

A Journey Around Constitutions

Reflecting on Contemporary Constitutions

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This Article is based on the inaugural Beinart Lecture at the University of Cape Town (2002) where I examined some differences between classical modern constitutions and the variety of contemporary constitutions, and used the contrasts to illustrate the changing nature of the state, politics, and identity. There have truly been remarkable changes in the ways constitution are perceived and prepared since I first became interested in the subject nearly five decades ago. I purpose, in a highly personal vein, to reflect in these changes, and to illustrate where possible, by my own research or consultancies and personal anecdotes.

What does a constitutional lawyer do now? First of all, I would say that if a constitutional lawyer is to help frame real solutions to contemporary problems facing states and people, his or her role must extend beyond the conventional approach of merely concentrating on drafting a text appropriate to the particular circumstances of a country. Various roles are involved in the tasks of a constitutional lawyer. It 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 has also involved processes of conflict resolution: opening up discussion between people who have been at war with each other in an attempt to find common ground where none may be apparent to start with. As well as facilitating negotiations and suggesting suitable compromises between positions of different sides, teaching negotiating skills is an important part of working towards constitutional solutions. A commitment to democratic procedures is crucial to identifying and addressing issues in the approach to constitution making.

The first constitution I encountered, as a child, was the colonial constitution in a racially mixed and hierarchical society of Kenya, inflicting on the majority of its people a double insubordination to interest of the empire and of the white settlers. By the time I was finishing my university studies, western colonial empires were collapsing and 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 neighbors – but I did advise on preparing and drafting constitutions for late decolonization - Seychelles, 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 to, overnight, disperse power, usher in democracy, establish a regime of human rights, and create intricate relationships between diverse communities and races – the very opposite of the colonial system. Not impatience of leaders newly introduced to the grandeur and temptations of power.

These neo-liberal constitutions were replaced by either military rule, which made little pretence of democracy or the rule of law, or by one party regimes whose constitutions they tried to root 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, only eight years ahead of Hong Kong's) were asked to recommend how the constitution could maximize democracy and constitutional safeguards-within the integuments 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 – come of this due to our advice). Nyerere was not, like 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 both coerce a fragile state and society into social and economic development and yet uphold freedom. Like many other states (including in Eastern Europe), Tanzania found that these two goals could not be easily balanced. A monopoly of power corrupts; indeed even a modicum of uncontrolled power corrupts absolutely-Lord Acton's aphorism erred on the side of understatement. The opportunism and vagaries of the cold war has 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 got mired in internal conflicts, frequently based on ethnic differences. Of the later, some collapsed into 'failed' states, and had to be taken into international care as 'protectorates' and a process of rehabilitation (Cambodia, East Timor, Guatemala, Namibia, Bosnia-Herzegovina, Afghanistan, soon 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, glorifying *difference* and particularistic identities, 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 and fudging of sovereignty. The principle of self-determination was turned from secession to autonomy to solve world problems and how right he was! States which emerged from colonialism soon after the second world war and 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 liberal Canada had to confront acute demands from the francophone's and the aboriginal peoples).

It is therefore not surprising that the most innovative constitutional innovations of our times derive from the imperative to accommodate diversities and plurality of identities, captured in the cliché of 'unity in diversity'. The collapse of the theory of the nation-state which this post-modern pre-occupation leads to tends to produce a complex, many layered polity, with centrifugal effects on the sites of power. At the same time economic globalization sucks state power upwards into confederal and perhaps eventually into federal regional structures – and international economic organizations. Not surprisingly, the question: Whither the state?, is on the lips of many. That surely is a fascinating question for scholars and practitioners of constitutions and politics. 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, providing security to citizens. The principal parameters of the economy extend well beyond state boundaries. State ideologies are vigorously, and sometime 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's rights. But more on this later.

Generations of Constitutions

a) Colonies

Over the period of my academic and practical work, the functions of constitutions have changed or acquired an older functionality. Growing up in Kenya, I become familiar with the colonial constitution whose principal function was domination of the colony and warding off competing imperial rivals (an important function in the early colonial period). The economic interest is overriding, although it finds little expression in the constitution – which is designed to give maximum discretion to the executive – personified in the office of the Governor. The Governor was the centre piece, representing the dominion of the imperial government, operating under the double principle of 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 highly administered market). However, political factors could not be wished away, since the dialectics of control and appropriation dictated limits on exploitation and a selective co-optation of local elites into the power structure. Perhaps this balancing was less important 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 previous political economy. Hong Kong was largely seen as a tabula rasa and its original role was to mediate world trade with China rather than generating production of its own. The colony became the basis of essentially a new settlement and a new society – this probably explains, my great surprise, as an ardent anti-colonialist, which I came to Hong Kong, the generally favorable attitude towards the colonial government.

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

b) Independence

The independence constitutions of the 1960s were driven by two considerations – the definition and consolidation of state sovereignty, cutting off links to the colonial power; and establishing, through the regulation of sovereignty, rules for the co-existence of different communities which colonialism had ensured did not become a nation. The structures of the state were redesigned to introduce democratic forms of representation bases on a new concept of citizenship, not always equal or universal, qualified by differentiation and inequality explicit in and as between customary laws. The independence constitutions certainly had liberal aspirations – borrowed heavily from western constitutionalism. Western constitutionalism is based on the theory of the social contract in which liberties and freedoms of individuals occupy a place of honour. Fundamental concepts of authority, jurisdiction, rights and obligations, representation, obedience and resistance, accountability and so on have been developed

within a contractual framework. Although the terms of the contract that give body to the constitution may vary between the key ideologies of the modern western state (reflecting the constituencies of the times), its underlying premise is the separation between state (as the apparatus of government) and civil society (representing social and economic institutions and processes autonomous of the state). Captured in the concept of constitutionalism or the rule of law, it is premised on the belief that the primary function of a constitution is to limit the scope of governmental powers and to prescribe the method for its exercise, thereby preserving the autonomy of civil society. In its modern form, 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 constitutionalism lie 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. In part the movement towards general rules was a reaction to special privileges and monopolies accorded in royal charters and instruments of incorporation. 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 of).

It should come as no surprise that the independence constitutional orders had extremely limited shelf life. For reasons too complex to explore here, the independent state was characterized more by continuities than discontinuities with the colonial state. Some called them charters of neo-colonialism. This was not entirely fair, for if the logic of the independence constitutions was allowed to play out, the colonial state might well have been transformed. But nationalist leaders who succeeded the governor were determined to reinvent themselves in the image of the governor with untrammelled powers—the office of the prime minister was 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 pressed to its logic when many states converted themselves into one party or military regimes, the previous parliamentary systems replaced by autocratic presidential systems. The autocratic president became now the centre piece 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. Authority is impersonal, deriving from a system of rules which also express the purposes for and the ways in which powers 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 estates, in which the ruler governed through some form of sharing and delegation of powers, in which the forms of delegation needed to be secured against arbitrary infringements, and which thus promoted notions of binding rules in certain relationships. In the other type, which he called patriarchal patrimonialism, the ruler governs more directly, without any legal limits

on his powers. The wishes, fears and anxieties of the ruler are paramount determinants of policy and action (consistent with not provoking outright rebellion), with consequent unpredictability. There is no sharp distinction between the public and the private sphere of the ruler—and often frequent raids on the state exchequer. The appointment and tenure of officials depend upon the grace and favour of the ruler. His trust and confidence are the key to power and influence and thus promote court politics, with its intrigues and uncertainty. Although the confederal and clientist nature of the politics of numerous, then newly independent states may suggest more an estastist than a patriarchal patrimonialism, the trend has been in the latter direction.

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

This burden was compounded by the nature of third world politics. Although not unattended by violence, the state in the west experienced a more organic growth than in the third world, where it was an imposition, dominated the economy, and was instrumental in shaping it. Political factors were consequently relatively more important. In the third world countries, political power is harder to control because, partly as a result of colonial policies, civil society is weaker and fragmented (which has proved congenial to new government). The western state also enjoyed relative autonomy from international forces, which facilitated indigenous control over society and enabled power to be diffused and institutionalized to a greater degree. The third world state owes not only 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 US and its corporations is a classic example; in our own region we have seen how the US has assisted so many regimes to trample upon 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.

c) rise and 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—from a situation in the last quarter of the 20th century when nearly half of the world was governed by communist regimes. My own familiarity with communist constitutions was through other people's scholarship—and a study of original texts. Writing in 1993, I said that the theory of communist constitutions rests on two bases—the criticism of bourgeois legality and Marxian teleology. Marx exposed the essential class, and exploitative, nature of the liberal state, disguised in the discourse of rights and constitutionalism. The bourgeois constitution itself secured the primacy of civil society through which the capitalist class dominated the state and economy. Clearly this would not do for communists. I wrote, ‘...unlike bourgeois constitutions which (denying the dynamics of their history) emphasis order and stability, socialist constitutions (inspired more by Lenin's perspective than Marx's) espouse as their mission the egalitarian transformation of society. In turn, this requires the dictatorship of the proletariat, the most progressive elements in society..., to break and appropriate the economic, social and political power of the bourgeoisie. While the bourgeoisie has for long periods used civil society to dominate the state, the proletariat has little alternative to the use of the state to change civil society, for the communist revolution vests it with political power but does not change the underlying economic structure. ‘Communist constitutions therefore become overtly authoritarian instruments of class power. The relative weakness of the proletariat as a class and the magnitude of the task it faces lead to the denial of various political and economic rights to members of the erstwhile bourgeoisie and the strengthening of the state apparatus. The working class must secure domination over and, if necessary, replace civil society so as to transform it. State power must be unified, so that the separation of powers is abandoned in favor 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 owes its existence and powers to a mandate 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, ‘It is thus possible for the liberal constitution to base its legitimacy upon values (such as civil and political rights) and mechanisms (such as pluralism) internal to itself and thereby become a major 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 these external sources of legitimacy demonstrates the secondary and functional nature of the constitution, one not particularly appropriate to legitimacy’. It is fair to say that as the PRC abandons socialism in favor 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 assault by their opponents as the total lack of legitimacy of the regimes once the basic tenets of socialism were abandoned.

My active engagement (as adviser and scholar) with the PRC constitution began with my research on Hong Kong's Basic Law and its foundations in the PRC constitution. It was clear to me that no study of the prospects of the Basic Law could be undertaken without understanding the PRC political and legal system in which it was ultimately embedded. I was struck by the very different traditions of law and legality, and the judicial function, on the Mainland and in Hong Kong, which boded ill for the autonomy of Hong Kong (for this reason in my book on the Basic Law, I devote a substantial chapter to the Mainland constitutional and legal system). The dialectics between the liberal legalism of Hong Kong and

Leninist ‘democratic’ centralism of the Mainland would have been a fascinating phenomenon to behold had not the superior political power of the Mainland subdued the technical superiority of the common law—so much, do I hear you say, for constitutions!.

d) New wave of democratization

The one party or military regimes could not survive the collapse of the Berlin wall. The new -found zeal in the US 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 their regimes of oppression. Under these pressures some countries managed a sort of transition to democratic constitutions, seeking at the same time to cure many of the ills of a bureaucratic and corrupt regime—what we might call the democratic constitution. Others under the weight of internal rebellions and civil conflicts, experienced greater difficulties in a transition of this kind and went on a different trajectory, sometimes being taken into international receivership or protectorates, the escape from which lay through the route of 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. The outstanding examples of liberal democratic constitutions are those of East European states. Just as the African independence constitutions were the anti-thesis of colonialism, the East European constitutions are the anti-thesis 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 by the communist party. Some constitutions prohibit the adoption of state or party ideologies by the state. The constitution is supreme and has direct application, unlike the previous rule that required statutes giving effect to its provisions. The principal powers of the state have to be separate. All constitutions establish constitutional courts with the ultimate power to interpret the constitution and laws, and to ensure the enforcement of their decisions—a marked reversal of the communist traditions. The market economic system is guaranteed, generally in explicit terms, and the protection of private property is strongly upheld. Despite this commitment to the market economy, the constitutions eschew moral declarations, perhaps mindful of attempts of the previous regimes to promote a New Socialist Man. They are extremely conservative, sparse in their scope, content with setting up political institutions and letting them get on with the business of the state—in the way of classical constitutions. The path to future social and economic policies is left open, but what is made clear that they must be consistent with market economies.

This European approach shows a great deal of faith in democratic politics, in contrast with democratic constitutions in Africa and Asia where there is considerable scepticism about politicians and politics, and hence highly regulated political systems. The 1997 constitution of Thailand, drawn at a time when the reputation of politicians and governments was at a particularly low point, provides a good illustration of this approach. Most devices discussed below feature in that constitution. The key operators and one may say the beneficiaries of democracy, that is to say, 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 the result of an

extensive bill of rights. Areas or jurisdiction prohibited to the state are also defined by vesting responsibilities for those matters in independent commissions or other authorities, such as, for example, over sensitive land issues, or the pursuit of linguistic and cultural rights of minorities. 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, affirmative action for disadvantaged communities, promote all indigenous languages, safeguard natural resources, protect the environment, ensure access to courts, support science and technology, and so on. 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 aim 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 to disclose to an independent agency their assets and liabilities periodically. The conduct of political parties, which are often the cause of violence and corruption, is regulated to ensure that their charters and practices are consistent with fundamental principles of democracy, that they practise internal democracy, and that their accounts are audited and published to achieve transparency—otherwise they forfeit 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 electoral commission and the constitutional court.

Independent commissions are also established to perform sensitive and critical functions which are essential to ensure an open political and administrative system. 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 the abuse of the criminal process, prosecutorial powers are vested in an independent director of prosecutions. Some key elements of monetary policy are removed from the ministry of finance and given to an independent central bank. Various institutions, their independence and resources granted 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 (the freedom of information) and the Kenya draft constitution obliges the government to publish and publicise any important information affecting the nation (in a country where the government routinely suppresses reports of commissions of enquiry or investigations into changes against ministers or others favored 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 her responsibility conscientiously may remove the MP. Parliament and the administration are required to ensure that opportunities are given to the people to participate in law making and decisions that affect them. Some constitutions, following the Swiss model, give people the right to initiate legislative proposals for consideration by the legislature. And to ensure that all these onerous provisions are observed,

constitutional of Supreme Court are established with wide constitutional jurisdiction.

As will be obvious, this type of democratic constitution reflects not only 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 amount politicians and political parties and to promote democratic habits and practices.

e) rise of ethnicity

The most interesting developments for a constitutional scholar have occurred in political systems which deal with the multi-ethnic diversity—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 always were—it is just that the diversity was not acknowledged. Now under the impetus of globalization, migration, rights consciousness, gender politics, powers of imitation, and 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, liberal and consociationalism. In the first stability to society/ societies is given by the hegemony or dominance of one ethnic group: The examples are whites in pre-apartheid South Africa 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; rights are not equally distributed. This approach is discredited now—although it is not without its adherents.

Liberalism on the other hand believes in equal rights of all individual/citizens. 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 only possible if these differences do not intrude on the public sphere—the liberal regime depends on a sharp sees the exercise of rights, associational and confessional activities, the pursuit of sectarian values and cultures. It also considers that individuals and groups should be free to seek their own conception of the good life (so 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 one would expect to support it.

One strand of criticism is that the liberal state does not live up to its claims—that the state is centralized, monopolizes power, searches for uniformities in law and administration, which leaves little space for diversity. More empirically, it is argued that in practice the liberal states privileges the culture of the majority community—and there have 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. 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 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.

Many countries which have been regarded as liberal have had to confront the rise of ethnic based claims to political recognition and participation, grounded in their own cultures, languages, religions (Canada being an interesting example which has tried hard to grapple with the dilemmas liberalism faces). Developing countries with acute difficulties of nation building have had to balance the demands of difference with the imperative of unity, and try to transcend ethnicity through genuinely national institutions. For example, the electoral system is 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% of the votes) in a specified number of provinces (say 65%) (as in Nigeria and Kenya). This can be very integrative. 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 in-born 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 it is necessary to abandon institutions and procedures of majoritarianism and make room for forms of power sharing which enable each ethnic group to participate in affairs of the state. Consociationalism owes a great deal to the intellect and energies of Professor Arend Lijphart who for decades have been arguing its virtues, and elaborating the detailed constitutional framework to achieve it, central to which 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, be conferred territorial, and where necessary, non-territorial forms of autonomy, and the state should observe the general principle of ethnic proportionality.

‘Primordialism’ is strongly contested by other social scientists who argue that cultural differences are not in-born 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 unravel and are ultimately unworkable (such as coalition governments). Despite powerful intellectual attacks, consociationalism is on the rise. As more and more countries are engulfed in civil ethnic wars, with 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 in the principle of self-determination shifts from secession to internal democracy, forms of power sharing have become salient to that

democracy.

In this approach, manifested in such recent constitutions as Northern Ireland, Bosnia Herzegovina, Kosovo and to qualified extent Fiji, 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 a vote of all the members together, sometimes separate voting by communities, and on sensitive issues a combination of the two. The form of government is often a coalition of different communities. Sometimes there is a joint presidency, three person or so executive 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, complex systems of cultural or religious councils are established to exercise community autonomy cutting across the country. Citizenship rights are less important than the entitlements of communities. There are serious restrictions on mobility from one community to another—although some people are allowed to or forced to designate themselves ‘others’. Such constitutions, privileging culture over a common or secular nationalism poses a clash between the universal and the particular. This clash is played out in the dialectics of individual and group rights.

A principal device much favored by minorities and much resisted by majorities, for accommodating diversity 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 Aland, or the Banabans of Kiribati) or arises from disenchantment with the state (Sri Lankan Tamils, Southern Sudanese, Bougainville). My first major encounter with autonomy was in the designing of the independence of Papua New Guinea. PNG 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 most of all, as it was the farthest from the capital and felt greater affinity to its neighbor, Solomon Islands. So it demanded, and the constitutional planning committee recommended, considerable autonomy for it and other communities which desired it. At 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 re-statement of the chapter somewhat modified.

In 1982, attending a conference on decentralization in Colombo, in the aftermath of the worse pogrom against Tamils, I had lunch with two old friends, Lalith Athlumudali then minister of justice and Neelan Tiruchelvam, then a leading light in Tamil United Liberation Front (a parliamentary group) jokingly asked me if I would produce proposals on autonomy since this was high on the demand of Tamils. 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 I had first to explain it to key Buddhist monks. When I met them that evening, they were in do disposition to listen to the proposals but delivered themselves of bitter invective against the Tamil community. Next morning the president decided not to proceed with the proposals, which were very modest compared to what the Liberation Tamil Tigers of Eelaam are now demanding and which the government is disposed to concede. This incident just

reinforces the general lesson that the rejection of reasonable proposals often leads to violence and the stakes are upped. Both Lalith and Neelan subsequently became victims of LTTE suicide bombers.

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 successful¹⁹. However autonomy of this kind is problematic. The autonomous area is small and the central authorities govern a large area (for example, Aland-Finland, Hong Kong-China, Kashmir-India, Puerto Rico- US, Zanzibar-Tanzania, Corsica-France). There are often no strong constitutional guarantees of autonomy. The autonomous area has to protect itself against larger forces (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 Aland alone, as does the US with respect to Puerto Rico—most the time). Hong Kong's small size has however been less protective—it has almost amazed me how much Hong Kong's politics are tied to the CPG, 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 PRC constitutional thought.

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. So the solution of declaring itself as an independent 'national' state was not feasible (the path chosen by other republics). 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 for form their own state. The international community had a vested interest in maintaining Bosnia as a united state—and to achieve this took off the sponsors of these communities in Serbia (including Milosevic) and Croatia to Dayton military base in Ohio, US, to craft a constitution for Bosnia. The Federation of Bosnia- Herzegovina is composed of two Entities: Bosnia and Srpska. Bosnia itself is a federation of Bosniac and Croatians, while Srpska is a Serbian entity. Most powers are vested in the Entities (in the case of Bosnia, in the constituent part of the Entity), the federation being left largely with those powers which 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—effectively making these three communities, rather than the people as a whole, the source and bearers of sovereignty.

The parliamentary assembly consists of five Croats and five Bosniacs from Bosnia and five Serbs from Srpska; they are elected by voters of their own communities (Art. 4). Nine of them constitute a quorum, so long as there are at least three from each community. The House of Representatives is constituted on the same principle and in similar proportions. The result of these arrangements is that politics are entirely communal, and almost perforce all political parties are ethnically based. Parties get together in parliament or government only after the elections. The system creates incentives for parties and their leaders to intensify appeals to narrow ethnic interests, linked to their kinfolk in other states, which does little for the unity of the country. In the 1996 elections, the most extreme ethnic party in each community won, leaving

their leaders the impossible task of finding a common purpose.

The constitution also provides for extensive power sharing. The Presidency, in which executive power is vested, consists of three persons, chosen directly by each 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.

Both parliaments and Entity governments are required to have a proportional ethnic balance, and the distribution of key political functions is along ethnic lines. Ironically, in this pre-occupation, the rights of national minorities are seriously downgraded or ignored (as for example the restriction of the office of the Presidency, or legislative vetoes, to Bosniacs, Croats and Serbs). 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 state level government is seriously handicapped in its capacity to make or execute policy. The constitution provides a key role for foreigners. Three judges of the Constitutional Court are foreigners (for rather different reasons from those that led to a foreign element in the Hong Kong Court of Final Appeal), appointed by the President of the European Court of Human Rights; and eight of the 14 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 IMF. The highest executive and key policy powers are vested in the Office of the High Representative (appointed in accordance with UN resolutions), whose mandate covers monitoring the implementation of the Dayton Accord. Due to differences within the collective presidency and the unwillingness of any of them to take decisions that might be resented by his or her community, many matters end up on the desk of the High Representative who then has to make the decision.

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

Conclusions

Let me now bring together the directions and by-ways 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 closer relation to the classical than the new democratic or the ethnic. The classic constitutions were content to set up political institutions; the contemporary are highly interventionist seeking to change society and the structure of power. They are inventive and oriented towards social engineering. Old constitutions were a means of consolidating and centralizing the power of the state that had been secured in other ways. The constitution registered class or ethnic victory. The major impulses of the nature and operation of the state—and of politics were to come from society. (The US constitution, although classified as the product of the American Revolution, is for this reason an extremely conservative document, designed to weaken the capacity of the state to intervene in civil society). But some revolutionaries fear even this degree of constitutionalisation of power, for they believe that no impediments should be placed on revolutionary objectives, themselves the source of legitimacy (echoes of this debate are to be found in contemporary period in the Chilean debates during Allende's access to and exercise of state power on the path to socialism—Allende arguing for a democratic path, others opposing him).

Contemporary constitutions are not based on clear victories of this kind. 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 a few years ago, the longer we failed to establish a framework for constitutional negotiations, the more the combatants, and civilians, on each side would be killed. A constitutional consultant frequently needs a manual on conflict resolution in her kit. Various consequences flow from this role of constitution making. First, they are not an imposition, but products of negotiations (a persistent difficulty is determining who sits at the negotiating table—just the warring factions, as in the Sudan, or a wider cross sections, 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 new autonomy arrangements are given a chance. Fourthly, because contestants bring not only different claims but also differing sources of authority and precedent for the 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). Fifthly, these constitutions are more delicate instruments than the traditional: the latter were based on dominance well established in civil society/economy, and thus less susceptible to counter pressures (role of constitution was procedural rather than substantive); the former are based on a balance of power, and can subsist only 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 (e.g., the French but also 20th century independence constitutions) were based on absolute sovereignty. The function of the constitution was to aggregate and consolidate this sovereignty as against outsiders. In modern parlance we would say that the constitution is an act of self-determination—the external aspect of self-determination which defines itself by 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 complex forms of dividing and sharing power). Once it is accepted that sovereignty lies with the people, not 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 obfuscate sovereignty²³. 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 (yet to be ratified) settlement for the Sudan, a group has reserved or been granted the right (the formulation depending on who you are) to exercise the right of external self-determination (i.e., secession and separate sovereignty) after a suitable period (around 10 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 postponing sovereignty over Ulster). Sometimes, as in the Northern Ireland 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: perhaps 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 heterogenisation 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 increase the vulnerability, and weaken the capacity, of the state. Globalization, with its tendency towards larger and larger scale 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 twin impulses of globalization—on the one hand responding to greater transnational dependence and integration (e.g. transnational constitutions are superseding national constitutions, as in the EU); or state constitutions have to defer to transnational decision making, producing a modern form of *lex mercatoria*, private law making encroaching upon what were previously regarded as prerogatives of the state. Globalization produces tension between the imperatives of the market (manifested most clearly in the constitutions of Eastern Europe) and the commitment to social justice, just as the capacity of the state is weakened. Constitutional globalization has another consequence: it weakens the state, not only vis-a-vis global forces, but also its domestic economic constituencies. For the effect of global economic integration is, in the interests of freer competition, to obliterate the earlier neater distinctions between the private and public, the regulation of which comes increasingly under inter-state regulation. It has also 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 charters and practices of the WTO, WIPO 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 autonomies.

There are other ways in which globalization affects contemporary constitution making. Constitutions must respond to developing international norms, especially as they are embodied in human rights treaties; they become embroidered as they weave their way into national constitutions (the longest chapter in the Kenya constitution draft is the Bill of Rights). States are under pressure of conditionalities 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!). Constitutions have become major carriers of values, institutions and procedures around the world. Constitutions are losing their national specificity.

This flurry of constitution making raises fundamental questions about the role and forms of constitutions on which there is no necessary consensus. It is increasingly accepted that widest possible participation of people is necessary to produce constitutions that are both relevant and legitimate, yet others raise questions about the risks of such participation in elaborating a large and complex agenda which may create acute controversies and overburden the state. Participation may result in constitutions that the politicians will reject or negate—because they seek to define the purposes of the exercise of state power and make government accountable and participatory. There is also controversy on how ambitious should be the scope of the constitution. Those who favour the austere and brief constitutions of the new European democracies point to the longevity of the US constitution which eschewed a social agenda, like many contemporary constitutions. Others argue that in the midst of poverty, squalor and corruption, a constitution which 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 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. So our draft provides for a broad ranging agenda of social, economic and political change—in part to counter the pressures and tendencies of globalization. The politicians did not like it and the government is refusing to implement it. Might it have been wiser to have opted for less radical change and carried the politicians—even if it meant ignoring the people?

We can see that the method of drafting and adopting the constitution have wide consequences—on which there is a lot to say if there were space! There is also the danger that an over-ambitious constitution will be honored more in breach than observance, and thus it will gradually lead to frustration and loss of legitimacy—as has indeed been the fate of many constitutions, perhaps also that of the 1997 Thailand's. There is also controversy about the planned durability of the constitution. US regard it as a matter of pride that its constitution, having lasted more than 200 years, is the oldest existing constitution. Perhaps the pride is justified, but we have to remember that formal change has been averted precisely because the Supreme Court has altered it to suit changing more and values (and so the people have to prepared to response more faith in Judicial rather than popular politics). Sometimes it is wise not to plan to far ahead,

either because the circumstances do not allow a participatory and meaningful process of constitution making, as in Afghanistan in 2002, where it may be advised that the constitution be reviewed in five years time when conditions might be more settled was rejected—but Fiji's military constitutions of 1990 provided automatic review within seven years—and that provisions lead to a good process and an infinity between constitution. To these and many other critical questions of the orientation of the constitution and the mode of making it, there may be no answer in the abstract, but would depend on the context. And it would depend on what it is perceived to be the function of the constitution.

Over the centuries, constitutions have been differently conceptualized and served many purposes—instruments for law and order or some deliberate 'stirring up'; for liberation or oppression; for self-government or co-optation; for legitimacy; defense against imperialism (the first constitutions of Hawaii and Tonga were enacted to ward off colonists by presenting themselves as civilized and organized, every way equal to foreigners); 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 very conscious of the manifold purposes of the constitution. 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 state itself was established by the constitution, inventing modalities of grouping and governing diverse peoples, and creating institutions which would give it credibility as a member of the international community of states. A new national identity, transcending, if not superseding, particularistic, traditional identities, had to be established, 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 seemed some irony in giving people with little literacy or knowledge of state political systems and opportunities of fashioning their constitutions denied to the citizens of more 'advanced' countries – but this process foreshadowed the participatory processes that have now become de rigueur in many parts of the world. But the task of integration through the state was handicapped by the suspension of a powerful state (lessons learned from the African experience). There was a preference for the constitution as brakes rather than accelerator.

Finally, a lesson from the highly participatory process of Kenya. 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 cannot or are not satisfied; the constant emphasis on culture may result in constitutions which are 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 the romanticism about the 'people'. There is no such thing as the people; there are religious groups, ethnic groups, the disabled, women, youth, forest people, pastoralists, sometimes 'indigenous peoples', farmers, peasants, capitalists and workers, lawyers, doctors, auctioneers, practicing, failed or aspiring politicians, all pursuing their own agenda. They bring different levels of understanding and skills to the process. Sometimes the composition or procedure of constituting bodies privileges one or another of these groups. Unless one believes in the invisible hand of the political marketplace, not all these groups can be counted to produce a 'good' constitution—certainly not the

politicians. The French had a rule when they made the constitution after the revolution: no member of the constituent assembly could stand for elections or occupy a public office for ten years after the adoption of the constitution. How I longed for such a rule in Kenya!