A JOURNEY AROUND CONSTITUTIONS: REFLECTIONS ON CONTEMPORARY CONSTITUTIONS★

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INTRODUCTION

I am greatly honoured by the invitation from the University of Cape Town to deliver the inaugural Beinart Lecture. It is a particularly flattering invitation as my mandate is to reflect on my experiences as a constitutional scholar and advisor. There have been truly remarkable changes in the ways constitutions are perceived, prepared and used since I first became interested in the subject nearly five decades ago. Although I will not be dealing with South Africa in this lecture, I think it important to state that these changes are reflected particularly well in South Africa's experience of constitutions, ranging from the use of constitutions to colonize and then to dominate, and latterly to liberate. I propose, in a highly personal vein, to reflect on these changes and to illustrate, where possible, with reference to my own research or consultancies and personal anecdotes.[1]

But first let me acknowledge my debt to the South African scholars and freedom fighters who have inspired our perspectives on constitutional values. I believe that Professor Ben Beinart was both a scholar and activist in this tradition. Public law was perhaps not his major speciality, but he was deeply committed to justice and the rule of law and his research in this area was instrumental in turning aside the preoccupation with the supremacy of

★ Originally delivered as the first Beinart Memorial Lecture at the University of Cape Town on 30 September 2003.

† DCL (Oxon). I want to acknowledge the generous funding by the University of Hong Kong, including the Distinguished Researcher Award, which has enabled me to make the several constitutional journeys discussed in this article.

[1] My practical work on constitution-making and litigation has ranged over Africa, Asia and the South Pacific; and has concerned, inter alia, independence constitutions (Seychelles, Papua New Guinea, Solomon Islands, Vanuatu), reviews (Tanzania, Kiribati, Cook Islands, Maldives, Zambia, Kenya), constitutional rehabilitation after coups (Fiji), establishing constitutional orders after prolonged internal conflict (Cambodia, East Timor, Afghanistan), facilitating negotiations and consensus in conflict situations (Papua New Guinea, Nepal, Sri Lanka), advising on the constitutional implications of setting up special tribunals to prosecute associates of a former dictator (Uganda), advising prime ministers and presidents on their powers, including dissolution of parliaments (Papua New Guinea, Samoa, Solomon Islands), establishing systems of autonomy (Papua New Guinea, Sri Lanka), litigation on the validity of a coup (Fiji), habeas corpus petitions (Kenya), validity of nomination for presidential elections (Kenya) and the legality of a legislature and the validity of laws and budgets passed by it (Samoa). I have also advised some international organizations and states on human rights issues.

the legislature. Throughout the dark days of apartheid he never lost his belief in the capacity of the law to fight injustice and oppression, and South Africa's new constitution is a full vindication of his confidence in the rule of law. As a scholar, he believed that the law could not be understood entirely within its own four corners and that those who sought true understanding were required to make forays into other disciplines. He influenced generations of students who went on to become distinguished judges, professors and practitioners of the law, and his spirit continues to animate the distinguished constitutional scholars of this University. This lecture is also a tribute to the scholars of South Africa, and to its wonderful constitution, a watershed not only for this country but also for many others.

THE ROLE OF THE MODERN CONSTITUTIONAL LAWYER

What does a constitutional lawyer do in our times? First of all, I would say that if a constitutional lawyer is to assist in framing effective solutions to contemporary problems facing states and people, his or her role must extend beyond the conventional approach of concentrating on drafting a text appropriate to the particular circumstances of a country. Various additional tasks define the role of a constitutional lawyer in the modern period, in which the people are recognized as the ultimate source of sovereignty. The role involves, for example, introducing decision-makers to comparative research on what has worked (or not worked) in other countries, helping to narrow down the available options and encouraging broader understandings of contentious concepts such as self-determination. It may also involve participating in processes of conflict resolution to open up discussion between people who have been at war with each other, in an attempt to find common ground where none may be apparent at the outset. Apart from facilitating negotiations and suggesting suitable compromises between the positions of different sides, teaching negotiating skills is also an important task of a lawyer working towards constitutional solutions. A commitment to democratic procedures is crucial to identifying and addressing issues in the society in question, and thus broadening participation forms a further prerequisite for contemporary constitutional lawyers. Indeed, this has been a key element of my approach to constitution-making. The role is, however, not nearly as glamorous as I thought when I was a student: a Lord Radcliffe carving up India to give it independence and birth to Pakistan, or an Ivor Jennings drafting the independence constitution of Ceylon from the splendour of a vice-chancellor's lodge. Today's constitution-maker rubs shoulders with soldiers and rebels with AK47s, self-confessed killers while roughing it in small and remote towns, putting himself or herself at considerable security risk, perhaps because the rebels will not go to the capital for fear of arrest.[2]

[2] I have to say that some of my earliest engagements did take me to the chandeliered chambers of Lancaster House in London, the maternity ward of many Commonwealth constitutions. Unfortunately it has been downhill since then, sometimes sleeping in makeshift accommodation, besieged, when lucky, only by mosquitoes.

THE CHANGING OBJECTIVES OF CONSTITUTIONS

The first constitution I encountered, as a child, was the colonial constitution in the racially mixed and hierarchical society of Kenya, inflicting on the majority of its people a double subordination: to interests of the empire and of the white settlers. By the time I was finishing my university studies, western colonial empires were collapsing and my research as I finished my undergraduate degree focused on independence constitutions negotiated with (or more frequently imposed on) local political leaders. I was too young to play any role in the making of independence constitutions in my country or its neighbours, but I did advise on preparing and drafting constitutions for late decolonization in the Seychelles, as well as in Papua New Guinea and some other island states in the South Pacific. The brief and simple colonial constitutions, primarily designed to create an authoritarian and undemocratic centre of power, gave way to complex instruments which, overnight, dispersed power, ushered in democracy, established a regime of human rights, and created intricate relationships between diverse communities and races — the very opposite of the colonial system.[3] Not surprisingly, these constitutions collapsed under their own weight and the impatience of leaders newly introduced to the grandeur and temptations of power.

These neo-liberal constitutions were replaced either by military rule, which made little pretence of democracy or the rule of law, or by one-party regimes, the constitutions of which, it was claimed, were rooted in indigenous concepts of governance and legality.[4] When President Julius Nyerere transformed Tanganyika/Tanzania into a one-party state, Professor Patrick McAuslan and I (both young law teachers then at the University of East Africa, the first law faculty in that region) were asked to recommend how the constitution could maximize democracy and provide safeguards within the enveloping layer of a one- party regime. (The new constitution established the first ombudsman in Africa, competitive elections under the auspices of the party, and a leadership code which restricted opportunities for senior officials to engage in private business or corrupt deals.)[5] Nyerere was not, unlike many other advocates of one-party regimes, a power- hungry politician, and his adoption of a one-party regime was an anxious and serious search for a political framework suitable to coerce a fragile state and society into social and economic development, and yet to uphold freedom.[6] Like many other states (including those in Eastern Europe), Tanzania found that

[3] My first book (co-authored with Professor Patrick McAuslan), *Public Law and Political Change in Kenya* (1970), examined Kenya's colonial structures for exercise of public power and its complicated independence constitution— and foreshadowed its collapse.

[4] Yash Ghai 'Constitutions and the political order in East Africa' (1972) 21 *International and Comparative LQ* 403.

[5] Some of this was a result of our advice. Our memorandum was later published—see Patrick McAuslan & Yash Ghai 'Constitutional proposals for a one party state in Tanzania' (1965) 1 *East African LJ* 124.

[6] In those early post-colonial years, his emphasis was on development. His more interesting remarks on the role of a constitution were in terms of constitutions being either 'brakes' or an 'accelerator'. He argued that the west valued a constitution because it put brakes on power, but what Africa needed was a constitution to accelerate development, for which safeguards might be an impediment.

these two goals could not easily be balanced: much less than a monopoly of power can corrupt absolutely. Lord Acton's aphorism erred, I think, on the side of understatement.

The opportunism and vagaries of the cold war buttressed military and one-party regimes, but with the fall of the Berlin wall, the west had less of a motive, and Russia less of a capacity, to shelter these regimes. The 'harsh' wind of democracy swept through Latin America, Africa, large parts of Asia, and eventually Eastern Europe. The constitutional trajectory of states subjected to the winds of change was not similar in all respects. Some made a relatively easy transition to liberal democracy (particularly in parts of Europe), but others became mired in internal conflicts, frequently based on ethnic differences. Some of the latter collapsed into 'failed' states and had to be taken into international care as 'protectorates' and subjected to a process of rehabilitation (Cambodia, East Timor, Guatemala, Namibia, Bosnia-Herzegovina, Afghanistan and Iraq).[7] Others sought the route to constitutional rule through 'consociationalism',[8] forms of democracy and power-sharing which rejected majoritarianism. Post-modernist thinking challenged the liberal state, glorifying difference as well as particularistic identities and fragmenting the political community into self-sufficient groups. The struggle was no longer over new territory but over the internal division of state territory, and with it the diffusion of sovereignty. The principle of self-determination was turned from secession to autonomy. My treatment of the Hong Kong constitutional dispensation in terms of the notion of 'one country, two systems' was my first detailed examination of autonomy, although autonomy has a long lineage.[9] Deng Xiaoping had predicted a critical role for autonomy to solve world problems — and how right he was![10] States that emerged from colonialism soon after the Second World War (and that had seemed to have achieved some kind of stability), like Sri Lanka and the Sudan, also came under pressure of ethnic and religious claims — indeed even the much older and liberal Canada had to confront acute demands from the francophone and the aboriginal peoples.

It is therefore not surprising that the most interesting constitutional innovations of our times derive from the imperative to accommodate diversities and plurality of identities, captured in the cliché of 'unity in

[7] My personal experience of the rehabilitation of 'international protectorates' was in Cambodia, where I was consultant to the United Nations; East Timor, where I advised on the structuring of the process of constitution-making; Afghanistan, where I worked with the Constitution Commission and the United Nations on the preparation of its new constitution; and Iraq, where I assisted the Constitutional Commission of the National Assembly.

[8] See below under the discussion of 'Ethnic constitutions'.

[9] Yash Ghai *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (1997). I had previously advised on and helped implement schemes of devolution in Papua New Guinea (analysed in Yash Ghai & A J Regan *Law, Politics and Administration of Decentralisation in Papua New Guinea* (1993)), Vanuatu and the Solomon Islands.

[10] Deng's views were expressed to the then British Foreign Secretary, Mr Geoffrey Howe, and appear in Deng Xiaoping *On the Question of Hong Kong* (1993) 14. The latest contenders for autonomy is Darfur in Sudan, whose claim has been advanced by the European Union and other international agencies.

diversity'.[11] The collapse of the theory of the nation-state, to which this post-modern preoccupation leads, tends to produce a complex, many-layered polity with centrifugal effects on the sites of power. At the same time, economic globalization sucks state power upwards into confederal and eventually, perhaps, into federal regional structures and international economic organizations. Not surprisingly, the question 'whither the state? is on the lips of many. It compels a re-examination of the functions of a state when, amidst numerous global and local arms bazaars, it can no longer claim a monopoly of power and no longer adequately perform the most basic of state functions, namely providing security to its citizens. The principal parameters of the economic order extend well beyond state boundaries. State ideologies are vigorously, and sometimes violently, contested by particularistic claims and interests, for which it is now possible to find support in international norms. Individual rights have to be balanced with group rights. But more on this later.

GENERATIONS OF CONSTITUTIONS

Colonial constitutions

As the brief overview in the previous section demonstrated, the functions of constitutions have changed dramatically over the period of my academic and practical work. Growing up in Kenya, I become familiar with the colonial constitution, the principal function of which was domination of the colony and the warding-off of imperial rivals.[12] Economic interests were overriding, although they found little expression in the constitution, which was designed to give maximum discretion to the legislature and the executive — both of which were personified in the office of the Governor. The Governor was the centrepiece, representing the dominion of the imperial government operating in terms of the principle of double subordination: the subordination of the colonial executive to the imperial government and the subordination of the colonial legislature to the colonial executive. The colonial constitution could dispense with democratic pretensions but relied to some extent on the rule of law, less for political legitimacy than to support the market, albeit a tightly administered market. However, political factors could not be wished away, since the dialectics of control and appropriation dictated limits to exploitation and a selective co-option of local elites into the power structure. (This balancing was less important in Hong Kong than in Kenya, which had a large indigenous population divided by tribe and religion, prone to extreme instability if there was too radical a rupture with the previous political economy. Hong Kong was largely seen as a tabula rasa and its

[11] Neglected is perhaps the even more important concept of 'diversity in unity', for unless there is unity among diverse groups, there is no diversity.

[12] This warding off of fellow imperialist competitors through the manifestation of sovereignty had parallels in constitution-making in the South Pacific, where Hawaii and Tonga adopted constitutions (with the help of western advisors) to ward off colonizers: constitutions proved they were a sovereign (and civilized) people.

original role was to mediate world trade with China, rather than to generate production of its own. The colony became the basis of what was essentially a new settlement and a new society. This probably explains the generally favourable attitude towards the colonial government which I discovered, to my great surprise, as an ardent anti-colonialist, when I came to Hong Kong.)

The absence of a bill of rights in colonial constitutions and the refusal of courts to recognize any overriding constitutional principles meant that the colonial government was free to organize not only the economy but also society generally as it wished. The colony was structured on the basis of racial separation and privilege: races were designated as 'corporate groups' entitled (or, as was often the case with Africans and Asians, not entitled) to representation in state institutions or to the resources of the country. The political community was thus fragmented, not only between different races but frequently also within races. The pluralistic legal system was the expression of the separation of ethnic and cultural communities, each subject to its own personal laws.

Independence constitutions

The independence constitutions of the 1960s were driven by different considerations, namely the definition and consolidation of state sovereignty, cutting links to the colonial power and establishing, through the regulation of sovereignty, rules for the co-existence of different communities which colonialism had prevented from becoming a nation. The structures of the state were redesigned to introduce democratic forms of representation based on a new concept of citizenship, not always equal or universal and also qualified by differentiation and inequality explicit in customary laws.

The independence constitutions certainly had liberal aspirations: they borrowed heavily from western constitutionalism, which is based on the theory of the social contract in which liberties and freedoms of individuals occupy a place of honour; and in which fundamental concepts of authority, jurisdiction, rights and obligations, representation, obedience and resistance, and accountability had been developed. Although the terms of the contract that give body to a particular constitution may vary between the key ideologies of the modern western state (reflecting the contingencies of the times), each constitution's underlying premise is the separation between state (as the apparatus of government) and civil society (representing social and economic institutions and processes autonomous of the state). Captured in the concept of constitutionalism or the rule of law is the belief that the primary function of a constitution is to limit the scope of governmental power and to prescribe the method for its exercise, thereby preserving the autonomy of civil society. In its modern form, the constitution typically performs these functions through the separation of powers, the incorporation of democratic principles, and some form of judicial review. The constitution validates certain fundamental values and, subject to their overriding supremacy, establishes a framework for the formation of

government and the conduct of administration. These values are essentially liberal and market-related, emphasizing individual civil, political and property rights underpinned by the concept of the equality of all citizens under the law.

Important roots of this version of constitutionalism are to be found in the need of capitalism for predictability, calculability and security of property rights and commercial transactions. The concept of general rules was particularly well suited to these aims and, in part, the movement towards general rules was a reaction to special privileges and monopolies accorded in royal charters and instruments of incorporation. However, there was, and remains, considerable tension between the needs of capitalism in general and the desires of individual enterprises or sections of industry, which modern states resolve in different ways (a dilemma of which the Hong Kong people are well aware).

It should come as no surprise that the independence constitutional orders had extremely limited shelf lives. For reasons too complex to explore here, the newly independent states were characterized more by continuities than discontinuities in relation to the colonial state. Some called these constitutions charters of neo-colonialism. This was not entirely fair, for if the logic of the independence constitutions had been allowed to play out, the colonial state might well have been transformed. But nationalist leaders who succeeded the governor were determined to reinvent themselves in the image of the governor with untrammelled powers. The office of the prime minister was often replaced by that of the president and colonial laws and administrative structures were kept intact, the courts refusing to acknowledge the primacy of the constitution over statute.[13] The principle of gubernatorial rule was taken to its logical extreme when many states converted themselves into one-party or military regimes and replaced the previous parliamentary systems with autocratic presidential systems, in which the president became the new centrepiece of the new political order.

I have elsewhere discussed the western-inspired independence constitutions, using Weberian categories, as examples of a rational-legal state, with legality as its underlying principle and a major source of legitimacy.[14] In this kind of state authority is impersonal, deriving from a system of rules that expresses the purposes for which, and the ways in which, power must be exercised. The powers of institutions and officials are defined and bounded by the law, and do not arise from the personal qualities of the office holder. The obedience of citizens is thus not to individuals but to lawful commands. Instead, the new leaders transformed the state from rational-legal to patrimonial. The patrimonial state is characterized by highly personal rule. The basis of authority is the overarching powers and discretion of the ruler. Weber discussed two types of patrimonial state: one, normally in a system of

[13] I explored this transformation in the work cited in note 4 above.

[14] Yash P Ghai 'Constitutions and governance in Africa: A prolegomenon' in Sammy Adelman & Abdul Paliwala (eds) *Law and Crisis in the Third World* (1993) 51.

estates, in which the ruler governs through some form of sharing and delegation of power, in which the forms of delegation need to be secured against arbitrary infringement, and which thus promotes notions of binding rules in certain relationships. In the other type, which he called patriarchal patrimonialism, the ruler governs more directly, without any legal limits on his powers. The wishes, fears and anxieties of the ruler are paramount determinants of policy and action, which inevitably results in unpredictability. There is no sharp distinction between the public and the private sphere of the ruler; and there are often raids on the state exchequer. The appointment and tenure of officials depend upon the grace and favour of the ruler. His trust and confidence form the key to power and influence and thus promote court politics, with its attendant intrigues and uncertainty. Although the confederal and clientalist nature of the politics of numerous, then newly independent, states may suggest more an estatist than a patriarchal patrimonialism, the trend has been in the latter direction.

The reason for the movement from the legal-rational to the patriarchal is a compound of many factors, better explicable in Marxist than in Weberian terms. There is of course the greed of the new rulers, whose principal access to resources is via the plunder of the state (hence the pervasiveness of corruption). But there are also more objective and structural factors. One reason for the failure of constitutions in Africa is simply that they were expected to carry a much heavier burden than, for example, constitutions in the west. They were required to inspire a new form of identity, create national unity out of diverse ethnic and religious communities, prevent oppression, promote equitable development, inculcate habits of tolerance and democracy, and ensure a capacity for administration. These tasks are sometimes contradictory. Nationalism can easily be fostered on the basis of myths and symbols, but in a multi-ethnic state these are often divisive (as the conversion of Ceylon to a 'Sinhala' Sri Lanka so aptly, and horrifyingly, illustrates). Traditional sources of legitimacy may be inconsistent with modern values of equality. Economic development, closely checked and regulated under colonialism, threatened order and ethnic peace by producing mobility and the inter-mingling of communities in contexts where there was severe competition for jobs and economic opportunities. Democracy itself, too, can sometimes evoke hostilities as unscrupulous leaders play upon parochialism, religion and other similar distinctions.

This burden was compounded by the nature of third-world politics. Although not unattended by violence, the state in the west experienced a more organic growth than in the third world, where it was an imposition which not only dominated the economy but was also instrumental in shaping it. Consequently political factors were relatively more important. In third-world countries political power is harder to control because, partly as a result of colonial policies, civil society is weaker and fragmented (which has often proved congenial to a new government). The western state also enjoyed relative autonomy from international forces, which facilitated indigenous control over society and enabled power to be diffused and

institutionalized to a greater degree. The third-world state not only owes its genesis to imperialism, but even now its very nature and existence are conditioned by contemporary economics and politics. Hardly in control of its destiny, such a state and its people find it hard to institutionalize power on the basis of general rules, or to resist encroachments upon rights and democracy, engineered by more powerful states and corporations. The overthrow of the government of Allende in Chile by the encouragement and material assistance of the United States and its corporations is a classic example. And in many other regions, too, we have seen how the United States has assisted regimes to trample human rights. When third-world countries moved to independence, the tools of coercion were readily available (from cold-war warriors), and made their rulers careless of cultivating the consent of the ruled.

Constitutions after the fall of communism

One of the most spectacular features of the history of constitutions in the last two decades has been the near annihilation of communist constitutions. This is a very large change indeed from the situation in the last quarter of the twentieth century when nearly half of the world was governed by communist regimes. My own familiarity with communist constitutions was through the scholarship of others and through a study of the original texts. Writing in 1993, I said that the theory of communist constitutions rests on two bases: the criticism of bourgeois legality and Marxist teleology. Marx exposed the essential class-based and exploitative nature of the liberal state, disguised by the discourse of rights and constitutionalism. The bourgeois constitution itself secured the primacy of civil society through which the capitalist class dominated the state and the economy. Clearly this would not do for communists. I wrote that

> 'unlike bourgeois constitutions which (denying the dynamics of their history) emphasise order and stability, socialist constitutions (inspired more by Lenin's perspective than Marx's) espouse as their mission the egalitarian transformation of society. In turn, this requires the dictatorship of the proletariat, the most progressive elements in society . . ., to break and appropriate the economic, social and political power of the bourgeoisie. While the bourgeoisie has for long periods used civil society to dominate the state, the proletariat has little alternative to the use of the state to change civil society, for the communist revolution vests it with political power but does not change the underlying economic structure.
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> Communist constitutions therefore become overtly authoritarian instruments of class power. The relative weakness of the proletariat as a class and the magnitude of the task it faces lead to the denial of various political and economic rights to members of the erstwhile bourgeoisie and the strengthening of the state apparatus. The working class must secure domination over and, if necessary, replace civil society so as to transform it. State power must be unified, so that the separation of powers is abandoned in favour of the centralisation of power in representative state institutions. This concentrated monopoly of power in the state body is in turn subject to the supervening authority of the Communist Party, which owes its existence and powers to a mandate higher than the constitution itself: to history itself'.
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> I noted a deep contradiction at the heart of a communist constitution—and stated it in the following way, 'It is thus possible for the liberal constitution to base its legitimacy upon values (such as civil and political rights) and mechanisms (such as pluralism) internal to itself and thereby become a major legitimising device for the state and society. The communist constitution (at least in the early stages, where coercion is written on its face) must seek legitimacy from elsewhere, namely socialist theory. The

very emphasis on these external sources of legitimacy demonstrates the secondary and functional nature of the constitution, one not particularly appropriate to legitimacy.'[15]

It is fair to say that as the People's Republic of China abandons socialism in favour of capitalism, its political and constitutional system will come under great stress. If evidence is needed, it comes from Eastern Europe, where the collapse of the communist regimes came less as a result of an assault by their opponents as the total lack of legitimacy of the regimes once the basic tenets of socialism were abandoned.[16]

My active engagement (as advisor and scholar) with the Constitution of the People's Republic of China began with my research on Hong Kong's Basic Law and its foundations in the constitution of the People's Republic. It was clear to me that no study of the prospects of the Basic Law could be undertaken without understanding the political and legal system of the People's Republic, in which it was ultimately embedded. I was struck by the very different traditions of law and legality, and the judicial function, on the mainland and in Hong Kong, which boded ill for the autonomy of the latter. (For this reason I devoted a substantial chapter in my book on the Basic Law to the mainland constitutional and legal system). The dialectics between the liberal legalism of Hong Kong and the Leninist 'democratic' centralism of the mainland would have been a fascinating phenomenon to behold had not the superior political power of the mainland subdued the technical superiority of the common law — so much, do I hear you say, for constitutions![17] The many complexities of autonomy, central to self-government, are bypassed as a result of the supremacy of the Communist Party, under whose dominance decisions of the central authorities always prevail over local initiatives. Now China itself is confronted with the fundamental contradictions between its economic policies and its instinct for political and social control administered from a tiny centre in Beijing. These contradictions are aggravated by the size of the population and the territory, unrest among minorities, and rapid economic and social change. It is unlikely that China will go the way of the Soviet Union or Yugoslavia, for its predominant Han population and its deep springs of nationalism and patriotism assure its territorial integrity. But transition to some form of democracy seems inevitable, and also perhaps the adoption of liberal constitutional artefacts, the separation of powers, spatial distribution of authority, and judicial review. The pace will, however, be

[15] Ibid at 57–60.

[16] An authoritative book on constitutional changes in Eastern Europe states the following: 'There was no counter-elite, no theory, no organisation, no movement, no design or project according to whose visions, instructions, and prescriptions the breakdown evolved . . . Apart from narrow and rather ineffectual circles of dissidents that could never effectively break out of their marginal habitat of academic, artistic, or religious institutions (if not prisons), opposition movements were largely . . . a product of the regime's decay rather than its antecedent cause': Jon Elster, Claus Offe & Ulrich K Preuss (with Frank Boenker, Ulrike Goetting & Friedbert W Rueb) *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (1998).

[17] I explored the rise and fall of the common law in post-transfer constitutional litigation in 'Litigating the basic law: Principles, interpretation and procedures' and 'The NPC interpretation and its consequences' in Johannes M M Chan, H L Fu & Yash P Ghai (eds) *Hong Kong's Constitutional Debate: Conflict over Interpretation* (2000) 3–52 and 119–214. The book contains many interesting analyses by leading scholars of, and documents on, the right of abode cases.

measured, with constitutional changes gradually registering the democratic transition. It will be an unusual transition, made possible by the very authority of the present system that is to be tamed.

Constitutions in the new wave of democratization

The majority of one-party or military regimes could not survive the collapse of the Berlin wall. The newfound zeal in the United States for democratization, now released from the imperatives of the cold war, left many a dictator naked, deprived of the political and material support to continue his regime of oppression. Under these pressures some countries managed a kind of transition to what we might call the democratic constitution, seeking at the same time to cure many of the ills of a bureaucratic and corrupt regime. Others, under the weight of internal rebellions and civil conflicts, experienced greater difficulties in achieving a transition of this kind and went on a different trajectory, sometimes being taken into international receivership or becoming protectorates, the escape from which was to be found in a negotiated constitution, designed not so much to overcome these internal divisions as to institutionalize them—what we might call the ethnic constitution.

I do not want to suggest that these two categories exhaust contemporary constitutions, but they are the more highly publicized and perhaps the more interesting ones. The outstanding examples of liberal democratic constitutions are those of East European states. Just as previously the African independence constitutions were the antithesis of colonialism, the East European constitutions are now the antithesis of communism. They place a special emphasis on democratic institutions, based on free and fair elections. They seek to separate parties and the state, prohibiting direct rule by political parties — in contrast to the Leninist policy of direct and exclusive rule by the Communist Party. Some constitutions prohibit the adoption of party ideologies by the state. The constitution is supreme and has direct application, unlike the previous position where typically statutes were required to give effect to the provisions of a constitution. The principal powers of the state have to be separate. These constitutions establish constitutional courts with the ultimate power to interpret the constitution and laws, and to ensure the enforcement of their decisions — a marked reversal of the communist traditions. The free-market economic system is guaranteed, generally in explicit terms, and the protection of private property is strongly upheld. Despite this commitment to the market economy, the constitutions eschew moral declarations, perhaps mindful of attempts of the previous regimes to promote the New Socialist Man. They are extremely conservative, sparse in their scope, and content (in the way of classical constitutions) with setting up political institutions and letting them get on with the business of the state.. The path to future social and economic policies is left open, but what is made clear that they must be consistent with liberal market economies.

This European approach shows a great deal of faith in democratic politics, in contrast with democratic constitutions in Africa and Asia where there is considerable scepticism about politicians and politics, and hence highly regulated political systems. The 1997 Constitution of Thailand, drawn up at a time when the reputation of politicians and governments was at a particularly low point, provides a good illustration of this approach. Most of the devices discussed below feature in that Constitution. The key operators and, one may say, the beneficiaries of democracy, politicians and political parties, are regarded as the most dangerous enemies of democracy. Consequently the Constitution defines in considerable detail what the government may or may not do. What it (and other state agencies) may not do is largely set out in an extensive bill of rights. Areas of jurisdiction prohibited to the state (such as, for example, sensitive land issues and the pursuit of linguistic and cultural rights of minorities) are also defined by vesting responsibilities for those matters in independent commissions or other authorities. What the government must do is prescribed in what are called Principles of State or Directive Principles, which may require the state to pursue policies of equitable regional development and affirmative action for disadvantaged communities, to promote all indigenous languages, to safeguard natural resources, to protect the environment, to ensure access to courts and to support science and technology. Increasingly, positive obligations are placed on state agencies by bills of rights where economic, social and cultural rights require them to ensure to the people their basic needs.

Another set of provisions aims at preventing the abuse of office by ministers, legislators and senior administrators. They may be prohibited from engaging in business, especially that which conflicts with their duties. They are required periodically to disclose to an independent agency their assets and liabilities. The conduct of political parties, often the cause of violence and corruption, is regulated to ensure that their charters and practices are consistent with fundamental principles of democracy, that they practise internal democracy, and that their accounts are audited and published to achieve transparency — on pain of forfeiture of the right to compete in elections. Thailand goes so far as to establish a second chamber where no candidate can be a member of a political party. This chamber has been given critical functions where independence from party politics or the administration is considered necessary, as in appointments to the electoral commission and the constitutional court.

Independent commissions are also established to perform sensitive and critical functions that are essential to ensure open political and administrative systems. Thus the drawing of electoral constituencies, preparation of electoral rolls and the conduct of elections are the responsibility of an independent electoral commission. In some countries the management and allocations of state land are done by an independent commission. In order to prevent abuse of the criminal process, prosecutorial powers are vested in an independent director of prosecutions. Some key elements of monetary

policy are removed from the ministry of finance and given to an independent central bank. Various institutions, their independence and resources guaranteed under the constitution, are established to deal with complaints against the administration and to protect people's rights: ombudsmen, human rights commission, and anti-corruption authorities.

Yet another device is to empower the people and facilitate their participation in public affairs. The constitution requires the state to disclose information and reports that it holds. For instance, the freedom of information provision in the Kenyan draft Constitution obliges the government to publish and publicize any important information affecting the nation — this in a country where the government routinely suppresses reports of commissions of enquiry or investigations into charges against ministers or others favoured by it. The allocation of airwaves is taken away from the government and given to an independent commission, while state-owned media are required to provide equal and fair coverage to all political and social groups. Electors who consider that their MP has failed to discharge his or her responsibility conscientiously may remove that MP. Parliament and the administration are required to ensure that opportunities are given to the people to participate in lawmaking and in decisions that affect them. Some constitutions, following the Swiss model, give people the right to initiate legislative proposals for consideration by the legislature. And to ensure that all these onerous provisions are observed, constitutional or supreme courts are established with wide constitutional jurisdiction.

As will be obvious, this type of democratic constitution not only reflects distrust of politicians but also acknowledges the rudimentary nature of the culture of democracy. In the European democratic constitutions the culture and practices of democracy are taken for granted, and made the basis of the constitution. The third-world constitutions seek to make up for the democratic deficit among politicians and political parties and to promote democratic habits and practices.

Ethnic constitutions

The most interesting developments for a constitutional scholar have occurred in political systems which deal with ethnic diversity, and this has been the main focus of my research and advisory work in the last decade or so. Today most states are multi-ethnic; and perhaps they always were, but it was just not acknowledged. Now, under the impetus of globalization, migrations, rights-consciousness, gender politics, and general suffering, the question of diversity has forced itself on politicians and policy-makers and the international community. Broadly, three approaches have contested for primacy: the hegemonic, the liberal and the consociationalist.[18] In the first, stability is given to a society by the hegemony or dominance of one ethnic

[18] See generally Yash Ghai 'The relationship between the state and minorities' in Nanda P Wanasundera (ed) *Protection of Minority Rights and Diversity* (2004).

group: examples are whites in apartheid South Africa and pre-independence Zimbabwe; Jews in Israel; Russians in the Soviet Union; the fatal attempts of Slobodan Milosevic to carve out a similar dominance of Serbs in the former Yugoslavia; and the aspirations of fundamentalist Hindus in India. Individuals acquire and exercise rights as members of communities which are given a corporate status; and rights are not equally distributed. This approach is now discredited, although it is not without its adherents.

Liberalism, on the other hand, believes in equal rights of all individuals. Under a regime of rights and democracy, the state is neutral between persons and communities — non-discrimination being its fundamental principle. The state's neutrality is not to be interpreted as hostility to differences in religion, language, social status or historical traditions. On the contrary, the liberal state prides itself on its tolerance, indeed celebration, of difference. But it believes that this tolerance is possible only if these differences do not intrude on the public sphere. The liberal regime depends on a sharp distinction between the private and public spheres, and it is in the private sphere that it sees associational and confessional activities and the pursuit of sectarian values and cultures. It also considers that individuals and groups should be free to seek their own version of the good life (as long as they respect the rights of others), and for this purpose, too, state neutrality between different conceptions of the good is necessary. This is an attractive framework but it has come under considerable criticism even from those who would be expected to support it.

One strand of criticism is that the liberal state does not live up to its claims, in that the state is centralized, monopolizes power, and aims for uniformity in law and administration, leaving little space for diversity. More empirically, it is argued that in practice the liberal state privileges the culture of the majority community; and there has of course been a close association between liberalism and the theory of the nation state, which is premised on the cultural homogeneity of a people, and in which the dominant mode of political organization and decision-making is majoritarianism, to the obvious disadvantage of minorities. Others say that liberalism underestimates the importance of culture to one's orientation and the development of one's values and moral judgments; or if it does not underestimate it, it tends to ignore the significance of minority cultures vulnerable to extinction under modern pressures of the market and the state.[19]

Many countries that have been regarded as liberal have had to confront the rise of ethnicity-based claims to political recognition and participation, each grounded in its own culture, language, and religion (Canada being an interesting example which has tried hard to grapple with the typical dilemmas which liberalism has to face). Developing countries with acute difficulties of nation-building have had to balance the demands of difference

[19] For a particularly trenchant criticism of the liberal state, see Bhikhu Parekh 'Cultural diversity and the modern state' in Martin Doornbos & Sudipta Kaviraj (eds) *Dynamics of State Formation* (1997) 177.

with the imperative of unity, and have had to attempt to transcend ethnicity through genuinely national institutions. For example, electoral systems are often designed to create incentives for national rather than regional political parties and, if the system is presidential, to ensure that the candidate who is elected president enjoys widespread support in the country, for example by requiring in addition to a majority vote nationally, specified support (say 25 per cent of the votes) in a specified number of provinces (say 65 per cent) (as in Nigeria and Kenya). This approach can have an integrative effect. Other devices to promote a broad nationalism can also be adopted, including inter-ethnic equity and redress for past injustices (this is the South African approach).

Those who consider that liberalism cannot do justice to minority cultures have turned to the consociational approach. Two assumptions underlie consociationalism. The first, much contested, is captured by the concept of primordialism, which starts from the presumption of what is often called the given and irrevocable reality of diverse communities and cultures. It assumes that cultural, religious and linguistic differences are inborn and define our very identity and are not susceptible to change. It is therefore better and fairer to accept these existing differences and identities and build political structures around them. The second assumption is that it is possible to have a democratic order in a multi-ethnic state, but that it is necessary to abandon institutions and procedures of majoritarianism and to make room for forms of power-sharing which enable each ethnic group to participate in the affairs of the state. Consociationalism owes a great deal to the intellect and energies of Professor Arendt Lijphart, who for decades has been arguing its virtues and elaborating the detailed constitutional framework necessary to achieve it. Central to this framework is the constitutional recognition of communities as corporate groups and the bearers of political entitlements. These groups should have representation in both the legislature and the executive, with appropriate vetoes to safeguard their key interests and be given territorial, and where necessary, non-territorial forms of autonomy; and the state should observe the general principle of ethnic proportionality.[20] While the principal concern of the liberal constitution is to regulate the relationship between the state and citizens, that of the consociational constitution is to regulate relations between communities as mediated through state structures.

'Primordialism' is strongly contested by other social scientists, who argue that cultural differences are not inborn and immutable but are socially and politically constructed, often by ethnic 'entrepreneurs' who have a vested interest in politicizing these differences. It would be foolish to institutionalize what are temporary and fluid identities — of which there are many in this post-modern and globalizing world — and to fragment the political community. The critics also argue that many of Lijphart's institutional

[20] I have discussed some constitutions influenced by Lijphart's ideas in 'Constitutional asymmetries: Communal representation, federalism and cultural autonomy' in Andrew Reynolds (ed) *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (2002) 141.

prescriptions are prone to instability, as compromises among community leaders (such as coalition governments) unravel and are ultimately unworkable. Despite powerful intellectual attacks, consociationalism is on the rise. As more and more countries are engulfed in civil ethnic wars accompanied by horrible atrocities, and the world community gets drawn in, consociationalism seems to provide a ready fix. Increasingly the demands of minorities are couched in terms of identity, power-sharing and self-government, the building blocks of consociationalism. As the focus of the principle of self-determination shifts from secession to internal democracy, forms of power-sharing have become salient to that form of democracy.

This approach is manifested in such recent constitutions as those of Northern Ireland, Bosnia-Herzegovina, Kosovo and (to a qualified extent) Fiji, where communities are treated as corporate groups and entitled to rights as such. This separation of communities is reflected in some countries in separate electoral rolls and reserved seats. The legislature operates through a complex system of voting, sometimes by all the members voting together, sometimes by communities voting separately, and sometimes, on sensitive issues, by combining of the two systems. The form of government is often a coalition of different communities. Sometimes there is a joint presidency, an executive of, say, three persons, with a rotating chair (as in Bosnia-Herzegovina); and membership of different communities in the cabinet based on proportionality or fixed numbers. Complex voting systems apply even in the cabinet. A general principle of proportionality applies to public service appointments. Where the geographical distribution of population allows, each community has control over its own region. If this is not the case, intricate systems of cultural or religious councils are established to exercise community autonomy cutting across the country. In these systems, citizenship rights are less important than the entitlements of communities. Furthermore, there are serious restrictions on mobility from one community to another, although in certain instances some people are allowed or forced to designate themselves 'others'. Such constitutions, privileging culture over a common or secular nationalism, represent a clash between the universal and the particular. This clash is played out in the dialectics of individual and group rights.[21]

A principal device for accommodating diversity, and one much favoured by minorities and much resisted by majorities, is autonomy. The demand for autonomy can arise because a community does not feel part of the wider political nation (as with the Swedish-speaking inhabitants of the Finnish islands of Åland, or the Banabans of Kiribati). It can also arise from disenchantment with the state (as in the case of the Sri Lankan Tamils, the Southern Sudanese, and the Bougainvilleans seeking independence). My first major encounter with autonomy was in the designing of the

[21] An issue I examine in 'Universalism and relativism: Human rights as framework for negotiating inter-ethnic claims' (2000) 21 *Cardozo LR* 1095.

independence of Papua New Guinea, which consists of the eastern half of New Guinea island (the other half being part of Indonesia) and a series of islands. These island communities had not been economically or politically integrated, and there was little sense of belonging to a wider state formation. Bougainville felt this most of all, as it was the farthest from the capital and felt greater affinity to its neighbour, the Solomon Islands. So it demanded, and the constitutional planning committee recommended, considerable autonomy for it and other communities which desired it. In the final stages of the process, the constituent assembly rejected the chapter on autonomy and Bougainville launched a rebellion. I was asked back as a mediator and the problem was resolved by the reinstatement of the chapter, somewhat modified.[22]

In 1982, attending a conference on decentralization in Colombo, in the aftermath of the worst pogrom against Tamils, I had lunch with two old friends: Lalith Athulathmudali, then Minister of Justice, and Neelan Tiruchelvam, at the time a leading light in the Tamil United Liberation Front (a parliamentary group). They asked me if I would produce proposals on autonomy since this was high on the Tamil agenda. Both liked the proposals I prepared. Neelan thought that he could persuade his party (then the principal representatives of the Tamils), and Lalith said that he would try to persuade President Jayawardena. The next morning Lalith told me that the president liked the proposals, but that I had first to explain it to key Buddhist monks. When I met them that evening, they had no disposition to listen to the proposals but delivered themselves of bitter invective against the Tamil community. The next morning the president decided not to proceed with the proposals, which were very modest compared to what the Liberation Tamil Tigers of Eelaam are now demanding and which the government is disposed to concede. This incident reinforces the general lesson that the rejection of reasonable proposals often leads to violence and the stakes are upped. Both Lalith and Neelan subsequently became victims of suicide bombers of the Liberation Tigers of Tamil Eelam.

Today there are many examples of autonomy defined as the special relationship of a part of the country to the whole. Most of these are successful.[23] However, autonomy of this kind is problematic The autonomous area is small and the central authorities govern a large area (for

[22] Subsequently, I advised on various aspects of the implementation of this and other parts of the constitution and reviewed the implementation of autonomy. A J Regan and I have described Papua New Guinea's experience of autonomy at length in Ghai & Regan op cit note 9. Autonomy arrangements secured peace for several years, but in 1988 (twelve years after the initial agreement on autonomy), Bougainville staged another rebellion which was only resolved in 2001 through negotiations in which Regan and I were involved. See our joint article, Anthony Regan & Yash Ghai 'Bougainville and the dialectics of ethnicity, autonomy and separation' in Yash Ghai (ed) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (2000) 77. I found similar longings for island-based autonomies in other South Pacific states in which I worked or studied — and some devices adopted for this purpose are discussed in my paper 'Reflections on self-determination in the South Pacific' in Donald Clark (ed) *Self-Determination* (1996) 173.

[23] See my paper 'Autonomy as a strategy for diffusing conflict' in Paul C Stern & Daniel Druckman (eds) *International Conflict Resolution after the Cold War* (2000) 483.

example, Åland-Finland, Hong Kong-China, Kashmir-India, Puerto Rico-United States, Zanzibar-Tanzania, Corsica-France). There are often no strong constitutional guarantees of autonomy. The autonomous area has to protect itself against larger forces and for this reason, ironically, the much greater degree of sharing of power through federalism is often more effective. Self-restraint on the part of the central authorities is critical. This may be possible when the autonomous area is really small compared to the overall size of the state (Finland leaves Åland alone, as does the United States Puerto Rico—most of the time). Hong Kong's small size has, however, been less protective: it has never ceased to amaze me how much Hong Kong's politics are tied to the Central People's Government, despite the much greater degree of Hong Kong's theoretical autonomy compared to these other examples. But there may be special reasons, including the lack of a proper concept of autonomy in the constitutional thought of the People's Republic of China.[24]

To give a fuller picture of an ethnic constitution, I turn to Bosnia-Herzegovina ('Bosnia'). Bosnia was a republic in the former Yugoslav Federation, but unlike other republics, its population was ethnically mixed with no community in a dominant position. Therefore the solution of declaring itself as an independent 'national' state (the path chosen by other republics) was not feasible. Leaders of the three major communities, Serb, Bosniac and Croatian, incited their followers to violence against others, partly to drive them out of particular areas where they hoped to form their own state. The international community had a vested interest in maintaining Bosnia as a united state, and to achieve this took the sponsors of these communities in Serbia (including Milosevic) and Croatia to the Dayton military base in Ohio in the United States to craft a constitution.[25] The republic, Bosnia and Herzegovina, is composed of two 'Entities'. One is the Federation of Bosnia and Herzegovina, and is mainly Bosniac and Croatian ('the Federation'); the other, Republika Srpska, is a Serbian entity. Most powers are vested in the Entities (in the case of Bosnia, in the constituent part of the Entity (Bosnia or Herzegovina)), the republic as a whole being left largely with those powers that are necessary to constitute and exercise external aspects of state sovereignty. The constitution is built around the concept of ethnic communities as separate corporate bodies. Arrangements for representation and power-sharing take the communities as building blocks, carrying forward the proposition stated in the preamble of the Constitution that Bosniacs, Croats and Serbs are 'constituent peoples' of Bosnia and Herzegovina, 'others' and 'citizens' being mentioned only in passing, which effectively makes these three communities, rather than the people as a whole, the source and bearers of sovereignty.

[24] I argue this point in 'Autonomy regimes in China: Coping with ethnic and economic autonomy' in Yash Ghai op cit note 22 (*Autonomy and Ethnicity*) at 242.

[25] See Constitution of Bosnia and Herzegovina 1995.

The House of Peoples consists of five Croats and five Bosniacs from the Federation, and five Serbs from Republika Srpska who are elected by voters of their own communities.[26] Nine constitute a quorum, so long as there are at least three from each community. The other chamber of the Parliamentary Assembly, the House of Representatives, is constituted on the same principle and in similar proportions, but with a total of forty-two members. The result of these arrangements is that politics are entirely communal, and almost perforce all political parties are ethnically based. Parties get together in parliament or government only after the elections. The system creates incentives for parties and their leaders to intensify appeals to narrow ethnic interests, linked to their kinfolk in other states, which does little for the unity of the country.[27]

The constitution also provides for extensive power sharing. The Presidency, in which executive power is vested, consists of three persons, each chosen directly by one of the three main communities. Decisions are made by consensus, giving each community a veto. Similar provisions apply for appointments to other public bodies, including the Constitutional Court and the Board of the Central Bank. The chair of the legislative chamber rotates among the representatives of the three constituent peoples. Voting rules ensure that each of the three main ethnic communities is involved in all decisions. Any one of them can declare that a proposed decision affects its vital interests, triggering special procedures for mediation and reconciliation. If that fails, the matter is referred to the Constitutional Court.

Entity governments are also required to have a proportional ethnic balance, and the distribution of key political functions is along ethnic lines. Ironically, in this preoccupation with ethnicity the rights of national minorities are seriously downgraded or ignored (as is demonstrated by the restriction of the office of the Presidency to Bosniacs, Croats and Serbs and by the legislative vetoes accorded to these groups). Rights of citizens, as citizens rather than as members of particular ethnic group, are also limited. Given this complex process of decision-making, it is not surprising that numerous deadlocks have occurred. The national-level government is seriously handicapped in its capacity to make and execute policy. The constitution provides a key role for foreigners. Three judges of the Constitutional Court are foreigners, appointed by the President of the European Court of Human Rights; and eight of the fourteen members of the Human Rights Chambers are also from outside. The first governor of the Central Bank had to be a foreigner, appointed by the International Monetary

[26] Article 4.

[27] In the 1996 elections, the most extreme ethnic party in each community won, leaving their leaders the impossible task of finding a common purpose. The OSCE reported that the 2002 elections were relatively peaceful, and nationalism was a'less overt theme', though still a 'pervasive underlying' factor and there was more cross-entity political activity. Turnout was low, and the main nationalist party in each community won the largest share of the vote (OSCE Office for Democratic Institutions and Human Rights *Bosnia and Herzegovia elections 5 October 2002 Final Report* (available at *www.osce.org/documents/documents/odihr/2003/01/1188-en.pdf/*). Discussions on reform of the constitution, moving away from the dominance of the ethnic factor, are well advanced.

Fund. The highest executive and key policy powers are vested in the Office of the High Representative (appointed in accordance with United Nations resolutions), the mandate of which covers the monitoring of the implementation of the Dayton Accord. Owing to differences within the collective presidency and the unwillingness of any of them to take decisions that might be resented by his or her community, many matters end up on the desk of the High Representative who then has to make the decision.

For some, this presents a bleak picture of the future of multi-ethnic states. For someone like me who grew up with the segregation of races in a colony, it evokes memories of a colonial society that had little to redeem it. South Africa resisted being cast into a Lijphartian model as it negotiated its post-apartheid constitution, while at the same time recognizing the need for social justice and ethnically based affirmative action. Fiji, which like South Africa had a colonially imposed racial constitution which persisted well into independence, made bold but incomplete moves towards a non-racial constitution in the aftermath of the coups of 1987. Canada has taken several steps to accommodate the claims of its indigenous people through autonomy arrangements that sustain traditional modes of governance and tribal society, as well as through other measures to foster its increasing ethnic and cultural diversity. All of these measures have involved some breach of classical liberalism, without a compromise of its essential principles of tolerance and human rights and national unity. These developments show that liberal values can be combined with various forms of political and constitutional recognition of diversity. This, it seems to me, is the way of the future.

CONCLUSIONS

It is time now to bring together the directions and byways of this personal journey through constitutions. Let me begin with some contrasts between the classical and contemporary constitutions. I have already stated that the new European constitutions have a closer relation to the classical than the new democratic or the ethnic ones. The classic constitutions were content to set up political institutions; the contemporary are highly interventionist, seeking to change society and the structure of power. They are inventive and oriented towards social engineering. Old constitutions were a means of consolidating and centralizing the power of the state that had been secured in other ways. The constitution registered class or ethnic victory. The major triggers for changing the nature and operation of the state, and of politics, were to come from society. The Constitution of the United States, although classified as the product of the American Revolution, is for this reason an extremely conservative document, designed to weaken the capacity of the state to intervene in civil society. But some revolutionaries fear even this degree of constitutionalization of power, for they believe that no impediments should be placed on revolutionary objectives, themselves the source of legitimacy. Echoes of this debate are to be found in in the Chilean debates during Allende's access to and exercise of state power on the path to socialism, with Allende arguing for a democratic path, others opposing him.

Contemporary constitutions are not based on clear victories. Indeed, they become necessary because no side has won a clear victory. A particular feature of contemporary constitutional processes, especially their adoption, is the role that negotiations over a constitution play in resolving conflict, rather than making a constitution after conflict has ended.[28] A great deal of my own advisory work in recent years has been of this type. I remember that, in the conflict between Papua New Guinea and the breakaway province of Bougainville, the longer we failed to establish a framework for constitutional negotiations, the more combatants and civilians would be killed. A constitutional consultant frequently needs a manual on conflict resolution in his or her kit. Various consequences flow from this role of constitution-making. First, they are not an imposition, but products of negotiations (in relation to which a persistent difficulty is the determination of who sits at the negotiating table: just the warring factions, as in the Sudan, or a wider cross-section, as is demanded in both Sri Lanka and Nepal?) Secondly, they are less final or definitive than older constitutions. Constitutions deal with complex and mutating realities. Frequently, within broadly acceptable provisions and parameters, they provide the framework for future negotiations and change. The Papua New Guinea settlement gives the people of Bougainville the option to raise the issue of secession after a suitable period when the new autonomy arrangements have been given a chance. Thirdly, because contestants bring not only different claims but also differing sources of authority and precedent for their claims, the new instrument may rest on several sources of moral and legal authority, which gives flexibility but also forces the competing groups to continue their dialogue and consensus-making (as illustrated in the discussion below on sovereignty). Fourthly, these constitutions are more delicate instruments than the traditional ones: the latter were based on dominance well established in civil society and the economy, and thus less susceptible to counter-pressures. It can be said that the role of the older constitutions was procedural rather than substantive. Contemporary constitutions are based on a balance of power, and can subsist only in so far as that balance is maintained. This kind of constitution is therefore both more important and more vulnerable than the older variety.

The older constitutions (such as the French, but also the twentieth century independence constitutions) were based on absolute sovereignty.[29] The function of the constitution was to aggregate and consolidate this sovereignty against outsiders. In modern parlance, we would say that the constitution is an act of self-determination, the external aspect of self-determination that defines itself in relation to other states. Several of today's constitutions are based on what has been called internal self-determination, and aim to

[28] See Vivian Hart 'Constitution-making and the transformation of conflict' (2001) 26 *Peace and Change* 153.

[29] The French Constitution of 1791 stated: 'Sovereignty is one, indivisible, inalienable, and imprescriptible; it belongs to the nation'. This theory of sovereignty was to justify the power of the 'nation', of 'imagined' people, antecedent to the constitution.

disaggregate state sovereignty into distinct packages (not merely in the form of federalism, but also other complex forms of dividing and sharing power). Once it is accepted that sovereignty lies with the people, not with the monarch or the party or an ethnic group, it is possible to visualize sovereignty in dispersed and pluralistic forms. The skill required for contemporary constitution-making is to diffuse (or perhaps obfuscate) sovereignty.[30] Indeed, some recent constitutional settlements have been possible only by keeping open the option of sovereignty: in French New Caledonia and in Papua New Guinea (both in the South Pacific) and in the recent settlement for the Sudan, a group has reserved or been granted (the formulation depending on who you are) the entitlement to exercise the right of external self-determination (that is to say, secession and separate sovereignty) after a suitable period (six years or so, which may be interpreted as a variant of the 1937 Constitution of the Irish Republic which proclaimed the unity of Ireland, thereby claiming, but at the same time postponing, sovereignty over Ulster). Sometimes, as in the Northern Ireland of today, sovereignty is diffused through a form of condominium, or as it is known in Ireland, co-sovereignty (a solution recently suggested for the conflict in and over Kashmir). This is another way to say that old constitutions were based on, or aimed to, establish state nationalism; newer constitutions recognize and build on difference.

There are many impulses behind the new constitutionalism: the failure of earlier centralized constitutions; the collapse of communism in Eastern Europe (moving away from statist to market orientation); the collapse of multinational states, particularly the former Yugoslavia, giving fresh impetus to the theory of nationalism; post-modernist theory celebrating difference, defining and protecting specific rather than national identities — a tendency reinforced by new international rights instruments targeting specific communities such as women and indigenous peoples; reformulations of liberal theory arguing for the importance of culture and traditions to identity and self-respect; the increasing heterogenization of populations of states; the difficulty of maintaining a sovereign centre of power in the face of ethnic rebellions (assisted by the easy availability of arms and other weapons, small and large). These are internal pressures but they are not unconnected with that series of economic, political, technological and social changes, often externally driven, that pass under the rubric of globalization. These changes increase the vulnerability and weaken the capacity of the state. Globalization, with its tendency towards ever larger scales of operations, has forced states to surrender parcels of sovereignty to regional associations, spectacularly in Europe, where key indicia of statehood like notes and coins, passports and in due course even flags, the quintessential symbols of nationhood, are beginning to disappear.

[30] See James Hooper & Paul Williams 'Earned sovereignty: The political dimension' (2003) 31 *Denver Journal of International Law and Policy* 355.

New constitutions are torn between the following two different impulses of globalization: first, they must respond to greater transnational dependence and integration (for example, in the European Union transnational constitutions are superseding national constitutions); and, secondly, state constitutions have to defer to transnational decision-making, producing a modern form of lex mercatoria, with private law encroaching upon what were previously regarded as prerogatives of the state. Furthermore, globalization produces tension between the imperatives of the market (manifested most clearly in the constitutions of Eastern Europe) and the commitment to social justice. Constitutional globalization also has another consequence: it weakens the state, not only vis-à-vis global forces but also in regard to its domestic economic constituencies. For the effect of global economic integration is, in the interests of freer competition, to obliterate the earlier, neater distinctions between the private and public, the regulation of which comes increasingly under inter-state regulation. It has also enhances the authority of the executive vis-à-vis the legislature, and this change in the relationship helps global forces, for they can more easily bind state executives than legislatures. Aspiring constitutional scholars would be advised to pay at least as much, if not more, attention to the charters and practices of the World Trade Organization, the World Intellectual Property Organization and international financial institutions as to the traditional notions of state sovereignty and the separation of powers. On the other hand, as discussed above, constitutions (freed by globalization from the grip of the state) have to accommodate (to use Tully's expression) the 'strange multiplicity'[31] of the people, principally through territorial autonomies.

There are yet other ways in which globalization affects contemporary constitution-making. In their constitutions states must respond to developing international norms, especially as they are embodied in human rights treaties. They are under pressure to adopt rules of 'good governance' (although quite what this means is not clear). Experts like me travel hither and thither purveying their goods. The Internet assists in a massive trade in constitutional provisions (and I have to confess to some plagiarism myself, particularly of the South African Constitution!).[32] Constitutions have become major carriers of values, institutions and procedures around the world. Constitutions are losing their national specificity (in part because the problems they are dealing with are similar the world over, which is again a consequence of the way in which markets and states have developed). But it is the provisions on human rights that have the greatest tendency towards universalizing constitutional norms. It is hard to imagine a constitution drafted today which would not give a place of pride to human rights. For the most part, civil and political rights are justiciable (and increasingly economic

[31] James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995).

[32] And although the Kenyan draft constitution, adopted by the National Constitutional Conference in 2004, has yet to be implemented, its provisions are reflected in new constitutional drafts in Zambia and Solomon Islands!

and social rights as well), and therefore rights values dominate the other provisions of the constitution. The universalizing tendency is reinforced by judicial practice to rely on decisions of courts of other countries as well as of international and regional tribunals — even the United States Supreme Court now deigns to look at the jurisprudence of other jurisdictions — to the extent that the precise wording is sometimes disregarded in favour of the 'spirit or purpose' of the right. A great deal of this borrowing takes place without much consideration of cultural or other contextual differences, and thus we have a new kind of abstraction. But the salience of rights has not gone unchallenged. In Afghanistan and Iraq there was nearly unanimous resistance to placing rights above the Sharia. Different formulations were tried in attempts to find a balance between the Sharia and human rights. Many Islamic principles are, of course, compatible with the international regime of human rights, but undoubtedly there are differences on some points, such as the fact that there is less than full equality for women and non-believers. The international community (for which read western states) tried to persuade the Afghanistan Constitutional Commission to give primacy to human rights treaties (suggesting that the Sharia should be stipulated merely as a 'source of law'), while the Commission wanted the Sharia to trump human rights (not merely as the source of law, but as a kind of Grundnorm). The Commission finally settled for this provision: 'In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam'.[33]

Islam is the official religion and non-believers do not have the same rights as Muslims. But the constitution also commits the state to respect the Universal Declaration of Human Rights[34] and has an impressive bill of rights (in which the equality provision[35] reads: 'The citizens of Afghanistan — whether man or woman — have equal rights and duties before the law.') Islam is concerned more with personal and family affairs than political matters, and so there is considerable variation in the structures of government, representing most forms of authority. Culture, often in the shape of customary laws, is also in some respects incompatible with the international regime of rights (again to the disadvantage of women). The constitutions with which the British endowed their colonies in Africa exempted customary laws from at least the requirement of equality. South Africa, in its new constitutional dispensation, dealt with the problem by constitutionalizing customary law but subjecting it to human rights provisions, a solution that was hard to sell to the Muslim community, and the recognition of Islamic law is not dealt with explicitly in the Constitution.

In the course of all this constitution-making fundamental questions arise about the role and forms of constitutions. It is increasingly accepted that the widest possible participation of people is necessary to produce constitutions

[33] Afghanistan Constitution 2004, art 3.
[34] Article 7.
[35] Article 22(2).

that are both relevant and legitimate. Nevertheless, some commentators raise the risks inherent in such participation, namely that it tends to open up a large and complex agenda, which may create acute controversies and overburden the state.[36] Participation may also result in constitutions that the politicians will reject or negate exactly because such constitutions often seek to define the purposes of the exercise of state power and make government accountable and participatory. There is also controversy on how ambitious the scope of the constitution should be. Those who favour the austere and brief constitutions of the new European democracies point to the longevity of the Constitution of the United States, which eschewed a social agenda. Others argue that in the midst of poverty, squalor and corruption, a constitution that does not engage with social justice will not serve the people. Perhaps sparseness of text is possible (even necessary) if the underlying assumption is an essentially unregulated market. In my work on the new constitution of Kenya, I was concerned to make fundamental changes in regard to the structure and orientation of the state, to free it from the grip of the logic of the colonial state, as well as to respond to the wider concerns of the people, who, mired in poverty, felt hopelessly marginalized. Therefore our draft provides for a wide-ranging agenda of social, economic and political change, in part to counter the pressures and tendencies of globalization. The politicians did not like the proposed political changes contained in the draft, and the government is refusing to implement it. Might it have been wiser to have opted for less radical change and carried the politicians with us, even if it meant ignoring the people?[37]

What lesson on the design of the process can be drawn from the highly participatory process of Kenya (which I chaired for over three years)? The first point that should be made is that the process empowered people, for we took them seriously. It greatly increased public knowledge of constitutional issues. It seemed to strengthen a consciousness of being a Kenyan. It expanded the agenda for constitutional reform. But such a degree of participation may raise expectations that are not or cannot be satisfied. The constant emphasis on culture may result in a constitution that is no longer congruent with dominant international political ideas or economic forces, widening the gap between the constitution and realities. But a proper assessment of the impact of popular participation cannot be made if the concept of 'people' is not disaggregated, nor without some moderation of

[36] An apparent paradox about participation is worth noting: Countries with an established tradition of democracy have less participatory processes than those without that tradition. Perhaps in the second case there is little alternative to a highly participatory process, involving dialogue at the grassroots, because there are few intermediate institutions, such as effective political parties, trade unions and other social and interest groups. By the same token, by the time the process is finished, however empowering it might have been, there is little prospect of sustaining this kind of engagement. In Kenya, to fill this gap, we gave considerable thought to modes of continuous participation, through the constitution, in the affairs of the state, but this was not appreciated by politicians!

[37] For preliminary thoughts on this matter, see Jill Cottrell & Yash Ghai 'Seeking democratisation, accountability and social justice: The constitution building process in Kenya' (2004, International Institute for Democracy and Electoral Assistance, Stockholm, forthcoming in *Democratization*).

the romanticism about the 'people'. There is no such thing as the people. There are religious groups, ethnic groups, the disabled, women, the youth, forest people, pastoralists, sometimes 'indigenous peoples', farmers, peasants, capitalists and workers, lawyers, doctors, auctioneers, practising, failed or aspiring politicians, all pursuing their own agenda. They bring different levels of understanding and skills to the process. Sometimes the composition or procedure of constituting bodies privileges one or another of these groups. Unless one believes in the invisible hand of the political marketplace, not all these groups can be relied upon to produce a 'good' constitution — certainly not the politicians. The French had a rule after the revolution: no member of the constituent assembly could stand for elections or occupy a public office for ten years after the adoption of the constitution. How I longed for such a rule in Kenya!

We can see that the methods of drafting and adopting a constitution have wide consequences. and there is the danger that an over-ambitious constitution will be honoured more in breach than observance, and thus that it will gradually lead to frustration and loss of legitimacy. This indeed been been the fate of many constitutions; and perhaps it will also be that of the 1997 Thailand Constitution, the planned durability of which has turned out to be very controversial. The United States regards it as a matter of pride that its Constitution, having lasted more than two hundred years, is the oldest existing constitution. Perhaps the pride is justified, but we have to remember that formal change has been averted precisely because the Supreme Court has altered it to suit changing mores and values (which can be done if the people are prepared to place faith in judicial rather than popular politics). Sometimes it is wise not to plan too far ahead, especially if the circumstances do not allow a participatory and meaningful process of constitution-making. This was the case in Afghanistan in 2002, where my advice that the constitution be reviewed in five years' time, when conditions might be more settled, was rejected. But Fiji's quasi-military constitution of 1990 provided an automatic review within seven years and that provision led to a good process and an infinitely better constitution, in 1997. To these and many other critical questions of the orientation of the constitution, and the mode of making it, there tusually are no answers in the abstract. Rather the solutions depend on the context[38] and on what is perceived to be the function of the constitution.

This survey demonstrates, I think, that while we use a fairly common language and seemingly common concepts when we discuss constitutions,

[38] Take the case of the review of the constitution of the Cook Islands in 1998, for which I was a consultant: The Cook Islands had been taken into receivership, in a manner of speaking, by the Asian Development Bank which insisted that savings should be made to the cost of operating the constitution. Successive drafts had to be faxed to its headquarters in Manila where they would be pored over by accountants. Replies would come back that the review committee still had to make further savings of specified sums! Among other provisions, we had to drop the public broadcasting of parliamentary proceedings, much to my sadness, for this was the only way people in far flung islands could keep in touch with national affairs.

we are in fact often talking about different things. Over centuries, constitutions have been differently conceptualized and they have served many purposes. They have been instruments for law and order or some deliberate 'stirring up'; for liberation or oppression; for self-government or co-optation; for legitimacy; for defence against imperialism; and to limit government or to enhance its capacity to promote development or social justice. When I assisted in the drafting of independence constitutions in the late decolonization period (in relatively small South Pacific colonies), I became particularly conscious of these manifold purposes of constitutions. Mostly archipelagic, with the bulk of the population spread over a vast area, living in traditional and separate communities, largely untouched by both market relations and state administration, the new states themselves were established by the constitution, which invented modalities of grouping and of governing diverse peoples, and which created institutions which would give them credibility as members of the international community of states. A new national identity, transcending if not superseding particularistic, traditional identities, had to be established or, one could almost say, decreed. The constitution-making process was the chosen device for achieving this. So the constitution-making process had to be fully participatory for purposes of legitimacy, but also for creating a consciousness of belonging to a larger entity, all pursuing the same goals.[39] There was a certain measure of irony in giving people with little literacy or knowledge of state political systems opportunities of fashioning their constitutions denied to the citizens of more 'advanced' countries, but these processes foreshadowed the participatory processes that have now become de rigeur in many parts of the world.[40] Nevertheless, the task of integration through the state was handicapped by the suspicion of a state that was too powerful (lessons learnt from the African experience) and there was thus a preference for the constitution as 'brakes' rather than as an 'accelerator'.

The specificity of the 'constitutional' function, and the corresponding perceptions and reflections, have been, I trust, copiously illustrated in this article. Communists do not think of it in the same way as democrats; social democrats pursue different agendas through a constitution than liberal democrats. Both the conception and purpose of constitutions in Eastern Europe emerging from communism were quite different from those of the independence constitutions in Africa, which were primarily concerned with nation-building, defining an identity, and less concerned with the ideological issues that dominated Eastern Europe. Nation-building is, at least partly, the concern of the contemporary Afghanistan and Iraqi constitutions, but there is also the sense of reconstruction, of building afresh, of not so much

[39] Those familiar with Benedict Anderson's *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983) will recognize in this the attempt at instilling a sense of nationalism in the absence of the integrative effect of the market, state authority, and literacy.

[40] I have explored the role and impact of constitution-making on state formation and legitimacy in the South Pacific in two essays, 'Constitution making and decolonisation' and 'Political consequences of constitutions' in Yash Ghai (ed) *Law, Politics and Government in the Pacific Island States* (1988) 1–53.

defining as finding a nation. Many people in developing countries see constitutions not so much as modes of governance as charters and mandates of fundamental change, not limiting but expanding the space for the state. Comparative constitutional law has become mired in formalism and pseudo-universalism, and the wonderful multiplicity of the constitution has been lost.