

**Conflicting Principles as Democratic Building Blocks:
Constitution-making in South Africa**

Heinz Klug
University of Wisconsin Law School

AALS Annual Meeting Workshop in Democratic Governance
Building a Democratic System
San Francisco
January 6, 2005

1) Introduction

- a) Building a democratic system encompasses a far broader range of issues than the process of drafting a new constitution, but it is the process of constitution-making that has become a key element in the political transitions that have followed the end of the cold war.
- b) Constitution-building is a process which must be understood to include far broader aspects of the political transition than merely the negotiation and drafting of a new Constitution. The broader project includes a number of different processes including: negotiating the cessation of hostilities; establishing transitional arrangements; arranging and holding a democratic election; negotiating and drafting a new constitution; implementing and sustaining the new democratic order. Within these different processes there are however two key issues and the balance between them is likely to have an important impact on the success or failure of a democracy-building project in the post-cold war era. First, there are the questions of who and how a future constitution will be produced. Second, is the question of what a new constitution will contain. While often conceived as simply the procedural and substantive aspects of constitution-building, it is the answers to these questions which will determine the parameters of the new democratic order.
- c) While principles of democracy, human rights and the rule of law are considered central to legitimate processes of state reconstruction, it must be recognized that there is neither universal agreement on the content of these principles or on the practical implications for institution building. These principles include a variety of forms of government, a range of different individual and even group rights as well as quite different notions of what the balance should be between judicial authority and democratically-elected or responsible institutions at different levels of government.
- d) Context is clearly central to the process of building democracy, yet the

importance of understanding the interaction between local context and global imperatives is often overlooked. Local context, including the history of the country and region, the different parties and even individual participants in a conflict often defines the parameters of what seems possible but it is important also to understand the impact of the particular global imperatives dominating the international arena at the time of a particular transition as this often provides the space in which local parameters may shift.

- e) A focus on principles and the need to frame a democratic transition within the realm of a set of broadly agreed upon principles provides a potential means of entrapping unnegotiable conflicts into ongoing but manageable constitutional struggles. Despite often divergent understandings and deliberately opened ended agreements over meaning, I will argue that the framing of constitutional principles in the South African case both facilitated the progress of the transition to democracy and provided the means of incorporating often inconsistent and conflicting ideas about the parameters of the future, whether in the forms of explicit guarantees or institutional arrangements. It was this principled ambiguity that allowed the conflict to be “civilized,” despite continuing violence and vociferous, if not fundamental disagreement.

2) Sources of Constitutional Principles

- a) The constitutional principles that have framed the post-cold war transitions to democracy stem from a range of sources, including local constitutional histories and the evolving international standards reflected in the post-World War II human rights agreements, Helsinki Accords and the experience of decolonization.
- b) For Southern Africa the first explicit articulation of Constitutional Principles as a basis for negotiating a democratic transition emerged in the form of the 1982 Principles produced by the Western Contact Group for Namibia. Given the status of Namibia, as a former German colony, League of Nations mandate and finally illegally occupied territory – after the United Nations withdrawal of the mandate was recognized as binding by the International Court of Justice – it was often assumed that the idea of constitutional principles would be unique to that conflict. While the implementation of Security Council Resolution 435 led to these principles being adopted as the guiding principles of the Namibian Constitutional Assembly which drew up Namibia’s Constitution after the 1990 elections, the idea of constitutional principles as a means of framing a democratic transition would become key to South Africa’s surprisingly successful transition to democracy.
- c) Although it is possible to claim that the idea of constitutional principles was

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

- d) Even then the debate over constitutional principles had only begun. While the parties failed to all agree on the Declaration of Intent a minimal set of principles adopted at their first formal meeting – the Conference for a Democratic South Africa in December 1991 – the debate over principles begun at that time would become central to the negotiations in the Multiparty Negotiating Forum which convened in early 1993 and led to the adoption of the “1993 Interim Constitution” under which South Africa’s first democratic elections were held and Nelson Mandela elected President. Even then the role of constitutional principles was not exhausted as an even larger number of constitutional principles had been included in an appendix to the 1993 Constitution for the purpose of providing a framework for the work of the newly elected bicameral-legislature, serving in joint sitting as a Constitutional Assembly with the mandate to produce a final Constitution within two years.
- e) While the Constitutional Principles negotiated by the South African parties represented a vast and often contradictory range of possibilities, the very process of negotiating and providing justification for their inclusion had a significant impact on the parameters they set. Although some would claim to provide a basis for continued authority of ethnic minorities or traditional authorities and embrace principles that were seemingly in conflict with the broader democratic thrust of the principles, the international frame within which they were located gave additional weight to a democratic interpretation of the overall framework.

3) Role of Constitutional Principles

- a) It is important to note that the idea of constitutional principles played very different roles at different moments in South Africa’s process of democratization. In this sense the idea of constitutional principles clearly embraces an important temporal element in addition to the broader substantive implications of the

principles.

- b) The publication of the ANC Constitutional Principles in 1988 can be seen as an opening gambit in the process of negotiations as well as an intervention designed to preclude internal options that the Apartheid government was then considering. The 1988 Principles served both as a signal to ANC activists and supporters of the possibility of a negotiated transition as well as providing a vision of a democratic alternative to those South African's who feared the possibility of a future ANC government. In this way it may be argued that the 1988 principles initiated the process in which the idea of constitutional principles became central to enabling the transition to democracy.
- c) The Harare Declaration which began the process of internationalizing the ANC's 1988 principles took a step further in outlining what would be an internationally acceptable transition process, including the establishment of an interim government to oversee the transition. This demand failed to recognize that the Apartheid government would not relinquish political power until there were some guarantees as to the shape a future South Africa would take. This problem pushed the question of the constitution-making process to the top of the political agenda but provided no means to resolve the different visions of who should participate in what form of process to create a new Constitution. It did however make it clear that any resolution of the conflict would need to meet minimum international standards if South Africa was to be accepted back into the world community.
- d) The effect of combining the debate over constitutional principles with the requirement that any future constitutional dispensation meet minimum international standards as defined by international human rights principles was to frame the parameters of acceptable options. This framing had a powerful impact on the shape of the debate over different constitutional options and the available alternatives. If on the one hand it precluded the demand for nationalizing the land and key national industries, it also precluded demands for ethnic self-determination and empowered the cross-party coalition of women demanding that gender equality not be overridden by claims of tradition.
- e) While agreeing on a list of thirty-four constitutional principles and including them in schedule 4 of the interim constitution was less difficult than first predicted, the key issue remained how they would work to resolve the dual problems of process and substance. Although it could be argued that the principles provided clear substantive criteria to constitution-makers, it was less clear how they would serve to bind the process. It was the decision to require the newly created Constitutional Court to certify that the final constitution produced and adopted by the democratically-elected Constituent Assembly adhered to the requirements of the constitutional principles that created the degree of confidence necessary for the democratic transition to go forward. While this was by no means the only issue,

its importance for creating the atmosphere of trust so important to political transitions cannot be over estimated.

4) Conclusion: Conflicting principles or constructive ambiguity

- a) Adopting a list of constitutional principles does not guarantee the future but it does provide a process and a framework within which areas of commonality may be defined and questions of difference may be located. Providing an institutional mechanism through which these principles may be brought to bear on either the debate over constitutional provisions or as a means to evaluate the final product adopted by a democratically-elected constitution-making body provides a zone of comfort for those who do not feel that their central concerns are likely to be adequately reflected in the democratic process – whether they be past elites or excluded minorities.
- b) Another important role that the debate over constitutional principles plays is in postponing or mediating the necessity of making a hard or immediate decision on what might be effectively non-negotiable issues. The adoption of a broad principle allows the conflicting parties to put aside an issue for further debate while working on issues over which there might be greater agreement. This postponement with continuing engagement between the parties is an important element in building the basic elements of trust between opposing groups which is central to the ultimate success of a democracy-building project.
- c) Constitutional principles are rarely definitive and contain in most cases a degree of constructive ambiguity which enables all parties to feel that they might be able to live with the outcome of the process. At times the different parties in South Africa held diametrically opposite understandings of the meaning of particular principles but it was precisely this often acknowledged ambiguity that allowed the process to go forward.
- d) One of the effects of the process of negotiating constitutional principles is to slowly entrap the constitutional conflict in a process of argumentation and alternative legal propositions. This has the effect of both precluding some outcomes and mediating the differences between what might be considered the acceptable alternatives, often influenced as much by international understandings as the particular historical and material parameters of the local conflict.
- e) Finally, the commitment to constitutional principles promotes constitutional engagement over exit and the ever present threat of violence this implies.