A JOURNEY AROUND CONSTITUTIONS: REFLECTIONS ON CONTEMPORARY CONSTITUTIONS*  
YASH GHAI†  
Professor of Law, University of Hong Kong

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 laterly 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 consultations 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 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

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† 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 (Timor, Kiribati, Cook Islands, Midwives, Zambia, Kenya), constitutional rehabilitation after coups (Fiji), establishing constitutional orders after prolonged internal conflict (Cambodia, East Timor, Afghanistan), facilitating organization 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 provisions (Kenya), validity of nomination for presidential election (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.

2 I have to say that some of my earliest engagements did take me to the chandeliered chambers of Lancaster House in London, the splendour of many Commonwealth constitutions. Unfortunately it has been downhill since then, sometimes shopping in makeshift accommodations, 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, dispensed 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. 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. 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.) 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. Like many other states (including those in Eastern Europe), Tanzania found that these two goals could not easily be balanced: much less than a monopoly of power could 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). Others sought the route to constitutional rule through 'consociationalism', forms of democracy and power-sharing which rejected majoritarianism. Post-modernist thinking challenged the liberal state, glorying 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. Deng Xiaoping had predicted a critical role for autonomy to solve world problems — and how right he was! 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

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6 Yahia Ghazi 'Constitutions and the political order in East Africa' (1970) 21 International and Comparative LQ 403.

7 Some of this was a result of our advice. Our memorandum was later published: see Patrick McAuslan & Yahia Ghazi 'Constitutional proposals for a one-party state in Tanzania' (1969) 1 East African LQ 124.

8 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 if a constitution accelerates development, for which safeguards might be an impediment.

9 Africa needed a constitution which rejected majoritarianism and had a long lineage. Deng Xiaoping had predicted a critical role for autonomy to solve world problems. It was not until after the Second World War that 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 — even the much older and liberal Canada had to confront acute demands from the francophone and the aboriginal peoples.

10 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 rehabilitation, 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.

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11 See below under the discussion of 'Factional constitutions'.


13 Deng's views were expressed to the then British Foreign Secretary, Mr. Geoffrey Howe, and to Deng Xiaoping in March of Hong Kong (1992) 14. The latest consensus for autonomy is in Sudan, whose claim has been advanced by the European Union and other international agencies.
diversity. The collapse of the theory of the nation-state, to which this post-modern preoccupation tends, leads 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 ‘whether 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 became familiar with the colonial constitution, the principal function of which was domination of the colony and the warding-off of imperial rivals. 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 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 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 have been transformed. But nationalist leaders who succeeded the governor were determined to reinvent themselves in the image of the governor with unravelled 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. 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. 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
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
civil society 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) emphasize order and
stability, socialist constitutions (inspired more by Lenin’s perspective than Marx’s) respond to the
instability of a communist 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 state to change civil society, for the communist
revolution vests it with political power but does not change the underlying economic structure.

Communist constitutions therefore become overly 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 centralization 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
owns its existence and powers to a magnitude higher than the constitution itself to history itself.

I noted a deep contradiction at the heart of a communist constitution—and stated it in the following
way: 'In 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
legitimizing 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 those external sources of legitimacy demonstrates the secondary and functional nature
of the constitution, one not particularly appropriate to legitimacy. 16

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 doomed all 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, 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 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

16 Ibid at 57–60.
17 As an authoritative book on constitutional changes in Eastern Europe states the following: ‘There was no
counter-elite, no theory, no organization, no movement, no design or project according to whose visions,
instructions, and prescriptions the breakdown evolved . . . Apart from narrow and rather intellectually
circles of dissidents who could never effectively break out of their marginal habitat of academic, artistic, or religious
institutions (if not prisons), opposition movements were largely . . . The product of the regime’s decay rather
than its antecedent cause.’ Jon Elster, Class Office & Ulrich P Pesch (with Frank Hooker, Ulrike Koettler &

I explored the rise and fall of the common law in post-transfer constitutional litigation in ‘Litigating
the basic laws: Principles, interpretations, and procedures’ and ‘The NWC interpretation and its consequences’
in Johannes M M Chan, H L Fu & Y F Goh (eds) Hong Kong’s Constitutional Debate: Conflict and
Interpretation (2000) 3–32 and 119–214. The book contains many interesting analyses by leading scholars of,
and documents on, the right of whole cases.
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 tradition. 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 the 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.

Constitutions in the new wave of democratization

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 skepticism about politicians and politics, and hence highly regulated political systems. The 1997 Constitution of Thailand, drawn up at a particular 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 practice 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
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 the 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. In the first, stability is given to a society by the hegemony or dominance of one ethnic 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

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19 For a particularly trenchant criticism of the liberal state, see Bhikhu Parekh 'Cultural diversity and the modern state' in Martin Dumont & Sudipta Kaviraj (eds) Dynamics of State Formation (1997) 71.
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. 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

prescriptions are prone to instability, as compromises among community leaders (such as coalition governments) unravel and are ultimately unworkable. Despite powerful intellectual attacks, consociationalism seems to be 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. 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 Bougainvillean seen seeking independence). My first major encounter with autonomy was in the designing of the


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.

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 he first had 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 (the other half being part of Indonesia) and a series of island communities had not been economically or politically integrated, and there was little sense of belonging to a wider state formation. 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.

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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. However, autonomy of this kind is problematic. The autonomous area is small and the central authorities govern a large area (for 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.

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. 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.  

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23 See my paper 'Autonomy regimes in China: Coping with ethnic and economic autonomy' in Yash Ghai op cit note 23 (Autonomy and Ethnicity) at 242.
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. Nine constitute a quota, 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 perform 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.

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 Fund.

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 seek to change society and the structure of power. They are inventive and seeking to change society and the structure of power. They are inventive and seeking to change society and the structure of power. They are inventive and seeking to change society and the structure of power. They are inventive and seeking to change society and the structure of power. They are inventive and seeking to change society and the structure of power. They are inventive and seeking to change society and the structure of power. They are inventive and seeking to change society and the structure of power. 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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. 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-pressure. 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. 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 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 obscure) sovereignty. 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.

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 obviate the earlier, emptier distinctions between the private and public, the regulation of which comes increasingly under inter-state regulation. It has also enhanced 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’ of the people, principally through territorial autonomy.

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 Constitutional). 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 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’.35

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 Rights34 and has an impressive bill of rights (in which the equality provision 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...
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. 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 intermediating 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.


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A JOURNEY AROUND 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 Manilla where they would be pored over by accountants. Replicas 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 the farflung 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. 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 rigueur in many parts of the world. 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 anew, of not so much 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.

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*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 in two essays, "Constitution making and decolonization" and "Ethic consequences of consent" in Yash Ghai (ed) Law, Politics and Governance in the Pacific Island (1980) 1-33.