necessary to understand the history of hostels. While many township communities were convulsed by widespread mobilisation against apartheid polices, many hostels remained isolated from the political developments of the '80s and increasingly became bastions of traditionalism often interpreted as conservative. In some ways this was the result of a failure by political organisations to make substantial inroads into the hostel community. With the abolition of influx control during the mid 1980s, the composition of hostel residents began to change rapidly. The hostels became increasingly overcrowded as people came to the urban areas to seek work. Many of these people were from rural areas in Natal and retained strong links there, such as families and property, etc. Political polarisation in Natal also impacted on these migrant workers.

There was a history of social and economic interaction between hostel residents and surrounding communities. Prior to the increased politicisation of hostels in the 1990s it was common for residents to visit hostels and vice versa. This was illustrated by hostel residents frequenting township shebeens[10], hostel and township football teams playing one another and residents hawking their wares inside the hostels. Divisive political activity inevitably eroded such interaction.

There is no single cause to the escalation of violence in the East Rand between 1990 and 1994 and it is important to take into account local conditions which were often the catalyst and engine to upsurges and the perpetuation of violent acts. It is clear that the causes of the violence in the East Rand were diverse and cannot always be attributed to events within the wider political arena. Other factors to consider include; taxi feuds in the area over routes and the politicisation of the local taxi industry which led to scores of people losing their lives; the "forced colonisation" by the IFP and ANC of areas in both Katlehong and Thokoza; revenge attacks in both Katlehong and Thokoza; the activities of the Internal Stability Unit

8. A vehicle used by the taxi industry and carries up 16 people.

9. A group of people contribute money on a monthly basis and one person benefits each month. This is normally accompanied by a party.

10. Drinking tavern.

(ISU)[11] – evidence gathered by the Independent Board of Inquiry (IBI) and Peace Action during the 1990s gives the distinct impression that the ISU had a clear programme to eliminate members of the self-defence units; SDUs[12] themselves were responsible for violent acts and intimidation. There were elements within SDUs that were not disciplined and who seemed to have their own agendas.

The conflict shattered the social and moral fabric of the East Rand community. Death was an everyday occurrence that seldom shocked. The violence led to a complete breakdown of civil society.

The underlying problem was mutual intolerance and mistrust, which created a culture that prevented accommodation and compromise.

Does the transition lead to peace?

With this history how did the transition to democracy act as a catalyst to peace?

The effects of the negotiation process on the national stage did have a filtered down effect on the violence permeating the East Rand. In February 1994 Nelson Mandela and then President FW De Klerk visited Katlehong to announce the withdrawal of the Internal Stability Unit and its replacement with the South African Defence Force (SADF). The deployment of almost 3000 soldiers had an immediate impact on the conflict. Prior to the deployment an average of 140 people were killed per month. The deployment which was sanctioned by the Transitional Executive Council (TEC) was unusual in that the military were in control and the police played a supporting role. The SADF had been in Thokoza before but not in large numbers. The sheer scale of the 1994 deployment had the effect of reducing the impunity which conflicting groups were attacking each other. The SADF were not universally welcomed. Residents of Phola Park recalled the events of April 1992 when they were attacked by members of 32 Battalion. The IFP were not happy with the deployment as they felt that the soldiers were partial to the ANC. They preferred the ISU who they felt dealt thoroughly with the unruly township youth (African Security Review, Vol. 5, no. 2, 1996: 2).

Despite some initial hostility, most townships residents preferred the SADF because they felt that they were impartial and more importantly were prepa-

11. Internal Stability Unit (ISU) was essentially a riot unit and was notorious in the area for shooting first and asking questions later. The unit has since been disbanded.

12. Self defence units (SDUs) were ANC aligned community defence units who were set up in light of the fact that the South African Police were failing in their duty to protect communities.

red to meet out instant justice. For example if a woman reported to an SADF patrol that her husband/boyfriend had beaten her, some SADF members were not averse to giving the husband/boyfriend a few 'claps'[13].

The army must take some credit along with other initiatives for its role in stabilising the East Rand and Kathorus in particular in the six months between February 1994 and July 1994 when it took control of the area. By August 1994, when the SANDF[14] pulled out, civil war conditions no longer existed, although the townships remained tense and violence ridden (African Security Review, Vol. 5, no. 1, 1996: 3).

The initial deployment of the SANDF was accompanied by the deployment of the newly formed National Peace Keeping Force (NPKF). The latter was made up of former ANC and PAC combatants and members of the SANDF. The NPKF was accused of being partial and was involved in an incident days before the first democratic elections in Thokoza which cost the life of renowned photographer Ken Oostebroek. An officer in the NPKF at the time said that the force never stood a chance as it was seriously under-resourced and lacked the necessary training required to return peace to the East Rand.

Along with the deployment of the SANDF, an announcement was made to launch a series of confidence building measures for the area under the broad title Kathorus Project. This project was set the enormous task of reviving the fortunes of this once vibrant area.

In September 1994 extensive discussions were held with statutory and non-statutory representatives to put together a Reconstruction and Development Programme for Kathorus.

Testament to the Project's success was that it managed to repair most of the homes that were damaged during the four year conflict in the area. It also managed to utilise local people and created a number of jobs for former SDUs and SPUs[15]. The project also managed to restore electricity and water supply to a number of areas which had been cut off since the beginning of the violence in 1990.

Following the withdrawal of the permanent military presence in August 1994, the police resumed normal policing duties in the area. Although the army had successfully brought down the levels of violence the potential for

13. A few smacks across the head.

14. The SADF was renamed the South African National Defence Force following the integration of non-statutory forces in 1994.

15. Self Protection Units were aligned to the IFP and in the East Rand were mainly based at hostels.

conflict was ever present. In light of this the police embarked on a programme which was aimed at improving relations between the communities and the police. Key to this success was the implementation of community police fora (CPFs). The idea was for different interest groups within the community to get together with the police to look at community safety. The concept was a good one but the implementation was beset with problems. Political antagonism between the major parties played themselves out in the forums. Members of the community saw the forums as an opportunity to voice their concerns about policing and crime in their areas. The police saw the forum as a chance to gather intelligence. This mutual lack of understanding led to many CPFs collapsing. However, in the period following the withdrawal of the SANDF they did act as forum where grievances between political parties could be talked about and hence were another weapon in the pacification arsenal.

Earlier initiatives, like the National Peace Accord (NPA) which set up a number of local peace committees which hoped to ensure dialogue and peace on the ground between political rivals should also be seen as part of the broad raft of measures introduced which finally led to the peaceful resolution of the conflict in the East Rand.

The local peace committees were successful in that they brought together the leadership of rival political parties however they had little impact on the day to day conflicts between warring SDUs and SPUs. Except for an initiative in late 1993, when the NPA supplied walkie-talkies to both the IFP SPUs and the ANC SDUs to maintain dialogue between the two – the walkie-talkies allowed the commanders of the opposing units to talk and prevent pending attacks. This initiative opened communication between the two warring parties on the ground.

Many of the initial peace initiatives in the area failed to include the SDUs and SPUs who were at the forefront of the conflict. At the micro-level the efforts of Reverend Mvume Dandala of the Central Methodist Church to bring SDUs and SPUs to the table ultimately bore fruit. This coupled with what has been termed the community constables programme and the role of individual leaders essentially restored peace to the East Rand.

Dandala played a decisive role in facilitating communication between opposing groups and in focusing police attention on the underlying causes of violence and worked extensively with SDU and SPU structures in the area. (African Security Review, Vol. 5, no. 1, 1996: 4) He became a strong proponent of using SDU and SPU members, regarded by many as renegades, to assist with normal policing functions. The initial suggestion was not looked upon favourably but Dandala pursued the idea with the police and community leaders. They were

eventually persuaded to accept the proposition and to embark on an experimental project integrating some members of the defence structures into the police as paid police reservists. As no funds were available through the police budget, the project was financed through the Presidential Lead Project which was a follow on from the initial Kathorus Project announced in early 1994.

The role played by Reverend Dandala cannot be over estimated. The fact that he was able to bring representatives of the SDUs and SPUs to the table was what brought about a lasting peace and lay the foundations of the Community Constable Programme. A programme that removed over a period of six months 900 SDUs and SPUs from the area and trained them as community constables. The programme was fraught with difficulties from the beginning and over the passage of time has proved very costly. Yet it did provide the final impetus which almost overnight brought peace to the East Rand.

This action of classic pacification and the initial role of the SANDF more than any other brought about a lasting peace. The fact that in the long term it has proven very costly does not undermine the initial impact. This action removed the key players in the conflict and forced them into a situation where they had to communicate; where they had to get along[16].

Following the initial round table talks it was agreed that SDU and SPU commanders would initiate a process where individual SDUs and SPUs across Thokoza, Katlehong and Vosloorus would be sent for psychometric testing thereafter to police training. The groups included men and women and this led to some controversy. In some cases the women chosen to go for training had very little to do with the SDUs and were chosen as a personal favour[17].

The initial training took place at Maloerskop and involved men and women from both the SDUS and SPUs. Initially there were tensions and very little trust between the groups who only months before had been shooting at each other. Other tensions also emerged; there were allegations that many of the participating SPUs were not from Kathorus but had been specifically brought in from Natal. Many SDUs claim that they were told by SPUs during training that they had been told to report to the hostel, as there would be jobs available. This tends to back claims that during the conflict the IFP bussed in people from Natal to participate in the violence. Further confirmation came when

16. An SDU recruit informed me that he was hired by the SPUs to act as an interpreter during the training at Maloeskop – a South African Police Service training camp north of Tswane (Pretoria).

17. There were allegations at the time that some of the women were given a training place in return for sexual favours.

the SPUs having completed their training and having been posted around the three townships had no idea of street names or local landmarks.

The training lasted six weeks and by all accounts consisted of guns, guns and more guns. The recruits were taught how to shoot various firearms and it will be no surprise that they all passed that course. Other aspects of the training included the Criminal Procedure Act (before it was amended) which basically informed the young constables as to when and where they could shoot[18].

Once having completed the course they were placed at various police stations in the Kathorus area and at a number of satellite police stations. From the beginning there were problems.

Fully-fledged members were unhappy having these young men and women in the station who only months before had tried to kill them. The permanent members also felt that they lacked discipline.

Of the initial 900 SDUs and SPUs that went for the initial training there are less than 300 in the service today. The reasons for this vary – suicide and criminal activity have accounted for more than there fair share although the majority took a package and left the service. The reason for the latter is that from the beginning there were concerns about the educational standards of the recruits. The lack of education across the South African Police Force and now service was always a concern for human rights activists. Encouraging the integration of SDUs and SPUs into the service without the necessary education standard created tension as it had been agreed that all new recruits should at least have a matric[19] as this would improve the reputation of the police. The community constables did not see it in the same way. They felt that during apartheid and in the run-up to South Africa's first democratic elections various police forces in the Bantustans, homelands, railways and municipalities were being integrated with no consideration of their educational qualifications. The SDUs and SPUs saw this as an excuse to get rid of them.

Community constables despite having to do the same duties, as fully-fledged members were not paid the same nor were they entitled to any benefits. This situation eventually led to the community constables going on strike in 1996. The strike action led to an increase in salary and moves towards parity and eventual full integration subject to a matric certificate and drivers licence.

18. I recall seeing one of the community constables notes at the time which basically said you could shoot someone if you 'caught them stealing a chicken and they failed to stop or if you caught two men having sex or if you caught anyone having sex with an animal'.

19 Achieved after completing final exams after 12 years of schooling.

The latter condition caused a great outcry from many of the SDUs[20]. Many felt that it was unfair to ask for a matric as many of them had been forced to leave school because of the violence and that several had made attempts to return but the schools were not interested[21].

The Police service provided opportunities for the community constables to study but only a few took this up.

Some constables on the other hand saw the opportunity to use their authority to their advantage[22]. This latter group in some instances hired out the stations weapons to criminals who then used them in cash in transit robberies, others used their police issue weapons to commit robberies and in some instances revenge attacks. In the first months of the programme dozens of community constables were facing charges ranging from armed robbery to murder.

Despite this there were some community constables who were committed to maintaining law and order and often arrested former comrades for criminal activities this also led to tensions. The community constables were much better placed to police the area as they had grown up there and had a good idea how criminals operated.

A further concern was the high suicide rate amongst community constables. There were a number of incidents where community constables shot lovers, friends and in some cases suspects and then fearing the consequences turned their guns on themselves[23].

Many people feel that the programme was a success and had a direct impact on bringing peace to the township as it took the main actors out of the conflict. The question still remains at what cost?

Was it realistic to take people who lived by the gun into a police service who at that time still lacked legitimacy and expect it to work?

20. While I was working at the Gauteng Ministry of Safety and Security during the course of the latter part of 1996 I conducted a survey and the vast majority over 90% of the community constables had a standard eight, nine or matric.

21. I recall during this period in early 1995 trudging from one school to another in Thokoza and Katlehong looking for places for former SDUs. The problem was twofold, a) they were seen as disruptive influence and (b) they were often much older than the other pupils. Only one school principal in Thokoza was prepared to take former SDUs.

22. A former SDU now a sergeant in the Southern African Police Service told me that in the early days he saw his warrant card as a license to seek revenge on the 'Zulus' who had forced him out of his home at the height of the violence. He claimed that he often went behind the hostel and robbed 'Zulu's of their wages on a Friday.

23. The South African Police Service does have a high suicide rate but the proportion of suicides by constables with an SDU background is fare higher. In the first two years of the programme at least 25 constables died in mysterious circumstances..

While agreeing that the programme was a success in so far as it removed one of the key contributors to the violence, through a classic 'pacification process' which presumes a control of the means of violence on the part of the legitimate authorities' (Giddens, 1994: 229) – in this case the police, we should not lose sight of the cost.

Leadership played a crucial role in the East Rand in ending the political conflict. The fact that the political leadership had control over the SDUs in Thokoza through the Central Command Structure was a bonus when it came to negotiating a peace deal at the local level and for subsequent initiatives like the weapons amnesty[24] and acceptance of the Truth and Reconciliation Commission (TRC). The SDUs in Thokoza were divided into 14 sections, with each section having a commander. The commanders then elected a chief commander from among the 14 and the political and civic leadership were part of the structure. The Central Command was not a command structure in the sense that it gave orders but rather it was a place to report incidents of violence; identify potential conflict areas and to act on any breaches of the code of conduct[25].

The leadership role played by Louis Sibeko[26] and Duma Nkosi[27] in Thokoza and in the broader context of the East Rand cannot be underestimated. Both men paid a heavy price for their contribution. Sibeko was detained under the notorious unrest regulations – subject to intense interrogation and threats. There were also several attempts on his life. Nkosi was targeted and narrowly escaped with his life. However, both men with their unique inclusive style were able to keep the doors of negotiation open. Sibeko spent countless nights on the phone, speaking to human rights activists, searching for assistance for detained SDUs, seeking medical care for the injured, food for their families, money for bail and ultimately contributions for funerals.

Both men played an important role in persuading the SDUs in Thokoza, Katlehong and Vosloorus to participate in the TRC. They led by example in

24. Thokoza SDUs in 1995 participated in a weapons amnesty that saw them hand in several AK47s, pistols and revolvers. The IFP on the other had handed in one broken shotgun.

25. The code of conduct was established by the ANC which all SDUs had to adhere to. The code included issues around age restrictions on joining an SDU and the use of weapons.

26. During the conflict on the East Rand Louis Sibeko headed up the Thokoza Civic Association and was a member of the ANC branch. He is now sits on the mayoral Committee of the Ekurhuleni Metro and has responsibility for Public Works and Transport.

27. Duma Nkosi at the time of the violence was the ANC chair of Thokoza. He also sat on the Local Peace Committee. He is now the executive mayor of the Ekurhuleni Metropolitan Council.

that they both submitted amnesty applications on the basis that they were part and parcel of the Central Command and therefore had overall responsibility for acts perpetrated by the SDUs in the defence of the Thokoza community as a whole.

SDUs in Thokoza embraced the TRC. More than 100 SDUs applied for amnesty for acts committed during the conflict between the IFP and the ANC. In contrast the only IFP members who applied for amnesty were those already serving sentences for acts of violence perpetrated during the conflict. SDUs in Katlehong and Vosloorus were not as forthcoming as SDUS in Thokoza. This lack of participation was down to the fact that political leadership in these areas did not offer the all encompassing support the leadership offered in Thokoza.

Clearly, a variety of initiatives at the national and local level served to bring peace to the East Rand. Over and above the initiatives already mentioned one needs to take into account the important role played by human rights activists and the organisations they represented during the conflict. The Independent Board of Inquiry (IBI) a non-governmental organisation was set up in 1989 by the South African Council of Churches (SACC), the South African Bishops Catholic Bishops Conference (SACBC), the Congress of South African Trade Unions (Cosatu), the Black Sash and many others in the wake of the poisoning of the Reverend Frank Chikane. The IBI went on to expose the activities of the police death squads based at Vlakplaas, attacks of human rights activists and in the 1990s it was instrumental in investigating the violence that engulfed the townships of the then PWV[28]. The organisation provided information to the various Goldstone Commissions of Inquiry into the causes of political violence on the Witwatersrand.

IBI was instrumental in investigating some of the most sinister attacks in the East Rand townships of Katlehong, Thokoza and Vosloorus. Apart from ensuring that incidents were recorded in the form of signed statements, various community members were trained as statement takers. Often in the chaos of the moment vital evidence was lost and the IBI trained members of the community to gather important evidence like bullet casings etc if the scene of crime could not be preserved. Residents were trained to ensure that evidence was not tainted and that any possible fingerprint evidence was preserved. This was vital as at the time the police always claimed that they could not investigate cases due to the lack of forensic evidence. The IBI made use of local community photographers and video operators to photograph or video inci-

28. Pretoria Witwatersrand and Vereeniging.

dents. If this was not available they were advised to make an accurate sketch. This had an important impact on the community. Prior to this intervention, residents often use to pick up bullet casings and place them in plastic bags and forget about them. This initiative empowered the community and went some way in dealing with the police's sense of impunity.

Perhaps one of the most significant examples of the role of civil society is the attack on Phola Park in April 1992 by 32 Battalion. As a result of the attack and the scores of statements taken by IBI and Nicholls, Cambanis and Associates[29] the police initiated an identity parade to try and identify the perpetrators. The parade was the biggest held in the southern hemisphere. It was held at the local civic centre and required the victims and witnesses to file past hundreds of members of 32 battalion who were on duty on the night of the incident. The atmosphere was very intimidating but bus loads of Phola Park residents attended the parade and walked up and down the aisles of soldiers. Victims and witnesses were told that if they recognised anyone they should touch the person on the shoulder. A number of victims claimed that they recognised one or two soldiers and instead of placing a hand on the soldiers shoulder they gave them a hard push.

It came to light some years later that the men who took part in the identity parade had not been on duty that night and that the whole thing had been a charade. The people of Phola Park had the last laugh in that the then minister of defence was forced to pay all the victims a substantial amount of money in compensation.

This incident clearly shows important role played by civil society in bringing about justice.

IBI was also at the forefront of encouraging people to come forward and testify against perpetrators of violence. Through their efforts and with the support of the community a number of perpetrators have been brought to book. These include the two men that murdered Phola Park leader Prince Mhlambi and four others.

IBI was also instrumental in assisting hundreds of people detained by the police during the violent conflict. IBI secured lawyers, bail money and medical attention for many and was particularly concerned with the detention of children under 16. IBI worked closely with Amnesty International ensuring that acts of torture were fully recorded and acted upon.

29. Nicholls, Cambanis and Associates were leading human rights law firm based in Johannesburg.

Community peace and election monitors cannot be overlooked in the overall pacification of the East Rand. They played an important role at the grassroots level. Generally, the monitors were people who were trusted in the community and because of this they were very successful in negotiating with authority and dealing with conflict.

The role of the Thokoza Civic Association (TOCA) and later the South African National Civic Organisation (SANCO) was crucial. The TOCA leadership suffered during the violent conflict at least three members were murdered during the violence. Yet the leadership remained at the forefront organising the community to defend itself, raising money for medical and legal assistance and funerals.

The combination of years of grassroots work by civil society opened the door for the army and later programmes to finally bring peace to the area.

The scars of the violence

Peace returned to the East Rand along with the promise of a better life - however, 10 years on what has really changed.

What happened in the East Rand once peace and stability was restored? Did the Kathorus Reconstruction and Development Project and the TRC deliver on its promises? What happened to the SDUs and community constables and some of the other key players in the area?

Firstly, the area was given a new name in step with promise of a new beginning: Ekurhuleni – A Place of Peace.

As in most areas the delivery of basic services has been slow and this has led to vocal protests by many residents. Having said this, in 2001 the Ekurhuleni Metro was the first Metro to offer free basic electricity and in June 2005, this was extended to Eskom's licence area (*The Star*, 17/6/2005).

Despite the progress for most people who have lived under the legacy of Apartheid change is not fast enough. "People on the ground, they've got no hope anymore. They've been promised many things, but nothing is delivered." (Goodman, 1999).

The East Rand like many other areas has to deal with the years of under spending by the former white government. An Ekurhuleni Metro councillor recently discovered that most black townships in the area are built on dolomite which has enormous implications in terms of health and safety and future development.

The reality is that economic transformation for South Africa's poor does not appear to be in the cards anytime soon… the most dramatic and visible economic changes in South Africa have been confined to the top strata of society.

A black elite is taking root under the guise of "black economic empowerment" (Goodman, 1999: 350).

This is the true legacy of apartheid. Civil society has been patient but many believe that delivery has been slow. Over the last year or two there have been more and more grassroots protests around delivery and corruption. The State has acted in many cases like its old masters by blaming 'instigators' – referring to some of the protests as 'right-wing plots' or 'a sinister third force'. Community activists have been detained and charged under the age old apartheid chestnut 'sedition'.

The deployment of the army in the East Rand was an exercise in classic pacification in that it brought stability to a region plagued by political violence for almost four years. However, much of the violence that plagued the East Rand in the early 1990s has now been redirected into criminal activity. A norm for many countries grappling with transition.

Blame for the high crime rate in the area is often placed at the door of former SDUs. SDUs interviewed in June 2004 felt that the main problem was that many of the SDUs had no political background. They were not part of Student Representative Councils (SRCs) at school nor were they active in the Congress of South African Students (Cosas)[30] or the ANC Youth League – "they were not politically sound"[31]. Hence when the conflict ended they did not have the means to engage at a political level and were quickly disillusioned with the slow pace of change.

A further reason is that a number of young people who initially engaged with the SDUs were already involved in crime. They were highly sought after in the early days, as they were the ones with the weapons. Once violence ceased they reverted back to their old ways.

There is also a group of former SDUs that feel that they have the right to steal and commit robberies particularly if the victim is white. Two former SDUs who were only 13 and 15 respectively at the height of the conflict are now engaged in criminal activity; both see white people as legitimate targets as they have money. One of the former SDUs also hijacks cars and tries to ensure that the victim is white 'because they have insurance'. He went as far as to say that if it came to his attention that car he stole belonged to a black person he would try and ensure that the car got back to the owner.

A number of former SDUs feel that the government owes them something for having been involved in the protection of the community and by extension the ANC. One young man felt that even if he got a job at a factory for R800 a month he would still have to supplement his income with crime.

30. Student body which fought for equal education during apartheid.

31. Interview with SDUs conducted by Sally Sealey June 2004.

Another SDU claimed that he seemed to commit more crime when he was angry especially cash in transit heists. He was also involved in buying stolen mobile phones.

One of the SDUs interviewed has a passion for robbing spaza shops[32]. He is currently on the police's wanted list.

The latter often uses the money he steals to support other former SDU members.

A former SDU, community constable and now police sergeant said that when he returned from his initial training he used his newly acquired service pistol and warrant card to rob 'Zulus' behind the hostel of their hard earned cash on a Friday. He says he no longer does this but feels no remorse. He is of the opinion that the hostel dwellers took everything from him during the violence and he was just returning the favour. It may be worth pointing out that he is also 'isiZulu' speaking.

He recently pointed his police issue firearm at his girlfriend, which resulted in him being declared unfit to carry a firearm for three years. He claims that the reason he pointed the gun at his girlfriend was because she was talking to a 'hostel Zulu' behind his back.

Some of the former SDUs that became community constables engaged in crime on a massive scale. Five from a particular section of Thokoza are currently serving 12 years for a murder and armed robbery. During the research conducted last year, the former SDU commander of this section was asked why so many SDUs/Community Constables[33] in his section ended up in prison? He seemed to feel it was due to upbringing. In one case one of the men had no parents and life was a constant struggle in another case the father was in an out of prison in a third case the father who was from Natal and took him along when there were fights between Inkatha and the UDF in Umlazi. The commander seemed to think a case could be made for having strict family upbringing and support.

Two police inspectors based in Thokoza believed that the current crime wave in the area could not all be laid at the door of former SDUs. In fact they believed that the current crime wave in the area was the sole province of 13-19 years olds. The generation that has grown up under democracy. The inspectors felt that young people are under tremendous pressure to have the best clothes

32. Spaza shops are like little tuck shops in the township often attached to a house, which sell basic essentials like milk, bread, etc.

33. There are other examples of SDUs in this area engaging in crime. One is currently serving sentence for car theft, another has just been released after having been charged with numerous counts of theft, armed robbery and murder.

and phones and that this leads to crime. The young people are involved in stealing mobile phones, housebreaking, and theft from motorcars, theft of motorcars, serious assault and rape. Most of the crimes are committed in groups and the young people carry weapons[34].

The inspectors felt that parents have lost control and that joint community responsibility for children no longer exists or at the very least is not a priority.

Both inspectors highlighted the problem of drugs. During the violence SDUs were known to smoke marijuana and in some instances a 'white pipe' a mix of marijuana and mandrax[35]. Today the Inspectors say children as young as eight are hooked on drugs and the current drug of choice is an amphetamine called 'Tic'. This drug is being sold outside primary schools and despite some community effort to get the perpetrators arrested they have walked free as people are afraid to testify against them.

What emerges 10 years on is that political conflict was dealt with swiftly following the deployment of the army and the various other initiatives like the Kathorus RDP and the Community Constables programme but criminality remains a problem as it does in most countries undergoing transition. Sadly, many of the political activists who are now unemployed, angry and disillusioned have become involved in crime. They have been dubbed 'comtsotsis' a hybrid of comrade and thug. "As for solving the crime problem, it doesn't help that South Africa's vaunted police force, so ruthless when it came to wiping out dissent, has proved inept at basic policing"(Goodman, 1999: 8)[36].

An added factor is the oft quoted lament that South Africa's Constitution praised in many quarters as the 'most liberal constitution in the world' is a hindrance to the South African Police as it gives suspects 'too many rights'.

The challenge the South African Police Service (SAPS) faced in the black community in 1994 was how to change from a force of 'occupation' to one involved or involving the community. "The SAP was not seen as an internal resource but a mechanism of control".

The police have found it difficult to throw off their past image of being the central instrument in the enforcing of apartheid laws and it is against this

34. The weapons carried are handguns. Except for heists there does not seem to be much of a market for AK47s. Most young people prefer a handgun, which they get by disarming someone of their licensed weapons or through housebreaking.

35. Mandrax is a synthetic drug that is compiled by mixing of chemicals in a chemical process and a tablet is then produced. The main ingredient in Mandrax is Methaqualone.

36. Although there have been improvements in resourcsing, the crime rate remains high. However, in priority crime areas like car hijacking there have been some improvements.

background that a new more accountable police service had to emerge. Eleven years later, the Constitution is given as a reason for South Africa's high crime rate along with the abolition of the death penalty, the granting of bail and democracy.

These myths are further entrenched when leading figures in government and the criminal justice system blame the Constitution and claim that it is "hampering their abilities to investigate and bring perpetrators to book"[37].

Along side the myth that the Constitution is 'crime friendly' is the myth that crime is a post-1994 invention. Crime has increased and the reasons for that are many and can be found in arguments about poverty and transitions but to believe that crime is was never a factor before 1994 is completely incorrect.

The Bill of Rights enshrines the 'right to life', which outlaws the death penalty. Many have seen this as an impediment to fighting crime. This is despite evidence, which clearly indicates that the death penalty is not a deterrent.

The Constitution prohibits the use of 'torture' and unlawful force when interrogating and gathering evidence from suspects. The SAPS's lack of training and forensic knowledge has led to a confession culture. As these confessions are now questioned in court as to whether they were obtained under duress the police have claimed that they are now operating with one hand tied behind their back. They believe that suspects have more rights than they do. Obviously, the rights of victims have to be acknowledged but not at the expense of others. The best protection for all South Africans is the protection of rights enshrined in the Constitution and not their erosion.

While acknowledging that one of the biggest challenges facing South Africa is the high crime rate one cannot overlook the levels of criminality within the South African Police Service. This is of particular concern as the police are the first port of call when your rights have been violated. Not a week goes by without police personnel being implicated in serious crime including acts of torture and unlawful killings.

The TRC is often seen as the foundation upon which reconciliation has been built and is given some prominence in discussions around the restoration of peace in the East Rand.

Most of the former SDUs in Thokoza applied to the TRC for amnesty. Most believed in the process but as mentioned earlier, their reasons for applying for

37. Research conducted by CASE for the EUFHR in 1998 showed that 70% of those surveyed thought that the Constitution provides protections for criminals, 10% disagreed.

amnesty were more to do with making a fresh start and setting the record straight. This differs from other areas where SDUs did not engage in the process. One of the reasons why SDUs in Thokoza participated in the TRC had a lot to do with the political leadership in the area and the support they offered. SDU activities were explained in a political context and had the backing of the ANC and civic leadership which was very different from areas like Katlehong and the Vaal townships. Different approaches to the amnesty process were not unique to the SDUs. Amnesty applications from the IFP for example were only received from people already serving prison sentences. In the case of the apartheid security forces, many of them only applied when it became clear that they may be in line for prosecution. While the SDUs in Thokoza supported the amnesty process there has been a misunderstanding about reparations. Reparations were part of the healing process put in place by the TRC. Reparations were recommended by the Reparation and Rehabilitation (R&R) Committee, one of the three committees under the TRC. The committee's role was to 'facilitate' reconciliation. The R&R committee is seen by many commentators as the weakest of the three[38] TRC committees. This is partly structural in that the TRC had no money of its own to disburse to victims. The committee could only make unbinding recommendations to the President's Fund with regard monetary compensation, symbolic memorials (monuments) and medical expenses (Wilson, 2001: 22). The monetary compensation has been the subject of much debate particularly among SDUs in Thokoza, Katlehong and Soweto.

During the course of interviews conducted in 2004 and at a subsequent meeting attended by former SDUs and the political leadership of the area – it would seem that the former SDUs that applied for amnesty feel that they should be entitled to reparations. The TRC was quite clear that reparations are only for victims of human rights violations and not for perpetrators. There are some SDUs who are both victim and perpetrator and they will receive reparation if a positive finding has been made in their favour. Most of the former SDUs have difficulty with the idea that they are perceived as perpetrators when in fact they were defending the community.

A lot of anger has been building up over the years. Many feel that they have been betrayed by not being offered jobs and in some cases pensions or medical attention and have joined forces with former SDUs in Soweto who have engaged an attorney who says that they have case for payment based on the

38. The three committees were, the Human Rights Violation Committee, the Amnesty Committee and the Reparation & Rehabilitation Committee.

notion that former MK[39] members were given ex-gratia payments based on the number of years service and they feel they are owed the same.

The vast majority of SDUs interviewed in June 2004 were disillusioned. They felt that the ANC enjoys its powerful base because of the sacrifices they have made. They feel that more of an effort should be made to engage them. They feel that they are a special case and that they should be assisted. They are not in favour of handouts but of something more concrete. They would like to see some of the suggestions they made 10 years ago implemented[40].

Many of the SDUs pointed to the fact that some employees of the Ekurhuleni Metro threw their good fortune in the faces of former SDUs. An often cited example is of an Ekurhuleni employee who purchased an expensive imported car but refused to give a down and out former SDU a few coins to buy a loaf of bread.

In another example a former SDU commander asked a member of the Gauteng Parliament for taxi fare to Pretoria in order to sign his reparation forms. The MPL laughed at the former commander saying he had no money to spare while he and his family tucked into boxes and boxes of McDonald's.

Most of the political leaders in the East Rand want to help and Ekurhuleni's executive mayor has committed himself to working on a demilitarisation plan for the area but as long as there are leaders who look down on other people's sacrifice there is always a potential for conflict.

Final considerations

Key triggers to the pacification of the political violence that swept through the East Rand in the early 1990s have been identified, some more long term than others. However, it is important to point out that although peace has returned to the area the legacy of violence still remains. This plays itself out in every facet of community life. Restoring peace to a community where neighbours turned on neighbours is a victory in itself and numerous lessons can be learned from the East Rand experience.

Pacification of the East Rand cannot be placed at any one door. The combination of factors that came together in a unique fabric of cooperation, mutual understanding and respect is what finally brought peace.

39. 'MK' Mkhonto we Sizwe – the ANC's armed wing during the liberation struggle.
40. These suggestions can be found in the IBI files at the Wits Historical Papers.

South Africa's miracle is that despite the best efforts of the apartheid state and its ally's peace has prevailed.

Its eleven years since South Africa's rebirth, and yes the people are impatient for a better life – but this yearning for a better life needs to be tempered with thought that it took the apartheid regime and its allies hundreds of years to build the racist structures that underpin South African society today. The prophetic words that end Nelson Mandela's autobiography are worth repeating.

"The Truth is we are not yet free; we have merely achieved the freedom to be free, the right not to be oppressed. We have not taken the final step of our journey, but the first step on a longer and even more difficult road. For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others. The true test of our devotion to freedom is just beginning. … I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb" (Mandela, 1994: 751).

South Africa in Africa: Promoting Constitutionalism in Southern Africa, 1994-2004

David Monyae[1]

Abstract: *This chapter argues that South Africa's transitional arrangements, namely, an accommodative and inclusive constitution, national reconciliation, and power sharing were useful foreign policy tools for Pretoria's southern African interventions since 1994. South Africa believes that the promotion of constitutionalism, sustainable development, peace, and stability for the African continent guarantees its own democracy. This was evident in its response in Lesotho and Zimbabwe's economic and political crises in the mid 1990s and early 2000s. South Africa's foreign policy limitations are highlighted in the Zimbabwean case study. South Africa's quest for promoting constitutionalism remains a challenging task. It is in this context that Pretoria's Africa policy is centered in and guided by African multilateral structures and programs such as the African Union (AU) and the New Partnership for Africa's Development (Nepad).*

"The question of the role of South Africa in the continent will always come up, and will have to be addressed with courage and humility. South Africa, objectively, has the characteristic of a middle - power, which are: (a) a comparatively strong military; (b) a comparatively strong and dominant economic base; (c) fiscal stability; (d) relative social and political stability; and (e) a government that has effective control over its territory and borders. However, in order for South Africa to play a role in the continent, the country will need to go beyond the will and start addressing its capacity to exercise such a role"[2].

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2. Special 51st National Conference Edition, UMRABULO, African National Congress (ANC), Volume 16, August 2002, pp. 100.

Introduction

The founding leaders of post-apartheid South Africa's democracy enthusiastically seized the opportunity of promoting a culture of constitutionalism at home and abroad. As shown by the final product of protracted negotiations, the South African constitution stands as one of the best in the world today. There is no doubt that the molders of this constitution believed in promoting a culture of constitutionalism, sustainable democracy, peace, continuous development, and stability for South Africa and the continent. South Africa's transition occurred at a critical moment, where the cold war was in its dying stages and there was rising hope for the spread of democracy across the world. It is in this context that South Africa entered the family of nations in 1994, as both a strong believer and champion of constitutional democracy and the rule of law. This meant that the postapartheid South Africa was foundered on,

"The belief system of government, laws and principles according to which a state is governed, controlled or limited by the constitution"[3].

In this short contribution, we look at how South Africa in its first decade of freedom 1994-2004, has attempted to extend the entrenched culture of constitutionalism at home in its Africa policy, particularly within the Southern African subregion. We shall pay special attention on South Africa's Africa policy, and specifically focus on its interventions in Lesotho and Zimbabwe during mid 1990s and early 2000.

South Africa's foreign policy evolved gradually in its approach to African issues from Nelson Mandela to Thabo Mbeki in the period 1994 to 2004. While there were no fundamental shifts in foreign policy from Mandela to Mbeki, there was however, a wide and visible gap in their focus, strategy, style, and indeed tactic towards matters concerning the African continent. There was also a sense of division of labor thus Mandela concentrated on the fundamental question of internal (South Africa) nation-building, while Mbeki championed the same initiatives continentally. Therefore the arguments that South Africa was reluctant to play a leading role in Africa during Mandela's rule, fail to appreciate let alone, understand the strength and weaknesses of both leaders. In short, President Mandela 1994 – 1999 focussed extensively on nation-building projects; such as the consolidation of the peaceful transitional arrangements, constitutionalism, reconciliation process, Reconstruction and Development Program (RDP), and a smooth re-entry of South Africa to

3. Oxford Advanced Learner's Dictionary, Oxford University Press, 1974, London, pp. 182.

the family of nations. On the other hand, President Thabo Mbeki creatively extended Mandela's domestic projects in Africa. This can be seen in Mbeki's led foreign policy vision of an African renaissance and the New Partnership for Africa's Development Programme (Nepad) which to a larger extent has propelled and positioned South Africa as an emerging leader in Africa.

The postapartheid South Africa's foreign policy-makers realised that their success in peace building initiatives in the southern African region depends on their country's foreign policy to align itself with regional and continental institutions' objectives. South Africa's Africa policy relied heavily on regional multilateral structures to create a harmonious relationship between and among member states. The main reason for taking such an approach was because South Africa believed that regional democratic norms and values were critical to peace and security. For the African National Congress (ANC) the governing party,

"There are two ways that South Africa can meaningfully contribute to the African renaissance: (a) it can "bully" others, whether they like it or not; or (b) it can work through existing continental, multilateral structures to advance and support the defense of progressive principles and ideals that have collectively been agreed to. It is the latter role that South Africa will have to consider; deploy its resources and political experience to advance and accelerate the implementation of the African Union and NEPAD. The realization of Africa's renaissance will be difficult to achieve without South Africa's commitment to play its role in the continent".

1. Origin of the Politics of Constitutionalism

The notion of constitutionalism in international relations can be traced from numerous scholars. Contemporary scholars draw much of their understanding of constitutionalism from Immanuel Kant's Perpetual Peace (1795), Adam Smith's Wealth of Nations 1776, and Hugo Grotius' writings in the first half of 17th century. The basic tenets of these scholars' writings posit that liberal democracy, democratic peace, liberal peace is the best form of governance. The rule of law as defined by the liberal democratic constitution and more importantly, the strict practice thereof brings a culture of constitutionalism. The constitution becomes the supreme law of the land that provide much wider freedom and the political space to determine how the individual which to be governed. Furthermore, the constitution gives an appropriate environment in which private property is guaranteed and protected. Therefore, the practice of constitutionalism separates powers in a way that accommodates marginal communities in multiracial and multiethnic communities.

The rule of law according to these scholars must and should be a prerequisite or precondition for sustaining peace, stability, and development. Additionally, it is the view of this school of thought that "*constitutional democracies do not fight one another; that they favor creating interdependent economic links with one another and that they collaborate well in international organization – whose tasks range from the adjudication of global disputes to military alliances"* (Smith, 2003). Larry Diamond states that "*the key shapers of democratic political thought have held that the best realizable form of government is mixed, or constitutional government, in which freedom is constrained by the rule of law and popular sovereignty is tempered by state institutions that produce order and stability (*Diamond, 1999: 2). Diamond argues that the system of democratic government inherently fosters constitutionalism within its mechanisms. It encourages, *"peaceful conflict resolution within their societies"*. The notion of constitutionalism has taken a centre in the post cold global order. Increasingly, there is a core relation between the practice of constitutionalism and good governance[4] in international relations.

There were two global factors in the 1990s that encouraged the rise of a culture of constitutionalism as a key force in international relations. First, the fall of the Berlin Wall in 1989 opened up the 'iron curtain' in Europe signaling not only the end of the cold war, but the victory of the grass root masses against dictatorial form of governance either aided by the U.S. or the Soviet Union. Second, the global support for multilateralism expressed by the international community's endorsement of the U.S. led coalition against Saddam Hussein's invasion of the sovereign state of Kuwait in the early 1990s. These global developments strengthened the hand of democratic forces against the apartheid regime in South Africa. Across the breath and length of the southern African subregion, and the entire Sub Sahara Africa, ordinary people demonstrated their unwillingness to be governed by dictators such as Mobutu Sese Seko of Zaire and Kamuzu Banda of Malawi. This global mood which swept across the world in favor of constitutional democracy at the end of the cold war, was fully appreciated by South Africa's foreign policy - makers. However, South Africa's foreign policy-makers realized that without a foreign policy vision and a proactive Africa policy, it would be hard to build shared democratic norms

4. In general, South Africa meets most of the United Nations Development Programmes' (UNDP) criteria for good governance, thus; "It is the exercise of political, economic, and administrative authority to manage a nation's affairs. Some of the ingredients of democratic governance include: (a) human rights and democracy; (b) rule of law; (c) public accountability and transparency; (d) free and independent press; (e) decentralization; (f) vibrant civil society and robust private sector and (g) political stability, peace and security.

and values in the southern African subregion and the rest of the continent. In this context, what were the colonial legacies that the African continent confronted?

2. Africa's Colonial Legacy

There are various reasons why African societies and governments in the post colonial and cold war era are battling to build sustainable and viable nations. Since their inceptions, African states were by and large formed before the formation of coherent 'nation-states'. They are by-products of colonial powers. The nature and character of these states as we know them today was conceived at European colonialists' conference in Berlin in 1885. As a result of this colonial scheme, Africans were divided in ways that created endless political challenges. First, the European colonial powers paid little attention to the ethnic, culture, language, and geographic complexities of the people they regarded as their subjects. Second, the nature of the economy that largely served few colonial settlers in urban areas and their mother countries, created a wide gap between Africans residing in urban and rural areas. These inequalities within and among most states in Africa continued to the post colonial era. It has also provided a conflictual environment as sidelined communities struggle to access their share of the tiny national cake. In some instances the political élite exploit the racial, ethnic, and religious inequalities to wage civil wars without a clear cause or ideology. The Rwandan genocide and other conflicts in the Democratic Republic of Congo (DRC), Burundi, Lesotho, Angola, Comoros, and Zimbabwe are classical examples. In all of the above mentioned countries, constitutions were either written at the time of independence or endlessly amended to favor a particular of group of society such as the governing élites.

3. The Rise and Consolidation of Constitutionalism in South Africa 1990-1996

The historical events leading to the release of Nelson Mandela in 1990 from Robben Island opened up space for major debates between the African National Congress (ANC) and the apartheid regime which had entered into negotiations. Despite the vast racial, ethnic, cultural, class and ideological differences, they all agreed on the critical need to write a constitution that will govern the country's polity. This exercise was carried out in the most transparent and democratic fashion. First, they ensured that the power of the armed forces in the post-apartheid South Africa will be under the principle of civil supremacy. Unlike before, under the old apartheid constitution, the new constitu-

tion clearly delineated and separated powers within and among three branches; the executive, judiciary, and legislative.

South Africa was declared in the new constitution as that which 'belonged to all who lived in it, both black and white' a dream found in the liberation charter called the Freedom Charter of 1955. All apartheid inspired discriminative laws that discriminated on race, gender, religion; creed, ethnicity, and sexual orientation were repelled. Access to state power was no longer limited to the white minority group but accessible to all South Africans. The same can be said about other freedoms limited under apartheid such as association, speech, movement, accommodation, employment, as well as dignity.

In the spirit of individual and group rights, the country adopted eleven official languages. This move accommodated the notable as well as minority ethnic groups in South Africa. Through political compromises the framers of the democratic constitution adopted what was labeled "Sunset Clauses" to accommodate the fears of the White minority employed by the government. Basically, sunset clauses allowed the whole white old guard in government and parastatals to maintain their jobs and pension funds. Furthermore, the Truth and Reconciliation Commission (TRC) was instituted to encourage former perpetrators of political violence to confess their heinous acts before members of the civil society under the leadership of Archbishop Desmond Tutu. These TRC hearings were held across the country in a more transparent fashion allowing a wider audience and receiving publicity on national televisions and newspapers. The perpetrators were given an opportunity to confront their victims and their relatives to first understand what their grievances were, secondly, to explain their deeds and lastly to ask for forgiveness. The main objective of such exercises was to heal the wounds of the past and try to bring the atrocious acts of violence in defense of either the apartheid government or the liberation struggle movements to a closure.

These national arrangements enabled the country to deal decisively with its dark past as well as to pave a more promising future for its people. The practice of constitutionalism became the central organizational basis of the country's politics of nation building under Nelson Mandela. Regardless, of the monumental challenges confronted by the Thabo Mbeki government, such as the sky-rocketing HIV/AIDS pandemic, unemployment, lack of housing, education, and crime, South Africa's future looks bright. Through dedication and hard work, South Africa has learned that constitutionalism forms the basis for sustainable peace and security.

4. Postapartheid South Africa's Africa Policy

South Africa's Africa policy can be summed up as one that is based on a belief,

"That the future of South Africa is inextricably linked to the future of the African continent and that of our neighbors in southern Africa"[5].

This policy,

"Rest on three pillars: Strengthening Africa's institutions continentally and regionally vis-à-vis the African Union (AU) and the Southern African Development Community (SADC); Supporting the implementation of Africa's socio-economic development programme, the New Partnership for Africa's Development (NEPAD); and, Strengthening bilateral political and socio-economic relations by way of effective structure for a dialogue and co-operation" (*ibid*.).

The governing party, African National Congress (ANC) embraced democracy and human rights in its foreign policy. In its foreign policy document, "Foreign Policy in a New Democratic South Africa: A Discussion Paper, Foreign Policy Belongs to South Africa's People" (1993) and "Foreign Policy Perspectives for a Democratic South Africa" (1994), the ANC stated that it was guided by the,

"Belief that just and lasting solutions to the problems of human kind can only come through the promotion of democracy, worldwide. …A belief that our foreign policy relations must mirror our deep commitment to the consolidation of a democratic South Africa".

For a nation emerging from apartheid, the determination to consolidate democracy at home and abroad was uppermost in the minds of the South African political leadership. However, the country's apartheid history of coercive hegemonic tendencies in the region was widely perceived as an obstacle in rekindling new partnerships with neighboring countries. The establishment of a liberal ethos of interstate rules, norms and values of engagement with fellow states in the region became a priority. The ANC was also cognizant of the potential negative perceptions that this would exacerbate. Promoting democracy throughout the region would, in some instances, undercut the principles of territorial sovereignty and Pan-African solidarity. Acknowledging that,

"These differing points of views understandably generate tensions. Our hope is that this can be creatively settled within recognized regional and international fora" (*ibid.*).

5. SA Department Foreign Affairs' Strategic Plan 2005-2008, at http://www.dfa.gov.za/department/stratplan05-08.pdf.

Over the years, as these interests have competed in foreign policy, the multiple elite voices coalescing around decision-making have guaranteed a tenuous, but manageable balance among them. Marie Muller argues that,

"Relations with one's neighbors are usually most immediate as these will have a direct effect on how a country is otherwise able to function in the international community" (Muller, 1992: 75).

It is in this context that South Africa started to think carefully about finding creative means to encourage the democratization and acceptance of the culture of constitutionalism in Southern African countries. Addressing the Bruno Kreisky Forum in Vienna, in 1995, the then Deputy President of South Africa Thabo Mbeki said that southern Africa had to be "*transformed*" into "a zone of peace" by "*build*ing *stable democratic systems*" (Landsberg, 2000: 109).

5. South Africa's Soft Power and its role in promoting constitutionalism in the Southern African subregion

The ability of the global or regional power to influence the actions and inactions of fellow states without relying on *coercion* or "*hegemonic power*" can best be explained as *'Soft Power'*. In his classical book, Joseph S. Nye described, "s*oft power*" in the following fashion,

"A country may obtain the outcomes it wants in world politics because other countries want to follow it, admiring its values, emulating its examples, aspiring to its level of prosperity and openness… This aspect of power – getting others to want what you want" (Nye, 2002: 9-10).

Such a country has the ability to co-opt other people instead of coercing them as was the case in the era of the Roman hegemony or 19th century's Pax -Britannica epoch in international relations. In yet another article, Nye argued that the,

"The lessons of the 1930s indicate that if the strongest state does not lead, prospects for instability increase" (Khadiagala, 1992: 431).

This is particularly true when one critically looks at Africa's international relations. According to Claude Ake,

"Most (transitions in Africa) have turned out to be false starts; the democratization has often been shallow. …But the pressures for democratization are so strong that for most of Africa it is no longer a question of whether there will be a democratic transition but when" (Ake, 1996: 136).

In relative terms, South Africa holds the various attributes of power; from economic, military capabilities, to ideas and value, i.e. soft power, (Nye, 2002: 9). It is therefore critical to note that global power relations largely influen-

ce interstate relations within regional subsystems in international relations (Clapham, 2004).

Kenneth Waltz, a realist scholar, argues that,

"Both friends and foes will react as countries always have to threatened or real predominance of one among them, …they will work to right the balance, … the present condition of international politics [one power] is unnatural"[6].

The apartheid inspired *"destabilization policy"* that significantly eroded regional economic growth, development, and bred poverty and corruption was abandoned in favor of the notion of "soft power" to promote and cultivate sustainable peace and security in Southern Africa. Unlike many countries with comparative advantages over their immediate regions, post-apartheid South Africa had two major challenges to overcome before it could be accepted as a constructive partner by others. First, it had had a terrible apartheid legacy. In the past decades, Africa confronted the impact of colonialism, cold war's low intense conflicts, state disintegration and collapse, famines and pandemic diseases of great proportion. As a result, Africa's contribution to global trade, technological development and financial investment remains shockingly low. There are indeed many democratic deficits that still hindering rapid development of the African continent. It was within these conditions that the post 1994 South Africa formulated an African renaissance vision. It was a vision designed primarily to meet five foreign policy objectives;

- The economic recovery of Africa;
- The establishment of political democracy throughout Africa;
- The end of neocolonial relations between Africa and the world's economic powers;
- The mobilization of the people of Africa to take their destiny into their own hands, thus preventing the continent from being a place for the attainment of geopolitical and strategic interests of the world's most powerful countries; and
- Fast development of people-centered economic growth and development aimed at meeting basic needs (Stremlau, 1999: 102-3).

Pretoria understood quite clearly that these objectives were to be achieved if it constructed meaningful 'partnerships' with both African countries and the developed countries. South Africa actively used bilateral and multilateral fora to achieve its foreign policy vision of an African renaissance. However the Mandela-Mbeki governments' quickly learned that not all states in the region and their leaders wel-

6. Op. cit., Nye, 2002: 14.

comed the country's new found role or shared its new found enthusiasm for democracy and human rights. Equally important, some critics of South Africa's foreign policy argue that its response to democracy in the region has been inconsistent with some of its foreign policy principles (Venter, 2001: 163). For instance, they further argue that, despite its well-entrenched pro-democratic foreign policy, South Africa demonstrated unwillingness to speak out or intervene against some African leaders with dictatorial behavior. South Africa's response to the Zimbabwean government's undemocratic rule is a case in point. Pretoria moved cautiously in lending a leadership role in the Southern African region. As a result, South Africa's commitments to regional peace, stability, and promotion for democracy often have vacillated between activism and conservatism, idealism and pragmatism[7].

Aware of the limits to its organizational capacity and political legitimacy, South Africa prioritized Southern Africa as the pivotal area of its foreign policy. There was a need to transform South Africa's foreign policy orientation and vision to achieve the desired strategic objectives. It was therefore imperative to transform the hegemonic foreign policy. South Africa was to fully identify itself as an African country. The African renaissance vision was embraced to guide the country's engagement with fellow African countries and as well as the entire world. Upon joining the Southern African Development Community (SADC) in 1994, South Africa played a critical role in the transformation of the organization. This, it was argued, would maximize its efficiency to better meet the burgeoning security predicaments lingering in the region in the postapartheid era.

Apart from its economic components, SADC worked tirelessly to create an Organ on Politics, Defense, and Security (OPDS) in 1997 to promote regional security and common political values. One of SADC's protocols on the general conduct of elections signed in Mauritius in 2004, for instance, committed its governments to the rule of law and democratic government. There has been a gradual move to enact shared regional democratic norms and values. This culminated into SADC's Mauritius Summit of 2004, in which South Africa vigorously sponsored the signing of a protocol that guides the conduct of democratic elections in the region.

Mindful of South Africa's well-established relationship with the developed countries, the new governing elite designed a foreign policy strategy that was to enable it to, "walks on two legs"**.** This meant that South Africa would draw the political and economic strength of developed countries to achieve its own

7. Defending Democracy: A Global Survey of Foreign Policy Trends 1992-2002, Democracy Coalition Project, South Africa, www.demcoalition.org/html/globa_survey.html.

African policy. The classical example was seen in Burundi where South Africa successfully encouraged local belligerent forces, regional, international powers to contribute meaningfully to peace and security.

In the broad African context, South Africa assumed an activist role in the African Union (AU), helping forge new interstate norms. It further collaborated with some influential African states such as Nigeria, Egypt, Algeria, and Senegal to exert shared leadership on African issues and furnish collective leadership in the international arena. Through cooperation with the Nigerian President Olusegun Obasanjo, Algeria's President Abdelaziz Bouteflika, and the Senegalese President Abdoulaye Wade, South Africa actively promoted the New Partnership for Africa's Development (Nepad). The central objective of Nepad was to promote good political and economic governance and the respect for human rights on the continent. It was also designed to be the guiding document to regulate the relationship between developed countries and Africa. South Africa's attempts to work with other African countries within multilateral structures has scored tremendous support and successes. Principally, Nepad is the continental programme that African leaders designed to stand as a pledge to themselves, their people, and the rest of the world to encourage good governance through the upholding of democratic norms and values, respect for the rule of law, and human rights in return for foreign aid and assistance.

Pretoria has indeed increasingly become an influential role player in conflict resolution, negotiation, peace building, and peacekeeping in Africa in the postapartheid era. In recent times South Africa has employed shrewd intervention strategies and tactics to achieve its foreign policy objectives in various parts of the continent. It has intervened in Nigeria, Lesotho, the DRC, Burundi, Zimbabwe, Ivory Coast, Libya, Madagascar, Ethiopia-Eritrea conflict, Sudan, and Comoros to mention just a few. Its military has swiftly become one of the world's fastest growing troops within the United Nations' peacekeeping missions, particularly in Africa.

6. South Africa's Interventions in Lesotho and Zimbabwe

We now turn to the two cases of the postapartheid South Africa's interventions in the southern African region. On numerous occasions, the apartheid South Africa intervened in the domestic affairs of its neighbors in the region. However, there were vast differences between the interventions of South Africa from its apartheid past to the one during the democratic order. Under the apartheid regime, Pretoria used bully diplomatic tactics, such as military incursions, economic sanction, and the use of proxy wars to undermine smaller

states in the region. Although, the postapartheid South Africa's interventions in Lesotho and Zimbabwe raised controversies, however, the strategic objectives of these interventions can not be questioned. South Africa tried with varying degrees of success particularly in Lesotho to achieve a democratic dispensation that mirrors its own internal culture of constitutionalism.

South Africa shares far borders beyond the national borders with Lesotho and Zimbabwe. The common bond among these countries ranges from, culture, they all were British colonies, and their economies are intrinsically intertwined around the South African economy. While Lesotho stands as South Africa's smallest and poorest neighbor, Zimbabwe remains the second biggest economy in the region. What follows is a tale of how Pretoria intervened in its weakest and the most powerful neighbors.

6.1 South Africa's Lesotho Intervention

Lesotho is uniquely located within South Africa's geographical setting. It is a landlocked country surrounded by South Africa on all sides. The history between these two countries has produced one of the greatest dependence interstate relationships in international relations (Khadiagala, undated). In 1998, junior military officers were on the verge of ceasing political power in Maseru (capital city of Lesotho) in an unconstitutional manner. South Africa intervened under the banner of SADC alongside Botswana to prevent a coup from occurring. Upon their arrival in Lesotho, South Africa's troops expected little resistance but this never happened. Instead, Basotho junior troops opened fire from a strategic position in deviance of South Africa's led SADC intervention. This resulted in scores of unnecessary deaths and massive destruction of private property and public infrastructure (Landsberg, 2004: 164).

The crisis in Lesotho started in the early 1990s. Much of the challenges faced by this tiny country emanated from its extreme poverty and a lack of an industry base. It had always depended on South Africa as it has no any other neighbor. Thirteen per cent of Lesotho's land is arable and the rest remains mountainous. There is a rich history between the two countries. Cultural links between the Basotho people in South Africa and those in Lesotho run deep. They share same language and cultural royalty and their interaction have been active regardless of the colonial and apartheid drawn geographical separation. Since Lesotho attained independence from South Africa, apartheid leaders attempted to incorporate it into South Africa. This hegemonic behavior failed as the Basotho people defended their right to sovereignty (Ajulu, 2002: 57).

6.1-a Postapartheid South Africa relations with Lesotho

Lesotho falls within Pretoria's foreign policy strategy and priority in the region. When South Africa was undergoing its transition, Lesotho was experiencing political upheavals. There was a serious constitutional crisis in Lesotho that had to do more with the role and functions of the monarchy. While the political crisis in Lesotho was perceived as one concerning the monarchy, the military and political parties, another factor seemed to be in play. There was massive migration of the professional class and industries from SADC countries to South Africa. This wave of deindustrialization denied poor countries such as Lesotho access to capital, skilled manpower and indeed financial investments. Coupled with the down turn of the global economy, the Lesotho state became incapable of creating sufficient jobs, alleviating poverty and developing its people. While South Africa was celebrating the birth of a new democracy and rejoining the international community, Lesotho was in the brink of falling apart.

King Letsie staged what became known as a 'royal coup' in 1994. This event was caused by the military demanding pay rise and power. The government of Prime Minister Ntsu Mokhehle failed to respond to these demands. The entire country was thrown into serious political instability. This led the SADC region to intervene. South Africa was concerned about being perceived as a regional hegemony unilaterally using its military muscle. It therefore joined the rest of SADC, particularly Zimbabwe and Botswana, to assuage tensions in Lesotho. The main aim was to deal with the three major political constituencies in Lesotho namely, the monarchy, the political parties and the military. President Robert Mugabe, Quiet Masire, and Nelson Mandela formed what was later considered as the 'SADC Troika' in handling the constitutional crisis in the Mountain Kingdom. From 1995 to 1997 the SADC Troika dealt with a host of political issues. These range from the powers of the monarchy and the military to the need to run fresh elections in Lesotho (Landsberg, 2004: 164).

South Africa facilitated numerous internal peace talks among the Basotho. Critics of Pretoria's foreign policy argue that the 'Quiet Diplomacy' in Lesotho produced limited dividends. Under SADC auspices, South Africa's constitutional judge, Pius Langa, was selected to lead a commission of inquiry concerning the election results disputes in Lesotho. The release of Judge Langa's controversial report was somehow delayed (Ajulu, 2002: 65). This delay fed into an already fragile political environment with lots of suspicions that South Africa's Deputy President Thabo Mbeki (the main negotiator) was doctoring the report in favor of the government. There was a major contestation concerning the prolonged period before the release of the report. The main reason given was that

the report was supposed to be presented to the SADC leadership before it could be given legitimacy and endorsement. When it was finally released, the Langa report rejected the opposition's reputed view that the elections were fraudulent. It however pointed to anomalies that had occurred in the run up to the elections but emphasized that they did not sufficiently necessitate a re-run of the elections. According to the report, the elections represented the will of the people.

As it were, this report opened up the floodgates to anarchy. The military and opposition parties openly challenged the authority of the government rendering it ineffective. The junior military officials arrested their senior officers providing clear signals of a coup in making. This led to the Lesotho Prime Minister calling for help from fellow SADC members to stop the unconstitutional political power take over in Lesotho.

South Africa was severely criticized for using massive force instead of the usual diplomatic channels. This became the first postapartheid South Africa's military intervention in a neighboring state. Somehow, it broke away from its original foreign policy strategy of peaceful resolution to conflicts in Africa. Critics argued that Pretoria used force in Lesotho because it wanted to protect its economic interest. For some scholars, South Africa demonstrated its regional hegemonic power to intimidate those who wanted to disturb its core interest in the region. Based on Pretoria's regional legacy, these arguments appear to make sense but it is important to look at the occurrences that followed the conflict in Lesotho. After the conflict, South Africa showed its resolve to promote constitutionalism in Lesotho as the guarantor of peace and security.

6.1-b The Promotion of Constitutionalism in Lesotho

A military coup in Lesotho, for South Africa, threatened peace and stability in the southern Africa region. This was the major basis on which its military intervention was pursued and justified. However, the Lesotho military intervention, as controversial as it was, produced one of the most success stories of South Africa's diplomacy tactic in the region and in the continent. First, Pretoria entered into an intensive and inclusive Lesotho political dialogue. This brought on board the majority of the stake holders into negotiations, enabling a much needed overhaul of Lesotho's constitution and electoral laws. Second, South Africa embarked on delivering financial assistance to Lesotho's development.

Although South Africa undoubtedly lacked diplomatic tact, it later managed to achieve credibility and legitimacy as a regional custodian of peace and security. What did Pretoria do after stabilizing and arresting the political situation in Lesotho? What scholars of South Africa's foreign policy often ignore

are the skillful diplomatic missions that Pretoria pursued to bring peace and security in Lesotho. There were many South African diplomatic negotiators and teams assigned to Lesotho by the Mandela government. Chief among these were Deputy President Thabo Mbeki, the Minister of Safety and Security, Sydney Mufamadi, experts in civil society and constitutional gurus.

The first move by the South African diplomats in Lesotho's peace process was to ensure that the Basotho agree on the formation of an Interim Political Authority (IPA). According to Thomas Mathoma,

"The IPA is a compromise agreement in that the ruling LCD (in full name) agreed to the holding of fresh elections within 18 months, while the opposition alliance recognized the legitimacy of the LCD government in the period leading to new elections. The IPA is made up of two members from each of the 12 political parties in Lesotho. Its primary purpose is to ensure the holding of free and fair elections in Lesotho by creating and promoting conducive conditions band leveling the political playing field" (Mathoma, 1999-2000: 75).

South Africa's diplomacy in Lesotho entered an accelerated speed the moment the Basotho agreed to the IPA idea. The relevant stake holders in Lesotho's peace process took yet another bold step to rewrite their constitution with a special focus on changing certain aspects of the electoral laws. Lesotho's electoral processes and systems were inherited from their colonial power Britain at Independence in 1966. The 'winner takes all' system prevailed throughout 1965, 1970, 1990, 1993, and 1998. In all these elections losers cried foul (Miti, 2002: 156). This was a major obstacle to Lesotho's democratic dispensation. South Africa's Minister of Safety and Security, Sydney Mufamadi chaired the negotiations.

Various changes were made in the electoral laws of Lesotho. Members of the IPA agreed to create space for smaller political parties in Parliament and the Senate. A system of proportional representation quite close to South Africa's electoral laws was instituted. The other fundamental agreement reached was on the management of elections. An Independent Electoral Commission (IEC) was formed. These major changes to the effective management of elections in Lesotho became a strong factor that allowed the smooth building of confidence and trust in the body politics in Lesotho (Mathoma, 1999-2000: 78).

The third phase of South Africa's strategy in Lesotho was to financially underwrite the cost of the peace process as well as campaign to the international community to assist the Mountain Kingdom. There were three areas in which South Africa enhanced peace in Lesotho. First, it granted Lesotho aid and a loan to rebuild its infrastructure. Second, it encouraged the IMF and World Bank to lend Lesotho financial assistance on favorable terms. This meant South Africa became the guarantor of those loans. Thirdly, South Africa encouraged global investments

into Lesotho. This included joint ventures in a variety of economic sectors. For instance, Lesotho benefited most from South Africa's booming tourism sector. Lesotho still stands to benefit in South Africa's successful 2010 World Cup bid.

In the year 2001, Lesotho went to the polls which were considered by international observer teams as representing the will of the people. These elections were free and fair. Peace returned to Lesotho. The constitutional culture has been central in accommodating losers in the elections. These changes have extended freedoms for Basotho women and other sectors of society previously in the margins of the political game in Lesotho. Today Lesotho boasts a significant number of women in Parliament, civil servants organizations and other important centers of power in their country. Lesotho has also benefited from the international community's support. The Gleneagles G8 Summit held in Great Britain in 2005 focused on poor African countries like Lesotho. Although the Basotho people deserve praise and admiration for the positive change they had achieved, it would be unfair and short sighted to discount and overlook the role Pretoria played in building a culture of constitutionalism in Lesotho. It was evident from the Lesotho crisis that the British electoral system and the constitution were designed by the colonial power as a debilitating strategy. The system itself was inherently flawed. The inclusive nature of the new constitution written by some of global constitutional experts including South Africans managed to accommodate a broad sector of stake holders in Lesotho's body politics. The traditional leaders especially the monarchy was given ceremonial powers by becoming a constitutional monarchy. The military was retrained and kept under civil control, limiting their chances of making coups. All these was possible because South Africa was able and willing to underwrite the cost for peace, help secure favorable loans for the country, invest in its institutional building and the state capacity to manage its constitutional mandate, and more importantly help in the general run of elections.

6.2 South Africa's Intervention in Zimbabwe

When President Robert Mugabe won the 1980 Zimbabwean elections, apartheid South Africa confronted the fiercest diplomatic assault. Zimbabwe however refused to house South African exiles like Mozambique, Lesotho, and Swaziland did. Unlike these countries, Zimbabwe received minimal levels of direct destabilization, such as cross border military raids. The most form of destabilization marshaled by the apartheid regime against independent Zimbabwe was in the area of sporadic terrorists setting bombs and assassinating ANC and PAC cadres in major cities.

The other strategy applied by Pretoria was strangling the land locked Zimbabwean economy through endless disruptions of its transport systems with Mozambique. These disruptions of transport were done through the proxy war in Mozambique in which Pretoria formed and armed the Renamo rebels fighting the government of President Samora Machel in Mozambique (Khadiagala, 1992: 177).

Zimbabwe led the SADC region in their diplomatic confrontation with the apartheid regime in South Africa. President Mugabe was the main opponent of the apartheid regime in international fora such as the UN, NAM, Commonwealth, OAU, and SADCC. He strongly advocated for tough sanctions against apartheid. However, there were simultaneous events taking place in Zimbabwe. The Lancaster House constitution was designed to be a transitional constitution. It was a compromised constitution that allowed white Zimbabwe continued access to land without unlawful and non market driven exchange of land to the black majority. Further, President Robert Mugabe retained powers of the state and the presidency to deal with both internal and external security threats. In 1987, Zanu PF[8] signed an important deal with its rivalry PF Zapu which was led by Joshua Nkomo. In this historic agreement called Unity Accord, President Mugabe extended his constitutional powers to become the Executive President with two Deputies, Simon Muzenda and Nkomo. It was also a period in which President Mugabe attempted to declare Zimbabwe as a one party state. Undemocratic tendencies were starting to develop in Zimbabwe.

President Mugabe and Zanu PF suppressed both real and potential threats to his rule inside the party and among the already weakened and ineffective opposition. A culture of corruption was deliberately allowed to grow as members of Zanu PF abused state resources. The end of the cold war in 1989 to 1991 and the release of Nelson Mandela in South Africa, brought a totally new political environment in the southern African subregion. Apartheid was on its way out. The global environment defined by the cold war was also slowly ending. Zimbabwe, like most countries in the world, found itself unprepared for the "New World Order" largely defined by the US and western powers. The 1990s witnessed fundamental political and economical changes. The IMF and World Bank imposed stringent economic and political liberalization measures called Economic Structural Adjustment Programmes (ESAP). Confronted by these changes, Zimbabwe attempted to restructure its economy from state led

8. Zimbabwe African National Union Patriotic Front (Zanu PF) is the governing party in Zimbabwe under the leadership of President Robert Mugabe.

to a more market driven one. Regrettably, these economic initiatives and political challenges pertaining to the lack of democratization triggered what was to become a permanent crisis. Global demands for democratization, human rights protection and the rule of law were spreading across the world. Undoubtedly, Zimbabwe was the champion and voice of the Frontline states in the fight against apartheid and ironically, the country it had been fighting for was rapidly transforming while it slowly deteriorated.

6.2-a The Mandela Policy towards Harare

The Mandela administration relied heavily on Zimbabwe in its own southern African foreign policy calculations and strategy. The obvious reasons as alluded above are numerous. First, Zimbabwe was South Africa's largest African trading partner and had major investments in that country. Second, President Mugabe and Zimbabwe in general commended considerable respect and reputation in the region and the developing world. For South Africa to achieve its Africa policy it needed Zimbabwe's support. As important as these factors were, Pretoria found itself in malevolent diplomatic tensions with Zimbabwe. The major areas of diplomatic contentions were around questions of unfair trade and what emerged as Zimbabwe's uneasiness with South Africa's dominance within SADC. Global focus in Africa, and particularly Southern Africa was increasingly in favor of South Africa. This phenomenon was compounded by the 'saint like' image of President Nelson Mandela. Numerous scholars of African politics stated that President Mugabe disliked Mandela's tendencies of talking down on him.

In 1995, South Africa successfully failed to convince the rest of Africa to isolate and impose economic sanctions on Nigerian military dictator Sani Abacha. Zimbabwe vehemently opposed South Africa's Nigeria policy. Furthermore, President Mugabe clashed with President Mandela over SADC's Organ on Defense, Peace and Security. Mugabe who was chairing SADC at the time wanted to incorporate chairmanship of both structures in 1997. While tensions concerning SADC's organ were raging on, conflict in Zaire broke out. The collapse of Mobutu Sese Seko's government witnessed the beginning of what was considered as Africa's First World War. The new government in the Democratic Republic of Congo (DRC) of Laurent Kabila was challenged by Rwanda and Uganda. Through proxies, Rwanda and Uganda entered the DRC inviting three SADC members to come to Kabila's side. South Africa argued against military intervention at the annoyance of Zimbabwe, Namibia and Angola. To worsen the situation, South Africa had militarily intervened in

Lesotho. While Zimbabwe was getting involved in military interventions in the DRC, economic strains were being felt at home by Zimbabweans. South Africa's attempt to stop Zimbabwe's military adventure in the DRC dismally failed. The Great Lake Region conflict triggered tremendous economic and political challenges domestically. South Africa took a pragmatic approach towards the Zimbabwean crisis. Under President Thabo Mbeki, South Africa worked tirelessly within regional and continental structures to find a common solution for Zimbabwe.

6.2-b South Africa's Response to Zimbabwe's Constitutional Crisis

Confronted with the dilemma in Lesotho and brewing regional conflict in the Great Lakes region, Pretoria's response to the crisis in Zimbabwe became quiet diplomacy. This entailed dealing with Zimbabwean issues in closed doors without applying either economic sanctions or a call for the isolation of President Robert Mugabe's regime. When Mugabe failed to maintain popular support due to the undemocratic rule, the suppression of the media, opposition voices, deepening poverty, domestic opposition to the war in the DRC, he exploited genuine grievances and demands for land among black majority for political purposes. The Zimbabwean liberation struggle's war veterans campaigned for financial compensations, land and political influence. President Robert Mugabe co-opted the war veterans by granting its members unbudgeted grants. He also manipulated the racial issues concerning land in which the tiny white minority controlled most of the fertile arable land in Zimbabwe. His government had deployed a strong military contingent in the DRC thereby draining scarce financial resources. The ill conceived strategies to grant war veterans and entering into a war backfired badly. The country failed to resuscitate the economy as it bled to death because of unbudgeted costs. These move triggered the worse economic crisis Zimbabwe had ever seen.

While this was taking place, drought ravaged the remaining resources the Zimbabwean state had. It had to simultaneously respond to a multiple of domestic, regional, and international issues. When the Movement for Democratic Change (MDC) was formed in opposition to Mugabe's government in 2000, Mugabe called for the first constitutional referendum. In the draft constitution, President Mugabe wanted more presidential powers to deal with the land question. When his Zanu PF lost out for the first time in Zimbabwe's post independent history, President Mugabe used state violence to suppress opposition.

6.2-c The Land Crisis

The Zimbabwean government realized that losing political power through democratic elections was in sight. It embarked upon a massive diplomatic campaign to gain financial support from its former colonial power – Great Britain. When this failed it openly encouraged the war veterans to grab land outside the law's ambit. Violence destabilized the agricultural sector, the most productive sector of the Zimbabwean economy. This exercise attracted unprecedented global media on Zimbabwe. The land grab created chaos in Zimbabwe as more white farmers were being forcefully removed from the land without proper compensation as agreed in the transitional constitution signed in 1979. There was no doubt the Zimbabwean government was under siege. It had not anticipated the level and effect of the isolation led by Britain, the US, Australia, and New Zealand.

In 2005 Zimbabweans went back to the polls to elect parliamentarians. The MDC opposition lost the elections that most of the international community believed to have been 'stolen' by President Robert Mugabe's Zanu PF party.

6.2-d South Africa's Quiet Diplomacy in Zimbabwe

President Mbeki's critics have highlighted numerous weaknesses in the quiet diplomacy strategy. Perhaps chief among these weaknesses is his failure to use the carrot and stick approach to achieve South Africa's foreign policy objectives like constitutional reforms and rule of law to name a few. Therefore, quiet diplomacy although useful, created a perception of South Africa appeasing a dictator in Zimbabwe.

What has been Pretoria's solution for the deepening crisis in Zimbabwe? Throughout the beginning of Zimbabwe's economic and political crisis South Africa tried to convince the government and the MDC to enter into negotiations that would provide a basis in which the country's elections could be rerun. For Mbeki, a government of national unity in Zimbabwe would create a conducive political environment for the country to reconcile and heal the wounds. At the same time, South Africa believes that if the constitution is rewritten, closing up most of the loopholes that create conflict such as excess power given to the president and the general management of elections, Zimbabwe will be in a better position to deal with its crisis. As much as quiet diplomacy has failed to produce a speedy resolution to the Zimbabwe crisis, it appears to be the only viable approach in light of the complex of matters in Zimbabwe's politics. The Zimbabwean government has emptied its coffers

and is seeking a loan from Pretoria. It has no sustainable avenues for financial bail outs other than South Africa. At the time of writing this chapter, South Africa had clearly drawn its line in the sand on the matter of a financial loan to Zimbabwe. It unequivocally, placed a high democratic premium for any financial bail out for the cash strapped Zimbabwe. The conditions for the loan are clear. Zimbabwe was asked to embark upon an inclusive constitutional reform, repeal restrictive laws against the media, negotiate in good faith with the opposition party, and more importantly embark upon economic reform. It remains to be seen whether President Mugabe will continue defying South Africa and the international community in their call for political change in his country. It appears that there is no any other solution to Zimbabwe's crisis other than constitutional reform and the restoration of the rule of law and justice.

7. Conclusion

South Africa's Africa policy has come of age since 1994. The lessons of the first decade of freedom in South Africa demonstrated greater hope for the culture of constitutionalism. Meanwhile, Zimbabwe, like Lesotho, has challenged South Africa's Africa policy. The economic and political crisis in Zimbabwe has gone unabated. However, South Africa managed to convince Zimbabwe to withdraw its troops from the DRC enhancing its own peace process in the Great Lakes region, the DRC and Burundi. The failure to limit the abuse of power by President Robert Mugabe has been largely due to the fact that South Africa initially avoided to be involved in a crisis that it had perceived to be one between Harare and London. President Mbeki also wanted President Mugabe's support in his African initiatives, Nepad, transformation of the then OAU to AU, South Africa's successful bid for the World Cup 2010, and lastly, a possible seat in the restructured United Nations Security Council (UNSC). In all these diplomatic initiatives South Africa needed to avoid to be seen as a regional bully and promoting-Western countries' interest in Africa. South Africa has managed to win over trust and legitimacy in Africa with minimal image bruises by its Zimbabwean policy. South Africa has applied a pragmatic policy thus allowing President Mugabe to exhaust all his diplomatic cards. Lastly, South Africa ought to learn how to effectively communicate its Africa policy. South Africa's Africa policy shows the level of commitment that South Africa has on promoting constitutionalism and democratization of the region and indeed the continent.

The South African Approach to Peacebuilding in the Great Lakes region of Africa

Devon Curtis[1]

Abstract: *South Africa has played a prominent role in the peace processes in the Democratic Republic of Congo (DRC) and Burundi. In both the DRC and Burundi, negotiations between belligerents led to peace agreements that included the establishment of broad-based power-sharing transitional governments and new, integrated, national armies. The constitutional processes in the two countries were influenced by ideas stemming from the South African transitional experience and by South Africa's diplomatic involvement. Nonetheless, despite some favourable signs and key positive developments in both countries, violence has persisted and the experiences of Burundi and the DRC highlight the limits of a South African transitional "model". The South African "model" ignores important political economy questions that are central to conflict in the Great Lakes region. It also overlooks the particular nature of the state and alternative structures of authority, as well as the regional dynamics of the conflicts. As such, this chapter points to the need for caution in discussing the transportability of the South African experience.*

In August 2005, Burundi reached a milestone in its peace process. Pierre Nkurunziza, the former leader of a main rebel group, became President of Burundi following a series of local, provincial and national elections. These elections marked the end of a transitional period that was intended to usher in peaceful democratic governance in Burundi after twelve years of violent conflict.

The elections in Burundi, along with the establishment of permanent institutions of governance and a new constitution, were acclaimed across Africa and the world. Given South Africa's prominent role in the Burundian peace

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process, the elections appeared to offer evidence that South African encouragement and assistance in Burundi had achieved desirable outcomes. The peace process involved a wide range of regional and international actors as mediators, facilitators and sponsors, with South Africa playing a leading role both in terms of its active participation in the facilitation of the various agreements, as well as through the promotion of a particular kind of transitional model. Indeed, Burundi's transitional trajectory was highly influenced by ideas coming from the South African transitional experience. Key elements of the South African "model" promoted and replicated in Burundi included: inclusive negotiations and dialogue with all belligerents, the establishment of a transitional national unity government, the creation of a new integrated army, and plans for a truth and reconciliation commission. More generally, the South African approach to transitions assumes that inclusive dialogue and broad-based national unity governments can lead to peace since differences are negotiable, and that constitutional development will contribute to ending violence.

Elements of this same South African model were promoted in the peace process in Burundi's much larger neighbour, the Democratic Republic of Congo (DRC). While different interests and issues are at stake in the DRC, South Africans and their partners supported a similar model of extensive dialogue with different belligerents and stakeholders, a negotiated settlement that included a broad-based power-sharing transitional government leading to democratic elections, and the establishment of a new national army. The transitional process in the DRC is not as advanced as the process in Burundi and has faced particular difficulties, but the approach in both countries was broadly similar.

The peace processes in Burundi and the DRC have led to some positive developments. Since the signing of the Arusha Agreement for Peace and Reconciliation in Burundi in 2000 and the Pretoria and Sun City Accords for the DRC in 2003, there have been hopeful moments in both countries. Nonetheless, despite the optimism surrounding the latest elections in Burundi and the adoption of transitional institutions and a new constitution in the DRC, the experience of these two countries point to limits in the South African peace process "model". Specifically, the context of the conflicts in Burundi and the DRC as well as state/society patterns of authority and prior institutional history are different from one another, as well as vastly different from the South African case. The promotion of a South African style transition in two environments that were so dissimilar from South Africa has led to several unexpected outcomes, and violence has persisted in both countries. Consequently, the experiences of Burundi and the DRC point to the limits of promoting constitutionalism as a means to end violence.

This chapter discusses the appeal of the South African approach to transitions, while describing the shortcomings and limits of this model in the context of the conflicts in the Great Lakes region of Africa. Since Rwanda has followed a very different model of conflict settlement that originated with military victory rather than negotiations, this chapter will focus on the peace processes in Burundi and the DRC. The chapter makes three broad arguments. First, there is a temptation, among policy-makers, to make generalizations and to try to reproduce "successful" models. Democracy promotion across Africa is a key South African foreign policy objective and South African officials tend to view appropriate conflict resolution techniques and processes of democratic consolidation in terms of their own domestic experience. Second, this model of conflict resolution and democratic consolidation faces critical challenges in the Great Lakes region of Africa. The South African model ignores key political economy questions that lie at the heart of conflict in the Great Lakes. It also overlooks the particular nature of the state in these two countries, as well as the regional dynamics of conflict. Third, this chapter argues that despite these limits in the transportability of the South African model, some aspects of the transitional strategies have had positive effects in the two countries. Most notably, comprehensive negotiations on a wide range of issues and sustained commitment from outside peacebuilders have been constructive. It is not possible to declare a decisive end to violence in Burundi and even less so in the DRC, but significant hopeful change has occurred in several key areas.

Conflict in the Great Lakes region of Africa

The extraordinary levels of violence in the Great Lakes region have their roots in historic processes, including colonial and post-colonial developments[2]. In the post-colonial period, the DRC, Burundi and Rwanda have suffered repeated cycles of violent conflict, sometimes in genocidal proportions[3]. Tragic events in one country have had ramifications on neighbouring areas and countries, so conflict must be understood from a regional perspective.

2. For accounts of the roots of conflict in the region, see Chrétien, 2003; Lemarchand, 1970; Braekman, 1992.

3. The best known genocide in the region is the 1994 genocide in Rwanda, where more than 800 000 Tutsi as well as many moderate Hutu were killed by Hutu genocidaires. There was also a less well-known genocide in Burundi in 1972, where an estimated 100 000-200 000 Hutu were killed.

The most recent rounds of violence began in 1993 in Burundi, and 1998 in the DRC, yet violence is a recurrent feature of politics in both countries. The most prevalent view of conflict in Burundi is that of a long-term ethnic conflict between the historically disadvantaged Hutu (85%) and the dominant minority Tutsi (14%), with the 1% Twa completely marginalized. The Tutsi ethnic group has dominated political, economic and military structures since Independence, but viewing the Burundian conflict exclusively through an ethnic lens fails to capture many of the important nuances in Burundian history and social structure, and the way in which ethnicity has been used as an instrumental tool by elites[4]. Ethnicity is a critical element of the conflict, but political and economic ambitions, regional divisions, urban-rural cleavages, a politicised military, and links to politics in neighbouring Rwanda and DRC are also important factors.

Majoritarian-style democratic elections were held in Burundi in 1993. In a break from years of rule by successive Tutsi presidents who gained power through military coups, Melchior Ndadaye, a Hutu from the FRODEBU party, won the 1993 elections. However, Tutsi army officers assassinated President Ndadaye and other high-ranking FRODEBU members less than three months after they took office. These assassinations sparked inter-ethnic massacres across the country, and waves of refugees fleeing to neighbouring countries.

The genocide in neighbouring Rwanda in April-July 1994 contributed to an already polarized, fearful and volatile environment in Burundi. International officials brokered a power-sharing agreement in Burundi between the predominantly Hutu FRODEBU party that won the 1993 elections, and the predominantly Tutsi UPRONA party that had been in power since Independence. Under heavy pressure from the UN Special Representative of the Secretary-General, Ould-Abdallah, an agreement was signed in September 1994[5]. Nonetheless, violence continued and the country was divided[6]. In July 1996, Pierre Buyoya, a Tutsi from the UPRONA party, launched a military coup and was

4. For a discussion of ethnicity and conflict in Burundi, see Lemarchand, 1994.

5. The "Convention of Government" was signed by 12 of the 13 parties in Burundi on September 10, 1994.

6. The FRODEBU party split into two factions. One faction, led by Leonard Nyangoma, formed a new party, the CNDD, which was committed to winning back power through violent means with its armed wing, the FDD. There was also another active Hutu rebel group, the Palipehutu, which had been founded in the Burundian refugee camps in Tanzania in the early 1980s.

reinstalled as President[7]. There was widespread international and regional condemnation of the coup, but comprehensive multi-party peace negotiations only began in 1998. Meanwhile, the Hutu rebel movements, with bases in neighbouring countries, continued to gain strength, and clashes occurred frequently.

The DRC is a much larger country than Burundi, with significant natural resources and a long history of external interference and strategic manipulation of regional and ethnic identities. In the DRC, an underlying factor contributing to conflict is the absence of formal state structures, stemming from the DRC's colonial legacy as well as the predatory politics practiced by former President Mobutu assisted by Cold War western aid and support[8]. Yet the specific spark that triggered the current conflict in the DRC was the 1994 genocide in Rwanda. Many Hutu génocidaires retreated to the camps in eastern Zaire (now renamed the DRC) alongside refugees, creating a security threat for the new post-genocide Rwandan government. In October 1996, the Rwandan army invaded eastern Zaire to break up the camps and find the ex-génocidaires. The Rwandan army subsequently helped several anti-Mobutu rebel movements drive the Zairean army out of the eastern part of the country. The leader of these rebels, Laurent Kabila, marched on to Kinshasa with his troops. Mobutu was forced into exile, and Kabila became President in May 1997. Kabila had come to power with Rwanda's strong military support but the Rwandan influence on his new government was unpopular among Congolese. In July 1998, Laurent Kabila turned against his former allies and ordered the Rwandan army out of the country. In response, the Rwandans once again invaded eastern DRC, this time in an attempt to remove Kabila from power.

To help topple Kabila, Rwanda sponsored a local rebel movement in eastern DRC, the *Rassemblement congolais pour la démocratie* (RCD). Uganda also became involved in the conflict and established a new rebel movement in eastern DRC, the *Mouvement de Libération du Congo* (MLC), led by Mobutu ally Jean-Pierre Bemba. In the ensuing civil war, elements of the armed forces of Zimbabwe, Angola, Namibia, Sudan and Chad came to the assistance of Kabila's government, while Rwanda, Burundi and Uganda helped various

7. Buyoya was President from 1987 until 1993, when he lost the democratic elections. He was President again from his coup in 1996 until 2003.

8. President Mobutu ruled Zaire for 32 years, from 1965 to 1997.

9. Neighbouring and regional countries became involved in the Congolese war for a number of different political, security, and economic reasons. On the war in the DRC and the various regional interests at stake, see Clark, 2002. See also Prunier, 2004; and Reyntjens, 1999: 241-250.

rebel groups against the government[9]. Other armed groups, such as the local Mai-Mai militias, fought the rebels in the east. By the end of 1998, the Government of the DRC had lost control of approximately one third of the country's territory, and peace negotiations were being held between most of the belligerents, including outside countries and their proxies.

In both the DRC and Burundi, therefore, poor governance and economic exploitation have contributed to the conflicts. The politics in neighbouring states have also been important factors, leading to refugee flows and the spread of arms and ideas. In some instances, neighbouring countries have intervened militarily and have provided support to insurgencies. In the DRC, the lack of constitutional rule was more a symptom of conflict, rather than a cause. The DRC has a paucity of formal state structures but alternative configurations of power and authority based on economic exchange and privatised networks have developed. In Burundi, there has always been a functioning (though repressive) state. In 1993, however, constitutional multiparty democratic elections were promoted without adequate safeguards, ultimately leading to even higher levels of violence.

The South African "Model"

By the end of 1998, there were peace negotiations in both the DRC and Burundi. In the DRC, this led to the signing of the Lusaka Cease-fire Agreement in July 1999 and subsequent negotiations on political and military arrangements. In Burundi, multi-party negotiations actively began in June 1998 in Arusha, bringing together 17 Burundian delegations under the facilitation of former President of Tanzania, Julius Nyerere.

South Africa played an important role in the negotiations in the DRC and in Burundi, particularly in the later stages of both sets of negotiations. In the Burundian peace process, South Africa was especially active after Nelson Mandela became facilitator of the process at the end of 1999 following Nyerere's death. It was also active in subsequent rounds of cease-fire negotiations in Burundi. In the DRC, South Africa played a central role in the Pretoria and Sun-City negotiations in 2002-2003. Yet South Africa's influence was felt not only through its role as intermediary and facilitator, but also through the implicit and explicit promotion of certain ideas about appropriate constitutional structures and processes.

Promoting peace and democracy across Africa is a key South African foreign policy goal (Landsberg, 2000, 2006). The South African government wishes to advance development and economic growth across the continent, and its

view is that this cannot occur without peace and security[10]. South Africa's foreign policy therefore makes a link between peace and security, development, governance and growth (Landsberg, 2006). Since 1997, these goals have been expressed through the concept of an African Renaissance. Taylor and Williams point to the neo-liberal ideology that lies at the heart of Mbeki's notion of an African Renaissance, but the operationalisation of the Renaissance concept also includes the desire to establish and maintain systems of good governance, often through the promotion of negotiated transitions to democracy and the rule of law (Taylor, Williams, 2001: 268). Promoting South Africa's national interests and values as well as the "African Renaissance" is listed as the core mission for South Africa's Department of Foreign Affairs. In the Department's 2005-2008 Strategic Plan, the mission is described in the following way: "our vision is of an African continent that is prosperous, peaceful, democratic, non-racial, non-sexist, and united and which contributes to a world that is just and equitable." (South Africa Department of Foreign Affairs, 2005-2008: 18). The White Paper on South African Participation in Peace Missions adopted by the South African Parliament in October 1999 also recognised that responses to conflict must "include a focus on effective governance, robust democracies and ongoing economic and social development." (White Paper, 1999: 5). To achieve its goals and vision, South Africa often offers and promotes its expertise and good offices in conflict mediation and facilitation. Ending conflict through negotiated transitions to constitutional democracy is therefore an important South African objective for the rest of the continent.

The establishment and consolidation of liberal democracy across Africa serves South Africa's interests, but it is also driven by South Africa's perception of its own liberation struggle and transition (Nathan, 2005: 362). South Africa believes that non-violent forms of conflict resolution are the most appropriate methods of achieving durable peace and stability in civil wars, and South Africa has been engaged in mediation and facilitation not only in Burundi and the DRC, but also the Comoros, Côte d'Ivoire, Liberia and Sudan (Nathan, 2005: 364).

Influenced by its own negotiated transition, the typical strategy for South Africa is to promote democracy by mediating between different belligerent factions. The goal is to get everyone around the same table to compromise and agree on inclusive transitional political arrangements as part of a peace agreement. Usually, the agreement consists of the establishment of the following: a broad-based national unity government involving the different belligerents;

10. For a review of South African foreign policy, see Alden, Le Pere, 2003.

confidence-building measures and the reform of the security forces; provisions to address justice issues; and a procedure and timetable for the drafting of a new permanent constitution and the holding of democratic elections. The idea behind this model is the belief that immediate public electoral contestation can be counterproductive in countries emerging from violent conflict, whereas elite power-sharing pacts can buy time and allow new patterns and liberal norms to take hold. As elites grow accustomed to working together, more integrative liberal forms of democracy can be enshrined in a permanent constitution[11].

However, several authors have shown why this model may be problematic. For instance, Christopher Clapham criticizes the model for its assumption that participants in the political process share a common value framework within which differences are negotiable. He sees a dissonance between the civic values underlying attempts at mediation, and the actual conflict in many areas of Africa (Clapham, 1998). Other authors claim that conflict resolution and democracy promotion programmes do not necessarily lead to the desired liberal democracy. There may be a tension between the compromise agreements between armed belligerents (including some of the worst abusers of human rights) to stop the fighting, and the institutions that are required for longer-term peaceful development (Rothchild, 2002). On a global level, Levitsky and Way show how efforts to promote democracy and human rights have reshaped opportunities and constraints facing elites, but have not necessarily led to liberal democracy. Rather, competitive authoritarianism and other hybrid regimes are becoming common (Levitsky, Way, 2002: 63). Similarly, Thomas Carothers points out that it is a mistaken assumption that transitional countries will move towards democracy in a set sequence of stages. He disputes the notion that countries can democratise according to external blueprints despite their underlying conditions and prior institutional legacies (Carothers, 2002: 6-9).

The "model" promoted by South Africa and others in Burundi and the DRC have encountered some of the problems highlighted by these authors. There are several differences in substance and in the form of the peace processes in the DRC and Burundi and in the problems that they have faced. Both, however, have involved elements of the typical transitional model.

11. This is a similar justification to the use of political pacts in transitions to democracy, discussed extensively in the democratisation literature in the late 1980s. This literature was initially based primarily on the Iberian, Southern European and Latin American transitions from authoritarian to democratic rule. See O'Donnell, Schmitter, 1986. For a discussion on the rationale for transitional national unity governments in Africa, see Zartman, 1994: 271; Ottaway, 1999: 131. See also Przeworski, 1991.

The Arusha Process for Burundi

At the outset, South Africa played only a secondary role in the Burundian negotiations. Efforts to resolve the Burundian crisis were centred on a regional initiative, with Tanzanian former President Julius Nyerere as facilitator. Nyerere and the other leaders in the region believed that it was necessary to take a strong stance against Pierre Buyoya's July 1996 military coup. The region placed economic sanctions on Burundi, and said that three conditions had to be met before their removal: restoring the National Assembly, re-instating political parties, and re-starting unconditional peace negotiations with all Burundian parties (Joint Communiqué of the Second Arusha Regional Summit, 1996). However, it took another two years before Buyoya's government agreed to multi-party negotiations chaired by Nyerere, which became known as the Arusha process.

When the Arusha negotiations finally began in June 1998, they brought together 17 Burundian delegations under Nyerere's facilitation[12]. The issues under negotiation were comprehensive, and five committees were established to deal with five themes: 1) the nature of the Burundian conflict; 2) democracy and good governance; 3) peace and security; 4) reconstruction and development; and 5) implementation and regional guarantees[13]. Although the South African government was not directly involved with the Burundian process at this stage, two South African officials had prominent roles. Nicholas (Fink) Haysom, a South African lawyer who had been a legal advisor to Nelson Mandela and the ANC during South Africa's transition was the Chairperson for the powerful Second Committee, which was responsible for drafting a power-sharing agreement and principles for a future Burundian constitution. General Andrew Masondo, a South African who had been in charge of integrating the South African National Defense Force (SANDF) after apartheid was the Vice-Chair of the Third Committee, which had been tasked with reaching a cease-fire and an agreement on the reform of the armed forces.

The Arusha negotiations continued over the next two years. They were characterised by constant strategic re-positioning, fragmentation of the Bu-

12. These delegations were the Government and the different Burundian political parties, including parties that represented some (though not all) the armed movements.

13. Each committee had one or two members from each Burundian delegation, and a foreign Chair and Vice-Chair chosen by Nyerere. The Chairpersons were Armando Guebuza of Mozambique, Fink Haysom of South Africa, Reverend Matteo Zuppi of Italy, and Georg Lenk of Austria. Nelson Mandela became the Chair of the Fifth Committee on Implementation and Guarantees, but this committee was established later in the negotiations process.

rundian political parties, back-tracking, and manipulation of the facilitation team[14]. The armed conflict continued throughout the negotiations.

South African involvement increased when Nelson Mandela took over the facilitation of the Arusha process after Nyerere's death in October 1999. Mandela had a strong desire to conclude the negotiations, and he took a more heavy-handed approach towards the Burundian participants. In his characteristically direct manner, Mandela openly criticised the Burundian leaders. In his first speech to the Burundian delegates, Mandela said: "Why do you allow yourselves to be regarded as leaders without talent, leaders without a vision? … The fact that women, children and the aged are being slaughtered every day is an indictment against all of you" (Mandela quoted in Fisher, 2000: A4). Both Nyerere and Mandela viewed the conflict in Burundi through the same lens as the apartheid struggle in South Africa, where an ethnic dominant minority ruled over a disenfranchised majority[15].

However, there were critical differences between the situation in Burundi and the situation in apartheid South Africa. As the former UN Special-Representative of the Secretary-General for Burundi pointed out, many of the people fighting in Burundi had grown up in the same communes and attended the same schools. More importantly, the use of mass violence was very different in Burundi and South Africa. In Burundi, violence, ethnicity, regional alliances and personal ties were all used as means to the end of gaining access to economic and political resources (Ould-Abdallah, 2000).

During the Arusha negotiation sessions in February and March 2000, Fink Haysom presented a working document that included a three-year transitional power-sharing government. Mandela then submitted a draft agreement to the delegates, saying: "You must study these draft compromise proposals and make your comments … but after making your comments, we will decide which comments to accept. You must now, after that, leave this matter entirely to the facilitation team". With this increased pressure from Mandela, the Arusha Peace and Reconciliation Agreement for Burundi was signed on August 28, 2000, in the presence of US President Clinton and other world leaders.

This strong outside pressure therefore succeeded in delivering an agreement that outlined specific constitutional principles and arrangements. However, it

14. Gérard Prunier, an observer at Arusha, pointed out that the facilitation team was ill-equipped and ignorant about the Burundian reality. Prunier, 1999.

15. See discussion in Chrétien, Mukuri, 2002: 126. The focus on similarities between South Africa and Burundi is also found in McMahon, 2001.

was a limited agreement with insufficient Burundian support, which could not bring about comprehensive peace or reconciliation. Several Tutsi parties had signed the Arusha Agreement with formal reservations on fundamental points. Two major armed factions that had been excluded from the negotiations, the Palipehutu-FNL and the CNDD-FDD, did not sign at all and continued their armed struggle. Furthermore, even among those politicians and parties that had signed the agreement, it was hard to distinguish between those who were strongly committed to the Arusha constitutional principles, and those who had signed due to external pressure and personal ambitions. Many individual leaders may have had mixed motives. They were willing to sign onto Arusha as long as it gave them attractive political offices and satisfied personal ambitions, but many were also cognizant and willing to engage with the option of further conflict if their interests were not served through Arusha. As such, critics of the Arusha process say that it was akin to office trading among elites, often among the very hardliners that had provoked the conflict in the first place.

Among other provisions, the Agreement specified a transitional period of 36 months. Transitional political positions were divided between the G7 (predominantly Hutu parties) and G10 (predominantly Tutsi parties)[16]. Burundian politicians, however, did not agree on who should be the President during the transitional period. One year after the signing of Arusha, Mandela broke the deadlock by announcing that Buyoya would remain President for the first 18 months of the transition, and a FRODEBU member would be Vice-President[17]. In the second 18 months of the transition, a FRODEBU member would be President and an UPRONA member would be Vice-President. To secure the establishment of the transitional institutions, Mandela also persuaded the South African government to provide a 700 member protection force for Burundian politicians returning from exile to take up positions in the transitional government. In October 2001, the Burundian National Assembly adopted a transitional constitution by acclamation, and the transitional government was inaugurated on 1 November 2001. The text of the transitional constitution had been set out by the Burundian government on the basis of the principles outlined in Protocol II of the Arusha Agreement.

16. The Arusha Agreement specified that the G7 parties would have more than half but less than 3/5 of the Ministerial portfolios, and 60% of the seats in the National Assembly. The Senate would be divided 50-50 between G7 and G10 members, but the President of the Senate would come from the G10.

17. Domitien Ndayizeye was chosen by FRODEBU to be Vice-President. He became President in April 2003, for the second half of the transition.

By the end of 2001, Burundi was therefore in a somewhat contradictory position of having a peace agreement and interim government institutions without having peace. The formal constitutional structures were in place, but the war continued. Negotiations for a cease-fire with the rebels were conducted on and off throughout the transitional period, with active roles played by the Deputy President of South Africa, Jacob Zuma, as the main facilitator, and by the Regional Initiative on Burundi, chaired by Ugandan President Museveni. In October 2002, agreements were signed with two smaller wings of the rebel groups[18]. In June 2003, the South African protection force was incorporated into the first AU peacekeeping mission, the African Mission in Burundi (AMIB). In November 2003, South African mediators succeeded in reaching an agreement between the Burundian government and the larger rebel faction (CNDD-FDD Nkurunziza wing), which included a protocol on power-sharing in the transitional government as well as in the army[19]. A UN peacekeeping mission, ONUB, was deployed in June 2004 to take over from the AU forces.

One rebel movement, the FNL, was still actively fighting in Burundi at the end of the transitional period in August 2005. Nonetheless, despite the continued low-intensity fighting, a new constitution was drafted by Burundian politicians with the help of the Presidents of South Africa, Rwanda and Uganda during the later stages of the transitional period. The new constitution includes constitutional quotas for both ethnic and gender representation. There were some disagreements over the text of the constitution that resulted in delays for the constitutional referendum (which was mandated by the Arusha Agreement). The referendum was finally held on February 28, 2005, and Burundians across the country voted overwhelmingly in favour of the new constitution. Communal, legislative and presidential elections were held later in the year.

The Inter-Congolese Dialogue

In the DRC, international and regional facilitators put forward a broadly similar transitional model, but the trajectory of the negotiations was different

18. These smaller wings, the CNDD-FDD (Ndayikengurukiye wing) and the Palipehutu-FNL (Mugabarabona wing), signed under strong South African pressure. The Nkurunziza wing of the CNDD-FDD and the Rwasa wing of Palipehutu-FNL continued to fight.

19. The Global Ceasefire Agreement was an agreement that finalized earlier political and security power-sharing agreements signed in Pretoria on October 8, 2003 and November 2, 2003. The CNDD-FDD was given 4 ministerial positions, 15 seats in the transitional national assembly, and 40% of the officer positions in the new defence force (Burundi National Defence Force).

from the Burundian process. The large number of external countries involved in fighting in the DRC, the enormous economic stakes, the weakness of the Congolese state and the vastness of the territory, meant that the situation was very different from neighbouring Burundi. South Africa had always been interested in pursuing a negotiated settlement in the DRC. In 1996 when Laurent Kabila and the rebel movements were fighting their way to Kinshasa, President Mandela unsuccessfully tried to broker a deal between Mobutu and Kabila. In the second rebellion against Kabila in 1998, South Africa again tried to intervene diplomatically to push for a new government that was "broadly based with representatives of all political persuasions in that country." (Landsberg, 2000: 111). Many other African countries did not agree with the South African emphasis on negotiations rather than force as a way to settle the conflict. In 1998, while South Africa pushed for a diplomatic solution, Zimbabwe, Namibia and Angola deployed troops to help President Kabila[20].

Negotiations finally led to the signing of the Lusaka Agreement in July 1999 by the governments of the DRC, Rwanda, Uganda, Namibia, Zimbabwe and Angola. The main Congolese armed rebel groups signed a month later[21]. The Lusaka Agreement was a cease-fire agreement calling for the withdrawal of foreign forces from the DRC, disarmament and repatriation, and the deployment of a UN peacekeeping force. It also called for: "inter-Congolese political negotiations which should lead to a new political dispensation in the Democratic Republic of Congo." (Lusaka Cease-fire Agreement Chapter 5 (5.1)). The Agreement provided a calendar for the inter-Congolese negotiations, and specified that they should include the Congolese government, the armed groups, the unarmed opposition (political parties), and civil society (Forces vives), all with equal status. Therefore, the idea of holding inter-Congolese negotiations was innovative due to the inclusive nature of the slated participants[22]. The negotiations were to be held under the aegis of a neutral facilitator, and Ketumile Masire, former President of Botswana was appointed in December 1999.

20. These countries also accused South Africa of double standards since South Africa was selling arms to Rwanda and Uganda, who had intervened in the DRC on the side of the rebels. South Africa eventually reversed its decision to sell arms to Rwanda and Uganda and continued to say that the problem in the DRC could not be solved militarily but had to be resolved through negotiations. See Smis, Oyatambwe, 2002: 417.

21. The MLC signed on August 1, 1999 and 50 people representing both factions of the RCD signed on August 31, 1999.

22. The inter-Congolese negotiations were even more inclusive than the Burundian Arusha negotiations, since the participants at Arusha were limited to political parties.

It took a long time for the cease-fire outlined in the Lusaka Agreement to be implemented and for the inter-Congolese negotiations to begin. President Laurent Kabila refused to work with facilitator Ketumile Masire. An opportunity to breathe new life into the peace process occurred in January 2001, when Laurent Kabila was assassinated and his son, Joseph Kabila, became President. Joseph Kabila recognised Masire as facilitator for the inter-Congolese dialogue and allowed the United Nations Organisation Mission in the Congo (MONUC) to increase its deployment.

Preparatory meetings for the inter-Congolese dialogue were held in Gaborone in August 2001, and the dialogue opened in Addis Ababa in October 2001. Substantive discussion was blocked because only 80 of the more than 330 designated Congolese delegates were invited to Addis due to technical and financial constraints. It was decided that the inter-Congolese dialogue had to be even more inclusive, and should involve groups such as the Mai-Mai militias, religious orders and traditional chiefs. Informal consultations, chaired by the UN from November 2001-February 2002, succeeded in narrowing the differences among the various Congolese parties.

South Africa became increasingly involved in the process in 2002, when the inter-Congolese dialogue resumed in Sun City, South Africa from February to April 2002. By then, there were 360 delegates for 8 components and entities: the Government, the RCD, the MLC, the RCD-N, the RCD-ML, the Mai-Mai, the unarmed political opposition, and civil society representatives (Forces vives). The delegates split into five technical commissions dealing with: political and legal issues; security and defence; social, cultural and humanitarian affairs; economy and finance; and peace and reconciliation.

The inter-Congolese dialogue suffered from internal and external problems. There was a lack of agreement among the parties on several important power-sharing points, and some individuals were clearly prospering through continued conflict and insecurity. The facilitator, Ketumile Masire, perceived his role to be minimalist and had difficulty mediating between the belligerents and their foreign allies (International Crisis Group, 14 May 2002). South Africa, however, wanted the dialogue to be successful, and South African President Thabo Mbeki put the negotiations back on track and encouraged more international pressure. Since it was the host country, South Africa had strongly committed itself to the inter-Congolese dialogue, and failure would hurt South Africa's reputation as a successful peacemaker[23]. Nonetheless many

23. As an economic power, South Africa also may have considered the business opportunities for South African companies that would exist in a peaceful DRC. For a discussion of South Africa's motives, see Rogier, 2004.

Congolese questioned the neutrality of the South African government, which was seen as overly supportive to Rwanda and the RCD-G. The rivalry between South Africa, Angola and Zimbabwe for the leadership of the Southern African Development Community (SADC) as well as for contracts in the DRC (most notably mining contracts), also contributed to difficulties and delays in the inter-Congolese negotiations[24].

No comprehensive agreement was reached at the inter-Congolese dialogue in Sun City, but the DRC government and the MLC delegation concluded a bilateral deal between themselves, which several smaller parties also signed. Then, in Pretoria in July 2002, South Africa brokered an agreement between the Governments of the DRC and Rwanda, whereby Rwanda would withdraw its forces from the DRC, in return for the disarmament of Rwandan Hutu rebels. A separate agreement was signed between the DRC and Uganda in Luanda in September 2002. By the end of 2002, most of the Angolan, Zimbabwean, Ugandan, Rwandan, and Burundian troops had withdrawn from the DRC[25]. Following months of consultations, shuttle diplomacy and negotiations assisted by the UN Special Envoy Moustapha Niasse and the Government of South Africa, the Congolese parties signed an all-inclusive peace agreement in Pretoria in December 2002. Further negotiations between the parties under joint UN/ South African auspices led to agreement on the text of a transitional constitution and a memorandum on military and security issues, signed in Sun City, South Africa in April 2003 with facilitator Masire[26].

The agreement provided for a transitional government with President Joseph Kabila (PPRD)[27], and four Vice-Presidents from different groups and factions: Jean-Pierre Bemba (MLC), Abdoulaye Yerodia Ndombasi (PPRD),

24. Initially, there was also some rivalry between South Africa and Zambia over who should lead the process. See Reyntjens, 2001: 315.

25. However, the Government of the DRC did not live up to its commitments under the agreement, since it failed to disarm or demobilize the Hutu rebels.

26. The Sun City Agreement was a political compromise between the main armed groups in the DRC, the *Forces armées congolaise* (FAC – the former government army), the *Mouvement du libération du Congo* (MLC, led by Jean-Pierre Bemba), the *Rassemblement congolais pour la démocratie-Goma* (RCD-G, led by Azarias Ruberwa), the *Rassemblement congolais pour la démocratie-mouvement de liberation* (RCD-ML, led by Nbusa Nyamwisi), the *Rassemblement congolais pour la démocratie-national* (RCD-N, led by Roger Lumbala), and *Mai-Mai* militias. These groups converted themselves into political parties that agreed to share power in Kinshasa, along with representatives from civil society and the political opposition.

27. Kabila's party is the *Partie du people pour la réconstruction et la démocratie* (PPRD).

Azarias Ruberwa (RCD-G), and Z'Ahidi Ngoma (civilian opposition). Ministerial portfolios were divided proportionally between the armed groups, the unarmed opposition, civil society, and the Mai-Mai[28]. The transitional government was sworn in on 30 June 2003 and was scheduled to govern for two years. The first national elections since 1965 were supposed to have been held in June 2005, but they were delayed until 2006 and voter registration is ongoing in many parts of the country. In May 2005, the transitional National Assembly adopted a draft new constitution with a text agreed on by representatives of the warring parties. This constitution will be put forward in a referendum before the end of 2005[29].

Implementation

In both Burundi and the DRC, detailed discussion in technical committees, extensive negotiations, and pressure by South Africa and other international and regional actors led to eventual peace agreements. Without Mandela's efforts and the deployment of a South African protection force in Burundi for politicians returning from exile, and without Mbeki's pressure to resolve outstanding issues in the Congolese negotiations, it is likely that the peace processes in the two countries would have collapsed.

Nonetheless, both peace processes evolved in environments that were tremendously different from South Africa's own negotiated transition, and the troubled implementation of the two agreements reflect these differences. It is still too early to assess whether or not they will be able to result in a long-lasting peace, but some problems are evident. The problems can be traced to a number of factors, including the political economy of conflict, prior state structures and authority, regional dimensions of conflict and the difficulties in addressing justice issues and popular exclusion.

The main difficulty in both Burundi and the DRC has been continued armed conflict. In Burundi, the inability to reach a cease-fire in the original Arusha Agreement meant that negotiations with the rebel movements continued after the establishment of transitional institutions. Consequently, it was difficult to implement other parts of the Arusha Agreement, such as economic and social reform as well as the provisions on justice and truth

28. The transitional Parliament consists of a National Assembly with 500 members and a Senate of 120 members.

29. Under the draft constitution, the current 10 provinces would be divided into 26. The DRC would be a decentralised but unitary state.

and reconciliation[30]. For the bulk of the Burundian population, the Arusha Agreement did not bring about any meaningful change in their daily lives, as insecurity and violence continued and poverty increased (Van Eck, 2002). Eventually, the largest rebel group, the CNDD-FDD, was brought into the peace process and violence diminished in many parts of the country, but the remaining active rebel group, the FNL, can still undermine the process if it is joined by other groups who are unhappy with events in Burundi[31]. Furthermore, there are allegations that the FNL has bases in eastern Congo, thus showing that the conflicts in the region are still inextricably linked[32].

Despite the numerous cease-fire agreements in the DRC, violence has also continued there, with fighting concentrated in the eastern parts of the country. Rwanda has repeatedly sent troops to eastern DRC to pursue the Hutu extremist *Forces démocratiques pour la libération du Rwanda* (FDLR), and also to control and manage lucrative commercial dealings. The FDLR has an estimated 8000-10 000 troops in the DRC and can still launch cross-border raids into Rwanda[33]. Fighting in the eastern DRC once again escalated in February 2004, including bloody battles in the city of Bukavu

30. The Arusha Agreement stipulated that a truth and reconciliation commission be established, but progress has been slow. In April 2003, the transitional National Assembly finally passed a law outlining the functions of a truth and reconciliation commission, but it was not established. In June 2005, the UN Security Council adopted a resolution to create a mixed (international and Burundian) truth commission and special court to prosecute human rights violations, but the Burundian government requested more time to study the proposals after the new government takes office following elections.

31. The Burundian human rights league, Ligue Iteka, pointed out that in July 2005, the FNL was active in 9 of Burundi's 17 provinces, a sharp rise from May 2005 when it was only active in one province. Viewed on: www.ligue-iteka.africa-web.org, 28 July 2005.

32. See for instance "Attaque des FNL dans l'ouest du Burundi" Arib news. 19 August 2005. Viewed on www.arib.info

33. In March 2005, following negotiations with the DRC Government under the auspices of the Community of Sant'Egidio in Rome, the FDLR announced that the movement was willing to cease military action against Rwanda and return home. However the Rwandan government has expressed doubts. See "The Congo: Solving the FDLR Problem Once and for All," International Crisis Group, 12 May 2005. In January 2005, the AU said that it would send a military force of 7000 troops to forcibly disarm the FDLR. The EU has said that it may support military action. See "EU may support military action against Hutu rebels, Ajello says", IRIN news, 24 June 2005. The FDLR is extremely divided and there have been a number of recent defections and leadership disputes. See for instance "Lutte de leadership au sein de la rébellion rwandaise des FDLR" Viewed on: www.arib.info, June 25, 2005.

in May/ June 2004. In 2005, periodic active fighting continued in the Kivu provinces.

The continued violent conflict in the DRC and Burundi is related to the political economy of conflict in the region, and the resulting factionalism within the armed groups and political parties. There are powerful people and interests in the region that benefit from continued conflict and insecurity. For some, war is preferable to peace, particularly if their prosperity and interests are threatened by the prospect of democratic elections. As Reyntjens explains: "local, national and regional state and non-state actors indeed act rationally, engaged as they are in cost-benefit analyses, whose outcome often shows that war, instability and state decay are more attractive than peace, stability and state reconstruction." (Reyntjens, 2001: 312).

Reflecting these pervasive war economies, the violence in the DRC and Burundi is not conducted on behalf of clearly defined political groupings with explicit grievances and objectives. Instead, rebel movements, political parties and groupings split and merge according to strategic interests and the opportunistic calculations of individual leaders. While there are legitimate grievances in the two countries, these have not been clearly represented by a cohesive opposition or rebel leadership. As a result, instead of negotiations leading to an all-encompassing new political dispensation that South Africa had envisaged, the talks in Burundi and the DRC were more akin to office-trading and bargaining between unrepresentative leaders, warlords, and opportunistic politicians. Power-sharing became a tool to placate opportunistic and sometimes dangerous leaders, rather than as a tool to ensure inclusivity and participation.

In Burundi, factionalism and the dissonance between leaders and those they claimed to represent led to some frustration on the part of the facilitation team. At times, when a leader of an armed movement would sign on to the agreement, the movement would split and one faction would continue to fight. It was, of course, impossible to accommodate everyone in the transitional structures, as there are a limited number of offices positions and postings. The Arusha process distributed offices among parties down to the level of diplomatic postings and provincial administrators, but it was not possible to convince everyone that they stood to gain more from peace than through violence.

The emphasis on office division pushed other issues to the margins and the transitional government in Burundi was disconnected from the population, particularly the rural population. Despite this disconnect, Burun-

dians voted overwhelmingly in favour of the new Constitution in the 2005 referendum at the end of the transitional period[34]. At first glance, this may seem surprising. However, the 2005 results were similar to the results of the last constitutional referendum held in 1992, where 90% voted in favour of the 1992 Constitution with a 97% turnout. Burundians were tired of war and wanted an end to the transitional period, but their displeasure with the transitional politicians was registered later. The former rebel party, the CNDD-FDD, won the communal and legislative elections, held in June/ July 2005. This was a devastating defeat to FRODEBU, who along with UPRONA, had been the main partner of the transition[35]. The CNDD-FDD, which was not associated with the transitional institutions due to its late arrival in the process, capitalized on these feelings of disenchantment. Yet it is too early to tell whether the new government will reach out to its political opponents and whether it will address the needs of the rural population that were largely ignored in the transitional period. The FNL rebel group has expanded its areas of military operations and the links with the conflict in the DRC are worrying.

The DRC has faced even more serious problems related to the political economy of conflict, state weakness, and regional networks. Many parties and factions are fighting to preserve the financial networks that they established since the first Congo war of 1996[36]. As such, many of the former belligerents have been reluctant to give up their power and have maintained parallel command structures in the army and in the administration. It has therefore been difficult to implement the Pretoria/ Sun-City Agreements and allow the transitional institutions to function properly.

Furthermore, Congolese party leaders lack control over their military and political wings. For instance, many of the hardliners around President Kabila

34. In the February 2005 referendum, 92% of Burundians voters were in favour of the new Constitution, which guaranteed 60-40 Hutu-Tutsi power-sharing in the National Assembly and the Government, and 50-50% power-sharing in the Senate and in the National Defence Forces. Voter turnout was over 90%.

35. In the legislative elections, the CNDD-FDD won 58.23% of the vote, FRODEBU won 22.33%, UPRONA 7.3%.

36. The economic wealth at stake in the DRC is enormous. For instance, at their peak in December 2000, revenues from the export of coltan were over US $ 1 million a month. That year, the RCD also exported gold and diamonds worth $30 million. Tull, 2003: 435. See also "United Nations Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo", 16 October 2002.

do not relish the prospect of elections and are eager to put an end to transitional power-sharing governance and pursue military action against the RCD-G. Many hardliners close to the President continue to support the FDLR, even though Kabila declared the FDLR unwelcome in the DRC in 2002 (International Crisis Group, 30 March 2005). Similarly, the RCD-G faces serious factional disputes. There is a split between hardline RCD-G commanders and representatives in the east, and the RCD-G representatives in the transitional institutions in Kinshasa. Supported by Rwanda, RCD-G dissidents in the east feel that they have nothing to gain from the transition and have criticised Vice-President Ruberwa[37]. The dynamics within the various parties and armed groups change continually, driven by political and economic considerations, and this lack of control allows hardliners to retain power and visibility and increases the chances of continued military conflict. The weakness of the state and the existence of competing structures of local authority mean that armed groups, particularly in the eastern part of the country, continue to manipulate and abuse civilians. Furthermore, corruption is rampant and is tied to conflict. The rank and file in the army are paid irregularly, and resort to looting from the local population. This is not a case of coherent Congolese groups under a strong state structure, fighting in response to clearly articulated grievances.

South Africa and its partners hoped that by giving the main Congolese power-brokers a stake in governance, they would be persuaded to stop fighting and learn to work together in preparation for elections. It was also hoped that by including civil society (Forces vives) and unarmed opposition members in the negotiations, the interests of ordinary Congolese would be represented. These efforts largely failed (Boshoff, Rupiya, 2003; Rogier, 2004: 32), and as usual, the bulk of the Congolese population were the losers. The power-holders in the DRC continued to pursue their clientilistic and predatory behaviour, following previous patterns. There has been little effort to rebuild state capacity or to finance social services. Rather, Congolese political and military leaders to continue to follow well-established old patterns, which include a reliance on aid, outside assistance, foreign investment, and resource extraction to compensate for their lack of domestic support. Little attention has been paid to justice issues and the judicial system has not been able to address human rights abuses or corruption.

As noted above, the Congolese conflict is a regional conflict, therefore peace in the DRC depends on peace in the region. Rwanda and Uganda continue

37. The hardline RCD-G Governor of North Kivu, Eugene Serufuli, and other RCD-G dissidents sometimes refuse to follow Ruberwa's orders.

to be directly involved. A US-sponsored Tripartite Commission consisting of the DRC, Rwanda and Uganda was formed in 2004 in response to the problem of the FDLR Rwandan rebels. (Burundi joined in September 2005, thus changing the name to the Tripartite-Plus Commission). However, the FDLR problem has not been resolved, thus maintaining Rwanda's source of justification for military involvement in the DRC. More concerted efforts to deal with the regional elements of the Congolese conflict are necessary. Likewise, a number of Ugandan rebel groups have taken advantage of the lack of state control in the eastern DRC. Most recently, the Ugandan rebel group the Lord's Resistance Army (LRA) is reputed to have fled to the DRC, and Uganda has asked to send troops to the DRC to fight them. Security threats, economic exploitation opportunities, and porous borders are part of the regional dynamics of the Congolese conflict.

Conclusions: The South African Approach to Peace

The Arusha process for Burundi and the inter-Congolese dialogue were loosely based on similar principles that guided the South African transition. South Africa's policy of promoting liberal internationalism through facilitation and multilateral engagement based on its own successful transition was put to the test in these two countries. Burundi in particular became a showpiece for the African Renaissance, as well as for Mandela's power as a mediator and South Africa's new role as peacemaker. If South Africa could not succeed in Burundi, how could it succeed in tougher cases such as the DRC? Once it had committed itself, South Africa's desire for success goes a long way in explaining the South African energy and resources put toward the peace process in Burundi.

Indeed, the principles behind the efforts of South Africa and other peacebuilders in the Great Lakes region were largely commendable. It is natural to try to reproduce a successful model, and the vision promoted in the DRC and Burundi was attractive. In Burundi, Arusha was the first attempt in that country's history to openly address all facets of the conflict, including divergent views on the nation's history, justice issues, economic and social issues, military reform and of course power-sharing. The ideals enshrined in the inter-Congolese dialogue went even further. This nation-wide dialogue, which included civil society members and unarmed groups, was intended to set the foundations for a new political order based on consent and inclusive participation. The goal was to achieve political legitimacy, good governance and an end to violence.

Ultimately however, both processes fell back onto a more narrow focus on the division of political and military offices, primarily among belligerents. Reaching these agreements over political and military offices took precedence over addressing justice, good governance and socio-economic issues. Furthermore, these agreements were unable to bring an end to the violence that they were intended to quell. This chapter has therefore uncovered the limits to the transportability of the South African model, despite its normative appeal. In the Great Lakes region, these limitations can be traced to three main factors.

First, the nature of conflict in South Africa was different from the conflict in Burundi and different again from the conflict in the DRC. It is one thing to fight for a specific grievance or injustice with clear demands and a cohesive leadership, and quite another to fight for elusive and changing goals, economic privilege and the control of resources. In the DRC, rebel groups had no clear, consistent grievance or coherent political manifesto. In Burundi, there were clear grievances related to the historic exclusion of Hutu from structures of political, military and economic power. Yet the scramble for political offices, the shifting alliances and allegiances, and the continued conflict show that conflict was not solely about ethnic grievances and imbalance. In the Great Lakes region, enormous profits can be made from conflict, especially in the DRC. The South African model fails to adequately address the political economy dimensions of conflict.

Furthermore, particularly in the DRC, patron-client ties and years of predation have meant that certain types of informal systems and structures of authority are firmly rooted. The Congolese state is weak, but this does not mean that sources of power and authority are non-existent. On the contrary, the weakness of the state has enabled different sorts of powerful licit and illicit local-global networks of authority to gain a strong base in the DRC. Superimposing formal "rules" and constitutional structures on an environment with deeply entrenched informal structures, leads to parallel, and sometimes conflicting, political structures. Tensions between formal and informal political arrangements in the DRC mirror the tensions between formal and informal economic structures and formal and informal security arrangements in the country. The elections scheduled for 2006 are unlikely to resolve the problem of political authority in the DRC. Indeed, there is a risk that elections could aggravate the existing cleavages between alternative sources of authority and could create new possibilities for a violent contest.

Second, this chapter has shown that regional dynamics in the Great Lakes are of paramount importance. An internal transitional power-sharing process is clearly not enough when the sponsors of violent local groups are external

patrons. When the interests of some external actors, including economic interests, are served by conflict, there is an added problem. Even in Burundi, military and rebel networks cross permeable borders, with bases and arms provided by neighbours. It is inherently difficult to build peace in a dangerous neighbourhood.

Third, the experience of Burundi and the DRC point to sequencing problems. Specifically, South-African style peacebuilding is difficult when fighting is ongoing. South Africa calculated that even with the cease-fire violations in the DRC, and the absence of a comprehensive cease-fire in Burundi, it was better to move ahead with other parts of the transition. If South Africa and its partners waited for credible, comprehensive cease-fires in the two countries before encouraging constitutional agreements and transitional arrangements, they would have been waiting a long time. Nonetheless, it should be recognised that when political arrangements are implemented before credible cease-fires, they will face very different constraints than those that are implemented later.

There is also a real dilemma about to what to do with those who violate cease-fires and continue to fight during political transitions. Should they be accommodated and enticed back to the negotiating table, or should they be marginalised and dealt with by justice or by force? At worst, the desire for inclusivity in the peace processes in the Great Lakes may have rewarded violent behaviour. Politicians were able to "shoot their way to the negotiating table" (Rogier, 2004: 39). Some politicians in both countries correctly calculated that continued fighting could bring them a better office later on. This is a dangerous signal to send, both in terms of the message it gives to those who were willing to compromise earlier and to non-violent opposition figures, as well as the message it may give to rebel groups in other countries who are developing their own strategies.

The human costs of the tragedies in the Great Lakes region cannot be overstated, and this chapter has shown the limits of the South African approach to peacebuilding in that region. The critical question stemming from the Great Lakes region is how to build peace in a context where some key actors do not want to do so; when some local and foreign interests benefit from continued conflict and where informal clientilist structures are pervasive. This is not to say, however, that peacebuilding efforts in the Great Lakes region have been in vain. Reaching transitional power-sharing agreements among belligerents may have been a necessary, though not sufficient, step towards eventual peace. There have been a number of important changes in the two countries. In Burundi today, competition is centred primarily between different groups of

Hutu, rather than between Hutu and Tutsi groups, partly as a result of ethnic constitutional requirements and the electoral law. Furthermore, gender provisions in the Arusha Agreement as well as in subsequent legislation mean that Burundian women now have a real opportunity to participate in the political institutions of their country. In the DRC, progress has been more limited and the peace process is still at risk. However, there are hopeful signs as well, such as the passing of the draft constitution, the laws on citizenship, the national army, and political parties by the Congolese legislature. Issues of truth and justice have also belatedly been put back on the agenda, though the outcome remains to be seen. While much difficult work remains to be done, it is hoped that small successes can lead to bigger changes that will make peace meaningful for the wider populations in the Great Lakes region.

Constitutionalism and Democracy in Nepal: what went wrong?

Upendra Dev Acharya[1]

Abstract: *Constitutionalism and democracy together can be an effective catalyst to the political, social, and economic success of a country. Constitutionalism and democracy can be attained through an unconditional popular sovereignty. Although democracy has been introduced in many developing countries, particularly in new constitutions, popular sovereignty is conditioned either by monarchical or other political dictatorship, which, in turn, has resulted in fake constitutions and defective democracy. Nepal is an example of a country in which fake constitutions and defective democracy have persisted for a long period of time due to disregard of popular sovereignty. Nepalese constitutionalism and democracy serve the king, not the people.*

Division of sovereignty between the king and few political elites has been a common phenomenon in Nepalese constitutional history. This dualism of sovereignty has steered Nepal into insurgency, instability, underdevelopment, irresponsible political leadership, and a power mongering monarchy. Now, Nepal is on the verge of drastic constitutional change. If real democracy and constitutionalism are to be achieved, this change must confirm unconditional popular sovereignty; an optimal opportunity for Nepalese people for survival, growth, and renewal of the polity; a guarantee of the rights of the people, and limitations on governmental authority and power.

Introduction

Constitutionalism and democracy together have become a forceful thought in modern political life. A constitution provides a mechanism for a democratic

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political order where citizens are able to govern themselves; the idea of self-government or popular sovereignty and the idea that the majority rules should be essential and central parts of a constitution. Countries where changes in the basic framework of the government — from dictatorship to democracy — have occurred all adopted new constitutions. Eastern European countries, South Africa, Nepal, Iraq, and Afghanistan are a few examples. These new constitutions are designed using principles of modern constitutional theory, such as democracy, separation of power, human rights, and independent judiciary, in order to protect representative democracy and constitutionalism against the minority or authoritarian government. This marriage between democracy and constitutionalism is a critical phenomenon in the history of the constitutional theory and practice.

The strength of the democracy-constitutionalism marriage — which sounds a bit like an oxymoron — depends on the tailoring of the constitution, existing institutions, cultural understanding, and the doctrinal structure of a country. I will discuss Nepal's constitution and analyze whether constitutionalism and democracy are realized. In doing so, I attempt to portray Nepal and its constitutional development to analyze the current constitution and to test that constitution on the basis of three criteria: effective and meaningful public participation in constitution making; whether the constitution provides for citizens and their state an optimal opportunity for survival, growth, and renewal of the polity; and at the same time, whether the constitution defines and guarantees the rights of the people vis-à-vis the government and determines limitations on governmental authority and power.

1. Nepal: a Brief Introduction

Nepal is a small land-locked country situated between the two most populous countries in the world — China to the north and India to the south, east and west. Nepal comprises an area of about 147,181 km^2, 885 km from east to west and a mean width of 193 km from north to south. Nepal is generally divided into three parallel zones running east to west. Terai, a flat tropical area bordering India and an extension of the Indo-Gangetic plain, is a strip of land along the southern part of the country. This region, with an elevation of 70 to 300 m., covers about 14% of the total land area. The second zone, the northernmost part of the country, is mountainous and covers about 43% of the total land area. Eight of world's ten highest mountains, including Mt Everest (8884 m.), are in this region. Between the mountains and the Terai is the zone referred to as "the hills." This region, consisting of deep valleys and hills with an elevation of 300 to 3000 m., functions as a transition zone. The population of Nepal is a little over 23 million with a 2.51% population growth rate. There are more than 200 ethnic groups

in Nepal. Most live at subsistence level and a few of them are under a bonded labor (a kind of slavery) system. Forty percent of the population six years and older is literate; 53% of males are literate as compared to 24% of females.

Nepal is one of the poorest countries of the world, with a per capita income of US $210. Limited natural resources, a land-locked location, difficult topography, poor infrastructure, weak human capital resources, poor levels of education and health, and corruption in every level of public authority are the major obstacles with which the Nepalese economy must struggle. Agriculture is the main economic base of the country, accounting for 85 percent of employment. The economy remains heavily dependent on rain-fed agriculture and, consequently, vulnerable to bad weather.

Nepal was under the barbaric Rana dynasty for 104 years until 1950, and governed by disorganized political parties and a king until 1959. From 1960 to 1990, Nepal was ruled under a "partyless" system with an absolute monarchy. Since 1990, Nepal has suffered in the name of "democracy" with shortsighted, corrupt, irresponsible, and characterless political leaders and a power-mongering king and leaders.

2. Constitutional Development in Nepal: Constitutions without Constitutionalism

The concept of constitutionalism in less developed countries embraces three major aspects: 1) a development aspect-fulfillment of social and economic aspiration of the people; 2) political aspect-an adult franchise and a system of government; and 3) liberty, equality and a system of justice –in order to transform the concept of rule of law into a living reality. Together, these three aspects together produce a deliberative democracy[2] where constitutiona-

2. Deliberative democracy has been questioned by one scholar as being less effective than "elite" or "competitive" democracy (Posner, 2004: 698). Another scholar views deliberative democracy as characterized by voter turnout in an election, which is described as "… a quixotic and highly contrived academic exercise" (Plides, 2004: 685). However, I use the term deliberative democracy in a holistic sense of a democracy that not only delivers the political right to vote and choose representatives but that also protects individual rights through legislation and enforcement mechanisms (an independent and competent judiciary) and meets socioeconomic needs in order to achieve the greatest comfort of the people. In examining the concept of democracy, it is important these days to consider instituting second-generation rights in the constitution. Civil and political rights and institutional structures alone can not be effective without fulfilling the minimum socioeconomic needs of individuals. Due to the lack of recognition of socioeconomic rights or of a constitutional mechanism to meet socioeconomic needs, many new constitutions have delivered a defective democracy or have led to dictatorship. This is particularly true in developing societies.

lism and democracy can live together without theoretical conflict. In addition, effective and meaningful public participation in the constitution-making process is a major force underlying an effective constitution. This force recognizes that the sovereignty of a nation is vested in the people and endorses the idea that the people determine their own fate through constitutional principles. Without public participation, the people become subject to a few affluent powers; even if the resulting constitution institutes all possible constitutional principles, it misses the real notion of democracy and constitutionalism.

Nepal has never been introduced to a real democracy. The concept of democracy has been laid out in the constitutions of Nepal since 1948, but never were the people recognized as the source of power. The people of Nepal were neither provided with the opportunities to participate in the constitution-making process nor were they regarded as an absolute sovereign entity. The system of government was either handpicked by the king or dominated by disorganized and unaccountable political parties. Therefore, the constitutions in Nepal since 1948 can be categorized as "fake constitutions" (Sartori, 2005)[3]. Prima facie, they may seem normal or even proper (garantiste) constitutions, but in practice Nepal's constitutions have been fake constitutions. Constitutional provisions are disregarded, so that as far as democracy and constitutionalism are concerned, they are, in effect, dead letters in "trap constitutions" and without constitutionalism.

An examination of Nepal's three major constitutional phases demonstrates that the constitutions of Nepal are trap or fake constitutions, which served neither democracy nor constitutionalism.

1. The Constitutions of Nepal, 1948

Nepal was under the Rana dynasty[4] for 104 years. But World War II and the post-war period was a disaster for dictatorships around the world, and, in 1948, the Rana dynasty felt that the Nepalese were falling under the influence of pro-independence movements. Its giant neighbor became independent from

3. Sartori classifies and defines present day constitutions in three ways-proper or normal, nominal and fake or trap constitutions. Normal constitution is a set of rules which organize but do not restrain the exercise of political power in a given polity and describe the working of the political system but do not abide by the telos of constitutionalism. Trap constitutions look nominal or proper, but the provisions of the constitution are disregarded and give us no reliable information about the real governmental process.

4. The aristocratic Rana clan claimed all executive powers in 1846 and controlled all major executive positions until a revolution in 1951.

British colonization; India's independence boosted political awareness in Nepal and encouraged Nepalese people to demand political freedom. To assuage these demands the Rana prime minister promulgated a constitution- the Government of Nepal Act, 1948. This constitution pretended that it provided limited public participation and civil liberties in order for the Rana dynasty to maintain a legitimate power base in Nepali political decision-making. People were not provided with the opportunity to participate in the constitution-making, rather, the Rana prime minister dictated the terms of the constitution.

This constitution could not respond to the demands of the time and the spirit of the people and the Rana regime was overthrown by a popular uprising in 1951. The king promised an election of a constituent assembly and a new constitution. Until the birth of a new constitution, an interim lconstitution was put in place. For the first time, Nepal seemed like it was going to breathe the air of democracy. This interim constitution was a product of a three-party power compromise involving Rana, the king, and the major political party of the time (the Nepali Congress). The interim constitution was amended three times, with the third set of amendments giving the king the power to exercise executive, legislative and judicial authority based on tradition and customs. The 1948 constitution was basically a transformation of power from one element (Rana) to three elements (Rana, the king and the Nepali Congress Party). From 1948 to 1958, none of these elements played a fair political game. The political party became unpopular due to corruption, and the king, instead of trying to operate under the constitution, started looking for opportunities to grab power. Citizens of Nepal were not offered any opportunity to participate in the constitution-making process. Civil liberties and democracy as pronounced in the constitution worked only as decoration.

2. The Constitution of Nepal, 1960

In 1955, king Mahendra declared that he would form a constitution commission consisting of experts and that he would hold a parliamentary election. He appointed experts to draft a constitution and make recommendations to the king. But the talk of constituent assembly and direct pubic participation in the constitution-making process remained a daydream[5]. This constitution commission received advice from British constitutional expert Sir Ivor Jennings, and his expertise replaced the constituent assembly, removing any illusion

5. The original provisions of the interim constitution had obligated the interim government to hold an election for a constituent assembly as early as possible. But King Mahendra, through a declaration, changed the mandate for a constituent assembly election, instead declaring that the election would be held for a parliament.

that the constitution was a democratic one. This draft constitution was first approved by the Council of Ministers, and then promulgated by the King. The process was very deceptive, because the King appointed the members of the commission that drafted the constitution, the Council of Ministers hired by the King approved the constitution, and the King promulgated the constitution. This was a one-dimensional-man model constitution (Marcuse, 1964).

Again, the people were not provided with an opportunity to be a part of the constitution-making process. They had no say in what kind of political process they wanted to adopt. Principles of the constitution were already mandated and political system was imposed on the people. The 1960 constitution did not even acknowledge the people as a source of sovereignty, but rather established an absolute monarchy[6] and endorsed the idea that the king-not the people-is the sovereign. The political system resulted in a self-styled "partyless", king-centered democracy; sovereign powers rested with the king and all powers of the government — executive, legislative and judicial — were to emanate from him. Popular sovereignty was disregarded. Political parties were declared unconstitutional. The polity under this constitution, lasting for thirty years, was called "Party-less Panchayat Democracy." During these thirty years, the political freedom of the people was at the whim of the king. Nepalese society was pushed further into caste and ethnic intricacy. The economy of the country did not progress compared to other developing nations, rather, development was at a stand still and relied increasingly on foreign aid. During this period, the constitution was amended three times[7]. Most significant was the third amendment in 1980. King Birendra, son of the late King Mahendra, announced a national referendum in 1979 to decide on whether the people wanted to retain the Panchayat regime with reforms, or preferred a multiparty system[8]. The result of the referendum favored a "party-less" system with the

6. The words used by the King while promulgating the constitution evidence an absolute monarchy. The promulgation reads: "I, king Mahendra Bir Bikram Shah Dev, in exercise of the sovereign powers of the kingdom of Nepal and prerogative vested in us in accordance with the traditions and customs of our country which devolved on us from our august respected forefathers, do hereby enact and promulgate this fundamental law entitled the Constitution of the Kingdom of Nepal".

7. The 1975 amendment, which introduced an institution called "Gaon Pharka" ("Back to the Village"). In this system, indirect elections were conducted based on a one-party type system-Panchayat party. A 1980 amendment abolished "*Back to the Village"* system and introduced direct elections. The 1990 amendment, introduced a multi-party system.

8. The regime continued to face resistance and challenges from banned political parties and their sister student organizations. In 1979, student agitation went beyond the control of the central government and King Birendra announced a national referendum.

direct election of a national legislature. The amendments injected some liberal elements into the political process, such as election of the prime minister by vote of the national legislature based on an adult franchise. Sovereignty remained in the king, who retained absolute power. While the king had the final say in political and judicial decision-making, provisions were made for election of individual legislative candidates based on a adult franchise. In this referendum, political parties, who campaigned in favor of multiparty system, failed[9]. The parties rejected the result of post-referendum elections and continued to resist the regime, favoring creation of a multiparty democracy.

3. The Constitution of Nepal, 1990

In 1990, there was a strong popular uprising in the country demanding a multiparty system. The King lifted the ban on political parties and allowed a peaceful democratic transition, promising democratic constitutional reforms. The leaders of the political parties[10] and the King came to an agreement and formed a Constitution Reform Commission consisting of representatives of major political parties and the King. Meanwhile, an interim government was formed represented by major political parties to maintain law and order in the country and to hold a general election under the new constitution. There was a strong voice in favor of establishing a constituent assembly by other small political parties and minority groups. The major political parties and the King suppressed that voice[11]. The new constitution was drafted based on three main principles agreed upon by the King and the major political parties (Nepal Congress and NCP-UML)[12]: 1) sovereignty will be divided

9. One of the reasons that political parties, in particular, the Nepali Congress Party, failed in this referendum was the "India factor". The Nepali Congress was labeled as a pro-Indian political party and people believed that the party would be dictated by Indian interests rather than Nepalese interests. The King and Panchayati rulers shrewdly took a nationalist stand during the referendum.

10. Nepali Congress Party, Nepal Communist Party – United Marxist-Leninist, and Nepal Communist Party-Marxist were the major political parties involved.

11. The major political parties thought that their major political goal – a multi-party system – was achieved and that they were going to be major players in the Nepalese political process. If an election for a constituent assembly had been held, power might have been shared with other political factions. However, the King thought that this might threaten his power and questioned whether there would be a smooth power transition. Therefore, both major political parties and the King suppressed the voice of constituent assembly, which had been supported small political parties, minority groups, and intellectuals.

12. Nepal Communist Party – United Marxist Leninist.

between the people and the king; 2) a multiparty democracy would be established; and 3) the system of government would be parliamentary. This new constitution was promulgated and enforced by the king in 1990 on the recommendation and the advice and consent of the council of ministers. The council of ministers did not represent the people, but rather was formed according to the agreement between the King and a few political leaders.

The 1990 constitution was not the product of an effective and meaningful public participation. The constitution was instead a product of understanding and compromise between the monarchy and major political leaders. Due to the nature of the power negotiation between the parties and King Birendra, the new constitution suffered from the division of sovereignty between the people and the king. This process undermined the absolute popular sovereignty in favor of a hybrid – a half-constitutional, a half-absolute monarchy. The constitution recognized, in theory, that sovereignty is vested in the Nepalese people but, in practice, substantial authority was bestowed on the king. The constitution provides that "… sovereignty … shall be exercised in accordance with the provisions of this constitution"[13]; other provisions of the constitution are crafted to let the king exercise substantial sovereign power, including:

- King has the power to preserve and protect the constitution for the best interest and welfare of the people[14].
- The King has the exclusive power to enact, amend and repeal the law relating to succession to the throne[15].
- No reduction in the expenditures and privileges of the royal family is allowed[16].
- No taxation is allowed on royal family property[17].
- No question may be raised in any court about the acts performed by his Majesty[18].
- Executive power is vested in the king and the council of ministers19. While the king exercises his power upon the recommendation and advice of the council of ministers20, no question shall be raised in any

13. The Constitution of Nepal 1990, Art. 3.
14. *Ibid* Art. 27 (3.)
15. *Ibid* Art. 28 (2)
16. *Ibid.*Art. 29 (2).
17. *Ibid.*Art. 30 (1).
18. *Ibid.*Art. 31.
19. *Ibid.*Art. 35 (1).
20. *Ibid.*Art. 35 (2).

court as whether the king received and advice from the council of ministers[21].

- Parliament consists of the king and two houses[22].
- The king has power to declare a state of emergency and get approval from the parliament within three months[23].
- The king is the supreme commander of the Army and appoints the commander in chief on the recommendation of the prime minister[24]. (It is not necessary for the king to get approval from the legislature and council of ministers-further, the king does not have to necessarily abide by the recommendation of the prime minister.)
- The king has power to remove any difficulty by issuing orders in connection with implementation of the constitution[25].

Under the 1990 constitution, the king reserved to himself the power of the parliament, the authority of the council of ministers, the power to declare state of emergency, military power, the power to remove difficulty (in case of a difficult situation in implementing the constitution), and the right to preferential treatment for the royal family. People, through political parties, could enjoy only half of the remaining sovereign power within the institutional arrangements — parliamentary and executive. The judiciary remained untouched; since it is not directly involved in the political process, it was not considered an important and effective instrument in the political game. Political parties seemed satisfied with the recognition of a multiparty system. Nevertheless, a little transitional progress toward democracy was made in this constitution: people were recognized as possessing 50% of sovereign power, up from zero. It was in the hands of the political parties to exercise wisely the half of the power that the people had gained. Unfortunately, political leaders deemed that the democratic system in place was, in itself, sufficient to satisfy the people and provide support for their regime. Thus, they did not make any extra efforts to build a nation (Acharya, 1999). They did not adhere to the general belief that democracy is the means for society to develop peace, security and economic prosperity through public participation in decision-making and the rule of law. Corruption among political parties was omnipresent. There have been

21. *Ibid.*Art. 35 (6).
22. *Ibid.*Art. 44.
23. *Ibid.*Art. 115.
24. *Ibid.*Art. 119.
25. *Ibid.*Art. 127.

more than a dozen of governments in 15 years. Such political instability is caused mainly by power-mongering among the leaders of the parties and the monarchy. The height of the corruption exceeded the height of the nation's most famous landmark, Mount Everest. Peace, security, law and order, and economic development became routine buzzwords of political leaders — and little more than a daydream to average people.

Meanwhile in 1996, a Maoist movement began with the aim of overthrowing the monarch. Many people in villages joined the Maoists, not because they believed the philosophy of Chinese Chairman Mao, but because they were hopeless and frustrated with the condition of themselves and the country. Their frustration has given strength to the Maoist movement, which, started from rural Nepal. This so-called "people's war" has now spread to all of Nepal's 75 districts. The Maoists initially announced 10-point charter demands, largely pro-poor and lower-caste, anti-Indian and anti-Monarchy. Conditions of the people in the countryside were ideal for such a movement and it spread rapidly; it has been estimated that more than 12,000 people have been killed either by actions of the Maoist group or the government. The growth of the Maoist movement in Nepal can be seen as a failure of post-1990 democratic leadership to meet the needs and aspirations of the poor. Nobody has internalized that the avoidance of a constituent assembly has caused insurgency by the Maoists and unaccountability among political leaders. There was a possibility of constitutional evolution in Nepal, but that potential is unrealized because political leaders have not run the country in an honest, sincere, and accountable manner.

And matters have gone from bad to worse. A prime minister, Sher Bahadur Deuba, dissolved the parliament in 2002 just to avoid a vote of no confidence against him. He surrendered the negotiated people's half of the power to the King. The King gladly took the power and appointed a new prime minister and formed a cabinet to run the country. In February 2005, the king dissolved the cabinet, declared state of emergency, suspending major fundamental rights and forming yet another cabinet under his own leadership. Thus in 15 years, relative democracy and a relatively constitutional monarch as envisaged by the constitution of 1990 were translated into absolute monarchy without democracy and constitutionalism. This is only a single example of the height of unaccountability among political leaders[26]. As a result, Nepal's glimpse of a

26. There have been dissolutions of the parliament by other prime ministers prior to Sher Bahadur Deuba. The Supreme Court of Nepal inconsistently has made decisions sometimes favoring and sometimes disfavoring the dissolution. This confused judicial decision-making was due to the constitutional mandate of dual sovereignty.

democratic transition is confronted with a multitude of diverse and pressing elements: corruption, Maoist movements, lawlessness, feeble judicial systems, ineffectual bureaucratic institutions, a fragmented political party system and dishonest and corrupt political leaders, a deep-seated caste system, growing socio-economic inequality, profound economic crisis and a king's temptation to grab power.

3. Measuring Constitutionalism and Democracy in 1990 Constitution

1. Public Involvement. There are ways to measure any constitution-making process. The first and foremost measure of a constitution is whether there was an effective and meaningful public participation in the constitution-making process. Direct election of the representatives of such a constituent assembly is a proven practice of an effective public participation in a constitution-making process.

Typically, this process is not a matter of great concern; instead much devotative discussion is centered on the elements of the constitution. There is a great deal of research and writing around the world about the substantive features of constitutions, and also the comparative point of view, but very little focus on the process itself, although there is increased interest in this topic[27]. While elements and the structure of the constitution are important, it is also equally important that people of a society have an emotional relationship with the process and product of the constitution making. Attention to the process also addresses the authority of the constitution and the authority of its authors. Constitution-making is not a part of a process of legal reform[28], but rather claims new moral authority from *we the people* and provides a legitimate and normative force to the constitution-making body. Legitimacy is possible only when a constitution-making body is formed by the people as a whole; since a constitution is the source of legal authority in a country, its own authority must arise from the consent of the governed. A normative force arises from

27. Special conference Section, Panel Discussion 2: Building the Institutions of the Nations, Special Conference*, From Autocracy to Democracy: The Effort to Establish Market Democracy in Iraq and Afghanistan*, 33 Ga. J. Int'l & Comp. L. 171 (2004).

28. Some writers view constitution making as a part of legal reform. This could be true where constitution has existed successfully for a long time. But for those countries that are in the process of originating new constitutions, just a legal reform does not serve the purpose, because old or past constitutions or legal authority is challenged as they deemed to fail (Raz, 1998: 152-159).

the fact that one gives one's free and informed consent to an arrangement affecting oneself (Raz, 1998: 162). In Nepal's case, it is a fact that Nepal's people were deprived of effective participation in the constitution-making process throughout the country's constitutional history. Whatever worthy structural and functional elements of a constitution were incorporated in Nepal's various constitutions, all of them failed. Effective public participation is the only way that a meaningful public connection to the constitution can be established in Nepal. Such participation would provide the benefits of structured symbolism and functional coordination, with the effect that society will do morally better by following the constitution's dictates than by not doing so (Raz, 1983). Public participation in constitution-making justifies the notion of democracy from the advent of the constitution; only the people can decide what needs to be preserved and what needs to be transformed. Election of a constituent assembly in Nepal would constitute a pre-commitment to democracy and recognition of minority political parties and groups, which ultimately promotes constitutionalism. Unfortunately, Nepali constitutions have been products of power accommodations between the king and political elites within a framework either through a Lancaster model[29] of constitution-making or within a structural framework dictated by the elites. The 1990 constitution was written by the members of the commission who were legal-technical experts representing by the major political parties and the king not by the people or people's representatives.

2. Survival of the polity. Another way of measuring constitution is whether the product provides for the citizens and their state an optimal opportunity for survival, growth, and renewal of the polity (Ackerman, 1991: 54-56)[30]. The constitution must establish appropriate governmental structures and must allocate power and responsibilities among the different branches of government.

29. The "Lancaster Model" of constitution-making reflects the idea that people believed that the former colonies were incapable of doing something like writing a constitution, and therefore needed help from the colonizing countries. Similarly, many countries that made their constitutions after World War II have been getting help from constitutional experts in writing their constitutions. The Lancaster Model takes its name from the Lancaster House in London where meetings to determine post-colonial constitutions were convened (Claxton, 2003: 529).

30. The author calls for national referendum on major constitutional or system transforming occasions and he argues that referendum can be important to legitimize devices for new structural constitutional arrangements of a significant nature. In Nepal's case, a constituent assembly is the only way to provide an optimal opportunity to the people for survival, growth, and renewal of the polity as they wish. See also Ackerman, 1992: 49.

Nepal's constitution has adopted such governmental structures and an allocation of power and responsibilities in a limited way. The constitution first allocated sovereignty between the king and the people. Then various governmental structures and their power and responsibilities were determined through negotiations between the King and the political elites, rather than through an agreement of the people. In theory, the king is a constitutional monarch but in reality, the king is a relatively powerful political institution. The parliament consisted of the king and two houses, with the executive power vested in the king and the council of ministers. When in 2002 prime minister Sher Bahadur Deuba dissolved the House of Representatives and asked the king to take full parliamentary authority, the king accepted that authority until a new election was held. The prime minister did so to avoid an upcoming vote of no confidence in the parliament while disregarding the fact that a basic principle of the parliamentary system-that the executive branch of the government is elected by the parliament in the parliamentary system. With this act, he committed a political homicide of the people and committed his own political suicide. Survival, growth, and renewal of the polity in Nepal, historically in the king's hand, again was taken by the king pursuant to the constitution, which allows the king to determine his own structure and function without public, legal or constitutional scrutiny. Therefore, Nepal has not experienced any real democratic system of government where the people, and only the people, can renew the polity as they think fit.

3. Rights and limitations. A constitution defines and guarantees the rights of the people vis-à-vis the government and determines limitations on governmental authority and power (Sunstein, 1988: 327). It has been asserted that the notion of constitutionalism contrasts with the notion of popular democracy, in that constitutionalism goes beyond the majority's political judgment, which is antithetical to the basic principle of democracy[31]. However, a solution or reconciliation of the contrasting notions constitutionalism and democracy has been suggested. Habermas suggests that both notions are sources of popular projecting interdependence of public and private autonomy (Habermas, 2005). This interdependence or reconciliation is explained by the economy theorists Geoffrey Brennan and Alan Hamlin[32], who have focused on the dualism between constitutional and day-to-day functions, and those functions that

31. *Ibid*. The author notes that constitutionalism is anti-majoritarian and therefore exists in tension with democratic practice.

32. The authors while explaining constitutional political economy argue that the focus of constitution is politics and the method of constitution is economic where institutional arrangements are measured by their social outcomes.

condition social activity and those that are so conditioned which make the relationship between democracy and constitutionalism mutually re-enforceable (Brennan, Hamlin, 2005)[33].

One of the basic elements of constitutionalism is protection of individual rights through the constitution. When a constitution guarantees fundamental rights of the people, government can not take those rights away. In case of a violation of fundamental rights, a person can go to the Supreme Court to enforce one's rights. This right enforcement mechanism limits the authority and power of the government. Nepal's constitution guaranteed fundamental human rights including rights to life, liberty and equality, and freedom of speech. These rights are so strong even the parliament can not enact a law that contradicts with these rights[34]. But both the strong guarantees of the constitution and the extensive powers of the Supreme Court are now paralyzed in the face of an absolute monarchy resulting from dual sovereignty and dishonest political leaders. The notion and practice of constitutionalism has withered away and democracy has become a sand castle in Nepal. The king does not have to abide by law and constitution; rather, he dictates laws. The king's power is limitless. The king forms the cabinet and declares ordinances as he wishes. But the constitutional course of Nepal could change. In France, a declaration of the rights of man and of the citizen was adopted in 1789 in the face of an existing monarchy. The declaration resulted in a movement under which the French monarch and his cabinet and administration were bound by the political decisions in the form of law adopted by the representatives of people. The sovereignty was based on the representative assembly no longer on the monarchy. The king was a king not because he was a god but because of the decision of the repre-

33. See also, Richards, 1993: 14-15.

34. Article 88(1), the paragraph giving the Supreme Court the power to strike down legislation states: "Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with the Constitution." The Constitution further in Article 88(2) grants the Court carte blanche remedial powers: "The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute".

sentative assembly (Fusaro, infra). This is in sharp contrast to Nepal, where 1990 constitution made it clear that the king's actions can not be questioned at the court of law. The constitution supposed that the king holds a ceremonial post, but the text of the constitution gave ultimate power and authority to the king. The resulting dissatisfaction may yet give rise to real change.

Nepal's experience tells us primarily that constitutional failure is a result of a non-participative constitution-making process. To foster constitutionalism, the process must be sufficiently transparent and must have popular participation to allow the constitution to be a product of people's will, rather than a document of ruler's interest. It is the constitution-making process that legitimizes institutions created by the constitution, where normative notion of a decision by the people is achieved. Since 1950 when democracy was introduced in Nepal, the king as an institution has been one of the biggest constitutional puzzles among Nepalese people and intellectuals. Sometimes the king is a religious figure[35], sometimes the king is a political giant like Louis the XIV and sometimes the king is a constitutional symbol of unity with cultural importance. One Japanese scholar has compared the Nepali king with the Japanese Emperor and said that both are symbols of states and peoples. The author posits that an elected symbolic head can be a dictator, but that kings as a symbolic and spiritual unit can never be dictators (Tanigawa, 1996). This author may be right in Japan's case, but he is proven incorrect in Nepal's case. Japanese people have not shared their sovereignty with their emperor, but Nepalese political leaders have-and the king has taken the lion's share.

In a country like Nepal, which has limited or no experience with successful constitutional governance and democracy — where constitutionalism and the rule of law are not well developed, it is the duty of all to popularize these concepts and to educate to the people during the constitution-making process through effective and meaningful participation. Only meaningful public participation keep sovereignty in the people so that Nepal does not continue to suffer from dual sovereignty between the king and the people.

35. The king is still regarded as a reincarnation of Hindu god Vishnu and is worshipped among illiterate rural Nepalese people. Those people are not aware that the king owns tea estates, five-star hotels and much other property in the country and, in addition, that he gets salary for being king, which he determines and raises as he wishes.

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Finito di stampare presso Grafiche Cappelli - Osmannoro - Firenze