

CONSTITUTION-MAKING AND THE TRANSFORMATION OF CONFLICT

by Vivien Hart

A constitution has traditionally been seen as the documentary record of a settlement of conflict. This traditional constitution is an enactive document, consummating the creation of a polity. Constitution-making has been a widespread practice in the many conflicted and divided societies of the late twentieth century. The issues of recent conflicts are concerned with the recognition of identities as well as with provisions for the legitimate exercise of power. This agenda necessitates a process as important as the product, both open-ended and open to participation. I propose that we reconsider constitution-making as itself a part of the process of conflict transformation. Defining constitution-making as a forum for negotiation or a continuing conversation amid conflict and division draws attention to the distinctive characteristics of modern constitutionalism and to the ways in which this process helps or hinders the transformation of conflict. Examples are drawn from recent constitution-making in Canada, Northern Ireland, and South Africa.

INTRODUCTION

The late twentieth century has been an era of constitution-making. By one count, “of the 170 or so written documents called constitutions in today’s world, more than half have been written since 1974.”¹ Constitution-making has been prominent in new nations in post-communist Eastern Europe and the former Soviet Union, in post-colonial nations around the world, in unresolved disputes of long standing in Canada and Northern Ireland, in divided societies from Sri Lanka to Fiji, and perhaps most notably in South Africa.² The leaders of new and renegotiated nation-states today hope or calculate that adoption of a written constitution will legitimize their regime in several possible ways: as self-justification, in the eyes of the world as a promise of just and democratic rule, and to their own citizens as a manifestation of consent and mutual respect.

Pondering such facts, Anthony DePalma recently declared a paradox: “While the whole idea of a constitution is that the people have reached a

consensus about the rules by which they choose to be governed, no other legal document is the source of more controversy.”³ Here I suggest that the puzzle of controversy within a consensus stems from a common misunderstanding of the contemporary process of constitution-making. If we think of constitution-making as a site of contest rather than a documentation of outcomes, the paradox disappears. Most often, making a constitution is part of a broader attempt to transform conflict. The goal is a working consensus on the principles and practices of governance in new and changing nations. Understanding constitution-making as a process, a continuing conversation, or a forum for negotiation amid conflict and division more accurately represents recent history than does the older tradition of Western liberal constitutionalism from which DePalma speaks. That tradition characterizes a constitution as a covenant or a contract made after conflict has been resolved.

In the discussion that follows, I first reconsider the constitution as a genre. Constitution-making is but one mode of negotiation in divided societies, with its own distinctive characteristics. I therefore examine some major features of that process and consider their positive and negative potential for contributing to the transformation of conflicts. Finally I explore the potential and the problems of this process as a mode of negotiation through some examples of constitution-making in Canada, Northern Ireland, and South Africa.

COVENANTS, CONTRACTS, AND CONVERSATIONS

Covenants and contracts are not identical synonyms for the constitution. The former term carries more communitarian, the latter more functional connotations, but both imply that a constitution is an enactive document consummating the creation of a polity. Both terms leave open the relationship between a preceding flux and a sharply delineated enactive moment. Walter Murphy encapsulates this problem in his discussion of the constitution as covenant: “The myth of a people’s forming themselves into a nation presents a problem not unlike that between chicken and egg. To agree in their collective name to a political covenant, individuals must have already had some meaningful corporate identity *as a people*. Thus the notion of constitution as covenant must mean it formalizes or solidifies rather than invents an entity: it solemnizes a previous alliance into a more perfect union.”⁴ Similar prerequisites for a constitution as the foundational contract of a regime appear in Alec Stone Sweet and Thomas Brunell’s account of the emergence of a “supranational constitution” for the European Union: “Contracts, which are codified promises, fix the rules for a given exchange by establishing the

rights and obligations of each contracting party with respect to each other. The contract is an inherently social institution, embedded in a cultural (or normative) framework. . . . to get to the very notion of a codified promise we must have language, notions of individual roles, commitment, reputation, and responsibility . . . as well as some set of collective expectations about the future.”⁵ The aftermath of the moment of covenant and contract is uncertain in these accounts. Sweet and Brunell note that as “exchange proceeds over the life of the contract, or as external circumstances change,” disputes are bound to arise. Murphy dispels romanticism about the future of the covenanted people with a reminder that constitutions are inherently concerned with “the human penchant to act selfishly and abuse power.”⁶

The constitution is thus enshrined, isolated, representing a moment of unity and consensus. This is the constitution as icon. The contract is signed, the covenant made. The constitution then stands outside the daily conduct of politics, a given, a “higher law.” Lord Bryce in 1901 defined “Rigid Constitutions” as “works of conscious art, . . . the result of a deliberate effort on the part of the state to lay down once and for all a body of coherent provisions under which . . . government shall be established and conducted.”⁷ This classic model of the constitution continues to inform recent interpretations of American constitutional history, such as Bruce Ackerman’s *We the People*. Ackerman’s “dualist democracy” separates “normal” from “constitutional” politics.⁸ What is normal is the daily, continuous process of political controversy and policymaking. Rarely, under the pressure of extreme discontent and exceptional mobilization, a “constitutional authority to make new law in the name of We the People of the United States” is activated. Ackerman finds a mere three such “jurisgenerative moments” of constitutional revision in more than two centuries of American history.

Even in a settled constitutional regime like that of the United States, it can be argued that the foundations laid by the original constitution were less secure, and “normal” politics more infused by constitutional debate and contest, than Ackerman allows. More radically and looking beyond the American example, to whatever extent such a model applied in the past, may it now be outdated? Have the formalism and finality attributed to constitutions in the past been supplanted by an agenda that imposes requirements of plasticity and continuous accountability?

Antje Wiener and Vincent della Sala suggest that an “old constitutionalism” has indeed been overtaken by the needs of the late twentieth century. The structuring and legitimation of institutions of limited power for a defined nation is no longer the prime or only goal: “there is a tension between an approach to constitutionalism that may be described as ‘constitutional

engineering' and one that emphasizes what James Tully has called the 'politics of cultural recognition' in constitution building."⁹ "New constitutionalism" must be responsive to an inherent uncertainty about the identity and inclusiveness of a "nation" or a "people" which embarks on constitution-making, and to a demand for "participatory constitutionalism" conducted by active citizens.¹⁰ DePalma's puzzlement about the simultaneous ubiquity and difficulty of modern constitution-making may thus be explained in part by the nature of the conflicts for and within which constitutional settlements are now sought. Late twentieth-century conflicts are within nations as much as between nations, concern identity as much as territoriality, are participatory rather than declaratory. There is, Wiener and della Sala note, "a tension between the view that constitutions codify and entrench procedures and structures, and the ongoing discussion about the terms and meanings of citizenship. The latter involves much wider participation and is an endless activity, while the former implies finality."¹¹

Recent experience of constitution-making amid conflict and division suggests a middle position, that the "old constitutionalism" is augmented rather than displaced by the "new." Constitution-making is inherently concerned with the exercise of power and the creation of institutions, limitations, and guarantees. Hence engineers are still required. The purpose of their structural endeavors as well as of the input of those who build meanings rather than institutions, however, is not just to create strong, just, or efficient government. It is also to recognize, include, give voice to, equalize, or advantage, and to exclude, silence, or stigmatize people and peoples.¹² The two aspects, power and recognition, go together, as the most cursory inspection of the institutional arrangements laid out in, for example, the Belfast Agreement of 1998 on Northern Ireland or the 1996 Constitution of South Africa will confirm.¹³ The structures of access to power, its exercise and limits, inevitably embody an authorized set of meanings and relationships.

Wiener and della Sala distinguished constitutional "engineering" as implying finality and "recognition" as an endless debate. The difficulty for modern constitutionalism is to find a point somewhere between finality and openness. Can a constitution both ensure government conducted on agreed principles and with predictability *and* avoid freezing into place the voices of one moment? The constitution can be neither wholly abstracted from politics nor wholly subsumed into politics as usual. Nonetheless constitution-making remains a process distinct normatively and in its methods from the making of social, economic, or foreign policy. Formal mechanisms for textual amendment and varieties of judicial review usually provide carefully constrained and technocratic channels for change. In the world of "new constitutionalism,"

before, during, and after the original moment of ratification a broader constitutional “conversation” (to adopt Simone Chambers’s word) also takes place.¹⁴ A constitutional guarantee that this conversation will be kept open is necessary to deter renewed conflict: “a model of agreement based on maintaining a conversation over time rather than on concluding a contract is a more realistic approach to constitution making, especially in multicultural societies, as well as a better articulation of the conditions of democratic legitimacy in the late twentieth century.”¹⁵ The conversation of constitutionalism as much as any iconic status postulated for the constitution sustains the settlement. From this perspective, the moment of agreement upon a textual constitution is a landmark in the transformation of conflict, rather than a completed map of conflict resolution.

CONSTITUTION-MAKING AS PROCESS

Amid apparently intractable conflicts, the traditional iconic constitution marking a final settlement seems an inappropriate as well as ambitious goal. A first step towards a new practice of constitutionalism is to rethink the pervasive assumptions of the older tradition, especially that the aim is closure. In this exercise, concepts such as constitutional “canon,” “discourse,” and “system,” imported to the study of constitutionalism from disciplines including literary criticism, cultural studies, and political science, counter the limitations of an overly formal and textual approach to constitutions.

First, the recognition of a constitutional canon dethrones the traditional single text and indeed the written text. The canon, borrowing from its literary counterpart, becomes a whole set of definitive sources rather than just one. The Canada Act of 1982, Murphy notes, “explicitly bestows constitutional status on a number of documents.”¹⁶ In the USA canonical status certainly extends to the Declaration of Independence and maybe to the *Federalist Papers*, for two examples. The judgement in *Marbury v. Madison* (1803) is another likely candidate for an American canon, the one United States Supreme Court decision whose overturn seems unthinkable. Equally, Britain’s mix of texts and conventions may not be a textual constitution but does form a constitutional canon: “The British constitution is renowned for being unwritten, or at best unassembled into a coherent form. And yet . . . the British sense of its constitution has always incorporated the conviction that it represents a distinctive and substantive code of political life.”¹⁷

Second, the location of a constitution as part of a discourse emphasizes process. Wayne Franklin situates the American constitution in a pragmatic political discourse continuous from early colonial days: “As the argument

between the colonies and Britain became more heated, the more deliberative attitude of the earlier years waned and a more nearly forensic one replaced it. Speculative texts . . . yielded to enactive ones like . . . the Declaration of Independence. In the exigencies of war, other crucial textual acts ensued.¹⁸ From this perspective, the U.S. Constitution becomes “just one of a number of written texts that Americans had come to trust as ways of defining and authenticating their unique dispensation.”¹⁹ Armed with the concepts of canon and discourse, we can include within the constitutional frame texts created during the conflict resolution process which are neither ordinary law, nor treaty, nor final, formal constitution. Framework documents, accords, principles, interim constitutions, and agreements bind their signatories by consent, forming temporary constitutions when they set the rules of the game, constraining future constitutions when they record agreement on basic principles.

Canon and discourse decenter the text and introduce a developmental perspective. The disciplinary origin of these concepts is also a reminder for the broadened field of constitutionalism that texts and practices are cultural artifacts. Thus South Africans were instructed, as they embarked on constitution-making in 1990, that “the country needs a new political culture as much as it needs a new constitution. Without this the finest constitution in the world is likely to have little impact.”²⁰ “Old constitutionalism” reminds us, however, that constitutions are also about power. “Power maps,” as constitutions have been called, delineate the internal power structures of a state, and its internal, external, and reciprocal power relationships with individuals, groups, society, and economy.²¹ A constitution makes no more sense in isolation from social structures of power, dominance, and possession than from political culture. Robert Benewick proposes the concept of a “constitutional system.” A system is by nature interactive. Hence “constitutions are about the authoritative distribution of power, and cannot be separated from economic, historical and political development, as well as the constraints between the citizen and the state and among the institutions of the state.”²²

As a device for the transformation of conflict within any system, constitutionalism’s distinctive characteristics offer both positive and negative possibilities. The map metaphor serves to introduce two of the features of constitutions: a map is both schematic and drawn from a particular perspective. However ingenious the cartographer in representing dimensions on the page, an act of imagination is required to comprehend the reality of the terrain from the signs and symbols of the map. Constitutional documents share these features. For example, constitutional texts exemplify what Clifford Geertz identified as the defining feature of legal process in general: “the

skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them.”²³ Such a schematic representation of the multidimensional complexities of power is inevitably open to the introduction of perspective, bias, and omission. The literature offers many examples of perspective and bias, from the Beardian account of an American subtext of the protection of property rights, to accounts of overt or covert racial or ethnic interests of the kind surveyed by Alan Cairns, to Patrick Hanafin’s assertion of phallogentrism in the Irish Constitution.²⁴

Along with such partialities, constitutions contain a characteristic methodological twist. Since their texts carry the authority of law, they are often written by lawyers. Apart from any political baggage the legal profession may carry with it, the language and practices of the law themselves are capable of selectively shifting, distorting, or reframing the complexities of social issues to fit their specialized terminology, their propensity for “bright lines” rather than conditional statements, their deployment of rights language, or their regard for precedent. The discourse of constitutionalism has a distinctive legal flavor, which affects not only the form of constitution-making and the range of considerations reviewed but also the possibilities and modes of participation in its processes.²⁵

Perhaps the most overbearing claim for the role of law in constitutionalism is that “in orthodox legal scholarship it is law which brings communication to an end.”²⁶ The association of constitutional with legal authority as well as legal method goes back to the definition of constitutions as fundamental law, and the forceful declaration by United States Chief Justice Marshall in *Marbury v. Madison* in 1803 that it is “emphatically the province and the duty” of judges to patrol constitutional observance. There is, one American authority has asserted, a “special relationship between written constitutions and judicial review.”²⁷ To Walter Murphy such an equation represents a “constitutionalist victory,” constitutionalist understood as the antithesis of democratic. The idea of constitutional democracy interests Murphy as the attempt to graft the discipline of constitutionalism onto the openness of democracy. A constitutional democracy provides for “a wide measure of popular political participation and simultaneously restricts the people’s government by a variety of institutional means.”²⁸ The danger of such a position is that the constitution becomes the intellectual property of experts, its practice constitutional law rather than constitutional politics or constitutionalism.

In at least one important respect, “new constitutionalism” has shifted the ground under such tenets of traditional constitutionalism. A democratic constitutionalism had become a necessity by the late twentieth century. The necessity arose from the inseparable dual functions of modern

constitutionalism, of institutional engineering *and* recognition. Where conflict is essentially over governance by, and respect for, a diversity of people and peoples, those people and peoples must be heard in the process of constitution-making. Even in the most legalistic societies constitutions have offered openings for the excluded to claim entry. Starting with the American Declaration of Independence, texts have extolled "the people," promised "equal protection" or outlawed discrimination, embodied aspirations, and guaranteed rights. However rhetorical in the minds of the drafters, such language inspires political action and legitimizes claims.²⁹ In recent "new" constitutional experience, citizens have reactively rejected constitutions emanating from elite or intergovernmental negotiations, or sought a formative role in writing these texts.

During the 1990s in both Canada and the European Union, constitution-making by intergovernmental negotiation ignored at its peril the necessity of democratic constitutionalism. The rejection of the Charlottetown Accord in Canada, and a narrow victory in France and defeat in Denmark for the European Union Maastricht Treaty, all in 1992, have often been attributed to a "democratic deficit" in top-down processes conducted by strong provincial or member state governments.³⁰ Public reaction to the Maastricht Treaty represented, Joseph Weiler has said, a "popular and national empowerment" which was "frequently and deliciously hostile, and the public debate which followed which almost sunk Maastricht . . . count[s] in my book as the most important constitutional 'moment' in the history of the European construct."³¹ Examples of mobilization to make constitutional claims include new groups like Charter 88 in the United Kingdom, seeking to initiate change; the redirection of existing interests to constitutional issues, such as women's intervention in the writing of the Canadian Charter of Rights; and the creation by the process itself of new claimants, as with aboriginal nations.³² Recognition of the necessity of participation can be seen in the appearance of citizens' conventions, official public consultations, and a genre of educative publications.³³

Belief in the status of a constitution as a badge of statehood has contributed to the potential for constitution-making to be more than a formalization of the outcomes of conflict and change. The expectation that there will, indeed must, be a constitutional outcome is one important reason why constitution-making can no longer be merely an *ex post facto* codification of a settlement. The concepts of a constitutional canon, a constitutional discourse, and a constitutional system open up the possibility of studying constitution-making as a part (distinctive in its discourse, content and politics) of conflict resolution in divided societies. The legitimacy of constitutional agreements at the end of the twentieth century depends upon openness in two senses: a process both open-ended and open to participation. The next

question then is how, when, and in what circumstances the necessity of constitution-making helps or hinders that process.

DOES CONSTITUTION-MAKING HELP OR HINDER THE TRANSFORMATION OF CONFLICT?

Peter Russell, the Canadian constitutionalist who once asked this question, answered it himself with a skepticism born of experience. In a 1968 speech, Pierre Trudeau anticipated a solution to conflict within Canada. He thought that the process of enacting a Charter of Rights, discovering and embodying those values upon which all Canadians could agree, would serve as “‘a meeting ground’, a site for ‘civil dialogues’ among citizens,” before they came to the more difficult process of “‘dealing with what divides us’.”³⁴ However, reflecting upon events since 1982, when Canadians patriated their constitution and enacted Trudeau’s Charter of Rights, Russell identified a process of constitutional politics which clarified old lines of conflict and drew new ones, a process of conflict escalation rather than conflict resolution. Canadians, Russell said in 1993, “have demonstrated their capacity as a sovereign people to reach a negative result.” Indeed, “Canada has the dubious honour of remaining a nation state driven to constitutional politics at the mega level by deep dissensus. That dissensus is as much the effect as the cause of constitutional politics.”³⁵

Ironically, given Trudeau’s intention to use a Charter of Rights to create a sense of national citizenship, conflicts burgeoned along at least three of the axes recognized in the Charter: francophones, first nations, and women all intensified and politicized group identities. The conversation widened. As differences and identities became more sharply defined, however, demands on constitution-makers became harder to meet. Redesigning the state, as constitutional change has been labeled, and redesigning the polity through new forms of mobilization and new participatory strategies were interactive parts of one system pulling in opposite directions.³⁶

A raising of the stakes for linguistic and cultural recognition can be traced in successive constitutional documents. In 1982 the Charter of Rights declared English and French official languages of equal status and protected minority language educational rights.³⁷ The 1987 Meech Lake Accord proposed to amend the constitution to recognize “that the existence of French-speaking Canadians, centered in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada.”³⁸ The accord failed to win ratification by provincial legislatures, vetoed by a

key vote in Manitoba by a first nation representative.³⁹ The 1992 Charlottetown "Consensus Report on the Constitution" required that the Constitution of Canada be interpreted consistently with a list of "fundamental characteristics," including that "Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition."⁴⁰ The Charlottetown agreement was rejected by 54.3 percent of the voters in a national referendum.⁴¹ Within a decade the textual lines had become brighter, more detailed, and more comprehensive. Decision-making on constitutional change had relocated from the national level to provincial legislatures and then to popular vote. The contested futures of both Quebec and language rights remained unresolved, but the constitutional agenda had lengthened.

Contemplating what he then saw as another failure of constitutional politics, Northern Ireland, in 1994 Christopher McCrudden began to refine a theory of whether and when constitution-making works. Dissensus of the Canadian kind, he suggested, was not inherent in constitutional politics. There were reasons why it emerged. For example, "the experience of Northern Ireland demonstrates clearly that constitution-building and institution-maintenance as a substitute for policies which address the core questions of substance that divide a community are almost certain to fail": "Northern Ireland provides a case study of the limits of what has been termed procedural constitutionalism. The rethinking of the Northern Ireland constitution must concern itself not only with the distribution of power between the individual and the institutions of the state, and between different state institutions, but also with the regulation of power relations between citizens."⁴² Elsewhere McCrudden has distinguished between pragmatic constitutionalism, epitomized by Britain's attitude of "solutions are what works and what lasts," and idealist constitution-making, which is aspirational and substantive rather than solely procedural: "a constitutional tradition which concentrates first and foremost on setting out a number of values which political and legal institutions are required to further."⁴³ Neither Britain's reliance on procedures that work, nor America's on a constitution embodying idealist rights, was simply transferable to Northern Ireland. The mission of an idealist constitution, however, "to identify the problems which constitute the core of uncertainty and instability between the contending parties, to espouse a positive view of the type of society which it seeks to bring about, and to provide sufficient core values around which a consensus can be built up," gave the starting point.⁴⁴

"Constitutions," Giovanni Sartori proposed, "are 'forms' that structure and discipline the state's decision-making processes. Constitutions establish

how norms are to be created; they do not, and should not, decide *what* is to be established by the norms. . . . A constitution that takes it upon itself to establish policies . . . preempts the popular will and tramples upon the policy-making bodies (parliaments and governments) to which the policy decisions are constitutionally entrusted.⁴⁵ The distinction between constitutional tenets and public policy, however, can surely be defined differently in different places, provided the popular will is *involved* in constitution-making. Constitutional lawyers are prone to reject the constitutionalizing of positive social rights to education, health care, environmental standards, and so on. They see them as policy decisions for legislators rather than rights decisions for lawyers, understanding them as nonjusticiable aspirations. McCrudden's point is that a constitution must elevate to the status of fundamental law whatever is the key to unity in a particular society, not whatever is within the capacity of judges.⁴⁶ The failure of constitution-making in Northern Ireland up to the early 1990s appeared therefore to lie in its concentration on procedures, assemblies, electoral systems, law, and order rather than on, "for example, the issue of equality between the citizens of Northern Ireland [which] is central to the way in which the population conceives its relationship to the state, and indeed views the legitimacy of the state itself."⁴⁷

The Belfast Agreement of 1998 finally confronted this historical silence regarding the omission of convincing guarantees of equality.⁴⁸ It did so rhetorically in the commitment to "partnership, equality and mutual respect" of the opening "Declaration of Support." Structurally it did so through the complicated institutional engineering of Strands One, Two, and Three of the Agreement. To ensure that antagonistic cultural communities would be recognized without a hierarchy of power emerging among them, key votes in the new Assembly must be by cross-community majorities, a Civic Forum is to channel representations from civil society, and intergovernmental institutions will place the conflicted Northern Ireland communities within a nexus of political relationships running both east and west within the parts of the United Kingdom and north and south within the Republic of Ireland. Addressing "the totality of relationships among the peoples of these islands," such guarantees were to reassure every party to the conflict equally.⁴⁹ The Agreement also addressed formal equality through human rights provisions unparalleled in United Kingdom experience, and substantive equality in sections on reconciliation, rights, and equality of opportunity. What Sartori defined as policy matters achieved the status of constitutional guarantees. Governments were obligated to develop integrated education and housing, community development, economic planning, employment equality, and recognition of minority languages.⁵⁰ Completing a near-comprehensive

exemplar of "new constitutionalism," a democratic voice was mandated "for the people of the island of Ireland alone . . . to exercise their right of self-determination on the basis of consent."⁵¹ Participation in ratifying the Agreement was required by referendum, and channels for reopening the discussion built in through review procedures.⁵²

By March 2000, the review procedures had already been activated twice as a means of keeping the process alive. There are times when what constitutions leave unsaid is as important as what they say. Michael Foley has written of the constructive role often played by such silences. Abeyances, as he terms them, are "those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity."⁵³ Foley's insight is both essential and too simple. Northern Ireland exemplifies abeyances as evasions of fundamental grounds of conflict. A history of past failures confirms that no constitutional settlement could work so long as the inequality grievance was ignored. The Belfast Agreement ended that abeyance. For more than a year after the Good Friday signing ceremony, however, the promised devolution of power to a Northern Ireland Assembly was "parked" while the parties continued to debate its staged implementation. A commitment to "achieve the decommissioning of all paramilitary arms within two years . . . in the context of the implementation of the overall settlement" left the timing and relationship of two hugely symbolic developments, the Assembly and disarmament, unspoken.⁵⁴ This was not so much letting sleeping dogs lie, as the theory of abeyances goes, as wishfully thinking that wakeful dogs might yet not bark.

"In Northern Ireland, given the absence of consent, it is necessary to try to construct consent in part on the basis of constitutional guarantees," McCrudden observed.⁵⁵ Lacking one last guarantee and therefore the consent of key actors, Northern Ireland's government reverted to Westminster, only to be restored to Belfast in May 2000 with the help of neutral guarantors brought in from South Africa and Finland. Meanwhile Canadians, also unable to gain consent for new constitutional texts, live with the forms of unreconstructed constitutional government while achieving "reform and accommodation through the more normal processes of legislation, and intergovernmental negotiation and agreement."⁵⁶ While Quebec remains an unresolved challenge to the constitutional system, women use the courts to attain the Charter's promise of equality, first nations win some territorial autonomy, and economic and social union is adjusted.⁵⁷ Not surprisingly, it is Canadians who have most enthusiastically adopted Foley's concept of constitutional abeyances, endorsing

in their scholarship what seems to have worked, perhaps uniquely, in their practice.

The centrality of issues of violence and peace may make Northern Ireland more typical than Canada of late twentieth-century constitution-making. Starting or sustaining a civil dialogue is both more urgent and more difficult amid internal violence or near-violence. As John Finn observes, "Political violence challenges the very presuppositions upon which our commitment to constitutional politics must be predicated."⁵⁸ In the absence of consent and the imminence of violence, constitutionalism is severely challenged to offer a route out of conflict. The very imminence of violence may, however, render constitution-making the more crucial. Canada is vulnerable to the charge that it can afford the luxury of a thirty-year conversation while life goes on regardless. Northern Ireland, and even more South Africa, cannot easily sustain the political, economic, social, and human damage that accrues in a constitutional vacuum.

If neither Canada nor Northern Ireland offers an assured peace through a process of constitution-making, how to explain the case of South Africa, always offered as the positive example of constitution-making as an integral part of the transformation of conflict? A cartoon sketch of the "multi-party talks" in the educational booklet *You and the Constitution*, circulated widely and free of charge by the Constitutional Assembly in 1996, nicely represents the positive view of constitution-making in the middle of conflict. The representative group of citizens, bags under their eyes from negotiating under the stars, have made "lots of compromises" to achieve "a big step towards a united South Africa!"⁵⁹ The sketch highlights representation, tireless determination, and willingness to compromise as keys to the successful outcome. These may be fundamental requirements to any process. The full story of the South African process would combine a larger number of both general and contingent factors in the internal and external environments of the constitution-making process. Here several points of comparison with the Canadian and Irish processes will serve to develop discussion of the potential contribution of constitutionalism.⁶⁰

In South Africa the fundamental issue of equality between citizens and between citizens and the state was the first of the Constitutional Principles enacted in the Interim Constitution of 1993, and was binding upon the final constitution of 1996.⁶¹ Staging of decisions, timetable, and procedures for second thoughts and appeals were matters for early agreement. From 1991 to 1993 the Convention for a Democratic South Africa (CoDeSA) and then the Multi-Party Negotiating Process (MPNP) worked on an Interim Constitution to operate for up to five years. The Interim Constitution provided for: (1) a calendar for elections, the convening of assemblies, the formation of

commissions and the Constitutional Assembly, and completion within five years; (2) mechanisms for proceeding from stage to stage, including the provision for vetting of the final constitution by the Constitutional Court; and (3) "Constitutional Principles" upon which all could agree and with which the final text must comply.⁶² All this graphically illustrates how, in "new constitutionalism," the process as well as the product creates meaning and legitimacy.

In the common situation of modern constitution-makers, working amid violence and mistrust, these were already major steps towards winning legitimation of the constitution and the new regime. Crucial in the transition, according to some observers, was the recognition among elites in the ANC and National Party that power sharing and constitution-making were the least objectionable path forward.⁶³ So, too, was the determined effort to engage in participatory constitutionalism as prominently as institutional engineering. More than any other constitution-making process, that in South Africa attempted to create a "civil dialogue." The constitutional "meeting ground," the Constitutional Assembly's invitation to public involvement, resulted in an astonishing two million submissions from interest groups and individuals and crowded public meetings. On the other hand, the process tapped only a proportion of the population of fourteen million, skewed towards urban dwellers and elite opinion.⁶⁴

The seamless process of constitution-making before, during, and after the foundational moment is clear in South Africa. After 1996, implementation underlined the need for a sustainable, not just a model, constitution. As Theuns Eloff observed: "However important a constitution is, it cannot guarantee a successful and sustainable transition. On the other hand, it can as forcefully be argued that without a good constitution and an accompanying Bill of Rights to help regulate relationships between individuals and institutions, a divided society clearly can easily slip back into the conflict cycle."⁶⁵ Experience further underlined how sustainability depends on the whole constitutional system, not just on legal observance. A constitution is created within an economic and social system in which, Eloff continued, the responsibilities of civil society for sustaining the settlement are as crucial as those of the state.

Just as "new" constitution-making precedes and follows the moment of ratification, so it must address the past as well as the future. The legislation of past regimes, historic divisions of the past, and injustices within living memory compound the constitution-makers' task. In divided societies with violent pasts this will require most mechanically addressing the status of past laws, most emotively confronting issues of retributive justice. Jonathan

Klaaren, for example, has described how institutions established by the South African constitution at one and the same time constituted themselves, and textual meanings, and a culture of constitutionalism: “the courts and the Truth and Reconciliation Commission, in mutually constitutive ways, have been involved in the construction of constitutionalism.”⁶⁶ Constitution-making is the means to a transformation of conflict, not an end in itself. It is, however, an enterprise which must ultimately “remove (at least most of) the reasons for conflict” if the result of peace is to be attained.⁶⁷ It is above all the comprehensive confrontation with those reasons that distinguishes the South African constitutional settlement from those unattained in Canada and Northern Ireland.

CONCLUSION: THE DIMENSIONS OF CONFLICT AND CONSTITUTION-MAKING

A Canadian constitutional solution to conflict may remain undiscovered, but Canadian writers have been particularly associated with “new constitutionalism.” While they have come to the fore in a blossoming international discussion of constitutionalism, Americans seem to have been somewhat sidelined, classified as representatives of the “old.” Their venerable model seems effective to a degree in resolving conflict among Americans, but not easily applicable to contemporary conflicts over identity and recognition.

Canadian James Tully captures the essence of the new constitutionalism, its embeddedness in cultural conflict in ethnically divided societies: “Can a modern constitution recognise and accommodate cultural diversity? This is one of the most difficult and pressing questions of the political era we are entering at the dawn of the twenty-first century. . . . The question is not whether we should be for or against cultural diversity. Rather, it is the prior question of what is the critical attitude or *spirit* in which justice can be rendered to the demands for cultural recognition.”⁶⁸ Tully identifies six such demands for recognition: from supra-national associations, nationalism and federalism, linguistic and ethnic minorities, feminism, multi- or intercultural claims, and claims for aboriginal self-government. Writing from and about the Canadian experience, he offers some middle-ground propositions on the potential of constitution-making, neither wholly negative nor assuredly positive.

First, cultural diversity is now a fact of life and so “the resulting common ground is a multiplicity.” Therefore constitution-making *must* deal with claims for recognition, and seek to build trust and consent through its process. Constitution-making conceived only as institutional engineering, given

the tendency of engineers to "impose uniformity and regularity," will not meet the need.⁶⁹ "A contemporary constitution can recognise cultural diversity if it is reconceived as what might be called a 'form of accommodation' of cultural diversity. A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity."⁷⁰ Second, having made the constitution itself a form of "civil dialogue," Tully lowers the stakes and makes the constitution less iconic and more modest in its aim: "the philosophy and practice of contemporary constitutionalism offers a mediated peace. In both theory and practice this is seen as second best to a just peace. A just peace is a constitutional settlement in accordance with the comprehensive theory of justice . . . the most destructive illusion of our age."⁷¹

Tully's contribution is essential to the understanding of the relationship between constitution-making and conflict resolution, and yet still limited. Cultural recognition is a fundamental but not the only claim in ethnically divided societies, not in South Africa any more than in Canada where intercultural respect seems in danger of dissolving, or Northern Ireland where mutual cultural recognition is tenuous. Mutual respect, although a good in itself, does not automatically resolve claims for political power, for which the constitutional engineers may need to be recalled to devise power-sharing structures. Nor does mutual respect necessarily provide economic and social equity or fairness, which the constitution may promise but whose delivery lies in the hands both of legislatures and civil society.

One final example can illustrate why a constitutionalism of cultural recognition must be layered onto claims from older traditions. The Constitutional Principles of the South African Interim Constitution prioritized cultural recognition, placing racial and ethnic equality at the head of the list of fundamental rights. The interim Bill of Rights of 1993 included only as Article 28 of 30 a concise right to "acquire and hold rights in property," and a "takings" clause not to be deprived of these rights "otherwise than in accordance with law." All "universal human rights" were to be guaranteed in a final text, with "due consideration" to all thirty enumerated in 1993.⁷² One major point of conflict over the 1996 constitution concerned property rights.⁷³ Radicals wanted the interim right removed as an obstacle to the redistribution of resources to deprived groups, especially through land reform. The compromise in the 1996 text is a three-page-long Article 25, granting a weakened property right and making explicit a public interest justification for expropriation. Sub-clauses promise restitution of property dispossessed by racially discriminatory practices

introduced in 1913, and allow an override for the state to undertake land reform or other measures “to redress the results of past racial discrimination.”⁷⁴ Alongside the constitutionalism of cultural recognition, in every instance touched on in this paper is some form of politics of material recognition or distribution. The politics of material deprivation is as characteristic of late twentieth-century conflict and constitution-making as is the politics of cultural deprivation. The material dimension may coincide with and often overlaps ethnic, gender, and cultural divisions. When it does, it makes cultural divisions even deeper and harder to resolve.

This discussion has placed constitution-making at the heart of contemporary endeavors to transform conflicts in deeply divided societies. This constitution-making process necessarily features “something old, something new,” as the saying goes. An understanding that constitutions are about power and its exercise with predictability and without arbitrary decision-making, and that citizenship involves material as well as symbolic recognition, comes from “old constitutionalism.” “New constitutionalism” sees a process not an event, focuses on groups and identities as well as individuals and rights, on participation as well as rule, and on indeterminate ends that may be partial and do deny the desirability of closure.

Constitution-making has become a conversation, a notion which resonates with concurrent but usually separate attempts to conceptualize democracy as “deliberation.”⁷⁵ Teasingly, the contemporary efforts of both constitutional and democratic theorists may yet reunite the new and the old by way of an original but overlooked feature of the American foundational moment. Self-styled “neo-republicans” will not find an entirely satisfactory analogy in the eighteenth-century republicanism excavated by Judith Shklar. The extended republic, she found, was intended “to provide a built-in remedy against the ruinous conflict of factions. Far from having to crush differences of interest in political or religious opinion, they are encouraged to flourish.”⁷⁶ They may, however, recognize the same spirit animating an analogous process which, in the words of a recent account of the Northern Ireland negotiations, “diverts our gaze away from formal institutions towards informal arenas of dialogue.”⁷⁷

Constitution-making is surely the crucial link between dialogue and governance, for to resolve, not merely transform, the intractable conflicts of the new millennium “any democratic settlement worth the name must be underpinned by solid safeguards which ensure that the continuing conversation about the norms and practices that structure the process of governance can be conducted in an inclusive way.”⁷⁸ To look at constitution-making as a meeting place, a site for civil dialogue, and a mode of formulating common

aspirations changes the goal from “formalizes, solidifies, solemnizes a previous alliance” to “creates or constructs a future.” The process of constitution-making is no longer a single event but a permanent meeting place where adversaries must try to construct the guarantees they need to sustain the “common ground” of mutual respect for their multiplicities within a shared system of governance.

NOTES

1. Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, 2nd ed. (New York: New York University Press, 1997), 197.

2. Several major international projects have chronicled these changes. In the 1980s, two influential compilations drew their analytical framework from the American political science literature on the conditions of stable democracy. See Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead, eds., *Transitions from Authoritarian Rule* (Baltimore: Johns Hopkins University Press, 1986), and Larry Diamond, Juan J. Linz, and Seymour Martin Lipset, eds., *Democracy in Developing Countries*, 4 vols. (Boulder, CO: Lynne Rienner, 1989). See also Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985). A focus on constitutionalism emerged later. If at first this continued to be framed by American preoccupations, as in Louis Henkin and Albert Rosenthal, eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990), a more international and situational perspective was soon introduced. See Douglas Greenberg et al., eds., *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993).

3. Anthony DePalma, “Constitutions Are the New Writers’ Market,” *New York Times*, November 30, 1997, Week in Review, 3.

4. Walter F. Murphy, “Constitutions, Constitutionalism, and Democracy,” in *Constitutionalism and Democracy*, ed. Greenberg et al., 9.

5. Alec Stone Sweet and Thomas L. Brunell, “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community,” *American Political Science Review* 92 (March 1998): 63. See also Dario Castiglione, “Contracts and Constitutions,” in *Democracy and Constitutional Culture in the Union of Europe*, ed. Richard Bellamy, Vittorio Bufacchi, and Dario Castiglione (London: Lothian Foundation Press, 1995), 59–79.

6. Sweet and Brunell, “Constructing a Supranational Constitution,” 63–64; Murphy, “Constitutions,” 6.

7. James Bryce, *Studies in History and Jurisprudence*, vol. 1 (Oxford: Clarendon Press, 1901), 145.

8. Bruce Ackerman, *Foundations*, vol. 1 of *We the People* (Cambridge, MA: Belknap Press of Harvard University Press, 1991), 6.
9. Antje Wiener and Vincent della Sala, "Constitution-making and Citizenship Practice—Bridging the Democracy Gap in the EU?" *Journal of Common Market Studies* 35 (December 1997): 597–98.
10. *Ibid.*, 612.
11. *Ibid.*, 600.
12. On the negative potential of constitution-making, see Alan C. Cairns, "Constitutional Stigmatisation," in *Identity, Rights and Constitutional Transformation*, ed. Patrick J. Hanafin and Melissa S. Williams (Aldershot, UK: Ashgate, 1999), 13–38.
13. *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland*, April 10, 1998. Cm 3883. See especially on this point the complicated arrangements in Strand One, "Democratic Institutions in Northern Ireland," providing for an Assembly "which is inclusive in its membership, capable of exercising executive and legislative authority, and subject to safeguards to protect the rights and interests of all sides of the community." Constitution of the Republic of South Africa (Act 108 of 1996), for example Chapter 3, Co-operative Government, especially Article 41.
14. Simone Chambers, "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis," *Politics and Society* 26 (March 1998): 143–72.
15. *Ibid.*, 143–44.
16. Murphy, "Constitutions," 11. The Schedule to the Constitution Act, 1982, itself enacted as Schedule B of the Canada Act 1982 (U.K.). Art. 52 (2), specifies that the Constitution of Canada includes "(a) The *Canada Act 1982* . . . ; (b) the [31] Acts and orders referred to in the schedule; and any Amendment to any Act referred to." Articles also entrench earlier agreements with aboriginal peoples, e.g., Art. 25 on rights and freedoms recognized in the Royal Proclamation of 1763.
17. Michael Foley, *The Politics of the British Constitution* (Manchester: Manchester University Press, 1999), 13.
18. Wayne Franklin, "The U.S. Constitution and the Textuality of American Culture," in *Writing a National Identity: Political, Economic and Cultural Perspectives on the Written Constitution*, ed. Vivien Hart and Shannon C. Stimson (Manchester: Manchester University Press, 1993), 10.
19. Stephen Fender, "Constitutional Discourse: A Commentary," in *Writing a National Identity*, ed. Hart and Stimson, 33.
20. Bobby Godsell, ed., *Shaping a Future South Africa: A Citizen's Guide to Constitution-making* (Cape Town: Tafelberg, Human and Rousseau, 1990), 22.
21. Ivo D. Duchacek, *Power Maps: Comparative Politics of Constitutions* (Santa Barbara, CA: ABC Clío, 1973).

22. Robert Benewick, "Towards a Developmental Theory of Constitutionalism: The Chinese Case," *Government and Opposition* 33 (Autumn 1998): 444.
23. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 170.
24. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913); Cairns, "Constitutional Stigmatisation"; Patrick Hanafin, "Defying the Female: The Irish Constitutional Text as Phallogentric Manifesto," *Textual Practice* 11 (Spring 1997): 249–73.
25. See, for example, Vivien Hart, *Bound by Our Constitution: Women, Workers, and the Minimum Wage* (Princeton, NJ: Princeton University Press, 1994), 6–7; Donald Horowitz, *The Courts and Social Policy* (Washington, DC: Brookings Institution, 1977), chap. 2, "Attributes of Adjudication"; Kim Lane Scheppele, "Constitutionalizing Abortion," in *Abortion Politics: Public Policy in Comparative Perspective*, ed. Marianne Githens and Dorothy McBride Stetson (New York: Routledge, 1996), 29–54.
26. Colin Harvey, "Governing after the Rights Revolution," *Journal of Law and Society* 27 (March 2000): 69.
27. David P. Currie, "Written Constitutions and Social Rights," in *Writing a National Identity*, ed. Hart and Stimson, 43. This view is not confined to the American tradition. See, for example, a South African comment that "constitutionalism is often equated with the power of review by judges over parliamentary legislation." Elsa Van Huysteen, quoted in Jonathan Klaaren, "The Truth and Reconciliation Commission, the South African Judiciary, and Constitutionalism," *African Studies* 57 (December 1998): 197.
28. Murphy, "Constitutions," 15, 6.
29. See, for example, the compilation of American manifestos making claims in traditional constitutional language, *We, the Other People: Alternative Declarations of Independence*, ed. Philip S. Foner (Urbana: University of Illinois Press, 1976).
30. Chambers, "Contract or Conversation," 152–55; J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), especially his Introduction, "We Will Do and Hearken"; Wiener and Della Sala, "Constitution-making," 603–08.
31. Weiler, *Constitution of Europe*, 4.
32. See Foley, *Politics of the British Constitution*, 137–39; Audrey Doerr and Micheline Carrier, eds., *Women and the Constitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981); Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983); John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics," in *Charting the Consequences: The Impact of Charter Rights on*

Canadian Law and Politics, ed. David Schneiderman and Kate Sutherland (Toronto: University of Toronto Press, 1997), 169–99.

33. Examples of accessible explanations of constitutional proposals include: Cheryl Saunders, *It's Your Constitution: Governing Australia Today* (Sydney: Federation Press, 1998); South African Constitutional Assembly, *You and the Constitution* (Cape Town: SACA, 1996); Godsell, *Shaping a Future South Africa*. The *Federalist Papers* was an early example of this genre, though a less accessible one.

34. Quoted in Robert C. Vipond, "Citizenship and the Charter of Rights: The Two Sides of Pierre Trudeau," *International Journal of Canadian Studies* 14 (Fall 1996): 181.

35. Peter H. Russell, "Attempting Macro-constitutional Change in Australia and Canada: The Politics of Frustration," *International Journal of Canadian Studies* 7–8 (Spring–Fall 1993): 47, 54.

36. Keith G. Banting and Richard Simeon, *Redesigning the State: The Politics of Cultural Change in Industrial Nations* (Toronto: Toronto University Press, 1985); Vivien Hart, "Redesigning the Polity: Women, Workers and European Constitutional Politics in Britain," unpublished paper delivered at Australian National University, Canberra, July 1994.

37. Canada, Constitution Act 1982, Articles 16 and 23.

38. Meech Lake Accord 1987, Appendix IV, 2 (1) (a).

39. See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. (Toronto: Toronto University Press, 1993), 141–53.

40. Consensus Report on the Constitution, Charlottetown, 1992, I A 1: Canada Clause.

41. Russell, *Constitutional Odyssey*, 227.

42. Christopher McCrudden, "Northern Ireland and the British Constitution," in *The Changing Constitution*, 3rd ed., ed. Jeffrey Jowell and Dawn Oliver (Oxford: Clarendon Press, 1994), 347, 375.

43. Christopher McCrudden, "Written Constitutions and Negative Rights," in *Writing a National Identity*, ed. Hart and Stimson, 60.

44. McCrudden, "Written Constitutions," 61.

45. Sartori, *Comparative Constitutional Engineering*, 202.

46. McCrudden, "Written Constitutions," 61.

47. McCrudden, "Written Constitutions," 62. See also John Morison and Stephen Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (London: Sweet and Maxwell, 1995).

48. For an extended analysis of this aspect of the Belfast Agreement see Harvey, "Governing after the Rights Revolution," 75–96. Authority for all the new institutions is granted by the Northern Ireland Act of 1998 and a series of agreements between the governments of the United Kingdom and Ireland.

49. Belfast Agreement, 5. Strand Three, para. 1.
50. Belfast Agreement, 6. Rights, Safeguards and Equality of Opportunity.
51. Belfast Agreement, 2. Constitutional Issues, para 1 (ii).
52. Belfast Agreement, 11. Validation, Implementation and Review, paras 2, 5–8. Referenda on May 22, 1998, approved the Agreement in both Northern Ireland and the Republic of Ireland, and elections to the New Assembly were held in June 1998.
53. Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (London: Routledge, 1989), 9.
54. Belfast Agreement, 7. Decommissioning, para 3.
55. McCrudden, "Written Constitutions," 61.
56. Richard Simeon, *Why Success, Why Failure? Some Observations on Constitutional Politics in Britain and Canada*, Research Paper 1, April 2000, Cunliffe Centre for the Study of Constitutionalism, University of Sussex.
57. Simeon, *Why Success*; H. Lazar, ed., *Canada: The State of the Federation: 1997: Non-constitutional Renewal* (Kingston, ON: Institute of Intergovernmental Relations, 1998); Kirk Cameron and Graham White, *Northern Governments in Transition: Political and Constitutional Developments in the Yukon, Nunavut and the Western Northwest Territories* (Montreal: Institute for Research on Public Policy, 1995).
58. John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (New York: Oxford University Press, 1991), 6. On the violent context of South African constitution-making, see Mervyn E. Bennun, "Understanding the Nightmare: Politics and Violence in South Africa," in *Negotiating Justice: A New Constitution for South Africa*, ed. Mervyn E. Bennun and Malyn D. D. Newitt (Exeter: Exeter University Press, 1995), 26–61.
59. South African Constitutional Assembly, *You and the Constitution*, 4.
60. Accounts include S. Friedman, *The Long Journey: South Africa's Quest for a Negotiated Settlement* (Johannesburg: Ravan Press, 1993); Siri Gloppen, *South Africa: The Battle over the Constitution* (Aldershot, UK: Ashgate, 1997); Allister Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (London: Mandarin, 1996).
61. Interim Constitution (Act No. 200, 1993), Schedule 4.
62. Jeffri Jay Ruchti, "South Africa: Introduction [1994]," in *Constitutions of the Countries of the World*, ed. Albert P. Blaustein and Gisbert H. Flanz (Dobbs Ferry, NY: Oceana Pubs., 1994), vii–viii.
63. "The benefits of a potential positive-sum outcome to the conflict—the creation of a jointly determined set of institutions to govern a future, common, and democratic society—were greater than the costs of continued confrontation in an environment ungoverned by common rules." Timothy Sisk, quoted by Adrian Guelke in "Deeply Divided Societies and Their Shared Experience of Conflict

Transformation: The Cases of South Africa and Northern Ireland,” paper delivered to a colloquium on “Constitution-making, Conflict, and Transition in Divided Societies,” Bellagio Center, February 1999, 14.

64. “All the proceedings of the Constitutional Assembly are open to the public. Submissions have been invited—and two million received. Information on the Constitutional Assembly is available on the Internet. And you have solicited the views of ordinary citizens in hundreds of meetings around the country.” Chief Emeka Anyaoku, Commonwealth Secretary General, July 17, 1995. Quoted in “Public Participation,” in South Africa, Constitutional Assembly, *Annual Report 1996* (1997) at http://www.constitution.org.za/95ca95_96.htm (accessed June 1997).

65. Theuns Eloff, “The Role of Civil Society,” paper delivered to a colloquium on “Constitution-making, Conflict, and Transition in Divided Societies,” Bellagio Center, February 1999, 4.

66. Klaaren, “The Truth and Reconciliation Commission,” 198.

67. Eloff, “The Role of Civil Society,” 2.

68. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 1.

69. *Ibid.*, 183.

70. *Ibid.*, 30.

71. *Ibid.*, 211.

72. Interim Constitution, 1993, Chapter 3, Art. 28, and Schedule 4, Arts. 1 and 2.

73. Gloppen, *South Africa*, 231, 239. See also Andrew Caiger, “The Protection of Property in South Africa,” in *Negotiating Justice*, ed. Bennun and Newitt, 113–40.

74. Article 25 (8), 1996. Article 25 reads, “(1) No one may be deprived of property except in terms of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application—(a) for a public purpose or in the public interest; and (b) subject to compensation. . . . (4) (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and (b) property is not limited to land.”

75. Jürgen Habermas originated this current debate. See Chambers, “Contract or Conversation,” 155–58, and J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity, 1996). One scholar who begins to bring theory and practice, deliberative democracy, and constitution-making together is Melissa S. Williams. See her *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* (Princeton, NJ: Princeton University Press, 1998), and “Impartial Justice and Partial Perspectives,” in *Identity, Rights and Constitutional Transformation*, ed. Hanafin and Williams, 58–72.

76. Judith N. Shklar, "A New Constitution for a New Nation," in *Redeeming American Political Thought*, ed. Stanley Hoffman and Dennis F. Thompson (Chicago: University of Chicago Press, 1998), 168.
77. Harvey, "Governing after the Rights Revolution," 74.
78. *Ibid.*, 96.