

# ON THE ROAD TO A New Constitution

After the dust settles on the elections in the Middle East, the writing of a viable constitution becomes the next priority. South Africa's experience following the end of apartheid can offer insightful lessons.

by Heinz Klug

The drafting of South Africa's constitution—which spearheaded the country's miracle transition from apartheid to democracy—has been heralded as an inspiration and a model. While I am certainly inspired by the process of negotiated constitution-building my country concluded some 10 years ago, my experience of those events leads me to urge caution on those who would hold it up as a model for other countries (like Afghanistan and Iraq). Instead, I suggest that a careful analysis of South Africa's experience provides insight valuable to those who seek to use constitution-making as a means of transcending conflict and achieving democracy. If South Africa's experience offers one simple lesson, it is that the process of negotiating is as important as the mechanisms for achieving agreement or the institutional arrangements finally adopted. As a result, the

essential elements in a successful constitution-making process are negotiation, participation, agreed-upon principles, flexible transitional mechanisms and messages of inclusion.

## Negotiation and participation

While many accurately point out that we in South Africa were privileged to have leaders with both the moral authority to craft compromises and negotiating skills honed in the labor movement and in exile, this does not explain the popular embrace of constitutional democracy that has been key to South Africa's political success. To understand this, I look to the dialectical relationship between inter-party negotiations and popular participation during the writing of the constitution. These exchanges both highlighted particularly important issues and produced shifts in popular perceptions and demands that ul-

timately brought the political parties closer to mutual understanding.

Early on in the transition (as the interim constitution was being written between 1990 and 1994), popular participation ranged from mass demonstrations—promoted by the African National Congress (ANC) in support of our demands—to a multitude of smaller engagements. A key element of these smaller gatherings was a series of conferences on constitutional issues (organized by the ANC Constitutional Committee) that brought together members of ANC branches, trade unions and other community activist groups with domestic and international academics to discuss key constitutional issues. In addition, many local meetings were held to discuss the constitutional options being considered both internally among ANC policymakers and externally in meetings with the government and other political parties.

Children—wearing hats that read “one law one nation”—join in the celebrations following the adoption of South Africa's new constitution in 1996.



This informal process of participation was institutionalized in the second phase of constitution-making (as the final constitutional draft was being crafted between 1994 and 1996) through a process of public consultations, education (via newspapers, radio, television and advertising) and requests for comments that accompanied the work of the elected Constitutional Assembly. During this time, the Assembly received some two million submissions from the public. However, the ambiguous nature of this participation was epitomized by a full-page newspaper advertisement showing Nelson Mandela standing in front of his home talking on his cell phone with a headline announcing that he was phoning in his comments to the Constitutional Assembly.

This ethos of participation pervaded South Africa's extended constitution-building process and served to integrate the imaginations of all parties and steadily push them towards the mutual embrace

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of sustainable alternatives—rather than to record popular demands. While this interactive process may be seen in various arenas—from the conflict over regional powers to the protection of minority rights—it is in the debate over property rights that its value is most evident.

In the face of the massive dispossession of black South Africans, the liberation movements had long promised the return of land to the people. However, the apartheid government was equally adamant that a future constitution must protect existing property rights. Refusing to accept the constitutionalization of apartheid's spoils, the ANC finally agreed to the protection of property but only with the guarantee of restitution for people whose land was taken under discriminatory laws between 1913 and 1994. Even then, it took public demonstrations by land claimants and ANC threats to block any property clause at all before the “white” parties accepted the promise of restitution (and even the promise of land redistribution) in the final constitution. In each area of major dispute, the constitutional outcome was the product of an iterative process in which demands and compromises were combined with threats and public engagement while different actors appealed to principles grounded in different (and often conflicting) perspectives.

### Constitutional principles and transitional mechanisms

Given these conflicting perspectives, it was particularly important that constitutional negotiations were grounded in agreed-upon principles and that the process was flexible enough to allow for change in the face of political opportunity or crisis. To achieve these goals, two key mechanisms

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framed the South African process: (1) reliance on selected constitutional principles and (2) the adoption of relatively fluid transitional mechanisms that brought the conflicting parties together to resolve crises or tensions. In the first instance, the debate over constitutional principles had the dual virtue of being abstract enough to seem less threatening and yet tying the process to broad international norms. The agreement on principles, set in 1994, allowed the negotiated evolution of elements of the constitution towards acceptable (if contested) understandings that fell within the broad framework of international con-

stitutional norms. Secondly, the adoption of a number of mechanisms that helped political actors administer the transition had the effect of creating personal and professional links between the parties. In turn, these bonds allowed for a process of confidence building in the midst of continuing conflict—such as the military rebellion in Bophuthatswana that broke out barely two months before the first democratic elections in 1994. In effect, these two mechanisms allowed the old regime legal continuity, which it demanded, while enabling a process of integration in which the emerging democratic opposition increasingly exercised authority and took on responsibility for governing.

### Democratic inclusion

Even if the interim constitution lacked an adequately democratic pedigree, two actions provided a sustainable basis for the next phase of constitution-making: (1) the careful inclusion of all parties willing to participate in negotiations—even as some engaged in violence or continually disrupted the process—and (2) the willingness of the dominant parties to include constitutional principles that addressed the concerns of some objectors even though they were in tension with the broader democratic goals of the process. As a result, the clear allocation of power to the ANC produced by the electoral

process served to bolster the demands of the democratic majority without precluding the hopes of the newly disempowered minority. Fundamental disagreements continued to roil the constitution-making process, right through to the moment the Constitutional Court certified that the Constitutional Assembly had abided by the requirements of the 34 constitutional principles listed in Schedule Four of the interim constitution. Yet, the iterative process of debate and adjustment precluded extreme alternatives and helped the parties to imagine a place for themselves in the emerging political dispensation.



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**President Nelson Mandela signed a new constitution for South Africa into law on December 10, 1996.**

Reflecting on the decade when South Africa's constitution was conceived, it becomes clear that the journey we traveled together was as important to the process of creating a common (if not necessarily national) South African vision as were the results of any of the deals we cut during negotiations. While this insight may seem self-evident, it contains important implications for other countries where constitution-making is advanced as a means to overcome conflict during transition to democracy. Instead of taking South Africa's two-stage transition or the details of the interim constitution as models to be applied in other contexts, I believe it is important to consider how the different elements of South Africa's transition—from constitutional principles to transitional mechanisms as well as practices of negotiation and participation—are elements that other political actors can embrace and adjust according to the specific historical and political context of their own nation-building processes. [dal](#)

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